

SWEDEN

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Social media in the work place from a Swedish legal perspective

Background

The growing use of social media channels such as Facebook, Twitter and private blogs gives rise to a number of employment law questions. One is how the employer should handle employees' use of social media during working hours. Another is how employees use social media, for example to publicly criticise the employer or use social media in an inappropriate way by publishing, for example, racist or pornographic material.

From an employer's perspective, both positive and negative aspects of employees' use of social media can be observed. It may benefit the company if employees are active in social media channels and market the company's products and services, especially at a time when the line between work and the private sphere is blurred. Many companies see advantages in this regard. The working environment often benefits from a transparent approach. This type of use, however, at the same time deprives the employer to some extent of control over what is being communicated about the company.

Use of social media during working hours

Extensive use of social media, just like any other leisure activity, naturally infringes on working time and efficiency. A survey made by the Danish Chamber of Commerce in 2010 suggests that Danish employees' activities in social media during working hours are estimated to cost employers approximately DKK 11 billion a year (approximately 1.5 billion). Further, according to a survey made by the British job site MyJobGroup.co.uk in 2010, working hours lost on social media networks could potentially be costing employers in Britain up to £14 billion a year (approximately €16 billion).

As a basic principle, under Swedish law the employer leads and allocates the work. The employer is also in charge of the working equipment, for example the company's computers. In this respect, an employer may decide rules for the employees as to what

they should be doing when they are at work and how to use the computers, including to what extent employees may be active in social media. An employer could basically decide that no 'disturbing' activities such as private communication can take place during normal working hours. However, this is not a very common approach as HR aspects become reality; how would I like to be perceived as an employer? In today's society it can often be regarded as old-fashioned not to allow activities on social networks. Having said that, this does not mean that social media activities should be allowed without limitation or guidance.

The fine line between private and public in social media

An adaptation phase is natural when new technology is introduced. One of the latest challenges in technological development is what attitude one should have towards the possibilities offered by social media. Media reporting from all around the world, revealing 'Facebook scandals' in which online comments have been posted a little too hastily, suggests that social media users sometimes have problems relating to the possibilities offered by the new technology. The difference between private and public becomes blurred and many do not seem to see that the social media can be a means of mass communication. As an interesting comparison, one can reflect over the difference in the way people act on social networks and the way they act in other situations. Many people do not act as 'public' in real life as they do when they are online, and furthermore they do not seem to realise that what they post on Facebook or Twitter is in the public domain and can be seen and read by everyone who is online – at least when no privacy settings are applied. And even if privacy settings are used, a post might not be as private as one thinks when hundreds or even thousands of Facebook 'friends' can read it. As soon as a 'friend' on Facebook makes a comment on a post, this post

becomes visible to this individual's 'friends' as well. When a 'tweet' is 'retweeted' it is spread to all 'followers' of the individual who made the 'retweet'. Through a 'print screen', a comment or a photo may then be spread more widely. In this respect, the Facebook concept of 'friends' is misleading.

Freedom of speech in relation to loyalty obligation

In Sweden, reports have been seen in the media about employees who have posted negative opinions about their employer on Facebook and employees who have published inappropriate material. In many cases, the employees have stated that the posting was not wilful and intended only for selected Facebook 'friends' and not for everyone. This behaviour suggests that it is easy to publish without considering the consequences. But even though a certain type of behaviour is not wilful, it can nonetheless result in substantial harm to the employer. A recent example is the case where an individual employed with a Swedish staffing company posted a status update with negative information about Volvo, the company for which he was performing services on behalf of the staffing company. 'Only one day left in this madhouse' was one of his posts. Volvo expressed a lack of confidence in the person in question, who was subsequently replaced by the staffing company. The case drew a great deal of media attention at the time.

In connection with the case described above, it should be pointed out that freedom of speech is a far-reaching fundamental right according to the Swedish constitution. The work place should be characterised by openness. However, in an employment relationship, freedom of speech only has an immediate effect in the relation between the individual and the government, ie, when the government is the employer. In an employment relationship in the private sector, however, the mutual loyalty obligation following from the employment relationship takes precedence. The loyalty obligation in Swedish employment law is a basic principle which can be summarised as an obligation for the employee 'to put the employer's interests before his own'. Criticising the employer in an irrelevant way which causes the employer harm is a breach of the employee's general loyalty obligation. In this sense, a Facebook post in which an employee criticises his or her employer can consequently be perceived

and regarded as disloyal. A fairly common perception by the individual, however, is that what is written and communicated in social media is entirely a private issue and, furthermore, that freedom of speech is an unlimited right – which accordingly is not correct from a legal perspective.

Recent case law (district court case)

In some employment relations there is a special need for the employer to have particular confidence in the employee. Here, social media activities may imply further problems and raise new questions. In a Swedish case recently decided upon in a district court, the principal of a private upper secondary school was dismissed immediately because of his Facebook profile. The case illustrates the blurred line between private and public and the problems in assessing in which role a person acts when appearing in social media. The school argued they had no confidence in the principal, since he had been found posting photos with what the school deemed to be sexual content and also found to be a member of groups with names related to sex. The principal had given the contact details of the employer on his Facebook profile and was accordingly very clear about the fact that he was employed by the school. The principal contested the dismissal in court and claimed that the groups were of a humorous nature and that the photos had no connection to any sexual activity.

The court found that the principal had been wrongfully dismissed and pronounced that he had not breached any internal regulations (since there was no policy in place). Further, only the fact that the groups had names related to sex and that the photos were of a somewhat sexual nature was not enough to constitute a justifiable reason for dismissal, since, according to the court's general assessment, the groups and photos were not that obviously inappropriate as to constitute reprehensible behaviour. At the same time, however, the court stressed that a position of trust such as a school principal demands that the employee put the employer's interests before the employee's own and, further, that the employer has a justifiable interest in protecting its reputation. Accordingly, the photos and group memberships should be removed upon the school's request.

It should be borne in mind that the school where the principal was employed was a

private school and the loyalty obligation takes precedence over freedom of speech which is very clear from the employer's argumentation. At a state school, the employees are protected unrestrictedly by their constitutional right to freedom of speech. This aspect is particularly important when it comes to employees' criticism of their employer. One example that can be mentioned is a case from the parliamentary ombudsmen in which a librarian at a public library was criticised by their employer (the municipality which ran the library) after having commented on an article on a newspaper's website. The article had been written by the head librarian. The librarian was reminded by the municipality's head of administration that such behaviour was disloyal and that he should have spoken to the head librarian first. The parliamentary ombudsmen, however, strongly criticised the municipality for infringing the librarian's freedom of speech and pronounced that the head of administration lacked knowledge of the rules governing freedom of speech.

New conflicts of interest because of social media

Subject to an overall assessment, an employer may be entitled to dismiss an individual where the individual, objectively, has made disloyal statements or published inappropriate pictures which have caused the employer damage. But in addition to such cases, we will see many unfortunate situations. And often, in severe situations, a dismissal will not even make up for the loss the company may have suffered because of the attention drawn to the situation.

One such situation is when an employee has posted inappropriate material themselves, but how should unwanted photos which are posted by someone else on Facebook or

on Twitter be regarded? On Facebook, an individual may be 'tagged' in someone else's photos. In a society where everyone has a mobile phone with a camera and is able to publish photos taken with it within seconds, incidents of the discussed kind will happen over and over again. And who is to determine what is moral and what is immoral? The mere presence of the internet and social media can of course not imply a ban for everyone with a position of trust from participating in social activities for the fear of being photographed being drunk at a party.

Another situation is indirect statements from one individual which then triggers other people to comment in a more direct and harming way.

Increasing use of social media services will most likely lead to a change in the way we use them. For example, a relevant assumption is that more people will use different accounts; one in their private life and one in their professional role.

The approach on how to handle the use of social media

In this situation, it becomes very important for employers to have a clear, fair and relevant policy in place. In the interest of both the employer and the employee, it is reasonable to expect the employer to guide the employee and issue clear instructions as to what is expected of him or her both when it comes to the use of social media and in any other regard. According to a survey made by Manpower in 2010, only 20 employers worldwide had a policy in place for their employees' use of social media. A greater use of policies on employees' use of social media is to be expected.