

TO TWEET OR NOT TO TWEET: WHAT THE LAW SAYS ABOUT SOCIAL MEDIA AND ITS EFFECT ON YOUR EMPLOYMENT

Information brochure prepared by Legal Services

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PURPOSE OF THIS NEWSLETTER

Over the last few years, there have been various incidents involving individuals making derogatory comments on social media (e.g. Penny Sparrow, Velaphi Khumalo, Gareth Cliff). Where the comments have caused reputational or other damage to the employer, these employees have been subjected to disciplinary action.

As a result of these incidents, it has accordingly become necessary for the Department to educate and inform employees about the use of social media and the legal effect it could have on the employment relationship.

THE PUBLIC SERVICE EMPLOYMENT RELATIONSHIP

As employees of the state, we are required to comply with the Code of Conduct for the Public Service, which requires us to:

- ⇒ respect and protect every person's dignity and his or her rights as contained in the Constitution;
- ⇒ not unfairly discriminate against any member of the public on account of race, gender, ethnic or social origin, colour, sexual orientation, age, disability, religion, political persuasion, conscience, belief, culture or language;
- ⇒ honour the confidentiality of matters, documents and discussions, classified or implied as being confidential or secret.
- ⇒ execute our duties in a professional and competent manner;
- ⇒ deal fairly, professionally and equitably with other employees, irrespective of the above grounds;
- ⇒ use appropriate channels to air our grievances or to make representations.

If officials do not comply with the above, they may be found guilty of misconduct and disciplinary action may be taken against them.

WHAT IS SOCIAL MEDIA?

Social media can be described as all online media communication platforms which allow for user participation and/or interaction, such as social networking applications and sites (e.g. Whatsapp, Facebook), video sharing sites (e.g. YouTube), micro-blogging sites (e.g. Twitter), blogging platforms (e.g. Tumblr), discussion forums (e.g. Google Groups), online encyclopaedias (e.g. Wikipedia) and any other websites that allow users to publish comments and/or images.

HOW HAS SOCIAL MEDIA AFFECTED THE EMPLOYMENT RELATIONSHIP?

Social media has not technically changed the basic principles of employment law in any major way; rather, it has affected the way in which the existing employment law principles operate in the workplace. Employers now have to deal with cases of employee misconduct which once physically occurred, and could be contained, in the workplace, now occurring online, in the public domain and possibly effecting their reputation and causing other damage.

AS A SOUTH AFRICAN, I HAVE A RIGHTS UNDER THE CONSTITUTION. SURELY I CAN SAY WHAT I WANT TO SAY PRIVATELY ON SOCIAL MEDIA AND IT IS NONE OF MY EMPLOYER'S BUSINESS?

In terms of the highest law in the land, which is the Constitution, 1996, everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed. The Constitution also states that everyone has the right to freedom of expression, which includes freedom to receive or communicate information or ideas, as well as the right to freedom of thought, belief and opinion. These rights extend to you in your capacity as an employee.

However, the Constitution also states that these rights may be limited if it is reasonable and justifiable to do so, based on human dignity, equality and freedom, taking into account all relevant factors.

For example, your right to freedom of expression and opinion does not protect you if you provoke violence or if you are promoting hatred based on race, ethnicity, gender or religion, and that opinion constitutes an incitement to cause harm. As much as you have a right to freedom of opinion, people also have a right to have their dignity protected and respected, and if you infringe on that right by making derogatory comments on social media, even in your personal capacity, you cannot use your right to privacy, freedom of expression or opinion as a defence.

ASPECTS OF EMPLOYMENT LAW AFFECTED BY SOCIAL MEDIA

The Right to Privacy and the Protection of Personal Information Act, 2013, (“POPI”)

The right to privacy stems from **the need to not be watched or seen**. By engaging on social media, we give out the message that we don't mind some personal and private information being seen, but **we want to control who sees it**.

In South Africa, the law of privacy has been recognised as a right to intimacy and autonomy (independence) that should be protected from invasion.

Basically, **you** determine what information about yourself you want to be kept private, and if you want that information to remain private, **you need to show a desire that this information remain private**. Where you have not shown a desire for your information to be kept private, **then you will be presumed to have no interest in the legal protection of your privacy**.

With regard to social media, the general approach of the Commission for Conciliation, Mediation and Arbitration (the “CCMA”) and internal disciplinary enquiries has been that **nothing posted on Facebook is private and posts on Facebook may be used by the employer as evidence**. In the case of *Sedick & Another v Kisray (Pty) Limited* (2011) 8 BALR 879 (CCMA), the CCMA specifically found that **if posts are made on the Internet, there cannot be an expectation of privacy**.

Furthermore, if a social media post says something that damages the reputation of the employee's employer or clients, this can result in the employee's dismissal. *Sedick's* case took this point further by dismissing the employee for the **potential** harm her posts could have caused to the reputation of the company, even though **actual** harm had not been proven.

Our law has further stated that privacy is based on how much of your personal space you allow people to have access to: as you participate in activities on a community, business and social level, your personal space shrinks and you move into a public space.

Therefore, when you invite or accept “friends” on social media, and fail to limit your privacy settings, thereby giving the public the ability to view your social media pages, then **you have clearly entered into a public space and can no longer claim a right to privacy**. With regard to work implications, if you befriend a work colleague on social media, then your right to privacy has been limited and you accept the risk of anything said on your pages coming to the attention of your employer.

Surely my personal opinions on social media are protected by POPI?

POPI was enacted, amongst other objectives, to promote the protection of personal information processed by public and private bodies. It recognises that the right to privacy includes the right to protection from the unlawful collection, retention, dissemination and use of personal information.

“Personal information” includes, but is not limited to, the personal opinions, views and preferences of a person.

Employees may state that employers cannot use their comments on social media as evidence against them, as these comments constitute “personal information” protected in terms of POPI.

However, if you do not invoke your privacy settings on your social media pages, you may be regarded as having consented to that information being accessible to the public and may not be able to claim protection under POPI.



Defamation and Social Media

Defamation is the unlawful and intentional publication of a statement about a person/party. This statement may be in the form of words, pictures, visual images or gestures, and must have the effect of violating that person's/party's good name and reputation in the eyes of society.

Defamation affects the good name of person/party and infringes on that person/party's right to dignity which is prohibited by the Constitution.

In South Africa, parties have the right to protect their name, goodwill and reputation. In the employment context, employees who make damaging statements about their employers on any social networking sites do not have a right to say what they like, as their right to freedom of expression is limited by the right of companies to protect their good reputation.

What constitutes defamation on social media?

A wrong tweet, a misguided comment, an incorrect fact or any other form of wrongful statement as mentioned above, once posted on social media, could result in possible brand damage and a case for defamation.

For an employer to show that defamation has occurred, it must show that a defamatory statement was made, which refers to the employer and that it has been published.

The publication should be brought to the attention of at least one other person, other than the one defamed - this may include the attention of another employee. In the *Sedick* case the court held that derogatory comments by employees on Facebook, about their employer, could have damaged the reputation of the employer and this conduct was therefore sufficient to warrant the dismissal of the employees as fair.

Defamation [continued]

As was held in the case of *Heroldt v Wills* 2013 (2) SA 530 (GSJ), the fact that the statement may be true, is not a defence to defamation. It must be shown that the statement made was in the "public interest".

It is important to note that not only the person who makes a defamatory statement may be held liable, but also those who participate in the publication. In *Ispar-ta v Richter and Another* 2013 (6) SA 529 (GNP) the court suggested that anyone who "likes" or "shares" a defamatory posting can also be held liable for the defamation, since s/he confirms and repeats the posting. Therefore, if an employee was to post a damaging statement and others were to comment on it and support it, they could also be liable for defamation.

Employees are to bear in mind that their employers have various options available in addition to cases of defamation for reputational damage. As seen in the *Sedick* case, the court found that dismissal was the appropriate sanction for employees who brought the name of the company into disrepute. The courts have also held that employees who post defamatory content on social media regarding their employers may also be found guilty of gross insubordination and subjected to disciplinary action. There also exists the possibility that an employee may face criminal and civil liability.



Discussion of Employment Conditions on Social Media

The Basic Conditions of Employment Act, 1997 ("BCEA"), states that every person has the right to discuss his/her conditions of employment with his/her fellow employees, his/her employer, or any other person.

This right was envisaged to be used in the privacy of the workplace and not for the public and potential customers and clients to become aware of.

Any public posting of work issues on social media now has the potential to, and can actually, cause harm to the reputation of the employer. Therefore, employees need to exercise caution when discussing employment conditions on social media, as they may not be afforded the protection of the BCEA as set out above.



Bullying and Harassment on Social Media

Social media spaces should not provide a space to direct insults at people or companies, or to bully or harass others.

Bullying and harassment are often taken to mean the same thing; however, there is a legal difference.

Bullying affects the morale and self-confidence of the person being bullied and does not relate to any personal attribute of the victim. **Cyberbullying** is deliberate and repeated harm inflicted through using social media and other electronic platforms and is also occurring more frequently in the workplace. Cyberbullying commonly occurs through abusive emails, threats via e-mail, gossip through text messaging or chat sites and posts such as comments, videos or pictures on social networking sites. **"Trolling"** refers to behaviour where internet users specifically try to provoke an emotional response. Often this will be in situations where there are online discussions or debates, and "trolls" (cyber bullies) make inflammatory comments to disrupt the discussion.

Harassment on the other hand, is based on a personal attribute of the victim and ultimately affects a person's dignity. The Protection from Harassment Act, 2011, defines harassment as **directly or indirectly engaging in conduct that the harasser knows or ought to know causes harm, or inspires the reasonable belief that harm may be caused to the complainant.**

In the social media context, harassment could be taken to have occurred where the:

- ⇒ harasser unreasonably engages in electronic or any other communication aimed at the complainant, by any means, whether or not conversation ensues; or
- ⇒ by the sending, delivering or causing the delivery of electronic messages, electronic mail or other objects to the complainant, or leaving them where they will be found by, given to, or brought to the attention of, the complainant.

Employees are cautioned against cyberbullying or harassing others through social media, as they could be found guilty of harassment in the workplace and subject to disciplinary as well as other legal action.

Even if the abuse is anonymous, a victim may approach the Magistrates Court with the internet protocol address of the perpetrator and the court may order that the internet service provider reveal the name of the perpetrator.





Workplace Confidentiality and Social Media

There have not been many South African cases dealing with workplace confidentiality in relation to social media; however, as it is a basic employment duty that employees honour the confidentiality of matters, staff should refrain from referencing service providers or partners or projects on social media without first obtaining consent from the employer. In addition, employees should not use public social media platforms to conduct internal work communications.



Social Media in Recruitment

Did you know that more and more recruiters use social media to look into the prospective employee's social media activity and behaviour? When was the last time you googled yourself to see what comes up? Maybe you should start doing it more often to see your online presence! It has become common for employers now to search social media profiles in order to screen and vet potential new employees before offering them employment.

As mentioned throughout this newsletter, there can be no expectation of privacy on social networking sites. Recruiters may therefore rely on the point that if something is posted on a public platform and visible to others, it is no longer private and further, that the poster gave indirect consent to accessibility of the information by not activating privacy settings. Instances, where potential candidates have been informed that their profiles will be researched, constitutes direct consent to such information being used for recruitment purposes.

It is therefore wise to be mindful of the potential harm of posting on social media platforms, as this may jeopardise any prospective employment opportunities.



Electronic Communications and Transactions Act, 2002 ("ECTA")

ECTA provides for the facilitation and regulation of electronic communications and transactions and allows for data messages to be used as evidence in legal proceedings.

Therefore, employees must be aware that what they post on social media platforms may be used against them as evidence in disciplinary and other legal proceedings.



Interception of Communication: Use of e-mails and Social Media Platforms

The Regulation of the Interception of Communications Act, 2002, popularly referred to as "RICA", allows any person to intercept any communication if he/she is a party to the communication, provided that such communication is not obtained for the purposes of committing an offence. Communication is classified as either direct or indirect.

Interception of Communication [continued]

RICA defines “direct communication” as an oral communication between two or more persons which occurs in the immediate presence of all the persons participating in that communication. “Indirect communication” means the transfer of information, including a message or any part of a message, in a form of speech, music data, text and visual images that is transmitted in whole or in part by means of a postal service or a telecommunication system.

In terms of RICA, the transmission of direct and indirect communication can be intercepted where one of the parties to the communication has given prior consent in writing.

Furthermore, RICA allows any person (such as an employer), in the course of the carrying on of any business, to intercept any indirect communication in the course of its transmission over a telecommunication system provided for use in connection with that business:

- ⇒ by means of which a transaction is entered into in the course of that business;
- ⇒ which otherwise relates to that business; or
- ⇒ which otherwise takes place in the course of the carrying on of that business.

The interception may only occur if persons using the telecommunication system have been notified in advance that their communications may be intercepted and that any such interception will be made with the implied/express consent of that person.

In the case of ***Smith and Partners in Sexual Health (Non-Profit) (2011) 32 ILJ 1470 (CCMA)***, the case dealt with the use of information intercepted by the employer from Smith’s private Gmail account without her knowledge. These e-mails were not stored on any company-based equipment; however, she had installed an automatic login feature on her Gmail account on her work computer, which the company used to obtain access to her private account.

The court ruled that the employer had no right to access Smith’s private Gmail account, as the internet domain hosting the account was technically owned by Google, and accordingly could not use the information contained in those mails, even if it contained derogatory information about the employer. The fact that Smith exited the account in a manner which left it open to access by another person did not place it in the public domain, as e-mails cannot be compared to other social media posts and usually have specified recipients. Private e-mails specifically are intended for those recipients and are not in the public domain.

Therefore, where the use of an electronic platform, in this case, e-mails, does not make use of the employer’s facility, the employee may claim his right to privacy. However, each case will have to be determined on its merits.

Where the communication is made through the use of employer’s e-mail facility/networks, the employee needs to be aware that any communication using an employer’s resources may be intercepted, and s/he can accordingly be held liable for any harm/damage caused by the content of that e-mail and may face disciplinary and other proceedings.

IN SUMMARY: SOCIAL MEDIA DOS AND DON'TS

Do...	Don't...
Understand/be clear about your intention/purpose in using social media: is it solely to socially interact with others? Is it for professional/career reasons? Is it to create awareness for a cause you support? The reasons you use social media will determine how you conduct yourself and the implications of such conduct.	Provide all your employment details if your aim of engaging on social media is not for professional or career reasons, and is merely to interact socially with others
Invoke your privacy settings should you wish to be active on social media but want to limit who sees your profile	Post all your personal information should you desire some anonymity when using social media
Use employer computer and related electronic resources for its intended purposes	Criticise previous and/or current employers, clients, or co-workers
Ensure your grammar and spelling is correct and that you haven't posted embarrassing photos of yourself, especially if you've consented to your online presence	Lie about your educational qualifications and/or previous employment experience on your profile
Be aware that your posts may be used as evidence in legal proceedings	Post inflammatory, derogatory or abusive content
Exercise caution when inviting/accepting invites from work colleagues on social media	Harass or bully others on social media
Verify the source of a post before you “Like” or “Share” it, in order to avoid potential defamation claims in the event of inaccurate/unreliable posts	Use social media to air workplace grievances/issues on workplace conditions
Be aware that the employer may intercept electronic communications made using its electronic communications systems.	Mention confidential or other business details on external social media channels without obtaining consent from your employer to do so.

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