

SENATE No. 1057

The Commonwealth of Massachusetts

PRESENTED BY:

Walter F. Timilty

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 adoption of the accompanying bill:

An Act relative to consumers and workers.

PETITION OF:

NAME:

Walter F. Timilty

DISTRICT/ADDRESS:

Norfolk, Bristol and Plymouth

SENATE No. 1057

By Mr. Timilty, a petition (accompanied by bill, Senate, No. 1057) of Walter F. Timilty for legislation relative to consumers and workers. Labor and Workforce Development.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 1772 OF 2015-2016.]

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

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 As used in the following sections, the following words have the following meanings:-

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

6 “Employee”, any person who performs services for an employer in exchange for financial
7 remuneration, including part time, leased, or former employees.

8 “Employer”, any person, partnership, corporation or other organization engaged in
9 commerce, or any other person or organization, which obtains the services of individuals in
10 exchange for financial remuneration.

11 “Customer”, a person who is encouraged or solicited by the employer to utilize or
12 purchase services and products of the employer.

13 “Consumer”, a person who is encouraged or solicited by the employer to utilize or
14 purchase services and products of the employer.

15 “Personal data”, any information concerning an employee which, because of name,
16 identifying number, mark or description, can be readily associated with a particular individual,
17 and such term includes information contained in printouts, forms, or written analyses or
18 evaluations.

19 “Telephone service observation”, the practice of listening to or recording telephone calls
20 being made by, or received by, an employee in order to monitor the quality of service provided
21 by the employee.

22 “Director”, the Director of the Office of Consumer Affairs and Business Regulation.

23 Section 2. Information Which May Be Collected

24 An employer may use electronic surveillance to collect any information so long as:

25 (1) The information is collected at the employer’s premises and

26 (2) The information is confined to the employee’s work.

27 (3) 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 prior
33 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 or
42 members of the public, the employer shall provide notice to those affected. This notice may take
43 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 (i),
59 an employer shall execute a notarized statement setting forth:

60 (A) With particularity, the conduct that is being electronically monitored and the basis for
61 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.

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

68 Section 4. Director’s Notice

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

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

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

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

80 (c) Exception to Notice Requirement

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

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

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

88 The employer may engage, on the employer's worksite, in electronic monitoring of such
89 employee, customer or consumer or of an area in which the actions described in subparagraphs
90 (A) and (B) occur without providing the notice required by section 4(b) and 5 and without regard
91 to sections, 9, 10(1) and 11.

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

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

96 (B) An identification of the specific economic loss or injury to the business of the
97 employer or the employer's employees, customers or consumers resulting from such conduct or
98 the injury to the interests of such employer or employer's employees, customers or consumers.

99 The employer shall sign the statement and retain it for three years from the date the
100 electronic monitoring began or until judgment is rendered in an action brought under section
101 12(c) by an employee, customer or consumer affected by such electronic monitoring, whichever
102 is later.

103 Section 5. Employer's Specific Notice

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

107 (1) The forms of electronic monitoring to be used.

108 (2) The personal data to be collected.

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

110 Section 6. Simultaneous Notice

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

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

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

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

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

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

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

126 Section 7. Private Areas

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

130 Section 8. Employee Review of Records

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

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

139 (i) Review permitted, if:

140 (A) The investigation by an employer with respect to electronic monitoring that was
141 conducted on the employer's employee has been completed, or

142 (B) Disciplinary action has been initiated by an employer against the employer's
143 employee who was the subject of such electronic monitoring, whichever occurs first, such
144 employer shall promptly provide such employee (or the employee's authorized agent) and
145 exclusive bargaining representative, if any, with a reasonable opportunity to review and, upon

146 request, obtain a copy of the personal data and any interpretation of such data obtained from such
147 electronic monitoring.

148 (i) Individual employee performance evaluation; or

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

152 Section 9. Use of Data Collected by Electronic Monitoring

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

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

160 Section 10. Disclosure

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

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

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

167 (3) To appropriate law enforcement agencies.

168 Section 11. Non-Retaliation

169 No employer may discharge, discipline, or in any other manner discriminate against an
170 employee because the employee has asserted his or her rights under this statute, assisted other
171 employees in asserting their rights, reported violations of this statute, or participated in
172 enforcement actions under this statute.

173 Section 12. Privacy Protections

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

178 (b) Private Areas — No employer may engage in electronic monitoring in:

179 (i) Bathrooms;

180 (ii) Locker rooms;

181 (iii) Dressing rooms, or

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

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

188 (i) Exception — Electronic monitoring by an employer whose purpose and principal
189 effect is to collect data about the work of an employee of the employer is not prohibited by
190 paragraph (a) because it collects some incidental data concerning the exercise of an employee’s
191 First Amendment Rights.

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

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

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

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

202 (iv) To the exclusive bargaining representative, if any.

203 (e) Issuance of Court Order — A court order for disclosure under subsection (b) or (c)
204 shall issue only if the law enforcement agency demonstrates that there is reason to believe the

205 contents of the data are relevant to a legitimate law enforcement inquiry. In the case of a State
206 governmental authority, such a court order shall not issue if prohibited by the laws of such State.
207 A court issuing an order pursuant to this section, on a motion made promptly by the service
208 provider, may quash or modify such order, if the data requested are unusually voluminous in
209 nature or compliance with such order would cause an undue burden on the employer.

210 Section 13. Enforcement

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

214 (b) Private Right of Action — Any person whose rights under this act have been abridged
215 may file a civil action. Any employer that violates the provisions of this act shall be liable to the
216 person aggrieved for special and general damages together with attorney’s fees and costs.

217 (c) Injunctive Relief — Any employer that commits, or proposes to commit, an act in
218 violation of any provision of this act may be enjoined therefrom by any court of competent
219 jurisdiction.

220 Section 14. Waiver of Rights

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

223 Section 15. Application

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

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

230 Section 16. Regulations

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