Handling social media as a private client employer

Michal Chudy | 11 January 2016

Following on from Katie Lancaster's article, regarding confidentiality issues when employing staff in the home, Michal Chudy sets out some key considerations in relation to the specific issue of restricting social media use.

1. Document the employee's obligations

If an employer wishes to take disciplinary action against an employee on the grounds of inappropriate social media use, the justification will be strengthened if they can point to clearly worded written obligations with which the employee was expected to comply.

Wherever practicable – and certainly where employees are expected to use social media to promote their employer's business interests – we would recommend that a specific social media policy is put in place. A standalone policy would allow you to present an unambiguous position on all of the relevant issues, and would highlight – both to employees and any court/tribunal, should matters reach that stage – the importance placed by you on the use of social media. It would also remind employees of the often-overlooked fact that social media activity in relation to their work is not necessarily private, and that online conduct can amount to misconduct (sometimes, gross misconduct); an employee who has been made aware of the potential risks of using social media cannot later plead ignorance.

A policy will not be appropriate in all cases, but at the very least we would recommend that a paragraph on social media use is included in the employee's contract.

Alternatively, if you require your employees to sign a specific non-disclosure/confidentiality agreement, provisions on the use of social media would be appropriate in such an agreement.

2. The devil is in the detail

If an employee's employment is terminated for breach of social media restrictions, the worst case scenario would involve the facts being scrutinised by a court/tribunal. For disciplinary action to be justified, clarity of the policy or contractual obligations that have been breached would be key.

For example, if there is a prohibition on employees from using social media to disclose or misuse confidential or proprietary information, the employees need to understand exactly what confidential or proprietary information is. This could be information about not only your business interests but also your personal activities and/or those of your family, friends, and acquaintances. Do not shy away from details! For example, you may specify that employees should not photograph (or post photographs of) you, your family, your residence(s) or personal possessions

(cars/artwork). Some employers do not want any information about their whereabouts being given for security as well as privacy reasons (for example if the family is going on holiday). This is all perfectly reasonable, but must be explained to the employee.

3. Remember the social context

Remember that attitudes to social media can vary enormously. Indeed, we often see cases where the key decision makers in organisations know the least about social media. It is possible that new recruits may not remember a time before it was possible to communicate one's every thought to the worldwide web, or fully understand why privacy may matter!

4. All in moderation

When imposing obligations in relation to social media (whether formally documented, or not), we would caution against imposing unnecessary or impractical restrictions. In an age where the use of social media is pervasive, disproportionate restrictions can undermine morale and invite non-compliance, without any real benefit to you as an employer.

5. When taking action, take caution

Before taking any disciplinary action against an employee for social media misdemeanours, think carefully about why you are doing so and the actual damage (if any) the employee's actions have caused. There may be a serious breach, security may have been compromised, or trust and confidence broken. Recent case law suggests that dismissing employees for "bringing an organisation into disrepute" is a particular favourite for employers. However, in such circumstances, a tribunal will want evidence that the employer has assessed the level of risk and that the employee has or reasonably could be expected to have brought the employer into disrepute.

A recent case (involving a journalist who is suing his former employer for dismissing him after pornographic photos appeared of him online) has highlighted in particular the need to ensure that before disciplinary action is taken a reasonable investigation is carried out; that any eventual disciplinary decision is based on the evidence before the employer; and that any evidence that the employee offers in mitigation of their conduct (eg that an offending post has been misconstrued) is properly considered.

If you require further information on anything covered in this briefing please contact Michal Chudy (michal.chudy@farrer.co.uk; 020 3375 7498) or your usual contact at the firm on 020 3375 7000. Further information can also be found on the Private Wealth page on our website.