

FTR Now

The Social Media Challenge – Protecting Your Organization in the Web’s Wild West

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The use of social media has exploded in a very short time frame, and many organizations are scrambling to deal with situations they never would have envisioned even five years ago.

Two issues in particular are proving to be troubling:

- derogatory or critical statements by employees about their employer or other employees (attacks from within); and
- illegitimate posts by third parties about an organization (attacks from without).

EMPLOYEE EXPRESSION: PRIVATE NO LONGER

While employees may think that what they say about their employer on a social media site such as Facebook is private, the traditional legal view is that this is a publication and not a private activity.

The problem is that it *feels* private to employees – and so many comments are posted and some inevitably go viral, causing harm and disruption within the workplace. To discourage this from happening, there are a couple of steps that employers can take:

- Advise employees that publishing something through social media channels is not private, and that they are accountable for statements they make.
- Have an Internet publication policy in place that makes this fact absolutely clear.

DOES IT AFFECT A LEGITIMATE COMPANY INTEREST?

When questionable materials are published by an employee on a social media site, and you are unsure of whether the employee should be sanctioned, ask yourself one question: “Is the conduct likely to significantly affect a legitimate company interest?”

Of course, the question of whether something affects a legitimate company interest can be tricky to determine, and there are a thousand factors that can tip the balance one way or the other. This can make borderline cases very hard to call.

Here are few ways in which an employer’s interest may be seen to be legitimately affected:

- **Interferes with duty to other employees.** You have a duty to provide a safe and harassment-free workplace to other employees. If an employee is posting threatening or derogatory material against one or more employees – and the employee continues to work alongside these co-workers – this likely will conflict with a company interest.
- **Interferes with job duties.** Another link to your interests is based on an interference with job duties. For example, a teacher must be a model of tolerance and respect in the classroom. Intolerant public expression may conflict with that duty.
- **Causes harm to reputation.** If an employee publishes negative comments directly about their employer, this could cause harm to the employer’s reputation and affect a legitimate company interest.

ATTACKS FROM WITHOUT

The issue of illegal expression by outsiders is more challenging, in that you do not have a direct means of control. While you can appeal to the organization hosting the content, your ultimate appeal is to the court.

When an illegal expression by an outsider has the potential to affect a company interest, you have several responses (or a combination of responses) to consider:

1. Ignore the material, but continue to monitor the situation.
2. Develop a public affairs response.
3. Demand that the third party take down the illegal material.
4. Demand that the third-party host take down the illegal material.

Taking action can be costly in a number of ways. A public relations battle can aggravate the situation and give attention to someone who may not be worthy of it. And demands that lead to court action can be an expensive and time-consuming undertaking.

For these reasons, the “ignore and monitor” approach is often a good strategy for businesses. But no two situations are alike. This is why getting legal advice before you respond is one of the best ways of ensuring that your response is principled, consistently applied and in your organization’s long-term best interests.

This article was also published in the November issue of *Toronto Life* magazine. If you have any questions about this article, please contact [Stephen J. Shamie](#) at 416.864.7304 or your regular [Hicks Morley lawyer](#).

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