

**Precedential Court Ruling in the matter of Entering
Employees' Electronic Mailboxes at the Workplace**



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Dear Clients and Friends,

On February 8, 2011, the National Labor Court delivered a **precedential ruling** addressing the rules applying to employees and employers with respect to computer usage at the workplace, including with respect to the entry by employers into the employees' e-mail correspondence and the submission of printouts generated from e-mail correspondence as evidence in legal proceedings (Labor Appeal 90/08 **Tali Isakov Inbar v. The Women's Employment Law Commissioner et al**)

Such Court Ruling's determinations have significant implications for the majority of employees and employers and we therefore wish to present you with the essence of the said Court Ruling, as follows:

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A Factual Summary of the Cases that were Addressed in the Court Ruling

The Court Ruling addressed two appeals that were filed on Regional Labor Court rulings:

In the first case (the "**Isakov Case**") there was a factual dispute in the matter of whether the actual termination of the employee's employment had occurred before she became pregnant. In the framework of the proceeding, the employer wished to submit, as evidence, an e-mail correspondence that the employee had sent from the electronic mailbox that had been provided to her from work, which could testify that at the time in dispute the employee had acted as though her employment had been terminated and she had been looking for other work. The Tel Aviv Regional Labor Court denied the employee's motion to prohibit the employer from submitting the e-mail correspondence as evidence and determined that the employee had given implicit consent to enter into her personal electronic mailbox at the workplace¹.



The second case (the "**Afiki Mayim Case**") addressed the matter of an employee who was suspected of wanting to compete with the company's business, while developing a private business of his own. In order to substantiate their claims regarding the employee's abusive actions, the employers wished to submit printouts from e-mail correspondence that the employee had sent during work both from electronic mailboxes that were made available to him for his personal use and from his external-private electronic mailbox. The Nazareth Regional Labor Court ruled that the entry by the employer into the employee's private electronic mailbox and the submission as evidence to the court, constituted a severe violation of the employee's privacy; and that the mere fact that the printouts from the e-mail correspondence from his private electronic mailbox were found in the waste paper basket on company premises does not serve as grounds for concluding that the employee had granted his consent that the employers read them. In the said case the Court granted the employee's motion and instructed that the printouts from the e-mail correspondence be removed from the Court file.

¹ For further details regarding said Regional Labor Court ruling in the matter of Isakov Inbar, please see our Firm's October 2007 Client Memorandum, at: http://www.shibolet.com/BookPublications/Employment%20Law%20Updates_October%202007.pdf

The Premises Set by the National Labor Court with respect to Employees' Usage of Computers and Employers' Monitoring thereof

In reviewing the guiding principles relating to employees' usage of computers and virtual technologies that are made available by employers and relating to employers' monitoring of the manners of use by employees, the National Labor Court addressed three premises:

- (1) The employer has the prerogative to determine whether employees are entitled to use the internet technologies for their personal use and to what extent they are allowed to do so;
- (2) The use of information technologies and electronic means of communication at the workplace is intended for work purposes and not for the employee's private needs, and the employee does not have a vested right to the computer as a work tool. Having said that, the employer may provide the employee with a personal virtual space at the workplace, including permitting use of an electronic mailbox for personal needs;
- (3) The entry by an employer into a personal mailbox that was made available for his personal use and into the employee's personal e-mail correspondence in the computer and into his virtual use thereof at work, constitutes a severe violation of the employee's privacy. Such an invasion is not permitted unless and to the extent permitted by law, only upon special and extraordinary circumstances of a serious concern or reasonable substantiation of an illegal or criminal activity on the part of the employee.

Based on the said three premises, if and to the extent an employer intends to take any actions of monitoring, surveillance of or entry into the employee's virtual use of a computer that was made available to him in the framework of work and for work needs, the employer must comply with the following pre-conditions:



- a. **The employer must maintain a clear workplace policy with respect to the allocation of virtual space in computer usage at the workplace.** In determining such a policy, the following can be taken into consideration: the essence of the workplace, its nature, business and special needs in general; the type of work that the employee performs, the nature of the position he holds etc. There may be cases in which use of information technologies for personal use may be completely prohibited at the workplace, due to legitimate interests of the employer, such as security and information security considerations, that derive from the essence of the workplace, the nature of the employee's occupation or his position.
- b. **The employer must clearly inform the employees regarding all of the information and communication technologies that exist at the workplace, while clearly distinguishing between those kinds of technologies that are available for the employees' use and those technologies that the employer can and intends to use for surveillance,** including by entering the electronic mailboxes that were allocated to the employee and his work and personal correspondence therein.
- c. In the framework of determining such a policy, **the employer must clearly set the rules of employee conduct in the workplace's virtual space and with computer and information technologies, including the electronic mailboxes allocated for their use, and must set the limits of what is permitted and what is prohibited with respect to the professional and personal aspects of using information technologies and with respect to accessing all or**

some websites. With regard to monitoring communication data and content, including entering professional correspondence, it is appropriate to consider the constraints that arise upon an employee's absence due either to vacations or sickness during his employment or during the period after his employment has ended.

d. In determining the policy with regard to computer usage, the employer may apply its proprietary rights and managerial prerogative in accordance with the law and in light of the following principles:

- 1) The Proportionality Principle – to the extent that there is a criminal or abusive act being performed by an employee, in circumstances that justify the employers' surveillance of the employee's computer usage at the workplace, the employer must make sure that the use of the means of surveillance is vital to the workplace's legitimate interest and that the surveillance is proportional to the risk that justified the surveillance to begin with. **The employer must consider alternate means of surveillance and must prefer the use of surveillance technologies or technologies that block other uses, that could serve as a worthy substitute instead of reading the e-mail correspondence and that would constitute a lesser invasion of the employees' privacy.**
- 2) The Legitimacy Principle – **the limits of the surveillance must be defined, and the surveillance must be legal and in good faith;** surveillance shall be performed based on grounds that have direct relevance to the employer and based on the workplace's legitimate interests; all while the employer shall, to the extent possible, refrain from violating the fundamental basic right of the employee, or act so that the violation shall be proportionate and reasonable, in relation to the purpose of the surveillance.
- 3) The Purpose Linkage Principle – the employer may not use information in a manner that deviates from the initial purpose for which it was collected.
- 4) The Transparency Principle – **The employer must clearly and specifically inform the employees of the policy that was set with respect to computer usage at the workplace,** and must explain, in detail, the manner in which the policy of monitoring the employee's e-mail correspondence will be applied. The employer must allow the employees to have access to the information about themselves that was collected in the surveillance and must inform them of the period of time during which such information will be stored. The employer must be diligent about the accuracy of the information collected and about its confidentiality and security. It is important to inform third parties of the possibility of monitoring communication data and contents of e-mail correspondence with the workplace.

e. **It is required to explicitly incorporate these principles in employment agreements.** Furthermore, it would be appropriate that these principles be reflected in the by-laws of a workplace, and that at unionized workplaces, they be settled together with the employees' union or their representatives, in the framework of a collective arrangement or collective agreement.

Types of Mailboxes Allocated to an Employee in the Virtual Space at a Workplace

There is an essential distinction between two main types of virtual mailboxes that are made available to employees: a mailbox owned by the employer and a mailbox owned by the employee. A mailbox owned by the employer is divided into two types: a “professional mailbox” designated solely for work purposes, in which the employee’s personal use is prohibited, and mailboxes allocated by the employer for the employee’s personal use at the workplace, such as “mixed mailboxes” and “personal mailboxes”.



The “Informed Consent” Requirement

In light of the severe violation of the employee’s privacy and in light of the strict and narrow interpretation of the defense arguments that an employer could argue regarding the employee’s consent to the violation of his rights, **it is necessary to obtain explicit and informed consent that is freely granted, and to the extent possible - in writing, as a pre-condition to any act of monitoring, surveillance of or entry into an electronic mailbox that was allocated to an employee by the employer and personal e-mail correspondence therein.**

Such employee’s consent has two cumulative aspects: (a) the employee’s prior willful and informed consent to the general policy applied at the employer with regard to acts of surveillance of and entry into electronic mailboxes made available to the employee for his personal use; and (b) the employee’s specific consent for any separate act of surveillance of or entry into personal correspondence, to the extent that the employer intends to do so.

The Rules of Surveillance of Electronic Mailboxes

Please find below the rules of surveillance of the various types of electronic mailboxes, as specified in the Court Ruling:

Type of Electronic Mailbox	The Rules of Conduct
<p><u>Professional Mailbox:</u> A mailbox that in its entirety is designated solely for professional workplace activity and correspondence and the employees are forbidden to use it for any personal use, including personal e-mail correspondence.</p>	<p><u>The employer may apply acts of monitoring, surveillance and back-up of communication data in general, and content data, including the e-mail correspondence therein,</u> subject to the Legitimacy and Proportionality Principles and the law and provided that the employer provides the employees with advance notification that specifies the following:</p> <ol style="list-style-type: none"> 1) the workplace policy regarding conduct in the Professional Mailbox; 2) the designation of the Professional Mailbox for work purposes only; 3) the restrictions regarding employees’ use of the Professional Mailbox for personal or private purposes, in accordance with the workplace’s needs; 4) the possibility or need of applying acts of monitoring, surveillance and back-up of communication data, including e-mail correspondence content data in the Professional Mailbox.

Type of Electronic Mailbox	The Rules of Conduct
	<p><u>Surveillance of Personal Correspondence</u></p> <p>Even if the employee uses the Professional Mailbox in a manner that deviates from what was permitted, and even if the personal correspondence was made in violation of a prohibition regarding conducting such personal correspondence in a Professional Mailbox, <u>the employer is not entitled to enter into the content data of the employee’s personal correspondence and violate his privacy, unless there is a serious concern or reasonable substantiation of criminal or abusive activity on the part of the employee and only after alternative and less violating means of surveillance were exhausted.</u> In such an event, the employer may request the employee’s informed consent, granted in free will, to enter the personal correspondence in the Professional Mailbox.</p>
<p><u>Mixed Mailbox:</u></p> <p>The employer allows personal correspondence in a mailbox that was allocated to the employee for work purposes.</p> <p><u>Personal Mailbox:</u></p> <p>A separate personal mailbox that the employer allocated to the employee that is designated solely for the employee’s personal use.</p>	<p>As opposed to the case of a Professional Mailbox, <u>the employer is not entitled to apply acts of surveillance of the employee’s personal correspondence in the Personal or Mixed Mailbox, and the employer is prohibited from entering the employee’s personal correspondence in such mailboxes, <u>except upon extraordinary circumstances that, pursuant to the Legitimacy Principle, would justify such entry; and only after the employer has taken less invasive technological measures that indicate inappropriate use by the employee of the technologies that were made available to him for work.</u> Upon the said cumulative conditions the employer must request and obtain the <u>employee’s informed explicit consent</u>, granted in free will, to the general policy regarding entering the Mixed or Personal Mailbox and the personal correspondence therein.</u></p> <p>Additionally, in the case of <u>entering a Mixed Mailbox</u>, <u>the employee’s specific consent is required for any entry by the employer into his personal correspondence</u> as opposed to his professional correspondence in said mailbox.</p> <p>In light of the Purpose Linkage Principle, the employee’s consent to automatic monitoring against viruses in a Personal or Mixed Mailbox cannot be deemed as consent to a specific surveillance that collects communication and content data or as consent to read his personal e-mail correspondence in such mailboxes.</p> <p>Prior to requesting and obtaining lawful general and specific consent to enter an employee’s personal correspondence in a Personal or Mixed Mailbox, <u>the employer must notify the employee in advance and specify the use that shall be made with the personal information collected from <u>entering and reviewing his personal e-mail correspondence</u> and if and to whom the information shall be transferred.</u></p> <p>In the case of a <u>Personal Mailbox</u>, that to begin with had been made available to the employee solely for his private use, <u>the employee’s specific consent is required for any act of surveillance that involves <u>entering the Personal Mailbox</u> and collecting communication and content data, including entering the personal correspondence.</u></p>

Type of Electronic Mailbox	The Rules of Conduct
	<p>In the event that, despite the existence of justifying circumstances, <u>the employee's consent is not granted</u>, whether generally or to a specific act of <u>surveillance of the Personal or Mixed Mailbox</u>, <u>the parties may act in the framework of the dispute resolution mechanism that appears in the Collective Agreement</u> regarding Usage of Employers' Computers at the Workplace², if and to the extent it applies in the circumstances of the specific case. Practically speaking, the parties may apply and request relief from the regional labor court.</p> <p><u>In the absence of such consent, the employer may request that the regional labor court prescribe temporary reliefs for the disclosure or review of the employee's e-mail correspondence and the files therein.</u> On the other hand, the employee may apply to the regional labor court to request an injunction prohibiting the disclosure or review of his e-mail correspondence and the files therein.</p>
<p><u>External-Private Mailbox:</u> A private mailbox owned by the employee that is generally located on an external server (Gmail, Hotmail, Netvision, etc.)</p>	<p>The employee's <u>External-Private Mailbox</u> is his private property and the employer is <u>forbidden to use technological or other means to enter it or to monitor communications or content data therein.</u> In the event that the employer believes that there are circumstances that justify surveillance of or entry into the employee's Private Mailbox, it may not do so <u>unless it has an appropriate court order</u> ("Anton Piller"), which shall be granted solely in rare and extraordinary cases and upon the existence of the conditions required by law.</p>

The Judgment Given in the Cases that were Addressed in the Court Ruling

In the **Isakov Case**, the National Labor Court granted the employee's appeal and held that the company's entering into the employee's personal correspondence on the computer and electronic mailbox allocated to her for her to use at the workplace, without her informed and willful consent being requested or granted, implicitly or explicitly, constitutes a violation of her privacy. It was further held that the company's entering into the content of the employee's personal e-mail correspondence was not proportionate, unreasonable and did not comply with the Transparency and Legitimacy Principles. Under such circumstances, the company's entry into the employee's personal correspondence in a mailbox that was made available to her was fundamentally invalid, and none of the legal defenses apply.



In the **Afiki Mayim Case**, the National Labor Court denied the employer's appeal and held that the documents that were generated by the employer by entering the employee's external-private electronic mailbox and the private

² The General Collective Agreement regarding Usage of Employer's Computers at the Workplace, that was signed on June 25, 2008, by and between the New General Workers Union (*Histadrut Haovdim Haclalit Hahadasha*) and the Coordinating Bureau of Economic Organizations (*Lishkat Hateum shel Hairgunim Hacalcaliim*).

correspondence therein, cannot be accepted, even if they were generated by a server owned by the employer at the workplace, without actually entering the private electronic mailbox (and even though they were printed on paper and found in the waste paper basket at the employer's offices).

Recommendations

The Court Ruling necessitates an in-depth examination of any existing procedures with regard to the employees' usage of electronic communications in the framework of their employment, and if no such procedures yet exist, procedures should be adopted in accordance with the principles laid down in the Court Ruling.

In any event in which there is a need to enter employees' correspondence on computers allocated to them by the employer, we recommend that you consult us in order to examine the appropriate actions that can be taken in accordance with the rules and guidelines prescribed in the Court Ruling.

Should you have any questions or request any clarifications, please do not hesitate to contact our Labor and Employment Team:

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The information provided in this memorandum is provided solely as general information, and should not be relied upon in any specific case without further legal consultation.

This memorandum, can also be found on our Firm's website – www.shibolet.com – along with our previous Labor Law Client Memoranda