



Smartphone in the workplace: What options for employers?

Using a smartphone in the workplace opens up labor law pitfalls: It is all about working time, co-determination and termination.

The smartphone is a constant companion in our workplace. But how much smartphone is allowed whilst working / during working hours? How much smartphone use do companies rightly tolerate? And at what point do labor law consequences are possible?

March 2017, Dr. Jan Tibor Lelley

I love it – the all-rounder

Almost everyone has one, almost everyone uses it – constantly and everywhere: a smartphone. A study, raised by the digital association Bitkom, tries to put it in numbers: nearly eight out of ten Germans use a smartphone – about 78 percent.

The corresponding constant accessibility can become important and problematic not only in private, but also in work life. Especially, when it is almost a reflex to answer messages, mails or calls immediately. Because precisely this ASPA costs time, in work life valuable working time.

There are limits to everything – labor law-related

Companies can restrict or even prohibit the private use of smartphones during working hours. Starting point is the employer's right of instruction: The general performance obligation of the employee contained/detailed in their work contract can be concretized through comprehensive regulations by the employer. Meaning the employer can restrict

the private use of smartphones to only be used during breaks or to set up a narrow timeframe. It is recommended to establish a clear starting position – whether by regulations in the employment contract or works agreements. If this is not the case, employees could expect a ‘socially adequate use’ of the smartphone to be. But: where to draw the line between a still socially adequate and an already inadmissible use? This remains entirely open – at least without transparent regulations. It always depends on the individual case.

In case of an employee using a business smartphone, these principles can be applied. If the employer tolerates private use over a longer period, a company practice is considered applicable. However, the permissible limit is reached, when an excessive use occurs.

And what about the co-determination rights of the works council? There is a difference between restrictions of use and a general prohibition of use: restrictions of use that companies carry out by their right of instruction directly affects the employee’s performance. Therefore they are basically not co-determined.

The situation is different, when the employer imposes a general prohibition such as forbidding smartphone at the work place. Contrary to an earlier case law, the labor court of Munich decided on November 11, 2015 that in such cases, the rules of operation and the conduct of employees in the establishment is regulated. The works council has a right of co-determination (§ 87 para. 1 no 1 BetrVG).

Work-life balance – what’s that?

More and more often we hear about situations in which the border between work and private life becomes blurred. Digital technologies provide the possibility to work after official hours, on the way home or at home. That may conflict with the German Working Hours Act (ArbZG). The law defines a maximum working time of eight hours on workdays, which is in total 48-hours per week. During working hours, breaks are prescribed and after finishing the daily working time a rest period of at least eleven hours is mandatory.

Whether and how the employee uses smartphones during mobile work is of course not under the control of the employer. But what has to be kept in mind is the co-determination right of the works council. The works council can participate regarding the beginning and the end, breaks and distribution of working hours among the days of the week.

What consequences are possible?

Basically, work is work and private smartphone activities are out of place. Employees do not work with their full labor, when they interrupt or stop working and commit themselves to private matters. These are violations of the main obligation to work.

The employer is then allowed to react with a warning and in case of further disregard with an ordinary termination. In particularly serious cases even an extraordinary

dismissal can be possible. Examples of such are extensive international phone calls or excessive internet surfing. In particularly serious cases even the accusation of working-time fraud can be possible.

What do companies need to do?

Whether by individual contractual agreements, usage regulations or works agreements: to counteract any uncertainties, companies should set clear conditions of use. The private use of smartphones will often be allowed within reasonable scope.

However, employers must prevent abuse. This can best be achieved by consistently sanctioning violations.

Well advised companies are aware of co-determination rights of their employee representatives. For this reason, they negotiate appropriate works agreements for using smartphones in order to integrate works councils in a preventive manner.

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