

Digital Employment - European Challenges

The third annual seminar in our Digital Employment series

Wednesday 18 March 2015

OLSWANG



Agenda

OLSWANG

6.00 pm Welcome and introduction

- Bring Your Own Device - where are we now?
- Finders, keepers? Recovery of data in a digital world
- The German Challenge: Dealing with Works Councils
- 24/7 - can an employee switch off their digital technology?

7.00 pm Drinks and canapés

Hashtag

OLSWANG

#olswangdigitalemp

Bring Your Own Device – where are we now?

OLSWANG



BYOD - Advantages

OLSWANG

- Employee satisfaction and morale
- Efficiency and flexibility
- Cost savings
- Focus on data protection obligations and security measures

BYOD - Challenges

OLSWANG

- Loss of control
- Data protection obligations
- Security risks
- Blurring of corporate and personal identities
- Corporate reputation
- Device support
- Restrictions in commercial agreements
- Employee expectations of privacy
- Clear policies and procedures and training vital

BYOD – UK New UK Government Guidance

OLSWANG

- Three main sections:
 - advice on assessing risks of BYOD
 - guidance to system administrators
 - executive summary targeted at management
- Encourages businesses to consider legal and practical issues and risks when assessing whether BYOD appropriate
- Warns costs of ensuring necessary security of data may outweigh benefits
- Recommends businesses consider alternative ownership models – “COPE” and “CYOD”

COPE – Key Features

OLSWANG

- Company chooses device and operating system
- Employee can use device for personal activities
- Closest to Corporately Owned Business Only (“COBO”) model

CYOD – Key Features

OLSWANG

- Staff choose from small pool of approved devices/operating systems
- Bought and controlled by company

BYOD v CYOD

OLSWANG

DEVICES	BYOD	CYOD
Who chooses the device?	Employee	Company & employee
Who chooses the operating system?	Employee	Company & employee
Who buys the device?	Employee	Company
Which device can be used?	Any	IT-approved
Who supports the device?	Employee & IT	IT
Where can the device be used?	Anywhere	Anywhere
Who chooses the service plan?	Employee	Company
Who pays for the plan?	Employee (sometimes company)	Company

- Choosing devices/operating systems (employee satisfaction?)
- Keeping up with changes in technology
- Some of risks remain
- More costly?

- According to the French National Data Commission (CNIL), only 44% of French smartphone owners say they use their smartphones exclusively for private purposes
- BYOD is increasing in France (companies such as Orange allow BYOD practices), but there is no legislation to date
- Issues in respect of French labour regulations:
 - BYOD should not imply working at home outside of working hours (which would potentially give rise to overtime and harassment issues and failure to comply with the disconnection obligation for companies falling under the scope of the SYNTEC CBA)
- In France, CYOD and COPE are not implemented yet

- Newly introduced practice in Germany, which has developed rapidly (today roughly 70% of all employees use their own devices).
- Major issues:
 - Who is liable in case of loss of the device?
 - Who is liable for damage caused to the device?
 - Are sanctions under employment law legally feasible, if the employee loses the device (data leak, inability to work, unavailability) or does not comply with internal BYOD rules?
 - May an employer monitor the device's contents?
 - Post-contractual obligations of the employee?
- Data protection concerns

Finders, keepers? Recovery of data in a digital world

OLSWANG



Finders, keepers? – Introduction

OLSWANG

- Increasing focus on recovery of electronic data on termination of employment:
 - Electronic data widely disseminated
 - Increasing number of devices
 - Recovery of employer's confidential information
 - Legal obligation to recover – client contract; data protection

Finders, keepers? – Introduction

OLSWANG

- **Preventative steps:**

- Contract:
 - Return of property
 - Deletion
 - Controlled recovery
- Email monitoring policy
- Security software
- Exit processes

Finders, keepers? UK

OLSWANG

- **Court action:**

- Wide discretion to order return, non disclosure, preservation, deletion

- **Basis:**

- Contractual
- Agency
- Property rights
- Intellectual property/database rights

Finders, keepers? UK

OLSWANG

- **Court action:**

- Usually demonstrate some confidential information
- Risk of dissemination
- Balance of convenience

Court action

- Employee defences:
 - whistleblowing
 - more general public interest
- Disadvantages of court action:
 - cost
 - reputational risk

What can an employer do when an employee refuses to return company or customer data?

- No specific legislation on this issue
- What employers might do in practice:
 - Injunctions: employers can take injunctive action against ex-employees who refuse to return company and/or customer data
 - Criminal complaint: employers may eventually bring a criminal complaint for the theft of company's goods

What can an employer do when an employee refuses to return company or customer data?

- No specific legislation on this issue
- What employers might do in practice:
 - Injunctions: employers can take injunctive action against ex-employees who refuse to return company and/or customer data
 - Refuse to pay salary, severance or other payments until data is returned
 - Criminal complaint: employers may eventually bring a criminal complaint for the theft of company's goods

The German Challenge: Dealing with Works Councils

OLSWANG



The German Challenge: Dealing with Works Councils

OLSWANG

The Power of German Works Councils

- Works Councils have vast co-determination rights
- The employer must inform, negotiate and agree with the Works Council regarding numerous entrepreneurial measures, if these measures potentially influence the employees and their employment related rights
- The Works Council may demand external (technical) support and consultation, if a matter subject to co-determination requires additional know-how
- Co-determination rights in practice end in the necessity to agree on a Works Agreement, a by-law for the employer's business with immediate effect upon the employment agreements

The German Challenge: Dealing with Works Councils

OLSWANG

The Power of German Works Councils – Digital Employment Case No. 1

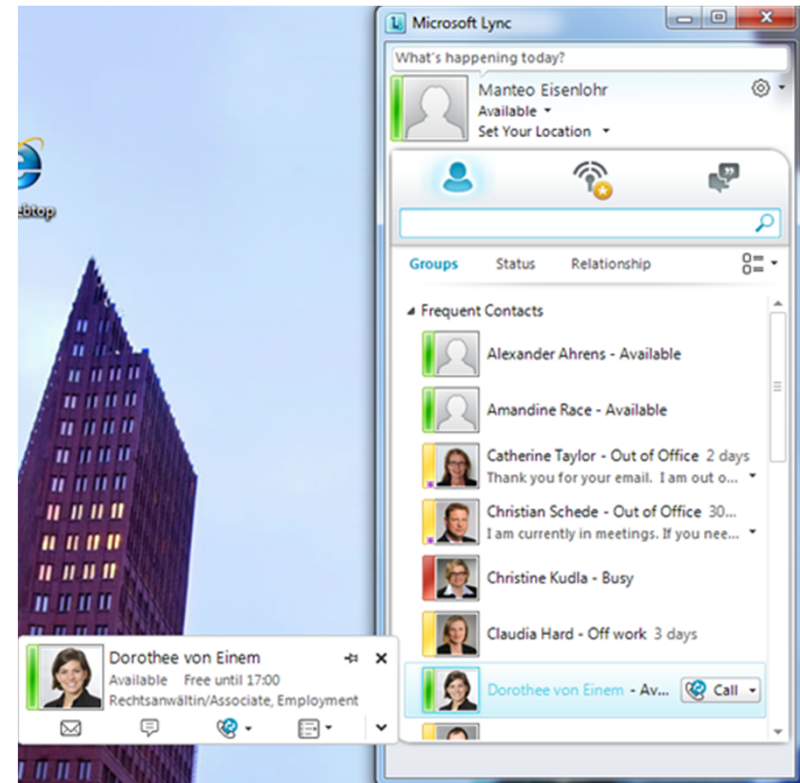
- Co-determination requirements exist, if the measure **potentially monitors the employees' conduct and performance**
- **Therefore**: BYOD/CYOD is subject to Works Council co-determination, since the employer may monitor the device
- **Consequently**: The **introduction of any IT tool** potentially is subject to co-determination

The German Challenge: Dealing with Works Councils

OLSWANG

An Example

- **Lync** (a Microsoft Communication Tool)
- What **information** does Lync **contain**?
 - Names and appearances
 - Activities: Is someone available, out of office, in a meeting, away, how long doing the respective activity?
- What **information** can be **gathered**?
 - How long has he individual been actively working, How long is the “break”, this individual is taking, When is this individual intending to return? And if the individual has not returned; where is she/he?
- Employees can **potentially be monitored**
- Therefore: **Co-determination probable**

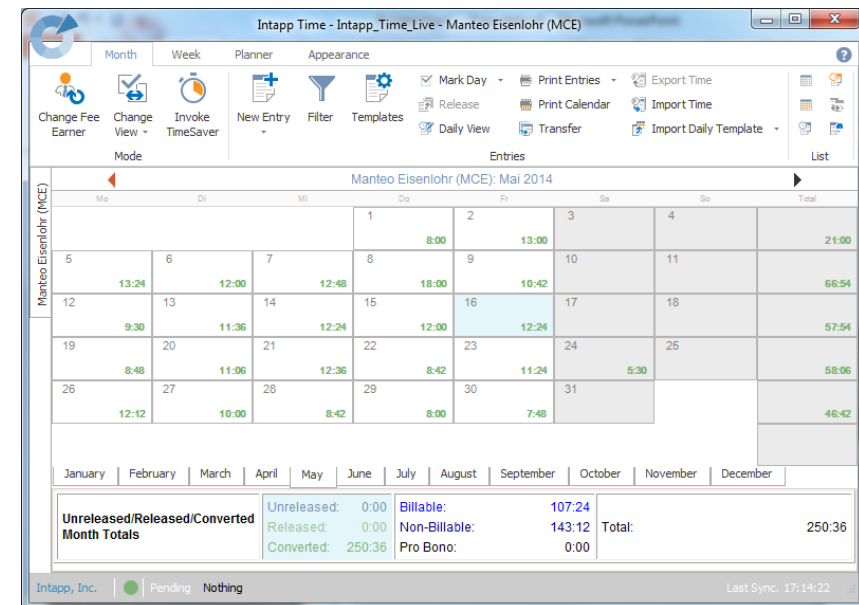


The German Challenge: Dealing with Works Councils

OLSWANG

An Example

- **InApp** (a time recording tool)
- What **information** does InApp **contain**?
 - Number of worked hours
 - Activities: On what files did the individual work?
For how long? Where and when did he/she travel?
- What **information** can be **gathered**?
 - When was the individual absent, when was he/she where?
- Employees **are monitored**
- Therefore: **Co-determination certain**



The German Challenge: Dealing with Works Councils

OLSWANG

Updating IT Tools

- If originally co-determination rights existed in introduction: the Works Councils must be **involved at the implementation of every update** - perpetuation or improvement of monitoring abilities of the IT tool
- Possibility of avoidance: agree in respective works agreement on the tool **without determining the tool's version** or that the **consent of the Works Council may not be unreasonably withheld**, if the monitoring abilities of the tool remain unchanged

The German Challenge: Dealing with Works Councils

OLSWANG

The Power of German Works Councils – Digital Employment Case No. 2

- Co-determination requirements exist, if the measure **takes influence upon working time and the allocation of working hours**
- **Consequently**: the **introduction of work from home** potentially is subject to co-determination
- **Consequently**: the introduction of the **use of smartphones** is subject to co-determination

The German Challenge: Dealing with Works Councils

OLSWANG

The Digital Employment Challenge

- Works Councils are major stakeholders when it comes to the digitalisation of the work place
- If the Works Council is not included in the process, the Works Council can stop the employer from introducing measures which are subject to co-determination (costly and time consuming, damage to reputation) by means of an injunction
- Co-determination may disrupt the global introduction of IT-tools, policies, etc
- The awareness of Works Councils in all matters relevant to the digitalisation of the workplace is rapidly growing (as is the awareness of the unions in Germany)

The German Challenge: Dealing with Works Councils

OLSWANG

Practical Lesson: How to deal with German Works Councils

- **Inform** the Works Council diligently
- **GET PREPARED** before you inform the Works Council:
 - Get to know the IT-tool
 - Get **someone from IT** to accompany you to the meetings
 - Get **someone from the business** to accompany you to the meetings
- In you HR department: **educate a specialist in Digital Employment** matters so that HR understands the matters and guides the discussion:

Let HR become the “Digital Employment Champion”

France: Dealing with Employees' Representatives

OLSWANG

Practical lessons in dealing with employees' representatives:

- In France, employers must consult the Works Council prior to the implementation of digital technology aimed at monitoring employees. There is no co-determination legislation like in Germany
- Employers are not bound by the decision of the Works Council
- Employers must also:
 - Register a monitoring declaration with the CNIL
 - Provide their employees with specific information (including the identity of the data controller; the aim of the monitoring tool and purposes of the processing; and employees' rights of access, rectification and objection)
- Employers must consult the Health and Safety Committee if the contemplated monitoring tool affects their health and safety

24/7 - Can an employee switch off their digital technology?

OLSWANG



Can an employee switch off their digital technology: France

OLSWANG

Working time - From the 35-hour limit to the disconnection obligation

- Legal working time system: 35-hour limit per week
- Autonomous employees and executives may perform their duties under a **flexible** working time arrangement known as a “**day contract**” scheme
 - Employees work a set number of days throughout the year irrespective of the number of hours (maximum of 218 worked days per year)
 - The possibility of working under such a scheme must be provided for by a national collective bargaining agreement (CBA) or a company agreement, in addition to being included in each employment contract
 - The French Supreme Court has delivered a number of recent judgments on the invalidity of day contracts, based on the protection of health and safety of employees. Such decisions have led certain **trade unions to create a “disconnection obligation”**

Can an employee switch off their digital technology: France

OLSWANG

The disconnection obligation - What does it imply?

- The disconnection obligation only applies to companies falling under the scope of the SYNTEC CBA (i.e. the CBA applicable to tech companies)
- The disconnection obligation has been created to ensure that employees genuinely benefit from their mandatory daily and weekly rest periods
 - Employees have a mandatory daily rest period of 11 continuous hours and a mandatory weekly rest period of 35 continuous hours
- The disconnection obligation implies
 - that employees “*disconnect from remote communication tools...*
 - *... during their rest time...*
 - *... which should be taken within a specific time period set up by the employer.”*
 - In practice, employers will have to display within the company the beginning and end of daily and weekly time periods during which mandatory rest periods must be complied with
 - E.g. employees shall take their daily rest during a time period from 7pm to 7am

Can an employee switch off their digital technology: France

OLSWANG

The disconnection obligation - How does it work ?

1. **Employees have to disconnect from remote communication tools** they have been provided with
2. **Employers have to set up a follow-up tool** to ensure compliance with the employees' minimum daily and weekly rest periods
 - The idea is to be able to determine the effective hours of work performed by employees under a day contract
 - E.g. a software program which records working time, a time-clock or timecard or a declaratory system filled-in by employees
3. **Employers have to ensure that employees can disconnect** from remote communication tools
 - The SYNTEC CBA does not provide any practical solution
 - Some companies will switch off their central server during the mandatory disconnection period
 - Some companies will order employees to not use remote devices (phone, computer, tablets) during the mandatory rest periods

Can an employee switch off their digital technology: UK

OLSWANG

- There are no statutory disconnection obligations
- The Working Time Regulations 1998 (which implement the European Working Time Directive) require **certain prescribed minimum periods of rest**
- Employers are **obliged** to ensure that workers can take their rest periods and whilst in some limited circumstances, workers can be required to work through these periods, they must be provided with **equivalent compensatory rest**
- A worker can work through rest a period (for example by checking emails in an evening) and will **not** be entitled to any compensatory rest or have any ground for complaint
- Claims relatively unusual in practice

Can an employee switch off their digital technology: Germany

OLSWANG

- Currently **no laws expressly preventing workers** from checking business emails outside normal working hours.
- **However**: high degree of **public awareness** of the issue. Businesses introduce **own regulations**:
 - **Telekom AG / Volkswagen AG**: Shut-down of server outside of working hours
 - **Daimler AG**: Out-of-office reply mandatory outside of working hours and automatic deletion of incoming emails
- The issue is **on the legislator's agenda** during the next three years

QUESTIONS?

OLSWANG

For more information please contact:

Karine Audouze

+33 1 7091 8770

karine.audouze@olswang.com

Catherine Taylor

+44 (0)20 7067 3588

catherine.taylor@olswang.com

Manteo Heikki Eisenlohr

+49 30 700 171 159

manteo.eisenlohr@olswang.com

Melanie Lane

+44 (0)20 7067 3653

melanie.lane@olswang.com

Digital Employment - European Challenges

The third annual seminar in our Digital Employment series

Wednesday 18 March 2015

OLSWANG

