



Employees and social networking

With social networking websites (SNS) playing an ever increasing role in everyday life, companies are continuing to explore how best to exploit this new communication tool. However, they also need to set clear, detailed policies for their staff when using SNS for work purposes or when discussing the company in their free time.

They may be relatively new creations but their business is booming. Social networking websites (SNS) that enable members to form links with other users have created vast, global online communities. Chief among them are Facebook, MySpace, LinkedIn and Twitter – all

established since 2003. The number of users is growing exponentially and SNS continue to proliferate.

While employee use of SNS may deliver real advantages for organisations, it can also involve a range of challenging issues including loss of productivity, negative

publicity, disclosure of confidential information and legal claims. But many organisations are positively regulating employee use of SNS with specific policies that provide good guidance for employees and lessen the legal risks involved. 'This is, legally, relatively uncharted

territory presently but we must all recognise that SNS are a major means of communication now,' says Elizabeth Lang, an employment law partner at Bird & Bird. 'People rely on sites like Facebook for their social lives but often blur the boundaries of their work and personal life. They don't understand the potency of the net so it's important to have clear, positive policies for employers and employees alike.'

Hiring

Staff selection is an initial area of concern for employers. Some organisations have joined SNS to promote their brands and may invite jobseekers to become friends or alternatively they may ask to be the online friends of job applicants. Photographs and postings of members' friends – and potential employees – may be available in any event. 'Recruitment is one main area of legal concern in the use of SNS,' confirms Salvador del Rey Guanter, partner at Cuatrecasas, Goncalves Pereira and Chair of the IBA's Global Employment Institute. 'On sites like Facebook you often get more personal information than you'd get through the hiring process. So you must be careful about what information you use in interviews and what you say about it. If a decision not to employ is made based on information included in an online profile, it may give rise to a claim based on discrimination.'

Nicholas Lakeland, employment law partner of London firm Silverman Sherliker, says care should be taken as SNS can also prove useful. 'It's a double-edged sword. You have to bear equality and discrimination laws in mind when viewing profile sites and using information found there but prospective employers can compare the information presented in job applications with what is displayed online. Discrepancies can occur.' In some jurisdictions too, organisations may have to be wary of laws regulating employers' record keeping. If an organisation becomes a friend of a SNS member, for example, it may have to consider if it needs to keep a copy of the request.

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Damage control

Damaging postings by employees, however, pose the most renowned legal risks for employers. Peninsula, a company that provides employment law advice to UK businesses, reports that ten per cent of the 1,000 to 2,000 calls it receives daily from clients are about SNS related problems. Derogatory postings about employers or fellow employees or postings that reveal trade secrets or confidential information can reach a wide audience rapidly and can sometimes be attributed to the employer. Employers must also face the prospect of being vicariously liable for some employee actions and the risks are in some cases widening. 'In the UK, for example, discrimination laws have been recently extended with the Equality Act 2010 so employers may be liable for an even wider range of remarks made by employees about fellow employees,' notes Elizabeth Lang. And employers who have notice of criminal activities by employee postings at work may have a duty to report them to relevant authorities.

As some SNS accounts can be opened in a false name, some postings are made anonymously and it is not a forgone conclusion

that bloggers can be identified, says Carla R Walworth of Paul Hastings, Janofsky & Walker, New York. 'Companies can conduct internal investigations to try to identify the culprit. They can also try to contact the internet service provider (ISP) and once a suit is filed you can subpoena it to get information on the identity of third parties.' In the US however, the First Amendment protects the right of an individual to speak anonymously, Walworth points out. 'The US Supreme Court has recognised that right in relation to the internet. Therefore to obtain the identity of an anonymous poster you must demonstrate that you have a meritorious case and that you've made other efforts to identify the blogger.' There are few cases so far on whether anonymous bloggers can be identified and the results are mixed, she says.

Other hurdles are faced when bloggers are known. 'In a recent case in the US, a court ruled that a company didn't have the right to coerce its employee to give it the access password to his SNS when they suspected that he was spreading false information about the company,' reports Salvador del Rey Guanter. Employers aggrieved at damaging employee postings can pursue various remedies including claims for defamation, misuse of information and breach of the duty of loyalty. Employees may be bound by employment contracts or corporate policies that forbid them from making offensive comments or disclosing confidential information. Employees in some jurisdictions automatically owe a duty of loyalty to employers, a breach of which can prompt their dismissal. Civil remedies, however, are not always as effective as may be imagined. The long established principles of defamation law, for example, may not always yield results. Salvador del Rey Guanter confirms: 'Expressions of opinion often aren't actionable. It's a question of the balance between freedom of speech and the limitations that are put on it – for instance, for an employer to be able to protect its reputation and its brand.'

Defences available to employees include the right to privacy and free speech, protections for whistleblowers, as well as discrimination laws and public policy. Privacy rights may be limited when employer-provided computers are used – especially when the employer’s right to monitor employee use is provided in a contract or by an acknowledged corporate policy. In the US, employees in some cases may also rely on the Stored Communications Act and the Electronic Communications Privacy Act which provide further protection against third parties accessing their electronic communications. Employees can claim that dismissals based on blogging are discriminatory so the application of internet policies must be consistent.

ISPs can be asked to remove offending material from their sites if employees fail to do so and usually have the right to remove content under their conditions of use. Facebook’s rules stipulate that users may not use the site to bully or harass others, to post content that is threatening or do anything unlawful, misleading, malicious or discriminatory or that violates the rights of others. Court orders can be sought to force an ISP to remove offending material, in particular if trade secrets are disclosed, if the employee fails to do so. But Carla Walworth warns: ‘There are substantial legal protections for ISPs. They’re providing a forum for speech and there are mixed results on having blogs removed involuntarily of winning an award of damages against an ISP for blogs posted.’ Illegal activities – like accessing and sharing child pornography – can more readily be stopped through court orders or social pressure, she says.

Companies operating internationally have additional challenges as national laws in the area vary. In any event, a measured approach to SNS problem postings is usually urged by lawyers. As Salvador de Rey Guanter notes: ‘In most countries the main response by employers faced with offensive postings is dismissal. Taking civil action is a step further – you must have good evidence of the

facts and of damage. Most courts think that if employees have been terminated, they’ve had enough and to date there are a limited number of cases in this area.’ Silverman Sherliker’s Nicholas Lakeland also urges caution. ‘Your response to problematical blogs should be well considered. Responding can give a blog credibility or turn the dispute into a “David and Goliath” battle. The public relations consequences must be examined along with the legal options unless it’s an extreme case where legal action is vital.’

At Nestle, the action to be taken is a question for management, says Ricardo Cortes-Monroy, General

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Counsel, Latin America and Group General Counsel designated. ‘There’s not much clarity in the law yet and legal action may compound a problem. Usually the decision on how to respond is made by the national line manager who is supported with advice from the corporate communications and legal departments. Head office only makes decisions when something is of global significance,’ he says.

Shaping policies

Opting for a proactive stance, many organisations now have SNS policies for employees to follow. ‘Guidelines are vital in ensuring that employees understand the consequences of their online communications and that if they’re offensive, they may lead to disciplinary procedures or dismissal. They need to be reminded of basic legal duties, including their duty of loyalty to their employer and the duty not to disclose confidential information,’ says Elizabeth Lang. Guidelines can provide that office equipment is to be used exclusively or predominantly for business purposes. Companies can opt to have the right to view employees’ private e-mails and blog posts when they are at work though some organisations believe that this could be an unwelcome invasion of employee privacy. UK company Peninsula’s IT systems prevent employee access to SNS on company computers. ‘We provide special stations with computers so employees can access their personal e-mails and SNS at certain times,’ explains Director Alain Price.

Since employees can access SNS through mobile phones at work and out of business hours on personal computers, policies should address the tone and content of all SNS use. Policies should be drafted broadly and be updated regularly to embrace changes in technology and personal habits. IBM first provided social media guidelines in 2005 and updated them in 2010. They are available online and the company says it welcomes others using them when drafting their own policies (see: www.ibm.com/blogs/zz/en/guidelines.html). The guidelines are positively expressed and confirm that the company wants to ‘encourage IBMers to participate in this sphere of information and interaction’. Employees are reminded that they are personally responsible for their blogs, that they should never discuss IBM business performance or other sensitive matters nor reveal confidential or other proprietary information of IBM, nor use ethnic slurs, personal insults or engage in any conduct

Feature articles

that would be unacceptable at work, and that when discussing IBM, they should identify themselves.

Recently too, Nestle revamped its social media staff guidelines. 'We're not too prescriptive. We don't have a right to view employees' blogs and we don't restrict employee use of SNS at work but generally say that computers and the internet should be used for business purposes,' reports Ricardo Cortes-Monroy. 'We use a common sense approach although we're very clear on trade secrets. When people use SNS, it's like an oral conversation – they don't take time to reflect. So the basic tenant of the guidelines is that employees have respect, for others and for Nestle, in their communications.' The usual human resources procedures apply to violations and so far, he says, there have been no law suits against employees.

Lawyers agree that notice is vital. Policies can be embedded in employee handbooks but staff must accept policies and updates. 'Organisations need an ongoing policy to ensure that employees

acknowledge and agree to the corporate policy. This can be done, for instance, electronically so when employees sign on to their computer they're prompted to accept the policy,' says Carla Walworth. Nestle's guidelines form part of the corporate Code of Conduct and are posted on the Nestle intranet and all employees are deemed to know them.

Some employers, like IBM and Nestle, are keen to stress the positive

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General Counsel, Nestle*

aspects of employee use of SNS. 'There's great potential for SNS for employers. I'm sure they'll be used more in recruitment in time. LinkedIn, for instance, is said to be launching an employment referral database next year' says Claire McCartney, an advisor to the UK's Chartered Institute of Personnel and Development. 'Your employees are all using SNS so employers have to learn how to engage with them.' In-house counsel are among those who want to embrace this area of communications. 'Next year, one of our IP specialist lawyers will spend a year working in various organisations to gain more experience in social media. This will include six months with a social media company,' reports Ricardo Cortes-Monroy. 'We lawyers have to learn.'

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