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## Guide to the Workplace Video Surveillance Act

# A Guide to the Workplace Video Surveillance Act 1998 (NSW)

Privacy NSW

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#### The Workplace Video Surveillance Act 1998

The Workplace Video Surveillance Act 1998 attempts to balance the rights of employees and employers in relation to workplace video surveillance. Under the Act employees have their privacy

in the workplace protected to some degree while employers are given the right to use video surveillance to prevent theft and other illegal activities occurring on their premises.

This document is intended as a guide only. It is not a substitute for legal advice.

### **Coverage of the Act**

The Act is limited in its application in a number of ways. It applies only to covert video surveillance of employees (not contractors) by an employer within a workplace. The Act is not intended to cover covert surveillance by law enforcement agencies Section 7(2).

The extent of some of these limitations is outlined below.

### **Covert or overt video surveillance?**

The Act is directed at covert video surveillance or surveillance by hidden cameras. However, even cameras that are clearly visible may be considered hidden in a number of cases. The Act applies a three part test to decide whether or not a camera is 'covert'. If any one of the three elements is missing then the cameras are considered to be covert. The three questions to ask are:

- Can the cameras or their housing (eg. black plastic domes) be clearly seen Section 4(1)(b)?
- Are there signs present at every entrance to the workplace informing people that they will be under video surveillance Section 4(1)(c)?
- Have all employees been notified in writing of the purpose and coverage of the video surveillance at least 14 days prior to the installation of the cameras Section 4(1)(a)?

If the answer to all of the above questions is "yes" then the video surveillance is not affected by the Act. The surveillance is considered to be 'overt' and should be conducted in accordance with the Department of Industrial Relations' *Code of Practice for the use of Overt Video Surveillance in the Workplace* (see Appendix 1).

However if any one of the three questions on page 1 is answered with a "no" then the Act probably applies, and a covert surveillance permit is necessary. However see s.4(2), which allows an exception to this rule; video surveillance will not be considered 'covert' if the surveillance is used for a purpose other than the surveillance of employees, and the employees have agreed to such a use. For example, staff may agree to the use of security cameras to protect staff or premises.

### **Overt video surveillance - employers' obligations**

As noted above, overt video surveillance should be conducted in accordance with the Department of Industrial Relations' *Code of Practice for the use of Overt Video Surveillance in the Workplace* (see Appendix 1).

The broad definition of covert surveillance means that any employer who uses video cameras on a day to day basis in a workplace will need to ensure that signs are placed at every entrance to the workplace and that all employees are notified in writing about the surveillance. Employers will also need to ensure that all cameras are clearly visible. Failure to do these things can be a breach of the Act and expose an employer to a criminal charge.

### **Is the surveillance occurring in a workplace?**

The Act defines workplace as "premises, or any other place, where persons work, or any part of such premises or place" Section 3. This clearly covers many places that would not normally be thought of as a workplace, for example shops (shop employees), public streets (council employees such as street cleaners), inside many vehicles (eg delivery drivers, taxis, couriers, bus drivers and inspectors), and outside buildings (security guards and maintenance personnel).

In other words most places where an employer places a camera will probably be a workplace for at least some employees and so all employers should be aware of the requirements of the Act.

### **Is the employer carrying out the surveillance?**

The Act covers cases where the employer actually carries out the surveillance and also cases where the employer "causes" covert surveillance to be carried out in the workplace Section 7(1). This would clearly cover cases where an employer carried out the surveillance or paid a person to carry out the surveillance. It is not so clear whether the Act would cover cases where an employer merely allowed a third party, such as the media, to film an employee covertly.

However, given that the Act is designed to prevent covert surveillance of employees except in a limited number of clearly defined situations, it is possible that allowing a third party to film will be seen as causing the surveillance to take place. Employers should be aware of section 33 of the Interpretation Act 1987 which directs courts to interpret ambiguous sections in a way that is consistent with the purposes of the Act. In this case the purpose of the Act is to prevent

unauthorised covert surveillance in the workplace..

## **Employers' Obligations**

### **When can an employer use covert video surveillance in the workplace?**

If an employer wishes to use covert video surveillance there are a number of requirements that must be observed:

- it must be used only to detect whether an employee is engaged in an unlawful activity in the workplace Section 7(1)(a). It is not allowed to be used to check whether an employee is present or is doing his or her job properly, or for other monitoring purposes;
- the employer must obtain a covert surveillance authority from a Magistrate approving the covert surveillance Section 7(1)(b);
- the surveillance must be carried out in accordance with the terms of the covert surveillance authority Section 18;
- the surveillance must not continue for more than 30 days Section 16;
- the covert surveillance must not take place in a change room, toilet, shower or bathing facility Section 9(3)(b); and
- the surveillance must be overseen by a nominated licensed security operator Section 9(2)(a). Licensed security operator is defined at s.3 to be "a person holding a Class 1 licence issued under the Security (Protection) Industry Act 1985 or a licence of a corresponding kind issued under any Act that replaces that Act". The Security (Protection) Industry Act 1985 has since been replaced by the Security Industry Act 1997. Under s.11(1) of that Act, a Class 1A licence authorises the licensee to "patrol, guard, watch or protect property ... ". The requirements for obtaining and operating under such a licence are set out in that Act; for example, holders of Class 1A licences must be employed by a person holding a 'master licence' issued under that Act. .

Employers are strongly advised to contract a licensed security operator to set up and conduct any covert video surveillance.

After the covert surveillance has taken place employers have a number of further obligations:

- the employer must not use the recording for an irrelevant purpose (that is one unrelated to legal action, disciplinary action or amending security procedures as a result of the illegal activity) Section 8;
- the employer must ensure that any recordings within his or her control are protected against loss, unauthorised access or use. (One precaution that could be taken is for an employer to erase all recordings as soon as they cease to be of use in relation to disciplinary or legal action);
- the employer also has a duty to report back in writing to the Magistrate issuing the authority, within 30 days of its expiry, the results of the surveillance Section 23; and
- if the employer proposes to take any detrimental action against an employee as a result of the covert surveillance, then that employer should provide the employee or the employee's lawyer with reasonable access to the recording Section 17(1)(d).

### **What are the obligations on the nominated licensed security operator?**

Apart from placing obligations on the employer, the Act and Regulation also place a number of obligations on the nominated licensed security operator. These can be summarised as follows:

- the security operator can supply to the employer only those parts of the tape that are relevant in proving that the employee was engaged in an illegal activity Section 17(1)(b);
- the operator is not allowed to give the tapes to any other person Section 17(1)(a);
- the security operator must ensure that any recordings within his or her control are protected against loss, unauthorised access or use Section ; and
- the operator must erase or destroy, within 3 months, all parts of the tape that are not required for evidentiary purposes Section 17(1)(c).

### **How does an employer obtain a covert surveillance authority?**

When an employer wishes to obtain a covert surveillance authority, either they or their nominated security operator needs to complete Form 1 (found in the Workplace Video Surveillance Regulation 1999) and apply to a Magistrate.

The form needs to address several matters, including:

- why the employer believes that one or more employees are engaged in an illegal activity within the workplace Section 10(2)(a);
- other managerial or investigative techniques that have been tried to detect the activity Section 10(2)(b);

- who and what will be seen by the cameras Section 10(2)(c);
- when the surveillance is planned to take place Section 10(2)(d); and
- the names of the licensed security operatives who will oversee the surveillance Section 10(3).

If the application to the Magistrate is made by the nominated security operative then that person will also need to provide evidence that the employer has authorised them to undertake the surveillance Section 10(2)(e).

In all cases the evidence supporting the application will need to be given to the Magistrate under oath or affirmation or in the form of an affidavit Section 10(4). Providing misleading or false information in relation to an application can lead to a serious penalty being imposed Section 11.

The Magistrate must then weigh up the evidence provided by the employer against the privacy expectations of employees and other people who may be filmed Section 14 and reach a decision whether to issue the authority or not. Employers have a right to appeal the decision Section 25 and have it reviewed by a judicial member of the Industrial Relations Commission.

## **Employees' Rights**

### **Can employees ask the Magistrate to stop the authority?**

Yes. But most employees will not know that the authority has been asked for or granted. If they do find out and want it stopped, they must apply to the Magistrate within 30 days of the authority being issued although there is provision for this time to be extended if applicable.

### **What happens if an employer unlawfully places employees under video surveillance?**

If an employer covertly films employees without a covert surveillance permit Section 7, or if the employer or nominated licensed security operator breach the terms of the covert surveillance authority Section 18, then they may be committing a criminal offence. If employees believe this to be the case then they should contact the Police.

### **Do employees have any other options if they are unhappy about surveillance in their workplace?**

Section 6(2)(j) of the Industrial Relations Act 1996 makes any surveillance of employees an industrial issue under that Act. As such employees may want to seek the intervention of their Union in disputes about workplace surveillance. The Industrial Relations Commission of NSW is empowered to make determinations in this area if necessary. Concerns about workplace surveillance can also be raised with the Privacy Commissioner of NSW.

## **The Role of the Privacy Commissioner**

Privacy NSW is the office of the NSW Privacy Commissioner. Privacy NSW was established in 1999 when parts of the *Privacy and Personal Information Protection Act 1998* came into effect. The role of Privacy NSW is to educate people about privacy issues and ensure that the people of NSW have their privacy rights respected.

Privacy NSW also has the power to receive, investigate and conciliate complaints about privacy related matters. However the Privacy Commissioner has no power to make binding orders on any party.

### **Where can I get more information, or make a complaint about covert or overt video surveillance?**

If you wish to obtain further advice on the Act or if you wish to make a complaint about any workplace surveillance issue then you should contact Privacy NSW.

Phone: **9268 5588**

Fax: **9268 5501**

Mail: **PO Box A2122**

**Sydney South NSW 1235**

e-mail **privacy\_nsw@agd.nsw.gov.au**

*(Please note that Privacy NSW does not receive complaints by e-mail)*

The Privacy Commissioner also has a website that contains useful information about privacy, this can be accessed at:

[www.lawlink.nsw.gov.au/pc](http://www.lawlink.nsw.gov.au/pc)

**Appendix 1 - Overt Surveillance Code**  
**NSW Department of Industrial Relations**  
**Code of Practice for the use of Overt Video Surveillance in the Workplace**

This Code establishes principles and standards of behaviour for employers and employees in New South Wales about the use of non-covert video surveillance cameras in the workplace.

The Code was considered by the Working Party on Video Surveillance in the Workplace which was established in March 1996 by the Attorney General and Minister for Industrial Relations, The Hon. J.W. Shaw AC MLC. The following members of the Working Party adopted this Code : The Labour Council of NSW; The Australian Liquor, Hospitality & Miscellaneous Workers Union; Miscellaneous Workers Division; The Australian Chamber of Manufactures - NSW Branch; the Retail Traders Association of NSW; The Australian Liquor, Hospitality & Miscellaneous Workers Union - Liquor and Hospitality Division; the Registered Clubs Association of NSW and the National Union of Workers.

***What is overt video surveillance?***

The use of video cameras in the workplace should be regarded as overt video surveillance if :

- a) employees have been notified in writing at a reasonable period of time before the video cameras are used;
- b) the video cameras are clearly visible to a person in the area which is under surveillance; and
- c) there are signs which are visible to both employees and visitors such as customers, which notify those persons that they may be under surveillance in an area.

***Overt video surveillance should not be used in certain areas***

Overt video cameras should not be installed or used in toilets, showers, change rooms or locker rooms which are located within a workplace.

***Employees should be notified before the use of overt video surveillance***

At a reasonable period of time before the use of overt surveillance, notice should be given to employees in the following ways:

- a) written notices, together with at least one copy of this Code, should be displayed in conspicuous places within the workplace where notice to employees are customarily posted, and
- b) written notices should be given to each individual employees working in the area intended to be under surveillance

This prior notice to employees should contain the following information:

- a) the area(s) in which the surveillance is to be conducted;
- b) the specific purpose(s) for the surveillance; and
- c) the person(s) or designated position(s) within the organisation who is/are responsible for the conduct of the surveillance.

***Employers should consult their employees before installing and using overt video surveillance equipment***

Employers should consult with employees and/or their representatives if they are planning to install video surveillance equipment. This consultative process should give individual employees the opportunity to comment on :

- a) the purposes(s) for the installation of surveillance equipment;
- b) the nature and capacities of the equipment being installed;

- c) the hours in which cameras will be operated (this requirement is only necessary if the purpose of the surveillance is to protect employee safety and security or otherwise to redress occupational health and safety risks);
- d) the circumstances in which the video tape recordings will be used;
- e) the mechanisms for ongoing consultation regarding the use of video surveillance equipment; and
- f) how any disputes arising from the use of video surveillance will be settled.

All employees who are affected by overt video surveillance should be provided with a written statement of employer policies, procedures, and purposes of the surveillance. They should also be made aware of and given access to a copy of this Code.

***Signs should be displayed***

Conspicuous signs should be displayed while an overt video surveillance operation is being conducted. These signs should inform employees and members of the public that:

"This area is under video surveillance".

This information should be in a language(s) which all employees can understand having regard to the composition of the workforce.

***The location and hours of use of surveillance cameras should be restricted***

Video cameras should only be installed in areas and be operated during the hours which have been the subject of prior consultation in accordance with this Code (see section 4 above).

***Overt video surveillance should be used in an ethical manner***

Surveillance cameras should be operated ethically. Cameras should not be used to zoom in on individuals or pry on a person's activities without cause. Employers should take responsibility to ensure that appropriate disciplinary action is taken if camera operators are found to be conducting surveillance in an inappropriate or unethical manner.

***Access to video tapes should be restricted***

Access to video tapes by persons other than those whose actions are recorded on those tapes should be restricted to individuals who are nominated personnel on the security staff and/or individuals in senior management. These individuals should only use the tapes for the original purpose of the surveillance operation. Instances of access to the tapes by persons other than the nominated individuals, including the purpose of such access, should be documented. Individual employees should be entitled to access tapes which record their actions in the workplace.

***The retention of tapes should be restricted***

Tapes may be kept for a reasonable predetermined time, for example seven days, after which time they should be erased or destroyed. The reasonable predetermined time may be extended subject to consultation with employees.

***External access to tapes should be restricted***

Parties external to the workplace should not have access to tape recordings unless that access is authorised by law, by this Code, or is necessary for the purposes of legal proceedings. The employer's or employees' agents for the purposes of the conduct of video surveillance are exempt from this provision.

***Employees should have a right to view tapes***

If an incident is viewed and as a result, an employee is the subject of a warning, or any form of disciplinary proceedings (including legal action), a videotape of the incident or incidents should be made available to the employee or the employee's representative within fourteen days of the warning, commencement of disciplinary proceedings, or legal action.

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