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B2B: My Mail Is My Castle?

By Anna Berlina

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Anna Berlina
Associate
Dentons

Don't send it to my work mail! They check everything!" We often hear this kind of comment. But do companies have the right to check an employee's email?

Most employers stipulate in employment contracts and corporate policies that all communications devices and equipment provided to employees should be used for work purposes only, and that the employer has the right to check work email at any time — for example, to monitor performance. Although lawyers recommend these provisions, do they really entitle employers to read any message the employee sends from a corporate email account? What if the employer reads the employee's personal messages while carrying out its checks? This question has recently been the subject of debate.

On the one hand, article 23 of the RF Constitution guarantees the secrecy of correspondence, which can only be limited by judicial decision. Correspondingly a proviso in an employment document, or even the employee's clear consent to the monitoring of his/her email, will not give the employer the right to read an employee's personal messages, if the employee sends them from a corporate account contrary to the employer's rules.

On the other hand, it could be argued that if the employee has confirmed that he/she understands that corporate mail should only be used for work and may be checked, but still uses it for non-work correspondence and, when the employer learns of this, accuses the employer of violating the secrecy of correspondence — then the employee's acts are an abuse of rights.

Notably, cases in which employees have attempted to hold employers liable for a presumed infringement of their rights in this area are practically unknown. However, the issue of lawfulness of the employer's access to employee mail is periodically exposed to light in cases where employers have taken disciplinary action against employees (typically

dismissals for divulging commercial secrets) using evidence gleaned from reading the employee's email as proof of guilt.

The appeal ruling in a case considered by the Moscow City Court in January 2014 provides a fairly indicative example of this kind of case. An employee was dismissed for divulging the employer's commercial secrets, the employer proved the disclosure by means of files sent from the employee's corporate account to his wife's personal address. The court ruled that the dismissal was lawful, and the court decisions at both instances did not even look into the subject of lawfulness of the employer accessing the employee's personal correspondence, and therefore did not consider whether it was lawful to take disciplinary action resulting from the use of such access, not to mention the admissibility of evidence in the form of a print out of personal correspondence in court. Perhaps these issues were considered in the course of the hearings, however, the judges did not find them sufficiently significant to reflect in the decisions. The conclusion can therefore be drawn that since the court ruled that the dismissal was lawful, it saw nothing unlawful in checking the employee's email.

The same applies to a number of regional court decisions in cases where employers have successfully proven that an employee's dismissal for divulging commercial secrets was lawful using evidence found while checking the employee's corporate mail.

Despite this apparently encouraging (for employers) court practice, we note that the associated risks must always be considered when basing disciplinary action on checking employee emails. As noted above, the inclusion of a ban on using corporate communications and equipment for personal purposes in employment documentation (contracts, policies) can be a useful tool for mitigating these risks.

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