

Social media is a double-edged sword

From employee gaffes and pranks that go viral on Facebook, YouTube and Twitter to rogue employees who pilfer competitive business information, employers have plenty to worry about.

Social media presents the classic double-edged sword: promoting the company's brand versus protecting the brand.

"What's posted to the Internet is like diamonds — it's forever," says Zohaib Maladwala, an associate in the litigation and dispute resolution group at Fasken Martineau.

Two ancillary issues of social media are the blurring of what is "work time" and what is "personal time," coupled with the realization that the Internet has ended any expectation of privacy.

And although the Ontario Court of Appeal has recognized "intrusion upon seclusion" as a tort (invasion of privacy) in *Jones v. Tsige*, the fact remains that office computers and network infrastructure remain the property of employers.

"Innocent dissemination" and "inadvertent dissemination" by employees has led to four areas that companies can control: restricting access to social media during work hours; monitoring landing sites; monitoring communication among employees; and establishing social media policies.

"Employers should develop very strong, comprehensive social media and electronic use policies," says Andrew Bratt, an asso-



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Chris Mathers Inc.

ciate in the labour and employment practice at Heenan Blaikie.

For Bratt, there are three areas that must be covered by such a policy.

First, the policy statement must make it clear whether the company supports social media.

Second, define the scope of acceptable use. What is appropriate and inappropriate content? Can employees use social media on company time, and if so, to what extent? What can and can't employees say? Can they use the employer's name? Can

they post the company logo? Can they post on company time?

Third, each employee posting should have a disclaimer that these views are the personal beliefs of the employee, not the company's views. This may be easier said than done.

TD Bank has one of the most comprehensive social media policies, with separate policies for Facebook, Twitter and LinkedIn. Generally, employees are made aware that every posting should be respectful, can spread very quickly, and will be around forever on the Internet.

"One of the problems with social media is that employees post stuff in haste, without thinking. And these are precisely the comments that get them into trouble," Maladwala says.

"A useful filter for all social media is this: if your mom, a judge, and a client can read your post and not be offended, then it is probably okay," Bratt says.

Of course, the incident that made employers sit up and take notice of the dangers of social media came in 2009, with two Domino's employees blowing their noses on a pizza on camera and uploading the video to YouTube. But rogue employees come in many varieties.

For Chris Mathers, there is a certain percentage of the population that is "deviant" and this has not changed over the decades. Mathers retired from the RCMP after a 20-year career and opened

his own private investigative firm, Chris Mathers Inc., in 2004.

"There is no new human behaviour, just better technology. And technology is the friend of malfeasance," says Mathers, whose specialty is anti-money laundering.

Although the number of rogue employees is small, they can cause a lot of damage. Employers must first recognize the patterns of behaviour.

"One is a fluke, two is a coincidence, and three is a pattern. Employers need to learn to pay attention to these and not brush them off," says Daniel Tobok, president of Digital Wyzdom, a computer forensic firm that specializes in employee investigations, hacking incidents, and e-Discovery services.

Many of Tobok's clients are Bay Street law firms, investigating incidents on behalf of their clients.

Tobok says that, typically, his firm is called to investigate incidents such as a company losing contract after contract to the competition, e-mails purporting to be from senior executives sent to employees that contain malicious software, and hackers trying to get into a company's customer database or research lab.

With the rise of workplace investigations, which Tobok says are up 40 per cent since 2008 (let

alone website hacking incidents which have become commonplace), police worldwide can barely keep up with hard crime, organized crime, gang violence and child pornography occupying their investigative time.

"If you call in the police to deal with your workplace incident, your chances of getting them to investigate are twofold: one, slim and two, none," Mathers says.

"If police do accept to investigate, the employer loses control of the investigation. You won't hear from them for months, or likely years."

Computer forensics uses specialized tools, software, and industry recognized chain-of-custody procedures to collect, preserve and produce data for court and out-of-court settlements. This is what enables employers to deal effectively and quietly with rogue employees, with minimal damage to operations and reputation.

"Merely the act of turning on a computer without the proper forensic tools can alter the important metadata that can make or break your case," Tobok says. ■

Jana Schilder writes about technology and employees, having a background in employee communications at Nortel Networks, Hydro One and Canadian National Railway.

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Enjoy your well-earned retirement, Dianne—but we still want to continue receiving your thoughtful questions from the front row at events and lectures!

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