

## Drinks, Hospitality & Leisure

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### Social Media – a best practice guide

Our hospitality team specialises in advising pub companies, late night operators, restaurants, hotels and brewers. A specialist team means specialist advice from lawyers who understand the issues that you face.



## Best practice guide: social media

*Social media has opened powerful new avenues for marketing for the hospitality industry. At the same time the potential for misuse of the channel by staff cannot be overstated. As an employer you need to be well prepared to deal with inappropriate use by employees. Organisations should ensure they have a Social Media Policy in place to instruct and guide employees on the permitted use of social media in a work context.*

### Social Media Usage in a Professional Capacity

#### Confidential Information

During employment all employees are bound by an implied duty of good faith and fidelity which encompasses the duty to act in the employer's best interests and not to disclose confidential information.

Employment contracts should include a similar express provision protecting the employer's confidential information from disclosure or misuse both during employment after termination. There should also be provisions requiring the return of company property on termination of employment. Where does this leave the employee's social media account? LinkedIn is now recognised as a very important business tool but the rise in the use of social media has been so fast that there is very little law about who owns the accounts when they are used for business and indeed the information which is put on to or gathered via these sites.

LinkedIn makes it clear, in its terms and conditions, that an account is personal to the account holder. When an account is used during employer's time, on their system and to promote their business does the employer have any rights to ownership of the account when the employee leaves employment?

#### High Court Case

A recent ruling has shed some light on the extent to which employers can control or access a former employee's LinkedIn account to protect themselves when an employee leaves.

#### Facts

Three employees left their jobs to join a competing business which they had set up before they resigned. Before they left the company the ex-employees had been responsible for dealing with LinkedIn groups on behalf of their employer. The groups were operated for the employer's benefit, promoted its business and the operation of the groups was carried out during working hours using the employer's computers.

Once she had left, the employee who ran the groups continued to do so but instead of continuing to promote her former employer's interests via the groups, she used the groups to further the activities of the new competing venture, including using contacts to invite people to the launch of the new business. The High Court granted an interim injunction which prevents the three ex-employees from using their former employer's confidential information until the full court hearing. The result of this was to effectively make the former employees hand over control of the LinkedIn groups to their former employer.

As the decision to grant an interim injunction is not the High Court's final decision in the matter, the decision leaves many questions unanswered about when employers will be able to gain access to and control of social media accounts, such as LinkedIn, used by employees during the working relationship and following its termination.

#### Contracts and policies are important

This case highlights the importance of employers ensuring that contracts of employment have been drafted with social media in mind and that they should be consistent with any social media policies in place. Confidentiality clauses and post-termination restrictions can be tailored to ensure they deal with social media and ensure that any proprietary rights that may be linked to social media accounts or groups are assigned to the employer via express provisions in the employee's contract.

#### Personal Use of Social Media

We have previously reported the case of *Preece v JD Wetherspoons Plc*. In that case the employer was found to have been justified in dismissing a duty manager whose inappropriate comments on Facebook about customers were seen by the sister of one of the customers mentioned.

By contrast, in another case, *Whitham v Club 24 Ltd*, the employer's dismissal was found to be unfair. Ms Whitham posted comments on Facebook about her colleagues and working conditions. These comments could only be seen by her "friends" – however this included some colleagues and superiors. Ms Whitham made these comments outside of working hours and using her own pc. There were no complaints made as a result of her postings; the employer's name was not mentioned and there was no evidence that there had been any damage caused to the employer's reputation. The Tribunal found that the employer acted unfairly when it dismissed her for making these comments.

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The following points from the decision are of interest:

- The employer had failed to investigate whether the comments had actually caused any damage to its business and no evidence of any genuine damage was produced at the hearing
- The employer did not have a social media policy which covered adverse comments made on Facebook. This was a crucial point in the Preece v Wetherspoons case. Wetherspoons had excellent documentation which made it clear that the use of Facebook in a defamatory way was a disciplinary issue entitling the employer to summarily dismiss an employee.

### Social Media Policy

The fairness of a dismissal will depend on the facts of each case individual case, however, having relevant documentation in place will usually assist an employer who wishes to dismiss an employee for inappropriate use of the internet.

The Wetherspoons case highlighted the need for comprehensive documentation and policies of which staff are made aware. A good policy that is properly communicated to the workforce can make any disciplinary process far easier, less risky and less controversial in the workplace. The documentation was lacking in the recent Whitham case.

If you do not have a social media policy this is something which you should introduce urgently. Even if your staff do not have internet access at work you should still have a social media policy prohibiting staff from bringing your business into disrepute even if comments are made when staff are not at work. The policy should make it clear to them what is expected of them when using social media sites even outside work.

If you have such a policy, remember to review it regularly to ensure that it remains effective and in accordance with current legislation.

### Practical Issues

- Social media accounts – try to assert as much control as possible over an employee’s account from the start. E.g. use your businesses address as the employee’s address and choose the password for them.
- Policies – draw up social media policies to require employees to promote your business on LinkedIn and other sites.
- Contracts – ensure post termination covenants and confidentiality provisions are in place and that employees are specifically required to return all social media contacts, passwords and access details for the management of any groups on termination.
- Compromise Agreements – ensure as part of any compromise agreement that an employee is required to hand over all contacts and delete all company social media accounts.

**To find out how we can help you please contact our Drinks, Hospitality & Leisure specialists:**

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