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Business Law

Social media policies and your law firm



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In 2008, a few Virgin Atlantic Airlines stewards posted very uncomplimentary comments about Virgin's airplanes and its passengers on Facebook, including comments that the planes "were full of cockroaches." To have posted these comments on Facebook was bad enough, but the comments became widely circulated in the media. Result? Thirteen stewards were fired and Virgin's reputation was tarnished.

In 2008, a public relations executive tweeted to his followers as soon as he got off a plane in Memphis, "I would die if I had to live here." Of course, the PR executive didn't realize that Memphis was the head office of FedEx—one of his company's largest clients. And FedEx found out about the tweet because one his followers was followed by someone in FedEx.

The Israeli army called off an incursion into a West Bank town because a soldier revealed his combat unit, the location of the operation and when the operation was to begin...on Facebook! He wrote, "On Wednesday we clean up Katana and on Thursday, God willing, we go home." The soldier was court-martialed and sentenced to 10 days in jail, his Facebook post having been discovered by other members of his unit.

Finally, Lady Shelly Sawyers, the wife of the director of MI6, Britain's Secret Intelligence Service, made postings to Facebook about her husband, their family and their social and professional circle, which exposed potentially compromising details about

where they live and work, who their "friends" were and where they go on holiday. Lady Sawyers put no privacy protection on the account, and any of Facebook's then 200 million users could have seen the posts, no matter what terrorist organization they belonged to.

So what do you do if statements are made that shouldn't be by your employees on Facebook, Twitter or a blog? Maybe there's a "black-out period" where no public statements can be made about a company under securities laws. What if someone in your organization is using Facebook, Twitter or other social media sites to promote a stock (and sell on the high) or trash a stock? What if technical resource people within a company are going back and forth on Facebook to a point where a potential patent application is jeopardized because the information is spotted by someone else and he or she makes a patent application first?

What if an employee's posts to a social network site are disparaging and perhaps defamatory to your business or tarnish your company's reputation? What if disparaging comments made by employees on a blog or Facebook complain about your company's human rights practices, workplace safety, sexual harassment on the job, hiring practices (only good-looking girls need apply here!) and other information which may open up a hornet's nest of legal consequences?

Like it or not, social media is here to stay. Registered users on Facebook number over 500 million, making it, if it were a country, the third-largest country in the world. Banning social media use by a company's employees might well drive creative, collaborative and expressive young people to companies that are more in tune with their

thinking. So you'll lose talent.

Whether you're a law firm or any other kind of business, you should formulate policies on social media use that your employees and contractors must adhere to as a condition of their employment.

Issues to consider when drafting a social media policy include:

1. Notwithstanding the fact social media is here to stay, you might very well want a policy that totally bans social media use outright (personally and in the office) if you're in the business of defense contracting, counter-terrorism, nuclear weapons development, espionage, biotechnology, the Mafia or some other highly secretive business where information protection is very important. By the way, the U.S. Army allows its soldiers to post on Facebook; they just have policies regarding what can and can't be said, and the soldiers know their posts are monitored.

2. If it's allowed, do you have rules about postings that emanate from computers or smart phones owned by the company and used by employees? Your policy may be "if you're going to do it, do it at home on your own time, and your own computer, but not on office time on office devices."

3. If you do permit employees to engage in social networking from work (or on work handheld devices) do you limit the employee's comments and conduct to something that is "related to work," or do you permit some limited personal use (the way you might with personal telephone calls, where the occasional one is fine)?

4. Whether employees are at work or at home, do you want to have a policy prohibiting the identification of the employee's job with that employer or the brand itself? That is to say, he or she can't say that they

work for BP, the RCMP or any other company or organization that might not want their brand mentioned on social media sites. So you might say, "post what you want, be professional, but no-one can know who your employer is on-line."

5. You might allow social media by employees for "appropriate business purposes." But how do you define those purposes?

6. How do you manage what is said about your company online, and do you have the resources to manage what your employees and customers say about your company? If you're going to outright prohibit social networking in the office, how will you monitor it? Are you currently using "Google Alerts" to monitor use of your brand on line? Should you have a person in your organization who is designated as the "social media tsar," responsible for managing your own content on social media sites, managing what employees say about the company, what the public says about the company and the ongoing reputation of the company online?

7. How do you enforce this policy?

8. How do you train your managers to implement this policy?

Businesses have to deal with how their employees can use and misuse social media. The way to do so is to have internal guidelines that all your employees agree to as a condition of their employment. ■

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Debate over securities regulator should focus on provincial concerns

Regulator

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strict French-language requirement for filings and potentially losing securities-related business as a result, Quebec is "losing out" in broader economic opportunities. For instance, when San Francisco-based Visa Inc. raised a record US\$17.9 billion in an initial public offering (the largest ever in the U.S.) two years ago, the world's largest credit card network did not file a prospectus in Quebec.

Provinces have other concerns (Manitoba also opposes the establishment of a national securities regulator), and chief among provincial issues is how local and regional economic interests will be taken into account by the proposed CSRA, explains securities law expert Poonam Puri, an associate professor at Osgoode Hall Law School, who served as an advisor to the Wise Persons' Com-



Puri

mittee and the Expert Panel on Securities Regulation.

A majority of issuers in the oil and gas and financial services sectors are headquartered in Alberta and Ontario, and are therefore subject to the oversight of those provinces' securities commissions.

"However, the capital market is made up of not just issuers, but also investors from across the country. So these markets and their economic significance are national in scope, despite the presence of these local clusters," explains Puri, who also serves as co-director of the Jay and Barbara Hennick Centre for Business and Law at York University.

She says that while the financial services industry (finance, insurance, real estate, renting) represents 22 per cent of Ontario's gross domestic product (GDP), it also accounts for between 12 and 23 per cent of the GDP of the other provinces and territories. "This means that the economic significance of the financial services cluster is ultimately important for the entire country."

Puri explains that the proposed

legislation, which the federal government hopes will come into effect three years from now, harmonizes existing provincial securities regulations in the form of a single statute, and would have a single structure which recognizes regional and local expertise. The pan-Canadian regulator would also have powers to deal with such crimes as fraud and market manipulation.

"A national securities regulator is more than workable—it's necessary. You'd have a national regulator that's accountable to all Canadians rather than having the current system, which is fragmented and features different standards for investor protection across the country. Moreover, the current passport system does not include Ontario, which is a significant player in Canada's securities market," she says.

"It's embarrassing that Canada is the only Group of Seven industrialized country without a national securities regulator.

"It doesn't speak well for us at the international level."

But over the past half-century,

the federal government of the day has been advised to establish a securities watchdog, beginning with the Royal Commission on Banking and Finance (also known as the Porter Commission), which in 1964 first floated the idea of a common securities regulator.

A decade later, Philip Anisman—then director of corporate research at the then-federal Department of Consumer and Corporate Affairs—led a study that resulted in the 1979 Proposals for a Securities Market Law for Canada, of which he was the principal author—that again recommended the creation of a national securities regulator.

In the mid-1990s, even former premier Ralph Klein's Alberta government was willing to sign on to the idea.

"The difficulty with much of the debate to date has been that it's focused on generalities rather than specific ways of addressing

the issues that are of concern to the provinces," says Anisman, a Toronto-based securities lawyer who also serves as a legal advisor to the Canadian Securities Transition Office.

"There's an opportunity here for the development of a cooperative scheme," he explains, noting that Prime Minister Stephen Harper's government has shown a "greater level of commitment" to the creation of a national securities regulator than any of its predecessors.

"But it's going to depend, in the part, on the level of cooperation, the willingness to cooperate, and the ability to come to a resolution that accommodates national and local issues in a manner that is satisfactory to both levels of government."

He says that the increasing globalization of securities markets, and the interrelationships among securities markets internationally and with other facets of the financial system, make the need for Canada having a national securities regulator "obvious." ■



Anisman