

SENATE No. 712

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:

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, including the
4 use of a computer, telephone, wire, radio, camera, electromagnetic, photo-electronic or photo-
5 optical system.

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

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

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

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

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

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

22 SECTION 2. Information Which May Be Collected

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

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

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

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

31 SECTION 3. General Notice

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

34 This notice shall provide the following:

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

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

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

38 (iv) the location of the monitoring equipment;

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

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

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

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

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

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

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

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

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

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

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

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

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

69 SECTION 4. Director's Notice

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

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

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

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

81 (c) Exception to Notice Requirement –

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

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

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

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

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

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

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

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

102 The employer shall sign the statement and retain it for three years from the date the
103 electronic monitoring began or until judgment is rendered in an action brought under section
104 12(c) by an employee, customer or consumer affected by such electronic monitoring, whichever
105 is later.

106 SECTION 5. Employer's Specific Notice

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

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

111 (ii) The personal data to be collected.

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

113 SECTION 6. Simultaneous Notice

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

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

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

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

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

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

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

130 SECTION 7. Private Areas

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

134 SECTION 8. Employee Review of Records

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

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

143 (i) Review permitted, if –

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

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

- 152 (i) individual employee performance evaluation; or
- 153 (ii) setting production quotas or work performance expectations,
- 154 unless an employee is not working at a facility of an employer and transmits the
- 155 employee's work to the employer electronically, and such data is the only basis available to such
- 156 employer for such purposes.

157 SECTION 9. Use of Data Collected by Electronic Monitoring

158 (a) Employer Actions – an employer shall not take any action against an employee on

159 the basis of personal data obtained by electronic monitoring of such employee unless the

160 employer has complied with all the requirements of this Act.

161 (b) Data shall not be used as sole basis for evaluation or production quotas – an

162 employer shall not use quantitative data on an employee that is obtained by electronic monitoring

163 and that records the amount of work performed by such employee within a specific time as the

164 sole basis for any advancement or increase in benefits.

165 SECTION 10. Disclosure

166 Information concerning employees which is collected through electronic monitoring may

167 be disclosed only:

168 (a) With the prior written consent of the employee (such consent shall not be

169 condition of employment);

170 (b) To officers, employees, or authorized agents of the employer who have a

171 legitimate need for the information in performance of their duties;

172 (c) To appropriate law enforcement agencies.

173 SECTION 11. Non-Retaliation

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

178 SECTION 12. Privacy Protections

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

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

184 (i) bathrooms;

185 (ii) locker rooms;

186 (iii) dressing rooms, or

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

189 (c) First Amendment Rights – in general, an employer shall not intentionally engage
190 in electronic monitoring of an employee when the employee is exercising First Amendment

191 Rights, and an employer shall not intentionally use of disseminate personal data obtained by
192 electronic monitoring of an employee when the employee is exercising First Amendment Rights.

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

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

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

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

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

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

208 (e) Issuance of Court Order – A court order for disclosure under subsection (b) or (c)
209 shall issue only if the law enforcement agency demonstrates that there is reason to believe the
210 contents of the data are relevant to a legitimate law enforcement inquiry. In the case of a State
211 governmental authority, such a court order shall not issue if prohibited by the laws of such State.

212 A court issuing an order pursuant to this section, on a motion made promptly by the service
213 provider, may quash or modify such order, if the data requested are unusually voluminous in
214 nature or compliance with such order would cause an undue burden on the employer.

215 SECTION 12. Enforcement

216 (a) Administrative

217 The Director shall have the authority to investigate alleged violations of this act. Any
218 employer who is found to have violated this act shall be fined an amount not to exceed
219 \$5,000.00.

220 (b) Private Right of Action

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

224 (c) Injunctive Relief

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

227 SECTION 13. Waiver of Rights

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

230 SECTION 14. Application

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

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

237 SECTION 15. Regulations

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

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