

Is the “Our Team” section of your website creating a liability?

Company websites are ubiquitous. They are a necessary form of marketing in any industry. One of the methods of exploiting the value of this medium is to use images and videos of employees as part of the advertisement: as a friendly face on display under the “Our Team” section; or as free models and actors for advertising photographs and videos. Before doing so, employers should be aware of the potential liability arising for statutory protections of privacy.

Personal Information and Privacy Act (“PIPA”)

The *Personal Information and Privacy Act*, S.B.C. 2003, c.63, restricts the collection, use and disclosure of personal information by private companies. Violating this act can bring the employer before the Information and Privacy Commissioner and potentially liable for any harm caused.

Under *PIPA*, “employee personal information” is special exemption apart from the general restrictions on personal information. These two terms are defined in the statute as:

"personal information" means information about an identifiable individual and includes employee personal information but does not include

- (a) contact information, or
- (b) work product information;

"employee personal information" means personal information about an individual that is collected, used or disclosed solely for the purposes reasonably required to establish, manage or terminate an employment relationship between the organization and that individual, but does not include personal information that is not about an individual's employment;

Notably, contact information is not considered personal information, and therefore may be disclosed in company websites.

However, images are included in this broad definition. In *Shoal Point Strata Council (Re)*, 2009 CanLII 67292 (BC IPC), the Commissioner expressly included video surveillance images as a form of personal information:

[60] ...Accordingly, while recorded images are not generally highly sensitive, they can and do constitute personal information of individuals and that information can, particularly viewed cumulatively or over time, convey a great deal of information about the filmed individuals, their personal lifestyle and habits...

Unlike ordinary “personal information”, employers are allowed to collect, use and disclose employee information if the employee consents, if the information reasonably collected for the purpose of establishing, managing or terminating an employment relationship (ss. 13, 16, 19).

The statute does provide some specific exemptions for when consent is not required (s.12, 15 and 18), which include:

- (a) when it is clearly in the employee's interests and consent cannot be obtained in a timely way,
- (b) when it is necessary for medical treatment and the employee is unable to give consent, or there are compelling circumstances that affect the health or safety of any individual and then only if notice of the employer's conduct is mailed to the last known address of the employee to whom the personal information relates,
- (c) when obtaining consent would compromise an investigation or proceeding in which the information is reasonably required,
- (d) when the information is collected by observation at a performance, a sports meet or a similar event that the employee voluntarily attends and is open to the public,
- (e) when the information is available to the public from the sources prescribed by law,
- (f) when it is necessary for determining entitlement to an honour, award or similar benefit, or being selected for an athletic or artistic purpose,
- (g) when it is necessary in order to collect or repay a debt owed,
- (h) when it is required by law, including complying with a subpoena, warrant or order to compel the production of personal information,
- (i) when it is to a public body or a law enforcement agency in Canada, concerning an offence under the laws of Canada or a province, to assist in an investigation, or in the making of a decision to undertake an investigation,
- (j) when it is for the purpose of contacting next of kin or a friend of an injured, ill or deceased individual,
- (k) when it is to a lawyer who is representing the employer, or
- (l) when it is to an archival institution if the collection is reasonable for research or archival purposes.

The statute also specifically sets out when consent is implied (s.8), though this is, again, only in specific circumstances:

- (a) where the employee has volunteered the information in circumstances where the use of the of information would have been reasonably understood;
- (b) where it is for enrolment or coverage under an insurance, pension, benefit or similar plan, policy or contract, whether the employee is benefitting directly or as a beneficiary; and
- (c) where the employer specifically advises the employee about the purpose for the collection, use and disclosure of the information, the employer also provides a reasonable time for the employee to decline, the employee does not decline, and the employer's collection, use and disclosure is reasonable.

If the Privacy Commissioner concludes that there has been a breach of the statute, the employee may then take the Commissioner's findings to Court and sue for any damages that have resulted.

Privacy Act

Like *PIPA*, the *Privacy Act*, R.S.B.C. 1996, c. 373 creates a cause of action and liability, this time relating to the use of a person's "portrait" without their consent:

Unauthorized use of name or portrait of another

- 3 (1) In this section, "portrait" means a likeness, still or moving, and includes
- (a) a likeness of another deliberately disguised to resemble the plaintiff, and
 - (b) a caricature.

(2) It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

There are some exceptions to this liability, such as exempting group photographs where the person is not specifically defined or not portrayed in a manner intended to exploit their name or reputation.

In *Poirier v. Wal-Mart Canada Corp.*, 2006 BCSC 1138, Wal-mart used a manager's image in a welcoming advertisement in their store. The manager had consented to the use of his portrait. He was later terminated for just cause, but Wal-mart continued to use the same advertisement with his image. The Court held that the termination also terminated the consent and the continued use of the portrait required re-obtaining the manager's consent.

Unlike in *PIPA*, the *Privacy Act* does not require proof of any damages. The *Walmart* decision surveyed various damages awards and noted that damages were weighed by the level of embarrassment caused and the commercial advantage gained by the use of the person's portrait, and have included awards from \$500 to \$35,000. In that decision, the Court awarded the manager \$15,000 for the breach of privacy.

Summary

The above to statutes create a general requirement to obtain the consent of employee's before using being able to use their image on company websites. If an employee is unwilling to cooperate, an employer should consult these statutes or obtain legal advice on whether their circumstances fall within the specific exceptions of the statutes.



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