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COULD MANAGERIAL PREROGATIVES JUSTIFY DIGITAL PANOPTICON IN THE CONTEMPORARY WORKPLACE?*

UDK / UDC: 349.23 : 343.45
349.23 : 342.7
004.9

DOI: 10.31141/zrpfjs.2025.62.158.609

Prethodno priopćenje / Preliminary communication

Primljeno / Received: 16.4.2025.

Prihvaćeno / Accepted: 23.12.2025.

Employment relation is characterised by dependency of the employees on their (specific) employer in an economic, social, and psychological sense. This employee dependency is a root of inequality of bargaining power between employer and employee in the employment relationship. So, the employer's higher hierarchical position gives him/her the possibility of consummation of managerial prerogatives. This means, as master of the work, s/he has exclusive rights to the control and supervision of the activities of the employees regarding the execution of the work, the possibility of applying disciplinary powers and organization of the work. The digital revolution and artificial intelligence have enabled employers to monitor employee activities even more closely, leading to a culture of panoptic surveillance that may cause significant harm to employees' privacy issues. Can a real justification for excessive surveillance of employees in managerial prerogatives be found?

Key words: *inequality of bargaining power, managerial prerogatives, employee privacy protection, digitalisation, panoptic surveillance*

1. INTRODUCTORY REMARKS

The digital revolution and artificial intelligence have brought an array of new tools employers use in their business models and methods to control their employees. The extent to which management can now monitor employees' behaviours, both, on-and-off site using advanced surveillance technologies has dramatically increased creating a scenario of panoptic power management, whilst causing significant harm to employees' privacy issues. Namely, digital tools and AI can enable employers to monitor employee activities more closely, leading to a culture of surveillance that may infringe on privacy rights. Organizations implement employee monitoring

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** This paper is a product of work that has been fully supported by the Faculty of Law, University of Split, under the project nr. 3. "Challenges of modern labor law - de lege lata and de lege ferenda (IMRP)"

systems through various methods, each serving different purposes. Here are some common approaches:

- Email monitoring - organizations may monitor employee email communications to ensure compliance with company policies and to protect sensitive information;
- Time tracking software - many companies use time tracking tools to monitor how employees spend their time during work hours. This can include logging hours worked, breaks taken, and project-specific time allocation;
- Internet usage monitoring - employers often track internet usage to see which websites employees visit during work hours. This can help prevent misuse of company resources and ensure productivity.;
- Keystroke logging - some organizations employ keystroke logging software to track the number of keystrokes made by employees. This can provide insights into productivity levels;
- Video surveillance - physical surveillance through cameras in the workplace is common for security purposes. This helps monitor employee behaviour and protect company assets;
- Social media monitoring - organizations may monitor employees' social media activities, especially if they relate to the company or if employees represent the organization online;
- Mobile device management (MDM) - for companies that provide mobile devices, MDM solutions allow monitoring of device usage, app installations, and data security measures;
- Performance management systems - some organizations use performance management tools that track employee performance metrics, project completion, and overall productivity;
- Project management tools - software like Asana, Trello, or Monday.com can be used to monitor the progress of tasks and projects, giving managers visibility into employee workloads;
- Biometric monitoring - in some cases, companies may use biometric systems (like fingerprint or facial recognition) for attendance tracking and access control;
- Remote monitoring tools - with more remote work, tools that allow for screen monitoring or remote access to an employee's computer have become more common.

The collection of personal data through various digital means raises concerns about how this data is stored, used, and shared. In that process of collection employees may not be fully aware of what data is being collected or how it is being used, leading to a mistrust of employers. Also, the data collected can be misused for purposes such as discrimination, bias in performance evaluations, or unjustified disciplinary actions. Furthermore, organizations may face legal challenges if they fail to comply with privacy regulations leading to financial and reputational damages.

In this article the specificity of the employment relation shall be explained regarding inequality of bargaining power which gives rise to employers dictating the conditions of employment as well controlling the way the work is done. Then the issue of digital panopticon is opened up and some controversial issues related to privacy protection in the contemporary workplace are pointed out. The aim of this article is to explore whether there any real justification for employer's excessive intrusion into employee's privacy in the contemporary workplace. Taking into account the identified shortcomings of the existing privacy protection legal framework¹, as well as the privacy design-based approach, which is not the point of direct interest in this article², due to, among other factors, fast technological solutions, some strategies are offered for employers. With these strategies, employers can bridge the existing gap in employee privacy protection bearing in mind that the right to privacy is one of the fundamental human rights which is dangerously threatened by digital panopticon.

2. THE RIGHT TO PRIVACY – FUNDAMENTAL RIGHT

Fundamental rights can be defined as rights that protect fundamental social values and are protected by regulations that are highly positioned on the scale of legal sources.³ The term “fundamental rights” dates back to the time of the French Revolution in XVIII century (*Droits fondamentaux*), but often it is replaced by the term “human rights”. The question that arises is whether an individual in society has absolute or limited freedom in the enjoyment of fundamental human rights. The answer to this question derives from human interaction. Namely, people interact with other people only in a certain context. Thereat, human interaction is determined by social circumstances, certain values and institutional categories, for example, relationships: men-woman, parent – child, employer-employee and so on.⁴ So, it is clear that the possibility of the consumption of human rights is determined by the

¹ European Convention on Human Rights (1953), the EU Charter of Fundamental Rights (2012), the European Union Data Protection Regulation (GDPR, 2016), EU Directive (EU) 2019/1152; Recommendation CM/Rec (2015)5 of the Committee of Ministers to Member States on the processing of personal data in the context of employment, Opinion 8/2001 on the processing of personal data in the employment context (WP48), Working Document on the surveillance of electronic communications in the workplace (WP55) and Opinion 2/2017 on data processing at work adopted on 8 June 2017; Code of practice on the protection of workers' personal data from 1997.

² Ebert, I., Wildhaber, I., & Adams-Prassl, J. (2021). Big Data in the workplace: Privacy Due Diligence as a human rights-based approach to employee privacy protection. *Big Data & Society*, 8(1), 5. <https://doi.org/10.1177/20539517211013051>; Montjoye Y, Hidalgo C, Verleysen M, et al. (2013) Unique in the crowd: The privacy bounds of human mobility. *Scientific Reports* 3: 1376. <https://doi.org/10.1038/srep01376>; Dix A (2010) Built-in privacy– No panacea, but a necessary condition for effective privacy protection. *Identity in the Information Society* 3: 257–265;

³ UN's Universal Declaration of Human Rights from 1948.; International Covenant on Civil and Political Rights from 1966 and the International Covenant on Economic, Social and Cultural Rights from 1966., European Convention on Human Rights from 1950. and Charter of Fundamental Rights of the European Union from 2000.

⁴ Milne, A.J.M., The idea of human rights; the critical inquiry, in: Dowrick, F.E. (ed.), *Human rights. Problems, perspectives and texts*, Westmead, Saxon House, 1972., 12.

social context in which people interact. The freedom of individual to enjoy certain human rights is limited by the same fundamental right of the other individual. Therefore, it is easy to conclude that fundamental human rights are by their nature relative and limited.

The right to privacy, as one of the fundamental human rights, is very hard to define. In the literature there is no unique, universal definition of the concept of privacy.⁵ Its precise determination is often burdened by historical and cultural factors. However, without knowing what privacy is, it is hard to ensure effective legal protection against infringements. It means that privacy must be reinterpreted in the light of the current era and be examined in the current context. A possible solution is three-fold: keeping the flexible interpretation of privacy and accepting that no exhaustive definition can be made; to acknowledge the responsibility of businesses and individuals for privacy infringements by educating them or raising their awareness and taking into consideration the technology itself, and the user's responsibility.⁶ So, we could cite here as a starting point one definition of privacy: "A person has privacy to the extent that others have limited access to information about him/her, limited access to the intimacies of his/her life, or limited access to his/her thoughts or his/her body". This definition is especially interesting in the context of intrusion into the privacy of employees in the workplace which will be in focus later on.

For the purpose of better understanding of the concept of the intrusion of privacy we should make distinction between "sphere of privacy" and "private sphere". "The sphere of privacy" is a zone in which legitimate concerns may arise about others' access to and information about him/her. "The private sphere" is a zone in which the individual's prerogative to decide what counts as an infringement of his/her privacy, according to his/her wishes and preferences. In other words, someone's sphere of privacy consists of a core, privacy rights that other should respect whether that person claims it or not, and of a discretionary part that consists of the privacy rights that others have to respect only if s/he claims them.⁷ That discretionary part is determined by the social tradition and culture of different countries. However, the core part of the sphere of privacy should be in general the same in all countries.

Throughout history, the development of the right to privacy could not be separated from the innovations of technology. So, in today's era of rapid technological development there is a need to redefine the protection of the right to privacy. In spite of the existing legal regulation and the appearance of the right to data protection, privacy protection meets new challenges constantly. There are several reasons for

⁵ For more information see: Moore, A. Defining privacy. *Journal of Social Philosophy*, (2008), 39(3), 411; Parker, R. B. (1973). Kuner, C. et al. "Privacy—an elusive concept." *International Data Privacy Law* 1 (2011): 141-142.; ALibeigi, A., Munir, A. B., Ershadul, K., "Right to Privacy, a Complicated Concept to Review" (2019). *Library Philosophy and Practice* (e-journal). 2841.<https://digitalcommons.unl.edu/libphilprac/2841>

⁶ Lukács, A., What is privacy? The history and definition of privacy, <http://publicatio.bibl.u-szeged.hu/10794/7/3188699.pdf> (accessed: 1. February 2025.)

⁷ Hansson, S. O., *The Structure of Values and Norms*, Cambridge University Press, 2001, 208-218

that: in the past, the dimensions of space and time seem to be one of the modes of protecting the privacy of individuals. Namely, over time, information about the activities and characteristics of individuals have disappeared. Geographical distance prevented the availability of other persons' personal data. In the situation of the expansion of information, communication and other technologies, the dimensions of time and space are disappearing, and therefore also the barriers of the protection of privacy of individuals. Therefore, it is necessary to develop new modes of protecting the right to privacy, taking care to reconcile the demand for the protection of privacy of the individual and the demand for the progress of humanity.

3. THE RIGHT TO PRIVACY IN THE EMPLOYMENT CONTEXT

In the employment relationship there is inherent conflict between free enjoyment of employees' human rights, precisely the right to privacy and employer's protection of business interests. Namely, in contemporary workplaces some human resource management techniques require stronger loyalty of the employee to the employer by strengthening the employer's control over the activities, behaviour and attitudes of employees, not just at work, but also in his/her private sphere, in other words, by the intrusion into employee's privacy. Such employer control can, in short, be justified by the need⁸ for reliability, responsibility, productivity, and effectiveness.⁹ On the other side of the employment relationship there is opposed interests for the protection of the employee's privacy. The justification for the protection of the privacy of the employee can be observed from several aspects such as the protection of his/her limited autonomy, dignity and well-being, freedom of expression¹⁰, possibility of self-evaluation and the creation and maintaining of a relationship of mutual trust between him/her and the employer.¹¹ To what extent these rights and interests can be limited will depend primarily on the bargaining power of the parties of the employment relationship. So, in order to preserve aforementioned interests that are competing in nature it is of the utmost importance to strike the right balance between them. But it is easier said, then done. Namely, the employment relationship is characterised by the inequality of bargaining power between employer and employee.

⁸ Regan, P. M., *Legislation Privacy*, Chapel Hill, University of North Carolina Press, 1995., 188.

⁹ Vaught, B. C., Taylor, R. E., & Vaught, S. F., The attitudes of managers regarding the electronic monitoring of employee behaviour: Procedural and ethical considerations, *American Business Review*, 2000. 18(1), 107–114.

Hendrickx, F., *Employee Privacy*, u *Comparative Labour Law and Industrial Relations*, in: *Industrialized Market Economies*, Kluwer Law International, 2001., 400.

¹⁰ Weiss, M., *Re-inventing Labour Law*, in: Davidov, Langille (eds.) *The Idea of Labour Law*, OUP, 2011 (n9) 44; Finkin, M. W., *Menchenbild: The Conception of the Employee as a Person in: Western Law*, 2002, 23 *CLLPJ* 577; Freedland, M., Kontouris, N., *The Legal Construction of Personal Work Relation*, OUP, 2011 (n8) 373. Also, importance of the dignity can be seen in the Charter of Fundamental Rights of the European Union in art. 31 "every employee has the right to working conditions which respect his or her health, safety and dignity".

¹¹ Wacks, R., *Privacy and the Law*, Oxford, Clarendon Press, 1989., II.-12.

3.1. Inequality of bargaining power

Employment relation is not equivalent to other contractual relationships between private parties. It is characterised by the dependency of the employees on their (specific) employer in an economic sense (economic reliance of the employee on the specific employment relationship), as well as for the fulfilment of their social (work enables people to meet and interact and has an important role in achieving a certain social status) and psychological (for the employee work can be a source of identity, self-realisation and fulfilment) needs.¹²

It is not hard to conclude how these vulnerabilities of employees present in the employment relationship form a risk of acceptance of poor working conditions, as well as the possibility of infringements into employee's human rights. So, it is of the utmost importance to address these vulnerabilities of the employees within employment relations through the protective labour laws (main object of labour law). We should also stress that the vulnerabilities of the employees in the employment relationship are further emphasized by the fact that labour law has traditionally been structured and organised in a manner that demonstrates a lack of trust towards employees.¹³ The laws were intersected with a belief that those without property were criminally inclined and needed to be controlled¹⁴, speed up and exploit¹⁵. Even the protective labour and employment legislation enacted during the twentieth century did not fundamentally change the managerial powers of the employers. So, the authoritarian structure of the employment contract has still remained.

Although the inequality of bargaining power is mostly evident before the commencement of the employment relationship, in the bargaining phase, it continues throughout the duration of the employment relationship. Namely, the employer's bureaucratic control of the employees is exercised through his/her capacity to vary the terms and conditions of the employment unilaterally (common law) or after the absence of the employee's consent. So, the act of concluding an employment contract is an act of employee's voluntary submission¹⁶ to conditions that cannot be changed by him or herself. This is possible due to the fact that the employment relation is, in the organisational sense, best described as a structure of governance with democratic deficits¹⁷ or subordination.

Namely, by entering into an employment relationship, the employee agrees to enter a subordinate position *vis-a-vis* the employer, whereby the employee is economically, legally and personally subordinated to the employer. Such a position

¹² Davidov, G., *A Purposive Approach to Labour Law*, Oxford University Press, 2016, 43-48.

¹³ The Master and Servant Act 1823; Mississippi Black Codes 1865-1866, Factory acts 1802., 1833., 1844., 1847., 1850 and 1853.; *Loi sur les règlements d'ateliers* 1896; *Loi sur le contrat de travail*, 1900.

¹⁴ Hay, D., Craven, P., (eds) *Master, Servants and Magistrates in Britain and Empire, 1562-1955*, Chapel Hill, University of North Carolina 2004., 59-116. 60

¹⁵ North, D., *Transactions costs, Institutions and Economic History*, 1984, *Zeitschrift für die gesamte Staatswissenschaft/Journal of Institutional and Theoretical Economics*, 7-17, 14-15

¹⁶ Freedland, M., Davies, P., *Kahn-Freund's Labour and the Law*, Stevens, 1983., (n 12) 18

¹⁷ Davidov, G., *A Purposive Approach to Labour Law*, o. c, 36

of the employee is determined by his/her socio-economic and legal position at the time of the establishment of the employment. It is justified by the public interest, when it comes to public and similar services, or by business risk in all other cases. The parties of the employment relationship can agree on the conditions of employment by concluding the contract of employment, or by incorporating the existing conditions from the clauses of the labour regulations, collective agreements or the legal regulations into the contract of employment¹⁸.

However, the vital part of the employment relationship, which refers to the content of the work to be performed, as well as the quality and intensity of the work effort that should be invested, could not be specified, nor legally enforced in this sense. One of the reasons for this impossibility is of an economic nature, since prior specification of the content would be too expensive. Namely, the employment relationship is, as a rule, a permanent mandatory relationship, so it is not always possible to predict what tasks the employee will perform, or even the place of work itself. It is precisely this incompleteness in defining the content of the work activity (incomplete contract)¹⁹ that favours the employer, who is able to determine the way the work is performed, monitor compliance with these orders²⁰ during the work process itself.²¹ By using different methods of direction, evaluation and discipline, employers are able to control employees' actions and behaviour.²²

3.2. Managerial prerogatives

So, what is the justification for authorizing the employer to exercise control and supervision over the activities and behaviour of employees?

The employer's hierarchical position gives him/her the possibility of consummation of managerial prerogatives, that is as a master of the work, s/he has exclusive right to the control and supervision of the activities of the employees regarding the execution of the work, the possibility of applying disciplinary powers and organization of the work. So, this exclusive right constitutes a general principle of law²³ and it is a legal recognition of the subordination of employees in the employment relationship. There can hardly be an employment relationship without power to command and duty to obey.²⁴ The power of the employer, to

¹⁸ Racabi, G., Abolish the Employer Prerogative, Unleash Work Law, Berkley Journal of Employment and Labour Law, 2022, 43(1), 79-138

¹⁹ Deakin, S., Wilkinson, F., Labour Law and Economic Theory: A Reappraisal, in: Collins, H., Davies, P., Rideot, R. (eds.) Legal regulation of the Employment Relation, Kluwer, 2000, 45

²⁰ Casale, G., The Employment Relationship: A General Introduction, in: Casale, G. (ed.), The Employment Relationship: A Comparative Overview, Geneva, ILO, 2011, 1-35

²¹ Bilić, A., Radno pravo, Školska knjiga, Zagreb, 2021., 148

²² Edwards, R., Contested terrain: The transformation of the workplace in the Twentieth Century, Basic Books, 1979. 18

²³ Rönmmar M., The Managerial Prerogative and the employee's obligation to work: Comparative Perspectives on Functional Flexibility, 2006, 35 ILJ 56, 61

²⁴ Freedland, M., Davies, P., Kahn-Freund's Labour and the Law, o. c, 18

which employees, whose work is an integral part of the company's operations are subordinated, serves the purpose of the company's operations.²⁵

According to the definition of subordination, as one of the essential elements of the employment relationship²⁶, the work of the employee should be carried out based on instructions and under the supervision of the employer. This definition corresponds to the understanding of the classical concept of subordination typical for the traditional employment relationship. But, in the further presentation, the issue of the subordination in the context of the right of privacy will be brought into close connection with transforming, modern employment relationships. Namely, working according to the instructions of the employer means non-autonomy or limited autonomy of the employee in performing the tasks of his/her workplace. In this way, the vertical power of the employer, closely related to the management of the production process, is expressed.

It is undeniable that control and supervision over the behaviour and activities of the employees are *sine qua non* of all activities of the company's management. Namely, the control of employees by management is a basic prerequisite for the production and consequent sale of products and services adapted to the needs of consumers. The problem arises in making a strategic choice between different types of control. Some of the possibilities are: simple/direct control (through close supervision); technical control (which is achieved by the technological or production process itself), and bureaucratic control (which is achieved by administrative rules and procedures).²⁷ On the other hand, some authors strive for the concept of "direct control", which is based on the principles of scientific management, and is characterized by the fragmentation of work tasks, by depriving the work of any expertise and qualifications, and accompanied by close supervision and strict discipline, to oppose the concept of "responsible autonomy".²⁸ The latter concept is characterized by the management's attempt to use the adaptability of the workforce, giving it room for action, and encouraging it to adapt to changing situations in a way that will be beneficial for the company.²⁹ This way, the employer gives employees discretion in the way they perform their work, but at the same time encourages them to identify with the company's goals. In other words, the employer seeks from the employee to be reliable and available for work.³⁰

Summarizing aforementioned, several legal aspects, i.e. the categories of labour law, which limit the right to privacy, can be crystallized:

²⁵ Barnard, C., *The functions of the executive*, Cambridge, MA: Harvard University Press, 1968.

²⁶ Essential elements of the employment relationship are: an agreement, subordination, *faciendi necessitas* (obligation of personal performance of the work), compensation of work. More in detail see: Bilić, A., *Radno pravo, o.c.*, 97-100

²⁷ Edwards, R., *Contested Terrain: The Transformation of the Workplace in the Twentieth Century*, Heinemann, London, 1979.

²⁸ Friedman, A.L., *Industry and Labour: Class struggle at Work and Monopoly Capitalism*, London, 1977., 78.

²⁹ Melman, S., *Decision Making and Productivity*, Blackwell, London, 1958.

³⁰ Hyman, R. (1987). *Strategy or Structure? Capital, Labour and Control*. *Work, Employment and Society*, 1(1), 25-55. <https://doi.org/10.1177/0950017087001001004>

- the legal subordination of the employee in the employment relationship (in addition to the economic one), based on which the employer can determine the degree of individual rights and freedoms;
- the verticality of the employment relationship characterized by power disparity;
- mutual limitation of the authority of the employer and the consumption of fundamental rights by the employee.

“The contract of employment embraces an authoritarian structure that appears to be at odds with a commitment in liberal societies to values such as liberty, equal respect, and respect for privacy.”³¹

The question arises whether the consumption of the employer’s authority to control and supervise the activities and behaviour of the employee violates the latter’s fundamental right to privacy? Who determines the limits of supervision? To what extent does the employee have the right to enjoy the right of the privacy given that during the period of working time he puts his/her labour capacity, which is inseparable from him/her on disposition to the employer? In other words, what would the right to privacy of the employee include and to what extent can this right be recognized for the employee, i.e. to what extent can the employee consume it, without negative effects on the production process managed by the employer? We shall try to give the answers to the aforementioned questions in the context of contemporary employment relationship, stressing that permissible extent of employees’ surveillance has long been amongst the most common and controversial regulatory problems at work.

4. PANOPTICON METAPHOR IN CONTEMPORARY EMPLOYMENT RELATIONSHIP

The extent to which management can these days monitor employees’ behaviours, both, on-and-off site using advanced surveillance technologies, has dramatically increased. Moreover, behaviour aside workplaces are increasingly adopting emotion AI, corporate wellness and genetic testing of employees. Also, there is a possibility and potential for the introduction of neurosurveillance. As we mentioned earlier employers use algorithms in order to predict employee’s behaviour and their future wellbeing.

The emerging field of Emotion Artificial Intelligence (Emotion AI)³², or data-driven technology that collects, analyses and interprets emotional data is currently being researched and developed to support future employee wellbeing and

³¹ Collins, H., *Is the Contract of employment Illiberal?* in: Collins, H., Lester, G., Mantouvalou, V, (eds.), *Philosophical Foundations of Labour Law*, Oxford: OUP, 2018, 48-67

³² Piispanen, J. R., Rousi, R., *Emotion AI in Workplace Environments: A Case Study*, 2024., at: <https://arxiv.org/pdf/2412.09251> (accessed: 16. of February 2025.)

organisational goals.³³ Workers' affective phenomena could influence organizational outcomes and events including sales³⁴, productivity³⁵, workplace violence³⁶, and insider threats. Through alleged capabilities of Emotion AI to automatically infer, analyse, and/or respond to workers' affective phenomena at scale, by influencing (shaping) employee emotion and related constructs, AI workplace technologies enable better managing organizational outcomes.³⁷

Many companies develop practices or programs related to wellness—a concept that refers to activities focused on encouraging people to adopt healthy behaviour and not have unhealthy lifestyles. They tend to offer a wide variety of practices by which to deal with employees' emotional, intellectual, physical and social issues. This may include health testing, fitness centres, incentive programs targeted at health behaviour, health education activities, and so on.³⁸ The purpose of corporate wellness is therefore to boost employees' health and productivity. It is completely obvious how many employees' data can be collected here with a great risk of the intrusion into employee's privacy.

With the help of neurotechnology for surveillance (neurosurveillance) in the workplace, employers could analyse the brain data from employees to assess their cognitive functions (such as mental capacity and efficiency), cognitive patterns (such as response to stress), and even detect neuropathologies.³⁹ Data obtained thereat could serve employers for purposes such as promotion, hiring, or dismissal. At the same time neurosurveillance represents a new threat to employees' privacy and a risk of neurodiscrimination.

³³ Roemmich, K., Schaub F., Andalibi, N., Emotion AI at Work: Implications for Workplace Surveillance, Emotional Labor, and Emotional Privacy. In Proceedings of the 2023 CHI Conference on Human Factors in Computing Systems (CHI '23), April 23–28, 2023, Hamburg, Germany. ACM, New York, NY, USA 20 Pages. <https://doi.org/10.1145/3544548.3580950>; Mantello, P., Manh-Tung, H. "Emotional AI and the future of wellbeing in the post-pandemic workplace." *AI & society*, 1-7. 7 Feb. 2023, doi:10.1007/s00146-023-01639-8

³⁴ Aggarwal, P., Castleberry, S. B., Ridnour, R., & Shepherd, C. D., Salesperson Empathy and Listening: Impact on Relationship Outcomes. *Journal of Marketing Theory and Practice*, 2005., 13(3), 16–31. <https://doi.org/10.1080/10696679.2005.11658547>

³⁵ Bellet, C., De Neve, J. N. Ward, G., Does employee happiness have an impact on productivity? *Saïd Business School WP 2019-13(2020)*; Di Maria, C. H., Peroni, C., Sarracino, F., Happiness matters: productivity gains from subjective well-being. *Journal of Happiness Studies* 21, 1 2020, 139–160. Robertson, I., Cooper, C., Well-being: Productivity and happiness at work, Springer, 2011.

³⁶ Barling, J., Dupré, K. E., Kelloway, E.K., Predicting workplace aggression and violence. *Annual review of psychology* 60 (2009), 671–692.

³⁷ Carolyn Holton, Identifying disgruntled employee systems fraud risk through text mining: A simple solution for a multi-billion-dollar problem. *Decision Support Systems* 46, 4 (2009), 853–864.

³⁸ Peña, I., Andrade, S. M., María Muñoz, R., Barba-Sánchez, V., Wellness Programs, Perceived Organizational Support, and Their Influence on Organizational Performance: An Analysis Within the Framework of Sustainable Human Resource Management. *Sage Open*, 2024., 14(1). <https://doi.org/10.1177/21582440241229358>; Soeren, M. et al. "Workplace Wellness Programs Study: Final Report." *Rand health quarterly* vol. 3,2 7. 1 Jun. 2013; Marin-Farrona, M., Wipfli, B., Thosar, S.S. et al. Effectiveness of worksite wellness programs based on physical activity to improve workers' health and productivity: a systematic review. *Syst Rev* 12, 87 (2023). <https://doi.org/10.1186/s13643-023-02258-6>

³⁹ Muhl, E., Andorno, R., (Neurosurveillance in the workplace: do employers have the right to monitor employees' minds? *Front. Hum. Dyn.* 2023., 5:1245619. doi: 10.3389/fhumd.2023.1245619

Workplace genetic testing (wGT) programs provide genetic testing in the context of an employee 'expand screening for actionable high-risk genetic diseases like cancer, those programmes address employer goals such as controlling workforce healthcare costs and improving health, employee retention and productivity. There are certain risks of the use of genetic testing in the workplace,⁴⁰ such as intrusion into privacy of employees. Namely, employees may fear that their data could be used to discriminate against them. Other concerns such as secondary use of the aggregated wGT results, sharing of aggregated wGT results could result in unintended consequences in the absence of sufficient privacy and confidentiality protections. Other risks of genetic testing in the workplace include discrimination and stigmatisation in the workplace.

Doesn't this remind us of a famous George Orwell fiction novel "1984" in which he stresses the danger of letting the individuals emotional and psychological state in the public space? It was terribly dangerous to let your thoughts wander when you were in any public place or within range of a telescreen. The smallest thing could give you away. A nervous tic, an unconscious look of anxiety, a habit of muttering to yourself-anything that carried with it the suggestion of abnormality, of having something to hide. In any case, to wear an improper expression on your face ... was itself a punishable offense. There was even a word for it in Newspeak: face crime So, let's not just hope, but let's do something in order to prevent this fiction from becoming reality.

If we put the extent to which management can now monitor employees into the definition of privacy which we have previously used: "A person has privacy to the extent that others have limited access to information about him, limited access to the intimacies of his life, or limited access to his thoughts or his body", we can with certainty use the panoptic⁴¹ power metaphor. Namely, the panopticon power metaphor has often been the starting point for examination of the effects of the surveillance in the workplace, as well for describing the type of relationship between employer and employees that electronic surveillance creates within the workplace. With so much information on employees that employers collected due to the use of

⁴⁰ Barclay, L. A., & Markel, K. S., Discrimination and stigmatization in work organizations: A multiple level framework for research on genetic testing. *Human Relations*, 2023., 60(6), 953-980. <https://doi.org/10.1177/0018726707080082>

⁴¹ Panopticon was elaborated by Jeremy Bentham at the end of the eighteenth century and later on Michel Foucault used it as a symbol of disciplinary power. The simple idea of Bentham can be described as follows: a circular building with the cells of the prisoners located in the circumference and, separated by an empty space, the tower of the inspector located in the centre. The side of each cell facing outwards would be occupied by a large window and the inner one by a thin iron grating in order to make the whole room perfectly visible from the tower, while also contributing to let sunlight inside the Panopticon. The Panopticon is an image for this discipline: in Foucault's opinion its objective is to improve the exercise of power, making it faster, lighter and more effective. The individual in the Panopticon, being subjected to a regime of constant visibility, is caught in a power relationship within which he becomes the principle of his own subjection. Botan, C., Communication work and electronic surveillance: A model for predicting panoptic effects. *Communication Monographs*, 1996., 63(4), 293-313. <https://doi.org/10.1080/03637759609376396>; Foucault, M., Panopticism" from "Discipline & Punish: The Birth of the Prison., Race/Ethnicity: Multidisciplinary Global Contexts, 1996., 2(1), 1-12. <http://www.jstor.org/stable/25594995>

electronic systems, information panopticon is formed which freed employers from the constraints of time and space.⁴²

Anyway, the panoptic power management has extended beyond the workplace and into the private sphere of employees and can create significant harm to privacy issues. These can include physical harms, economic harms, reputational and other social-psychological harms, direct psychological harms, individual ‘autonomy harms’ such as coercion and manipulation, collective harms such as ‘chilling effects,’ and the erosion of work/non-work boundaries and work-life balance.⁴³ Anyway, supervised employees have a feeling of insufficient privacy, and in some situations even of the threat to their dignity. Through surveillance, employers have the opportunity to find out personal information about employees, which, if improperly used, can serve as the basis for a series of illegal activities of the employer, for example, discrimination against employees or unjustified dismissal. The employee’s knowledge of being subjected to the supervision and control by the employer may result in the appearance of fear, stress, diseases closely related to stress, and paranoia. This way, supervision can become a means of damaging the mutual trust of employees and employers, creating a feeling of suspicion, tension and resistance in the workplace. As a result, there is increased dissatisfaction, industrial disputes, and a decrease in the effectiveness of the workforce and the quality of work.⁴⁴ This undermines one of the reasons why supervision and control over employees is carried out in the first place.

5. CONCLUSION - WAY FORWARD?

These days it seems that an employer’s intrusion into employee privacy justified by his/her need for reliability, responsibility, productivity, and effectiveness prevails over the need for employee privacy protection precisely due to the justification rooted in managerial prerogatives. The way employers use those technologies today is often unclear, not only to employees, but also to policy makers. They are either still operating in the legal vacuum or within legislation that reinforce managerial prerogatives or reflect distrust in employees. The lack of regulation leads to strong incentives for employers to use digital technologies at will, in the ways that can directly or indirectly harm employees. Some of this harm stem from technology design decision, but more often derive from employers’ bad decisions regarding when, why, where and how to use this technology.⁴⁵ But one should keep in mind that

⁴² More in details: Zuboff, S., *In the age of the smart machine*, 1998., New York, Basic Books

⁴³ Citron, D., Solove, D., ‘Privacy Harms,’ 102 *Boston University Law Review* 793, 2022.; Future of Privacy Forum, ‘Identifying algorithmic harms when creating DPIAs: a quick guide,’ 2018

⁴⁴ Mishra, J.M., Crampton, S.M., *Employee monitoring: Privacy in the workplace?* S.A.M. *Advanced Management Journal*, vol.63, no. 3, Summer 1998., 4.-14.; Nebecker, D.M., Tatum, B.C. The effects of computer monitoring, standards and rewards on work performance, job satisfaction and stress, *Journal of Applied Social Psychology* 508, no. 23, 1993., 508.

⁴⁵ Cappelli, P., *Stop overengineering people management*. *Harvard Business Review*, 2020., September–October. <https://hbr.org/2020/09/stop-overengineering-people-management>

for the employee employment relationship is not just economic transaction, it is, as we previously mentioned, source of employee's social and psychological fulfilment. That is why employee's vulnerabilities in employment relationship should not be used by employer just to pursue his/her own goals neglecting employee's social and psychological, and to some extent economic needs s/he gets from employment relationship.

So, while managerial prerogatives might justify the implementation of digital panoptic systems in certain contexts, it is essential to weigh the benefits against the potential drawbacks, such as privacy concerns, potential for misuse, impact on employee well-being as well as ethical considerations. Organizations should strive for a balance that respects employee privacy and autonomy while meeting managerial objectives. So, in order to avoid negative repercussions such as elevated conflict and inefficiencies, possible perception of person violation and potential litigation,⁴⁶ when employer's need for information and employee's privacy intersect it is of utmost importance to maintain the correct balance between rights, policies and practices. In order to achieve the right balance between managerial prerogative and employees' right to privacy and present an effective strategy for preventing harms, employee protection required by employment law and data protection law accompanied with tech solutions must be a holistic and ongoing process especially due to the technological evolution with which privacy protection legislation and design-based approach can hardly keep up the pace.

So, to mitigate the effects of a digital panopticon on employee privacy in the workplace following strategies should be considered:

- establish clear and transparent policies regarding the use of monitoring technologies which would enable employees to be informed about what data is collected, how it's used, and who has access to it.
- limit monitoring tools by using them judiciously and focusing on tools that enhance productivity without excessive surveillance that may create a culture of distrust.
- seek consent from employees before implementing monitoring systems. Involving them in discussions can foster trust and make them feel more secure regarding their privacy.
- data minimization by collecting data that is necessary for specific purposes, avoiding collecting unnecessary information that could lead to privacy infringements.
- conduct regular audits of monitoring practices to ensure compliance with privacy policies and to assess the impact on employee morale and trust.
- provide training for employees educating them about their rights regarding privacy and data protection.

⁴⁶ Brown, W.S., Technology, Workplace Privacy and Personhood, *Journal of Business Ethics* 15: 1237-1248, 1996, 1244.

- encourage open communication creating environment where employees feel comfortable discussing privacy concerns without fear of repercussions.
- implement feedback mechanisms by regularly solicit feedback from employees about monitoring practices and privacy concerns which can help to adapt policies to better meet their needs.
- balance accountability and privacy using monitoring tools that promote productivity while respecting employees' personal space.
- ensure that all monitoring practices comply with relevant laws and regulations concerning employee privacy and data protection.

By applying these strategies, organizations can create a more respectful work environment that values employee privacy while still maintaining necessary supervision.

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MOGU LI POSLODAVCI OPRAVDATI DIGITALNI PANOPTIKON NA SUVREMENOM RADNOM MJESTU MENADŽERSKIM PREPOGATIVIMA?

Radni odnos karakterizira ovisnost radnika o (konkretnom) poslodavcu u ekonomskom, socijalnom i psihološkom smislu. Ova ovisnost radnika korijen je nejednakosti pregovaračke moći između poslodavca i radnika u radnom odnosu. Zahvaljujući višem hijerarhijskom položaju poslodavac ima mogućnost ostvarivanja menadžerskih prerogativa. Drugim riječima, kao gospodar posla ima isključivo pravo kontrole i nadzora nad aktivnostima radnika glede izvršenja posla, mogućnosti primjene stegovnih ovlasti i organizacije rada. Digitalna revolucija i umjetna inteligencija omogućili su poslodavcima još intruzivnije praćenje aktivnosti radnika, što je dovelo do kulture panoptičkog nadzora koja može uzrokovati značajnu štetu po privatnost radnika. Temeljno pitanje glasi: Možemo li u menadžerskim prerogativima pronaći pravo opravdanje za ekscesivan nadzor radnika?

Ključne riječi: *nejednakost pregovarače pozicije, menadžerski prerogativi, zaštita privatnosti radnika, digitalizacija, panoptički nadzor*

