



WILLIAM FRY EMPLOYMENT REPORT 2013

Social Media in the Workplace



CONTENTS

- Foreword
- Key Findings
- Recruitment
- Ownership
- Productivity
- Brand Protection
- Disciplinary Issues
- Social Media Policy
- About the Research
- About William Fry

FOREWORD

Welcome to the William Fry Employment Report 2013 which focuses on social media in the workplace.

Social media platforms such as LinkedIn, Facebook and Twitter have revolutionised communication. There have been many reports on social media in the workplace internationally, but the Irish workplace has not been extensively reviewed. We commissioned a survey to gain an insight into how social media is being used in the Irish workplace. The survey was conducted with 200 Irish based companies, both domestic and international, and 500 employees.

The purpose of our report is to help employers manage social media in the workplace effectively by pre-empting and avoiding potential employment issues.

The overriding message for employers is the need to implement a social media policy tailored to the needs of their organisation, to review that policy regularly, to ensure that employees are aware of the policy and understand how it affects them and to enforce it consistently.

We hope you find this report interesting and informative and we welcome your feedback.



Alicia Compton
Employment & Benefits Partner
Phone: + 353 1 639 5376
Email: alicia.compton@williamfry.ie



Catherine O'Flynn
Employment & Benefits Associate
Phone: + 353 1 639 5136
Email: catherine.o'flynn@williamfry.ie

KEY FINDINGS

This survey examined a number of areas arising from the use of social media in the workplace, including its importance in the recruitment process, its effect on productivity, disciplinary issues and ownership of social media accounts and their contents.

Our findings show that evidence on social media of bad language or discriminatory views of job candidates influences employers' decision to hire. In relation to **Recruitment** we consider the extent to which employers can screen the online activity of job candidates.

Candidates are protected by the Employment Equality legislation which prohibits discrimination on nine specific grounds such as gender, sexual orientation, age and race. An employer who checks the profiles of candidates on social media platforms could be liable under this legislation if a candidate can show that the reason he/she was not offered a job was connected with material relevant to one of the nine grounds and seen by the prospective employer on the candidate's social media account.

A key emerging challenge for employers is the **Ownership** of social media accounts and/or contacts on those accounts. The most significant challenge is what happens to work-related contacts when the employee leaves the organisation. 61% of employees have work-related contacts on their personal social media accounts yet only 3% of employers know what work-related social media contacts their employees have. The question of ownership should be dealt with as early on in the employment relationship as possible.

We also examine issues around **productivity** and whether access to social media sites during work hours decreases Productivity. While 47% of employees believe that access to social media during working hours decreases productivity, only 38% of employers agree. Issues regarding employee

productivity relating to the use of social media should be treated in the same way as any other underperformance issue, such as, by putting a performance improvement plan in place.

Businesses are turning to social media to enhance and strengthen their brand. Social media facilitates online relationships with potential customers or clients. To ensure **Brand Protection**, employers should set out clear guidelines on communications on social media and specify how employees should report negative comments made about the organisation.

Disciplinary Issues arise in connection with employees' social media activity. Although 51% of employers and 40% of employees say that activity on social media should be treated differently if it takes place outside working hours, the same considerations apply regardless of when the activity takes place.

Employers may be held vicariously liable for acts of bullying or harassment of employees carried out by their colleagues on social media sites, even if the comments are posted outside of working hours. It is not a defence for an employer to say that those acts were carried out without their consent or knowledge. It will be helpful to a defence, however, to show that the employer took practical steps to prevent the act complained of. A clear and comprehensive social media policy which deals with appropriate conduct is key.

We have set out best practice for putting in place a Social Media Policy and list the issues which should be addressed when preparing a Social Media Policy. A social media policy should be a considered policy which meets the needs of the organisation to which it applies. It should cross refer to other relevant HR policies. Given the speed of developments in this area, the social media policy should be updated regularly and effectively communicated to all employees.

RECRUITMENT

Our survey results indicate that employers are influenced by evidence on social media of discriminatory views and bad language when it comes to job applicants. Social media undoubtedly provides a significant resource for recruiters in terms of sourcing candidates but is it acceptable to use social media to screen candidates?

Social media screening has become an issue in other jurisdictions to the extent that several US States have enacted legislation prohibiting employers from requesting login details of the social media accounts of job applicants.

There is no legislation prohibiting an employer requesting login details in Ireland. However, when an employer reviews a job candidate's social media accounts, two issues should be considered.

Firstly, candidates are protected by the employment equality legislation which prohibits discrimination on the nine grounds of gender, civil or family status, sexual orientation, religious belief, age, disability, race or nationality or membership of the Traveller community. An employer could be liable under equality legislation if a candidate can show that the reason he/she was not offered a job was connected with material relevant to one of the nine grounds and seen by the prospective employer on the candidate's social media accounts.

Secondly, data protection legislation and guidance issued by the Data Protection Commissioner suggests that employers must, at a minimum, advise candidates that online screening will take place, explain what form it will take and why screening is considered necessary having regard to the nature of the job. Other data protection obligations, including how a candidate's personal data gleaned in the screening process should be stored and protected from unnecessary dissemination must also be considered.

SCREENING

The UK's first Youth Police and Crime Commissioner, Paris Brown (17), recently resigned from her post following criticism of messages posted by her on Twitter when she was aged between 14 and 16.

The Police and Crime Commissioner responsible for recruiting Ms Brown has been criticised for not carrying out checks on social media before Ms Brown's appointment. The Commissioner has suggested that such checks are likely to be part of future recruitment processes.

86%

of employers say the use of bad language on a candidate's social media account would affect their decision to hire that candidate.

82%

of employers would be negatively influenced by discriminatory views on a candidate's social media account.

81%

of employers say they would be put off by inappropriate photos/videos on a candidate's social media account.



Best Practice

- If reviewing a candidate's social media accounts forms part of an organisation's recruitment process, let candidates know that this will take place, explain what form it will take and why it is considered necessary having regard to the nature of the job.
- Ensure that information sourced from social media is obtained and retained in accordance with data protection requirements.
- Ensure that any decision not to recruit an individual is not based upon any of the discriminatory grounds covered by the employment equality legislation.

OWNERSHIP

Ownership of social media accounts, and of the contacts, friends or followers on those accounts is an emerging issue for employers. As the economy recovers and movement increases within the job market these issues will arise more frequently.

Customer or client facing employees often set up social media accounts to reinforce customer/client relationships and may be encouraged to do so by their employer.

Employees can amass a significant number of contacts, friends or followers on social media accounts. Who owns those work related contacts and social media accounts and what happens to them when the employee leaves the employment.

An employer cannot claim ownership over all work related contacts simply because they are work related. Disputes between employers and employees regarding ownership of social media material are governed by contract and common law principles developed through case law. There is no Irish case law on this issue to date, however developing UK and US case law may indicate the approach the Irish courts will take.

8%

of employers allow employees to store work related contacts on their personal social media accounts.

61%

of employees have work related contacts on their personal social media accounts.

3%

of employers know what work related contacts their employees have on their personal social media accounts.

WHOSE CONTACT IS IT ANYWAY?

The leading UK case involving ownership of LinkedIn contacts is *Hays Specialist Recruitment (Holdings) Limited v Ions (2008)*. Mr Ions left Hays to set up a rival agency. Hays suspected that Mr Ions was using confidential information concerning clients and contacts which he had copied to his LinkedIn account during his employment. A search of Mr Ions' e-mail account revealed that, during his employment, Mr Ions had invited two existing clients of Hays to join his LinkedIn network.

When deciding on the claim brought by Hays for breach of contract the Court considered that an employee recording client contact details with a view to their future use in a competing business was potentially a breach of the employee's employment

obligations. Essentially, while an employer may authorise employees to gather contact details on their LinkedIn accounts that information is confidential information, and remains the property of the employer. This illustrates the distinction between ownership of a LinkedIn account and ownership of the information contained within that account.

The Court directed disclosure of those contacts whose names and addresses Mr Ions had taken from his work email address book and all emails sent to or received by his LinkedIn account from the Hays computer network whilst Mr Ions was an employee of Hays. He was also ordered to disclose all documents, including invoices and emails, evidencing the use of the LinkedIn contacts and any business names obtained from them.

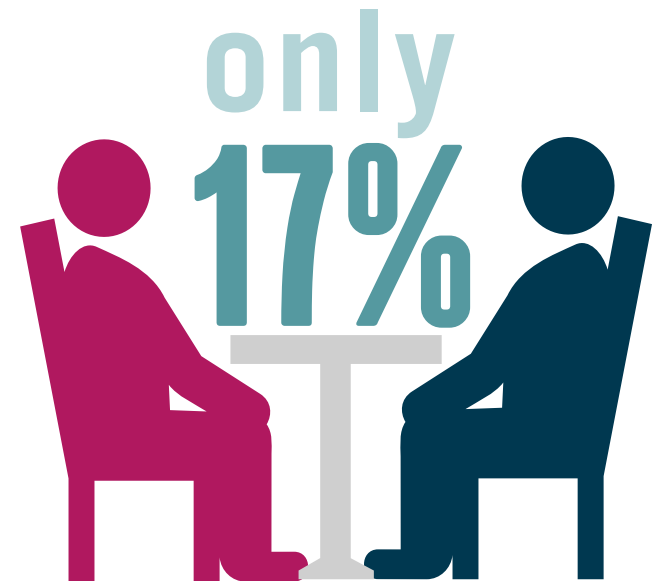
OWNERSHIP

LOCKED OUT OF LINKEDIN

In March 2013, judgement was delivered in a US case involving ownership of a LinkedIn account. In ***Eagle v Edcomm***, Dr Eagle, former CEO of Edcomm, filed a complaint alleging that Edcomm hijacked her LinkedIn account after her employment was terminated. While Dr Eagle was CEO of Edcomm, she established a LinkedIn account with the encouragement and assistance of Edcomm. She used this account to promote Edcomm's services, to foster her professional reputation, to connect with her family and to build social and professional relationships.

After her employment was terminated, Edcomm, using Dr Eagle's LinkedIn password, accessed the account and changed the password so that Dr Eagle could no longer access the account. Edcomm then changed the account profile to display Dr Eagle's successor's name and photograph, although Dr Eagle's honours, recommendations and connections were not deleted. For several weeks thereafter, a search for Dr Eagle on LinkedIn found the information for her replacement instead.

The Court held in Dr Eagle's favour and pointed out that Edcomm, although clearly concerned about its employees' social media presence, did not have a policy in place determining who owned the accounts.



**of employers have discussed
with their employees the position
regarding work related contacts
on social media accounts upon
termination of employment.**

We asked employers and employees to tell us who owned the followers, contacts and friends on employees' personal social media accounts.

The results show two very different points of view and a significant degree of uncertainty in the minds of employers and employees.



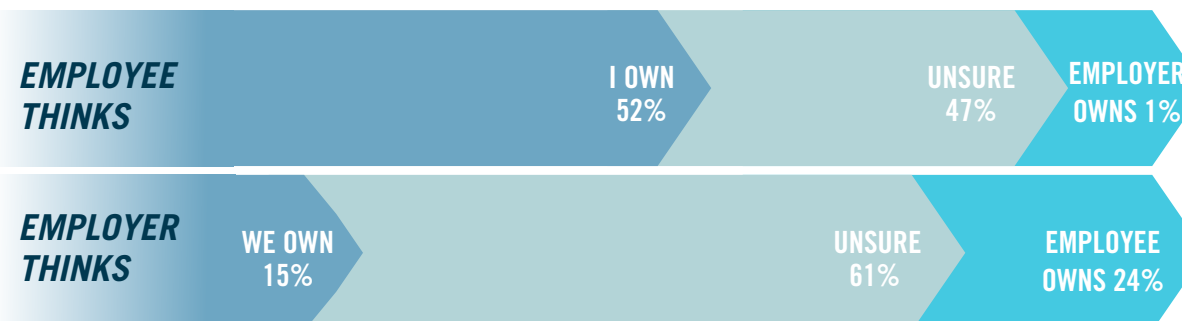
Twitter®



Facebook®



LinkedIn®



Best Practice

- Deal with ownership of work related contacts on employer or employee owned devices and social media accounts at the start of the employment relationship.
- Set the boundary between personal and professional contacts and/or other important business information.
- Amend contracts of employment and staff handbooks so that confidential information and post termination restrictions capture work related contacts on social media accounts.
- Require employees not to add work related contacts to personal social media accounts or make clear the basis on which they are permitted to do so.
- Require employees to delete work related contacts from social media accounts on termination of employment.
- Inform employees that they are not permitted to hold themselves out as employees on their social media accounts once their employment has ended.

PRODUCTIVITY

Our survey indicates that 47% of employees believe that access to social media during work hours decreases productivity. It is interesting that only 38% of employers agree. As the majority of employees access social media from personal devices while at work there is limited value in imposing absolute restrictions upon employees accessing social media on employer-owned devices.

If an employer is concerned about an employee's productivity, whether it is connected with suspected high levels of social media use during the working day, or for any other reason, these concerns should be addressed through the implementation of a performance improvement plan.

81%

of employees access social media sites at work.

42%

of employers allow some form of social media access while at work.

31%

of employees access social media sites multiple times a day at work.

47%

of employers think that social media access, while at work, increases workplace morale. 36% of employees agree.

ON AVERAGE
EMPLOYEES SPEND
56 MINUTES
per working day
on social media sites.

Best Practice

- Set realistic guidelines for employees regarding the accessing of social media sites at work irrespective of whether on employer or employee owned devices.
- Deal with concerns about productivity due to suspected social media usage at work in the same way as any other performance issue is dealt with - by putting a performance improvement plan in place.

BRAND PROTECTION

Business is increasingly turning to social media to enhance reputation and grow. Social media provides unique opportunities to connect and network with potential customers or clients that were simply not available before.

A key issue for employers is to identify how employees will participate in this process and to set out clear guidelines as to how, what and by whom information relating to the employer's business is communicated

on social media. Employees should be encouraged to report comments concerning the business made on social media to a central point within their organisation.

The potential for an organisation to interact negatively with customers and clients on social media at a speed and on a scale previously unimagined is also an issue for employers.

REPUTATION RISK

In a much viewed YouTube video, an employee of a multi-national fast food operation was seen preparing a sandwich for delivery. It was clear from the video and the accompanying narrative by a co-worker that the sandwich was being prepared without regard to hygiene or food standards and in a way that would be damaging to the employer's brand.

Within days of the video being posted online it had been viewed more than a million times. Both employees were dismissed.

In a case involving a UK supermarket chain, an employee was dismissed for posting a video on YouTube of colleagues having a fight with plastic bags. The video clip was viewed by eight people, three of whom were the managers of the supermarket where the employee worked and who took the decision to dismiss the employee.

The Employment Tribunal held that the dismissal was unfair since there was no actual risk of reputational damage to the supermarket.

56%

of employers encourage their employees to report negative comments.

38%

of employees say they would do nothing if they came across negative comments about their employer on social media sites.

73%

of employers are not concerned that confidential business information may be posted on social media sites by employees.

Best Practice

- If employees are encouraged or required to use business social media accounts ensure that account passwords and login details are not changed by employees without permission.
- Define who is permitted to post or comment on business social media accounts.
- Consider whether postings or comments need to be monitored in advance to ensure appropriate content.
- Ensure employees are clear about what to do if they read comments about the organisation on social media.
- Ensure employees are not permitted to post confidential information on personal social media accounts and are clear as to what confidential information means.
- Decide whether employees may post work related photographs or comments on personal social media accounts.

DISCIPLINARY ISSUES

Employers may have regard to employee conduct which takes place on social media sites. Conduct which is linked or damaging to the employer, has an impact upon the employee's ability to do his/her job or causes offence to other employees, requires action. Although 51% of employers and 40% of employees say that activity on social media should be treated differently if it takes place outside of working hours, the same considerations apply regardless of when the conduct takes place.

When an employer is considering taking disciplinary action against an employee, the employee may say that he/she thought their social media account was private or that he/she has a right to freedom of expression. In fact, employees should not assume that posts or comments will remain private given the nature of the internet. In addition, the freedom of expression enjoyed by the employee must be balanced against the right of the employer to protect their reputation and to observe their duty of care to other employees.

Employers may be vicariously liable for acts of bullying, harassment or discrimination of employees carried out by their colleagues on social media sites. It will not be a defence for the employer to say that such acts were carried out without their consent or knowledge. It will be helpful to a defence however, to show that the employer took practical steps to prevent the act complained of taking place. Key to this would be to have in place a clear and comprehensive social media policy which identifies and requires appropriate conduct concerning colleagues both during and outside of working hours on social media sites.

As with any disciplinary matter with which an employer must deal, sanctions for misconduct in relation to social media must be proportionate to the circumstances and the disciplinary process followed must be fair.

EMPLOYEE ACTIVITY ON SOCIAL MEDIA

Kiernan v Aweare (2007) was one of the first Irish cases to raise the issue of social media in the workplace. The case involved the posting of comments by Ms Kiernan about her branch manager on the social networking site Bebo outside of working hours. The remarks were brought to management's attention by a customer. Ms Kiernan, who had a previously clean disciplinary record, was dismissed for gross misconduct. On appeal to the Employment Appeals Tribunal, it was held that the sanction of dismissal was disproportionate to the offence.

A different determination was made in *O'Mahony v PJF Insurances Limited (2010)*, a case which also involved an employee posting disparaging comments about the employer and a director of the organisation on her Facebook page. Ms O'Mahony was dismissed and challenged the dismissal in the Employment Appeals Tribunal. The Tribunal held that the posts were personally offensive to one of the directors in particular and that the breach of trust was so significant that Ms O'Mahony's position became untenable.

In *Toland v Marks & Spencer (2013)* Ms Toland was awarded €18,000 compensation in her claim for unfair dismissal. Ms Toland had been dismissed due to a breach of the organisation's social networking policy. In giving evidence to the Tribunal, Ms Toland said that her participation in the social networking sites was limited and that she did not intend to hurt or disrespect anyone. Ms Toland did accept that by commenting on posts by other staff members she did participate in conversations regardless of her intentions.

As Marks & Spencer could not provide the witness who made the decision to dismiss the employee at the hearing or any notes of the disciplinary meeting, the Tribunal treated the case as an uncontested unfair dismissal. However, the Tribunal did accept that there was some contribution to the dismissal by Ms Toland as a result of her "careless misuse of a social networking site and the compensation awarded reflects this".



VICARIOUS LIABILITY

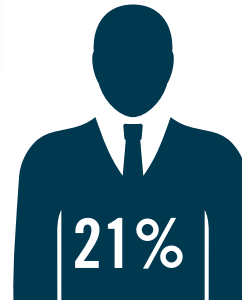
The UK case of *Otomewo v Carphone Warehouse (2012)* illustrates the importance of having an effective social media policy in place to deal with claims of vicarious liability.

Mr Otomewo was a manager in a Carphone Warehouse store. During working hours, two of Mr Otomewo's colleagues took his iPhone without his consent and used it to post a status update on his Facebook page saying "finally came out of the closet, I am gay and proud".

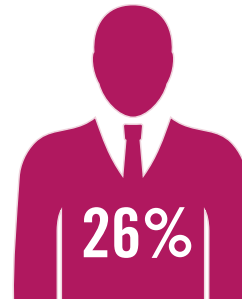
At a Tribunal hearing it was acknowledged that Mr Otomewo was not gay and that his colleagues did not

believe that he was gay. However, it was accepted that the status update caused Mr Otomewo embarrassment and distress as it could be seen by his friends and family.

The Employment Tribunal found that it was reasonable for Mr Otomewo to be embarrassed and distressed by the status update on his Facebook page which was unwanted and an unnecessary and an unwarranted intrusion into his private life on a public space amounting to sexual orientation harassment. The Employment Tribunal found that the comments were made in the course of employment and that Carphone Warehouse, as the employer, was liable for such actions.



of employers have disciplined employees based on their actions on social media.



of employees say their organisation has disciplined employees based on social media activity.

Best Practice

- Ensure your social media policy states what is/is not permitted otherwise it will be difficult to discipline an employee for any social media policy breach.
- The social media policy should cross refer to other relevant HR policies.
- Before taking disciplinary action against an employee, consider whether there is a work-related context and/or whether the activity in question actually affects the work relationship and/or impacts upon the employer's reputation.
- Regardless of what the employee is thought to have done, fair investigatory and disciplinary procedures must be followed.
- Adopt a consistent and proportionate approach to disciplinary sanction for breach of social media policy.

SOCIAL MEDIA POLICY

Social media is an increasingly important part of the personal lives of employees and of business life and it is here to stay. Employers should consider the issues social media raises in their workplace and regulate its use and application. Key to this is to have a comprehensive, tailored social media policy in place and to ensure that employees read and understand it.

Where employees are required to use their own devices for work the social media policy should cover BYOD (Bring Your Own Device). Irrespective of whether employees use their own or employer owned devices, employers should require employees to use privacy and lock settings to minimise the risk of unauthorised access to those devices.

84%
of employers say that
social media is important
to their organisation.

Only **51%**
of employers have a
social media policy.

43%
of employees are
unsure whether their
organisation has a social
media policy.

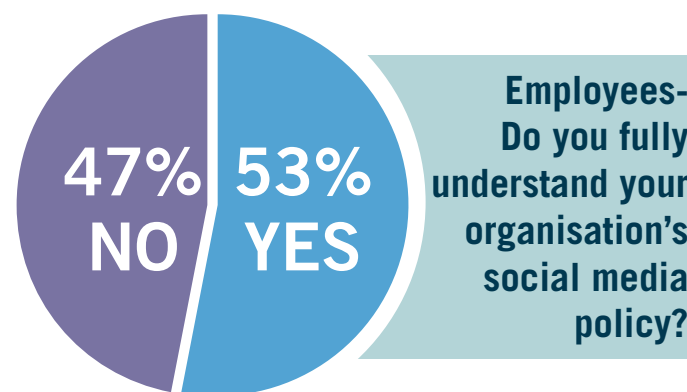
POLICY - WHY BOTHER?

In *Walker v Bausch & Lomb (2009)* the policy at issue was the employer's intranet usage policy. However, the deciding point holds good for social media. In this Irish case an employee posted to the organisation's intranet a message that had serious implications in terms of publicity and workplace industrial relations. The employee was dismissed and challenged the dismissal. The Employment Appeals Tribunal found that the organisation's investigation was fair but that the dismissal was not. A factor in the decision was that there was no proof that the employee had ever received or reviewed the organisation's intranet policy.

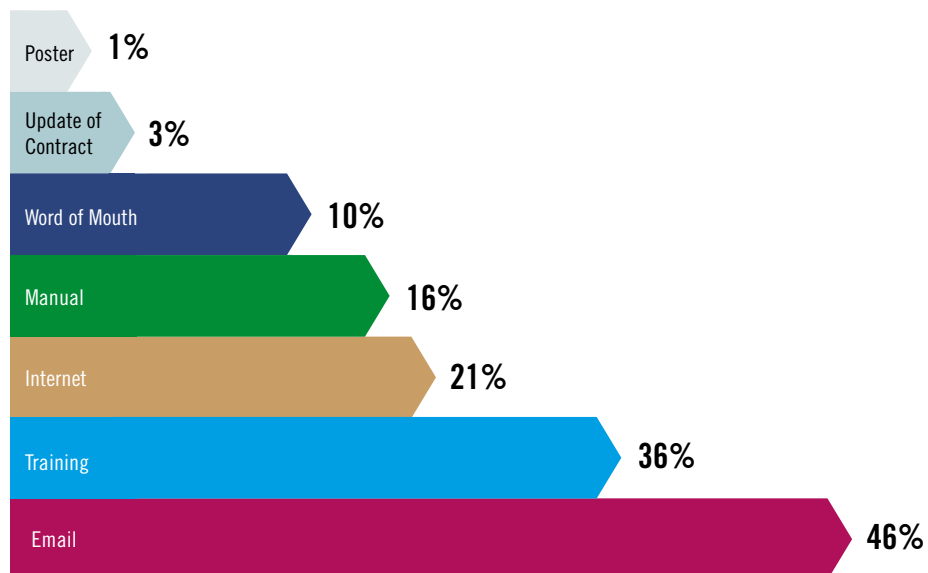
Crisp v Apple (2011) is a UK case concerning Mr Crisp who worked at an Apple store and posted derogatory comments on his Facebook page about his work and certain Apple products. These comments were brought to the attention of Mr Crisp's manager.

Mr Crisp was dismissed for gross misconduct and challenged his dismissal. The Employment Tribunal in the UK upheld the dismissal.

In arriving at its decision, the Employment Tribunal was influenced by the fact that training and policies on the use of social media had been provided to Mr Crisp by his employer.



How is your organisation's social media policy communicated to employees?



Of the employees who are required to use personal devices for work, **60%** say that their employer does not have a BYOD policy in place.

POLICY GUIDELINES

We have set out a number of key guidelines which we recommend including in your organisation's social media policy.

- Define the scope - apply it to personal and professional use on personal and work devices; cover activity inside and outside working hours.
- Set realistic guidelines regarding usage during work hours - consider allowing social media access in moderation once it does not affect productivity; confirm that excessive use of social media during working hours may constitute misconduct.
- Provide guidelines for employee communications in social media - advise employees to keep personal and work-related social media activities separate; state that employees are personally responsible for their posts; advise employees to think before they engage and be mindful of third parties' rights; inform employees of the need to use privacy settings/lock devices.
- Cross refer to other relevant workplace policies - e.g. disciplinary, bullying and harassment, equality, email and internet and data protection.
- Address confidential/sensitive information i.e. - remind employees they must not discuss clients, business partners or colleagues without permission outside the organisation or post any information that is not public.
- Reputation management - confirm what employees should do if they see any inaccurate or negative comments about the organisation on social media.
- Ownership - confirm whether the organisation has a proprietary interest in any accounts and/or information generated by employees on social media.
- Address consequences - confirm that failure to adhere to the social media policy may lead to disciplinary action.

Best Practice

- Implement a social media policy based upon actual business needs, bearing in mind what role social media has to play in the business.
- Ensure the social media policy is reviewed regularly as developments may quickly render it out of date.
- Include the employer's position on BYOD where employees are required or permitted to use their own devices for work.
- Ensure the social media policy is communicated effectively to all employees. Retain proof that it has been received, read and understood.

ABOUT THE RESEARCH

The research upon which this report is based was undertaken by Amárach Research. Two separate surveys were conducted, one among employers and one among employees of organisations operating in Ireland and of a size of 50 employees or more. A range of questions relating to social media in the workplace were asked of both groups to allow for an employer and employee perspective to be captured. A total of 200 employers were surveyed via telephone interviews and 500 employees were interviewed online. All interviewing was conducted in February 2013.

Amárach Research is a full service market research and consultancy firm operating in Ireland since the 1980's. Amárach Research is proud to be fully Irish owned, run and wholly independent. Amárach provides a range of research and consultancy services for blue chip and public sector clients who are seeking to gain a competitive advantage through understanding their customers and markets in more detail. Amárach Research brings clarity to complex issues through best in class research and analytic methods.



III= ABOUT WILLIAM FRY

William Fry is a leading full service Irish law firm with offices in Dublin, London, New York and Mountain View, California. Our client-focused service combines technical excellence with commercial awareness and a practical, constructive approach to business issues. We advise leading domestic and international corporations, financial institutions and government organisations. We regularly act on complex, multi-jurisdictional transactions and commercial disputes. Strong client relationships and high quality advice are the hallmarks of our business.

Our Employment & Benefits Team is one of the largest employment law practices in Ireland. Our areas of expertise include:

- Advising on all legal issues relating to the employment relationship
- Representing clients before courts and tribunals in discrimination claims, unfair dismissal cases, breach of contract actions, injunction proceedings and prosecutions
- Industrial relations
- Advising on employment and pension issues in business sales, group reorganisations, insolvencies and outsourcing
- Advising on all aspects of pensions law for employers, trustees, pension product providers and individuals
- Employee share plans
- Providing bespoke employment law training sessions for HR personnel
- Advising on health and safety matters

Our clients include many leading multinational and Irish companies, pension scheme trustees and public sector organisations. Our team has advised on the employment and pensions aspects of many of the major corporate transactions in Ireland in recent years. We have successfully represented clients in a number of High Court and Supreme Court cases in which the judgments handed down have clarified key points of Irish employment law.

Recent directory commentary includes:

"Practice head Boyce Shubotham is '*tactically astute in all his dealings*', Maura Roe '*remains calm and focused*', and Alicia Compton is '*excellent*.'" (Legal 500 EMEA, 2013)

"A well-connected practice that really tries to understand its clients. I have yet to give the lawyers a scenario which has stumped them - you can always find an expert in your area." (Chambers Europe, 2013)

"William Fry is fabulous. It understands the issues clients face and ensures transactions progress smoothly..." "everyone we deal with is just superb. We value the team's judgement and view them as colleagues" (Chambers Europe, 2012)

"William Fry's 'first class' team is capable of 'devising and delivering a solution' that clients are happy with." (Legal 500 EMEA, 2012)

CONTACT



Boyce Shubotham
Partner
T. +353 1 639 5362
E. boyce.shubotham@williamfry.ie



Alicia Compton
Partner
T. +353 1 639 5376
E. alicia.compton@williamfry.ie



Maura Roe
Partner
T. +353 1 639 5246
E. maura.roe@williamfry.ie



Michael Wolfe
Partner
T. +353 1 639 5204
E. michael.wolfe@williamfry.ie



Liam Connellan
Partner
T. +353 1 639 5110
E. liam.connellan@williamfry.ie



Catherine O'Flynn
Associate
T. +353 1 639 5136
E. catherine.oflynn@williamfry.ie



Aisling Butler
Associate
T. +353 1 639 5178
E. aisling.butler@williamfry.ie



Anne O'Connell
Associate
T. +353 1 639 5286
E. anne.oconnell@williamfry.ie



Maryrose Dillon
Associate
T. +353 1 489 6520
E. maryrose.dillon@williamfry.ie



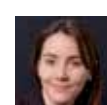
Louise Harrison
Associate
T. +353 1 489 6580
E. louise.harrison@williamfry.ie



Louise Moore
Assistant
T. +353 1 489 6526
E. louise.moore@williamfry.ie



Ciara Ruane
Assistant
T. +353 1 489 6644
E. ciara.ruane@williamfry.ie



Nichola Harkin
Assistant
T. +353 1 489 6616
E. nichola.harkin@williamfry.ie



Mary Greaney
Assistant
T. +353 1 639 5358
E. mary.greaney@williamfry.ie



Lorna Osbourne
Assistant
T. +353 1 489 6408
E. lorna.osbourne@williamfry.ie



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A selection of the clients of our Employment & Benefits Team



THE IRISH TIMES



“A well-connected practice that really tries to understand its clients. I have yet to give the lawyers a scenario which has stumped them – you can always find an expert in your area.”

Chambers Europe, 2013

NOTES

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