

UPDATE ON THE IBA GEI REPORT ON SOCIAL MEDIA (THE 'NET REPORT')

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Discussion paper for the

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Partly driven by the 20/20 Report, the focus of the original Net Report (published in September 2013) was to identify the key challenges, both from a legal and HR perspective, based on the assumption that Social Media creates problems for the internal organisation and management of a multinational corporation.

When the draft Net Report was presented at the GEI Open Meeting in London in June 2013 the response from the HR leaders was that social media is not considered a major problem in itself, but rather a platform for opportunities. The issues arising were seen as not very different from other employment issues in the workplace, and so could be dealt with through training and coaching.

This response was incorporated into the final text of the Net Report to a certain degree. Thus, the final text noted, the major focus of the survey had been to identify problems from a perhaps narrow legal perspective.

Building on the findings at last year's Open Meeting, the purpose of this discussion paper is to raise some of the possible key issues to consider, which were not fully reflected in the Net Report, and which may serve to paint a fuller picture of the phenomenon which is Social Media as it exist in the workplace.

Minority Report: What will the future hold for employer monitoring on social media?

In the Net Report, the majority (**84.2%**) of lawyers confirmed that employers are permitted to monitor social networks of their current employees, as well as job candidates, provided that certain local procedures are followed. However, only a minority (**37,5%**) of the surveyed companies stated that they used social media as a screening tool or background check in the recruitment process. Of these the majority (**75.9%%**) did not ask for permission or inform candidates when doing so.

Today the latest technological developments within data monitoring, allow employers to discover unusual behaviour and even predict employee misconduct through the monitoring of employee data and patterns through emails, phone recordings, work tasks undertaken on computers, etc. The same techniques can be used for potential candidates. From this it seems clear that companies can review and generate reports on all social media activity, which go far beyond looking at a person's Facebook or LinkedIn profile.

We can compare this with the latest push for privacy, for example the so called "right to be forgotten", which has now led companies such as Google to introduce an option to have search results for an individual deleted.

The following questions therefore arise:

Is there a limit to the scope and extent of monitoring of employees and candidates? Should there be a limit? Does the employee/candidate have a right of privacy? Would it be justified to discipline someone for something they are likely to do tomorrow? Is there a need for further regulation and if so should it be global or local?

Positive trends

In the Net Report the majority of the surveyed companies considered that they had benefited from the use of social media in the workplace. More than half believed it had facilitated innovation and development of new ideas. The majority said their company had experienced benefits in connecting with employer branding (**75.3%**). However, in the cases of training (**51.9%**), and diversity (**52.7%**) the majority view was that there **had been no** benefits. Finally, the use of social media to help connections between different departments of the company through groups with common interests was finely balanced.

These benefits did not appear clearly from the conclusions amongst the surveyed lawyers. The reason may well be that lawyers traditionally are trained as problem-solvers, and therefore are looking for the possible problems in a given situation. Another reason may be the scope of the questionnaire.

Building further on the feedback from the companies, the authors of the Net Report have questioned whether it is possible to elaborate further on the benefits achieved from the use of social media in the workplace, and if so whether it is possible, to identify how those positive trends have or will affect how work is organised. The answers to this could ultimately have an impact on how lawyers need to consider these issues when considering the legal aspects.

The following questions therefore arise:

What impact, if any, do social media have, in the workplace? Does the use of social media (and similar collaborative work tools) change how HR and legal approach other HR issues (including but not limited to issues such as talent management, performance management, developing company know-how and IP, diversity issues, disabilities, whistleblowing, grievances, health & safety, anti-bribery, and codes of conduct).

Cyber mobbing

In their responses to the questionnaire for the Net Report the respondents were split on whether it appeared likely that social media in itself might increase the number of discrimination claims. As a consequence, it was difficult to draw a concrete conclusion in the Net Report. Nonetheless, the authors of the Net Report were of the view that it was probable discrimination claims would increase. This was because the nature of social media is such that it offers a convenient and “easy to use” tool to abuse, or report an abuse. In that context, most companies present at the Open Meeting in June 2013 agreed that if an employee’s “offence” concerned discrimination, then most employers would take disciplinary action in such cases. In other words, the fact that social media was the instrument of abuse would not affect the employer’s decision to discipline.

With the increased focus on the work environment and protection against hostile working environments, bullying and harassment, we can foresee, given the zero-tolerance approach that is seemingly applied by the companies, that the number of cyber mobbing incidents that employers will have to investigate will only increase.

The following questions therefore arise:

Have you already or do you foresee an increase in cases of cyber mobbing in the workplace? Do you see this as the employer's obligation to prevent? What steps could a company take to combat cyber-mobbing? Is there a need for further regulation and if so should it be global or local?

Social Media as a CRM tool

In the Net Report the majority of the surveyed companies considered that they had benefited from the use of social media in connecting with customers (**74%**), while a minority of companies (**41.5%**) stated they do distinguish between employees who use social media for work purposes.

It seems that although many companies recognise the commercial benefits from their employees' use of social media as a platform for sales and customer relation management ("crm"), they do not distinguish in their policies when social media is used as such and when social media is used for private purposes.

Given the global trends, where advertisement budgets are moved from traditional marketing platforms into social media and other similar platforms, and the increased use of social media as a crm tool, it is possible that there will be increased pressure to exploit to the full commercial opportunities of social media, and a consequential increase in legal issues (for example disputes over the ownership of contacts linked to personal social media profiles).

The following questions therefore arise:

What impact, if any, do social media have, on customer relations, both positive and negative? Is there a need to rethink the traditional concepts of "ownership" to customer contacts? How can we apply restrictive covenants, fiduciary duties and trade secret concepts in this new reality? Is there a need for further regulation and if so should it be global or local?

The use of social media as a whistleblower-hotline

In the Net Report the lawyers confirmed by a big majority (**82.5%**) that where the law permits employees to speak out (for example, concerted activity or whistleblowing) such permission includes social media communications.

However, it was also clear from the responses, that social media does not change the underlying legal rights and entitlements of employers and employees. To the extent an employee could be disciplined for disloyalty through comments made, that they are made on social media generally appears to make no difference.

In the countries where concerted activity or whistleblowing is protected, social media presents a powerful tool for such activity and therefore possibly an increased pressure on the companies.

We have already witnessed the use of Facebook and YouTube by multi-site employees to organise and pressurise employers and their regulators. New media can be used to generate conventional TV coverage, and as practical litigation support tools. Trade unions and claimant lawyers are also utilising these media.

The following questions therefore arise:

What impact, if any, do social media have, on whistleblowing and related litigation or organised activity, both positive and negative? How do companies deal with these issues? (PR/HR/legal, proactive/reactive, etc.) Is there a need for further regulation and if so should it be global or local?