

ITAC HR Forum – Managing Employee Use of Social Media Applications

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Use of Social Media – Common Issues for Employers

- Prospective Employees – Pre-employment screening
- Current Employees – Use during work hours, permitted/encouraged use and off-duty use
- Former Employees

Prospective Employees – Pre-employment Screening

- No legislation in Ontario to prohibit viewing candidates' social media profiles – even where access restricted by password
- However, there are concerns to be aware of:
 - Human rights concerns
 - Possible violation of Terms of Use
 - Evolving recognition of privacy interests – new “intrusion upon seclusion” tort

Prospective Employees – Pre-Employment Screening

- Best practices for employers:
 - Check at end of hiring process
 - Check only when there is a demonstrable need
 - Search based on objective criteria
 - Have someone other than decision maker conduct search
 - Direct a written report to the decision maker
 - Validate negative information

Current Employees

- Excessive use during work hours
- Managing permitted (or encouraged) use
- Off-duty social media conduct

Current Employees – Excessive Use

- May impact productivity
- Employers may discipline for “time theft” in appropriate circumstances
- Important to have clear policy in place that sets out:
 - Use of social media (or other non-work related sites) prohibited during work hours
 - Employer will monitor for proper usage
 - Will discipline in appropriate circumstances

Current Employees – Permitted Use

- The problem
 - How to use social media for employer purposes without losing control
- The solution
 - You don't speak on our behalf without permission
 - License your “deputized communicators” or create a clear social media policy

Current Employees – Permitted Use

- License your “deputized communicators”
 - Limited in number
 - May or may not be communication professionals
 - But: trustworthy, well trained
 - Subject to a specific “licence”
 - Accountable for compliance with the licence

Current Employees – Permitted Use

- Ensure expectations are clearly defined:
 - Have clear policy in place
 - If identifying as employee, ensure there is a disclaimer indicating that comments are views of employee, not employer
 - Make clear that conduct reflects on employer – consider reputation of employer before posting.
 - Misuse may result in discipline

Current Employees – Off-Duty Use

- Off-duty online “expression” may harm legitimate interests of employer
- Key principles:
 - Employees have a duty of loyalty and fidelity
 - Employers can restrict employee speech to protect a legitimate interest
 - There needs to be a nexus to the workplace, but the nexus often will not be physical

Current Employees – Off-Duty Use

- Easy cases – where nexus to workplace is clear:
 - Breach of confidence
 - Harassment, discrimination, bullying or defamation
 - Open criticism of employer

Current Employees – Off-Duty Use

- Where nexus to workplace is less clear, off-duty social media expression may justify discipline or even termination where:
 - detrimentally affects reputation;
 - adversely affects an employee's ability to discharge duties and responsibilities; or
 - affects other employees' employment-related rights
- Severity of conduct as well as nature of position must be considered

Former Employees

- Must rely on a tort, crime or contractual provision
 - Employment contracts often contain confidentiality provisions, or other restrictive covenants, that may be relied upon following termination
- Two options
 - Convince the ISP to take it down
 - Go to court
- Don't discount the role of advocacy to the ISP

QUESTIONS?????

Managing Employee Use of Social Media Applications

**Hicks
Morley**