Preamble

The workplace is part of the public sphere which includes the right to privacy.

It is generally considered appropriate to balance between the worker’s interest to the protection of his privacy and the competing interests of the employer and the society to disclosure of information and to preventive surveillance of workers. These competing interests are most often dictated by security and productivity concerns.

The technological innovations facilitate the employer’s control over the worker’s activities in the workplace and thus increase the risk of conflict between the interests of the enterprise and the worker’s right to privacy. The border that separates professional life from privacy is therefore very fragile and it reveals that the two spheres (private and public) are not perfectly sealed anymore.

Therefore, the purpose of this study is the protection of privacy that a worker can expect both with regard to his future employer (recruitment phase) or his employer (during his employment period), when information about him circulate on social networks (Facebook, LinkedIn, etc ...) or on blogs depending on:

— whether the worker is circulating this information by himself or it is done by third parties;
— whether there is a direct and free access to the information (« open profile ») or not (« closed profile »);
— whether we are talking about collecting information or using this information;
— the fact that the gathering and use of information is done by the employer or the information is collected by a third party and then made available to the employer who will use it.

** * * *

Questions

[1] Does your country have laws or regulations that protect the confidentiality of electronic communications?

Yes.
The main Irish law dealing with data protection is the Data Protection Act 1988, as amended by the Data Protection (Amendment) Act 2003.

The European Communities (Electronic Communications Networks And Services) (Privacy And Electronic Communications) Regulations 2011, also known as the ePrivacy Regulations 2011 (S.I. 336 of 2011), deal with data protection for phone, e-mail, SMS and Internet use. They give effect to the EU e Privacy Directive 2002/58/EC (as amended by Directive 2006/24/EC and 2009/136/EC).

The Irish Office of the Data Protection Commissioner has warned, in its Guidance on Monitoring of Staff, that in the absence of an ‘Email and Internet Acceptable Use Policy’, employees may have a reasonable expectation of privacy in the workplace. It is vital that employees are informed of the existence, extent and purpose of any email and internet monitoring.

[2] If so, are these provisions applicable when the information is collected on social networks or blogs?

Yes.

[3] If so, are these provisions protecting the information collected or used by an employer:

- during the recruitment phase?

  There is no legislation preventing a prospective employer from vetting the social media profiles of job applicants. However, employers need to exercise caution in their use of information which could be deemed to discriminate against potential candidates.

- in the course of the employment for disciplinary reasons or others?

  Social media can come into play in connection with surveillance of workers and the monitoring of employee e-mails and cyber communications. If an employer has in place a policy warning employees that all communications on devices, supplied by the employer or personal, could and would be monitored then it is being made clear to employees that misuse of internet is prohibited, and such misuse can be used in disciplinary proceedings.

  Alternatively, it may be that the employer has a duty to other employees to conduct a disciplinary process, for example, where bullying and harassment of one employee by another occurs through social media. Irish law has generally upheld an employer’s right to take such action but, like any termination of employment, fair procedures must always be followed and any sanction must be proportionate.

Notably, in the case *Mehigan v Dyflin Publications* (UD 582/2001), the EAT said that:
“…the use of the internet for unauthorised purposes will (likely not) amount to a sufficient reason justifying an employer from dismissing an employee in the absence of a clear written policy statement to this effect…”

Furthermore, a number of other cases illustrate that disciplinary action for misuse of email or internet is unsound unless the employee in question has been made aware of the consequences of his or her actions. A business interest must underlie any monitoring of employees’ use of company computer systems, employees must be aware that monitoring may be undertaken, and monitoring must be proportionate, never systematic.

[4] Are the employees allowed to use social networks during working hours? If so, in which way?

According to the Data Protection Commissioner’s Guidance Notes on Monitoring of Staff, there is nothing in principle to stop an employer specifying that use of equipment is prohibited for personal purposes, but the likelihood is that most employers will allow a limited amount of personal use. In the absence of a clear policy, employees may be assumed to have a reasonable expectation of privacy in the workplace. In short, it is advised that employers have a clear social media policy in place outlining the ways in which employees may or may not use social networks during working hours.

[5] Can the employer monitor the use of social networks by his employees during working hours?

Employer policies and actions in relation to monitoring and surveillance of employees must be clear and should only be carried out to give effect to the stated purpose. Monitoring and surveillance in Irish law in general is governed by the Data Protection Act 1988, as amended in 2003. If an employer wishes to set up monitoring and use the data, it should comply with the principles in this legislation.

In Barbulescu v Romania¹, the European Court of Human Rights (the “ECtHR”) ruled that a Romanian employer did not breach the privacy rights of an employee when it monitored chats on his Yahoo Messenger account. The ECtHR found that it was “not unreasonable for an employer to want to verify that employees are completing their professional tasks during working hours”. In the circumstances of the case, in particular where there was an express ban on personal use by employees of the internet at work, the ECtHR found that the employer did not violate Article 8.

The ECtHR has jurisdiction only to interpret the Convention and its protocols. The Convention was incorporated into Irish law by the European Convention on Human Rights Act 2003, and decisions of the ECtHR are of persuasive value to the Irish courts.

Outside of the working hours?

Most social media accounts are personal to the employee and most posts created by employees are personal and do not occur in the course of employment. However, in

---
¹ [2016] ECHR 61
cases where social media posts affect the reputation of the employer or constitute bullying and harassment of other employees, an employer may feel it necessary to formally investigate and potentially take disciplinary action.

When an employee at a small insurance brokerage in County Cork referred to one of the directors on her personal Facebook page as a “bitch”, the employer implemented procedures that ultimately led to the employee’s termination of employment. The employee’s unfair dismissal claim was rejected by the Employment Appeals Tribunal as the Tribunal felt dismissal was justified due to the breach of trust.\(^2\)

In a Northern Ireland Tribunal case, an employee who made offensive Facebook comments about a female colleague’s promiscuity from his home computer in his own time, but naming the company, had his dismissal upheld by the Tribunal. While the employee’s action did not necessarily bring his employer into disrepute, the posts did amount to sexual harassment by one employee of another, which ultimately justified his dismissal.

There are many other examples from case law in Ireland and, particularly, the UK which establish an employer’s right to take disciplinary actions in appropriate cases, even where the post is on a private social media account.

An illustrative case on proportionality is that of *Emma Kiernan v A Wear Limited* (UD643/2007). An employee posted profane comments about her branch manager on the social networking site, Bebo, outside work. The remarks were brought to management’s attention by a customer and a disciplinary meeting followed. The employee, who had a previously clean disciplinary record, was suspended pending a disciplinary hearing. Ultimately, the employee’s actions were deemed to be gross misconduct and she was dismissed.

The EAT decided that while A-wear’s disciplinary procedures were fair, dismissal was a disproportionate sanction. Of note is that the EAT accepted that an employee’s online activities outside work can constitute misconduct.

\(^*\ *

\(^2\) “Woman lost her job after insulting boss on Facebook”, *Irish Examiner* (2\(^{nd}\) December 2011)