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PRIMER ON SOCIAL MEDIA IN THE WORKPLACE

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By RBS Lawyers

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"Social media" allows individuals to communicate on a highly accessible level through the assistance of technology. When the workplace and social media interact, a variety of legal and business issues arise. Failure to consider these issues can have negative repercussions for employers and employees alike. The following points should be considered by all parties in the context of social media in the workplace.

"Social" + "Networking" ≠ "Private":

The notion that personal information posted to social networking websites will be private seemingly defies the definition of "social" and "media". Nevertheless, people frequently and mistakenly assume that such information will be private from co-workers, employers, or employees, as the case may be. Similarly, people commonly forget that information posted on such websites may be viewed by unintended individuals. As a result, be mindful that such information could be accessed by co-workers, employers, or employees. Courts and other decision making bodies have increasingly been called upon to deal with the unintended consequences of employment related information being posted on social networking websites.

Don't Disparage, Defame, Discriminate, or Disclose Confidential Information:

Posting disparaging comments about co-workers or employers may invite discipline, termination and legal action for defamation or breach of applicable human rights legislation. Such posts could also result in criminal charges if they are of a hateful or threatening nature.

Disclosing confidential information about co-workers and employees, or confidential information belonging to employers, may similarly result in discipline, termination, or legal action for breach of confidentiality or breach of privacy, as the case may be.

The following examples illustrate some of the negative consequences that have resulted from a failure to abide by this policy:





- Recently, the B.C. Labour Relations Board upheld the dismissal of two employees of a car dealership who posted increasingly hostile and offensive comments about their employer on Facebook, including homophobic comments and violent threats against their supervisors, and accusations that their employer cheated customers. (*UFCW v. Lougheed Imports, Local 1518 v. Lougheed Imports Ltd. (c.o.b. West Coast Mazda)*, [2010] B.C.L.R.B.D. No. 190)
- The U.S. National Labor Relations Board recently settled a dispute with an employer who was alleged to have terminated an employee for critical comments she made about her supervisor on Facebook.
- In 2008 an Alberta grievance arbitrator upheld the dismissal of an employee who created a blog in which she ridiculed co-workers and supervisors, and discussed the inner workings of her department. While this decision was reversed by the court on the basis that the employer failed to comply with the disciplinary process set out in the collective agreement, the decision serves as a reminder that inappropriate comments about the workplace environment could have consequences. (*AUPE v. Alberta*, [2008] A.G.A.A. No. 20; reversed [2009] A.J. No. 368)
- In 2008 an Ontario arbitrator upheld the dismissal of an employee for breach of a confidentiality agreement and insubordination. The employee was a worker at a home for the aged and she posted on the internet photographs of the home's residents and comments critical of her employer, co-workers, and residents. (*CAW-Canada, Local 127 v. Chatham-Kent*, [2007] O.L.A.A. No. 135)
- In 2010 a pilot was terminated by his employer, an airline owned by First Nations communities in Northern Ontario. It was alleged that the employee posted insulting and racial comments about the airline's customers on Facebook. The arbitrator found that the employee's comments had the potential for significant detrimental effect on the company's reputation and on its ability to efficiently conduct business. The misconduct poisoned the work environment and rendered the employment relationship untenable. The arbitrator found that discharge was excessive and substituted a three month paid suspension followed by the employee's resignation, in lieu of an immediate termination. (*Air Line Pilots Association, International, v. Wasaya Airways LP*, [2010] C.L.A.D. No. 297)
- Teachers in a number of jurisdictions are increasingly facing discipline for posting comments on Facebook which disparage students or their parents.

Consider Social Media in the Context of Recruitment:

While employers should use social media to learn more about prospective employees, social media should not replace traditional application processes and reference checks. After all, information obtained through social media may be inaccurate or unfairly attributable to the candidate.

Furthermore, employers should be careful not to use information obtained through social media in a discriminatory manner. The B.C. *Human Rights Code* prohibits an employer from arbitrarily refusing to





employ a person because of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age, among other things.

Job applicants should also be cognizant of the fact that employers may use social media to research them.

Consider the Role of Social Media in the Workplace:

Employers should consider the extent to which they want employees to access social media in the workplace. The conventional thinking is that social media will inhibit productivity, but this mode of thought may be outdated or inaccurate. Whether to permit access to social media in the workplace will typically be a business decision, and consideration should be given to the following:

- Is social media necessary for employees to properly function in their positions, or will it be an unnecessary distraction?
- Can social media enhance employee productivity or the employer's marketing and business opportunities?
- Should employees be given a degree of control over the employer's messaging or marketing, and to what extent?
- Does access to social media have the potential to result in the disclosure of confidential information, and if so to what extent?
- Will employees be able to access social media through personal means regardless of whether the employer permits access in the workplace (i.e., through cell phones, personal computers, etc.)?

Implement/Respect Social Media Policies in the Workplace:

If and when an employer decides to permit social media in the workplace, an important next step will be to implement policies which set-out the guidelines for use. Such policies should address, among other things, the limitations imposed on access to social media and the conduct of employees in their use of social media. Employees should carefully review and respect any policies implemented by their employer.

Get Legal Advice:

Given the many challenges associated with social media in the workplace, employers should obtain legal advice to help protect against some of the many pitfalls associated with its use. Such advice may include assistance with the development and implementation of social media policies that are tailored to the specific needs of a workplace.

Legal advice will also be important for both employers and employees when confronted with alleged





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misconduct associated with social media. Given the many unique manifestations such alleged misconduct can take, legal advice is crucial to ensure that rights and interests are preserved to the greatest extent possible for all parties involved.



VANCOUVER OFFICE:
700 - 401 W GEORGIA STREET
VANCOUVER, BC CANADA V6B 5A1
TEL: 604.682.3664 FAX: 604.688.3830

SURREY OFFICE:
200 - 10233 153 STREET
SURREY, BC CANADA V3R 0Z7
TEL: 604.582.7743 FAX: 604.582.7753

RBS.CA