

**SENATE . . . . . No. 712**

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**The Commonwealth of Massachusetts**

PRESENTED BY:

**Marc R. Pacheco**

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*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:
Marc R. Pacheco	First Plymouth and Bristol
Bruce E. Tarr	First Essex and Middlesex

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

## The Commonwealth of Massachusetts

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In the Year Two Thousand and Nine

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### 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 employee  
14 which, because of name, identifying number, mark or description, can be readily associated with  
15 a particular individual, and such term includes information contained in printouts, forms, or  
16 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 take  
42 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 are  
44 engaged in conduct which violates the legal rights of the employer or the employer's employees,  
45 customers or consumers and involves significant harm to that party, and that electronic  
46 monitoring will produce evidence of this misconduct, the employer may conduct monitoring  
47 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 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)  
57 occur 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  
61 the basis for the electronic monitoring;

62 (B) an identification of the specific economic loss or injury to the employer  
63 or the employer's employees resulting from such conduct or the injury to the  
64 interests of such employer 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  
68 section 12(c) 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 notice  
71 that will inform employees, customers or consumers –

72 (i) that an employer engages in or may engage in electronic monitoring of  
73 employees and specifies the circumstances (including the electronic monitoring and  
74 exception described in section (c) under which an employee, customer and consumer is or  
75 is not entitled to additional 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 post and  
79 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  
84 suspicion that an employer's employee, customer or consumer is engaged in or is about to  
85 engage in conduct which –

86 (A) violates criminal or civil law, or constitutes willful gross misconduct;  
87 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) and  
94 11(2).

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

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

99 (B) an identification of the specific economic loss or injury to the business of  
100 the employer or the employer's employees, customers or consumers resulting  
101 from such conduct or the injury to the interests of such employer or employer's  
102 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 notice  
111 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 the  
119 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 of  
128 all employees performing the task;

129 (v) The affected employees are given feedback on the employer's evaluation of their  
130 performance at a time when they can reasonably be expected to remember the events  
131 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 any,  
153 with a reasonable opportunity to review and, upon request, obtain a copy of the  
154 personal data and any interpretation of such data obtained from such electronic  
155 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 that  
167 records the amount of work performed by such employee within a specific time as the sole basis  
168 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 or 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 written  
202 consent of) the individual employee to whom the data pertain, unless the disclosure would be –

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

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

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

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

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

## 218 SECTION 12. Enforcement

### 219 (a) Administrative

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

### 222 (b) Private Right of Action

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

### 226 (c) Injunctive Relief

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

229 SECTION 13. Waiver of Rights

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

232 SECTION 14. Application

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

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

238 SECTION 15. Regulations

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

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