

## Social Media in the workplace

*As most major retail brands have developed a strong social media presence, there is little doubt that the rise of platforms such as Facebook, Twitter and Instagram have had a positive impact on the retail industry. However, social media can often be a double-edged sword, especially when it comes to employees' use of the platforms. Have you restricted, or attempted to restrict what your employees can and can't do on social media?*

### **What can go wrong?**

If you don't have an answer for that question, then you are in luck. Unfortunately businesses, particularly those in the retail sector, commonly fall victim to social media in one way or another. Generally speaking this is as a result of abuse at the hands of your employees. Some common examples where businesses have dealt with negative social media posts include:

- Strong criticism of the business, its practices, values or staff;
- Disparaging comments about clients or customers;
- Disclosure of confidential or commercially sensitive information;
- Misrepresentation of the business, its achievements, brand or clients; and
- Bullying and harassment of other staff members.

Even innocent and 'seemingly' harmless social media usage can be damaging to the company in other ways, such as impacting on workplace productivity. Recent surveys indicate that the average individual will spend between 1 and 3 hours on social media every day, so it is important that you communicate your expectations clearly to your employees to ensure they are appropriately utilising work time.

### **How do we fix it?**

The best tool for dealing with inappropriate social media use is a well-drafted social media policy, which defines the difference between a personal view and a professional one. A policy places the obligation on your employees to act responsibly when using social media in relation to their work, and provide for disciplinary action to be taken in the event they fail to do so.

Questions you may wish to consider when implementing such a policy include:

- Are your employees permitted to use social media during work time on a "reasonable use" basis or are they prohibited from using social media at all?
- Are your employees permitted to access social media applications on work computers?
- Are your employees expected to use social media as part of their duties, such as advertising on Twitter or networking through LinkedIn? If so, should they use the business account or their personal accounts?
- Do employees need management consent before posting on behalf of your business?
- Are employees able to identify that they are an employee of the Company on their social media accounts?

The policy should clearly prohibit unauthorised use of social media, such as disclosing confidential information or posting discriminatory, threatening, obscene or disparaging material.

**If you are unsure of how to best approach the issue, or which response is most appropriate for your business, please call the VANA Telephone Advisory Service on (02) 9083 0091.**

### **Employer obligations for work experience**

It has become increasingly common for businesses to offer unpaid internships or work experience opportunities to individuals or students. However, unpaid work experience, job placements and internships that aren't 'vocational placements' will be considered unlawful where an employment relationship exists.

A 'vocational placement' that meets the definition within the *Fair Work Act 2009* (Cth) is lawful if it meets the following criteria:

1. There must be a placement
2. No entitlement to pay for the work performed by the student
3. The placement is a requirement of an education or training course (i.e. a requirement of a particular course or subject)
4. The placement must be approved by the institution (i.e. the university or college)

In the absence of a vocational placement, unpaid work experience or internships will be unlawful where an employment relationship exists. There are a number of indicators that suggest an employment relationship exists between an individual and a business. These include:

- Where an individual has an expectation of payment for the work they have performed;
- Where an individual commits to perform work for the *benefit* of the company; and
- Where the individual has an intention to perform work on behalf of the company.

Each situation will need to be assessed on a case by case basis, however, if the above circumstances apply to a work experience arrangement your business is facilitating, it is likely that an employment relationship exists and the individual will be considered an employee and need to be paid for their time.

In order to protect your business from potential claims, it is important to consider the following:

#### **Reason for the arrangement**

An employment relationship is less likely to exist in circumstances where the work experience is undertaken for the *sole* purpose of gaining experience in a particular the industry. However, if an individual is performing work to help with the ordinary operation of the business, (rather than just observation or learning) the individual is likely to be considered an employee.

#### **Length of engagement**

The length of time that an individual is engaged on work experience can impact on whether an employment relationship exists. The longer an individual is on work experience, the more likely it is that the individual will be considered an employee.

#### **Significance to the business**

The importance of the work that is undertaken by the individual on behalf of the business also impacts on whether an employment relationship exists. The more critical the work is to the business,

or the likelihood that the work will generate profit for the business, the more likely an employment relationship will exist.

#### What the person is doing?

If the employee is performing duties on behalf of the business for the predominant purpose of improving their own skills, it is unlikely the individual will be viewed as an employee. However, if the business relies upon the individual to perform certain tasks, or the individual is undertaking work similar to that of an employee (or that would otherwise be performed by an employee), an employment relationship likely exists. Tasks that are commonly undertaken by people on work experience include observing other staff members, partaking in training exercises and undertaking tasks that develop their own skills.

#### Who's getting the benefit?

The individual should receive the primary benefit from their work experience. If the company is greatly benefiting from the work experience then the individual is likely to be viewed as an employee.

**If you are uncertain as to whether an individual on work experience may be classified as an employee or would like more information please call the VANA Telephone Advisory Service on (02) 9083 0091.**

#### Criminal History of Employees

A recent investigation conducted by the Australian Human Rights Commission (**AHRC**) has resulted in the discovery that a large banking organisation had discriminated against an applicant for withdrawing a conditional employment offer based on the individuals' criminal record. So, what can employers do if they become aware of a prospective employee's criminal history during the recruitment process and what should employers be aware of when they have a potential applicant with an undisclosed criminal history?

During the recruitment process, employers are able to request applicants to undergo police and criminal history checks. This can be to ascertain whether an applicant is fit to perform the role, are of good character and to identify if they have any criminal charges which have relevance to the potential position.

If it can be determined that a job applicant has a criminal record, it may not be considered discrimination to not offer that individual the particular role, if the person's criminal history means that they cannot perform the inherent requirements of the position for which they are applying.

In saying this, it is important to consider the nature of the crime in relation to the position the individual has applied for. In some industries, employers are permitted to refuse employment if a job applicant is found to have a criminal record that would pose a threat of danger to other staff members or individuals within the workplace. An example of this could involve an individual who has a criminal history of sexual misconduct being unable to work within the childcare industry.

The question remains however, what can an employer do if after conducting a criminal history check, it is discovered that an applicant has an undisclosed criminal history that is 'irrelevant' to the role?

Currently, Tasmania and the Northern Territory are the only states which have laws that specifically prohibit discrimination on the grounds of an 'irrelevant criminal record'. No other State or Territory anti-discrimination laws provide employees with specific protection against discrimination on the

basis of criminal record. However, it is worth noting that in Western Australia and the ACT, there are provisions that make discrimination on the basis of *spent* convictions unlawful.

Despite the state legislation however, employees and prospective employees of all states are still able to bring discrimination claims at a federal level within the AHRC if they believe they have been discriminated against.

In order to mitigate your risk of a potential claim, it is recommended that you implement a recruitment policy that includes the requirement of applicants to disclose their criminal history when commencing the recruitment process as well as stating that applicants may be subject to criminal history checks.

**If you are unsure how to address an employee with a criminal history please call the VANA Telephone Advisory Service on (02) 9083 0091.**