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Attwaters' Employment Update

"Facebook masks wasted work time"

There are many employees who have signed up to Facebook and subscriptions are increasing on a daily basis. Reports suggest that hundreds of hours of work time are wasted every week; its use reduces network performance, there is the threat of breaches of confidentiality and the very real risk of viruses infecting business systems. Those businesses seeking to capitalize on social networking sites and in particular viewing prospective employee's web pages must be aware of possibly breaching equal opportunity law.

IT departments have begun blocking Facebook and similar sites as businesses realise the potential damage that may be caused both internally and externally. These include British Gas, Lloyds TSB, Transport for London, Credit Suisse, Goldman Sachs, Dresdner Kleinwort, and The Metropolitan Police. That said the law firm Allen & Overy have publicly reversed their initial decision to ban Facebook due to extensive complaints from staff.

The restrictions placed by companies on employees using social networking sites are perfectly legitimate however Brendan Barber, the TUC General Secretary, has commented that;

"Simply cracking down on use of new web tools like Facebook is not a sensible solution to a problem, which is only going to get bigger. It's unreasonable for employers to try to stop their staff from having a life outside work, just because they can't get their heads around the technology."

Despite this utopian ideal even the creators of Facebook are unable to guarantee that the information placed on the site is secure. The privacy policy states that "... we cannot and do not guarantee that user content you post on the site will not be viewed by unauthorized persons" additionally "we are not responsible for circumvention of any privacy settings or security measures contained on the site". Still further Facebook highlights that any content which has been deleted may subsequently be viewed at a later stage. Tom Hadley, the REC's Director of External Affairs, highlighted the problem of an "internet footprint" created by individuals which brings up; in particular, the possibility of employers becoming liable for employees acts of discrimination during and potentially after employment. Vicarious liability is a serious concern for businesses as acts committed by employees in the course of their employment may ultimately be the responsibility of the business. A defence may be available to an employer provided that it can be shown they took all reasonable steps to prevent the behaviour of the employee occurring.

Social networking sites may contain inappropriate material which when viewed by other employees may give rise to claims of discrimination (race, sex, disability, age, sexual orientation and religion or belief) or amount to harassment if directed at another employee purposefully to cause harm or distress. A claim brought under discrimination legislation against an employer, if successful, has no limit on the amount of compensation that may be awarded. There is also the concern that online criticism or viewing of inappropriate material of other colleagues may result in possible constructive dismissal claims against the business.

As such a business may follow disciplinary procedures ultimately leading to dismissal, provided that this is made clear in any Internet policy, if there is a detriment to the company or offence is caused to other employees. A clear example of this is where an employee at Argos was sacked due to negative postings of Facebook. Tom Beech was initially suspended and then dismissed for gross misconduct;

"I'm stunned they've fired me for this. I had a really bad day. My mistake was to sound off on Facebook. I wish I'd moaned at a mate."

Any firm that intends to allow employees access to sites such as Facebook should have a clear and detailed Internet policy that sets out the consequences of misuse. The CBI's head of employee relations, Katja Hall, has commented that;

"The CBI's advice to companies is that they should have a policy on staff use of the Internet during work time, whatever the website."

Employers may monitor an employee's use of the internet under the provisions set out in the Data Protection Act 1998 and the Human Rights Act 1998. Monitoring is allowed provided that it can be shown to do so is relevant to the business, it is justifiable and proportionate in the circumstances and employees are made aware that such activity is undertaken by the employer; covert monitoring is only allowed in extreme cases, for example in the investigation of criminal activity.

The difficulty of policing employees use of social networking sites and in particular the possible repercussions of failing to do so may lead some employers to the conclusion that banning the site altogether is the safest option.

*The recent case of **PennWell -v- Isles and ors** has highlighted that in certain circumstances an employer may hold the legal title over an employee's online information if it relates to the business. In this particular case a journalist who brought a contact list with them to their new position at PennWell and began adding to this list during his employment was deemed to be the property of his employer. This raises the very real question of whether online information contained on social networking sites created in the course of business; even personal information, may in be fact company property even though it is hosted in a virtual environment. Employers and employees both, in light of this ruling, must be alive to the fact that a document or other such object created at work, in the course of employment may ultimately be the property of the company.*

The most recent casualty of “cyber-slacking” is highlighted by administrator Kimberley Swann who had posted comments on Facebook suggesting her job was “boring” and subsequently sacked. Even though never revealing the company in question she did refer other employees to the webpage. Only being employed for 3 weeks and therefore falling outside the unfair dismissal regime it goes to show how some employers may deal with derogatory comments made about their business.

Should you wish any further information concerning this article or any other employment matters please contact Tim Carter by clicking on the button below.

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