

REMOTE MONITORING: THE LABOUR INSPECTORATE'S APPROVAL PROCESS

The National Labour Inspectorate has released the criteria it will follow when deciding whether to authorise the installation of audio-video systems to monitor the workplace. Employers will need to comply with these criteria when preparing applications for authorisation.

Circular Letter 5/2018

With Circular Letter no. 5 of 19 February 2018 ("Circular"), the Italian National Labour Inspectorate (INLI) has issued operating instructions and guidelines to be followed by its inspectors to decide whether - and if so, under what applicable restrictions - to authorise employers to install audio-video and other monitoring systems pursuant to Article 4 the Workers' Statute (Law 300/1970), as amended by the Jobs Act (i.e., Legislative Decree 151/2015) and Legislative Decree 185/2016.

The terms of use of the equipment must relate to the specific purpose of the monitoring, which the employer must declare and cannot change over time. The terms must also take into account any preventative measures the employer has already implemented, and the most invasive forms of monitoring are to be considered a last resort.

INLI's instructions should be consulted by employers from when the monitoring systems are set-up. At this sensitive stage of the process, consideration must also be given to the notion of "*privacy by design and by default*" imposed under the General Data Protection Regulation (GDPR), which comes into force on 25 May 2018.

Implications for employers

The Circular sets out practical suggestions for employers planning to install technologies that allow remote monitoring of their employees' activities.

Article 4 of the Workers' Statute requires that such equipment must be used exclusively for:

- organisational and production needs
- to protect safety in the workplace, or
- to safeguard the company's assets.

Prior to installation, the employer must also reach an agreement over the equipment with the union workers' representative or obtain authorisation from the Labour Inspectorate.

Key issues

- The core element of the monitoring authorisation process is the specific purpose for the monitoring declared by the employer
- In light of the declared specific purpose, the inspector will assess whether the monitoring is necessary and proportional compared to other prevention measures
- Assessors will decide whether to grant authorisation and any necessary restrictions on the use of the monitoring if authorisation is granted
- Any inspection after authorisation is granted will focus on the originally declared specific purpose

The GDPR sets out a series of mandatory principles to follow when processing personal data, including lawfulness, transparency, fairness, proportionality, and non-excessiveness. It holds the employer responsible for complying with these principles from the point of setting up the remote monitoring equipment.

The Circular takes into account all these principles, and mandates that:

- the decision making process to grant the application must focus on whether the declared specific purpose for the monitoring actually exists
- the inspectors can impose conditions on the use of the equipment only if the conditions are related to the declared specific purpose
- the employer cannot, over time, change the purpose of the monitoring, because the authorisation is granted exclusively on the basis of the reasons declared in the application
- any inspection following authorisation must first and foremost ascertain that the equipment is used in a manner consistent and compliant with the specific purpose set out in the application.

New guidelines for the benefit of employers

The Circular is innovative in scope and overcomes a number of rigid assumptions that have underpinned best practice to date. These have routinely been taken into account during application processes and are reflected in the union agreements pursuant to Article 4 of the Workers' Statute. They have resulted in the following standard procedures:

Before Circular Letter 5/2018 of 19 February 2018	After Circular Letter 5/2018 of 19 February 2018
Direct filming of an employee not permitted / limitation imposed e.g. employee's face is covered or camera shot is angled.	Filming of employees permitted, providing the employer has suitable reasons.
"Double-key" system: taped images can only be viewed in the presence of two people; viewing images in real time from a remote location not permitted.	Viewing the images – both taped and in real time – from a remote location can be authorised.
New application required to move existing, authorised, cameras or to install additional cameras.	New authorisation application and process not required, if the changes are consistent with the declared reasons supporting the need to monitor.

Greater burden for employers

Nevertheless, employers are now asked to identify with extreme rigour the specific purpose of the monitoring and to track monitoring activities. For example:

- when the monitoring is needed to protect company assets and the equipment is monitoring the places where and when employees are at work, even if only occasionally, the employer must:
 - describe in extensive detail the purpose of the monitoring, for example, proving that company assets have a high intrinsic value and can be easily removed and transported
 - explain what anomalies it has already identified, such as any prior theft, and describe the prevention measures already in place, and especially how it will be impossible to limit loss using measures that are less restrictive of employees' rights
- the request to view images in real time from a remote location must be supported in great detail, and must specify the exceptional circumstances in relation to which the request is made
- any access to taped images, from any location, must be recorded and traceable. This can also be done using specific mechanisms that allow storing of the access log for a suitable time period (not less than six months).

Taking into account the Circular's instructions and guidelines will help minimise denials of employers' applications for authorisation and prevent sanctions from INLI.

It is also highly likely that unions will use the Circular to guide their approach to agreements pursuant to Article 4 of the Workers' Statute and the Italian Data Protection Authority will consider the Circular when it assesses whether the processing of the personal data is lawful.

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