15. Social Networking in the Workplace Under Swiss and U.S. Law

Richard Frank, Cooley, Zurich
Ueli Sommer, Walder Wyss, Zurich

Social media have emerged as a dominant form of communication, fundamentally changing the nature and dynamics of social, business and political discourse locally and globally. Leading social media sites are among the most popular of all websites. Facebook and YouTube ranked second and third (behind Google) in usage when the Yearbook went to press, and Twitter and LinkedIn ranked not far behind at #9 and #15, respectively. Facebook boasts over 600 million users, and LinkedIn recently crossed the 100 million user threshold. More people now use social networking sites than e-mail.

Social media usage in the workplace has also increased dramatically, as to both work-related and personal content. Companies are increasingly using Facebook, Twitter and other social media to engage customers, and utilizing intranets and other internal media to enhance employee productivity. As a result, social media pose both familiar and unfamiliar risks for employers and employees, who must address these risks in the dual slipstreams of rapid technological change and relentlessly evolving usage patterns. Adding to this challenge, social media law is in its infancy. We address the most significant legal questions arising from social media usage in the workplace.

1. Can Employers Limit Employee Use of Social Networks?

Permissible employer limitations on employee use of social networks will depend largely on (a) whether such use is via employer-provided equipment or systems, or during working hours, and (b) the content of employee social media posts.

Under Swiss labor law, which looks at the employment relationship in a social context, employees have the right to address certain private issues during business hours (e.g., arrangement of medical appointments and other personal matters). Accordingly, Swiss case law provides that employees may make limited private calls during working hours, which employers must facilitate. Swiss case law has not yet addressed such employee rights in the context of social media. Yet, since social media can be viewed as a technological advance over telephone communications, it may be assumed that the rules in regard to the use of telephones also apply to social media, in particular as generations X and Y communicate to a larger extent by social media than by telephone. In addition, if no regulation or policy exists at a workplace it may be assumed that limited use of social media is allowed for the personal purposes described above.

In Switzerland and the U.S., employers may regulate employee use of company-issued equipment, such as desktop computers, laptops, mobile phones, and company operated systems. In Switzerland, employers may also prohibit use of social media in the workplace as long as employees are able to communicate on a limited basis by other means (e.g., a private mobile phone or separate workstation). In the U.S., employers may prohibit all use of social media by employees on company equipment, but actual employer practices vary widely.

It is similarly assumed that employers can prohibit employee use of social media during working hours (time on the job other than during lunch periods or breaks) for personal purposes using personally-owned equipment, although there is scant directly applicable law. Such prohibitions would advance legitimate employer interests in maximizing employee productivity.

Employers are well advised to implement written social networking policies that address the respective rights and obligations of employers and employees. Such policies should include, at a minimum, clear statements of what (if any) and when social media activity is permitted using company equipment and systems, as well as notice of the employer's rights to access or monitor such activity within the bounds of applicable law, as addressed below.

2. May Employers Monitor or Access Employee Social Media Activity on Company Equipment?

In Switzerland, the same rules for monitoring employee Internet and e-mail use applies to social media. Data protection laws require clear monitoring guidelines in a written policy, and the Working Act in addition prohibits continuous monitoring of employees, except in case of overriding safety or business interests. Consequently, monitoring may generally be allowed only on a random and anonymous basis, except in case of a clear suspicion of an employee's breach of the employer's policy.

No U.S. federal law specifically addresses employer monitoring or access to employee social media activity, although federal statutes such as the Wiretap Act and the Stored Communications Act might apply in certain circumstances. State laws vary on the extent to which such monitoring or access is prohibited or limited by employee privacy rights. Most state laws addressing employer monitoring of employee e-mail and the like require prior written notice or written consent. In some jurisdictions, employers are required to have a legitimate business purpose for the monitoring or access. In City of Ontario v. Quon, 130 S.Ct. 2619 (2010), the U.S. Supreme Court determined that a public employer's access and review of employee text messages sent from employer-issued pagers was legally permissible, because the search was conducted pursuant to a general written monitoring policy, and motivated by a legitimate work-related purpose. Prior to the enactment or development of state or federal U.S. laws specific to social media, it is reasonable to assume existing law regarding employer monitoring or access to other electronic communications (email, text messaging, Internet search history, etc.) by employees will be equally applicable to social media.

3. What Rights Do Employers and Employees Have Regarding the Content of Social Media Posts?

Perhaps the most contentious issues in emerging social media law concern the types of employee-posted content employers can prohibit and take disciplinary action to redress. Easiest to discuss is content violating legitimate employer

policies; more difficult, are issues arising from content critical of employers.

3.1 Content Violating Legitimate Employer Policies

Under both Swiss and U.S. law, employers can prohibit and take disciplinary action (including employment termination) to redress employee social media postings that breach company policies or proprietary information/confidentiality agreements barring unauthorized disclosure of company trade secrets or confidential information. Hence, if an employee posts trade secrets or confidential information of the employer and such postings are accessible to third parties, the employer will have the same remedies as if the employee breached such confidentiality obligations by other means.

As to breaches of other company policies using social media, Swiss and U.S. laws diverge somewhat. In case of the breach of internal policies (e.g., prohibiting pornography viewing, sexual harassment), available remedies under Swiss law will turn on whether the breaches occur during work time or are directed against other employees, or if the offending social media activity is conducted outside of work. In case of the latter, the employer may only remedy a substantial breach or if the reputation of the employer is adversely affected. If the breach occurs during work time or the posted content is directed against another employee, a breach can be remedied according to the applicable company policy.

At-will employment relationships in the U.S. give employers considerable latitude to terminate and otherwise discipline employees for violating a wide range of legitimate company policies – via social media activity or otherwise. Such policies include prohibitions against discrimination, harassment, workplace violence, and infringement of third-party intellectual property rights. Employer sanctions against employees for social media conduct in the U.S. also need to be carefully considered within two emerging but conflicting trends – increased statutory protection in some states for lawful off-duty conduct, and case law in some jurisdictions broadening the scope of conduct considered “work related,” in particular in sexual harassment law.

3.2 Content Expressing Criticism of the Employer, Management or Working Conditions

At present, scant specific law exists governing whether disciplinary action is permissible against employees for social media postings critical of their employers, management or working conditions.

The basic rule in Switzerland is that employees may make use of the freedom of speech in their private life. However, employees also have a duty of good faith toward their employer. Hence, they may criticize an employer in private, but not in public. Employees using social media tools can blur the line between professional life and private life, depending on both the number of “friends” that have access to a posted message and the category of the friends, e.g., whether they are subordinates or a superior of the social media user.

In case a Swiss employee breaches the duty of faith and damages the reputation of the employer, a warning is in most cases the appropriate remedy. Only in case of a repeated or substantial breach is a termination feasible, and in very substantial breaches a summary dismissal might be possible. Employer and employee rights in Switzerland with respect to social media content posted by employees do not depend on whether an employee is a union member. Thus, in case of any breaches of duty arising from social media postings, union workers can be treated in the same way as any other employee.

No cohesive set of principles has emerged under U.S. federal law or state law regarding disciplinary action against employees who post social media comments critical of an employer or related matters. Employers’ broad lattitude to discipline at-will employees is limited by lawful off-duty conduct statutes and whistleblower protections laws. A tension remains between such employee rights and employee obligations of loyalty to the employer, violations of which have supported termination decisions involving negative comments by employees about employers in more traditional media. Government employers likewise must be cautious in taking adverse employment actions against employees for social media posts on issues of public importance, which actions might infringe an employee’s free speech rights. Employers are on particularly shaky ground in disciplining employees for making disparaging comments about the employer on limited access social media sites, where the employer obtains “friend” status, a password or other access by surreptitious or other improper means.

In the context of union workers, the U.S. National Labor Relations Board (NLRB) has challenged employer disciplinary actions against employees taken in response to criticism of management – in one case on Facebook, in another in a Twitter tweet. The NLRB asserted the employers’ actions violated the workers’ federally protected right to engage in concerted, protected activity with co-workers to improve working conditions. Both disputes were settled earlier this year prior to adjudication of the NLRB’s claims.

4. Can Employers Bring Claims Against Employees Based on Employee Social Media Posts?

In addition to taking disciplinary action to redress improper employee social media posts, employers can also bring claims against employees in appropriate circumstances. Under Swiss law, if the content of the posting violates the employer’s legitimate interests, a court may order an employee to remove the infringing content. Employers may also obtain damages in case of an employee’s intentional or gross negligent act. In practice, this is possible in the event of breaches of an employee’s trade secrets or confidentiality obligations, but rarely to address alleged reputational damage.

U.S. law is similar to Swiss law on this question. Employers can bring actions for damages and injunctive relief when employee social network posts reveal confidential or trade secret information. Employers might have other valid claims such as breach of contract, breach of fiduciary duty, trade libel and defamation, based on the content and circumstances of the post(s) at issue. One open question is whether connections, contacts or posted updates on business-oriented social networking sites such as LinkedIn and Xing might violate post-employment non-competition and non-solicitation covenants, for example, where a worker communicates via these sites to customers or employees of a former employer.

5. Do Employers Risk Liability to Third Parties for Employee Postings?

The above discussion of permissible employer actions against employees for improper social media posts has particular importance given possible employer liability to third parties for such postings. A company has the greatest risk (in Switzerland and the U.S.) where an employee posts information in his/her capacity as an officer or authorized representative of the employer. Potential employer liability could also arise from an employee – at any level – positing proprietary, confidential or trade secret information of a third party for which the employer as a contractual duty of confidentiality. Similar liability might also arise from illegal postings or content reflecting other contractual breaches. In addition, some courts in U.S. jurisdictions have found companies liable for

employee posting of messages deemed to constitute sexual harassment, where the employer was aware of the postings and failed to take adequate action to cause their removal.

6. Can Employers Use Social Media Postings by Applicants or Employees in Making Hiring, Promotion and other Employment Decisions?

Presently, neither Swiss nor U.S. law provides statutory or case law limitations on employer use of public (i.e., not password protected) social media postings in making hiring, promotion, compensation or other employment-related decisions. However, Swiss employment law limits questions in the application process to those having relevance to the actual job. Hence, any questions in regard to financial situation (unless directly relevant to a position such as a cashier), illnesses, pregnancy, general health condition, etc. are in most cases not permissible. Swiss law also prohibits an employer from seeking information by research that the employer is not allowed to ask directly from a job applicant. Hence, research using social media networks is most likely not allowed, even with the approval of the employee. An exception applies in case of information clearly addressed to the public, such as profiles and postings on business networks such a LinkedIn and Xing.

In the U.S., employers using social media research in the recruiting context should be mindful that viewing information about an applicant's marital status, religion, disability, sexual orientation, genetic information or other protected class status, even unintentionally, could give rise to accusations from workers not hired, promoted, etc., under state and federal anti-discrimination laws. In addition, where employees give written consent to background checks under federal and/or state laws governing such checks, employers should assess whether social media research must be disclosed in the notice and consent process.

About the authors:

Richard Frank is Partner at Cooley, LLP in Zurich.

Ueli Sommer is Partner at Walder Wyss Ltd. in Zurich.