

PUBLICATION

Video surveillance in the workplace: a balancing act of rights

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The privacy rights in Alberta of most employees are enshrined in the *Personal Information Protection Act* (“PIPA”). However, those rights are not absolute and one can think of many legitimate reasons why an employer may want to have video surveillance in the workplace, such as security and loss prevention.

The challenge of balancing those competing interests has shaped the decisions of the courts, privacy commissioners, and arbitrators in determining whether an employer has acted properly in implementing or maintaining video surveillance in the workplace.

Under PIPA an employer must not collect, use or disclose personal information, which is defined as “information about an identifiable individual,” unless that individual has given their consent. This is an extremely broad obligation that is subject to a number of exceptions, such as:

- Personal information which relates to a current or former employee that is required for the purposes of establishing, managing, or terminating an employment relationship.
- The collection, use and disclosure of personal information where it is “reasonable for the purposes of an investigation or legal proceeding” or where the personal information is “publicly available”.

A four part test is generally used by decision-makers to determine whether an employer has acted reasonably by using video surveillance to collect personal information:

1. Is the video surveillance demonstrably necessary to meet a specific need?
2. Is it likely to be effective in meeting that need?
3. Is the loss of privacy proportional to the benefits gained?
4. Is there a less privacy-intrusive way of achieving the same result?

When an employer is considering implementing video surveillance they should consider *why* that step is being taken and *how*. Video surveillance can be improper not only if it is done for an illegitimate purpose, such as to monitor employee performance without evidence of an existing problem, but also if it is done in an improper manner. For example, video recordings that are only viewed if there is a triggering event, such as vandalism, and are destroyed after a fixed period of time will be more reasonable than recordings which are saved indefinitely.

It appears that the courts and other decision-makers are more likely to find that video surveillance was a

reasonable choice if the following elements are present:

- The employer has given employees notice of the surveillance, unless the circumstances come within the narrow scope of exceptions to the notice requirements contained in PIPA.
- There is evidence that less intrusive alternatives to video surveillance were attempted and failed, or were carefully considered and reasonably rejected.
- Efforts have been made to minimize the level of intrusion into an employee's privacy, such as:
 - Using periodic instead of continuous surveillance;
 - Limiting the use and viewing range of cameras to the extent possible;
 - Ensuring cameras are pointed away from higher privacy areas like lunchrooms;
 - Not viewing surveillance tapes unless there is an incident to justify it; and
 - Ensuring that any information obtained through video surveillance is safeguarded and that access is limited.
- The employer has a policy in place ensuring that:
 - Legislative requirements are met relating to use, disclosure, and access to information captured on video; and
 - Employees are aware of their rights of access and who to contact about any questions.
- The employer has periodically evaluated the need for continuing video surveillance.

If those items are not present there is a risk to the employer that a decision-maker may direct the employer to change their practices, issue fines, award damages to an affected party, or refuse to allow evidence obtained through improper video surveillance.

The law in this area is constantly evolving and is heavily fact-specific. There is no universally applied (or accepted) approach to dealing with issues raised by video surveillance in the workplace. As a result, employers are strongly urged to obtain legal advice when drafting or implementing any policy that could implicate the privacy rights employees or third parties.