

SOCIAL MEDIA AND PRIVACY: WHAT EMPLOYER COUNSEL NEEDS TO KNOW

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November 18, 2015

Employer Concerns

Social media is fundamentally changing the way we work, offering new ways to engage with customers, colleagues and the public at large. For employers, the growing prevalence of social media means exposure to a number of significant risks from both operational and legal perspectives. Potential risks for employers related to social media include:

- a) A reduction in productivity resulting from time wasted by employees sending and receiving personal email, surfing the net or participating in social networking during work hours;
- b) Legal liability and/or reputational harm if an employer's systems are used to distribute information or images that are pornographic, discriminatory, harassing, criminal or in breach of confidentiality or intellectual property rights;
- c) Liability for failing to provide employees with a safe workplace free from harassment and discrimination in accordance with the requirements of human rights and/or occupational health and safety legislation; and
- d) Having employees knowingly or unknowingly expose the employer's computer systems to viruses.

Developing a Social Media Policy

Employers should adopt and enforce social media policies that inform users as to the acceptable and unacceptable uses of such systems. These policies should also state that the employer owns the systems and will monitor any use of its systems, that users have no expectation of privacy in their email communications and internet usage, and that consequences will flow from the breach of such policies.

A well-drafted policy can make a significant difference in an employer's ability to monitor and ultimately discipline employees for inappropriate social media use. In fact, the absence of a clear policy may restrict or prevent the employer from imposing discipline for inappropriate social media use.

When drafting and reviewing such policies, the following questions should be asked:

- a) Does the policy clearly state that employees have **no** expectation of privacy in their use of the employer-provided electronic devices, and that these devices are subject to regular monitoring by the employer?
- b) Does the policy establish what constitutes appropriate business use and what usage will not be tolerated? Does it indicate what penalties will be imposed for breach of the policy and are those penalties reasonable?
- c) Are employees required to read and sign an acknowledgment that they have read, understood and agree to be bound by the policy? Is this document updated as the policy is revised? Are employees reminded of the policy periodically by email, during meetings or otherwise?
- d) Are employees warned when they are in breach of the policy? Are these discussions documented? Do disciplinary letters contain an appropriate warning regarding future misuses and are such letters retained on employees' files?
- e) Is the policy consistently applied? If the employer does not monitor a policy, it will have difficulty enforcing it.
- f) Have all relevant circumstances been considered before imposing discipline? Considerations should include:
 - The employee's work record and length of service;
 - The position held by the employee;
 - The nature, extent and duration of the wrongdoing;
 - Whether the employee has been warned for similar behavior in the past; and
 - The discipline that has been imposed on others for similar wrongdoing.
- g) If the workplace is a unionized environment, is the policy consistent with the collective agreement?

Legislation and Useful Links

1. Saskatchewan Privacy Legislation

a) For public sector employers:

- i) *The Freedom of Information and Protection of Privacy Act (FOIP)* for government institutions;
- ii) *The Local Authority Freedom of Information and Protection of Privacy Act (LA FOIP)* for local authorities; and
- iii) *The Health Information Protection Act* for personal health information.

b) For private sector employers there is currently no similarly comprehensive legislation in force.

Saskatchewan Information and Privacy Commissioner: <http://www.oipc.sk.ca/>

2. Federal Privacy Legislation

For private sector employers:

- *Personal Information Protection and Electronic Documents Act* (“PIPEDA”)

Office of the Privacy Commissioner of Canada: <https://www.priv.gc.ca/>

3. MLT Blog Posts: <http://www.mlt.com/blogs/>

Western Employers' Counsel: <http://westernemployerscounsel.com/>

Privacy Law Advisor: <http://privacylawadvisor.com/>

Technology Law Advisor: <http://technologylawadvisor.com/>