Employee@enterprise.at
Private use of email and internet at the workplace

Legal experts and, in part, the courts have recently launched upon an intense discussion of issues involving the private use of email and internet at the workplace. Whether and to what extent it is permissible for employees to privately use these media at their workplace chiefly depends on the regulations governing the respective enterprise (collective agreement, shop agreement, individual agreement, instruction) or, conceivably, on an (accepted) enterprise-specific practice, as no laws have yet been passed to regulate the situation. Many employees may feel that they are perfectly entitled to using email and internet for private purposes, but no such "right" actually exists. During working hours, employees owe it to their employer to make full use of their working capacity, so that, in legal terms, they are banned from performing any private activity during their working hours.

PROHIBITION OF PRIVATE USE

In his capacity as equipment owner, the employer is free to explicitly ban the private use of email and internet. Such a ban needs to be evaluated against the limits of unethical behaviour (violation of *bonos mores*) and the prohibition of deliberately annoying action. In analogy to rulings on private telephone calls at the workplace, the view is vented that, under special circumstances, private use of email and internet may be necessary or, at least, excusable (e.g. if the employee needs to make enquiries with government bodies, settle children's school matters, make an appointment for a visit to a doctor, etc.). For the employer it may even be advantageous if the employee uses email or internet in such a situation (which otherwise would entitle the employee to leave of absence).

PERMITTED PRIVATE USE

Where an employer permits the private use of email and internet, the scope and extent of such use should be specified in as much detail as possible. Specifically it should be determined to which media the permission applies, whether private use is permitted only during breaks or after official working hours or, alternatively, also during working hours, whether the employee has to bear the costs of such use, what the consequences of abuse are, etc. It is recommended that an individual contractual agreement (e.g. clause in the employment contract, "internet policy" as an integral part of the employment contract) be set up or a shop agreement enforceable through the arbitration board be negotiated.

LACK OF REGULATION

Typically, however, enterprises make no provisions to regulate the private email and internet use. Once again, we need to go back to court decisions on the private use of telephones and computers, analogously to which the private

use of email and internet is deemed customary and permissible provided that it is moderate and of small scale only. It may well be difficult to judge on a case to case basis when the permissible time scale is exceeded. Depending on practice and usage in a given enterprise, some "convention" may creep into usage which will become the yardstick even when it negatively affects the employer.

MONITORING MEASURES

Considering that the use of email and internet implies costs and risks (e.g. risk of virus infection, unauthorised access) and that the private use by an employee may cause valuable working time to be lost to the employer, it is only understandable that employers would like to monitor internet surfing and emailing practices by their employees. However, any monitoring measures that impinge upon human dignity must be approved by the works council by way of a shop agreement (without the possibility to address the arbitration board), or, in enterprises that have no works council, individually by each employee. Courts have long discussed the issue of which monitoring measures are detrimental to human dignity. A ruling by the Supreme Court regarding a telephone call registering system (OGH 13.6.2002, 8 Ob A 288/01p) provided a landmark decision on measures to monitor modern media. The Supreme Court found that a call registering system that records the calling extension, number dialled, date, time, duration of the call, costs accrued, etc. is a monitoring measure that affects human dignity – even when the user can mark private calls by pushing a button so that the system records only the start of the number dialled (with the last digits hidden).

Law experts have criticised the decision, especially with regard to the aspect of affecting human dignity and the requirement of approval by the works council. There is no agreement on whether such monitoring rights should be handled differently when the use of email and internet is restricted to work purposes only and their private use is prohibited. Some argue that, if a specific ban on private use is in place, an employer must be allowed to check whether this ban is actually observed. Others think that even when the private use of email and internet is banned, monitoring is permissible only upon approval by the works council (or in its absence approval by the individual employee). Rulings on the monitoring of email and internet are still outstanding.

CONSEQUENCES OF ABUSE

When an enterprise has no regulations on the permissibility of private use of email and internet, it has to acquiesce in its moderate private use. It is only when such use is excessive, abusive or damaging that it constitutes a cause for dismissal (typically abuse of confidence or persistent dereliction of duty). Even when the private use of email and internet is expressly forbidden, a single breach will not justify dismissal. As is the case with any other misconduct, the employee will first have to be admonished and threatened with dismissal upon repetition.

For more information on this subject please contact:

Dr. Barbara Kurz, LL.M.
Attorney-at-Law and Partner

Areas of expertise:
labour law, e-commerce, intellectual property law

kurz@preslmayr.at

Barbara Kurz and our data protection expert Rainer Knyrim will contribute labour law and data protection aspects to the Business Circle seminar on "Sensitive HR Data and the Internet" on 17 March and 16 June 2005.

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New Publication by Preslmayr

In co-operation with Heid Law Office, Preslmayr are publishing a revised and considerably enlarged edition of their Handbook on Public Procurement Law. Authors include Raimund Madl and Dieter Hauck, our partners specialising in procurement law. The volume is arranged in accordance with the chronological structure of a procurement process.

A separate chapter discusses aspects of legal protection and judicial remedies. Overall, the volume is thus a valuable tool for everybody dealing with public procurement law.

PRESLMAYR RECHTSANWÄLTE OEG
Dr. Karl Lueger-Ring 12, 1010 Wien, Austria / Tel: (+43 1) 533 16 95, Fax: (+43 1) 535 56 86
office@preslmayr.at, www.preslmayr.at