S T A T E O F N E W Y O R K

4362

2009-2010 Regular Sessions

I N S E N A T E

April 22, 2009

Introduced by Sen. KRUGER -- read twice and ordered printed, and when printed to be committed 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:

Section 1. The labor law is amended by adding a new section 203-e to read as follows:

S 203-E. EMPLOYERS ENGAGED IN ELECTRONIC MONITORING; PRIOR NOTICE REQUIRED. 1. FOR PURPOSES OF THIS SECTION, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

(A) "EMPLOYER" MEANS ANY PERSON, FIRM OR CORPORATION, INCLUDING THE STATE AND ANY POLITICAL SUBDIVISION OF THE STATE WHICH HAS EMPLOYEES;

(B) "EMPLOYEE" MEANS ANY PERSON WHO PERFORMS SERVICES FOR AN EMPLOYER IN A BUSINESS OF THE EMPLOYER, IF THE EMPLOYER HAS THE RIGHT TO CONTROL AND DIRECT THE PERSON AS TO (I) THE RESULT TO BE ACCOMPLISHED BY THE SERVICES, AND (II) THE DETAILS AND MEANS BY WHICH SUCH RESULT IS ACCOMPLISHED; AND

(C) "ELECTRONIC MONITORING" MEANS THE COLLECTION OF INFORMATION ON AN EMPLOYER'S PREMISES CONCERNING EMPLOYEES' ACTIVITIES OR COMMUNICATIONS BY ANY MEANS OTHER THAN DIRECT OBSERVATION, INCLUDING THE USE OF A COMPUTER, TELEPHONE, WIRE, RADIO, CAMERA, ELECTROMAGNETIC, PHOTOELECTRONIC OR PHOTO-OPTICAL SYSTEMS, BUT NOT INCLUDING THE COLLECTION OF INFORMATION (I) FOR SECURITY PURPOSES IN COMMON AREAS OF THE EMPLOYER'S PREMISES WHICH ARE HELD OUT FOR USE BY THE PUBLIC, OR (II) WHICH IS PROHIBITED UNDER STATE OR FEDERAL LAW.

2. (A) EXCEPT AS PROVIDED IN PARAGRAPH (B) OF THIS SUBDIVISION, EACH EMPLOYER WHO ENGAGES IN ANY TYPE OF ELECTRONIC MONITORING SHALL GIVE PRIOR WRITTEN NOTICE UPON HIRING AND ONCE ANNUALLY TO ALL EMPLOYEES WHO MAY BE AFFECTED, INFORMING THEM OF THE TYPES OF MONITORING WHICH MAY

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

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OCCUR. THE NOTICE REQUIRED BY THIS PARAGRAPH SHALL BE IN WRITING, IN AN ELECTRONIC RECORD, OR IN ANOTHER ELECTRONIC FORM AND ACKNOWLEDGED BY THE EMPLOYEE EITHER IN WRITING OR ELECTRONICALLY. EACH EMPLOYER SHALL ALSO POST, IN A CONSPICUOUS PLACE WHICH IS READILY AVAILABLE FOR VIEWING BY ITS EMPLOYEES, A NOTICE CONCERNING THE TYPES OF ELECTRONIC MONITORING WHICH THE EMPLOYER MAY ENGAGE IN.

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

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

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

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

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

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

4. THE PROVISIONS OF THIS SECTION SHALL NOT BE DEEMED TO BE AN EXCLUSIVE REMEDY AND SHALL NOT OTHERWISE LIMIT OR BAR ANY PERSON FROM PURSUING ANY OTHER REMEDIES AVAILABLE UNDER ANY OTHER LAW, STATE OR FEDERAL STATUTE, OR THE COMMON LAW. THE VIOLATIONS OF THIS SECTION BY AN EMPLOYER SHALL NOT BE ADMITTED INTO EVIDENCE FOR THE PURPOSE OF, OR USED AS, A DEFENSE TO CRIMINAL LIABILITY OF ANY PERSON IN ANY COURT IN THIS STATE.

5. THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO A CRIMINAL INVESTIGATION. ANY INFORMATION OBTAINED IN THE COURSE OF A CRIMINAL INVESTIGATION THROUGH THE USE OF ELECTRONIC MONITORING MAY BE USED IN A DISCIPLINARY PROCEEDING AGAINST AN EMPLOYEE.

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

S 2. This act shall take effect immediately.