



## Text Messaging in the Work Place

When companies have to gather information for lawsuits, "text messaging is the new frontier" in electronic discovery, also known as e-discovery, according to Judge Andrew Peck of the U.S. District Court for the Southern District of New York.

"Discovery is that phase of litigation when both parties make information relevant to a lawsuit available to the other side. Since most information inside an organization is never transferred to paper, most discovery is e-discovery, observed Aaron Crews, chief data analytics officer for Littler in Sacramento, California. Employees lately seem more aware that e-mail can become public; they are less likely to write something in an e-mail if they'd be embarrassed for their mother to see it, Peck told *SHRM Online*. But he's noticing more ill-conceived texts introduced as evidence" (SHRM).

### Smartphones' Significance

Smartphones may contain inappropriate texts sent from a supervisor to a subordinate, or workers might use text messages to communicate proprietary information to third parties. Smartphones contain critical information that may not be available anywhere else—and the amount of that information will grow, predicted Trina Fairley Barlow, an attorney with Crowell & Moring in Washington, D.C.

The devices may be used in ways that also could acquit workers during litigation; for example, employees may leave voice-mail messages that demonstrate a consensual relationship.

"In short, information contained on a smartphone is often equally as important as information that resides on the company's e-mail system, as employees sometimes use their smartphones to communicate informally or share information they don't think will be documented elsewhere," Barlow said" (SHRM).

### Subpoenas

"But if they suspect there is information to be found in the texts on a personal phone, lawyers can obtain subpoenas to dig up relevant evidence.

If, for example, a supervisor has used his or her own phone to harass another employee or call workers off hours, making them do off-the-clock tasks, the plaintiff's attorney may subpoena that private device, Thompson said.

"There was a time when everyone thought, 'Ooh, my text is secret,' " he noted. Now software can recover old text messages.

Everything on the device can be subpoenaed, including texts, e-mails and images sent to or received from someone else. Sometimes it's difficult to obtain the devices, he said, but it can be done.

A text can be damning evidence, such as a message saying, "I saw you across the room today, and you looked lovely in your miniskirt," Thompson noted" (SHRM).

## How to Monitor Texts

"One way to reduce risk is for the employer to let an employee bring a personal phone to work but provide a professional phone for the individual to conduct business on, and instruct the worker to keep the personal and professional separate, noted Charles Thompson, an attorney with Polsinelli in San Francisco" (SHRM).

Require employees to note on their time cards the time they spend texting, so they can be compensated for it, he noted. And remind employees of the different methods of reporting harassment.

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