



Privacy and Social Networking in the Workplace

FRANCE, GERMANY & THE UK

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What should employers be doing to ensure appropriate use of social networking by employees both at work and outside work?



- In France, employers who want to monitor, restrict, or forbid the use of social networking have to be very cautious, because all employees:
 - have a right to privacy, even at the workplace during working time according to Article 9 of the French Civil Code;
 - benefit from freedom of speech, within the company and outside of it, which can only be restricted for legitimate grounds.
- Employers may limit the use of social networks by requiring that employees do not disclose confidential information or trade secrets.

Restrictions can be made through:

- the employment contract, by implementing a duty of confidentiality or a non-compete covenant to the employee;
- staff handbooks or codes of conduct, to inform employees about the terms and conditions of Internet, e-mail and social networking use.

What should employers be doing to ensure appropriate use of social networking by employees both at work and outside work? (cont'd)



- Adopt a social media policy to encourage appropriate use of social networking both at work and outside work.
- Use the policy to prohibit employees from using social media in ways that could damage the company.
- Provide training to employees on the appropriate use of social media, and monitor for compliance.
- Do not allow employees to disclose or misuse confidential or proprietary information.
- Set clear guidelines to prevent discrimination, harassment and bullying, misrepresentation, and defamation.

What should employers be doing to ensure appropriate use of social networking by employees both at work and outside work? (cont'd)



- When it comes to the private use of e-mail and Internet communications, German law draws a sharp distinction between private use of the employer's equipment at work (which, if generally allowed, may only be monitored to the extent required to detect evidence of serious criminal misuse) and private use in private, which is mostly protected by privacy laws.
- As regards the private use at work, it is generally advisable not to allow or tolerate private use of the employer's equipment, but to provide staff with access to a free mail server for private use during breaks.
- As regards the private use in private, it is generally recommended that guidelines and recommendations be issued on general behavior on the Internet, specifically on social media sites. These should include issues such as avoiding appearing to speak for the employer, bullying, and harassment and discrimination.

To what extent is it legitimate to restrict and/or monitor an employee's Internet access and how should this be carried out?



- Access to the Internet for **personal purposes** during working time is generally admitted as long as it is reasonable.
- Any **restriction** must be proportionate to the goal pursued → general prohibition of personal use is not recommended.
- Permissible to **restrain** the type of use or prohibit access to specific Web Sites by name ("*Facebook*") or content ("*pornography*").
- Permissible to **prohibit** certain employee actions with regard to network security (e.g., downloading software; connecting to forums).
- **Before implementation** of restrictions, the employees must be **informed**, Works Council must be **consulted**, and the French Data Protection Agency must be notified if the connections are monitored.
- Restrictions are usually contained in **codes of conduct** and may lead to disciplinary measures (e.g., dismissal of an employee who spent 41 hours on the Internet in one month).

To what extent is it legitimate to restrict and/or monitor an employee's Internet access and how should this be carried out? (cont'd)



- Lawful to restrict access – discretion of employer
- Blocking certain sites permissible
- However, where there is not automatic blocking and employees can access sites:
 - Have a clear policy based on an impact assessment – regularly audit
 - Ensure employee awareness of policy with regular reminders (pop-ups when the Internet is accessed)
 - Be wary of distinctions between policy and practice

To what extent is it legitimate to restrict and/or monitor an employee's Internet access and how should this be carried out? (cont'd)



- This depends on whether the employee uses the Internet strictly for business or for private purposes as well. Problems arise if the employer tolerates use of the Internet at work for private purposes.
- As a general principle, employers may collect data only in well-founded circumstances.
- It is advisable to contact the company's data protection officer and the Works Council, and to obtain clearance from general counsel or the relevant designated person before collecting data.
- Data which is no longer required should be deleted; the employee should be informed afterwards.
- It is advisable to establish a process description in a works agreement on data protection. Any existing compliance and discipline committee should be involved.

When is it permissible for employment-related decisions, such as hiring and firing, to be based on information obtained from social networking sites?

- Hiring:

In January 2010, several French headhunter agencies adopted a code of conduct in which they agreed to select candidates based on their professional skills only and not on their private life.

- Firing:

French case law considers that comments posted on a wall, such as Facebook, are admissible evidence that can be used without infringing upon the employee's privacy.

But case law is divided on the rights of employers to sanction employees who have posted negative comments.

To sanction the employee, the employer needs to prove that it negatively impacted the company and/or its employees.



When it is permissible for employment-related decisions, such as hiring and firing, to be based on information obtained from social networking sites? (cont'd)

- Hiring:

- Employer free to consider the content of public social networking sites when recruiting but there is a need to balance the employer's needs and the applicant's right to respect of his/her private life.

- Firing:

- Employees can be fairly dismissed for conduct outside work provided this has bearing on their ability to do their job. With social media's potential for large audiences to become aware of the conduct, the employer needs to balance:
 - its right to protect its reputation; and
 - the employee's right to a private life.

- *Gosden v Lifeline* and *Preece v JD Wetherspoons*

When it is permissible for employment-related decisions, such as hiring and firing, to be based on information obtained from social networking sites? (cont'd)



- When hiring employees, data may be collected from business networking sites without significant legal difficulties.
- In contrast, the collection and use of data from all-purpose or private networks is contentious in respect of all employment-related decisions.
- However, where such private or all-purpose networking sites allow business users to participate in the communications, data collection and use is permitted in well-founded cases.
- In general, data collection and use requires that the interests of the employer in this collection and use outweigh the interests of the employee in keeping his data private, *e.g.*, in cases of criminal behavior or damage to the employer's reputation.



To what extent is an employer liable for things done by employees on the Internet?

- **Civil liability** → employer is liable for the wrongful acts of his employees while they are under his control (*i.e.*, misuse of the Internet during working time).
- Court of Appeal 2006: Employer was liable for the actions of an employee who had created a Web Site during his work time that infringed the rights of another existing Web Site. Since the code of conduct allowed the employees to consult Web sites unrelated to professional activity, the employer had provided the employee with the means to commit the offense.
- **Exemption** from liability if it is proven that the employee acted outside the scope of his mission and without any authorization.




To what extent is an employer liable for things done by employees on the Internet? (cont'd)

- Generally, an employer is liable for all things done by an employee “*in the course of employment*”
 - No vicarious liability for activities not expected of employee and outside the scope of normal duties; e.g., defamation, breach of confidence, breach of copyright
- BUT, the test in discrimination/harassment cases is wider – onus on employer to show “*that it took such steps as were reasonably practicable to prevent the employee from doing the discriminatory act*” – even where the acts were outside the normal scope of the employee’s duties




To what extent is an employer liable for things done by employees on the Internet? (cont'd)

- Basically, an employer is liable for employee behavior which can be imputed to it.
- Liability requires that the employee either acts in a business capacity or at least seems to do so, *e.g.*, in cases involving comments on company blogs.
- In cases concerning IP infringements by employees, such as illegal music downloads, the employer can be liable by virtue of being the subscriber to the Internet connection.
- In order to avoid liability for employee IP infringements, employers must take measures to prevent such infringements, *e.g.*, by installing special software.



Can provisions in staff handbooks/codes of conduct enable employers to safeguard their rights in relation to misuse of social networking sites and other new technologies in the workplace?



- Employers should implement codes of conduct informing employees of **terms and conditions** of Internet and e-mail use (rights, obligations, responsibilities).
- French Supreme Court 2006: A code of conduct can be **binding and enforceable** against employees, provided that information and consultation requirements have been fulfilled (Works Council, employees, labor authorities).
- **Failure** of the employee to comply with the code may be a defense to the employer's civil liability in case of wrongful use of new technologies.
- Generally, existing codes only provide for **general guidelines** regarding use of e-mails and the Internet and do not address social networking.

Can provisions in staff handbooks/codes of conduct enable employers to safeguard their rights in relation to misuse of social networking sites and other new technologies in the workplace? (cont'd)



- New media: increased opportunities for stupidity and damage
- Policies can be introduced to handbooks without consent
- Areas for policies:
 - References on social networks
 - Breaches of confidentiality
 - Harassment/Discrimination
 - Defamation
 - Bringing company into disrepute

Can provisions in staff handbooks/codes of conduct enable employers to safeguard their rights in relation to misuse of social networking sites and other new technologies in the workplace? (cont'd)



- Generally, yes.
- From a personnel policy perspective, such codes should contain mere recommendations or “soft” rules, since strict rules on Internet behavior would not be accepted by “Generation Y.”
- Behavior recommendations for social networking should be established by a company or “shop” agreement.
- An effective personnel policy with regard to the Internet requires ongoing communication with staff, and may involve training too.
- With regard to private use in private, even recommendations are problematic.

What is the impact of the new EU proposals to reform the protection of personal data such as the right to be forgotten and privacy by default?



- The right to be forgotten: means that people would have the right, and not only the possibility, to delete their data from data processing or social networks and that companies would not be allowed to keep a ghost of the data. By providing to the employees a right to be forgotten, employers could find themselves in a position where they will no longer be able to access information that the applicant/employee considers having a detrimental impact on his career.
- Transparency: all information on the protection of personal data would have to be given in a clear and intelligible way by social networks.
- Privacy by default: privacy settings too difficult to implement, which means that social networks would need to ensure that data are used in accordance with the end purpose of which the data subject had given his initial consent.
- Protection of European citizens regardless of data location: homogeneous privacy standard for European citizens should apply independently of the area of the world in which their data is being processed. Therefore, US-based company that has active users in Europe would need to comply with EU rules.

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- Betsy Plevan is a Partner in the Labor & Employment Law Department, co-head of both the International Labor & Employment Group and Class/Collective Action Group, and a former member of the firm's seven-person Executive Committee. She has built her practice handling all types of labor and employment litigation, as well as counseling clients in employment matters. In addition to maintaining her active practice, she recently completed a two-year term as President of the New York City Bar.
- Betsy's practice includes representing clients in such diverse industries as banking and finance, health care, entertainment, publishing and consumer products. She spends considerable time representing leading law firms in counseling and litigation assignments. She has handled both single plaintiff and class action lawsuits involving issues of discrimination, harassment and employee benefits matters. Betsy has successfully tried a number of jury and non-jury cases in New York and elsewhere in the U.S., and her trial work has been recognized by her induction as a Fellow of the American College of Trial Lawyers. She also has argued more than 50 appeals in state and federal courts, and she has been elected a member of the American Academy of Appellate Lawyers.
- Betsy has been involved in representing employers in sexual harassment matters for many years. Noteworthy cases include, among others, her retention by Meritor Savings Bank to handle the remand of the landmark Supreme Court case in this area. She also handled, on appeal, the landmark case in which the New York Court of Appeals reversed a \$4 million punitive damages award against the magazine *Penthouse* on the ground that no punitive damages are available under the State Human Rights Law.
- In the employee benefits area, Betsy has handled class action lawsuits involving alleged breaches of fiduciary duty, COBRA violations and termination of retiree benefits. She also has extensive experience counseling employers on litigation avoidance and sexual harassment investigations, and training management employees in these areas.
- Betsy is quoted frequently in national newspapers, legal and other trade publications, and has appeared on television to discuss employment issues, especially sexual harassment suits, about which she has lectured and written extensively.



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- Cécile Martin is an Associate in the Labor & Employment Law Department in the Paris office. She is a member of the International Labor & Employment Group and the Privacy & Data Security Group. Cécile has experience with all employment law aspects of corporate restructurings (including transfer of undertakings and due diligence), redundancy procedures, including dismissing protected employees, settlement negotiations, and negotiations with employee representative bodies (personnel delegates, Works Councils, health and safety committees, unions) and French Labor Authorities (Labor Inspector, Ministry of Employment).
- Cécile also has extensive experience in data privacy law and is generally responsible for cases involving privacy issues at the crossroads of employment law and the law of new technologies, particularly issues concerning the cyber-surveillance of employees and the dismissal of employees for abusing technologies put at their disposal during their work time.
- Prior to joining Proskauer, she served as in-house counsel for the legal department of the French Data Protection Agency (C.N.I.L.). She was a speaker, on several occasions, for the American Bar Association's Workplace Committee and at a Technology in Practice conference.



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- **Publications:** "Facebook activities as a reason for dismissal", essay in: ArbR 2011, p. 157 et seq.; "Facebook and employment law", newsletter contribution; "Employer research on social networking sites under the planned Act on the Protection of Employee Privacy", essay in: NZA 2011, p. 1329 et seq.



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