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It's Good to Talk…
Social Networking in the Workplace

There are now a staggering five hundred million Facebook users across the world and according to some surveys, about nine million users in the UK. Facebook, of course, is just the tip of the social networking iceberg, with a host of other sites and opportunities allowing UK employees to blog, post and tweet merrily throughout their working day.

Whilst the distraction from working time is undoubtedly an irritant for employers, this networking explosion has so far not turned out to be the "HR accidents waiting to happen" that was gloomily predicted by the TUC back in 2006.

It seems at this stage that lots of employers are sitting quietly and watching this revolution develop, rather than taking any pro-active steps to try to control it. Rather than seeking to hold back the tide, many recognise the positive impact it can have for business and are turning it to their advantage. So, what is the right approach and what steps can and should employers take at this point to deal with the situation in the best way?

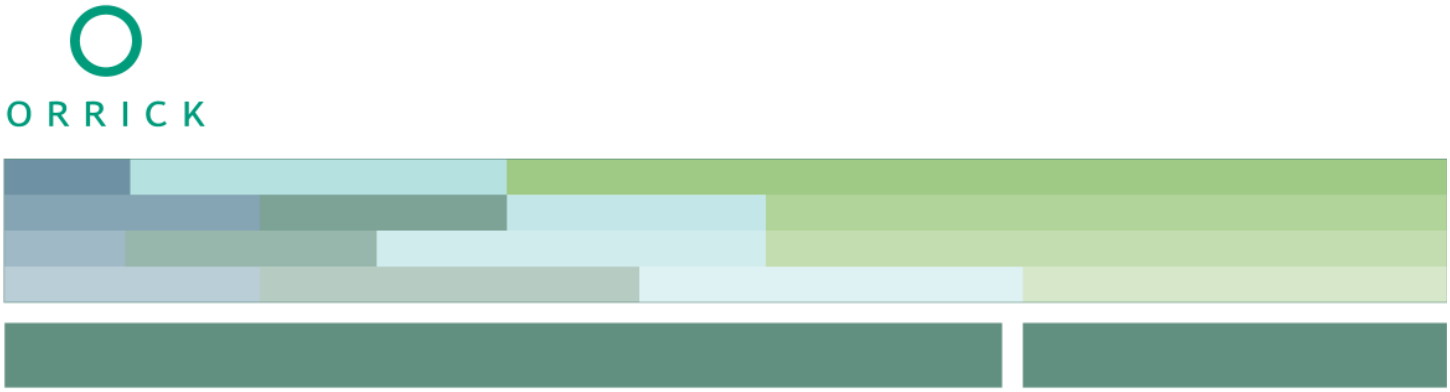
What price, privacy?

Let's start by looking at some of the helpful aspects of social networking for employers. It seems increasingly that whenever you hear a new name, one of the first things you do is look the person up on Facebook. It is therefore a logical extension to this that in a recruitment situation, employers look up candidates on Facebook. The first point to note about that is that if the person has not set their privacy settings so that only their Facebook friends can see their posts (and their comments, photos, etc are therefore open to all), it may leave potential employers wondering whether that lack of judgment in their personal life with regard to confidentiality might influence their life as an employee and their judgment in relation to the Company's confidential information.

That aside, if you can see information about the potential employee, what if any of their posts are unseemly, unhinged or worse – discriminatory in some way – what do you do then?

From a data protection perspective, the Information Commissioner takes a relatively relaxed view of information posted in a public forum such as Facebook, as this is not information which is considered to be personal data under the Data Protection Act because it is posted for "domestic purposes" and therefore exempt from the Act.

However, in the Employment Codes (data protection guidance for employers) the Information Commissioner does question whether potential employers reviewing such information could be considered to be "vetting" or carrying out "pre-employment checks". If these actions do constitute pre-employment checks, the Information Commissioner makes clear that employers should only be undertaking them if they are relevant to the role in question and proportionate, and that employers should ensure that they do not use "unreliable sources" in the making of such checks.



The reality is that employers might look at Facebook in the recruitment process but (except in extreme circumstances) they are unlikely to use anything they find on there as an express reason for not taking a candidate forward. It is therefore highly unlikely that the Information Commissioner would get involved in these matters. Unless and until the Information Commissioner takes a stance like that of his German counterpart, who has recently made checking Facebook as part of the recruitment process a breach of German data protection laws, this UK guidance will be little disincentive to employers in this regard.

Accentuate the positive

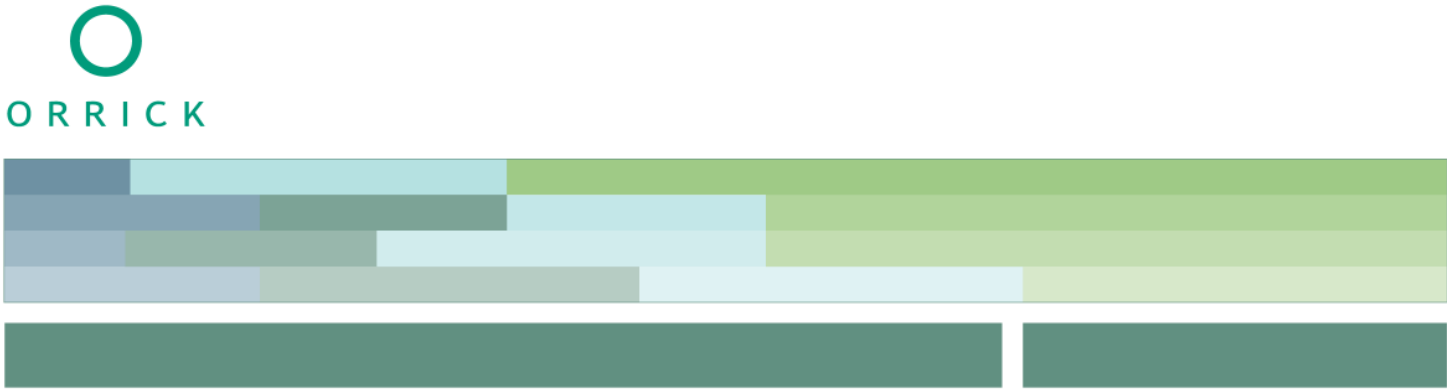
Perhaps the most obvious and non-contentious positive use of social networking for employers is its publicity value for the business. The free advertising, marketing and PR potential of sites such as LinkedIn and Facebook is invaluable and, many increasingly argue, essential to a modern business. Organisations are also using these sites for their own recruitment tools, with candidates "reverse-vetting" their potential future employers' and colleagues' entries to see what they might be getting into if they accept the offer.

Checking up

Another popular, but currently mostly unspoken, use of social networking sites is to verify information about employees who might be exhibiting signs of being less than truthful in their dealings with their employer. Most HR professionals have been well aware of this as a source of information and gauging levels of employee morale for some time. So when employees phone in sick but then post pictures of themselves on Facebook drunk at a party the night before or out shopping when they are supposed to be at home, they should not be surprised if this is used as part of a disciplinary process for misconduct. Even with stringent personal settings, they are likely to be "friends" (in Facebook terms) with a number of other employees, who may divulge the relevant information to HR or line management, bringing new meaning to the old adage to "choose your friends wisely"!

A question of discipline

The problem, of course, is that we have all read the high profile cases where the use of social networking has caused problems for employer and employees alike. One of our favourites was the Bishop of Willesden, the right Reverend Pete Broadbent, who made comments on his Facebook page surrounding the announcement of the engagement of Prince William and Kate Middleton. Specifically, he said that the royal family was full of "broken marriages and philanderers" and expressed disappointment that the wedding would cost the public "an arm and a leg". The unfortunate Bishop was forced into a very public apology and complete retraction of his comments once these comments made their inevitable way into the media mainstream. It remains unclear what, if any, internal sanction was meted out to the Bishop by his church and of course this was a particularly public example in view of his position within the Church and the subjects of his comments. However, the "thought police" debate as to whether an employer generally can or should take action against an employee for their private opinions – albeit expressed in the public or semi-public forum of a blog or networking page – rages on.



Another favourite is the employee at the city law firm who published a blog on the internet under her actual name (rather than a pen name) which was a serialised novel detailing description of casual sex, drug use and the life of an expatriate in Moscow. The lawyer in question was allegedly dismissed and, rumour has it, is currently suing the city law firm for substantial damages for unfair dismissal and sex discrimination on the basis that dismissing her because of her blog was some kind of elaborate ruse with the real reason being that her boss was sexually obsessed with her.

This very same law firm later went on to ban access to Facebook but was forced into a complete u-turn when the backlash from employees was so great because they felt that Facebook was a critical tool allowing them to market their services and that its prohibition would cause significant detriment.

The hidden cost

One study estimates that employees spend a total of 233 million working hours on social networking websites every month in the UK, at a cost to the economy of £130 million a day, but this needs to be balanced against the unquantifiable benefits that social networking does bring in some sectors. With an estimated 60% of the adult population accessing the internet every day and 43% of all users posting messages to social networking sites, a ban on its use is clearly always going to be difficult to enforce and a more canny approach may be more appropriate.

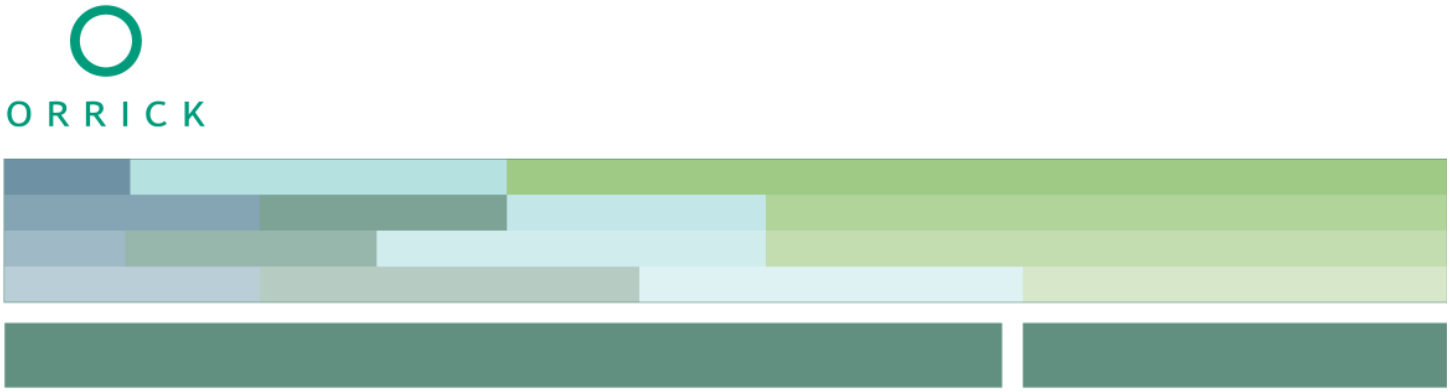
So should employers put a policy in place to try to pre-empt and manage these situations and if so, what should it say?

To ban or not to ban?

Well, first of all, you have to decide whether to ban or not to ban. It seems that, for some types of employers, banning may not be the sensible option but for others it may. If you genuinely believe that there can be no real benefits to the company from employees using social networking sites during working hours, then from a productivity perspective, a ban might be the best way to go. Provided a ban on accessing social network sites is implemented clearly and consistently and ties in with any other email/internet appropriate use policies, then it is a perfectly acceptable approach for an employer to take, legally speaking.

The question of whether or not such a ban would work in practice is a different matter entirely and it may just force the issue "underground" and make it more difficult to police. One survey in the US suggested that in workplaces where accessing social networking sites was banned, over half the employees accessed them anyway and 27% said that they changed settings on their company computers to enable them to access the sites.

In fact imposing and policing a ban is potentially more problematic than helpful. With the rise in iPhones and Blackberries and other personal devices regardless of what employers do in relation to work systems, employees are probably going to find a way access these sites anyway during the day. If that is the case and there is a ban



imposed, employers may find themselves in the position where they have to ignore their own rules or risk spending the next decade in painful and prolific disciplinary proceedings.

Practical policy

So perhaps clear guidelines on how such social networking can be used may be the more pragmatic and effective approach. These policy guidelines might include:

- Inclusion of realistic rules and restrictions around the use of social media and social networking sites at work; for example, detailing when and under what circumstances these sites can be used and for how long (e.g. only during lunch breaks or outside of working hours, for reasonable periods of time only and never when it would conflict with duties or workload).
- A reminder to employees that they must not disclose confidential information or trade secrets or make derogatory, defamatory, discriminatory or potentially offensive comments about the Company, their colleagues, their clients or any other connected third party (or otherwise comments which might bring them or the Company into disrepute or conflict with the image or ethics of the Company or the employee's role) on any social networking sites, whether those comments are made during working hours or outside the workplace.
- Information in relation to the Data Protection Act and employees' obligations not to misuse other employees' personal data in this regard.
- A requirement that employees put a disclaimer into any blogs (or posts) stating that any views contained in the blog (or posts) are those of the employee and in no way represent the employee's employer.
- A reminder that working time and equipment is for working and that breach of the policy may lead to disciplinary action up to and including summary dismissal.

STOP PRESS

On 27 January 2011 the government launched a consultation on reforms to the Employment Tribunal system with the main proposals as follows:

- Extending unfair dismissal qualifying periods to two years. They say this should result in 3700-4700 fewer claims each year.
- Charging a fee to bring an Employment Tribunal claim.
- Greater use of workplace mediation.
- ACAS conciliation before a claim can be brought.

Final consultation closes on April 2011 and the reforms will be announced after that. Watch this space for more updates on this one.

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And finally, a reminder that unfair dismissal and redundancy rates were increased from 1 February 2011. The weekly maximum salary rate for unfair dismissal basic awards and statutory redundancy payments is now £400 and the maximum unfair dismissal compensatory award is £68,400.

If you would like to discuss any aspect of this alert or require further information on the matters referred to, please contact:

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