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Social Media Legalities

an article
from T10

With an increasing number of staff accessing social media, whether during working hours, as part of their job or for mere recreation, so the potential blurring of work and home life / communications grows. On a morning train journey into work, it is not uncommon for a person to take out their tablet, update their status on Facebook and Yammer, check their Twitter feed and re-tweet a couple of tweets, one of which may be linked to an article in the newspaper mentioning their employer maybe.

Or perhaps they may have used their smartphone to check how many new contacts are suggested for them in their LinkedIn account. In the space of five minutes, they may have connected with a large number of people - many of whom they do not know. But none of this had anything to do with their job. Or does it?

In reality, every one of these activities could impact on the reputation of the company they work for, be associated with their employer or even make their employer in some way liable. The activity does not need to be work-related for that to be the case, so each one of these activities could potentially constitute a breach of their contract of employment.

Protecting a business from deliberate or, more likely, inadvertent breach of contract through employee use of social media is rarely straightforward for employers but the most effective means normally involves a combination of strategies.

As a minimum, it will require a clear policy statement. Indeed, as a number of recent cases have demonstrated, a lack of policy may not only fail to avoid or tackle problems but may also inhibit the employer's ability to discipline employees who digress or prove fatal to a subsequent defence against unfair dismissal.

Many employees will be unaware of the potential impact on the employer and the business of what they see as personal communications, so it is vital they are made aware of the limitations upon and requirements for use of social media.

A case in point was that of Whitham v Club 24 limited t/a Ventura in 2011, where a tribunal concluded that an employee had been unfairly dismissed for making derogatory comments about her work colleagues on Facebook.

A relevant factor for the tribunal in considering the employer's contentions that it had suffered reputational damage was that the only guidance it provided to staff warned against breaches of confidence on social media, without reference to further risks such as reputational damage.

The employee saw no harm in what she posted and in any event considered it to be a personal matter. As it transpired, the tribunal agreed, viewing her comments as 'relatively minor' and highly unlikely to have any effect upon the employer's reputation or relationship with a key client.

Even so, dismissal and costly legal proceedings might have been averted had the employee been made aware of the risks and the company's stand point.

The above case is in contrast to Whitham, where employers have been forward-thinking over potential implications of social media.

Here, they provided a clear policy and this has proved to be a persuasive factor for an employment tribunal. In the case last year of Preece v JD Wetherspoon plc, Ms Preece - a pub manager - chose to vent work frustrations on Facebook, also identifying the customers concerned.

Her employer found out and promptly dismissed her for gross misconduct, a decision that was subsequently found by an employment tribunal to be fair in the circumstances. The fact that the employer provided clear guidance to employees, of which Ms Preece was aware and had evidently breached, was highly influential in the tribunal's decision.

As indicated above, employers not only risk reputational damage through employee use of social media but are potentially liable for the repercussions.

Defamatory comments of the employee, harassment possibly or even discrimination can be the responsibility of the employer if this can be said to be carried out in the course of their employment. This is so whether or not the conduct is done with the employer's knowledge or approval if it is connected with authorised activities due to 'vicarious liability'.

Employers may therefore struggle to demonstrate communications were not sanctioned unless employees are made aware of the limitations upon and requirements for use of social media.

In defending such claims, the employer will need to show that it took all reasonable steps to prevent its employees from such conduct and the absence of a policy to supervise the use of social media will make that extremely difficult.

Policy

Prevention is more important than detection. As with any policy document an internet/ social media usage policy should be user friendly and concise. It should provide guidance and control but also clear indication of how the policy is to be supported by disciplinary action in the event that a breach occurs.

For example, it is vitally important to set out and for employees to appreciate that there is personal social media activity and there is social media activity associated with work and the line between the two should not be blurred or disciplinary repercussions may follow.

As a minimum a social media policy should:

- clarify employer expectations and restrictions;
- inform employees of what communications they can treat as private;
- identify risks of inappropriate use (non-exhaustive examples like the ones above can be useful);
- highlight consequences of breaching the policy;
- protect against discrimination, bullying or harassment;
- promote positive image of the organisation but also employee morale;
- be consistent with other policies of the organisation and their application.

While writing on the subject of blurring or work and private time, it is also worth revisiting your company's policies/terms of employment relating to ownership of intellectual property.

Whilst, at least in the UK, generally a company will own the work created by its employees (though not its contractors) "during the course of employment", the concept has been slightly blurred for reasons such as differing working patterns (for example, working on commuter journeys but taking an extended lunch break) and by the use of home devices to work etc.

As such, it is worth checking that it is clear that such activities are regarded and defined as being during the course of employment. Additionally, more than ever, we are advising that your policies remind employees / make it clear which business information is confidential and not to be divulged easily, whether by comments through social media about the firm's next big idea or otherwise.

More than ever, as the lines continue to blur, clear definition and policy will be essential in order to ensure, as far as possible, your business is protected and secures the intellectual property it needs to.

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