National Data Protection Commission, Portugal

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# GUIDELINES

## REMOTE CONTROL BY TELEWORKING

Following the pandemic arising from the new SARS-CoV-2 coronavirus and the Covid-19 disease and the social containment and isolation measures, teleworking1[1] has become more widespread. It is in this context that a number of questions have been brought to the National Data Protection Commission (CNPD) relating to the control of both working hours and work carried out by teleworking from the worker's home.

Among the exceptional and temporary measures relating to the epidemiological situation, Decree Law No 10/2020 of 13 March 2020 extended the system of subordinated teleworking during its lifetime.

In this context, and in the exercise of its tasks and competences2[2], the CNPD shall outline guidelines in such a way as to ensure that processing of personal data of workers is in conformity with the legal data protection regime and to minimize the impact on privacy by teleworking.

1. In normal circumstances, the working tools for information and communication technology used by the employee on teleworking belong to the employer[3]. Where this is the case, workers must comply with the rules governing the use and operation of the working instruments made available to them and may only use them for the provision of work unless otherwise agreed. However, given the exceptional nature of the current situation and the impossibility for employers to have provided themselves with technological resources to make available to their workers in general, the resources used are often private, which requires greater caution in imposing certain measures.

   Naturally, irrespective of the ownership of the work tools, the employer in the teleworking system maintains the powers of management and control of the performance of the work. However, there is no legal provision in this scheme governing remote control[4], so that the general rule prohibiting the use of remote surveillance means for the purpose of monitoring the worker's professional performance[5] is fully applicable to the reality of teleworking. Moreover, the same conclusion would always be reached by applying the principles of proportionality and minimization of personal data[6], since the use of such means implies an unnecessary and certainly excessive restriction on the private life of the worker.

   For this reason, technological solutions for remote control of worker performance are not allowed. Examples include software that, in addition to tracking working time and downtime, records the Internet pages visited,

[1] Work performed under legal supervision, usually outside the undertaking and using information and communication technologies (cf. Article 165 of the Labor Code) is considered as teleworking.
[2] See Articles 57(1)(b) and (d) and 58(1)(b) of Regulation (EU) 2016/679 of 27 April 2016 (Regulamento Geral sobre a Proteção de Dados – RGPD)/(General Regulation on Data Protection - RGPD) and Articles 3 and 6 of Law No 5 8/2019 of 8 August.
[3] See Articles 166(5)(e) and 168 of the Labor Code.
[4] In the case of teleworking, the employer's right to carry out such checks by means of access to the worker's residence between 9.00 and 19.00 is expressly regulated.
[5] See Article 20(1) of the Labor Code.
[6] See Article 5(1)(c) of the RGPD.

the location of the terminal in real time, the uses of peripheral devices (mice and keyboards), captures the desktop image, watches and records when you start accessing an application, controls the document you are working on and records the time spent on each task (v.v. g., TimeDoctor, Hubstaff, Timing, ManicTime, TimeCamp, Toggl, Harvest). Tools of this kind manifestly over-collect personal data of workers, promoting control of work to a much more detailed degree than can legitimately be carried out in the context of their supply at the employer's premises. And the fact that work is being provided from home does not justify a further restriction of the legal sphere of workers

Similarly, it is not acceptable to require the worker to keep the video camera permanently on, nor in principle should it be possible to record teleconferences between the employer (or managers) and the workers.

Despite the inadmissibility of the use of such tools, it is reaffirmed that the employer retains the power to monitor the worker's activity. This could be done, inter alia, by setting targets, by setting reporting obligations at intervals he or she understands, by marking meetings in teleconferencing.

2. The need to record working times is different, which can be done by using specific technological solutions in this teleworking system.

   Such solutions should be limited to reproducing the registration carried out when the work is carried out at the employer's premises (i.e. recording the beginning and end of the work and lunch break). Therefore, these tools should be designed in accordance with the principles of privacy by design and by default, not to collect more information than is necessary for that purpose.[7]

   In the absence of such tools, it is exceptionally legitimate for the employer to lay down an obligation to send e-mail, SMS or any other similar means which would enable the employer, in addition to monitoring the availability of the employee and working times, to demonstrate that the maximum working hours permitted by law have not been exceeded. Similarly, there is nothing to prevent this monitoring of the availability of the worker and of compliance with working times being carried out by telephone or electronic contact by the employer.

Lisbon, 17 April 2020

[7] See Article 25 of the RGPD.