

3871

2009-2010 Regular Sessions

I N A S S E M B L Y

January 28, 2009

Introduced by M. of A. ROSENTHAL, EDDINGTON, MAISEL, JAFFEE, ZEBROWSKI, REILLY, GOTTFRIED, CAHILL, JOHN, PERALTA, KELLNER -- Multi-Sponsored by -- M. of A. GALEF, GREENE, HEASTIE, KOON, PHEFFER, SCHIMEL -- read once and referred to the Committee on Labor

AN ACT to amend the labor law, in relation to requiring employers to provide prior notice to employees when they are engaging in electronic monitoring

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. The labor law is amended by adding a new section 203-e to
2 read as follows:
3 S 203-E. EMPLOYERS ENGAGED IN ELECTRONIC MONITORING; PRIOR NOTICE
4 REQUIRED. 1. FOR PURPOSES OF THIS SECTION, THE FOLLOWING TERMS SHALL
5 HAVE THE FOLLOWING MEANINGS:
6 (A) "EMPLOYER" MEANS ANY PERSON, FIRM OR CORPORATION, INCLUDING THE
7 STATE AND ANY POLITICAL SUBDIVISION OF THE STATE WHICH HAS EMPLOYEES;
8 (B) "EMPLOYEE" MEANS ANY PERSON WHO PERFORMS SERVICES FOR AN EMPLOYER
9 IN A BUSINESS OF THE EMPLOYER, IF THE EMPLOYER HAS THE RIGHT TO CONTROL
10 AND DIRECT THE PERSON AS TO (I) THE RESULT TO BE ACCOMPLISHED BY THE
11 SERVICES, AND (II) THE DETAILS AND MEANS BY WHICH SUCH RESULT IS ACCOM-
12 PLISHED; AND
13 (C) "ELECTRONIC MONITORING" MEANS THE COLLECTION OF INFORMATION ON AN
14 EMPLOYER'S PREMISES CONCERNING EMPLOYEES' ACTIVITIES OR COMMUNICATIONS
15 BY ANY MEANS OTHER THAN DIRECT OBSERVATION, INCLUDING THE USE OF A
16 COMPUTER, TELEPHONE, WIRE, RADIO, CAMERA, ELECTROMAGNETIC, PHOTOELEC-
17 TRONIC OR PHOTO-OPTICAL SYSTEMS, BUT NOT INCLUDING THE COLLECTION OF
18 INFORMATION (I) FOR SECURITY PURPOSES IN COMMON AREAS OF THE EMPLOYER'S
19 PREMISES WHICH ARE HELD OUT FOR USE BY THE PUBLIC, OR (II) WHICH IS
20 PROHIBITED UNDER STATE OR FEDERAL LAW.
21 2. (A) EXCEPT AS PROVIDED IN PARAGRAPH (B) OF THIS SUBDIVISION, EACH
22 EMPLOYER WHO ENGAGES IN ANY TYPE OF ELECTRONIC MONITORING SHALL GIVE

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 PRIOR WRITTEN NOTICE UPON HIRING AND ONCE ANNUALLY TO ALL EMPLOYEES WHO
2 MAY BE AFFECTED, INFORMING THEM OF THE TYPES OF MONITORING WHICH MAY
3 OCCUR. THE NOTICE REQUIRED BY THIS PARAGRAPH SHALL BE IN WRITING, IN AN
4 ELECTRONIC RECORD, OR IN ANOTHER ELECTRONIC FORM AND ACKNOWLEDGED BY THE
5 EMPLOYEE EITHER IN WRITING OR ELECTRONICALLY. EACH EMPLOYER SHALL ALSO
6 POST, IN A CONSPICUOUS PLACE WHICH IS READILY AVAILABLE FOR VIEWING BY
7 ITS EMPLOYEES, A NOTICE CONCERNING THE TYPES OF ELECTRONIC MONITORING
8 WHICH THE EMPLOYER MAY ENGAGE IN.

9 (B) WHEN (I) AN EMPLOYER HAS REASONABLE GROUNDS TO BELIEVE THAT
10 EMPLOYEES ARE ENGAGED IN CONDUCT WHICH (1) VIOLATES THE LAW, (2)
11 VIOLATES THE LEGAL RIGHTS OF THE EMPLOYER OR THE EMPLOYER'S EMPLOYEES,
12 OR (3) CREATES A HOSTILE WORKPLACE ENVIRONMENT, AND

13 (II) ELECTRONIC MONITORING MAY PRODUCE EVIDENCE OF THIS MISCONDUCT,
14 THE EMPLOYER MAY CONDUCT MONITORING WITHOUT GIVING PRIOR WRITTEN NOTICE.

15 3. (A) IN ANY CIVIL ACTION ALLEGING A VIOLATION OF THIS SECTION, THE
16 COURT MAY:

17 (I) AWARD DAMAGES AND REASONABLE ATTORNEYS' FEES AND COSTS TO A
18 PREVAILING PLAINTIFF; AND

19 (II) AFFORD INJUNCTIVE RELIEF AGAINST ANY EMPLOYER THAT COMMITS OR
20 PROPOSES TO COMMIT A VIOLATION OF THIS SECTION.

21 (B) THE MAXIMUM CIVIL PENALTY SHALL BE FIVE HUNDRED DOLLARS FOR THE
22 FIRST OFFENSE, ONE THOUSAND DOLLARS FOR THE SECOND OFFENSE AND THREE
23 THOUSAND DOLLARS FOR THE THIRD AND EACH SUBSEQUENT OFFENSE.

24 4. THE PROVISIONS OF THIS SECTION SHALL NOT BE DEEMED TO BE AN EXCLU-
25 SIVE REMEDY AND SHALL NOT OTHERWISE LIMIT OR BAR ANY PERSON FROM PURSU-
26 ING ANY OTHER REMEDIES AVAILABLE UNDER ANY OTHER LAW, STATE OR FEDERAL
27 STATUTE, OR THE COMMON LAW. THE VIOLATIONS OF THIS SECTION BY AN EMPLOY-
28 ER SHALL NOT BE ADMITTED INTO EVIDENCE FOR THE PURPOSE OF, OR USED AS, A
29 DEFENSE TO CRIMINAL LIABILITY OF ANY PERSON IN ANY COURT IN THIS STATE.

30 5. THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO A CRIMINAL INVES-
31 TIGATION. ANY INFORMATION OBTAINED IN THE COURSE OF A CRIMINAL INVESTI-
32 GATION THROUGH THE USE OF ELECTRONIC MONITORING MAY BE USED IN A DISCI-
33 PLINARY PROCEEDING AGAINST AN EMPLOYEE.

34 6. THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO PROCESSES THAT
35 ARE DESIGNED TO MANAGE THE TYPE OR VOLUME OF INCOMING OR OUTGOING ELEC-
36 TRONIC MAIL OR TELEPHONE VOICE MAIL OR INTERNET USAGE, THAT ARE NOT
37 TARGETED TO MONITOR OR INTERCEPT THE ELECTRONIC MAIL OR TELEPHONE VOICE
38 MAIL OR INTERNET USAGE OF A PARTICULAR INDIVIDUAL, AND THAT ARE
39 PERFORMED SOLELY FOR THE PURPOSE OF COMPUTER SYSTEM MAINTENANCE AND/OR
40 PROTECTION.

41 S 2. This act shall take effect immediately.