

# Social Media in the Workplace

In this article Triona Cody examines the significant impact Social media has on the employment relationship from the recruitment stage right through to termination of employment and beyond

## Social media and recruitment

It is becoming common practice for employers to check the social media profile of prospective employees during the recruitment process before making a decision on their job application. However, employers should think twice before accessing a candidate's social media profile, as information obtained and held by employers from social media profile screening is subject to data protection rules.

Employers should have a clear policy on the use of social media profile screening in recruitment. Best practice is for employers to inform prospective employees that social media profile screening is a part of the recruitment process. Any information obtained should be provided to the candidate for their comments prior to a decision being made on their job application. Employers should not ask prospective employees to "friend" the employer or to give the employer access to their social media profile.

Employment equality legislation applies to the recruitment process. A claim of discrimination is a real possibility if the information obtained from social media profiling is used to reject a prospective employee's job application.

## Monitoring social media usage

Monitoring social media usage in the workplace is a delicate balancing act. On the one hand, employers have a legitimate interest to protect their business, reputation, resources and equipment. On the other hand, individuals should not lose their privacy and data protection rights simply because they are employees. An outright ban on access to social media on the employer's equipment during working hours may not be practical, in particular

for employers with a strong social media presence. A more achievable solution may be to limit access to social networking sites (or limit access to certain employees) on the employer's equipment during working hours.

In any event, employers should have a clear policy on the use of social media in the workplace and that policy should be communicated to all employees. If employers allow access to social media on the employer's equipment during working hours, the policy should be very clear on what is (and is not) acceptable use. The existence of monitoring should be notified to employees and the purposes of any such monitoring should be specified in the policy. There should be no indiscriminate monitoring and any monitoring should be limited to that which is necessary and appropriate.

## Liability for employees' social media usage

Employers are liable for the acts and/or omissions of their employees which occur in the course of the employee's employment. This includes liability for any act of discrimination or harassment by an employee unless the employer can prove that they took reasonable steps to prevent the discrimination or harassment. The best defence for employers is to have a social media policy in place which explicitly prohibits the inappropriate use of social media by employees and social media being used as an instrument of harassment in the workplace. Employers should also have a Dignity At Work Policy which includes a provision specifically for the purpose of preventing harassment through social media.

Where an employee alleges harassment by another employee online, there is no requirement to show that the alleged wrongdoer was acting in the course of employment. It does not matter if the



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alleged wrongdoer was in work at the time of the alleged incident or if it occurred outside the workplace. However, the alleged victim must have suffered the harassment in the course of employment whilst he or she was engaged in an activity authorised by the employer. This includes attending a conference or training outside the workplace and may even extend to work-related social events.

### **Social media and disciplinary matters**

There have been a number of Irish cases on the inappropriate use of social media by employees. One of the very first cases involved an employee of a retail store<sup>1</sup>. The employee made disparaging and vulgar comments about her manager on the social networking website Bebo but did not directly name her manager. The offending conduct took place outside of the workplace. A customer drew the attention of a member of staff to the comments. The employee was suspended pending a disciplinary hearing which resulted in her dismissal. The employee challenged her dismissal and the Employment Appeals Tribunal found that the employer acted disproportionately in dismissing the employee.

In a more recent case, an employee of a Dublin restaurant sent a Snapchat to a group of his friends and work colleagues which showed a video of him taking cocaine in a bathroom whilst wearing his work t-shirt with the restaurant's logo on it<sup>2</sup>. The employee was called to a meeting with his employer but was not told the purpose of the meeting or that he could have a work colleague accompany him. At the meeting, the employee was advised that he could go down the investigation and disciplinary route and lose his job or he could resign and obtain a reference. The employer did not follow normal practices and fair procedures. The employee challenged the fairness of his dismissal in the Employment Appeals Tribunal. The Tribunal found that the employer was justified in the summary dismissal and could apply a modified procedure because of the gross misconduct of the employee. It is important to note that this case is fact specific and, as a general rule, employers should not modify their normal practices and procedures.

<sup>1</sup> **Kiernan v A-Wear Limited – Employment Appeals Tribunal UD 643/2007**

<sup>2</sup> **Boyle v Portalon trading as Wagamama – Employment Appeals Tribunal UD 1735/2014**

A social media policy should explicitly state that any breach of the policy could result in disciplinary action up to and including, dismissal from employment. An employee should only be disciplined for breach of clearly understandable rules of what constitutes misconduct.

### **Ownership of social media accounts**

Employers and employees should consider what happens to work related contacts on social media accounts when employees leave their employment. An express term in the employment contract or social media policy should specify who owns online accounts and contacts. There is no case law in Ireland on ownership of social media accounts and contacts. However, UK case law provides useful guidance on the ownership of LinkedIn accounts and contacts. Ownership is determined by a number of factors, including: (1) if there is a contractual clause or a social media policy; (2) who created the account and why; (3) was the account created prior to the employee commencing employment with the employer; (4) has the employee included the brand or logo of the employer; and (5) are the account contacts professional or personal.

### **Social Media Policy**

The importance of a social media policy in the workplace cannot be overstated. The policy should specify what is acceptable use, what constitutes misconduct and address the consequences of improper use of social media by employees both during and outside working hours. Employers should ensure that the policy is properly communicated to employees and should obtain written confirmation from employees that they have read and understood the policy, including their obligations under the policy. Employers should also make sure that they reserve the right to vary and review the policy to take account of future developments in internet capability and social media usage.

Employees should apply a common sense approach to their use of social media both during and outside working hours. Increasing numbers of employees work from home or bring their own devices to work which, in turn, blurs the lines between personal and work-related social media use. Employees should at all times adhere to their employers' social media policy.

