

2009 ASSEMBLY BILL 64

February 17, 2009 – Introduced by Representative SCHNEIDER. Referred to Committee on Personal Privacy.

1 **AN ACT** *to amend* 111.322 (2m) (a) and 111.322 (2m) (b); and *to create* 103.12,
2 106.54 (8) and 111.91 (2) (im) of the statutes; **relating to:** employer monitoring
3 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

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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 the Department of Workforce Development (DWD). 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 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.

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1 (c) “Message” means any transfer of signs, signals, writing, images, sounds,
2 data, or intelligence of any nature or any transfer of a computer program, as defined
3 in s. 943.70 (1) (c).

4 (d) “Monitor” means to intercept, observe, review, or examine through the use
5 of any electronic or other device.

6 **(2) PERMITTED MONITORING.** (a) Subject to sub. (3), an employer may not monitor
7 any electronic mail message sent or received by an employee of the employer unless
8 the employee sends or receives the electronic mail message through a computer
9 owned by the employer and the employer does all of the following:

10 1. Provides written notice to the employee of the employer’s policy regarding
11 the monitoring of employee electronic mail usage when the employee is hired and not
12 less than once each year after that.

13 2. Provides written notice to the employee of any change in the employer’s
14 policy regarding the monitoring of employee electronic mail usage not less than 30
15 days before the effective date of the change in policy. An employer may not change
16 its policy regarding the monitoring of employee electronic mail usage retroactively
17 or change that policy to permit the monitoring of employee electronic mail messages
18 that originated before the effective date of the change in policy.

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

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

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

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

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

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

14 1. Monitoring the number or frequency of the personal electronic mail
15 messages sent or received by an employee to ascertain the efficiency or productivity
16 of the employee.

17 2. Using any electronic or other device to manage the electronic mail messages
18 coming into or going out of the employer's computerized communication system
19 solely for the purpose of system maintenance, security, or protection and not for the
20 purpose of monitoring the electronic mail messages sent or received by any
21 particular employee.

22 **(4) DISCRIMINATORY ACTIONS PROHIBITED.** No employer may discharge or
23 otherwise discriminate against any person for opposing a practice prohibited under
24 this section, filing a complaint or attempting to enforce any right under this section,

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1 or testifying or assisting in any action or proceeding to enforce any right under this
2 section.

3 **(5) ENFORCEMENT.** An employee whose electronic mail messages are monitored
4 in violation of sub. (2) or (3) or who is discharged or otherwise discriminated against
5 in violation of sub. (4) may file a complaint with the department, and the department
6 shall process the complaint in the same manner as employment discrimination
7 complaints are processed under s. 111.39. If the department finds that a violation
8 of sub. (2), (3), or (4) has been committed, the department may order the employer
9 to take such action under s. 111.39 as will effectuate the purpose of this section.
10 Section 111.322 (2m) applies to a discharge or other discriminatory act arising in
11 connection with any proceeding under this subsection.

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

13 106.54 **(8)** The division shall receive complaints under s. 103.12 (5) and shall
14 process the complaints in the same manner as employment discrimination
15 complaints are processed under s. 111.39.

16 **SECTION 3.** 111.322 (2m) (a) of the statutes is amended to read:

17 111.322 **(2m)** (a) The individual files a complaint or attempts to enforce any
18 right under s. 103.02, 103.10, 103.12, 103.13, 103.28, 103.32, 103.455, 103.50,
19 104.12, 109.03, 109.07, 109.075, or 146.997 or ss. 101.58 to 101.599 or 103.64 to
20 103.82.

21 **SECTION 4.** 111.322 (2m) (b) of the statutes is amended to read:

22 111.322 **(2m)** (b) The individual testifies or assists in any action or proceeding
23 held under or to enforce any right under s. 103.02, 103.10, 103.12, 103.13, 103.28,
24 103.32, 103.455, 103.50, 104.12, 109.03, 109.07, 109.075, or 146.997 or ss. 101.58 to
25 101.599 or 103.64 to 103.82.

