

Employment Update

New NSW Workplace Surveillance Act - Worth a Look

1 November 2005

From 7 October 2005 employers in New South Wales have been subject to additional obligations in relation to workplace surveillance of employees.

The *Workplace Surveillance Act 2005 (NSW)* has repealed and replaced the *Workplace Video Surveillance Act 1994 (NSW)* and, as the difference in the titles of the two Acts suggest, the new Act is broader in its reach than the 1994 Act.

The main change is that the legislature has now caught up with the fact that, nowadays, the use of computers (particularly email) seems to have overtaken the use of telephones and faxes as the workplace communications method of choice.

While the old Workplace Video Surveillance Act was concerned only with video surveillance (either covert or overt) of workplaces, the new Act covers not only video surveillance but also:-

- n surveillance of employees' computer use at work; and
- n tracking surveillance of employees' movements (eg satellite tracking of vehicles) while working.

[Telephone surveillance is of course separately regulated by Federal and State statutes, and has been so for many years.]

The new Act only applies to New South Wales but of course computer communication is not restricted by State borders, so an employer who has computer sites outside New South Wales has to assume that if it undertakes surveillance of a person's email from a site in New South Wales then the Act would apply, even if the employee concerned is outside of New South Wales.

Major Aspects of the Act

The following is a very brief outline summary of the major aspects of the new Act.

First, if an employer wishes to undertake covert surveillance of employees in the workplace then the employer has to apply for and obtain a permit to do so from a Magistrate. That aspect of the new Act is in substance the same as the old Act, but now of course the requirement for a permit extends not only to video surveillance but also to computer surveillance and tracking system surveillance.

Secondly, if an employer wishes to undertake surveillance of employees in the workplace without first obtaining a judicial permit (ie "overt surveillance"), then the employer has to do the following:-

- n the employee(s) must be given prior written notice of the surveillance to be undertaken (which is either 14 days notice, or an agreed lesser period for existing employees, and prior to commencement of employment for new employees);
- n the notice must indicate the kind of surveillance to be carried out (camera, computer tracking);
- n the notice must also indicate how the surveillance will be carried out;
- n the notice will also need to say when the surveillance will start, whether it will be continuous or intermittent, and whether the surveillance will be for a specified period or ongoing.

[Aptly for this day and age, the written notice may be given by email.]

There are additional requirements for overt surveillance: cameras and signs at entrances to the subject areas must be visible to employees; computer surveillance must be carried out in accordance with a policy published to affected employees; a vehicle or thing subject to tracking surveillance must be fitted with a clearly visible notice that tracking will take place.

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Thirdly, an employer must not prevent an employee emailing to or receiving email from a site outside the workplace unless the employer has a policy notified in advance to employees that advises of the blocking of emails that will occur and which requires the employer to notify an employee that delivery of a particular email has been prevented. Blocking of access to, or the receipt of emails from, trade union sites and sites dealing with industrial matters is however not permitted.

Fourthly, the Act prohibits the surveillance of employees (whether overt or covert) in a toilet, change room or shower/bathing facility at work.

Finally, an employer cannot undertake surveillance of an employee when not at work, unless using equipment supplied by or at the expense of the employer.

What Should Employers Do?

Check your practices and policies on surveillance, particularly computer surveillance, to ensure that they are compliant with the new Act. Make sure that employees are aware that surveillance of their computer use is being undertaken, and in that regard ensure that notice is given to employees in accordance with the requirements of the Act in relation to blocking of emails.

Until 7 October 2005, regulation of employee use of computers, emails and the internet while at work was very uncertain. Nowadays employees are apt to treat email or the internet as being something like a private telephone call - so employers now have to make sure that they disabuse employees of that notion, otherwise real problems, including possible penalties on the employer, might follow.

If in doubt, do not hesitate to contact any of the members of the Carroll & O'Dea Employment & Industrial Law Team for specific advice on your situation.

Work Choices Legislation on the Way

At the time of publishing this e-Bulletin the Federal Government is about to introduce into the Federal Parliament its "WorkChoices legislation", which will constitute the greatest change in employment and industrial law in this country for over 100 years. That is, we can assure you, no exaggeration whatsoever.

A Work Choices booklet has been distributed by the Commonwealth Government but it is a mere general introduction, so it is not possible to fully advise clients about what the new legislation will mean for them until the legislation has actually been finalised and passed by the Parliament.

Carroll & O'Dea's Employment & Industrial Team is studying the legislation for the purpose of being able to advise all our clients on what it means for each and every one of them (as it may mean different things for different employers - there is not going to be a "one size fits all" situation). Once the legislation has been bedded down we will be arranging private client briefings to which you will all be invited.

In the meantime if you have any particular queries or enquiries please do not hesitate to contact any of the members of the Carroll & O'Dea Employment & Industrial Team, but particularly Peter Punch or Mick Sheils. In the meantime we suggest that you not make any plans as to changes in your existing employment and industrial relations arrangements until you have had an opportunity to get our specialist advice as to what is the best course for you to adopt. n

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