

BAN ON CELL PHONES FOR PRIVATE USE DURING WORK HOURS

HEADNOTE An employer may prohibit employees from using their cell phones during working hours. Works councils have no right to be consulted in such cases (Rhineland-Palatinate Regional Labor Court, judgment of 30 October 2009 - 6 TaBV 33/09).

FACTS The defendant operates a nursing home with some 100 employees. Employees were initially allowed to use their cell phones in the nursing home. However, management of the home issued instructions prohibiting the use of cell phones to make or receive personal calls in January 2009. The works council contested this policy before the local labor court, arguing that the prohibition of the use of cell phones for personal calls was illegal since section 87(1) no. 1 of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) stipulates that works councils are to be consulted in such cases.

DECISION The Rhineland-Palatinate Regional Labor Court dismissed the action of the works council with its order of 30 October 2009 (- 6 TaBV 33/09 -). The court made it clear that the prohibition of the use of a personal cell phone was not an issue that involved general rules and regulations within the enterprise or the conduct of employees within the meaning of section 87(1) no. 1 of the Works Constitution Act. In fact, it involved the actual work of the employees. In this regard, an employer is free to issue any instructions that relate to the actual performance of work by employees. As a result, work – in contrast with general conduct – is involved whenever an employer may, by virtue of his organizational and managerial authority, specify what activities are to be carried out and how they are to be carried out.

COMMENTS The order of the Regional Labor Court involved a case that was interesting since it straddled the line between general rules of conduct, which do entail mandatory consultation of the works council and work rules, which do not. The decision was most likely driven by the idea that the use of a personal cell phone can have significant effect on work performance since it might not be possible to perform the required work properly when making a personal telephone call. This is especially the case in the care area, where not only active physical work is important but also concentration. The decision of the Rhineland-Palatinate Regional Labor Court can also be applied to the use of the Internet for personal reasons. Accordingly, works councils have no right to be consulted if the use of the Internet for personal purposes is prohibited in general. On the other hand, however, it is necessary to bear in mind that the Federal Labor Court ruled in 1986 that listening to the radio while at work is an activity which falls into the category of general conduct and that works councils do therefore have the right to be consulted in that case. At the same time, the court mentioned that there was no direct con-

nection between listening to the radio and work performance. However, it is of course necessary to make a distinction here. For example, that same conduct is likely to affect work performance in the case of a call center. On the other hand, if an employer wants to allow the use of the Internet for personal reasons and only modify the conditions for such use, the responsible works council does have the right to be consulted pursuant to section 87(1) no. 1 of the Works Constitution Act since this would involve general rules of conduct. Issues such as when, where and to what extent such personal use is allowed may be covered in works agreements.