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?
The major provisions to protect the secrecy of telecommunication are as follows.

a. The second sentence of Article 2 of the Constitution stipulates that "the secrecy of any means of communication shall not be violated."

b. Article 4, Paragraph (1) of the Telecommunications Business Law stipulates that "the secrecy of communications being handled by a telecommunication carrier shall not be violated."

c. Article 3 of the Act on Prohibition of Unauthorized Computer Access stipulates that "it is prohibited for any person to engage in an Act of Unauthorized Computer Access."

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

The provisions of [1] shall also apply to communication on social networks or blogs. Under these provisions, for example, the details of communication between specified people on the social networks and information concerning the sender of the information sent anonymously on the blogs shall be protected. On the other hand, information to which people have direct, free access is not protected under these provisions.

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

- during the recruitment phase?
- In the course of the employment for disciplinary reasons or others?

In principle, in no case may an employer collect or use information concerning workers protected pursuant to the provisions of [1].

Although it is not related to the secrecy of telecommunication, Article 5-4, Paragraph (1) of the Employment Security Act stipulates the matters concerning the collection and use of the information by the employer at the stage of recruitment. More specifically, Paragraph (1) stipulates that unless the person concerned consents or there is other good cause, those who recruit workers shall, in collecting, retaining and using the personal information of those who intend to become workers in response to recruitment with respect to their businesses, collect the personal information within the scope necessary to achieve the purpose of their businesses and retain and use the same within the scope of the purpose of said collection. In this regard, the Ministry of Health, Labour and Welfare announced guidelines for the handling of personal information by a person recruiting workers (the "Guidelines" as a public notice). The Guidelines provide that a person who recruit workers shall collect personal information within the scope of purpose of its business and shall not collect the following personal information unless there is a special necessity for the duties or it is
otherwise essential for the achievement of business purpose and the personal information is collected from the person concerned after showing the purpose of collection.

   a. Race, ethnic group, social status, family origin, registered domicile, place of birth or any other matter which is likely to be the cause of social discrimination
   b. Thought and creed
   c. Whether or not the worker has joined a labor union

   The Guidelines also provide that in collecting the personal information, a person who recruits workers must use lawful and fair means such as collecting the information directly from the person concerned or from a person other than the person concerned with the consent of the person concerned.

   While there is no provision that directly provides for the matters concerning the collection and use of information by an employer while examining the grounds for disciplinary action, the obligations that a business operator handling personal information should observe have been prescribed by the Act on the Protection of Personal Information in general. With respect to the acquisition of the personal information, Article 17 of the Act provides that a business operator handling personal information must not acquire personal information through deception or other wrongful means.

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

   There are no provisions of laws or ordinances prescribing whether or not workers are allowed to use social networks during their working hours or Supreme Court precedents instructing this point.

   Generally speaking, since workers have an obligation to devote themselves to their duties, the private use of social networks by the workers during their working hours may breach such obligation.

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

   There are no provisions of laws or ordinances prescribing whether or not an employer may monitor workers' use of social networks.

   There are Supreme Court precedents which held that a company may generally prescribe necessary matters in the rules and give concrete instructions or orders to workers to maintain and ensure the order of the company and investigate the facts concerning the case of disturbance of the company order, but there are no Supreme Court precedents which held that an employer may monitor workers' use of social networks.
In theory, some think that if the authority to monitor whether or not the personal computers provided by an employer are privately used and to monitor the extent of private use has been specified in the regulations for use of such computers, the employer may monitor the use in accordance with such regulations and even if there are no such regulations, monitoring is allowed as long as it is reasonably necessary for business operation such as when it is necessary to investigate whether or not the use breaches the corporate order and the means of monitoring is reasonable.

***