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Workplace 4.0: Part 2 – Social Media

Labor regulatory framework for the use of social media: what employees and employers should consider when using social media accounts.

There has been a (drastic) increase in the importance of social media platforms: both in private and in business areas. A differentiation between private and professional use is not always clear and legally difficult. Companies must know the legal framework.

September 2017, Dr. Jan Tibor Lelley

According to a study by the Federal Association of the Digital Economy, 47% of the surveyed companies already had a social media profile in 2014. Companies are expanding their marketing and running customer advertisement and acquisition by creating their own profile on Facebook or in professional networks such as Xing and LinkedIn,. In addition to the homepage, such company profiles represent a central contact point for applicants and interested parties. Especially in the area of marketing, it is advantageous for the employer to commission employees with the representation of the company. They are, for example, entrusted with the maintenance of the company profile with contributions and posts or with the contact with potential applicants in professional networks. Within the scope of the study, one-fourth of the company's own employees or entire departments were used for the topic of social media.

The use of social media for employees is thus not only of a private nature, but also to pursue professional goals. Especially in professional networks, the border between private and professional use blurs. This happens precisely when employees use their private profiles, for example, for contact management to (potential) customers or applicants.

The increased use of social media raises ongoing labor law issues. Discussions are:

- Who owns social media accounts?

What are the consequences when employees place negative remarks on social media platforms? ?
Are trade and business secrets threatened by social media?

Careless handling of social media can have serious consequences for the employer and for the employee.

Mine or yours? The dispute over social media contacts

Especially in professional networks employees interact with their employer's customers, applicants or potential business partners. When the employment relationship terminates, the employer in particular has an economic interest in obtaining the contacts collected by the employee. If an employee leaves the company, the question of the legal assignment of data records, such as contacts or followers of the social media account arises. According to the prevailing opinion, the employer may require the employee to disclose all the contacts the employee has obtained during the employment relationship. This also applies to acquired business contacts. It is irrelevant whether information has been collected in form of business cards, customer files or purely on virtual interaction. There is also a handover obligation of social media contacts.

In case of purely **professional accounts**, the question of whether the employee has acquired the contacts as part of his or her work is unproblematic. A purely professional usage is considered if the account is functionally or company specific by name. This is regularly the case with company profiles. In case leaving the company, the employee is obliged to surrender the account including the access data and all the stored information. The more difficult question is the handling of **mixed accounts**. Particularly in professional networks, the previously used private accounts are reclassified for the duration of the employment relationship for business purposes. In order to be able to classify the business use, the account can be defined according to the outer appearance. For this purpose a number of criteria are applicable, for example, whether the employer has paid the cost of a premium account or under which name the account is managed. Due to many possibilities, a case-by-case assessment is a prerequisite.

If the employee is obliged to relinquish the access data after leaving the company, he is entitled to delete the personal data of a private nature.

When the contact between the employee and the business partner takes place in connection with professional activity, those contacts can also represent business secrets. If the employee leaves the company, the employer may issue an injunctive against the employee. Then the employee must refrain from using the contact data and delete the contacts.

But if a company actually wants to enforce its claim to surrender or omission, this can be difficult. Experience shows that there are problems of presentation and proof. The employer must demonstrate the positive evidence that the employee has gained business-relevant contacts during his / her period of employment. This is difficult in practice. It is then necessary to overcome another obstacle within the scope of data protection law. This is because the employer does not have any right to view private communications and private contacts of the employee in mixed accounts. The

employee has the right to delete such private contacts obtained by him when publishing the data. Companies thus do not have any final control over whether they receive all business data from the employee or not.

I can say that, can't I? Freedom of expression & social media

The fact that employees in social media have expressed negative opinions about their employer or have written discriminatory or unlawful contributions has been a frequent concern for labor courts in the past several years. Increasingly the question is when contributions in social networks fall into the worker's freedom of opinion or justify a termination.

Starting point is that almost all contributions in social media are expressions of opinion. They can thus fall under the fundamental right of freedom of expression. However, freedom of expression is limited by the general laws. In the opinion of the Federal Labor Court, this also includes the basic rules on the employment relationship and thus the fiduciary and loyalty obligations of the employee. If the employee expresses negative opinions about the employer and if these are based on untrue facts, the Federal Labor Court regularly rules that gross insults towards the employer, his representative or colleagues constitute as a failure to comply with the required consideration duties. And this in principle justifies an extraordinary termination.

Furthermore, private statements are possibly made, which are defamatory to the company's business. If an employee, from whose profile the employer can be determined, makes racist and inhuman statements, this can be seen to damage the employer's reputation in the public eye. Derogatory and humiliating comments also do not fall under the right of freedom of expression and may lead to an extraordinary termination. However, in most cases it is not immediately clear whether a certain statement constitutes a breach of the contractual obligations. Here, the courts examine the individual statements case-for-case, and go to some effort to do so.

Business secrets & social media – You got that wrong?

A further question arises, whether employees are obliged to protect trade and business secrets in their social media activities?

Of course, in social media no company secrets may be disclosed. The duty of confidentiality and secrecy covers all events and facts which are known to the employee in connection with his activities and whose secrecy is in the interests of the company. Secrecy is regarded as a work-related secondary obligation, but can also justify an extraordinary termination. There is only no such duty of secrecy if the fact is obvious and can be ascertained readily.

Master the challenge – What can companies do?

Prevention is better than a cure: for the protection of employees and the company companies should determine binding rules for the use of social media.

In order to prevent negative and potentially damaging statements, one must educate employees about the risks and consequences of rash actions in social media. In addition to trainings, the employer can issue directives in accordance to his instruction right. The instruction right allows the company to influence the employment relationship unilaterally. Furthermore, a Social Media Guideline can be used as a supplement to the employment contract.

In the Guideline, the existing work-related or statutory principal and subsidiary obligations are clarified, specified and detailed without extending the duties of the employee. We distinguish whether activities in social networks are motivated professionally or privately. Within the framework of professional use, we are able to provide the employee with a list of the content which should be published in the name of the company. In case of exclusively private activities, the employer's regulatory competence is basically excluded. However, attention should be drawn to the contractual obligations (consideration!) and the legitimate interests of the employer.

If a works council exists in the company, the regulations of a Social Media Guideline must be examined for possible co-determination rights of the works council. We recommend to implement the Social Media Guideline in form of a works agreement. In addition to compliance with possible co-determination rights, the employee's workplace agreement is better accepted than a unilateral directive. The old rule applies: good shepherds lead gently.

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