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Supplements

The broker's update on...

Employment Law

Social Media

Horizon Issues

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Tackling employment law challenges in the age of social media

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Zurich is going to feature in *The Broker* supplements throughout 2013, providing expertise as our industry looks to overcome some great challenges.

Brokers are at the very centre of these challenges, caught between the competing pressures of customers' economic woes and the insurer's need to maintain, or attain, even an average return on capital.

However, it's an industry that always responds to such challenges and one we should all feel very proud to work in, despite the adverse publicity we sometimes receive. The customer's interest is at the heart of what we do, as an industry, as we help them protect themselves and their businesses and recover from misfortune.

Expertise and integrity are the cornerstones of any successful broker business, and these principles, allied with true customer focus, will win the competition for new business.

But the rules of engagement are changing, especially so for business communication, which brings both commercial opportunities, threats and a material impact on the public perception of our industry.

Thanks to social media, people are (officially) friends and colleagues with each other in a virtual space as well as a physical one. Communication technologies and social media give employees a 360˚ view of every opportunity, whether it's a social or employment-related one.

With this blurred line dividing social and professional networking, there is also a danger that previously containable situations can mushroom rapidly across social networks.

That's why we have teamed up with BIBA and expert employment lawyers at international law firm DAC Beachcroft to bring you practical tips on employment law issues in the age of social media. In particular, this will cover the difficulties that brokers can face around restrictive covenants and social media; employment documents and compromise agreements.

At Zurich, we're more than just your capacity provider or source of risk capital. We're dedicated to being your partner in risk, helping you protect your customers' people, physical assets, and balance sheet.

Together with our expert partners, our aim is to give you the tools for expert risk management and insurance solutions in 2013. Look out for us again in your next edition of *The Broker*.

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Social Media Issues:

Employment Horizon Issues:

Brave new world

Controlling social media risks

Christine Jenner
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LinkedIn, Facebook and Twitter - All these and more are frequently visited and used by employees - But are employers up to speed and able to keep this increasing trend in check?

Employees are key assets in any broker business and even more so when times are tough. Whilst it is important to provide incentives for key employees to stay, it is equally important to protect your business against an employee moving to a competitor. The three traditional ways to protect your business interests are confidentiality clauses, post termination restrictive covenants and garden leave provisions. The unstoppable rise of social media in recent years has created new challenges that can be difficult for employers to tackle within the existing legal framework.

Social media in business

It is almost impossible to open the newspaper these days without being struck by the impact of social media on our everyday lives, both socially and in a business context.

Use of social media for business purposes has grown enormously and continues to grow. LinkedIn has more than 175 million registered users and many employers actively encourage use of the site for business purposes. Twitter and Facebook are also increasingly being used for business purposes. So, what are the key challenges and what can employers do to protect their businesses in this context?

Ownership of information

There has been much debate over ownership of LinkedIn contacts and the extent to which database rights might apply. The key difficulty stems from the fact that an employee's contacts on LinkedIn are usually a mix of friends, colleagues and contacts known from previous jobs and those made in the course of employment. In addition, it is difficult for an employer to assert such contacts are confidential when their details are readily available on a networking site. After employment has ended, employers may wish to ensure that an ex-employee's social media contacts are not used to compete.

In the recent case of Fairstar v Adkins the High Court confirmed that a business cannot be said to have an "enforceable proprietary claim" to the contents of emails held by staff unless the business can prove the content is its confidential information, owns copyright in the content or has a contractual right of ownership over the content. Employers who want to argue that they own information created by an employee using social media during employment should consider including specific contractual obligations on employees i.e. put parameters around how employees use business networking sites to put the employer in the best possible position in the event of a breach. For some suggestions see our practical tips box. This approach is unlikely to be a failsafe option for employers but can serve as a deterrent to employees. Obviously, the closer the connection between the employee's use of LinkedIn and the performance of the duties, the more chance there is of asserting rights to the contact list which is created as a result.

Restrictive covenants

LinkedIn and other business networking sites also present new problems for employers trying to enforce non-solicitation and non-dealing covenants after termination of employment. The issue is that employees may remain connected to clients and contacts even after the employment relationship ends. A number of things might then happen.

For example, the employee might update his LinkedIn account with his new contact information or start a discussion topic or even set up a new LinkedIn group. The employee's contact settings on his profile might also invite contact for "business deals". Can these kinds of behaviour be said to amount to solicitation?

There is currently no case law directly relating to whether updating a social media profile amounts to solicitation but there is case law on the meaning of solicitation in other contexts. In Taylor Stuart & Co v Croft a communication which informed a client that an employee had left his employer was found not to amount to solicitation, even where it contained the new address of the former employee.

However, advising a client how to make contact with the former employee did amount to solicitation. It is clear then that there is a fine line between what is and is not solicitation. Solicitation itself requires the ex-employee to make contact and some form of encouragement to move business.

In practice, it is often difficult for an employer to demonstrate solicitation by an ex-employee and this is even more so in a social media context. Employers who are concerned to protect their contacts and clients from poaching by ex-employees should therefore ensure that they include non-dealing as well as non-solicitation covenants in their employees' contracts. For more practical suggestions see our practical tips box.

Employment documents:
Practical tips

- Prepare an up-to-date social media policy to address use of social media in/outside of the workplace. A sample social media policy prepared by DAC Beachcroft is available for BIBA members at **www.biba.org.uk.**
- Supplement with training.
- Keep the policy updated regularly to keep pace with developments in social media.
- Encourage employees to have clear distinctions between personal and work accounts.
- Where an employee tweets or blogs for business purposes state that the employer owns those accounts and their content.
- Include provisions in contracts or the social media policy expressly prohibiting employees from copying or transporting lists of contacts held on social media to personal computers.
- Expressly state that professional contacts created during employment and stored within the employer's system remain the property of the employer.
- Consider including a contractual obligation to 'unlink' from clients and/or contacts on termination of employment and not to 'link' with them again during a specified period of restriction.
- Review restrictive covenants to ensure non-dealing is covered as well as non-solicitation.
- Review the meaning of company property in employment contracts to ensure lists of contacts held on social media are included and must be returned on termination of employment.

Compromise agreements:
Practical tips

Where an employee's employment terminates and an employer's contracts and policies do not provide adequate protection to deal with social media issues, employers may wish to include the following provisions in a compromise agreement:

- An undertaking that the ex-employee will not use any accounts previously used for business purposes.
- An undertaking to remove all business contacts from LinkedIn or other business networking sites.
- An undertaking that all lists of contacts have been returned to the company and no copies taken by the ex-employee.
- A non-solicitation and non-dealing covenant that refers specifically to contacts on social media.

Restrictive covenants:
Practical tips

Restrictive covenants can only be enforced where they are required to protect the employer's legitimate business interests. If they go further than is necessary to protect those interests then the courts will decline to enforce them, leaving the employer with no protection. For this reason, it is vital that employee covenants are worded carefully.

Employers' legitimate business interests are likely to be their client and supplier relationships, their confidential information and maintaining their workforce. Covenants should, therefore, be drafted with these specific interests in mind.

Other factors which will affect enforceability are:

- Duration - a sensible way to establish the length of this period may be the amount of time that it would take for the employee's successor to gain influence over the business contacts.
- Scope - generally, the covenant should be restricted to clients with whom the employee had contact during a specified period before termination.
- Role of ex-employee – the seniority and the extent of the ex-employee's role in securing new business will be relevant.
- The particular circumstances of the employer's business.
- Whether the covenant is usual in the ex-employer's sector – such covenants are usual in the broking sector.

All these factors should be carefully considered at the outset of the employment relationship and reviewed each time an employee's role changes e.g. on promotion. Such covenants will be particularly important in client facing roles.

What's on the horizon?

Christopher Syder
Partner, Employment & Pensions Group
DAC Beachcroft

The world of employment law is fast moving with a number of important changes recently implemented or in the pipeline.

Children and families
March 2013 to 2015

The Government has set out a new system of statutory maternity and paternity leave rights which can be shared between the mother and father, and a package of other family-friendly measures. These measures will take effect at various times over the next two years. Highlights include:

What this means:

Brokers should review parental leave policies to ensure they reflect these new entitlements for employees who are parents.

Unpaid parental leave
March 2013

New regulations, which will increase the amount of unpaid parental leave that can be taken per child from 13 to 18 weeks, are expected to come into force on 8 March 2013. Unpaid parental leave will continue to be limited to a maximum of four weeks per year.

Changes to flexible working
Expected March 2014

The right to request flexible working will be extended to all employees with 26 weeks' continuous employment. The current statutory procedure will be replaced with a duty on employers to deal with requests reasonably, and a statutory code of practice will be published to give guidance.

What this means:

Again, brokers should review flexible working policies to ensure they reflect these new entitlements.

Flexible parental leave
Expected March 2015

The new system of flexible parental leave will mean:

- Parents will be able to share 50 out of 52 weeks of statutory maternity leave between them.
- Parents will be able to choose how to divide up the leave, which can either be taken consecutively or concurrently, subject to agreement with their respective employers.
- Flexible parental leave can be taken by each parent consecutively, or by both parents concurrently, as long as the combined amount of leave does not exceed the amount which is jointly available to the couple.
- Employed women will remain entitled to 39 weeks of statutory maternity pay, of which 37 weeks can be shared between the two parents.

What this means:

When they go live in 2015, the plans for the new system of parental leave will almost certainly place a new administrative burden on brokers. This is something which the Government says it will address in its further consultation this year. Allowing parents to customise their own leave, dividing it up however they choose, will also present organisational problems for employers. Finding maternity covers will be particularly challenging where the leave period is broken up into many different blocks, and calculating how much statutory parental pay or normal salary is due will not be straightforward.

Employee ownership
April 2013

Controversial plans for a new type of employee ownership arrangement, under which employees would give up some of their employment rights in exchange for shares in the company, are due to be implemented in April. An employer and employee will be able to agree that, in return for the individual being an "employee shareholder" (instead of just an "employee"), the company will issue or allot a minimum of £2,000 worth of shares to the individual. The employee shareholder would have the same rights as an employee except for:

- No right to request time off for study or training.
- No right to make a flexible working request.
- No right not to be unfairly dismissed (except in health and safety cases, automatically unfair cases, or cases where the dismissal is discriminatory).
- No right to a statutory redundancy payment.
- The employee must give 16 weeks' notice if they want to return early from statutory maternity, adoption or additional paternity leave.

What this means:

The proposal is unlikely to have an immediate impact on brokers. However, employers should be aware of this development as it could become an important aspect of tax and employee equity planning for some. Shares for rights may seem attractive to some employees who do not feel they need unfair dismissal or redundancy protections and are keen to have tax-efficient equity participation in their employer.

Employment tribunals
Summer 2013

Fees will be introduced into the employment tribunal system. The Government will implement this significant change via a two-stage fee charging structure, requiring claimants to present an "issue fee" when they submit their claim or appeal, followed by a "hearing fee" prior to a hearing. In the employment tribunals, the amount of each fee will depend on the type of claim.

What this means:

This is likely to reduce the number of employees bringing tribunal claims against their employers. However, once an employee has issued a claim, it is likely that they will ask the employer to refund those fees as part of any settlement agreement.

Reporting obligations
October 2013

New regulations will, among other things, oblige quoted companies to report on the number of men and women on their board, the number of men and women who are 'managers' and in the organisation as a whole. Quoted companies will also be required to produce a strategic report on their overall strategy, their business model, and any relevant human rights issues.

What this means:

The regulations will come into force in October 2013, so quoted companies with reporting years ending after October next year will be expected to prepare their annual report in line with the new regulations.

Pre-claim conciliation
Expected 2013

In an attempt to reduce the number of claims the employment tribunals have to deal with each year, claimants will be required to attempt pre-claim conciliation prior to issuing a claim. A mandatory four step pre-claim procedure must be followed:

1- Claimant sends ACAS information on a prescribed form.

2- Conciliation officer (CO) appointed.

3- CO promotes settlement within a specified period.

4- CO issues certificate if settlement is not achieved. The certificate is required to issue proceedings.

There are some claims to which the procedure will not apply.

What this means:

The objective of pre-claim conciliation is to avoid proceedings being issued. However, it is open to question whether employers will be motivated to settle before the claim has been issued. Once fees are introduced to the employment tribunal system, brokers may wish to "wait and see" whether a claimant is serious about issuing proceedings before agreeing settlement.

Settlement agreements
Expected 2013

Compromise agreements will be renamed as "settlement agreements". The introduction of "settlement agreements" includes proposals for the use of a model agreement, standard letters and a new statutory Acas Code of Practice on settlements. In addition, settlement offers made or discussions held "with a view to termination on agreed terms" will not be admissible in ordinary unfair dismissal proceedings. The proposals are limited to ordinary unfair dismissal proceedings so that discrimination, automatically unfair dismissals and breach of contract claims are not covered.

What this means:

On the face of it the new rules on settlement offers will be helpful to employers because there is no need for an existing dispute (as is required for a genuine without prejudice discussion). However, brokers should be cautious about using this protection, given the limited scope of the rules which leave open the possibility of settlement offers being admissible as evidence in a different claim and grievances being brought by employees who are approached in the absence of an existing dispute.

Annual Leave
Expected 2013

The Government has put forward important proposals concerning annual leave, including.

- Updating the law so that workers who are unable to take annual leave during one holiday year (for example, due to sickness absence) will be able to carry unused leave over to the next holiday year.

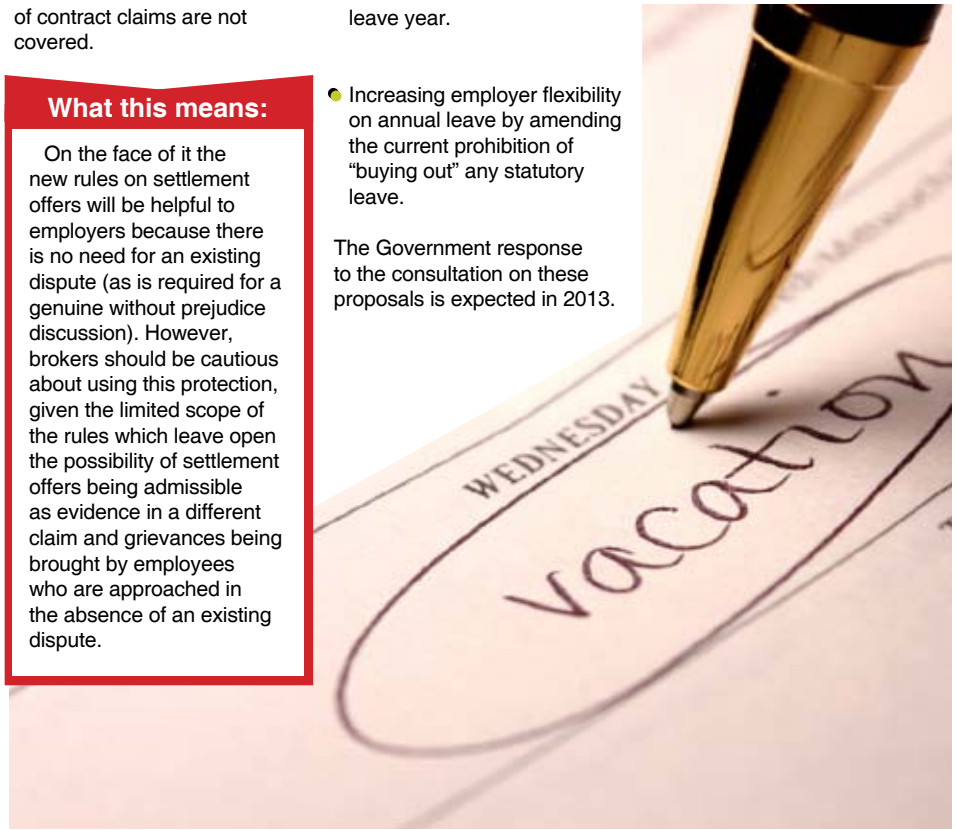
- Allowing leave which is untaken due to absence on maternity, adoption, parental and paternity leave to be carried over into the next leave year.

- Increasing employer flexibility on annual leave by amending the current prohibition of "buying out" any statutory leave.

The Government response to the consultation on these proposals is expected in 2013.

What this means:

Annual leave is a legal minefield for employers and it will help if the Government can clarify a number of matters and bring UK law in line with European requirements. However, the possibility of employers making changes to entitlements following any amendment could still be limited by existing contractual terms which the employer could only change with the consent of the workforce.



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