# OFF THE CLOCK ONLINE CONDUCT

## When employees can be disciplined for personal social media posts

BY J.P. KARAM

IN TODAY'S HYPER-CONNECTED WORLD, where personal opinions are frequently shared on platforms like X (formerly Twitter), Facebook, Instagram and TikTok, the lines between professional and private life are increasingly blurred. A common inquiry for Ontario employers is determining when they can discipline or terminate an employee for something they post online during their personal time.

While employees have rights to freedom of expression and privacy, those rights are not absolute, particularly when off-duty conduct intersects with workplace reputation, safety or operations.

### THE LEGAL LANDSCAPE

In Ontario, employment is governed by a combination of statutes, such as the Employment Standards Act, the Human Rights Code and common law principles. None of them allow employees to act however they wish outside of work hours, nor do they permit employers unlimited discretion to police personal behaviour. Instead, the laws try to strike a balance between an employer's legitimate interest in maintaining its reputation and operations, and an employee's right to a private life.

Ontario courts and tribunals have recognized that off-duty conduct can, in certain circumstances, be grounds for discipline or dismissal, but only where there is a clear and material connection to the employment relationship. This threshold is difficult to meet and employers carry the burden of proving the conduct has harmed, or is reasonably likely to harm, the employer's interests.

### OFF-DUTY MISCONDUCT

Off-duty misconduct generally refers to behaviour occurring outside of work hours and off work premises that an employer believes negatively impacts the employment relationship. Historically, this may have included incidents like criminal charges, harassment of coworkers outside of work or intoxication-related events. In the digital era, however, the definition has expanded to include online behaviour, particularly the content shared on social media platforms.

What distinguishes social media activity from other forms of off-duty conduct is its visibility and potential for viral amplification. A post made in seconds can be screenshot, shared widely and preserved permanently, even if deleted. In some cases, posts that seem personal or private can easily be linked back to the individual's employer, intentionally or not. This reality significantly influences the legal analysis of whether off-duty social media conduct justifies employer discipline.

### SOCIAL MEDIA USE BY EMPLOYEES

Ontario case law provides some guidance on how tribunals and courts evaluate off-duty social media conduct. A leading principle emerges from the broader doctrine of 'just cause' in employment law: for an employer to terminate an employee for off-duty conduct, it must demonstrate the behaviour harmed the employer's interests in a material and demonstrable way.

In cases involving social media, courts tend to ask: Did the employee's post identify their employer? Did the post go viral? Was the content discriminatory, harassing, violent or otherwise offensive? Did it attract negative attention to the employer?

The more affirmatively these questions are answered, the more likely the discipline will be upheld.

### BALANCING FREEDOM OF EXPRESSION

A frequent point of contention is the employee's right to freedom of expression. Although the Canadian Charter of Rights and Freedoms guarantees this right, it only applies to government action, not private employers. However, the principle of expressive freedom is not entirely irrelevant. Courts may consider whether an employee's post constitutes a personal opinion shared privately and whether the employer proportionately addressed that expression.

It is important to note that employees who work for public institutions, such as government departments, school boards or hospitals, may have greater protections under the charter. Even then, expression rights must be weighed against the employer's duty to maintain a safe and respectful workplace and protect its public image.

### CROSSING THE LINE

Disciplinary cases based on social media conduct have become more common in the last decade, with outcomes varying depending on context. For example, an employee who posts racist or discriminatory remarks, even on a personal account, may be terminated if the post is linked to their employer, especially in sectors like education, healthcare or government. Employers have successfully argued in some cases that such posts damage public trust, compromise the employer's diversity commitments or undermine workplace safety.

In contrast, courts have occasionally reinstated employees where the disciplinary response was found to be disproportionate to the conduct. If a post was vague, anonymous or made without intent to associate with the employer, especially where the employee showed remorse, tribunals have sometimes

» The number one way to manage off-duty social media conduct is by making expectations clear in your workplace policies.

A worker may be terminated for a social media post that's racist, discriminatory or that directly harms their employer's reputation.

concluded that a warning or suspension would have sufficed.

**EMPLOYER POLICIES**

Employers who wish to regulate off-duty conduct, especially on social media, must ensure they have clear, written policies that are communicated to employees. These policies should outline expectations around respectful conduct, confidentiality, harassment and the use of employer branding or logos. Employees should be made aware that misconduct on social media, even outside of work hours, may lead to discipline where it adversely affects the employer.

However, policies cannot be overly broad or vague. A policy that states "any conduct harmful to the company will result in termination" is unlikely to survive legal scrutiny. Moreover, policies must comply with human rights legislation, meaning they cannot be enforced in a way that discriminates against protected grounds, such as race, religion, gender and disability.

**HUMAN RIGHTS CONSIDERATIONS**

Social media posts may also touch on matters of religion, political belief or other protected characteristics. For example, a human rights complaint may arise if an employee posts a personal religious view that some find controversial and the employer disciplines them. In such cases, legal analysis becomes even more nuanced, as tribunals must weigh freedom of belief against the right to be free from discrimination and harassment.

**BEST PRACTICES FOR EMPLOYERS**

For Ontario employers, disciplining employees for off-duty conduct requires a careful balance between protecting business interests and respecting employee privacy and rights under employment and human rights laws.

Employers should implement a clear, consistently applied social media policy to mitigate legal risk. This policy should outline acceptable behaviour, clarify expectations around brand representation and specify potential consequences of violating those expectations, even off the clock.

When an issue arises, employers must assess whether the social media activity in question has a legitimate and material connection to the workplace. To justify discipline, the post must reasonably harm the employer's reputation, breach confidentiality, disrupt the workplace or conflict with the employee's duties. Knee-jerk reactions to controversial or unpopular opinions can expose the employer to liability if those posts do not actually impact the employment relationship.

Employers should document all findings, ensure the employee has an opportunity to respond and consider progressive discipline where appropriate. Seeking legal advice before taking disciplinary action is strongly recommended to ensure decisions align with employment law standards and minimize the risk of wrongful dismissal or discrimination claims.

J.P. Karam is a partner at Willis Business Law, where his practice is restricted to representing employers in all areas of labour and employment law. Willis Business Law is a top-tier business and employment law firm located in Windsor, Ont. The firm is committed to providing first-rate, innovative business law, employment and labour law, and mediation services. J.P. can be reached at 226-526-9954 or jpkaram@willislawfirm.ca.