Regulating Employee Use of Social Media



Once you get past the hype, the challenges posed by employee use of social media are the same as the ones addressed in those crusty “old” HR policies—issues like organizational reputation, confidentiality, harassment and discrimination. What the HR director really needs isn’t a whole new set of rules but a mechanism for translating the old rules to the new media. Effectively written and implemented, this is precisely what the social media use policy does. Click here to learn more about what a social media policy is and why you need one.

WRITING THE SOCIAL MEDIA POLICY

As with any other HR policy, a Social Media policy can’t be one-size-fits-all and must be based on the specific conditions of the organization and workplace. But BC employment lawyer, Marino Sveinson, cites key elements that every policy should contain:

Purpose, i.e., to establish expected standards of conduct about employee use of social media;

Rationale, i.e., to protect the organization’s reputation and other legitimate interests, as well as to embrace positive aspects of the use of social media by employees;

No Privacy Expectation Caveat, i.e., a provision:

- Noting that all computer equipment and systems, including email and internet, are the employer’s property (assuming, of course, this is true);
- Explaining how hard drives, email, etc. are monitored by your IT department; and
- Expressly stating that the employer has access to computer and email communications and that employees should have no expectation of privacy with respect to the use of such systems.

Description of Permissible Conduct with respect to use of social media both on and off the worksite, including examples of appropriate uses of computers and the internet for work-related purposes and ground rules for participation in company and employee Facebook groups;

You-Speak-for-Yourself Caveat, i.e., language to ensure that employees engage in social media use only in a personal capacity and not as a company spokesperson, including:

- A clearly worded stipulation that employees may not directly or indirectly represent that they're speaking on behalf of or representing the organization while using social media unless they're expressly authorized to do so;
- Banning the use of the organization's brand names, logos, trademarks and other intellectual property without express permission when using social media; and
- Requiring employees to add a disclaimer clearly stating that they're not speaking on the organization's behalf when saying something that may even be perceived as an official organization communication.

Description of Other Impermissible Conduct not to engage in on social media sites, including online communications that:

- Disparage, defame or cast an embarrassing light on the organization, management, co-workers, customers, clients of suppliers;
- Compromise the privacy of employees, customers, clients or suppliers;
- Disclose business secrets or confidential information belonging or entrusted to the organization; and
- Discriminate or harass co-workers on the basis of gender, race, religion, sexual preference, nationality, disability or other personal characteristic protected by human rights laws.

Consequences of Violations, i.e., clear language warning that violations of the social media policy can lead to not only personal liability to parties injured by their abusive online communication but also discipline up to and including termination;

Continuation after Employment Ends, i.e., a provision stating that restrictions in the policy regarding privacy, confidentiality, non-harassment and non-disparagement remain in effect even after employment ends, and that legal action may be taken against *ex-employees* for social media communications that violate these restrictions or otherwise harm the organization, its employees or customers.

IMPLEMENTING THE SOCIAL MEDIA POLICY

The 2 key challenges of implementation are communication and enforcement.

Communicating Your Policy: Simply including a copy of the social media policy in your HR manual isn't enough. You need to make sure the policy actually gets into the hands of your employees. Distribute the policy when it's first drafted and each time it's changed. Make sure all new employees get a copy of the policy when they're first hired.

Many companies take the additional step of requiring employees to acknowledge receiving the policy. "A policy is ineffective unless you can show employees actually knew about it," notes Toronto lawyer, Karen Seargent. 3 options:

- Attach the policy to an email and have the employee acknowledge by return email that she read and understood the policy and agrees to its terms;
- Attach the policy to the paycheque and ask the employee to sign and return the hard copy; or
- Deliver the policy to employees face-to-face, either individually or in a group.

Sveinson favours the in-person group meeting approach. The meeting gives you an opportunity to explain the policy and let employees ask questions about it, he explains. By contrast, email and hard copy attachments are harder to track and control. You can't be sure all employees will actually open the email attachment or read the policy attached to their paycheque, cautions Sveinson.

Communication should also continue after dissemination. It's good practice to remind employees about the social media (and other key company policies) and let them ask questions about it at regular intervals. Communications can include intranet postings and even video. For example, Ontario employment lawyer Dan Michaluk says the best example of an employer social media policy communication that he's ever seen is a You Tube video created by the Department of Justice in Victoria Australia. "The video is effective because it's so appropriately crafted to an audience of social media users."

Imposing Discipline for Violations: As with any other HR policy, a social media policy isn't effective unless it's backed by discipline. And while it's a newly emerging area of law, there's already ample case law to show that social media use is *not* regarded as private correspondence and that employees can be disciplined for harming their organization on a blog, tweet, Facebook page or other social media communication.

Of course, discipline for social media offences is judged according to the same factors that courts and arbitrators use to evaluate the validity of discipline for other kinds of misconduct, including the nature and severity of the violation. Thus, for example, "disparagement is a very serious offence especially when it's targeted to individuals and based on race, religion, gender and other personal characteristics covered by human rights legislation," says Michaluk. "Accessing pornography sites, disseminating hate or other inappropriate emails could also be just cause for termination," notes Seargent.

Courts and arbitrators also consider factors like whether there are written policies addressing the conduct, whether the employee was warned and whether there were any mitigating factors like no history of discipline. Examples of social media violations found to have constituted just cause for termination in actual cases:

Social Media Violation	Why Termination Upheld
Disparagement of Co-Worker: Nurse made highly unflattering remarks about supervisor—calling her "Nurse Rached"—on her personal blog	Blog is not a private communication and even though nurse didn't use her name, she gave enuf info to figure out who she was, who she worked for and who she was talking about [*R. Grievance,* [2008] A.G.A.A. No. 20, April 11, 2008] (but nurse gets damages for abusive termination *procedure*)
Viewing Pornography: Supervisor viewed porn on his work computer	Supervisor had been warned twice [*Poliquin v. Devon Canada Corp.,* 2009 ABCA 216 (CanLII), June 17, 2009]
Harassment & Intimidation: Probationary employee sends threatening emails to colleagues	Termination upheld. Conduct violates company violence and harassment policy [*Monette v. Parks Canada Agency,* 2010 PSLRB 89, Aug. 20, 2010]
Disparagement of Boss, Business: 2 car dealers make negative comments on Facebook about boss and the dealership they work for including "don't buy from" them	Labour Board treats Facebook postings as public communications [*Lougheed Imports Ltd. v United Food & Commercial Workers Union, Local 1518,* 2010 CanLII 62482 (BC L.R.B.), Oct. 22, 2010]
Excessive Texting for Personal Use: Probationary employee in Sask. constantly using personal cell phone to text during work hours	Conduct violated written policies and employee received at least 2 warnings [*CUPE Local 726 v. City of Estevan,*[2011] CanLII 11357 (SK L.A.), March 8, 2011]

Pornography, Privacy, Ethics: Teacher found to have naked pictures of his 15-year-old student on hard drive of work computer	Teacher knew IT department had access to his hard drive and had no reasonable expectation of privacy [*R. v. Cole,* [2011] O.J. No. 1213, March 22, 2011] (Appeal pending)
Inappropriate Work Conduct Video Posted on You Tube: Inspired by the movie *Jackass,* construction workers bear their genitals in lunch room and engage in other idiocy, all of which is captured on video and posted on YouTube	Termination upheld. Even though it was a first offence, the conduct was egregious[*In'tl Union of Elevator Contractors, Local 50 v. Thyssen Krupp Elevator (Canada) Ltd.,* [2011] CanLII 46615 (ON LRB), July 28, 2011]