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EU Court Draws Fine Line For Employee Monitoring Programs

By **Allison Grande**

Law360, New York (January 15, 2016, 9:31 PM ET) -- A recent European Court of Human Rights decision throws the door open for employers in the EU to monitor their employees' online activities for business purposes, but attorneys warn that surveillance policies must be clear and tailored in order for companies to avoid ending up in hot water.

Handing a boost to employers, the human rights court in **a 6-1 opinion issued Jan. 12** concluded that an unidentified Romanian company had not breached an employee's privacy rights by monitoring his communications for nine days on the Yahoo Messenger account he had been directed by his employer to set up for the sole purpose of communicating with clients.

"This decision is important," Covington & Burling LLP partner Henriette Tielemans, who is based in Brussels, told Law360. "It will bring much needed legal certainty in an area that many companies are struggling with."

Multinational companies that do business in Europe have the most to gain from the ruling, given that countries that have signed the European Convention on Human Rights are bound to adhere to the decision and the U.S. already has a fairly well-established regime for such employee monitoring practices, attorneys noted.

But while the ruling backs employers' right to conduct limited monitoring to ensure that employees are adhering to established policies and completing their professional tasks during work hours, attorneys were quick to point out that the decision in no way endorsed giving employers the absolute right to monitor their employees.

"Many media reports are suggesting that this decision gives employers a carte blanche to monitor employee communications without limitations," Brussels-based Morrison & Foerster LLP attorney Alja Poler De Zwart said. "This is not the case here."

Instead, the opinion backs a much more nuanced form of monitoring that is only likely to be achieved when, as in the matter at hand, the employer's reason for conducting the surveillance outweighs an employee's right to privacy, attorneys noted.

"The decision is a step in the right direction for employers who want to monitor their employees, but they need to be careful and realize they don't have carte blanche to implement wide-ranging monitoring programs," said Thomas Zych, the chairman of Thompson Hine LLP's emerging technologies practice.

The human rights court's decision turned heavily on the specific and somewhat unique facts of the case before it, which challenged the surveillance of the Yahoo Messenger account of Romanian national Bogdan Mihai Barbulescu, who was employed as an engineer in charge

of sales.

According to the ruling, the employer had a strict policy prohibiting the use of employee resources for personal purposes. When confronted, Barbulescu denied using his Yahoo Messenger account — which he was directed by the employer to set up for the sole purpose of communicating with clients — for personal matters, leading the company to produce a transcript of the communications that showed that he spoken with his fiancee and brother about matters such as his health and sex life.

"In this case, there were allegations that the employee was using the Internet for personal purposes, so what the company did was less surveillance and monitoring and more confirming the information that it already had," Zych said.

The distinction was not lost on the human rights court panel, which cited both the company's acceptable use policy and Barbulescu's insistence that he had not used the account for personal reasons in reaching its conclusion that the employer had not run afoul of Article 8 of the European Convention on Human Rights, which guarantees a right to respect for private and family life, the home and correspondence.

"Overall, the decision is a very good result for employers," said Littler Mendelson PC workplace privacy and data protection practice group chair Philip Gordon. "The decision demonstrates that even under the EU's heightened concern about privacy, an employer who provides prior notice to employees of monitoring and conducts the monitoring in a proportionate manner to enforce legitimate work rules generally will not be subject to a privacy-based claim based on that monitoring."

However, attorneys stressed that, based on the court's heavy reliance on the policies that the Romanian company had in place, making sure that such policies exist and are clearly communicated to employees is a key to avoiding similar privacy claims.

"Clear, tailored policies and notice to employees that their communications may be monitored is likely to go a long way towards protecting employers' right to carry out such actions," said Brenda Sharton, the head of Goodwin Procter LLP's privacy and data security practice.

Specifically, in light of the ruling, employers should strive to identify the purpose of the monitoring and the benefits it is likely to bring, and they should assess whether the monitoring is proportional to their reason for carrying it out, according to Bird & Bird LLP employment partner Elizabeth Lang, who is based in London.

"Also, monitoring should go no further than necessary to achieve the objectives," Lang added. "In the Barbulescu case, the need to demonstrate the disciplinary allegations against the employee would, in the U.K. context, be likely to justify the printing out of the material, but this is a fact-specific exercise."

Policies should also be crafted with an eye toward privacy and labor laws both in EU member states and in the U.S. that could operate to trump the human rights court's ruling, which was based on obligations of employers under the Romanian labor law.

Mintz Levin Cohn Ferris Glovsky & Popeo PC member Susan Foster, who is based in London, noted that in a number of EU countries, the law limits employers' right to restrict personal communications in the workplace.

"EU companies should not assume that they can forbid all personal communications at work and should check first with local employment lawyers, as well as consider the implications of EU privacy laws and human rights decisions," Foster said. "Given that there's no EU-wide rule for employment law, it's going to be a more country-specific analysis."

Employers should also consider distinctions that exist in the law in the U.S., where the National Labor Relations Board ruled in December that employees who are authorized to use a corporate email system for work have the right under Section 7 of the National Labor Relations Act to use that system during nonworking hours for union-related communications and for communications with co-workers about the terms and conditions of employment, Gordon noted.

"The board likely would apply that holding regardless of whether the email system is provided by the employer or by a third party on the employer's behalf," Gordon said. "Consequently, U.S. employers, unlike the Romanian employer in Barbulescu, cannot under current law maintain a policy that prohibits authorized employees from using company-provided email for any nonbusiness purpose."

But while local laws may limit the application of the ruling, and Barbulescu can still ask the Grand Chamber of the court to review the decision, attorneys noted that employers in both the U.S. and EU are likely to view the case as a positive development, especially given recent rulings by the European Court of Justice that went against businesses, such as those **striking down** the EU-U.S. safe harbor data-transfer mechanism and **endorsing EU citizens' right** to be forgotten from online search results.

"There's a breath of realism in this decision, especially in light of what we have been seeing recently coming out of Europe," Zych said.

The case is Barbulescu v. Romania, application number 61496/08, in the European Court of Human Rights.

--Editing by Mark Lebetkin and Philip Shea.