Top 10 social media legal risks for Employers

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Help or Hindrance?

Social media platforms and networking sites are influential social communication tools used to varying degrees by business.

By social media we mean any online platforms for networking or sharing information or opinions, for example Facebook, Linked In, Twitter or blogs (but not email).

Virtually every business uses email these days and these other platforms are fast catching up.

However, as with all good things there are also risks….

CIPD survey December 2013

According to the CIPD Survey December 2013, only 26% of UK employees use social media for work but 61% use a mobile digital device at work and of course have ready access to social media.

So, what are employees doing on social media at work: -

75 % Read other people's comments, blogs or articles
56% Share my personal experiences or photos
48% Share interesting or useful information
43% Chat with people in real time
30% Comment on forums (e.g. Twitter, LinkedIn)
20% Post blogs or articles
14% Have looked for or been approached about a job through social media.
11 % None of these

Is it a big deal?

Whilst 58% separate their personal and professional use of social media which would appear to indicate that 42% do not and could be using social media in a personal context from a work platform. This exposes the Company to risks if not carefully controlled.

*At **HCHR** we have identified our **Top 10 risks** for employers together with our recommended antidotes.*

1. Employees spending too much time at work on social media sites

To allow access or not to allow access that is the question……!

Ignore this at your peril. Set clear workable parameters. Is a total ban on social media usage at work feasible? Employees like clear rules - with a Social media policy they know where they are and properly enforced the Company is protected. It can be a stand-alone policy or as part of an IT User/internet and email policy.

The policy must be appropriate and feasible for the employer and readily understood by the employee. Points to cover include what access to social media sites is allowed, how usage is monitored and whether or not an absolute ban is in place. The policy should remind employees that they must not disclose confidential or proprietary information, make any derogatory, untrue or discriminating comments about the company, its employees or clients, or any comments that are likely to bring the company into disrepute.

It is good practice for the employer to consult with employees and/or their representatives about the proposed policy and the business reasons for having it. It also advantageous to publicise the policy to ensure employees understand what they can and cannot do.

Employers may also wish to consider incorporating specific provisions into employment contracts.

If not, employees may have claims arising from the confusion as to and how much time, if at all, they are allowed to spend on social media. It is often easier to impose a blanket ban on such matters, which, if clearly stated in relevant employees' policies and contracts, can be used to substantiate allegations of misconduct if employees abuse the situation. It is also possible to raise performance issues generally if employees are failing to complete their set duties, irrespective of the reason for this failure.

2. Employee posts derogatory comments about employer

Following an investigation into the post, depending on the nature of the comments, an employer could take disciplinary action up to and including dismissal. In the first instance, the employee should be asked to remove the offending posts. If that fails, they can ask the site's hosts or owners to remove the content and if necessary, an injunction can be sought. Libel proceedings can also be brought if comments are considered defamatory, but you must not forget that employees have the right to freedom of expression and if their posts are genuine complaints about work and conditions, they may not be defamatory.

In the absence of any express contractual clause, an employee has implied duties of fidelity to their employer and not to bring their employer into disrepute. This duty extends to the employee's off-duty time. On this basis, it is possible that the employee has committed a conduct offence. However, the damage caused will often be speculative and difficult to substantiate.

If the employee is dismissed and lodges a claim for unfair dismissal, the employment tribunal may, examine and take into consideration the potential impact of the posting, for example the number of hits it received. If the posting is judged to be insubstantial or not especially damaging, the tribunal may find in the employee's favour.

3. Employee posts video clips on a social media site that may bring employer into disrepute

This is a similar situation to posting derogatory comments.

Employers can take disciplinary action against the employee and ask the website to remove the offending clip.

If it doesn't, then an injunction may be sought, and damages claimed.

4. Employee airs controversial views on blogs in which his/her employer is named

This is a similar situation to posting derogatory comments.

Employees should be required to include a disclaimer on any blogs that they publish that make it clear that the views expressed are those of the employee and are not representative of the employer's view.

5. Employees leak confidential information about their employer via a social media site

Unless told otherwise, employees have an implied duty not to release confidential information during the course of their employment. To do so can be an act of gross misconduct and result in subsequent dismissal.

However, where the information is already in the public domain e.g. posted accounts or announcements, it is unlikely this will be protected as the information is not longer confidential.

In appropriate cases, restrictive covenants should be used to protect the employer's interests. Injunctions can be sought to prevent the use of this information, although this can be costly.

6. Rejecting an applicant because of the content of their Facebook profile

The level of risk would depend on the nature of the content, potential pitfalls include information relating to a protected characteristic under the Equality Act 2010 i.e. age, disability, gender reassignment marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, sexual orientation.

If the employee has revealed personal details and it could be inferred that the reason for not selecting the individual was because of one of the protected characteristics, then the employer could be at risk of a discrimination claim. If there are no discriminatory reasons, then there is no risk as there is no contractual relationship between a potential job applicant and the employer.

7. An employee takes lists of contacts they have built up from social media sites accessed in work and their own time and then leaves to work for a rival

Customer details held on a system such as LinkedIn are arguably public and not confidential. Ultimately, an employer in these circumstances may need to seek a court injunction to prohibit the ex-employee and their new employer from using the client contact list on the basis that the list is confidential information. However, obtaining one could be difficult.

Also, if this is the only place where records of an employee's business contacts are held, it will be difficult to establish that this information belongs to the employer rather than to the employee. Such issues make it essential for employers to ensure that employees are obliged to record client contact details on an internal database and that this information is expressed to belong to the company and be returnable on termination.

Where appropriate, express contractual restrictive covenants and confidentiality provisions should be used.

8. Employees post user-generated content on internal sites without checking copyright status or accuracy

Distributing documents, pictures, or "works" of another without the owner's permission is likely to amount to an infringement of copyright laws for which the employer could be held liable.

This issue should be addressed specifically in a social media policy, any email and internet policy and also in the disciplinary policy. The dissemination of copyrighted information should be clearly stated to amount to a disciplinary offence that could result in disciplinary action including, in serious cases, dismissal.

9. Using information posted on blogs when making recruitment decisions

If an applicant has a blog, employers may be tempted to use such information to help make hiring decisions.

Again, employers should be aware of any discrimination claims under the Equality Act 2010.

10. Cyber-bullying of other employees

This issue should be addressed specifically in a social media policy.

Employers should ensure that they have up-to-date, effective social media policy that set out clear consequences for non-compliance.

Disciplinary policies should make it clear that cyber-bullying may constitute gross misconduct and could result in summary dismissal.

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