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Monitoring employees?

Do not take justice into your own hands!

SQUIRE SANDERS

In today's world of highly sophisticated information and communication technologies, it is much easier for employers to monitor the work of their employees than it ever was before. There is no doubt that employers can find plenty of important and justifiable reasons to justify monitoring their employees. Since there is always a "but", this will not be an exception. There is one thing they should always bear in mind – the employee's right to privacy.

Reasons for monitoring

There are several reasons lying behind monitoring, most of which are purely commercial. Employers have every right to expect that their employees will work efficiently, and utilize the working time for assigned work. Employers want to ensure high-quality utilization of working time along with high-quality work performance, work discipline, and protection of their property. They also want to cut costs as well as prevent information leakage, intellectual property right infringement and damages.

Forms of Monitoring

The monitoring is most commonly done with video surveillance cameras, monitoring of arrival and departure from the workplace, email and chat communication, phone calls, remote access to employee computers or monitoring of web activities. With no doubts all of the above mentioned forms of monitoring intrude upon the privacy of the employee. The important question is what level of intrusion is permitted in order to protect the employer's commercial interests? According to case law of the European Court of Human Rights the intrusion into employees' privacy has to be governed by three principles, the principles of legality, legitimacy and proportionality. To make it clear, intrusion must be in accordance with law, a concrete purpose has to be achieved by monitoring and the scope and form of monitoring must be adequate to the purpose to be achieved.

Labor Code amendment and Monitoring of Employees

An amendment to the Slovak Labor Code to be passed soon does not shed more light on the permitted scope of monitoring as it does not differ much from the current wording. The amendment says that "Employers may not, without serious reasons consisting in the special nature of the business activities of the employer, violate employees' privacy at the workplace and common areas of the employer's premises by monitoring them, by keeping records of their telephone calls made on employer's technical equipment and by monitoring emails sent from work email address and delivered to such address, without prior notification."

In general, the special nature of business activities does not mean that the business activity has to be particularly dangerous or regulated such as activities in the energy or defense sector.

Based on the proposed wording of the Labor Code, the basic prerequisite of intrusion into an employee's privacy by monitoring him/her is that the employer has a serious reason for monitoring which relates to the special nature of the business activities of the employer. However, the term "serious reason" is not defined by law and thus each employer can consider whether their reasons for surveillance are serious. A serious reason might even be constituted by frequent thefts of the employer's property, high telephone bills or congestion of an employer's communication networks for an unknown reason.

Another substantial prerequisite to be met before starting to monitor employees is that they must be informed of the extent of monitoring, the method by which it is carried out and the period of monitoring. The amendment introduces an obligation of an employer to discuss the extent of the monitoring, the method by which it is carried out and the period of monitoring with employee representatives. However, the fact that the monitoring has to be discussed with employee representatives does not mean that they have to approve it. They have to be given chance to put forward their opinions.

From the wording of the amendment it might seem that an employer is actually allowed to know what his employees are talking about on company telephones or sending and receiving in company emails. Most of the articles dealing with this topic agree that such assumption is wrong.

When contemplating monitoring employees not only labor law has to be considered. As monitoring constitutes a violation of privacy also provisions of constitutional law, civil law and some strict provisions of data protection law have to be taken into account and complied with.

Golden Rule? Stay Away from Content!

The permitted scope of monitoring is a very complex topic, however obeying a simple rule should keep you on the right track of compliance with law – do not monitor the content. When monitoring an employee's emails in general, you can monitor the recipient of the email, the date and time when the email was sent or received and the subject field of the email, but you cannot monitor the content. If you are eager to find out how your employees spend time on the Internet, you can check on the time spent browsing, whether they were browsing pages connected to their work, and the date and time when they were browsing. However you cannot monitor the content of the visited webpage. If your employee is "chatty" you can monitor how long his/her chats last, with whom the employee engaged in virtual conversation and also when it took place. But what they chatted about is not for your eyes to see. Also, nowadays popular monitoring applications such as keyloggers (tracking the keys struck on a keyboard) or software that make printscreens of employees` desktops at random intervals intrude upon privacy beyond the permitted limits.

So, to wrap it up, you can monitor whether your employees engage in work-related activities in their working time or not, but you shouldn't monitor what they are actually up to.

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