

EVERY BREATH YOU TAKE, EVERY MOVE YOU MAKE¹: CYBERSURVEILLANCE IN THE WORKPLACE AND THE WORKER'S PRIVACY

by

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The themes of privacy and cybersurveillance by the employer have been turning in a matter of considerable interest and surrounded by great controversy in the last years.

The Internet changed the business landscape, making it far more competitive and the workplace considerably more fast-moving.

But, on the other hand, it also hastened the advent of widespread twenty-four-hour connectivity, particularly through netcentric technologies.

Together, these factors led to a re-conceptualization of work time and private life, making that the concept of work-life balance gained new meaning in a highly competitive and global economy in which each worker is accessible at any time, from any place and employees can access their colleagues, documents, and data from just about anywhere.

This new form of control establishes powerful means of cybersurveillance and of memorization, but also of analysis thus interfering in people's privacy, and one of the major challenges today is the regulation of the electronic control in the workplace because the advancement of modern technology, notably computers and the Internet, has made it possible to collect and store information on a seemingly limitless scale, while also facilitating access to it.

¹ The title of this article uses a very known song from The Police, from 1983, Every breath you take, because we think that the first part of this song reveals a little bit of the huge possibilities that today exists in the cybersurveillance and the electronic control of the employer: Every breath you take/Every move you make/Every bond you break/Every step you take/I'll be watching you. And the problem is that the worker can be watched without his knowledge or consent.

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This has led to a new and much more intrusive form of control. Almost everything can be controlled, even the way the worker thinks, because these instruments leave footprints that are immediately perceptible to the employer.

KEYWORDS:

Cybersurveillance, privacy, workplace.

1. INTRODUCTION

In 1890 SAMUEL D. WARREN AND LOUIS D. BRANDEIS, with the article *The Right to Privacy* published at *Harvard Law Review*, started the appearance of the first notion of the right to privacy. Although some previous approaches exist, none had the impact of this one. The author's objective was to establish a juridical limit to the interferences of the press in private life. With this article WARREN and BRANDEIS declared the right to privacy as a central part of the personality of the human being. The authors remind in the article that the law should protect privacy, assuring each individual the right of determining the extension up to where each one wants to see his private life, feelings, thoughts, tastes, known and published.

Nowadays, the authors' concerns continue to be very up to date. The right to privacy was enlarged in the end of the XIX century and in the XX century, related with the development of new technologies and with the objective of including new realities. Already WARREN and BRANDEIS noticed that the inventions and the progress of the technique could bring serious risks for the individual's freedom defending that "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops". And beginning from these arguments it appeared the conviction of the need of the existence of a true and autonomous right to privacy.

More than a century has passed from this article and numerous economic, political and social conditions changed, as well as technological, that affected the appearance of new threats to the right to privacy and that created the need of its reformulation.

For many, nowadays, the "sacred precincts of private and domestic life" extended to the information highways. More and more users put, volunteer and involuntarily, personal information, pictures and personal data in

blogs, online social networks and in other places in Internet and the great challenge that this new behavior brings to privacy is the fact that great part of the information that is put in online social networks is a result of the initiative of the user and based on his consent.

In the last years we have been attending an enormous increase and development of ICT in the workplace that has been originating great changes at the work level.

The use of information technology in the workplace has grown exponentially and surveillance and monitoring have become permanent issues in the modern workplace. The growth of information and surveillance technologies, closed-circuit television and video surveillance, biometrics, genetic and drug testing, monitoring employees location by GPS in their cars or even with the resource to RFID's technology, medical exams and information for hiring or retaining an employee and ownership of personal information have raised unprecedented concerns about privacy.

These new technologies, most of all Internet, changed the business landscape, turning it in a more competitive way but, at the same time, created a new type of control, the electronic control of the employer that although not different in the legal framework, is very different in practice from the traditional control.

The use of these new technologies of the Web 2.0, led the user to have a positive and active attitude interacting with others, abolishing the notions of time and space and changed the Labour landscape. The internet and the e-mail, the use of online social networks, the blogs, the forums, changed the control of the employer in to a more and more present and intrusive one, affecting the worker's privacy and putting new questions to Labour Law, not only in the course of the execution of the labor contract, but also in the hiring process and even in the contract termination²

² See JENNIFER FISHER, Implications of electronic mail policies for fairness and invasion of privacy: a field experiment, Albany University, 2002, in www.proquest.com, p. 1, and JOSEPH KIZZA e JACKLINE SSANYU, "Workplace surveillance" in *Electronic Monitoring in the Workplace: Controversies and Solutions*, (coordination JOHN WECKERT), Idea Group Publishing, USA, 2005, pp. 3-4.

2. CYBERSURVEILLANCE: THE ELECTRONIC CONTROL OF THE EMPLOYER

2.1 INTRODUCTION

The employment relationship is a perfect example of the existence of imbalance relationship. The worker and employer don't have the same freedom in what concerns neither the celebration of the contract nor the specification of the conditions of the same. This has generated the emergence of a contractual imbalance that is amplified with the huge unemployment existing today in Portugal and in many other countries.

This imbalance situation has new developments with the increase of the NICT and with the development of online social networks, because today it is quite common for many companies to googalize the candidates in the hiring process, because that helps very much the person in charge of this process. Through a distance, extremely fast, free, and above all discreet research, it is possible to know the intimacy of the candidate. This data, sometimes very private data, is frequently in a free access, and many times are the candidates who voluntary or involuntarily give these information and personal data on their online social networks.

This new form of electronic control allows an easy collection and gathering of the worker's personal data. Data that one finds disseminated in several sources of information, appears instantly gathered in a database without having been submitted to a previous inference concerning its relevance to the recruitment process or to the activity that the candidate is applying for.

Several employers see the candidate's profiles in these online social networks as a way of verifying information about them that is not in the CV. The CV is a brief abstract or presentation of the candidate's professional life, while other personal information can be seen (and searched) online. And, unfortunately, many candidates discover in the worst possible way that what they post online can come later to haunt them.

And in addition to this we must remember that computers don't forget and that information is stored for many years on these systems and I think that once again we have to establish limits. And I think that it is very positive the Proposal presented by the European Commission on the 25th January 2012 trying to create the right to forget. And this right is very important for limiting this cybersurveillance of the employer because contrary with what occurred with the conversations in the cafeteria or at school, now the

conversations are immortalized, and it is very easy to turn voyeur and to do judgments based on the people's social interactions. The digital information becomes permanent and the employers are the voyeurs of this type of actions³.

2.2 ELECTRONIC CONTROL

The Internet changed the business landscape, making it far more competitive and the workplace considerably more fast-moving.

But, on the other hand, it also hastened the advent of widespread twenty-four-hour connectivity, particularly through netcentric technologies.

Together, these factors led to a re-conceptualization of work time and private life, making that the concept of work-life balance gained new meaning in a highly competitive and global economy in which each worker is accessible any time, from any place and employees can access their colleagues, documents, and data from anywhere.

By the late 1990's many people are "always on, always connected" and for many this has become a kind of second nature, with the raising of new problems related to health and the huge increase in the power of control by the employer.

With these NICT there are countless benefits for the workers and also for the employers, but, at the same time, these new technologies, namely the Internet, have been originating new challenges, raising new questions and forcing the rethinking of old ones.

So, as we can see, the introduction of this new technology in the work relationship has multiple connections and many interrogations⁴.

³ See, among others, JEF AUSLOOS, "The Right to be Forgotten - Worth Remembering?", available in <http://ssrn.com/abstract=1970392> and BERT-JAAP KOOPS, "Forgetting Footprints, Shunning Shadows. A Critical Analysis of the "Right to be Forgotten" in Big Data Practice", in *Scrip-ED*, vol. 8, Issue 3, 2011.

⁴ According to the Eurobarometer, number 390, from July 2012, presented by the European Commission about Cyber security, more than half of EU citizens access the internet at least once a day (53%), although a substantial minority (29%) say that they never access the internet. Nearly all internet users (95%) access the internet from home, while 39% access the internet from work, 16% when they are on the move, and 11% at school or university. As well as accessing the internet from a desktop computer (63%) or a laptop computer or netbook (61%), 24% of internet users access the internet through a smartphone, and 6% use a tablet computer or touchscreen.

Around half of internet users in the EU say they buy goods or services online (53%), use social networking sites (52%), or do online banking (48%), while 20% sell goods or services. There is considerable variation in the online activities that respondents undertake in different countries.

If on one side it allowed a huge reduction of costs and work times and hastened the transmission of information, on the other hand, this revolution triggered a change in the ways of work organization and an enormous increase in the power of control of the employer, causing, sometimes, an inhuman dimension of this power.

So, the transformations in companies' organization in the productive structure and the changes in the organization of work started by the introduction of the new technologies, are affecting this power of control and demanding new forms of rationalization and administration of human resources, as well as creating the emergence of new ways of control and surveillance. If the control by the employer is neither new nor forbidden, new is the fact that these new technologies changed this control and have a capacity to collect data that, sometimes, seem to have no limits. These new technologies can even lead to a change in the power of control of the employer because great part of the direction, control and surveillance will be accomplished at distance through the computer.

We have to understand that one of the most disturbing aspects of the introduction of the new technology is related with the new forms of exercise of the electronic power of the employer, because they increased it in an unusual and unprecedented way. The traditional notion of directive power established in Portuguese Labour Code has to be interpreted accordingly with this new power of control. It is true that this power has always existed, but the traditional surveillance and control was limited. Nowadays, the monitoring and electronic surveillance create a qualitative jump and we have an electronic "control at distance, cold, incisive, surreptitious and seemingly to know everything"⁵, becoming possible a total control, or almost total, of all the activities of the workers' life, making that the worker becomes transparent for the employers and stops feeling free⁶. At the present time, with these new technologies, the electronic control increased exponentially because it is much more present.

⁵ See PATRICIA WALLACE, *The Internet in the workplace: How New Technology is Transforming Work*, Cambridge University Press, Cambridge, 2004, pp. 3-4 and also JAVIER THIBAUT ARANDA, "El derecho español", in *Tecnología Informática y Privacidad de los Trabajadores*, (coord. MARK JEFFERY, JAVIER THIBAUT ARANDA e ÁNGEL JURADO), Thomson Aranzadi, Navarra, 2003, p. 59.

⁶ DÄUBLER, *Internet und Arbeitsrecht*, 3.^a edição, Bund-Verlag, Frankfurt am Main, 2004, and LARRY O. NATT GANTT, II, "An affront to human dignity: electronic mail monitoring in the private sector workplace", in *Harvard Journal of Law & Technology*, vol. 8, n.º 2, 1995, p. 345.

Another characteristic of NICT that increases, and a lot, the possibility of the control is its ambivalent character in the measure that these technologies are used, simultaneously, as instrument to carry out the activity and as mechanism of control of the work performed by the worker. It is activated a perfect concentration in the same machine of the activity of the worker and of control, in such a way that while the computer is used for productive ends by the worker, it is, at the same time, providing an enormous amount of data to the employers, contributing to increase the sphere of exercise of their power, and also originating a direct participation of the worker in their own control. The worker becomes, simultaneously, an active and passive subject of a machine in such a way that is possible to accomplish a bidirectional control⁷.

And with this concentration new problems have emerged because the main working tool (of the workers) is also the instrument of a new form of control (much more intrusive and that controls almost everything even the way the worker thinks, because these instruments leave tracks that are immediately perceptible by the employer). It is the new fingerprints⁸ related with different features of the person: personal, professional, political, social, that the worker leaves, consciously or not, and that through an easy research in the Internet allow to build up the workers and the candidates profiles. The idea of Big Brother that all could identify and that could control everything seems old and almost innocent, when compared with these uncountable Little Brothers, truly nightmares that can follow us and know everything to the tiniest detail and the ghosts of the panoptic seem very real, like strange mirrors that we look and we see a different person, a kind of second life and, sometimes, a digital photoshop! We think that we have to reflect about the idea of a "habeas corpus numeric", that allows the real and effective control of personal data, as well as the real possibility of its elimination⁹.

On the other hand, this control seems to have no limits. Previously to the introduction of the NICT, the surveillance always involved a certain physical interference. Nowadays, however, with the help of these new technolo-

⁷ FABRIZIA SANTINI, "La corrispondenza elettronica aziendale tra diritto alla riservatezza e potere di controllo del datore di lavoro", in *ADL*, n.º 3, 2007, p. 759.

⁸ JEAN-EMMANUEL RAY and JEAN-PAUL BOUCHET, "Vie professionnelle, vie personnelles et TIC", in *DS*, n.º 1/2010, p. 45

⁹ EMMANUEL HOOG, apud JEAN-EMMANUEL RAY and JEAN-PAUL BOUCHET, op. cit., p. 45, footnote number 3.

gies, the employers can access all the data stored in a computer without the workers knowledge.

These new technologies have a huge capacity that seems to have no limits and that affects the work relationship, getting the attention for a true risk of corruption of this power that originates a deep change in the electronic power because great part of the exercise, given the ambivalent character of these new technologies, will be done at the distance through the computer. There is an extension of the power of control, as well as a decentralization of the subordination and a difficulty in distinguishing among the structure of control.

Through the NICT there is a clear disappearance of the borders between professional and personal life. The new technologies allow the notion of time to be transcended, with an huge capacity of storage of the computers and the possibility of always leaving track and of being invisible, what leads to computers becoming a great help for employers while allowing them to gather proofs for litigation with their workers. The computers turned in to be the new supervisors of the workers¹⁰.

On the other hand, it is more and more visible a smaller division among the borders of the personal and professional life because workers can enjoy, through these technologies, more leisure, (sometimes very private) during the work time. However, simultaneously, they invade the home and the worker's private life and, like this, "the official working hours don't mean anything when the work can be taken home and to be continued and accomplished there, without any temporary limit"¹¹. But the worker is entitled to the right to disconnect, as the right to private life of the XXI century and has not to become the homo connectus. The worker is entitled not to be permanently online. He has a right to the disconnection, to effective rest.

The official hours don't have any meaning when the worker is neither entitled to rest by having to be constantly on line nor to disconnect and to enjoy the necessary re-establishment of the physical and psychological balance.

This control becomes, many times, potentially vexatious, continuous and total, bringing, inclusively, risks for the workers' health, so much physical, as psychic, namely feeling himself as constantly watched. This can cause a

¹⁰ CHRISTOPHE VIGNEAU, "El control judicial de la utilización del correo electrónico y del acceso a internet en las empresas en Francia", in *RL*, n.ºs 5-6, 2009.

¹¹ ALAIN SUPIOT, "Travail, droit et technique", in *DS*, n.º 1, 2002, p. 21 and "Les nouveaux visages de la subordination", in *DS*, n.º 2, 2000, p. 132.

great psychological pressure that can lead, *inter alia*, to cases of occupational stress, burn-out syndrome, depressions and mobbing.

On the other hand, these new forms of control constitute powerful means of control and memorization, but also of analysis and of interference in the people's privacy, and one of the major challenges today is the regulation of the electronic communications in the workplace, because the advancement of modern technology, notably computers and the Internet, has made it possible to collect and store information on a seemingly limitless scale, while also facilitating access to it.

2.3 ELECTRONIC CONTROL AND PORTUGUESE LEGAL FRAMEWORK

The problem is in fact that with these new technologies there is a new type of control much more intrusive, with programs capable to record the worker's in such a way that the employer can observe all the details, the mistakes, the written words and several other things that, in another way, would not be known by the employer. And if we add the possibility that many companies give their employees to bring their own devices, we can see how this control seems to have no limits. If the employer encourages his workers to bring their devices, their smartphones, their tablets, their laptops, their touchscreens to the workplace, where do we draw the line? What are the limits?

And the answer is related with data protection and the positive notion of privacy because just data that is pertinent, necessary and appropriate should be collected for the lawful treatment of personal data. This principle is in article 6.^o, no. 1, paragraph b) of the Directive 95/46/EC, and in art. 5.^o, no. 1, paragraph b), of the Portuguese Data Protection Act, meaning that the purposes for which data are collected shall be specified, that these purposes must be explicit, *i.e.* fully and clearly expressed and that the purposes must be legitimate.

It also means that workers' personal data can only be treated if such treatment respects these principles, being essential the explicit definition of these purposes.

This principle comprises the truly fundamental and main principle of data protection¹². The other principles are all related with this legitimacy principle because data should be appropriate, pertinent and not excessive in relation to the legitimate purpose; the data should be exact, complete, accurate and precise in relation with that purpose; and data should only be conserved for the time and the needs of the initial purpose.

Restrictions to the workers' privacy should respect this legitimacy principle. That is to say that even if the restrictions are acceptable in abstract, they should always be justified according to the nature of the activity and proportional to the initial purpose¹³.

It is essential that the purpose be defined in the most concrete and accurate way because it is only with this detailed specification that we will be able to prove the proportionality of the personal data that has been treated and to check the legitimacy of all other operations that were undertaken.

The purpose intended by the employer has to be legitimate, that is, it should be in accordance with the legal and ethical framework, mainly with the fundamental rights, especially since we are dealing with a work relationship. In fact, this principle embodies an important limit to the treatment and conservation of personal data under any form, mainly imposing restrictions in the elaboration of automatic profiles based in the personal data treated.

On the other hand, the employer, previously to the adoption of any measure of control will still have to respect the principle of transparency that consists of the knowledge of the surveillance and of the control made by the employer. This principle is essential for the correct treatment of personal data, in general, and of the workers, in special.

The workers have to be informed on how, where and when the control is made. The employers have to clearly notify the workers on the limits on the use of these new technologies and these limits must be reasonable and not excessive in relation to the initial purpose. It is absolutely indispensable that the workers know the limitations in the use of these new means of communication, not forgetting that the information about the control is enforced by a principle of legitimacy, lawful data treatment and good faith in the exer-

¹² BELLAVISTA, "I poteri dell' imprenditore e la privacy del lavoratore", in DL, vol. 76, n.º 3, 2002, p. 152, ENRICO GRAGNOLI, "La prima applicazione della legge «sul trattamento dei dati personali» ed il rapporto di lavoro privato", in RCDP, n.º 4, 1997, p. 703, and MARIAPAOLA AIMO, "I «lavoratori di vetro»: regole di trattamento e meccanismi di tutela dei dati personali", in RGLPS, n.º 1, 2002, pp. 106-107.

¹³ JEAN SAVATIER, "La liberté dans le travail", in DS, n.º 1, 1990.

cise of the electronic power of the employer and, thus being, the hidden control or a control without the worker's knowledge is forbidden.

And we have to remind and defend that the workers don't leave behind their rights as persons and mainly their right of privacy that includes data protection when they celebrate a labor contract. In fact, they have a founded and legitimate expectation of a certain degree of privacy in the workplace, because they develop a significant part of their relationships with other human beings in this place and there is a reasonable protection of privacy and data protection and cybersurveillance must have limits¹⁴.

3. CONCLUSIONS

1. The recognized values promoted by privacy are clearly in stake in the work relationship. Autonomy, dignity, trust, respect and diversity acquire fundamental importance in this relationship, mainly when we know that the workers are spending more and more time in professional matters. Workers must be protected as well as their privacy, mainly when it is their dignity that is at stake.

It seems to us, in this matter, that we should reflect upon what a German philosopher's H. JONAS said, that "not everything that is technically possible is unavoidably maintainable." In the Law field, and specifically in Labour Law, we could sustain that not everything that is technically possible is juridical acceptable. The rights to privacy and to the workers' dignity can never give in before arguments of larger productivity or larger efficiency. And if it is unquestionable that the companies should be efficient, competitive and dynamic, it is not less clear that those objectives cannot be obtained at the expense of the workers' dignity.

2. We believe that the employers must act out of a higher responsibility to society to preserve the natural right to personal privacy, because, as BLOUSTEIN¹⁵ wrote some years ago, invasions of privacy are wrong because "they are invasions of liberty as individuals to do as we will", and "they undercut individuality and create a society of conventional, mediocre persons".

¹⁴ TERESA COELHO MOREIRA, *A Privacidade dos Trabalhadores e as Novas Tecnologias de Informação e Comunicação: contributo para um estudo dos limites do poder de controlo electrónico do empregador*, Almedina, Coimbra, 2010, *Estudos de Direito do Trabalho*, Almedina, Coimbra, 2011, and "The worker's privacy and electronic control", in *JLSS*, volume 2, number 1.

¹⁵ "Privacy as an aspect of human dignity: an answer to Dean Prosser", in *New York University Law Review*, vol. 39, 1964, p. 818.