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Social media policy Q&A: India

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India-specific information concerning the key legal and commercial issues to be considered when drafting a social media policy for use internationally.

See also Standard document, Social media policy: International, with country-specific drafting notes.

Applicability

1. In your jurisdiction, is a policy such as Standard document, Social media policy: International usually:

- Put in place by employers?
- Included in a general IT and communications systems policy or as a free-standing policy?

Employers do not normally use a separate social media policy. These provisions are usually covered either in the actual employment agreement or in a general handbook or code of conduct applicable to employees.

Alternatively, the guidelines on the use of social media may be implemented through internal communications to employees (for instance, the guidelines may be circulated through internal emails or training held at the workplace to inform the employees of the acceptable uses of social media).

However, it has recently become more common practice in India for companies (especially multinationals and listed companies) to adopt specific policies to regulate employees' use of social media.

2. What are the terms in a policy called in your jurisdiction? For example, clauses, paragraphs, articles.

The terms in a policy are usually referred to as "paragraphs" or "clauses".

3. Does Standard document, Social media policy: International help to minimise risk for employers by defining what is acceptable and unacceptable uses of social media in the context of the employment relationship?

Yes, the social media policy set out in Standard document, Social media policy: International would, in our view, minimise risk for employers by clearly laying down the acceptable and prohibited use of social media by employees, helping to regulate their conduct.

In addition, a policy setting out the extent and nature of monitoring of employees' social media activity, along with an obligation to use social media responsibly, will help safeguard the employer from any reputational risk without infringing on the rights to freedom of expression and privacy that individuals enjoy in India.

4. Is it possible in your jurisdiction for Standard document, Social media policy: International to apply to an employee's social media use, including outside of office hours?

Since India does not have specific legislation regarding social media, there is no prohibition on a social media policy extending to an employee's use of social media outside the office hours. Accordingly, Standard document, Social media policy: International can apply to out of hours use of social media.

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Enforceability

5. Is Standard document, Social media policy: International enforceable against employees? How?

The employer (especially a private entity) may, contractually or otherwise, make provisions for regulating the conduct of employees on social media platforms, the employer may proceed against the employee in the event they conduct themselves in a manner that contravenes these provisions.

One such action could be initiating disciplinary proceedings against the employee on the ground of misconduct (see Question 6). The alternative action is for the employer to issue the employee with a written warning.

6. Can an employer take disciplinary action for breach of the social media policy (as set out in Standard document, Social media policy: International: clauses 2.3 and 9)?

Yes, any act or omission on the part of an employee in breach of an obligation under the contract of employment or any rules of service or policy, including the social media policy, may amount to misconduct, and the employee may be subjected to disciplinary action. Typically, companies stipulate this in their internal disciplinary policy or code of conduct.

7. What disciplinary procedures should the employer follow where the employee is in breach of Standard document, Social media policy: International?

The Industrial Employment (Standing Orders) Act 1946 (IESOA) applies to industrial establishments (including factories) employing 50 or 100 or more workmen (the threshold varies from state to state); it requires employers to stipulate conditions of services or adopt model standing orders. The model standing orders framed by IESOA require the employer to follow the prescribed disciplinary procedure:

- Preliminary investigation.
- Service of a show-cause notice on the employee (which asks the employee to explain in writing why disciplinary proceedings should not be brought against them), detailing specifics of the alleged breaches.
- If the employee fails to give a satisfactory explanation or denies the alleged breaches, an internal investigation must be conducted by a designated investigating officer.
- For establishments not covered by IESOA, the relevant labour legislation does not prescribe a specific enquiry process to which an employer must adhere.

The disciplinary mechanism is instead decided on by the employer, and is typically set out in the company's service rules or employee handbook. However, employers must ensure that any disciplinary procedure satisfies the principles of natural justice; this entails:

- Clear communication of the charges to the employee through a show-cause notice.
- Examination of witnesses in the presence of the employee.
- Fair opportunity for the employee to examine and cross-examine witnesses.
- Issuance of a speaking order (that is, an order detailing clear findings, supported with reasons justifying those findings).

(*Sur Enamel and Stamping Works v Their Workmen* 1963 II LLJ 367.)

To maintain certainty and uniformity, companies usually have an established disciplinary procedure set out in their code of ethics and conduct or social media policy.

8. Is the employer required to carry out an investigation before taking any action against an employee in respect of Standard document, Social media policy: International?

Since the breach of the applicable policies may amount to misconduct and enable an employer to terminate the employee's contract, it is imperative that the employer conduct a thorough investigation (following the principles of natural justice) before taking any action against an employee (see Question 7). If the investigation is found to be in violation of the principles of natural justice, the employee may have the proceedings vitiated on that ground. In such cases, courts ordinarily remand the matter back to the disciplinary authority for it to conduct the investigation again.

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9. What disciplinary sanctions may be brought against the employee for breach of the social media policy? Can an employee be dismissed (as set out in Standard document, Social media policy: International: clause 2.3)?

The disciplinary sanction which may be imposed on an employee after an adverse finding in a disciplinary enquiry would largely depend on, among other factors:

- The gravity of the breach.
- The frequency of acts or omissions amounting to the breach.
- The actual or potential damage caused as a result of the breach.

The action taken by an employer (where breach is proved) may range from a simple reprimand to termination of employment.

In case of minor misconduct, the following disciplinary actions are common:

- Warning.
- Fine.
- Adverse entry in service record.
- Reduction of remuneration.
- Withdrawal of incentives.
- Withholding of a specific increment of salary.
- Demotion.

In matters of serious misconduct, an employer may dismiss the employee immediately, or suspend the employee until completion of the investigation, after taking into account any mitigating factors. The suspension may be followed by immediate termination of employment, if breach is proved.

10. Can an employee be required to provide their personal passwords and log in details for social media accounts as set out in Standard document, Social media policy: International: clause 9.1?

An employer cannot require employees to provide their personal passwords and log-in details for social media accounts. They can only do this with each individual employee's consent.

The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (SPDI Rules) protect employees from access to or use by an employer of the employee's sensitive personal data or information.

The term "sensitive personal data or information" is defined in the SPDI Rules to mean personal information which consists of information relating to, among other things:

- Passwords.
- Physical, physiological and mental health conditions.
- Bank account details.
- Medical records.
- Biometric information.

The SPDI Rules provide that, before collecting any "sensitive personal data or information", a body corporate must:

- Obtain the person's consent in writing in the form of a letter, fax or email from the provider of such information, before the collection of the information.
- Take steps to ensure that the person has reasonable knowledge with regard to collection of the information, its purpose, and the intended recipients of the information, to enable the person to review the information or withdraw consent at any point of time.

11. Can an employer draw negative inferences about the employee if they do not provide their passwords and log in details when requested to do so by their employer?

If an employee who has contractually consented to provide personal information at the start of their employment subsequently refuses to provide that information during an internal investigation, the refusal may be taken into consideration during the enquiry. However, this factor cannot be the sole basis for completing the enquiry against an employee. In any event, in a departmental enquiry, the principles of natural justice must be adhered to (see Question 7).

12. What potential criminal offences could result from the misuse of social media in your jurisdiction?

The following criminal offences could result from the misuse of social media:

- Defamation through the publication of any information which would be an imputation concerning any person, if it is intended to harm the reputation of that person (*section 499, Indian Penal Code 1860*) (IPC).

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An imputation is any statement, whether written or verbal, of an accusatory nature suggesting anything that may harm the reputation of the person regarding whom it is made. However, certain acts, although harming the interests of a person, would be permissible as exceptions to the offence of defamation (for example, imputation of truth is a valid defence in any criminal action for defamation).

- Cyberstalking (*section 354D, IPC*).
- Sexual harassment (*section 354A, IPC*).
- Voyeurism (*section 354C, IPC*).
- Criminal intimidation (*section 503, IPC*).
- Use of words which would outrage the modesty of a woman or would intrude on her privacy (*section 509, IPC*).
- Publication and transmission of obscene content (*section 67, Information Technology Act 2000*) (ITA).
- Publication of material containing sexually explicit acts (*section 67A, ITA*).
- Stalking and securing access to electronic material without the consent of the person concerned and transmitting it further (*section 72, ITA*).

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (PoSHA) provides protection to women against sexual harassment in the workplace and prohibits employees from engaging in certain kinds of conduct. It has its own substantive provisions regarding the offence of sexual harassment, separate from those under the IPC. Section 3 of PoSHA provides that no woman shall be subjected to "sexual harassment" in the workplace, and also specifies as to what constitutes "sexual harassment".

Further, PoSHA imposes a liability on the employer to provide reasonable assistance to a woman if she chooses to file a criminal complaint in relation to the offence of sexual harassment under the IPC.

The ambit of "sexual harassment" under PoSHA is wide enough to include virtual spaces such as messaging services, blogs and social or professional networking sites. Therefore, any sexual harassment of women employees on virtual spaces would be deemed to be an offence under PoSHA.

13. What potential civil claims could be brought against an employee from the misuse of social media in your jurisdiction?

Since adherence to the policies (including social media policy) forms part of the contract of employment, the employer may bring an action for damages in relation to any loss caused to it as a result of a breach of the social media policy (for example, if an employee is found to have disclosed any confidential information relating to its employer, the employer may initiate a civil action for damages against the employee).

An employer may also bring a civil defamation claim under tort law where an employee publishes, in breach of the social media policy, any imputation which would cause reputational damage to the company or its officers including directors, unless the information is true.

14. Can an employer require an employee to remove any social media content that it considers to constitute a breach of the social media policy (as set out in Standard document, Social media policy: International: clause 9.2)?

Yes, an employer may, where its social media policy is breached, require an employee to remove the content constituting a breach.

15. Can an employer take disciplinary action if an employee fails to remove any social media content that the employer considered to constitute a breach of the social media policy (as set out in Standard document, Social media policy: International: clause 9.2)?

The employer may take disciplinary action if an employee fails to remove any social media content that, in the employer's opinion, constitutes a breach of the social media policy. However, any show-cause notice issued to the employee must clearly set out the specific acts which allegedly amount to a breach of the social media policy.

Contractual status

16. Is it advisable for the social media policy not to form part of an employee's contract of employment in your jurisdiction so that an employer can make changes as it wishes without breaching the contract of employment with its employees (as set out in Standard document, Social media policy: International: clause 1.4)?

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Yes; the rules governing employee social media activity may require regular updating to keep up with technological advances, and it is therefore advisable to have a separate policy on social media, to enable:

- Quicker modifications to the policy.
- Uniform application of the policy to all employees.

However, it is imperative that any change in be policy be duly notified to all employees.

17. If Standard document, Social media policy: International does not form part of the employee's contract of employment, could there be an implied contractual duty on the employee to comply with this policy?

There is no implied contractual duty on the employee to comply with a social media policy.

Therefore, the employer should either:

- Set out the rules governing employee use of social media platforms expressly in the contract of employment.
- Include in the employment contract an express obligation on the employee to comply with all policies introduced by the employer (which would include any separate social media policy).

We would recommend the latter approach (see Question 16).

18. Could an employee be in breach of contract if they are in breach of the social media policy, even where it is stated that the policy does not form part of the employee's contract of employment as set out in Standard document, Social media policy: International: clause 1.4?

Yes, potentially.

We would recommend incorporating into the employment contract an express obligation on the employee to comply with all policies introduced by the employer (which would include any separate social media policy) (see Question 17), so that any breach of an obligation of the policy would also constitute a breach of the employment contract.

If such an obligation were not included, a breach of the policy would also constitute a breach of the employment contract only if it could be seen as breaching specific obligations under the contract; for example:

- A breach of the employee's contractual obligation to use their best endeavours to promote and protect the interests of the employer.
- A breach of the employee's contractual obligation of maintaining confidentiality.

19. If Standard document, Social media policy: International is non-contractual could this reduce its legal force in your jurisdiction?

Not as long as the contract of employment incorporates a provision to the effect that the employee must comply with all the policies formulated by the employer. In this case, a breach of the social media policy will be treated as a breach of the employment contract itself.

20. Can the social media policy be amended at any time by an employer in your jurisdiction (as set out in Standard document, Social media policy: International: clause 1.4)? If not, what steps should the employer take when it needs to amend this policy?

Yes, it is permissible for an employer to amend a social media policy at any point in time, provided it duly notifies all employees of the change.

Restrictions

21. Can the employer prohibit its employees from the uses of social media as set out in Standard document, Social media policy: International: clauses 4.1 *to* 4.4 inclusive?

Yes, the employer may impose restrictions on the use of social media in the manner set out in Standard document, Social media policy: International: clauses 4.1 *to* 4.4.

Courts have held that stipulations in the employment contract which are reasonably necessary for the

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adequate protection of the employer's interests are valid and enforceable (*Niranjan Shankar Golikari v The Century Spinning and Mfg. Co. Ltd* (AIR 1967 SC 1098)). In our view, this principle may be extended to the social media policy. Therefore, any restriction on social media activity which is reasonably necessary to protect the interests of the employer may be considered as reasonable.

22. Can an employer prohibit its employees from adding business contacts made during the course of their employment to personal social networking accounts (as set out in the first option in Standard document, Social media policy: International: clause 4.5)?

Yes, an employer may prohibit its employees from adding business contacts to personal social networking accounts by way of a well drafted social media policy that lays down a clear stipulation in this regard, in the manner set out in Standard document, Social media policy: International: clause 4.5.

23. Can all the contact details of business contacts made by employees during their employment be the employer's confidential information in your jurisdiction (as set out in the second option of Standard document, Social media policy: International: clause 4.5)?

Yes, an employer can treat all business contacts made by employees during their employment as confidential information by expressly providing that the contact lists acquired by employees during the course of employment or on account of rendering services to the employer will constitute the employer's property, and therefore must remain strictly confidential. In our view, Standard document, Social media policy: International: clause 4.5 meets these requirements.

24. If not, how can an employer protect against such information being used by employees to compete with the employer or solicit its customers/ clients?

N/A.

25. Can an employer place an obligation on employees to provide copies of all business contacts and for employees to delete any such information from their personal social networking accounts on termination of their employment (as set out in the second option of Standard document, Social media policy: International: clause 4.5)?

Yes; the obligation to provide copies of business contacts and to delete any such information on termination of employment is acceptable.

26. If an employee is required to speak on behalf of the employer, can the employer impose certain requirements and restrictions on the employee as referred to in Standard document, Social media policy: International: clause 5.1?

An employer can be held liable for the actions of its employees, including those on social media, if they are deemed to be acting on behalf of the employer or in the course of their employment with the organisation. This would require an employer to regulate any statements made by employees on social media platforms in a professional capacity.

The employer may prohibit any disclosure regarding the internal workings of the organisation. It can also lay down guidelines as regards the statements that can be made by an employee, to enhance the company's business prospects through social media platforms. Thus, the restrictions imposed by Standard document, Social media policy: International: clause 5.1 are permissible.

27. When an employee discloses an affiliation with their employer on their personal social media, can an employer include provision in the policy for the employee to state that their views do not represent the views of the employer as set out in Standard document, Social media policy: International: clause 6.3?

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Yes, this is appropriate.

There is a thin line of demarcation between the use of social media by employees for personal purposes and use for business purposes. An employee disclosing their affiliation to the employer may be taken to be a representative of the employer. The employer would, therefore, run the risk of liability on account of any misrepresentation by the employee.

It is therefore vital to include a provision like that in Standard document, Social media policy: International: clause 6.3, to the effect that the employee, unless authorised in the manner set out under clause 4.3, must expressly state that their views do not represent the views of the employer.

28. Can an employer include provision in the policy for an employee to refrain from posting anything until the employee has discussed it with their manager (as set out in Standard document, Social media policy: International: clause 6.4)?

A blanket provision prohibiting an employee from posting anything in their personal capacity without discussion with the manager may invite judicial scrutiny. However, Standard document, Social media policy: International: clause 6.4 as it stands can serve as a deterrent and can direct employees to refrain from posting where they are uncertain about the appropriateness of the information.

In our view, such a provision could be revised to be more specific, stating that the employee should, where uncertain or concerned about the appropriateness of any statement to be made in their professional capacity relating to the organisation (or its practices, processes, directors, employees, clients or agents) consult the manager before posting the statement.

Monitoring

29. In your jurisdiction, can internet postings and social media use by employees be monitored by employers?

Other than certain provisions in the ITA and the SPDI Rules (see Question 10 and Question 12), India does not have specific legislation on data privacy and the law is considered inadequate in dealing fully with data protection and regulation concerns.

Therefore, with regard to internet postings and other publicly available information, employers could monitor what is being posted by the employees insofar as it relates to any statement made in a professional capacity or has a connection to the organisation. It is also common for employers to have an IT policy restricting employees' use of any office equipment, including computers and laptops, for office purposes only. However, it may be noted that section 43 of the ITA prohibits any person from accessing or securing access to a computer or network or downloading or extracting any such data without permission of its owner. This provision prohibits the employer from using any means to gain unauthorised access to the employee's computer or social media accounts. Thus, the employer can obtain sensitive personal information such as account passwords only after obtaining the consent of the employee. Any unauthorised access would fall foul of section 43 of the ITA.

30. On what basis can an employer legally monitor its employees' social media use?

An employer may legally monitor its employees' social media use as a measure to protect its confidential information or prevent any unauthorised solicitation Obligations of non-disclosure and duty to maintain confidentiality constitute implied terms of an employment contract and are enforceable in law. However, it is advisable that they are expressly included in the employment contract for clarity.

In 2017, the Supreme Court observed that, as far as non-state actors are concerned, there could be a legislative framework for protection of the right to privacy (*Justice K. S. Puttaswamy (Retired) v Union of India* (2017) 10 SCC 1). (Under the Indian Constitution, fundamental rights are only enforceable against the "state"; that is, the government and authorities controlled administratively, financially and functionally by the government. Fundamental rights, including the right to privacy, have not generally been enforceable in a court of law against non-state entities).

As a result of that case, the government brought forward the proposed Personal Data Protection Bill 2019 (PDP Bill). The bill would impose statutory limits on the processing of personal data of data principals (here, employees) by data fiduciaries (here, employers).

Under the PDP Bill, "personal data" would mean any information which renders an individual identifiable. To process the data in any manner, the employer would have to:

- Obtain the employee's consent in advance.
- Collect only as much data as is needed for a specific purpose.

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- Notify the employee of the nature and purpose of the collection.
- Process the data in a manner which is "fair and reasonable". (The PDP Bill does not specify any principles or guidelines as to what constitutes a "fair and reasonable" manner of processing personal data. However, taking into consideration other provisions of the PDP Bill, it can be construed to mean processing only for purposes that are clear, specific and lawful, limited to collection of data that is necessary and not retaining the data beyond the time such purpose has been fulfilled.)

In addition, the employee will have the right to:

- Request a summary of their personal data that is being processed.
- Request corrections of any inaccuracies.
- Have the data transferred to another fiduciary.
- Prohibit the employer from continuing disclosure of the data.

Clause 13 of the PDP Bill stipulates that employees' personal data may be processed for purposes related to employment, such as data necessary for:

- Recruiting or terminating employees.
- Providing employee benefits.
- Verifying employee attendance.
- Assessing employee performance.

However, the processing of employees' data for the above specific purposes without their consent would only be permissible where the nature of the activity is such that obtaining express consent would involve a disproportionate effort on the part of the employer, such that it is not practicable.

To avoid any future conflict with the proposed legislation, it is therefore recommended that an employer provides for all the above safeguards in its internal social media policy.

31. Can an employer monitor employees using the employer's IT resources and communications systems to ensure that its rules and policies are being complied with and for legitimate business purposes as set out in Standard document, Social media policy: International: clause 7.1?

Yes, the employer may, to the extent required in Standard document, Social media policy: International: clause 7.1, monitor employees using its IT resources and communication systems, including any equipment provided by an employer for an official purpose.

It is important to understand that the monitoring may lead to an employer or its IT department extracting certain sensitive personal data or information as defined in the SPDI Rules (see Question 10). To ensure that the information is duly secured, it is advisable for the employer to introduce security practices and procedures to protect sensitive personal data or information from:

- Unauthorised access.
- Damage/impairment (though section 43A of the ITA mentions both impairment and damage, no distinction has been drawn judicially between them, and so both the terms may be used interchangeably).
- Use.
- Modification.
- Disclosure.

Appropriate safeguards assume particular relevance because, under section 43A of the ITA, if the employer is negligent in implementing and maintaining these security practices and procedures to protect the employee's sensitive personal data or information, and so causes wrongful loss or wrongful gain to any person, the employer will be liable to pay damages to the employee by way of compensation.

The employer must also comply with the provisions of the SPDI Rules when dealing with any sensitive personal data or information of an employee obtained through surveillance (see Question 10).

32. Are there any legal requirements or limitations that an employer needs to be aware of when monitoring its employees' social media use in your jurisdiction?

See Question 31.

33. If consent is required for such monitoring, is the consent provided by the employee in Standard document, Social media policy: International: clause 7.1 sufficient?

Although the SPDI Rules do not expressly require consent to be obtained from the employee before initiating surveillance (if the surveillance does not entail collection of personal or sensitive information), in

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practice seeking consent would be recommended, for the following reasons:

- To prevent any claim of unauthorised access being raised by the employee against the employer.
- To ensure that the employer has complied with Rule 5 of the SPDI Rules, which requires that consent be sought from the concerned person before collection of any sensitive personal data or information (see Question 10).
- The consent provided by an employee as per Standard document, Social media policy: International: clause 7.1 is sufficient.

Recruitment

34. In the recruitment process, can employers use internet searches to perform due diligence on candidates as set out in Standard document, Social media policy: International: clause 8?

Since India does not have specific legislation on privacy, the collection of information contained in social media to perform a background check on prospective candidates is not prohibited. However, if the candidate did not consent in advance, the employer must ensure that the due diligence is limited to the information available in the public domain.

35. Can a recruiting employer lawfully rely on information gained from a prospective employee's available social media activity?

Yes, the recruiting employer may lawfully rely on such information, provided it is not extracted through any unauthorised access to that person's account (see Question 31).

36. Is there a risk that an unsuccessful job applicant could claim discrimination where an employer has accessed their available social media activity during the recruitment process?

Yes, there is a risk that a job applicant could file a claim of discrimination, in a scenario where an employer rejects their application based on a negative inference drawn from accessing the applicant's social media activity. In the case of employees in the public sector, Article 16(1) of the Constitution provides for equality of opportunity for all citizens in matters relating to employment or appointment to any state office, while Article 16(2) provides that no citizen shall be discriminated against on grounds of religion, race, caste, sex, descent, place of birth or residence in respect of employment.

Accordingly, an employee may bring a claim of discrimination in matters of employment against a public sector employer.

For employees in other sectors, that is, the private sector, the following restrictions apply:

- The Equal Remuneration Act 1976 prohibits discrimination on the basis of gender in matters relating to recruitment.
- The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Protection and Control) Act 2017 prohibits discrimination against persons who are HIV-positive or are or were ordinarily residing with a person with HIV in matters of employment.

It should be noted that the Transgender Persons (Protection of Rights) Bill 2019 seeks to prohibit discrimination against any transgender person in matters relating to recruitment in any establishment. The Bill has only been passed by the Lok Sabha as at the time of writing, and is yet to become law.

37. Can an employer prevent its staff from providing references for other staff on social media and professional networking sites (as set out in Standard document, Social media policy: International: clause 2.2)?

Yes, an employer may do so, provided it is clearly stated in the policy that the restriction is intended to protect the interests of the employer, in the manner set out in Standard document, Social media policy: International: clause 2.2. The courts have held that restrictive stipulations in the employment contract which are reasonably necessary for the adequate protection of the interests of the employer are valid and enforceable (*Niranjan Shankar Golikari v The Century Spinning and Mfg. Co. Ltd* (AIR 1967 SC 1098)).

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Employee's rights

38. What rights do employees have in your jurisdiction in relation to their personal social media use during employment, for example, a right to privacy, a right to freedom of expression?

As individuals, employees who are Indian citizens have the right to freedom of speech and expression under the Constitution. This right comes with certain reasonable restrictions in relation to:

- The sovereignty and integrity of India.
- The security of the state.
- Friendly relations with foreign states.
- Public order, decency or morality.
- Contempt of court, defamation or incitement to an offence.

Further, every individual enjoys the right to life which, as clarified by the landmark decision of the Supreme Court in *Puttaswamy*, also includes the right to privacy.

However, it should be noted that these rights can be enforced primarily against the state or entities performing a public function. Having said that, employers typically have an IT policy barring employees' use of social media during office hours, and such a restriction does not infringe any of these rights. Further, private organisations, except those performing a public function, may adopt more stringent restrictions in relation to social media use during employment.

39. What claims could an employee bring against an employer for breach of such rights?

Regarding the public sector, or entities performing a public function, see Question 38 in relation to fundamental rights which are enforceable against the state. In the case of infringement of any of the fundamental rights of an employee in a public sector establishment, they can invoke the writ jurisdiction of the Supreme Court or High Court by filing a writ petition in the appropriate court and seeking an appropriate remedy to ensure enforcement of that fundamental right (the writ courts can grant any relief they deem appropriate in the interest of justice, equity and good conscience, including injunctions and compensation).

In addition, across all sectors, any unauthorised access to the employee's sensitive personal data or information may entitle the employee to bring a claim for damages against the employer under section 43A of the ITA.

40. Do the laws in your jurisdiction address potential harassment or bullying between employees via personal social media?

Yes, Indian law addresses cases relating to harassment and bullying between employees through personal social media (see Question 12).

41. What obligations would be placed on employers where there is harassment or bullying between employees via personal social media?

An employer has several obligations in relation to sexual harassment between employees. Under PoSHA (see Question 12), it must:

- Appoint an internal committee at the workplace, to enquire into any complaint relating to sexual harassment.
- Ensure that there is adequate training provided to employees regarding sexual harassment (which may include familiarising all employees with the applicable legal framework and best practices at work).
- Formulate an appropriate policy to deal with cases of sexual harassment.

Regarding harassment or bullying more generally, the employer must implement and maintain reasonable security practices and procedures addressing the possession, dealing with or handling of any sensitive personal data or information (*section 43-A, ITA*).

If, due to any negligence on the part of an employer, certain personal data is improperly accessed or used by an employee for the purpose of causing harassment to another employee, the employer may be held liable under section 43-A of the ITA. This is separate from vicarious liability, as it is a liability on the employer's part not for the employee's actions, but for its failure to comply with its standalone obligations regarding personal data under section 43-A of the ITA.

42. How do these obligations differ where the harassment or bullying is being conducted via personal social media or do the same obligations apply to employers regardless of the bullying or harassment taking place via personal social media or in person?

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Under PoSHA, sexual harassment includes "verbal or non-verbal conduct of sexual nature", as well as "showing pornography". PoSHA covers actions in the "workplace", which is broadly defined, covering not only the premises owned and controlled by the employer but also places visited by the employee arising out of or during the course of employment, including transportation provided by the employer for undertaking such a journey.

As many business activities are now carried out in cyberspace, "workplace" cannot be restricted only to the physical environment of the workplace, and may include an act of harassment that occurs in cyberspace, even if that act has been committed by the employee using their personal social media account.

In *Saurabh Kumar v CAG*, the court discussed such a situation and observed that, with the advent of technology, a broader interpretation needs to be adopted as regards the provisions of PoSHA (*(2008) 151 DLT 651*). In *Murlidhar Raghoji Savant v General Manager, Mather & Platt*, the Bombay High Court held that the question of whether an act taking place outside the premises of the workplace amounts to misconduct would be decided by seeing whether the act is directly linked with the general relationship of employer and employee, or has a direct connection with, or bearing on, the contentment or comfort of the employee (*(1992) IILLJ 394 Bom*).

43. Can an employer be vicariously liable for bullying and harassment between employees via personal social media in your jurisdiction?

The Indian legal framework, including PoSHA, does not provide for vicarious liability on the employer's part as regards anything done in a personal capacity by the employees and not in the course of their employment.

Execution and other formalities

44. Are there any formalities or language requirements that must be adhered to in relation to the creation, introduction or execution of Standard document, Social media policy: International?

Formalities

There are no specific requirements under Indian law in terms of the content of social media policies. However, since certain personal information may be collected in implementation of such a policy, it is imperative to take into consideration the provisions of the ITA and the SPDI Rules while drafting it (see Question 10 and Question 12).

There are no specific formalities relating to the form and execution of such a policy.

Language requirements

Under the current legal framework, there are no language requirements. However, it is best practice to provide the policy to employees in English and the relevant regional or local language.

45. Under what circumstances is consultation with or approval of a works council or trade union required for the social media policy (as set out in Standard document, Social media policy: International: clause 1.3)?

There is no requirement of approval of a works council or a trade union as regards implementation of a social media policy.

General

46. Are any of the parts of Standard document, Social media policy: International not legally valid and enforceable or not standard practice in your jurisdiction?

Standard document, Social media policy: International: clause 6.4 may require revisions in view of the inherent risks to an employer (see Question 28).

47. Are there any other standard clauses that would be usual to see in a social media policy such as Standard document, Social media policy: International and/or that are standard practice to include in your jurisdiction?

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No. The provisions set out in Standard document, Social media policy: International comprehensively cover the standard provisions found in social media policies in India.

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