Tilleke & Gibbins

The Use of Social Media in the Workplace

THAILAND

1. *Are there any risks for employers that use social media sites to vet job applicants?*

(a) *General right to Privacy*

Thailand's 2007 Constitution protects a person's family rights, dignity, reputation, and right to privacy, and also provides for the protection of individuals' personal data. Theoretically, an employer's use of information gathered from social media sites may violate these 'rights'. However, very little has yet been done in the way of statute to implement these Constitutional aspirations.

(b) *The Personal Data Protection Bill ("PDPB")*

The PDPB has been under consideration for a number of years and, at the time of writing, no date has been set for it to come into force. Based on the last version reviewed, it would establish a comprehensive data protection regime, which would have broad applicability across virtually all sectors, including employment (and applying to both current employment relationships and potential employment relationships).

The PDPB would provide a wronged applicant various means of redress, including civil actions, criminal actions, and administrative complaints. However, for now, these concerns are merely theoretical, as the PDPB has not yet been enacted.

(c) *Unlawful discrimination*

Social media sites typically contain personal information on job applicants, which may include information on which it would be inappropriate for employers to make employment decisions. The 2007 Constitution prohibits unjust discrimination against a person on the grounds of difference in origin, race, language, sex, age, disability, physical or health condition, personal status, economic or social standing, religious belief, education or political views. An employer who

makes an employment decision on the basis of one or more of these factors might be engaging in unlawful discrimination. However, the reality is that such a claim would be very unlikely, particularly given that there are no provisions of labour law which implement this aspiration. In addition, some laws actually have the effect of requiring discrimination in certain of these categories.

2. *What steps can be taken by employers to minimise such risks?*

As noted, the concerns in this area are, at present, largely theoretical, although there is a very small risk of a successful claim. Indeed, many HR experts are likely to advocate employers' use of social media sites in making hiring decisions, and would recommend it as a sensible policy. Nevertheless, when the PDPB becomes law, and if other new labour laws are enacted, it will be necessary to revisit this issue.

3. *What problems could an employer face as a result of employees using social media sites?*

(a) *Release of confidential information*

Employees using social media sites may intentionally or inadvertently post information and/or images which contain confidential information relating to the employer or to a third party. If the released confidential information relates to a business partner and is protected by a non-disclosure agreement, this may damage the business relationship, and could potentially result in a claim for damages against the employer.

(b) *Damage to employer's reputation*

Employees using social media sites may intentionally or inadvertently post information and/or images which reflect poorly on the employer, for example, photographs of inebriated staff at the office New Year party, or perhaps

'status updates' containing complaints about the employer. Given that employees may add business partners (or even customers) to their 'friend lists', this information may reach precisely the wrong people. Moreover, since many social media sites allow users to display their employment details, viewers of a user's profile may recognise that a particular user works for a particular employer, and the user's online persona may have some impact on viewers' opinions of the employer.

(c) *Claims for defamation*

There is also a risk that an employee's post could defame a third party. If the subject matter of the defamatory comment is sufficiently linked to the employee's work (for example, saying that the employer's main competitors are a bunch of frauds), then the employer may be liable for that comment. The risk to the employer would increase with the level of the employee's position, and the extent to which the comments are linked to the employee's work, as these factors may indicate that the employee was speaking on behalf of the employer, rather than in the employee's personal capacity.

(d) *Employee issues*

An employee's posted photos and/or updates may produce a negative reaction in other employees. This may lead to confrontation and bickering, as well as a loss of esprit de corps. However, it is unlikely that a successful claim could be brought against an employer as a result of acts of harassment committed by its employees, unless it can be shown that the employer was somehow complicit in the harassment.

(e) *Loss of productivity*

Though some employers expect employees to use social media sites in doing their work (e.g. marketing personnel), others are concerned about the drain on employee productivity. This concern often arises with respect to employees who are paid by the hour.

4. What steps can be taken by an employer to minimise the risks associated with employees using social media sites?

(a) *Ban access*

Often, employers attempt to impose bans on access to social media sites during work hours. Though employers can set access controls for work computers, these bans are becoming less effective, given the prevalence of personal smart phones that can access the Internet. Indeed, smart phones are fast becoming the primary means of access to social media sites for many users. In addition to their lack of effectiveness, access bans can also be problematic because employees often react negatively to such restrictions, feeling that they are being treated like children or are being micro-managed. Moreover, this approach would certainly not work in situations in which employees were expected to use social media sites for work, e.g. employees who work in public relations or marketing. In this regard, if some employees are allowed to access social media sites, and others are not, an employer could be opening itself to claims for unfair employment practices.

(b) *Amend Work Rules*

Some employers may choose to amend their Work Rules (as registered with the Ministry of Labour) to provide clear standards for employees as to what is acceptable conduct and what is not, when using social media. Though some employers craft rules to only apply during work hours, some opt for more comprehensive rules that would purport to also apply outside work hours, and even outside the workplace. In any case, it is important that the Work Rules clearly describe the prohibited conduct, and also clearly state the disciplinary actions that could apply if the rules are violated.

Depending on the type of business, the employer could consider amending the Work Rules to establish:

- rules on employees' personal use of the employer's IT systems (possibly including an outright ban on the use of social media sites);
- rules on personal mobile phone usage during work hours;
- a prohibition on releasing confidential information, and information on who to ask, if an employee is unsure whether or not something constitutes confidential information;
- a prohibition on negative comments about the employer, its employees, and any third parties; and/or
- an outright ban on mentioning the employer's name on social media sites.

Should the employer ever need to enforce such a policy, it will be necessary to do so fairly, so as to avoid claims for unfair employment practices.

(*c*) *Monitor usage*

Many employers opt to monitor employee usage of the employer's IT systems and equipment. The information generated can be helpful in keeping the employer aware of employee concerns and issues, and is also useful when building evidence in advance of a potential termination. However, employee consent should be sought before initiating monitoring activities. Aside from the legal reasons for doing this, it is also beneficial in that it puts employees on notice that their online activities will be monitored, and this often results in moderation of personal use habits.

(*d*) *Restrictive covenants*

Surprisingly, many employers fail to include contractual provisions in employment agreements that impose obligations of confidentiality on employees. As such, these employers

should amend their employees' employment agreements to include restrictive covenants on confidentiality, and these clauses should be drafted to apply both during and after the employment. Also, depending on the type of employer, consideration should be given to including restrictive covenants on non-solicitation and non-competition.

Contributed by Tilleke & Gibbins