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INTERNATIONAL FINANCIAL LAW REVIEW

INTERNATIONAL BRIEFINGS 2014



Slovak Republic

Futej & Partners

Pitfalls of monitoring employees

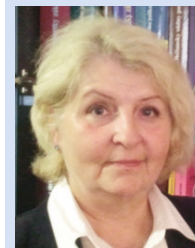
The use of email for personal use (such as visiting social network sites and online shopping) is considered the most frequent forms of abuse of company resources. Employers are battling this trend through more consistent enforcement of codes of conduct and by closely monitoring how their employees use work time and resources. This means that various monitoring methods are being put into practice, such as checking employees' web traffic and the emails they send and receive, and even the installation of monitoring cameras. However, as there is fairly strict legislation in Slovakia regarding protection of privacy and personal data, as well as mandatory provisions in the Labour Code, employers' hands are tied to a certain extent and these forms of monitoring can only be employed in compliance with strictly defined conditions. That legislation has been reinforced this year by the adoption of a completely new Act on Personal Data Protection and an amendment to the Labour Code, which expressly governs the matter of monitoring employees in the workplace.

Under existing legislation, employers can only employ monitoring in the workplace if there is a compelling reason, whether in respect of protecting the company's property, if the employee handles the company's production technology, or for the sake of safety in technologically difficult production processes. Although the consent of employee representatives (trade unions or works council) is not required for installing a monitoring system, by law the employer must consult them on this matter. Furthermore, no monitoring system can be put into place without notifying the employees as to the extent of the monitoring,

how it will be conducted and how long it will last. There are no specifics as to how employees should be notified, but practice has shown that it is best to put it in writing as an internal guideline which all the employees will sign as proof they were made aware of it. That way, in the event of a law suit or an inspection by the Office for Personal Data Protection of the Slovak Republic, the employer will be able to demonstrate that it notified the employees in compliance with law.

Monitoring is any form of control by which the employer may violate the privacy of its employees in relation to the employees' job duties, including control of business email and the installation of camera systems. However, even if the employer complies with the notification duty and the other conditions, he is not authorised to monitor letters addressed to the employee as a private person or the private email of the employee, because that type of communication does not fall into the category of job duties.

Employers are not authorised to control business related emails of an employee if it is clear that the email is private (for instance, if the subject line contains "dinner invitation" or "private"). That conclusion is also inferred from the case law of the European Court of Human Rights in Strasbourg which, when ruling on such cases, works from the theory that the employee has legitimate expectations. If an employee, as a monitored person, has a reasonable expectation of privacy in the workplace because the employer has not banned the use of business email accounts for personal purposes in any internal guidelines, then control of private emails is not permitted. Yet, prior to adoption of the amendment to the Labour Code effective from January 1 2013, there were numerous instances in Slovak case law that showed an inclination to protecting the employer when it introduced these types of control mechanisms. The argument of the Slovak courts was that the purpose of having business email accounts was to use these accounts for business purposes, and so monitoring those accounts does not violate



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any right to privacy even if there is no general ban in the workplace on using business email accounts for personal purposes. However, since the most recent amendment to the Labour Code elaborated the conditions for installing control mechanisms, we can expect that Slovak case law will undergo some changes in this area.

If an employer wants to install a camera system, he should first carefully consider where it will be installed. For instance, camera systems cannot be installed in employee locker rooms or in the employee WC, because that would be deemed a violation of the employees' privacy. Camera systems cannot be used to control job performance. Installation of a camera system is a form of personal data processing, because concrete persons can be identified on the monitor and therefore the employer must adhere to the obligations arising from the Act on Personal Data Protection. Employers must therefore have a security guideline or project in place, depending on the circumstances of any specific case, and must also keep a log relating to the camera system, because under the Act on Personal Data Protection, a camera system is considered a separate information system.

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