Privacy in Employment: Navigating the Maze of Employers’ and Employee’s Obligations, Rights, and Interests

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Privacy Update

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PRIVACY IN EMPLOYMENT: NAVIGATING THE MAZE OF EMPLOYERS’ AND EMPLOYEES’ OBLIGATIONS, RIGHTS, AND INTERESTS

Privacy issues erupt in employment settings in a myriad of ways that fall into these broad categories: employers who collect or disclose private information of employees; employees who improperly access or disclose private information in the employers’ custody; and employees’ private information on employers’ networks and the use that can be made of it.

The forums in which these issues are decided are similarly varied. The courts, privacy commissioners, professional regulatory bodies, human rights tribunals, and labour arbitrators all have privacy issues to contend with from time to time. Their jobs are made more difficult by the ubiquity of electronic data, and potential for privacy breaches on grand scales.

Some of the most harmful disclosure of personal information occurs online, however much of it is disclosed by those who hold the privacy interests. Arbitrators and courts alike have found repeatedly that individuals hold no reasonable expectation of privacy for information they disclose online, be it on Facebook, Twitter, blogs and other internet forums.

1. EMPLOYERS COLLECTING OR DISCLOSING PRIVATE INFORMATION OF EMPLOYEES

Many of the disputes in this area occur in labour arbitrations, because unions have a readier ability to dispute policies and practices than individuals in a common law employment relationship.

The starting point for rules in the workplace is that employees are expected to obey rules, and only if the rule is found to be unreasonable or discriminatory in an arbitration will the employees be allowed to deviate from the rule. This notion is commonly known as the “work now, grieve later” rule. A significant exception to this rule can be in the collection of private information; in some circumstances, rules that interfere with employees’ personal or private lives can be refused.

For instance, labour arbitrators have long held that searches of employees’ persons or their property cannot be done unless the employer can show problems with theft, or a reasonable basis to justify a search. Even if the employer can demonstrate a reasonable basis for a search, an employer is required to conduct a search reasonably. In other words, decision-makers evaluating the collection of private employee information must always engage an approach that balances the interests of employers to control their workplaces and minimize risks with employees’ rights to maintain their personal privacy and dignity.
Decisions evaluating this balance have occurred in challenges to drug and alcohol testing, requirements to provide medical information and be examined by particular physicians, mandatory vaccinations, drivers’ and criminal records checks, and electronic and video surveillance.

A recent Alberta arbitration decision in the area is *Faculty Association of Red Deer College v Red Deer College (Legault Grievance)*, [2015] AGAA No 1 by Arbitrator Kanee. The grievor was a probationary nursing instructor who went off work a month after she started working for the Employer due to pregnancy complications. The Union filed a grievance on the basis that the Employer required her to disclose excessive medical information prior to granting her short term disability benefits. The Employer had rejected the grievor’s application for short term disability benefits, finding that her physician’s diagnosis of “pregnancy complications” and treatment plan of “stress reduction, rest, decreased activity” as both being too general.

The Union also filed a policy grievance challenging the employer’s process to gather information, alleging the process itself violated privacy and human rights legislation.

Arbitrator Kanee allowed the grievances, finding that the medical release the Employer required employees to sign was unwarranted. While the employee was required to provide a medical certificate to the Employer, this did not require the employee to give unfettered access to their medical information and health care practitioners.

Additionally, Arbitrator Kanee found that the physicians’ form that required the physician to disclose an employee’s diagnosis was too intrusive on employees’ privacy and was not required for the administration of short term disability benefits. The form also required the physician to disclose the treatment plan; this requirement was also ruled to be an intrusive and unnecessary invasion of privacy at the short term disability stage.

Arbitrator Kanee did not foreclose that certain circumstances would alter the balance in this analysis. Those circumstances could include the length of absence from work, situations that give rise to a suspicion of sick leave abuse, information that suggests a non-arms’ length relationship between the health care provider and the claimant, or safety concerns related to an employee’s return to work or ability to undertake modified duties.

Arbitrator Kanee found that the information provided by the grievor was sufficient information to entitle the grievor to benefits since it confirmed that the grievor’s absence was medically justified. The Arbitrator rejected the Employer’s suggestion that the information was required to explore