

Bird & Bird & Social Media & the Workforce

The Perils and Opportunities for Employers

Introduction

Folklore has it that King Canute stood on the banks of the River Crouch in 1035 and tried to turn back the tides. Attempting to resist the power and impact of social media in the workplace might be viewed in a similar vein!

The use of social media is well understood but its actual scale can still come as a surprise when confronted with the actual figures. According to Brandwatch (June 2019), there are currently 4.4 billion internet users, and a staggering 3.49 billion are active social media users, who spend on average 2.5 hours on social media accounts every day. The usage of social media is still on the rise, with a 202 million increase in users from April 2018 to April 2019, which translates to a new social media user every 6.4 seconds. Instant messaging applications (e.g. Whatsapp and Facebook Messenger) handle around 60 billion messages a day.

It is no exaggeration to say that we are living in the age of social media. The impact of social media has brought about unprecedented changes and issues to the workplace. Different organisations will be met with its unique set of social media conundrums, in addition to the complexities of navigating the legal landscape of different jurisdictions. It is an unpopular message to deliver for businesses wanting fast and agile legal advice, however, the devil really is in the local legal detail!

Leaving all the legal complications aside, in this article we seek to categorise the key questions that clients ask us about the general challenges that social media is creating in the workplace and we share our high-level comments.

One of our team has been charged with a criminal offence which was committed on the weekend and is totally unrelated to their work with us. The individual's actions were caught on video which is being shared broadly among our staff and in the public sphere. While the individual was acting entirely on their own account and in their own time, it is generally known that the individual works for us. Should we do anything and can we remove the individual from our business if this matter becomes an issue with our other staff or even our clients?

As the potentially criminal act is a personal activity, this is always a tricky issue and a balancing act. Before looking into termination, it would be wise for employers to conduct an investigation into the incident pursuant to normal protocols applicable to outside work events. Given that social media videos are rarely conclusive of criminality, it is prudent for employers to obtain a thorough understanding of the events and hear the employee's side of the story, which will be crucial in deciding the next steps. If the employee's conduct casts doubt on his/her integrity or ability to perform job duties (e.g. dishonesty, fraud or causing physical harm to others), or the reputation of the employer is potentially damaged by the conduct of the individual, there may be grounds to consider disciplinary action or even dismissal. Particularly if the video has gone viral or is related to hotly debated issues, the employer should adopt a cautionary approach and weigh its options carefully. Factors that will likely come into play include any potential public outcry or backlash against the employer

arising either from the video itself or the termination of the employee, and whether the disciplinary action or dismissal will severely damage morale among staff.

Social media is a total time-waster and is also being used by our staff to share views about what the company is doing and whether we have adopted the right ethical approach when making decisions. Can we ban it entirely or at least severely restrict its use in our workplace?

There are differing views about the impact of social media on productivity, efficiency and workplace culture. Some organisations fully embrace and encourage its use with the popular adoption of many different tools including Facebook Workplace, Slack, and Basecamp to name just a few. This approach is supported by significant amounts of research including a report by the McKinsey Global Institute in 2012 which concluded that: "Social technologies are not just giant time sinks that keep your employees from getting their work done. On the contrary, they may become the most powerful tools yet developed to raise the productivity of high-skill knowledge workers". The research suggested increases in productivity of 20% - 25% when effective social media was adopted.

As is often the case, there are alternative views and research that suggest an entirely different impact. For example, in a widely reported research in 2016, it was concluded that: "an average of 2.35 hours is spent accessing social media at work every day and around 32% of the total time spent on social media during working hours is used entirely for personal work indicating a huge loss of official resources and productivity. In fact, 13% of the total

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productivity is lost owing to the social media indulgence alone” (TeamLease World of Work Report 2016).

While organisations are generally free to make commercial decisions about the availability and use of social media from an efficiency perspective, the situation is fraught with reputational and legal difficulties when it comes to the issue of employee empowerment and collective dialogue. Leaving aside the impact on reputation if an organisation seeks to close down avenues of communication within the workplace, there are also potential legal challenges as well. In some countries (including the US), restricting access to social media has been determined to be an unlawful restriction on the rights of employees to organise and engage with each other in order to exercise legally protected rights including collective bargaining. Employers may consider putting in place a social media policy, which provides employees with the freedom to use social media in a respectful, safe and productive manner that is beneficial to both the company and its staff.

We are receiving an increasing number of complaints about inappropriate exchanges and sometimes bullying by peers within our staff. Often this is through social media platforms using personal accounts and outside of working hours. Can we treat it as a private matter and hope these things resolve themselves?

Casual interactions among employees often take place through social media platforms. However, banter that is meant to be friendly may be perceived as discriminatory, defamatory, or harassing in some cases. Worse still, workplace bullying may find its way to social media platforms, which is more difficult for employers to monitor because it can occur outside of office and working hours. However, this does not necessarily absolve the employers from any potential vicarious liability should an aggrieved employee wish to lodge a complaint or initiate a litigation. This puts employers in a dilemma. On the one hand, where it is known to the employer that workplace victimisation is happening on social media, the employer has a duty to take measures to alleviate it. On the other hand, intrusive scrutiny on employees’ use of social media may undermine trust within the company, or amount to an infringement of employees’ personal data privacy.

If the inappropriate exchanges or even bullying is related to work and is affecting employee’s performance or relationships, it is appropriate for employers to step in to resolve the issue and to mitigate any risks of vicarious liability.

Before the complaint escalates into a formal complaint or full-on law suit, employers are advised to establish an accessible channel through which victimised employees can seek timely support from the human resources personnel. Employers should ensure that it has a comprehensive communication framework and grievance procedure, and that the relevant personnel are well-equipped to handle any complaints in a confidential and respectful manner. It may be possible to rectify matters early on via informal discussions, since complaints of a less serious nature may be due to a simple misunderstanding or lack of awareness. If

the complaints are substantial, the employers should conduct a detailed investigation and to collate the evidence on social media platforms (given that uploaded content can be easily edited or deleted), and to take disciplinary actions as appropriate.

As mentioned in the previous section, it is prudent for an employer to have a robust social media policy that sets out the acceptable and unacceptable standards for use of social media by employees, both within and outside of work.

We always check-out a candidate’s social media profile before hiring - are there any legal issues?

A 2018 survey by Career Builder established that 70% of the employers surveyed use social media to screen candidates during the hiring process. This is an increase from 12% in 2006 and 25% in 2010. In addition, about 43% of employers use social media to check on current employees, and 34% have reprimanded or fired an employee based on content found online. While this was US-focused data and is based on a relatively contained sample, it received a lot of media coverage because it clearly reflects a growing perception of reality.

Social media presents itself as a convenient forum to explore what lies outside the confines of a CV, and provides employers with insight as to the candidate’s work ethic, attitudes towards previous employers, writing and communication skills and activities that are not apparent in the application or interview. With that being said, employers should be mindful of the potential legal consequences associated with using social media during the recruitment process.

The information contained on the candidate’s social media profile will likely contain personal data, and many jurisdictions would require the employer to inform the candidate that his/her personal data may be collected, stored and used. In addition, the employer should also ensure that any information collected is necessary, relevant and not excessive for the purpose of recruitment.

Discrimination is another relevant issue to be aware of. The employer may be able to obtain a lot of personal information from the social media sites, for example sex, marital status, pregnancy, family status, disability or race. The employer needs to be particularly careful that it is not using these “protected characteristics” as an unlawful reason to reject an application, or to make inappropriate or even unlawful enquiries about the applicant’s background based on the information obtained. To limit the company’s exposure to any inference of discrimination, the employer should make sure that it conducts the same social media searches at the same point of time in the recruitment process for every applicant, and to keep a good record of the reasons for each hiring/rejection decision. Some companies assign someone outside the recruitment process to review the social media profiles, in order to remove any information relating to the “protected characteristics”.

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One of our employees has made LinkedIn connections with many of our clients and suppliers. Can we treat the contact list as company property?

LinkedIn and various other business-oriented social media sites have made it convenient for users to reach out to business contacts and to aggregate such connections. The ownership of the contact list can be a controversial matter and unfortunately does not have a clear-cut answer.

If the contact list is developed for business purposes during the course of employment (e.g. employee was responsible for maintaining the company's social media profile, or the social media platform was used in the capacity of an employee), the employer may be regarded as the owner of the contact list.

The position is a lot less certain when it comes to the contact list of the employee's personal social media account. The best way to address the issue of ownership is to have in place an agreement or policy on confidential information and intellectual property that sets out clearly the ownership of business contacts which specifically addresses the social media platforms relevant to the business and expectations in relation to staff both during and after employment or engagement.

Conclusion

The age of social media has made it a lot easier to form human connections, foster workplace culture and camaraderie, and serves as a useful tool in the recruitment process. However, social media has also brought about a myriad of challenges and blurred the divide between work and personal space. It is important that employers implement a comprehensive and tailored social media policy to pre-empt the potential complications, and to regularly review the policy to keep up with the evolving technology. Employees should also be given regular training to raise their awareness of the company's expectations regarding social media usage and etiquette.

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