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HOUSE . . . . . No. 1862

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

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:

Definitions.

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

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

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

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

(e) Personal data — The term “personal data” means any information concerning an employee which, because of name, identifying number, mark or description, can be readily associated with a particular individual, and such term includes information contained in printouts, forms, or written analyses or evaluations.

(f) Telephone service observation — The term “telephone service observation” means the practice of listening to or recording telephone calls being made by, or received by, an employee in order to monitor the quality of service provided by the employee.

(g) Director — The term Director means the Director of the Office of Consumer Affairs and Business Regulation.

2. Information Which May Be Collected.

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

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

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

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

3. General Notice.

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

This notice shall provide the following:

(i) the information which is to be collected;

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

(iii) the times at which the monitoring is to occur;

(iv) the location of the monitoring equipment;

(v) the use to be made of the information which is collected;

(vi) the identity of the employees who will be monitored.

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

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

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

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

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

The employer may engage, on the employer's worksite, in electronic monitoring of such employee or of an area in which the actions described in sub-paragraphs (A) and (B) occur without providing the notice required by section 3(a), 4(a) or 4(b).

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

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

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

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

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

4. Director's Notice.

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

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

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

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

(c) Exception to Notice Requirement —

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

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

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

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

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

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

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

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

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

5. Employer's Specific Notice.

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

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

(ii) The personal data to be collected.

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

6. Simultaneous Notice.

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

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

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

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

(iii) The purpose of the program is to compare the performance of employees performing the task to the standard; (iv) Information is collected on a reasonably equal basis regarding the performance of all employees performing the task;

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

7. Private Areas.

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

8. Employee Review of Records.

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

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

(i) Review permitted, if —

(A) the investigation by an employer with respect to electronic monitoring described in section 5(c)(1) that was conducted on the employer's employee has been completed, or

(B) disciplinary action has been initiated by an employer against the employer's employee who was the subject of such electronic monitoring, whichever occurs first, such employer shall promptly provide such employee (or the employee's authorized agent) and exclusive bargaining representative, if any, with a reasonable opportunity to review and, upon request, obtain a copy of the personal data and any interpretation of such data obtained from such electronic monitoring.

(i) individual employee performance evaluation; or

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

9. Use of Data Collected by Electronic Monitoring.

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

(b) Data shall not be used as sole basis for evaluation or production quotas — an employer shall not use quantitative data on an employee that is obtained by electronic monitoring and that records the amount of work performed by such employee within a specific time as the sole basis for —

10. Disclosure.

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

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

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

(c) To appropriate law enforcement agencies.

11. Non-Retaliation.

(a) No employer may discharge, discipline, or in any other manner discriminate against an employee because the employee has asserted his or her rights under this statute, assisted other

employees in asserting their rights, reported violations of this statute, or participated in enforcement actions under this statute.

12. Privacy Protections.

(a) Work Related — no employer may intentionally collect personal data about an employee through electronic monitoring if the data are not confined to the employee's work, unless the employee is a customer or consumer of the employer at the time of the electronic monitoring.

(b) Private Areas — no employer may engage in electronic monitoring in —

(i) bathrooms;

(ii) locker rooms;

(iii) dressing rooms, or

(iv) any other area where an employer customer or consumer has a reasonable expectation of privacy.

(c) First Amendment Rights — in general, an employer shall not intentionally engage in electronic monitoring of an employee when the employee is exercising First Amendment Rights, and an employer shall not intentionally use of disseminate personal data obtained by electronic monitoring of an employee when the employee is exercising First Amendment Rights.

(i) Exception — Electronic monitoring by an employer whose purpose and principal effect is to collect data about the work of an employee of the employer is not prohibited by

paragraph (a) because it collects some incidental data concerning the exercise of an employee's First Amendment Rights.

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

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

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

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

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

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

12. Enforcement.

(a) Administrative. The Director shall have the authority to investigate alleged violations of this act. Any employer who is found to have violated this act shall be fined an amount not to exceed $5,000.00.

(b) Private Right of Action

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

(c) Injunctive Relief

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

13. Waiver of Rights.

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

14. Application.

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

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

15. Regulations.

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