

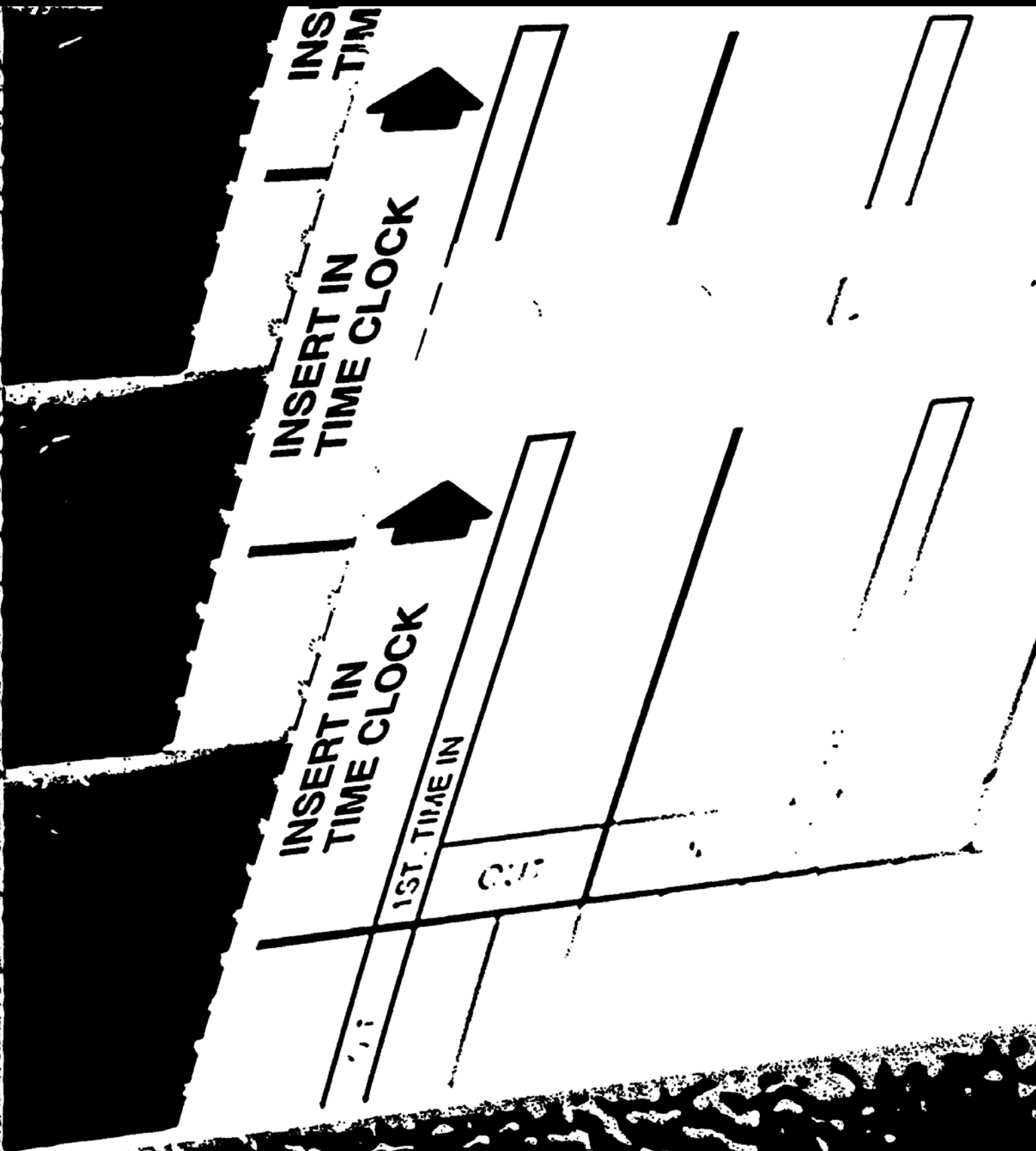


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Social media and human rights: Avoiding the pitfalls

We live in a digital age. The use of social media is part of our culture. It is often the way we communicate with friends, family and colleagues. We can take for granted that the information we make so readily available to others may have an unexpected impact.

Consider the following. An employer is reviewing applicants for a position. As part of the 'vetting' process a member of the human resources department conducts an internet search of the applicant and is rewarded with a treasure trove of information mined from Facebook, Twitter, YouTube and/or LinkedIn.

In these circumstances, the employer may be quite comfortable using this information to determine whether or not the applicant will be seriously considered for the job. After all, if the employee didn't want the information to be discovered, they should never have allowed it to be posted. And the employer has a legitimate interest in protecting the integrity and reputation of its business by conducting this 'due diligence' to ensure only the right individuals are hired.

But what if the information 'discovered' reveals certain characteristics, beliefs or physical attributes which, from a human rights perspective, might otherwise constitute an inappropriate ground of consideration for employment? What if there are Facebook photos of a prospective employee drinking and engaging in other questionable activities? What about an employer who stumbles upon a YouTube video of a job applicant expressing radical religious and political views? What if the employer discovers that the applicant has a disability through the use of social media?

This raises a number of interesting issues questions from a human rights perspective which did not exist in the old days of the simple reference and background check. Is an employer entitled to refuse to employ an individual on account of his or her views? Can an employer use social media to screen out an applicant on the basis that his or her interests are not in line with the company's moral values? Where is the line for employers between responsible due

diligence, which may be required in order to protect a company's business and reputation, and reckless trolling for information? And what of the use of social media by employees in relation to other employees?

To answer these questions, we can briefly examine the interplay between the legislated human rights protection of employees (and potential employees) and the legitimate use of social media in the workplace.

Use of social media based information in employment decisions

Employers of course want to obtain as much information as possible about a current or potential employee. Generally the more information an employer has at its disposal in assessing various candidates, the higher the odds of finding the right employee. Social media provides a natural tool for the review and collection of all kinds of background information about a candidate.

Every Canadian province has human rights legislation prohibiting discrimination with respect to employment on the basis of various protected grounds, namely: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability. An employer is at risk of facing a complaint under provincial human rights legislation if it makes an employment decision after actively or passively gathering information about a person regarding a protected ground. This is true whether the information was actually used to discriminate against a person on a protected ground or whether it was perceived to be used for this purpose.

The risk then is not necessarily only use of the information which may come into conflict with a prohibited ground of discrimination, but the perception by a candidate that personal information of him or herself relating to a protected human rights ground has been gathered and used by the employer.

When does the employer cross the line? In Canada, the test for establishing discrimination in hiring based on a prohibited ground is not whether the

protected ground was the *only* reason an employer made a particular decision, but simply whether it was *one of the reasons*. Social media cases as they relate to human rights and employment, however, are only beginning to make their way through various human rights tribunals, courts and arbitrations.

In British Columbia, the Human Rights Tribunal in *Estrada v Clace Holdings and Smith*, 2008 BCHRT 232 considered the complaint of an employee who was terminated after his criminal record was discovered by his employer via Facebook. However, the Tribunal did not deal with the merits of the argument but rather dismissed the complaint on the basis of a preliminary objection.

The British Columbia Human Rights Tribunal was also presented with a complaint relating to the termination of two female employees whose sexual orientation was discovered through Facebook in *Berezan and Wray v Photo Express Foto Source*, 2010 BCHRT 42. Again, no decision on the merits of the case was made, but both cases demonstrate that complaints based on an allegation that information gained by employers through the use of social media are likely to proliferate.

In France, the High Authority for the Fight Against Discrimination and for Equality (HALDE) has seen a significant increase in the number of complaints they receive – partly due to the heightened use of social media by employers and employees alike. In 2008, HALDE controversially carried out a ‘test’ of major French companies. A number of false CVs were sent in response to job advertisements posted by employers. It was discovered that these employers invited fewer numbers of candidates from certain minority groups for interviews. One presumption was that this additional information was gathered from social media sites, whereas prior to the use of these websites, information such as this was unobtainable.

In the United States, the EEOC (Equal Employment Opportunity Commission), an independent federal law enforcement agency that enforces laws against workplace discrimination, is concerned with the use of social media to research and recruit job applicants not only because the information found may reveal a person’s race or religion, for example, but also because of a potential ‘disparate impact’.

The typical user of social media is more likely to be affluent and young. As such, using social media as a recruitment tool

could be discriminatory against a prospective job candidate on the basis of his/her age or socioeconomic status.

What becomes clear is that the risk is not limited to actual use: it also exists where there is a perception that a decision relating to hiring, internal promotion, termination etc is in some way ‘tainted’ by the mere act of collection and possession. This is a much more difficult allegation to defend and employers who fail to establish a process and procedure for collection and use, do so at their peril.

Other concerns: harassment and ‘cyber bullying’

In the context of social media and social networking sites, an employer may risk facing a human rights complaint if harassment occurs in the workplace via a social media or a networking site, regardless of whether the employer is responsible for the conduct. For example, most jurisdictions have specific laws governing health and safety in the workplace and placing upon employers the responsibility for providing a healthy and safe work environment. And while most health and safety legislation deals directly with the physical conditions of the workplace, there is a trend to expand this obligation to include an overall employer responsibility for keeping employees safe and for acts of its employees that are in some way related to or associated with employment.

Social networking sites and blogs create an avenue for engaging in conduct which may constitute harassment and, consequently, for which employers may be liable for. For example, an employee may access a co-worker’s MySpace page during working hours and post derogatory, harassing, or discriminatory comments or alternatively engages in similar comment and communications via his or her own social networking. An employer that knows or ought to reasonably know that such conduct is occurring may find itself vicariously or independently liable if they fail to intervene.

Harassment on the basis of statements posted on social media or social networking sites are unlikely to be treated any differently from any other form of harassment that an employee may encounter in the workplace. In fact, in certain Canadian jurisdictions there have been specific legislative amendments to health and safety legislation to place a

positive duty on employers to identify and address harassment in the workplace.

In the United States, whether an employer can be held liable for an employee's use of social media or networking sites which may be discriminatory, harassing or threatening to another employee is slightly more established.

In *Blakley v Continental Airlines, Inc* 751 A.2d 538 (N.J. 2000), the New Jersey Supreme Court held that an employer has a duty to remedy any harassment which takes place by one employee against another to avoid a hostile work environment. Although that case involved an employee who used the company's electronic bulletin board to post harassing e-mails to another employee on the basis of her sex, it was held that the bulletin board was an extension of the workplace and if the employer knew or had reason to know that the harassment was occurring, it had a duty to put an end to it.

In France, employers are held to a higher standard than that imposed upon employers in Canada or the United States. French case law has held that employers have an added duty to prevent harassment as between employees from occurring in the first place. As such, even if an employer has taken various steps to protect an employee from harassment, such as terminating the employee engaging in the harassing behaviour, employers in France may nonetheless be held liable.

Minimising the human rights risk

The use of social media is and will continue to be a valuable tool for employers. The risk of possible human rights liability should not necessarily deter employers from its use. To minimise the risk, employers should implement clear, concise and common sense policies and procedures (or amend those which may already exist) as to the use of social media in the workplace and address the possibility of harassment. Here are some practical pointers on how to do so:

- Avoid employment decisions based on information related to a protected ground of discrimination under human rights legislation.
- Develop a well-defined and openly distributed policy. Ensure that the information gathered from social media sites is limited strictly to information legitimately related to the specific job. A policy or procedure limiting the information gathered through social media and networking sites will help avoid the appearance that information related to a protected ground was improperly used or considered.
- Avoid having the individual conducting the online screening as the decision-maker. He/she should report only relevant information and should not record or report any information which an employer could not openly solicit on an employment application.
- Document and retain any information relied upon in the employment decision making process. In particular, clearly document the basis for a hiring or termination decision and ensure it is not related to a prohibited ground of discrimination.
- Do not abandon traditional hiring procedures (eg, reference and background checks where permissible). These are effective tools. Continue to use them.
- Do not limit recruitment efforts to advertising or posting only on social media sites in order to avoid inadvertently excluding certain populations.
- Update harassment policies frequently to clearly prohibit such conduct in the workplace regardless of whether it is online or in-person. If online harassment in the workplace is reported or discovered, it should be treated in the same manner as more traditional forms of harassment.