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# Social Media: What Corporate Counsel Must Know

There has been a huge increase in the popularity of social media like Facebook, Twitter and LinkedIn. Social media has transcended languages, borders and cultures; through social media a vast amount of information is exchanged daily and globally. People often post personal and professional information. This information can be viewed not only by friends and relatives but also by colleagues, clients and employers. Consequently, as a Corporate Counsel, you cannot ignore social media in a corporate environment. Social media can be a powerful tool you can use to your advantage. On the other hand, inappropriate use of social media can influence the (online) reputation of the company in an unwanted way. But that is not all: social media can also play an important role in employment relationships. As a Corporate Counsel, you are likely to be faced with questions such as: "Are employers allowed to monitor what information (future) employees exchange and who they exchange it with?" and "How should I deal with employees who are telling company secrets or are openly bad-mouthing their employer or their colleagues?"

Privacy legislation, which can vary from jurisdiction to jurisdiction, often plays an important role in employer-employee relationships. However, the key issues and pressure points are similar worldwide. More specifically, regarding employers, problems can arise throughout all stages of the employment relationship: that is, at the recruitment and selection stage, during employment and after the termination of employment.

## Recruitment and Selection

Employers wish to gather information on future employees to get an overall picture of a person. But to what extent are employers allowed to review social media profiles and to what extent can and may that influence the employer's decision-making process? When hiring a sales professional, it is good to know who he is networking with. On the other hand, social networking with competitors can have a negative effect. Information on a person's situation at home or in private activities can be more important than expected. Think, for instance, of difficult care situations at home or of "dangerous" hobbies.

But how does this relate to, for instance, data privacy laws and anti-discrimination laws? In the U.S., job candidates need to provide the employer with a written authorization prior to a background check, whereas job candidates in the United Kingdom must be given the opportunity to first check the accuracy of the online data collected about them.

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In addition to privacy laws, anti-discrimination laws, and codes of conduct as implemented, for example, in France, user conditions of social networking sites themselves can also contain restrictions. User conditions (general terms and conditions) of social media or platforms may restrict the use of information for professional or recruitment purposes. In some jurisdictions, there is a difference between the types of social media. Employers in Germany and France may use information collected from professional social networks only (such as LinkedIn), but they are not allowed to use information from general social networking sites, such as Facebook.

## During Employment

An employee must observe the rules and regulations of the organization he works for, and he must act as a good employee. Employees are expected to act professionally and to behave like good colleagues, especially when it comes to the use of social media. Information revealed on the internet is hard to remove and spreads fast. This can have negative effects for both employer and employee. It is a completely different question, however, whether an employer is allowed to use information available through social media on the employee's private life. Can a Tweet (such as "Relaxing on the beach") by an employee on sick leave to his Twitter followers be used in a dismissal procedure? Is an employer allowed to monitor what an employee posts on Facebook about his manager or about the company? Is an employer allowed to check who an employee is linked with on LinkedIn? The answer to these questions depends on data privacy laws that vary from country to country.

### Monitoring Of Employee's Usage Of Social Media

Whether or not employers are permitted to monitor the social network use of their employees and if so, what considerations and limitations apply, are additional questions to be answered by the different legislations. In most jurisdictions, employers are permitted to monitor social media use on work-provided devices on condition that the employee's privacy is respected. The European Court of Justice has ruled that in Europe employees enjoy their right to privacy and private life in their work environment as well, therefore, a limited amount of private internet use must be allowed. Furthermore, the European Court of Human Rights has determined that, for example, monitoring telephone conversations and emails should be announced beforehand.

Of course, if the employer has a specific and good reason to suspect violations of company policies, it will, in general, be allowed to investigate that specific situation. However, monitoring internet use as a general policy is only allowed under certain conditions, or in some cases not at all.

In general, privacy rights of the employees must be balanced against the employer's legitimate interests to protect its business or IT. Some jurisdictions have established guidelines about appropriate monitoring in the workplace (e.g., UK and Switzerland). In others, it is important to have a consistent policy about monitoring that has to be made known to all employees beforehand, either via a works council or individually (Germany, the Netherlands, France). In Spain, monitoring is only permitted with the consent of the employee, and Switzerland does not allow preventive monitoring at all.

### Dismissals Due to Inappropriate Usage of Social Media

To what extent employees can be dismissed based on inappropriate use of social media depends on the national legislation. When it comes to inappropriate use of social media, in the U.S., the focus will be on whether or not it is related to "concerted activity." In Canada and in most European countries, the reason given for dismissal will be checked. In Canada the criteria for inappropriate use of social media are (1) breach of the company policy, for instance, regarding confidentiality, computer use or anti-harassment and (2) damage to the company. Other considerations taken into account are whether it is a matter of frequent inappropriate use or one time inappropriate use only, and whether the employee has been warned.

A court in Australia considered an employee's 3,000 chat sessions in three years sufficient for the termination of the employment. In two recent decisions in France, the courts ruled that employees posting insulting comments about their employers on a social media website could be terminated for fault and also fined for the offense of public insult. It was held that comments posted on a social media site could not be considered private, since the postings were not set to be displayed only to friends.

This is not only an issue in France but also in Switzerland where employees must check the relevant privacy settings before posting derogatory comments. In France it was held that employees must be made aware about the possible sanctions and the consequences of inappropriate postings in advance. On the contrary, in the UK, an Employment Tribunal held that the employee's comments on Facebook were not in private even though the employee had set his privacy settings so that only his Facebook friends could see them. The Dutch court had the same line of reasoning about an employee posting an insulting remark about his employer to his friends on Facebook. According to the Dutch court, the term "friends" is a very relative notion on the internet because these friends can, and in this case they did, forward the message very easily. The employer's need to protect its

reputation was weighted more important. In the U.S., a report was issued about the protection of disparaging comments on social media about employers.

### Clear Rules Required

Therefore, it is important to lay down rules on the use of social media and on the employees' online activities regarding revealing information on the company they work for, as well as the sanctions for non-compliance. In the best case, employees expressly consent to such rules, implemented either as policies or contractual provisions. Such rules not only facilitate proving whether or not an employee has broken company rules, but are also valuable in the event the employer intends to hold the employee responsible for damages the company or clients suffered due to information spread via social media. These rules may include, for example, if and to what extent employees are allowed to befriend business relations and whether employees will have to create separate accounts for business relations and for solely personal contacts. It is worth considering setting up employees' business accounts according to the company guidelines. It can also be included whether, and if so, which social media can be used during work hours and to what extent they may be used. This will often depend on the position of the employee and the type of company. A sales manager of a software company will be allowed more social media activity than an accountant of a food wholesaler. In this regard, it may be also taken into consideration how often and to what extent emails and telephone calls are permitted for private purposes.

## After Employment

After the termination of employment, employer and employee are most likely to still be active on the Internet. At this stage, issues such as duty of confidentiality and competition clauses are very important. It must be clear whether or not contacts with business relations and business-related social media and accounts will have to be cancelled. It is also advisable to make arrangements on whether LinkedIn contacts will have to be deleted or may be kept. You can include these guidelines, for instance, in a competition clause or a business relations clause. That way you can control that no business relations will be accepted as Facebook friends, or that the employer has a say in the management of a LinkedIn account. Arrangements like this can even be made if the above mentioned clauses have not been agreed upon, for instance in a special clause of the employment agreement or they can be included in the staff regulations.

## Conclusion

There is not just one uniform way to deal with social media. After all, every country, every company and every human being is different from one another. A social media policy has to be tailored to fit the country, the company culture, the image of a company, the sensitivity level of information and safety aspects so that all employees know the company's rules and you can enforce them. It is advisable to include such a policy as standard in the staff regulations. P