

Whatsapp, Zalando, Facebook & Co – What do Employers Have to Accept?

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Introduction

Internet

Employees must, as a rule, have the permission of their employers to use Internet facilities for personal reasons while at work. Such permission will usually take the form of a clause in their employment contracts or a works agreement. However, tacit acceptance of private use by an employer may also constitute consent.

Cellphones

The principles elaborated by the Federal Labor Court governing the use of radios during working hours can be applied to the private use of cellphones at work by analogy. Employees have a duty to perform their work properly, i.e., to work in a concentrated and conscientious manner in keeping with their personal abilities. An employee who occasionally uses a cellphone for private purposes, but nevertheless performs his or her work properly, cannot be considered to be in breach of his or her contractual obligations. However, there are circumstances that would warrant prohibition of the use of cellphones. For example, it is not acceptable to read private text messages while performing customer support and service activities.

Implications for Practice

Review

If personal use of company Internet facilities is prohibited, the employer will, as a rule, have the right to monitor Internet usage by employees to determine whether they limit their use to company business. If personal use is allowed, monitoring of Internet use by employees is subject to restrictions grounded in the need to protect the general right of privacy of employees. This applies in particular with respect to the surveillance of email traffic.

In this case, only the content of official company emails may be inspected. The use of suitable technical means to separate official and private email correspondence is therefore recommended since access to an employer's own official business correspondence would also be limited by the duty to protect general privacy.

Sanctions

Violations of company rules governing personal Internet usage or limits imposed upon such use may, depending upon the severity and duration, warrant dismissal for reasons lying in the conduct of the employee (e.g., 40 hours of private use of the Internet over a period of 30 working days). However, it will normally be necessary to issue a formal warning and weigh the respective interests of the two parties prior to dismissal in the case of such a violation. Under exceptional circumstances, immediate termination without notice may be possible, for example, in the event of criminal behavior in connection with personal use of Internet facilities in violation of company rules (child pornography, seditious speech, defamation of the employer, etc.).

Sanctions may come into question in the case of the use of cellphones for personal reasons if an employee violates explicit rules of the employer governing such use or if the employee's performance is negatively impacted by such use (e.g., private use of a cellphone by a surgeon during an operation). Here too, termination for reasons lying in the conduct of the employee must regularly be preceded by a written warning.

Co-determination

Rules governing the private use of Internet facilities and cellphones may require consultation with and approval by a company's works council.

Legal Update

Conclusion

Explicit rules governing the private use of Internet facilities and cellphones create clarity for both sides and facilitate disciplinary action by the employer in the case of abuse.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Pia Pracht on +49 221 33660-524 or by email to ppracht@goerg.de. For further information about the author visit our website www.goerg.com.

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