

Need for continued compliance with Surveillance legislation in NSW workplaces

Many NSW companies appear to be unclear about the impact of the Federal Government's WorkChoices legislation on the Workplace Surveillance Act 2005 (NSW), which came into operation, effective 7 October, 2005. The issue is, does WorkChoices displace the Workplace Surveillance Act 2005 (NSW)?

Unfortunately, in the absence of any tribunal decisions on this issue, the law currently remains unclear. While it could be argued that the NSW Workplace Surveillance Act does attempt to deal with issues now covered by WorkChoices, many workplace lawyers feel that there is enough to distinguish the operation of the NSW Act to allow it to remain in force.

Our advice to clients and readers of this ENews is to continue to comply with the requirements of the Workplace Surveillance Act 2005 (NSW) until the issue is tested and a definitive decision reached.

In this context, the following provides a summary of the requirements of the Workplace Surveillance Act 2005 (NSW) - referred hereafter as "the Act", necessary for NSW employers.



What types of surveillance does the Act cover?

Unlike the Workplace Video Surveillance Act 1998 which it replaces, the Act covers not only surveillance by cameras but extends legislative coverage to computers used by staff and also to tracking devices. It needs to be kept in mind that the strict requirements of the Listening Devices Act 1984 remain unchanged by the new Act.

Camera surveillance

Surveillance by cameras that monitor and/or records visual images of activities

Computer surveillance

Surveillance of an employee through monitoring and/or recording the use of a computer, including information inputs and outputs, by means of software or other equipment. Surveillance includes, but is not limited to, the receipt and sending of emails and accessing the Internet and probably includes accessing and printing of stored information.

Tracking surveillance

Surveillance by means of an electronic device designed to monitor or record geographical locations or movement i.e. GPS technology.

When is surveillance lawful?

As a general rule, covert surveillance is prohibited unless it meets certain limited exceptions – see below. Most permissible surveillance in workplaces will be notified surveillance where the employer has taken certain measures to ensure that staff know their activities will be subject to surveillance.

Notified surveillance

General requirements include:

- 14 days written notice prior to the commencement of any surveillance
- Written notice to new staff
- Notice to specify the kind of surveillance to be conducted, how it is conducted, when it commences, whether it is continuous or intermittent and for a limited or ongoing period.

Covert surveillance

This is generally an offence unless carried out under strict conditions to establish whether staff are involved in an unlawful activity. Employers wishing to conduct covert surveillance in their workplace need to obtain prior written authority from a Magistrate.

When is surveillance unlawful?

The Act specifically prohibits any surveillance of change rooms, toilet, bathing or shower facilities or any surveillance when an employee is not “at work”.

What are the limitations on the use and disclosure of surveillance records?

Employers have a legal obligation not to use or disclose surveillance records, whether from notified or covert surveillance, unless it is:

- For the purpose of instituting civil or criminal proceedings;
- To avert an imminent threat of substantial damage to property or serious violence to persons



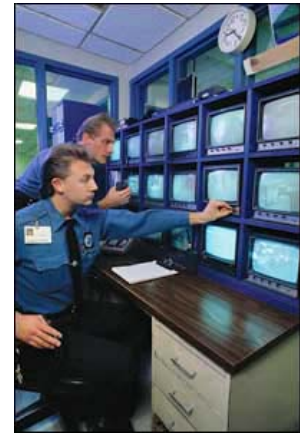
What steps are needed by employers?

To comply Act, employers are urged to take immediate action to avoid the chance of substantial penalties. These include

- Ensure the 14 days notification is given to existing staff
- Give prior notice to new staff of surveillance in the workplace
- Develop or review computer surveillance policies that cover the provisions of the new Act
- Ensure managers and supervisors are properly informed of the requirements of the Act
- Provide detailed briefings to IT and security staff on the new Act

The penalties can be quite substantial for employers failing to fully comply with the Act, and include liability for Directors and senior managers.

In addition, companies not fully complying with the notification requirements for computer surveillance may find it more difficult to take action to prevent the misuse of documents sourced from computers by departing employees.



How we can assist

The Employment Law Specialists can provide on-site briefings for your managers and staff to assist in compliance with the Act. We can also conduct an assessment of your existing policies to bring them up to date with the NSW legislation and prepare documentation to cover off on the notification requirements of the Act.

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