

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
Clare Fletcher at Slaughter and May

07. What data protection or other regulations apply when gathering physical evidence?

Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*
at People + Culture Strategies

As part of an investigation, the investigator may want to collect evidence such as camera footage from CCTV, swipe card records, computer records, telephone records or recordings and GPS tracking. There are state-based workplace surveillance laws that operate in each jurisdiction in Australia. The laws recognise that employers are justified in monitoring workplaces for proper purposes, but this is balanced against employees' reasonable expectations of privacy.

The Privacy Act 1988 (Cth) (Privacy Act) also regulates how certain organisations handle personal information, sensitive personal information and employee records. The Privacy Act contains 13 privacy principles that regulate the collection and management of information. Employers should familiarise themselves with the privacy principles before conducting any investigation to ensure they are not in breach when gathering evidence.

Last updated on 15/09/2022

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The Swiss Federal Act on Data Protection applies to the gathering of evidence, in particular such collection must be lawful, transparent, reasonable and in good faith, and data security must be preserved.^[1]

It can be derived from the duty to [disclose and hand over benefits received and work produced](#) (article 321b, Swiss Code of Obligations) as they belong to the employer.^[2] The employer is, therefore, generally entitled to collect and process data connected with the end product of any work completely by an employee and associated with their business. However, it is prohibited by the Swiss Criminal Code to open a sealed document or consignment to gain knowledge of its contents without being authorised to do so (article 179 et seq, Swiss Criminal Code). Anyone who disseminates or makes use of information of which he or she has obtained knowledge by opening a sealed document or mailing not intended for him or her

may become criminally liable (article 179 paragraph 1, Swiss Criminal Code).

It is advisable to state in internal regulations that the workplace might be searched as part of an internal investigation and in compliance with all applicable data protection rules if this is necessary as part of the investigation.

[1] Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 52.

[2] Claudia Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 148.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

Documents and instruments that set out a company's policies (eg, employee handbooks, code of conduct or other written guidelines) often contain provisions regarding employee data and document collection, workplace searches, communication monitoring, privacy, and confidentiality. As discussed below, state and federal constitutional, statutory and common law – and in some cases foreign data privacy regimes – may provide additional protections to protect employees from an unwarranted or unreasonable invasion of privacy during an internal investigation.

Last updated on 15/09/2022

Contributors



Australia

Joydeep Hor
Kirryn West James
Chris Oliver
People + Culture Strategies



Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer



United States

Rachel G. Skaistis
Eric W. Hilfers
Jenny X. Zhang
Cravath, Swaine & Moore

