

SENATE NO. 1090

AN ACT RELATIVE TO CONSUMERS AND WORKERS

*Be it enacted by the Senate and House of Representatives in General Court assembled,
And by the authority of the same, as follows:*

1 SECTION 1. Definitions

2 (a) The term "electronic monitoring" means the collection of information concerning
3 employee activities or communications by any means other than direct observation,
4 including the use of a computer, telephone, wire, radio, camera, electromagnetic, photo-
5 electronic or photo-optical system.

6 (b) The term "employee" means any person who performs services for an employer
7 in exchange for financial remuneration, including part time, leased, or former
8 employees.

9 (c) The term "employer" shall mean any person, partnership, corporation, or other
10 organization engaged in commerce, or any other person or organization, which obtains
11 the services of individuals in exchange for financial remuneration.

12 (d) Customer or consumer shall mean a person who is encouraged or solicited by the
13 employer to utilize or purchase services and products of the employer.

14 (e) Personal data - The term "personal data" means any information concerning an
15 employee which, because of name, identifying number, mark or description, can be

16 readily associated with a particular individual, and such term includes information
17 contained in printouts, forms, or written analyses or evaluations.

18 (f) Telephone service observation – The term "telephone service observation" means
19 the practice of listening to or recording telephone calls being made by, or received by, an
20 employee in order to monitor the quality of service provided by the employee.

21 (g) Director – The term Director means the Director of the Office of Consumer
22 Affairs and Business Regulations.

23 SECTION 2. Information Which May Be Collected

24 (a) An employer may use electronic surveillance to collect any information so long
25 as:

26 (i) the information is collected at the employer's premises and

27 (ii) the information is confined to the employee's work.

28 (iii) Exception: Electronic monitoring, including security cameras, whose sole
29 purpose and principal effect is to collect information permitted by this act is not
30 prohibited by section (ii) because it collects some information about employees
31 which is not confined to the employee's work.

32 SECTION 3. General Notice

33 (a) Each employer who engages in any type of electronic monitoring shall provide
34 prior written notice to all employees, customers or consumers who may be
35 affected.

36 This notice shall provide the following:

37 (i) the information which is to be collected;

38 (ii) The means by which this information is to be collected;

- 39 (iii) the times at which the monitoring is to occur;
- 40 (iv) the location of the monitoring equipment;
- 41 (v) the use to be made of the information which is collected;
- 42 (vi) the identity of the employees who will be monitored.

43 (b) Where an employer's monitoring program will include the employer's customers
44 or members of the public, the employer shall provide notice to those affected. This
45 notice may take any form that is reasonably calculated to reach the affected parties.

46 (c) Exception: Where an employer has reasonable grounds to believe that the
47 employees are engaged in conduct which violates the legal rights of the employer or the
48 employer's employees, customers or consumers and involves significant harm to that
49 party, and that electronic monitoring will produce evidence of this misconduct, the
50 employer may conduct monitoring without giving notice as provided below.

51 (i) Special Electronic Monitoring – Subject to paragraph (ii), an employer,
52 other than the State or political subdivision thereof, who has a reasonable
53 suspicion that an employer's employee, customer or consumer is engaged in or is
54 about to engage in conduct which:

55 (A) violates criminal or civil law or constitutes willful gross
56 misconduct and

57 (B) has a significant adverse effect involving economic loss or injury
58 to the employer, the employer's employees or the employer's customers
59 or consumers.

60 The employer may engage, on the employer's worksite, in electronic monitoring
61 of such employee or of an area in which the actions described in sub-paragraphs

62 (A) and (B) occur without providing the notice required by section 3(a), 4(a) or
63 4(b).

64 (ii) Statement – Before engaging in the electronic monitoring described in
65 paragraph (1), an employer shall execute a notarized statement setting forth:

66 (A) with particularity, the conduct that is being electronically
67 monitored and the basis for the electronic monitoring;

68 (B) an identification of the specific economic loss or injury to the
69 employer or the employer's employees resulting from such conduct or the
70 injury to the interests of such employer or employer's employees; and

71 (C) that the employer is in compliance with section 5(c)(1).

72 The employer shall sign the statement and retain it for three years from the date
73 of the electronic monitoring began or until judgment is rendered in a action
74 brought under section 12(c) by an employee affected by such electronic
75 monitoring, whichever is later.

76 SECTION 4. Director's Notice

77 (a) In general, the Director shall prepare, have printed and distribute to employers a
78 notice that will inform employees, customers or consumers –

79 (i) that an employer engages in or may engage in electronic monitoring of
80 employees and specifies the circumstances (including the electronic monitoring
81 and exception described in section (c) under which an employee, customer and
82 consumer is or is not entitled to additional notice under this section; and

83 (ii) of the rights and protections provided to employees, customers or
84 consumers by this Act.

85 (b) Posting of Notice – Each employer who engages in electronic monitoring shall
86 post and maintain the notice required in paragraph 4 (a) in conspicuous places on
87 its premises where notices to employees, customers or consumers are
88 customarily posted.

89 (c) Exception to Notice Requirement –

90 (i) Special Electronic Monitoring – subject to paragraph (ii), an employer,
91 other than the Federal Government or State or political subdivision thereof, who
92 has a reasonable suspicion that an employer's employee, customer or consumer is
93 engaged in or is about to engage in conduct which –

94 (A) violates criminal or civil law, or constitutes willful gross
95 misconduct; and

96 (B) has a significant adverse effect involving economic loss or injury
97 to the employer or the employer's employees, customers or consumers.

98 The employer may engage, on the employer's worksite, in electronic
99 monitoring of such employee, customer or consumer or of an area in
100 which the actions described in subparagraphs (A) and (B) occur without
101 providing the notice required by section 4(b), 5(a) or 5(b), and without
102 regard to sections, 9, 10(a) and 11(2).

103 (ii) Statement – Before engaging in the electronic monitoring described in
104 paragraph (i), an employer shall execute a statement setting forth –

105 (A) with particularity, the conduct that is being electronically
106 monitored and the basis for the electronic monitoring;

107 (B) an identification of the specific economic loss or injury to the
108 business of the employer or the employer's employees, customers or
109 consumers resulting from such conduct or the injury to the interests of
110 such employer or employer's employees, customers or consumers; and

111 (C) that the employer is in compliance with section 5(c)(1)

112 The employer shall sign the statement and retain it for three years from the date
113 the electronic monitoring began or until judgment is rendered in an action
114 brought under section 12(c) by an employee, customer or consumer affected by
115 such electronic monitoring, whichever is later.

116 SECTION 5. Employer's Specific Notice

117 (a) Each employer shall provide to each employee, customer or consumer who will
118 be electronically monitored, and the exclusive bargaining representative, if any, prior
119 written notice describing the following regarding the electronic monitoring of such
120 employees:

121 (i) The forms of electronic monitoring to be used.

122 (ii) The personal data to be collected.

123 (iii) The hours and days per calendar week that electronic monitoring will
124 occur.

125 SECTION 6. Simultaneous Notice

126 (a) Employers who engage in random or periodic monitoring of employees'
127 customer's, or consumer's communications, such as telephone service observation or
128 monitoring of electronic mail, shall inform the affected employees of the specific events
129 which are being monitored at the time the monitoring takes place.

130 (b) Exception: Employers who are engaged in a bona fide quality program is an
131 employer program which meets the following requirements:

132 (i) the information collected relates to the performance of a specific defined
133 task;

134 (ii) the employer has a written standard for the performance of
135 this task;

136 (iii) The purpose of the program is to compare the performance of employees
137 performing the task to the standard;

138 (iv) Information is collected on a reasonably equal basis regarding the
139 performance of all employees performing the task;

140 (v) The affected employees are given feedback on the employer's evaluation
141 of their performance at a time when they can reasonably be expected to
142 remember the events upon which their evaluation is based.

143 SECTION 7. Private Areas

144 (a) No electronic monitoring shall take place in bathrooms, locker rooms, shower
145 facilities, dressing areas, room rental, or other areas provided to customers or consumers
146 or other similar private areas.

147 SECTION 8. Employee Review of Records

148 (a) In general, except as provided in subsection (6), each employer shall provide the
149 employer's employee (or the employee's authorized agent) and the exclusive bargaining
150 representative, if any, with a reasonable opportunity to review and, upon request, a copy
151 of all personal data obtained or maintained by electronic monitoring of the employee.

152 (b) Exception – In general, except as provided in paragraph (i), an employer is not
153 required to provide the employer's employee (or the employee's authorized agent) or the
154 exclusive bargaining representative, if any, a reasonable opportunity to review data that
155 are obtained by electronic monitoring described in section 5(c)(1).

156 (i) Review permitted, if –
157 (A) the investigation by an employer with respect to electronic
158 monitoring described in section 5(c)(1) that was conducted on the
159 employer's employee has been completed, or
160 (B) disciplinary action has been initiated by an employer against the
161 employer's employee who was the subject of such electronic monitoring,
162 whichever occurs first, such employer shall promptly provide such
163 employee (or the employee's authorized agent) and exclusive bargaining
164 representative, if any, with a reasonable opportunity to review and, upon
165 request, obtain a copy of the personal data and any interpretation of such
166 data obtained from such electronic monitoring.

167 (i) individual employee performance evaluation; or
168 (ii) setting production quotas or work performance expectations,
169 unless an employee is not working at a facility of an employer and transmits the
170 employee's work to the employer electronically, and such data is the only basis
171 available to such employer for such purposes.

172 SECTION 9. Use of Data Collected by Electronic Monitoring

173 (a) Employer Actions – an employer shall not take any action against an employee
174 on the basis of personal data obtained by electronic monitoring of such employee unless
175 the employer has complied with all the requirements of this Act.

176 (b) Data shall not be used as sole basis for evaluation or production quotas – an
177 employer shall not use quantitative data on an employee that is obtained by electronic
178 monitoring and that records the amount of work performed by such employee within a
179 specific time as the sole basis for any advancement or increase in benefits.

180 SECTION 10. Disclosure

181 Information concerning employees which is collected through electronic monitoring
182 may be disclosed only:

183 (a) With the prior written consent of the employee (such consent shall not be
184 condition of employment);

185 (b) To officers, employees, or authorized agents of the employer who have a
186 legitimate need for the information in performance of their duties;

187 (c) To appropriate law enforcement agencies.

188 SECTION 11. Non-Retaliation

189 (a) No employer may discharge, discipline, or in any other manner discriminate
190 against an employee because the employee has asserted his or her rights under this
191 statute, assisted other employees in asserting their rights, reported violations of this
192 statute, or participated in enforcement actions under this statute.

193 SECTION 12. Privacy Protections

194 (a) Work Related – no employer may intentionally collect personal data about an
195 employee through electronic monitoring if the data are not confined to the employee's

196 work, unless the employee is a customer or consumer of the employer at the time of the
197 electronic monitoring.

198 (b) Private Areas – no employer may engage in electronic monitoring in –
199 (i) bathrooms;
200 (ii) locker rooms;
201 (iii) dressing rooms, or
202 (iv) any other area where an employer customer or consumer has a reasonable
203 expectation of privacy.

204 (c) First Amendment Rights – in general, an employer shall not intentionally engage
205 in electronic monitoring of an employee when the employee is exercising First
206 Amendment Rights, and an employer shall not intentionally use or disseminate personal
207 data obtained by electronic monitoring of an employee when the employee is exercising
208 First Amendment Rights.

209 (i) Exception – Electronic monitoring by an employer whose purpose and
210 principal effect is to collect data about the work of an employee of the employer
211 is not prohibited by paragraph (a) because it collects some incidental data
212 concerning the exercise of an employee's First Amendment Rights.

213 (d) Disclosure – an employer shall not disclose personal data obtained by electronic
214 monitoring to any person or other employer or business entity except to (or with the
215 prior written consent of) the individual employee to whom the data pertain, unless the
216 disclosure would be –

217 (i) to officers and employees of the employer who have a legitimate need for
218 the information in the performance of their duties;

219 (ii) to a law enforcement agency pursuant to a warrant issued under the
220 Federal Rules of Criminal Procedure, an equivalent State warrant, a grand jury
221 subpoena, or an administrative subpoena authorized by the Federal or State
222 statute;

223 iii) to the public if the data contain evidence of illegal conduct by a public
224 official or have a direct and substantial effect on public health or safety; or

225 (iv) to the exclusive bargaining representative, if any.

226 (e) Issuance of Court Order – A court order for disclosure under subsection (b) or (c)
227 shall issue only if the law enforcement agency demonstrates that there is reason to
228 believe the contents of the data are relevant to a legitimate law enforcement inquiry. In
229 the case of a State governmental authority, such a court order shall not issue if
230 prohibited by the laws of such State. A court issuing an order pursuant to this section,
231 on a motion made promptly by the service provider, may quash or modify such order, if
232 the data requested are unusually voluminous in nature or compliance with such order
233 would cause an undue burden on the employer.

234 SECTION 12. Enforcement

235 (a) Administrative

236 The Director shall have the authority to investigate alleged violations of this act. Any
237 employer who is found to have violated this act shall be fined an amount not to exceed
238 \$5,000.00.

239 (b) Private Right of Action

240 Any person whose rights under this act have been abridged may file a civil action. Any
241 employer that violates the provisions of this act shall be liable to the person aggrieved
242 for special and general damages together with attorney's fees and costs.

243 (c) Injunctive Relief

244 Any employer that commits, or proposes to commit, an act in violation of any provision
245 of this act may be enjoined therefrom by any court of competent jurisdiction.

246 SECTION 13. Waiver of Rights

247 (a) The rights provided by this act may not be waived by contract or otherwise,
248 unless such waiver is part of a written settlement to a pending action or complaint.

249 SECTION 14. Application

250 (a) Law Enforcement – This Act shall not apply to electronic monitoring
251 administered by law enforcement agencies as may otherwise be lawfully permitted under
252 criminal investigations.

253 (b) Third Party – Monitoring for another person – A person who engages in
254 electronic monitoring may not perform electronic monitoring for another person unless
255 the requirements of this Act are complied with.

256 SECTION 15. Regulations

257 (a) The Director shall, within six months after the date of the enactment of this Act,
258 issue regulations to carry out this Act.