HOUSE DOCKET, NO. 1489 FILED ON: 1/20/2011

HOUSE . . . . . No. 1404

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 passage of the accompanying:

An Act relative to consumers and workers.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Walter F. Timilty	*7th Norfolk*

HOUSE DOCKET, NO. 1489 FILED ON: 1/20/2011

HOUSE . . . . . No. 1404

By Mr. Timilty of Milton, a petition (accompanied by bill, House, No. 1404) of Walter F. Timilty relative to electronic monitoring in the workplace. Labor and Workforce Development.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE
HOUSE
, NO. *1862* OF 2009-2010.]

The Commonwealth of Massachusetts

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:

Definitions.

(a) The term "electronic monitoring" means the collection of information concerning employee activities or communications by any means other than direct observation, including the use of a computer, telephone, wire, radio, camera, electromagnetic, photo-electronic or photo-optical system.

(b) The term "employee" means any person who performs services for an employer in exchange for financial remuneration, including part time, leased, or former employees.

(c) The term "employer" shall mean any person, partnership, corporation or other organization engaged in commerce, or any other person or organization, which obtains the services of individuals in exchange for financial remuneration.

(d) Customer or consumer shall mean a person who is encouraged or solicited by the employer to utilize or purchase services and products of the employer.

(e) Personal data — The term "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 such term includes information contained in 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
21 and Business Regulation.

22 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 purpose
27 and principal effect is to collect information permitted by this act is not prohibited by section (ii)
28 because it collects some information about employees which is not confined to the employee’s
29 work.

30 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
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 than
49 the State or political subdivision thereof, who has a reasonable suspicion that an employer's
50 employee, customer or consumer is engaged in or is about to engage in conduct which:

51 (A) violates criminal or civil law or constitutes willful gross misconduct and

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

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

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

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

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

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

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 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 and
72 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), 5(a) or 5(b), and without
91 regard to sections, 9, 10(a) and 11(2).

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 and

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

101 The employer shall sign the statement and retain it for three years from the date the
102 electronic monitoring began or until judgment is rendered in an action brought under section
103 12(c) by an employee, customer or consumer affected by such electronic monitoring, whichever
104 is later.

105 5. Employer's Specific Notice.

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

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

110 (ii) The personal data to be collected.

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

112 6. Simultaneous Notice.

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

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

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

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

121 (iii) The purpose of the program is to compare the performance of employees performing
122 the task to the standard; (iv) Information is collected on a reasonably equal basis regarding the
123 performance of all employees performing the task;

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

127 7. Private Areas.

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

131 8. Employee Review of Records.

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

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

140 (i) Review permitted, if —

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

143 (B) disciplinary action has been initiated by an employer against the employer's
144 employee who was the subject of such electronic monitoring, whichever occurs first, such
145 employer shall promptly provide such employee (or the employee's authorized agent) and
146 exclusive bargaining representative, if any, with a reasonable opportunity to review and, upon
147 request, obtain a copy of the personal data and any interpretation of such data obtained from such
148 electronic monitoring.

149 (i) individual employee performance evaluation; or

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

153 9. Use of Data Collected by Electronic Monitoring.

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

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

161 10. Disclosure.

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

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

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

168 (c) To appropriate law enforcement agencies.

169 11. Non-Retaliation.

170 (a) No employer may discharge, discipline, or in any other manner discriminate against
171 an employee because the employee has asserted his or her rights under this statute, assisted other

172 employees in asserting their rights, reported violations of this statute, or participated in
173 enforcement actions under this statute.

174 12. Privacy Protections.

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

179 (b) Private Areas — no employer may engage in electronic monitoring in —

180 (i) bathrooms;

181 (ii) locker rooms;

182 (iii) dressing rooms, or

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

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

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

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

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

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

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

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

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

211 12. Enforcement.

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

215 (b) Private Right of Action

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

219 (c) Injunctive Relief

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

222 13. Waiver of Rights.

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

225 14. Application.

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

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

232 15. Regulations.

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