

Survey:

## Social Networks in the Workplace Around the World



Proskauer 

## Social Networks in the Workplace around the World

The business world is witnessing an ongoing and rapid proliferation in the use of social networks. Although this has many benefits, hardly a week goes by without yet another new story of a business finding its reputation in tatters from its own employee's viral tweet or Facebook posting, or finding itself in hot water over its own attempts to monitor its employees' use of social media or to use social media to vet employees and applicants. The sheer proliferation of social network use means that in terms of quantity, it is becoming as prevalent as email, and businesses are increasingly using social networks as a business tool, often as a distinct part of marketing and public relations strategies.

It is tempting to take the view that social networks do not create any new workplace issues and that their use can be dealt with through the application of general principles rather than specific policies and practices tailored towards social media. There is a growing consensus, however, that, for several reasons, businesses need to have distinct and specific social media policies and practices in order to harness the benefits and minimize the risks these new media present. Social network use is often at the boundary of the divide between the workplace and the personal, which in turn raises difficult questions as to whether and how rules regarding workplace confidentiality, loyalty, privacy and monitoring apply to these new forums and if so, how they are balanced against freedom of expression. Also, a frequent feature of tweets and postings is that they have the character and informality of a verbal remark, but as with any writing or recording, they are essentially permanent and can be forwarded verbatim by any recipient, often to multiple parties; this mismatch can be dangerous and businesses would be well advised to do all they can to ensure those working for them think very carefully before they post or tweet.

To help us and our clients understand what is happening on the ground in this fast-developing area, we are delighted to present the results of our informal survey on emerging trends and practices on the use of social media in the workplace. We received over 120 responses from a broad range of businesses, many of whom have international presence. The survey results, which are set out below, are extremely informative and evidence the recent proliferation of social networks for business use, as well as the potential pitfalls associated with its use.

In addition to the survey results, and in collaboration with select law firms across the world, we have also included a brief summary of the developing law in relation to social networks and the workplace, which provides a valuable overview of the similarities and differences in different jurisdictions in relation to this increasingly important issue.

## Key Findings

We received over 120 responses from a broad range of businesses, many of which have a global presence. Some of the key findings are:

- More than three-quarters of responders use social networking for business.
- The majority of these have only started doing so in the last two years.
- Just over a quarter of responders actively block employees' access to social networking sites, and a similar percentage monitor employee use of social networking sites.
- More than 40 percent of the businesses in the survey have had to deal with employees misusing social networks, and nearly a third have had to take disciplinary action against employees in relation to misuse of social networks.
- Despite the widespread use and misuse of social networking at work, nearly half of the companies responding to our survey still do not have social networking policies.

The full results are set out at the end of this report.

## The Law around the World

Different jurisdictions take different approaches to workplace use of social media. In order to provide an overview of the current position, which is developing rapidly, we provide some answers to some of the most frequently asked questions across the following jurisdictions: Argentina, Brazil, Canada, the Czech Republic, England, France, Germany, Hong Kong, Italy, Japan, Mexico, Singapore, The Netherlands, Spain and the United Arab Emirates.

### Are Employers Permitted to Monitor Social Network Use by Employees at Work on Equipment Provided by an Employer?

For most of the jurisdictions covered by this survey, the answer is yes, but with constraints on the extent to which monitoring is permissible as well as requirements that need to be satisfied to ensure the monitoring is lawful. Employers will not generally have a right to monitor social network use on an employee's own devices (such as a smart-phone).

One exception to this is Italy, where employers are generally not permitted to monitor social network use (a restriction that cannot be circumvented even with employee consent). However, an employer in Italy may prohibit the use of social networking sites during work hours and is also permitted to monitor the sites to determine whether an employee has used them in breach of any policies (and impose sanctions against an employee for breach of any policies), but the monitoring must be limited to ascertaining whether the employee used the social networking sites and may not involve any review of the data and information posted or checked by the employee.

### If Employers are Permitted to Monitor Social Network Use by Employees at Work on Equipment Provided by an Employer, What Limits and Considerations Apply?

In the majority of jurisdictions, the key consideration is the balancing of an employer's legitimate interest in protecting its business against an employee's right to privacy (and associated rights in relation to data privacy and personal data). Accordingly, the best practice in most jurisdictions is that employers should take the following steps in monitoring employee use of social networking sites:

- Put in place a clear, well-defined and well-communicated policies or contractual provisions concerning the appropriate use of social networking sites and the sanctions for non-compliance—ideally, employees should expressly consent to such policies.
- Ensure monitoring goes no further than is necessary to protect the employer's business interests.

- Implement safeguards and practices to ensure:
  - any monitoring is only done by those representatives of an employer who are authorized and who have a legitimate interest in carrying out any monitoring.
  - any data collected as a result of any monitoring is stored safely, not tampered with and not disseminated more widely than is necessary.
  - personal data is not stored for any longer than is necessary.
- Train management and employees in the correct use of information technology.
- Be able to particularize and evidence any misuse of social networking sites by employees.

Notwithstanding these general guidelines on best practices, we would note the following features that are specific to particular jurisdictions:

- **England:** The government agency responsible for data privacy has issued guidelines about appropriate monitoring in the workplace, which should be complied with. Among other things, these state that any monitoring needs to be proportionate, which broadly means that the reason for monitoring has to be sufficient to justify the intrusion into an employee's private life. Businesses should carry out an impact assessment of any monitoring in order to determine whether it is proportionate in the circumstances.
- **France:** Before an employer may monitor its employees' use of social networks, it must inform and consult its works council, and the affected employees must be informed that monitoring is to take place and its purposes. If these requirements are not met, the information gathered by the monitoring process cannot be used to discipline an employee. In addition, the French data protection agency must be informed that monitoring is taking place if (as is usually the case) it will result in storing, recording or otherwise processing data about identifiable individuals. Finally, where an employer wants to implement a policy on the use of social networks which contains disciplinary sanctions for noncompliance, the policy must be regarded as an addendum to the internal rules of the company and its introduction will require a specific procedure (which includes consultation and filing of the policy before the French labor administration).
- **Germany:** Although works councils need not be informed about monitoring in individual cases (although in some cases this may be advisable), for any monitoring that can impact an entire business, such as the introduction of monitoring policies, works council involvement will be required.

- **Hong Kong:** The local data protection agency has issued guidelines for reconciling employer monitoring with personal data protections at work. If the employer anticipates that personal data will be collected in the process of monitoring, the employer should expressly inform its employees of the monitoring activities beforehand. This is usually done by a written Personal Information Collection Statement which sets out, in advance of any monitoring: the purpose for which the personal data collected will be used; the classes of persons to whom the personal data will be transferred; and the rights of the employees to request access to and to correct their personal data. Employees may be entitled to compensation if they suffer damage as a result of an employer's violation of the data privacy laws.
- **Italy:** The limited monitoring permitted in Italy (i.e., to monitor only to the extent of determining whether or not an employee has used social network sites in breach of any policies) is only permissible if an employee is given prior notification (as a part of a company policy) about (i) how such monitoring is to be executed; (ii) its purposes; (iii) how long personal data will be held by the company; and (iv) the safeguards in place to prevent the misuse of personal data. In addition, any prohibition on social networking at work must be part of a policy which clearly sets out the extent to which use of social networking is permitted and the steps a company will take to monitor compliance with the policy. Any such policies must also be accepted by employee representative bodies (usually the works council or the labor office). These requirements cannot be circumvented or excluded by obtaining the individual consent of employees to monitor social network use—such consent would not be deemed valid under Italian law.
- **Mexico:** A recent Supreme Court ruling has raised the possibility that the balance between the right to privacy and an employer's legitimate business interests is tilting in favor of the employee's right to privacy. In particular, the decision, in the context of a divorce, emphasized an individual's right to secrecy of private communications. This could have a negative effect on the ability of employers to monitor the use of social networks during work hours, as the Court may very well determine in the near future that social networks are considered private communications, particularly where the user has used privacy settings.
- **Spain:** Employers are permitted to monitor the time spent by employees on social networks while they are at work (provided that they have previously been informed that such monitoring will take place, ideally through a policy or a code of conduct), but in most circumstances employers may not monitor the content of a social networking site (such as an employee's postings) without the consent of the employee.
- **The Netherlands:** Where a company has a works council, the works council must be consulted about any policy on social networking that the company wishes to implement.

## Is an Employer Allowed to Prohibit Use of Social Network Sites During Work: (i) On Equipment Provided By Employers; (ii) On an Employee's Own Devices (e.g., Mobile Phones)?

In all the jurisdictions, an employer is permitted to prohibit the use of social network sites during work, both on equipment provided by the employer and on the employee's own devices. However, the prohibition against use of social network sites on an employee's own devices would not give the employer the right to monitor such devices (which would infringe the employee's right to privacy in many jurisdictions); rather, the prohibition would be an incident of the employer's general right to require employees to devote their working hours to their work.

Moreover, in all the jurisdictions surveyed, an employer is permitted to block access to social network sites on employer-provided equipment.

In the United Arab Emirates, the publication of information concerning the private or "family" affairs of another is prohibited, and it is an offense for any person who acquires confidential information by virtue of his profession or occupation to disclose that information to others without authorization. It seems, therefore, that use of social networking systems could lead to the commission of offenses on the part of employees by online disclosure of details concerning the confidential affairs of the employer or the private lives of work colleagues. Given this, an employer who wishes to prohibit the use of social networking sites by staff members while at work would be fully justified in so doing. In fact, it is understood that many employers in the UAE have imposed such a ban.

## To What Extent Is it Permissible to Refer to Social Networking Sites when: (i) Taking Disciplinary Action Against an Employee; And (ii) Making Decisions about Recruitment and Selection?

In most jurisdictions, it is permissible to refer to social networking sites, both when taking disciplinary action against an employee and when making decisions about recruitment and selection.

One exception to this is Italy, where it is not permissible to refer to social networking sites to make decisions about recruitment and selection of candidates, broadly because referring to social network sites in such a context would be an infringement of an individual's right to privacy.

In any event, and notwithstanding the general ability to refer to social networking sites both in relation to taking disciplinary action and recruitment and selection, the following should be kept in mind (which are common to all jurisdictions):

- An employer would be well-advised to consider carefully the evidential weight to be given to information obtained from a social networking site. The information posted may be inaccurate, out-of-date, not intended to be taken at face value, or even posted by someone other than the person who is the subject of the enquiries.
- Relying on information contained in social networking sites creates a risk of discrimination. It is possible to envisage situations where someone is treated less favorably by reason of a protected characteristic, or a condition is imposed which has disparate impact on people of a particular class.
- Any use of social networking sites when making decisions should comply with data privacy requirements (including in relation to the secure storage and deletion of information after it is no longer needed) and any internal policies about monitoring of such sites.

In relation to these issues, it is worth noting that The Netherlands Association for Human Resources Management and Development of Organizations has developed a code of conduct, which, although drafted specifically for The Netherlands, contains suggestions that would not be out of place in other jurisdictions. The code of conduct provides, among other things, that information about a job applicant that has been obtained from social networking sites: (i) should be discussed with such job applicant before relying upon it; (ii) should be treated confidentially; and (iii) should be deleted within four weeks after the job application if the applicant is not hired (unless the applicant consents to such information being kept for a maximum period of one year). Similarly, many recruitment agencies in France have implemented a code of conduct which stresses that the selection of candidates should be based solely on their professional skills and exclude all elements relating to their private lives.

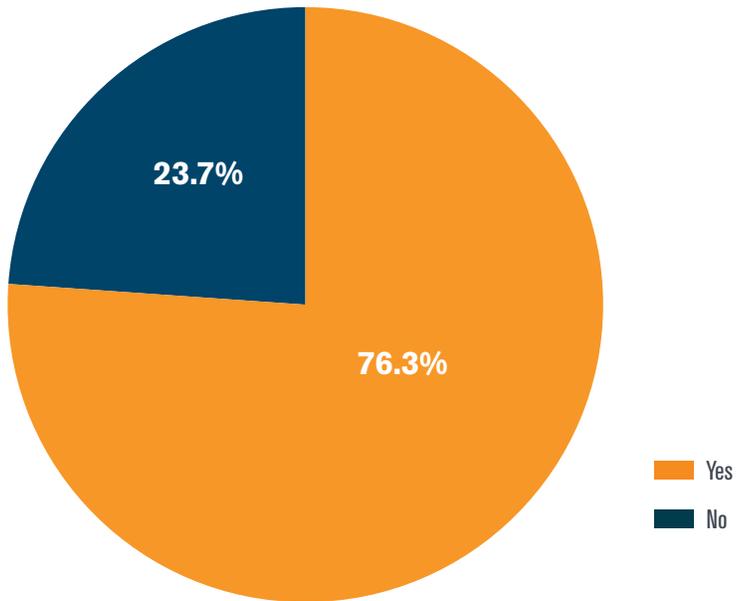
## To What Extent can Employers Limit Use of Social Network Sites of Their Employees Outside of Work?

In all jurisdictions, an employer has no right to prohibit the use of social networks per se. However, employees are not entitled to use social networks to do things that would otherwise be impermissible, such as misusing confidential information, infringing intellectual property rights, harassing another employee, or otherwise breaching the duties they owe to their employers. It would, therefore, be prudent for any policy on social networking to make clear that employees can be held responsible (and can be disciplined) for work-related misconduct that they engage in on a social networking site, even on their own time.

## The Survey Results in Full

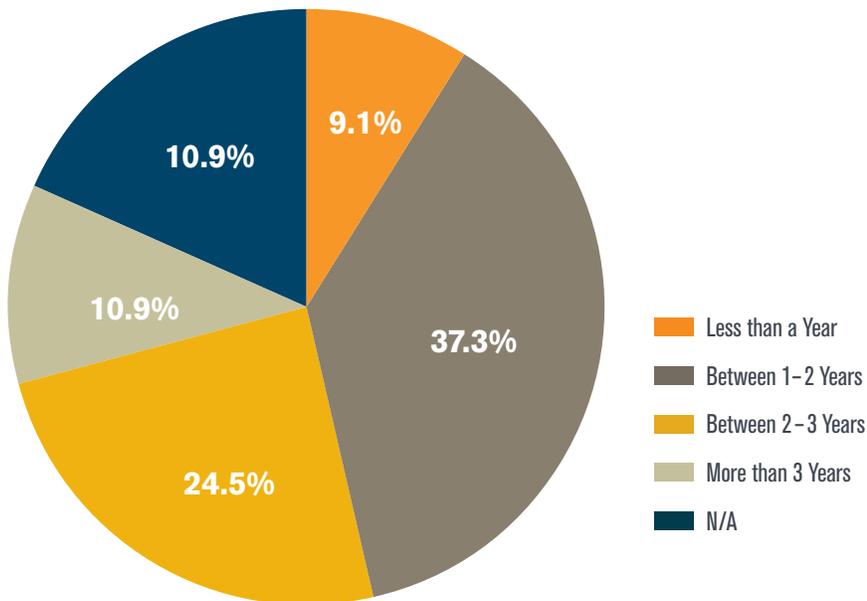
### Question 1:

Does your business use social networking (e.g., LinkedIn, Facebook) for business purposes?



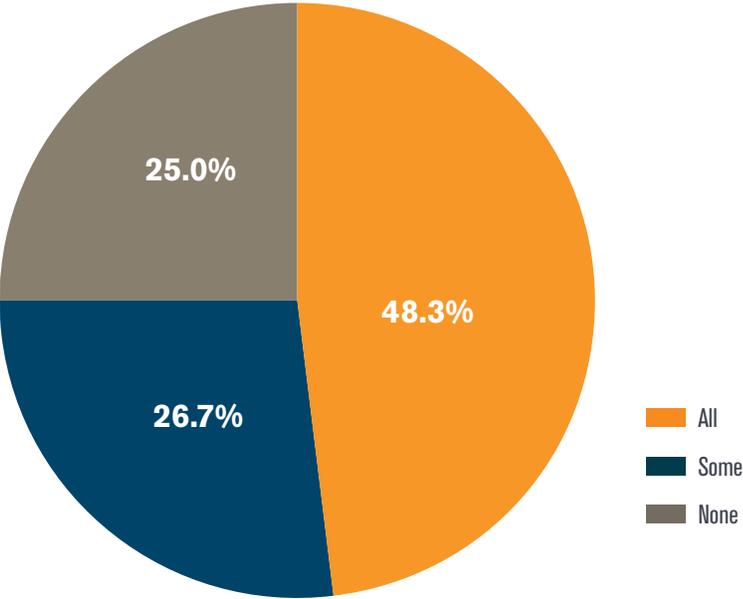
### Question 2:

If your business uses social networks for business purposes, how long have you used them?



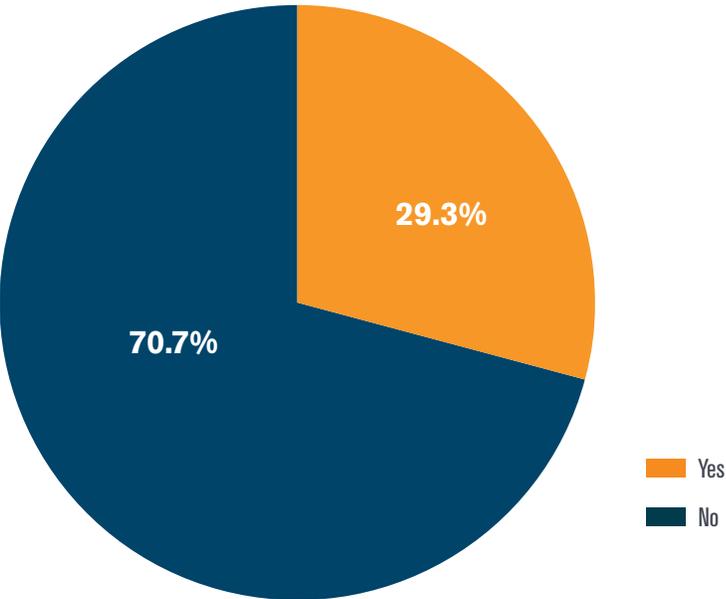
### Question 3:

Are all, some, or no employees permitted to access social networking sites at work for non-business use?



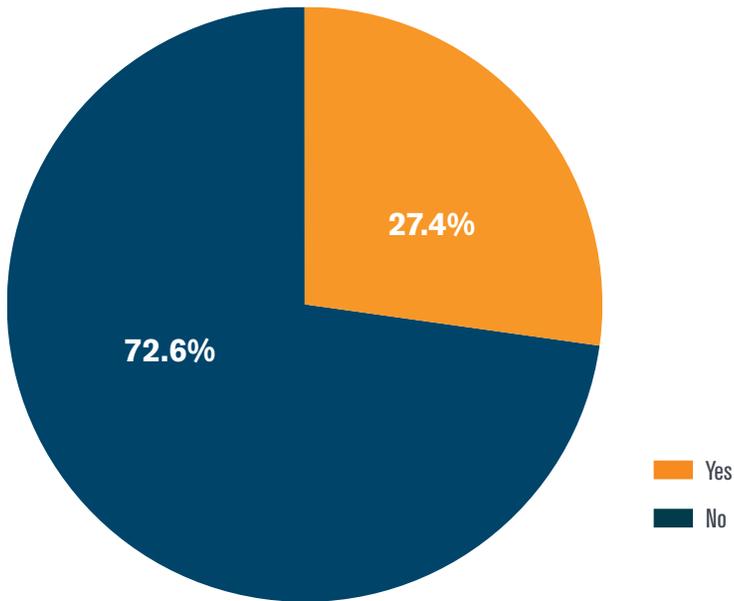
### Question 4:

Do you actively block access to social networking sites at work?



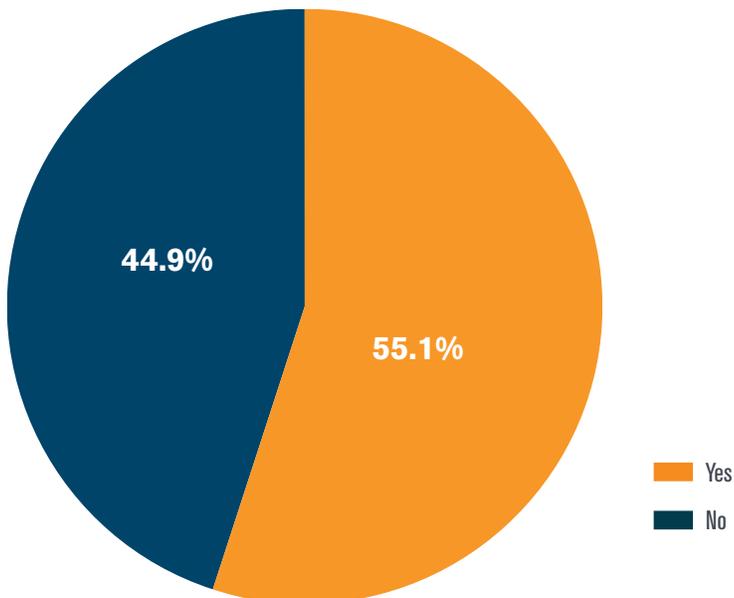
### Question 5:

Do you monitor the use of social networking sites at work?



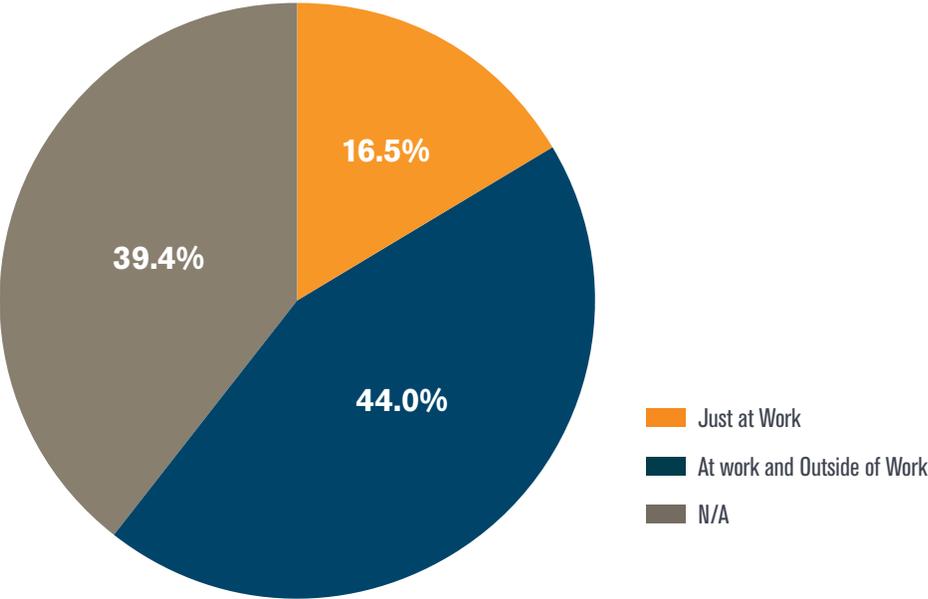
### Question 6:

Do you have any policies in place in relation to social networking?



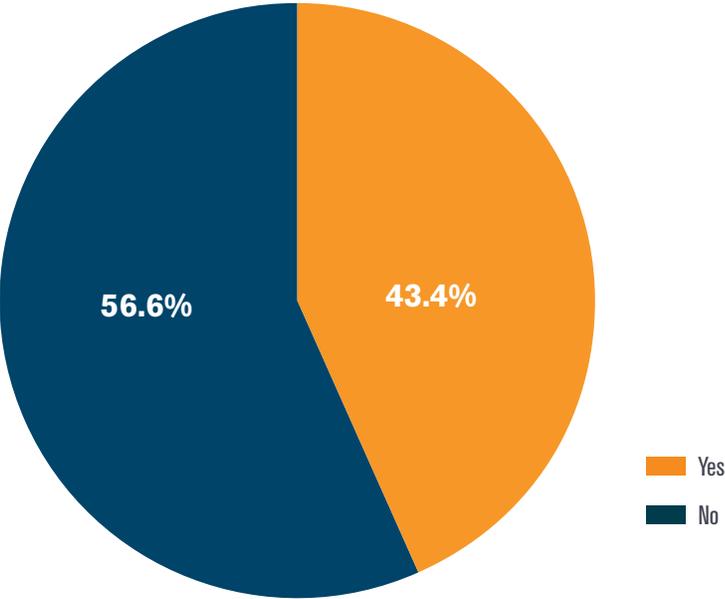
### Question 7:

If you have policies in place in relation to social networking, do they cover both use at work and outside of work?



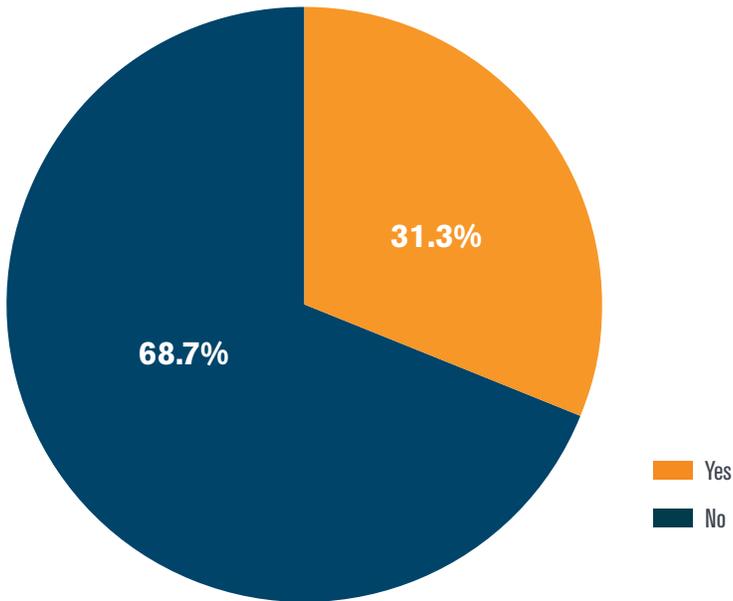
### Question 8:

Is misuse of social networks an issue your business has ever had to deal with?



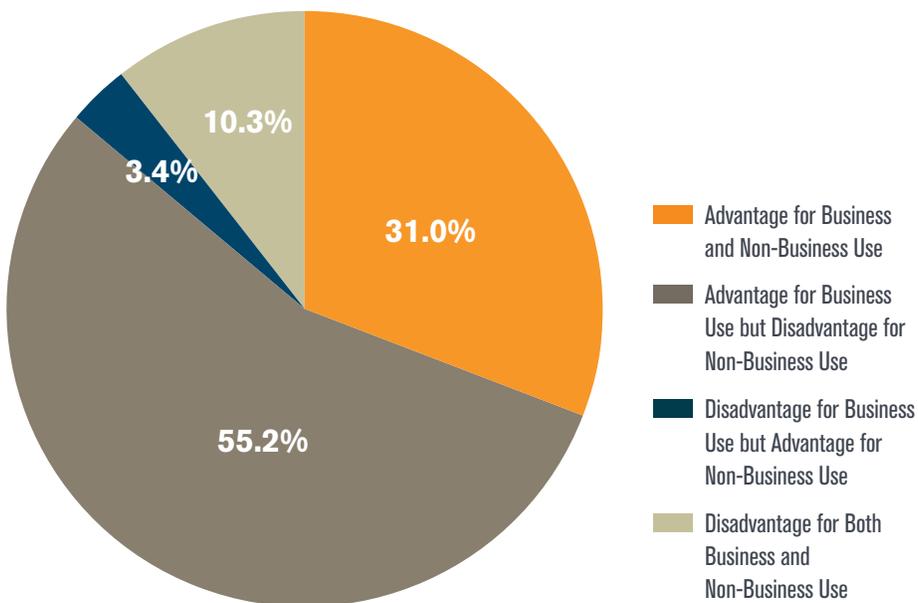
### Question 9:

Has your business ever had to take disciplinary action against an employee in relation to misuse of social networks?



### Question 10:

Do you think it is an advantage or disadvantage to your business to allow employees access to social networking sites while at work for (i) business use and (ii) non-business use?



## Law Firm Participants

We are grateful to the following lawyers and firms who have worked with us on the summaries for each of these jurisdictions:

**Argentina:** Enrique M. Stile, Marval, O'Farrell & Mairal, ([www.marval.com.ar](http://www.marval.com.ar))

**Brazil:** Fabio Medeiros, Machado Associados ([www.machadoassociados.com.br](http://www.machadoassociados.com.br))

**Canada:** Bridget McIlveen and Adam Kardash, Heenan Blaikie LLP  
([www.heenanblaikie.com](http://www.heenanblaikie.com))

**Czech Republic:** Martin Kubánek and Michaela Handrejchová, Schoenherr  
([www.schoenherr.eu](http://www.schoenherr.eu))

**England:** Dan Ornstein and Peta-Anne Barrow, Proskauer Rose LLP  
([www.proskauer.com](http://www.proskauer.com))

**France:** Cecile Martin and Jean-Baptiste Martin, Proskauer Rose LLP  
([www.proskauer.com](http://www.proskauer.com))

**Germany:** Burkard Göpfert, Gleiss Lutz ([www.gleisslutz.com](http://www.gleisslutz.com))

**Hong Kong:** Gladys Ching, Cynthia Chung and Elsie Chan, Deacons  
([www.deacons.com.hk](http://www.deacons.com.hk))

**Italy:** Analiza Reale and Cristiano Pambianchi, Chiomenti Studio Legale  
([www.chiomenti.net](http://www.chiomenti.net))

**Japan:** Nobuhito Sawasaki and Kazutoshi Kakuyama, Anderson Mori & Tomotsune  
([www.amt-law.com](http://www.amt-law.com))

**Mexico:** Carlos Leal-Isla Garza, Leal-Isla & Horváth, S.C. ([www.lealislacom.mx](http://www.lealislacom.mx))

**The Netherlands:** Hermine Voûte, Loyens & Loeff N.V. ([www.loyensloeff.com](http://www.loyensloeff.com))

**Singapore:** Kelvin Tan and Jason Chen, Drew & Napier LLC ([www.drewnapier.com](http://www.drewnapier.com))

**Spain:** Juan Bonilla, Cuatrecasas, Gonçalves Pereira ([www.cuatrecasas.com](http://www.cuatrecasas.com))

**UAE:** Alexander McGeoch, Hadeef & Partners ([www.hadeefpartners.com](http://www.hadeefpartners.com))

## Proskauer Contacts:

For more information please contact the following at Proskauer.



**Kristen J. Mathews**  
Partner  
New York  
212.969.3265  
kmathews@proskauer.com



**Aaron J. Schindel**  
Partner  
New York  
212.969.9346  
aschindel@proskauer.com



**Jeffrey D. Neuburger**  
Partner  
New York  
212.969.3075  
jneuburger@proskauer.com



**Yasmine Tarasewicz**  
Partner  
Paris  
33.1.53.05.60.18  
ytarasewicz@proskauer.com



**Daniel Ornstein**  
Partner  
London  
44.20.7016.3687  
dornstein@proskauer.com



**Peta-Anne Barrow**  
Associate  
London  
44.20.7539.0638  
pbarrow@proskauer.com



**Bettina B. Plevan**  
Partner  
New York  
212.969.3065  
bplevan@proskauer.com



**Cécile Martin**  
Associate  
Paris  
33.1.53.05.69.26  
cmartin@proskauer.com



**Howard Z. Robbins**  
Partner  
New York  
212.969.3912  
hrobbins@proskauer.com



**Jean-Baptiste Martin**  
International Labor & Employment Counsel  
Paris  
33.1.53.05.60.21  
jmartin@proskauer.com

### **Boca Raton**

2255 Glades Road  
Suite 421 Atrium  
Boca Raton, FL 33431-7360, USA

t: 561.241.7400

f: 561.241.7145

### **Boston**

One International Place  
Boston, MA 02110-2600, USA

t: 617.526.9600

f: 617.526.9899

### **Chicago**

Three First National Plaza  
70 West Madison, Suite 3800  
Chicago, IL 60602-4342, USA

t: 312.962.3550

f: 312.962.3551

### **Hong Kong**

Suites 3605-3607  
36/F, Edinburgh Tower, The Landmark  
15 Queen's Road Central  
Hong Kong

t: 852.3410.8000

f: 852.3410.8001

### **London**

Ninth Floor  
Ten Bishops Square  
London E1 6EG, United Kingdom

t: 44.20.7539.0600

f: 44.20.7539.0601

### **Los Angeles**

2049 Century Park East, 32nd Floor  
Los Angeles, CA 90067-3206, USA

t: 310.557.2900

f: 310.557.2193

### **New Orleans**

Poydras Center  
650 Poydras Street  
Suite 1800  
New Orleans, LA 70130-6146, USA

t: 504.310.4088

f: 504.310.2022

### **New York**

Eleven Times Square  
New York, NY 10036-8299, USA

t: 212.969.3000

f: 212.969.2900

### **Newark**

One Newark Center  
Newark, NJ 07102-5211, USA

t: 973.274.3200

f: 973.274.3299

### **Paris**

374 rue Saint-Honoré  
75001 Paris, France

t: 33.(0)1.53.05.60.00

f: 33.(0)1.53.05.60.05

### **São Paulo**

Rua São Tomé, 86, 17º andar  
04551-080 São Paulo, SP, Brasil

t: 55.11.3045.1250

f: 55.11.3045.1391

### **Washington, DC**

1001 Pennsylvania Avenue, NW  
Suite 400 South  
Washington, DC 20004-2533, USA

t: 202.416.6800

f: 202.416.6899

The London office of Proskauer Rose LLP operates as a limited liability partnership registered in England and Wales (with registered number OC330064) and is regulated by the Solicitors Regulation Authority. It is registered for Value Added Tax in the United Kingdom under registration number GB 918 8174 91. A list of members and their professional qualifications is open to inspection at our registered office, Ten Bishops Square, London E1 6EG. We operate in association with the New York registered limited liability partnership of Proskauer Rose LLP, which is organised under the laws of the State of New York, USA.