National Protective Security Authority

SUMMARY BY REGION

Employee Monitoring Law: Then, Now and the Future

Europe – key points

- The most stringent restrictions on employee monitoring arise from jurisdictions in Europe;
- Monitoring needs to be fair, transparent, proportionate and have a specified purpose;
- GDPR implements even stronger and more uniform requirements;
- Cases focus on how clear an employer's policy is, the business need for the monitoring, the proportionality in relation to the risk posed, and the severity of the conduct in question;
- There are varying approaches to admissibility of evidence improperly obtained by employers:
    - France has been more strict in excluding such evidence;
    - Belgium and the UK have been more lenient, provided the evidence is relevant to the proceedings and there is no public policy reason to exclude the evidence.
- There is an increased willingness by the European Court of Human Rights (ECtHR) to defend privacy rights in the context of the workplace. Respect for private life and correspondence continue to exist in the workplace, even if restricted so far as necessary.

North America – key points

- The US has no comprehensive federal privacy regime, but there are pockets of legislation (for example, relating to health data), and more liberal states have introduced regulations. Additionally, in relation to EU data subjects, the US must comply with the Privacy Shield Framework.
- The National Labor Relations Board (NLRB) has taken the position that employee's negative comments about the workplace may be protected under 'concerted activity' speech, including when it is on social media. This employee protection is beyond that which has been permitted in most other countries around the world.
- All US states (except for Alabama and South Dakota) have adopted data security breach notification laws, implying that levels of monitoring should allow for adequate incident response.
- More states are increasingly (currently 30) prohibiting inquiries into a potential employee's criminal convictions prior to an offer of employment being extended.
- Canada has detailed federal legislation in relation to the protection of personal information in trade and commercial activities. This incorporates ten principles in relation to the collection, use, retention, disclosure and access to personal information.
- Canada appears to have applied the law relating to monitoring and surveillance in a similar way to the courts in Europe. A balance should be struck between addressing a specific monitoring need with the loss of privacy involved.
- A residual expectation of privacy remains when monitoring IT in the workplace.

Other jurisdictions

Australia, the Middle East, Singapore, Brazil and India are covered in their individual reports as it difficult to generalise in terms of the regions they sit within given the necessarily limited scope of this report.

Please see the main report for further detail, surrounding context and case information relating to all of the above key points.