

Update on employee surveillance

Following the entry into force of the General Data Protection Regulation (GDPR) on 25 May of this year, Luxembourg repealed its former data protection act of 2002, and on 1 August 2018, adopted a new act implementing the GDPR. This act amended Article L 261-1 of the Labour Code concerning employee surveillance.

By amending the Labour Code in this way, the legislator exercised the option left open to the Member States by Article 88 of the GDPR to provide for more specific rules concerning the processing of personal data for employee surveillance purposes under employment relationships.

By way of example, surveillance at the work place may materialize through the installation of a time clock, a badge access control system, or cameras.

It is first of all important to note that this new article concerns only the surveillance processing cases considered once the act of 1 August 2018 entered into force. It consequently does not challenge processing put in place in the past. Every such mechanism must accordingly be compliant with the GDPR which has been in force since 25 May 2018.

Here are the main changes brought about by Article L 261-1 of the Labour Code:

1. Abolition of prior authorization requirement

In the past, when an employer wanted to put surveillance in place, he was required to apply for prior authorization from the *Commission Nationale pour la Protection des Données* (NCPD) [National Data Protection Commission] which conducted checks to ascertain the pertinence of such surveillance.

The former version of Article L 261-1 of the Labour Code provided for only 5 cases of recourse to surveillance:

1. For the health and safety needs of employees;
2. For the needs to protect company property;
3. For the control of the production process pertaining to machines only;
4. For the temporary control of production or employee performance when such a measure is the only means of determining the precise remuneration;
5. As part of the organization of work according to flextime arrangements.

Such surveillance thus authorized was geared more to the technical conditions concerning security issues.

The new provision henceforth authorizes more easily the processing of personal data for employee surveillance purposes under employment relationships by the employer, if the latter is the data controller.

It suffices henceforth for the employer to rely on one of the six conditions provided by the GDPR. The processing of personal data by the employer for surveillance purposes is therefore authorized:

- If it is necessary:
 - . for the performance of the contract of employment;
 - . for compliance with a statutory obligation of the employer;
 - . for legitimate interests pursued by the employer or by a third party, unless the employee's interests or fundamental rights and freedoms prevail over the former;
 - . for the safeguarding of the vital interests of the employee or another natural person;
 - . for carrying out a mission that is in the public interest or relevant for the exercise of public authority vested in the employer;
- Or if the person concerned has consented to the processing of his or her personal data.

It is worth noting that the employee's consent is not always considered as given freely because of the subordinate relationship in which the employee finds him/herself with the employer. Yet the voluntary consent of the person concerned is a necessary precondition to making valuable sense within the meaning of the GDPR.

In practice, the surveillance measures will most often be justified by the legitimate interest of the employer.

2. A reinforced right to information

As under the former version, in addition to an individual right of access to information for each employee by virtue of Articles 13 and 14 of the GDPR, the employer must also inform the staff delegation or, otherwise, the Inspectorate of Labour and Mines. The underlying term here is the collective right of employees to information.

Conversely, the new feature has to do with the content of this information, which must henceforth include the following elements:

- A detailed description of the purpose of the proposed processing;
- The implementation methods of the surveillance system and, where applicable, the period of and criteria for data retention;
- The employer's formal commitment not to use the data collected for a purpose other than that provided explicitly in the prior information.

Thus, the employer's obligation to inform is considerably reinforced.

Beyond this right to information, the new Article L 261-1 of the Labour Code maintains the co-decision regime between the employer and the staff delegation, in accordance with the provisions of Articles L. 211-8., L. 414-9. and L. 423-1. of the Labour Code, when data are processed for the following purposes:

- for the health and safety needs of employees;
- for the control of the production processes or employee performance when such a measure is the only means of determining the precise remuneration;
- for the organization of work according to flextime arrangements.

3. Possibility of requesting a prior opinion from the CNPD [National Committee for Data Protection]

Article L 261-1 of the Labour Code introduces another new provision: when the employer plans an employee surveillance measure that involves the processing of personal data, the staff delegation or, otherwise, the employees concerned by the surveillance measures, may, within fifteen days following the prior information, lodge a request with the CNPD for a prior opinion on the compliance of the processing plan.

All requests for a prior opinion lodged with the CNPD after this period shall be inadmissible. Employers are consequently strongly advised to indicate a precise date when announcing a processing plan to the employees (Example: registered letter sent to employees with possible internal posting).

The request for a prior opinion shall have a suspensive effect, i.e. the processing may not be carried out for as long as the CNPD has not given its opinion. The committee shall have one month as of the date of the request to give its opinion. Although strongly advised to do so, the employer is not required to comply with the opinion given by the CNPD.

The new version of Article L. 261-1 of the Labour Code points out also that the employees concerned are always entitled to file a complaint with the CNPD if their rights are infringed, and that the exercise of this right may not constitute gross misconduct nor legitimate grounds for dismissal.

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