

WORKPLACE SURVEILLANCE

In some situations, an employer may find it necessary to conduct covert or overt surveillance of employees, particularly where the employer has reason to question an employee's honesty or loyalty.

Employers have a variety of surveillance options, including the use of GPS systems in company vehicles, the monitoring of email and internet use, accessing data in smart phones, video camera surveillance and phone recording. However, an employer's right to access that information (at least in NSW) is limited by workplace surveillance legislation.

Workplace Surveillance Act 2005 (NSW)

The Workplace Surveillance Act (the Act) prescribes the way in which employers can legitimately use camera, computer and tracking surveillance, to monitor an employee whilst they are at work.

However, the law appears to have fallen behind technology in regulating electronic surveillance. The 'computer surveillance' requirements under the Act can be extended to have particular relevance for employers who wish to access information on an employee's smart phone.

Policy & Notice

Workplace surveillance can only commence once employees have received proper notification or their employer has obtained Court approval to conduct covert surveillance.

Computer surveillance can only be carried out in accordance with a policy of the employer on computer surveillance of employees at work, and employees must be notified in advance of that policy in such a way that it is reasonable to assume that the employee is aware of and understands the policy.

Under section 10(4) of the Act, a written notice must be given to employees 14 days prior to the commencement of any surveillance or prior to the commencement date of a new employee. The notice must indicate:

- 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 ongoing.

AUSTRALIA / NEW ZEALAND / JAPAN

Basically, *unless an employer has complied with the notification requirements, it is not entitled to conduct surveillance of an employee's smart phone.*

Penalties for Breach

All casual, temporary, agency workers, and volunteers need to be informed of the employer's email and internet usage policy to avoid any penalties which may arise from conducting surveillance without effective notice.

In the event of non-compliance, employers may be exposed to civil penalties under the Act, and may also find it more difficult to use any information obtained as evidence in a court or commission (for example, in the defence of an unfair dismissal).

Tips

- Ensure that all employees are given the appropriate notification of the surveillance that will occur.
- Develop and maintain an appropriate policy on workplace surveillance that explains the type and nature of the workplace surveillance.
- Ensure its surveillance policy is developed in conjunction with the employers IT usage and Social Media policies that deals with appropriate smart phone and social media usage.
- Provide employees with appropriate training in relation to its policies, and ensure employees understand them.

AUSTRALIA / NEW ZEALAND / JAPAN

Liability limited by a scheme approved under Professional Standards Legislation
Level 9, Dymocks Building, 428 George Street, Sydney NSW 2000
GPO Box 2577, Sydney NSW 2001
Tel (02) 9221 7555 Fax (02) 9221 7230
E-mail: legal.one@advantagepartnership.net
Web: www.advantagepartnership.net