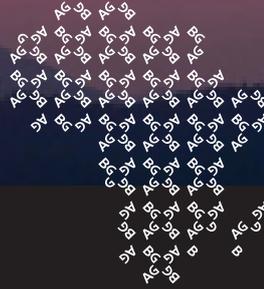


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# Firms need social media policy for staff

by Rosalind Davey, Featured in Business Day BD Live, March 30 2015

AN INCREASING number of people are engaging on social media platforms and they are also used by companies to promote their businesses. People are connected and are engaging with others around the world in a way that has never been possible before.

However, the inappropriate use or abuse of social media has also led to several legal battles, in SA and around the world. There have been many arrests for cybercrimes and an increase in the number of employees dismissed for social media misconduct.

The most popular social media platforms for business in SA are Twitter, followed by Facebook and YouTube. Their use is fraught with possible pitfalls and hidden dangers, especially because the laws regulating acceptable behaviour on them are underdeveloped.

People access their platforms of choice on their smartphones at all hours of the day or night, and often without a thought for the consequences of what they post. This has resulted in many public relations debacles, significant brand damage and costly litigation.

While there are no specific laws in SA regulating social media, this does not mean that its use is unregulated. As with any social interaction, the laws of general application apply. All users should be mindful that what they post amounts to written publication that can make a popular but careless and potentially damaging comment impossible to recall.

Employers may face brand damage and possible loss of business, and be liable for content or comments posted on its business accounts. They may also be vicariously liable for posts by their employees on their personal social media pages. To address the downsides of social media use and protect their

business interests, employers should implement and enforce a social media policy that aligns with their social media strategies.

IN THE policy, employers should distinguish between employees' private social media use and use for business purposes. Clear parameters should be set on what is considered acceptable conduct.

The consequences for breaches of the policy should be highlighted to encourage compliance. The policy should also set parameters for time spent by employees on personal social media during working hours. When addressing personal use in the social media policy, a distinction should be made between private use outside working hours that does not affect the employer's reputation or the employment relationship, and private use, either during or after work, that has a negative effect on these or opens the employer to claims for vicarious liability.

Should an employer take disciplinary action against an employee for unsavoury conduct during private use of social media, the action or dismissal may be substantively unfair because misconduct committed outside the workplace only justifies disciplinary action if it affects the employer, the employment relationship or employee relations.

However, employers will be justified in disciplining, and even dismissing, employees who during or after normal working hours, make derogatory, defamatory or scathing remarks about employers on social media or use it to harass, victimise or discriminate against fellow employees.

As with any dismissal, one for social media misconduct must be substantively and procedurally fair.

But negative or potentially damaging posts made on social media by an employee about an employer will not always justify disciplinary action. For example, comments that amount to protected disclosures or conduct in furtherance or support of a protected strike are protected under South African law and any ensuing disciplinary action will, in all likelihood, be unfair.

Employees responsible for controlling their employers' social media accounts may be held to a higher standard than those who use social media privately. As the business accounts are generally branded, employers are entitled to rigorously monitor such accounts as any careless, derogatory, defamatory or embarrassing remarks will reflect directly on the employer and may result in brand damage and litigation.

IN DEVELOPING the policy, consideration should be given to protecting employees from cyber-bullying and cyber harassment. In terms of the Employment Equity Act, employers will be liable for acts of unfair discrimination (which includes harassment) committed by its employees, unless it can show that reasonable steps were taken to prevent contraventions of the act.

The policy should also clearly identify ownership of the social media sites used for business purposes. Employees have left companies with passwords for its sites and "locked" their former employers out by changing them.

Employees active on LinkedIn may make connections with key clients and customers. When they leave, possibly to work for a competitor, they will have client contact information and may use it to set up business in competition with their former employers. Employers have a remedy, but the damage may be costly and time-consuming to reverse.

Employers should be mindful of limiting their employees' privacy rights only to the extent permitted in law and to protect the business. Before accessing employees' social media accounts, employers should obtain written consent which must be given freely, voluntarily and without duress — or the employer could breach the Regulation of Interception of Communications and Provision of Communication-related Information Act.