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Update on Social Media Workplace Developments

Angela Wiggins
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CRAWFORD CHONDON & PARTNERS LLP

24 QUEEN ST. EAST, SUITE 500, BRAMPTON, ON L6V 1A3
T 905 874 9343 1 877 874 9343 F 905 874 1384
E info@ccpartners.ca www.ccpartners.ca

BARRIE T 705 719 2107
SUDBURY T 705 805 0174



Update on Social Media Workplace Developments

What's New in Social Media?

As the use of social media continues to grow on both a professional and personal level it is important for employers to be aware of possible risks and appropriate responses to employee conduct on these various platforms.

Employers should take note that personal social media activity of employees can create duties for employers. Particularly, employers should consider how their workplace harassment policies address social media and should ensure that employees are aware that conduct on a social media platform can become the subject of a workplace complaint.

#MeToo

The #MeToo movement was a significant story line in 2017 and continues into 2018. The movement began on Twitter and spread to other social media sites. The #MeToo movement encourages individuals to speak out against sexual harassment and abuse. Employers should take note of not only the #MeToo movement but the implications of online complaints on workplaces.

This movement, as well as other social media movements, encourage the public airing of grievances or complaints. Employers should be concerned about this. Investigations into harassment complaints are required by the *Occupational Health and Safety Act* and these investigations are to be confidential, to the extent possible. Employers will face logistical challenges as well as confidentiality challenges if complaints are raised on social media instead of through workplace programs. It may be beneficial to review your policies and provide training that encourages employees to use the workplace programs in place.

Encouraging employees to raise complaints through your programs may also help to avoid reputational impact or public relations impact issues as the complaints can be addressed internally. If social media is permitted or becomes the main forum to make complaints employers will not only need to address the complaint and the alleged harassment but also the public relations issues. In trying to avoid complaints being made on social media it can be beneficial to include language on this in a social media policy.

The #MeToo movement is also an example of how social media can require employers to initiate investigations into complaints that are not made through workplace policies. Employers are obligated to investigate a complaint that they are aware of – regardless of if the proper format is used to make the complaint. Accordingly, employers should be aware that a complaint made on social media can trigger the obligation to investigate.

If after an investigation it is determined that the complaint was vexatious or made in violation of the social media policies, employers should be cautious in considering discipline for the complainant. In light of the existing social climate, it is possible that a court, arbitrator or tribunal would be sympathetic to a complainant who raised a concern about sexual harassment. Employers should consider each situation individually to determine if discipline is appropriate.

Workplace Harassment and Social Media

Beyond complaints about harassment being made on social media, employers are also responsible to provide a harassment free workplace – which has been determined to include social media websites.



The decision of *Amalgamated Transit Union, Local 113 v Toronto Transit Commission (Use of Social Media Grievance)* determined in 2016 that the legal obligation of employers to prevent harassment of employees extends to harassment by customers and third parties. In this case the Arbitrator determined that the TTC failed to take all reasonable and practical measures to protect bargaining unit employees from harassment by members of the community. The grievance arose as employees complained that customers were making harassing and inappropriate comments to employees via the Twitter account.

Employers should take note of this case, and implement policies to protect a harassment free social media space. Employers should consider how much control they have over the social media website and consider what steps they can take. For example, in this case the TTC as the owner of the Twitter account was criticized for not requiring tweets to be removed or pictures to be deleted and instead assisting disgruntled customers.

Employers should also be prepared to investigate complaints made on social media and consider the social media space as part of the workplace.

Other Concerns

- a. Recruitment and Social Media: Employers should also recognize privacy when recruiting. Employers should not ask candidates for passwords to their social media accounts. The Ontario Human Rights Commission has directed employers not to ask job applicants for access to information on social media or other online sites as it can open the possibility of a claim of discrimination. For example, social media regularly contains information that identify traits that are protected grounds. A good practice may be to not use social media as a screening practice to avoid the possibility of discrimination claims.

However, employers can use social media when it is publicly available, as a tool in recruitment. For example, it is permissible to review a candidate's social media accounts. Many employers will "google" an employee as part of a reference checking process to see if any concerns arise. Employers should be careful that when reviewing social media accounts that they are following their recruiting policies and remaining outside the *Ontario Human Rights Code*. For example, if an employer was conducting phone interviews and did not know that a candidate was black, the candidate should not then be disqualified from recruitment if the employer subsequently learns of the candidate's race through social media.

- b. Off-Duty Conduct. Employers should develop policies outlining expectations for employees with respect to off-duty conduct, including conduct on social media. A policy should generally include the following, although each workplace will need to tailor their policy:
 - Broad definition of social media with the goal to capture new platforms as they develop;
 - Broad coverage to both employer sponsored site and personal use of social media on both company and personal equipment;
 - Establish expectations on posting and good judgment including when posting for behalf of organization and as an individual;
 - Outline the enforcement of the policy and what disciplinary action may be taken; and,
 - Provide training on the policy.

If (or perhaps when) an employee engages in inappropriate conduct on social media, employers should consider discipline. However, dismissal will not always be appropriate. For example in *Toronto (City) v Toronto Professional Fire Fighters' Association, Local 3888 (Bowman*



Grievance) and *Toronto (City) v Toronto Professional Fire Fighters' Association, Local 3888 (Edwards Grievance)* two firefighters tweeted sexist comments from their personal twitter accounts. Although both employees were initially terminated, one was ultimately reinstated with a three day suspension based on the intent of the grievor and his positive relationships in the workplace.

When disciplining off-duty conduct, employers should consider the big picture which includes the employee's behaviour, the employee's working relationships, the impact on the employer, and the policy that is in place.

- c. *Social Media as Evidence*: Just as litigation has come to rely more on emails than letters, social media is quickly becoming more commonly used as evidence in litigation. Social media posts are not surprisingly relied on in off-duty conduct cases but beyond this use social media posts can become relevant in sick leave abuse cases, disability claims, attendance issues, mitigation for wrongful dismissal and many other areas. Ontario courts have confirmed that content posted to social media sites such as Facebook or Twitter constitute data in electronic form and can be producible as documents under the Rules of Civil Procedure. This means that when preparing a case it is possible to rely on information drawn from social media websites.

Employers should also be cautious that comments made from employer social media accounts can be used in litigation as well. For example, in an unfair labour practice complaint a union may rely on comments made by the employer via social media to try to seek a remedy.

Generally, employers should be aware of and prepared to use social media as necessary as part of a litigation strategy and preparation.

Take Away for Employers

Employers should recognize that social media is becoming a growing area of risk and management for workplaces and develop policies to set out expectations. It is important to clearly outline responsibilities and requirements for social media use – especially as it becomes a part of daily life.

Employers should ensure that a contextual approach is applied to each situation to determine an appropriate response. This should be used in both assessing discipline as a result of off-duty conduct and in determining if and what type of investigation is appropriate when harassment is alleged on social media.

Finally, employers should consider how social media can assist in the workplace either in traditional ways such as promoting the business and in non-traditional ways such as being a source of information or evidence in litigation.