

LABOR IMPACT OF TECHNOLOGICAL DEVICES IN ITALY

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Introduction

The first regulation directly regarding the impact of technological devices on labour relations dates back to 1970 with the introduction of the article 4 of the Workers' Statute (l. n. 300/1970). The aim of this regulation is to protect the dignity and the privacy of the workers from pervasive monitoring and controls over their activities through the use of technology. Until its reform in the context of the so-called Jobs Act (in 2015), article 4 of the Workers' Statute provided a clear prohibition of the use of technologies for the monitoring of workers' activities, with the exception of those technological equipments or tools which only indirectly allow the remote monitoring of workers, if used for organizational, productive or safety purposes and only after the stipulation of an agreement with workers' representatives in the company or, lacking the agreement, after an administrative authorization. The information produced by these equipments and tools, as a result of a prohibited remote monitoring, could not be used for decisions regarding the workers.

Following the 2015 reform, even though it is still prohibited to monitor workers' activities by means of technological tools and equipments, important changes have been introduced. While the use of technological equipments which only indirectly allow the remote monitoring of workers is still bound to specific needs (beyond the organizational, productive and safety purposes, also reasons concerning the protection of employees' goods in the new version) and to the stipulation of an agreement with workers' representatives (or, lacking the agreement, the administrative authorization)⁷¹, these requirements do not apply for the use of working tools and systems for registering the access and presence at work. Moreover, after the reform, the employer can use information produced by tools and equipments "for any aims related to the labour relations" (promotion, training but also sanctions, including dismissal) if the usage of the tools and the practice of monitoring of such data are adequately communicated to the employee and if the processing of such information is legitimate according to data protection regulations.

⁷¹ After the reform, in case the company has establishments in different provinces or regions the agreement can be stipulated with comparatively more representative unions at national level. In a similar manner, lacking the agreement, the autoauthorization can be asked to the head office of the Labour Inspectorate, instead of the office competent for the different territories.

Beyond the regulation of the remote monitoring, few other provisions address the impact of technologies on the labour relations. Apart from those directly related to the safety of the tools assigned to the workers' (contained in the occupational health and safety regulation, Legislative Decree n. 81/2008) and the few provisions regarding teleworking⁷², the most relevant innovation in the field has been the regulation of the right to disconnect introduced for employees involved in *lavoro agile* (smart working) practices according to article 19 of the Law n. 81/2017.

2. Is there any regulation in your country regarding employees' use of technological devices in the company?

The Italian legal system does not provide a specific regulation concerning the use of technological devices provided by the company for the work performance. General regulations on employees' conduct are relevant for the use of technological devices as well, notably those related to the duties of good faith and care.

Except for these general principles, the regulation of the use by the employee of technological devices is left to the companies, which increasingly decide to provide a specific policy regulating the use of technological devices. As said, the introduction in the companies of new technological devices and applications must conform with article 4 of the Workers' Statute when these technologies entail the possibility of a remote monitoring of workers' activities.

2. Is it mandatory for the company to have a code of conduct or an internal policy regulating the use technological devices? If not, what is the procedure that the company must follow to regulate the use of technological devices?

As said, lacking a specific regulation in the law regarding the use of technological devices, while the codes of conduct and internal policies are not mandatory in general terms, employers use them to regulate the matter of the use of such devices. Thus internal policies and codes of conduct regarding the use of technological devices are growing in importance.

Fistly, as we have seen, the employer can use information provided by technological devices only upon adequate communication of the use of such tools and devices given to the employee (article 4, paragraph 3 of the Workers' Statute).

⁷² With regards to teleworking see Dagnino E., Teleworking and Labor Conditions in Italy, IUS LABOR, 2017, vol. 2, 24 ff.

Secondly, lacking a clear regulation concerning the use of technological devices by the employees, it could be difficult for the employer to prove that the behaviour of the employee was in breach of his/her duties, for example in the case of personal/private use of the devices provided by the company.

Finally, the internal policies are useful instruments for the employer to demonstrate the compliance with regulations relevant outside the labour relations, such as the one regarding the corporate administrative and criminal liability (Legislative Decree n. 231/2001), and those regarding data protection (GDPR and Legislative Decree n. 196/2003).

3. In which cases and under what conditions is it possible to access and monitor employees' personal communications through the company's technological devices (e-mail, instant messaging, etc.)?

The legitimacy of the access to and monitoring of employee's personal communication through company's devices (e-mail and instant messaging) must be evaluated from an integrating perspective taking into account both labour law (article 4 and 8 of the Workers' Statute) and the data protection regulation (GDPR and Legislative Decree n. 196/2003), without overlooking the constitutional right of secrecy of the correspondence, which has an important criminal corollary.

As far as labour law is concerned, the first problem is if e-mail could be considered as working tools, thus not falling under the application of article 4, paragraph 1 of the Workers' Statute (requiring the above-mentioned procedure with workers' representatives or Labour Inspectorate and the use bound to specific reasons). With reference to the e-mail itself, this seems to be the right interpretation; differently, once the e-mail are collected and monitored through a specific software, the use of this software must conform to article 4, paragraph 1.

The Privacy Authority as well as case law has confirmed that a constant collection and monitoring of e-mail entails a monitoring of the worker's activity forbidden by article 4 and it also violates data protection regulation.

In order to provide some guidance for a legitimate management of company e-mail addresses, the Privacy Authority has issued the Guidelines Applying to the Use of E-Mails and the Internet in the Employment Context - 1 March 2007⁷³.

In some cases, the access to the content of communications is allowed according to the case law doctrine of *controlli difensivi* (see *infra*, § 5), thus not requiring the respect of

⁷³ <https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1408680>

article 4 of the Workers' Statute. In the other cases, the information collected through the access could be used by the employer in the context of the employment relationship only if the employee has been informed in terms of tools, their usage and the ways of monitoring and if the following processing complies with data protection regulation.

Since the access to private communications can provide information regarding non-work related aspects of employee's life, it can also imply the violation of article 8 of Workers' Statute, which forbids the investigation by the employer on information regarding opinions, beliefs and any other aspect of the employee's life that are not relevant for the evaluation of employee's attitude to the work.

4. Under what circumstances is it possible to install permanent video surveillance systems to control work activity?

According to article 4 of the Workers' Statute, workers' activities (including work performance and other behaviours put in place by the workers while at work) can not be (directly) controlled by the employer by means of technological monitoring. Video surveillance systems can be used only for the aims above-mentioned (organizational and productive reasons or regarding workers' safety or the protection of employers' goods) and can be installed only after the stipulation of an agreement with workers' representatives or, lacking the agreement, after the authorization of the Labour Inspectorate.

Their use should also comply with data protection regulations, with reference, *inter alia*, to the principles regarding data processing, the right to be informed and the legal basis of the processing.

When the above-mentioned conditions are respected, information provided by video surveillance can be used by the employer in the context of the employment relationship (also for dismissal purposes) only if the employee has been informed about the way the control is put in place and if the following processing comply with data protection regulations (article 4, paragraph 3 of the Workers' Statute).

5. Under what circumstances is it possible to install hidden cameras to control work activity? In particular, is its installation only possible when the company suspects that a criminal offense has been committed or also when there are signs of a breach of contract?

Before the reform regarding article 4 passed in 2015, Courts have considered as legitimate the use of hidden cameras (thus falling outside the application of article 4 and

its limits and procedure) if used not for the monitoring and control of the work performance but for the investigation regarding misbehaviour by the employees (so-called *controlli difensivi*, defensive controls). After a first decision (Cass. n. 4746/2002) stating that the use of monitoring technologies aimed to ascertain employees' misbehaviour falls always outside the application of article 4 of the Workers' Statute, case law has been consolidated in the interpretation of the exception from the application of article 4 only when the monitoring through technological tools was aimed to ascertain employees' misbehaviour not related to the work performance, but impacting on employers' goods.

After the reform, scholars debated the survival of this case law, since the new version of article 4 of the Workers' Statute clearly states that the technologies (including cameras) used for the protection of employers' goods fall within the application of the article, so that can be installed and used only after the stipulation of an agreement with workers' representatives or, lacking the agreement, after the authorization by the Labour Inspectorate.

The first decisions of the lower courts⁷⁴ –decisions from the Corte di Cassazione are still awaited– regarding hidden remote monitoring seem to confirm the possibility to use hidden cameras but only for ascertaining misbehaviour that are not related to the work performance. Notwithstanding, the nature and extent of this specific category of monitoring activities (*controlli difensivi*) is still debated and we have to wait the consolidation of case law by the Corte di Cassazione in next years.

6. In what cases is it possible to install geolocation systems (GPS) to control work activity?

As previously said, according to article 4 technological devices and tools can not be used for direct monitoring of the workers' activities, but information produced by such tools, if their use is not aimed to workers' monitoring, can be used in the context of the employment relationships under the condition outlined above. Geolocation systems (GPS) are widely used nowadays: under the regulation of article 4 of the Workers' Statute, it is important to distinguish between their usage for monitoring of workers' activities (forbidden), for the reasons outlined above (thus requiring an agreement with unions or the authorization before their installation) or if they can be considered

⁷⁴ See, for example, Trib. La Spezia 25 novembre 2016 cited in SITZIA A., "Videosorveglianza occulta, privacy e diritto di proprietà: la Corte Edu sul criterio del bilanciamento", *Argomenti di Diritto del Lavoro*, n° 2, 2018, note 23 and Trib. Roma ord. 24 marzo 2017, commented by GRAMANO E., "La rinnovata (ed ingiustificata) vitalità della giurisprudenza in materia di controlli difensivi", *Diritto delle Relazioni Industriali*, n° 1, 2018, p. 265.

working tools. While there are not particular difficulties in distinguishing when GPS are installed for the control of the workers' activities, many doubts raised around the qualification as tools used by the employer for reasons related to the organization, the production, the workers' safety or the protection of employers' good or, otherwise, as working tools.

While a settled case law is not yet available about this matter, a circular⁷⁵ issued by the Labour Inspectorate clearly states that geolocation systems are not normally used by the employee directly in the performance of his/her work. For example, if they are installed on company vehicles, they aim to protect an employer's good; if they are installed in workers' equipment they are used for safety reasons or, in some cases, to a better management of the work performance. It follows that the installation of such tools on a device must be preceded by the stipulation of an agreement with the workers' representatives or, lacking the agreement, by the authorization provided by the Labour Inspectorate.

In the few cases where the GPS are used as working tools or as systems for registering access and presence at work, they can be used without the need of any agreement or authorization, but in compliance with data protection regulations.

7. In the event that the company fires an employee in breach of the conditions regarding control communications by e-mail or installation of video surveillance systems, what would be the qualification of the dismissal and what administrative sanctions could be derived?

In case of dismissal of the employee in breach of the requirements regarding technological monitoring of the workers' activities, the dismissal will be deemed unjustified, if the misbehaviour alleged to the dismissal of the worker is not proven through other means of proof obtained lawfully. In this event, the consequence depends on the protection regime applied to the employment relationship according to the number of employees employed by the company and the date of stipulation of the contract: the sanction ranges from the payment of an indemnity to the reinstatement of the employee.

Beyond the consequences related to the dismissal, it is worth mentioning that a complex system of sanctions is provided by the different regulations applied to remote monitoring of the employees in administrative, civil and criminal field. Apart from the

⁷⁵ Circolare INL n. 2/2016. <http://www.lavoro.gov.it/documenti-e-norme/normative/Documents/2016/Circolare%20INL%20n.2%20indicazioni%20operative%20%20utilizzo%20%20impianti%20GPS-signed.pdf>

sanctions provided by the GDPR regarding the breach of data protection regulations (article 83), it must be highlighted that the violation of article 8 and article 4 – if a direct monitoring of the workers’ activities is put in place or when equipments and tools requiring the agreement with the workers’ representatives or the authorization are used in lack of them – entails the application of criminal sanctions. Criminal sanctions are applied also in cases of violation of the secrecy of the correspondence.

8. What personal data can be collected and processed in the framework of the employment relationship? In particular, is employees’ consent necessary? In what cases is it not necessary?

Italy has not yet adapted its internal regulation (Legislative Decree n. 196/2003) to the content of the GDPR, creating some problems of coordinations between the two regulations.

Since the European Regulation prevails on the internal regulation, we will focus on the first one.

The processing of personal data regarding the employee – as well as for any other data subject – shall conform to the principles of: lawfulness, fairness and transparency; purpose limitation; data minimisation; accuracy; storage limitation; integrity and confidentiality; accountability (article 5 of the GDPR). The employee must also be informed by the employer regarding the existence, the nature and the features of the processing.

In general terms, the processing of employee’s personal data is legitimate –without the need of express consent by the employee– when it is necessary for the performance of a contract or for complying with legal obligation regarding the controller. In the other cases, the legal basis for the processing should usually be the explicit consent by the employee.

For specific processing, such as those implying automated decision making (section 4 of the GDPR), including profiling, or those “*likely to result in a high risk to the rights and freedoms of natural persons*” (see article 35 regarding data protection impact assessment), other protections apply.

9. What information in the field of data protection must the company provide to workers’ representatives? How and with what periodicity?

Except for the obligation to negotiate an agreement (not to stipulate it, since it is possible, lacking the agreement, to ask for an authorization to the Labour Inspectorate)

for the installation of technological equipments and tools when they entail the possibility for an indirect control of the workers' activities, no specific regulation establishes a duty to inform workers' representatives about data treatments. Nor does the GDPR provide any specific obligation in this field⁷⁶.

10. Is there a right to disconnect from technological devices outside working time? In this case, should the company define the extension and limits of this right jointly with the workers' representatives or can it do so through an internal policy?

A specific mention to the disconnection from technological devices is contained in the Law n. 81/2017 which is applied to the so-called *smart workers* or *lavoratori agili*. *Lavoro agile* is a particular way of working characterized by flexibility regarding the place and time of work⁷⁷. Italian regulator decided to require the stipulation of a specific individual agreement between employer and employee to access that specific form of work. The law provides some mandatory contents of this agreement between employer and employee: one of them is the definition of organizational and technical measures to guarantee the disconnection of the employee from technological devices used to work. It is still debated among the scholars, if this provision establishes a specific right to disconnect, but it is clear that not defining adequate measures can lead to responsibility for the employer in case a work-related illness affecting a *smart worker*. The law does not establish the specific measures, since the measures should be adapted to the organization of work of the company and, also, to the specific features of the way of working adopted by the employee (*lavoro agile* could be tailored).

While there is a duty of specification in the individual agreement of *lavoro agile*, no role is specifically assigned to the unions. Notwithstanding, it is worth saying that the stipulation of individual agreements of *lavoro agile* is often preceded by a company-level collective agreement introducing a framework regulation of *lavoro agile* in the company. Collective agreements are now starting to provide some general regulation regarding the right to disconnect, even if unions in Italy seem not to be ready to regulate this right of new generation as a comparison with the content of French collective agreement on the issue makes clear⁷⁸.

⁷⁶ The only reference to representatives of the data subjects is contained in article 35 paragraph 9 which states that in the context of a Data Protection Impact Assessment, "where appropriate", the controller must "seek the views of data subjects or their representatives". No specification is given regarding who should be considered a legitimate representative of the data subject and, in any case, the obligation seems to be weak.

⁷⁷ See, again, DAGNINO E., "Teleworking and Labor Conditions in Italy", *Teleworking and labor conditions. Comparative Labor Law Dossier*, IUSLabor n° 2, 2017, p. 26-27.

⁷⁸ A comparison between the contents of collective agreements regarding the right to disconnect in Italy and France is offered in DAGNINO E., "The Right to Disconnect in the Prism of Work-life Balance. The

11. Other relevant aspects regarding the labor influence of the technological devices in the workplace

New regulations impacting on the introduction and the use of technologies in the company –such as GDPR, new version of the article 4 of the Workers’ Statute; the regulation regarding the right to disconnect– as well as the application of traditional regulation to the technological context of the new workplace, are feeding debate among Courts and scholars with different positions. As a consequence, some interpretations provided in the article according to decisions by Courts and administrative bodies can be subverted in the future.