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Christopher Hitchins and Mark E Zelek

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Social Media and Employment

Christopher Hitchins, Angela Gill and Denise Backhouse

Morgan, Lewis & Bockius LLP

Introduction

The use of social media, such as Facebook, LinkedIn, YouTube, MySpace and Twitter, has grown enormously in recent years, and throws up particular challenges for employers. For example, could their use by employees infringe confidentiality obligations? Is the company's intellectual property adequately protected? How can the employer protect its reputation? Can employees be disciplined or terminated for misuse or overuse of social media? Can employers be held liable for discrimination or defamation damages if their employees say things that they should not? How does the employer monitor its employees, and are there privacy concerns in doing so?

Recognising these concerns, the Trades Union Congress, the national trade union centre in the UK, commented in 2007 that employers who simply ignored the issues posed by employees' online postings until faced with a problem to which it had to respond rendered the UK's then 3.5 million Facebook users '3.5m HR accidents waiting to happen'. In our experience, employers have generally been slow to adopt tailored policies and strategies in order to deal with the particular concerns that employees' use of social media, and targeted marketing by employers through this media, present.

Level of usage

In 2010, it was estimated that there were almost 30 million Facebook accounts in the UK alone, and 15 million LinkedIn users on the European continent. Of the UK's estimated 34 million strong workforce, over 55 per cent is estimated to access social media at work, nearly a third of whom spend more than half an hour a day accessing such sites, with 6 per cent spending an hour a day doing so.

The US, which accounts for almost half of global social network traffic, has about 30 per cent of Facebook's more than 500 million users. Worldwide, more than 30 billion pieces of content (web links, news stories, blog posts, notes, photo albums, etc) are shared on Facebook each month. A 2009 US workplace survey showed that 45 per cent of workers visit social networking sites at least once a week, that 27 per cent do not consider the ethical consequences of posting comments, photos or videos online and that 74 per cent agreed it is easy to damage a company's reputation on social media.

Despite the above, it is estimated that three-quarters of the UK's employers and a similar percentage in the US have no social media policy at all.

Even where an employer has a social media policy (or other relevant policies), few employees appear to know and understand what they mean, and fewer still appreciate that an employee's use of social media, even outside the workplace and outside working hours, can have repercussions for their continued employment.

As a result, we are starting to see cases where the employee has been terminated because of his or her use of social media. Often the decisions themselves are fact-sensitive, but result from the application of existing workplace laws dealing with dismissal to the employee's online postings. The overarching message from these

cases appears to emphasise the need for a properly drafted social media policy, properly communicated to employees (preferably with relevant training).

Challenges for employers

So what are the principal challenges that social media pose for an employer?

An employee's online postings, whenever made and no matter who owns the technologies used, may:

- disclose the employer's confidential information or trade secrets, or infringe the employer's confidentiality or other obligations owed to a third party;
- damage the employer's reputation, including its relationship with customers or prospects;
- appear to represent the views of the employer and so expose the employer to the risk of litigation (or, as above, damage its relationship with customers or prospects);
- constitute harassment or discrimination of co-workers and so, again, expose the employer to the risk of litigation; or
- be disclosable in litigation – discovery requests specifically addressing social media data sources are now standard practice in the US, and electronically stored information is now the subject of a specific practice direction in the UK.

Even without a specific social media policy, some or all of the above may render an employee liable to disciplinary action under an employer's existing HR rules or policies. Among the benefits of a specific social media policy (which is likely to require updating as the media develop further) and of employee training on its introduction or amendment, are clarity and openness – two vital components in the effective management of employees – as well as providing important technology education to employees; few would consider publishing to the outside world a diatribe against their boss, a work colleague or a customer, and yet many do so in an online blog, a tweet or on their Facebook wall in the mistaken belief that their comments are not public.

The 'unregulated' (ie, without a specific policy on their use) use of social media at work can also, of course, mean that employees are not working when they are meant to be.

From an employer's IT department's perspective, such use (using the employer's technology) may also render the employer's IT system more vulnerable to virus or other attack, whether from an employee's direct access to a social media site via his or her workplace e-mail account, or his or her access to such a site using the employer's technology but via the employee's personal e-mail account.

Workplace policies and procedures

So, what are the essential elements of a social media policy?

First and foremost, it should set out the employer's attitude to the use of social media at work. As with personal use of other

communications facilities at work – principally telephone and e-mail – most employers are likely to allow limited (incidental and occasional) personal use of internet and social media so long as it does not adversely impact the employee's work.

Moreover, an all-out ban on the use of the employer's technology for social media use at work is not a complete answer to the issues posed by the media, first because employees can equally well access them during working time via their own mobile devices, and secondly because an employer should also make clear its expectations of its employees' (and others') conduct in using social media outside working, and during their personal, time.

In the US, the National Labor Relations Board has made it clear that overbroad social media use rules and policies may implicate the right to engage in protected concerted activity.

Communication

As with all employment policies, a social media policy needs to be properly communicated to the workforce. Where the policy appears to change existing practice, particular care over its communication and implementation is needed. Given that employees (and others engaged in an employer's organisation) use social networking sites outside the workplace, on their own equipment and during non-working time, the proper communication of the policy is likely to require some form of training for all employees, not least to demonstrate that they all know and understand their employer's expectations.

Coverage

The policy's coverage in terms of to whom it should apply is also an important issue. As with policies on matters, such as anti-discrimination, harassment and bullying, computer and communications systems and internet usage and data protection issues, an employer should review carefully all of those who work in its organisation – irrespective of their capacity (eg, employees, whether temporary or permanent, and whether engaged through an agency or not; contractors, etc) as well as volunteers and interns – and consider extending its social media policy's application accordingly.

Other employment terms and policies

A social media policy also needs to mesh consistently with an employer's existing HR policies and with the terms of its contracts with employees and others. HR policies, such as those on anti-discrimination, harassment and bullying, computer and communications systems and internet usage, rules of conduct and data protection, should all be considered and updated and taken into account (as appropriate) in a social media policy.

Equally, an employer should consider the terms of its employees' (and others who work for it) contracts of employment or other engagement and ensure that its social media policy is both consistent with, and takes account of, rights and obligations under those contracts. Key contractual rights are likely to include those concerned with the use and disclosure of the employer's confidential information or trade secrets.

Restrictive covenants, protection of intellectual property and confidentiality

Careful thought needs to be given to any restrictive covenants imposed on employees and others in the workplace. How are obligations, such as non-solicitation and non-deal covenants aimed at protecting an employer's confidential information about customers – and, in terms, preventing an ex-employee from soliciting to a competitor (or dealing with them) the customers with whom the employee worked while employed by his or her former employer – to be policed or enforced if all of those confidential customer details are included in the ex-employee's personal LinkedIn account?

How does the employer intend to ensure that its trade secrets, intellectual property and other confidential information are properly

protected in this context? Specific rules addressing this issue (and ensuring that the employer complies with its obligations to third parties) are therefore very important.

Regulated employer

Where an employer operates in a regulated sector, then the rules of the relevant regulatory body may also need to be taken into account in the terms of the employer's social media policy. In the US, for example, the Financial Industry Regulatory Authority's (FINRA) 'Guide to the Internet for Registered Representatives' covers all communications with the public and provides granular direction on the status of static (eg, profile, background or wall information) versus interactive (eg, chat room) content.

Professional rules of ethics may also need to be considered in the context of an employer's social media policy.

Marketing and identification of the employee's employer

Particular considerations apply where the employer has its own social media presence as part of its marketing strategy. In these circumstances, authorised employees whose roles require them to post online on behalf of the employer need particular training, and an employer's social media policy should additionally make explicit provision for such use only by authorised employees.

Where the employer itself has a social network presence, all employees need to know who is authorised (and who isn't) to make postings or comments on the employer's behalf, and if they are so authorised, then as indicated, specific training for such employees is recommended.

In any event, an employer is well-advised to ensure that it deals in its social media policy with such issues as whether it is happy for an employee to identify his or her employer in their personal social media postings, and to ensure that the employee also makes clear that any views that he or she expresses in such postings are the employee's own for which they are personally responsible.

Monitoring

Where the use of social media is permitted via an employer's technology, the employer should set out, in just the same way as it should in its computer and communications systems use and internet policy, the degree to which such use is monitored, and the degree of privacy (if any) that the employee should therefore expect in any such communications.

Responsible and respectful use

'Responsible and respectful use' of social media are important elements of any social media policy: the policy should make clear that employees may neither disparage or damage the employer's reputation or those of its customers or suppliers, nor make damaging or disparaging comments about their co-workers. Employers may also wish to add that employees are expected to draw to the employer's attention any posting that they see that offends the policy or that otherwise reflects on the employer or that may render it liable to litigation.

Recruitment

A number of 'cautionary tales' (from the unsuccessful job applicant's perspective) have circulated about recruiters using information that is publicly available on social media sites in order to gain an insight into potential recruits. Nonetheless, the dangers of such use are not all 'one way', and an employer's social media policy should make clear that any such use by recruiters should conform to general principles of 'responsible and respectful use' (including that any information relevant to a recruitment decision that comes from such a site should be properly verified). Intrinsically, of course, such use has the potential to expose an employer to the risk of litigation – particularly to the risk of a discrimination claim from an unsuccessful applicant claiming that the employer

based its decision not to recruit on information regarding a protected characteristic of the applicant gleaned from one of the social networks.

Termination

Cases arising from the termination of employment because of online activity are starting to come through the system. These tend to be fact-sensitive, but nonetheless demonstrate the adaptation and application of existing and established principles to the 'new' media.

Conclusion

The rapid changes in, and growth in the use of, social media pose challenges and create new opportunities for employers: the potential of social media is far from all negative – properly managed, the media create new business relationship opportunities, new marketing opportunities and the potential for increased employee efficiency and enhanced workplace collaboration. The key, however, is to ensure that they are 'properly managed': a properly considered, communicated and implemented (and reviewed and updated) social media policy is the first step in this process.

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