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Social media and company values: how to deal with off-duty misbehaviour online

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This article considers the ubiquitousness of social media and how this impacts the employer-employee relationship in Brazil. In particular, to what extent can off-duty behaviour affect an individual's employment?⁽¹⁾

Companies have an indisputable role in fostering the progress of inclusion and diversity in modern society. Therefore, establishing a position on such a matter is becoming increasingly important in determining market value.

As such, it is clearly unacceptable for employers and employees to conduct themselves in ways that are inconsistent with their company's values and principles.

As the lines between public, professional and private life become increasingly blurred, paired with increasingly lower public tolerance towards certain types of conduct, employer and employee misbehaviour can cause severe reputational and commercial damage to companies.

One significant challenge in this context is the management of day-to-day situations and the unique combination of factors to be considered in every given instance of online misconduct.

For example, is a racist post on an individual's social media a cause to terminate employment? What if such post or posts were made before the employment relationship started? What if the social media account is not public? If the account is private, what if the post still can be seen by co-workers or clients and cause offence?

A further issue to resolve is whether penalising off-duty misbehaviour and opinions can represent a violation of the employees' right to speech and privacy.

Many companies in Brazil have internal policies determining that employees should stress that their opinions on social media are not being expressed in their company's name.

However, the inclusion of wording that attempts to separate an individual from their employer in an offensive post is not enough to avoid adverse consequences to the employee, other members of the workforce and the company itself.

Companies are vehicles of change and can be leaders of social responsibility. Accordingly, it must be considered what message is sent to other members of the company and the public when an employee responsible for a damaging post is not dismissed or disciplined.

However, there is not a standard solution to this and companies will need to establish:

- the nature of the offensive content;
- whether it was aimed at a particular person or group;
- when the post or posts were published;
- whether it is an isolated event;
- how they became aware of the content; and
- whether they already have a policy on the matter.

Brazilian companies can take steps to educate employees to avoid further inappropriate behaviour and impose disciplinary procedures or set improvement plans. While termination for cause in this circumstance may be controversial, costly and would likely trigger litigation, companies are generally free to terminate the employment of individuals at will. Furthermore, courts have been upholding termination for cause when employees post content on social media that is deemed defamatory to their employers.

Although there are less severe ways to deal with online misconduct, companies must also consider the cost of not taking action at all.

For further information on this topic please contact Patricia Barboza or Maury Lobo at CGM Advogados by telephone (+55 11 2394 8900) or email (patricia.barboza@cgmlaw.com.br or maury.lobo@cgmlaw.com.br). The CGM Advogados website can be accessed at cgmlaw.com.br.

Endnotes

(1) This article is the second in a two-part series on the role that employers can play in managing employee conduct online. For the first article in the series, please see "[Social media and employer disparagement: to like, or not to like?](#)"