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The increasing importance of social media

Social media have an increasingly broad user base. In 2011 there were over 40 million users in Europe. This number is expected to increase to nearly 110 million during 2012.

Companies are increasingly keen to use social media for business purposes, in particular, as part of their communication, marketing and recruitment strategy.

However, the legal framework applying to social media is often complicated and unclear. Social media are subject to a broad range of laws and regulations, including market practices, intellectual property, privacy, data protection and employment law.

The purpose of this brochure is to provide some insight into the legal issues attached to the use of social media in a Belgian context.

What are social media?

Social media are online applications that enable their users to interact with each other. This includes creating and sharing content (text, images and video), as well as networking and bookmarking. As compared with traditional media which only deliver content; social media promote active user participation.

There is a great variety of social media ranging from social networks (e.g. Facebook, LinkedIn), private enterprise social networks (e.g. Yammer, Socialcast, Jive), content-sharing websites (e.g. Youtube, Flickr) to Wikis (e.g. Wikipedia), blogs (e.g. WordPress, Blogger) and micro-blogs (e.g. Twitter).
Social media and employment law

The growth of social media sites has significant ramifications for employers. It offers ample opportunities for you to search for prospective employees (e.g. both LinkedIn and Facebook can be used to advertise job vacancies) or to create communities with your staff. Wikis and blogs offer an effective tool for making announcements and exchanging information (replacing the traditional message boards).

Social media also present significant challenges if you want to use them to check potential employees' backgrounds, to monitor staff or to discipline employees who make inappropriate use of social media.

1. Recruitment

Can I use search engines and social media to find out information about prospective employees?

Yes, if you respect some basic rules.

Studies show that the majority of recruiters, when preparing for the first interview, carry out an online search to find out additional information about the applicant. LinkedIn and Facebook are the websites most often consulted.

But, employers may not ask job applicants about their private life, unless it is considered relevant for the nature of the function. A company may not make employment decisions based on criteria such as age, race, gender, sexual orientation, marital status, religion or philosophy of life, political beliefs, trade union membership, language, handicap, fortune and social origin.

Someone with a Facebook page may well post information that touches on these subjects. When checking job applicants, you must not let information on these protected criteria influence your hiring decisions.

Can I publish a job vacancy exclusively through social media?

The problem here is that not everyone uses or can access social media. So you may be making it difficult or impossible for some people to apply for the job you are advertising. This could amount to indirect discrimination based on the economic or social position of potential applicants.
2_Performance of the employment agreement

Can I prevent the use of social media in the workplace?

Yes, if social media are not a necessary working tool for your employees.

For almost all employees, social media are not considered a necessary working tool (unlike, for example, an internet browser). In 2010, 43% of Belgian employers blocked access to Facebook and 39% blocked access to Twitter.

Alternatively, you may opt for a softer approach and allow access within certain limits. When monitoring employees' online behaviour, you will need to take into account the strict regulations set out in Collective Bargaining Agreement n° 81 (CBA n° 81 defines the conditions under which an employer is authorised to monitor an employee's electronic online communication in the workplace).

Can I regulate the use of social media by employees?

You can and we recommend you to.

In general, you want to prevent your employees from using the company's name or logo without authorisation.

To ensure that employees use social media appropriately you can set guidelines on how employees are to use social media in relation to the company.

How can I prevent my confidential information from leaking onto social networking sites?

There is a significant risk that employees will disclose confidential information online. Sometimes they may not realise the risk: a sales representative may put the company's confidential list of customers onto his LinkedIn contact list. A careless post on Twitter about a business dinner may leak inside information about a potential deal.

Most companies have strict confidentiality clauses in their employment agreements. But do employees think about confidentiality when using their social networking accounts? Do they know what information the company considers to be confidential? And in this age of instant communication, do they pause to think before pressing the 'send' button?

It is recommended that you give clear guidelines to employees to make them aware of the potential dangers of posting information online, especially in a business context. That will allow you to manage the risks proactively.
3 Termination of employment

Can I dismiss an employee for serious cause for comments made on Facebook?

Yes, when the comments are sufficiently damaging.

Employees may use social networking to post degrading messages about their supervisors or the company's customers, or start criticising the company's business policies, or harassing or intimidating colleagues.

Companies have started dismissing employees for serious cause in these circumstances. In 2011, the labour court of Leuven confirmed a dismissal for serious cause of an employee who used his Facebook account to criticize his company's business policies. The labour court considered it a breach of the employee's loyalty duty towards his employer.

However, you should always consider whether the comments are sufficiently damaging before proceeding with any disciplinary action and to avoid a 'knee-jerk' reaction to any negative comments posted online.

Can I claim ownership of my employee's social media connections?

There has not yet been any case law on this issue in Belgium. But in the United States, a company is already suing a former employee regarding a twitter account. During his employment, the employee tweeted for the company and gained 17,000 followers. After he left, the employee changed the company account to a personal account, taking the entire 17,000 list of 'clients' with him.

To manage this risk, your social media policy should address ownership of social media content and connections. Employment agreements and confidentiality agreements can also put in place the protections your business needs.

Can I rely on evidence secured through social networking sites?

Yes, but you must proceed with caution.

Employees may sometimes reveal incriminating personal information through social media: someone on sick leave posts pictures on Facebook showing them partying or playing tennis. Or they post degrading messages about their employer's business on Facebook. Can you use this as evidence?

Does it make a difference if you receive this information first-hand, by being selected as a 'friend' on Facebook? Usually companies discover this kind of information second-hand from co-workers acting as 'whistleblowers'. Would
you breach the employee's privacy rights if you used this information? Do privacy settings make a difference here?

In 2011 the Belgian labour courts ruled for the first time on these issues and these cases offer some guidance. The key tip is to act swiftly but with caution: take screenshots or have a bailiff register the posts in an official transcript.
Other legal issues related to using social media for business purposes

1_Social media and advertising law

Can I freely advertise my products and services through social media?

Yes, when respecting the applicable rules.

Social media have the potential to reach a staggering number of people. This can make social media an extremely cost-efficient advertising channel.

Advertising via social media is subject to the restrictions of the Act on market practices and consumer protection of 6 April 2010 (the Act) which defines – in a very broad manner – advertising as “every communication by a company that is directly or indirectly aimed at promoting the sales of products, independently of the place or means of communication used”.

As a result, when communicating about products or services using social media, companies (like all users) must comply with the general advertising rules set out in the Act. These rules state, among other things, that the advertising must not be misleading and must not denigrate a competitor.

In addition, for certain products and/or sectors, advertising via social media will be subject to specific advertising regulations (e.g. financial products, pharmaceutical products, alcohol or tobacco).

Furthermore, some social media have developed their own advertising guidelines which impose a number of restrictions and obligations.

2_Social media and intellectual property law

Can I freely publish content via social media?

Yes, if respecting third parties' rights.

Any publication of content via social media must take into account the intellectual property rights held by third parties, for instance copyright or trademark rights. If content is protected by intellectual property rights, users may in principle only publish this content via social media with the prior authorisation of the content owner.

When publishing content online, users should take adequate precautions to avoid undermining their own rights (e.g. confidential know-how may lose its
confidential nature if it is published online). The same precautions should be taken with respect to any third-party know-how to which users might have access.

Do I retain the content rights to the material I post?

Generally, yes.

But pay attention to any relevant terms and conditions of the social media operator, since these might grant the social media operator certain content rights.

For example, both Facebook and Twitter's current standard terms state that by posting content online users automatically grant them a non-exclusive, sublicensable, royalty-free and a worldwide license to use the content in any way that they see fit.

Can I freely use the content obtained from social media?

No, you can't.

Social media content will often be protected by intellectual property rights, particularly trademarks and copyright. Consequently, the reproduction of the content obtained from social media can be prohibited unless it is allowed under the applicable terms of the social media application. Twitter for example, permits and encourages the broad re-use of content ('retweeting').

3_Social media and privacy / data protection law

Can I publish anything about anybody?

No, when publishing content online, you need to respect certain individual rights.

Individuals have the right to privacy. As a result, a company cannot publish information about an individual's private life without his or her consent. Related to this is the right of personal portrayal, which means that you need a person's prior approval if you wish to use their photograph.

Furthermore, any content which may be considered insulting, denigrating or defamatory, as well as discriminatory, must not be published.

Can I freely collect and use personal data available on social media?

No, personal data on social media are subject to the Belgian Data Protection Act of 8 December 1992.
Personal data may be processed only if such processing complies with one of the exhaustively listed legitimacy grounds in the Belgian Data Protection Act, which include the prior consent of the data subject (i.e. the individual to whom the personal data relates). The conditions are even stricter if the personal data relates to sensitive data such as racial origin, political opinions or religious beliefs.

Furthermore, companies that wish to process personal data must, prior to any such processing, inform the data subjects about the collection and use of their personal data, as well as notify the Privacy Commission (although some limited exceptions exist to this notification).

Finally, while personal data can, in principle, be freely transferred within the European Economic Area, transfer of this data outside of the European Economic Area (e.g. to another group company) is subject to specific formalities.
How can we help?

When used in a controlled manner, social media allow for quick, targeted and large-scale communication and information-sharing both within the company (internal social media) and outside the company (external social media).

However, without the appropriate controls, the use of social media (whether externally or internally) may seriously damage the company's image due to the durability of content published online and the size of the audience, and may even lead to the company being held civilly or criminally liable.

You should consider developing and rolling out a social media policy to deal with any issues that may arise. You should not hesitate to take appropriate action against any staff who breach the policy or bring your business into disrepute.

Your policy should draw some bright lines between what is acceptable and unacceptable internet use, how this will be monitored, and how disciplinary rules and sanctions will be applied.

You may not need to start from scratch. If you already have a policy on the use of email and the internet, you can expand it to include social media guidelines. You will need to inform and consult employee representatives formally before implementing any new policy.

Social media are here to stay: companies and employees simply need to recognise and manage the risks. If they do, then Facebook can be good for business.
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