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Blogging guidelines for employees: A necessity in today's workplace

Preventative measures to forestall the need for "doocing"

By now, most employers know that a "blog" is a regularly updated on-line journal of information and opinions, some employers know that the term "dooced" refers to being terminated for inappropriate blogging about the workplace, but few employers understand how to deal with the potential legal risks of employees blogging on the job. These risks include harassment, disclosure of confidential information, disparagement and privacy issues.

Exposure to these risks is rapidly increasing, given the growing popularity of blogging. According to an article released earlier this year on Forbes.com,¹ as much as 5% of the United States workforce maintain personal Internet diaries, 16% of whom have posted information that could be considered negative or critical regarding their employer, supervisor, co-workers, customers or clients. However, only 15% of employers have put specific policies in place to address work-related blogging.

Although to date there have been no reported cases dealing with a "dooced" employee, most of us are familiar with clashes between workers and management in companies such as Google, Delta Airlines, Microsoft and Friendster. Each of these companies has been faced with very public employee terminations as a result of employees posting inappropriate content and disparaging remarks on the Internet. In an effort to prevent such issues and manage employee blogging, employers effectively have two choices: (1) ban all blogging at the workplace; or (2) create and enforce a clear policy with respect to the use of blogs by employees. Given that the former option is difficult to monitor, most employers opt for the latter. The Forbes.com article suggested that blogging policies should contain at least the following provisions:

- Blogging may not be done on company time or with the use of company

computers.

- Bloggers must comply with all of the company's policies, including, but not limited to, the code of conduct and the discrimination and harassment policies.
- Blogs are individual interactions, not corporate communications, and employees must not represent or imply that they are expressing the opinion of the company. Bloggers are personally responsible for the content of their blogs.
- Never disclose any confidential or proprietary information concerning the company.
- Respect yourself, your co-workers and your company. Do not put anything on your blog that will embarrass, insult, demean or damage the reputation of the company, its products and customers, or any of its employees.

Not only is it important to implement policies incorporating such guidelines, appropriate employee training must also be provided. Employees should be made aware of the existence and content of these policies and their obligations to uphold the employer's reputation, refrain from posting disparaging remarks, maintain a harassment-free blog and ensure that an employer's confidential information is kept secure.

FOOTNOTE

[1](#) Leblang, Kevin B, "Protecting Employers Against Bloggers" Forbes, (February 2006) online: Forbes.com

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Court of Appeal clarifies application of "Wallace" damages

Jessen v. CHC Helicopters International Inc.,
[2006] C.L.L.C. 210-032 (N.S.C.A.)

In *Jessen v. CHC Helicopters*, Justice Oland, writing for the Nova Scotia Court of Appeal, held that a jury award of forty-eight months' salary for Wallace damages was wholly inordinate given the circumstances of the employee's termination. Additionally, the court confirmed that Wallace damages are not subject to mitigation.

By way of background, in July 2000, Jessen returned from vacation to discover that her position had been advertised. She had received no notice. Approximately two months later her employer announced that it had created a new position for her. However, it revoked the position the following day. Ms. Jessen was then terminated on a without-cause basis, approximately five months later. She was not provided with a letter of reference and her Record of Employment was issued only after significant delay. At the time of her dismissal, Ms. Jessen had been employed with CHC for approximately two and a half years.

On appeal, the Court reviewed similar cases where Wallace damages had been awarded and concluded that there was a significant disparity between the jury award to Jessen and those in other cases. Specifically, the Court stated that Jessen's dismissal was not exceptionally egregious, given that there was no

public humiliation (e.g. an accusation of theft or fraud or being escorted out of the premises). Ultimately, the jury award was deemed "an erroneous determination of fact that is palpable and overriding, and shocks the conscience of the Court". The Court of Appeal reduced the award to nine months.

Turning to the second issue, the Court relied upon the following comments made *in obiter* by Justice Weiler in *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (Ont. C.A.):

If this deduction of earned income were also made from the damages awarded in relation to a "Wallace" extension, Prinzo would not effectively be compensated for the injury done to her. This result would appear congruent with the Supreme Court's view in Wallace that the injuries resulting from bad faith conduct on the part of the employer are "sufficient to merit compensation in and of themselves" irrespective of whether the bad faith conduct affects employment prospects....This issue was not, however, argued before us, and having regard to my earlier conclusions upholding the trial judge, I need not resolve it.

For these reasons, Justice Oland adopted the view that reducing an award of Wallace damages by the amount of earned income does not align with the Supreme Court of Canada's view that an employee should be compensated for bad faith conduct. Consequently, the nine-month extended notice award was not subject to mitigation income.

This decision is significant as it upholds the principle established in *Prinzo* and clarifies the issue of whether Wallace damages are subject to the duty to mitigate.

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An employee in consultant's clothing?

Liability may exist, despite the intention of the parties

There is a trend in the modern workforce towards outsourcing non-core business competencies to professional service providers, consultants and other independent contractors. Whether a business engages a consultant to obtain highly specialized skills, or to avoid the costs and potential claims associated with the employment relationship, there is always an underlying risk that the consultant may later be deemed an employee. The costs associated with such a determination for a business can be substantial. They include—among other things—liability for penalties and interest under the *Income Tax Act* (Canada), liability for workplace safety and insurance premiums, health tax premiums, damages for wrongful dismissal on termination of the agreement, and employment standards entitlements.

Notwithstanding the risks, independent-contractor agreements remain a valuable business management mechanism, motivating corporations to go to great lengths to structure their relationships with individuals so that on paper they remain independent contractors. The courts have generally held, however, that it is the substance of the relationship, rather than the form, that dictate whether an independent contractor will be treated in law as an employee.

In a recent decision, the Federal Court of Appeal¹ ruled that the intentions of the parties to a contract purportedly for services should not be ignored in characterizing their relationship. Nevertheless, courts consistently disregard the intentions of consultants and the companies purchasing their services.

In July 2006, the Ontario Superior Court² demonstrated just how little credence

the courts are willing to give to formal structure and expressed intent. Braiden was a commissioned sales agent whose incorporated company entered a written consulting agreement with Lay-Z Boy; the agreement expressly stated that the parties did not intend to enter an employment relationship. Under the agreement, Braiden's company was liable for all statutory deductions and withholdings related to employment, including Employee Health Tax, Workplace Safety and Insurance premiums, Canada Pension Plan and Income Tax. Braiden's company was also responsible for setting up its own office and all of the expenses related thereto. Nevertheless, when Lay-Z Boy terminated the agreement between it and Braiden's company in accordance with the terms of the agreement, Braiden commenced an action for wrongful dismissal. In deciding the case, the court chose to look past the formal arrangements, the expressed intention of the parties, and the additional compensation arguably attributed to Braiden in return for providing his services as an independent contractor, and deemed Braiden to be an employee, awarding him twenty months' pay in damages for wrongful dismissal.

Based on the recent case law, it remains imperative that businesses seeking the services of consultants and independent contractors structure their relationships with such service providers to be in both substance and form that of vendor and purchaser of services. This is essential not only when drafting the initial agreement, but also in the ongoing maintenance of the relationship. In addition to drafting an agreement that clearly communicates the intentions of both parties not to deal as employer/employee (and that carefully addresses the termination obligations of the parties), in the day-to-day fulfillment of the contract, independent contractors should be given the maximum degree of freedom to provide the services in question when, how and where they choose. Independent contractors should also be free to sell their services to other purchasers in the marketplace and any post-termination restrictions on such a capacity—through non-solicitation/non-competition provisions, for instance—should be avoided as much as possible.

FOOTNOTES

^{1]} *Royal Winnipeg Ballet v. Canada (Minister of National Revenue)*, [2006] F.C.J. No. 339.

^{2]} *Braiden v. Lay-Z Boy Canada Ltd.*, [2006] O.J. No. 2791

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Is your business governed by the *Canada Labour Code* or by provincial employment standards?

It has nothing to do with where you are incorporated

Constitutional quandaries, while largely relegated to the realms of academia and political debate, may well be relevant to how your business manages its human resources. The question of whether your workplace is federally or provincially regulated is not simply a business decision. Indeed, it is not a decision open for your business to make at all. It does not matter whether you are an OBCA or CBCA company. Canada's highest law dictates whether a workplace will be governed by the *Canada Labour Code* (the Code) or a provincial employment standards equivalent, such as the Ontario *Employment Standards Act* (the ESA). While the provisions of the Code and the ESA are substantially similar, their differences can result in unnecessary costs to an employer who elects to follow the wrong legislative regime.

The Canadian Constitution carves out specific subjects over which the

provinces have jurisdiction, including, among other things, property and civil rights, which is the authority from which provincial employment standards legislation draws its legitimacy. Certain activities are, however, exempt from provincial jurisdiction for the purposes of labour and employment relations. Specifically, businesses engaged in activities and undertakings that are within federal jurisdiction are governed by the Code for the purposes of their employees. Such federal undertakings include aviation, navigation and shipping, banking, intra-provincial trucking, broadcasting and businesses integral to a federal undertaking. Recently, federal jurisdiction has been deemed to include Internet service providers and website operators.

If your business has been dealing with its employees in accordance with the ESA but your workplace is in fact regulated by the Code, you may be in breach of a number of provisions of the Code, some more costly than others. The opposite also applies. By way of a single example, the hours of work and overtime provisions of the ESA expressly exempt information technology professionals from the rights provided thereunder. The Code, by contrast, includes no such exemption. As a result, your business could be liable for overtime pay if in fact it is governed by the Code.

If you are establishing a business or acquiring a business, always consider whether your employment relations are governed federally or provincially.

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Thursday, February 15, 2007
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