

Important Update - Workplace Surveillance Bill¹



The *Workplace Surveillance Bill* 2005 (NSW) (“the Bill”) was assented to on 23 June 2005 and will commence on a date to be fixed by proclamation.

The Bill:

- prohibits surveillance by employers of their employees at work except by surveillance of which employees have been given notice or surveillance carried out under the authority of a covert surveillance authority issued by a Magistrate for the purpose of determining whether or not an employee is involved in unlawful activity at work;
- restricts and regulates the blocking of emails and internet access of employees at work by employers;
- provides for the issue of covert surveillance authorities by Magistrates and the regulation of the carrying out of surveillance under such an authority and the storage of covert surveillance records; and
- restricts the use and disclosure of covert surveillance records.

The Bill repeals and replaces the *Workplace Video Surveillance Act* 1998 (NSW), which applied only to video surveillance.

Application

The Bill applies to the following types of surveillance:

- camera surveillance;
- computer surveillance; and
- tracking surveillance, being surveillance of the location or movement of an employee.

The Bill applies to surveillance of an employee that is carried out (or caused to be carried out) by the employee’s employer while the employee is at work for the employer. An employee is “at work” for an employer when the employee is:

- at a workplace of the employer (or a related corporation of the employer) whether or not the employee is actually performing work at the time; or
- at any other place while performing work for the employer, or a related corporation of the employer.

Prohibited surveillance

Surveillance of an employee may **only** be undertaken with a least 14 days prior notice to the employee in writing (“overt surveillance”). The Bill does, however, prohibit **all** surveillance by an employer of an employee:

- in a change room, toilet facility or shower or other bathing facility at a workplace; and
- when not at work, by means of a device used for surveillance of the employee at work (except computer surveillance) of the use by the employee of equipment or resources provided by or at the expense of the employer.

¹ Based on the text of the *Workplace Surveillance Bill* 2005 (NSW) and the NSW Parliament Legislation Review Digest 6 of 2005 (23 May 2005)

Any notice of overt surveillance that is given to an employee by the employer must state:

- the kind of surveillance to be carried out;
- how the surveillance will be carried out;
- when the surveillance will start;
- whether the surveillance will be continuous or intermittent; and
- whether the surveillance will be for a specified limited period or on an ongoing basis.

The Bill also prohibits the blocking of emails sent to or by an employee and internet access by an employee unless:

- the employer is acting in accordance with the employer's email and internet access policy as notified to the employee; and
- the employee is notified as soon as practicable that an email has been blocked.

The above provisions do not apply to spam or menacing or offensive emails, and a maximum penalty of 50 penalty units (currently \$5,500) applies for a breach of the provisions.

Covert surveillance

The Bill prohibits the covert surveillance by employers of employees at work **except** as authorised by a covert surveillance authority, which may authorise the covert surveillance of employees for the purpose of establishing whether or not an employee is involved in any unlawful activity at work.

Any covert surveillance that is carried out by an employer must be overseen by a surveillance supervisor for the authority, being a person named in the authority as a person who is to be responsible for the oversight of the conduct of the covert surveillance authorised by the authority.

A covert surveillance authority does not authorise the carrying out (or causing to be carried out) of covert surveillance of any employee:

- for the purpose of monitoring the employee's work performance; or
- in any change room, toilet facility or shower or other bathing facility.

Covert surveillance authorities

The Bill provides for the making of an application to a Magistrate for a covert surveillance authority. In issuing such an authority, a Magistrate must:

- find that reasonable grounds exist to justify the issue of the authority;
- have regard to whether the covert surveillance might unduly intrude on the privacy of employees or any other person; and
- designate one or more surveillance supervisors to oversee the conduct of surveillance operations under the authority.

Contravention of a condition of a covert surveillance authority is an offence with a maximum penalty of 50 penalty units (currently \$5,500).

Covert surveillance records

The Bill also imposes restrictions on the storage of covert surveillance records to ensure that they are protected against loss or unauthorised access or use.

The Bill also imposes restrictions on the use and disclosure of covert surveillance records for irrelevant purposes. Relevant purposes will include:



- to establish whether an employee is involved in unlawful activity while at work for the employer;
- to take disciplinary action or legal action against an employee as a consequence of alleged unlawful activity while at work for the employer;
- to establish security arrangements or take other measures to prevent or minimise the opportunity for unlawful activity while at work for the employer of a kind identified by the surveillance record to occur while at work for the employer;
- to avert an imminent threat of serious violence to persons or of substantial damage to property;
- to disclose to a law enforcement agency for use in connection with the detection, investigation or prosecution of an offence; and
- for purposes related to the taking of proceedings for an offence or for taking any other action required or authorised under the Bill.

Offences by corporations

The Bill provides that if a corporation contravenes any provision of the ensuing Act or Regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention. Such a person may also be proceeded against and convicted whether or not the corporation has been proceeded against or convicted.

Recommendation

It is strongly recommended that employers review any workplace email and internet policies to ensure compliance with the provisions of the ensuing Act and any Regulations. In particular such policies will need to contain provision that overt surveillance is properly notified to employees in accordance with the legislation.

Employers should also ensure that all employees are provided with a copy of the workplace email and internet policies and return a signed copy to the employer.

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