

# Employees' Use of Social Media

Understanding your options if an employee uses a social media account to the employer's detriment in the People's Republic of China

By K. Lesli Ligorner



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With the prevalence of the Internet and smartphones in the PRC, social media has become ingrained in our daily lives, for both personal and professional activities. For companies, the explosion in social media is used to increase public awareness of the company's activities, with many now maintaining a social media account to promote their brand. To gain traction, many employers are open to the use of social media by employees inside and outside the workplace. Some employers even encourage their employees to do business via social media apps like WeChat.

However, in doing so, are employers prepared to cope with the legal issues related to the use of social media by employees? Many questions remain unanswered as the law is still undeveloped in this area. For example, will an employer be held accountable for an inappropriate or offensive post on an employee's personal social media account? Can an employer discipline an employee for an inappropriate

or offensive post on a personal social media account? How easy is it to collect this evidence to support a unilateral termination for an employee's disclosure of sensitive or confidential company information through social media? Is it permissible and lawful to monitor the use of social media by employees during and after the work hours?

Given these uncertainties and because PRC law is employee friendly, employers should consider adopting comprehensive policies on the use of social media by employees in their personal capacity but re-

lated to the company's business and for those who operate social media accounts to promote the company. Adopting such policies should provide employees with clear guidance on what is and is not acceptable, and proper disciplinary actions may then be supported if an employee crosses the line into the latter category. In the absence of properly adopted policies, an employer will have difficulty disciplining an employee for his/her activities in the social media space.

A case decided in Beijing in favor of an employee is instructive. A

▼ The consequences of hitting "send"



**An increasing number of employees are using social media to conduct business, but few realize that the obligation of loyalty and confidentiality towards the employer continue to apply even when writing a personal post**

Beijing-based software developer maintained a company microblog account. The software developer assigned one of its marketing specialists to manage the company microblog account on its behalf. In early 2014, the company microblog account posted an update which accused its management of laying off employees "by force". In March 2014, the software developer terminated the employment of this marketing specialist on the grounds, among others, that the marketing specialist posted the microblog that disparaged the company. The marketing specialist lodged a claim for wrongful termination. Eventually, the labor dispute arbitration committee and trial and appellate courts ruled in favor of the employee because the software developer failed to prove (i) how the company microblog account was managed; and (ii) it was the marketing specialist who posted the disparaging comment.

Indeed, in the PRC, a comment made by an employee may be extrapolated and interpreted to represent the company – rightly or wrongly. In another reported case, an employee made negative comments, which went viral, and the employer decided it had to respond to the netizens to protect its reputation. Whether it could sustain the termination of the employee's employment if a claim of wrongful termination was lodged is unclear.

In this case, in January 2012, the marketing director of a Chinese consumer electronics company posted a microblog in which he expressed fury and contempt towards Wuhanese just because he heard a Wuhan teenager use abusive words against his parents in the airport. The marketing director concluded that Wuhan was the "biggest woodlice (i.e. uncivilized) city in China". This post was forwarded more than 200 times and many netizens criticized the marketing director for his comment. The next day, the president of the company posted in response that it was wrong for the marketing director to hurt the feelings of and to disrespect Wuhan residents

merely because of his opinion of an individual. The president indicated that the marketing director should apologize to the Wuhanese, or the company would have no choice but to dismiss him. The president's post drew more public attention and more criticism of the marketing director. Subsequently, the marketing director posted an apology, but netizens rejected it. The same evening, the president announced via a microblog post that the company decided to dismiss the marketing director for cause. In the absence of existing work rules at that time which prohibited employees from posting offensive or discriminatory comments on a personal social media account, a court would likely have ruled in favor of the employee if he lodged a wrongful termination claim. At the same time, publishing that the employee would be summarily terminated could have exposed the company to a libel claim, particularly if there was a finding for the employee.

This case illustrates a common fact pattern – an increasing number of employees are using social media to conduct business, but few realize that the obligation of loyalty and confidentiality towards the employer continue to apply even when writing a personal post. A reckless comment on social media may lead to the unauthorized disclosure of sensitive business information, which in turn might result in unintended but irreparable damage to the employer.

An employer that implements policies and provides guidance in this area can reduce the risk of negative public exposure caused by an employee's inappropriate social media posts and can provide grounds for disciplinary actions. However, employers cannot just sit back after adopting such policies. While they need not monitor the daily use of social media by their employees, it is advisable that they reserve the right to monitor an employee's social media posts if and as necessary and obtain employee consent around such policies because they delve out of the professional realm and into the personal. Along these lines, the trial and appellate courts upheld the termination of a senior employee by a Shanghai accounting firm because the firm was able to present the employee's microblog posts which showed that the employee went to Ocean Park in Hong Kong with her family while she was purportedly on sick leave.

The published case of a European airline also provides a good example for other companies to follow. In February 2012, the airline posted in a microblog that it had decided to reform and improve its business class meal service for flights departing from Shanghai. Two airhostesses commented via their personal microblog accounts that these efforts were in vain because the airline was only going to improve the dinnerware, when the food itself tasted bad. After an internal investigation in April 2012 the airline dismissed



▲ Haute altitude cuisine

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both employees for violating the company's work rules, including the social media policy. Both employees lodged wrongful termination claims, defending their personal microblog activities as having no impact on the airline and not justifying summary dismissal. They asserted: (i) their personal microblog activities fell outside business hours and should not be governed by the airline's work rules; (ii) they neither used their real names on the microblog nor identified themselves as employees of the airline; and (iii) their comments were not untrue and were deleted after the airline suspended them.

To justify the termination, the airline presented evidence to prove that the airhostesses: (i) indicated they worked for the airline in their microblog profiles; (ii) admitted that they made the inappropriate comments; (iii) acknowledged in writing their receipt of the airline's relevant work rules; (iv) the airline's work rules provided that "making, sending or forwarding offensive or indecent content on the Internet will

be deemed as a serious violation of work rules" and that an employee "shall always act professionally and responsibly during and after work... and shall not engage in any activities that damages or might damage the reputation of the airline or its staff. Failure to follow the [policy] will subject the offender to disciplinary action, up to and including dismissal"; and (vi) the social media policy explicitly provided, in relevant part, that employees were "not allowed to discuss anything related to work on a social media website," and needed to keep their "social media activities...in line with the airline's branding and image, its value and policies..."

Based on the evidence submitted by the airline, the labor dispute arbitration commission and the trial and appellate courts sustained the termination as lawful. The court ruled that an employee has a duty of loyalty toward his/her employer which provides that the employee is prohibited from making any negative comments against the employer even outside

business hours. The court further held that when an employee makes a comment on social media that adversely impacts or poses a material threat to the operation of the employer, the employer may take disciplinary action against the employee based on its work rules. Although it appears that the airline did not submit direct evidence showing damages, the public comments arguably threatened the airline's reputation which influenced the dismissal of the employees' claims.

In sum, these cases are instructive and show that employers can mitigate the risk to their reputation and branding by adopting detailed policies addressing the proper use of social media by employees both within and outside the workplace and to obtain employees' written consent to the potential monitor of their social media activities. **1**

**Katherine Liu**, a former associate at the firm, contributed to this article.

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