

A Short Guide to the Workplace Surveillance Act 2005 (NSW)

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Generally, the *Workplace Surveillance Act 2005*:

- prohibits the surveillance by employers of their employees at work except where employees have been given notice or where the employer has a covert surveillance authority. The notice requirements are outlined below. Covert surveillance authorities can only be issued by a Magistrate for the purpose of establishing whether or not an employee is involved in any unlawful activity at work;
- applies to camera surveillance, computer surveillance (surveillance of the input, output or other use of a computer by an employee) and tracking surveillance (surveillance by means of an electronic device the primary purpose of which is to monitor or record geographical location or movement);
- extends beyond the workplace to any place where an employee is working;
- prohibits surveillance in a change room, toilet facility or shower or other bathing facility at a workplace;
- restricts and regulates the blocking by employers of emails and Internet access of employees at work. In particular it prevents employers from blocking access to emails or Internet sites because the content relates to industrial matters;
- provides for the issue of covert surveillance authorities by Magistrates and regulates the carrying out of surveillance under a covert surveillance authority and the storage of covert surveillance records;
- restricts the use and disclosure of covert surveillance records;
- repeals and replaces the *Workplace Video Surveillance Act 1998*, which applied only to video (i.e. camera) surveillance.

General notice requirements

Written (or emailed) notice must be given at least 14 days prior to any surveillance commencing, indicating the kind of surveillance to be carried out (camera, computer or tracking), 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. For new employees notification must be given before they start work.

Additional camera/video surveillance notice requirements

Cameras used for the surveillance (or camera casings or other equipment that would generally indicate the presence of a camera) must be clearly visible in the place where the surveillance is taking place. Signs must also notify people that they may be under surveillance in that place and must be clearly visible at each entrance to that place. These mirror the requirements under the *Workplace Video Surveillance Act 1998*.

Additional tracking surveillance notice requirements

There must be a notice clearly visible on the vehicle or other thing that is being tracked, indicating that the vehicle or thing is the subject of tracking surveillance.

Additional computer surveillance notice requirements

Notification: Computer/Internet/email surveillance of an employee must not be carried out unless the surveillance is carried out in accordance with a policy of the employer on computer surveillance of employees at work. The employee must be notified in advance of that policy in such a way that it is reasonable to assume that he or she is aware of and understands the policy. The notification requirements are flexible so that employers can meet them in different ways.

It is not true that the Act prevents or even significantly restricts employers from conducting email and internet surveillance. All the Act requires is that notice of surveillance must be given.

Monitoring and recording: It is also not true that all monitoring or recording of the use of a computer is 'computer surveillance'. The Act requires there to be 'surveillance', as that term is ordinarily understood. Computer surveillance therefore does not cover normal business practices such as back-ups of hard drives, network performance monitoring, software licence monitoring, computer asset tracking, computer asset management or the normal saving of documents, because these are not normally considered to be "surveillance" activities. However, if back-ups, for instance, were to be used to conduct surveillance to facilitate the reading of somebody's emails, that would need to be notified to employees, otherwise it would be considered to be covert surveillance.

This is a common sense approach to the issue of computer surveillance. There are obviously many functions of a computer that require the recording of activities. Only surveillance activities, such as reading emails, or watching every web site a person goes to, or logging individual keystrokes, or covert observation of everything an employee does on their machine, require notification.

Emails: The Act also places restrictions on the blocking of emails. Employers will be required to give notice to an employee on any occasion when an e-mail message sent by or to the employee is blocked (that is, prevented from reaching its intended recipient). Such notice is not required if the email has been blocked because it was spam, contained a virus, or would be regarded by reasonable persons as being, in all the circumstances, menacing, harassing or offensive (for example, if it is pornography or involved criminal activity or was otherwise unlawful). It will be unlawful for an employer to block an e-mail message, or access to a website:

- otherwise than in accordance with the employer's stated policy on e-mail and internet use; or
- merely because the message or website includes information relating to industrial matters.

Internet access: It is not the case that the provisions in relation to access to information relating to industrial matters will require employers to provide Internet access to employees. Nor will the Act prevent employers from blocking all external Internet access, where previously they allowed such access, unless they do so to prevent their employees obtaining access to industrial information. There may be legitimate business reasons, such as cost considerations, for an employer to not have external Internet access.

The Short Guide was developed by the Legislation and Policy Division of the NSW Attorney General's Department, who are responsible for administering the Act.

Workplace Surveillance Act 2005: www.legislation.nsw.gov.au/fullhtml/inforce/act+47+2005+FIRST+0+N

Workplace Surveillance Regulation 2005: www.legislation.nsw.gov.au/fullhtml/inforce/subordleg+567+2005+FIRST+0+N