

Managing privacy in employee relations

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Meeting your privacy obligations

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Outline

- Legal background
- Consent – how to get it
 - Pre-employment
 - Ongoing
 - Post-employment
- Specific issues
 - Surveillance
 - Social networking sites
 - GPS

Privacy - PIPEDA

- PIPEDA is implemented in a unique way that demonstrates its unusual constitutional position.
 - Property and civil rights in a province are part of **provincial** jurisdiction.
 - Privacy is a civil right.
 - But commerce is inter-provincial, international, inter-jurisdictional.
 - Government decided on a phased-in implementation.
- Federal government cannot regulate provincially-regulated workplace.

Privacy - PIPEDA

- Phased in application
 - 1 January 2001 - Federal Private Sector
 - Telecommunications, railways, air travel, shipping, credit bureaus, banks
 - 1 January 2004 - Provincial Private Sector
 - The rest of the economy
- Exemption if provincial government steps in and passes legislation that is declared to be “substantially similar”.
- Substantially similar laws:
 - British Columbia
 - Alberta
 - Quebec

Privacy - PIPEDA

- Addresses “personal information” – information about an identifiable individual:
 - **NOT** name, title, business address or telephone number of an employee of an organization
 - Would include name, address, income, health information, demographics, preferences, birth date, SIN, customer numbers, unique identifiers
- Also includes information that may be traced back to an individual

Does it apply to your workplace?

- *PIPEDA*, s. 4(1):
 - “... applies to every organization in respect of personal information that
 - (a) the organization collects, uses or discloses in the course of commercial activities; or
 - (b) is about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.”

Does it apply to your workplace?

- PIPEDA only applies generally to employee information in the federally-regulated private sector
- Employee information is only covered in the provincially-regulated private sector if it is used in a commercial way
- Provincial privacy laws apply in Alberta, British Columbia and Quebec
- But, even employers who are not subject to the law are experiencing a “privacy chill”
- Employees *believe* they have rights

Baseline

- Section 5(3) of PIPEDA:

(3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

Concerns for Employers

- Common questions
 - Reference checks
 - Collection of personal information
 - Providing references for former employees
 - Disclosure of personal information
 - Video surveillance of the workplace
 - Collection of personal information
 - Monitoring customer service calls
 - Collection of personal information
 - Monitoring of internet / e-mail use
 - Collection of personal information

References

- References
 - Seeking a reference is a collection of personal information (requires consent)
 - Giving a reference is a disclosure of personal information (requires consent)
- What to do?
 - Get consent before you seek a reference – better to get it in writing
 - Make it part of the hiring process or place a consent as part of the job application form
 - Be prepared to provide a copy of the consent to reference providers
 - Before giving a reference, confirm that the reference seeker has consent to obtain it.
 - “In order to confirm the applicant’s qualifications and suitability for the position applied for, the applicant hereby consents to the collection of personal information for this purpose by AcmeCo, including obtaining references from the applicant’s former employers, supervisors, clients and colleagues, confirmation of any criminal convictions for which a pardon has not been granted, results of aptitude tests, and verification of educational attainment. I consent to the indefinite retention and periodic update of such information, if hired.”

Consent

- Consent is very problematic in the workplace
- Probably most voluntary before the person is hired
- Can get consent
 - pre-employment based on application form
 - in employment offer
 - episodic from time to time
 - upon exit

Consent

- Might as well confuse implied consent with deemed consent, since everyone else does.
- Actual consent is often replaced with s. 5(3) of PIPEDA:

(3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

Video surveillance in the workplace

- Before PIPEDA, labour arbitrators had arrived at a test of reasonableness
- Largely adopted by the Privacy Commissioner
 - **Decision 114 – Employee objects to company’s use of digital video surveillance cameras**
 - Railroad company placed cameras on its premises to counter theft and vandalism. (This was in addition to cameras in place for operational purposes.)
 - Informed employees of the cameras and their locations. Told employees they were not to be used for tracking employees or their productivity.
 - To ensure compliance with the intent of section 5(3) (**limited to reasonable collection**), the Commissioner stressed that the circumstances must also be considered. In determining whether the company’s use of the digital video cameras was reasonable in this case, he asked the following questions:
 - Is the measure demonstrably necessary to meet a specific need?
 - Is it likely to be effective in meeting that need?
 - Is the loss of privacy proportional to the benefit gained?
 - Is there a less privacy-invasive way of achieving the same end?
 - Concluded that the use of the cameras was not reasonable in the circumstances. He concluded there were more effective measures and even though the cameras were only on “public places”, the cameras would have a psychological effect on employees.

Monitoring Customer Service Calls

- Two issues – collecting customer information and collecting employee information
- Greater concern re customer information
- “Knowledge and consent” of the employee are required
- Can give notice to employees about monitoring.
- Need to disclose the purpose for the monitoring
- If reasonably necessary for the job, can be a condition of continued employment

- Note: In Canada, consent of one party is required under the *Criminal Code* for monitoring and/or recording. But for PIPEDA, knowledge and consent of all parties must be obtained

Monitoring E-mail and Internet Use

- Common concern - Collection of personal information
- Privacy Commissioner has taken a negative view of the practice
- General principles depend on the reasonable expectations of the employee
 - Is there notice of rules of use?
 - Is there knowledge of the monitoring?
 - Are the restrictions reasonable?
- Baseline reasonableness requirement in s. 5(3)

PIPEDA in the Unionized Workplace

- Intersection of PIPEDA and the collective agreement
- Many collective agreements deal with employee records
 - What can go in the record
 - Who has access
 - Employee access
 - Right to make corrections

PIPEDA in the Unionized Workplace

- What if provisions of the collective agreement are different from PIPEDA?
- What if the collective agreement requires the employer to provide personal information about employees to the union
- Can the union consent on behalf of employees?
Not tested in the courts: If consent is required and it is workplace related, the union can probably consent on behalf of the employee since it can bargain collectively on behalf of the employee.
 - But if the information is especially sensitive, try to get express consent from the employee

PIPEDA in the Unionized Workplace

- *L'Écuyer v. Aeroports de Montreal*
- Among the first PIPEDA cases to be considered by the Federal Court of Canada
- L'Écuyer was a unionized employee of Dorval Airport in Montreal
- L'Écuyer was subject of complaints by other employees and she sought access to her employee file under PIPEDA
- Supervisor refused, in writing, to provide access and copied the shop steward and HR employee on the letter denying the access request.

L'Écuyer v. Aeroports de Montreal

- L'Écuyer complained to the Commissioner that (a) she had been wrongly denied access to her personal information and (b) copying the letter to the shop steward was an unlawful disclosure of her personal information without her consent.
- Airport eventually provided access to the info
- The Commissioner investigated and issued a finding that
 - the denial was not acceptable
 - copying the union rep was not acceptable
 - copying the HR employee was acceptable

L'Écuyer v. Aeroports de Montreal

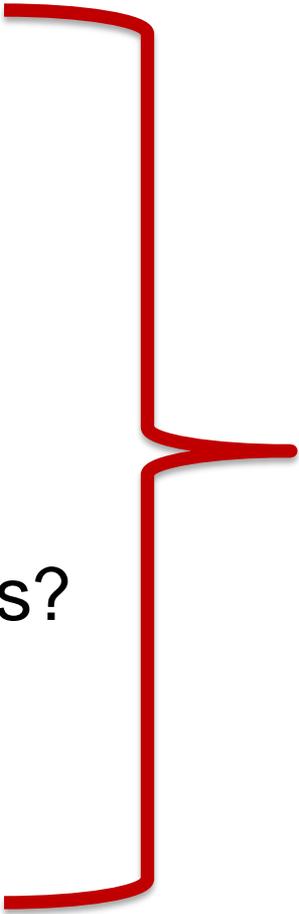
- L'Écuyer filed an application in the Federal Court of Canada
- FCC judge determined that the Commissioner did not have jurisdiction to hear the complaint
- Relationship between the employer and the employee was the subject of a collective agreement
- Collective agreement provided for arbitration of all disputes related to the employment relationship
- Arbitrable dispute – not within the jurisdiction of the Commissioner or the Courts
- Justice Pinard noted that the collective agreement in question addressed issues related to privacy and this would govern the circumstances

Social networking

- Successful social networking sites are about relationships and essentially, disclosure of information
- Increasingly, they are being embraced by users across all demographic ranges
- Employers are looking for guidance about whether Facebook can be used for hiring and for discipline

Ok, but can I ...

- Screen job candidates?
- Discipline employees?
- Impeach witnesses?
- Be nosy?



Probably.

Screening Candidates

- What one can do, legally, depends upon whether the workplace is subject to privacy laws
 - Federal works, undertakings or businesses (FWUBs) (including all operations in the Territories),
 - British Columbia
 - Alberta
 - Quebec
- Also consider whether it's an “unreasonable invasion of privacy”

Consent?

- FWUBs are subject to PIPEDA and need consent to collect info about candidates.
- May argue implied consent
 - “Submitting an application is implied consent for all reasonable collection, use and disclosure that is incidental to processing the application.” Might work
- But better to get explicit consent

Lawful collection

- Regardless of consent, collection must be *reasonable* (s. 5(3)).
- Collection also has to be *lawful*
 - Check the terms of use for the relevant website
 - Using the service to screen employees may be an invalid use of the service

Is it reasonable?

- No caselaw on this – too new
- Consider whether the user has a “reasonable expectation of privacy” regarding the information
 - Was the information likely submitted by the user?
 - Is the information available to anyone on the internet?

Privacy expectations

- **Low**
 - No privacy settings
 - Shouldn't really expect that it will remain private
- **Medium**
 - Available to all “users”
 - May not reasonably expect you to see it
- **High**
 - Available to friends only
 - Probably justified in having a reasonable expectation that this will remain private
 - Unless the user's manager has been added as a friend

Employee Discipline

- Employees can be disciplined for out of work conduct if their out of work conduct is prejudicial to the employer's interests
- A sliding scale.



Signs of the social networking times.

blurring the line between work and home

- Employees can be disciplined for off-duty conduct
- Usually if ... conduct is prejudicial to the employer
- Even “unofficial blogs” can cause problems for employers and consequences for employees

GPS

- Global positioning systems are regularly used to track corporate assets
- But if that corporate asset is your workplace (a truck, for example), GPS tracks the employee
 - Working
 - Breaks
 - Driving habits
- Is this acceptable?

GPS

- Commissioner's finding #2006-351
 - Company implemented GPS to address dispatching efficiency
 - Company had developed a policy about use of GPS data and had communicated it to the employees
 - Found to be reasonable

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