

# Expert Opinion

## « When can employees' posts on social media take on disciplinary relevance? »



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The disciplinary relevance of messages, conveyed on social networks by employees, that target the employer or their representatives or co-workers in negative, disrespectful or defamatory terms has been widely discussed. In Portugal, it has been understood by the higher courts that, if there is a legitimate expectation of privacy, the employee must benefit from the protection of confidentiality of messages of a personal nature that the Labour Code guarantees him/her. Differently, when the employee cannot have a reasonable expectation of reservation in the disclosure

of publications with possible professional implications, the private or personal nature of the publications is clearly excluded, and the employee does not therefore benefit from this protection of confidentiality. The question is, therefore, to define the situations in which publications on social networks (in particular Facebook and Instagram), and the potential infringements of the duty of respect or civility that are manifested in them, may or may not be likely to affect the working environment or have a negative impact on the operation of the company. If there is a legitimate expectation that such publications, by the private or closed circle of the network in which they are disclosed, will remain private, their author, even if he/she negatively targets his/her employer or his/her representatives, may not merit disciplinary censure. Such a conclusion will arise, moreover, not only from the absence of the potential for damage of a private (or tententially private)

message with regard to the general environment and functioning of the employer, but also from the legal impossibility of the employer using personal messages as evidence in disciplinary proceedings. On the other hand, there will be no such legitimate expectation of privacy when the circle of publication of the messages is (tententially) public or open, namely by including the employer or its representatives in the network of contacts or "friends" of the page where the publication is inserted. It should also be said that the employee's own attitude or intention will also influence the formation of the judgment regarding the expectation of privacy of the publication. In this sense, the employee who, with his conduct, contributes to a message made available only for "friends" becoming public – for instance, leaving a call for the dissemination or sharing of the publication - will no longer deserve the protection of privacy.