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The monitoring of employees and legal limits of its implementation - are employers powerless after GDPR came into force?

IT for Practice 2019

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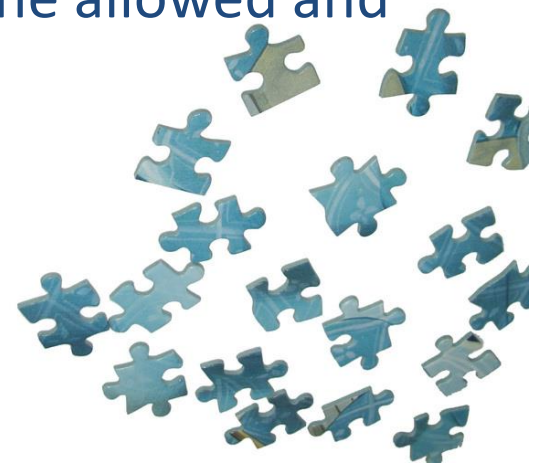
Focus and Objectives - What Sort of Challenges do Employers Face

- Hardware and software capacities consistently grow in all areas... To what extent can this be utilized by the employer to oversee their employees, though?
- What is the borderline between the employer's right to control and the employee's right to privacy?
- May the employer read the employee's emails and keep track of what websites they visit?
- Is it allowed to keep records of the employee's communication by instant messaging tools (Skype, ICQ, etc.?)
- What to do if there is a suspicion that an employee deals with their private matters on-line in their working hours?



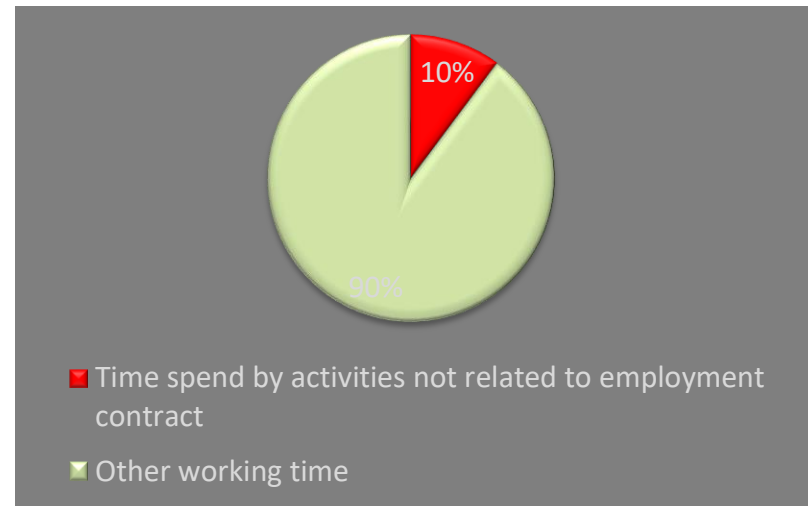
AGENDA

- What situation are the employers really facing?
- The clash of employees' and employers' rights and duties
- Elementary rights and duties while working with IT equipment
- Violations by employees using their employer's IT infrastructure
- The rules of conduct and sanctions for violations thereof
- Possibilities of employee supervision and the allowed and prohibited forms thereof
- The tracking of employees' emails
- The tracking of Internet use
- Files stored in a computer



WHAT SITUATION ARE THE EMPLOYERS REALLY FACING?

According to a 2012 research conducted by TruconneXion, employees (mis)use **49 minutes** of their workplace time per day, which equals **204 hours per year!**



THE TRACKING OF EMPLOYEES THE CLASH BETWEEN EMPLOYEE'S AND EMPLOYER'S RIGHTS AND DUTIES

The diagram features a central vertical dashed line. To the left of the line is a large blue arrow pointing right, labeled 'Employer'. To the right of the line is a large purple arrow pointing left, labeled 'Employee'. Below the 'Employer' arrow are three stacked boxes: 'Protection of employer's resources', 'Right to tracking of employees' performance and their use of workplace time', and 'Protection of trade secrets and sensitive information'. Below the 'Employee' arrow is one box: 'Right to privacy and personal data protection'.

Employer

Protection of
employer's resources

Right to tracking of employees'
performance and their use of
workplace time

Protection of trade secrets
and sensitive information

Employee

Right to privacy and
personal data protection

ELEMENTARY RIGHTS AND DUTIES WHILE WORKING WITH IT EQUIPMENT, PART I.

- § 2 Section 2 of the Labour Code (LC) – The employee shall perform their work solely on the employer's cost - all means such as PC, connection, data storage etc. must be provided to the employee.
- § 301 of the LC – Employees shall use their working time and resources to perform their work, fulfil their tasks properly and in a timely manner ... protect the employer's property from harm, loss, destruction or misuse and not act in contradiction of the employer's justified interest.

ELEMENTARY RIGHTS AND DUTIES WHILE WORKING WITH IT EQUIPMENT, PART II.

- § 316 Section 1 of the LC – Protection of the employer's property interests
- Employees must not, without the employer's consent, use working tools provided by the employer, including IT equipment, nor the employer's telecommunication tools. The employers is entitled to monitor the adherence to this rule appropriately.



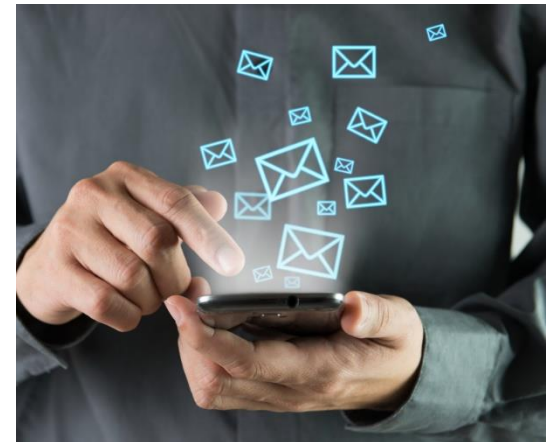
Key rules on the use of IT equipment by employees:

- no use without the employer's consent
- for one's private purposes
- appropriate monitoring

VIOLATIONS BY EMPLOYEES USING THEIR EMPLOYER'S IT INFRASTRUCTURE, PART I.



- Internet browsing
- Downloads of inappropriate contents from the Internet (mainly copyright items, eg. „uloz.to“)
- Storing private data on the business computer (eg. private photos)
- Using the business mailbox for private purposes
- Installing SW on the computer - either legal or not (Instant messengers, image processing SW etc.)
- The use of instant messaging tools (Skype, WhatsApp, etc.)



VIOLATIONS BY EMPLOYEES USING THEIR EMPLOYER'S IT INFRASTRUCTURE, PART I.

- Breach of confidentiality - searches of sensitive information on the employer's computer or network or local downloads thereof or sending these elsewhere
- Breach of competition clause - the use of PC for one's own or a third person's economic gain
- Unfair competition - any other action in contradiction of the employer's interests capable of causing harm and contrary to fair competition conduct



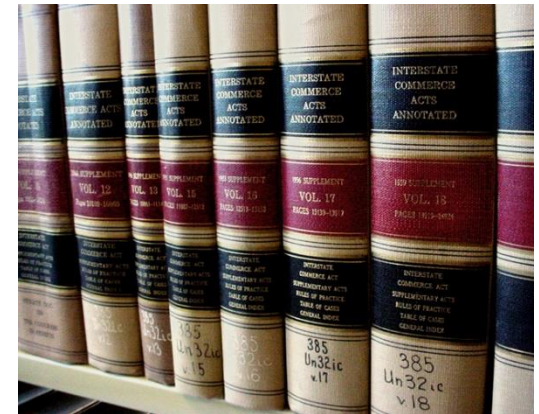
Employees' violations:

- Both minor and causing major harm
- potential loss of time, money or other resources, customers, loss of reputation harm

THE RULES OF CONDUCT AND SANCTIONS FOR VIOLATIONS THEREOF

- **Prohibition of following actions:**

- Enacted in law (§ 301 LC, § 316 Section 1 LC)
- can also be subject to employer's internal guidelines (workplace rules, IT guidelines etc.)



- **The violation thereof generally implicates:**
- Labour law related consequences (violation of workplace conduct)
- employer's entitlement to damages
- Damages in accordance with unfair competition laws
- Criminal law entitlements



SANCTIONS FOR INAPPROPRIATE USE OF BUSINESS IT EQUIPMENT

- Sanctions may differ depending on the violation severity
- Sanction types:
 - Verbal reminder
 - Reduction of salary bonuses
 - Written reminder including the mention of dismissal without severance pay
 - Immediate dismissal - exceptional measure for severe violations
 - Criminal complaint – in case of major damage – criminal offence of embezzlement or fraud



HOW TO MITIGATE THE RISK OF EMPLOYEES' VIOLATIONS AND THE EXTEND OF DAMAGE

- Employment Contract
 - should foremostly contain the employee's explicit consent with the given monitoring and personal data processing methods
 - the employee's obligation to use the business IT equipment for work purposes only
- Further internal rules (workplace rules, IT guidelines...)
 - detailed rules on IT security, email handling, virus protection, monitoring, copyright information...



The importance of workplace documentation:

- good wording sets clear rules
- enhances the chances of finding and addressing the violation
- better prevention

POSSIBILITIES OF MONITORING YOUR EMPLOYEES

- The right to supervision – § 316 Section 1 LC – „ The employer may check the adherence to the prohibition under the above sentence **in an appropriate manner**”
- Limitations – § 316 Section 2 LC – „The employer must not **without reasonable justification restrict the employee’s privacy** at the employer's premises and common areas, considering the special nature of the employer's activity, by subjecting the employee to open or hidden interception and recording of their telephone conversations, e-mail or regular mail“

WHAT MONITORING ACTIVITIES ARE APPROPRIATE?

time spent browsing the Internet
and the websites visited

contents of business
mailbox (see further)

computer activities
(eg. playing games)



inbound phone calls or
fax numbers

memory content of the
business computer or
external data devices,
installed software

WHAT MONITORING ACTIVITIES ARE INAPPROPRIATE?

monitoring the contents of the visited websites

monitoring private email correspondence received or sent from a private email account (eg. by a camera, keylogger or screenscan)



monitoring of chat contents on Skype or other IMs

hearing or recording employees' private phone calls

full-scale monitoring of the email communication contents

THE EMPLOYER'S DUTY OF INFORMATION TOWARDS THE EMPLOYEE

- **Appropriate checks**
 - The right is enacted in law (§ 316 Section 1 LC)
 - No need to inform employees in advance BUT there is Article 13 GDPR (*Information to be provided where personal data are collected from the data subject*)
- **Extraordinary instances of monitoring**
 - Extraordinary instances as per § 316 Section 2 and 3 LC – extraordinary reasons due to the nature of the employer's business activity
 - The employee must be **notified in advance** (§ 316 Section 3 LC)
 - about the scope
 - and methods of the checks
- **Records of processing activities according GDPRP**

THE MONITORING AND CHECKING OF EMPLOYEES' EMAIL TRAFFIC, PART I.

- The monitoring of email traffic relates to privacy protection, message exchange protection, personal data protection
- Only „personal“ business mailboxes are protected
- When is an email address deemed „personal“?
 - unique identification of a particular natural person
 - does not concern freemail addresses
 - typically: name.surname@company.cz
- Generic or technical email addresses are not protected
 - typically: info@company.cz

THE MONITORING AND CHECKING OF EMPLOYEES' EMAIL TRAFFIC, PART II.

- A standpoint by the UOOU (Personal Data Protection Authority) - the employer may:
 - read email headers
 - monitor their frequency, receivers, senders, subject
 - BUT NOT read the contents
- The employer may only read the contents exceptionally in case of necessity and as long as the header clearly indicates a business nature of the message
- It is impossible to completely prevent a private message from being read (albeit unintentionally)

THE MONITORING AND CHECKING OF EMPLOYEES' EMAIL TRAFFIC, PART III.

- The content of the contract is essential



- Recommended subjects to contain in a contract:
 - The duty of using business email address for communication with partners and customers
 - Prohibition of receiving or sending private messages, unless received/sent coincidentally
 - Employer's right to monitor all contents of the business mailbox
 - Employer's right to restrict the reception of private messages

MONITORING THE INTERNET USE AND WATCHING THE CONTENTS, PART I.

- Information on the traffic may be recorded, however not the content of the visited websites
- Aggregated statistics
- Small-scale use allowed



- Recommended subjects to contain in a contract:
 - **allow** Internet use **to a reasonable extent** as long as employee's tasks fulfilled
 - **Right to revoke** that consent
 - employer allowed to **measure the time** spent on browsing and the **visited websites**

MONITORING THE INTERNET USE AND WATCHING THE CONTENTS, PART II.

- When is Internet use for private purposes deemed inappropriate?
- (Czech) Supreme Court ruling No. 21 Cdo 1771/2011 of 16 August 2012
 - deals with the monitoring of Internet use
 - in a single calendar month, an employee spent 103 hours (out 168 hours at work) on "inefficient PC work"
 - immediate dismissal accepted by the court as lawful
 - employer's right to supervision/checks

MONITORING THE INTERNET USE AND WATCHING THE CONTENTS, PART III.

- Is it necessarily true that the content of instant messaging communication is inaccessible?
- Court ruling *LAG Hamm, Urtein von 10. 7. 2012, Az 14 Sa 1711/10*
 - eBay an employee stole their employer's goods and sold it on eBay
 - Legal battle over an immediate job dismissal
 - records of Skype chats
 - the interest in enquiry into criminal activity and gross violation of workplace rules may override the employee's right to privacy

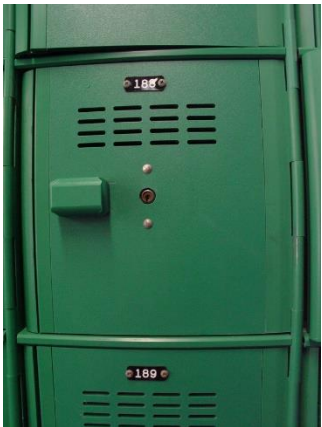


THE MONITORING OF IT INFRASTRUCTURE USE AND PREVIOUS CASELAW TRENDS

- (Czech) Supreme Court ruling 21 Cdo 2172/2002
 - Employer entitled to the adoption of such measures that are capable to eliminate or mitigate the risk of damage in relation to employees' activities as much as possible.
- European Court of Human Rights ruling: Niemetz vs. Germany
 - The European court concluded that private life is a matter of respect mutual relations between human beings and it is not relevant whether that occurs in a workplace or elsewhere. The employer is therefore entitled to monitor their employees in a manner not affecting their dignity and private sphere excessively.
- French Court of Appeal ruling: NIKON case of 2 October 2001
 - Very restrictive

FILES STORED IN A COMPUTER

- Comparable to personal property stored in a locker room



- Not a message hence not protected by the same privacy laws as post or emails
- “Private” therefore must not be watched
- If private correspondence or files found in a computer, the employer may, not acquiring any knowledge of the contents, adopt measures aimed at employee efficiency improvements



FINAL SUMMARY

- Employer and employee tend to have contradicting interests
- Monitoring activities involve clashes of employer's and employee's interests
- Monitoring allowed to a reasonable extent
- Excessive monitoring may amount to a violation of employee's rights
- On an exceptional basis and with due justification, strict and extensive monitoring of employees allowed
- Proper rights and duties description in the employment documentation is advisable



Thank you for your attention!