

## PROTECTING YOUR BUSINESS WITH A SOCIAL MEDIA POLICY

When employees publish on social media there can be serious impacts on an employer's business. A workplace with an up to date and well-communicated social media policy is an essential tool for businesses to protect their reputation and to hold employees accountable for their online actions.

A social media policy can cover how employees should conduct themselves during their personal use of social media, as well as when posting in their capacity as an employee on behalf of their employer and business. When an employee publishes a negative or offensive post it can have unfavourable impacts on an employer. The consequences can be damage to reputation or even legal implications depending on the nature of the industry and the publication. Both an employer and employee could be exposed to a criminal or civil liability. The laws of defamation cover communications made on social media.

A key function of a social media policy is to provide employees with guidance on what they can and cannot publish, and to explain the consequences of what they post on their employment. A publication may be damaging on an employee's own professional reputation. Trade secrets, private or confidential information regarding clients or customers and their business activities are key assets for an employer, so the public disclosure by an employee is far from ideal. Letting employees know their boundaries for publishing work-related information will always be in an employer's favour.



The Full Federal Court's 2013 decision in *Linfox Australia v Fair Work Commission*, on appeal from a decision of the Full Bench of Fair Work Australia, highlights the importance of having a well-communicated social media policy in the situation of an unfair dismissal claim. An employer could not dismiss a truck driver's employment for posting offensive, derogatory and discriminatory comments about his managers on his Facebook page.

A range of factors supported the Court's decision to reinstate the employee:

- The employer did not have a dedicated social media policy.
- The employer did not take action against other employees who had also commented on the offending Facebook post.
- The employee believed (mistakenly) that the Facebook page was on maximum privacy settings and that comments made by others could not be deleted.
- The conduct occurred outside work and work hours.
- The employee had a long length of employment with the employer and small employment prospects.

The circumstances of each situation will determine whether a decision to dismiss an employee is warranted. The nature of the post and the extent of its publication must be assessed, taking into account the potentially wide audience of social media and the ease of 'sharing'. The *Linfox* case is only an



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indication of the factors a Court may consider. Many employees are gaining an increased knowledge about the workings of social media, so an employee claiming ignorance of their actions may carry little weight in front of a Court.

In the 2013 decision of *Pedley v IPMS Pty Ltd t/as peckvonhartel*, the Fairwork Commission found that an employee could be dismissed for sending a group email to his LinkedIn connections soliciting work. These connections were the employer's clients, and therefore associating with a business or activity in competition with the employer was in breach of the employee's employment contract.

It should be assumed that content posted on social media is publicly available for many years. Making employees aware of their obligations through a well drafted social media policy can save an employer large costs in the future, both monetary and reputation.



A social media policy can list the steps an employer may take against an offending employee. These may include warnings, reduction of privileges, and if warranted, termination of employment.

The responsibility to use social media in an appropriate manner also rests on an employer. A New Zealand franchisee of Pita Pit recently informed staff that their employment was terminated via Facebook. The negative media attention that this attracted to the employer's reputation should be a lesson to employers to consider damaging consequences.

Employers should ensure that they have an up to date social media policy, and that they regularly make employees aware of their obligations under it. If an employee breaches a social media policy, then an employer should take the appropriate disciplinary action. If an employer ignores an incidence of misconduct, they can create the impression that such conduct is tolerated in their workplace.

At Bywaters Timms we can help employers identify the impact of social media on their business interests, and draft a social media policy best suited for their workplace and industry. A well drafted social media policy may afford an employer protection against some consequences of employee's online actions. We can also draft an internet and email use policy, harassment policy and all other workplace policies.

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