



Internet and e-mail Policies

29 days per year per employee lost due to use of internet/social media for personal use
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Advantages to be gained from increased communication through email, intranet and social media are at risk of being lost if companies have not up-dated their internet and email policies to include social media use. A recent survey worldwide showed that only 20% of all employers have a social media use policy.

Most employers have an internet and email policy in place to monitor staff use and to ensure there is no misuse of company systems, inappropriate behaviour or illegal downloading. However, employees are regularly communicating on non-work matters by instant messaging, twitter feeds etc. They are commenting on their employers on facebook, bebo and other social media sites. Policies need to be reviewed to keep up with changes in technology and in culture. Employers should ensure that they develop a social media policy, clearly setting out what is and is not acceptable.

Policies should be fair, proportionate and transparent

If an employer is going to monitor employees' computer use, it must ensure that it does so in a fair and objective manner and in a way that is proportionate to the risks. Employers have to take into account the rights of employees to privacy under the Irish Constitution and the European Convention on Human Rights and also ensure that they comply with the Data Protection Acts 1988-2003 in processing personal information. Monitoring activity should be transparent and should not be introduced covertly. Employees should be made aware at the commencement of their employment that any communications or internet access on company equipment, including mobile phones, may be monitored. This includes private email accounts if they are being accessed from company equipment. Employees should not have an expectation of privacy when using equipment provided by an employer and this should be highlighted to them.

The ease with which information is passed by way of email and social media may also lead to an increased likelihood of other company policies being violated. For example, a simple comment made in an email that is forwarded, or a photo of a colleague, may ultimately lead to an allegation of bullying and harassment for which the employer may face a claim.

The key to mitigating your loss is to have relevant policies and procedures in place to deal with such issues. These policies should state explicitly that social media or internet use may not be used to violate other company policies, including bullying and harassment policies and non discrimination policies.

Action taken outside of normal working hours

The difficulties faced by employers effecting disciplinary measures against an employee who carried out the disputed action outside of work hours is highlighted in the decision of the Employment Appeals Tribunal in *Emma Kiernan v A Wear Limited*. The employer instituted disciplinary proceedings against an employee on the basis of derogatory comments she posted about her manager on bebo. The EAT accepted that the employer's disciplinary procedures were fair and proper, but held that the sanction of dismissal was disproportionate to the offence and awarded the employee €4,000. The EAT held that the employee's comments "deserved strong censure" but they did not constitute gross misconduct in the circumstances. Had the company identified such action as gross misconduct in its policies, then it could have successfully defended this claim.

The issue of using social media responsibly also arose in the UK recently where an employee faced a criminal prosecution and was dismissed following a post on twitter. The employee had decided to go on holiday to Northern Ireland. When his local airport was closed due to the snow, he tweeted to his 600 followers that he was going to blow "the airport sky high!!". The court heard that the tweet was discovered when an airport manager, who was not a twitter member, searched for Robin Hood Airport on the twitter site. At the criminal hearing the Court was informed that he had also lost his job as a trainee accountant as a result of the matter

Impact of Social Media on IP Rights and Non-Compete Clauses

People do not think of use of social media in the same context as employers' intellectual property rights and non-compete clauses. However, it is becoming relevant where a designated employee is responsible for writing the company blog, managing the facebook page or twitter account. What happens when this employee leaves - does the employer have the required password and login details? who owns the profile? who owns the content? and most importantly who owns the followers?

Employers are beginning to require relevant employees sign social media non-compete agreements, which provide that the profile, content and followers of a blog or other communication tool belong to the employer. These agreements often bear closer resemblance to non-solicitation agreements rather than traditional non-compete clauses. Whilst ultimately these may be difficult to enforce they are useful in defining the intent of the parties if an employer is forced to litigate to protect its brand or marketing position.

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