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SELECTED METHODS OF STAFF SUPERVISION IN THE LIGHT OF CURRENT LEGAL REGULATIONS

Introduction

The Polish labor law does not include detailed regulations concerning the rights and responsibilities of employers as regards their operations aiming at the supervision of their employees as well as any indications defining the boundaries of such supervision.

Staff supervision consists in controlling the work of employees so that reaching the objectives of the organization is facilitated and its constant functioning is ensured in accordance with both short- and long-term plans. In brief, the supervision is one of the means that aim at reaching the harmony between the actual state (the execution) and the determined state (the determination) in a given field. At present, employers tend more and more frequently to apply new technologies in the supervision process that intervene with staff privacy. As a result the following questions arise:

- 1) Are such measures in accordance with law?
- 2) What is the acceptable range of staff supervision by the employer?
- 3) What staff supervision methods can be used that are accepted by law?

There is no doubt that the employer's right to supervise the employee's work is an inherent feature of the employment relationship, which results from the principle of superiority and inferiority between the two and which, consequently, includes the possibility to supervise the work of employees. When supervising employees, employers often refer to a well justified interest of the business they are managing, the safety regulations or simply they are convinced that "an employee under supervision is more effective". Thus, a question should be asked what steps that are taken by employers in the broad interest of their company can be accepted and – more significantly – follow the adequate provisions of the law, and which ones violate the constitutional right to protect employee's privacy and dignity. The answer to that question seems to be particularly interesting in the times when technological

and scientific progress makes it possible to supervise workers at work (cameras) and beyond it (GPS), to assess their emotional states (lie detectors) or honesty (forensic traps).

The article presents some methods of staff supervision selected by the following categories:

- 1) Personnel data collected by their employer on the basis of the provisions of the labor code and the act on personal data protection.
- 2) Modern methods of staff supervision (telephone billing systems, e-mail control, monitoring, GPS, breathalyzer).
- 3) Forensic methods of staff supervision (lie detector, traps).

1. Staff data collected by employer

According to art.22¹ section 1 of the Labor Code, employer is entitled to demand the following personal data from the applicant¹:

- first name (names) and surname,
- parents' names,
- birth date,
- place of residence (correspondence address),
- education,
- employment history.

In the course of the recruitment procedure, the information should be limited to the data that are indispensable to assess the applicants' vocational potentials and their appropriateness to the position that they are applying for². After the applicant has been employed, the situation is different as the range of information that the employer is allowed to ask for is extended by:

- VAT registration number (NIP), personal identity number (PESEL),
- personal details on children (names, birth dates),
- bank account numbers,
- qualification certificates, employment certificates, a photocopy of the identity card, doctor's certificates and documents required by other regulations.

¹ Act of 26 June 1974, The Labour Code, cont., Dz. U. (Journal of Laws) 1998, No 21, section 94 as amended

² Recommendation No. R(89)2 and explanatory memorandum adopted by the Committee of Ministers to member states on the protection of personal data used for employment purposes, p.3 - www.giodo.gov.pl (Accessed: 19 February 2014).

Only then, the employer's right as defined by art.22¹, Labor Code, becomes the right resulting from the employment relationship. Consequently, the refusal of the employee to disclose the data indicated by the regulation constitutes a violation of the employee's duties resulting from the employment relationship with all the consequences³.

The employer can require other data than listed above only in the case if the obligation to provide such information results from specific provisions of other acts. The collection of other data than indicated in art.22 of the Labor Code is acceptable only when the data subject (the employee) has given his/her consent, under art. 23 (1) section 1 of the act on personal data protection⁴. However, employers, due to their status of a superior subject, are in power to "force" the employee's consent for the collection of data that evidently exceed the needs of the administration of the employment relationship. It must be pointed out, that employer's demand from the employee to provide information (personal data) that is not listed in art. 22¹ sections 1 and 2, Labor Code, or in specific regulations (art. 22¹, section 4, Labor Code) is against the law (art. 100, section 1, Labor Code) and, consequently, the refusal to do so cannot be the basis for the termination of the employment agreement under art.52 section 1 item 1, Labor Code)⁵. Such a behavior on the part of the employer (i.e. demanding data beyond the range specified by the Labor Code), despite being against the law, is not considered by the Labour Code as the violation of the employee's rights. However, one should not forget about the provisions of the act on personal data protection, according to which (art. 49) " 1. A person, who processes personal data in a data filing system where such processing is forbidden or where he/she is not authorized to carry out such processing, shall be liable to a fine, a partial restriction of freedom or a prison sentence of up to two years. 2. Where the offence mentioned in paragraph 1 of this article relates to information on racial or ethnic origin, political opinions, religious or philosophical beliefs, religious, party or trade union membership, health records, genetic code, addictions or sexual life, the person who processes the data shall be liable to a fine, a partial restriction of freedom or a prison sentence of up to three years." ⁶. While article 51 of the act states that „1. A person who, being the controller of a data filing system or being obliged to protect the personal data, discloses them or provides

³ J. Iwulski, W. Sanetra, *Kodeks pracy. Komentarz.* (commentary to art.. 22¹ LexPolonica), <http://lexis.pl/pages/document?id=1548814&unitId=28557787&source=RELATION&sDocId=380693&sUnitId=25488417&sDate=2014-04-28> (Accessed: 28 April 2014).

⁴ Act of 29 August 1997 on personal data protection, con.t., Dz. U. (Journal of Laws) 2002, No. 101, section 926 as amended

⁵ The Supreme Court ruling of 5 August 2008, ref. No.: I PK 37/2008 LexPolonica No. 1934069 (OSNP 2010, Nos 1-2, item. 4) – <http://www.lex.pl/osnp-akt/-/akt/i-pk-37-2008> (Accessed:19 February 2014).

⁶ Act of 29 August 1997 on personal data protection, con.t. Journal of Laws (Dz.U.) 2002, No 101, item 926, as amended

access to unauthorized persons, shall be liable to a fine, the penalty of restriction of liberty or deprivation of liberty up to two years. 2. In case of unintentional character of the above offence, the offender shall be liable to a fine, the penalty of restriction of liberty or deprivation of liberty up to one year.”⁷

The provisions of the Act on personal data protection are applicable to employers in compliance with the principle included in art. 22¹, section 5, Labour Code, as well as general principles resulting from the subjective scope of the Act’s provisions. Thus, all data collected by the employer are subject to the act provisions and the employers are treated as the administrators of personal data.

Additionally, heated discussion appear as regards the collection of the employees’ finger prints, iris images and DNA codes. However, it cannot be forgotten that the fundamental rule that should be applied to the processes of personal data collection and processing is the principle of adequacy, which is perceived as the state of balance between the right to administer one’s own data and the interest of the personal data administrator, i.e. - in this case- the interest of the employer.

2. Modern methods of staff supervision

Do najpopularniejszych metod kontroli pracowników z wykorzystaniem nowoczesnych środków technicznych należą:

The most common methods of staff supervision that make use of modern technologies include:

- monitoring phone conversations,
- monitoring e-mails and computer/the Internet,
- camera monitoring and the GPS,
- sobriety checks.

Telephone conversations

Company mobiles can only be used on behalf and in the interest of the employer in order to fulfill the duties committed to the workers. Consequently, the use of the company phone can be monitored by the employer. That right results from the simple fact that the employee is only the user of the company phone, while the employer is the owner that covers the costs of the use. As a result, the employer has a justified interest to verify the purposes for

⁷ Ibidem.

which the phone is used by the employee. As the owner of the phone, the employer is entitled to check telephone calls made from company phones, for example, by monitoring the billing lists provided by phone network operators. However, the verification can be done after the employee has been informed about it. The failure to notify the employer may be considered a violation of privacy. The European Tribunal of Human Rights in Strasburg in its verdict in the case of Copland v. UK⁸ of 3 April 2007 regarding the monitoring of staff telephone calls and e-mails confirmed that, in accordance with Art.8 of the European Convention on Human Rights⁹, which was also ratified by Poland, everyone has the right to respect his private and family life, his home and his correspondence. Thus, the Tribunal admitted that the failure to inform the employee about monitoring the phone calls or e-mails as well as other activities, may be considered a possible violation of his/her right to privacy. Article 49 of the Constitution of the Republic of Poland guarantees the freedom and protection of communication privacy. That right should be perceived in a broad sense, i.e. not as the right of the secrecy of correspondence and phone calls but also the right to keep in secret the fact that there was communication between two particular persons¹⁰.

In conclusion, monitoring company phone calls by the employer is permitted only when the employee has been informed beforehand and it always must be done with the respect to human dignity.

E-mails, computer, the Internet

Employers increasingly more often supervise the effectiveness of their staff by monitoring their presence on the Internet, checking the contents of their e-mails or looking into the files on their computers. An infrequent use of e-mail or browsing through the websites for private purposes does not usually result in negative consequences but the employee takes the risk of his private correspondence to be read or the passwords to be discovered. Thus, it seems reasonable that the employer, when signing the work agreement, should inform the employee about the rules concerning the use of company Internet accounts, files and websites, which makes it possible to avoid the violation of employee's privacy through, e.g. uncovering the contents of private letters. Company regulations should determine the procedures of assigning passwords, the range of operations that can be performed by employees with the use of e-mails, as well as the range of the employer's

⁸ Verdict of the European Tribunal of Human Rights of 3 April in the case of Copland v UK (application No. 62617/00), www.giodo.gov.pl (Accessed: 19 February 2014).

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms drafted in Rome on 4 November 1950, amended by Protocols No 3, 5 and 8 and completed by Protocol No. 2 (Dz.U.) Journal of Laws of 10 July 1993).

¹⁰ www.giodo.gov.pl (Accessed: 19 February 2014).

supervision. It should be emphasized that – when on the Internet – the employee is obliged to behave responsibly and to follow the law regulations. That means that the employee should not put the employer at risk by downloading illegal software or other files from the Internet. Such a behavior would constitute the grounds for taking disciplinary actions. However, the possibilities to monitor the employee's activity on the Internet may result in the violation of his/her fundamental rights. In the judgement of 16 October 2007, in the case of *Wieser and Bicos Beteiligungen GmbH v. Austria* (application No. 74336/01), the European Tribunal of Human Rights declared that an authorized interference with electronic correspondence may constitute the violation of the confidentiality of correspondence and, as such it may interfere with the right for the protection of private life guaranteed by Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹¹. The judgement defines the boundaries that should be considered by an employer in order to avoid accusations of unlawful interference with the employee's private life.

Camera monitoring and GPS

Cameras are currently an inseparable element of everyday life. They are not anymore installed just for safety reasons in such places as banks or shops; an increasing number of employers are installing camera monitoring in their companies in order to supervise the employees – their honesty, behavior and effectiveness at work. Although current legislation does not include particular regulations as regards camera monitoring (elaborations concerning the issues of camera monitoring are based on the interpretation of the existing provisions of the Labor and Civil Law), it is worth – following Arkadiusz Lach – indicating a few principles that should be followed by employers who install camera monitoring in their companies¹²:

- camera monitoring should not be in the form that is forbidden by legal regulations, i.e. cameras cannot be installed in rooms where employees may expect privacy;
- there must be a justified reason for installing cameras, e.g. the protection against attacks on the staff, the discovery of behavior harmful to the company, and the employer should be prepared to justify the objective in the court;

¹¹ Judgement of the European Tribunal of Human Rights of 16 October 2007, in the case of *Wieser and Bicos Beteiligungen GmbH v. Austria* (application No. 74336/01), www.giodo.gov.pl (Accessed: 19 February 2014).

¹² A. Lach, *Monitorowanie pracownika w miejscu pracy*, „Monitor Prawa Pracy” 2004, No. 10, p. 268.

- the measures taken by the employer have to be adequate to the objective and should interfere with the employees' privacy as little as possible;
- the employees should be made aware of the sort of supervision that they are or may be under; common access to supervision rules is significant; it is also advisable that employees – when starting the employment relationship or afterwards – should sign a declaration that they know and accept the rules;
- the requirements as defined in the provisions on personal data protection must be met.

The GPS is another technique of staff supervision that is commonly applied by employers. It is an efficient tool of supervision especially in the cases when the work requires a constant change of location. Before placing such a system, the employer is obliged to inform the employee about it, and the range of monitoring should be justified and be adequate to the type of work performed. It has become a more common practice that the results of the GPS monitoring are applied in court trials in the field of Labor Law that aim at proving improprieties in the cases of the appeal from dismissals or dismissals without notice on the one hand, and – on the other – in the cases in which, for example, employees sue the employer for overtime compensation.

Sobriety check

Staff sobriety checks are justified by art. 17 of the Act on Upbringing in Sobriety and Counteracting Alcoholism¹³. Pursuant to that provision, the employer has the right to test the sobriety of employees. However, there are doubts as regards the way the tests can be conducted. Sobriety is one of the basic staff responsibilities resulting from art. 22, Labor Code. Moreover, art. 108, Labor Code states precisely that the consumption of alcohol at workplace or the appearance at work in the state of inebriation constitutes a violation of employment duties for which the employee may be punished with a disciplinary – financial penalty. In the cases when there is a justified suspicion that an employee turned up to work after alcohol consumption or drank it at work, a sobriety check by the employer is acceptable providing that the employee expresses his/her consent. That can be done pursuant to art. 4 section 2 of the Regulation of the Ministry of Health and Social Security of 6 May 1983 on conditions and methods of detecting alcohol in blood, according to which sobriety checks can

¹³ Act on Upbringing in Sobriety and Counteracting Alcoholism, cont.t. Dz.U. (Journal of Laws) of 2012, No.1356, as amended.

be conducted not only by an authorized institution but also by a person authorized by employer¹⁴. The person examined has the right to be accompanied by a third party. However, there is no legal obligation on the part of the employee to be examined. In the case when the employee refuses the permission to undergo the examination at workplace, the employer can draw up a protocol of the incident and call the police to check the sobriety of the employee. It must be pointed out and it is worth remembering that if there was no justification for the sobriety check, the employee may consider it a violation of dignity and demand an appropriate compensation for the infringement of personal rights.

3. Forensic methods of staff supervision

Criminology is a scientific study of tactical rules and ways as well as technical methods and means of recognizing and discovering legally determined negative social phenomena, particularly crimes and criminals, and proving the existence of relation, or the lack, between individuals and events¹⁵. It is basically applied in the areas of criminal law and related. A question arises whether labor law can and should exploit that field of study and whether it is ethical.

Polygraph tests

Polygraph (popularly referred to as a lie-detector) is a device that measures and records moments of increased emotional activity in the course of affecting an individual with stimuli with subjective significance¹⁶. Polygraphs are mainly used by law enforcement authorities (as a forensic tool) but also they are applied by private business (e.g. in companies to test employees' loyalty). The value of a polygraph test given to an applicant or employee depends mainly on the diagnostic value of the methodology applied. That depends on the fact whether the test is conducted with reference to a particular incident or not¹⁷. The permissibility to conduct a polygraph test, as well as its value, are undoubtedly a controversial criminological method if applied by an employer. However, employers often state that if something is not directly forbidden (and there is no ban on polygraph tests in the Labor Code), then it is permitted, especially if there is the consent on the part of the employee. The consent, however, may be doubtful as it may be forced by the relationship of inferiority and superiority

¹⁴. Regulation of the Ministry of Health and Social Security of 6 May 1983 on conditions and methods of detecting alcohol in blood, Dz.U. (Journal of Laws) of 1983, No. 25, item 117.

¹⁵ T. Hanausek, *Kryminalistyka*, Wydawnictwo Wolters Kluwer, Warszawa 2009, p. 20.

¹⁶ D. Wilk, *Kryminalistyka*, Wydawnictwo „Dom Organizatora”, Toruń 2013, pp. 290-291.

¹⁷ V. Kwiatkowska-Darul, J. Wójcikiewicz, *Wartość diagnostyczna badania wariograficznego w stosunkach pracy* [in:] Z. Góral (ed.), *Kontrola pracownika. Możliwości techniczne i dylematy prawne*, Wydawnictwo Wolters Kluwer, Warszawa 2010, pp. 293-302.

between the parties. One should emphasize the fact that the value of the employee polygraph test depends on the diagnostic value of the methodology (the difference between the values of the CQT *Comparative Question Test* and GKT *Guilty Knowledge Test* that is divided into CKT *Concealed Knowledge Test* and CIT *Concealed Information Test*). That is because of the fact that the questions asked in the test frequently go beyond art.22¹, Labor Code, and consequently there are opinions of the doctrine that such test are not only against the Labor Code but also against the Constitution¹⁸. Following Ewa Guza, it should be stated that the application of polygraph tests at workplace should be legally forbidden not only for the sake of employees and employers but also for the sake of a widely understood system of justice as they may be the source of frequent abuse¹⁹.

Forensic trap devices

Forensic trap is a method applied by law enforcement authorities to prevent from crime commitment, to prevent violators from escaping, to follow them and arrest in a suitable place as well as to mark and photograph them for evidence purposes. The objective of a trap is to prevent crime and to provide the evidence. There are the following types of trap devices²⁰:

- signalling,
- marking,
- incapacitating,
- registering-recording,
- combined,
- software.

Employers apply forensic traps increasingly more often to check the honesty of their staff. Most frequently, they use chemical traps to monitor employees as regards the thefts of money and goods, corruption, exchanging genuine money for counterfeit currency. Chemically-based marking traps belong to forensic traps that are used to prove the employee's guilt²¹. In order to reach that goal, objects are covered with some powder or paste that can be seen either in the visible light (coloring) or in the ultraviolet light (shining).

¹⁸ V. Kwiatkowska-Darul, J. Wójcikiewicz, *Wartość...*, op. cit., pp. 293-302.

¹⁹ E. Guza, *Czy badania wariograficzne są skuteczną kontrolą prawdomówności pracownika?* [in:] Z. Góral (ed.), *Kontrola pracownika. Możliwości techniczne i dylematy prawne*, Wydawnictwo Wolters Kluwer, Warszawa 2010, pp. 303-311.

²⁰ M. Łachacz, *Wykorzystywanie pułapek kryminalistycznych do kontroli pracownika* [in:] Z. Góral (ed.), *Kontrola pracownika. Możliwości techniczne i dylematy prawne*, Wydawnictwo Wolters Kluwer, Warszawa 2010, pp. 383-384.

²¹ *Ibidem*, s. 383-387.

Scented powder is used less frequently as such traps require adequate equipment and qualifications. Liquid fuels are increasingly more often marked by special markers to discover fuel thefts, fuel dilution or illegal sale. The legal aspects of the application of forensic traps have not been fully investigated and, consequently, they involve controversies.

Conclusion

Labor Code imposes the responsibility on employers to organize work in such a way that the working time of employees should be fully and effectively used, while the employees' duty at work is to devote their time solely to the realization of tasks related to work. As the essence of the employment relationship is the execution of tasks under the leadership of the employer, there is no doubt that the latter should have adequate supervision tools. However, every case of the application of supervision raises a question on the ethicality of the means applied by employers. Thus, the application of particular forms of supervision and their objectives should be defined in a written form and presented to employees beforehand. It is crucial that the employer should always follow the principle of adequacy, act in accordance with the provisions of law and – first of all – always have in mind the protection of the staff dignity and other personal rights.

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- [17] www.giodo.gov.pl.

Abstract

The aim of the article is to present the selected methods of staff supervision in the light of the existing provisions of law. The Polish Labor Law lacks detailed regulations concerning employer's rights and responsibilities as regards the supervision of employee's work rendered within the employment relationship, moreover it does not determine precisely the limits of supervision. As a result, both employers and employees are frequently not aware where supervision ends and mobbing and discrimination occurs. The methods shown in the article aim at the presentation of legal regulations as regards the issue of staff supervision.