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The Big Think

*Social media: leading the way
through the shades of grey*

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The Big Think

is a new publication from Allen & Overy's global Employment practice. Its mission is to think big, think forward and think without boundaries. Our first edition thinks about how business navigates through the grey area of the personal and professional divide of social media.

The Big Think is written for HR practitioners, in-house counsel, and anyone with an interest in the topic being considered.

Social media

Leading the way through the shades of grey

Social media knows no bounds. It has marched rapidly into the workplace, obscuring the lines between the private and the professional. With the law struggling to keep pace, employers need clear and well-crafted policies to secure the benefits of the world's fastest growing media technology.

Young chatters, bloggers and file-sharers

It's become a cliché to talk about the extraordinary pace of technological change in the world today. But every now and then a statistic leaps out at you to reveal the truth behind the hype.

There was just such a statistic in McKinsey's recent report, "Turning buzz into gold – how pioneers create value from social media", and it measured the time it hastaken different media technologies to reach an audience of 50 million.

Radio took 38 years. TV took 13 years, the iPod, four, and the internet, three. Facebook did it in just one year, and Twitter in only nine months. Conclusive proof that social networking is the fastest growing media technology the world has ever known – and, of course, it just keeps growing.

At first that wasn't much of a problem for employers. Social networks were once the preserve of mostly young chatters, bloggers and file-sharers looking for increasingly sophisticated ways to connect with friends, both real and virtual. It was a largely private activity, albeit one often carried out very publicly.

"The reality is that the law is way too ponderous for this digital age."

All change

But that's all changed. Now companies are getting in on the act, realising that social media can boost both their businesses and their brands, beyond just offering new ways to communicate and to market products and services.

For the real corporate pioneers, social media opens up exciting new ways to bolster the bottom line. They may, for instance, be using open sourcing to create new market-sensitive products; gaining access to up-to-the-minute customer gripes, likes and recommendations; improving internal collaboration between colleagues dotted across the world; or finding a new way to track down and recruit exciting talent. The possibilities are huge.

Opportunities, risks and ambiguities

But with these opportunities come some hefty risks too. As employers have encouraged more of their staff to use social media in their working lives, the lines between the private and the professional have fast become obscured.

The gap between work and home life quickly becomes ambiguous. We describe this gap as "the fifty shades of grey" in our 18 December 2012 thought piece on social media because the grey areas keep growing at the same pace as the new technologies and services.

What rights do employees have to express an opinion about their workplace and work colleagues on their Facebook and Twitter pages? What sanctions can employers impose if those comments are abusive to a colleague, or deemed to be damaging to the firm's reputation?

Many employers are now encouraging staff to use their own smartphones and tablet computers at work – a sensible move, given the huge investment needed just to keep pace with new technologies. Many employees are happy to oblige when asked to "bring your own device" (BYOD) to work. But who owns the content on these devices and how can employers make sure corporate content is being used appropriately? What happens to that content when an employee quits and goes to a new job, or if confidential information gets tampered with, compromised or leaked?

“The courts have no choice but to use existing laws that are not fit for purpose.”

And then there are other groundbreaking issues like those thrown up in the celebrated Phonedog dispute in the U.S. – where an employee left the company and took a huge professional Twitter following with him to his new job, only to be sued by Phonedog which claimed those followers were its property. Who owns a work-related Twitter feed? What’s the economic value of a Twitter follower? How can intellectual property and copyright laws or restrictive covenants and post-termination restraints be used to solve such issues?

The limits of the law

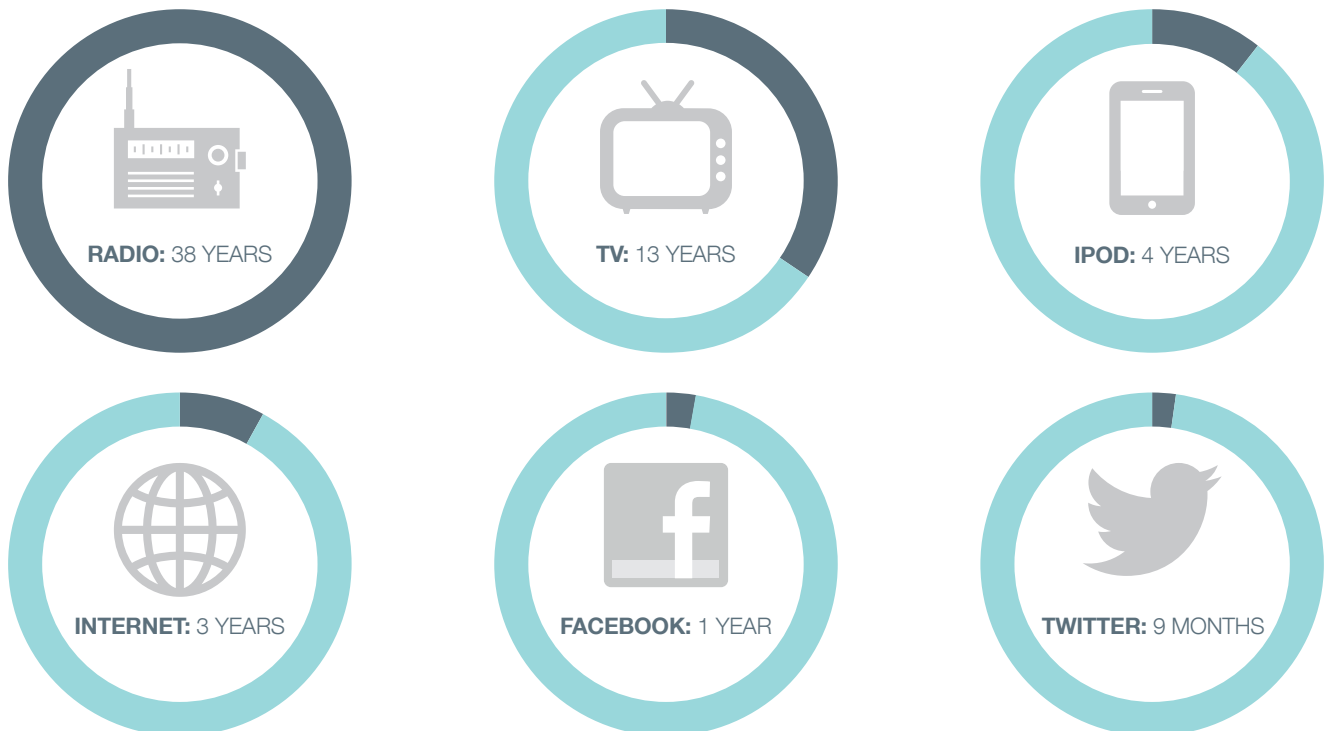
The truth is, in every jurisdiction the law is struggling to keep pace with technological change. And employers have to continue to rely on a range of privacy, data protection, anti-discrimination and Intellectual Property laws that are,

frankly, inadequate to regulate the new world of social media. Don’t overestimate the level of legal protection you have in this new world.

As Karen Seward, partner in Allen & Overy’s Employment practice in London, puts it: “Companies think the law offers them clear protections, when the reality is that the law is way too ponderous for this digital age. If employers want adequate protection, DIY is the only way to go – they need to provide security for themselves as the only way to plug the gaps in the existing law.”

Sheila Fahy, PSL counsel in the London practice, agrees: “The courts have no choice but to use existing laws that are not fit for purpose. What we have is a huge grey area where the law can’t quite reach and where employers are forced to regulate for themselves in this space.”

TIME TAKEN TO REACH AN AUDIENCE OF 50 MILLION



It's a dilemma repeated across the world. And it's one made all the more complex by the fact that, while the social media tends to operate across national boundaries, the law is, of course, very much contained within them, with each jurisdiction insistent in applying its own rules in its own way.

There are some common threads, but these don't help. No one jurisdiction has yet really got to grips with trying to regulate the social media space in its own right. The reliance on existing laws is a pretty universal approach; and there is a general lack of relevant statute and case law.

Surprises and contradictions

In addition, no one set of existing laws appears to be having more success than others in dealing with the shades of grey. That means that, wherever you go, court rulings and interpretations can be surprising, even contradictory.

Sabine Smith-Vidal, a partner in our Paris office, cites a number of examples from the French courts where judges have made some distinctions that turn on a pinhead in drawing a line between the public and the private.

An employee posting damaging comments about an employer to friends, and friends of friends, on Facebook, may be ruled to be doing this in a public arena and be open to sanction if the comments are deemed to constitute an abuse of the employee's freedom of expression.

But if the posting is limited to a small and defined group of friends, the employer would have no control over its content as this would be covered by the individual's rights of "private correspondence."

Some cases are not directly related to social media, but have obvious implications for it in the BYOD era, Sabine points out.

In one 2012 case, an employee who secretly recorded conversations with colleagues on a personal device was dismissed for gross misconduct. However, the court ruled that the employer had no right to listen to the recording on a personal device without inviting the employee to be present.



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“The courts are finding it very difficult to decide a consistent approach.”

In another case earlier this year, the court ruled that an employee who downloaded company information onto a personal memory stick that was connected to a work computer had no such right – the company was free to access all information on the stick not specifically marked as personal without the employee being present. However, had the personal memory stick not been connected to the professional computer, the court may have taken a different view.

“What’s interesting is that the courts are finding it very difficult to decide a consistent approach. There are few hard and fast rules; it’s often case-by-case which makes things complicated for clients” says Sabine.

Tobias Neufeld, a partner in our Düsseldorf office, sees the same trends, but points out there are stricter data protection and privacy controls operating in Germany and the Benelux countries than elsewhere and these have provided a degree of extra clarity, although at the expense of flexibility. A recent national debate about the use of workplace CCTV cameras in Germany became very heated, he says. They have now been largely banned in the draft legislation under debate.

Monitoring employees’ social network pages or making recruitment checks on Facebook may not be in line with data protection laws in Germany and will be handled in an even more restrictive way under the new law.

But distinctions between jurisdictions can also be unclear. Since the introduction of the Human Rights Act, for instance, the UK courts have been taking a noticeably more subtle line on freedom of expression and privacy in work-related cases.

We saw this in the UK when an employee posted his opinion on Facebook that gay marriage was “an equality too far”. His employer believed this contravened its policy of being strictly apolitical and non-religious and its explicit codes on discrimination and equal opportunity. The court disagreed and defended the individual’s right to freedom of expression. While acknowledging his comments could cause widespread offence, the comments were not unlawful.

Ignorance of the law

David Cummings, a senior associate in our Sydney office, points to a recent case involving a major Australian transport and logistics company which was ordered to reinstate an employee with over 20 years of service. He had been dismissed for serious misconduct in posting, and allowing other “friends” to post, offensive, derogatory and discriminatory comments about his line managers on his Facebook page.

In ordering the reinstatement of the employee, the Commissioner of the Fair Work Commission (the Australian Federal employment tribunal) accepted that the employee was new to social networking, not as tech-savvy as generation-Y users might be and didn’t really understand Facebook’s privacy settings or the ability to delete the posts of others. Factors such as these, together with the employee’s long period of service and (crucially) the absence of a company social media policy, led to the employee’s reinstatement – despite what was generally considered to be obvious misconduct.

The decision to reinstate the employee was upheld by the Full Bench of the Fair Work Commission on appeal, although the Full Bench noted that any weight given to an employee’s lack of understanding of social media networks is likely to be significantly less in the future as the use of social media continues to grow throughout the community. Other Australian cases have taken a tougher line on employees disciplined for misconduct within the online sphere, highlighting that, as in other jurisdictions, each case will turn on its own circumstances.

As Karen Seward puts it: “Paradoxically, ignorance of the law can be a defence in this area. It’s often the case that a judge accepts it to be reasonable for an employee to say they didn’t know they were doing anything wrong.”

More change to come

With no sign of the pace of technological change slowing, this is an area of the law that will undoubtedly continue to develop quickly as more and more employers, and employees, test the new frontiers.

The BBC reported in February that 635 people had faced criminal prosecution in England and Wales in connection with comments on Facebook and Twitter in the last year. Although most of those were not related to the workplace, it is still a sign that this is an area that is growing more litigious – and that must have implications for the world of work.

“Social media is an under-developed area of the law” says Shira Selengut, an associate in our New York office. “But cases are beginning to blossom and multiply. We will see big changes in the next five years.”

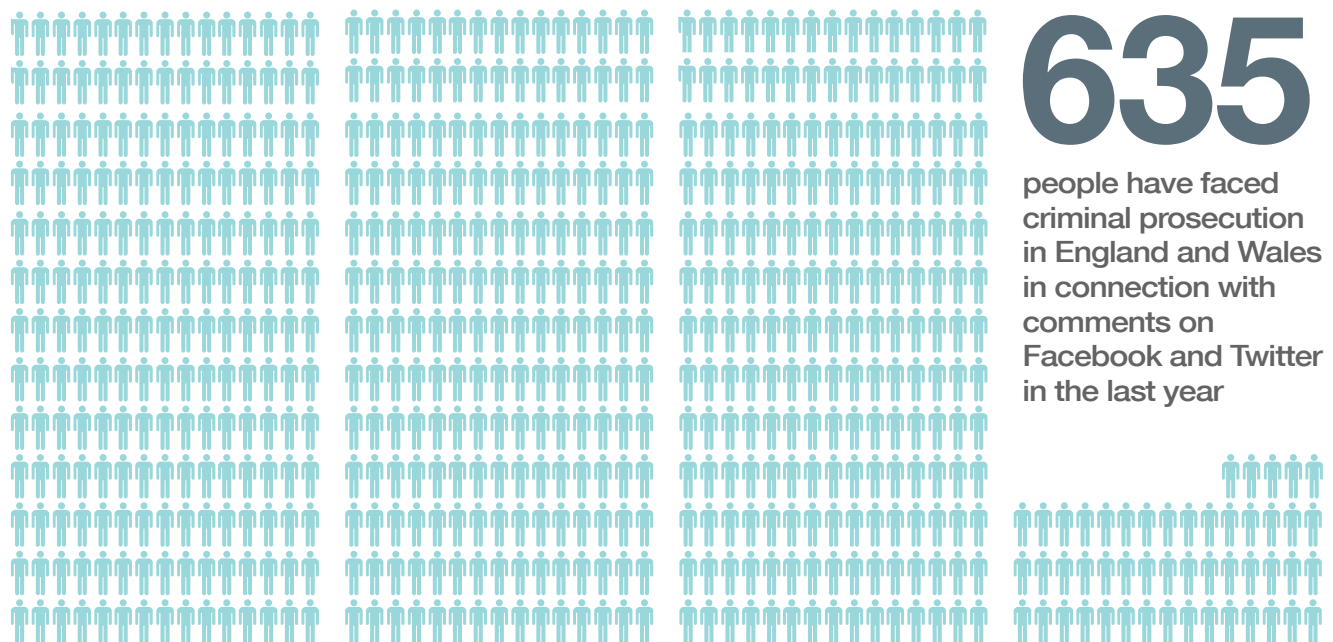
We’re seeing employment tribunals take a bigger interest in workers’ rights. The U.S. National Labor Relations Board, for instance, has recently issued some interesting guidance on social media policies, often concluding that the restrictions imposed by employers are “overbroad”. Mostly this relates to the legitimate rights of individuals to discuss

their terms and conditions with colleagues on social media pages.

In Australia’s highly unionised mining and construction industries, social media is being deployed as a front-line weapon in collective bargaining disputes, by unions and employers alike. You can scarcely imagine a more febrile environment for potentially negative public posting than a strike.

Asia is likely to be an area of huge change too, notes David Cummings. China is seeing extraordinary levels of social media take-up by individuals in the big cities, with research demonstrating that word of mouth through social media is having a greater impact on consumer trends than direct marketing from companies.

It is only a matter of time before social media issues arise in the context of the employment relationship, yet Chinese companies have barely begun to think about the legal and employment implications of this. Many are only now turning their minds to the need to deal with social media among their workforce, within a legal framework where it is already very difficult to dismiss employees for misconduct.





Speak with a megaphone

So if the law is unpredictable in this area, what should employers do to get the most out of a technology that has such huge potential, while protecting their interests against damage and abuse?

Shira Selengut says U.S. law is no further forward in providing consistency in this area. Federal laws are few and far between, and state laws tend to be reactive, much as is the case in other parts of the world. “The only way forward is for employers to have a very clear and succinct policy on social media so employees know precisely where they stand.”

But that’s not always about being prescriptive. Education plays an important part in this too.

Karen Seward says that companies need to “speak with a megaphone” in their social media policies – there is an overwhelming need to be crystal clear. Relying on existing internet and email policies will not suffice. Even social media policies drawn up two to three years ago are way past their sell by date now.

But it’s more a matter of risk management than outright risk control, Sheila Fahy adds. “Don’t phrase your policy in terms of prohibitions, but tell employees clearly what you think it’s appropriate for them to say on Facebook or Twitter. It’s an educative process. You have to instruct employees about the voice they use in this space, so that they use it appropriately and responsibly. Treat them as the adults they are.”

Tobias Neufeld feels many companies are falling down here simply because they haven’t worked out how to really turn social media to their advantage.

“When I talk to companies, the first thing I always ask is: what is your social media strategy? If you don’t have one, there’s no way I can give you valuable legal advice on how to set up a workable policy. You’ll be surprised how many executives ‘um and ah’ when I ask that question.”

From a legal perspective, the task then is to draw up a policy that supports the social media strategy and, in the absence of solid statute, to make sure as much of it is as enforceable as possible.

Reasons to be positive

For companies just starting this journey, it can all look a bit daunting.

But there are good reasons for companies to be positive about this trend. Social media, as we have said, offers some extraordinary benefits and employers need to be on the front foot in their approach to it.

In some senses it might even become a matter of competitive advantage, particularly in the race to attract new talent.

This is evident from a range of recruitment and workplace surveys conducted throughout Australia, where arguably the world's most advanced high-speed broadband network is now being built.

David Cummings explains: "The recruitment research coming out of Australia consistently concludes that for generation-Y people these days their decision to join a company is in part about the company's approach to social media in the workplace. These guys live and breathe social media and in some sectors like law and financial services, where business development and professional networking is key, networks like LinkedIn and Facebook are key tools in making new contacts and advancing their careers."

This calls for comprehensive yet facilitative social media policies that also protect the employer's interests, rather than overly restrictive and draconian policies based on the fear of social media in the workplace, he says. "It's just what is increasingly needed by employers in the war for talent in Australia."

For the many clients we advise on this issue across the world, there's a realisation that the course is set and that they need to embrace this change in a clear and forward-looking way. That looks like the sensible way to proceed – a social media strategy, backed by a clear policy which carries employees with the company and its long-term goals.

As Karen Seward puts it: "Employers realise they are not going to turn back the tide. But if they are going to extend their definition of the workplace into cyberspace to gain real benefits from the new technology, they are going to have to do it through unambiguous and carefully crafted social media policies and keep on top of updating them."



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