How to solve the right to privacy in the workplace without being detrimental to companies

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Expansión

Although it is natural for companies to want to control what their people use e-mail for, from a legal point of view this could be considered as an illegal intrusion into their privacy rights. According to Joan Fontrodona, IESE professor, companies can notify their staff of the rules, to minimise conflicts. Inmaculada Fernández, PwC manager, thinks managers must elaborate a corporate policy about how to use e-mail.

Barcelona, January 25, 2002.- The terrorist attacks of 11th. September have reopened the debate between those in favour of privacy and those who want control over individuals. There is even talk about identifying labels, a sort of bar code, tattooed on people's chests so that they can be easily identified. A Gallup poll published two weeks after the attacks revealed that 49% of Americans were in favour of all Arabs, including those who were American citizens, wearing a special identification; 58% agreed that there should be special security controls for them.

Within the workplace the conflict arises between the right of a person to have his private space where no unwanted person can enter and the legitimate interest of the companies to increase their efficiency, although at the expenses of the motivation of the workers.

The Privacy Foundation calculates that the number of employees watched while they surf the Internet or send e-mails amounts to 27 millions worldwide. The volume of world sales of control and supervisory software tops 152 million Euros, which means an annual expense of 5.7 Euros per supervised employee. Those who defend control by the companies do so for reasons of efficiency. They are not short of arguments: Gartner calculates that employees spend an average of 49 minutes per workday just revising e-mails when only 27% of the messages received require immediate attention. Other studies prove the slowness of data transfers via the Internet and electronic mail due to saturation of the bandwidth.

Side by side with the reasons for efficiency are those of a legal nature. The law holds the companies responsible and can indeed condemn them for the illegal content their employees can access. This was the case of Chevron, the petrol company, who in 1995 had to pay out 2.3 million Euros to four employees who had experienced sexual harassment via e-mail from some colleagues at work. Those who defend privacy do so on ethical grounds whereby the dignity of the person is recognised and must be recognised by others. Therefore, the logic of control is opposed by the logic of confidence. Those who entrust their efforts to the logic of control don't take long to come up against the operative limits of that control. On the other hand, the manager
who bets on the logic of confidence really runs the risk of being disappointed, but in the long term this risk is worth taking because confidence leads to a better working environment, it encourages creativity in the employees and improves their performance.

Arguments

There are also legal arguments in favour of privacy. The crime of revealing secrets and interfering with one's privacy is included in the Spanish Penal Code with sentences of one to seven years' imprisonment. In this way, companies that use data of their employees obtained from their computer database without the consent of those employees can see how those actions turn against them in court.

When we look for positions that conciliate the two points of view we can resort to technological solutions, as for example the use of filters that restrict the access of users to certain content. Using these tools companies reduce their legal risk by simply limiting the use of the Internet, without violating the privacy of the worker with systems of observation. However, those systems don't cover 100% of the cases nor do they guarantee total reliability. Moreover, there is always the question of how the content filters are determined.

Another conciliation point comes from the law when the conditions in which this control can be carried out are laid down Therefore for example, there must be a clear distinction between a general and indiscriminate revision of the use of the Internet and the action in certain justified cases, in which a series of requirements are established, such as the prior notification to the unions and the participation of their representatives from the workplace at the time of the inspection. With this kind of policies, companies manage to guarantee a minimum of productivity while obeying the law. The workers obtain respect for their fundamental rights.

The Question

"What can a company do to control its employees without invading their privacy?"

Informing employees is essential
Joan Fontrodona, IESE professor

It is all about conciliating two rights that will inevitably clash with each other. The best attitude is to try to reduce to the utmost the negative effects that control may cause in the invasion of the employees' privacy. Studies indicate that, for example, when companies inform their employees about the measures to be taken, the conflictive situations are reduced. Companies should firstly set up the measures they think are right, keeping them to a minimum. Later they should establish clear procedures about how the control should be carried out, what use would be given to the information obtained and what sanctions would be applied. Finally, they should communicate this to their employees. It is a question of being specific; defining clearly what is understood by "reasonable use" or "improper use" and not taking it for granted that the employees use the same parameters. In general terms the companies should avoid any excessive or indiscriminate control of their employees.
Towards a solid jurisprudence
Inmaculada Fernández Gil-Fournier PwC manager

The debate is wide open, as the exercise of fundamental rights by the workers (article 18 CE) clashes with the right of the manager to control and watch over his employees in order to check the fulfilment of their obligations and duties. The sentence of the High Court of Catalonia, passed on 14th. November 2000, deems the dismissal of a worker as legitimate based on the use of e-mails containing information other than the offer of services during working hours. Due to the rapid development of technology as opposed to that of the law, the ideal thing for the manager is prevention through the drawing up of an internal code of conduct that is both clear and specific about the use of electronic communications and their control. This must be known to the employee and accepted by him. Until such time as a solid jurisprudence is set new cases of conflict for similar reasons to the ones explained here will crop up.