

Redraft of HB 4196 and HB 2577

Presented by:
Representatives Sherwood Guernsey, David Magnani and Suzanne Bump

main sponsor 9/22/21/30

An Act to Prevent Potential Abuses of Electronic Monitoring in the Workplace

Section 19D is added to Chapter 149 of the General Laws to read as follows:

Section 19D. Electronic monitoring; notice to employees; access to records; privacy; use of electronic monitoring; civil remedies; regulations.

(1) Definitions

As used in this section --

- (a) "electronic monitoring" means the collection, storage, analysis and reporting of employees' activities by means of computer, electronic observation and supervision, remote telephone surveillance, telephone call accounting and other forms of auditory and computer-based surveillance conducted by any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system;
- (b) "employee" means a person currently employed or formerly employed by an employer;
- (c) "employer" means each private and public sector employer in the Commonwealth including an individual, corporation, partnership, labor organization, unincorporated association or any other legal business, public or private, or commercial entity, the Commonwealth, counties, cities, towns and other political subdivisions therein, and any agents of the employer;
- (d) "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 includes information contained in printouts, forms or written analyses or evaluations; and
- (e) "prospective employee" means an individual who has applied for a position of employment with an employer.

(2) Notice

- (a) It shall be unlawful for an employer to engage in electronic monitoring without providing each affected employee with prior written notice describing the following regarding the electronic monitoring directly affecting the employee:
- (i) what forms of electronic monitoring are to be used;
 - (ii) what personal data is to be collected;
 - (iii) how frequently each form of electronic monitoring will occur;
 - (iv) how the personal data is to be used;
 - (v) how to read printouts of statistics or other records of information collected through electronic monitoring;
 - (vi) what production standards and work performance expectations exist; and
 - (vii) how production standards and work performance expectations based on electronic monitoring statistics are to be determined.
- (b) It shall be unlawful for an employer to fail to notify a prospective employee at any personal interview or meeting of existing forms of electronic monitoring which may directly affect the prospective employee if he is hired by the employer.
- (c) It shall be unlawful for an employer, upon request by a prospective employee, to fail to provide the prospective employee with the written notice described in subparagraph (a) above regarding existing forms of electronic monitoring which may directly affect the prospective employee if he is hired by the employer.
- (d) It shall be unlawful for an employer to engage in electronic monitoring unless the employer provides the affected employee with a signal light, beeping tone, verbal notification or other form of visual or aural notice, at periodic intervals, that electronic monitoring is taking place; provided that if the electronic monitoring is conducted on a continuous basis during all of the employee's shift, such notice need not be provided at periodic intervals.
- (e) It shall be unlawful for an employer to engage in telephone service observation unless the employer provides the affected customer with a signal light, beeping tone, verbal notification or other form of visual or aural notice, at periodic intervals, that the telephone service observation is taking place.

- (f) Notwithstanding the provisions in subparagraph (a) above, an employer who is engaged in electronic monitoring on the effective date of this section will have ninety days from said effective date to provide each affected employee with the required written notice.

(3) Access to Records

- (a) It shall be unlawful for an employer not to allow an employee, or the employee's authorized agent, access to all personal data obtained by electronic monitoring of his work, as outlined in section 52 C of this chapter.
- (b) It shall be unlawful for an employer not to allow an employee the opportunity to comment on any record obtained through electronic monitoring of his performance, as outlined in section 52 C of this chapter.

(4) Privacy

- (a) It shall be unlawful for an employer to collect personal data on an employee through electronic monitoring which is not relevant to the employee's work performance.
- (b) It shall be unlawful for an employer to disclose personal data obtained by electronic monitoring to any person or business entity except by, or with the prior written consent of, the individual employee to whom the data pertains, unless the disclosure would be --
 - (i) to those officers and employees of the employer who have a legitimate need for the information in the performance of their duties;
 - (ii) required under chapter sixty-six;
 - (iii) to a law enforcement agency in connection with a criminal prosecution; or
 - (iv) pursuant to the order of a court of competent jurisdiction.

(5) Use of Electronic Monitoring

- (a) It shall be unlawful for an employer to maintain, collect, use or disseminate personal data obtained by electronic monitoring which describes how an employee exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the employee to whom the data relates or unless pertinent to and within the scope of an authorized law enforcement activity.

- (b) It shall be unlawful for an employer to use personal data obtained by electronic monitoring as the basis for individual employee performance evaluation or disciplinary action unless the employee is provided with an opportunity to review said personal data within a reasonable time after said data is obtained.

(6) Civil Remedies

Any person aggrieved by a violation of any provision of this section may institute within three years of such violation and prosecute in his own name and on his own behalf, or for him and for others similarly situated, by himself or by a recognized collective bargaining agent, a civil action for injunctive relief and damages. A person so aggrieved and who prevails in such action shall be entitled to an award of reasonable attorney's fees and the costs of litigation. If the Court finds the violation to be willful and knowing, it may double or treble the damage award, if any. In any event, the damages awarded shall equal or exceed one thousand dollars for each such violation.

(7) Regulations

The Department is empowered to make rules and regulations to carry out the provisions of this section.

(8) Miscellaneous

- (a) No waiver of the provisions of this section by an employee or prospective employee shall be a defense to either criminal prosecution or civil liability.
- (b) This section shall not apply to electronic monitoring administered by law enforcement agencies as may otherwise be permitted in criminal investigations.