CPNI
Centre for the Protection of National Infrastructure

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Spain: Relevant legislation

We have identified the following key pieces of legislation which are applicable to employee IT monitoring in Spain. Note that there is other legislation which is applicable which we have not included in this document.

Spanish Constitution

- The right to honour, to personal and family privacy and to one's own image is guaranteed.
- The secrecy of communications is guaranteed, except for judicial decisions.
- The law will limit the use of information technology to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.
- Privacy and secrecy of communications rights must be respected by employers when monitoring employees.

Data Protection Act 1999 – replaced in line with GDPR in 2018

- Individual's right to control the processing of their personal data is considered a constitutional right to privacy.

Employment Act 2015

- Workers have the right to respect their privacy and due consideration to their dignity.
- An employee must carry out the work agreed under the direction and follow the instructions provided by the employer.
- An employer may adopt the measures they deem most appropriate for monitoring and controlling the working activity to verify compliance by the employee of their obligations and duties, while making due consideration to their dignity in doing so.

Collective Bargaining Agreements (CBAs)

- These have been negotiated for specific industries in Spain (e.g. financial services). They are essentially agreements in writing between an employer and a trade union in respect of the terms and conditions of employment of employees;
- May include infringements and sanctions related to the monitoring of employees;
- CBAs could, for example, sanction misconduct regarding the use of IT, but they can also state tolerance with regard to such use, prohibiting absolute restriction on the use of IT devices for private purposes.

Principles deduced from case law

Monitoring employees is lawful, but such control is not absolute.

Monitoring measures by an employer must be:

- suitable;
- proportionate and balanced;
- necessary;
- justified; and
- the employee must be aware of them and their location.

The employer must use the least 'aggressive' means to monitor employees bearing in mind other circumstances such as whether:

- the installation is carried out massively and indiscriminately;
- the monitoring systems are visible or hidden; and
- the actual goal of the installation of the monitoring devices.

Employers must set rules on IT use and provide these to employees.

Illegally gathered evidence

There is a high risk that monitoring evidence will be declared null and void in court, if the following points have not been borne in mind:

- Is there a specific, explicit and legitimate purpose?
- Is the monitoring/access to data a proportional response to the threat?
- Are there the minimum repercussions to the intimacy right of the employees?
- The employee and his/her representatives must be present when the employer accesses an employee's email.

The future

GDPR: The General Data Protection Regulation applies in Spain, as a member of the EU. See UK chapter or short report for more detail on the GDPR.

New data protection legislation will allow employers to use security cameras at work centres to monitor employees, beyond mere safety reasons. Employers must:

- Inform employees about the cameras and purpose of image collection, as well as the identity of the person in charge;
- Place the above information in a sufficiently visible place.

There has been contradictory case law between the Spanish Supreme and Constitutional Courts (which have tended to favour the employer rights) and the European Court of Human Rights (which have tended to favour employee privacy rights). The enforcement of GDPR will likely force more alignment towards the latter.

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