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Employee surveillance and data privacy: Peeping into the legal considerations

In this article, the authors discuss the importance of workplace surveillance, examine the different forms of employee and workplace surveillance from the lens of the Indian data privacy regime and an ethical viewpoint, and also discuss the need to strike a balance between employee surveillance and privacy of employees.





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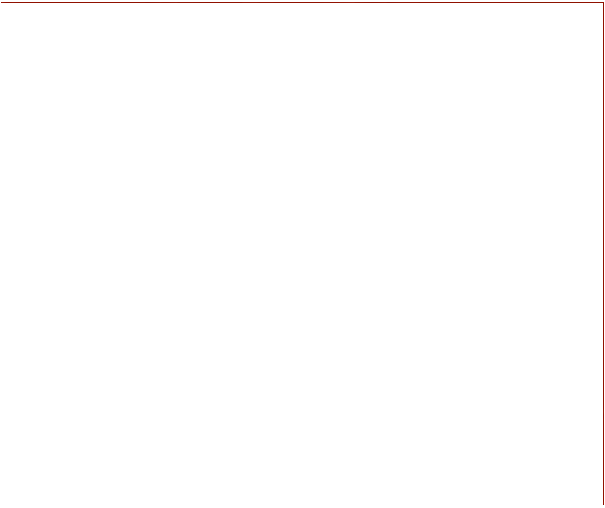
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The rapid increase in the use of technology in all spheres of our lives is a boon and a bane. While technology has facilitated advancement in all aspects, its rampant misuse has also raised grave concerns. The impact of technology on the world of work has been tremendous, especially against the

backdrop of the COVID-19 pandemic where humans were physically drifted apart but remained connected through technology. While the pandemic is long gone, workplaces have become increasingly reliant on technology and their computer systems for their daily operations. With the extensive use of devices, internet and technology, the workplace has become susceptible to misuse by various stakeholders, including employees.



This has led to employers conducting employee and workplace surveillance. Workplace surveillance is conducted by employers to monitor employee productivity as well as to protect the company's interests and prevent any misuse of its systems. This helps employers keep a tab on employees' activities or any inappropriate or unacceptable behaviour, which is not aligned with the company's ethos and code of conduct.

At the same time, it is crucial to tread cautiously and protect the employees' privacy. While employee surveillance has become a necessity against the backdrop of the evolving workplace arrangements, it is equally important to be guided by legal and ethical considerations while conducting such surveillance, to prevent any violation of privacy and maintain industrial harmony.

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Forms of Workplace Surveillance

Employers use advanced tools and software to monitor messages and phone calls that employees participate/engage in through company devices or official platforms used for communication by the organisation (such as Microsoft Outlook, Microsoft Teams, Google Suite, etc). Use of personal email and transfer of data to personal devices or external drives is restricted by many employers to prevent leakage of confidential information and data. In some cases, employees' web search history on company devices is also monitored by employers to observe any alarming search activities by employees which need to be dealt with.

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With the advent of remote and hybrid working arrangements, employers

have also begun to implement Global Positioning System (GPS) tracking to monitor the employees' location through the company devices. To avoid any security breaches and also prevent loss of productivity, access to specific social networking websites and unsecure websites and applications is blocked on company's devices and computer systems, or while using company's internet or browser.

While employee monitoring through virtual platforms has come to the forefront in the recent past with the advent of technology and use of online mediums, one form of surveillance that has been in place since a considerable amount of time is use of Closed-Circuit Television (CCTVs). CCTVs are affixed within the premises at appropriate locations to monitor office activities and also provide for a safe and secure workplace for all stakeholders. Attendance of employees is also monitored through access cards, punch-in system or even through facial recognition.

Legal Landscape vis-a-vis Workplace Surveillance

Employment Law Considerations

Under Indian employment laws, both the Factories Act 1948 and state-specific shops and establishments statutes entrust responsibility upon the employer to take reasonable steps to ensure safety at the workplace. While both sets of laws set out various safety and welfare mechanisms in detail, there is a broader obligation to take all reasonable steps towards employee health, safety and welfare. Therefore, the genesis behind employers setting up such safety mechanisms (including surveillance at workplace) emanates from such legal provisions.

In fact, few legislations expressly recognise surveillance mechanisms

from a safety standpoint. Few shops and establishments statutes (as part of exemptions and conditions set out for employment of women employees in night shift) require installation of CCTVs in the establishment or in transportation vehicles for surveillance and require the employer to preserve the CCTV footage for a defined duration and submit the same to the competent authority on demand. Such provisions suggest that surveillance mechanisms in itself are not viewed negatively under Indian employment laws, provided they are connected with the objective of ensuring safety at the workplace, are reasonable in nature and also involve consent of the concerned stakeholders.

The Indian legal regime does not give an overarching prerogative to the employer to conduct workplace surveillance. That said, it provides for surveillance in some cases from the lens of employee safety and not from the perspective of monitoring of employees.

Data Protection Considerations

There is no substantial legal regime or framework in India that deals with workplace monitoring or surveillance in the private sector. The Information Technology Act, 2000, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 and the upcoming Digital Personal Data Protection Act, 2023 (awaiting enforcement) are few legislations that primarily deal with data protection in India.

The Information Technology Act, 2000 includes provisions inter alia in relation to unauthorisedly accessing, hacking, downloading any material, introducing any computer virus or contaminant, damaging another person's computer, computer system or computer network.

The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 inter alia provides for reasonable security practices and procedures for collection and processing of sensitive personal data or information. Any surveillance mechanism being used at the workplace should be analysed for any collection of sensitive personal data or information, and reasonable security measures should be followed along with consent of the employees for such process.

As per the upcoming Digital Personal Data Protection Act, 2023, a person can process the personal data of an individual in accordance with the provisions of the statute and for a lawful purpose for which the individual has given his/her consent and for 'certain legitimate uses' which inter alia includes for the purpose of employment, or in relation to safeguarding the employer from loss or liability, such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information or provision of any service or benefit sought by the individual/employee. That said, the statute does not provide any further details on how the provision is to be interpreted, as of yet.

Various judgments address the aspect of employee monitoring and employees' right to privacy in the public sector. In the case of *Vijay Prakash v Union of India* [Writ Petition (Civil) Number 803 of 2009], it was inter alia opined that, "A private individual's right to privacy is undoubtedly of the same order as that of a public servant. Therefore, it would be wrong to assume that the substantive rights of the two differ..." In view of the same, employees' privacy should be borne in mind while setting up monitoring mechanisms, although the same may be set up in

good faith and for bona fide reasons.

Conducting Effective Workplace Surveillance

Organisations may be guided by various legal considerations and best practices for conducting effective workplace surveillance and protecting employees' privacy.

Although prior consent of / intimation to employees is not required under the existing applicable data protection regime for monitoring (unless any personal data or sensitive personal data or information is being collected), as a matter of good practice, the organisation should obtain consent from employees prior to initiation of the CCTV monitoring or any other type of monitoring. Such consent is likely to mitigate the potential claims of breach of privacy. This consent may be collected through a consent form, or as part of the employees' employment agreement / employee handbook.

In the event the organisation is unable to obtain such consent, the organisation should provide a prior notice to the employees apprising them about the monitoring, including the timing of the monitoring both within and outside the workplace premises.

Organisations should also display appropriate notices at the establishment that the area is under surveillance. Maintenance of transparency and clear and open dialogue with employees are instrumental in establishing trust and ensuring compliance.

While installation of CCTVs is commonplace and a necessity in most cases, courts have held that CCTVs should not be installed in areas

where individuals may have a reasonable expectation of privacy. In the case of *Raptakos Brett and Company Limited v The Deputy Commissioner of Labour, DMS Compound, Teynampet, Chennai* [Writ Appeal Number 576 of 2015], the Madras High Court acknowledged that employers should not install CCTVs in the employees' rest room since it is the employees' private area.

Organisations should keep themselves updated with the evolving trends, practices, legal and industry expectations and guidelines and periodically assess their manner of workplace surveillance from such lens. Organisation may also designate a dedicated team to monitor such dynamic industry trends.

Organisations should ensure that all employees are able to voice their concerns without any inhibition or hesitation.

Organisations should formulate a robust social media policy which provides clear guidelines on (a) how an employee can express personal opinions without affiliating the same to the employer, (b) the requisite approval mechanism to be followed for making any statements in relation to or on behalf of the company, (c) prohibited areas where an employee must refrain from making any statements on a public forum (such as comments against a certain religion or political party, or the company and its stakeholders).

While it does not appear to be common for organisations in India to regularly monitor employees' social media accounts and posts in particular, organisations may monitor and track employees' activities on company devices. In case of particular events such as unpleasant employee exit, mass redundancies, reorganisation, etc, the organisation

may monitor social media sites for any posts being made against the organisation. The organisation's HR team / social media team should be equipped to deal with such untoward situations (including any social media posts made by employees that may not be in the best interests of the organisation).

Organisations should ensure that the monitoring mechanisms are proportionate to the objective to be achieved, i.e., for the safety of the employees and workplace, for improving employee efficiency and productivity, and safeguarding the organisation's confidential data and interests.

Concluding Observations

Striking a reasonable balance between effective workplace surveillance and mitigating its potential privacy violations is critical for navigating this terrain and adopting fair workplace practices. Well-managed surveillance and monitoring should be carried out with minimal intrusion into the employees' lives and personal data. Organisations should be guided by legal and ethical considerations such that they may instil a sense of trust and confidence in the employees. Employers may ensure that employees are apprised of the surveillance being conducted, such that they are aware and accordingly regulate their conduct.

Employee/workplace surveillance, if done appropriately and in compliance with the applicable law, would prove to be an effective tool in maintaining a secure and conducive working environment. While workplace surveillance by private employers is not statutorily governed, common law principles of reasonableness cannot be ignored. In view of the same, some of the best practices as set out by us in this article should

help in ensuring that there are checks and balances to facilitate a seamless process for conducting workplace and employee surveillance.

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