

A-Z Guide

SOCIAL MEDIA



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Overview

- Social media uses web based technologies to allow users to publish information online and interact with others.
- The employee-employer relationship has been affected by the widespread use of social media websites.
- Social media poses risks for employers at the various stages of an employment relationship, including pre-employment, during employment and post-employment.
- Although the use of social media creates relatively new concerns for employers, existing rules and legal principles can be applied.
- Employers can implement clauses or comprehensive policies to define the boundaries of appropriate social media use in relation to the workplace.
- Risks posed by social media include: bringing the company into disrepute, derogatory comments about the employer, other employees, clients or suppliers and disclosures of confidential information.
- Inappropriate use of social media in relation to the workplace may be met with disciplinary action. The instances where discipline is used will depend on the conduct of the employee and the rules and policies businesses have implemented.
- When looking at dismissal as a result of social media misconduct there are several factors to consider. If a policy on social media has been adopted then it should be consulted with when considering disciplinary action.
- For post-employment protection it is best to have an express term in an employment agreement. Express terms must state they survive the end of the employment relationship to afford the most protection for employers.

Introduction

Social media uses web based technologies to allow users to publish information online and interact with others. The employee-employer relationship has been affected by the widespread use of social media websites such as Facebook, Instagram, LinkedIn and online blogs.

Employers need to be aware of the risks that the social media activities of their employees can create for their businesses. The risks can include productivity issues, damage of business reputation and conflict between employees. Steps can be taken to minimise employer risk and to protect an employer's brand and reputation by educating employees on the appropriate use of social media in relation to their workplace. Businesses are also able to monitor social media websites to ascertain what is being said about them. This is primarily used for marketing or to gauge customer feedback. Although the use of social media creates relatively new concerns for employers, some existing rules and principles can be applied. It is recommended that specific clauses and policies are developed to manage this new media and its associated risks.

Employers can implement clauses or comprehensive company policies to define the boundaries of appropriate social media use. These clauses can also state the action that may be taken against employees for misuse of social media. The main risks that employers need to be protected from are postings which bring the company into disrepute, derogatory comments about the employer, other employees, clients or suppliers and disclosures of confidential information. Employers may also need to manage productivity issues that may arise where employees spend excessive company time on social media.

Pre-employment

Recruiters are increasingly using social media to gather information about potential employees. Issues may arise where information that cannot be lawfully considered for the purposes of recruitment are inadvertently obtained. For example, age, race, or sex and other private details should not have any bearing on screening potential employees. For more detailed information regarding discrimination in the workplace please refer to EMA's **A-Z guide on Discrimination in Employment**.

During employment

All employment agreements automatically encompass implied terms that both employers and employees must adhere to. The implied terms include confidentiality, fidelity, trust and confidence. Abuse of social media in some cases may breach these implied terms and a company may take action against employees in breach. Existing clauses in employment agreements may also provide employers with some protection. For example a general clause regarding employee conduct may be used to address misconduct carried out through social media. Although implied terms and existing clauses may afford employers some protection, it is recommended specific terms which address conduct through social media be inserted in employment agreements (see sample clause on page 6).

Having a specially formulated policy is also an effective way to address social media issues that arise during employment. Policies should clearly address all blogging and online posts that affect the business during or outside of work time, and on work or private computers. In such policies employers can state the rules around appropriate social media use and what the consequences may be if they are breached. Policies should make it clear that disciplinary consequences will apply to online indiscretions. Policies could also state that summary dismissal may result in cases of social media misuse where the actions of the employee are considered serious misconduct.

Most companies would include social media issues within their Computer or Information Technology 'Terms of Use' policy. Such policy could include:

- A statement that social media abuse will not be tolerated and disciplinary action including dismissal may follow.
- A list of examples that the company could consider as breaching the policy either directly or indirectly, including but not exclusive to:
 - The harassment of any employee or agent of the company.
 - Posting disparaging or negative remarks against the company's employees, customers or suppliers.
 - Disclosure of confidential or commercially sensitive information online.
 - Prohibiting employees from using company property, such as insignia, logos and other identifiable images in social media.
 - Posting material which could affect the reputation of the company in the eyes of the public.

Employee relationships and social media

Employees in conflict at work may use social media as a medium to communicate how they feel about one another. This may lead to an escalation of the dispute which can affect the workplace. In *Adams v Wellington Free Ambulance Service Inc* WA 81B/10 Ms Adams made abusive comments about another employee on Facebook following a dispute in the workplace. The Authority's position was that an employer was entitled to investigate matters outside of work in such cases and especially so if the dispute originated in the workplace. This indicates that employers can rely on information that comes from social media exchanges between employees.

In the case of *Hammond v Credit Union Baywide* Ms Hammond uploaded a picture on Facebook of a cake with the words NZCU F**** YOU and the side of the cake with C*NT after recently resigning with Credit Union Baywide. The HR Manager became aware that there was a photograph of a cake that was offensive to NZCU and pressured a junior employee who recently joined the company to log into her own Facebook so the employer could see the cake. The HR Manager called four recruitment agencies in the Hawkes Bay area, warned them against hiring Ms Hammond and emailed them the screenshot from Facebook. Pressure was placed on Ms Hammond's new employer to dismiss her under the 90 day trial period. Ms Hammond received \$168,000 in the Human Rights Tribunal. However after the decision there was much public discussion about whether Facebook posts or pictures were truly personal information.

Employee comments and client relationship

Businesses have always been mindful of their client relations and customer satisfaction. Employees posting negative comments about customers can be an issue for employers. In *Hohia v New Zealand Post Limited* AA 362/10, an employee created two Facebook pages which contained negative comments about NZ Post and its customers, and also humiliating comments about a work colleague. The employee was dismissed for his inappropriate use of social media. Mr Hohia's application for reinstatement was declined. The Authority held that at the very least the employee's negative attitude towards his employer was apparent. Employee education and a social media policy would be an ideal way to minimise these kinds of incidents and provide certainty as to repercussions for misuse of social media.

Removal of derogatory comments made online

There may be cases where an employee has already posted comments or confidential information about their employer online. In the first instance the employer should endeavour to seek agreement of its removal with the employee. If an agreement cannot be reached an employer may begin disciplinary proceedings and/or apply to the Employment Relations Authority for an injunction. Disciplinary action may involve written warnings through to summary dismissal depending on the misconduct concerned and the policies that may be in place. An injunction could order the employee to remove current posts and to refrain from further comments or disclosures. This process could be used both during employment and after an employee has left the company.

In *Kaikeri Corporation Ltd t/a McDonald's Kaitaia v Davis* AA 5/08 a McDonald's employee posted derogatory comments about Kaitaia McDonalds on an internet blog site. The employer sought an injunction to restrain the employee from posting any further information about the McDonalds on his blog site. Whilst the injunction was initially declined, an Employment Relations Authority investigation facilitated an agreement by the employee to remove and cease making any further online postings about the McDonalds. This undertaking was endorsed by the Employment Relations Authority as a binding consent order.

Factors to consider when looking at dismissal as an option

When looking at dismissal as an option there are several factors to consider. If a policy on social media has been adopted then it should be consulted with when considering disciplinary action. For minor infractions formal warnings may be appropriate and dismissal will usually arise after repeated breaches. For more serious breaches the option of summary dismissal for serious misconduct may be considered.

The following factors may be relevant in exercising a judgment regarding dismissal:



- Whether there were attacks against the company, its employees, customers, or suppliers
- Whether there was a disclosure of confidential information
- Whether the company was brought into disrepute
- Whether the company can show economic damage from being brought into disrepute
- The seniority or visibility of the employee
- Whether the employee shows remorse and gives a commitment not to repeat the behaviour
- How many people have the potential to access the publication
- How offensive the postings are
- How sensational and interesting the postings are
- Whether the postings are unsolicited or are part of a conversation
- Whether clients are aware of the postings
- The extent to which the employer was identified

Advertising Standards Authority

Employers should be aware that the Advertising Standards Authority (ASA) has held businesses accountable for their own online content and also any other user generated content directly under their control. The ASA has released guidelines for social media advertising which are available on the ASA website. It is recommended that employees responsible for the business' social media be familiar with these guidelines to avoid any potential complaints.

Post-employment

Post-employment conduct of an employee can have an impact on employers as former employees could post or blog negative or confidential comments about employers and their business. For post-employment protection it is best to have an express term in an employment agreement. Express terms must state that they survive the end of the employment relationship in order to afford the most protection for employers. In the case of a breach of an express term an employer may seek an action for penalties and damages. Although not directly concerning social media the two cases below apply in principle regarding post-employment and the requirement of express terms.

Case 1: The importance of an express term stating that it applies after employment ceases was highlighted in *Birthcare Auckland Ltd v MacFarland* [2000] 1 ERNZ 674. An employee resigned and set up her own business providing midwife services. The Court found that in the absence of express restraints on the employee's post-employment activities, the employer could not recover for losses caused by the employee once employment ceased.

Case 2: *Benchmark Building Supplies LTD v Francis* AA 235/02 an ex-employee used confidential information from his former employer Benchmark to secure a client for his new employer. The employee was found to have breached an express term of his employment agreement and was ordered to pay a penalty of \$1,000 and damages for a breach of confidentiality totalling \$6,353.90 being the amount the former employer stood to make from the client.

Refer to the sample clause below under 'Adverse Comments' for an example of express terms that can be included into employment agreements.

Reinstatement after dismissal

The Employment Relations Authority has considered two cases where reinstatement was declined due to employee conduct regarding social media. In *Adams v Wellington Free Ambulance Service Inc* WA 81B/10 reinstatement was considered and declined as the Authority was not satisfied that Ms Adams would be a harmonious and effective member of staff. Ms Adams' comments displayed a degree of intolerant and overbearing behaviour, and the Facebook comments involved strong and abusive language, which took place sometime after the incident at work. In *Hohia v New Zealand Post Limited* AA 362/10 the Authority found that an employee's online postings displayed his serious lack of confidence in his employer. The Authority felt this would seriously hinder his ability to undergo sincere reinstatement and that it was not practicable to reinstate the employee pending a substantive hearing. Both cases indicate employers can consider employee statements that are made through social media when making decisions that affect the employment relationship.

Sample clauses

The EMA has created the following sample clause for possible inclusion into future company policies and/or employment agreements. **Note:** This is a new clause relating to issues that have not yet been significantly tested in New Zealand law.

Adverse comments

- a. Both during employment and after employment is terminated, the employee agrees they will not directly or indirectly make or cause to be made any disparaging comments or publish disparaging material:
 - I. about the employer, its employees, suppliers, customers or any other party associated with the employer's business;
 - II. that brings the employer into disrepute;
 - III. that discloses confidential information.
- b. The prohibition in subclause (a) above includes all comments and publications made electronically, including any comments posted in any social media web sites or made from outside New Zealand.
- c. Any breach of this provision will be treated as serious misconduct.
- d. This clause survives termination of the employee's employment to the extent that the employee directly or indirectly discloses or causes to be disclosed information or knowledge that was acquired during employment.

Contact Adviceline if you need more information or require a custom clause/policy.

Conclusion

The New Zealand experience with social media and employment law is relatively limited at this stage. Social media use is on the rise and employers need to be mindful of the effects it can have on the employment relationship and their business.

Intrinsically there are rules that govern the employment relationship which may afford some limited protection for employers. It is recommended that further steps are taken by employers to ensure risks are minimised. Specific clauses and policies setting rules and expectations should be implemented in order to manage social media effectively.



This A-Z guide was designed to give you an overview of social media and its interaction with employment law. Contact AdviceLine on 0800 300 362 to discuss any of the issues raised in this guide.

Remember

- Always call AdviceLine to check you have the latest guide
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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