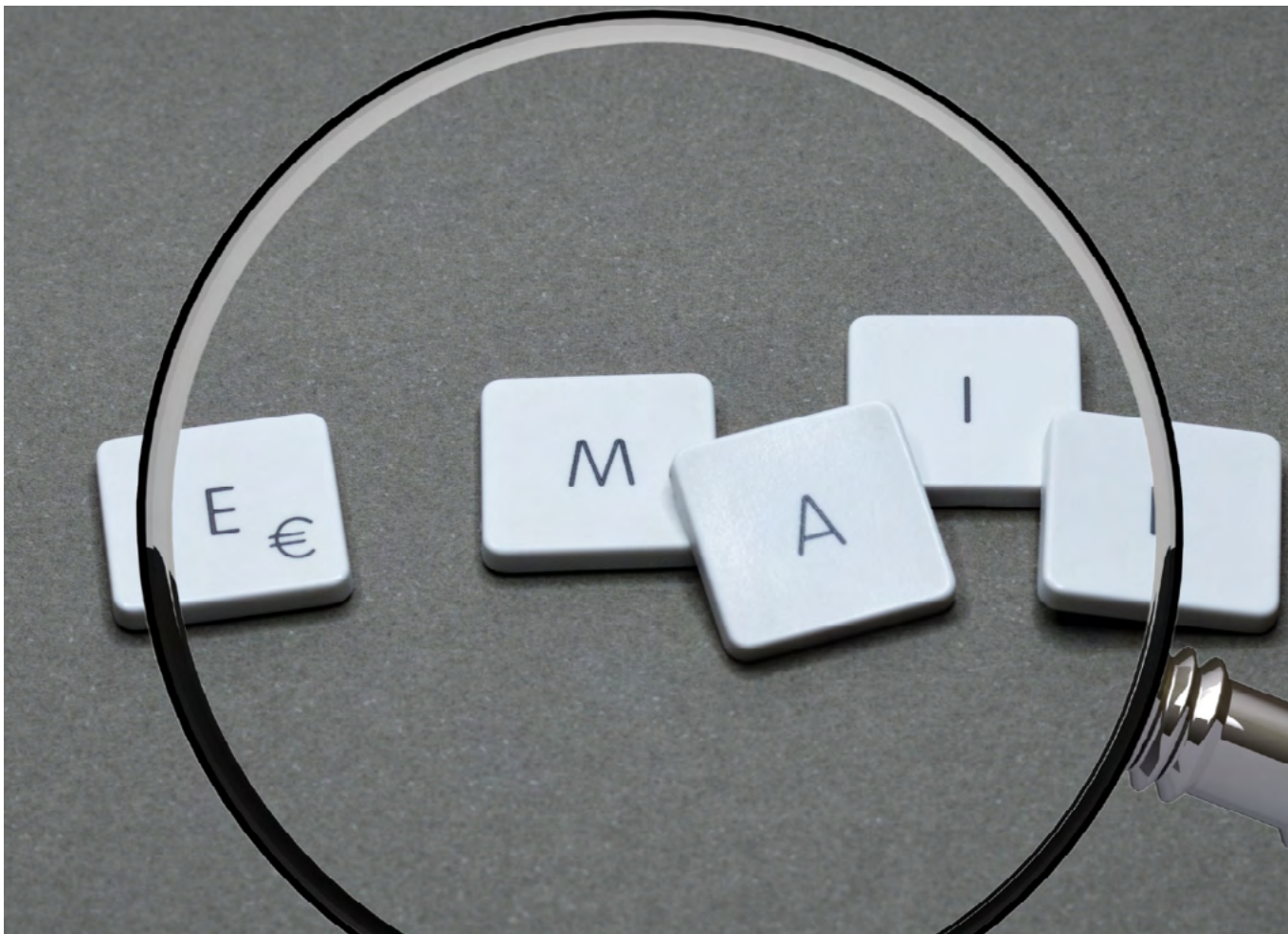




Srbija: Praćenje prepiske radnika od strane poslodavaca

Serbia: Monitoring of Workers' Correspondence By Employers

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Publisher: JPM | Partners

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www.jpm.law

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Design and prepress: JPM | Partners

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Jedan od najvrednijih stavova iz dostupne sudske prakse širom sveta je da mnogi radnici provode veći deo dana i veći deo večeri na poslu ... Kao rezultat toga, jasne granice (na koje aludira većina) između radnog mesta i profesionalnih aktivnosti, sa jedne strane, i lične imovine i privatnih aktivnosti, sa druge strane, ne postoje u stvarnosti .

Ovaj stav ukazuje na potreban nivo ravnoteže između privatnosti radnika na radnom mestu i legitimnih interesa poslodavca za praćenje njihovog rada – poslodavci moraju biti svesni da zapošljavaju ljude, a radnici moraju poštovati činjenicu da nisu kod kuće.

One of the most valuable sentences from available jurisprudence over the globe is that many workers spend the better part of their days and much of their evenings at work ... As a result, the tidy distinctions (to which the plurality alludes) between the workplace and professional affairs, on the one hand, and personal possessions and private activities, on the other, do not exist in reality ¹.

This sentence points out the necessary level of balance between the privacy of workers at the workplace and the employer's legitimate interests in monitoring their work. Employers must be aware that they hire humans, and workers shall respect the fact that they are not at home.

1 O'Connor v. Ortega, 480 SAD 709 (1987)

I Opšta zapazanja

Srbija je ratifikovala Konvenciju Saveta Evrope za zaštitu ljudskih prava i osnovnih sloboda ("Konvencija"). Ratifikacija znači da je navedena Konvencija sastavni deo srpskog zakonodavstva i da se automatski primenjuje, što znači da Srbija, odnosno regulatorna tela i sudovi Srbije, obezbeđuju sprovođenje Konvencije.

Član 8 (1) Konvencije propisuje da svako ima pravo na poštovanje svog privatnog i porodičnog života, svog doma i svoje prepiske.

Član 8 (2) Konvencije propisuje da se javne vlasti neće se mešati u vršenje ovog prava, osim ako je to u skladu sa zakonom i neophodno je u demokratskom društvu u interesu nacionalne bezbednosti, javne bezbednosti ili ekonomske dobrobiti zemlje, radi sprečavanja nereda ili kriminala, zaštite zdravlja ili morala, ili radi zaštite prava i sloboda drugih.

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I General Observations

Serbia has ratified the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). Ratification means that the said Convention is integral part of Serbian legislation and is automatically applied meaning that Serbia, i.e., Serbian regulatory bodies and courts shall ensure implementation of the Convention.

Article 8 (1) of the Convention prescribes that everyone has the right to respect for his private and family life, his home and his correspondence.

Article 8 (2) of the Convention prescribes that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Prema presudama ESLJP u predmetima Copland protiv Ujedinjenog Kraljevstva i Niemetz protiv Nemačke, e-mailovi koji su poslani sa posla, kao i informacije koje proizilaze iz praćenja korišćenja interneta u privatne svrhe su deo privatnog života i na sličan uživaju zaštitu u skladu sa članom 8 Konvencije. Poštovanje privatnog života takođe mora da sadrži u određenoj meri pravo na uspostavljanje i razvijanje odnosa sa drugim ljudskim bićima. Čini se, štaviše, da ne postoji principijelni razlog zašto bi iz razumevanja pojma "privatni život" trebalo da se izuzmu aktivnosti profesionalne ili poslovne prirode jer, na kraju krajeva, u toku svog radnog veka većina ljudi ima značajnu, ako ne i najveću, priliku za razvijanje odnosa sa spoljnim svetom.

Prema praksi ESLJP-a, privatni život uključuje profesionalne aktivnosti ili aktivnosti koje se odvijaju u javnom kontekstu. Kao što je navedeno u slučaju Barbulescu v. Rumunija, ograničenja profesionalnog života pojedinaca mogu da se podvedu pod član 8 Konvencije kada imaju posledice na način na koji građani grade svoj društveni identitet razvijanjem odnosa sa drugima.

According to ECHR judgments in cases Copland v. United Kingdom² and Niemetz v. Germany³, e-mails sent from work as well as information derived from the monitoring of personal internet usage are part of private life and shall similarly be protected under Article 8 of the Convention. Respect for private life must also comprise, to a certain degree, the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.

According to ECHR practice, private life includes professional activities or activities taking place in a public context. As stated in the case Barbulescu v. Romania⁴ Restrictions on individuals' professional life may fall within Article 8 of the Convention, where they have repercussions on the manner in which citizens construct their social identity by developing relationships with others.

2 Copland v Ujedinjenog Kraljevstva/United Kingdom - 62617/00

3 Niemetz v. Nemačka/Germany - 13710/88

U vezi sa prepiskom, treba napomenuti da Konvencija u članu 8 ne pominje pridev “privatni” kao u slučaju termina “privatni život”, što dalje znači da prepiska obuhvata slučajeve prepiske profesionalne prirode, tj. e-mailove poslate sa radnog mesta ili telefonske pozive primljene ili obavljene sa posla.

Zaključak iz citiranih presuda ECHR-a je da se prepiska radnika putem e-mailova sa naloga poslodavca smatra delom prepiske i privatnog života radnika.

As per correspondence, it shall be noted that the Convention in Article 8 does not mention the adjective “private” as in the case of “private life” which further means correspondence covers situations of correspondence of a professional nature, i.e., e-mails sent from the workplace or telephone calls received or made from work.

The conclusion from the cited ECHR judgments is that workers’ correspondence through e-mails from the account of the employer is considered part of workers’ correspondence and private life.

II Privatnost v. Privatni život v. Prepiska v. Podaci o ličnosti

Termin “privatnost” obuhvata termine “privatni život” i “prepiska”.

Termin “podaci o ličnosti” označava svaki podatak koji se odnosi na fizičko lice čiji je identitet određen ili odrediv, neposredno ili posredno, posebno na osnovu oznake identiteta, kao što je ime i identifikacioni broj, podataka o lokaciji, identifikatora u elektronskim komunikacionim mrežama ili jednog, odnosno više obeležja njegovog fizičkog, fiziološkog, genetskog, mentalnog, ekonomskog, kulturnog i društvenog identiteta.

Kako se elementi privatnog života i sama prepiska pripisuju fizičkim licima, odnosno predstavljaju faktore identiteta fizičkih lica, oni se smatraju podacima o ličnosti. Na primer, ako se vrši praćenje toka komunikacije radnika, odnosno njenih/njegovih mejlova kako bi se proverilo da li radnik šalje e-maile unutar ili izvan kompanije, takvo praćenje i podaci dobijeni iz monitoringa smatraju se obradom podataka o ličnosti jer takvo praćenje otkriva njegovo ponašanje na poslu.

II Privacy v. Private Life v. Correspondence v. Personal Data

The term “privacy” covers the terms “private life” and “correspondence”.

Term “personal data” means any information relating to an identified or identifiable natural person; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

As elements of private life and correspondence itself are attributed to natural persons, i.e., are factors of identity of natural persons, these are considered as personal data. For example, if monitoring of the flow of workers’ communication, i.e., her/his e-mails, is carried out to check whether the worker sends e-mails within or outside the company, such monitoring and data derived from monitoring is considered as processing of personal data as such monitoring reveals her/his behaviour at work.

Ako poslodavac ima pristup sadržaju e-mailova kako bi proverio koje informacije sadrže e-mailovi, ovi e-mailovi mogu da sadrže podatke o ličnosti ili radnik može da pošalje nekom kolegi e-mail u privatne svrhe.

Srbija kao potpisnica Konvencije preko regulatornih tela i sudova obezbeđuje sprovođenje Konvencije. ESLJP ispituje da li Srbija ispunjava negativne i pozitivne obaveze koje su propisane Konvencijom. Što se tiče negativnih obaveza, ESLJP razmatra da li su se Srbija, odnosno državni organi, neopravdano mešali u privatni život i/ili prepisku radnika. U pogledu negativnih obaveza, ESLJP ispituje da li su regulatorna tela i sudovi Srbije procenili da li poslodavci sprovode proporcionalnost, politike i procedure protiv proizvoljnosti.

If the employer has access to the contents of e-mails to check which information e-mails contain, such e-mails may contain personal data or can be sent to a colleague for private purposes.

Serbia, as a signatory to the Convention, shall, through its regulatory bodies and courts, ensure implementation of the Convention. The ECHR examines whether Serbia fulfils negative and positive obligations prescribed by the Convention. In terms of negative obligations, ECHR considers whether Serbia, i.e., state bodies, unjustifiably interfered private life and/correspondence of the workers. In terms of negative obligations, the ECHR examines whether Serbian regulatory bodies and courts evaluated whether proportionality, policy, and procedures against arbitrariness are implemented by employers.

III Legitimna očekivanja radnika v. Legitimni interesi poslodavaca

Praksa ECHR-a uspostavlja koncept legitimnih očekivanja radnika u pogledu praćenja njihove prepiske na poslu.

Prema *Barbulescu v. Rumunija*, postoji nekoliko mera koje poslodavci moraju uzeti u obzir prilikom donošenja odluke da li prate prepisku radnika:

- a) da li su radnici unapred obavešteni o mogućnosti da poslodavac preduzme mere za praćenje prepiske i drugih komunikacija, kao i o sprovođenju takvih mera, uključujući obim praćenja, tj. da li poslodavac namerava da prati tok komunikacije i/ili sadržaj komunikacije;
- b) da li je poslodavac pružio legitimne razloge da opravda praćenje komunikacija i pristup njihovom stvarnom sadržaju;
- c) da li bi bilo moguće uspostaviti sistem praćenja zasnovan na manje invazivnim metodama;
- d) posledice praćenja za radnika i korišćenje od strane poslodavca rezultata praćenja, posebno da li su rezultati korišćeni za posizanje deklarisanog cilja mere.

III Legitimate Expectations of Workers v. Legitimate Interests of Employers

ECHR practice establishes the concept of legitimate expectations of workers in regard to the monitoring of their correspondence at work.

According to the *Barbulescu v. Romania* case⁴, there are several measures employers shall take into account when deciding whether to monitor workers' correspondence:

- a) whether the workers have been notified in advance of the possibility that the employer might take measures to monitor correspondence and other communications, and of the implementation of such measures, including the scope of monitoring, i.e., whether the employer intends to monitor the flow of communication and/or content of communication;
- b) whether the employer has provided legitimate reasons to justify monitoring the communications and accessing their actual content;
- c) whether it would have been possible to establish a monitoring system based on less intrusive methods;
- d) the consequences of the monitoring for the worker subjected to it and the use made by the employer of the results of the monitoring operation, in particular, whether the results were used to achieve the declared aim of the measure.

⁴ *Barbulescu v. Rumunija/Romania* - 61496/08

Važno je istaći da preporučena zabrana prepiske u privatne svrhe na poslu na uopšten način ne ovlašćuje poslodavca da prati prepisku radnika. U toku procedure prijema u radni odnos, potrebno je da se obaveštenje o praćenju i o prirodi praćenja dostavi radnicima, uključujući i obaveštenje o privatnosti. Potrebno da se gore nabrojane mere detaljno razrade u internom dokumentu, na primer, u bezbednosnoj polici i procedurama, a koje će biti stavljene na raspolaganje radnicima.

Interni dokument će, između ostalog, urediti sledeće situacije:

1. obavezu i način pružanja obaveštenja praćenju i o prirodi praćenja, uključujući obradu podataka o ličnosti;
2. da li je slanje e-mailova ili korišćenje interneta u privatne svrhe dozvoljeno, ili ukoliko postoje ograničenja, o kojim ograničenjima je reč. Ova pitanja bi trebalo urediti u Politici prihvatljive upotrebe IKT sistema i Proceduri za upotrebu e-mail naloga. Trebalo bi razmotriti manje invazivne mere kako bi se omogućilo ograničeno korišćenje interneta u privatne svrhe, na primer, instaliranje filtera za sprečavanje pristupa problematičnim sajtovima ili antivirusnih programa kako bi se sprečili bezbednosni incidenti;

It is important to point out that the generally recommended prohibition of correspondence for private purposes at work does not empower employers to monitor workers' correspondence. In the course of the onboarding procedure, the notification about the monitoring and nature of the monitoring shall be provided to workers, including a privacy notice. The above numbered measures shall be worked out in a detailed manner in an internal document, such as security policy and procedures, which shall be made available to workers.

The internal document shall, inter alia, define the following situations:

1. obligation and manner of provision of notification about the monitoring and the nature of the monitoring, including processing of personal data;
2. whether sending e-mails or using of internet for private purposes is allowed, and in case of limitations, which limitations are applied. These matters should be defined in the Acceptable Use of ICT System Policy and Procedure of E-mail Account Use. Less invasive measures should be considered to enable limited use of the internet for private purposes, for example, installing filters to prevent access to problematic websites or antivirus programmes to prevent security incidents;

3. koji događaji su povod za praćenje prepiske radnika i za koju prirodu praćenja, tj. tok prepiske i / ili pristup sadržaju e-mailova. Na primer, slučajevi mogućeg curenja poverljivih informacija unutar ili izvan kompanije ili kršenja zakonskih odredbi ili internih pravila društva koja mogu dovesti do štete za poslodavca (curenje informacija, interne povrede podataka i drugi bezbednosni incidenti, itd.) mogu da budu povod za pristup sadržaju e-mailova radnika;
4. neproverene glasine ili intrige u kompaniji koje su sastavni deo svakog radnog okruženja ne bi trebalo da budu povod za praćenje prepiske radnika;
5. mogućnost korišćenja manje invazivnih mera za utvrđivanje relevantnih činjenica, odnosno ograničavanje praćenja na protok prepiske, na primer u slučajevima kada poslodavci nameravaju da utvrde da li radnici poštuju zabranu korišćenja interneta u privatne svrhe ili uz ograničenu upotrebu interneta;
6. koji radnici (na kojim pozicijama) će pratiti prepisku radnika i imati pristup toku prepiske i / ili sadržaju prepiske;
3. which events trigger monitoring of workers' correspondence and what nature of monitoring, i.e., flow of correspondence and/or access to contents of e-mails. For example, cases of possible leakage of confidential information within or outside the company or possible breaches of the legal provisions or internal rules of the company, which may result in damage to the employer (leaking of information, internal data breaches, and other security incidents, etc.) may trigger access to the contents of workers' e-mails;
4. unchecked rumours or intrigues in the company, as an integral part of each working environment, should not trigger monitoring of workers' correspondence;
5. Possibility of using less intrusive measures to determine relevant facts, i.e., to limit monitoring to the flow of correspondence, for example, in cases when employers intend to determine whether workers comply with the prohibition of using the internet for private purposes or with limited use of the internet;
6. Which workers (at which positions) will monitor workers' correspondence and have access to the flow of correspondence and/or content of correspondence;

- 7) u slučaju da kompanija, u toku praćenja toka komunikacije, a svrhu utvrđivanja kršenje radne discipline utvrdi da je, na primer, radnik, uprkos zabrani, koristio e-mail nalog u privatne svrhe ili povredio bilo koju drugu obavezu za čije utvrđivanje nije potreban pristup sadržini komunikacije, omogućiti radniku, u prisustvu dva radnika kao svedoka, da označi e-maile sa privatnim sadržajem kojima poslodavac ne bi trebalo da ima pristup;
- 8) koje proporcionalne disciplinske mere će biti izrečene radnicima kako bi se opravdala ozbiljnost mera praćenja. Na primer, slučaj praćenja protoka prepiske radnika može rezultirati upozorenjima ili novčanim kaznama, ali ne otkazima ugovora o radu, a naročito u slučajevima kada poslodavac nije pretrpeo štetu.

Pravila navedena u gore pomenutom internom aktu bi poslodavci trebalo da koriste kao smernice i to svaki put kada odlučuju da li će i koju će prirodu praćenja e-mailova radnika da sprovede. Ove smernice će pomoći poslodavcima da se uspešno kreću između svog legitimnog interesa za praćenje prepiske radnika i razumnih očekivanja radnika za privatnost na poslu.

7. In case the company, in the course of monitoring of communication flow to determine breach of work discipline determines that, for example, worker has used e-mail account for private purposes or breached any other obligation for which determination is not necessary to access the content of communication, it shall allow the worker, in the presence of two workers as witnesses, to mark e-mails with private content to which content employer should not have access;
- 8) which proportionate disciplinary measure/s will be imposed on workers to justify the severity monitoring measure carried out. For example, the case of monitoring of flow of workers' correspondence can result in warnings or pecuniary fines and in termination of employment, especially in cases when the employer has not suffered damage.

Rules set out in the internal act above shall be used as guidance by the employer every time when deciding whether and what nature of monitoring of workers' e-mails to carry out. This guidance will help employers navigate successfully between their legitimate interest in monitoring workers' correspondence and reasonable workers' expectations for privacy at work.

IV Rizici

Poslodavci bi trebalo da razmotre rizike u slučaju da nisu usvojili ili ne sprovedu gore navedene politike i procedure. Osnovni rizici se odnose na mogućnost da radnici prijave nezakonito praćenje nadležnom organu za nadzor na primenom Zakona o zaštiti podataka o ličnosti (Poverenik). Poverenik može izreći različite mere kao što je zabrana obrade podataka o ličnosti koji su prikupljeni u toku praćenja i novčane kazne do 10% godišnjeg prihoda kompanije koja je registrovana u Srbiji (ukoliko kompanija ne postupi u skladu sa izrečenim merama).

Zabrana obrade podataka o ličnosti dovodi do automatskog prekida postupka koje je poslodavac pokrenuo protiv radnika kao rezultat praćenja. Radnici su ovlašćeni da podnesu tužbu protiv poslodavaca za naknadu štete. Dodatni rizik za poslodavce odnosi se na ograničenje upotrebe dokaza protiv radnika koji su prikupljeni na nezakonit način u krivičnim i parničnim postupcima.

IV Risks

Employers should consider risks in case they have not adopted and not implemented the policies and procedures mentioned above. Main risks are related to the possibility that workers report illegal monitoring to the competent authority for supervision of the implementation of the Law on Protection of Personal Data (the Commissioner). The Commissioner may impose various measures, such as a ban on the processing of personal data collected in the course of monitoring and fines, up to 10% of the annual income of the company registered in Serbia (in case the company does not act in accordance with the measure/s imposed).

The ban on the processing of personal data automatically results in the termination of any procedure that may be initiated by the employer against workers as a result of monitoring. Workers are authorised to file an action against employers for compensation for damages. Additional risk for employers is related to the limitation of the use of proof against workers collected in an illegal manner in criminal and civil procedures.

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