Question 1)

There are no specific regulations regarding the confidentiality of electronic communications, but confidentiality of letters is generally protected in the Danish Penal Code § 263. An employer is not entitled to open or read e-mails to an employee just in his capacity as employer. This demands a clear agreement or it must be a condition of appointment.


Question 2)

Yes, the above mentioned provisions are also applicable when the information is collected on social networks or blogs.

Question 3)

The provisions are also protecting information collected and used by an employer.

a) During the recruitment phase

It is probably not unusual that an employer makes a google-search on a job applicant. And there is no legislation that prevents him from checking out professional and personal networks and blogs. However the employer must show precaution in the use of the information.

The employer is only allowed to collect and use information of professional and proportional relevance. According to the anti-discrimination legislation the employer is not allowed to collect or use information concerning color of skin and race, religion, political conviction, sexual orientation or national, social or ethnical origin. It is in certain contexts allowed to collect information about age and physical skills possibly revealing a handicap, because it may have an importance to the employment. If it is of concrete importance and the job applicant agrees, it is allowed to collect health information.
If the information is published by the job applicant himself and not only in a private network, it will be regarded as information that the employer can collect and use without a consent. The employer must though be aware, that some information on the blog or network may be published by other persons than the applicant.

It is always the duty of the employer to inform the job applicant about the collected information. And the job applicant has the right to make comments to the information.

b) In the course of the employment for disciplinary reasons or others

In the course of the employment the protection will be of relevance in connection with decisions of conducting a disciplinary process. The employee has an obligation of loyalty to the employer – also after working hours. If this obligation is neglected the employer has a right to take disciplinary measures and ultimately terminate the employment.

The obligation of loyalty can i.e. be neglected by critical or negative statements harming the employer in social media. It depends on the content of the statement and its context if it can be regarded as an infringement of the obligation of loyalty. Important is here the intention or risk of spreading the information.

It will therefore be an issue whether the information is published in a group or forum where the employee should know that the information will be widely spread. Basically an employee must be aware that a statement will be widely spread if it is not only put forward in a closed or very narrow group of persons with mutually tight private bonds.

If a harmful statement about the employer is put forward in social media it may be seen as an aggravating circumstance according to the possibility of spreading of the harmful statement without control and the fact that in practice is impossible to withdraw the harmful statement from the internet.

It will be a relevant factor if the employer has a clear policy or regulation for the employee’s use of social media during and outside working hours. Employers have increasingly made such policies not only regulating the employee’s use of social media in relation to the employer but also in relation to colleagues and managers/direction. Such regulations must respect the fundamental and civic rights of the employee – especially the right of freedom of expression.

In an international conference in Strasbourg in 2008 about protection of data the Danish Data Protection Agency and other similar agencies from all over the world has adopted a resolution about protection of privacy in social media (Privacy Practices).

Question 4)
Theoretically the employer is entitled to decide that employee is not allowed to use social networks from devices supplied by the employer, both during and outside working hours. The employer is as a rule not entitled to put restrictions to the employee’s use of social media from the employee’s own devices after working hours. But the employee must in that situation still respect the general obligation of loyalty, and there may be situations where regulations can be legitimate in the interest of the employer.

In most working places the employer will accept a limited use of social media during working hours, but the employer is recommended to have a clear policy about the conditions for using social media in working hours.

**Question 5)**

The employer is entitled to monitor the use of social networks by the employees if he has an objective and legitimate interest in doing so, but he has to inform about it and there should be a founded suspicion of misuse in case of controlling the log of an employee’s devices supplied by the employer. The interest of the employer must override the consideration of the employee. Some unions demand a warning of 6 weeks before starting monitoring. In general it is considered as a good custom to inform before starting up monitoring.

Often the employee will use social media after working hours from his own devices, and the employer will in that case not have the same access to control. But still it is not prohibited for the employer to use information in social media from the employee in case he has collected it in a way that is not contrary to regulations in the Penal Code or the Act on Processing of Personal Data.

Association of Danish Judges, 8th September 2016