



Social media use: issues for employers

The rapid advancement in social media technology and the accompanying dramatic surge in use have exposed businesses to new opportunities and new risks over the past few years. Businesses have to balance the benefits of the new technologies with policing their use by employees.

As well as providing opportunities for customer and colleague engagement, employees' use of Facebook, LinkedIn and other social media sites can cause problems for employers, including reputational damage, confidentiality breaches and loss of control over information. Bullying, harassment and discrimination can occur easily online. Defamation and negligent misstatement can create liability to third parties; privacy and data protection principles need to be considered and respected.

What is "social media"?

The term "social media" covers a range of different communication and interaction media that include collaborative projects (Wikipedia), blogs and microblogs (Blogspot and Twitter), content communities (YouTube and Flickr), social networking sites (Facebook and LinkedIn), virtual game worlds, and virtual social worlds (Second Life).

Risks for employers

We have identified five key risks arising for employers from unguarded use of social media.

1. Claims by employees/potential employees

Grounds for claims can arise throughout the employment relationship, from recruitment to termination, including:

- Discrimination claims, where pre-recruitment social media searches reveal information (whether false or accurate) about protected characteristics not apparent from a candidate's application and an unsuccessful applicant asserts this is the reason for rejection;
- Vicarious liability for discrimination and harassment, resulting from "cyber-bullying" of fellow employees in the course of their employment (which can include acts outside the physical workplace);
- Unfair dismissal, where information obtained online as part of an investigation is not disclosed, the dismissal is a knee-jerk reaction to a relatively inoffensive post or tweet, or relying on the information breaches the human right to privacy;
- Whistleblowing or victimisation, where an employee claims they have made a protected disclosure or carried out a protected act via social media.

Did you know?

- Around 91% of businesses with ten or more employees have internet access (*ONS 2010*).
- Among employed internet users, 61% made some use of the internet at work, spending on average 7 hours a week online at work (*Dutton Helsper & Gerber 2009*).
- 49% of internet users engage in social networking online (*Dutton Helsper & Gerber 2009*).
- Facebook is second only to the Google web search engine in terms of traffic (*Alexa 2011 internet rankings*).

(Information contained in the Acas research paper on Workplaces and Social Networking)



2. Breach of data protection principles

Accessing or viewing an employee's or candidate's profile on social media sites could amount to unlawful processing of their personal data unless necessary pre-conditions are met. Individuals must be told when and how online information will be viewed, and in some cases express consent will be required.

3. Damage to reputation

A derogatory comment by an employee about their employer or customer can go viral in a matter of moments. Merely disciplining an employee may not be enough to salvage a corporate reputation. In some circumstances, depending on the social media tool being used, it can even appear as though the employer endorses the comment.

4. Loss of control over information

Employees may be indiscreet on social media platforms about matters and projects which are confidential to their employer's business, jeopardising both the employer's ability to profit from the employee's work and the employer's relationships with third parties and regulators. Employee use of LinkedIn can also raise issues about who is entitled to use contact lists after termination of employment.

5. Claims by third parties

Employees spreading confidential or inaccurate information, sometimes under their employer's name on sites such as LinkedIn, can give rise to claims by third parties, including for defamation, breach of confidentiality or negligent misstatement (for instance, when recommendations of former employees are provided online).

What should employers be doing now?

Employers need to establish their approach to social media, educate their employees on what is expected of them, and put in place workplace documentation that gives them the ability to enforce this. Emerging case-law shows that a "social media policy" is a key tool in preventing claims, protecting the business and managing the brand. This can be accompanied by corresponding changes to contracts, guidelines and available modes of staff communication. Employers who embrace social media can set up their own internal equivalent of Facebook or encourage brand development through employee use of external social media; however, the purpose and rules of engagement must be defined. Employers should also frequently review and update this documentation to ensure that it is consistent with the fast-moving development of technology.

How can we help?

The Employment team at CMS Cameron McKenna can help you harness the benefits of social media while minimising risks. We have extensive experience in advising employers on the drafting and use of social media policies and clauses, advising on their interaction with other policies and handling legal and HR issues arising from breaches of those policies and clauses. We can "audit" existing policies and contracts and revise and tailor them to suit your corporate culture. We can also assist in training HR and other staff.

Contacts:



Anthony Fincham

Partner

T +44 (0)20 7367 2783

E anthony.fincham@cms-cmck.com



Sarah Ozanne

Partner

T +44 (0)20 7367 2650

E sarah.ozanne@cms-cmck.com



Amy Bird

Associate

T +44 (0)20 7367 2381

E amy.bird@cms-cmck.com

