

2007 DRAFTING REQUEST

Bill

Received: **05/11/2007**

Received By: **gmalaise**

Wanted: **As time permits**

Identical to LRB:

For: **Marlin Schneider (608) 266-0215**

By/Representing: **Himself**

This file may be shown to any legislator: **NO**

Drafter: **gmalaise**

May Contact:

Addl. Drafters:

Subject: **Employ Priv - miscellaneous
Employ Pub - miscellaneous**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Schneider@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Monitoring of employee electronic mail

Instructions:

See Attached--place certain restrictions on employer monitoring or employee electronic mail

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	gmalaise 05/17/2007	bkraft 05/21/2007		_____			S&L
/1			sherritz 05/21/2007	_____	lparisi 05/21/2007	lparisi 05/29/2007	

FE Sent For: *at who*

10/16

<END>

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/?	gmalaise	1/ bjk 1/ jld	dh 5/21	dh/nyn 5/21			

FE Sent For:

<END>



Madison Teachers Inc.

821 Williamson Street
Madison, Wisconsin 53703-4503
(608) 257-0491 Fax - (608) 257-1168

John A. Matthews, Executive Director

opt #2

May 1, 2007

Hon. Marlin Schneider
Wisconsin State Assembly
Room 204 North
State Capitol
P.O. Box 8953
Madison, WI 53708

Dear Rep. Schneider:

When we met to discuss the "electronic snooping" by the Madison Metropolitan School District on its employees, you asked that we prepare a proposal for your possible introduction. That has been done and is attached hereto for your consideration.

A recent event in the Madison Metropolitan School District moved us to once again make contact with you. A teacher used his school district assigned computer to access his home computer for information. Later, when District management suspected wrongdoing, they used forensic "snooping" software to search his work computer, and then following his above-described use of it, went into his home computer.

After investigation, the District concluded that the teacher had not engaged in wrongdoing. It is the way they proceeded in this matter, i.e. the violation of his privacy, that is problematic. It is our understanding from information provided by District staff that District management regularly surveils the use of District owned computers by its staff. The District had formerly told staff to use the computers "as their own."

I would be happy to discuss this matter again, should you so desire.

Very truly yours,


John A. Matthews
Executive Director

JAM:lkd
Enclosure



MEMORANDUM

DATE: October 17, 2006
TO: John Matthews
FROM: Rich Thal

A bill to prevent abuses of electronic mail monitoring in the workplace. (Option 1: Total Ban)

Sec 1. Legislative Findings.

Whereas it is the sense of the Legislature that ...

Sec 2. Definitions.

(a) Electronic mail. For the purposes of this subsection, electronic mail means messages transmitted with the use of a computer in the workplace, including messages transmitted through an Internet connection and messages transmitted through an internal company system (such as an intranet or private mail server).

(b) Employee. "Employee" shall have the same meaning as that used in sec. 103.001(5), Stats.

(c) Employer. "Employer" shall have the same meaning as that used in sec. 103.001(6), Stats.

(d) Monitor. "Monitor" means the interception, observation, or examination of electronic mail by an employer.

Sec 3. (Total Ban) Monitoring prohibited. No employer shall monitor the electronic mail of its employee.

Sec 4. Department to Administer.

(1) This subchapter shall be administered by the department. The department may make, amend and rescind such rules as are necessary to carry out this subchapter. The department or the commission may, by such agents or agencies as it designates, conduct in any part of this state any proceeding, hearing, investigation or inquiry necessary to the performance of its functions. The department shall preserve the anonymity of any employee who is the aggrieved party in a complaint of discrimination in promotion, compensation or terms and conditions of employment, of unfair honesty testing or of unfair genetic testing against his or her present employer until a

determination as to probable cause has been made, unless the department determines that the anonymity will substantially impede the investigation.

(2) This subchapter applies to each agency of the state.

Sec 6. Powers and Duties of Department. The Department shall have such powers and duties to enforce this Chapter as provided in sec 111.39, Stats., and the employee shall have access to the remedies and procedures under that section.

**A bill to prevent abuses of electronic mail monitoring in the workplace.
(Option 2: Balanced Approach)**

Sec 1. Legislative Findings.

Whereas it is the sense of the Legislature that...

Sec 2. Definitions.

(a) Electronic mail. For the purposes of this subsection, electronic mail means messages transmitted with the use of a computer in the workplace, including messages transmitted through an Internet connection and messages transmitted through an internal company system (such as an intranet or private mail server).

(b) Employee. "Employee" shall have the same meaning as that used in sec. 103.001(5), Stats.

(c) Employer. "Employer" shall have the same meaning as that used in sec. 103.001(6), Stats.

(d) Monitor. "Monitor" means the interception, observation, or examination of electronic mail by an employer.

Sec 3. (Balanced) Permissible Monitoring. Except as provided in subsection 4, the employer may monitor the electronic mail of its employee provided that:

(a) The employer provides notice to the employee of its monitoring policy at the time of hire and at least once per year thereafter.

(b) The employer provides notice to the employee of changes to its monitoring policy at least thirty (30) days in advance of such a change. Changes in monitoring policy shall not be retroactive or permit monitoring of employee electronic mail communications that originated prior to the effective date of such a policy.

(c) All notices of employer monitoring policy shall include a description of the purposes for monitoring and the frequency with which monitoring shall be conducted.

Sec 4. Prohibited Monitoring Practices. The employer shall not

(a) Monitor an employee's electronic mail transmission because of the employee's membership in any group protected under the Wisconsin Fair Employment Act, the Municipal Employment Relations Act, or the State Employment Labor Relations Act, sec. 111 *et seq.*, Stats.

(b) Review, examine, or disseminate the contents of an electronic mail beyond the extent necessary to determine that said electronic mail is of a personal nature. Nothing in this subsection shall be construed to restrict the right of the employer to monitor the number or frequency of personal electronic mail messages to ascertain the efficiency or productivity of the employee, nor to monitor the content of electronic mail to the extent necessary to protect trade secrets. The employee shall have a reasonable expectation of privacy in the contents of his or her personal electronic mail.

Sec 5. Department to Administer.

111.375 (1) This subchapter shall be administered by the department. The department may make, amend and rescind such rules as are necessary to carry out this subchapter. The department or the commission may, by such agents or agencies as it designates, conduct in any part of this state any proceeding, hearing, investigation or inquiry necessary to the performance of its functions.

? The department shall preserve the anonymity of any employee who is the aggrieved party in a complaint of discrimination in promotion, compensation or terms and conditions of employment, of unfair honesty testing or of unfair genetic testing against his or her present employer until a determination as to probable cause has been made, unless the department determines that the anonymity will substantially impede the investigation.

(2) This subchapter applies to each agency of the state.

Sec 6. Powers and Duties of Department. The Department shall have such powers and duties to enforce this Chapter as provided in sec 111.39, Stats., and the employee shall have access to the remedies and procedures under that section.

Notes:

Do we want a section also banning the tracking of web traffic for privacy purposes?

1; 70 Del. Laws, c. 460, § 1.)

§ 705. Notice of monitoring of telephone transmissions, electronic mail and Internet usage.

(a) As used in this section, "employer" includes any individual, corporation, partnership, firm or association with a place of business in Delaware and the State of Delaware or any agency or political subdivision thereof.

(b) No employer, nor any agent or any representative of any employer, shall monitor or otherwise intercept any telephone conversation or transmission, electronic mail or transmission, or Internet access or usage of or by a Delaware employee unless the employer either:

(1) Provides an electronic notice of such monitoring or intercepting policies or activities to the employee at least once during each day the employee accesses the employer-provided e-mail or Internet access services; or

(2) Has first given a 1-time notice to the employee of such monitoring or intercepting activity or policies. 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.

The notice required by this subsection shall not apply to activities of any law enforcement officer acting under the order of a court issued pursuant to Chapter 24 of Title 11. *wiretapping*

(c) Whoever violates this section shall be subject to a civil penalty of \$100 for each such violation. A civil penalty claim may be filed in any court of competent jurisdiction.

(d) 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.

(e) 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. (73 Del. Laws, c. 148, § 1; 73 Del. Laws, c. 403, §§ 1, 2.)

§ 706. Continuation of labor contracts despite merger or other business combination.

(a) Notwithstanding any other provisions of this Code, no merger, consolidation, sale of assets or business combination shall result in the termination or impairment of the provisions of any labor contract covering persons engaged in employment in this State and negotiated by a labor organization or by a collective bargaining agent or other representative. Notwithstanding such merger, consolidation, sale of assets or business combination, such labor contract shall continue in effect until its termination date or until otherwise agreed by the parties to such contract or their legal successors.

(b) For purposes of this section:



State of Wisconsin
2007 - 2008 LEGISLATURE

LRB-2711/7

GMM.....

TRSTE

2007 Bill

bjk
+
jld

SA ✓
X-ref ✓

- gen. cat. ✓

1 AN ACT ...; relating to: employer monitoring of employee electronic mail usage.

Analysis by the Legislative Reference Bureau

Current law does not regulate employer monitoring of employee electronic mail (e-mail) usage. This bill prohibits any employer, including the state, from monitoring any e-mail message sent or received by an employee unless the employee sends or receives the message through a computer owned by the employer and the employer: 1) provides written notice to the employee of the employer's policy regarding the monitoring of employee e-mail usage when the employee is hired and not less than once each year after that; and 2) provides written notice to the employee of any change in that policy not less than 30 days before the effective date of the change in policy. The notice must include a statement of the purposes for which employee e-mail messages are monitored and the frequency with which that monitoring is conducted and a statement for the employee to sign acknowledging that the employee has received and understands the notice.

The bill also prohibits an employer from monitoring any e-mail message sent or received by an employee because the employee has exercised or is exercising, or because the employer believes that the employee has exercised, is exercising, or may exercise, his or her right to form, join, or assist a labor organization, to bargain collectively, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. In addition, the bill provides that an employee has a reasonable expectation of privacy in the content of any personal e-mail message sent or received by the employee and prohibits an employer from monitoring the content of such a message except as necessary to determine whether the message is personal or work related or to protect any trade secret or other confidential business information of the employer.

The bill provides, however, that an employer is not prohibited from monitoring the number or frequency of the personal e-mail messages sent or received by an

employee to ascertain the efficiency or productivity of the employee or from using any electronic or other device to manage the e-mail messages coming into or going out of the employer's computerized communication system solely for the purpose of system maintenance, security, or protection and not for the purpose of monitoring the e-mail messages sent or received by any particular employee.

Finally, under the bill, an employee whose e-mail messages are monitored in violation of the bill or who is discharged or discriminated against for opposing a practice prohibited under the bill, filing a complaint or attempting to enforce any right granted under the bill, or testifying or assisting in any action or proceeding to enforce any right under the bill may file a complaint with DWD, and DWD must process the complaint in the same manner as employment discrimination complaints are processed under current law, which processing may include the ordering of back pay, reinstatement, or compensation in lieu of reinstatement.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

*
the Department of Workforce Development

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 103.12 of the statutes is created to read:

2 103.12 Monitoring of electronic mail. (1) DEFINITIONS. In this section:

3 (a) "Electronic mail message" means any message transmitted by means of a
4 computerized communication system.

5 (b) "Employer" includes the state and any office, department, independent
6 agency, authority, institution, association, society, or other body in state government
7 created or authorized to be created by the constitution or any law, including the
8 legislature and the courts.

9 (c) "Message" means any transfer of signs, signals, writing, images, sounds,
10 data, or intelligence of any nature or any transfer of a computer program, as defined
11 in s. 943.70 (1) (c).

12 (d) "Monitor" means to intercept, observe, review, or examine through the use
13 of any electronic or other device.

1 (2) PERMITTED MONITORING. (a) Subject to ^{sub.} par. (3), an employer may not monitor
2 any electronic mail message sent or received by an employee of the employer unless
3 the employee sends or receives the electronic mail message through a computer
4 owned by the employer and the employer does all of the following:

5 1. Provides written notice to the employee of the employer's policy regarding
6 the monitoring of employee electronic mail usage when the employee is hired and not
7 less than once each year after that.

8 2. Provides written notice to the employee of any change in the employer's
9 policy regarding the monitoring of employee electronic mail usage not less than 30
10 days before the effective date of the change in policy. An employer may not change
11 its policy regarding the monitoring of employee electronic mail usage retroactively
12 or change that policy to permit the monitoring of employee electronic mail messages
13 that originated before the effective date of the change in policy.

14 (b) A notice under par. (a) 1. or 2. shall include all of the following:

15 1. A statement of the purposes for which employee electronic mail messages are
16 monitored and the frequency with which that monitoring is conducted.

17 2. A statement for the employee to sign acknowledging that the employee has
18 received and understands the notice. The employer shall give the employee one copy
19 of the notice signed by the employee and shall retain one copy in its files.

20 (3) PROHIBITED MONITORING. (a) Subject to par. (c), an employer may not monitor
21 any electronic mail message sent or received by an employee because the employee
22 has exercised or is exercising, or because the employer believes that the employee has
23 exercised, is exercising, or may exercise, any right guaranteed under s. 111.04, 111.70
24 (2), or 111.82 or under 29 USC 157.

1 (b) An employee has a reasonable expectation of privacy in the content of any
 2 personal electronic mail message sent or received by the employee. Subject to par.
 3 (c), an employer may not monitor the content of any electronic mail message sent or
 4 received by an employee except as necessary to determine whether the electronic
 5 mail message is personal or work related or to protect any trade secret, as defined
 6 in s. 134.90 (1) (c), or other confidential business information of the employer.

7 (c) Paragraphs (a) and (b) do not prohibit an employer from doing any of the
 8 following:

9 1. Monitoring the number or frequency of the personal electronic mail
 10 messages sent or received by an employee to ascertain the efficiency or productivity
 11 of the employee.

12 2. Using any electronic or other device to manage the electronic mail messages
 13 coming into or going out of the employer's computerized communication system
 14 solely for the purpose of system maintenance, security, or protection and not for the
 15 purpose of monitoring the electronic mail messages sent or received by any
 16 particular employee.

17 (4) DISCRIMINATORY ACTIONS PROHIBITED. No employer may discharge or
 18 otherwise discriminate against any person for opposing a practice prohibited under
 19 this section, filing a complaint or attempting to enforce any right under this section,
 20 or testifying or assisting in any action or proceeding to enforce any right under this
 21 section.

22 (5) ENFORCEMENT. An employee whose electronic mail messages are monitored
 23 in violation of sub. (2) or (3) or who is discharged or otherwise discriminated against
 24 in violation of sub. (4) may file a complaint with the department, and the department

1 shall process the complaint in the same manner as employment discrimination
2 complaints are processed under s. 111.39.

3 **SECTION 2.** 106.54 (8) of the statutes is created to read:

4 106.54 (8) The division shall receive complaints under s. 103.12 (5) and shall
5 process the complaints in the same manner as employment discrimination
6 complaints are processed under s. 111.39.

7 **SECTION 3.** 111.91 (2) (im) of the statutes is created to read:

8 111.91 (2) (im) Employee electronic mail usage requirements that provide
9 fewer rights and remedies to employees than are provided under s. 103.12.

10 **SECTION 4. Initial applicability.**

11 (1) This act first applies to an employee who, on the day before the effective date
12 of this subsection, is covered by a collective bargaining agreement that contains
13 provisions inconsistent with section 103.12 of the statutes, as created by this act, on
14 the day on which the collective bargaining agreement expires or is extended,
15 modified, or renewed, whichever occurs first.

16 (END)

D-note

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2711/1dn
GMM.....

bjk
+
jld

Date

Representative Schneider:

In addition to the language submitted by MTI, this draft borrows language from s. 19-1705(e) (2), Delaware Code, to permit employers to monitor employee e-mail for the purpose of filtering out spam and viruses so long as the monitoring is not for the purpose of monitoring a particular employee. *reas*

Gordon M. Malaise
Senior Legislative Attorney
Phone: (608) 266-9738
E-mail: gordon.malaise@legis.wisconsin.gov

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2711/1dn
GMM:bjk&jld:sh

May 21, 2007

Representative Schneider:

In addition to the language submitted by MTI, this draft borrows language from s. 19-1705 (e) (2), Delaware Code, to permit employers to monitor employee e-mail for the purpose of filtering out spam and viruses as long as the monitoring is not for the purpose of monitoring a particular employee.

Gordon M. Malaise
Senior Legislative Attorney
Phone: (608) 266-9738
E-mail: gordon.malaise@legis.wisconsin.gov

Parisi, Lori

From: Schneider, Marlin
Sent: Tuesday, May 29, 2007 11:29 AM
To: LRB.Legal
Subject: Draft Review: LRB 07-2711/1 Topic: Monitoring of employee electronic mail

Please Jacket LRB 07-2711/1 for the ASSEMBLY.