

1 H.114

2 Introduced by Representatives Priestley of Bradford, Anthony of Barre City,
3 Graning of Jericho, Headrick of Burlington, Mulvaney-Stanak
4 of Burlington, Sims of Craftsbury, and Small of Winooski

5 Referred to Committee on

6 Date:

7 Subject: Labor; employment practices; fair employment; electronic
8 monitoring; automated decision systems

9 Statement of purpose of bill as introduced: This bill proposes to restrict the
10 use of electronic monitoring of employees and the use of automated decision
11 systems for employment-related decisions.

12 An act relating to restricting electronic monitoring of employees and
13 employment-related automated decision systems

14 It is hereby enacted by the General Assembly of the State of Vermont:

15 Sec. 1. 21 V.S.A. § 495o is added to read:

16 § 495o. ELECTRONIC MONITORING OF EMPLOYEES; AUTOMATED
17 DECISION SYSTEMS; RESTRICTIONS; EXCEPTIONS

18 (a) Definitions. As used in this section:

19 (1) “Algorithm” means a computerized procedure consisting of a set of
20 steps used to accomplish a determined task.

1 (2) “Automated decision system” means an algorithm or computational
2 process that is used to make or assist in making employment-related decisions,
3 judgments, or conclusions. The term “automated decision system” includes
4 algorithms and computational processes that are derived from machine
5 learning, statistics, data processing, or artificial intelligence.

6 (3) “Automated decision system output” means information, data,
7 assumptions, predictions, scoring, recommendations, decisions, or conclusions
8 generated by an automated decision system.

9 (4) “Data” means information obtained by any means that, directly or
10 indirectly, identifies, relates to, describes, may reasonably be associated with,
11 or could reasonably be linked to an employee, including:

12 (A) personal identifying information;

13 (B) biometric information;

14 (C) health, medical, lifestyle, and wellness information;

15 (D) information related to workplace activities;

16 (E) human resources information and personnel files; and

17 (F) information related to the employee’s Internet and digital
18 activities, including electronic communications, private social media activity,
19 and personal Internet Protocol address.

20 (5) “Electronic monitoring” means the collection of information
21 concerning employee activities or communication by any means other than

1 direct, in-person observation, including through the use of a digital device,
2 computer, telephone, wire, radio, camera, or electromagnetic, photoelectronic,
3 or photo-optical system.

4 (6) “Employee” means an individual who, in consideration of direct or
5 indirect gain or profit, is employed by an employer.

6 (7) “Employer” means a person who employs one or more individuals in
7 Vermont, and includes any agent or contractor acting on the employer’s behalf.

8 (8) “Employment-related decision” means any decision by an employer
9 that:

10 (A) affects an employee’s compensation, benefits, or terms and
11 conditions of employment;

12 (B) relates to the discipline, evaluation, promotion, or termination of
13 an employee; or

14 (C) relates to the hiring of an individual or employee for a position or
15 job.

16 (9) “Essential job function” means a fundamental duty of a job or
17 position that an employee with that job or position must be able to perform.

18 (b) Employee monitoring restricted. An employer shall not engage in
19 electronic monitoring of an employee unless all of the following requirements
20 are met:

21 (1) The employer’s purpose in utilizing the electronic monitoring is to:

1 (A) assist or allow the employee to accomplish an essential job
2 function;

3 (B) monitor production processes or quality;

4 (C) ensure compliance with applicable employment or labor laws;

5 (D) protect the health, safety, or security of the employee; or

6 (E) track time worked or production output for purposes of
7 determining the employee's compensation.

8 (2) Electronic monitoring is necessary to accomplish the purpose
9 identified pursuant to subdivision (1) of this subsection (b).

10 (3) The specific form of electronic monitoring is the least invasive
11 means, with respect to the employee, of accomplishing the purpose identified
12 pursuant to subdivision (1) of this subsection (b).

13 (4) The specific form of electronic monitoring is used with the smallest
14 number of employees and collects the smallest amount of data necessary to
15 accomplish the purpose identified pursuant to subdivision (1) of this subsection
16 (b).

17 (5) The employer ensures that only authorized persons have access to
18 any data produced through the electronic monitoring and that the data is only
19 used for the purpose and duration that the employee has been notified of
20 pursuant to subsection (c) of this section.

21 (c) Required notice for employee monitoring.

1 (1) At least 15 calendar days prior to commencing any form of
2 electronic monitoring, an employer shall provide notice of the electronic
3 monitoring to each employee who will be subject to it. The notice shall, at a
4 minimum, include the following information:

5 (A) the specific form of electronic monitoring;

6 (B) a description of the intended purpose of the electronic monitoring
7 and why the electronic monitoring is necessary to accomplish that purpose;

8 (C) a description of how any data generated by the electronic
9 monitoring will be used;

10 (D) a description of the technologies that will be used to conduct the
11 electronic monitoring;

12 (E) whether and, if so, how the data generated by the electronic
13 monitoring will be used to inform employment-related decisions;

14 (F) the name of any person conducting electronic monitoring on the
15 employer's behalf and any associated contract language related to the
16 monitoring;

17 (G) the name of any person, apart from the employer, who will have
18 access to any data generated by the electronic monitoring and the reason why
19 the person will have access to the data;

20 (H) the positions within the employer that will have access to any
21 data generated by the electronic monitoring;

1 (I) when, where, and how frequently monitoring will occur;

2 (J) the period of time for which any data generated by the electronic
3 monitoring will be retained by the employer or another person and when that
4 data will be destroyed;

5 (K) notice of how the employee may access the data generated by the
6 electronic monitoring and the process to correct any errors in the data; and

7 (l) notice of the employee's rights pursuant to this section.

8 (2)(A) Notice of electronic monitoring provided pursuant to this section
9 shall be written in plain, clear, and concise language, and provided to each
10 employee in the employee's primary language.

11 (B) An employer shall provide a new, updated notice to employees if
12 it makes any significant changes to the manner of electronic monitoring or to
13 the way that the employer utilizes the electronic monitoring or any data
14 generated by it.

15 (3) Notwithstanding subdivision (1) of this subsection (c), prior notice
16 of electronic monitoring shall not be required if:

17 (A) the employer has reasonable grounds to believe that the
18 employee is engaged in conduct that:

19 (i) is illegal;

20 (ii) violates the legal rights of the employer or another employee;

21 or

1 (iii) creates a hostile work environment; and

2 (B) the electronic monitoring is reasonably likely to produce
3 evidence of the conduct.

4 (4)(A) An employer that utilizes electronic monitoring shall annually
5 provide each of its employees with a list of all electronic monitoring systems
6 currently in use by the employer in relation to that employee. The list shall be
7 provided in the primary language of the employee.

8 (B) As used in this subdivision (4), “currently in use” means that the
9 employer:

10 (i) is currently using the system in relation to the employee;

11 (ii) used the electronic monitoring system in relation to the
12 employee within the past 90 days; or

13 (iii) intends to use the electronic monitoring system in relation to
14 the employee within the next 30 days.

15 (d) Prohibitions on employee monitoring. Notwithstanding the purposes
16 for electronic monitoring set forth in subdivision (b)(1) of this section,
17 electronic monitoring shall not be used:

18 (1) in any manner that violates State or federal labor or employment
19 laws;

20 (2) in relation to workers who are off-duty and not performing work-
21 related tasks;

1 (3) to identify employees exercising legal rights;

2 (4) for audio-visual monitoring of bathrooms, locker rooms, changing
3 areas, breakrooms, smoking areas, employee cafeterias, lounges, or other
4 similarly private areas;

5 (5) to determine the frequency with which employees visit or use
6 bathrooms, locker rooms, changing areas, breakrooms, smoking areas,
7 employee cafeterias, lounges, or other similarly private areas; or

8 (6) for audio-visual monitoring of any space within an employee's
9 residence or personal vehicle, or a property owned or rented by the employee,
10 unless the monitoring is necessary to ensure the employee's health and safety
11 or to verify the security of employer or client data.

12 (e) Restriction of employee monitoring through personal devices.

13 (1) An employer shall not require an employee to install an application
14 on a personal device for purposes of electronic monitoring or to wear a device
15 or attach, embed, or physically implant a device on the employee's clothing
16 that can be used for electronic monitoring, unless the electronic monitoring is:

17 (A) necessary to accomplish the employee's essential job functions;

18 and

19 (B) limited to only the times and activities necessary to accomplish
20 the essential job functions.

1 (2) Any location tracking function of an application or device shall be
2 disabled outside of the times when the employee is engaged in activities
3 necessary to accomplish essential job functions.

4 (3) An employer shall not require an employee to physically implant a
5 device on the employee's body for purposes of employee monitoring.

6 (f) Restrictions on use of automated decision systems.

7 (1) An employer shall not use an automated decision system in a manner
8 that:

9 (A) violates or results in a violation of State or federal law;

10 (B) makes predictions about an employee's behavior that are
11 unrelated to the employee's essential job functions;

12 (C) identifies, profiles, or predicts the likelihood that an employee
13 will exercise the employee's legal rights;

14 (D) makes predictions about an employee's emotions, personality, or
15 other sentiments; or

16 (E) uses customer or client data, including customer or client reviews
17 and feedback, as an input of the automated decision system.

18 (2)(A) An employer shall not solely rely on outputs from an automated
19 decision system when making employment-related decisions.

20 (B) An employer may utilize an automated decision system in
21 making employment-related decisions if:

1 (i) the automated decision system outputs considered in making
2 the employment-related decision are corroborated by human oversight of the
3 employee, including supervisory or managerial observations and
4 documentation of the employee’s work, personnel records, and consultations
5 with the employee’s coworkers;

6 (ii) the employer has conducted an impact assessment of the
7 automated decision system pursuant to subsection (g) of this section; and

8 (iii) the employer is in compliance with the notice requirements of
9 subsection (h) of this section.

10 (3) An employer shall not use any automated decision system outputs
11 regarding an employee’s physical or mental health in relation to an
12 employment-related decision.

13 (g) Impact assessment of automated decision systems.

14 (1) Prior to utilizing an automated decision system, an employer shall
15 create a written impact assessment of the system that includes, at a minimum:

16 (A) a detailed description of the automated decision system and its
17 purpose;

18 (B) a description of the data utilized by the system;

19 (C) a description of the outputs produced by the system and the types
20 of employment-related decisions in which those outputs may be utilized;

1 (D) an assessment of the necessity for the system, including reasons
2 for utilizing the system to supplement nonautomated means of decision
3 making;

4 (E) a detailed assessment of the potential risks of utilizing the system,
5 including the risk of:

6 (i) errors;

7 (ii) discrimination against employees on the basis of race, color,
8 religion, national origin, sex, sexual orientation, gender identity, ancestry,
9 place of birth, age, crime victim status, or physical or mental condition;

10 (iii) violating employees' legal rights or chilling employees'
11 exercise of legal rights;

12 (iv) directly or indirectly harming employees' physical health,
13 mental health, safety, sense of well-being, dignity, or autonomy;

14 (v) harm to employee privacy, including through potential security
15 breaches or inadvertent disclosure of information; and

16 (vi) negative economic and material impacts to employees,
17 including potential effects on compensation, benefits, work conditions,
18 evaluations, advancement, and work opportunities;

19 (F) a detailed summary of measures taken by the employer to address
20 or mitigate the risks identified pursuant to subdivision (E) of this subdivision

21 (g)(1); and

1 (G) a description of any methodology used in preparing the
2 assessment.

3 (2) An employer shall provide a copy of the assessment prepared
4 pursuant to subdivision (1) of this subsection (g) to an employee upon request.

5 (3) An employer shall update the assessment required pursuant to this
6 subsection any time a significant change or update is made to the automated
7 decision system.

8 (h) Prohibition on facial, gait, and emotion recognition technology.
9 Electronic monitoring and automated decision systems shall not incorporate
10 any form of facial, gait, or emotion recognition technology.

11 (i) Protection of employee privacy.

12 (1) An employer; any person that develops, operates, or maintains
13 electronic monitoring or an automated decision system on behalf of an
14 employer; and any person who collects, stores, analyzes, interprets,
15 disseminates, or otherwise uses data produced or utilized by electronic
16 monitoring or an automated decision system shall implement reasonable
17 security procedures and practices appropriate to the nature of the data to
18 protect employees' personal information from unauthorized or illegal access,
19 destruction, use, modification, or disclosure.

20 (2) Any person that develops, operates, or maintains electronic
21 monitoring or an automated decision system on behalf of an employer and any

1 person who collects, stores, analyzes, interprets, disseminates, or otherwise
2 uses data produced or utilized by electronic monitoring or an automated
3 decision system shall, upon termination of the contract with the employer:

4 (A) return all data and automated decision system outputs to the
5 employer; and

6 (B) destroy all data and automated decision system outputs in the
7 person's possession.

8 (j) Employee right to access data. An employer shall, upon request,
9 provide an employee with any data that relates to the employee that was
10 produced or utilized by electronic monitoring or an automated decision system
11 used by the employer.

12 (k) Retaliation prohibited. An employer shall not discharge or in any other
13 manner retaliate against an employee who exercises or attempts to exercise the
14 employee's rights under this section. The provisions against retaliation set
15 forth in subdivision 495(a)(8) of this subchapter shall apply to this section.

16 (l) Enforcement. The provisions of section 495b of this subchapter shall
17 apply to this section.

18 Sec. 2. EFFECTIVE DATE

19 This act shall take effect on July 1, 2023.