CLIFFORD
CHANCE

Briefing note February 2017

ITALY: Employment Update Monitoring employees electronically: "less is more"

Monitoring programmes must be well defined and clearly explained to employees: essential elements in light of recent decisions by the Italian Data Protection Authority (*Garante per la protezione dei dati personali*).

In its 17 February 2017 Newsletter, the Italian Data Protection Authority clearly explained the essential requirements that, in light of the new amendments to Article 4 of the Worker Statute, the employer must follow if it wishes to use the information it collects electronically in the context of the employment relationship: the monitoring means must be carefully chosen and appropriate disclosure must be given to employees and in the company policies.

The Italian Data Protection Authority continues to interpret strictly the regulations governing monitoring of employees, set out in Article 4 of the Worker Statute, as amended by Legislative Decree 151/2015, also known as the "Jobs Act".

Most recently, in its newsletter of 17 February 2017, the Italian Data Protection Authority affirmed that the employer can verify if the work is being performed properly and verify the proper use of instruments used for work and to record presences/absences and accesses/departures, all instruments that can be used even in absence of an agreement with the unions or with the Labour Inspectorate pursuant to the amended Article 4 of the Worker Statute.

The Italian Data Protection Authority, however, addressing Article 173 of the Consolidated Safety at Work Act (Legislative Decree 81/2008), has narrowly defined these work instruments to include only services, software or applications that are "strictly functional to the work performance", such as for example the assignment of a personal e-mail account, connection to internet sites and systems and measure that allow their organic and safe use (for example, logging systems that retain only the external data contained in the "envelope" of the e-mail, and only for a brief period of time; anti-virus filters; systems that automatically prevent access to internet websites unrelated to work, without registering attempts to access the sites).

Outside of the narrow definition, and therefore excluded, the software systems that allow continuous and indiscriminate monitoring, filtering, and tracing of accesses to internet and/or to electronic mail and of the data contained in smartphones, including personal contents or those unrelated to work.

Processing of data in those instances is also prohibited under Article 8 of the Worker Statute, which bans investigations of circumstances that are not relevant in the context of a professional evaluation of the employee, and under the principles set out in the Italian Data Privacy Law (Legislative Decree 196/2003), such as those requiring that processing of data be fair, relevant and not excessive to achieve the intended purpose.

These decisions of the Italian Data Protection Authority can provide employers with essential practical instructions on

matters relating to software and applications to collect data on their employees, who should:

- At the time the purposes and scope of the monitoring is identified, select the priorities, avoiding massive, protracted, indiscriminate and rigid monitoring;
- Prefer monitoring in an aggregated and anonymous form, limiting individualised monitoring to specific, well-defined cases and circumstances;
- Retain only the data necessary to achieve the intended purposes and only for time periods that are consistent with the disclosed purposes;
- Use smartphones geolocalisation service to "take attendance" only after having notified the Italian Data Protection Authority pursuant to Article 37(1) of the Italian Data Privacy Law, and ensuring that the user is warned with an icon when geolocalisation services are activated, and not collect, or delete when collected, all unnecessary, unrelated data (such as location, when the data is irrelevant to the intended purpose, or personal content);
- Provide or amend disclosure on privacy and the company policy to ensure they offer fulsome information on how the electronic instruments are used, the scope of the monitoring and subsequent processing, also informing of the related conditions, retention periods, persons involved, technical modalities, any transfer of the data, etc.

In many instances the Italian Data Protection Authority has prohibited processing of the data and has imposed sanctions when it found the existing disclosure notices and the policies inadequate, in absence of agreements and appointments for persons responsible for the processing, which are necessary even in case of intra-group monitoring. A review focusing on the existing documents and the scope of the monitoring should prevent these consequences.

Contacts

For any further clarification, please contact:

Simonetta Candela
Partner, Employment

T: +39 02 806 34245
E: simonetta.candela
@cliffordchance.com

Claudio Cerabolini
Partner, Data Privacy

T: +39 02 806 34248
E: claudio.cerabolini
@cliffordchance.com

Marina Mobiglia
Senior Associate, Employment

T: +39 02 806 34339
E: marina.mobiglia
@cliffordchance.com

Andrea Tuninetti Ferrari
Senior Associate, Data Privacy

T: +39 02 806 34435
E: andrea.tuninettiferrari
@cliffordchance.com