An overview of 30 jurisdictions

Guide to Social Media Privacy

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Editors:
Jan Dhont
Bert Theeuwes

Guide to Social Media Privacy

2013

Editor's Note

Employer's Guide to Social Media Privacy

We are pleased to present the *Guide to Social Media Privacy 2013*. This guide compiles surveys on a selected number of key questions answered by social media law experts in each European Economic Area (hereinafter: "EEA") member state. With this approach we are able to provide a comparative and pragmatic description of the developing legal landscape on social media.

Following global trends, European employees increasingly use Social Media such as Twitter, Facebook, Foursquare or LinkedIn, both in and outside the workplace. With the proliferation of such use, employers are facing serious challenges - typically in terms of reputation or productivity. This guide aims to help employers identify means to regulate and control the use of social media.

To provide employers with such insight, the survey focuses on three issues: (i) the rules applicable to the use of social media in the recruitment process; (ii) the regulation of the use of social media during and after working hours; and (iii), permitted monitoring practices and the use of social media content to enforce company policies.

This survey highlights the legal uncertainty employers are confronted with when dealing with social media. Courts and data protection authorities struggle to find the right balance between the employees' right of privacy and the need of employers to regulate and control employees' use of social media. It is often a matter of applying the existing legal framework to find adequate solutions in a context marked by changing cultural values and expectations.

We would like to thank all the legal experts for their valuable input and time to make this contribution possible. We trust that this survey is a useful tool providing clarity in a challenging and changing legal landscape.

Jan Dhont & Bert Theeuwes
Lorenz | International Lawyers

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Austria

Dr. Axel Anderl
Dorda Brugger Jordis Rechtsanwälte GmbH
Universitätsring 10
1010 Vienna
www.dbj.at

Dorda Brugger Jordis Rechtsanwälte GmbH is a leading Austrian business law firm specializing in commercial law and is often involved in some of the most complex transactions in the market. The firm has about 80 lawyers (partners and associates) who are organized into specialized teams and have extensive experience in all aspects of business, civil and commercial law. In addition to M&A, banking & finance and real estate law, the firm's core practice areas include IP/IT, e-commerce, media and data protection law, employment law, corporate and tax law, dispute resolution, competition, trusts & estates and public commercial law.
Axel Anderl heads the IP/IT and media law practice group. His team provides comprehensive advice on IT and IP issues and has a strong record in outsourcing, IT projects, e-commerce, copyright, unfair competition and data protection matters. Axel Anderl frequently gives lectures, in particular, on outsourcing, IT law and social media use.
Dorda Brugger Jordis received the Austrian ILO Client Choice Award in 2012. In the area of IT the firm is ranked first tier by all leading directories. Axel Anderl was personally awarded with the ILO Individual E-Commerce Award for Austria in 2012 and is recognized as a leading individual for IT in Legal500.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant (laws available at www.ris.bka.gv.at):

- Article 8, European Convention on Human Rights, 1950;
- Sec 16, Austrian Civil Code 1811 (*Allgemeines Bürgerliches Gesetzbuch* – ABGB);
- Secs 98, 99, Labor Constitution Act 1974 (*Arbeitsverfassungsgesetz* – ArbVG);
- Data Protection Act 2000 (*Datenschutzgesetz 2000* – DSG);
- General Equal Treatment Act 2004 (*Gleichbehandlungsgesetz* – GlBG).

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

The use of information which is publicly available on social media websites does not infringe the job applicant's interest in secrecy deserving protection (Sec 8 Para 2 DSG). Moreover, by providing his or her personal data to a social media website, the job applicant is deemed to have implicitly consented to the processing of the information (Sec 8 Para 1 No 2 DSG). The employer will not be required to notify the Data Protection Authority of the processing of job applicants' personal data, as long as the processing is limited to information that has been published by the job applicant him or herself (Sec 17 Para 2 No 1 DSG).

However, recruiters should not base any recruitment decision on information regarding a job applicant's gender, race, religion, philosophical affiliation, age or sexual inclination, which they obtain by screening social media profiles, since this would violate:

- Data protection regulations (as the above mentioned information is deemed sensitive personal data, it can only be processed with the explicit consent of the job applicant);
- The principle of non-discrimination; and;
- The General Equal Treatment Act 2004.

3. Is works council intervention required?

Yes.

The employer should inform the works council about the need for personnel and the measures it intends to take with respect to personnel management. The works council has the right to require a special meeting about a particular recruitment, but has no right to determine how the employer can obtain information on potential candidates (Sec 98, 99 ArbVG).

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense. However, the following general laws apply (laws available at www.ris.bka.gv.at):

- ABGB;
- Secs 96 Para 1 No 1, 96a, 97 Para 1 No 6 ArbVG;
- Sec 3 Employment Liability Act (*Dienstnehmerhaftpflichtgesetz*; DHG).

The right to restrict social media use is derived from the employer's (i) property rights over the IT infrastructure that it provides to its employees to perform their work (Sec 353 ABGB), (ii) authority over its employees, and (iii) liability for damages resulting from the acts of its employees during the performance of their employment contract (Secs 1293 and 1313 ABGB, Section 3 DHG). The right to restrict the use of social media also flows from the employee's obligations (i) to be respectful towards their employer, (ii) to respect public morality, (iii) to execute their work with due care, (iv) to act in accordance with the instructions and orders of the employer, (v) not to disclose confidential information obtained during the execution of the employment contract, and (vi) not to participate in any unfair competition.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's right to regulate the use of social media is very broad. The employer can for example determine that employees are allowed to use social media (i) for a limited or specific period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

It is highly advisable to determine such rules, as continuous use of social media during working hours or on corporate IT infrastructure may result in a company practice, if there is no objection by the employer. If no such rules are determined, employees are allowed to make non-excessive use of internet for private purposes (including social media).

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. The employer can stipulate these rules in any kind of document. Theoretically, even oral work instructions or employment contracts (and amendments thereto) are possible. However, in order to make the rules regarding social media use during working hours or on corporate IT infrastructure enforceable and subject to disciplinary sanctions, they should be incorporated in or attached to the employment contract or the company work rules.

6. Is an intervention of the works council required for the implementation of such rules?

Yes. If the employer intends to implement a corporate disciplinary code (which for example provides sanctions for violations of its social media policy), a prior plant agreement is required (Sec 96 Para 1 No 1 ArbVG).

For the implementation of a policy on the non-excessive use of corporate IT infrastructure a plant agreement may be concluded with the works council, but is not obligatory (Article 97 Para 1 No 6 ArbVG).

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

In general, the employer has no right to impose any rules on its employees with respect to their private life. However, the employer always has the right to dismiss an employee or to terminate an employment contract by giving notice if the employee (i) violates his or her duty of loyalty and mutual respect, (ii) discloses confidential information, (iii) participates in any unfair competition, (iv) harms the employer's reputation, or similar.

In addition to the employee's general duty of loyalty, the employer can impose special duties on its employees (i) to keep company secrets, (ii) not to reference the company on social media profiles, or (iii) not to post comments or other content regarding co-workers, or which might harm the reputation/interests of the company, etc.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The employer's power to impose rules on its employees concerning their use of social media in their private life is limited to the employment relationship. This implies that the restrictions on the private social media use should be relevant for and proportionate to the employer's interests. Furthermore, the employer must tolerate a certain level of criticism from its employees.

4. Is an intervention of the works council required for the implementation of such rules?

If the employer intends to implement a corporate disciplinary code, which for example provides sanctions for violations of its social media policy, a prior plant agreement with the works council is required (Article96 Para 1 No 1 ArbVG).

For the implementation of a policy on the non-excessive use of corporate IT infrastructure a plant agreement may be concluded, but is not obligatory (Article97 Para 1 No 6 ArbVG).

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No. However, the following general laws apply (laws available at www.ris.bka.gv.at):

- Secs 96 Para 1 No 3, 97 Para 1 No 6, ArbVG;
- Sec 10, Employment Law Harmonization Act (*Arbeitsvertragsrechts-Anpassungsgesetz*, AVRAG);
- DSG;
- Telecommunications Act (*Telekommunikationsgesetz 2003* – TKG).

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes, the employer can process the results of the monitoring of frequency of the employee's internet use (which in most cases will be considered personal data) on the basis of its overriding legitimate interest (Sec 8 Para 1 No 4 DSG), preventing infringement of the employee's interest in secrecy deserving protection. However, the employer is required to inform its employees of (i) the fact that their social media usage is being monitored, and (ii) the purpose of such monitoring. Moreover, a notification duty to the Data Protection Authority may be triggered depending on the circumstances.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes. It is required to obtain the works council's consent (by plant agreement) prior to implementing any technology which allows the employer to control the employees, where such technology affects human dignity (Sec 96 Para 1 No 3 ArbVG). If there is no works council in the company, the employee's individual consent is required. The employee's consent can be withdrawn at any time in writing (Sec 10 AVRAG). However, ad hoc checks of individual employees' on a case by case basis would still be allowed.

If the monitoring measures violate (rather than merely affect) human dignity, they cannot be implemented, even if the works council consents by conclusion of a plant agreement or the employees consent individually.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can apply, if they are determined in company work rules. Company work rules can be adopted unilaterally by the employer, unlike a plant agreement which is concluded with the works council. Further, dissolution of the employment contract, dismissal for gross misconduct or after a notice period is conceivable, depending on the circumstances. If the employee's social media use causes reputational damage, the employer can claim damages.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

Yes. As a general rule, evidence obtained unlawfully may still serve as evidence in court proceedings.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. However, the following general laws and regulations apply (laws available at www.ris.bka.gv.at):

- Arts 8 and 10, European Convention on Human Rights, 1950;
- Arts 10 and 10a, Basic Law on the General Rights of Nationals 1867 (*Staatsgrundgesetz* - StGG);
- Arts 16 and 17, ABGB;
- DSG;
- TKG;
- Sec 10 AVRAG;
- Secs 96 Para 1 No 3, 96a and 97 Para 1 No 6 ArbVG.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

This depends on the type of media:

- Private media: In general, the employer is not allowed to monitor the content of private social media, if the employee is permitted to use social media during working hours or on corporate IT infrastructure (in case of clear indications of misuse, monitoring may be permissible as an exception on a case-by-case basis). The validity of ongoing monitoring of the content of private internet use is highly contested as it violates human dignity. Employees have to be

informed if social media content is permanently monitored. If, however, the employer has prohibited private use of the internet/corporate IT infrastructure, monitoring can be carried out on the basis that communication is assumed to be professional;
- Professional media: The employer has the right to monitor the use of professional social media. This right is derived from the employment relationship. However, employees should be informed prior to the monitoring;
- Public media: If information/posts on social media platforms are publicly available, employee's interest in secrecy deserving protection cannot be infringed and monitoring of such information is legitimate without any restrictions.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

In general, evidence which is obtained unlawfully may still serve as evidence in proceedings.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes. It is required to obtain the works council's consent (by plant agreement) prior to implementing any technology which allows the employer to control the employees, where such technology affects human dignity (Sec 96 Para 1 No 3 ArbVG). If there is no works council in the company, the employee's individual consent is required. The employee's consent can be withdrawn at any time in writing (Sec 10 AVRAG).

If the monitoring measures violate (rather than merely affect) human dignity, they cannot be implemented, even if the works council consents by conclusion of a plant agreement or the employees consent individually.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can apply, if stipulated in the work rules. Further, dissolution of the employment contract, dismissal for gross misconduct or after a notice period is conceivable, depending on the circumstances. If the employee's social media use causes reputational damage, the employer can claim damages.

Belgium

Data Protection and Privacy law - Jan Dhont
Employment law - Bert Theeuwes
Lorenz | International Lawyers
Regentlaan 37 - 40
1000 Brussels
www.lorenz-law.com

Lorenz International Lawyers provides legal services in a number of well-defined areas of Belgian and international business law to a large number of multinational corporations and Belgian companies.

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 8, European Convention on Human Rights, 1950;
- Act on the Protection of Privacy in Relation to the Processing of Personal Data of December 8, 1992 ('Data Protection Act');
- Collective Labor Agreement n° 38 of December 6, 1983.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, recruiters should not base any recruitment decision on information regarding a job applicant's age, health, disability, gender, sexual inclination, skin color, race, origin, ethnicity, political or philosophical affiliations, religion, or trade union membership, which they obtain by screening social media profiles as this could constitute unlawful discrimination. Furthermore, sending 'friend requests' with the sole purpose of gaining access to more information on the private social media profile of the concerned individuals might be deemed an unfair practice. However, this has not yet been confirmed by case law.

Further, the processing of information from social media profiles (e.g. downloading the information to create a database of potential candidates for a vacancy) is restricted. Such processing must be performed in accordance with the Data Protection Act, and recruiters may only process information which is strictly necessary for a vacancy.

3. Is works council intervention required?

Yes. According to Article 9 of the Collective Labor Agreement n° 9 of March 9, 1972 the employer must inform the works council about measures taken with respect to personnel management, such as measures with respect to recruitment and selection. Implementing a new policy for the screening of employees constitutes a measure with respect to recruitment and selection. Therefore, the policy must be given to the works council prior to the execution of the measures in order to leave open the possibility for the works council to formulate suggestions, advice and objections.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

However, the employer's right to restrict the employee of social media use during working hours or on corporate IT tools is derived from the employer's (i) property rights over the IT infrastructure that it provides to its employees to perform their work (Article 544 of the Belgian Civil Code), (ii) authority over its employees (Articles 2 and 3 of the Act on Employment Contracts of July 3, 1978), and (iii) liability for damages resulting from the acts of its employees during the performance of their employment contract (Article 1384 of the Belgian Civil Code). Furthermore, the right to restrict the use of social media also results from the employee's obligations (i) to be respectful towards their employer, (ii) to respect public morality, (iii) to execute their work with due care, (iv) to act in accordance with the instructions and orders of the employer, (v) not to disclose confidential information obtained during the execution of the employment contract, and (vi) not to participate in any unfair competition (Articles 16 and 17 of the Act on Employment Contracts of July 3, 1978).

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media are very broad. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. The employer can stipulate these rules in several types of documents, such as the company work rules, a general ICT-policy or a specific social media policy. However, these various documents do not have the same legal force. In order to make the rules regarding social media use during working hours or on corporate IT infrastructure enforceable and subject to disciplinary sanctions, they should be incorporated in the company work rules.

6. Is an intervention of the works council required for the implementation of such rules?

Yes. However, the level of intervention of the works council depends of the factual circumstances.

- Agreement of the works council

  If the policy regarding the use of social media provides for disciplinary sanctions (such as warnings, suspension, etc.), they must be included in the company work rules to be enforceable. In that case, the agreement of the works council would be necessary as part of the general obligation of the employer to submit any modification of the company work rules to the works council for prior agreement.

- Informing and consulting with the works council

  If the policy (i) has an impact on the working conditions or the organization of the work, (ii) is an important change for the day-to-day work and (iii) applies to all employees (and therefore has a collective impact), the works council must be informed and consulted in advance.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

However, the employer's right to impose rules regarding the use of social media outside working hours and on private IT tools can be derived from the employee's obligation (i) to be respectful towards their employer, (ii) to respect public morality, (iii) to execute their work with due care, (iv) to act in accordance with the instructions and orders of the employer, (v) not to disclose confidential information obtained during the execution of the employment contract, and (vi) not

to participate in any unfair competition (Articles 16 and 17 of the Act on Employment Contracts of July 3, 1978).

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes. An employer can determine certain rules which employees must respect when using social media in their private time or on private IT tools, such as rules regarding (i) the disclosure of confidential company information, (ii) references to the company on social media profiles, (iii) the posting of comments or other content which might harm the reputation or interests of the company, (iv) the posting of comments regarding co-workers, etc.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The power of an employer to impose rules regarding the private use of social media of its employees is limited. The restrictions on the social media use of the employees should be relevant for and proportionate to the employer's interests. Furthermore, the employer must tolerate a certain level of criticism from its employees.

4. Is an intervention of the works council required for the implementation of such rules?

The level of intervention of the works council depends of the factual circumstances of the case.

- Consent of the works council

  If the policy provides for disciplinary sanctions (such as warnings, suspension, etc.), they must be included in the company work rules to be enforceable. In that case, the agreement of the works council would be necessary as part of the general obligation of the employer to submit any modification of the company work rules to the works council for prior agreement.

- Informing and consulting with the works council

  According to Article 9 of the Collective Labor Agreement n° 9 of March 9, 1972 the employer must inform the works council about the measures taken with respect to personnel management. This information must be given to the works council prior to the execution of the measures in order to leave open the possibility for the works council to formulate suggestions, advice and objections. Implementing a new policy regarding the private use of social media constitutes a measure of personnel management. Therefore, the employer should inform the works council upon the implementation of such policy.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

Yes, Collective Labor Agreement n° 81 of April 26, 2002 specifically stipulates rules regarding the monitoring of employees' use of electronic communication tools. The following general laws also apply:

- Data Protection Act;
- Act on Electronic Communications of June 13, 2005.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. However, monitoring of the employee's use of electronic communication tools (e.g. whether or not employees visit social media websites or chat websites from their workstations, the frequency of such visits, etc.) is only permitted under certain conditions:

- Only for specific purposes: (i) to prevent illegal or defamatory facts, (ii) to protect the company's interests, (iii) to ensure the security of the corporate IT infrastructure, or (iv) to ensure compliance with internal company policies;
- Compliance with procedural requirements (e.g. identification of specific employee only after detection of violations or problems during monitoring on company level) and;
- Notification of employees (individually and through representative bodies).

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes. Before implementing technology which allows the employer to monitor the employee's electronic communications and internet use, the works council must be informed of the following: (i) the monitoring policy, (ii) the prerogatives of the employer and the supervising staff, (iii) the purposes of the monitoring, (iv) whether the data are being stored, and if so, the duration and location of data storage, and (v) whether or not the monitoring is performed continuously.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can apply if they are determined in the company work rules. In addition, judicial dissolution of the employment contract, dismissal for gross misconduct or dismissal after a notice period or with payment of a termination indemnity could be contemplated depending on the factual circumstances (e.g. the frequency of the social media use, duration of the social media use during working hours, etc.).

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

There is a risk that the evidence will not be accepted in court. However, according to recent case law of the Belgian Supreme Court evidence will be excluded by the court only if: (i) it constitutes a violation of formal requirements sanctioned with nullity, (ii) the unlawfulness affects the integrity or reliability of the evidence, or (iii) use of the evidence constitutes a violation of the right to a fair trial.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

There is no specific legislation regarding the monitoring of content of social media. However, the following general laws and regulations apply:

- Article 8, European Convention on Human Rights, 1950;
- Article 22, Belgian Constitution;
- Article 314*bis*, Belgian Criminal Code;
- Article 124 (and following), Act on Electronic Communications of June 1;.
- Data Protection Act;
- Articles 16 and 17, Act on Employment Contracts of July 3, 1978.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

This depends of the type of media:

- Private media (e.g. private use of chat applications): monitoring of content is generally not permitted (in case of clear indications of misuse, monitoring may be permissible as an exception, to be assessed on a case-by-case basis).

- Professional media (e.g. corporate chat program): monitoring of content requires consent; however, recent report of the Belgian Data Protection Authority appears to justify limited access based on employer's authority/control rights.

- Public media (e.g. posts on wall of LinkedIn or Facebook groups which are open to the public): information can be monitored by employer because it is publicly available.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

There is a risk that the evidence will not be accepted in court. However, this risk is rather low in Belgium, further to recent case law of the Belgian Supreme Court on this matter. According to this case law evidence will be excluded by the court only if: (i) it constitutes a violation of formal requirements sanctioned with nullity, (ii) the unlawfulness affects the integrity or reliability of the evidence, or (iii) use of the evidence constitutes a violation of the right to a fair trial.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes. According to Article 9 of the Collective Labor Agreement n° 9 of March 9, 1972 the employer must inform the works council about measures taken with respect to personnel management. This information must be given to the works council prior to the execution of the measures in order to leave open the possibility for the works council to formulate suggestions, advice and objections. Implementing a new policy for the monitoring of employees constitutes a measure with respect to personnel management. Therefore, the employer should inform the works council upon the implementation of the monitoring policy.

If the monitoring policy (i) has an impact on the working conditions of the employee, (ii) is an important change on the day-to-day work and (iii) it applies to all employees (and has therefore a collective impact), such policy must be subject to a prior information and consultation with the works council.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can apply if they are determined in the company work rules. Judicial dissolution of the employment contract, dismissal for gross misconduct or dismissal after a notice period or with payment of a termination indemnity could be contemplated depending on the factual circumstances (e.g. gravity of the facts, public character of the comments, function of the employee, potential damage to the company, previous violations of the employee, etc.). If the use of social media caused damage to the employer's reputation, damages can be sought.

Bulgaria

Mrs. Violetta P. Kunze & Dr. Teodora V. Tsenova
Djingov, Gouginski, Kyutchukov & Velichkov
10 Tsar Osvoboditel Blvd.
Sofia 1000
www.dgkv.com

Djingov, Gouginski, Kyutchukov & Velichkov is one of the largest business law firms in Bulgaria and provides first-class legal services. Founded in 1994 by the four name partners, the firm currently employs more than 50 lawyers.

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 8, European Convention on Human Rights, 1950;
- Article 32, Constitution of the Republic of Bulgaria (right to respect for private and family life) (available in English at www.parliament.bg);
- Law on Personal Data Protection ('LPDP') (available in English at www.cpdp.bg).

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants. However, recruiters should take into account the applicable terms of use when accessing and using information from social media websites.

The processing of information from social media profiles (e.g. downloading the information to create a database of potential candidates for a vacancy) is restricted. Such processing must be performed in accordance with the LPDP.

3. Is works council intervention required?

No. The Bulgarian Labor Code only provides for a general obligation on employers to provide information to works councils regarding the status, structure and expected development of employment (including any preparatory measures being taken), especially where there is a threat to employment at the company. This general obligation does not cover the screening of social media profiles of job applicants for recruitment purposes.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

The employer's right to restrict employee social media use during working hours can be derived from the employer's general right to instruct its employees. Further, the Labor Code stipulates that employees are obliged to devote all of their working hours to performing their professional tasks.

The employer's right to restrict social media use on corporate IT tools can be derived from (i) its proprietary rights over the equipment, and (ii) the fact that such tools are only provided to the employees to perform their work.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes. On the contrary, employees are obliged to devote all of their working hours to their professional tasks.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media are very broad. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. The employer can freely choose the type of document it deems to be the most convenient (order, internal rules, etc.). However, in order to be enforceable, it is important that the employees are familiarized with the document. There is no specific procedure to follow in that respect, as long as there is evidence that the employees are aware of the existence of the document and of the fact that it is binding upon them.

6. Is an intervention of the works council required for the implementation of such rules?

Yes, if the rules take the form of internal rules. According to the Labor Code the employer should consult the employee's representatives (elected under Article 7, para. 2 of the Labor Code) and the trade union representatives (if any) before adopting internal rules on the rights and

obligations of the parties to the employment relationship. Regulations on social media use during working hours fall within that scope and therefore prior consultation of the employee's representatives is required. The obligation to consult does not require the consent or approval of the employee's representatives.

Note that if the employer adopts an order and not internal rules, the above requirement to consult is not applicable. An order is a shorter and simpler document, which instead of elaborating on the rights and obligations of the parties in relation to social media use in the employment context, would simply instruct the employees not to use/how to use social media. The requirement to consult similarly does not apply to documents directed to individual employees.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning that matter.

However, the general obligations of the employee (i) to protect the employer's confidential information, (ii) to be loyal towards the employer, and (iii) to protect the employer's reputation are relevant.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes. An employer can determine certain rules which employees must respect when using social media in their private time or on private IT tools, such as rules regarding (i) the disclosure of confidential company information and (iii) the posting of comments or other content which might harm the reputation or interests of the company.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. Such restrictions must be limited to those necessary for the protection of the employer's interests, in particular the protection of confidential information and the employer's reputation. The restrictions should not be excessive to their purpose.

4. Is an intervention of the works council required for the implementation of such rules?

Yes, if the rules take the form of internal rules. According to the Labor Code the employer

should consult with the employee's representatives (elected under Article 7, para. 2 of the Labor Code) and the trade union representatives (if any), before adopting internal rules on the rights and obligations of the parties to the employment relationship. Regulations on social media use outside working hours fall within that scope and therefore prior consultation of the employee's representatives is required. The obligation to consult does not require the consent or approval of the employee's representatives.

Note that if the employer adopts an order and not internal rules, the above requirement to consult is not applicable. An order is a shorter and simpler document, which instead of elaborating on the rights and obligations of the parties in relation to social media use in the employment context, would simply instruct the employees not to use/how to use social media. The requirement to consult similarly does not apply to documents directed to individual employees.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

There are no specific rules regarding the monitoring of employees' social media use. However, the following general rules apply:

- Article 8, European Convention on Human Rights, 1950 (right to respect for private and family life);
- Article 32, Constitution of the Republic of Bulgaria (right to respect for private and family life and prohibition to watch, film, etc. without the individual's consent or irrespective of their express objection) (available in English at www.parliament.bg);
- LPDP (available in English at www.cpdp.bg);
- Law on Electronic Communications.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. Monitoring whether employees use social media websites and how often this happens is allowed, provided that such monitoring is conducted in compliance with the following conditions:

- Employees should be expressly informed that the use of corporate IT infrastructure is monitored and that any use shall be considered business related, or if the employees use it

for personal purposes, the use of corporate IT infrastructure will be deemed consent to the monitoring of this private activity (to ensure compliance with the European Convention on Human Rights and the Constitution); and

- The processing of personal data which might be revealed in the course of monitoring should be performed in compliance with the principles on data processing.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

No. There is no intervention of the works council required for the implementation of such technology.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. The employer may impose one of the statutory listed sanctions (reprimand, warning for dismissal or disciplinary dismissal), taking into account the gravity of the violation and all relevant circumstances.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

The court can accept the evidence resulting from unlawful monitoring, provided it falls within the scope of a category of evidence recognized in Bulgarian procedural law. However, there is a risk that such evidence, being collected unlawfully, will not be accepted in court or if accepted, be treated as evidence of low evidentiary value.

Irrespective of whether the court accepts such evidence, the employer should be aware that by showing evidence collected in an unlawful manner, it exposes itself to liability for the unlawful monitoring.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation regarding monitoring of content of social media. However, the following general laws are relevant:

- Article 8, European Convention on Human Rights, 1950 (right to respect for private and family life);

- Article 32, Constitution of the Republic of Bulgaria (right to respect for private and family life and prohibition on watching, filming, etc. an individual without their consent or irrespective of their express objection) and Article 34 (right to secrecy of correspondence);
- LPDP;
- Law on Electronic Communication.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

- Public media: There are no limitations on monitoring public media. However, the principles of the data protection legislation should be taken into account if the content contains personal data, and this data is being processed by the employer.

- Professional media: If these media are provided by the employer for business purposes only and as a business tool, monitoring is permitted. To avoid claims that any private communication has been carried out on such media, personal use should be prohibited and employees should be informed that the content might be monitored.

- Private media (i.e. not publicly available, access restricted by passwords or similar): Generally, the employer is not allowed to monitor the content of private media (or even try to get access to such media). However, if the employer has access to such media (e.g. wall posting available to all participants in a group in compliance with the applicable laws and rules, without breaking an individual's password), content monitoring may not be illegal.

  It may be possible to monitor content of private media if the employee uses it on corporate IT tools, provided that the employer has (i) prohibited the use of corporate IT tools for private purposes, and (ii) informed the employees that if they do use the corporate IT tools for personal purposes, this will be deemed consent to the employer's monitoring. However, there is no relevant Bulgarian practice or case law to confirm this position, and it may be a violation of the constitutional right to secrecy of correspondence.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

The court can accept the evidence resulting from unlawful monitoring, provided it falls within the scope of a category of evidence recognized in Bulgarian procedural law. However, there is a risk that such evidence, being collected unlawfully, will not be accepted in court or if accepted, be treated as evidence of low evidentiary value.

Irrespective of whether the court accepts such evidence, the employer should be aware that by showing evidence collected in an unlawful manner, it exposes itself to liability for the unlawful monitoring.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes. According to the Labor Code, the employer should consult the employee's representatives (elected under Article 7, para. 2 of the Labor Code) and the trade union representatives (if any), before implementing internal rules on the rights and obligations of the parties to the employment relationship.

Implementing a policy regarding the monitoring of content of social media affects the employee's right to use social media in their employment relationship. Therefore, such act will require prior consultation of the mentioned representatives. The employer is not, however, required to obtain their consent or approval.

Note that if the employer adopts an order and not internal rules, the above requirement to consult is not applicable. An order is a shorter and simpler document, which instead of elaborating on the rights and obligations of the parties in relation to social media use in the employment context, would simply instruct the employees not to use/how to use social media. The requirement to consult similarly does not apply to documents directed to individual employees.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. The employer may impose one of the statutory listed sanctions (reprimand, warning for dismissal and disciplinary dismissal), taking into account the gravity of the violation and all relevant circumstances.

Cyprus

Achilleas Demetriades
Charalambos Satsias
Lellos P. Demetriades Law Office LLC
The Chanteclair House, 2 Sophoulis Street, 9th Floor
1096 Nicosia
www.ldlaw.com.cy

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 15, Constitution of the Republic of Cyprus: Every person has the right to respect for his private and family life;
- Article 17, Constitution of the Republic of Cyprus: Every person has the right to respect for and to the secrecy of his correspondence and other communication if such other communication is made through means not prohibited by law;
- Article 8, European Convention on Human Rights, 1950;
- The Processing of Personal Data (Protection of Individuals) Law, Law no. 138(I)/2001 as amended**.**

The Office of the Commissioner for the Protection of Personal Data has issued 'Guidelines Regarding the Processing of Personal Data in the Field of Employment Relations. Section 2.5 of the Guidelines clarify that the Guidelines also apply to potential employees and/or candidates. Section 15 of the Guidelines contains specific provisions for the recruitment procedure.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants, assuming that posting information on social media websites (e.g. Facebook) is tantamount to making it available to the public. In general data uploaded to social media without privacy settings to restrict access is regarded as publicly available, however this question has not been definitively addressed by legislation or case law. It will be a question of fact depending on the circumstances of the case, including the exact privacy settings of the profile.
If the information is saved, collected or used in order to create a database then the Processing of Personal Data (Protection of Individuals) Law, Law no. 138(I)/2001 as amended ('Law'), applies. The personal data of a data subject can only be processed if the data subject has unambiguously given their consent. It is unclear whether the data controller could also justify processing based on its own legitimate interests (Section 5(2)(e) of the Law as amended). According to section 15.7 of the Guidelines, if, in the context of a recruitment procedure, a prospective employer intends to review or substantiate any information that an applicant has provided in their application, the employer has an obligation to inform the applicant of this collection of data.

Social media can also contain *sensitive data* (i.e. data concerning racial or ethnic origin, political convictions, religious or philosophical beliefs, participation in a body, association or trade union, health, sex life and sexual orientation as well as data relative to criminal prosecutions or convictions). The collection and processing of such data is prohibited according to section 6(1)

of the Law unless the data subject has given their consent or one of the exceptions applies. Insofar as the information has been made public by the data subject themselves, the exception in Section 6(2)(e) of the Law will apply and processing will be permitted.

Furthermore, the employer is required to notify the processing of a job applicant's data to the Office of the Commissioner for the Protection of Personal Data, since it is not performed in the context of an employment relationship.

Recruiters should not base any recruitment decision on sensitive information such as information on ethnic origin, religious and political beliefs. Using the publicly available information as a means to discriminate will infringe discrimination laws.

3. Is works council intervention required?

There is no works council in Cyprus and it appears that there is no requirement to inform or consult any collective consultative body (such as a trade union) about the implementation of such rules unless it is a matter on which the employer has agreed to inform and/or consult.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

However, the employer has a right to restrict the use of social media in order to protect its legitimate interests such as ensuring the security of the system, preventing transmission of confidential information, and ensuring that employees are efficient during working hours and exercise due care. The employer also has the right to regulate use of the equipment based on its property rights over the IT infrastructure.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media are very broad. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc. Some employers have introduced systems which block access to some websites either after a period of time or even completely.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

The employer is not required to stipulate these rules in a specific type of document.

The status of the rules on social media (i.e. whether it is a term of the contract) depends on the employer. If the rules are included or incorporated in the employment contract, they will be enforceable and subject to disciplinary actions and/or sanctions.

6. Is an intervention of the works council required for the implementation of such rules?

No, there is no requirement to inform or consult any collective consultative body (such as a trade union or national works council) about the implementation of such rules unless it is a matter on which the employer has agreed to inform and/or consult.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

There is no specific legislation concerning this matter.

The use of social media outside working hours is part of the employee's private life. The employer must respect the employee's private and personal life and personality, but the employee must also act in good faith (see for example the judgment of the Supreme Court in *Thanos Hotels Limited v Andreas Andreou* (2002) 1 Α.Α.Δ.1000).

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

There are no clear rules regarding the ability of the employer to impose rules on the behavior of employees in their private lives. An employer can impose rules regarding the use of social media as long as they are of a professional business nature and are related to the business relationship between an employee and employer (e.g. not to use confidential information, not to harm the employer's reputation).

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The employer has no right to impose rules on the employee's actions that are not related to the employment relationship. However, a strict distinction between private and professional is difficult. Jurisprudence of the Supreme Court states that on the one hand, the employee is obliged to obey his employer, based on the employment contract, but on the other hand, the employer must respect an employee's personal life.

4. Is an intervention of the works council required for the implementation of such rules?

There is no works council in Cyprus and it appears that there is no requirement to inform or consult any collective consultative body (such as a trade union) about the implementation of such rules unless it is a matter on which the employer has agreed to inform and/or consult.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No, there is no specific legislation regarding the monitoring of social media use of employees. However, the following general laws are relevant:

- Articles 15 and 17, Constitution of the Republic of Cyprus;
- Article 8, European Convention on Human Rights, 1950;
- Processing of Personal Data (Protection of Individuals) Law, Law no. 138(I)/2001 as amended;

- Law for the Protection of Confidentiality of Private Communications (Surveillance of Communications) Law, Law no. 92(I)/1996.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. Monitoring of usage (i.e. whether and/or how much an employee uses social networking sites) is allowed. However, the employee's right to privacy in the workplace must be balanced with the legitimate interests of the employer (e.g. the efficient control of their business, the right to safeguard confidential information from unwanted transmission and to ensure the security of the system).

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

There is no works council in Cyprus and it appears that there is no requirement to inform or consult any collective consultative body (such as a trade union) about the implementation of such rules unless it is a matter on which the employer has agreed to inform and/or consult.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. If the rules on social media are part of the employment contract, the employer, as a matter of employment contract law, will be able to impose sanctions up to and including dismissal of an employee.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

No. If the monitoring is unlawful, the information obtained cannot be used in a court proceeding. The right to secrecy of correspondence is safeguarded by Article 17 of the Constitution and the right to privacy is protected by Article 15 respectively. Evidence obtained in contravention of the provisions of the Constitution safeguarding fundamental rights are inadmissible in Cyprus Courts according to the landmark case of *The Police v Andreas Georgiades* (1983) 2 C.L.R.33. These rights can also be exercised horizontally (between individuals).

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

There is no specific legislation regarding the monitoring of content of social media. However, the following laws may apply:

- Article 15, Constitution of the Republic of Cyprus;
- Article 17, Constitution of the Republic of Cyprus;
- Article 8, European Convention on Human Rights, 1950;
- Law for the Protection of Confidentiality of Private Communications (Surveillance of Communications) Law, Law no. 92(I)/1996 - prohibiting interception or monitoring of private communications of any kind unless prior express consent and/or authorization of both the originator and the recipient of the communication is provided (Section 3(2) (a));
- Processing of Personal Data (Protection of Individuals) Law, Law no. 138(I)/2001 as amended).

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

This depends on the type of media:

- Public media: If the information is publicly available (e.g. wall postings, photos uploaded by the user, tweets), it can be monitored because of its public status, assuming the posting of information on a social media website is tantamount to making it available to the public (see above Section I, question 2).

- Private media: It is illegal to monitor private conversations (e.g. chat sessions) even if the conversation occurs from the business premises because it may be covered by the notion of privacy/private life. While monitoring for statistical purposes is allowed in the employment relationship, interference with correspondence (e.g. email accounts) would violates Article 17 of the Constitution. In order to have access to another employee's corporate IT infrastructure express consent must be given.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

No. If the content is obtained without the consent of the individual it cannot be used as evidence in criminal or civil procedures. The right to secrecy of correspondence is safeguarded by Article 17 of the Constitution and the right to privacy is protected by Article 15 respectively. Evidence obtained in contravention of the provisions of the Constitution safeguarding fundamental rights are inadmissible in Cyprus Courts according to the landmark case of *The Police v Andreas Georgiades* (1983) 2 C.L.R.33. In *Police v Christodoulou Yiallourou* (1992) 2 A.A.Δ.147 the Supreme Court held

that evidence obtained in contravention of fundamental rights and freedoms is not admissible in any circumstance. The fundamental rights and freedoms enshrined in the Constitution can be exercised both vertically, i.e. the individual vis-a-vis the state, and horizontally i.e. between individuals.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

There is no works council in Cyprus and it appears that there is no requirement to inform or consult any collective consultative body (such as a trade union) about the implementation of such rules unless it is a matter on which the employer has agreed to inform and/or consult.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, however, it depends on the kind of monitoring and whether the information which the employer will rely upon is publicly available (see above Section I, question 2). Also, in order to be able to impose sanctions on an employee, the behavior must have contravened the employment contract.

Czech Republic

Mrs. Barbora Rovenská
White & Case (Europe) LLP
Na Příkopě 8
110 00 Prague 1
www.whitecase.com

White & Case, a global law firm operating in 26 countries, has been providing a wide range of Czech and cross-border legal and tax advisory services in the Czech Republic since 1991. With more than 60 lawyers and tax advisors, White & Case is now one of the largest law firms in the country.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 10, Bill of Human Rights and Freedoms (No. 2/1993 Coll., as amended);
- Articles 11 – 16, Act No. 60/1964 Coll., Civil Code (as amended);
- Act No. 262/2006 Coll., Labor Code (as amended);
- Act No. 101/2000 Coll., Personal Data Protection Act (as amended), (available at www.uoou.cz) (the 'Data Protection Act');
- European Convention on Human Rights, 1950.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, recruiters should not base any recruitment decision on information regarding a job applicant's race, ethnic origin, nationality, gender, sexual orientation, age, health disability, religion, belief or world view, which they obtain by screening social media profiles as this would violate the prohibition on discriminating against individuals in connection with their access to employment (as stipulated in Act No. 198/2009 Coll., as amended, Anti-Discrimination Act).

The employer may use the social media information only to the extent it is necessary for the recruitment process. It is explicitly prohibited to gather and use any information regarding (i) sexual orientation, (ii) origin, (iii) trade union membership, (iv) membership of political parties or movements; or (v) religion. Information about (i) criminal records, (ii) pregnancy, (iii) family status, and (iv) property can only be used exceptionally if it is necessary due to the nature of the job vacancy and provided that the use is reasonable.

If the employer wishes to create a general database of potential job candidates, prior notification to the Personal Data Protection Office is required and processing must be performed in accordance with the Data Protection Act. However, notification is not required if the information is used in relation to one particular vacancy.

3. Is works council intervention required?

No.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There is no specific legislation dealing with this issue. The use of social media during working hours or on corporate IT infrastructure is governed mainly by Article 316 of the Labor Code and by the Data Protection Act for any processing activities.

Employees are obliged to dedicate their working hours and use of the employer's equipment to performance of their professional duties. Further, they are not allowed to use the employer's property, including IT infrastructure, for their own personal needs. Breach of these statutory obligations may lead to sanctions up to and including termination, depending on the seriousness of the breach.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. Employees already have the statutory obligations mentioned above which restrict their use of social media during working hours and on corporate IT tools. However, it is recommended to also include such restrictions in the employer's internal regulations. The employer's rights to regulate the use of social media in that respect are very broad.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

There is no legal requirement to use a particular type of document, however, these rules are usually included in the company's work rules. The employees must be informed about the existence of such work rules and they must be made available to them.

6. Is an intervention of the works council required for the implementation of such rules?

The implementation of such rules requires prior information and consultation with the works council insofar as such rules are considered to constitute basic working conditions, which must be decided on a case by case basis. If employees regularly work with computers, for example, the rules could constitute basic working conditions, however there is no definitive case law on this point. Information and consultation requires an exchange of views and the provision of explanations with the intention to reach a consensus. The information and consultation must be performed reasonably in advance and in a manner suitable to allow the works council to present their views and the employer to take such views into consideration before implementing the rules. The works council is entitled to receive reasoned responses from the employer to their views and opinions.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

There is no specific legislation concerning this matter.

However, employees are not allowed to act against the employer's legitimate interests and are prohibited from participating in any competitive behavior. To ensure compliance with these obligations, the employer may restrict the employee's right to use social media outside working hours and on private IT infrastructure, however, such right is very limited.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes, the employer may impose rules in order to protect its legitimate interests (e.g. to protect business secrets and know-how) and prevent competitive behavior.

3. Are there any restrictions on the employer's power to impose such rules?

Yes, these rules must be limited to what is necessary to achieve the legitimate objectives described above. The employer must balance the protection of its interests and needs with the employee's right to privacy. The protection of the employer's reputation may not justify the imposition of rules but may be followed up with appropriate action depending on the seriousness of any harm caused.

4. Is an intervention of the works council required for the implementation of such rules?

There is no legislation containing a specific obligation for the employer to involve the work council in the implementation of such rules. However, if the rules are included in a document which requires prior information and consultation of the works council, such as the work rules, intervention of the works council will be necessary.

Information and consultation requires an exchange of views and the provision of explanations with the intention to reach a consensus. The information and consultation must be performed reasonably in advance and in a manner suitable to allow the works council to present their views and the employer to take such views into consideration before implementing the rules. The works council is entitled to receive reasoned responses from the employer to their views and opinions.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

Monitoring of social media use by employees is governed by Article 316 of the Labor Code and by the Data Protection Act.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. Case law has confirmed that monitoring can be performed to verify the frequency of use of social media and the type of websites accessed by the employee, while respecting employee privacy regarding the content of communication. If the employer wants to monitor whether the employees comply with a duty not to use social media during working hours and on corporate IT infrastructure, they must be informed about the method and extent of such monitoring in advance.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes. The works council must be informed and consulted before the monitoring technology is implemented. It is specifically required to consult the works council regarding the manner and extent of monitoring which will be performed using the technology in question.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Depending on the seriousness of the breach the employer may either terminate the employment relationship or issue a written warning which may lead to termination of the employment contract if the breach occurs repeatedly. The sanctions could be specified in the work rules, but this is not required.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

The evidence obtained by unlawful monitoring of the employee's electronic communications and internet use will not be accepted in court. If the employer uses such unlawfully obtained evidence as a basis for termination of employment, and the employee challenges the validity of the termination within 2 months, the court will declare the termination null and void.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

There is no specific legislation dealing with this matter. However, the following general laws are relevant:

- Article 10, Bill of Human Rights and Freedoms (No. 2/1993 Coll., as amended);
- Arts. 11 – 16, Act No. 60/1964 Coll., as amended, Civil Code;
- Act No. 262/2006 Coll., as amended, Labor Code;
- Act No. 101/2000 Coll., as amended, Personal Data Protection Act, (available at www.uoou.cz) ('Data Protection Act');
- Act No. 198/2009 Coll., as amended, Antidiscrimination Act.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Monitoring of private communication is not permitted. Information which is publicly available can be subject to monitoring. However, the employees' right for protection of their private and personal lives must always be respected. Therefore, the employer's right to perform such monitoring is very limited.

The employer is not allowed to collect or use any information regarding (i) sexual orientation, (ii) origin, (iii) trade union membership, (iv) membership in political parties or movements, or (v) religion of employees. Information about criminal records, pregnancy, family status and property

can be used only in exceptional case where it is necessary due to the nature of the employment and provided that the use is reasonable.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

Evidence obtained by unlawful monitoring will not be accepted in court. If the employer uses such unlawfully obtained evidence as a basis for termination of employment, and the employee challenges the validity of the termination within 2 months, the court will declare the termination null and void.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes. The employer must inform and consult with the works council in order to exchange views and provide explanations with the intention to reach a consensus. The information and consultation process has to be conducted reasonably in advance of implementing the measures and in a manner suitable to allow the works council to present their views and the employer to take these into consideration. The works council is entitled to receive reasoned responses from the employer to their views and opinions.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, but only if the information is obtained lawfully. The employer may use such information (depending on the seriousness of the breach by the employee) either to terminate the employment contract or to issue a written warning which may lead to termination if the breach is repeated. The employer may also seek compensation for damages caused, however if the damage has been caused by the employee's negligence (rather than intentionally), the employer may only request up to 4.5 multiples of the employee's average monthly income.

Denmark

Mrs. Pia Kirstine Voldmester
Kromann Reumert
Sundkrogsgade 5
2100 Copenhagen
www.kromannreumert.com

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 8, European Convention on Human Rights, 1950;
- Data Protection Act;
- The Equal Treatment Act;
- The Act Against Discrimination in the Labor Market.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, recruiters should not base any recruitment decision on information regarding a job applicant's age, health, disability, gender, sexual inclination, skin color, race, origin, ethnicity, political or philosophical affiliations, religion, or trade union membership, which they obtain by screening social media profiles. This would violate the principle of non-discrimination.

Further, the processing of information from social media profiles (i.e. any registration or downloading the information to create a database of potential candidates for a vacancy) is restricted. Such processing must be performed in accordance with the Data Protection Act.

3. Is works council intervention required?

No.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

However, the employer's right to restrict employee social media use during working hours or on corporate IT tools is derived from the employer's managerial right.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media are very broad. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks); (ii) on separate hardware; (iii) on the company's laptop, but only after working hours; etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. The employer can stipulate these rules in several types of documents, such as a general IT policy or a specific Social Media Policy that constitutes an addendum to the employment contract. In order to make the rules regarding social media use during enforceable and subject to disciplinary sanctions, the rules should include a description of the relevant sanctions (e.g. warning, termination with notice or summary dismissal depending on the circumstances).

6. Is an intervention of the works council required for the implementation of such rules?

Pursuant to the Danish Act on Information and Consultation, employers that (i) employ more than 35 employees, or (ii) are subject to the Cooperation Agreement, must inform and consult works councils of circumstances that are of material relevance to the employees, including decisions that will affect the working conditions and employment, such as dismissals, and material amendments to the terms and conditions of employment. It has not been settled whether the works council, if any, should be consulted when implementing rules regarding the use of social media. However, it is recommended to inform/consult the relevant parties (e.g. the works council, if any), prior to implementing such rules.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

However, the employer's right to impose rules regarding the use of social media outside working hours and on private IT tools can be derived from the employee's obligation (i) to be respectful towards their employer, (ii) to respect public morality, (iii) to execute their work with due care, (iv) to act in accordance with the instructions and orders of the employer, (v) not to disclose confidential information obtained during the execution of the employment contract, and (vi) not to participate in any unfair competition.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes. An employer can determine certain rules which employees must respect when using social media in their private time or on private IT tools, such as rules regarding (i) the disclosure of confidential company information, (ii) references to the company on social media profiles, (iii) the posting of comments or other content which might harm the reputation or interests of the company, (iv) the posting of comments regarding co-workers, etc.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The power of an employer to impose rules regarding the private use of social media of its employees is limited. The restrictions on the social media use should be relevant for and proportionate to the employer's interests. Furthermore, the employer must tolerate a certain level of criticism from its employees. Employers cannot prohibit the use of social networks outside working hours or on private IT tools.

4. Is an intervention of the works council required for the implementation of such rules?

Pursuant to the Danish Act on Information and Consultation, employers that (i) employ more than 35 employees, or (ii) are subject to the Cooperation Agreement, must inform and consult works councils of circumstances that are of material relevance to the employees, including decisions that will affect the working conditions and employment, such as dismissals, and material amendments to the terms and conditions of employment. It has not been settled whether the works council, if any, should be consulted when implementing rules regarding the use of social media. However, it is recommended to inform/consult the relevant parties (e.g. the works council, if any), prior to implementing such rules.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No, there is no specific legislation on this subject. However, the following general laws apply:

- Data Protection Act;
- If the employer is subject to a collective bargaining agreement, including the General Agreement (Hovedaftalen), a special agreement on control measures may be applicable. The obligations in the agreements on control measures are triggered by the proposed implementation of control measures. The term control measures is not further defined.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. However, monitoring of the employee's use of electronic communication tools (e.g. whether or not employees visit social media websites or chat websites from their workstations, the frequency of such visits, etc.) is only permitted under certain conditions:

- Monitoring must be necessary to protect the legitimate interests pursued by the employer provided that these interests are not overridden by the interests of the employees. Such purposes could for example be (i) prevention of illegal or defamatory acts, or (ii) to ensure the security of the corporate IT infrastructure, or (iii) to ensure compliance with internal company policies; and
- Employees must be provided with clear and unambiguous notification of the monitoring.

Private companies are not required to notify the Danish Data Protection Authority about the monitoring, unlike public authorities which are required to do so.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes, intervention of the works council is required if: (i)the employer is covered by the General Agreement (Hovedaftalen) and the underlying Agreement on Control Measures, and (ii) no other applicable collective bargaining agreement has been agreed to the contrary.

Pursuant to the Agreement on Control Measures, an employer can implement control measures, provided that the measures: (i) are legitimate and have a reasonable purpose, and (ii) are not insulting or cause loss or notable inconvenience to the employees. The employer must notify the

works council of new control measures no later than 6 weeks prior to the implementation, if possible.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can apply if they are determined in a general IT policy or a specific social media policy that constitutes an addendum to the employment contract. In addition, termination of the employment contract - with or without notice - could be contemplated depending on the factual circumstances (e.g. the frequency of the social media use, duration of the social media use during working hours, etc.).

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

In principle the evidence can be used in court. However, there is a risk that the court will attribute lesser or no value to the evidence. According to case law, the more severe the violation by the employee, the more likely it is that the court will allow such evidence to be used in court.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. However, the following general laws and regulations apply:

- Article 8, European Convention on Human Rights, 1950;
- Data Protection Act;
- Section 263, Criminal Code;
- The Agreement on Control Measures, if applicable;
- Other collective bargaining agreements, if applicable.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

An employer will be entitled to implement such a policy by virtue of its managerial right. Monitoring of the employee's use of electronic communication tools, including accessing content, is only permitted under certain conditions:

- Monitoring must be necessary for the purposes of the legitimate interests pursued by the employer, and these interests are not overridden by the interests of the employees. Such purposes could be to prevent illegal or defamatory facts or to ensure the security of the corporate IT infrastructure; or to ensure compliance with internal company policies; and
- The employees must be notified that the monitoring takes place in a clear and unambiguous way.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

In principle the evidence can be used in court. However, there is a risk that the court will attribute lesser or no value to the evidence. According to case law, the more severe the violation by the employee, the more likely it is that the court will allow such evidence to be used in court.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Pursuant to the Danish Act on Information and Consultation, employers that (i) employ more than 35 employees, or (ii) are subject to the Cooperation Agreement, must inform and consult works councils of circumstances that are of material relevance to the employees, including decisions that will affect the working conditions and employment, such as dismissals, and material amendments to the terms and conditions of employment. It has not been settled whether the works council, if any, should be consulted when implementing rules regarding the use of social media. However, it is recommended to inform/consult the relevant parties (e.g. the works council, if any), prior to implementing such rules.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can apply if they are determined in a general IT policy or a specific social media policy that constitutes an addendum to the employment contract. In addition, termination of the employment contract - with or without notice - could be contemplated depending on the factual circumstances (e.g. the frequency of the social media use, duration of the social media use during working hours, etc.).

England & Wales

Data Protection and Privacy law - James Brunger and Mark Watts
Employment law - Clare Cruise and Linda Farrell
Bristows
100 Victoria Embankment
London EC4Y 0DH
www.bristows.com

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the employment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- The Equality Act 2010;
- The Data Protection Act 1998;
- Regulation of Investigative Powers Act 2000;
- Article 8, European Convention on Human Rights (contained in Schedule 1 of the Human Rights Act 1998).

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of social media profiles of job applicants.

However, recruiters should not base any recruitment decisions on information related to 'protected characteristics' under the Equality Act 2010 (age, disability, sex, pregnancy and maternity, religion or belief, sexual orientation, gender reassignment and marriage and civil partnership) which they obtain by screening social media profiles as this could constitute unlawful discrimination.

There could also be implications for employers under the Data Protection Act 1998 as performing such a check will normally involve an employer processing personal data or sensitive personal data. Such processing must be carried out in accordance with the general data protection principles contained in the Data Protection Act. In particular, there may be concerns around fairness (including the provision of fair notice), necessity, excess and accuracy.

3. Is works council intervention required?

No, there is no requirement to inform or consult any collective consultative body that may exist (such as a trade union or national works council) about pre-employment checks unless it is a matter on which the employer has agreed to inform and/or consult.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

No, there is no specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools. As in any other context, a person with proprietary rights in an IT system may make permission for others to use such system subject to restrictions. However, if the restriction involves monitoring, the employer will need to comply with the Data Protection Act 1998 and, potentially, the Regulation of Investigative Powers Act 2000.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. If an employer chooses to prohibit the use of the company's electronic communication tools for social media purposes, the employer is not required to provide other communication tools to its employees for such purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer is able to impose rules on the use of social media during working hours or on corporate IT tools. The employer can, for example, allow employees to use social media only (i) on freestanding equipment not connected to the company's network, (ii) up to a maximum period of time per day, (iii) only during specified periods such as at lunchtime or before or after core working hours.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. However, it would be usual for an employer to stipulate these rules in a Social Media policy or an IT policy. To ensure that the rules are enforceable, the policy should state that failure to abide by the rules may lead to a disciplinary sanction and the employment contract should contain a provision that the employee will comply with all company policies and rules from time to time.

6. Is an intervention of the works council required for the implementation of such rules?

No, there is no requirement to inform or consult any collective consultative body (such as a trade union or national works council) about the implementation of such rules unless it is a matter on which the employer has agreed to inform and/or consult.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools.

However, the right of an employer to impose rules regarding the use of social media outside work hours and on private IT-tools can be derived from the terms implied into an employee's employment contract that (i) the employee will serve their employer with good faith and fidelity, (ii) they will not disclose confidential information, (iii) they will not bring their employer into disrepute, and (iv) they will obey lawful and reasonable orders. An employee may also have a specific obligation in their contract of employment that they comply with rules set down by the company.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes. An employer can impose certain rules regarding the use of social media by employees in their private time or on private IT tools, such as rules prohibiting (i) the disclosure of confidential company information, (ii) references to the company on social media profiles, (iii) the posting of comments or other content which might harm the reputation or commercial interests of the company, (iv) the posting of comments regarding co-workers, etc.

3. Are there any restrictions on the employer's power to impose such rules?

There are no specific legal restrictions on the employer's power to impose rules regarding the private use of social media by employees in their private time. However, disciplinary action for a breach of such rules outside office hours will be difficult to justify unless the breach causes damage to the employer's commercial interests or is an act of gross misconduct (e.g. the employee has revealed the employer's confidential information, damaged the employer's reputation, harassed or bullied members of staff or committed an act of discrimination).

4. Is an intervention of the works council required for the implementation of such rules?

No, there is no requirement to inform or consult any collective consultative body (such as a trade union or national works council) about the implementation of such rules unless it is a matter on which the employer has agreed to inform and/or consult.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

There are no specific rules regarding the monitoring of employees' use of electronic communication tools. However, the following general laws apply:

- The Data Protection Act 199;
- The Information Commissioner's Office has issued guidance on monitoring in an employment context:
  - Employment Practices Code;
  - Employment Practices Code Supplementary Guidance;
- Regulation of Investigative Powers Act 2000 and The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000;
- Article 8, European Convention on Human Rights (contained in Schedule 1 of the Human Rights Act 1998).

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. However, active monitoring of the employee's use of electronic communication tools is only permitted under certain conditions, in particular:

- Only for specific purposes, including: (i) preventing or detecting crime; (ii) investigating or detecting the unauthorized use; and (iii) securing the effective operation of the system;
- Only to the extent the information being monitored is business-related; and;
- Only where all reasonable efforts to inform every person who may use the monitored system have been taken.

If any information being monitored relates to identified/identifiable persons, the general requirements of the Data Protection Act 1998 will also be relevant (see ICO guidance on the monitoring of employees).

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

No, there is no requirement to inform or consult any collective consultative body (such as a trade union or national works council) prior to the implementation of technology which allows monitoring unless it is a matter on which the employer has agreed to inform and/or consult.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, disciplinary sanctions can apply as set out in the employer's disciplinary policy. These can range from an informal warning for a minor violation through to summary dismissal for gross misconduct in serious cases.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

The UK Courts and tribunals have a broad discretion to determine the admissibility of evidence. In principle, evidence of social media use in violation of a social media policy which is obtained by unlawful monitoring is likely to be admissible if relevant to the issues in the proceedings. When deciding whether evidence obtained unlawfully is admissible, the Courts will have regard to Articles 6 and 8 of the European Convention on Human Rights (right to a fair trial and the right to respect for private life respectively).

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation regarding monitoring of content of social media. However, the following general laws apply:

- The Data Protection Act 1998;
- The Information Commissioner's Office has issued guidance on monitoring in an employment context:
  - Employment Practices Code;
  - Employment Practices Code Supplementary Guidance;
- Regulation of Investigative Powers Act 2000 and The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000;

- Article 8, European Convention on Human Rights (contained in Schedule 1 of the Human Rights Act 1998).

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Yes but only to a limited extent without consent. The active monitoring of content of social media by intercepting internet communications through the company's IT systems is only permitted under certain conditions and only in accordance with general data protection laws.

Of particular relevance to this question is the fact that in general an employer may only intercept without consent business-related communications (or to decide whether an unopened received message relates to business-related communications). Access to social media communications that are wholly private in nature is not permitted without consent. However, incidental and unavoidable access to private communication may be acceptable, particularly if the purpose of the social media in question is to facilitate business-related communications (such as a corporate chat program).

The above restriction, however, only applies to the interceptions. Monitoring publicly accessible posts made on social network sites directly from the site itself would not be an interception. General data protection laws would still apply to the processing of this information.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

The UK Courts and tribunals have a broad discretion to determine the admissibility of evidence. In principle, evidence of social media use in violation of a social media policy which is obtained by unlawful monitoring is likely to be admissible if relevant to the issues in the proceedings. When deciding whether evidence obtained unlawfully should be admissible, the Courts will have regard to Articles 6 and 8 of the European Convention on Human Rights (right to a fair trial and the right to privacy respectively).

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

No, there is no requirement to inform or consult any collective consultative body (such as a trade union or national works council) prior to the implementation of a policy regarding the monitoring of content of social media use by employees unless it is a matter on which the employer has agreed to inform and/or consult.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, disciplinary sanctions can apply as set out in the employer's disciplinary policy. These can range from an informal warning for a minor violation through to summary dismissal for gross misconduct in serious cases.

Estonia

Ms. Karin Madisson and Ms. Kaia Kuusler
Sorainen
Kawe Plaza, Pärnu mnt 15
10141 Tallinn
www.sorainen.com

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 26, Constitution of Estonia;
- Employment Contracts Act ('ECA');
- Personal Data Protection Act ('PDPA').

Furthermore, the Estonian Data Protection Inspectorate ('DPI') issued advisory guidelines about processing personal data in employment relationships.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, according to the PDPA and guidelines of the DPI, the applicant must be informed of (i) what kind of data was collected, (ii) what was the purpose of collecting data, (iii) where the data was collected from, and (iv) who is processing the data.

Additionally, recruiters should not base any recruitment decision on information regarding a job applicant's age, health, disability, gender, sexual inclination, skin color, race, origin, ethnicity, political or philosophical affiliations or religion which they obtain by screening social media profiles. This would violate the principle of non-discrimination.

3. Is works council intervention required?

No. In Estonia, works councils are not common. A representative of the employees (in Estonian 'töötajate usaldusisik') may be elected by the employees to protect their interests and rights. For employers employing at least 30 people, all decisions which could cause 'significant changes' in work organization must be consulted with the representative (Article 20 of Employee's Representatives Act (ERA).

Regarding the use of information about job applicants, an intervention or consultation with the representative is not required.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

However, an employee should fulfill their duties loyally (Article 15 subsection 1 of the ECA) and perform the agreed work in the agreed volume, in the agreed place and at the agreed time (Article 15 subsection 2 of the ECA). This in effect restricts the employee from using social network sites during working hours as social media use is not part of the employee's duties. The employer's right to restrict social media use is also derived from its proprietary rights over the IT tools.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes (provided that there is no direct work-related need to use social media).

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No (provided that there is no direct work-related need to use social media). Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. These rules can be considered as rules for work organization, which must be followed by the employee. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. The employer can stipulate these rules in several types of documents. However, it is important that this document is provided to the employee, evidenced with their signature, and that the employee is informed that the documents are part of the work rules.

6. Is an intervention of the works council required for the implementation of such rules?

No. However, if the employer employs 30 or more people, the employees' representative, if any, must be consulted regarding all decisions which could cause significant changes in work organization (Article 20 of ERA). Election of the representative is not required however, if the representative is not elected, the consultation process must proceed with all the employees if the decisions could cause significant changes.

Enactment of rules regarding social media use may be considered as a significant change to working conditions and must therefore be preceded by a consultation process. This should be performed by (i) the employer providing information about the changes, (ii) the representative has the right to present a written opinion or make a proposal concerning the information received from the employer, (iii) if the employer does not take the proposals into consideration, it must provide the reasons for this decision, and (iv) the parties must seek to reach an agreement concerning the planned action and may involve experts if necessary.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

Social media use outside working hours and on private IT tools cannot be prohibited by the employer. Nevertheless, the employee must (i) perform their duties loyally (Article 15 subsection 1 of ECA), (ii) refrain from actions which harm the reputation of the employer (Article 15 subsection 2 clause 9 of ECA), (iii) maintain confidentiality (Article 22 of ECA).

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes. In light of the above legislation, the employee is prohibited from posting information which (i) is considered to be confidential, (ii) could harm the employer's or another employee's reputation, (iii) is negative toward clients or partners, etc.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The rules regarding social media use should be relevant for and proportionate to the employer's interests. The employer can require the employee to follow the rules mentioned above, but cannot restrict employee's right to self-realization.

4. Is an intervention of the works council required for the implementation of such rules?

If the employer employs 30 or more people, the employee's representative must be consulted regarding all decisions which could cause significant changes in work organization (Article 20 of ERA). The enactment of rules regarding social media use outside working hours and on private IT tools will probably not be considered a significant change to the work organization (as long as they are not very different from the general rules mentioned above).

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No, there is no specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure. However, the following general laws apply:

- Article 26, the Constitution;
- Employment Contracts Act (ECA);
- Personal Data Protection Act (PDPA).

The DPI has also issued advisory guidelines about processing personal data in employment relationships.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes, provided that the employee is informed about monitoring. It is required to obtain the employee's consent if, during monitoring, more personal data is processed than necessary for the performance of the employment contract by the employer (i.e. necessary to supervise that the employee is performing their duties). For example, the employer may monitor that an employee visited the website Facebook, however, it is not acceptable that the employer monitors the

employee's activities on Facebook without their consent. Consent must be obtained in a format which can be reproduced in writing (e.g. e-mail).

Furthermore, the following conditions must be fulfilled: (i) monitoring must be necessary and reasoned, (ii) monitoring must serve a purpose (according to the DPI the purpose cannot be too general, e.g. supervision of the employee, but must be more specific), (iii) the employer should not have access to the employee's personal e-mails or similar information, (iv) pursuant to Article 19 of PDPA the employee must have an opportunity to know what kind of data is being collected.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

If the employer employs 30 or more people, the employee's representative should be consulted regarding all decisions which could cause significant changes in work organization (Article 20 of ERA). This would include the implementation of technology which allows monitoring of employee's activities. The necessary consultation process requires that (i) the employer provides information about the changes, (ii) the representative has the right to present a written opinion or make a proposal concerning the information received from the employer, (iii) the parties must seek to reach an agreement regarding the planned action and may involve experts if necessary, and (iv) if the employer does not take the proposals into consideration, it must provide the reasons for this decision.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, violating rules on the use of social media can be considered as a breach of the employment contract and sanctions can be imposed, as long as the monitoring was carried out lawfully (including information about the monitoring and consent where necessary).

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

No, the court may refuse to accept evidence if the evidence has been obtained by an unlawful violation of a fundamental right (Article 238(3), Code of Civil Procedure (CCP)). In some cases the unlawful monitoring may be considered unlawful surveillance activity under the Penal Code.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No there is no specific regulation dealing with this matter. However, the following general laws apply:

- Article 26, the Constitution;
- Employment Contracts Act (ECA);
- Personal Data Protection Act (PDPA).

The DPI has also issued advisory guidelines about processing personal data in employment relationships.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Information which is publicly available can be monitored without specific restrictions. However, if monitoring is conducted in order to seek certain information regarding the employment relationship, the employee should be informed about the information collected.

Without the employee's consent it is not permitted to monitor the employee's private communication or chats. If there is a risk that private communication is read while monitoring the employee's work-related activities, the employee must be informed about this risk and all possible measures must be taken to avoid it. If private chats are still accidently read (despite the measures taken), this is usually tolerated because it is impossible to totally exclude this risk. Nevertheless, reading personal communication must be interrupted immediately when the employer understands that this is not work-related information.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

No, the court may refuse to accept evidence if the evidence has been obtained by an unlawful violation of a fundamental right (Article 238(3), Code of Civil Procedure (CCP)). In some cases the unlawful monitoring may be considered unlawful surveillance activity under the Penal Code.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

If the employer employs 30 or more people, all significant changes must be discussed with the employee representative. Implementing a policy regarding the monitoring of content of social media use may be considered as a significant change and must therefore be preceded by the consultation process outlined above.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, violating rules on the use of social media can be considered as a breach of the employment contract and sanctions can be imposed, as long as the monitoring was carried out lawfully (including information about the monitoring and consent where necessary).

Finland

Ms. Eija Warma
Castrén & Snellman Attorneys Ltd
PO Box 233 (Eteläesplanadi 14)
00131 Helsinki
www.castren.fi

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Act on the Protection of Privacy in Working Life (759/2004, as amended);
- Personal Data Act (523/1999, as amended).

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

No, this is not allowed without the job applicant's consent.

The main rule is that the personal data must be directly collected from the job applicant. Collecting information of the job applicant from other sources requires their consent. Such consent is not required when (i) an authority discloses the information to the employer in order to fulfill a statutory duty; or (ii) the employer acquires personal credit data or information from the criminal record in order to establish the employee's reliability. Note that this exception does not apply to all job applicants/employees.

In addition, according to a mandatory 'necessity requirement' set forth in the Act on the Protection of Privacy in Working Life (Section 3), the employer is only allowed to process that personal data which is directly necessary for the vacancy the job applicant has applied for. No exceptions to this necessity requirement can be made, not even with the job applicant's consent.

Furthermore, in the recruitment procedure, the employer must also comply with other obligations in the recruitment process such as the principle of non-discrimination and the obligation to treat the job applicants equally. Otherwise the employer may be (i) required to pay compensation; or (ii) convicted of a work discrimination offence.

3. Is works council intervention required?

There are no works councils in Finland.

However, if the company regularly employs at least 30 employees, it must carry out cooperation negotiations with its employees and/or their representatives regarding principles and practices followed by the company for collecting information from employees during the recruitment procedure and employment relationship. If the company regularly employs less than 30 employees, the company must inform the employees about the practices but the procedure to be followed is less formal.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

However, the employer may restrict the use of social media during working hours based on its managerial prerogative.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes, as long as all employees are treated equally.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. According to the mandatory legislation, the employer has no such obligation. The employer may decide how the work is done and what equipment is used.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. This is usually done by issuing written instructions to all employees. The employer may also technically prevent access to specific web sites and/or social media services.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No, there is no requirement to stipulate these rules in a specific type of document. However, it is highly recommended that the rules are in a written format.

6. Is an intervention of the works council required for the implementation of such rules?

There are no works councils in Finland.

However, if the company regularly employs at least 30 employees, it must carry out cooperation negotiations with its employees or their representatives regarding principles and practices followed by the company for collecting information from employees during the recruitment

procedure and employment relationship. If the company regularly employs less than 30 employees, the company must inform the employees about the practices but the procedure to be followed is less formal.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

There is no specific legislation regarding this matter.

However, according to the employee's loyalty obligation set forth in the Employment Contracts Act (55/2001, as amended), an employee must avoid any activity that conflicts with the actions reasonably required by their position. This loyalty obligation also applies outside working hours. The higher the position occupied by an employee within the company, the greater relevance the loyalty obligation has outside working hours.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes, the employer can determine rules related to its interests including regarding disclosure of its confidential information and/or other information that could harm the employer's reputation or business interests. In this respect the rules could also cover the employees' use of social media.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The obligations should only relate to issues relevant to the employee's loyalty obligation, in particular the non-disclosure of information mentioned above, which also applies outside working hours. Note that the employer is not entitled to monitor its employees' social media usage. Nevertheless, if an employee uses social media contrary to the loyalty obligation outside working hours, and this comes to the employer's attention otherwise than through monitoring, the employer may take any necessary action relating to the employee's employment relationship.

4. Is an intervention of the works council required for the implementation of such rules?

There are no works councils in Finland. However, if the company regularly employs 30 or more employees, it must carry out cooperation negotiations with its employees or their representatives regarding the principles of usage of electronic mail and data networks. If the company regularly employs less than 30 employees, the company must inform the employees about the rules but the procedure to be followed is less formal.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

The main principle is that the employer has limited possibilities to electronically monitor its employees. Insofar as this possibility does exist, it applies only as specifically set forth in the legislation which does not generally allow an employer to monitor an employee's network usage on corporate IT infrastructure. The employer is allowed to electronically monitor the employees in accordance with the following laws:

- Act on the Protection of Privacy in Electronic Communications (516/2004, as amended).
- Act on the Protection of Privacy in Working Life (759/2004, as amended).

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Anonymous monitoring of network traffic is permitted, provided that an individual employee cannot be directly or indirectly identified. Therefore, the total network usage of all employees may be monitored, but an employer may not monitor the network usage (e.g. data regarding IP addresses) of a certain employee, for example in order to investigate which websites this employee visited and how often. An employer may process such data in specific situations, as specifically permitted in the Act on the Protection of Privacy in Electronic Communications.

In principle monitoring the network usage of a certain employee is not permitted. The exceptions to this prohibition on monitoring the employee's use of electronic communication tools (i.e. processing of identification data) relate to e.g. the following situations:

- Detecting, preventing or investigating certain cases of misuse;
- Preventing and investigating the disclosure of the employer's business secrets;
- Preventing and investigating unauthorized use of information society service or communications network or service;
- Detecting, preventing, investigating and committing to pre-trial investigation any disruptions in information security or communications networks or related services;
- Safeguarding ability to communications of the sender or the recipient of the message;
- Preventing preparation of means of payment fraud referred to in the Criminal Code planned to be implemented on a wide scale via communication services.

Even in these circumstances, monitoring is only allowed to the extent necessary for the purpose of such monitoring. In addition, certain types of monitoring require a prior notification to be submitted to the Finnish Data Protection Ombudsman.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

There are no works councils in Finland. However, if the company regularly employs 30 or more employees, it must carry out cooperation negotiations with its employees or their representatives regarding the principles of usage of electronic mail and data networks. If the company regularly employs less than 30 employees, the company must inform the employees about the rules but the procedure to be followed is less formal.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. The employer may impose sanctions if the employee breaches their obligations or neglects their duties. The grounds for and procedures relating to sanctions, such as warning and dismissal or cancellation (i.e. termination without notice) of employment, are set forth in the Employment Contracts Act. However, an employer's options regarding monitoring the employees' usage of social media are very limited.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

In Finland there is free production of evidence. It is generally allowed to admit unlawfully obtained material as evidence in court. The court then evaluates the proof value of the evidence in question. In practice judges may have a negative attitude towards unlawfully obtained evidence. Please note that if evidence is obtained unlawfully, the employer itself might have committed a criminal act under the Finnish Criminal Code.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

There are no specific laws related to this matter. The main rule is that all kind of communication is considered confidential and the employer has very limited possibilities to electronically monitor its employees. The following general laws apply:

- Act on the Protection of Privacy in Electronic Communications (516/2004, as amended);
- Act on the Protection of Privacy in Working Life (759/2004, as amended).

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

No, automated or systematic monitoring of the content of the employee's social media usage is not permitted. In most cases the content published on social media is public and not considered confidential, but the employer may still not monitor the employee's usage of social media (such as postings on Facebook). Data concerning an employee must primarily be collected from the employee themselves.

However if, for example, a colleague prints out a posting on Facebook, an employer is entitled to take necessary action and use the information for its decision making process. In that case the employee should be heard before making any decisions regarding their employment relationship.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

There is free production of evidence in Finland. It is generally allowed to admit unlawfully obtained material as evidence in court. The court then evaluates the proof value of the evidence in question. In practice judges may have a negative attitude towards unlawfully obtained evidence. Please note that if evidence is obtained unlawfully, the employer itself might have committed a criminal act under the Finnish Criminal Code.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

There are no works councils in Finland. However, if the company regularly employs 30 or more employees, it must carry out cooperation negotiations with its employees or their representatives regarding the principles of usage of electronic mail and data networks. If the company regularly employs less than 30 employees, the company must inform the employees about the rules but the procedure to be followed is less formal.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. The employer may impose sanctions if the employee breaches their obligations or neglects their duties. The grounds and procedures for sanctions, such as warning and dismissal or cancellation (i.e. termination without notice) of employment, are set forth in the Employment Contracts Act. However, an employer's options regarding monitoring the employees' usage of social media are very limited.

France

Mr. Thierry Dor and Ms. Marta Lahuerta Escolano
Gide Loyrette Nouel A.A.R.P.I.
26, cours Albert 1er
75008 Paris
www.gide.com

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 8, European Convention on Human Rights, 1950;
- Article L1221-9, French Labor Code: no personal information related to a candidate can be collected by a device if the candidate has not been previously informed;
- Article L1132-1, French Labor Code: recruiters should take care not to use information obtained from social media in a way that would violate the non-discrimination principle;
- Act n°78-17 of 6 January 1978 on Data Processing Data Files and Individual Liberties ('Data Protection Act').

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, the Data Protection Act must be complied with and the non-discrimination principle must be taken into account. Pursuant to the principle of non-discrimination (Article L.1132-1 of the French Labor Code), recruitment cannot be denied on the basis of origin, gender, morality, sexual orientation, age, family situation, pregnancy, genetic characteristics, ethnicity, race, political opinions, trade union activities, religion, physical appearance, family name, health or disability.

'A Compétence Egale' charter has also been signed by several French recruitment professionals accepting the following principles:

- Limitation of the consultation of information publicly available on social media such as Facebook;
- A preference for the consultation of social media dedicated to the professional sphere, whose aims are to create professional ties, publish job offers and identify possible candidates;
- To refrain from using social media to collect personal information about candidates;
- Training of recruiters not to take into account such information;
- Warning job applicants of the need to control the information which they publish and the persons that have access to this information;
- Encouraging users to verify before publishing their personal information whether there is any possibility to erase personal data; to ask the administrators of the websites that host the social websites or blogs to inform their users about the objectives of the website, the persons having access to the information and the duration of conservation of such information.

3. Is works council intervention required?

Yes. According to Article L.2323-32 of the French Labor Code, the works council must be informed in advance about the methods of recruitment used by the company.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

However, the employer's right to restrict employee social media use during working hours or on corporate IT tools is derived from the employer's (i) property rights over the IT infrastructure that it provides to its employees to perform their work (Article 544 of the French Civil Code), (ii) authority over its employees, and (iii) liability for damages resulting from the acts of its employees during the performance of their employment contract (Article 1384 of the French Civil Code).

Other legitimate interests, arising from the employment contract or general principles of law, may also be taken into account such as avoiding the disclosure of confidential information obtained during the execution of the employment contract or posting comments harming the reputation of the employer or co-workers.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes. However, it is recommended to filter out social media sites using technical measures rather than prohibiting their use. The French Data Protection Authority considers that an absolute ban on the use of internet at the office for personal purposes is unreasonable, and a total prohibition on social media use could similarly be considered unreasonable.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media are very broad. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No, there is no specific document which should be used to determine rules on the use of social media during working hours or on corporate IT tools. The employer can incorporate these rules in several types of documents, such as the company's internal rules and regulations (*'règlement intérieur'*), an IT policy or a social media policy. It is unusual to incorporate such rules in the standard employment contract.

In order to make the rules regarding social media use during working hours or on corporate IT infrastructure enforceable and subject to disciplinary sanctions, they should be incorporated in or attached to the company's internal rules and regulations.

6. Is an intervention of the works council required for the implementation of such rules?

Yes. An intervention of the works council will be required if such rules are subject to disciplinary sanctions, since they will be considered as an attachment to the company's internal rules and regulations. The procedure requires that the rules be addressed to either the works council (if the company employs more than 50 people) or the staff representatives for consultation (Article L1321-4 of the Labor Code). The rules should also be addressed in two copies to the local labor administration (Article R 1324-4 of the Labor Code).

Exceptionally, when a social media policy does not provide specific rules subject to disciplinary sanctions but merely recommends best practice for using social media, the above requirements do not have to be complied with.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

However, the employee is not allowed to use social media in a way which violates the law or is contrary to their loyalty duties towards the employer, such as the disclosure of confidential information obtained during the execution of the employment contract, or posting comments harming the reputation of the employer or co-workers. The duty of loyalty is derived from the general principle of good faith performance of contracts provided in Article 1134 of the French Civil Code.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

An employer can only impose rules regarding the private use of social media insofar as they are necessary to fulfill the employee's loyalty duties. However, the employer may still issue recommendations regarding the use of social media by the employees in their private sphere.

The Besançon Court of Appeal (Besançon, 15 nov 2011, n°10/02642) has recently upheld that insulting comments made by an employee on Facebook about his manager are not protected by freedom of expression, instead constituting a real and serious motive for dismissal.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The power of an employer to impose rules regarding the private use of social media of its employees is limited. The restrictions on the social media use of the employees should be relevant for and proportionate to the employer's interests.

4. Is an intervention of the works council required for the implementation of such rules?

Yes. An intervention of the works council will be required if such rules are subject to disciplinary sanctions, since they will be considered as an attachment to the company's internal rules and regulations. The procedures mentioned above should be followed.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No, there is no specific legislation regarding monitoring of social media use on corporate IT infrastructure. However, general rules of the Labor Code and the Data Protection Act relating to monitoring are applicable.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes, subject to general rules of the Labor Code and Data Protection Act relating to monitoring. Employers must (i) inform their employees of the monitoring, as no personal information related to an employee can be collected by a device if the employee has not been previously informed (French Labor Code L1222-4), (ii) respect the principles of justification and proportionality (Article L1121-1, French Labor Code), (iii) comply with the Data Protection Act.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes. Employers must inform and consult the works council about any monitoring measure to be implemented on a permanent basis (L2323-32**)**.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can apply if they are specified in the company's internal rules and regulations. More generally, a misuse of internet for personal purposes may justify disciplinary action for gross misconduct and even the dismissal of the employee in some extreme cases (Cassation, Soc., March 18, 2009, n° 07-44.247).

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

No. Evidence obtained by unlawful monitoring of employees is illegal and inadmissible in court (Cassation, Soc., June 7, 2006, n°04-43.866).

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation on this matter. However, the rules of the Data Protection Act relating to monitoring are applicable.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Yes, subject to the Labor Code and the Data Protection Act. Only social media information which is publicly available may be monitored. In that respect, the Labor Relations Board Tribunal (Cons. prud'h. Boulogne-Billancourt, 19 nov. 2010, F09/0031) has clarified that messages are considered public when they are not restricted to a narrow circle of friends. As a result, messages posted on the profile of a dismissed employee, were deemed to be addressed to the public and thus screen-capturing and monitoring of those messages could be carried out without violating the employee's right to privacy.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

No. Evidence obtained by unlawful monitoring of employees is illegal and inadmissible in court (Cassation, Soc., June 7, 2006, n°04-43.866).

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes. Employers must inform and consult the works council about any monitoring measure to be implemented on a permanent basis (L2323-32**)**.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can apply if they are specified in the company's internal rules and regulations. More generally, a misuse of internet for personal purposes may justify disciplinary action for gross misconduct and even the dismissal of the employee in some extreme cases (Cassation, Soc., March 18, 2009, n° 07-44.247).

Germany

Mr. Peter Huppertz
Hoffmann Liebs Fritsch & Partner
Kaiserswerther Straße 119
40474 Düsseldorf
www.hlfp.de

Hoffmann Liebs Fritsch & Partner specializes in advising commercial clients with high expectations. We provide comprehensive legal advice to businesses on a wide range of commercial matters as well as advice on complex transactions and highly specific issues. Our clients include small and mid-sized firms as well as DAX 30 and MDAX companies or companies listed on foreign stock exchanges.

Our range of advisory services is designed to meet the needs of businesses and business owners in every sector. We cover every area of law that is of relevance to business. This is not restricted to traditional commercial practice areas such as corporate law (including M&A and capital markets), employment law, trade, commercial and distribution law, insolvency and competition. We have expertise in a range of further specialist areas. These include environment law, technology law and construction, banking regulation and stock exchange supervisory law, IT law (including data protection), particular areas of criminal law, such as tax proceedings, fraud, white-collar crime, environmental and health and safety offences. We act not merely in an advisory capacity, but also have considerable experience in court procedural matters. We can therefore provide each of our clients with a comprehensive advisory and representative service.

Our reputation is based on the acknowledged quality of our services. In 2004 HLFP won the JUVE Award for "Medium sized Law Firm of the Year" and was nominated again in the same category in 2009.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are currently no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, on August 25, 2010, the German government approved a draft law concerning special rules for employee data protection. The draft law would substantially amend the German Federal Data Protection Act (the 'Act') by adding provisions that specifically address data protection in the employment context. It would also include a special regulation about the collection and use of social media data in the recruitment procedure.

The approved draft law (the 'Draft') is pending before the German Parliament, where it is expected to undergo further discussions and may be amended.

In the meantime, the general provisions about collecting, processing and using employee and applicant data according to Sec. 32 of the Act apply.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Sec. 32 para. 6 of the Draft provides for different approaches depending on the purpose of the social network. As a general rule information about the job applicant should be collected directly from the job applicant, even if it is publicly available. An exception is made for professional and career networks. Though other social networks may also be used in a professional manner, collecting data will not be allowed if the networks are primarily dedicated to private use. This is because every collection of data has to be weighed between the respective interests of the job applicant and the recruiter. The job applicant's interests will usually outweigh the recruiter's interests in relation to information from non-professional social media.

Further, under anti-discrimination law currently in force, recruiters should not base any recruitment decision on information regarding a job applicant's age, health, disability, gender, sexual inclination, skin color, race, origin, ethnicity, political or philosophical affiliations, or religion, which they obtain by screening social media profiles.

Any data collection must also be performed in accordance with the Act, so recruiters may only collect and process information which is strictly necessary for a vacancy.

3. Is works council intervention required?

The consent of the works council must be obtained if the employer wants to establish general rules for hiring and selecting employees.

Furthermore, the works council has the right to be notified about the measures taken with respect to personnel management, such as measures with respect to recruitment and selection, before the measures are implemented.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

However, general rules apply. According to Sec. 106 of the German Trade, Commerce and Industry Regulation Act, the employer has a one-sided right to direct the particular scope of work of its employees. The use of social media is also restricted by the employee's obligations, including to thoughtfully respect the interests of the employer according to Sec. 241 para. 2 of the German Civil Code (the 'Civil Code'). However, this is limited by occupational freedom and freedom of opinion. Employees may speak freely about their employer as long as they do not abusively criticize or commit offenses such as disclosing confidential information obtained during the execution of the employment contract or participating in any unfair competition according to the German Act on Unfair Competition.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media are very broad in terms use during working hours or on corporate IT tools. As there is no specific legislation on this matter it is recommended to put specific company rules in place.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. The employer can stipulate rules on the use of social media in various documents. In order to make these rules binding and subject to disciplinary sanctions, either an individual agreement with the employee has to be reached or these rules have to be incorporated in the company work rules approved by the works council.

6. Is an intervention of the works council required for the implementation of such rules?

The works council must be involved if the employer wants to put in place general rules of conduct regarding the private use of social media during working hours. These rules always require the approval of the works council, which has to be properly informed about the details in order to render its decision. The works council has no right to intervention if the rules exclusively concern the private life of the employees or if they contain only general ethical principles.

If the employer does not want to negotiate with each individual about the specific scope of permitted social media use, consulting the works council may be the more feasible option. If the works council agrees on these rules, they will be binding on any employee in the firm.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter. However, the use of social media outside working hours is restricted by the employee's obligations, including to thoughtfully respect the interests of the employer according to Sec. 241 para. 2 Civil Code. However, this is limited by occupational freedom and freedom of opinion. Employees may speak freely about their employer as long as they do not abusively criticize or commit offenses such as disclosing confidential information obtained during the execution of the employment contract or participating in any unfair competition according to the German Act on Unfair Competition.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

There are no specific laws or regulations concerning the employer's right to impose rules outside of working hours. Since this belongs to the private sphere of the employees, in principle the employer is not entitled to regulate social media use. However, the employees remain subject to

their general obligations as mentioned above. If they do not fulfill these obligations they are violating their employment contract, even if the social media use is outside working hours.

It is not clear whether and to what extent an employer can regulate information shared and communication engaged in via a professional social media network. This involves a balance between the employer's legitimate interest in that content and the occupational freedom of employees.

3. Are there any restrictions on the employer's power to impose such rules?

As an exception to the employee right to privacy, the employer's power to impose such rules is limited. Employer's regulations must be relevant for and proportionate to the employer's interests. Beyond this exemption the employer may only forbid private behavior of its employees if this constitutes a breach of the employment contract.

4. Is an intervention of the works council required for the implementation of such rules?

As there is a strict separation between the professional and the private sphere, works councils have no input into rules that relate exclusively to the private lives of employees. Rules regulating the use of social media outside working hours therefore do not require the involvement of the works council. However, if the rules also relate to the use of social media during working hours or on company IT equipment, the works council must approve the rules.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No, there is no specific law or regulation concerning this matter. The Draft provides a special regulation in Sec. 32i about the use of telecommunication services. However, as stated above it is not yet clear if and how the Draft will come into force. Therefore the following general rules for collecting data and the use of telecommunication services apply:

- The Act;
- The Act on Telemedia Services: TMG;
- The Act on Telecommunication: TKG;
- Article 10, the German Constitution (principle of communication secrecy).

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes, but only under very specific conditions. The scope of the employer's surveillance rights depends on the employer's decision whether to tolerate private use of communication services at work or not.

If the employer forbids any private use, the employer has more options to control its employees. However, the employer is subject to the general rules of the Act, which limits the use of monitoring to situations where collecting the data is necessary (i) to perform the employment contract, or (ii) to uncover criminal offenses if there is a reasonable suspicion.

The Draft also provides options to monitor for (i) ensuring the proper functioning of the telecommunication services, (ii) billing purposes, and (iii) efficiency and behavior control. These options may be considered under the current law as well. However, it is not yet settled whether the employer can engage in general pre-emptive monitoring without any probable cause.

If the employer does allow private use of social media at work, it is a service provider according to Sec. 88 of the Act on Telecommunication, making it subject to the secrecy of telecommunications. In that case, the employer cannot access any information regarding private communication, even the frequency of social media use. As private communication cannot be separated from professional communication within one account, the employer has very limited monitoring rights. These rights are stipulated in Sec. 14 f. of the Act on Telemedia Services. According to this law collecting data is only allowed if it is necessary to use or bill the communication services. There is a topical decision of the Regional Labor Court of Berlin which puts the limited scope of these provisions in question. The court allowed the employer access to employees' communication data if there is a reasonable cause. However, this has not yet been acknowledged as predominant case law.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes, a works council agreement must be reached to implement such technology. The works council must be provided with all information necessary to evaluate the scope of the implementation and its effect on the privacy rights of employees.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, as long as there is a legal basis in the obligations under the employment contract. Typical sanctions will be judicial dissolution of the employment contract, dismissal for gross misconduct or dismissal after a notice period or with payment of a termination indemnity depending on the factual circumstances.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

There is no general prohibition on using unlawfully obtained data in German law. Whether the data can be used as evidence in court depends on weighing the interests of the opposing parties. Information which is obtained under a breach of the principle of telecommunication secrecy can usually not be used in court. However, if the employee committed a major crime, the court may make an exception.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific law or regulation concerning this matter. The Draft provides a special regulation in Sec. 32i about the use of telecommunication services. However, as stated above it is yet unclear, if and how the Draft will come into force. Therefore the general rules for collecting data and the use of telecommunication services apply:

- The Act;
- The Act on Telemedia Services: TMG;
- The Act on Telecommunication: TKG;
- Article 10, the German Constitution (principle of communication secrecy.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Yes, but only under very specific conditions. The scope of the employer's surveillance rights depends on the employer's decision whether to tolerate private use of communication services at work or not. If the employer forbids any private use, the employer has more options to control its employees. However, the employer is subject to the general rules of the Act, which limits the use of monitoring to situations where collecting the data is necessary (i) to perform the employment contract, or (ii) to uncover criminal offenses if there is a reasonable suspicion.

The Draft also provides options to monitor for (i) ensuring the proper functioning of the telecommunication services, (ii) billing purposes, and (iii) efficiency and behavior control. These options may be considered under the current law as well. However, it is not yet settled whether the employer can engage in general pre-emptive monitoring without any probable cause.

If the employer does allow private use of social media at work, it is a service provider according to Sec. 88 of the Act on Telecommunication, making it subject to the secrecy of telecommunications. In that case, the employer cannot access any content or information

regarding private communication. As private communication cannot be separated from professional communication within one account, the employer has very limited monitoring rights. These rights are stipulated in Sec. 14 f. of the Act on Telemedia Services. According to this law collecting data is only allowed if it is necessary to use or bill the communication services. There is a topical decision of the Regional Labor Court of Berlin which puts the limited scope of these provisions in question. The court allowed the employer access to employees' communication data if there is a reasonable cause. However, this has not yet been acknowledged as predominant case law.

The German administrative courts limit the scope of secrecy of telecommunications to the transmission procedure. Under certain conditions this makes it possible to access mails of the employees downloaded in their personal folders.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

There is no general prohibition on using unlawfully obtained data in German law. Whether the data can be used as evidence in court depends on weighing the interests of the opposing parties. Information which is obtained under a breach of the principle of telecommunication secrecy can usually not be used in court. However, if the employee committed a major crime, the court may make an exception.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes, a works council agreement must be reached to implement such technology. The works council must be provided with all information necessary to evaluate the scope of the implementation and its effect on the privacy rights of employees.

However, the competence of the works council is limited to policies that have an actual effect on monitoring the professional use of social media only. The work council is not allowed to determine the monitoring of private use.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, as long as there is a legal basis in the obligations under the employment contract. Typical sanctions will be judicial dissolution of the employment contract, dismissal for gross misconduct or dismissal after a notice period or with payment of a termination indemnity depending on the factual circumstances.

Greece

Mrs. Chara Daouti
Lambadarios Law Firm
Stadiou No 3, 5th Floor
105 62 Athens
www.lambadarioslaw.gr

Lambadarios Law Firm specializes in a wide variety of both domestic and international commercial work offering a high level of legal services to its clients worldwide to include: Corporate law and M&A, EU and competition, banking and finance, litigation, commercial arbitration and ADR, telecommunications and intellectual property, privacy law, project finance, public works and procurement and securities law. The firm's client base includes banks, financial institutions, insurance corporations, large industrial and commercial sector corporations and private individuals. Since the early 1960s, the firm has advised foreign clients who wish to establish businesses in Greece. Moreover, the firm has represented foreign and domestic clients in numerous litigations and arbitrations in the ICC. The firm's intellectual property expertise includes trademark, patent and copyright law. Recently the firm, recognizing the impact of environmental legislation on the way business is conducted, decided to create an Environmental Law Department that advises clients on issues relating to their business.

In the field of privacy law, the firm advises many multinational companies on data protection compliance issues, particularly novel products, processing of consumer data, international data transfers and disclosure requests. The firm also regularly advises technology companies on IT legal issues such as software development, data security, confidentiality and unfair competition and represents them in regulatory investigations conducted by the Hellenic Data Protection Authority (DPA) and the Hellenic Authority for Communication Security and Privacy (ADAE).

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Law 2472/1997 on the Protection of Privacy in Relation to the Processing of Personal Data ('Data Protection Act');
- Directive of the DPA no. 115/2001 which deals with data protection matters in the employment context and is also applicable in the recruitment process.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. Under Directive 115/2001 processing of personal data in the recruitment process is allowed provided that the information collected is relevant to the assessment of the capacities of the job applicant. The collection and use of sensitive personal data, such as health data or criminal background of the job applicant, is permitted only if it is absolutely necessary for the assessment of the applicant's suitability for the specific position (e.g. criminal background check is necessary for bank tellers or security officers).

3. Is works council intervention required?

Yes. Article 12 paragraph 4 of Law 1767/1988 requires the employer to consult and reach agreement with the works council regarding new organizational measures in the workplace, such as organizational measures using new media and technologies, new technological means of monitoring employees, etc. In the recruitment process, monitoring of candidates using new media and technologies is allowed provided that the information collected is relevant and absolutely necessary for the assessment of the capacities of the candidate.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations dealing with this matter.

Under Greek law, employers have the general authority ('management right') to restrict the use of any material which- at their discretion- could prevent employees from carrying out their tasks effectively. However, the employer' s right to restrict use of social media during working hours is subject to the following general rules: (i) the restriction of the use by employees of social media must be appropriate for the purpose sought by the employer, e.g., such restriction would not be justified if the use of social media is relevant and beneficial to the work carried out by the employees, (ii) the restriction of use of social media must be absolutely necessary for the achievement of the purpose sought by the employer, and (iii) the benefits arising from such restriction must outweigh the potential negative effects of such measure.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes, provided that the rules analyzed in the previous answer are respected (i.e., relevancy, necessity, proportionality) and that the employees are adequately informed of such prohibition prior to its enforcement.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. In principle employers must provide adequate space to employees for private communication, however, social media is not necessarily an essential part of that private space.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media, as part of the employer's management right, are very broad. Consequently, the employer has the right to determine the permitted duration and type of use of social media by its employees.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

The employer must adequately inform employees of the rules connected with the use of social media, prior to their enforcement. According to recent case law, the communication of such rules to employees may take place by any adequate means, e.g. by e-mail.

6. Is an intervention of the works council required for the implementation of such rules?

Yes. Article 12 para. 4 of Law 1767/1988 requires that the employer consults and reaches an agreement with the works council regarding new organizational measures in the workplace, such as organization measures using new media and technologies, new technological means of monitoring employees, etc.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter. However, under Greek law employers may restrict the use of social media outside working hours or on private IT tools insofar as the use of social media affects the employer-employee relationship, such as where (i) the employee is prevented from carrying their tasks effectively, (ii) the employee's use of social media risks disclosing the employer's confidential information, (iii) the employee's use of social media creates financial costs to the employer which are not relevant to the employer-employee relationship, or (iv) the employee excessively uses corporate infrastructure for personal purposes.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes. An employer may determine rules regarding employee use of social media in their private time or on private IT tools in order to prevent violations of the employee's duties, such as their duty of loyalty, duty of confidentiality, spirit of cooperation within the workplace and with the employer, etc.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The employer's right to restrict employee social media use in their private sphere is limited by the general principles of relevancy, necessity and proportionality. In addition, the employer must adequately inform its employees prior to the enforcement of such rules.

4. Is an intervention of the works council required for the implementation of such rules?

Yes. Article 12 par. 4 of Law 1767/1988 requires that the employer consults and reaches an agreement with the works council regarding new organizational measures in the workplace, such as organization measures using new media and technology, new technological means of monitoring employees, etc.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations dealing specifically with the monitoring of the use of social media by employees. Nevertheless, the following general provisions apply:

- Law 2472/1997 on the Protection of Privacy in Relation to the Processing of Personal Data ('Data Protection Act');
- Directive of the DPA no. 115/2001 which deals with data protection matters in the employment context.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. However, monitoring an employee's use of social media is permitted only under the following conditions: (i) the monitoring must be relevant, necessary and proportionate to the legitimate interests of the employer, (ii) the employee must be adequately informed prior to the implementation of such monitoring, and (iii) monitoring is carried out on an occasional basis and not as a general practice of the employer.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes. Article 12 par. 4 of Law 1767/1988 requires that the employer consults and reaches an agreement with the works council regarding new organizational measures in the workplace, such as organization measures using new media and technology, new technological means of monitoring employees, etc.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. The employer may impose disciplinary sanctions if monitoring of employees reveals the violation of work rules regarding the use of social media. According to recent case law, an employer may substantiate a termination for 'serious cause' if the use of Facebook prevents the employee from carrying out their tasks efficiently according to its employment agreement, the work rules and the general principles of Greek law.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

Such evidence could be rejected in court. In that case other evidence may still be relied upon to establish whether the employee was working efficiently.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

There are no laws or regulations dealing specifically with monitoring the content of social media. Nevertheless, the following general provisions apply:

- Law 2472/1997 on the Protection of Privacy in Relation to the Processing of Personal Data ('Data Protection Act');
- Directive of the DPA no. 115/2001 which deals with data protection matters in the employment context.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

This depends on the type of media:

- Public media: It is permitted to monitor content of an employee's public use of social media provided that the rules of relevancy, necessity and proportionality are being respected and employees are informed of the fact that the employer monitors the content of their public use of social media;
- Private media: Monitoring the content of an employees' private use of social media is, in principle, prohibited unless (i) an investigation is conducted by the employer in relation to the violation of work rules (e.g., violation of employee's duties of loyalty and confidentiality), (ii) the rules of relevance, necessity and proportionality are being respected, and (iii) employees are informed that the employer could monitor the content of their private use of social media.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

Such evidence could be rejected in court. However, in principle, private communications revealing a violation of the employee's essential duties (e.g. duty of loyalty, duty of confidentiality)

will be accepted in court on the basis that the employer had the right to obtain this evidence in accordance with the principles of relevance, necessity and proportionality.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes. Article 12 par. 4 of Law 1767/1988 requires that the employer consults and reaches an agreement with the works council regarding new organizational measures in the workplace, such as organization measures using new media and technologies, new technological means of monitoring employees, etc.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. The employer may impose disciplinary sanctions if monitoring reveals the violation of work rules regarding the use of social media. According to recent case law, an employer may substantiate a termination for 'serious cause' if the use of Facebook prevents the employee from carrying out their tasks efficiently according to its employment agreement, the work rules and the general principles of Greek law.

Hungary

Dr. Zoltán Balázs Kovács and Dr. László Pók
Szecskay Attorneys at Law
Kossuth tér 16-17
1055 Budapest
www.szecskay.com

Szecskay Attorneys at Law provides a full range of legal advice and assistance to the business community and over the past 20 years has been involved in a large number of M&A transactions. The firm typically acts for large local enterprises - established by multinational companies, or traditional Hungarian privatized corporations owned by large local investors - in connection with M&A, corporate, commercial, regulatory, financing, employment, real estate, competition, liquidation, environmental and data protection matters.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 8 of the European Convention on Human Rights, 1950;
- Act no CXII of 2011 of the Act on the Information Right and the Freedom of Information ('Information Act');
- Section 10, Act no I of 2012 on the Labor Code ('Labor Code').

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, the recruiter may not base its recruitment decision on information concerning the applicant's age, gender, health, race, political view, religion, trade union membership etc., which the employer obtained while screening the applicants' social media profiles. Any such decision would violate the principle of non-discrimination.

Processing (e.g. compiling and organizing) information collected from social media profiles is subject to the provisions of the Information Act.

3. Is works council intervention required?

No.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific rules or regulations concerning this matter.

However, a relevant general provision of the Labor Code states that the employee must not behave in a manner which endangers the lawful business interests of the employer.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. If the employer has prohibited the use of employer-owned equipment for social media purposes, employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. Employers are free to regulate the use of social media during working hours or on corporate IT tools.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. The employer can stipulate these rules in several types of documents. Typically, such use is regulated in specific by-laws of the company. It is also possible to regulate the use of social media in the employment contract but in such cases, any amendment requires the consent of the employee.

6. Is an intervention of the works council required for the implementation of such rules?

According to the Labor Code, employers are required to obtain the works council's opinion on proposed actions or by-laws if the proposals affect a larger group of employees. Such opinion must be requested at least 15 days prior to the decision on the planned action or by-laws. The term 'larger group of employees' is not defined in the Labor Code, but for example may mean all employees working in the same business line or unit.

The opinion of the works council must in particular be obtained with respect to the employer's action concerning the control or the protection of personal data of employees or the application of technical tools on the surveillance of employees. It is therefore likely that the opinion of the works council will have to be obtained when the employer wishes to set up rules concerning the use of social media during working hours.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

There are no specific rules or regulations on social media use outside working hours or on private IT infrastructure. However, the Labor Code has some provisions which may be applicable to private social media use.

The Labor Code prohibits control of the employees' private life, but also provides that the employee must not behave outside working hours in a manner which is directly and effectively harmful to the employer's reputation or business interests or the fulfillment of the purpose of the employment relationship. The interpretation of this rule will depend on the nature of the employee's work and their position in the organization.

The Labor Code also declares that the employee's right to free speech may not be exercised in a way which grievously harms or endangers the employer's reputation or lawful business and organizational interests. However, any restriction must be proportionate and necessary for the achievement of the purpose. Prior notice of the restriction must be provided to the employee with the indication of the manner, the conditions and the expected duration of the restriction.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes. The Labor Code allows the employer to impose rules regarding social media use which may restrict certain behavior and freedom of speech in their private sphere, consistent with the provisions outlined above.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The employer has no general right to restrict employees' behavior or right to free speech if there is no direct connection with the employment relationship. The employer must take into account the nature of the employee's work and the position of the employee in the organization in the course of imposing such rules. This means that for example, more restrictive rules may be introduced with respect to the CEO of the company than for an 'ordinary employee'. The employer may introduce rules which are necessary and proportionate to achieve the purpose of such regulation.

4. Is an intervention of the works council required for the implementation of such rules?

According to the Labor Code, employers are required to obtain the works council's opinion on proposed actions or by-laws if the proposals affect a larger group of employees. Such opinion must be requested at least 15 days prior to the decision on the planned action or by-laws. The term 'larger group of employees' is not defined in the Labor Code, but for example may mean all employees working in the same business line or unit.

The opinion of the works council must in particular be obtained with respect to the employer's action concerning the control or the protection of personal data of employees or the application of technical tools on the surveillance of employees. It is therefore likely that the opinion of the works council will have to be obtained when the employer wishes to set up rules concerning the use of social media during working hours.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No, there is no specific law governing the monitoring of the use by employees of company computers, emails, cell phones etc. However, the Labor Code declares that the employer may control the employee's behavior in connection with their employment, but prohibits control of the employees' private life. Control by the employer and the tools used may not violate the human dignity of the employees. The Labor Code also sets forth that the employees must be informed in advance of the technical tools used to control the employees (e.g. software checking the activities of the employees on the internet). Also relevant are several opinions issued by the data commissioner on monitoring the use by the employees of the internet, email correspondence and cell phones.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes, monitoring is permitted under certain conditions: (i) internet access has to be provided to employees exclusively for the purposes of carrying out duties in relation to employment and not for private use, (ii) private internet use must be prohibited or restricted, (iii) the employer must inform the employees of (i) and (ii) and also of the fact that the employer is entitled to monitor and check internet use, (iii) the employer must inform the employees of their rights in connection with data management, (iv) all data protection obligations must be complied with, and (v) the

content of data must not be monitored, as this would require consent of third parties involved in the communication.

In the Data Commissioner's view, the following may serve as a valid legal interest of the employer for monitoring the internet use: (i) protection of economic, commercial or financial interests of the employer, (ii) safe operation of the employer's IT system, (iii) compliance with employment rules set by the employer.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

If there is a works council or trade union operating in the company, the works council must be informed in advance of the internet/social media monitoring policy.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Depending on the gravity of the violation, sanctions typically vary from a warning to the termination of employment with immediate effect. Damages may also be claimed by the employer if damage was suffered as a result of the employee's violation.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

There is a risk that the evidence will not be accepted in court. In criminal proceedings, such evidence may not be used *ex lege*, whereas there is no such prohibition as regards civil or labor proceedings. However, it is questionable whether a judge will allow the use of such evidence.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. As a rule, the employer may only monitor publicly available information on the internet under the conditions outlined above. The following general laws also apply:

- Article 8, European Convention on Human Rights, 1950;
- Article VI, the Hungarian Constitution;
- Articles 177/A and 178/A, the Hungarian Criminal Code;
- Act no CXII of 2011 on the Act on the Information Right and the Freedom of Information ('Information Act');
- Article 10 of Act I of 2012, the Labor Code.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

This depends on the type of media:

- Private media: as a rule, the employer may not monitor the employee's private life. In the event it is evident that the employee has used private media (such as chat applications) with a view to harming the employer's business interests or goodwill, monitoring may be permissible.

- Professional media: it may be permitted if the employer gave prior notice to employees of the prohibition to use employer's computers and laptops for private purposes. In this case, the employer may check whether the employee has complied with the prohibition.

- Posts on public social media: the employer may monitor publicly available information.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

There is a risk that the evidence will not be accepted in court. In criminal proceedings, such evidence may not be used *ex lege*, whereas, there is no such prohibition as regards civil or labor proceedings. However, it is questionable whether a judge will allow the use of such evidence.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

If there is a works council or trade union operating in the company, the works council must be informed in advance of the internet/social media monitoring policy.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Depending on the gravity of the violation, sanctions typically vary from a warning to the termination of employment with immediate effect. Damages may also be claimed if damage was suffered as a result of the employee's violation

Iceland

Mrs. Hjördís Halldórsdóttir and Mrs. Áslaug Björgvinsdóttir
Logos legal services
Efstaleiti 5
103 Reykjavík
www.logos.is

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Employers seek our advice on all aspects of employment and labor law. Logos is unsurpassed providing companies and employers' organizations with employment law advice and support, for instance in creating syndicate agreements and employment contracts, and representation in disputes with employees and organizations.

The field of information technology is furthermore close to our heart. Our legal teams call upon yearlong experience of counseling in relation to cases concerned with data protection, such as regarding the processing of personal data.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

No, there are no specific laws or regulations dealing with the use of information from social media websites in the recruitment context. However, the following general laws are relevant:

- Article 8, European Convention on Human Rights (incorporated into Icelandic law by Act no. 62/1994);
- The Constitution of the Republic of Iceland ('the Constitution');
- Act no. 77/2000 on the Protection of Privacy as regards the Processing of Personal Data ('the Data Protection Act');
- Act no. 139/2003 on Fixed Term Employment;
- Act no. 10/2004 on Part-time Workers.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, the processing of information from social media profiles (e.g. downloading the information to create a database of potential candidates for a vacancy) is restricted. Such processing must be performed in accordance with Articles 7, 8, 9, 20 and in some cases Article 21 of the Data Protection Act.

Employers must bear in mind the principle of non-discrimination in Article 65 of the Constitution and not base any recruitment decision on information which they obtain by screening a job applicants' social media site regarding the applicants' sex, religion, opinion, national origin, race, color, property, birth or other status.

Furthermore, if the employer uses any means to obtain further information than that which is publicly available (e.g. by sending a 'friend request' or looking at their profile through someone else's account), with the sole purpose of the recruitment procedure, it could be deemed an unfair practice. However, this has not yet been confirmed by case law.

3. Is works council intervention required?

No.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

No, there are no specific laws or regulations in that sense. The employer's right to restrict the use of social media of its employees during the working hours or on corporate IT tools is unlimited.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. Employers have unlimited rights to regulate the use of social media during working hours. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No, it is not required to stipulate such rules in a specific document. However, in order to make the rules enforceable and subject to disciplinary sanctions for violation, it is best if they are incorporated in or attached to the employment contract and/or in the company work rules.

6. Is an intervention of the works council required for the implementation of such rules?

Works councils are not applicable, except in undertakings or groups of undertakings that operate in at least two states in the European Economic Area (EEA) and have at least 1000 employees, according to the Act on European Work Councils in Undertakings, no. 61/1999.

However, a duty to inform and consult employees may result from relevant collective agreements and the Act on Information and Consultation in Undertakings, no. 151/2006. It is unlikely that regulation of the use of social media would trigger these obligations, however as there is no case law on this matter it cannot be excluded as a possibility. According to these provisions, the employer must provide employees' representatives, which all companies with more than five employees must appoint, with information concerning decisions that are likely to lead to substantial changes in the structure of work or employment contracts. Furthermore, the employees' representatives must have the opportunity to meet the employer and obtain a response to their questions.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

If the employer imposes rules regarding the use of social media outside working hours and on private IT tools in the employment contract, general principles of Icelandic contract law will be relevant (e.g. Act no. 7/1936 on Contracts, Agency and Void Legal Instruments).

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes, an employer can determine certain rules which employees must respect when using the internet in their private time or on private IT tools, such as rules regarding (i) the disclosure of confidential company information, (ii) references to the company on social media profiles, (iii) the posting of comments or other content which might harm the reputation or interests of the company, (iv) the posting of comments regarding co-workers, etc.

3. Are there any restrictions on the employer's power to impose such rules?

Yes, the employers' power to impose such rules outside working hours is limited. The restriction on social media use must be relevant for and proportionate to the employer's and/or the company's interests. This restriction is derived from Article 73 of the Constitution which grants a right to freedom of expression to employees. Furthermore, the employer and the company must tolerate a certain level of criticism from its employees.

4. Is an intervention of the works council required for the implementation of such rules?

Works councils are not applicable, except in undertakings or groups of undertakings that operate in at least two states in the European Economic Area (EEA) and have at least 1000 employees', according to the Act on European Work Councils in Undertakings, no. 61/1999.

However, a duty to inform and consult employees may result from relevant collective agreements and the Act on Information and Consultation in Undertakings, no. 151/2006. It is unlikely that regulation of the use of social media would trigger these obligations, however as there is no case law on this matter it cannot be excluded as a possibility. According to these provisions, the employer must provide employees' representatives, which all companies with more than five employees must appoint, with information concerning decisions that are likely to lead to substantial changes in the structure of work or employment contracts. Furthermore, the employees' representatives must have the opportunity to meet the employer and obtain a response to their questions.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

Yes, the Data Protection Act no. 77/2000 specifically stipulates rules regarding the monitoring of employees' use of electronic communication tools. The following regulations also apply:

- Rules no. 837/2006 on Electronic Surveillance;
- Rules no. 299/2001 on the Security of Personal Data

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. Monitoring of the employees' use of electronic communication tools (e.g. whether or not employees visit social media websites or chat websites from their workstations, the frequency of such visits, etc.) is only permitted under certain conditions: (i) electronic surveillance must be carried out for specified, explicit and legitimate purposes, such as security or property protection, (ii) internet browsing data, connections to websites, and data volume can only be accessed if there is a substantiated suspicion that the relevant employee is violating the law or rules set out by the employer. In case of suspicion of criminal activities, the police should be contacted, (iii) it should be established that the objectives of the surveillance cannot be reached by other

reasonable and less intrusive means, (iv) the employer must adopt rules and/or provide his employees' with notice on the surveillance beforehand and by verifiable means, e.g. at the time of signing an employment agreement.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Works councils are not applicable, except in undertakings or groups of undertakings that operate in at least two states in the European Economic Area (EEA) and have at least 1000 employees, according to the Act on European Work Councils in Undertakings, no. 61/1999.

However, a duty to inform and consult employees may result from relevant collective agreements and the Act on Information and Consultation in Undertakings, no. 151/2006. According to these the employer must provide employee representatives with information concerning decisions that are likely to lead to substantial changes in the structure of work or employees' employment contracts. Furthermore, employee representatives must have the opportunity to meet the employer and obtain a reasoned response to their questions.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, disciplinary sanctions can apply if they are determined in the employment contract and/or in the company work rules. Judicial dissolution of the employment contract, dismissal for gross misconduct or dismissal upon performance of a notice period or with payment of a termination indemnity could be contemplated depending on the factual circumstances (e.g. the frequency of the social media use, duration of the social media use during working hours, etc.).

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

In Icelandic criminal and civil court procedures, there is a general legal principle allowing judges to freely evaluate the admissibility of evidence that is brought before the court. Therefore such evidence may be accepted in a court procedure, at the discretion of the court.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. However, the following general laws and regulations apply:

- Article 8, European Convention on Human Rights, incorporated into Icelandic law by Act no. 62/1994;

- Data Protection Act no. 77/2000;
- The Constitution of the Republic of Iceland;
- Chapter XXV of the Icelandic General Penal Code no. 19/1940.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

This depends on what kind of media is monitored:

- Monitoring of private media (e.g. private use of chat applications) or professional media (e.g. corporate chat program) is in principle not permitted. However if there is consent, substantiated suspicion that the relevant individual is violating the law, or rules set out by the employer, monitoring may be deemed permissible. When accessing such private media, the employee should be notified beforehand and given the possibility to attend the viewing. This does not apply if the attendance of the individual is not possible, e.g. due to serious illness. If the individual cannot attend the viewing they must have the possibility to appoint a representative.

- Material on public social media websites can be monitored by employers because it is publicly available.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

In Icelandic criminal and civil court procedures, there is a general legal principle allowing judges to freely evaluate the admissibility of evidence that is brought before the court. Therefore such evidence may be accepted in a court procedure, at the discretion of the court.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Works councils are not applicable, except in undertakings or groups of undertakings that operate in at least two states in the European Economic Area (EEA) and have at least 1000 employees', according to the Act on European Work Councils in Undertakings, no. 61/1999.

However, a duty to inform and consult employees may result from relevant collective agreements and the Act on Information and Consultation in Undertakings, no. 151/2006. According to these the employer must provide employee representatives with information concerning decisions that are likely to lead to substantial changes in the structure of work or employees' employment contracts. Furthermore, the employee representatives must have the opportunity to meet the employer and obtain a reasoned response to their questions.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, disciplinary sanctions can apply if they are determined in the employment contract and/or in the company work rules. Judicial dissolution of the employment contract, dismissal for gross misconduct or dismissal upon performance of a notice period or with payment of a termination indemnity could be contemplated depending on the factual circumstances (e.g. gravity of the facts, public character of the comments, function of the employee, potential damage to the company, previous violations of the employee, etc.). Damages can also be sought by the employer where damage to reputation has been caused by the employee's use of social media.

Ireland

Mr. Leo Moore and Mr. David Cullen
William Fry
Fitzwilton House
Wilton Place
Dublin 2
www.williamfry.ie

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Employment Equality Acts 1998-2011;
- Data Protection Acts 1988-2003;
- Article 8, European Convention on Human Rights, 1950.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, as with all steps of the recruitment process it would be important that any information gathered is not used in a discriminatory way and that the provisions of the Employment Equality Acts 1998-2011 are complied with. These prohibit discrimination based on gender, civil status, family status, sexual orientation, religion, age, disability, race, color, nationality, ethnic or national origins and membership of the Traveler Community.

Any personal data gathered and processed in this context would be subject to the Data Protection Acts 1998-2003. Processing of this nature would need to be justified by the employer as necessary.

3. Is works council intervention required?

No, there is no requirement to inform or consult any collective consultative body that may exist (such as a trade union or national works council) about pre-employment checks unless it is a matter on which the employer has agreed to inform and/or consult.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

No, there are no specific laws governing the power of employers to restrict the use of social media during working hours.

Increasingly employers will have a social media policy in place (in addition to an email/internet usage policy) which will define the parameters of permissible employee use of social media and may include a statement of the employer's monitoring practices. This policy is typically incorporated by reference to the employment contract, so that compliance with it is an ongoing condition of employment. An employer's right to insist on any such restrictions stems from its ownership rights over its IT infrastructure.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to access social media at work.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes, an employer may implement rules to regulate employee use of social media. Such rules may restrict or prohibit use of social media during working hours and/or using the employer's IT infrastructure for such purposes, as well as regulating 'private' use of social media where that 'private' use has the potential to bring the employer into disrepute.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

Irish law does not require that these rules be stipulated in a prescribed form. Social media rules can form a discrete Social Media policy (either stand-alone or in a company handbook) or be included in a dedicated email and internet policy or in the employer disciplinary policy.

6. Is an intervention of the works council required for the implementation of such rules?

No, there is no requirement to inform or consult any collective consultative body that may exist (such as a trade union or national works council) about pre-employment checks unless it is a matter on which the employer has agreed to inform and/or consult.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No. However, an employer can seek to restrict use of social media outside working hours where such use has the potential to bring the employer into disrepute.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes. An employer may impose rules regarding the use by employees of social media in a private capacity. Those rules might, for example, (i) prohibit the use of work email addresses to subscribe to social media (other than social media which the employee subscribes to in the course of employment and which the employer approves of, e.g. LinkedIn), (ii) impose restrictions on making references to the employer in social media, (iii) require the use of a disclaimer to indicate that any postings are the personal view(s) of the employee and do not represent those of the employer, (iv) prohibit the revealing of confidential information, and (v) prohibit posting anything which could be damaging to the reputation of the employer or its clients/customers.

3. Are there any restrictions on the employer's power to impose such rules?

Online activity conducted on private infrastructure is protected by the employee's right to privacy. To be effective, any employer restriction must be necessary and proportionate to the likely damage to the employer's business including damage to its reputation or a breach of confidentiality damaging its business interests.

4. Is an intervention of the works council required for the implementation of such rules?

No, there is no requirement to inform or consult any collective consultative body that may exist (such as a trade union or national works council) about pre-employment checks unless it is a matter on which the employer has agreed to inform and/or consult.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

There is no specific legislation, however any monitoring must be carried out transparently and comply with the Data Protections Acts 1988-2003.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes monitoring is permitted provided that (i) the employee is made aware of the monitoring policy (transparency), (ii) monitoring is necessary to protect the legitimate interests of the business, (iii) monitoring is proportionate to the business interests sought to be protected, and (iv) the employee has acknowledged his understanding that the employer may undertake monitoring.

In practice, an employer will have a workplace policy in relation to email/internet usage and social media, which will define the parameters of employees' permissible use and which will include a statement of the employer's monitoring practices. This policy is typically incorporated by reference to the employment contract, so that compliance with it is an ongoing condition of employment. Employees should be asked to review and accept the terms of the policy, including an acknowledgment of the employee's understanding that monitoring may be undertaken by the employer. Consent of the employee to such monitoring is not of itself sufficient to justify carrying out the monitoring. It must be warranted by the employer's right to protect a legitimate business interest (which must be balanced with the employee's right to privacy).

Systematic monitoring would not be proportionate to protect an employer from the implications of under-productivity, but where an employee is consistently underperforming, this may warrant monitoring of that employee's social media activity during the working day.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

No, there is no requirement to inform or consult any collective consultative body that may exist (such as a trade union or national works council) about pre-employment checks unless it is a matter on which the employer has agreed to inform and/or consult.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Disciplinary sanctions (up to and including dismissal) could be imposed for a violation of social media rules, if provided for in the employer's workplace policies. A robust policy will provide that a violation of the social media rules constitutes misconduct and will be treated as a disciplinary matter.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

The exclusion of unconstitutionally obtained information falls under Article 40.3.1° of the Irish Constitution. It is accepted that the admissibility of such evidence depends on the nature and extent of the illegality. If obtained by 'deliberate and conscious violation' the information is likely to be inadmissible.

The right to privacy under the Constitution is protected as far as is practicable and, as a qualified right, will be balanced against competing rights such as an employer's right to earn a living. Recent case law has established that it is necessary to distinguish underlying information with the method by which it was obtained. Therefore, an employee could have a potential right of action in privacy against its employer if such information was obtained unlawfully.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

There is no specific legislation, however the following law would be relevant:

- Defamation Act 2009;
- Employment Equality Acts 1998-2011;
- Copyright and Relation Rights Acts 2000-2007;
- Prohibition of Incitement to Hatred Act 1989;
- Child Trafficking and Pornography Acts 1998-2004;
- Safety, Health and Welfare at Work Act 2005;
- Data Protection Acts 1988-2003;
- Article 8, European Convention on Human Rights.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Yes, a social media policy may address social media activities using both work facilities and those used in a private capacity where private activities have the potential to bring the employer into disrepute (provided the specific conditions regarding monitoring (set out below) are met). Monitoring of publicly accessible social media usage by employees would be permitted subject to the conditions set out below and any personal data gathered would be subject to collection and processing in accordance with the Data Protection Acts 1988-2003. Monitoring of employees' private media use (on private media tools) by employers is not permitted. Such monitoring can only be carried out by organizations such as law enforcement authorities.

Monitoring must meet the conditions that (i) the employee is made aware of the monitoring policy (transparency), (ii) monitoring is necessary to protect the legitimate interests of the business, (iii) monitoring is proportionate to the business interests sought to be protected, and (iv) the employee has acknowledged his understanding that the employer may undertake monitoring.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

The exclusion of unconstitutionally obtained information falls under Article 40.3.1° of the Irish Constitution. It is accepted that the admissibility of such evidence depends on the nature and extent of the illegality. If obtained by 'deliberate and conscious violation' the information is likely to be inadmissible.

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4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

No, there is no requirement to inform or consult any collective consultative body that may exist (such as a trade union or national works council) about pre-employment checks unless it is a matter on which the employer has agreed to inform and/or consult.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Disciplinary sanctions (up to and including dismissal) could be imposed for a violation of social media rules, if provided for in the employer's workplace policies. A robust policy will provide that a violation of the social media rules constitutes misconduct and will be treated as a disciplinary matter.

Italy

Mr. Daniele Vecchi and Ms. Martina Ortillo
Gianni, Origoni, Grippo Cappelli & Partners
Piazza Belgioioso 2
20121 Milano
www.gop.it

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Thanks to the commitment of 350 professionals, every area of the firm is widely recognised among the top firms in the legal arena in Italy and abroad.
The firm data protection specialized team boasts more than fifteen years of experience in the area of data protection, handling cross-border privacy issues involving multiple jurisdictions, and has developed considerable experience providing assistance in relation to all business sectors and specific areas as, inter alia, corporate, contracts, mergers and acquisitions, labor law, intellectual property, banking and securitization laws.
The Data Protection Team has also a broad experience in providing for assistance to and in advising companies in relation to investigations carried out by local Foreign Courts or Authorities in order to require information or documents to assess the conducts by managers or executives, as well as in assisting clients in civil litigation and criminal investigation.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Legislative Decree of 30 June 2003 no. 196 'Personal Data Protection Code' (also called the 'Privacy Code'), and subsequent provisions by the Italian Data Protection Authority (the 'Garante');
- Law of 20 May 1970 no. 300 'Workers' Statute'.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, Italian Labor Law expressly provides that the employer must not conduct any inquiry into the job applicant's personal opinions or any other information which is not directly connected with the job applicant's professional skills.

Further, recruiters should not base any recruitment decision on information regarding a job applicant's age, health, disability, gender, sexual inclination, skin color, race, origin, ethnicity, political or philosophical affiliations, religion, or trade union membership, which they obtain by screening social media profiles. This would violate the principle of non-discrimination.

The use and processing of such information must also be carried out in compliance with the general principles set forth by the Italian Privacy Code.

3. Is works council intervention required?

No.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

However, the employee must comply with all employment obligations and must not engage in conduct which may cause damage to the employer by using a social network (art. no. 2104 and 2105 of the Italian Civil Code). Consequently, the employee must (i) be respectful towards their employer, (ii) respect public morality, (iii) not disclose confidential information obtained during the execution of the employment contract, and (iv) not participate in any unfair competition.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer has the right to regulate the use of social media during working hours, e.g. by (i) totally forbidding such use on corporate IT tools or by allowing it for a limited period of time during the day (e.g. only during lunch breaks), or (ii) by imposing some restrictions on the use on personal IT tools (e.g. only for communication purposes in exceptional cases).

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. The employer can stipulate these rules in several types of documents, such as the company work rules, a general IT policy or a specific social media policy. However, in order to be able to check compliance with the rules, the employer must clearly and formally inform the employees of them and the possibility of disciplinary sanctions for violation. The lack of any such document containing the rules may prevent the employer from checking compliance.

6. Is an intervention of the works council required for the implementation of such rules?

No. However, if the employer puts a control mechanism in place to assess compliance with the rules, works council agreement is required because this would constitute indirect remote monitoring of employees' working activities with a technological device.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

However, the employee must comply with all employment obligations and must not engage in conduct which may cause damage to the employer, even by using a social network outside working hours (art. no. 2104 and 2105 of the Italian Civil Code). Consequently, the employee must (i) be respectful towards their employer, (ii) respect public morality, (iii) not disclose confidential information obtained during the execution of the employment contract, and (iv) not participate in any unfair competition.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Only insofar as such rules relate to the employment obligations outlined above. On this basis rules could be set out regarding (i) the disclosure of confidential company information, (ii) insulting or offensive references to the company on social media profiles, (iii) the posting of comments or other content which might harm the reputation or interests of the company, (iv) insulting or offensive comments regarding co-workers, etc.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The employer may not impose any rules regarding employee private use of social media which do not derive directly from their employment obligations. Therefore, any possible restrictions on the social media use of employees should be relevant for and proportionate to these purposes. Furthermore, the employer must tolerate a certain level of criticism, provided that it does not constitute a breach of the employee's obligations.

4. Is an intervention of the works council required for the implementation of such rules?

No.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

There are no specific laws and regulations dealing with the monitoring on the use of social media. However, the following general laws apply:

- Legislative Decree of 30 June 2003 no. 196 'Personal Data Protection Code' (also called the 'Privacy Code'), and subsequent provisions by the Garante;
- Italian Data Protection Authority Provision 'Guidelines applying to the use of e-mails and the Internet in the employment context' issued on 1 March 2007;
- Law of 20 May 1970 no. 300 'Workers' Statute'.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Section 4 of the Workers' Statute sets a general ban on using audiovisual systems or any other remote control equipment for monitoring employee working activity (direct control). Therefore, monitoring whether and how much employees are using social media on corporate IT infrastructure is only possible provided that the monitoring is not aimed at assessing whether the employees are working properly, as a direct control of their working activity. However, it is possible, subject to some conditions, to control employees' behavior for organizational, productivity or safety-related purposes, including compliance with law and internal policies (indirect control). According to recent case law, under certain conditions the employer has been allowed to monitor employees in order to detect illicit behavior or any possible unlawful misconduct ('defensive controls'). 'Indirect' monitoring is subject to the Italian Privacy Code, and the Italian Data Protection Authority Guidelines mentioned above specifically provide for rules regarding the monitoring of employees' use of electronic communication tools. Prolonged, continued and blanket controls are always forbidden.

In particular, monitoring of employee use of electronic communication tools (e.g. access, visits and frequency of social media websites or chat websites from their workstation) must be carried out in compliance with the said Guidelines of the Italian DPA, according to which employers

intending to carry out controls are required to take all appropriate measures to prevent the risk of misuse and minimize the use of employee-related data, giving priority to anonymous controls. The employer must collect and process the data 'in the least intrusive way possible'.

Any monitoring is subject to the following conditions: (i) an internal policy document must be drawn up detailing the appropriate use of IT devices, the relevant controls, and their purpose and extent, which must be made known to employees, (ii) the controls are supported by adequate and legally admissible motivations, and (iii) preference should be given, where possible, to preliminary controls on aggregate data, and individual inquiries should only be undertaken where harmful activities have not been prevented.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes, pursuant to the Working Statute, an agreement with the internal works councils, or where there is no works council the competent Labor Office, is required to implement any 'indirect control'.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. If the employer is aware of any employee misconduct or breach of employment obligations, the employer may start a disciplinary procedure and may be entitled to dismiss the employee.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

There is a risk that the evidence will not be accepted in court. In general, the ban on remote control aimed at directly monitoring working activity and personal behavior in the workplace is likely to render the collected information inadmissible. However, Section 160 of the Privacy Code states that the civil judge in the particular proceedings has competence to assess the admissibility of the evidence based on its relevance.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. However, the following general laws and regulations apply:

- Legislative Decree of 30 June 2003 no. 196 'Personal Data Protection Code' (also called the 'Privacy Code') and subsequent provisions by the Italian Data Protection Authority (the 'Garante');

- Law of 20 May 1970 no. 300 'Workers' Statute';
- Relevant provisions of the Italian Criminal Code (by way of an example, Section 494 on substitution of person;
- Section 615-ter on illicit access to computerized systems.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

This depends on the type of media:

- Private media (e.g. private use of chat applications and posts on Facebook wall of an employee's private account): access to content is generally not permitted, unless the employee has consented by including the employer as a 'friend', and provided that the general principles set forth by the Privacy Code are complied with.

- Public social media (e.g. posts on wall of LinkedIn or Facebook groups which are open to the public): access to the information is allowed because it is publicly available, provided that the general principles set forth by the Privacy Code are complied with.

Italian Law expressly provides that the employer must not conduct any inquiry into an employee's personal opinions. However, a 2010 case decided by the Italian DPA found that monitoring of an employee was legitimate for the purpose of verifying a breach of industrial secrecy. This was because the employee had set their privacy settings on Facebook to allow viewing of their wall by 'friends of friends', opening it to undefined viewers.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

There is a risk that the evidence will not be accepted in court. According to case law, any information obtained by violation of Section 4 of the Workers' Statute may not be used by the employer as evidence in a judicial proceeding against an employee. However, Section 160 of the Privacy Code states that the civil judge in the particular proceedings has competence to assess the admissibility of the evidence based on its relevance.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

No, provided that it does not constitute a violation of Section 4 of the Workers' Statute. If it does, an agreement with the internal Works Council must be reached or, if there is no Works Council, authorization must be sought from the competent Labor Office.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can apply if (i) the employee has breached their employment obligations or their misconduct has caused damage to the employer, (ii) the employer can provide evidence of the breach or misconduct, and (iii) such evidence is not illegitimately obtained.

Latvia

Mr. Andis Burkevics
Sorainen
Kr. Valdemāra iela 21
1010 Riga
www.sorainen.com

Sorainen is a leading regional business law firm with fully integrated offices in Estonia, Latvia, Lithuania and Belarus. Established in 1995, today Sorainen numbers more than 120 lawyers and tax consultants advising international and local organizations on all business law and tax issues involving the Baltic States and Belarus**.**

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Sorainen has the best capacity to advise on regional employment issues that the firm's international clients face. In the light of the rapidly changing business environment, lawyers from the Sorainen Employment Practice regularly assist in managing labor costs, adapting global policies to the regional employment environment, and resolving contractual issues or disputes with personnel.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Section 96, Constitution of the Republic of Latvia;
- Natural Persons' Data Protection Law of March 23, 2000 (although latest amendments are not available in English);
- Labor Law, 20 June 2001 (although latest amendments are not available in English).

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes, provided that this information could be regarded as 'objectively needed' in order to evaluate the job applicant's suitability for the particular work. Apart from that, there are no specific restrictions on the screening of public social media profiles of job applicants.

Additionally, recruiters should not base any recruitment decision on information regarding a job applicant's age, health, disability, gender, sexual inclination, skin color, race, origin, ethnicity, political or philosophical affiliations, religion, trade union membership or similar criteria, which they obtain by screening social media profiles. This would violate the principle of non-discrimination.

The processing of information from social media profiles must also be carried out in accordance with the Natural Persons' Data Protection Law. It might be difficult to find a legal basis for processing information in relation to potential job applicants (i.e. those individuals who themselves have not actually applied for the job).

3. Is works council intervention required?

No.

Under Latvian law there are only two types of employee representatives (but no work councils) having basically the same rights, being (i) trade unions, and (ii) employee-authorized representatives (elected by employees according to a specific procedure described in the Labor Law). No involvement of employee representatives is required for the use of social media in recruitment procedures.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

However, an employer's power to restrict the use of social media during working hours can be derived from the employer's proprietary rights over the IT equipment. Employees are also required to comply with work procedures and orders issued by the employer (Section 28 (2) of the Labor Law), and the definition of 'working time' implies that during working hours the employee must perform their work duties (Section 130 (1) of the Labor Law). These legal provisions prevent employees from using social networking sites during working hours.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media are very broad. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

Yes, these rules should be included either in internal work procedure rules or in each individual employment contract. However, the name of the document (e.g. code, policy) is not crucial as long as it is adopted using the same procedure as internal work procedure rules.

6. Is an intervention of the works council required for the implementation of such rules?

Yes. An employer is obliged to provide employee representatives with relevant information and to consult with them before adopting any decision possibly affecting the interests of employees (Section 11 (1) 2) of the Labor Law).

Further, prior consultations with employee representatives are necessary before adoption of internal work procedure rules (Section 55 (1) of the Labor Law).

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

An employer's right to restrict the use of social media outside working hours or on private IT tools (insofar as such restriction applies to employer-related information which should not be communicated through social media) could be derived from the employer's right to stipulate behavioral regulations for employees (Section 55 (2) 6) of the Labor Law) and from the employee's statutory duty not to disclose the employer's commercial secrets (Section 83 of the Labor Law).

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

An employer is entitled to restrict the use of social media outside working hours or on private IT tools insofar as such restriction applies to employer-related information which should not be communicated through social media. For example, the employer can order the employee to refrain from actions which could harm the employer's reputation, and not to disclose confidential information. In practice the restriction is usually formulated as a general prohibition rather than one specifically focused on social media.

3. Are there any restrictions on the employer's power to impose such rules?

Yes, the employer can only impose rules governing the disclosure of information relevant to the employment relationship.

4. Is an intervention of the works council required for the implementation of such rules?

Yes. An employer is obliged to provide employee representatives with relevant information and to consult with them before adopting any decision possibly affecting the interests of employees (Section 11 (1) 2) of the Labor Law).

Further, prior consultations with employee representatives are necessary before adoption of internal work procedure rules (Section 55 (1) of the Labor Law).

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No, there is no specific legislation regarding monitoring frequency of social media use of employees on corporate IT infrastructure. The following general laws apply:

- Section 96, Constitution of the Republic of Latvia;
- Natural Persons' Data Protection Law of March 23, 2000 (although the latest amendments are not available in English);
- Labor Law, 20 June 2001 (although the latest amendments are not available in English).

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes, only in limited circumstances and provided that such monitoring complies with the Natural Persons' Data Protection Act. The Latvian Data Protection Authority and courts are likely to follow guidance included in the Article 29 Working Party Opinion 8/2001 on the processing of personal data in the employment context and Working document on the surveillance of electronic communications in the workplace (WP 55, 29 May 2002).

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes. An employer is obliged to provide employee representatives with relevant information and to consult with them before adopting any decision possibly affecting the interests of employees (Section 11 (1) 2) of the Labor Law). Further, prior consultation with employee representatives is necessary before adoption of internal work procedure rules (Section 55 (1) of the Labor Law).

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions may be applied if restrictions on frequency of use of social media were included either in the employer's internal work regulations or in the particular employment contract. However, it is unlikely that violation of rules on frequency of use of social media would be regarded as important enough for employment contract termination.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

There is a risk that the evidence which is obtained illegally may not be accepted in court or, if initially accepted, could be declared inadmissible at a later stage.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation regarding monitoring of content of social media. The following general laws apply:

- Section 96, the Constitution of the Republic of Latvia;
- Natural Persons' Data Protection Law of March 23, 2000, although the latest amendments are not available in English);
- Labor Law, 20 June 2001, although the latest amendments are not available in English);
- Criminal Law, 17 June 1998, although the latest amendments are not available in English).

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Monitoring activities would be permitted only in limited cases. Information which is publicly available most likely can be monitored or collected provided that this information can be regarded as objectively related to the existence of an employment relationship and work to be performed. Monitoring of the employee's private chat is unlikely to be justified even if the employee has granted their consent to such monitoring activities.

The Latvian Data Protection Authority and courts are likely to follow guidance included in the Article 29 Working Party Opinion 8/2001 on the processing of personal data in the employment context and Working document on the surveillance of electronic communications in the workplace (WP 55, 29 May 2002).

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

There is a risk that the evidence which is obtained illegally may not be accepted in court or, if initially accepted, could be declared inadmissible at a later stage.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes. An employer is obliged to provide employee representatives with relevant information and to consult with them before adopting any decision possibly affecting the interests of employees (Section 11 (1) 2) of the Labor Law). Further, prior consultations with employee representatives are necessary before adoption of internal work procedure rules (Section 55 (1) of the Labor Law).

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions may be applied, provided that the monitoring has been performed in accordance with the law.

Lithuania

0 UV5 HDXO HUDVNLė and Mr. Rytis Martinkėnas
Sorainen
Jogailos 4
01116 Vilnius
www.sorainen.com

Sorainen is a leading regional business law firm with fully integrated offices in Estonia, Latvia, Lithuania and Belarus. Established in 1995, today Sorainen numbers more than 120 lawyers and tax consultants advising international and local organizations on all business law and tax issues involving the Baltic States and Belarus**.**
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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Labor Code of the Republic of Lithuania (although latest amendments are not available in English);
- Law on Legal Protection of Personal Data of the Republic of Lithuania (although latest amendments are not available in English);
- Law on Works Councils of the Republic of Lithuania (although latest amendments are not available in English).

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, recruiters should not base any recruitment decision on information regarding a job applicant's age, health, disability, gender, sexual inclination, skin color, race, origin, ethnicity, political or philosophical affiliations, religion, or trade union membership, which they obtain by screening social media profiles. This would violate the principle of non-discrimination.

In addition, the processing of information from social media profiles must be performed in accordance with the Data Protection Law. Recruiters may only process information which is necessary for a vacancy.

3. Is works council intervention required?

No, the intervention of the works council is not required. However, works councils have the right to put forward proposals to the employer relating to economic, social and work issues, decisions of the employer relevant to employees, as well as the implementation of laws, other regulatory enactments and collective agreements regulating employment relations.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There is no specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools. However, employers have the right to incorporate such restrictions in the employment contract or in to the company's internal rules.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes, an employer can impose rules on the use of social media during working hours or on corporate IT tools. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

Yes, these rules should be incorporated in the employment contract or into the company's internal rules in order to make them enforceable and subject to disciplinary sanctions.

6. Is an intervention of the works council required for the implementation of such rules?

If there is a collective agreement or an agreement between the works council and the employer, the employer must hold consultations with the works council prior to taking a decision or reaching agreement.

Additionally, works councils have the right to put forward proposals to the employer relating to economic, social and work issues, decisions of the employer relevant to employees, as well as the implementation of laws, other regulatory enactments and collective agreements regulating employment relations. Upon receipt of the opinion of the works council, the employer must consider it and give a reasoned response. The employer may initiate additional discussions or negotiations with the works council.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools.

However, the employer's right to impose rules regarding the use of social media outside working hours and on private IT tools can be derived from the employees' obligation (i) to be respectful towards their employer; (ii) to respect public morality, (iii) to execute their work with due care, (iv) to act in accordance with the instructions and orders of the employer, (v) not to disclose confidential information obtained during the execution of the employment contract, and (vi) not to participate in any unfair competition.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

In general, an employer cannot impose rules regarding employee use of social media in their private sphere. However, the obligation to be respectful towards their employer and not to disclose employer's commercial and confidential information obtained during the execution of the employment contract will apply even outside working hours.

3. Are there any restrictions on the employer's power to impose such rules?

It would be rather difficult for an employer to impose mandatory rules regarding the use of social media of its employees in their private sphere.

4. Is an intervention of the works council required for the implementation of such rules?

No, because an employer cannot in general impose rules regarding employee use of social media in their private sphere.

III. Monitoring of the Use of Social Media

C. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No, there is no specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. Such monitoring should be a balance between the employer and employee interests and should not violate the personal privacy rights of an employee.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

If there is a collective agreement or agreements between the works council and the employer, the employer must hold consultations with the works council prior to taking a decision or reaching agreement on its intended decision with the works council.

Additionally, works councils have the right to put forward proposals to the employer relating to economic, social and work issues, decisions of the employer relevant to employees, as well as the implementation of laws, other regulatory enactments and collective agreements regulating employment relations.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions may be applied if they are determined in the company's work rules or in the employment contract.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

Generally, evidence that is obtained unlawfully cannot be used in a court. However, the court has a right to decide to accept such evidence according to the concrete situation.

D. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation regarding monitoring the content of social media.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

This depends of the type of media:

- Private media (e.g. private use of chat applications): monitoring of content is generally not permitted (in case of clear indications of misuse, monitoring may be permissible as an exception; to be assessed on a case-by-case basis).
- Professional media (e.g. corporate chat program): monitoring of content requires consent.
- Posts on public social media (e.g. posts on wall of LinkedIn or Facebook groups which are open to the public): information can be monitored by employer because it is publicly available.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

Generally, evidence that is obtained unlawfully cannot be used in court. However, the court has a right to decide to accept such evidence according to the concrete situation.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

If there is a collective agreement or agreements between the works council and the employer, the employer must hold consultations with the works council prior to taking a decision or reaching agreement on its intended decision with the works council.

Additionally, works councils have the right to put forward proposals to the employer relating to economic, social and work issues, decisions of the employer relevant to employees, as well as the implementation of laws, other regulatory enactments and collective agreements regulating employment relations.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions may be applied if they are determined in the company's work rules or in the employment contract.

Luxembourg

Mr. Gary Cywie and Ms. Agnes Mongin-Weiss
MNKS
Vertigo Polaris Building
2-4 rue Eugène Ruppert
2453 Luxembourg
www.mnks.com

MNKS is a leading Luxembourg full service business law firm offering its clients an extensive range of legal services, not only in traditional practices such as corporate (corporate structuring, private equity, M&A), banking and finance, investment funds and tax law, but also in practices such as employment, litigation/dispute resolution and IP/ICT in which MNKS has top-tier expertise.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article L.251-1 and following, the Labor Code, prohibiting discrimination in the workplace, notably during recruitment;
- Data Protection Act of 2 August 2002;
- Article L-261-1, the Labor Code, concerning surveillance in the workplace;
- Article 8, European Convention on Human Rights, 1950, on the protection of privacy;
- Article 14, European Convention on Human Rights, 1950, prohibiting discrimination.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants. However, the principles in the above relevant laws must be respected.

Any processing (including screening and use of this information) must be performed in compliance with the Data Protection Act and the recruiters may only process information which is strictly necessary for a vacancy. Notably, the employer must respect the principle of non-discrimination and should in principle not process sensitive data (e.g. health, disability, gender, sexual inclination, skin color, race, origin, ethnicity, political or philosophical affiliations, religion, or trade union membership).

3. Is works council intervention required?

Yes, for companies employing more than 150 employees. According to Article L.423-1 of the Labor Code, the joint works council (in place when the company employs at least 150 employees) has a power of decision as regards the establishment or modification of the general criteria concerning the selection of candidates.

Companies with at least 15 employees must have a staff delegation. However, this staff delegation has no power of decision as regards the establishment or modification of the general criteria regarding the selection of candidates.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There is no specific legislation concerning this issue.

The employer's right to restrict employee social media use during working hours or on corporate IT tools is derived from the employer's (i) property rights of the IT infrastructure that it provides to its employees to perform their work, (ii) authority over its employees, and (iii) liability for damages resulting from the acts of its employees during the performance of their employment contract.

Furthermore, by virtue of their obligation of loyalty, derived from their employment contract, employees must devote all their working time to the tasks assigned by their employer. This principle authorizes the employer to restrict employee use of social media during working hours or on corporate IT tools.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes, in principle, provided that the employees are properly informed of this prohibition.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

The employer's right to control the use of social media is derived from the employee's duty to perform their work and the employer's authority over employees, as stated in the Luxembourg Labor Code. For example, the use of social media can be restricted to a determined period of time, or authorized only outside of the working hours.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. The employer can stipulate these rules in several types of documents, such as the company work rules, a general ICT-policy or a specific social media policy. However, if the policy provides for disciplinary sanctions (such as warnings, suspension, etc.), they must be included in the company work rules to be enforceable.

6. Is an intervention of the works council required for the implementation of such rules?

Not in principle. However, if the policy provides for disciplinary sanctions (such as warnings, suspension, etc.), they must be included in the company work rules to be enforceable. In that case, the joint works council has a power of decision concerning the implementation or modification of the company's internal rules. New rules regarding the use of social media by employees in their private sphere must be incorporated into the company internal rules and therefore will require the prior consent of the works council.

In the absence of a works council, the staff delegation is competent to issue opinions regarding the establishment or modification of the company internal rules, but has no power of decision.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No specific legislation exists on the subject.

The employer's right to impose rules regarding the use of social media outside working hours and on private IT tools can however be derived from the employee's obligation (i) to be loyal towards their employer, (ii) to respect public morality, (iii) to execute their work with due care, (iv) to act in accordance with the instructions and orders of the employer, (v) not to disclose confidential information obtained during the execution of the employment contract, and (vi) not to participate in any unfair competition

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes. By virtue of the above rules, an employer can determine rules which employees must respect when using social media if there is a possible impact on the company's business or reputation. These may be rules regarding, (i) the disclosure of confidential company information,

(ii) references to the company on social media profiles, and (iii) the posting of content which might harm the reputation or interests of the company or co-workers.

3. Are there any restrictions on the employer's power to impose such rules?

The restrictions on the use of social media imposed by the employer outside of the working hours must be relevant and proportionate to the employer's interests.

4. Is an intervention of the works council required for the implementation of such rules?

Not in principle. However, if the policy provides for disciplinary sanctions (such as warnings, suspension, etc.), they must be included in the company work rules to be enforceable. In that case, the joint works council has a power of decision concerning the implementation and the modification of the company's internal rules. New rules regarding the use of social media by employees in their private sphere must be incorporated into the company internal rules and therefore, will require the prior consent of the works council.

In the absence of a works council, the staff delegation is competent to issue opinions regarding the establishment or modification of the company internal rules, but has no power of decision.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

The following legislation applies to the monitoring of social media:

- Article L.261-1, Labor Code, regarding conditions for monitoring in the workplace;
- Article 11, Data Protection Act 2002, regarding surveillance in the workplace;
- Article 14, Data Protection Act 2002, providing for an authorization of the National Commission for the Protection of Data prior to processing data for the surveillance in the workplace available.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes, monitoring of employee use of electronic communication tools is only permitted under certain conditions: (i) only for specific purposes provided by Article L.261-1 of the Labor Code,

(e.g. to ensure the security and the health of employees, the protection of the employer's property, control of the production process, or the organization of the mobile working schedule), (ii) prior notice has been given to employees (e.g. via the contemplated policy and a specific clause in the employment agreement) indicating the purpose of the processing and of their related rights, and (iii) the Luxembourg National Commission for Data Protection ('CNPD') has given its prior authorization.

In principle, the surveillance of specific employees at the workplace may not be systematic. The intended surveillance must be envisaged gradually, applying the principle of proportionality.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes. Before implementing a technology which allows the employer to monitor the employee's electronic communications and internet use, the works council, staff delegation, or the Labor Inspection must be informed (Article L.261-1 § 2 of the Labor Code). In addition, according to Article L.423-1 of the Labor Code, the joint works council has the power of decision regarding technical facilities aimed at controlling the behavior and performance of the employee.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can apply if they are determined in the company work rules and depending on the factual circumstances (e.g. the frequency of the social media use, duration of the social media use during working hours, etc.).

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

There is a risk that the evidence will not be accepted in court, especially before the employment court.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No specific legislation concerns social media. However, the monitoring of content of social media can be understood as data processing for surveillance reasons in the workplace and therefore falls under the provisions of Article 11 of the Data Protection Act of 2002 availa. The following general laws may also apply:

- Article 8, European Convention on Human Rights, 1950;

- Article 261-1, Labor Code;
- Privacy Act, 1982.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Yes, but only insofar as it is business communication or files being monitored. Private information cannot be accessed. Any monitoring of employee use of electronic communication tools is only permitted under certain conditions: (i) only for specific purposes provided by Article L.261-1 of the Labor Code, (e.g. to ensure the security and the health of employees, the protection of the employer's property, control of the production process, or the organization of the mobile working schedule), (ii) prior notice has been given to employees (e.g. via the contemplated policy and a specific clause in the employment agreement) indicating the purpose of the processing and of their related rights, and (iii) the Luxembourg National Commission for Data Protection ('CNPD') has given its prior authorization.

In principle, the surveillance of specific employees at the workplace may not be systematic. The intended surveillance must be envisaged gradually, applying the principle of proportionality.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

There is a risk that the evidence will not be accepted in court, especially before the employment court.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes. Before implementing a technology which allows the employer to monitor the employee's electronic communications and internet use, the works council, staff delegation, or the Labor Inspection must be informed (Article L.261-1 § 2 of the Labor Code). In addition, according to Article L.423-1 of the Labor Code, the joint works council has the power of decision regarding technical facilities aimed at controlling the behavior and performance of the employee.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. During the working relationship, employees have an obligation of loyalty and confidentiality towards the employer, which survives after the end of the employment contract. Disciplinary sanctions can apply if they are determined in the company work rules and depending on the factual circumstances (e.g. the frequency of the social media use, duration of the social media use during working hours, etc.).

Malta

Andrew J Zammit B.A., LL.M. (Lond.), LL.D
Doran Magri Demajo B.A., LL.D
Ann Bugeja LL.M. (IMLI), LL.D
Matthew Galea Debono LL.B (Melit.) Dip. N.P.
CSB Advocates
The Penthouse, Tower Business Centre
Tower Street, Swatar BKR 4013
www.csb-advocates.com

CSB Advocates is a leading law firm in Malta, which specializes in labor and employment, corporate law and commercial law, mergers and acquisitions, finance, financial services, hedge fund registration, e-commerce, immovable property, shipping, yachting and aviation. Our client-base is largely composed of foreign-owned Maltese companies and financial institutions.
We are committed to providing our clients with smart and effective legal solutions, based on detailed legal analysis and carefully considered courses of action, delivering complete peace of mind - every time. This commitment, combined with pragmatism, efficiency and pro-active thinking, has earned our firm the solid reputation that our clients have come to rely on for their legal requirements in Malta.
CSB Advocates is a member of the Employment Law Alliance, Malta Chamber of Advocates, the International Bar Association (IBA), the Institute of Financial Services Practitioners (IFSP), FinanceMalta, the International Tax Practitioners Association (ITPA), International Fiscal Association (IFA), Malta Maritime Law Association (MMLA), and International Masters of Gaming Law (IMGL).

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws relating to the fundamental human right to privacy and family life are relevant:

- Article 8, European Convention on Human Rights, 1950;
- Chapter 440, Laws of Malta ('Data Protection Act').

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. Once information has been voluntarily put in the public domain, the Data Protection Act does not prohibit its processing, even if the data is normally considered sensitive. Consequently, an employer could use information from such sources for the purposes of recruitment procedures. Any such processing must still be undertaken in accordance with the Data Protection Act, however the legal basis for the processing is established.

It is currently common practice for employers and recruitment agencies to use certain social networks such as "LinkedIn" in the process of searching for new employees. Prospective employers should not, however, base any decision on information obtained by screening social media which would constitute unlawful discrimination.

3. Is works council intervention required?

Work councils are more commonly referred to in Malta as trade unions and are regulated under Maltese law. There is no rule or law requiring a trade union to be involved in the recruitment process. Trade unions generally act when there is an issue of perceived unfairness towards workers already employed, for example regarding working conditions.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There is no specific legislation regarding this issue. An employer nevertheless maintains the right to regulate the use of infrastructure in the workplace, based on its proprietary rights over the tools.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes, there is nothing prohibiting an employer from imposing rules regarding the use of social media during working hours. The employer can for example determine that employees are allowed to use social media for a certain period of time during the day, such as during lunch breaks or after working hours.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. The restrictions could be included in any form of guidelines ranging from the contract of employment itself to any office manual/I.T. policy for the workplace. The most important consideration is that the rules should be as clear as possible, including stating any disciplinary measures that may be taken in case of breach.

6. Is an intervention of the works council required for the implementation of such rules?

No. A trade union may choose to intervene if it is believed necessary by advocating any particular improvement of conditions in the workplace.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

There is no legislation regulating this matter. However, the employer has the right to protect its good name at law, and other interest such as confidentiality. As a matter of practice, an employee's duty of confidentiality is provided for in the contract of employment.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes, an employer can determine certain rules which employees must respect when using social media in their private time or on private IT-tools, such as rules regarding (i) the disclosure of confidential company information, (ii) references to the company on social media profiles, (iii) the posting of comments or other content which might harm the reputation or interests of the company, and (iv) the posting of comments regarding co-workers. These rules would normally emanate from provisions in the contract of employment.

3. Are there any restrictions on the employer's power to impose such rules?

There are no legal restrictions however as a matter of practice, restrictions are expected to be relevant and proportionate to the employer's interests. Insofar as the restrictions are relevant to protecting the employer's good name, they could be permissible. The scope of the right to impose rules regarding criticism of other employees is, however, less clear.

4. Is an intervention of the works council required for the implementation of such rules?

A trade union would intervene if it deems that the measures or rules imposed by the employer are in any way infringing upon employee rights. However, trade unions generally do not address or get involved in matters related to the use of social media.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense. However, the employer's right to regulate the use of IT infrastructure is derived from its property rights over the tools.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. Such monitoring is limited by the employee's right to privacy which must be respected. Further, it is preferable and general practice to notify the employee that their use of employer property may be monitored. The importance of the individual's right to privacy enshrined in the Constitution of Malta should be kept in mind as it may be given priority over employer rights.

Employees may be notified by email of any monitoring policy and it should be easily accessible to them. The policy should be easy to understand and best practice is to have a contact person to answer any employee questions about the policy. Written consent is not required but is a useful measure to evidence the notification of employees. The consent could be obtained by including the policy as an annex to the employment contract signed by the employee.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

No.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, the employer may impose sanctions which form an integral part of the employment contract. Such measures may range from blocking of particular sites on the employee's terminal, to dismissal of the employee. In taking disciplinary action, the employer will invariably consider the impact which access to social media is having on the employee's performance and on the employer's interests (if relevant).

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

The judge presiding over such a case retains a level of discretion as to whether the evidence will be accepted or not, taking into account the right to fair trial. If evidence is deemed to have been obtained through clandestine or illegal means, it would be expected that a judge will refuse such evidence. Furthermore, if the evidence is shown to have been obtained in an illegal manner, the employer may expose itself to criminal proceedings.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

There is no specific legislation in Malta pertaining to the monitoring of content placed by individuals on social networks. However, the following general laws apply, which relate to the right to privacy:

- Article 8, European Convention on Human Rights, 1950;
- Article 38, Constitution of Malta;
- The Data Protection Act.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Anything released into the public domain, such as Twitter and Facebook, is considered to be in the public domain and is therefore available to anybody to see unless the individual has excluded them through security settings. If the use of social media has given rise to a criminal or civil legal action, it can be acquired as evidence. In a criminal context this would not be an issue as the Data Protection Act does not protect personal data required by police authorities in the context of investigating, preventing, detecting and prosecuting criminal offences. In a civil context the principle is not as clear. It can be presumed that where a civil action is being made against the employee by his employer, the employer may file an application in the civil court to have the information retrieved by court order.

Where the electronic communications employed involves the use of software belonging to the employer, such as custom made chat applications, these would fall within the realm of using an asset belonging to the employer. Having said this, the employee's right to privacy must be continuously be respected.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

The judge presiding over such a case retains a level of discretion as to whether the evidence will be accepted or not, taking into account the right to fair trial. If evidence is deemed to have been obtained through clandestine or illegal means, it would be expected that a judge will refuse such evidence. Furthermore, if the evidence is shown to have been obtained in an illegal manner, the employer may expose itself to criminal proceedings.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

No, a trade union is very unlikely to act upon policies regarding the monitoring of social media by an employer.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, it is possible for the employer to impose sanctions for a violation of the rules regarding social media. The employer may give the employee a written warning if it is deemed that using social media is negatively affecting the performance of the employee or in any way harming the integrity or goodwill of the employer. This could conceivably go beyond working hours where the employee has posted content that violates the legitimate expectations or contractual rights of the employer, for example a status update defaming the employer. If the employee disregards the written warning this may then lead to dismissal on the grounds of good and sufficient cause. The Industrial Tribunal has indicated that 3 prior disciplinary warnings could lead to dismissal for good and sufficient cause.

The Netherlands

Ms. Nicole Wolters Ruckert & Dr. Hester de Vries
Kennedy Van der Laan
Haarlemmerweg 333
1051 LH Amsterdam
www.kvdl.nl

Kennedy Van der Laan is an independent law firm based in Amsterdam, The Netherlands. With nearly 100 attorneys and civil law notaries, it is one of the top 20 independent law firms in the country. Kennedy Van der Laan represents great innovative business clients ranging from large national and international companies to beginning entrepreneurs, as well as government bodies at the national and local level. Kennedy Van der Laan became the winner of the Chambers Client Service Award 2012 for the Netherlands. The firm is home to the leading personal data protection and privacy practice in The Netherlands.

Hester de Vries heads the Personal Data Protection and Privacy team. Hester advises both international and Dutch companies on effective business implementation of EU and Dutch privacy regulations and Dutch government bodies, on strategic implementation of the law. She frequently lectures on personal data protection and is a member of the editorial board of a number of publications on privacy and data protection, such as the magazine Privacy & Informatie and Tekst & Commentaar Telecommunicatie- en Privacyrecht (Kluwer).

Nicole Wolters Ruckert is senior associate, specialized in privacy and personal data protection. She advises various international businesses for example, on the implementation of centralized personnel systems, on e-mail and internet monitoring, whistle blowing and internal complaint mechanisms, and on the international transfer of personal data. Nicole also focuses on advising on e-marketing and behavioral advertising. Nicole is a member of the editorial board of Privacy & Informatie and Juridisch Up-to-date.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 8, European Convention on Human Rights, 1950;
- Article 10 and 13, Dutch Constitution;
- Personal Data Protection Act of July 6, 2000 ('Data Protection Act');
- Civil Code, Book 7 title 10, of January 1, 1992 ('Civil Code'), especially Article 7:611 of the Dutch Civil Code.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes.

The extent to which screening of social media profiles of job applicants which are publicly available is allowed under Dutch privacy laws will depend on how the processing is performed and how the search results are handled. When an employer uses social media to screen potential employees, generally personal data is processed and should therefore be handled in accordance with the Data Protection Act.

In each case, it is the employer's obligation to establish their legitimate interest in processing the data. The circle of people with access to the data should be limited and the data may not be retained longer than necessary. One option may be a warning in the job description, stating that an internet search is part of the application procedure and will only take place with the prior consent of the candidate. It may be preferable to obtain the applicant's consent to the screening.

In the Netherlands, the recruitment procedure is in most cases also subject to a self-regulatory code, the NVP- recruitment code. The NVP is the Dutch Association for Personnel Management and Organization Development. Pursuant to Article 5.1 of this code, the applicant should be asked for permission if information is obtained from third parties or other resources, unless permission is not required by a statutory or generally binding regulation. Also, the applicant should be informed about the information retrieved, the source of the information, and the information should be discussed with the applicant. In the NVP-code attention is also drawn to the fact that information available from open sources like the internet and information obtained from third parties is not always reliable.

3. Is works council intervention required?

Yes, the works council has an important role in safeguarding privacy rights in a company. Under Article 27 of the Works Councils Act ('WCA'), for decisions that relate to (i) the employment policy (including recruitment, dismissal and promotion), (ii) the protection or processing of personal data belonging to employees or (iii) monitoring of the absence, performance or conduct of employees, consent of the works council is required. A policy relating to the screening of social media in the context of recruitment would require the consent of the works council as it may be considered as a policy relating to recruitment.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws in that sense. However, the general laws mentioned above apply.

Relevant principles of labor law include (i) the right to privacy as guaranteed by the principle of 'good employer and employee' (Article 7:61, Civil Code), (ii) the relationship of authority between employer and employee (Article 7:610 and 7:660 BW), where the employee is the economically weaker party, and should be protected against the employer, and (iii) the employer's right to give instructions to the employee (Article 7:660, Civil Code), restricting their freedom of action and expression. The authority relationship gives the employer the right to set rules regarding the use of social media and monitor compliance with these rules.

Guidelines issued by the CBP (Dutch Data Protection Authority) concerning the interception of telephone calls and a report on rules for monitoring employee e-mail and internet usage can also provide guidance on this issue.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes, but it is advised by the CBP to execute this blockage by software applications.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media are broad. The CBP advises that the rules should be clear and unambiguous about permitted and prohibited uses.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

Yes, to be effective the rules must be incorporated into the individual labor agreement. They may also be listed in the company work manual and/or be placed on the intranet but this on its own would not be sufficient to render the rules enforceable and thus to put disciplinary sanctions in place. The CBP advises that the relevant rules must be published in a manner accessible to the employee.

6. Is an intervention of the works council required for the implementation of such rules?

Yes, consent of the works council is required to implement such rules based on Article 27 WCA.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

There are no specific laws in that sense. However, the general laws mentioned above apply.

The authority relationship, derived from title 10 of Book 7 and more specifically Article 7:660, Civil Code gives the employer the right to determine the requirements concerning the performance of the work as well as those directed to *promote good order in the company*, and therefore establish rules with regard to the use of social media, including outside working hours as long as this would be reasonable to promote the good order in the company. The employer's right to restrict the use of social media outside working hours on private IT tools could apply under the same conditions or could alternatively be derived from the 'good employee' standard included in Article 7:611 Civil Code.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Based on the legislation mentioned above, an employer may impose rules regarding the use of social media by its employees in their private sphere as long as this would be reasonable to

promote good order in the company (Article 7:660 Civil Code) or to clarify the 'good employee' standard included in Article 7:611 Civil Code.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. Under the 'good employer' standard of Article 7:611 Civil Code, the employer has to respect freedom of expression and the right to privacy of the employees. Furthermore, the processing of personal data is subject to the Data Protection Act. In order to balance the interests of the employer and employee, it is important to distinguish statements made in the public domain and statements in a private domain. The employee may appeal to the idea of having a reasonable expectation of privacy concerning his statements on a private profile when there is a careful selection of the participants.

It is important to incorporate the rules with regard to the use of social media outside working hours on private IT tools in a document, such as a company work manual and/or placed on the intranet. The rules must be incorporated into the individual labor agreement to make them enforceable.

4. Is an intervention of the works council required for the implementation of such rules?

Yes. If an employer decides to implement such rules, approval of the works council is required based on Article 27 WCA.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No. As stated above, the authority relationship in title 10 of Book 7, Civil Code, gives the employer the right to give instructions to the employee, and therefore establish rules regarding the use of social media and monitor compliance with these rules. Personal data should be processed in compliance with the requirements set out in the Data Protection Act.

Guidelines issued by the CBP (Dutch Data Protection Authority) concerning the interception of telephone calls and a report on rules for monitoring employee e-mail and internet usage also provide guidance on this issue, for example (i) the employees must be clearly informed about the monitoring, (ii) personal data resulting from the monitoring and included in the personnel file must be discussed with the employee concerned, including the opportunity to react, before they

are filed, (iii) the control should be limited to pre-formulated purposes, and (iv) the control mechanisms should be tailor-made to the purposes.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. Restrictions include that monitoring should meet the requirements of the Data Protection Act. In most cases, the privacy of the employee prevails over the employer's interest. However, an employer can have a legitimate interest when monitoring, such as the prevention of abuse of corporate IT infrastructure. In practice, monitoring must be minimized and is permissible only if strictly necessary. Monitoring should not take place at an individual level, and only when misconduct is identified, is an employer allowed to find out who the employee responsible is. Unnecessary monitoring of other employees should be avoided.

Although the system administrator or IT department have significant liberty to undertake monitoring activities, Article 273d of the Dutch Penal Code prohibits administrators of a network from intentionally and unlawfully learning about confidential communication of users.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes. If an employer decides to implement such rules, approval of the works council is required based on Article 27 WCA.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can be imposed when monitoring reveals abuse of the rules regarding the use of social media. Dismissal is an exceptional measure. The sanction should be necessary and appropriate to the situation. A judge will mainly look at the damage caused and whether the work of the employee concerned has suffered as a result of the abuse. Appropriate sanctions may include: a formal, written warning, transfer, or forfeiting periodic pay increases.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

There is a risk that the evidence will not be accepted in court, however the fact that evidence was obtained unlawfully does not necessarily mean that a court will reject its admission into evidence, as the court is empowered to admit the evidence when it is sufficiently reliable. See judgment of the Supreme Court C99/318HR.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. However, the following laws apply:
- Article 8, European Convention on Human Rights, 1950;
- Articles 10 and 13, the Dutch Constitution;
- Personal Data Protection Act of July 6, 2000 ('Data Protection Act'), based on Directive 95/46/EC;
- Civil Code, Book 7 title 10, of January 1, 1992 ('Civil Code');
- Penal Code of March 3, 1881.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

This depends on the type of media. Regarding private chat sessions, the monitoring should be in accordance with Article 8 ECHR and is, apart from exemptions, not permitted. The employee also has a reasonable expectation of privacy concerning their statements on social media when there is a careful selection of the participants. However, the employer may monitor compliance with a social media policy, thus the reasonable rules set to promote the good order in the company and to clarify the 'good employee' standard of Article 7:611 Civil Code.

Any processing must be carried out in accordance with the Data Protection Act. Pursuant to the CBP guidelines and taking into consideration the requirement of the Data Protection Act, the continuous monitoring of content placed by employees on social media will be considered unlawful in most cases.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

There is a risk that the evidence will not be accepted in court. The fact that evidence was obtained unlawfully does not necessarily mean that a court will reject its admission into evidence, as the court is empowered to admit the evidence when it is sufficiently reliable. See judgment of the Supreme Court C99/318HR. In 1987 the Supreme Court ruled (Hoge Raad 16 juni 1987, NJ 1988, 850) that to justify the exclusion of evidence there must be 'a legally impermissible invasion of privacy'. In other words, a violation in itself is not enough, there must be a very serious infringement. This ruling was confirmed by the District Court of Amsterdam in 2010, Case Number 1169389 EA COMM 10-1237.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes. If an employer decides to implement such rules, approval of the works council is required based on Article 27 WCA.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can be imposed when monitoring reveals abuse of the rules regarding the use of social media. Dismissal is an exceptional measure. The sanction should be necessary and appropriate to the situation. A judge will mainly look at the damage caused and whether the work of the employee concerned has suffered as a result of the abuse. Appropriate sanctions may include: a formal, written warning, transfer, or forfeiting periodic pay increases.

Norway

Jens Kristian Johansen & Øystein Flagstad
Advokatfirmaet Grette DA
Filipstad Brygge 2
P.O. Box 1397 Vika
0114 Oslo
www.grette.no

Grette is a full range commercial law firm with some important areas of specialization. The firm's long traditions and a proactive attitude, combined with an uncompromising commitment to providing services of the highest quality, form the basis of the prompt and progressive assistance that Grette offers business and industry. Grette employs knowledgeable, insightful and committed lawyers to help you with your problems and to reach your goals.

Grette's Employment Law Group provides clients with strategic advisory services and representation in litigation. The key areas include national and international transactions, employment and immigration, downsizing, pensions, employment of leading personnel and incentive schemes, non-compete clauses, as well as protection against discrimination and collective labor law.

Grette has extensive experience in working with technology companies. Our lawyers have wide knowledge of internet-related matters such as e-commerce, digital signatures, data protection, data storage systems, digital content services, domain names and software copyright. Other areas of expertise include electronic communications, download problems and camera surveillance.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- The Working Environment Act;
- The Gender Equality Act;
- The Anti-discrimination Act;
- The Personal Data Act;
- Act on prohibition of discrimination on the basis of reduced functional ability.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. However, according to the Working Environment Act it is forbidden to collect information on, among other things, health, pregnancy, sexual orientation or religious factors in the hiring process. Consequently, such information cannot be obtained via social media.

Apart from this, the employer can use all publicly available information. However, businesses should be cautious about using information obtained from such sources, at least without doing research on the legitimacy of the information.

It is forbidden to base any recruitment decision on information regarding a job applicant's age, health, disability, gender, sexual inclination, skin color, race, origin, ethnicity, political affiliations, religion, or trade union membership, which is obtained by screening social media profiles. This would violate provisions of the Working Environment Act, the Gender Equality Act, the Anti-discrimination Act, the Act on prohibition of discrimination on the basis of reduced functional ability and the principle of non-discrimination. Furthermore, sending 'friend requests' with the sole purpose of gaining access to more information on the private social media profile of the concerned individuals might be deemed an unfair practice. However, this has not yet been confirmed by case law.

The processing of information from social media profiles (e.g. downloading the information to create a database of potential candidates for a vacancy) is restricted. Such processing must be performed in accordance with the Personal Data Act, and recruiters may only process information which is strictly necessary for a vacancy.

3. Is works council intervention required?

There is no legislation related to works councils in Norway. However, the Working Environment Act requires companies with more than 50 employees to have a working environment committee,

which is obliged to monitor the working environment of the company. Working environment committees must also be formed in undertakings with between 20 and 50 employees when so required by any of the parties to the undertaking.

Further, companies with more than 10 employees are obliged to have a 'safety representative'. The safety representative must safeguard the interests of employees in matters relating to the working environment. The safety representative must ensure that the undertaking is arranged and maintained, and that the work is performed in such a manner that the safety, health and welfare of the employees are safeguarded in accordance with the provisions of the Working Environment Act. At undertakings with less than ten employees, the parties may agree in writing upon a different arrangement or agree that the undertaking shall not have a safety representative.

Plans that can be significant to the working environment should be dealt with in the working environment committee. Therefore, the employer should inform the committee upon the implementation of any screening policy. As the safety representative's duties are mainly related to health and safety of the employees, the employer is not obliged to discuss any screening policy with the representative upon implementation.

According to The Working Environment Act the employer is also obliged to inform and discuss matters affecting the employees with the employee representatives on a regular basis. The employer should inform the employee representatives of the planned measures with respect to management of personnel, such as measures relating to recruitment and selection. Implementing a new policy for the screening of employees constitutes such a measure. Therefore, the proposed policy must be given to the employee representatives prior to the execution of the measures in order to provide the opportunity to formulate suggestions, advice and objections.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There is no specific legislation in that sense.

However, the employer's right to restrict employee social media use during working hours or on corporate IT tools, follows from the employer's management prerogative under non-statutory law. With this prerogative, the employer is free to draw up guidelines for the use of social media during working hours and on corporate IT tools.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media are very broad. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. The employer can stipulate these rules in several types of documents, such as the company work rules, a general ICT-policy or a specific social media policy. Employees must be made sufficiently aware of the rules and the consequences of violations.

6. Is an intervention of the works council required for the implementation of such rules?

There is no legislation related to works councils in Norway. However, if the company has more than 50 employees the working environment committee should be informed of plans significant to the working environment, including rules on social media use.

Nevertheless, in the process of developing guidelines it is customary to involve the employee's representatives before they are determined. This relates to any company, regardless of the number of employees.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter. However, the general laws mentioned above are relevant.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

The employer can restrict the use of social media outside working hours or on private tools to some extent, however it is not clear what is a permissible level of control over employee private time and personal property, with freedom of expression in mind. It is therefore also unclear to what extent the employer can sanction violations of guidelines concerning use of social media outside working hours or on private IT tools.

However, an employer can determine certain rules which employees must respect when using social media in their private time or on private IT tools, such as rules regarding (i) speaking on the employer's behalf, (ii) the disclosure of confidential company information, (iii) the posting of comments or other content which might harm the reputation or interests of the company or clients, (iv) the posting of comments regarding co-workers; etc.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The power of an employer to impose rules regarding the private use of social media by its employees is limited. The restrictions on the social media use by the employees should be relevant for and proportionate to the employer's interests. Furthermore, the employer must tolerate a certain level of criticism from its employees.

4. Is an intervention of the works council required for the implementation of such rules?

There is no legislation related to works councils in Norway. However, if the company has more than 50 employees the working environment committee should be informed of plans significant to the working environment, including rules on social media use.

Nevertheless, in the process of developing guidelines, it is customary to involve the employee's representatives before the final guidelines are determined.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No. In principle the question of monitoring of social media use must be assessed under the provisions of the Working Environment Act and the Personal Data Act.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. The Working Environment Act allows the employer to implement control measures when it is objectively justified by business conditions and it does not involve an undue burden on the employee. This means that the employer's control measures must be proportionate to the problems the employer wants to solve. If these conditions of section 9-1 of the Working Environment Act are fulfilled, the employer may monitor whether and how much employees are using social media on corporate IT infrastructure. The provision does not, however, give grounds to go into the employee's profile.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

There is no legislation related to works councils in Norway. However, the employer is obliged to discuss as early as possible the need for, design of, implementation and major changes to control measures in the undertaking with the employees' elected representatives. Before implementation, the employees must be informed of the purpose of the control measure, consequences, how the control will be implemented and its duration. The control measure must be evaluated regularly, in cooperation with the employees' elected representatives.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, disciplinary sanctions may be applied. Consequences of breaches should, however, be discussed with employee representatives, and employees should be made aware that violations may have consequences.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

There is a risk that such evidence will not be accepted in court. In accordance with section 22-7 of the Civil Procedures Act, the court may refuse recognition of evidence obtained in an improper manner. However, case law reveals that unless a severe breach of employee rights has occurred, the evidence will generally be accepted.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. However, the Personal Data Act and Article 8 of the European Convention on Human Rights, 1950 may be applicable.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

This depends of the type of media:

- Private media (e.g. private use of chat applications): monitoring of content is not permitted.

- Posts on public social media (e.g. posts on wall of LinkedIn or Facebook groups which are open to the public): information can be monitored by the employer because it is publicly available.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

There is a risk that such evidence will not be accepted in court. In accordance with section 22-7 of the Civil Procedures Act, the court may refuse recognition of evidence obtained in an improper manner. However, case law reveals that unless a severe breach of employee rights has occurred, the evidence will generally be accepted.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

There is no legislation related to works councils in Norway. However, the employer is obliged to discuss as early as possible the need for, design of, implementation and major changes to control measures in the undertaking with the employees' elected representatives. Before implementation,

the employees must be informed of the purpose of the control measure, consequences, how the control will be implemented and its duration. The control measure must be evaluated regularly, in cooperation with the employees' elected representatives.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, disciplinary sanctions can apply. Consequences of breaches should, however, be discussed with employee representatives, and employees should be made aware that violations may have consequences.

Poland

Ms. Monika Tomczak-Górlikowska
Miller, Canfield, W.Babicki, A.Chełchowski i Wspólnicy Sp.K.
ul. Batorego 28-32
81-366 Gdynia
www.millercanfield.pl

Miller Canfield in Poland was incorporated in 1992 when it established its first office in Gdansk. Currently, the firm has offices in Warsaw, Gdynia and Wrocław. The firm provides legal services to business entities conducting economic activity in Poland, foreign and Polish companies and Polish and European public institutions. The firm provides legal advisory services in all aspects of business and public law, including an important practice in Personal Data Protection and Privacy issues.

Our Personal Data Protection practice was established several years ago, coinciding with the adoption of the Polish Personal Data Protection Act back in 1997. Since then, we continuously provide legal advice to a large group of corporate clients with respect to all aspects of personal data processing, consumer data and cross-border issues. We have drafted and reviewed all types of data privacy documents, data privacy clauses as well as motions and notifications to the Polish Data Protection Authority. We have assisted our clients in relation to a wide range of issues related to processing of employee data. Moreover, we have analyzed data protection issues in the context of sectors subject to additional legal requirements such as the banking, telecommunication and pharmaceutical sector. Our Data Protection practice group has also conducted due diligence projects regarding compliance with Polish Data Protection Laws.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

No, there are no specific legal provisions that govern the use of social media in the employment context. However, the following general legal acts apply:

- Article 8, European Convention on Human Rights, 1950;
- The Polish Constitution;
- The Labor Code of December 23, 1997;
- Act on Protection of Personal Data of August 29, 1997.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes, but only in order to obtain strictly limited information. There is no provision that explicitly prohibits consulting information about job applicants which is publicly available on social media websites. However, according to Article 22^1 of the Polish Labor Code an employer may only demand the following personal data from a job applicant: name(s) and surname, names of parents, date of birth, residential address (for correspondence), education and employment history. The employer may not demand any additional information, unless it results from specific provisions of Polish Law, even if the job applicant agrees to the processing of such information. This provision was introduced in order to prevent or hinder discrimination against job applicants and to secure their privacy rights. Therefore, processing of information beyond these limited categories or sending a 'friend request' to obtain it would violate Polish law.

Further, the recruiter cannot base a decision on information gained from social media regarding gender, age, disability, race, religion, nationality, political views, trade union membership, ethnic origin, beliefs, or sexual orientation in violation of anti-discrimination law.

3. Is works council intervention required?

No.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

No, there are no specific laws or regulations in that sense.

Nevertheless, the employer's right to restrict the use of social media by the employees during working hours or on corporate IT-tools arises from the employee's obligation (i) to comply with the instructions of superiors, (ii) to respect the interest of the work establishment, (iii) to protect its property, (iv) to keep confidential any information that could cause damage to the employer if disclosed, (v) to perform work diligently and carefully, (vi) not to be involved in unfair competition acts or practices (Articles 100 and 101, paragraph 1, Labor Code). Moreover, this right is also a derivative of (i) the principle of subordination of the employee (Article 22, Labor Code), (ii) employee's liability for nonobservance of the organization and order established in the process of work, (iii) employee's liability for damage caused to employer, and (iv) the liability for property assigned to an employee. Introduction of such rules is also justified by Article 128 of the Labor Code which states that during working hours the employee remains at the disposal of the employer.

In principle, employees must be notified in advance that such restrictions are imposed by the employer – for example in the form of relevant provisions in the work rules that have to be implemented by the majority of employers.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a general right to use social media during working hours or on IT tools provided by the employer for professional purposes. Obviously, if the tasks assigned to the employees involve interaction with social media for business related purposes, the employer needs to provide such communication tools.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer has wide discretion to regulate use of social media during working hours or on corporate IT-tools. The employer is entitled to limit it in any way or even prohibit it completely. However, it is important that the employee be expressly informed about the introduction of such rules before their implementation.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. In general, such rules can be included in several types of documents for example in the employment contract, rules of order set out in the work establishment, work rules, collective labor agreement or a specific social media policy. The type of document does not affect the potential disciplinary measures that may be imposed for breach. However, it is essential to ensure that the employee has been notified about the policy and has acknowledged it. If the notification and acknowledgement of the rules by the employee cannot be demonstrated, there may not be a valid basis to impose disciplinary sanctions.

6. Is an intervention of the works council required for the implementation of such rules?

According to Polish regulations the employer is only obliged to inform works councils about and consult with them regarding actions which may cause significant changes in the organization of work. Implementation of rules restricting social media use during working hours or on corporate IT-tools does not seem to fall into this category. However, in some cases, the introduction of such rules will require collaboration with the trade unions (which may be established in enterprises independently of works councils), depending on the type of document used to implement them. For example work regulations (which must be introduced by an employer employing 20 or more employees) and any changes to them are established in an agreement with the trade union(s) in the enterprise. The work rules can only be established by the employer unilaterally if agreement cannot be reached with the trade union within a certain period, or where there is no trade union. Similarly, the incorporation of rules regulating the use of social media into a collective labor agreement must be preceded by negotiation with the trade union representing employees in accordance with the procedure established in the Labor Code.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

However, the employer's right to impose rules regarding the use of social media outside working hours and on private IT-tools can be derived from the employee's obligation to respect the interest of the work establishment, to keep confidential any information that could cause damage to the employer if disclosed and not to participate in any unfair competition acts or practices (Articles 100 and 101, paragraph 1, of the Labor Code). However, such policy would need to be strictly limited to the above issues, otherwise the employees may invoke their broad right to privacy. As there is no previous practice or jurisprudence in this respect it cannot be completely excluded that a court may in principle limit the power of the employer to regulate the use of social media outside working hours or on private IT-tools.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes, an employer may establish certain principles regulating this issue, but only limited to such issues as confidentiality, unfair competition and possibly harming the reputation and the interests of the company, though this last aspect may be controversial in light of the right to privacy and the freedom to express opinions.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. First, the freedom to express opinions is guaranteed by the Polish Constitution. Second, the employer is obliged to respect the employee's right to privacy, dignity and other personal rights. Furthermore, the employer must observe the employee's right to private life. For example, the employer may not prohibit an employee from including employment-related information on their Facebook profile unless it is justified by the type of work. The employees also have the right to express their opinions about the employer, within 'acceptable criticism'.

4. Is an intervention of the works council required for the implementation of such rules?

It depends on the type of the document in which the rules are to be introduced. According to Polish law the employer is only obliged to inform works councils about and consult with them regarding actions which may cause significant changes in the organization of work. Implementation of rules restricting social media use outside working hours or on corporate IT-

tools does not seem to fall into this category. However, if such restrictions are to be included in the working regulations (work rules) they must be agreed with the enterprise trade union(s) (which may be established independently of works councils). If the work regulations (work rules) are not agreed upon with the enterprise trade union(s) within a period specified by the parties, or if there is no enterprise trade union at the employer, then the work regulations can be established by the employer. Similarly, incorporation of rules regulating use of social media into a collective labor agreement must be preceded by negotiations with the trade union representing employees in accordance with the procedure established in the Labor Code.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No, there are no specific legal provisions regarding monitoring of employee social media use on corporate IT-infrastructure. However, the following general laws apply:

- The Polish Constitution;
- Labor Code of December 23, 1997;
- Act on Protection of Personal Data of August 29, 1997;
- Articles 23 and 24, Polish Civil Code.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes, such monitoring may be permitted, as long as it is justified by the interests of the employer and it does not violate employees' personal rights. The employee must be notified that the corporate IT infrastructure at their disposal is to be used exclusively for business purposes and will be monitored by the employer in this respect. The employee must be provided with information regarding the scope and purpose of such control prior to its commencement.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

According to Polish regulations the employer is only obliged to inform works councils about and consult with them regarding actions which may cause significant changes in the organization of work. The implementation of technology which allows monitoring may fall into this category since it affects all employees in the workplace and the degree of intervention in the employee's private sphere is significant, however this is a question of interpretation. It would therefore be

advisable to consult with the works council regarding such action if the works councils have been established in the particular work place.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. If the employer expressly communicated the rules to the employees and reserved the right to monitor the corporate IT infrastructure for the purpose of verifying whether such rules are observed, and an employee does not observe them, the employer may apply a range of disciplinary measures depending upon the particular circumstances including (i) an admonition, (ii) a reprimand, (iii) termination where appropriate. Termination of an employment contract without notice would be an exceptional scenario reserved for a grave violation by the employee of their basic duties, and would be subject to likely scrutiny of a court.

An employee who is at fault in causing damage to the employer by not performing their duties, or performing them improperly, is financially liable for damage to the extent of a material loss sustained by the employer but only for the normal consequences of the acts or omission that caused the damage.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

Polish Law does not recognize any doctrine restricting the use of unlawfully obtained evidence. However, an employer using such evidence in court would have to take into consideration the serious risk of being accused of violating the employee's personal rights and data protection regulations.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. However, the following general acts apply:

- Article 8, European Convention on Human Rights, 1950;
- Article 49, the Polish Constitution;
- Labor Code of December 23, 1997;
- Articles 23 and 24, the Polish Civil Code;
- Article 267, the Criminal Code.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

This depends on the type of media, as well as on the particular case:

- Private media: monitoring of its content by the employer is as a rule not permitted.

- Professional media: (e.g. corporate chat program): monitoring of content requires prior notification to the employee of the purpose of such control and its scope and must be limited to issues where the employer faces risk.

- Posts on public social media: in the event the information is publicly disclosed it may be monitored by everyone, including the employer. However the implementation of such monitoring program on a permanent basis (outside the professional context) could be regarded as a breach of the employee's rights to privacy and freedom of expression.

The right to introduce a monitoring program is also dependent on the type of work and the rationale for implementing the monitoring. In certain industries where the employer is able to determine a high risk of breach of confidentiality it may be easier to justify. However, for most workplaces, where confidentiality is not that crucial, it may be less justifiable and to that extent will breach the employee's privacy.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

Polish Law does not recognize any doctrine restricting the use of unlawfully obtained evidence. However, an employer using such evidence in court would have to take into consideration the serious risk of being accused of violating the employee's personal rights and data protection regulations.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

According to Polish regulations the employer is only obliged to inform works councils about and consult with them regarding actions which may cause significant changes to the organization of work. The implementation of a policy regarding monitoring of the content of employee social media use is not an issue that immediately falls into this category, but in view of the controversial character of such policy and the limitations with which it must be accompanied, it would be advisable to consult with the works councils where they are present.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, subject to the restrictions outlined above. If the employer expressly communicated the rules to the employees and reserved the right to monitor the corporate IT infrastructure for the purpose of verifying whether such rules are observed, and an employee does not observe them, the employer may apply a range of disciplinary measures depending upon the particular circumstances including (i) an admonition, (ii) a reprimand, (iii) termination where appropriate. Termination of an employment contract without notice would be an exceptional scenario reserved for a grave violation by the employee of their basic duties or a flagrant breach of confidentiality, and would be subject to likely scrutiny of a court.

An employee who is at fault in causing damage to the employer by not performing their duties, or performing them improperly, is financially liable for damage to the extent of a material loss sustained by the employer but only for the normal consequences of the acts or omission that caused the damage.

Portugal

Mr. Ricardo Rodrigues Lopes & Mr. João Caiado Guerreiro
Caiado Guerreiro & Associados, RL
Rua Castilho 39-15°
1250-068 Lisboa
www.caiadoguerreiro.com

Caiado Guerreiro, previously named Franco Caiado Guerreiro, has a general practice in all areas of law. However, the firm is better known for its services in areas such as: Commercial and Corporate Law, Mergers and Acquisitions, Banking, Finance Tax and Fund Law, Labor and Social Security Law, Real Estate Law and Intellectual Property, as well as the areas of Telecommunications, Media and Technology (TMT) and Data Protection.

Our clients include industrial and commercial companies from all business sectors, utilities, banks and other financial institutions, insurance companies, professional firms, public bodies and other organizations, as well as individuals.

Caiado Guerreiro is ranked by Chambers and Partners, Legal 500, IFLR and International Tax Review directories among Portugal's leading law firms.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 8, European Convention on Human Rights, 1950;
- Article 26, Portuguese Constitution;
- Article 2, Personal Data Protection Law (Law 67/98);
- Article 17, Portuguese Labor Code.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, recruitment decisions based on information obtained by screening social media profiles must respect the fundamental principle of non-discrimination. The information stated in Article 24 of the Portuguese Labor Code must not be processed and used for recruitment purposes unless particular reasons exist and even then should be restricted to what is strictly necessary, in accordance with the Personal Data Protection Law.

Furthermore, the creation of a database with information extracted from social media profiles must be submitted to the National Data Protection Commission (CNPD) for approval and notification.

3. Is works council intervention required?

No, unless the measures related to recruitment and selection are stipulated in the company's work regulations. In that case, (i) any modification or addition to the company's work regulations must be submitted to the works council; and (ii) if the policy has an impact on the working conditions or work organization, the employer should also seek the opinion of the works council.

The company's work regulations must also be approved by the Authority for Working Conditions (ACT) and notified to the National Data Protection Commission (CNPD) should they stipulate rules concerning data processing.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

No, there is no specific legislation concerning this matter.

Nevertheless, Article 22 nº 2 of the Portuguese Labor Code stipulates that the employer may establish rules for the use of IT tools in the Company. Furthermore, the right to restrict the use of social media also derives from the employee's obligation (i) to be respectful towards their employer, (ii) to execute their work with due care, (iii) to act in accordance with the instructions and orders of the employer, (iv) to preserve and make proper use of work tools, and (v) to execute acts taking into account productivity improvements as well as a general duty of obedience of the employee and the power of management of the employer (Articles 97 and 128 of the Portuguese Labor Code).

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes, although according to Guidelines issued by the Portuguese DPA, employers should tolerate reasonable use of social media.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. Article 22 nº 2 of the Portuguese Labor Code states that the employer may establish rules for the use of IT tools in the company. Portuguese doctrine has confirmed that permissible regulation may include limitations such as (i) a maximum period of time per day, (ii) use only during specified periods, and (iii) refusal of access to certain sites (black lists).

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. The employer can stipulate these rules in several types of documents, such as the company work regulations, a general ICT-policy or a specific social media policy. However, these various documents do not have the same legal force. In order to make the rules regarding social media use during working hours or on corporate IT infrastructure enforceable and subject to disciplinary sanctions, they should be incorporated in or attached to the company work regulations. While inclusion in the employment contract may strictly be sufficient, the Portuguese DPA has issued guidelines stating that the notification of the processing of data must be filed together with the work regulations (which requires the prior approval of Labor Inspection).

6. Is an intervention of the works council required for the implementation of such rules?

Yes. If the rules are included in the company's work regulations, any modification or addition must be submitted to the works council for their consideration by way of consultation. If the policy provides for disciplinary sanctions (such as warnings, suspension, etc.), according to the Portuguese DPA they must be included in the company's work regulations to be enforceable. The employer should also seek the opinion of the works council if the policy has an impact on the working conditions or the work organization.

The company's work regulations must also be approved by the Authority for Working Conditions (ACT) and notified to the National Data Protection Commission (CNPD) if they stipulate rules concerning data processing.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

Nevertheless, the right to restrict the use of social media outside working hours or on private IT tools derives from the employee's obligation (i) to be respectful towards their employer, (ii) to treat the employer with loyalty, (iii) not to disclose confidential information of the employer, (iv) not to engage in unfair competition, and (v) to be generally obedient. The employer's power of management is also relevant (Articles 97 and 128, Portuguese Labor Law).

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes, to a limited extent. As a general rule, employees have freedom of speech (Article 37, Portuguese Constitution and Article 14, Portuguese Labor Code). However, the duty of loyalty towards the employer may justify certain exceptional rules to avoid damage to the company such as rules regarding (i) the disclosure of confidential company information, (ii) discreditable references to the company on social media profiles, (iii) the posting of comments or other content which might harm the reputation or interests of the company, (iv) the posting of comments regarding the character or reputation of co-workers, etc.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The power of the employer to impose rules regarding employee private use of social media is very limited. Any restrictions should be relevant for and proportionate to the employer's interests. Furthermore, the employer must tolerate a certain level of criticism from its employees.

4. Is an intervention of the works council required for the implementation of such rules?

Yes. The company's work regulations should be publicized and submitted to workers and their representatives for their consideration. Any modification or addition to the work regulations must be submitted to the works council for consultation. If the policy regarding the use of social media provides for disciplinary sanctions (such as warnings, suspension, etc.), they must be included in the company work regulations to be enforceable. The employer should also seek the opinion of the works council if the policy has an impact on the working conditions or the work organization.

The company's work regulations must also be submitted to the Authority for Working Conditions (ACT) and notified to the National Data Protection Commission (CNPD) if they stipulate rules concerning data processing.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No. However, the Personal Data Protection Law (Law 67/98) is applicable, and the National Data Protection Commission issued a set of guidelines in this regard.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. As a general rule, employers may not use distance monitoring equipment with the purpose of controlling employees' performance. However, the use of distance monitoring equipment is allowed for the protection and safety of persons and assets or when required in view of specific needs. Employees should be informed of the use of such equipment (Article 20 of the Portuguese Labor Code).

The Portuguese National Data Protection Commission also issued guidance on employee's internet use in the workplace where they considered that:

- Monitoring should take into account the principles of necessity, sufficiency, reasonableness, proportionality and good faith and the employer should prove that they chose the form of control that had least impact on the fundamental rights of employees.
- The employer should favor generic forms of control, avoiding the individualized consultation of personal data unless there is a suspected breach of the rules. General statistics should be adequate for the employer to ascertain the degree of use of the internet in the workplace, and the extent to which access by employees compromises work or productivity.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes. Any modification or addition to the company's work regulations must be submitted to the works council for consultation. If the policy regarding the use of social media provides for disciplinary sanctions (such as warnings, suspension, etc.), they must be included in the company's work regulations to be enforceable. The employer should also seek the opinion of the works council if the policy has an impact on the working conditions or the work organization.

The company's work regulations must also be submitted the Authority for Working Conditions (ACT) and notified to the National Data Protection Commission (CNPD) if they stipulate rules concerning data processing.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Disciplinary sanctions can apply if they are determined in the company's work regulations. The sanctions may include termination with just cause if appropriate in the specific situation.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

No. If the employer fails to comply with the above rules (Article 20 of the Portuguese Labor Code), the evidence obtained should be disregarded during the disciplinary process. Also relevant are Article 32 of the Portuguese Constitution (on procedural guarantees in criminal accusations, applied analogously to disciplinary procedures); Article 126, nº 3 of the Penal Procedure Code (stating that evidence obtained by undue intrusion into private life, domicile, correspondence, or telecommunications without the consent of the data subject is unlawful); and Article 519, nº 3, of the Civil Procedure Code (stating the same principle regarding unlawfully obtained evidence).

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. However, the following general laws and regulations apply:

- Article 8, of the European Convention on Human Rights of November 4, 1950;
- Articles 35 and 37, the Portuguese Constitution;
- Articles 14 (freedom of speech and opinion), 16 (right to privacy), and 22 (confidentiality of messages and of access to information), the Portuguese Labor Code;
- Data Protection Law.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

The systematic monitoring of content of social media should be avoided, although occasional monitoring may be permissible. The basic idea is that what is made publicly available can be monitored by the employer (e.g. posts on wall of LinkedIn or Facebook) but should not be done

in a systematic way. Private messages or private chat on these social networks are considered to be private correspondence and, as a result, cannot be monitored under any circumstances.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

No. If the employer fails to comply with the above rules (Article 20 of the Portuguese Labor Code), the evidence obtained should be disregarded during the disciplinary process. Also relevant are Article 32 of the Portuguese Constitution (on procedural guarantees in criminal accusations, applied analogously to disciplinary procedures); Article 126, nº 3 of the Penal Procedure Code (stating that evidence obtained by undue intrusion into private life, domicile, correspondence, or telecommunications without the consent of the data subject is unlawful); and Article 519, nº 3, of the Civil Procedure Code (stating the same principle regarding unlawfully obtained evidence).

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes. Any modification or addition to the company's work regulations must be submitted to the works council for consultation. If the policy regarding the use of social media provides for disciplinary sanctions (such as warnings, suspension, etc.), they must be included in the company work rules to be enforceable. The employer should also seek the opinion of the works council if the policy has an impact on the working conditions or the work organization.

The company's work regulations must also be submitted to the Authority for Working Conditions (ACT) and notified to the National Data Protection Commission (CNPD) if they stipulate rules concerning data processing.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes, disciplinary sanctions can apply if they are determined in the company's work regulations and provided that the monitoring is conducted within the legal limits. Some recent cases show companies applying more severe sanctions such as dismissal for gross misconduct. Nevertheless, employers should base their sanction on the principles of necessity and proportionality.

Romania

Ms. Roxana Ionescu & Ms. Roxana Sandulescu
Nestor Nestor Diculescu Kingston Petersen
1A Bucaharest Business Park
Bucuresti-Ploiesti National Road, Entrance A, 4th floor
1st District, 013681 Bucharest
www.nndkp.ro

Nestor Nestor Diculescu Kingston Petersen (NNDKP) is a leading, full service law firm providing integrated legal and tax advice in all business fields. At present, the firm's activity covers the following practice areas: Mergers and Acquisitions; Banking and Finance; Dispute Resolution; Energy; Real Estate; Taxation; Intellectual Property; Competition Law; Infrastructure and PPP; Public Procurement; Commercial Contracts; Environmental Law, Capital Markets; Employment Law; Data Protection; Pharmaceuticals and Health Care; Consumer Protection; Gaming; Immigration Law.

A distinguishing feature of the firm has long been its emphasis on providing superior, individualized client service. Over the past ten years, NNDKP obtained many recognitions and distinctions from the most reputed international specialized publications, which constantly ranked the firm as first in all practice areas researched in Romania.

In 2012 NNDKP was awarded, for the second time in four years, "*Law Firm of the Year in Romania*" at the Chambers Europe gala in Amsterdam, after receiving one year before the „*Chambers Europe 2011 Client Service Award*" for Romania. Moreover, both this year and in 2011, NNDKP was the only law firm in Romania ranked first in all practice areas researched by three other prestigious legal guides, Chambers & Partners, global edition, The European Legal 500 and IFLR 1000.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Articles 22, 26 and 28, Romanian Constitution;
- Articles 70, 71, 74, 75 and 77, Romanian Civil Code;
- Law No. 677/2001 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ('Data Protection Law');
- Articles 5, 6, 39, 40, 241 and 242, Romanian Labor Code (Law No. 53/2003);
- Decision of the President of the National Authority for the Supervision of Personal Data Processing No. 11/2009 regarding the establishment of the categories of personal data operations susceptible to present special risks for the rights and liberties of persons.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, Romanian labor legislation expressly provides that any background checks performed by the employer prior to the conclusion of an employment contract can only be conducted for the primary purpose of determining the job applicant's professional and personal abilities relevant to the contemplated position. The collective labor agreement, the internal regulation and the statute of personnel must provide the way in which such preliminary checks are to be conducted by the employer.

To the extent the information collected qualifies as personal data, the employer must comply with the personal data processing rules. It is likely that grounding the recruitment decision on sensitive personal data collected from the social media profile of a job applicant would be deemed excessive and discriminatory.

3. Is works council intervention required?

As a general rule, under Romanian law employee representative structures are either trade unions or the workers' representatives. According to the Romanian Labor Code, when determining an internal regulation such as rules related to recruitment criteria and procedures on conducting the recruitment process, the employer should carry out consultations with the trade union or other employee representatives, if any, and to inform the employees of the content of such regulations. Any other internal policies which may constitute an important change in the organization of the

work will be subject to the same requirements. The introduction of checks on job candidates may be considered to require consultations.

Works councils also exist in Romania to the extent that EU Directive 2009/38/EC applies, transposed into Romanian legislation by Law No. 217/2005 on the establishment, organization and functioning of Works Councils. To the extent that Directive 2009/38/EC is applicable and pre-employment checks are to be applied to all establishments of a group within the EU, the information and consultation of the European works councils could be required.

However, the lack of such consultations does not affect the validity of the internal regulations or policies adopted.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There is no specific legislation in this respect.

However, the employer has a right to set forth various rules, including rules for restricting the use of social media during working hours or using corporate IT tools. This is derived from the employer's proprietary rights over the IT tools and its right to organize and manage the employment relationship, as well as its interest in running an efficient business and protecting the business from actions likely to harm operations and legitimate interests.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employers are not obliged to provide employees with access to alternative tools for such purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No, but they must be communicated to the employees. The rules may be stipulated in various types of documents such as the employment contract, internal regulations, codes of conduct or any other internal policy. Such documents communicated to the employees have a binding effect.

6. Is an intervention of the works council required for the implementation of such rules?

Yes, the trade union or other employee representatives must be informed of the content of such regulations and consulted in relation to them. This obligation applies all internal regulations in the workplace (Article 241, Romanian Labor Code). Law No. 467/2006 also requires employee representatives to be informed and consulted whenever there are significant changes in the management of employment, contractual relations or employment relations.

To the extent that Directive 2009/38/EC is applicable and the policy is to be applied to all establishments of a group within the EU, the information and consultation of the European works councils could be required.

However, the lack of such consultations does not affect the validity of the internal regulations or policies adopted.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

However, based on the employee's obligations under the Romanian Labor Code, the employer may impose certain rules on the use of social media outside working hours or on private IT tools, such as: (i) the obligation of loyalty towards the employer, (ii) the obligation to respect the provisions of the internal regulations, the collective labor agreement and the employment contract, (iii) the obligation to observe professional secrecy, (iv) the obligation not to perform any unfair competition against the employer.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes. An employer can impose rules regarding the use of social media by its employees in their private sphere if such rules are justified by a legitimate interest pursued by the employer (e.g. mitigation of the risk that the employee may engage in unethical or immoral behavior which may affect the employer's good reputation or credibility in the business environment, prevention of the illegal disclosure of confidential information).

3. Are there any restrictions on the employer's power to impose such rules?

Yes. Employees must be informed of such rules, they must pursue a legitimate interest, and the employee's fundamental rights and freedoms must be balanced with the employer's interests. Data protection principles must also be observed.

4. Is an intervention of the works council required for the implementation of such rules?

Yes, the trade union or other employee representatives must be informed of the content of such regulations and consulted in relation to them. This obligation applies all internal regulations in the workplace (Article 241, Romanian Labor Code). Law No. 467/2006 also requires employee representatives to be informed and consulted whenever there are significant changes in the management of employment, contractual relations or employment relations.

To the extent that Directive 2009/38/EC is applicable and the policy is to be applied to all establishments of a group within the EU, the information and consultation of the European works councils could be required.

However, the lack of such consultations does not affect the validity of the internal regulations or policies adopted.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

There is no specific legislation regarding the monitoring of social media on corporate IT infrastructure.

However, the following general laws apply:

- Law No. 677/2001 regarding the individual's protection as regards personal data processing and the free movement of such data, amended and completed;
- Law No. 506/2004 regarding personal data processing and protection of private life in the electronic communication sector (an on-line updated version is not publicly available);
- Article 40, the Romanian Labor Code (Law No. 53/2003) (an on-line updated version is not publicly available).

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. However, any monitoring of the employees must be a proportionate response to the risk faced by the employer. Web browsing tracking should be regarded as an exceptional measure by the employer. When conducting such monitoring, the following restrictions are applicable: (i) the employer is required to justify a legitimate interest for monitoring the employees (e.g., to determine whether corporate IT infrastructure is misused, whether the employees comply with the work-related obligations, etc.), (ii) any personal data collected or used in the course of monitoring must be adequate, relevant and not excessive for the purpose for which the monitoring is justified (iii) the employees must be informed of the monitoring carried out by the employer and the purposes of such monitoring.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes, the trade union or other employee representatives must be informed of the content of such regulations and consulted in relation to them. This obligation applies all internal regulations in the workplace (Article 241, Romanian Labor Code). Law No. 467/2006 also requires employee representatives to be informed and consulted whenever there are significant changes in the management of employment, contractual relations or employment relations.

To the extent that Directive 2009/38/EC is applicable and the monitoring measures are to be applied to all establishments of a group within the EU, the information and consultation of the European works councils could be required.

However, the lack of such consultations does not affect the validity of the internal regulations or policies adopted.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. The employer may impose sanctions when the employees do not comply with the provisions of the employment contract, code of conduct or other internal regulations communicated to the employees. Therefore, if the employees do not comply with the rules related to the use of social media on corporate IT infrastructure elaborated for certain particular and pre-determined purposes and provided in the relevant documents, the employer may impose disciplinary sanctions or may even dismiss the employees who do not comply with such rules. However, in order to be able to use monitoring as basis for the application of sanctions, the employer must inform the employees that among the purposes of such monitoring is the verification of compliance with internal rules and regulations.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

Evidence collected in this way may not be admissible in court. The Romanian Civil Procedure Code requires evidence presented in court to be legal. When assessing the lawfulness of the evidence, the requirements of both substantial and procedural law are observed. Consequently, although the evidence may be legal in relation to the provisions of procedural law, if such evidence was obtained, for example, by breaching the Romanian data protection legislation requirements, there is a risk that such evidence will not be accepted. Nonetheless, the admissibility of the evidence is subject to the discretion of the court, which may vary on a case by case basis.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation regarding the monitoring of the content of social media. However, the following laws and regulations apply:

- Articles 22, 26 and 28, the Romanian Constitution;
- Article 195, Romanian Criminal Code (an on-line updated version is not available);

- Law No. 677/2001 regarding the individual's protection as regards personal data processing and the free movement of such data, amended and completed;
- Law No. 506/2004 regarding personal data processing and protection of private life in the electronic communication sector (an on-line updated version is not available);
- Articles 5, 39 and 40, the Romanian Labor Code (Law No. 53/2003) (an on-line updated version is not available).

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Yes, however prior to monitoring the content of the social media use of employees, the employer must assess whether such monitoring is absolutely necessary for the purposes for which it is conducted. Less intrusive methods of supervision are recommended given that accessing correspondence or any other communication (including posts on social media) by distance transmission without a right is a criminal offence under the Romanian Criminal Code. The Romanian Criminal Code does not make a distinction between private and professional communication. Therefore access will be prohibited unless it is publicly available.

In order to mitigate the risks related to the above, it is advisable for the employer to obtain the employee's consent to the intended monitoring and to expressly provide that any email, document, or communication generated using the company's IT infrastructure is the property of the employer. In addition to the above, the employer must observe data protection principles.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

Evidence collected in this way may not be admissible in court. The Romanian Civil Procedure Code requires evidence presented in court to be legal. When assessing the lawfulness of the evidence, the requirements of both substantial and procedural law are observed. Consequently, although the evidence may be legal in relation to the provisions of procedural law, if such evidence was obtained, for example, by breaching the Romanian data protection legislation requirements, there is a risk that such evidence will not be accepted. Nonetheless, the admissibility of the evidence is subject to the discretion of the court, which may vary on a case by case basis.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes, the trade union or other employee representatives must be informed of the content of such regulations and consulted in relation to them. This obligation applies all internal regulations in the workplace (Article 241, Romanian Labor Code). Law No. 467/2006 also requires employee representatives to be informed and consulted whenever there are significant changes in the management of employment, contractual relations or employment relations.

To the extent that Directive 2009/38/EC is applicable and the monitoring measures are to be applied to all establishments of a group within the EU, the information and consultation of the European works councils could be required.

However, the lack of such consultations does not affect the validity of the internal regulations or policies adopted.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. The employer may impose sanctions when the employees do not comply with the provisions of the employment contract, code of conduct or other internal regulations communicated to the employees. Therefore, if the employees do not comply with the rules related to the use of social media on corporate IT infrastructure elaborated for certain particular and pre-determined purposes and provided in the relevant documents, the employer may impose disciplinary sanctions or may even dismiss the employees who do not comply with such rules. However, in order to be able to use monitoring as basis for the application of sanctions, the employer must inform the employees that among the purposes of such monitoring is the verification of compliance with internal rules and regulations.

Russia

Ms. Maria Ostashenko
Alrud
6th floor, 17 Skakovaya Street
125040 Moscow
www.alrud.com

As a native Russian law firm with 20 years of experience, we have built a reputation as a reliable guide for foreign companies entering the Russian market. We provide integrated legal and tax advice on launching new businesses in Russia, supported by our special insights, as one of Russia's leading law firms, into the national, regional and local business environments of key business sectors. We help our clients to manage the full scope of complex financial, structural, cross-border, labor, tax and regulatory issues at all stages – from the first evaluation of business opportunities in Russia through to the daily support of our clients' new business operations. In this way we empower our clients with the legal knowledge and practical expertise that enables them to capitalize on the most promising emerging-market opportunities.
Our services include: Competition / Antitrust; Corporate / M&A; Dispute Resolution; Banking and Finance; Labor & Employment; Real Estate; Private Client; Restructuring and Insolvency; Investments in strategic sectors; Intellectual Property and Tax.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 8, European Convention on Human Rights, 1950;
- Articles 23, 24 and 29, Constitution of the Russian Federation;
- Federal Law No.152-FZ of July 27, 2006 'On Personal Data' ('Data Protection Act');
- Russian Federal Law No. 149-FZ of July 27, 2006 'On Information, Information Technologies and Information Protection';
- Labor Code of the Russian Federation of December 30, 2001 No.197-FZ ('Labor Code').

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes, provided that the individual made their personal data available to the public themselves or upon their request. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, recruiters must not base any recruitment decision on information regarding a job applicant's sex, race, skin color, nationality, language, origin, property status, social status, job position, age, residence, political and religious views or other facts not related to their professional abilities.

Recruiters must refrain from sending 'friend requests' or using any other measure with the sole purpose of gathering information about a candidate which they have deliberately limited access to. This practice may be considered as illegal by a court or by the data protection authority. However, there are not yet publicly available court judgments on these issues.

In accordance with the Data Protection Act and the Labor Code, a recruiter can only process that information available on social media which is necessary for recruitment. Recruiters should avoid collecting and further processing data related to the private life of the individual.

3. Is works council intervention required?

Work councils do not exist in Russia and Russian law does not provide for this term. Involvement of trade unions or other representative bodies is not required by law at the recruitment stage, unless it is prescribed by the collective agreement or other local normative act of the company or in some cases prescribed by the Labor Code, e.g. when the policy is a part of internal labor regulations.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

However, the employer's right to restrict employee social media use during working hours or on corporate IT tools is derived from the employer's (i) property rights over the IT infrastructure that it provides to its employees to perform their work (Article 209; Russian Civil Code), (ii) authority over its employees (Article 22, Labor Code), and (iii) liability for damages resulting from the acts of its employees during the performance of their employment contract (Article 232, Labor Code).

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No, unless the employee's position requires use of social media for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media are very broad. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

Yes, to be enforceable the respective rules must be either formalized in an internal policy with which each employee is familiarized, or such rules should be part of the employment contract.

6. Is an intervention of the works council required for the implementation of such rules?

The policy must be agreed with any company trade union or other employee representative body that exists, provided that this is prescribed by the collective agreement or other local normative act of the company or in some cases prescribed by the Labor Code, e.g. when the policy is a part of internal labor regulations.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

However, the employer's right to impose rules regarding the use of social media outside working hours and on private IT tools can be derived from the employee's obligations under the employment contract.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes. An employer can determine certain rules which employees must respect when using social media in their private time or on private IT tools, such as rules regarding (i) the disclosure of confidential company information, (ii) references to the company on social media profiles, (iii) the posting of comments or other content which might harm the reputation or interests of the company, (iv) the posting of comments regarding co-workers, etc.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The employer's power to impose rules regarding employee private use of social media should be balanced with employee rights to private life and freedom of expression.

4. Is an intervention of the works council required for the implementation of such rules?

If the rules are formalized in an internal act, the policy must be agreed with any company trade union or other employee representative body that exists, provided that this is prescribed by the collective agreement or other local normative act of the company or in some cases prescribed by the Labor Code, e.g. when the policy is a part of internal labor regulations.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

The following laws may apply in this context:

- Article 8, European Convention on Human Rights, 1950;
- Articles 23, 24 and 29 of the Constitution of the Russian Federation of December 12, 1993;
- Federal Law No.152-FZ of July 27, 2006 'On Personal Data' (the 'Data Protection Act');
- Russian Federal Law No. 149-FZ of July 27, 2006 'On Information, Information Technologies and Information Protection';
- Labor Code of the Russian Federation of December 30, 2001 No.197-FZ (the 'Labor Code').

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

This issue is not well-regulated by Russian law and clear conclusions from case law are yet to emerge. It is presumed that monitoring is permitted if there is no violation of employee's rights to private life, private correspondence and confidentiality of personal data and provided that the facility which is monitored is not a private facility of an employee. The monitoring must be based on the principles of rationality and transparency. Another option would be to obtain written consent from the employees to process the data.

Employees should be notified of the fact of monitoring by written notification or through the procedure of written familiarization with the policy establishing monitoring rules. It is recommended to prohibit the use of corporate IT infrastructure for private purposes in order to reduce the risk of obtaining private information or excessive employee personal data.

Such monitoring should have reasonable purposes (which it is recommended to indicate in the policy), which have not been defined by law but may information protection purposes, including securing data and prevention of data leakages, as well as protection of the company's commercial secrets, estimating effectiveness of measures undertaken for protection of personal data and other similar purposes.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Implementation of monitoring technology does not require agreement with the trade union or other representative body unless agreement is prescribed by the collective agreement or other local normative act of the company or in some cases prescribed by the Labor Code, e.g. when the policy is a part of internal labor regulations.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Disciplining employees for the violation of rules regarding the use of social media may be highly disputed. Relevant considerations to take into account in each case may be (i) whether the individual was acting on social media as the representative of the company or a private person, (ii) whether the rules of social media use have been stipulated in the employment contract or in the duly adopted policy of the employer acknowledged by the employee with their signature, and (iii) whether the employer is able to prove the reputation damage caused by the employee's posts on social media.

Where a disciplinary sanction is imposed , the employee may try to challenge the legitimacy of the monitoring and the disciplinary sanction in court. As there is a high risk that termination for improper use of social media will be found to be unfair dismissal, recent practice is to find another means to end the relationship e.g. by mutual agreement of the parties.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

There is a risk that the evidence will not be accepted in court, especially if the IT tools used for social media purposes are owned by the employee.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

The following laws may apply in this context:

- Article 8, European Convention on Human Rights, 1950;
- Articles 23, 24 and 29, the Constitution of the Russian Federation of December 12, 1993;
- Federal Law No.152-FZ of July 27, 2006 'On Personal Data' (the 'Data Protection Act');
- Russian Federal Law No. 149-FZ of July 27, 2006 'On Information, Information Technologies and Information Protection';
- Articles 137, 138, Criminal Code of the Russian Federation No. 63-FZ dated June 13, 1996.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Monitoring of the information made publicly available by an individual is permitted, however further processing of such information as general rule may not be legal, e.g. processing of private information for the purpose of adopting a decision on hiring a candidate or promotion of an employee etc unless such processing is permitted by applicable law or consent of the personal data subject is given. The legitimacy of further processing of the information obtained from social media should be determined in each particular case.

Obtaining access to hidden information (e.g. by sending 'friend requests', etc) and further processing of this information may be illegal due to misuse of the information. It is highly recommended to refrain from any further processing of private data and private correspondence. Where there is any dispute related to the legitimacy of screening the individual information, the employer should be able to prove that this information was made publicly available by the data subject and not by third parties.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

There is a risk that the evidence will not be accepted in court..

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Implementation of monitoring technology does not require agreement with the trade union or other representative body unless agreement is prescribed by the collective agreement or other local normative act of the company or in some cases prescribed by the Labor Code, e.g. when the policy is a part of internal labor regulations.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Disciplining employees for the violation of rules regarding the use of social media may be highly disputed. Relevant considerations to take into account in each case may be (i) whether the individual was acting on social media as the representative of the company or a private person, (ii) whether the rules of social media use have been stipulated in the employment contract or in the duly adopted policy of the employer acknowledged by the employee with their signature, and (iii) whether the employer is able to prove the reputation damage caused by the employee's posts on social media.
Where a disciplinary sanction is imposed , the employee may try to challenge the legitimacy of the monitoring and the disciplinary sanction in court. As there is a high risk that termination for

improper use of social media will be found to be unfair dismissal, recent practice is to find another means to end the relationship e.g. by mutual agreement of the parties.

Slovakia

Mr. Tomas Rybar & Ms. Jana Cernakova
Cechova & Partners
Sturova 4
811 02 Bratislava
www.cechova.sk

Čechová & Partners, established in 1990, is one of leading Slovak law firms. All lawyers are admitted or associate members of the Slovak Bar Association. It is an independent local law firm, offering in-depth knowledge of Slovak law and business and profound experience in the local market, while providing legal assistance and client service of recognized international standards. It is consistently top-ranked by Chambers, Legal 500 and PLC Which Lawyer.

Čechová & Partners regularly assists in a broad range of privacy matters, including registrations, notifications, processing agreements, privacy policies, consents, trans-border flow of data, monitoring, whistleblowing schemes and other.

I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the employment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 8, European Convention on Human Rights, 1950;
- Constitution of the Slovak Republic No. 460/1992 Coll., as amended, in relation to the right to privacy protection;
- Act No. 428/2002 on Personal Data Protection, as amended, in relation to the processing of personal data ('Data Protection Act');
- Act No. 311/2001 Coll., Labor Code, as amended ('Slovak Labor Code') in relation to equal treatment in Article 11 and Section 13 and 41;
- Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination (Antidiscrimination Act), as amended;
- Act No. 40/1964 Coll., Civil Code, as amended.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants, however several general laws restrict such screening.

According to the Slovak Labor Code (Arts. 41(5) and 41(6)) the employer may only request information from a job applicant concerning the work to be carried out by that person. The employer cannot request information from a job applicant concerning pregnancy, family situation, integrity (except where integrity is required for the work concerned under a special act or due to the nature of the work to be carried out by the person), membership of political parties or religious affiliation and from 1 January 2013 also on trade union membership.[1] According to the Civil Code, a natural person has the right to the protection of their personal rights, in particular, life and health, civic honor, human dignity, privacy, their name and expressions of a personal nature. The use of information must be in line with this general rule.

Further, recruiters must not violate the principle of equal treatment in access to employment. Discrimination based on marital status, family status, sexual orientation, race, skin color, language, age, unfavorable state of health or disability, genetic characteristics, belief and religion, political or other conviction, trade union activity, national or social origin, national or ethnic group affiliation, property, gender or other status is prohibited. Any database must be constructed in a way which ensures equal treatment (e.g. the candidates must not be categorized according to their marital status or sexual orientation).

[1] An Amendment to the Slovak Labor Code was passed by the National Council of the Slovak Republic which modifies and changes some provisions of the Slovak Labor Code. It will be effective from 1 January 2013.

The processing of information from social media profiles to create a database of potential candidates for a vacancy is not restricted, however, it must comply with data protection laws.

3. Is works council intervention required?

No. No involvement of any employees' representatives is required.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

The employer has the right to restrict the use of social media on corporate IT tools based on the employer's general property rights (Section 123, Slovak Civil Code). Further, according to the Slovak Labor Code (Article 81(b) and (e)), the employee must use working hours to perform work tasks and must refrain from any conduct conflicting with the employer's lawful interests.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes. Unless the use of social media is part of the job description, social media use can be prohibited during working hours.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. The Slovak Labor Code does not grant the employees a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media are very broad. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. If the employer decides to regulate the use of social media at work and sets restrictions at its own discretion, it is sufficient that the employer informs the employees of its decision by way of a notice or internal instruction.

If the employer implements a policy (either in the Work Order or another internal work regulation) and defines its breach as a breach of work discipline, the rules are enforceable and disciplinary sanctions may be imposed. However, if such breach leads to termination of employment and the employee files a claim in court to invalidate the termination, the court is not bound by the policy and it will decide at its own discretion whether the particular employee's action represents a breach of work discipline, regardless of whether the policy is breached.

6. Is an intervention of the works council required for the implementation of such rules?

No. The prior approval of employees´ representatives is only necessary where the employer decides to implement the policy as part of the Work Order (in Slovak '*Pracovný poriadok*'). The Work Order is an internal work regulation dealing in more detail with employment conditions stipulated by the Slovak Labor Code (e.g. where the Slovak Labor Code sets working hours to 8 hours per day, the Work Order may stipulate that these 8 hours are from 8.00am to 4.30pm). However, the law does not require that the policy is included in the Work Order itself.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

However, according to the Slovak Labor Code (Article 81(e) and (f)), the employee is obliged to refrain from any conduct conflicting with the employer's lawful interests and to keep in confidence any matters that the employee has learnt of during the pursuit of his occupation and which in the employer's interest must not be disclosed to third parties. Therefore, the employee is prohibited by law from using social media in a way that would be in conflict with those obligations, including outside working hours.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes. Apart from the general obligations of the employee described above, the employer may stipulate in greater detail any precise action which would conflict with the employer's lawful interests, or any information which in the employer's interest must not be disclosed to third parties. In general, the business name of the employer, the position of the employee or their connection with the employer should not be used by the employee outside working hours for private use, and may be classified as an unlawful use of the business name or endangerment of reputation of the employer.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. An employer's restrictions must be legal, legitimate and proportionate in relation to employer's justified interests and at the same time should be balanced with the employees´ right to privacy.

If the employer implements a policy (either in the Work Order or another internal work regulation) and defines its breach as a breach of work discipline, the rules are enforceable and disciplinary sanctions may be imposed. However, if such breach leads to termination of employment and the employee files a claim in court to invalidate the termination, the court is not bound by the policy and it will decide at its own discretion whether the particular employee's action represents a breach of work discipline, regardless of whether the policy is breached.

4. Is an intervention of the works council required for the implementation of such rules?

No. The prior approval of employees´ representatives is only necessary where the employer decides to implement the policy as part of the Work Order (in Slovak '*Pracovný poriadok*'). The Work Order is an internal work regulation dealing in more detail with employment conditions stipulated by the Slovak Labor Code (e.g. where the Slovak Labor Code sets working hours to 8 hours per day, the Work Order may stipulate that these 8 hours are from 8.00am to 4.30pm). However, the law does not require that the policy is included in the Work Order itself.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No, however the following general laws may apply:

- Slovak Labor Code;
- Data Protection Act;
- Act No. 351/2011 Coll. on Electronic Communications;
- Act No. 40/1964 Coll., Civil Code, as amended.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. In order to carry out monitoring there must be (i) justified reasons based on the specific nature of the employer's activities, and (ii) notification to the employees of the scope and methods of such control (Recital 11 of the Slovak Labor Code), as well as the duration of the monitoring (Article 13(4), Slovak Labor Code, applicable from 1 January 2013).

As of 1 January 2013, the employer can implement a control mechanism only after the employees have been informed of its existence and the necessary consultations have taken place with employees´ representatives.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

No intervention of the employees´ representatives was necessary up to 31 December 2012. From 1 January 2013 implementation of a control mechanism requires consultation with the employees´ representatives. The employees´ representatives must be provided with information on the scope of the control mechanism, the way it is conducted and its duration. A consultation with the employees´ representatives is a dialogue and exchange of opinions, therefore there is no need to obtain their approval.

The prior approval of employees´ representatives is only necessary where the employer decides to implement the policy as part of the Work Order (in Slovak '*Pracovný poriadok*'). This applies also after 1 January 2013. The Work Order is an internal work regulation dealing in more detail with employment conditions stipulated by the Slovak Labor Code (e.g. where the Slovak Labor Code sets working hours to 8 hours per day, the Work Order may stipulate that these 8 hours are from

8.00am to 4.30pm). However, the law does not require that the policy is included in the Work Order itself.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

If the employer implements a policy (either in the Work Order or another internal work regulation) and defines its breach as a breach of work discipline, the rules are enforceable and disciplinary sanctions may be imposed. However, if such breach leads to termination of employment and the employee files a claim in court to invalidate the termination, the court is not bound by the policy and it will decide at its own discretion whether the particular employee's action represents a breach of work discipline, regardless of whether the policy is breached.

Further, labor law only allows some forms of sanctions to be imposed on the employees, for example a withdrawal of benefits or deduction from a variable part of the salary. In serious cases, excessive use of social media might be considered lost working time, which might be sanctioned by reduction of salary for the relevant month or shortening of leave. In the most extreme cases, termination of employment might be considered. However, the factual circumstances of each case must be taken into account before imposing such sanctions.

A sanction such as a contractual fine is prohibited by law in an employment relationship. If the reputation of the employer was damaged by the use of social media by the employee, the employer may seek compensation for damage in civil court proceedings.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

- Criminal proceedings: No. According to Article 119 (2) of the Slovak Criminal Procedure Code only evidence gained in accordance with the law is admissible. Therefore, it will not be possible to use such evidence in criminal proceedings.

- Civil proceedings: Although the Slovak Civil Procedure Code does not contain a clause similar to the one in Criminal Procedure Code, according to prevailing legal opinions and case law, unlawfully obtained evidence cannot be taken into account in civil proceedings and should be excluded.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. However, the following general laws apply:

- Article 8, European Convention on Human Rights, 1950;
- Article 19, the Slovak Constitution;
- Section Four (Articles 55-63) of the Act No. 351/2011 Coll. on Electronic Communications;
- Recital 11, Slovak Labor Code;
- Section 377, Slovak Criminal Code;
- Data Protection Act.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Information posted on social media which is made public may be monitored by anybody including an employer. However, according to Recital 11 of the Slovak Labor Code, the employer may collect only that personal information which relates to the employee's qualifications and professional experience and information which is relevant for the work the employee will, is, or was carrying out.

If an employer finds it necessary to monitor professional media such as a corporate chat program or corporate e-mails, employees must be given prior notice of the scope, methods, and reasons for such monitoring (Recital 11 of the Slovak Labor Code), as well as the duration of the monitoring (Article 13(4), Slovak Labor Code, applicable from 1 January 2013).

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

- Criminal proceedings: No. According to Article 119 (2) of the Slovak Criminal Procedure Code only evidence gained in accordance with this law is admissible. Therefore, it will not be possible to use such evidence in criminal proceedings.

- Civil proceedings: Although the Slovak Civil Procedure Code does not contain a clause similar to the one in Criminal Procedure Code, according to prevailing legal opinions and case law, unlawfully gained evidence cannot be taken into account in civil proceedings and should be excluded.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

No intervention of the employees´ representatives was necessary up to 31 December 2012. If the monitoring is conducted in the workplace or common areas of the employer and on corporate IT tools, from 1 January 2013, implementation of such control mechanism requires consultation with the employees´ representatives. The employees´ representatives must be provided with information on the scope of the control mechanism, the way it is conducted and its duration. A consultation with the employees´ representatives is a dialogue and exchange of opinions, therefore there is no need to obtain their approval.

The prior approval of employees´ representatives is only necessary where the employer decides to implement the policy as part of the Work Order (in Slovak '*Pracovný poriadok*'). This applies also after 1 January 2013. The Work Order is an internal work regulation dealing in more detail with employment conditions stipulated by the Slovak Labor Code (e.g. where the Slovak Labor Code sets working hours to 8 hours per day, the Work Order may stipulate that these 8 hours are from 8.00am to 4.30pm). However, the law does not require that the policy is included in the Work Order itself.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

If the employer implements a policy (either in the Work Order or another internal work regulation) and defines its breach as a breach of work discipline, the rules are enforceable and disciplinary sanctions may be imposed. However, if such breach leads to termination of employment and the employee files a claim in court to invalidate the termination, the court is not bound by the policy and it will decide at its own discretion whether the particular employee's action represents a breach of work discipline, regardless of whether the policy is breached

Further, labor law allows only some forms of sanctions to be imposed on the employees; for example a withdrawal of benefits or deduction from a variable part of the salary. In serious cases, excessive use of social media might be considered lost working time, which might be sanctioned by reduction of salary for the relevant month or shortening of leave. In the most extreme cases, termination of employment might be considered. However, the factual circumstances of each case must be taken into account before imposing such sanctions.

A sanction such as a contractual fine is prohibited by law in an employment relationship. If the reputation of the employer was damaged by the use of social media by the employee, the employer may seek compensation for damage in civil court proceedings.

Slovenia

Mrs. Jasna Ca[illegible]
Jadek & Pensa
Tavčarjeva Street 6
1000 Ljubljana
www.jadek-pensa.si

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the employment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Article 8, European Convention on Human Rights, 1950;
- Articles 35, 37, 38 and 39, Constitution of the Republic of Slovenia;
- Article 8, Personal Data Protection Act;
- Article 46, Employment Relationship Act;
- Law on Employment and Social Security Records.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, recruiters should not base any decision on information regarding a job applicant's ethnicity, race or ethnic origin, national or social background, gender, skin color, state of health, disability, faith or conviction, age, sexual orientation, family status, membership of unions, financial standing or other personal circumstance, which they obtain by screening social media profiles. This would violate the principle of non-discrimination. Furthermore, sending 'friend requests' with the sole purpose of gaining access to more information on the private social media profile of the concerned individuals might be deemed an unfair practice. However, this has not yet been confirmed by case law.

The processing of information from social media profiles (e.g. downloading the information to create a database of potential candidates for a vacancy) is generally not restricted. Because the personal information on social media profiles is published intentionally by a job applicant, this personal data can be viewed and used by 'friends' who are also accepted intentionally by the applicant. However, processing of personal data which is intended for inclusion in a filing system must be performed in accordance with the Personal Data Protection Act.

3. Is works council intervention required?

An intervention of the works council is not in principle required. However, before adopting proposals for general acts, which lay down the organization of work or the responsibilities the workers must be familiar with in order to fulfill the contractual or other obligations, the employer must present them to the works council for consultation. In that case, a policy for the screening of social media profiles for recruitment purposes would require consultation.

Further, if the union is organized within the company, the union has the right to give its opinion regarding the rules to be adopted. For the purposes of review, the policy should be submitted to the union which has 8 days to give its comments. The employer is not obliged to comply with the union's comments.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

However, the employer's right to restrict employee social media use during working hours or on corporate IT tools is derived from the employer's (i) property rights over the IT infrastructure that it provides to its employees to perform their work, (ii) authority over employees in relation to the fulfillment of contractual and other obligations arising from the employment relationship (Article 32, Employment Relationship Act), (iii) right to supervise that the IT infrastructure is used in accordance with the purpose for which it was provided to the employee and that it is efficiently used, and (iv) liability for damages resulting from the acts of its employees during the performance of their employment contract (Article 147, Slovenian Civil Code).

The right to restrict the use of social media also flows from the employee's obligations (i) to carry out work with due diligence in the workplace in accordance with the organization of work and business operations of the employer, (ii) to follow the demands and instructions of the employer, (iii) to refrain from all actions which, in view of the nature of work, cause material or moral damage or might harm the business interests of the employer, (iv) not to disclose confidential information obtained during the execution of the employment contract, and (vi) not to engage in unfair competition with the employer (Articles 31, 32, 35, 36 and 37, Employment Relationship Act).

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes, however such prohibition must be clearly communicated to the employees in advance and included in the employment contract.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

Yes. Such rules must be included in the internal rules and the reference to those rules must be explicitly made in an employment contract. Due to the sensitivity of the issue it is highly recommended that the prohibition is also part of the employment contract, as it should include the employee's consent to check the use of social media.

6. Is an intervention of the works council required for the implementation of such rules?

In principle there is no need to involve the works council. However, if a union is organized within the company, the employer must present the internal rules to the union prior to their adoption in order to enable the union to comment on the proposed wording. If the trade union delivers its opinion within a period of 8 days, the employer must discuss the opinion and present its position before adopting any general acts. The employer is not obliged to comply with the union's comments.

If there is no organized trade union, the employer's general act may lay down the rights and obligations which, pursuant to the Employment Relationship Act, can be regulated in collective agreements, if they are more favorable to the worker than those determined by law and/or any collective agreement which binds the employer. The employer must directly inform the workers of the contents of the proposed general act before adopting it.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

However, the employer's right to impose rules regarding the use of social media outside working hours and on private IT tools can be derived from the employee's obligation (i) to carry out work with due diligence in the workplace in accordance with the organization of work and business operations of the employer, (ii) to follow the demands and instructions of the employer, (iii) to refrain from all actions which, in view of the nature of work, cause material or moral damage or might harm the business interests of the employer, (iv) not to disclose confidential information obtained during the execution of the employment contract, and (vi) not to engage in unfair competition with the employer (Articles 31, 32, 35, 36 and 37, Employment Relationship Act).

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes, however this power is very limited. The employer can only require that the employee's obligations relating to business secrecy and loyalty are not violated at any time.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The employer's power to impose rules regarding employee private use of social media must be balanced with the employee's rights to privacy and personality, to privacy of correspondence and other means of communication, to protection of personal data and freedom of expression (Articles 35, 37, 38 and 39, Constitution of the Republic of Slovenia). Further, employers must protect and respect the worker's personality and take into consideration and safeguard workers' privacy (Article 44, Employment Relationship Act).

4. Is an intervention of the works council required for the implementation of such rules?

If the employer stipulates rules regarding the use of social media by its employees in their private sphere in the general act (governed by the Employment Relationship Act, see above), and there is a trade union, the rules must be presented to the trade union for their opinion before adopting them.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT Infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

There are no specific laws and regulations regarding monitoring of employee social media use on corporate IT infrastructure. However, the following general laws apply:

- Article 35, the Constitution of the Republic of Slovenia (protection of right to privacy);
- Data Protection Act.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Only under strict conditions, where use has been explicitly prohibited. According to case law, Article 35 of Constitution of the Republic of Slovenia which protects right to privacy also refers to corporate IT. The scope of the right to privacy in the workplace depends on the job tasks performed by employee and requirements of the job. The control by the employer over employees should be transparent and proportionate.

Monitoring whether and how much employees are using social media on corporate IT infrastructure is also restricted according to the Data Protection Act. Monitoring of the employee's use of electronic communication tools (e.g. whether or not employees visit social media websites or chat websites from their workstations, the frequency of such visits, etc.) is only permitted under certain conditions:

- monitoring is anticipated in advance in the employer's general acts or in the law;
- monitoring is necessary, which means that the employer's right to supervise efficient use by the employees and work activity cannot be exercised using other means;
- employees must be informed that the corporate IT infrastructure may not be used for private use and that the employer may monitor whether and how much employees are using it for private use;
- monitoring is proportionate, which means that monitoring does not disproportionately intervene in the employee's privacy, which includes the employee's right to privacy and personality, the right to privacy of correspondence and other means of communication, the right to protection of personal data and freedom of expression (Articles 35, 37, 38 and 39 of Constitution of the Republic of Slovenia).

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

The Employment Relationship Act only regulates the general act with which the employer lays down the organization of work or the responsibilities the employees must be familiar with in order to fulfill the contractual or other obligations. If the employer stipulates rules regarding the frequency of social media use on corporate IT infrastructure in this document, they must be presented to the trade union for their opinion before adopting them.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. If disciplinary procedures are provided for in a collective bargaining agreement adopted at the national level, then the employee may be exposed to them. These can range from an informal warning for a minor violation through to commencement of the termination procedure in serious cases.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

According to case law, such evidence generally cannot be used in civil court proceedings, apart from exceptional cases where there are justifiable circumstances. The use of such evidence must have a specific purpose being the exercise of a constitutional right. The court will follow the principle of proportionality to decide which right prevails.

In criminal procedure the court may not base its decision on evidence obtained in violation of human rights and basic freedoms provided by the Constitution (Article 18 of the Criminal Procedure Act).

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. However, the following general laws and regulations apply:

- Article 8, European Convention on Human Rights, 1950;
- Articles 35 and 37, the Constitution of the Republic of Slovenia;
- Article 44, the Employment Relationship Act;
- Data Protection Act.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

This depends on the type of media:

- Private and professional media (e.g. private use of chat applications or corporate chat program): monitoring of content is generally not permitted. The privacy of correspondence and other means of communication is guaranteed. Only a law may prescribe that on the basis of a court order the protection of the privacy of correspondence and the inviolability of personal privacy can be suspended for a set time where necessary for the institution or course of criminal proceedings or for reasons of national security (Article 37 of the Constitution of the Republic of Slovenia; according to the case law this Article also refers to communication at work). Any monitoring of private content is subject to the same conditions outlined above for monitoring the use of social media;
- Posts on public social media (e.g. posts on wall of LinkedIn or Facebook groups which are open to the public): information can be monitored by the employer because it is publicly available.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

According to case law, such evidence generally cannot be used in civil court proceedings, apart from exceptional cases where there are justifiable circumstances. The use of such evidence must have a specific purpose being the exercise of a constitutional right. The court will follow the principle of proportionality to decide which right prevails.

In criminal procedure the court may not base its decision on evidence obtained in violation of human rights and basic freedoms provided by the Constitution (Article 18 of the Criminal Procedure Act).

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

The Employment Relationship Act only regulates the general act with which the employer lays down the organization of work or the responsibilities the employees must be familiar with in order to fulfill the contractual or other obligations. If the employer stipulates rules regarding the frequency of social media use on corporate IT infrastructure in this document, they must be presented to the trade union for their opinion before adopting them.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. If disciplinary procedures are provided for in a collective bargaining agreement adopted at the national level, then the employee may be exposed to them. These can range from an informal warning for a minor violation through to commencement of the termination procedure in serious cases.

Spain

Ms. Guadalupe Sampedro
Garrigues
Hermosilla 3
28001 Madrid
www.garrigues.com

Garrigues is organized as a professional services firm providing business law advisory services in the broadest sense, including all of the specialist services that may be required by companies in the pursuit of their activities in any industry.

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Organic Law 15/1999 of December 13, on the Protection of Personal Data ('LOPD');
- Royal Decree 1720/2007 of December 21, approving the Regulations implementing the LOPD ('RLOPD');
- Revised Workers' Statute Law approved by Legislative Royal Decree 1/1995, of March 24, 1995 ('Workers' Statute').

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants.

However, job applicants and employees cannot be discriminated against on the basis of their gender, marital status, age, origin, ethnicity, social condition, religion, political convictions, sexual orientation, trade union membership or language (Article 4.2.c of the Workers' Statute).

Any processing of personal data must be undertaken in compliance with the LOPD. An infringement could be subject to fines ranging from €900 to €600,000.

3. Is works council intervention required?

No. In relation to recruitment, the works council only has to be informed of the employer's forecast of new hires, indicating the number and types of contracts that will be entered into (Article 64.2.c, Workers' Statute).

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations regarding the use of social media during working hours or on corporate IT tools. However, general rules contained in the Workers Statute apply (i.e. Article 4.2.d regarding employees' rights to their privacy and dignity, Article 5.c regarding employees' obligation to comply with the employer's instructions, and Article 20.3 of the Workers' Statute stating, 'The employer may adopt the measures of supervision and control that it deems most fitting in order to verify compliance by the worker of his/her working obligations and duties, observing, in such adoption and application, the due consideration for his/her human dignity and bearing in mind the real capacity of handicapped workers, as applicable'. Furthermore, the Spanish Supreme Court has established specific rules regarding the employers' ability to impose restrictions on the use of corporate IT tools (not only for the use of social media).

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes. However, employees must be duly informed of such restrictions.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes, the employer can establish limitations as long as the employees are duly informed of the specific restrictions. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

It is not compulsory but it is advisable to incorporate the rules into a document (i.e. IT policy) in order to make those rules enforceable and subject to disciplinary sanctions. It is important that all employees have actual knowledge of the content of the document (i.e. IT policy).

6. Is an intervention of the works council required for the implementation of such rules?

This matter is not specifically regulated under labor law. However, pursuant to previous judicial decisions, it could be construed that when specific rules regarding the use of IT tools establish limitations, the rules could be considered an important change in the organization of the company (Article 64.5, Workers' Statute), and the employees' representatives should be informed prior to implementation of the policy.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter. However, general rules established in the Workers' Statute apply (i.e. Article 4.2.d regarding employees' rights to their privacy and dignity, Article 5.c regarding employees' obligation to comply with the employer's instructions, and Article 20.3 of the Workers' Statute that states that 'The employer may adopt the measures of supervision and control that it deems most fitting in order to verify compliance by the worker of his/her working obligations and duties, observing, in such adoption and application, the due consideration for his/her human dignity and bearing in mind the real capacity of handicapped workers, as applicable'. From a labor standpoint, the employer cannot establish restrictions in the employees' private life, unless the activities of the employees in the referred private lives affect, for example, the reputation of the company.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

An employer can determine certain rules which employees must respect when using social media in their private time or on private IT tools, such as rules regarding (i) the disclosure of confidential company information, (ii) references to the company (the use of trademarks, trade names, etc.) on social media profiles, (iii) the posting of comments or other content which might harm the reputation or interests of the company, (iv) the posting of comments regarding co-

employees, etc. Such restrictions would be applicable only where employees have been provided with a document explaining the purposes of these limitations and are thereby duly informed.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The employer's interests should be balanced with the employee's right to freedom of speech. The restrictions on employee social media use should be relevant for and proportionate to the employer's interests.

4. Is an intervention of the works council required for the implementation of such rules?

Yes, as the monitoring could be considered as a system of control over the employees' activities, prior to implementation the works' council will have the right to issue a report on the employer´s decision (Article 64.5 of the Workers' Statute).

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

From a labor perspective, there is no specific legislation. However, the Supreme Court has established general rules regarding use of the IT tools of the company (see judgments of the Supreme Court of June 28, 2006, September, 26, 2007 and October 6, 2011). Furthermore, the following general laws and regulations apply for the processing of personal data:

- LOPD.
- RLOPD.
- Workers' Statute.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes, monitoring is possible provided that the employees have been informed. Additionally, the monitoring must comply at all times with the proportionality principle, that is, it is not possible to review and monitor any kind of employee communication unless it is necessary for the proper performance of the contractual relationship. Otherwise, the processing of personal data carried out by the company would not comply with the provisions of the LOPD.

The Spanish Data Protection Agency published guidance on 'Data Protection in Labor Relations' in 2009 which should be respected where applicable:

- The legitimacy of the data processing derives from the existence of the employment relationship and therefore, in accordance with Article 6.2 of the LOPD, it does not require consent;
- The purpose must be 'to verify compliance by the worker with his labor obligations and duties' (Article 20.3 of the Workers' Statute);
- All the other obligations under the LOPD and the RLOPD must be complied with by the employer as data controller;
- The duty of disclosure to employees must be fulfilled. This duty is particularly significant when dealing with controls over use of the internet. It is highly advisable that the information provided to employees is clear about company policy on use of the internet, describing in detail the extent to which employees may use the company's communications systems for their private or personal use. It is also recommended that this includes the purpose of the monitoring, information on the monitoring measures adopted, and when it might have an impact on the resources normally used by the employee.

Prior information and evidence that it has been provided is essential, given that this type of processing does not require the consent of the employee and is an expression of the employer's powers of control.

Prior information and evidence that it has been provided is essential, given that this type of processing does not require the consent of the worker and is an expression of the employer's powers of control.

Additionally, the monitoring on the use of corporate IT tools will be subject to the provisions of the LOPD and the RLOPD. Guides and reports about the monitoring on the use of corporate IT tools have been published by the Spanish Data Protection Agency (i.e. 'Guide Data Protection in Labor Relations' published by the Spanish Data Protection Agency in 2009)

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes, as the monitoring could be considered as a system of control over the employees' activities, prior to implementation the works' council will have the right to issue a report on the employer´s decision (Article 64.5 of the Workers' Statute).

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. It is advisable to inform the employees about this possibility through the document or policy that regulates social media use on the employer IT infrastructure. Where dismissal is contemplated, the applicable procedures in the collective bargaining agreement and the Workers' Statute will also have to be complied with.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

Evidence obtained unlawfully cannot be used in a court proceeding.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. However, the following general laws and regulations apply for the processing of personal data:

- LOPD;
- RLOPD;
- Workers' Statute.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Monitoring is permitted when it is undertaken on the company's IT infrastructure, during working hours, and the employees have been informed of the possibility of such monitoring. Additionally, the monitoring must comply at all times with the proportionality principle, that is, it is not possible to review and monitor any kind of communication of the employee unless it is necessary for the proper performance of the contractual relationship. Therefore, the private communications cannot be monitored.

The Spanish Data Protection Agency published guidance on 'Data Protection in Labor Relations' in 2009 which should be respected where applicable:

- The legitimacy of the data processing derives from the existence of the employment relationship and therefore, in accordance with Article 6.2 of the LOPD, it does not require consent.

- The purpose must be 'to verify compliance by the worker with his labor obligations and duties' (Article 20.3 of the Workers' Statute).
- All the other obligations under the LOPD and the RLOPD must be complied with by the employer as data controller.
- The duty of disclosure to employees must be fulfilled. This duty is particularly significant when dealing with controls over use of the internet. It is highly advisable that the information provided to employees is clear about company policy on use of the internet, describing in detail the extent to which employees may use the company's communications systems for their private or personal use. It is also recommended that this includes the purpose of the monitoring, information on the monitoring measures adopted, and when it might have an impact on the resources normally used by the employee.

Prior information and evidence that it has been provided is essential, given that this type of processing does not require the consent of the employee and is an expression of the employer's powers of control.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

Evidence obtained unlawfully cannot be used in a court proceeding.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes, as the monitoring could be considered as a system of control over the employees' activities, prior to implementation the works' council will have the right to issue a report on the employer´s decision (Article 64.5 of the Workers' Statute).

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. It is advisable to inform the employees about this possibility through the document or policy that regulates social media use on the employer IT infrastructure. It is important that all employees have actual knowledge of the content of the document (i.e. IT policy). Where dismissal is contemplated, the applicable procedures in the collective bargaining agreement and the Workers' Statute will also have to be complied with.

Sweden

Börje Leidhammar
Wistrand
Regeringsgatan 65
103 93 Stockholm
www.wistrand.se

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

No, there are no specific laws and regulations dealing with the use of social media in the recruitment context. However, the following general laws apply:

- Discrimination Act (SFS 2008:567);
- Public Employment Act (SFS 1994:260);
- Personal Data Act (SFS 1998:204);
- Employment (Co-Determination in the Workplace) Act (SFS 1976:58).

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of social media profiles of job applicants which are publicly available. However, some information that can be obtained by screening social media for the purpose of a recruitment decision may be deemed unlawful due to discrimination legislation. The Discrimination Act prohibits recruiters from treating job applicants differently if the treatment differs based on the job applicant's gender, transgender identity, ethnicity, religion, handicap, sexual inclination or age. In relation to public employers, appointment may only be based on objective factors such as merits and competence.

Further, the processing of information from social media profiles is restricted and must be carried out in accordance with the Personal Data Act.

3. Is works council intervention required?

Works council intervention may be required. The employer is required to regularly inform the works councils to which it is bound by collective bargaining agreements, or the employees' representatives if the employer is not bound by any collective bargaining agreement, about measures taken with respect to personnel management. The duty to inform primarily focuses on financial and general information, but it may also be necessary to inform about such as measures with respect to recruitment and selection.

In addition, it is recommended in the Employment (Co-Determination in the Workplace) Act that parties entering into a collective bargaining agreement regarding salaries and general conditions of employment should also agree on the rights of co-determination of employees as regards the conclusion and termination of employment contracts, management and dispatching of work, and the operational activities.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

No, there are no specific laws or regulations in that sense. However, the right of an employer to restrict the use of social media of its employees during working hours or on corporate IT-tools is derived from the employer's general authority over its employees and its duty of supervision.

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer can for example determine that employees are allowed to use social media (i) for a limited period of time during the day (e.g. only during lunch breaks), (ii) on separate hardware, (iii) on the company's laptop, but only after working hours, etc.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No, it is not required to stipulate these rules in a specific type of document. However, to make sure that the rules are enforceable, it is recommended to annex them to the employment contract.

6. Is an intervention of the works council required for the implementation of such rules?

Yes, works council intervention may be required. The employer is required to regularly inform the works councils to which it is bound by collective bargaining agreements or the employees' representatives if the employer is not bound by any collective bargaining agreement, about measures taken with respect to personnel management. The duty to inform primarily focuses on

financial and general information, but it may also be necessary to inform about implementation of rules restricting the use of social media

Also, before an employer takes any decision concerning significant changes in working or employment conditions, the employer must, on its own initiative, enter into negotiations with the work councils to which it is bound and with the employees' representatives that have members affected by the proposed decision. Intended decisions regarding personnel management may, even if the decisions are within the employer's general authority, trigger a duty for the employer to initiate negotiations if the decisions are not of regular nature and concern a matter that typically is of interest to the works council.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter. However, the employee has a general duty of loyalty to the employer and must refrain from actions that may harm or have negative consequences upon their employer. The employee cannot disclose confidential information of their employer.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes, an employer may impose rules regarding the use by employees of social media in their private sphere, based on the employee's duty of loyalty and confidentiality

3. Are there any restrictions on the employer's power to impose such rules?

Yes, this power is limited by the employee's right to free speech in the private sphere. The restrictions on employee social media use must be relevant for and proportionate to the employer's interests. Furthermore, the employer may have to tolerate a certain level of criticism from its employees.

4. Is an intervention of the works council required for the implementation of such rules?

Yes, works council intervention may be required. The employer is required to regularly inform the works councils to which it is bound by collective bargaining agreements or the employees' representatives if the employer is not bound by any collective bargaining agreement, about measures taken with respect to personnel management. The duty to inform primarily focuses on

economical information and overall information, but it may also be necessary to inform about implementation of rules restricting the use of social media.

Also, before an employer takes any decision regarding significant changes in working or employment conditions, the employer must, on its own initiative, enter into negotiations with the work councils to which it is bound and with the employees' representatives that have members affected by the proposed decision. Intended decisions regarding personnel management may, even if the decision is within the employer's general authority, trigger a duty for the employer to initiate negotiations if the decision is not of regular nature and concerns a matter that typically is of interest to the works council.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No. The following general laws however apply:

- Personal Data Act (SFS 1998:204);
- Employment (Co-Determination in the Workplace) Act (SFS 1976:58);
- Employment Protection Act (SFS 1982:80).

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes, monitoring can be justified based on technical and security reasons, as long as the employee is informed of it. If the monitoring of the employee's use of the IT-infrastructure is automatic and information that can be linked to a person is processed, the monitoring must be conducted in accordance with data protection law and the employer must report the monitoring to the Data Inspection Board.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Yes, works council intervention may be required. The employer is required to regularly inform the works councils to which it is bound by collective bargaining agreements, or the employees' representatives if the employer is not bound by any collective bargaining agreement, about the

measures taken with respect to personnel management. The duty to inform primarily focuses on financial and general information, but it may also be necessary to inform about rules regarding monitoring.

Also, before an employer takes any decision concerning significant changes in working or employment conditions, the employer must, on its own initiative, enter into negotiations with the work councils to which it is bound and with the employees' representatives that have members affected by the proposed decision. Intended decisions regarding personnel management may, even if the decision is within the employer's general authority, trigger a duty for the employer to initiate negotiations if the decision is not of regular nature and concerns a matter that typically is of interest to the works council.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. The sanctions that the employer may impose are stipulated in the Employment Protection Act such as notice of termination due to personal reasons of the employee or summary dismissal. If an employee does not follow the rules of the workplace, this may constitute a ground for termination due to reasons personal to the employee. In order for a summary dismissal to be legal, the employee must have severely disregarded its responsibilities towards the employer. If the matter is regulated in a collective bargaining agreement other sanctions such as disciplinary action may be available.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

Yes, the evidence may be used, however its reliability may be questioned.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No, there is no specific legislation dealing with this matter. However, the following general laws and regulations apply:

- The Fundamental Law on Freedom of Expression (SFS 1991:1469);
- Employment Protection Act (SFS 1982:80);
- Personal Data Act (SFS 1998:204).

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

Content that is publicly available can be monitored by the employer. It is generally not allowed for an employer to monitor and read an employee's private e-mails or other types of private media.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

Yes, the evidence may be used, however its reliability may be questioned.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

Yes, works council intervention may be required. The employer is required to regularly inform the works councils to which it is bound by collective bargaining agreements, or the employees' representatives if the employer is not bound by any collective bargaining agreement, about the measures taken with respect to personnel management. The duty to inform primarily focuses on financial and general information, but it may also be necessary to inform about rules regarding monitoring.

Also, before an employer takes any decision regarding significant changes in working or employment conditions, the employer must, on its own initiative, enter into negotiations with the work councils to which it is bound and with the employees' representatives that have members affected by the proposed decision. Intended decisions regarding personnel management may, even if the decision is within the employer's general authority, trigger a duty for the employer to initiate negotiations if the decision is not of regular nature and concerns a matter that typically is of interest to the works council.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

The sanctions that the employer may impose are stipulated in the Employment Protection Act such as notice of termination due to personal reasons of the employee or summary dismissal. If an employee does not follow the rules of the workplace, this may constitute ground for termination due to personal reasons of the employee. In order for a summary dismissal to be legal, the employee must have severely disregarded its responsibilities towards the employer. If the matter is regulated in a collective bargaining agreement other sanctions may be available such as disciplinary actions.

Switzerland

Mr. Mark A. Reutter
Walder Wyss Ltd
Seefeldstrasse 123
P.O. Box 1236
8034 Zurich
www.walderwyss.com

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I. Recruitment and Social Media

1. Is there a specific legal framework for the use of social media in the recruitment context?

There are no specific laws or regulations dealing with the use of information from social media in the recruitment context. However, the following general laws are relevant:

- Employment law as set out in the Code of Obligations, in particular Article 328b of the Code of Obligations;
- Articles 4, 12, 13 and 14 of the Federal Act on Data Protection.

2. Is it permitted to consult information which is publicly available on social media websites in the context of the recruitment procedure? What conditions apply (if any)?

Yes. There are no specific restrictions on the screening of public social media profiles of job applicants, however it may be more legitimate to collect data from professional platforms than private ones.

The general data protection rules and principles apply as well to the recruitment procedure. The potential employer may handle data concerning the potential employee only to the extent that such data concern the employee's suitability for his job or is necessary for the performance of the employment contract. Generally, personal data may only be processed for the purpose indicated at the time of collection, that is evident from the circumstances, or that is provided for by law. The collection of personal data and in particular the purpose of its processing must be evident to the data subject. In light of all these principles, the collection of data from private platforms may be an impermissible intrusion into the applicant's private life.

3. Is works council intervention required?

Whether an intervention of the works council is necessary can only be answered on a case-by-case basis. Swiss law does not provide for mandatory works councils. Pursuant to the Employee Participation Act, employees may (but are not obliged to) elect a works council. For companies with 50 or more employees, the employees are entitled to a works council if they elected to have one.

Under the Employee Participation Act, the works council representatives must be kept informed of all matters necessary to fulfill their tasks, and they must be consulted regarding (i) security at work and health protection, (ii) collective dismissals, (iii) affiliation to an occupational pension fund and termination of the affiliation agreement, and (iv) transfer of undertakings. The Act defines the information rights of the works council in an open and broad way. Whether the information rights extend to recruitment and related procedures or policies cannot be answered generally, but only be determined for each individual case.

II. Regulating and Restricting Use of Social Media

A. Regulation During Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media during working hours or on corporate IT tools (such as company laptops, smartphones, etc.)?

There are no specific laws or regulations in that sense.

However, the employer's right to restrict employee use of social media during working hours or on corporate IT tools is derived from the employer's right to issue general directives and specific instructions regarding the performance of the work and the conduct of employees (Article 321d, Code of Obligations).

2. Can an employer totally prohibit the use of the company's electronic communication tools for social media purposes?

Yes.

3. If so, is the employer required to provide other communication tools to its employees which they can use for social media purposes?

No. Employees do not have a right to use social media during working hours or on IT tools provided by the employer for professional purposes.

4. Can an employer impose rules on the use of social media during working hours or on corporate IT tools?

Yes. The employer's rights to regulate the use of social media are very broad. The employer can for example determine that employees are allowed to use social media for a limited period of time during the day or on separate hardware.

5. If so, is it required to stipulate these rules in a specific type of document, such as the work rules of the company?

No. Mere oral instruction may, however, cause evidentiary problems. It is normal practice to stipulate such rules in the employment regulations of the company.

6. Is an intervention of the works council required for the implementation of such rules?

Whether an intervention of the works council is necessary can only be answered on a case-by-case basis. See Section I, question 3 above.

B. Regulation Outside Working Hours

1. Is there any specific legislation concerning the power of employers to restrict the use of social media outside working hours or on private IT tools?

No, there is no specific legislation concerning this matter.

However, the employee's right to use social media platforms outside working hours or on private IT infrastructure may be restricted based on their duty of care and loyalty (Article 321a, Code of Obligations). Such restrictions would, however, be the exception rather than the rule since Swiss law is based on the principle that the professional and private spheres should be separated.

2. Can an employer impose rules regarding the use of social media by its employees in their private sphere (e.g. rules regarding the content of wall posts on Facebook, rules regarding sharing of information on chat websites or on private social media pages, etc.)?

Yes, but only to a limited extent. It is already required by law that an employee must refrain from anything that could economically hurt the employer (e.g. disclosure of confidential company information or posting of comments or other content which might harm the reputation or interests of the company). The employer can substantiate this obligation, for example by imposing rules regarding disclosure of information or defamation of the employer.

3. Are there any restrictions on the employer's power to impose such rules?

Yes. The power of an employer to impose rules regarding employee private use of social media is limited to a substantiation of the employee's duty of care and loyalty.

4. Is an intervention of the works council required for the implementation of such rules?

Whether an intervention of the works council is necessary can only be answered on a case-by-case basis. See Section I, question 3 above.

III. Monitoring of the Use of Social Media

A. Monitoring Frequency of Social Media Use of Employees on Corporate IT infrastructure

1. Is there any specific legislation regarding monitoring of social media use of employees on corporate IT infrastructure (such as company laptops, smartphones, etc.)?

No. However, the employer's right to monitor employees is restricted by Article 26 Ordinance 3 to the Labor Act, Article 328b of the Code of Obligations and the Data Protection Act.

2. Is it permitted to monitor whether and how much employees are using social media on corporate IT infrastructure? If so, are there any restrictions on such monitoring?

Yes. Monitoring to check compliance with an acceptable use policy or similar is permitted if the anonymity of the individual users is maintained and assured, and provided that its results cannot be attributed to one specific employee (e.g. control of data volume).

Monitoring individual employees is only allowed if written monitoring rules exist that inform the employee about possible monitoring. Furthermore, before monitoring of individual employees is permitted, the employer must have knowledge of misuse or have suspicion of a breach of the rules of use or of the duty of loyalty (e.g. anonymous monitoring provides evidence of infringement of the acceptable use policy). Individual monitoring must be pre-announced and must always be proportionate.

3. Is an intervention of the works council required prior to the implementation of technology which allows such monitoring?

Whether an intervention of the works council is necessary can only be answered on a case-by-case basis. See Section I, question 3 above.

4. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Employers should, however, first warn their employees before actually imposing the sanction. If behavior of the employee does not change, employer can impose various types of sanctions. Sanctions can start from blocking social media platforms/internet. All sanctions should be proportionate to the severity of the misconduct.

5. Can evidence of social media use in violation of the social media policy, which is obtained by unlawful monitoring of the employee's electronic communications and internet use, be used in a court proceeding?

According to Article 152 of the Swiss Civil Procedure Code, illegally obtained evidence will only be considered if there is an overriding interest in finding the truth. Whether finding the truth is more important than the personal rights of the employee has to be decided on a case-by-case basis.

B. Monitoring Social Media Content

1. Is there any specific legislation regarding monitoring of content of social media?

No. However, the employer's right to monitor employees is restricted by Article 26 Ordinance 3 to the Labor Act, Article 328b of the Code of Obligation and the Data Protection Act.

2. Is it permitted to monitor content of social media use of employees (e.g. wall postings on Facebook, statements on public chat websites, Twitter messages, private MSN-chat sessions, etc.)? If so, are there any restrictions on such monitoring?

To the extent such monitoring relates to the conduct of the employees while working, the same rules and restrictions as applicable to the monitoring of frequency of social media use by employees on corporate IT infrastructure as mentioned above apply.

Data protection principles must always be observed, namely that the employer may handle personal data concerning the employee only to the extent that such data is necessary for the performance of the employment contract. In addition, the employer is under a duty to respect and protect the employee's personality and the employer is also prevented from intruding into an employee's private sphere. These limitations would not normally prevent the employer from monitoring that is not employee-focused, for example screening the internet for postings that could harm the employer's reputation.

3. Can content (e.g. content of a chat conversation) which is obtained unlawfully (e.g. without consent of the employee) be used as evidence in a court procedure (e.g. in the context of a dismissal procedure)?

According to Article 152 of the Swiss Civil Procedure Code, illegally obtained evidence will only be considered if there is an overriding interest in finding the truth. Whether finding the truth is more important than the personal rights of the employee has to be decided on a case-by-case basis.

4. Is an intervention of the works council required when implementing a policy regarding the monitoring of content of social media use of employees?

No.

5. Can an employer impose sanctions when monitoring reveals that employees violate the rules regarding the use of social media?

Yes. Employers should, however, first warn their employees before actually imposing the sanction. If the behavior of the employee does not change, the employer can impose various types of sanctions. Sanctions can start from blocking social media platforms/internet. All sanctions should be proportionate to the severity of the misconduct.

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