

Employment & Safety May 2011

ACT introduces workplace surveillance legislation

The ACT has introduced the *Workplace Privacy Act 2011* (ACT) (**WPA**) to regulate the surveillance of employees in the workplace. The law came into effect on 10 March 2011, with Parts 3 and 4 (Notified and Covert Surveillance) only becoming operational on 24 August 2011. All employers who have employees working in the ACT must be aware of this new law. Employers who have employees working in the ACT will need to modify their existing workplace surveillance policies and procedures to ensure that they conform with these new requirements. In particular, there are significant differences between the WPA and the laws governing workplace surveillance in other States and Territories.

Broad coverage

The WPA applies to any 'worker' – defined as an individual who carries out work in relation to a business or undertaking, whether for reward or otherwise, under an arrangement with the person conducting the business or undertaking. This includes, but is not limited to:

- employees
- independent contractors
- outworkers
- persons doing a work experience placement, and
- volunteers.

The WPA also contains a broad prohibition on certain types of surveillance, particularly surveillance in:

- change rooms
- toilet or bathing facilities
- parent or nursing rooms
- prayer rooms

- sick bays, and
- first-aid rooms.

Notification of surveillance

Under the WPA, employers are required to consult with workers in good faith about proposed workplace surveillance. Consultation in good faith occurs if an employer gives a worker a genuine opportunity to influence the conduct of the surveillance. This is the first such law in Australia that includes an obligation to consult with employees.

Other laws do require notice to be given to employees about surveillance. For example, in NSW the *Workplace Surveillance Act 2005* (NSW) requires employers to give prior notice in writing to employees about workplace surveillance. This notice must be given at least 14 days before the surveillance commences or before an employee commences employment, and must indicate:

- 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.

The WPA introduces more detailed obligations to notify employees before surveillance is to take place, including an obligation to notify employees:

- about who will regularly or ordinarily be the subject of the surveillance

- of the purpose for which the employer may use and disclose surveillance records of the surveillance, and
- that the worker may consult with the employer about the conduct of the surveillance.

In addition, the WPA stipulates that an employer's surveillance policy dealing with data surveillance devices must include:

- how the employer's computer resources may, and must not, be used
- what information about the use of the employer's computer resources is logged and who may access the logged information, and
- how the employer may monitor and audit a worker's compliance with the policy.

It is an offence for an employer to fail to notify workers about workplace surveillance in accordance with the WPA.

Surveillance records

The WPA imposes significant responsibilities on employers to ensure that surveillance records are properly managed and not misused. Some of these responsibilities are similar to the obligations imposed by the National Privacy Principles (under the federal *Privacy Act*) in relation to personal information.

Under the WPA, it is an offence for an employer to use a surveillance record to take adverse action against a worker. (The term 'adverse action' is defined in the *Fair Work Act 2009* (Cth) and includes dismissing an employee or subjecting him/her to other detriment in the context of the employment.) However, this prohibition does not apply if the notice of surveillance given to the worker

stated that the employer may use the surveillance to take adverse action against the worker.

An employer must, on the written request of a worker, allow a worker to have access to surveillance records of notified surveillance. If an employer denies this access, then the employer cannot use the records:

- in legal proceedings between the employer and the worker, or
- to take adverse action against the worker.

The WPA provides grounds for an employer to refuse access, including if:

- it would cause an unreasonable impact on the privacy of individuals
- the request for access is frivolous or vexatious, or
- allowing access would be likely to prejudice an investigation of possible unlawful activity.

It is also an offence for an employer to fail to take reasonable steps to protect surveillance records it holds from misuse, loss, unauthorised access, modification or disclosure. This includes if an employer fails to take reasonable steps to destroy or permanently de-identify surveillance records which are no longer needed for any purpose for which the record may be used or disclosed under the WPA.

All employers who employ persons in the ACT will need to introduce appropriate procedures to comply with this new law and to amend their existing workplace surveillance policies to ensure that they comply with this new law. Please contact us now if you would like advice concerning the impact of this new law on your business.

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