

**MONITORING PRACOWNIKA W MIEJSCU PRACY A OCHRONA PRYWATNOŚCI I DANYCH OSOBOWYCH W PRZEPISACH PRAWA PRACY
– WYBRANE ZAGADNIENIA**

EMPLOYEE MONITORING IN THE WORKPLACE AND THE PROTECTION OF PRIVACY AND PERSONAL DATA IN EMPLOYMENT LAW- SELECTED ISSUES

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ABSTRACTS

Wraz z rozwojem nowoczesnej techniki obserwuje się wzrost zainteresowania pracodawców różnymi formami kontrolowania pracowników pomimo tego, iż prawo polskie, z wyjątkiem regulacji dotyczącej ochrony dóbr osobistych, nie reguluje szczegółowo tych kwestii. Tymczasem zakres dopuszczalnej kontroli pracownika w miejscu pracy budzi poważne wątpliwości zarówno prawne, jak i praktyczne. Przede wszystkim wskazuje się na konflikt dwóch wartości, tj. podporządkowania pracownika i związane z nim prawa pracodawcy do sprawowania kontroli nad pracownikiem przy wykorzystaniu nowoczesnych technik nadzoru oraz prawa pracownika do prywatności. Artykuł analizuje przepisy regulujące zakres danych osobowych pozyskiwanych przez pracodawcę w procesie zatrudnienia. Celami artykułu jest ustalenie zakresu dopuszczalnej kontroli pracownika w miejscu pracy na gruncie polskiej regulacji prawnej w zakresie ochrony danych osobowych i ochrony prywatności oraz ocena zgodności polskich standardów ochrony pracownika z regulacją europejską.

With the development of modern technology, an increase in employers' interests in various forms of controlling workers has been observed despite the fact that Polish law, with the exception of regulations concerning the protection of personal rights, does not regulate these issues in detail. Meanwhile, the range of acceptable controls of employees in the workplace raises serious questions, both legal and practical. First of all, it points to the conflict between the two values, i.e. on the one hand there is the subordination of an employee and the associated rights of the employer to control the employee with the use of modern surveillance techniques. On the

other hand, there is the right of employees to privacy. The article analyses the rules governing the scope of personal data obtained by the employer in the employment process. The purpose of this article is to determine the scope of permissible control of the worker in the workplace under Polish legal regulations for the protection of personal data, the protection of privacy and the assessment of conformity of Polish worker protection standards with European legislation.

KEY WORDS:

ochrona danych osobowych, Kodeks pracy, przetwarzanie danych osobowych, monitoring w miejscu pracy, prawo do prywatności

personal data protection, Labour Code, processing personal data, monitoring at the workplace, right to privacy

INTRODUCTION

The management by the employer of the labour process requires that the proper organization of work and effective management be ensured. For this purpose, the employer obtains information about an employee using modern control methods such as cameras, fingerprint readers etc. Development of modern technologies in conjunction with the necessity of employers to attract the widest possible knowledge about the behaviour of employees at work, and often also after its completion, causes a growing threat to the private lives of employees (Wójcicka M., Łęski M., 2014, p. 167). This leads to conflict between the two values. On the one hand, the employer reasonably argues that surveillance improves the efficiency of workers and facilitates assessment of their work, encouraging the protection of property and contributes to safety improvements in the workplace. On the other hand, freedom of gathering data about the employee violates his privacy, making it illegal if the acquired information, such as his state of health or religious views, is used against the employee in the form of discrimination as regards working conditions, pay and promotion or training opportunities, among others (Głowacka, 2012, p. 42, Siejka, 2014, p. 119, Szejniuk, 2014, p. 245). Even collecting this information does not always have a legal basis. In light of the foregoing, two aspects of this phenomenon should be distinguished. The first aspect concerns the admissibility of the collection of personal data of the employee by the employer with the use of modern control techniques. The second is the processing

of such data.

THE NOTION OF MONITORING AT THE WORKPLACE

In the literature it is assumed that the monitoring of employees means the activities undertaken to collect information on employees by subjecting them to direct observation or to observation by electronic means (Szewczyk, 2007, p. 24). Monitoring is divided into proactive and reactive. Proactive monitoring has a preventive nature, aiming to assess the employee's performance. By contrast, reactive monitoring is undertaken by the employer in order to obtain information about the misconduct of the employee. The most important forms of control include: control of telephone calls (in particular, checking the list of phone calls), checking e-mail, controlling the use of the Internet by, among others, restriction of visited sites, video monitoring, and geolocation of employees among others.

Information obtained from monitoring often concerns the private life of the employee. It usually has the nature of personal data within the meaning of Art. 6 of Act of 29 August 1997 on the protection of personal data (the PPD). The question therefore arises whether the employer is entitled to collect such data and process it.

ADMISSIBILITY OF MONITORING OF EMPLOYEE IN THE WORKPLACE

The problem of the monitoring of an employee in the workplace has not been settled in Polish labour law. However, it is the subject of lively discussion in the doctrine (Litwiński, 2008, p. 2, Mednis, 2012, p. 102). Also, international and European law, in particular the jurisprudence of the European Court of Human Rights in the field of the worker's right to privacy and personal data protection in labour relations, are helpful in determining the permissible limits of the collection of personal data of the employee by the employer as a result of monitoring.

The privacy and personal data of the employee or job candidate are subject to protection both at international and European levels. International instruments relating to the protection of personal data are sparse. Sources of this law can be seen in Art. 12 of the Universal Declaration of Human Rights, which guarantees that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." Art. 17 of the International Covenant on Civil and Political Rights (the ICCPR) also seems to express the legal basis

for the protection of personal data. It states that the rights guaranteed by its content, such as “privacy, family, home or correspondence” should be protected against any attack, both on the part of state officials as well as individuals. The same art. 17 of the ICCPR provides the legal basis for the protection of the right to privacy. Due to the dynamic nature of the right to privacy, Art. 17 of the ICCPR does not attempt to define it, limiting itself to calculating the interests protected by the article. As a result of an analysis of the concept of privacy under Art. 17 of the ICCPR taken in the case *Coeriel and Aurikavs. Netherlands* (EComHRDecision of 31 October 1994, No. 453/1991, paragraph 10.2.), the Human Rights Committee concluded that “privacy” should be understood not only as individual autonomy in the sphere of privacy, but also it pointed to its external aspect and the need to protect the privacy of individuals in the public sphere to allow them to freely shape their relationship with their environment (Gliszczyńska-Grabias, Sękowska-Kozłowska, 2012, p.373).

In European law the protection of personal data is regulated in Art. 8 of the Charter of Fundamental Rights (the CFR), which states that “everyone has the right to protection of personal data concerning him or her” and in Art. 7 of the Charter of Fundamental Rights, which states that “everyone has the right to respect for private and family life, home and communications.” The right to privacy is not an absolute right. Art. 8§2 of the ECHR allows interference of public authorities in the sphere of privacy, but only in cases “provided by law and in the cases necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, prevention of disorder or crime, for the protection of health or morals or the protection of the rights and freedoms of others.” In the content of Art. 7 of the CFR the possibility of interference in the right to privacy is missing despite its inclusion in Art. 8§2 of the European Charter of Human Rights (the ECHR). However, in accordance with Art. 52§3 of the CFR, the meaning and scope of the right to privacy should be consistent with the meaning and the scope given to the law by the ECHR. As the Secretariat of the Convention explained, authorized restrictions of the right to privacy guaranteed by Art. 7 of the CFR are the same as under Art. 8 of the ECHR. Apart from the ability to compete on the basis of these two European systems of protection of fundamental rights and institutions guarding against the interpretation of individual rights protected by the ECHR and the CFR, it should be noted that the ECHR and the CFR, in a coherent way, interpret the notion of the right to privacy, including in

their scope not only the private sphere, but also how the individual functions in the public sphere.

The European standards of worker protection are derived from the well-established case-law of the European Court of Human Rights (the ECtHR), whose origins can be traced to the ECHR judgment of 16 December 1992 in case No.13710/88 on Niemietz vs. Germany (LEXNo.81278), in which the ECtHR for the first time extended the concept of privacy activities of a professional nature, and the place of work became protected alongside the place of residence (Głowacka, 2012, p. 43). The case involved the search of a lawyer's office on suspicion of him having committed a crime. The ECtHR took the view that the behaviour of the police violated Art.8 of the ECHR. The ECtHR stated that "it is neither possible nor necessary to make attempts to recognize the concept of 'private life' in the exhausted definition." As a result, this understanding of privacy can be extended to other areas, including the professional sphere. This broad understanding of the right to privacy by the ECtHR was confirmed in later judgments (the ECtHR judgment of 27 July 2004 No. 55480/00 in the case of Sidabras vs. Lithuania, LEXNo.139389; the ECHR judgment of 26 March 1987 No.9248/81 in the case of Leander vs. Sweden, LEXNo.81034).

For the problems of monitoring in the workplace, of particular importance is the broad understanding by the ECHR of privacy protected under Art.8 of the ECHR. According to the ECHR the guarantees provided by Art. 8 of the ECHR are not absolute. Some judgments of the ECtHR show that the application of various techniques is not in compatible with the ECHR per se. The case of Copland vs. the United Kingdom (judgment of the ECHR of 3 April 2007 No.62617/00) should be primarily cited, where the ECtHR formulated a number of conditions that must be met to consider the monitoring as lawful. The ECHR requires that monitoring takes place in accordance with the law and fulfils the condition of necessity in a democratic society. Consequently, monitoring conditions should be carefully regulated, and workers should be informed of the monitoring. In specific cases indicated above, the Court held that in the absence of any other agreement between the employer and the employee, the area of workplace is limited, and a "reasonable expectation of privacy" of the employee should cover at least the desk, room, equipment or tools of communication of the employee. For the admissibility of interference with the privacy of the employee in the workplace, the employee's awareness of the control, and the compliance of the control with national regulations and the provisions

of the ECHR, seems to be important. Although the protection of the right to privacy under Art. 8 of the ECHR applies to the violations caused by acts of public authorities, this provision also has a significant impact on the situation of persons employed in the private sector. Art. 8 of the ECHR imposes on a State party to the Convention so-called positive obligations related to the prevention of violations of privacy. This is done through the adoption of appropriate national regulations to hold perpetrators accountable for violations, and establishing effective mechanisms to assert rights within court proceedings (Głowacka, 2012, p.44).

Under Polish law the right to privacy and the right to protection of personal data are constitutional rights. Art. 47 of the Polish Constitution plays a fundamental role in the protection of privacy. It provides that everyone has the right to legal protection of private and family life, honour and good reputation, and to make decisions about their personal life.

The processing and protection of personal data are regulated in Art.51 of the Polish Constitution, which in paragraphs 1-4 guarantees the protection of personal data. In paragraph 5 there is a delegation to regulate the procedures for gathering and sharing information in the statutory acts. In carrying out that delegation, many commonly existing legislations were implemented, but the greatest importance should be given to the Act of 26 June 1974-Labour Code (hereinafter referred to as LC) and the Act of 29 August 1997 on the protection of personal data (hereinafter PPD).

In accordance with Art. 31 § 1 of the Polish Constitution, the limitation of constitutional rights requires two cumulative conditions: the existence of a legal basis in the Act and the necessity of limitations in a democratic state to ensure the security of the State, public order, protection of the environment, health, morals and the rights and freedoms of others. With these indicated restrictions it does not violate the essence of the rights and freedoms (Mednis, 2012, p.102). Consequently, where the validity of the restrictions of privacy in the workplace is concerned, it should not only find its legal basis in the law, but also the existence of at least one of the conditions enumerated in Art.31 § 3 of the Constitution needs to be indicated. Unlawful infringement of privacy leads to liability on the basis of Art. 24 of the Civil Code. The right to privacy is in fact considered as the personal rights of every human being. Although the catalogue of personal goods in Art.23 of the Civil Code does not include the right to privacy it does focus on health, freedom, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, artistic cre-

activity, inventions and improvements. However, this is an example of the directory's open and dynamic nature. In particular, it is possible to see the emergence of new personal rights recognized by case law. For example, the Supreme Court in its judgment of 18 January 1984 (I CR 400/83) extended the open catalogue of personal rights contained in Art.23 of the Civil Code to the personal interests related to the sphere of private life, the family, and the sphere of intimacy.

Redress for the infringement of personal rights pursuant to Art. 24 of the Civil Code requires the fulfilment of one condition more. As stated by the Supreme Court in its judgment of 6 March 2008 (IIPK188/07), the assessment whether there was a personal unlawful infringement cannot be a subjective assessment made according to the measure of the individual sensitivity of the person concerned who feels affected by the behaviour of another person, but it needs to be recognized in society according to objective criteria of negative behaviour, infringing personal rights. A. Szpunar explained that with the objectivistic approach, "a variety of criteria, among which the views of reasonable and fair-minded people, life experience, as well as public opinion, which is dominant in the system of values come to the fore" (Szpunar, 1979, p.107) should be used when assessing the violation of personal goods.

Those provisions of the Civil Code relating to the protection of personal rights are to some extent applicable to employment relations. With personal property the Labour Code directly shows only the dignity of the worker. In accordance with Art.11(1) of the LC the employer is obliged to respect the dignity and other personal interests of the employee. Dignity is understood under Art.11(1) of the LC as being the respect enjoyed by the employee because of his personality, individuality, gender, citizenship, and also because of the professed value system (Jończyk, 1966, p. 134). In order to identify the other employee's personal property, it refers under Art.300 of the LC to Art.23 of the Civil Code.

As previously mentioned, under Polish law there are no provisions allowing for the most popular form of monitoring, e.g. monitoring of phone calls, checking e-mail, controlling the use of the Internet (web sites visited, downloaded files, etc.), video monitoring, geolocation (GPS), or access control through the collection and use of biometric data among others (Mednis, 2012, p.104). Due to lack of regulation, for the purpose of employee control, on the one hand, one should use the regulations on the organisation of workflow by the employee and the regulations on employ-

ee's submission, and, on the other hand, one should use regulations on the protection of the right to employee privacy, as one of the personal rights (Liszczyński, 2007, p. 14). The justification of the violation of an employee's rights to privacy as a result of the subordination of the employee to the employer at the place and time of work, or by the necessity to ensure safety at the workplace as a result of use of monitoring in the workplace, seems to be accepted in jurisprudence as a condition of release from liability of Art. 24 of the Civil Code. The Ministry of Labour and Social Policy in 2007 reached the same conclusion and stated that on the basis of Art. 94 § 2 of the LC "the employer can control the contents of the mailbox of the employee, read his official correspondence and make it available for inspection by other workers" (ROF, 2007). Meanwhile, in the light of Art. 8 of the ECHR and the case law of the ECHR, such an interpretation may give justifiable doubts regarding its compatibility with Art. 31 § 3 of the Polish Constitution and Art. 8 of the ECHR as well as the case law of the ECHR. Both of these provisions require a legal basis to restrict the right to privacy. Meanwhile, in Polish law there is no statutory provision expressly authorizing the control of the employee in the forms indicated above (Mednis, 2012, p. 106). In particular, Art. 94 § 2 of the LC reported that such a basis seems to be too vague to satisfy Art. 8 of the ECHR according to which the infringement of privacy must be provided by law, available to citizens and formulated in such a way that a citizen can predict the consequences of a particular action, while the law should contain adequate safeguards to prevent arbitrary violations of rights.

EMPLOYEE MONITORING IN THE WORKPLACE AND THE PROTECTION OF PERSONAL DATA

The point of the monitoring carried out by the employer is undoubtedly the collection of information on employees which the employer can identify in the course of ordinary activities (Rosińska-Wielec, Sarwas, Stygar, 2014, p. 184). Therefore, the question of the admissibility of the collection and processing of data obtained as a result of monitoring from the point of view of the protection of personal data of the employee arises.

The concept of personal data, in accordance with Art. 6 of the PPD, should be understood as any information relating to an identified or identifiable natural person. This data can take many forms: pictures, videos, recorded voices, biometric data (facial features, fingerprints etc.), messages expressed in any way, regardless of the manner of making them available,

their scope and freedom of access to them, as well as regardless of how they were obtained, if they fulfil the criteria of Art. 6 of the PPD (Litwiński, 2008, p. 3). The data obtained as a result of, for example, checking the mailbox of a particular employee is always personal (Bomba, 2014, p. 106). By contrast, video monitoring in a room accessible to many people, for example customers, may lead to the collection of information about the nature of personal data, however, the nature of collected data depends on the circumstances of the situation.

Despite the assessment of data as being personal data from the point of view of Art. 6 of the PPD, the Polish legislator allows it to be collected and processed in the scope prescribed by law. Statutory authorization of the employer to require data from candidates to work and from workers in connection with employment can be found in Art. 22(1) of the LC. The introduction of this provision to the Labour Code by the Act of 1 November 2003, which entered into force on 1 January 2004, was dictated by the need to adapt labour law to Art. 51 of the Polish Constitution. According to this provision no one may be obliged to disclose information about themselves on a basis other than the statutory act (Gersdorf, 2011, p. 151). In accordance with Art. 22(1) § 5 of the LC, in matters relating to personal data protection of a worker and a candidate for employment not covered by labour law, the provisions of the Act of 29 August 1997 on the protection of personal data should be applied. This provision is consistent with Art. 5 of the PPD, according to which “if other laws relating to the processing of personal data provide greater protection than is apparent from this Act, those provisions shall be applied.” According to the above-mentioned provisions, the legislator gives priority to Art. 22(1) § 1-4 of the LC over the provisions of the Act on personal data protection. On the other hand, it is restricted to a fairly narrow range specified in § 1-4 of art. 22(1) of the LC. This priority is therefore to reduce the range of data covered by the LC which may be required by the employer from the employee and candidate for the job. Although Art. 22(1) of the LC directly grants the right only to request personal data and not to its processing, it is assumed in the literature, however, that the right of the employer to process personal data received for recruitment (candidates for the workers) and employment (employees) is a consequence (Sibiga, 2012, p. 124).

Protection of personal data under the Act on personal data protection has been differently defined for ordinary personal data (the Article 23 of the PPD) and sensitive data (the Article 27 of the PPD). These provisions re-

flect the European regulation based on the principle of the legality of data processing (Litwiński, 2008, p. 3). In accordance with Art.23 of the PPD, the processing of data obtained from monitoring must meet at least one of the legal grounds for processing personal data provided in this article. The legal basis for the processing of personal data may be constituted by Art.23 §1 point 5 of the PPD, containing the so-called clause of the justified goal of the administrator of data. This provision authorizes the administrator of personal data (in labour relations -the employer) to the processing of personal data, even if he does not have the consent of the data subject, and he does not have to rely on any legal provision which is the basis for the processing of employee personal data if its processing is necessary for the purposes of the employer (the data) and does not violate the rights and freedoms of the data subject. To conclude, data processing must be legally justified, necessary to achieve the objectives of the employer, and at the same time does not violate the rights and freedoms of the data subject. Therefore, monitoring which aims only to control workers will not be justified. On the other hand, monitoring for the protection of the legitimate interests of the employer e.g. by disclosure of employee behaviour that is to the detriment of the employer, finds a legal basis on the grounds of Art.23 § 1 point 5 of the PPD. For example, controlling the use of mobile phones by workers for private purposes which expose employers to increased costs, is, in the opinion of the Supreme Court, a justified reason for monitoring. However, the employer should warn the employee that he should not use the mobile phone for private purposes and that monitoring can be carried out (the judgment of the Supreme Court of 15 May 1997, PKN93/97). The literature emphasizes, however, that the monitoring of activities must be proportionate to the objectives pursued, and thus interference with the privacy of an employee may take place only to the extent necessary to achieve the purpose of data processing (Litwiński, 2008, p. 3).

The matter of collecting and processing sensitive data as a result of the monitoring is regulated differently. In accordance with Art. 27 of the PPD, sensitive data includes data referring to racial or ethnic origin, political opinions, religious or philosophical beliefs, religious, party or trade union membership, as well as data on the state of health, genetic code, addictions or sex life, and data relating to convictions, judgments about penalties and fines, as well as other decisions issued in the course of judicial or administrative proceedings. The provision of Art.27 §1 of the PPD uses a phrase that “prohibits the processing of the above mentioned sensitive data.”In

that way it introduces a general prohibition on sensitive data processing. Situations in which the processing of sensitive data indicated in Art.27 §1 of the PPD will be an exception to the prohibition of processing are indicated in § 2 of Art. 27 of the PPD. Among the conditions which allow the processing of sensitive data, the consent of the employee deserves a special attention. Undoubtedly, voluntarily expressed consent to the collection and processing of sensitive data by the employee would avoid the prohibition regulated in Art.27 § 1of the PPD. However, as the doctrine and jurisprudence correctly express, due to the unequal labour relationship, the freely expressed consent of the employee is doubtful. This was confirmed by, among others, the Supreme Administrative Court in its judgment of 1 December 2009 (I249/09OSK), according to which “expressed at the request of the employer, written consent of the employee for collecting and processing of his personal data violates the rights of the employee and the freedom to express his will.”As a result, it should be assumed that the processing of sensitive personal data within the framework of the monitoring is not allowed. This means that the process of employee monitoring cannot be directed at obtaining such data, and if it is accidentally acquired, it should be removed due to the lack of a legal basis for the processing (Litwiński, 2008, p. 4).

SUMMARY

The practice of monitoring the activities of employees indicates the need for a comprehensive settlement of this matter by the legislator. Basing the monitoring on the regulations on personal data protection and circumstances regulated therein is premised on guidelines developed in a judgment of the European Court of Human Rights on the grounds of Art.8 of the ECHR (Mednis, 2012, p. 109), if the employer’s action is legitimated by his interests associated with the risk of violating constitutional standards. The Polish regulation on the protection of privacy in the workplace should also be negatively evaluated in terms of its compliance with international and European standards. First of all, Polish law lacks specific legislation defining the entitlements of the employer to use modern methods of control of employees in the workplace, and therefore a violation of the ECHR takes place at the level of the formal requirement of its legality, e.g. due to the lack of a national law regarding sufficient grounds for violation of employee privacy. In particular, neither Art.22(1) of the Labour Code should be seen as that legal basis because it indicates only the scope of the per-

sonal data that can be processed by the employer (Głowacka, 2012, p.56), nor art. 94 § 2 of the Labour Code, which provides that the employer shall organize the work in a way that ensures full utilization of working time. This provision does not meet the conditions of Art. 8 § 2 of the ECHR. Polish law also lacks explicit sanctions for violation by the employer of the worker's right to privacy. The legislature is limited here only to the possibility of the employee to immediately terminate the contract of employment due to the fault of the employer under Art. 55§1(1) of the Labour Code, i.e. due to a serious breach by the employer of his obligations arising from the employment relationship. However, it should be emphasized that it is possible for an employee to seek redress in court for the infringement of his personal rights by an employer (Articles 23 and 24 of the Civil Code). In order to adjust Polish legal regulations to the standards provided for in Art. 17 of the ICCPR and Art. 8 of the ECHR it appears to be essential in the Polish legal system to regulate the use of modern methods of controlling employees at the careful consideration of the interests of both sides of the employment relationship.

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