

CON·STRUCT

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SOCIAL MEDIA: HAVE LOCAL GOVERNMENTS BEEN BLESSED OR CURSED? PRACTICAL STRATEGIES FOR RISK MANAGEMENT

Social media is a source of both opportunities and liabilities for local governments as service providers and employers. Social media differs from traditional media in that, instead of a one-way broadcast by trained professionals who abide by journalistic codes or ethics and have editors to provide objective review of content for accuracy and compliance with journalistic codes and ethics, social media involves a two-way platform that is available and accessible by anyone with a computer, with no editorial overview. Social media is much further reaching than traditional media used to be, as the content can be disseminated globally in an instant.

There is no question that social media's accessibility and reach creates opportunities. Social media is not only used by individuals. Businesses, including local governments, use it for a number of purposes, including marketing, dissemination of information to the public, networking and employment purposes, such as recruitment.

At the same time, social media creates increased duties and risks. When social media is misused by staff, Council members or members of the public, a host of problems can result, including unauthorized collection of information, unauthorized communications and disclosures or other potential liability risks to the local government.

While the Charter of Rights protects freedom of speech, such rights are not absolute. For example, the law also provides protection from discrimination and defamation as well as privacy rights. As an employer, the local government is exposed to potential liability from its employee's misuse of social media where that use is connected with the authorized duties of that employee, regardless of whether the use was during or after work hours. Therefore, if social media is used to make discriminatory or defamatory statements about another, or to harass another employee, the employer local government may be exposed to potential liability.

Local governments also have statutory obligations regarding confidential and personal information. For example, under the *Freedom of Information and Protection of Privacy Act* ("FOIPPA"), personal information should not be disclosed except in accordance with that Act, which requires that the use of the information be limited to the purposes for which it was collected and that the discretion to disclose be made through the "head" (who is usually expressly appointed by Council). A disclosure of personal information outside of FOIPPA is an offence. In addition, the local government may have entered into contracts with third parties that require the local government to maintain confidentiality over certain information or documents. Improper disclosure of that information or documents may expose the local government to a potential breach of contract claim.

Further, local governments who conduct social media searches for recruitment purposes face challenges to comply with privacy legislation, which requires that organizations take steps to ensure that information collected is accurate and reasonable for the purposes. Further, one cannot consider during the recruitment process characteristics of an applicant that are protected under Human Rights legislation. For example, one may learn from a social media search that that an applicant is pregnant. During a social media search, one has little control over finding more information than one reasonably needs or should legally consider, and the accuracy of information found on social media can be difficult to discern. While obtaining the consent of the applicant is recommended and may provide some protection, the consent does not protect against collecting inaccurate information, information about third parties or information that is protected by Human Rights legislation.

One recommended guideline to reduce the risk is to refrain from using social media until after the first screening or inter-

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view takes place so that it is background a check, rather than a recruitment tool. A person other than the person making the decision should conduct the social media search and filter the information that is provided to the decision maker to exclude irrelevant and protected information. The criteria used to conduct the background checks should be standardized so that, if challenged, the local government can prove that all candidates were screened based on identical criteria. A policy should be created that sets out how social media will be used and applied during the hiring process, and how inaccurate or irrelevant information will be managed.

As an employer, a local government owes a duty to its employees to take reasonable steps to keep the employees safe from harassment. Employers have been found liable where one employee harasses another through social media where the employer failed to have a harassment or human rights policy in place to protect its employees from harassment.

Local governments may use surveillance, IT monitoring or GPS tracking to monitor the conduct of the employees to promote productivity, ensure social media is being used appropriately and in compliance with policies, protect against harassment and to ensure that external communications are lawful and appropriate in order to comply with its duties, and minimize the local governments reputational and liability risks. But these legitimate interests must be balanced with the employees' privacy rights. For any monitoring being considered, the local government should ensure that the monitoring is:

- necessary and effective to meet the specific need;
- the least intrusive way to meet that need; and
- proportional, such that the loss of privacy is proportional to the benefit gained.

Employees must be notified of any monitoring and the purpose for which the information is collected.

Social media has also added duties onto employers, as illustrated in a recent Ontario arbitration decision, *Toronto Transit Commission v. ATU, Local 1313*, where it was held that media sites operated by the employer were part of the workplace. The arbitrator imposed a duty on the employer to monitor its own social media to prevent the posting of harassing or discriminatory comments from members of the public against the employees. The arbitrator confirmed that employee discipline matters should be private, and that the employer must take all reasonable and practical measures to protect its employees

from harassment.

It is critical in this age of social media that policies be updated to expressly address social media and provide specific guidelines setting out the parameters of appropriate and prohibited social media uses. Employees should be trained on the policies, and the training should periodically be repeated. Social media has created a developing area of the law. Therefore, the policies should be periodically reviewed and updated to ensure that they are kept current and relevant. The social media policy should also clearly outline the disciplinary steps that may be taken for breach of the policy, including termination. In addition, contracts with third party service providers should include the requirement for the third party contractor to comply with all laws and the local government's policies. Social media policies, in conjunction with other workplace policies, such as harassment, are an effective way to communicate expectations to employees. They also provide evidence to justify disciplinary action or defend a local government from potential claims, such as a claim that the local government did not act reasonably to protect its employees from others' misuses of social media.

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Adrienne brings over 24 years of legal experience in litigation and dispute resolution in the areas of local government, construction, public procurement professional liability, and insurance. Adrienne has advised and represented clients in relation to a variety of matters, Adrienne worked with the MIABC for 21 years, both as outside counsel, and for 8 years in-house as Senior Staff Lawyer. Adrienne has extensive experience at all levels of Court in British Columbia, administrative tribunals, mediations and arbitrations.

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