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MONITORING EMPLOYEES

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I. Introduction

Employers are, within the scope of their managerial right, obliged to preserve the order in workplace and in consideration of that, employees are obliged to work diligently due to the *duty of loyalty*. In that respect, employers have the right to request from employees to abstain from spending non-work-related time in the workplace. Then again, employers' practices to that end cannot violate the right of privacy and freedom of communication. In order to avert such practices causing violations in that respect, certain stipulations are introduced, through the legislation and the precedents of Court of Appeals' to restrict employers' right to monitor employees. This article will examine such and its boundaries.

II. Employers' Right to Monitor

The notion of "dependence" is one of the integral elements lying in the core of employee - employer relationship. This notion is the defining element separating employment agreement from any other agreement that depends on performance of a work,[1] as one is considered to be an "employee" only if she/he depends on an employer. In that context, depending on employer means obligation to perform work in accordance with the employer's instructions and under its supervision and control[2], which is how the employer keeps the employee dependent on itself, by regulating the employee's activities, the way, time and place of work[3]. Such regulations are accepted to derive from employers' managerial right, by virtue of which employers are deemed to have the right to monitor employees as to whether instructions and orders are duly followed. Such monitoring can be conducted through various ways, e.g. monitoring of e-mail accounts, files or implementation of performance tests. That said monitoring of e-mail accounts and correspondences has the potential to bear personal information. The Court of Appeals' decision dated 13.12.2010 and numbered 2009/447 E., 2010/37516 K. [4] indicates that "*employer is entitled to monitor employee's computers and e-mail accounts, thus the e-mail messages as well, that belong to workplace (employer) at all times*". According to this, monitoring e-mail correspondences that can be found in a computer and an e-mail account that **belongs** to employer would not violate the right of privacy and freedom of communication, even if such correspondences concern employee's personal life as well.

[1] Sarper Süzek, **İş Hukuku,** İstanbul 2014, Beta Yayınevi, p.219.
[2] Süzek, p.220.
[3] Süzek, p.220.
[4] www.kazanci.com In the relevant case, upon monitoring of work computers, e-mail correspondences slandering and insulting the employer are detected. Those correspondences are accepted to be just cause for termination and no severance and notice payment were made.

Furthermore, per Court of Appeals' decision dated 17.03.2008 and numbered 2007/27583 E., 2008/5294 K. use of internet in workplace for personal purposes is forbidden unless employer gives consent to such use, explicitly or implicitly. Court of Appeals considers that there is implicit consent to personal use of internet in cases where personal use is spotted by employer but no actions were taken in that respect for at least six months. Yet this does not apply if employer has specifically prohibited personal use of internet, and in such case personal use of internet may lead to termination of employment agreement based on *valid* or *rightful* reason under Article 18 or 25 of Labor Law numbered 4857.

Additionally, according to Courts of Appeals decision dated 28.05.2013 and numbered 2011/16044 E., 2013/16158 K., termination based on *rightful* reason due to MSN correspondences including insulting remarks about the employer and other employees in the workplace, which are determined upon monitoring the respective employee's computer, shall be deemed valid.

However there are restrictions to employers' such right, deriving from the constitutional rights and freedoms of individuals for the purpose of preventing malicious use of the right to monitor employees and protecting the right of privacy and freedoms of communication.

III. Limitations of Employers' Monitoring Right

The constitutional rights and freedoms of employees cannot be restricted for the purpose of preserving the order in workplace. However, the constitutional rights and freedoms don't entitle employees to act in violation of the common morale rules in workplace. In other words, acting in violation against the common moral rules (or the criminal legislation) cannot be protected under the constitutional rights and freedoms. Employees are obliged to endure and abide by the control and monitoring done by employers within the scope of their right[5]. However, there should be a limit to employees' such obligation since employers' right to monitor cannot supersede the constitutional rights and freedoms. Then this raises the question of "*to what extent monitoring falls under employer's managerial right and does not violate employees' constitutional rights and freedoms?*", hence the following:

i. Constitutional Restrictions

Monitoring employees has the potential to injure numerous constitutional rights and freedoms, mostly relating to privacy of personal information, private life and communication; therefore the scope of employees' constitutional rights and freedoms sets the boundaries of employers' right to monitor. In that context, monitoring of any sort that is in violation of those constitutional rights and freedoms shall be deemed illegal[6]. For instance, monitoring of phone

[5] Kenan Tunçomağ/Tankut Centel, **İş Hukuku'nun Esasları,** İstanbul 2005, s.100.
[6] Zeki Okur, **İş Hukuku'nda Elektronik Gözetleme,** Legal Kitapevi, Mart 2013, s.57.

calls is, under any circumstance, accepted to be a violation of employees' freedom of communication right. This is established in Court of Appeals' decision dated 31.10.2000 and numbered 2000/6487 E., 2000/9467 K. as follows:

"*It is realized that the conversation that took place between two people is supposed to be private and pertains to private life of those people. Even if the conversation, given its context, is not supposed to be private, tapping telephone or broadcasting thereof is, in itself, a violation of private life. No persons' telephone can be tapped*."

On those grounds, the employee subject to this decision, whose phone was tapped, was granted morale compensation.

That said, there are certain circumstances that supersede and restrict the right of privacy and freedom of communication. These circumstances are stipulated to be necessities that national security, public order, prevention of crime and common health entail. Then again, even under those circumstances, there has to be a court order to restrict the constitutional rights[7].

ii. Statutory Law Restrictions

Employers' obligation to preserve employees' personality: Obligation to preserve employees' personality is stipulated under Article 417 of Turkish Code of Obligations numbered 6098 (the "CoO"):

"The employer shall be obliged to take proper measures necessary for the protection of the personality of the employee in the work relations and to show respect, to ensure an order in the workplace which is in conformity with the principles of honesty, especially to prevent psychological and sexual harassments to the employees and to prevent those who had been victims of such harassment from further damages.

The employer shall be responsible for taking all the measures required for ensuring work health and safety in the workplace, to keep the necessary equipment and materials completely, whereas the employees shall be responsible for following of all the measures taken for work health and safety.

The compensation of damages regarding the death, the impairment of the bodily integrity or breach of the private rights of the employee due to the conduct of the employer against the law and the contract, including the foregoing provisions, shall be subject to the provisions for responsibility originating from the breach of the contract.

[7] Okur, s.57, Penal Department no.9 of the High Court of Appeal's decision dated 04.06.2008 – and numbered 2008/74 E., 2008/22381 K.

This stipulation extends employers' obligation to preserve employees' by including "*personality*" in addition to bodily integrity and health. Employers' obligation to preserve employees' personal rights is arising from Article 2 of Turkish Civil Code numbered 4721, regulating the good faith principle[8]. For instance, body search on employees must be executed gently[9], otherwise, a body search damaging employees' personality, body or health shall be deemed illegal per Article 417 of the CoO.

iii. Contractual Restrictions

Employment agreement, or collective labor agreement, may include certain stipulations regulating the scope of employers' right to monitor. Then again, in any case, those stipulations must be in line with constitutional and statutory restrictions, otherwise such stipulations will be deemed null and void. Stipulating monitoring rights in employment agreements can be useful to precisely determine the limits of monitoring acts.

IV. Conclusion

Per precedents of Court of Appeals, as explained above, employers are responsible for preserving order in their work places. Accordingly, employers are entitled to monitor employees' actions. That being said, monitoring shall not violate constitutional rights and freedoms. Even though phones, computers, internet etc. used in workplaces belong to employers, the right of privacy and freedom of communication cannot be restricted based on employers' responsibility to preserve order in workplace. Monitoring those mediums freely without any restriction may pose a risk for employers, unless specific stipulations are made under employment agreements with regard to how and to what extent such monitoring will be implemented. In any case, scope of monitoring must be determined diligently to avoid running across any personal information that is irrelevant to work to the extent that it is possible. This means that even in cases where monitoring is legally allowed, the scope thereof may render monitoring illegal.

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[8] İlhan Ulusan, **Özellikle Borçlar Hukuku ve İş Hukuku Açısından İşverenin İşçiyi Gözetme Borcu, Bundan Doğan Hukuki Sorumluluğu,** İstanbul, 1992, s.4.
[9] Okur, s.69.