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<https://www.peoplemanagement.co.uk/experts/legal/limiting-the-damage-caused-by-workplace-social-media-abuse>

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Limiting the damage caused by workplace social media abuse

3 Mar 2020 By Paige Tompkins

Paige Tompkins and Chris Weaver look at the steps employers can take to protect their reputation when employees make controversial comments online



The use of technology, specifically social media, has increased significantly in recent years. Social media is often used by employees both in their professional and personal lives. With that comes many benefits, such as on-demand communication and the ability to maintain relationships easily.

Social media, however, also creates many risks for employers and employees alike. For example, there is an increased risk of data protection breaches, the potential for reputational damage when posted content potentially amounts to harassment, discrimination or malicious conduct, and liability for employers in respect of their employees' actions.

But of course, there is a balancing act between employees exercising their right to privacy under Article 8 and freedom of expression under Article 10 of the Human Rights Act 1998, and employers seeking to protect their legitimate business interests.

Employers have little control over what their employees post on social media and will only generally be responsible for any conduct that is carried out by employees ‘in the course of their employment’. However, the definition of ‘in the course of their employment’ is given wide scope. Accordingly, businesses can be liable for conduct of employees that is deemed to be an extension of the workplace. For example, an employer could be held liable for content posted in WhatsApp messages between employees if the content amounted to harassment, discrimination or malicious conduct.

Businesses have the right to monitor their employees’ use of social media on work computers and phones and, in some instances, to review personal phones if they are largely used for work purposes, so WhatsApp messages between colleagues could be reviewed. This right does not, however, extend to logging into employees’ social media accounts. This is with a view to respecting their private life under Article 8. While an employer's ability to review content posted by an employee on social media may be limited, employees should still be mindful that even if they have taken steps to protect their private life by using the privacy mechanisms offered by social media platforms, a ‘friend or connection's’ ability to screenshot, copy and forward content is not limited. Accordingly, seemingly private content may still be viewable by an employer.

Companies can seek to rely on the defence of taking ‘all reasonable steps’ to prevent employees from carrying out acts that may amount to harassment, discrimination or malicious conduct. Reasonable steps will include ensuring that employees are aware of the standards expected of them (that is, not to post content that could amount to harassment, discrimination or malicious conduct about their colleagues, clients and/or contacts) in respect of social media use, both inside and outside the workplace. This can be achieved by providing training and dealing with any complaints that may arise.

An employer's position around social media use can also be cascaded to employees via a policy. This policy should make it clear that any breaches of the policy may be dealt with by way of disciplinary action. Additionally, it is prudent to remind employees within the policy of the ‘disinhibition effect’ – ie when people say things on social media they would never say in other circumstances. Employees should therefore be reminded to exercise their judgement before posting on social media, and consider whether it may amount to harassment, discrimination or malicious conduct.

Businesses should also remind employees of the terms that are implied in the employment relationship, such as the implied duty of mutual trust and confidence. That is, that the employee (and the employer) should not act in a manner that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between parties. Clearly, publicly posting comments that are damaging to an employer's business can be destructive of trust and confidence if the posts are sufficiently serious.

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