

SENATE No.

The Commonwealth of Massachusetts

PRESENTED BY:

Marc R. Pacheco

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to consumers and workers.

PETITION OF:

NAME:

DISTRICT/ADDRESS:

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. S01093 OF 2007-2008.]

The Commonwealth of Massachusetts

In the Year Two Thousand and 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
4 the use of a computer, telephone, wire, radio, camera, electromagnetic, photo-electronic or
5 photo-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 the
18 practice of listening to or recording telephone calls being made by, or received by, an employee
19 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 Affairs and
21 Business Regulations.

22 SECTION 2. Information Which May Be Collected

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

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

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

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

30 SECTION 3. General Notice

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

33 This notice shall provide the following:

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

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

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

37 (iv) the location of the monitoring equipment;

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

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

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

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

48 (i) Special Electronic Monitoring – Subject to paragraph (ii), an employer, other
49 than the State or political subdivision thereof, who has a reasonable suspicion that an

50 employer's employee, customer or consumer is engaged in or is about to engage in
51 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
54 employer, the employer's employees or the employer's customers or
55 consumers.

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

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

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

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

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

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

70 SECTION 4. Director's Notice

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

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

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

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

82 (c) Exception to Notice Requirement –

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

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

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

90 The employer may engage, on the employer's worksite, in electronic monitoring
91 of such employee, customer or consumer or of an area in which the actions

92 described in subparagraphs (A) and (B) occur without providing the notice
93 required by section 4(b), 5(a) or 5(b), and without regard to sections, 9, 10(a)
94 and 11(2).

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

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

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

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

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

108 SECTION 5. Employer's Specific Notice

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

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

113 (ii) The personal data to be collected.

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

115 SECTION 6. Simultaneous Notice

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

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

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

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

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

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

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

132 SECTION 7. Private Areas

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

136 SECTION 8. Employee Review of Records

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

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

145 (i) Review permitted, if –

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

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

154 of the personal data and any interpretation of such data obtained from such
155 electronic monitoring.

156 (i) individual employee performance evaluation; or

157 (ii) setting production quotas or work performance expectations,

158 unless an employee is not working at a facility of an employer and transmits the
159 employee's work to the employer electronically, and such data is the only basis available
160 to such employer for such purposes.

161 SECTION 9. Use of Data Collected by Electronic Monitoring

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

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

169 SECTION 10. Disclosure

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

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

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

176 (c) To appropriate law enforcement agencies.

177 SECTION 11. Non-Retaliation

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

182 SECTION 12. Privacy Protections

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

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

187 (i) bathrooms;

188 (ii) locker rooms;

189 (iii) dressing rooms, or

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

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

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

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

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

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

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

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

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

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

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

220 SECTION 12. Enforcement

221 (a) Administrative

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

224 (b) Private Right of Action

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

228 (c) Injunctive Relief

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

231 SECTION 13. Waiver of Rights

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

234 SECTION 14. Application

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

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

240 SECTION 15. Regulations

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

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