



The IBA GEI REPORT ON SOCIAL MEDIA (THE 'NET REPORT')

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Prepared by the

International Bar Association
Global Employment Institute



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1. Introduction

- 1.1 The IBA Global Employment Institute (GEI) was established in early 2010. Its primary purpose is to develop for multinational companies (multinationals), worldwide institutions and organisations a global and strategic approach to the main legal issues in the human resources and human capital fields (collectively referred to as 'HR').
- 1.2 Drawing on the resources and expertise of the IBA membership, the GEI provides a unique contribution in the field of employment, discrimination and immigration law on a diverse range of global issues to private and public organisations throughout the world. The GEI's objective is to enhance the management, performance and productivity of these organisations and help achieve best practices in HR management from a strategic perspective.
- 1.3 The GEI aspires, through its activities, to be the leading voice and authority on global HR law issues by virtue of having a number of the world's leading labour and employment practitioners in its ranks, the support and resources of the world's largest association of international lawyers, and its involvement in these activities.

2. Why a survey on Social Media at the workplace?

- 2.1 The GEI's 10/20 Survey of December 2010 presented a number of senior HR managers (over 100 in a large number of multinationals in five continents) with a shortlist of the perceived top ten global HR issues for the next 20 years. On the list was the issue called 'net company'. The respondents were told that this term was shorthand for the arrival of the 'net-gen' and their use of 'social nets' and the like at the workplace. The senior HR managers ranked the 'net company' in the top five.
- 2.2 This result was no surprise. We can articulate many reasons why multinationals must understand and respond to the 'net company' and 'social media' at the workplace. But before we do that it might be helpful to describe what we mean by the 'net company' and 'social media'.
- 2.3 The 'net company' is a new organisational model which connects employees and their managers, supervisors and leaders with each other, and helps many businesses connect with customers, vendors, possible job candidates and suppliers. It allows for instant communication among stakeholders not only at local and national levels, but also, in the case of multinationals, on a global scale.
- 2.4 'Social media' is not a clearly defined concept. Broadly speaking it refers to the means of interactions among people in which they create, share and exchange information and ideas in virtual communities and networks. Social media includes magazines, the internet, forums, weblogs, social blogs, microblogging (eg, Twitter), wikis, social networks (such as Facebook and LinkedIn), podcasts, photographs and video rating (such as, youtube, Flickr, and Daily Motion), social bookmarking, blogs, picture-sharing, vlogs, wall-postings, e-mail, instant messaging, music-sharing, crowd-sourcing and voice over IP (eg, Skype).
- 2.5 Armed with our concepts of 'net company' and 'social media' we can now articulate their importance to multinationals.
- 2.6 To begin with some advantages, the net company and social media offer a multitude of opportunities for improvements in productivity, innovation, knowledge and competitiveness.
- 2.7 On the other hand, there are several legal and business challenges for employers to handle. For example, an obvious organisational challenge in having employees working online (permanently or temporarily) is the potential for employees to involve themselves with personal or private matters while online. This has self-evident implications for the employer's ability to control time spent working. Thus, the perceived benefits of the net company can be immediately impacted by a reduction in productivity. Yet this is not to say the picture is black and white. The employer may gain through employees developing their IT skills or avoiding a (genuine) absence through resolving a domestic problem online.

- 2.8 Another set of challenges arises if the employer decides it wishes to exercise control over the navigation of the web by employees, or over communications between employees or between employees and third parties. A preliminary consideration is the time period and geographic scope of control. For example, the period of control might be limited to working time (whatever that might mean for senior executives!) and the area of control might be solely at the workplace. The next challenge facing the employer is the definitional problem of which communication devices are to be controlled (such as mobile phones, laptops and other technology hardware) and whether one covers devices not provided by the employer? Then there are legal challenges such as how can the employer lawfully monitor employee communication? A clash with fundamental employment rights relating to privacy and confidentiality might occur, and if so, how is this to be resolved?
- 2.9 Returning to the advantages for the employer, the employer might use social media as a work tool providing new possibilities for HR specialists in recruiting and screening etc. But again a conflict with those fundamental employment rights relating to privacy and confidentiality might arise, and we could add anti-discrimination laws to this duo of laws restricting the freedom of usage by employers.
- 2.10 We can confidently predict more challenges arising for multinationals as our understanding of the net company evolves. For example, recently we have witnessed the emergence of a category of employee who chooses not only to use the net for their own personal or private social communication but also to comment on company issues. There is nothing new in an employee criticising their employer but the novelty is that one negative comment about the employer on a private social net can reach as many people (or even more people) than a comment in a newspaper or during a TV broadcast (or careless talk at the office party!). Contrasted with 'old ways' of communicating the net offers the disgruntled or thoughtless employee greater speed and geographic coverage. Employer control is illusory and there may be no remedy once the horse, as it were, has bolted. Further, the law may not be wholly sympathetic to the aggrieved employer. In its eyes the rights of freedom of speech and privacy for employees have to be balanced and accommodated with the rights of an employer to defend its brand or its reputation or its leadership team, managers and supervisors. Thus, the balance may be struck at a point giving some leeway to the employee. Moreover, the employer may be placed in the invidious position of reconciling the right of the employee to speak out with its duty to protect co-workers and their livelihoods from another employee's adverse comments.
- 2.11 Putting all of this together we can discern why the respondents to the 10/20 Survey rated this issue as important. Social media presents opportunities but also threats. Further, the employer who believes it can just opt out of social media lives in a fantasy world. Social media and the net company are realities and here to stay for some time. Therefore, multinationals and their advisers need to be aware

of the arising issues. In consequence, the GEI concluded it would be worthwhile to undertake a survey of HR directors and HR lawyers in relation to some of the legal and business aspects of social media at the workplace (the 'Survey'). This Net Report encapsulates the results of the Survey together with the reflections of a roundtable discussion on those results that took place at a special meeting in June 2013 funded by the IBA and organised by the GEI ('the roundtable meeting').

- 2.12 The reader will find in sections 3 and 4 a description of the goals of the Survey and an outline of the methodology of the Survey (including the roundtable meeting) respectively. As will be seen, the Survey principally covers the use (some might say misuse) by employees of social networks whether they be private or personal social networks, or company social networks or blogs. In addition, it covers the use of social media by employers as a tool for HR purposes.
- 2.13 Finally, sections 5 and 6 provide an overview of the results of the Survey and draw some conclusions respectively.

3. Goals of the 'Net Report'

3.1 In short, this Report has two goals:

- to capture some general trends on the current state of the law and the practice of some multinationals with regard to the use of social media and to make some observations upon them; and
- to cause HR professionals to examine critically those observations and to relate those general trends to their own experiences with a view to assessing the implications for them.

3.2 Looking at the first goal in more detail, as previously indicated the cornerstone of this Net Report is the Survey. Thus, the Survey's structure and its coverage reflected this goal.

3.3 In terms of structure, the Survey was founded on two different questionnaires: one completed by HR directors of multinational companies, and the other by external HR lawyers. This approach was adopted as there are usually differences not only between what is provided in the law and what is developed by multinationals in their policies but also between the perspectives of managers and lawyers on the same matter. Therefore, in order to present a more comprehensive view of the current situation of social media at the workplace, this 'Net Report' needed to reflect both the legal aspects of this matter (as seen by HR lawyers) and the practices of multinationals (as seen by HR directors).

3.4 In terms of coverage, the two questionnaires had some overlap but some significant differences.

3.5 The principal aim of the questionnaire sent to HR lawyers was to gather information on the specific legal frameworks which govern access to, and use of, social media. Therefore, the main focus of the questions was on how each HR lawyer's national law regulated social media at the workplace with particular reference to:

- the relevant fundamental employment rights;
- the extent to which an employer's monitoring of communications is permitted;
- the legal permissions or processes which govern the employer's use of social media; and
- the legal sanctions, and incidence of claims before the courts by employees.

3.6 The principal aim of the questionnaire sent to HR directors in multinationals was to survey current attitudes and practice in using (or preventing the use of) social media at work. Therefore, the main focus of the questions was on the employer's

regulation of social media including:

- the practical uses employers have for social media (such as recruiting, training, employee engagement, and customer relations);
 - whether employers have policies or systems for controlling or monitoring the use of social media;
 - the frequency of disciplinary issues; and
 - the approach to different types of social media.
- 3.7 It is important to bear in mind that the Survey was not intended to be a 'scientific' survey in the sense of a means to develop an academic or theoretical model of social media at the workplace.
- 3.8 Seventy-seven Multinationals and 36 lawyers from 37 countries completed the 2013 survey.
- 3.9 Please note nothing in this Report is, or is intended to be, legal advice. This Report deals in generalities only. Readers should take specific legal advice addressed to any particular issue they are considering.

4. Methodology

- 4.1 Copies of the two questionnaires are attached as Schedules 1 and 2. Two distinct lists of questions were prepared by the members of the Working Group (see below) and reviewed by the Council of the GEI in order to evaluate the use of social media at the workplace from an HR perspective.
- 4.2 Respondents were asked to rate the importance of certain issues in their national law or company policy, their linkage to certain purposes in their national law or company policy, and to evaluate certain aspects of their national law or company policy according to 'yes/no' questions (with scope for providing additional comments). This was done online with the assistance of the IBA.
- 4.3 Distribution covered employers of various sizes, the largest being +100,000, and the smallest 70 or so employees. Industries of many kinds, including automotive production, healthcare marketing and distribution, and professional services were covered. Accordingly, the Survey provides a broadly based snapshot of experiences and attitudes of different kinds and sizes of businesses, which have evolved differing structures and marketplaces. It would be unwise to extrapolate too strongly from the answers provided, for example on an industry-specific basis, but certainly broad trends can be clearly identified.
- 4.4 The Council of the GEI appointed a Working Group for the development of this Report. The members of this working group were Maria Alexia Aurelio (Aresco, Argentina), Nadia Demoliner Lacerda (Mundie Advogados, Brazil), Lionel Paraire (Galion Société d'Avocats, France), Jan Rudolph (Linklaters, Germany), Vikram Shroff (Nishith Desai Associates, India), Sean Nesbitt (Taylor Wessing, United Kingdom), and Eric Savage (Littler Mendelson, United States).
- 4.5 This Working Group, with the coordination of the GEI Chair (Salvador del Rey) and the Vice-Chairs for Knowledge Management (Mariann Norrbom and Dirk Rutgers) and with the collaboration of Graeme Kirk (Vice-Chair for Internal Affairs), Julia Onslow-Cole and Rob Towner (Vice-Chairs for Multinationals) and Marcus Beresford (member of the GEI Council), designed the questionnaires and contacted lawyers from different countries. These lawyers were asked to contact multinationals headquartered in their countries with a view to combining the views of those multinationals with their own when answering the questionnaire. A list of these law firms and a list of the number of multinationals per country can be found in Schedule 3.
- 4.6 An initial draft of this Report was submitted to representatives of businesses and other organisations, experts, and some members of the GEI Council at a meeting in June 2013 in London: the roundtable meeting noted at 2.11 above. The meeting was generously hosted by Baker and McKenzie and sponsored by the IBA. Some of the conclusions of that meeting have been included in this Report.
- 4.7 The participants were:

- GEI: Salvador Del Rey (Chair of the GEI), Graeme Kirk, Keith Corkan, Robert Mignin, Julia Onslow-Cole, Pascale Lagesse, and Dirk Jan Rutgers (Vice-Chairs of the GEI), Scott Borene and Raymond Jeffers (members of the GEI Council), Els De Wind (Co-Chair of the IBA Employment and Industrial Relations Law Committee), Anders Etgen Reitz (Co-Chair of the IBA Discrimination Law Committee) and Jelle Kroes (Secretary of the IBA Immigration and Nationality Law Committee).
- Experts: Barry Walsh (A&L Goodbody), Caroline André-Hesse (Altana), Peter Lewis (Bingham McCutchen), Tsvi Kan-Tor (Kan-Tor & Acco), Oscar de la Vega (Littler, De la Vega y Conde), Ed Stacey (PricewaterhouseCoopers), James Perrott (PricewaterhouseCoopers) and Matthew Lynch (PricewaterhouseCoopers).
- Representatives of businesses and other organisations: Nathalie Hellio (Accenture), Elisa Bleier (BBVA), Bernard Boudin (BNP Paribas), Guillermo Francisco Martinez Sans (CEMEX), Mireya Serra-Janer (Cognizant Technology Solutions), Hanne Blume (DONG Energy), Maria Dionis (Ferrovia), Shailesh Tewary (G4S), Susan Henderson (GE Capital), Allen Powley (GlaxoSmithKline), Marco Bijl (Hill-Rom), Trevor Beagrie (HSBC), Susan Winters (HSS Staffing), Baba Zipkin (IBM), Carlos González-Garces (Inditex), Richard Devereux (Intel Corporation), Roberto Suárez (International Organisation of Employers (IOE)), Maria Paz Anzorreguy (International Organisation of Employers (IOE)), Paul Tuberville (International Paper), Craig Pattison (Lloyd's of London), Yaara Alon (OECD), Katy Van der Wilk (Permits Foundation), Michael Rendell (PricewaterhouseCoopers), Gunda Niehaus (Procter & Gamble), Annemarie Muntz (Randstad), Andrew Matz (Reed Elsevier), and Karen Fitzgerald (Royal Bank of Scotland).

4.8 The GEI Council wishes to convey its gratitude to the HR directors and HR lawyers (and the multinationals to whom they spoke) for their participation and interest in the development of the Survey. The GEI Council also wishes to thank the Working Group for their hard work throughout the whole of this project. In addition, the GEI Council would like to record its gratitude to the participants at the roundtable meeting for their insightful contributions on the initial draft of this Report. Finally, the GEI Council also wishes to express its thanks to Elisabet Calzada (associate at Cuatrecasas, Gonçalves Pereira), who contributed to the drafting of the Report, and to Sandra Peris (assistant at Cuatrecasas, Gonçalves Pereira), who edited substantial parts of the Schedules.

5. General comments on the results of the Survey

5.1 *Comments on lawyers' responses to the questionnaire*

5.1.1 DUTY OF LOYALTY

- 5.1.1.1 With regard to the limits on the use of social media, the majority of respondents considered that employees in their country had a duty of loyalty by law or a restriction under company policies. Interestingly the size of the majority depended upon when social media was being used and for what purpose. The smallest majority (70.7 per cent) reported that the duty or restriction extended to private purposes outside of working hours; and the highest percentage was for private purposes during working hours (94.9 per cent). A little oddly, the size of the majority for restrictions for business purposes was in between the other majorities (86.5 per cent). Many European countries have, by law, a general duty of loyalty owed by the employee to the employer, which applies to the use of social media. Even so, it is commonplace to have policies which regulate the use of equipment during work hours in addition to the legal duty.
- 5.1.1.2 Regarding whether it makes a difference if employees access to social media is through company hardware or private devices, the majority (56.1 per cent) of surveyed lawyers replied that who was the owner of the equipment did not 'make a difference'. Although note that this means a large number considered private ownership did make a difference. Another majority (61 per cent) reported that there is a difference between accessing social media internally, for example, as an integrated part of the company's intranet, as opposed to externally. This suggests that employers perceive that it is more appropriate or convenient to control the misuse of internal systems than the misuse of external systems.
- 5.1.1.3 A very high percentage of all of the surveyed lawyers (85.4 per cent) believed that where the law or employment terms establish a duty of loyalty there is no difference between the duty's application to employee communications via social media and elsewhere (such as face-to-face). This suggests that the medium of communication does not determine the application of the duty. Thus, information that is communicated or posted in any social media appears to be subject to the same duty as if the information had been made available elsewhere. For example, all other things being equal it seems an employee who is bound by a non-disclosure agreement (NDA) and yet reveals trade secrets through social media, commits a breach against that agreement in the same way that he or she would do so through communicating the trade secrets in a face-to-face conversation (assuming no specific provisions in the NDA exempting the employee from social media communications). Even so

there remains virtue in NDAs being drafted with sufficient breadth to catch disclosures through social media.

- 5.1.1.4 Importantly lawyers confirmed, by a big majority (82.5 per cent), that where the law permits employees to speak out (eg, whistleblowers) such permission includes social media communications. This is not a great surprise. If the duty of loyalty applies to social media it would be strange for the exemptions from the duty not to apply to social media as well. Even so this implies that the greater speed and geographical coverage of social media communications is not seen as undermining the policy basis for the permission.

5.1.2 SOCIAL MEDIA POLICY

- 5.1.2.1 There was unanimous agreement among the respondents that employers can implement a social media policy, however, the procedures and approvals required differ significantly. For example, there may be specific language requirements and the need to undertake consultation with employees and/or their representatives.
- 5.1.2.2 In most of the surveyed countries, it appears that social media policy strengthens the company's ability to sanction employees, and creates more legal certainty for the employer.
- 5.1.2.3 Over half (55 per cent) of the surveyed lawyers recorded that case law does exist in their country in relation to employees use of social media. Unsurprisingly, such case law has been prompted by two types of challenge: first, an employer who monitors employees' communications; and secondly, an employer who dismisses an employee for disloyal comments. With regard to the latter, significantly courts have ruled the employer acted fairly and legally when dismissing an employee for making comments on social media that damaged the interests of the employer.
- 5.1.2.4 When considering if the sanctions imposed by the employer was proportionate in the circumstances of the case, the courts have tried to balance the employer's interests with the employee's right to freedom of expression, and whether the employer's sanction was proportionate.
- 5.1.2.2 In relation to whether there have been any significant changes in respect of the rules relating to the use by employees of social media, almost all respondents (90 per cent) reported that there have not been any significant changes. Countries where there have been significant changes are due to new laws concerning the employer's monitoring and controlling of the use by employees of social media during working hours, for example through company e-mails.

5.1.3 SOCIAL NETWORKS AND MONITORING

- 5.1.3.1 In relation to the monitoring of employees, the majority (84.2 per cent) of lawyers confirmed that it is permitted to monitor social networks but usually this is subject to compliance with conditions and restrictions laid down by law. A typical restriction is the requirement to inform the employee of the monitoring before it begins (see also some procedural requirements mentioned at 5.1.3.3 below). Within the European Union (EU), the plethora of data protection rules are such that an employer's ability to monitor will need to be tested against data protection laws.
- 5.1.3.2 On the subject of using social nets as a tool for screening job candidates, the majority of surveyed lawyers (84.2 per cent) said this is permissible. Nonetheless, the number (15.8 per cent) saying this is not permissible is striking. Indeed one country reported they had an 'absolute bar' on using social media as a tool for screening candidates. Furthermore, even where the employer is at liberty to use social nets, over half of the respondents said that the candidate's consent is required. Also, in some countries it can make a difference if the candidate invites management to connect or has an open profile. In other words there can be a subtle legal distinction between the situation where the candidate offers up access to say a CV profile and the situation where the employer obtains the candidate's consent.
- 5.1.3.3 According to a significant majority (67.6 per cent), employers are required to follow procedures such as consultations and public approvals before monitoring their employees. This appears to be more the case in EU countries (with their traditions of general employee consultation) than in the US, Latin American and developing economies.
- 5.1.3.4 Where employers have violated the local rules on employers' use of social media, the lawyers report that the most common sanctions are economic penalties. Importantly the possibility of criminal law convictions exists in some countries.
- 5.1.3.5 Remarkably the respondents were equally split in their responses with regard to a link between the monitoring of social media and the breach of anti-discrimination laws. Thus, one half confirmed there is an increased risk of successful anti-discrimination claims (such as in relation to personal characteristics or union connections) by reason of monitoring social media. It is perhaps no surprise that local legislation prohibiting discrimination should encompass inappropriate monitoring conducted through social media. By contrast there remain those jurisdictions with little or no anti-discrimination laws and so the lawyers unsurprisingly reported that the existence of social media was not triggering more anti-discrimination claims.
- 5.1.3.6 The majority of surveyed lawyers did not report case law involving an employer's use of social media, whilst a small percentage (17.9 per cent) did. It is important to recognise that this is not tantamount to saying that there are

no claims or there will be no claims. Not all claims reach the courts (eg, they may be settled), not all cases get reported and inevitably there is a time gap between employees recognising they might have a legal claim and launching a claim (for example, in the EU many years separated the introduction of a law on equal pay and the flood of litigation that eventually flowed).

- 5.1.3.7 Most respondents submitted that there had not been any significant changes in the rules relating to employers' use of social media (90.2 per cent). The message is that the principles governing freedom of speech, privacy and anti-discrimination laws are being applied to social media without modification. However, where there has been change through case law it is reported that this is seen as a 'hot topic' and it is predicted more cases are likely in the future.

5.2 Comments on multinationals' responses to the questionnaire

5.2.1 SOCIAL MEDIA AS A LOCAL OR GLOBAL ISSUE

- 5.2.1.1 A minority (36 per cent) of the surveyed HR multinationals considered that the issue of social media is mainly a local issue, whilst (41.1 per cent) believed it is a global and local issue, and only a small percentage believed it is a wholly global issue. This answer may be due to two factors. First, awareness that the legal rights and rules which determine what an employer can do with social media are determined by country-specific rules. An example is the need for employee consultation. A second factor may be a sense that in different countries labour issues evolve at different rates, even among multinationals.
- 5.2.1.2 The majority (52.2 per cent) saw the issue of social media in their company as being 'somewhat important'. It is not accurate to say that social media is a 'burning' issue. For most businesses it is clearly one of a number of long term contextual developments that needs managing. From the responses, there is a greater incidence of 'high importance' in companies with a sales and marketing or online function. These businesses significantly work through virtual methods and have a higher experience of practical issues: for them, social media and the systems it uses are their 'tools'.

5.2.2 SPECIFIC COMPANY POLICIES (RECRUITMENT, BREACH, LEGAL RISK)

- 5.2.2.1 A large percentage of the surveyed multinationals believed that social media policy is an important consideration in the hiring and retaining of talent. For them, it is either 'somewhat important' (64 per cent) or 'very important' (16.2 per cent).
- 5.2.2.2 Overall, the majority of respondent multinationals stated that their company has specific policies in relation to particular issues such as recruitment, screening, hiring, the use of technology, confidentiality of business information,

and protection of company brand image. Almost all of the responding multinationals reported that they have specific policies concerning the use of technology (84.7 per cent), confidentiality of business information (86.9 per cent), and the protection of company and brand image (76.8 per cent), even where there is no overarching 'social media policy'. It appears frequently that there is a patchwork of policies that govern how businesses behave in particular situations rather than policies which have developed for the expression of these issues in a particular technology. In other words, policies have been developed by reference to a behaviour or process (such as, confidentiality of information and recruitment) rather than the use of social media.

- 5.2.2.3 However, with regard to recruitment, screening, hiring and social media, the percentages of multinationals with specific policies is relatively high – 66.4 per cent, 58.2 per cent, 70.7 per cent, and 61.2 per cent respectively.
- 5.2.2.4 According to the majority (91.5 per cent), the same policies apply to all staff regardless of the category of worker to which they belong (eg, blue collar or white collar, and full-time or part-time). There is little evidence of access to social media being treated as a 'benefit' of status.
- 5.2.2.5 Only a small majority of multinationals apparently make a breach of their social media policy a disciplinary offence (57.3 per cent). And, in perhaps a similar sign that the threats of social media are yet to be fully appreciated, 83.2 per cent of surveyed multinationals said their company does not insure against legal risk such as an employee defaming a third party through statements on social media (eg, via Twitter).
- 5.2.2.6 Generally, the majority of companies (63.3 per cent) do not have a 'corporate social media', for example, as an integrated part of their intranet.
- 5.2.2.7 In relation to monitoring the usage by employees of company equipment a majority of companies (56.4 per cent) do this.
- 5.2.2.8 A large majority of the multinationals (73.8 per cent) confirmed that they do not have a policy for managers and HR professionals against monitoring the use by employees of social media. This suggests that companies adopt a 'laissez faire' approach: if an employee makes their behaviour visible, it is not generally thought wrong to observe it.

5.2.3 COMPANY POLICY

- 5.2.3.1 The majority of surveyed companies (56.7 per cent) have not taken steps to ensure that their global social media policy is in compliance with local regulation. This could be seen as reflecting relative priorities and the degree of detail required in particular in highly regulated countries (see 5.1.3.1 above). Employers may prefer to express general principles in global policies. At the roundtable meeting (see 2.11 above), the view was expressed that companies

see behaviour on social media as already regulated by other company policies, and as a result companies do not believe that it is necessary to have a separate policy for this matter. The view is that management of employee behaviour on social media is more a question of training employees on how to use social media and coaching those employees who need more.

- 5.2.3.2 The multinationals surveyed were asked whether policies were implemented with the involvement of employees, employee representatives, works councils, unions, local authorities, or any other organisations. The responses varied, with the majority of companies (71.1 per cent) saying that employees had been involved in the implementation of social media policies. Respondents commented that often this is done on functional grounds such as where HR and legal support are required to develop and implement them. Only 11.8 per cent involved employee representatives, 11.8 per cent works councils, 7.9 per cent unions, 5.3 per cent local authorities, and 26.3 per cent used other parts of the organisation such as legal departments.
- 5.2.3.2 Most respondents (63.3 per cent) acknowledged that their company does not regularly assess the effectiveness of its social media policy.

5.2.4 USES OF SOCIAL MEDIA IN THE COMPANY

- 5.2.4.1 As to employers benefitting from the use of social media, almost half of the surveyed companies considered that they have benefited in terms of new ideas. The majority said their company had experienced benefits in connecting with customers (74 per cent) and employer branding (75.3 per cent). However, in the cases of training (51.9 per cent) and diversity (52.7 per cent), the majority view was that there had been no benefits. The use of social media to help connections between different departments of the company through groups with common interests was finely balanced.
- 5.2.4.2 According to the majority of companies surveyed, employees are permitted to use social media during work hours. However, some limited use to official work breaks (46.2 per cent) and some capped the amount of time permitted (27.4 per cent).
- 5.2.4.3 A minority of companies (41.5 per cent) stated they distinguish between employees who use social media for work purposes.
- 5.2.4.4 The majority of companies do not block employees from social media sites such as Facebook, LinkedIn, Twitter and Instagram. From the responses received, it seems that LinkedIn is seen as more likely to be used by the employer for employee screening and less likely to have its use by employees blocked as a social medium, compared to other designated services. This probably correlates with the perceived business orientation of LinkedIn.

- 5.2.4.5 Generally, most companies have not reported cases where employees had to be disciplined for the use of social media during work hours. However, a small minority (20.2 per cent) reported they had between one and five cases, whilst very few (one per cent) have had between six and ten cases.
- 5.2.4.6 When asked if the company regulates the use by employees of social media outside working hours, a massive majority (87.7 per cent) answered that the company did not. When asked about cases where they have had to discipline an employee for the use of social media outside working hours, a small number (13 per cent) said they had disciplined employees.
- 5.2.4.7 The majority of companies do not distinguish between the use of company hardware and the use of employee owned devices. This suggests that what is of importance to employers is not whether the device used belongs to the company or to the person but rather the manner of use.

5.2.5 SOCIAL MEDIA AND THE RECRUITMENT PROCESS

- 5.2.5.1 A significant minority (37.5 per cent) of surveyed companies stated they used social media as a screening tool or background check in the recruitment process. The majority (75.9 per cent) do not ask for permission or inform candidates when doing so. This may reflect the fact that technology presents a chance to gain a much broader 'window' into a candidate's life. It also presents the employer with the chance to increase and speed up the number of candidates it deals with.
- 5.2.5.2 Some employers have a policy which rules out the use of social media to 'screen' candidates – they will not look at Facebook profiles for example.
- 5.2.5.3 The surveyed companies were almost equally split on whether their company takes any steps if sensitive data is obtained through social media in the recruitment process or during employment to ensure that decisions on hiring, promotion, demotion or termination are not discriminatory.

Conclusions

6.1 *The relative importance of social media issues: differences between legal professionals and multinationals*

- 6.1.1 There is a contrast between the priority attached to social media issues by the HR lawyers and the multinationals surveyed. For lawyers, this area is a 'hot topic'. Partly this is driven by uncertainty, with only just over half considering that there is sufficient case law established to set out working principles governing the use and control of social media. At the roundtable meeting, the view expressed by many of the employers was that they recognise that the issue is significant but it is not so much a legal liability issue as an opportunity for employer branding and more efficient recruitment.
- 6.1.2 The different reactions of the two constituents are partly explained by the experience (so far) of lawyers in relation to legal change. Since 90 per cent considered there have not been any significant changes in their national rules relating to the use by employees of social media, this may explain the attitude of multinational employers: if nothing much has changed, why should it be a high priority for them to adopt a social media policy?
- 6.1.3 Other explanations could lie in the differing structural and economic pressures on employers and legal professionals: employers may be more preoccupied with revenue generation than with internal risk management concerning social media use among employees.
- 6.1.4 Confronted with the fact that the issue was listed as one of the most important issues by employers in the GEI 10/20 survey, the representatives of multinationals at the roundtable meeting explained that although companies recognise social media as one of the most important HR tools in relation to recruitment and branding, they do not consider the legal challenges as a top priority compared to other challenges they face within HR. Going further they argued their concerns were more about the user than the use. The main issue that the companies are facing relates to the younger generation, and the difference in their expectation of privacy. Young people tend to regard a conversation on Facebook just as private as a private conversation between two people. But the reality is that it is not as private as they might think.
- 6.1.5 However, employers attach a higher importance to having social media policies where the use of new technologies and social media are close to, or intrinsic to, their core business. Examples of this would be in branding and communications businesses and in businesses creating software or other intellectual property rich businesses. Here employer respondents have a higher level of engagement with social media. They are 'early adopters' of social media. It remains to be seen whether they are a different kind of employer, or an advanced guard of other employer attitudes.

6.2 Loyalty, monitoring and control: comments of lawyers and multinationals

- 6.2.1 Most legal respondents consider that ordinary principles of loyalty and control will apply to comments made by staff on social media.
- 6.2.2 Lawyers generally report that the introduction of social media does not change the underlying legal rights and entitlements of employers and employees. To the extent an employee could be disciplined for disloyalty through comments made, that they are made on social media generally appears to make no difference.
- 6.2.3 Similarly, employees who are protected by 'free speech' or 'whistleblowing' rules may have that protection where comments are made on social media.
- 6.2.4 Where employees tend to use intranet or social media to communicate messages to their own staff, employers need to be wary of any presumption that the speed and ease of communication means that their messages will be binding. There are many countries which have proper channels or procedures for the introduction of new policies or requirements, such as employee consultation.
- 6.2.5 Some employees may fall foul of assumptions that the characteristics of social media can protect them. It is tempting to make comments about perceived bad practices or characteristics of colleagues. An employee will not be protected as a whistleblower in these circumstances if they do not meet existing national rules on the subject matter of a protected comment, or the (sometimes limited) identities of people to whom comments may be made for the employee to have protection. Social media may trap the unwary.
- 6.2.6 Given the differences in national rules and procedures relating to employees, it is unsurprising that the majority of surveyed companies have not, as yet, taken steps to ensure that their global social media policy, where they have one, complies with local regulations. The authors of this report generally find the process for checking local compliance to be time consuming and expensive for many employers. Frequently it is a matter of frustration for those businesses which wish to set out a strong, universal set of values to be told that there are local constraints in acting on the consequences of those statements. Where employers have clear approaches, they may prefer to simply set them out and negotiate the individual effect of any infringements on a case by case basis.

- 6.2.7 In that regard, there is a relatively low incidence of reported disciplinary issues concerning social media. Most respondents have not reported taking disciplinary action relating to the use of social media during work hours. Only one per cent have had as many as six to ten cases of disciplinary action. This suggests that, so far, the increase in availability of social media for comments has not resulted in a large number of infractions.
- 6.2.8 This result corresponds well with the comment made at the roundtable meeting to the effect that what is required is training and coaching, and not necessarily disciplinary measures. A further comment made at that meeting was that if a company perceives the value of social media as a PR opportunity (in other words embracing 'free speech'), it is likely to be accused of hypocrisy if it disciplines employees who speak freely. Nonetheless, most companies at that meeting agreed that if an employee's 'offence' concerned discrimination, breach of ethics or the company's safety or brand, then most employers would take disciplinary action in such cases.

6.3 Screening and potential for dispute

- 6.3.1 Lawyers and multinationals appear to have a common level of interest in the use of social media relating to recruitment and employee screening. We have noted that a large percentage of multinationals surveyed thought that a social media policy was an important feature in the hiring and retention of talent. This response seems to correlate with concerns from other surveys on the difficulty in attracting and retaining staff, and on the need to target different generations with the use of new technology. A higher incidence of policies relating to recruitment screening and hiring as a specific use for social media indicates this is the most important area of concern for multinationals dealing with their employee base.
- 6.3.2 For the authors of this Report, it is easy to contemplate circumstances in which employers might risk claims of discrimination or infringement of human rights from their screening of candidates in social media. It may be easy to risk inferences of discrimination on the grounds of protected personal characteristics, religious or other beliefs. Responses among lawyers were split on whether it appeared likely that social media in itself might increase the number of claims. It is difficult to draw a concrete conclusion, but we suggest that there is the probability of increase related to the inherent characteristics of social media, which may act as a tool through which there could be increased abuse, and/or increased reporting of abuse.
- 6.3.3 Just as the new technology gives employers and prospective employers a larger window into the 'private' lives and views of their employees, so it also gives individuals an increased capacity to speak out and reach a wider audience to discuss concerns or complaints. In some jurisdictions, this is seen currently even in sensitive areas of discussion such as among victims of abuse.
- 6.3.4 Since the surveyed companies were almost evenly divided on the adoption of extra controls to prevent misuse of sensitive data, it seems likely that more occasions of

bad practice or breach will arise, and in the long term this is one of the 'hot topics' which lawyers and employers may return to.

- 6.3.5 Until employers come across consistent commercial or legal requirements to focus on social media policies, and financial or other material risks for not doing so, it is likely that they will be more preoccupied with social media as a customer-facing tool in relation to revenue generation. We think it is likely that from jurisdiction to jurisdiction the characteristics of social media will create those requirements.

7. About the International Bar Association Global Employment Institute

The International Bar Association Global Employment Institute was established in early 2010. Its primary purpose is to develop a global and strategic approach to the main legal issues in the human resources and human capital fields for multinationals and worldwide institutions.

The Executive Council Officers of the IBA GEI are:

- Chair: Salvador del Rey
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If you would like to join the IBA Global Employment Institute or one of the other committees in the Human Resources Section, or if you would like further information on section or committee activities, please visit: www.ibanet.org. We also invite you to contact the IBA Membership Department on:

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Further information is available at the IBA website:

www.ibanet.org/LPD/Human_Resources_Section/Global_Employment_Institute/Global_Employment_Institute_Home.aspx

Schedule 1: Questionnaire to country lawyers

1. For which country are you the national reporter?
2. Does the employee in your country have a duty of loyalty or a restriction under company policies, which limits his/her use of social media:
 - for private purposes outside working hours?
 - for private purposes during working hours?
 - for business purposes?
3. Does it make a difference whether the employee accesses social media on the company hardware or on his/her own devices?
4. Does it make a difference if the social media accessed is purely internal, for example, as an integrated part of the company's intranet?
5. Does the duty of loyalty (what an employee may say before it is considered disloyal) differ on social media than other places? If so, how?
6. Is the employee protected when raising specific issues (whistleblowers, etc)?
7. Can the company implement a social media policy?
8. What difference will a social media policy make on the assessment of the employee's conduct and the ability to sanction?
9. Is there any case law in your country pertaining to the employees' use of social media? If so, please include the case law in your response together with a brief summary in English.
10. Have there been any significant changes in respect of the rules relating to employees' use of social media?
11. Are companies allowed to monitor through social nets? If yes, are there any restrictions?
12. Are companies allowed to use social nets as a tool for screening job candidates? If yes, are there any restrictions?
13. Is employee consent required? If yes, does it make a difference if the employee invites management to connect or has an open profile?
14. Are companies required to follow any procedures before monitoring its employees, for example, consultations, public approvals, etc? If yes, please list.
15. What are the penalties if companies violate the local rules on companies' use of social media, if any?

16. Does a company's monitoring of social media increase the risk of discrimination cases? Have there been any examples in your country?
17. Is there any case law involving a companies' use of social media? If so, please include the case law in your response together with a brief summary in English.
18. Have there been any significant changes in respect of the rules relating to companies' use of social media?

Schedule 2: Questionnaire to HR directors in multinationals

1. Name of company.
2. Main economic activity of company.
3. Number of employees worldwide.
4. Country where the company has its head office.
5. How important is the issue of social media in your company?
6. Is the issue of social media mainly local or global or mixed?
7. Do you think your social media policy is an important consideration in the hiring and retaining of talent in your company?
8. Does your company have a specific policy on any of the following subjects: recruitment, screening, hiring, social media, use of technology, confidentiality of business information or protection of company brand and image?
9. Does your company have a specific policy on social media? Is it a global policy or local policies that vary from country to country?
10. Does the policy differ between different categories of staff (ie, white collar/blue collar or full-time/part-time)?
11. Does your company have a corporate social media, for example, as an integrated part of the intranet? If yes, does the same social media policy apply to the corporate social media as to the external?
12. What is the consequence in your company of breach on the policy on social media? Is it treated as a disciplinary offence?
13. Does your company insure against legal risk, for example, defamation from statements on social media (eg, Twitter)?
14. Does your company monitor the employee usage of company equipment?
15. Has your company taken steps to ensure that the company's global social media policy is in compliance with local regulation?
16. Has your social media policy been implemented with the involvement of: employees, employee representatives, works councils, unions and/or local authorities (including data protection agencies)?
17. Does your company regularly assess the effectiveness of its social media policy?

18. Has your company experienced benefits from its use of social media in respect of: new ideas, training, connecting with customers, employer branding, diversity, or connections between different departments of the company through groups with common interests?
19. Are employees allowed to use social media during working hours in your company and is the time capped?
20. Do you distinguish between employees who use social media for work purposes?
21. Do you block employees from certain social media sites, such as Facebook, LinkedIn, Twitter, Pinterest, Instagram or any other?
22. Has your company had any cases where employees had to be disciplined for the use of social media during work hours? If so, how many?
23. Does your company regulate the employees' use of social media outside working hours?
24. Do you distinguish between the use of company hardware and the use of own devices?
25. Did your company have any case where an employee had to be disciplined for the use of social media outside work hours? If so, how many?
26. Does your company use social media as a screening tool/background check in the recruitment process? Do you ask for permission or inform the candidates? Do you distinguish between the different social media: Facebook, LinkedIn, Twitter or other?
27. Does your company take any steps if sensitive data is obtained through social media in the recruitment process or during the employment (religious beliefs, sexual orientation, pregnancy, nationality, union membership, health information, etc) to ensure the decisions (hiring, termination, promotion, demotion) is not discriminatory?
28. Does your company monitor the employees through social media?
29. Does your company have a policy for managers and HR professionals against monitoring the employees?

Schedule 3: List of law firms and number of multinationals per country

List of law firms

- Argentina: Aresco
- Australia: Ashurst
- Belgium: Lorentz
- Brazil: Mundie Advogados
- Canada: Stikeman Elliott
- China: King & Wood
- Colombia: Brigard & Urrutia
- Cyprus: Neocleous
- Czech Republic: Giese & Partner
- Denmark: IUNO
- Finland: Castren & Snellman
- France: Galion Société D'Avocats
- Germany: Linklaters
- Greece: Kremalis
- Hong Kong: Ribeiro Hui
- India: Nishith Desai Associates
- Ireland: William Fry
- Israel: Herzog Fox & Nieman
- Italy: Studio Legal Associato Simonetti Persico Scivoletto
- Japan: Anderson Mori & Tomotsune
- Malaysia: Skrine
- Mexico: Basham Ringe

- Netherlands: Kennedy van der Laan
- New Zealand: Buddle Findlay
- Nigeria: Templars
- Poland: Salans
- Russia: Freshfields
- South Africa : Bowman Gilgfillan
- South Korea: Kim & Chang
- Spain: Sagardoy Abogados
- Sweden: Delphi
- Switzerland: MME Partners
- Turkey: Pekin & Pekin
- United Arab Emirates: Al Tamimi
- United Kingdom: Taylor Wessing
- United States: Littler Mendelson

Number of multinationals per country

- Argentina: 1
- Brazil: 2
- Canada: 1
- China: 5
- Cyprus: 1
- Denmark: 4
- Finland: 4
- France: 2
- Germany: 3
- Greece: 1

- Hong Kong: 3
- India: 5
- Ireland: 1
- Israel: 2
- Italy: 3
- Japan: 1
- Malaysia: 2
- Netherlands: 3
- New Zealand: 5
- Norway: 2
- South Africa: 1
- Spain: 4
- Sweden: 2
- Switzerland: 1
- United Arab Emirates: 1
- United Kingdom: 5
- United States: 12