

# Employers urged to get proactive on social media policies

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For Law Times

**M**ost employers are all talk and no action when it comes to social media policies, according to a Toronto employment lawyer.

But Stuart Rudner, co-founder of employment boutique Rudner MacDonald LLP, hopes a string of high-profile incidents will spur more businesses to finally take action.

In the last few months, three firefighters saw Twitter jokes backfire as they lost their jobs for allegedly sexist and inappropriate posts. The incident followed the case of a mechanic at a Mr. Lube in Vaughan, Ont., who sought out local drug dealers to supply him with a “spliff” on Twitter. He lost his job after police invited themselves along in a responding tweet and forwarded the message to one of his bosses.

“I think a lot of people talk about the issue but I’m not sure how many have actually taken the steps they should of putting policies in place,” says Rudner.

According to Rudner, a well-written policy can help prevent a firestorm before it happens by educating employees on their responsibilities online or back up stiff discipline should the worst happen.

“I tell my clients to be proactive,” he says.

“Have a policy and make it clear to employees what they can and can’t do. If you do that, it makes it difficult for an employee to go to court down the road and say, ‘I had no idea this could possibly lead to discipline or dismissal.’”

Daniel Pugen, a partner in the labour and employment group at McCarthy Tétrault LLP’s Toronto office, says employers are kidding themselves if they think they can ignore social media use by employees.

“Practically speaking, all your employees are on Facebook, Twitter, LinkedIn or some other social media platform. You can’t escape that practical point, and the fact is they’re doing it at work.”

Rudner says social media issues divide along the lines of off-duty and on-duty conduct and that any policy

should address both.

In the workplace, he says, productivity is a big concern for employers. “We’ve all seen it when you’re walking through the office and people start rushing to minimize windows. They’re obviously doing something they don’t want you to know about,” says Rudner.

He says policies should lay out employers’ expectations about acceptable and unacceptable uses of social media while in the workplace and emphasize the fact they’ll be monitoring usage and there will be no expectation of privacy for employees.

“There are lots of tools out there for monitoring what employees are doing. Some are expensive and some are not, but the key is if you’re going to have a policy, you have to enforce it. Otherwise, it becomes meaningless,” says Rudner.

While some employers may want to ban social media use at work outright, Kumail Karimjee, co-founder of Karimjee Greene LLP in Toronto, says it may not always be realistic or wise to go that far.

“A policy shouldn’t seek to overreach. For employees to buy in, it has to be reasonable. We’ve seen that in the evolution of computer and Internet use policies. The first wave typically said that you can’t use work-owned computers for anything not work related. Things have evolved a bit and employers have typically recognized an occasional-use policy is a good way to go. I think the same is true of social media policies and it will make them more likely to be honoured.”

Pugen agrees that a complete ban may not make sense for all employers, especially since many have embraced corporate Twitter accounts and Facebook pages.

“That’s an area that’s often neglected. It should be made clear that the employer owns any social media accounts that are used by employees on behalf of the company,” he says.



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When it comes to regulating off-duty conduct, things can get a little bit complicated, according to Pugen. He says a recent Ontario Human Rights Tribunal highlights the blurring of personal and professional lines in social media use as well as the potential liability of employers.

In *Perez-Moreno v. Kulczycki*, the HRTTO found Facebook posts by one employee describing a co-worker as a “dirty Mexican” constituted workplace harassment under the province’s Human Rights Code. Although the action didn’t name the employer, Pugen says businesses may be liable for harassment of staff.

“I find the respondent’s statements and actions in communicating them on Facebook amount to harassment in employment contrary to the code. The comments clearly were vexatious and

related to an incident that occurred in the workplace,” wrote HRTTO vice chairwoman Dawn Kershaw in the June 18 decision.

Rudner says employers have always had the law on their side when it comes to dismissal for off-duty conduct where it affects the business. But he says the public nature of social media has made it far easier for employees to damage the reputation of their employer by association than in the past.

“It could be as blatant as going online and saying, ‘My employers cheat clients’ or something as simple as posting an offensive comment online where it’s obvious they work for a certain company,” he says.

Karimjee says policies should address off-duty conduct but notes employers should be careful about going too far.

“I think there have to be limits on the extent to which an employer can seek to control private behaviour of employees,” he says.

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