

Social media and compliance Part 2: Employment law — managing the risks

In the second of a two-part series looking at legal and compliance issues in social media, Melanie Lane and Catherine Taylor, Partners at Olswang LLP, suggest some practical ways of navigating the issues that arise when dealing with employee use of social media whether for business or personal purposes

The rise in profile of social media means that employees are increasingly commenting on all aspects of their lives on personal blogs, Twitter, Facebook and LinkedIn (to name but a few).

Some employers' reaction to this has been to place an outright ban on the use of social media in the office. However, this approach ignores the now widespread use of smartphones meaning employees have access to such sites at all times, including during the working day.

Further, the possible legal implications of employees' personal postings, as well as the potentially significant commercial benefits of employees using social media for business purposes, means that this approach is becoming less and less attractive, even for highly-regulated employers.

In the first article in this series we noted that, as use of social media becomes more prevalent, businesses are best advised to look to embrace the commercial opportunities it offers, rather than avoid it all together. For employers, the key to doing so is ensuring that a clear, logical and regularly-reviewed social media policy is in place.

Professional or personal use of social media?

The use of social media calls into question the issue of where an employee's professional life ends and his personal life begins. While an employer may seek to exercise a degree of control over an employee's professional life, an attempt to do so in relation to his personal life may well be met with resistance.

A clear social media policy can help employees to draw a line between their professional and personal lives, although there will inevitably be times when the distinction is blurred.

Any policy should start by identifying clearly which uses are regarded by the employer as business use of social media and which regarded as private use.

Personal use by employees

In practice, it is impossible to prevent employees using social media in their personal capacities (such as maintaining a Facebook account). Employers are, however, advised to include, at the very least, general guidelines in the social media policy in relation to both business and personal use of the media (see further below).

If an employer wishes the demarcation between business and personal use to be more distinct, specific guidelines may be necessary — for example, the policy may state that employees may not identify the employer on their personal profiles or may prohibit employees from connecting with clients or other business contacts in a personal capacity.

Business use by employees

An employer must decide whether it will prohibit business use of social media (for example, tweeting about issues related to an employee's work), permit such use subject to the employee's compliance with express guidelines issued, or actively encourage it, for example by requiring employees to set up a LinkedIn profile for business purposes.

If business use is to be prohibited, this must be clearly communicated to employees. If it is to be permitted then the employer should set out clear guidelines about what employees may include in their profiles — for example requiring them to have the company name as part of their Twitter username or "handle" — and also in their posts, requiring compliance with industry guidelines, such as those issued by the FSA in relation to financial promotions, for example.

Employers may also want to build in an obligation for more junior employees to have their posts approved by an appropriate person.

Whether business use is simply permitted or actively encouraged, employers should be aware that they may be vicariously liable for posts made by employees in the course of their employment, including

potentially defamatory posts.

Depending on the type of use that is permitted, employers may require employees to include a disclaimer stating that the views expressed are the employee's own. However, in practice, if an employee's use of social media is connected to his employment, such a disclaimer is unlikely to protect the employer from serious claims and could potentially have an impact on protections put in place to prevent competition by the employee after termination of his employment (see below).

Confidential information

A common concern about employees posting directly onto the internet is that they may either inadvertently, or even deliberately, publish confidential information about their employer or its clients.

Many employers prefer, for example, to keep their clients' identities confidential, but an employee following that client on Twitter, or adding a number of employees at that client as connections on LinkedIn (or even Facebook), could highlight the relationship.

Similarly, employees making reference to their current working location in postings could tend to reveal on what projects the employees are engaged.

Employers therefore need to consider the confidentiality issues carefully and incorporate appropriate guidelines into their social media or confidentiality policies, giving clear examples where appropriate and noting that confidentiality issues may arise when using social media either for business or for personal purposes.

Other content issues

In addition to dealing with misuse of confidential information, a social media policy should address a number of other potentially important issues.

It should emphasise that employees must not make posts that are defamatory, discriminatory or otherwise

offensive, and must not post material that breaches copyright or other intellectual property rights.

Guidance on providing references or endorsements online can also be helpful including, where appropriate, specifying that these should not be attributable to the employer.

It is also helpful to remind employees that the nature of

social media and the internet in general means that posts cannot be assumed to be private (regardless of any privacy settings in place) as it is very easy for posts or emails to be forwarded on.

Finally, encouraging employees to report not only their own mistakes but also any social media use they spot that disparages or reflects poorly on the employer or its employees, can assist employers in identifying problem posts at an early stage.

Disciplinary issues

An essential part of any social media policy will be clear guidance on what could give rise to disciplinary action – this will help both to prevent incidents occurring and to enable an employer to respond robustly if a problem does arise.

decisions, companies with more detailed and specific policies have generally fared better when defending claims for unfair dismissal related to misuse of social media.

Key areas employers should highlight as potential gross misconduct are situations where an employee's post causes (or could potentially cause) reputational damage to the employer, or involves cyber bullying or harassment. The employer's disciplinary and bullying and harassment policies should be cross-referred as appropriate.

When taking action in relation to employee misuse of social media, as with any disciplinary procedure, it is important for the employer to consider the seriousness of the offence and the actual damage caused by the offending post (including consideration, perhaps, of for how long the post was live and how many people saw it).

Additional factors such as the employee's response to the complaint, his seniority, employment history and any mitigating circumstances must also be taken into account. Finally, a consistent approach is key, as the employer must be able to explain any differences in the treatment of individual breaches of the social media policy.

Monitoring and vetting

If an employer is proposing to monitor employee use of social media, it should ideally carry out a risk assessment first. It should then put in place a clear policy setting out what monitoring will take place, and this must be communicated to employees. Employers should be aware that covert monitoring could breach both the data protection legislation and also constitute a breach of the duty of trust and confidence between employer and employee, potentially entitling the employee to resign and claim constructive dismissal.

Similar issues arise in relation to vetting of job applicants, and employers considering using social media for this purpose should take note of the Employment Practices Code

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In recent employment tribunal

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published by the Information Commissioner's Office. The Code makes a number of recommendations, including that employers tell candidates what vetting will take place and give them an opportunity to make representations.

Termination of employment and employee competition

Another significant part of a social media policy will be that which addresses employee competition issues that may arise once an employee leaves his employment.

Specifically, where business use of social media is permitted or encouraged, employers should also consider whether they wish to assert ownership over, or have access to, followers and connections at the end of the employment relationship.

Whether they will in fact own the connections may depend on the extent to which the contacts were acquired during the course of employment and, as mentioned above, any disclaimer distancing a social media account from an employer could be unhelpful in this context.

A social media policy could require, for instance, that employees add connections made on LinkedIn during their employment to a central company-owned database, or that they must change their Twitter 'handle' or hand over any similar business accounts when they leave. Establishing a clear policy at the start of the employment relationship will ensure that both parties understand what will happen when the employee moves on.

Employers may also want to reconsider the drafting of post-termination restrictions contained in their contracts of employment. Such restrictions may not directly address the use of social media nor be designed to prohibit certain actions on social media which may not otherwise fall squarely within standard definitions of, for example, solicitation.

In particular, the employer may consider including restrictions such as prohibitions on updating a LinkedIn status or posting details about a new employer. If an employee's contractual restrictions are deemed insufficient then it may be possible to include new or amended restrictions in any compromise agreement that the employee may be given.

It can also be helpful for employers to have an action plan in place for when employees announce they are leaving, or when they are given notice of the termination of their employment.

At this point employers may want to require the leaver to connect with a member of the human resources or compliance teams in order to make his social media accounts and activity available for scrutiny. Arrangements can also be put in place to hand over contacts or accounts to the employer, as mentioned above, and to make agreed announcements via social media regarding the employee's departure.

Awareness of the policy

A social media policy will only be effective and enforceable if employees are aware of it. Ensuring that the social media policy is communicated as part of an employee's induction and that there are regular reminders of it is key.

Additionally, in such a fast moving area with constantly developing platforms, it is essential to keep social media policies and other contractual documents under regular review to ensure they are still up-to-date, reflect current relevant practices and provide sufficient protection for the business.

Compliance checklist

- Decide on the general policy in relation to both business and personal use of social media. Consider what business use is acceptable and set guidelines accordingly.
- Set general guidelines on

content of social media postings.

- Tie the social media policy into disciplinary and bullying and harassment policies.
- If planning to monitor employees' social media use or vet job applicants using social media, refer to the ICO Code and inform the employees and applicants in advance.
- Specify who owns connections/followers and what will happen to them on termination of the employment.
- Review post-termination restrictions and amend them to cover social media activity if appropriate.
- Have an action plan in place for when employees announce their resignation.
- Make sure employees are aware of the existence of the social media policy and the detail of what it contains.

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