PCS | Littler

Dear Readers,

Here we are with our latest edition of *HR Perspectives* where we look at employee activity on the Internet from different angles.

GoWork, LinkedIn, Facebook...

The ever-increasing use of social networking sites brings about the recurring question of whether or not employee online activity can be subject to any limitations. Can an employer limit freedom of speech by imposing the duty to take responsibility for the employer's good name?

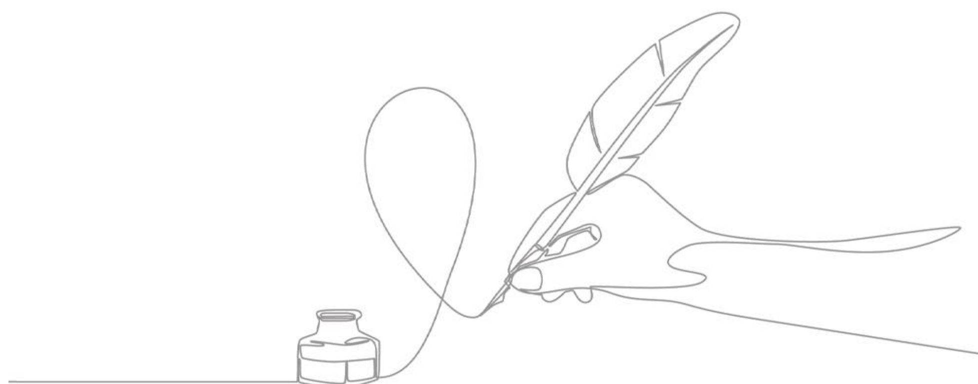
We reflect, among other things, on what are employers' options to make their employees accountable for their actions. Also, what legal steps they can take against employees whose online activity infringes on the interests of the employer. We put forward arguments in favour of introducing an internal social media policy. We believe that every employer should have such a policy and we explain why.

We also devote some time to a Q&A session on the whistleblower protection bill.

We invite you to follow our **LinkedIn profile.**

Enjoy your reading!

Sławomir Paruch
Robert Stępień



An employee's intentions matter

Employees have the right to free speech and constructive critique of their employer, but they cannot go beyond the boundaries of acceptable critique, aiming at ridiculing the employer and damaging its reputation. Employees who notice any irregularities in the workplace should first share their concerns with their employer, not with Internet users.

Unfortunately, it is not uncommon for employees to publish negative comments about their employer on the Internet with an intention to cause damage to the employer and spread negative, usually false information. This is unacceptable so if it does happen, the employer can and should take an appropriate legal action against such employees.

The threat and damage to the employer's reputation may be enormous. Negative, untrue or defamatory statements may bring tangible results, such as financial loss, customer outflow and damage to a carefully built employer brand. Such actions can also have a negative impact on the level of interest in the company's recruitments process, which, in turn, may halt the company's development. Restoring a positive image and reputation can take years. That is why it is so important to take prevention measures and to hold accountable any person who infringes on the interests of the employer.

Professional vs. private social media

Employees need to take responsibility for the employer's good name not only when using social media in a professional capacity, but also privately. Although the assessment of a particular infringement will be different for statements published on business-oriented online platforms (such as LinkedIn) and private social media channels. The situation would be further aggravated if an infringing employee's social network includes their employer's business partners or potential customers. This way any published content can reach the whole industry. Conversely, private activity on social media seems to be less of a threat to the employer. However, if an employee's profile includes information about their place of employment and the employee has colleagues listed as connections, the infringement may be deemed as if it took place on professional social media channels.

If an employee has included some employment details in their profile, the employer may expect them to be more cautious in posting or promoting content that is not consistent with the company's values or image. Moreover, if an employee posts content that harms the employer's good name, the extent of potential consequences may be more severe for the ease of linking an employee to a specific workplace. Every employee who decides to share information about his employer must accept the fact that it comes with potential consequences.

Private groups

It sometimes happen that defamatory statements about an employer are posted on private, closed groups on social media, e.g. on Facebook. Such cases are more difficult to identify, due to the private, 'covert' status of the groups.

But it does not mean, however, that an employer cannot hold admins of such groups or their members who post defamatory entries accountable. If there is a reasonable suspicion

that the law or legitimate interests of an employer are infringed on by such group members, the employer not only has the right to use the content sourced from there but also to take active steps to gather additional evidence. The extent of potential consequences will depend in particular on the number of group members, which are potential recipients of any content posted there, and the nature of the content itself.

In practice, it also happens that such private groups on social networking sites are administered by trade unions, where the unionists share, for example, the employer's content and documents which should not be made available to third parties. Let us not forget that trade unionists are usually employees, with all employee duties, including the duty to act in the best interest of the employer. Trade union activity does not exempt from this duty

Dismissed for a Facebook post?

Each time an employer identifies an employee's social media post infringing on the employer's interests, the case should be assessed individually. The assessment would depend on such factors as the extent of infringement on employee duty to take responsibility for the employer's good name, the place of publication of the specific content and its reach, as well as the employee's job position.

For example, in the case of managers, supervisors or persons with special social responsibility, such as representatives of trade unions, the consequences of defamatory actions may be more far-reaching. The assessment of employee conduct should also take into account the target audience. The more people are reached by defamatory comments, the more likely it is to be considered a breach of duty to act in the best interest of the employer and a reason for losing confidence in an employee.

If a company good name has suffered as a result of an employee action, terminating such an employee may just not be enough. It may be reasonable to take further legal action against the employee.

For example, an employer may claim damages and compensation for its own benefit or a selected charity cause. Another remedial measure is issuing an apology by the employee, for example, on social media where the offence has occurred.

Employee activity cannot infringe on business secrets

There is a world of difference between an employee sharing their general professional insights or knowledge and publishing information relating to the company's internal operations to which the employee is privy because of their job position. HR policy, production methods, sales forecasts and plans, or internal company financial reports are undisputed examples of company secrets. They are legally protected and should not be discussed by employees outside their work environment, not even on professional portals or private Facebook groups.

The duty to not disclose information that could bring damage or loss to the employer applies first and foremost to employees in managerial positions who have inside knowledge of their company's operations.

Such actions under no circumstances can be justified by freedom of expression, especially if taken by employees who, by virtue of their position, are especially obliged to act for the benefit of their employer. Even if the employee's sole motivation was to use the information for research or training purposes.

Employee social media policy

To properly and effectively manage the use of social media by employees, we recommend introducing a specific internal policy to regulate this issue. It can either be a stand-alone policy or part of a wider system for whistleblowing, conflict and hate speech prevention. Especially now, when remote working is the norm and employee activity is being shifted online, such a policy becomes one of the core internal regulations each employer should have in place.

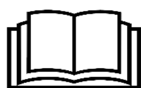
A policy tailored to employer needs has, above all, a preventive function. But it also comes in useful when employees have infringed on the employer's interests through their activity on social media. Non-compliance with the policy can be an additional argument for an employer deciding to terminate the employment with the wrongdoer. The procedure should oblige employees not only to take responsibility for the employer's good name and comply with the law when engaging in online activity but also to inform the employer about any infringements that took place on social media and may - even potentially – harm the employer's interests.

An employer has a duty to prevent workplace bullying and introducing social media policy can be one of the means to that end. Should employees engage in any activity on social media that could be considered bullying, a well-written policy would demonstrate that an employer took all the necessary steps to prevent it.

#Alert: Bill of the Whistleblower Protection Act

On 18 October 2021, the whistleblower protection bill was published. After reviewing it, we have it explained for you in an accessible Q&A format, based on questions about whistleblowers that are often asked by our clients.

Go to the Q&A by clicking here.



Publication: Labour Code 2021 with practical commentary on changes

We invite you to read the latest publication on the Labour Code 2021, including a practical commentary on changes thereto, published together with Dziennik Gazeta Prawna..

The publication discusses such issues as:

- employee vaccinations;
- equal pay for men and women;
- employee online activity;
- remote working in and out of the country;
- verification of a trade union size

Authors: Sławomir Paruch, Robert Stępień, Paweł Sych and Agnieszka Nicińska | More: *here.*

REPORT: Company secrets - what and how to protect against the competition

We invite you to read the report 'Company Secrets - what and how to protect against the competition', which we have prepared and published jointly with Rzeczpospolita.

The report discusses such issues as:

- what economic espionage is;
- which industries are most exposed to illegal activities of competitors;
- what kinds of content are most often targeted;
- what methods are used to illegally acquire know-how and business secrets.

Authors: Bartosz Tomanek and Bartosz Wszeborowski and Patryk Kozieł | More: *here.*