

Big Data to have implications on labour law

BY DALE SMITH

For Law Times

The age of Big Data is coming to the workplace.

With the changes, lawyers say clients need to be aware of privacy concerns and the potential for the data to be used for discrimination.

They also warn that employers need to be aware of Big Data's limitations as a predictive tool.

"The reality is that Big Data is starting to have very serious encroachments on our private



Lisa Stam says employers who use analyses based on Big Data could face pushback.

lives, and the aggregation of what is notionally public infor-

mation results in shockingly accurate profiles of individuals.

"And this is not just being leveraged in the public sector but increasingly being leveraged by the private sector," says Adrian Ishak, partner with employment law firm Rubin Thomlinson LLP in Toronto.

The Information and Privacy Commissioner of Ontario recently released guidelines for how to use Big Data with regards to the public sector for policy-making.

"Ensure that you have the legal authority to directly or indirectly collect any personal information involved in your big data project and use it for the purposes of the project," counsel the guidelines.

Labour and employment lawyers note that these guidelines will likely serve as a template for future legislative changes that will apply to the private sector.

While Ontario doesn't currently have legislation that generally protects an individual's rights to privacy, courts have nevertheless recognized "intrusion upon seclusion" as a tort arising from violations of individuals' privacy rights.

Ishak notes that Big Data tools are already being used in the hiring process at certain companies, like employers using aptitude testing to make hiring decisions. For example, Ishak recently dealt with a client who is building an automated video conferencing tool to pre-screen job candidates.

He says the proposed tool

will analyze a job candidate's content of responses, as well as their physical reactions and behaviours.

"A lot of conversation that I was having with in-house coun-

reasonable search and seizure when it comes to that collection of information.

Employers who try to use analyses stemming from Big Data could face pushback from

It could be very problematic for companies to rely on some sort of Big Data to form a methodology and thereby ignore the human relations in employment law.

Natalie MacDonald

sel was about that we will have limited control over the biases that will be going into the programming," says Ishak.

"Is there inherent bias going into their programming and how is that going to impact society more broadly?" he adds.

Ishak says lawyers need to be aware of different legal risks as they advise clients.

If it turns out people are inadvertently being systematically screened out by data they provide, Ishak notes that it could be problematic from a legal perspective.

Employment and contract lawyer Lisa Stam, founder of virtual law firm Spring Law in Toronto, says that when it comes to the collection of data, employers face legal issues like finding a way to protect individuals' privacy while being transparent about where it comes from.

She highlights to them that it's important not to run afoul of Charter rights around un-

employees and unions, she says, so she recommends discussions with legal counsel about how the information is collected and used.

"If you can share with your employees some of the information and where it's coming from, and clarifying why it's really relevant to that demographic of workplace, but if you're trying to treat humans like machines, there will be resentment," she says.

Human rights tribunals, courts and judges applying case law tend to lean toward the necessity to look to individual circumstances and whether accommodation is needed, she says.

That's something Big Data may wind up missing, says Stam.

Natalie MacDonald, managing partner with Rudner MacDonald LLP in Toronto, shares concerns that Big Data results could be used to justify a discriminatory policy or procedure.

"[E]mployment law is not about data and statistics — employment law involves human beings and human relationships," she says.

She recommends lawyers advise employers that they ensure that if Big Data is used to form a methodology or provide any conclusions that they're not based on any prohibited discriminatory grounds.

At the same time, lawyers need to be aware that if they are contributing data to any databases that they be keenly aware that they don't inadvertently breach solicitor-client privilege.

"It could be very problematic for companies to rely on some sort of Big Data to form a methodology and thereby ignore the human relations in employment law," says MacDonald.

"Employment doesn't look at things by way of graphs and math. That's the big conundrum with data, and you could fall into some kind of unfair or flawed methodology as a result."

She adds, "It's important that we take into consideration context, and that's something that I fear is missing when we just look at things in terms of methodology or a mathematical equation."

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