

Privacy, data protection and measuring employee performance. The triggers from technology and smart work

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On 19 and 20 March 2018 the XVIth annual Conference in Commemoration of Professor Marco Biagi took place in Modena, Italy. The conference is an interdisciplinary classic in the study of comparative labour law, labour markets and industrial relations. It is organized by the Marco Biagi Foundation at the University of Modena and Reggio Emilia (www.fmb.unimore.it).

The general theme of the conference was "Assessing Workers' Performance in a Changing Technological and Societal Environment". I was honoured to preside one of the parallel sessions focusing on the right to privacy under the EU framework.

Right to privacy papers

Three excellent papers were presented. The first paper, entitled "Lie as a Workers' Privacy Protection Measure", was presented by **Izabela Florczak**, University of Lodz (Poland) and **Marcin Wujczyk**, Jagiellonian University (Poland). The paper analysed the protection of workers' privacy in light of technological transformations at the workplace. The approach taken was to build a case for the worker's right to lie as a means to ensure such privacy. A way to guarantee privacy from a worker's perspective, it was argued, is lying in cases employers or other parties would wish to unlawfully obtain personal information. The second paper on "Employee Privacy in the Context of EU Regulation n° 2016/679" was presented by **Federico Fusco**, Lund University (Sweden). The focus was on the EU's General Data Protection Regulation (GDPR) and the discussion concerned how to balance the employer's interest to use new technologies for reasons of control of workers' activities versus the workers' rights. The data protection principles play an important role and the employment relationship could even need some additional and specific regulations, due to artikel 88 of the GDPR. In the third paper, "The Impact of European General Data Protection Regulation (EU/2016/679) on Remote

Monitoring” was further discussed by **Alessandra Ingraio**, University of Milan (Italy). She not only took into account the Italian legal framework but pointed out that the new European GDPR increased many duties at company level in order to improve prevention. For example, employers will need to ensure that they have a sufficient and understandable policies in monitoring and have to undertake a data protection impact assessment in which invasive monitoring technology has to be considered.

Trends and debates

The sessions triggered an interesting debate among the participants and panelists. Reflecting further on this, a couple of interesting trends could be mentioned.

First of all, the privacy notion has developed strongly over time. In Europe, the right to privacy has evolved into a broad concept, including the private and intimate sphere, but also covering professional relationships and what is defined in the case law of the Strasbourg Human Rights Court as the ‘private social life’. This broad perspective implies that employees have privacy protection in and during the development of work relationships. It allows autonomy and dignity to be included in the protection. The European ‘answer’ to the workplace privacy issue, therefore allows quite broad protection and guarantees for worker privacy expectations and this from a human rights perspective.

Second, the fact that the privacy concept is expanding so broadly, has been seen as a positive thing. It allows the legal system to adapt to new circumstances. Furthermore, two relevant developments in the employment context can be seen to confirm that. They are both triggered by technology: first, information cannot be easily stopped and, second, work and life are increasingly mutually interfering.

Information and disclosure of information cannot be easily put to a halt. Considering technological evolutions, personal data and information relating to behaviour, someone’s whereabouts, performance, become quite easily traceable and available. New tracking tools, GPS, screen-shotting, key-logging, and so on, are on the rise in employment relations. Therefore, keeping information away from others, appears more and more difficult and the discussion seems to subsequently shift towards principles governing the processing of information, with principles such as transparency and fairness. Regulation through data protection law seems to be one of the important legal responses. Another development comes from the work-life debate. The division between work and private life seems to become increasingly blurred and difficult to separate. Not only has work, including its meaning changed over time, it has become part of our larger life sphere Work is becoming an aspect of self-development and even our right to private life itself. Off-duty life is often taking place on-line. Employers become thus much more aware of what their employees do in their free time. Furthermore, the impact of what employees undertake in their own private time *online* may have much more impact on the employment relationship compared to the past, precisely due to the specific context of this environment.

A final remark concerns the question what this tells us about performance measuring, the central theme of the Marco Biagi conference. It should be noted that privacy discussions remain centralised within the context of employment law. National legal tradition in coping with managerial prerogatives forms part of the legal exercise, even while sharing common values about the right to privacy. Additionally, developments in reality bring important change. Taking this into account, there seem to be two opposite trends coming up. On the one hand, new technologies make the supervision of workers, including their behaviour and their performances more and more available. These technologies can be tools of managerial control and surveillance. On the other hand, new ways of working, including smart working, suggest more autonomy for workers, including more responsibility, own initiative, and self-control. That would imply less strict control from the employer and implying more longer term views on performance and results. It thus evident that the privacy and performance management issue is strongly related with the broader debate on the new designs of the digital workplace. The triggers are clear: technology and smart work.

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