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COMMONWEALTH OF PENNSYLVANIA  
HOUSE OF REPRESENTATIVES  
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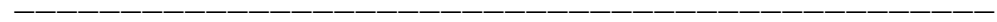
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HARRISBURG, PENNSYLVANIA

PUBLIC HEARING ON  
HOUSE BILL 1298

WEDNESDAY, JULY 1, 2009  
10:05 A.M.

BEFORE:

- HONORABLE THOMAS R. CALTAGIRONE,  
MAJORITY CHAIRMAN
- HONORABLE DEBERAH KULA
- HONORABLE JOHN E. PALLONE
- HONORABLE PAUL J. DRUCKER
- HONORABLE RONALD G. WATERS
- HONORABLE RON MARSICO, MINORITY CHAIRMAN
- HONORABLE MIKE VEREB
- HONORABLE TOM C. CREIGHTON
- HONORABLE KATE HARPER



BRENDA J. PARDUN, RPR  
P. O. BOX 278  
MAYTOWN, PA 17550  
717-426-1596 PHONE/FAX



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## P R O C E E D I N G S

1  
2 CHAIRMAN CALTAGIRONE: I'll open the  
3 hearing right now. I'm Chairman Caltagirone.  
4 Chairman Marsico, if everybody would like to  
5 introduce themselves for the record. Want to  
6 start with Mike and work our way down?

7 REPRESENTATIVE VEREB: Sure.  
8 Representative Mike Vereb, 150th District.

9 REPRESENTATIVE DRUCKER:  
10 Representative Paul Drucker, 157th District.

11 REPRESENTATIVE HARPER:  
12 Representative Kate Harper, 61st, Montgomery  
13 County.

14 REPRESENTATIVE MARSICO:  
15 Representative Ron Marsico, Dauphin County.

16 REPRESENTATIVE KULA: Representative  
17 Deberah Kula, 52nd District, Fayette,  
18 Westmoreland Counties.

19 MS. FOX: Tamara Fox, staff counsel.

20 MS. MOORE: Michelle Moore, secretary  
21 to Representative Marsico.

22 MR. HANNAFORD: Wendell Hannaford,  
23 intern, Representative Caltagirone.

24 MR. TYLER: Dave Tyler, executive  
25 director, judiciary committee.

1 CHAIRMAN CALTAGIRONE: And  
2 Representative Tom Creighton is joining us.

3 We're having a hearing on House Bill  
4 1298, Mark Cohen's bill. And it basically  
5 deals with notice to employees of monitoring  
6 of the information technology resources by  
7 employers and establishing the cause of action  
8 and imposing civil penalties.

9 We'll first start off with Andy  
10 Hoover, the legislative director of the ACLU.

11 Andy.

12 MR. HOOVER: Thanks.

13 Good morning, Chairman Caltagirone  
14 and members of the committee. It's a pleasure  
15 to be here with you this morning.

16 I'm here today on behalf the 15,000  
17 members of the American Civil Liberties Union  
18 of Pennsylvania. The ACLU is one of the  
19 nation's oldest civil rights organizations,  
20 founded in 1920. And activity by the ACLU in  
21 Pennsylvania dates back to the 1930s.

22 Thank you for the opportunity to  
23 testify today. This bill, HB 1298, requires  
24 employers that conduct electronic surveillance  
25 of employees to notify their workers of that

1 surveillance. The ACLU of Pennsylvania  
2 supports this bill, and we encourage the  
3 committee to move it to the floor of the house  
4 for consideration.

5 We support this bill because it is  
6 sound policy related to privacy. HB 1298 is  
7 sound policy because it sets clear  
8 boundaries. When people are being watched,  
9 whether it's a worker at his or her place of  
10 employment or it's a person walking the  
11 streets of the city, it essential that they  
12 know that they are being watched.

13 Privacy is about how we present to  
14 the world. We communicate with people  
15 differently based upon who we're talking to.  
16 So I, as a lobbyist, might talk differently to  
17 all of you than I talk with my family. How we  
18 communicate with equal co-workers differs from  
19 how we communicate with supervisors. And it's  
20 beneficial for all parties if an employee at  
21 least knows who his audience is when  
22 communicating in the workplace.

23 HB 1298 is fair because it stops a  
24 person from secretly intercepting the  
25 communications of another person.

1           Now, it's also important to be clear  
2           about what the bill does not do. HB 1298 does  
3           not stop employers from monitoring the e-mail  
4           communication on internal servers owned by the  
5           company. This bill is a measured step that  
6           carefully balances the rights of employers to  
7           run their companies as they see fit and the  
8           need for employees to know and understand the  
9           monitoring power of those for whom they work.

10           The positive impact of the bill  
11           potentially goes beyond simply drawing lines  
12           of privacy and increased knowledge or  
13           workplace surveillance for employees. HB 1298  
14           also has the potential to deter worker  
15           mischief, from violations of basic company  
16           policies to criminal activity. If workers are  
17           aware that their employers may be monitoring  
18           their electronic communication, they are less  
19           likely to engage in inappropriate or illegal  
20           activity.

21           Now, although case law generally  
22           favors employers on these issues, the courts  
23           do not provide total direction. In one  
24           example from 1996, the federal Eastern  
25           District Court of Pennsylvania ruled against

1 an employee in *Smyth v. Pillsbury* after the  
2 company terminated the employee for  
3 inappropriate e-mail. The employee claimed  
4 that the employer stated that e-mail would not  
5 be monitored, but then the employee was  
6 terminated for inappropriate e-mail.

7 The court found that the company has  
8 an interest in providing -- or preventing  
9 inappropriate and illegal activity.

10 Meanwhile, last year, the Court of  
11 Appeals for the Ninth Circuit in federal  
12 courts ruled that it is unconstitutional for  
13 communications providers to give employers  
14 e-mails and text messages from company-  
15 financed accounts.

16 In *Quan v. Arch Wireless*, the appeals  
17 court found that Arch Wireless and the  
18 Ontario, California, police department  
19 violated an employee's Fourth Amendment right  
20 to freedom from unreasonable searches and  
21 seizures when Arch gave the department the  
22 employee's text messages. The ruling bans  
23 providers from handing over e-mails and text  
24 messages to companies when the companies  
25 contract those services with the providers.



1 It does not affect companies that maintain  
2 their own internal servers.

3 And although the ruling is only  
4 binding in the Ninth Circuit, it does indicate  
5 that the courts are willing to consider cases  
6 regarding workplace privacy.

7 I should also note that the courts  
8 are typically behind when it comes to  
9 technology. In 1928, in Olmstead v. The  
10 United States, the United States Supreme Court  
11 ruled that a person does not have a right to  
12 privacy on the telephone. Thirty-nine years  
13 later, in 1967, Katz v. United States, the  
14 supreme court ruled seven to one that a person  
15 does have right to privacy on the telephone.

16 Legislatures can fill that gap as the  
17 courts catch up with the technology.

18 The courts have not given employees a  
19 clear constitutional right to privacy in the  
20 workplace, but the state government can always  
21 give the people more rights than what the  
22 constitution allows.

23 HB 1298 is effective policy. I would  
24 notice that the chamber's recommending  
25 amendments, and certainly we'd be interested

1 in talking about amendments as well. We are  
2 open to that, as long as it maintains the  
3 notice provision.

4 This bill aids workers in knowing  
5 where their right to privacy in the workplace  
6 begins and ends, and it deters employees from  
7 engaging in inappropriate behavior.

8 The ACLU of Pennsylvania supports  
9 HB 1298 and encourages the committee to pass  
10 it.

11 Thank you for the opportunity to  
12 testify today.

13 CHAIRMAN CALTAGIRONE: Thank you.

14 We have been joined by Representative  
15 Ron Waters from Philadelphia.

16 Questions from members?

17 Yes, Mike and Kate.

18 REPRESENTATIVE VEREB: Andy, the case  
19 you've -- I missed. I know it's in your  
20 testimony. Would you explain further the one  
21 case with the wireless communication company  
22 releasing information, text messages?

23 MR. HOOVER: As much as I can, yes.  
24 So, basically, this police department gave out  
25 pagers and the officers were sending messages

1 using the pagers. The contract that they have  
2 with this Arch Wireless provider. And the  
3 provider, Arch, gave messages to supervisors  
4 at the department without ever -- they just  
5 give them, handed them over. And the circuit  
6 court in Ninth Circuit, the appeals court,  
7 found that that was a violation of the Fourth  
8 Amendment.

9 So if companies -- now, this is --  
10 there are some specific facts here, which is  
11 that if companies contract out -- they don't  
12 have their own internal servers, they contract  
13 out with a provider -- the provider cannot  
14 hand over the messages.

15 REPRESENTATIVE VEREB: Okay. And I  
16 know there's representation from the  
17 communications industry in the room here, but  
18 how do you feel this -- this notification is  
19 proposed and the legislation really doesn't  
20 change the expectation of privacy. In my  
21 mind, I think everyone realizes on their work  
22 computer that somebody eventually is watching,  
23 either by trace of words or by physical  
24 e-mails, but there is an exception in the  
25 wiretap law where telecommunication providers,

1 to be able to monitor any phone or  
2 communications device if they feel the  
3 company's being defrauded over their system.  
4 And I'm curious, if not you, if you could look  
5 into that and, you know, get back to us with  
6 that issue. There is an exception in the  
7 wiretap law, which, frankly, I've used with  
8 Comcast and, you know, when used right -- of  
9 course, we're expecting people to be  
10 responsible and respectful of the law, but I'd  
11 be curious as to how that comes into play with  
12 whatever disclaimer you have to put in front  
13 of the employees.

14 MR. HOOVER: Sure. I'll do that and  
15 get back to you.

16 REPRESENTATIVE HARPER: I have a  
17 question also.

18 Certainly be beneficial if employees  
19 understand that they don't have a right to  
20 privacy on the company computers. But the  
21 bill calls for far more than that. The bill  
22 calls for a notice to be signed by the  
23 employee and then, presumably, the records  
24 kept for however long the employee is with the  
25 company. Wouldn't all the beneficial things

1 about this bill be served by a simple notice,  
2 "Your e-mail communications may be monitored  
3 by your employer"?

4 MR. HOOVER: Potentially. I know,  
5 it's Representative Cohen's bill, so he has to  
6 decide how he wants to alter it. I think that  
7 the key piece of this is the fact that  
8 employees are being notified. I was here last  
9 week, and Representative Cohen talked about  
10 the bill and said that, you know, if you have  
11 a signed acknowledgement, then people -- it's  
12 clear that the employees got the notice.

13 But certainly be willing to discuss  
14 further how that notice occurs and if that is  
15 necessary.

16 REPRESENTATIVE HARPER: All right.  
17 And the question regarding the ninth circuit  
18 case you were talking about, many companies  
19 now contract with outside servers just to  
20 handle the traffic.

21 MR. HOOVER: Right.

22 REPRESENTATIVE HARPER: In my mind,  
23 if you lease an outside server, there  
24 shouldn't be any difference between whether  
25 it's on your premises or whether it happens to

1 be located several miles away. From a privacy  
2 point of view, what difference does that  
3 make? You know, I don't get that.

4 MR. HOOVER: First of all, obviously,  
5 it's not well established case law. It's one  
6 case in that particular circuit.

7 I think that I would -- I think our  
8 position would be that as a private company --  
9 you know, the employer, if they own a server,  
10 then that's their server, they own it.

11 REPRESENTATIVE HARPER: But if you  
12 lease a server, there's no difference. They  
13 own a piece of the server for a portion of  
14 time.

15 MR. HOOVER: Sure. I understand what  
16 you're saying. I just -- we would just say  
17 that it's because an outside company is  
18 handling it, that makes a difference.

19 REPRESENTATIVE HARPER: You believe  
20 that; the ACLU believes that?

21 MR. HOOVER: Correct.

22 REPRESENTATIVE HARPER: Thank you,  
23 Mr. Chairman.

24 CHAIRMAN CALTAGIRONE: Any other  
25 questions?

1 Thank you, Andy.

2 Chairman Cohen is here, and if you  
3 want to make any remarks on your bill, Mark,  
4 you're certainly welcome to, unless you want  
5 to wait --

6 REPRESENTATIVE COHEN: Why don't I  
7 wait until the chamber of commerce has spoken,  
8 and any others.

9 CHAIRMAN CALTAGIRONE: Certainly.  
10 Okay.

11 Brian Rider, president of the  
12 Pennsylvania Retailers' Association.

13 MR. RIDER: Good morning,  
14 Mr. Chairman, Chairman Marsico, committee  
15 members. My remarks will be brief.

16 Good morning. And, again, thank you  
17 for the opportunity this morning to submit  
18 some brief remarks concerning House Bill  
19 1298. My comments this morning are on behalf  
20 of several members of the Pennsylvania  
21 Retailers' Association, and we are the state-  
22 wide trade association representing retailers  
23 throughout the commonwealth.

24 We appreciate Representative Cohen's  
25 attempt to balance employees' privacy rights

1 with employer company resources; however,  
2 House Bill 1298, as currently drafted,  
3 presents several concerns for our members  
4 operating stores in the commonwealth.

5 Currently, many employers already  
6 provide notification to employees that their  
7 company-owned e-mail may or will be monitored,  
8 via their employee handbooks and/or other  
9 documents, that do not, should not require a  
10 signature from the employee or employees.

11 Employers have the right, our  
12 members, under their impression and  
13 interpretation of the law, to monitor company-  
14 owned e-mails that is being utilized by their  
15 employees and should not have to obtain  
16 written permission and/or signatures  
17 authorizing them to do so or in an effort to  
18 protect the employee's privacy.

19 Quite frankly, Mr. Chairman, if the  
20 employee's using his or her employer's e-mail  
21 for personal reasons, that employer should be  
22 entitled to have access to those  
23 correspondence due to the fact that they, as  
24 our members feel, own these e-mail  
25 correspondence, because they are company --



1 the company owns it, they're working on the  
2 employer's time.

3 Mandating that employers obtain and  
4 maintain written and/or electronic permission  
5 from employees, our members are telling us,  
6 could be costly, burdensome, and create  
7 unnecessary tracking requirements. We also  
8 feel that it's unrealistic to allow employees  
9 to bring civil action against employers when  
10 employees are, in fact, using their employer-  
11 owned e-mail systems.

12 What if the employees' actions  
13 provide significant harm to the employer or  
14 others? And there's no notices necessary in  
15 that case, from what the HR people are telling  
16 us from our members.

17 Again, I am not an attorney and I'm  
18 far from a human resource expert. But -- and  
19 we appreciate the opportunity to present some  
20 remarks here, and if you have the opportunity,  
21 Pennsylvania Chamber of Business and Industry  
22 provides some very good written testimony  
23 today to committee members, citing specific  
24 case law in Pennsylvania regarding this issue  
25 that I think far addresses this better than

1           our remarks today. But, again, I'd been happy  
2           to try to answer any questions, and if I  
3           cannot, I will be more than happy to provide  
4           you with written response to any questions you  
5           have.

6                         CHAIRMAN CALTAGIRONE: Thank you.

7                         REPRESENTATIVE DRUCKER: Are you  
8           suggesting in your testimony that under this  
9           act the employee needs permission to monitor  
10          the employee's e-mail?

11                        MR. RIDER: You mean employer  
12          represented?

13                        REPRESENTATIVE DRUCKER: Yes.

14                        MR. RIDER: They must provide some  
15          type of notification. And a lot of times,  
16          what I'm being told, is they're doing it via  
17          their employee handbook or an e-mail that is  
18          sent to all new employees saying that, "Your  
19          e-mail correspondences may be monitored."

20                        REPRESENTATIVE DRUCKER: As I read  
21          the act, there's a specific requirement as to  
22          what the employer must do in order to monitor  
23          the e-mail. And it's not that the employer  
24          need ask. As I read the act, the employer has  
25          that right. What is required, under the act,

1 is that the employer give the employee notice  
2 that they have that right and they are  
3 exercising that. That's far different than  
4 asking the employee for permission, which is  
5 what I thought I heard you say you want.

6 MR. RIDER: If I misspoke or did not  
7 read the act correctly, I apologize. But,  
8 again, what our stores are telling us, that  
9 they are providing this notification, whether,  
10 again, it's in the employee handbook, it's in  
11 the employee manual, or you're provided with  
12 an e-mail from the employer.

13 REPRESENTATIVE DRUCKER: What if your  
14 position is each time the employee logs on,  
15 the notice that comes up on his screen tells  
16 him that this e-mail may be monitored by his  
17 employer? Do you have a problem with that?

18 MR. RIDER: I would have go to back  
19 and ask our member stores.

20 REPRESENTATIVE DRUCKER: All right.

21 CHAIRMAN CALTAGIRONE: We have been  
22 also joined by Representative John Pallone.

23 REPRESENTATIVE PALLONE: Thank you,  
24 Mr. Chairman.

25 CHAIRMAN CALTAGIRONE: Are there any

1 other questions?

2 MR. TYLER: You may have mentioned  
3 this, Brian, and if you did forgive me. I was  
4 kind of reading your testimony awhile. Is it  
5 your belief that many of these businesses whom  
6 you work with are already sending some sort of  
7 notification to their employees?

8 MR. RIDER: That's our understanding,  
9 that they are informing us.

10 MR. TYLER: And what form -- you said  
11 via manuals. It's my understanding that many  
12 companies, when they're hired, as part of  
13 their HR process, they're also signing some  
14 sort of document saying that they have been  
15 notified; is that correct?

16 MR. RIDER: I would have to ask. I  
17 don't know if it's part of the document when  
18 they're hired, acceptance of employment, if  
19 they're signing something attesting to or  
20 saying that, yes, we understand that these --  
21 our e-mails may be monitored.

22 MR. TYLER: Okay. Thank you.

23 CHAIRMAN CALTAGIRONE: Any other  
24 questions?

25 MR. RIDER: Thank you, Mr. Chairman.

1                   CHAIRMAN CALTAGIRONE:  As was alluded  
2                   to, we do have a very extensive written  
3                   testimony, which we are going to submit for  
4                   the record, from the Pennsylvania Chamber of  
5                   Commerce.  It's in your packets.

6                   And I think it's appropriate now that  
7                   we hear from the primary sponsor of the bill,  
8                   Chairman Mark Cohen.

9                   REPRESENTATIVE COHEN:  Thank you,  
10                  Mr. Chairman.

11                  Mr. Chairman, as Representative  
12                  Drucker said, there's nothing in this bill  
13                  that is meant to require employee permission  
14                  for the employer to monitor the e-mail.  I  
15                  don't really understand how -- how it is being  
16                  read that way so as to view it as required,  
17                  but it doesn't.

18                  And if you want to make it clear, put  
19                  a sentence in, "Nothing in this" -- "Nothing  
20                  in this bill requires employee permission to  
21                  monitor."  All this is is a notice bill, and,  
22                  you know, I'm -- I appreciate all the  
23                  creativity that is being shown.  It does not  
24                  seem to me this is very earthshaking.  It,  
25                  frankly, seems to me it's in the employer's

1 interest to give the employee notification  
2 because these are to stop improper use of  
3 e-mail.

4 CHAIRMAN CALTAGIRONE: Chairman  
5 Marsico has a question.

6 Chairman.

7 REPRESENTATIVE MARSICO: Yes.  
8 Mr. Chair. Reading the bill analysis,  
9 Democratic bill analysis, in the middle of the  
10 analysis, the paragraph says: All employees  
11 should -- would be required to sign  
12 acknowledgment of receipt of their own copy of  
13 the notice. You said there wasn't anything  
14 that would be required by the employer. So  
15 where are -- where are they getting the  
16 receipt? I don't understand what you're  
17 saying.

18 REPRESENTATIVE COHEN: The employees  
19 would sign -- this was seen as protection of  
20 employers. But if employers are against this  
21 protection, you know, you can take it out. I  
22 mean, this -- it give the employee -- or  
23 absolute proof to the person had received the  
24 e-mail. I, frankly, believe this is in the  
25 employer's interest. But if the employer

1 communities said, "No, this is not in our  
2 interest. This is a tremendous burden. We're  
3 going to move out of Pennsylvania. All sorts  
4 of terrible things will happen to us if we  
5 have to get -- get a signature from the  
6 employee." Then take it out.

7 This was put in -- this was put in to  
8 balance it. And this was considered by me and  
9 my staff to be a pro-employer provision. If  
10 the employers want to take it out, take it  
11 out, if the employee has to sign it.

12 REPRESENTATIVE VEREB: Mr. Chairman,  
13 obviously I think we all understand what  
14 you're trying to accomplish. And I do  
15 think -- I don't think the burden that is  
16 being described is a roadblock to what you're  
17 trying to do. I guess when we're talking  
18 about electronic communication system, maybe  
19 the thought is, can we enact this with  
20 language that's 2009?

21 You know, I don't know how many  
22 policies anymore are even in writing. People  
23 get hired, most of it's on-line training for  
24 bigger companies. But you're right, most of  
25 the employers are very concerned, you know,

1 about employees' rights, and most of your  
2 employers have very credible policies in place  
3 that are much more stringent than what you're  
4 trying to pass. I think what you're trying to  
5 put through here is minimum protection, and I  
6 think a lot of us understand that.

7 I think what it comes down to, Mark,  
8 is what's going to be easiest and simplest and  
9 what's going to be cohesive with, you know, a  
10 few years down the road here. And sometimes  
11 communication -- and our federal workplace  
12 laws are required to be on a certain size  
13 poster in so many different places on so many  
14 different floors in businesses. I mean,  
15 there's all kind of stringent requirements on  
16 workers' rights act as an employer.

17 I think we all agree it's okay to  
18 make sure that employees know that they're  
19 being monitored. I got to tell you, an  
20 employer who hires somebody that doesn't know  
21 they're being monitored might want to  
22 reconsider their resume.

23 But, you know, what you're trying to  
24 do is minimal. It's just a matter of the  
25 employees.



1           I think the argument here, and my  
2 question would be, if there's going to be a  
3 paper trail, just how long is that paper trail  
4 valid and how long do they have to keep it?  
5 And, you know, with mergers and acquisitions,  
6 where does that paperwork go? And if somebody  
7 slips through the cracks and, therefore, the  
8 future employer is hold liable. So I'm not --

9           REPRESENTATIVE COHEN: I would think  
10 if it's a merger or some other change of  
11 ownership, all this is, you know, public  
12 information. It's not going to be secret.  
13 And I would -- I don't think this creates an  
14 impossible demand on somebody.

15           Some people -- what happens if fifty  
16 years from now -- the employee signs this as a  
17 young man, and fifty years from now he's still  
18 working for the same company and the company's  
19 lost it, I mean, I think we're just getting  
20 into the field of creativity here. This has  
21 very little to do with how -- with how the  
22 real world operates.

23           REPRESENTATIVE VEREB: If I could  
24 finish my point, I think you just justified my  
25 point. You know, fifty years from now, the

1 documents not going to be around and the  
2 company's going to be exposed to have not  
3 officially notified that employee. The  
4 question is, can we do an amendment,  
5 Mr. Chairman, that is reflective of  
6 technology? If the person's going to be on  
7 the computer and is in fear of their rights  
8 using that computer, then why not that message  
9 be an automatic message to every single  
10 employee, and in some cases it can be every  
11 month. It can every time they log on, like we  
12 do here in the House.

13           It's no secret our e-mails are  
14 private. Anyone in the capitol who thinks  
15 their e-mails are private obviously has not  
16 been reading the paper.

17           But there are notifications, right,  
18 and I think my point is that I think we can  
19 address this. If you have to get on the  
20 computer to send an e-mail in the company,  
21 then why can't you get an automated message  
22 where we know they have it, and then there's  
23 no need for all this potential roadblock of  
24 paperwork. That's all I'm suggesting to you.

25           No sense having a paper trail in an

1 electronic process.

2 REPRESENTATIVE COHEN: If you want to  
3 use other language to make it an electronic  
4 trail somehow -- I don't know. If you want to  
5 require that every single time the employee  
6 has to -- has to consent, I'm sure employers  
7 who find one-time signature requirement  
8 burdensome would probably find a much more  
9 detailed requirement even more burdensome.

10 REPRESENTATIVE VEREB: Actually, I  
11 actually think it's better for companies if  
12 it's on their system and it's that much more  
13 documented, that much more helpful. The  
14 language that you want to use, but the  
15 delivery, Mr. Chairman, is, I guess, the  
16 question, the delivery of the message.

17 CHAIRMAN CALTAGIRONE: As my good  
18 friend, Representative Drucker says, automatic  
19 pop-up.

20 I think we can possibly discuss that  
21 with the retailers and maybe the chamber,  
22 ACLU, to see if that kind of amendment would  
23 be something that you all agree to. I think  
24 it's a good point.

25 Also, got to realize the cost

1 associated with smaller companies, larger  
2 companies, and how that can be accommodated.

3 Representative Kula, Pallone, and  
4 then Dave.

5 Representative Kula.

6 REPRESENTATIVE KULA: I guess I don't  
7 have a question more than a comment. I don't  
8 think I have been hired in any position where  
9 I have not had paperwork that I've had to deal  
10 with. And if we look back when we all started  
11 here at the House of Representatives, there  
12 were volumes of papers that we needed to  
13 sign.

14 It doesn't seem to me that signing  
15 one more little document that says that I  
16 understand that my e-mails are going to be  
17 monitored is any real great burden to sign my  
18 name to. I think it is much better to have  
19 that paper trail. If something should come  
20 before the court, it's much easier to copy  
21 that document and present it to the court than  
22 any electronic document.

23 I have not known many businesses, I  
24 guess, that doesn't maintain an employee  
25 file. Whether it's merged, it's transferred,

1           it's whatever.  If you are still an employee  
2           of that company, I would assume that any  
3           paperwork that you signed upon employment  
4           would be part of that employee record.

5                        So I'm just not seeing a real problem  
6           with this.  With everyone looking for jobs  
7           right now and wanting and needing a job, I  
8           think signing your name to a small document  
9           doesn't seem to be real burdensome to me.

10                       Thank you.

11                       CHAIRMAN CALTAGIRONE:  John.

12                       REPRESENTATIVE PALLONE:  Thank you,  
13           Mr. Chairman.  Excuse me.

14                       Mr. Cohen, in your proposed  
15           legislation, is there any requirement that the  
16           employer must maintain only the hard copy  
17           document, or is there a provision or an option  
18           that enables the employer to have you sign the  
19           form and then digitize that record and store  
20           it digitally?

21                       REPRESENTATIVE COHEN:  Nothing stops  
22           the digital storage of records.

23                       REPRESENTATIVE PALLONE:  And the  
24           digital copy would be equally as valid or  
25           enforceable as the hard copy?

1                   REPRESENTATIVE COHEN:    Sure.  Of  
2                   course.

3                   REPRESENTATIVE PALLONE:  Just a  
4                   comment, Mr. Chairman.  In the employment  
5                   arena that we're in today -- the employment  
6                   world of my grandfather was, you went to work  
7                   for a company, and you worked there for forty-  
8                   five or fifty years and retired.  That's not  
9                   happening today.  This generation's  
10                  employers -- employees coming out of colleges  
11                  and high schools are working anywhere from  
12                  twenty-four to thirty-five months, and then  
13                  changing jobs literally dozens of times  
14                  throughout their careers.  And with the  
15                  ability to be able to maintain a record like  
16                  this digitally, I don't see that it's an  
17                  overburden.

18                  However, I would ask that we look at  
19                  developing some of the amendments that we're  
20                  looking at, that we break it down into the  
21                  classifications as to -- we have small,  
22                  medium, and large employers, as to what the  
23                  requirement might be.  For a small mom-and-pop  
24                  operation that has two or three people on  
25                  staff, the burden may be a little more than

1 for, you know, some international company that  
2 has hundreds or thousands of employees, may be  
3 more convenient to be able to do it.

4 So if we have an opportunity to  
5 improve the legislation by looking at that,  
6 because I'm even looking at our court records  
7 today. You know, more and more the  
8 prothonotary offices and clerk of court  
9 offices are going to digital documents. The  
10 recorder of deeds office now in some counties  
11 has a provision where we can record a deed  
12 digitally without even appearing in the  
13 courthouse to do it.

14 So there's no reason why something  
15 like this can't be transitioned into the  
16 employment arena to do both, protect the  
17 employees as well as protect the employer.  
18 So, Representative Cohen, I think you're on  
19 the right track here, so thank you very much.

20 REPRESENTATIVE COHEN: Thank you.

21 Repeat, there's nothing wrong with  
22 digital recordkeeping under this bill.

23 CHAIRMAN CALTAGIRONE: Representative  
24 Waters.

25 REPRESENTATIVE WATERS: Thank you,

1 Mr. Chairman.

2 And I'm -- I agree with Mark,  
3 comments that he made. There's a couple  
4 questions that, I believe, for clarity. And  
5 one is, what happens if an employer doesn't do  
6 it and the employee violates, who is  
7 responsible then? And I know this is for the  
8 protection of the employer. But what happens  
9 if, for some reason, it doesn't happen?

10 And I think it's important for the  
11 pop-up because there are cases, I know, of  
12 different former police officers, and many  
13 times people go on light duty, and they are  
14 removed from the regular stuff and they go and  
15 have access to a computer for their light  
16 duty, and how we make sure that that light-  
17 duty employee understands that while he's  
18 here, have technology in front of you, it is  
19 not a normal part of your daily routine, make  
20 sure you behave yourself. So the pop-ups  
21 probably would be good.

22 But what would happen if the employer  
23 doesn't, what would be the consequence of  
24 something like that --

25 REPRESENTATIVE COHEN: Then the



1 employee could sue the employer if the  
2 employer does not do it. But it doesn't have  
3 to be damages. All this is is -- you come up  
4 with the most complicated regulatory scheme.  
5 How long is the bill right now? I don't have  
6 it in front of me.

7 You can work with whatever its exact  
8 size is. It's a short bill. We can make it  
9 into a very long bill in trying to answer  
10 every conceivable situation.

11 REPRESENTATIVE WATERS: Might be a  
12 good idea.

13 REPRESENTATIVE COHEN: Could easily  
14 convert this into a five hundred- or six  
15 hundred-page document with detailed  
16 prescriptions. I'm trying not to do that. It  
17 seems just a very simple rule that we're  
18 seeking to establish.

19 REPRESENTATIVE WATERS: Thank you,  
20 Mr. Chairman.

21 REPRESENTATIVE COHEN: Thank you.

22 CHAIRMAN CALTAGIRONE: Dave.

23 MR. TYLER: If I could just add to  
24 the one comment that I made earlier, I don't  
25 see the challenge, firsthand and respectfully,

1 with adding one piece of paper to employee  
2 sign in would be. I was recently hired six  
3 months ago. I probably signed thirty pieces  
4 of paper, from insurance to my conditions of  
5 my employment to my benefits for my wife.  
6 What happens if one of those documents are  
7 lost? So certainly it would be the same  
8 application as my tax documentation, my  
9 insurance documentation.

10 My other comments would be is  
11 databases are just as easily lost via virus  
12 acts as losing one particular document.

13 Thank you, Mr. Chairman.

14 CHAIRMAN CALTAGIRONE: There was  
15 another issue raised, Mark, that we may want  
16 to look at. And Chairman Marsico had said,  
17 you know, for a small business, one, two,  
18 three person employment, two thousand dollar  
19 fine would be pretty horrendous. And it was  
20 suggested that maybe that be ratcheted down  
21 somewhat because, you know, life is what it  
22 is, and people do make mistakes, and things  
23 can happen, and I'm just wondering if you'd be  
24 amenable to consider maybe reducing that  
25 somewhat. Your thoughts?

1                   REPRESENTATIVE COHEN:    Yeah.

2                   That's -- that's fine.

3                   I really don't think this is on my  
4                   top ten most important bills I've ever  
5                   introduced, and I really don't think this is  
6                   one of the top ten most important bills of  
7                   this legislative session.  This is a minor  
8                   bill that seeks to solve what's a minor  
9                   problem.

10                  CHAIRMAN CALTAGIRONE:  Right.

11                  REPRESENTATIVE COHEN:  And I would  
12                  hope that people would approach this without  
13                  trying to make -- to add complexity to this  
14                  where there's no need to do so.  I would say  
15                  if an owner of a business has two or three  
16                  employees, it's highly likely they're all in  
17                  one location, and they're all communicating  
18                  personally.  They're not really spending a lot  
19                  of time communicating by e-mail.

20                  So, if you want to say anybody with  
21                  three employee or less, it is five hundred  
22                  dollars, I don't think there would be any  
23                  litigation with that.  But, again, always the  
24                  question is what do you wanted to define small  
25                  business as.  And some people believe a small

1 business is ten thousand or less employees.  
2 Some people believe it's fifty thousand or  
3 less employees.

4 Just think, you know, small ought to  
5 be, like, real small. It shouldn't be just  
6 applying to the governor's bill.

7 CHAIRMAN CALTAGIRONE: Right.  
8 Right. And I think, in all honesty, and in  
9 fairness to the members of the committee, we  
10 try to do our due diligence in crafting  
11 legislation, because whatever becomes law, you  
12 know, we have to live by it. And, you know,  
13 these hard economic times, I think one of the  
14 point is -- that is available here today, and  
15 some of the concerns is that we don't want to  
16 put an extra burden on businesses that are  
17 already having a difficult time right now.

18 And, you know, I'm not afraid to deal  
19 with this issue, Mark. You know me. And  
20 we'll try to get the direct amendments that  
21 have been discussed here today and get them  
22 prepared so we can deal with this piece of  
23 legislation and move on.

24 REPRESENTATIVE COHEN: Okay.

25 CHAIRMAN CALTAGIRONE: Any other

1 comments?

2 All right.

3 REPRESENTATIVE COHEN: Thank you,  
4 Mr. Chairman. Thank you members of the  
5 judiciary.

6 CHAIRMAN CALTAGIRONE: We're  
7 adjourned.

8 10:38 a.m.

9

10 \* \* \* \* \*

11

12 WRITTEN TESTIMONY SUBMITTED

13

14 (The following is the written  
15 testimony submitted by Pennsylvania Chamber of  
16 Business and Industry, prepared by Stephanie  
17 Catarino Wissman, Director, Government  
18 Affairs.)

19

20 Chairman Caltagirone, Chairman  
21 Marsico and other distinguished members of the  
22 House Judiciary Committee and guests, the  
23 Pennsylvania Chamber of Business and Industry  
24 appreciates the opportunity to provide written  
25 testimony to discuss a very important issue to

1       our membership.....employee email monitoring.  
2       We applaud Representative Cohen's ongoing  
3       efforts to balance employee workplace privacy  
4       with the need for employers to manage and  
5       protect company resources from non-productive,  
6       non-work related activities. However, as  
7       currently drafted, we believe HB 1298 is  
8       extremely prescriptive and is not necessary in  
9       light of federal and case law and repetitive  
10      of existing employee monitoring disclosure  
11      policy utilized by Pennsylvania businesses  
12      today.

13               The Pennsylvania Chamber of Business  
14      and Industry is the state's largest broad-  
15      based business advocacy association, serving  
16      more than 24,000 members and customers. PA  
17      Chamber membership comprises nearly 50 percent  
18      of the private workforce, ranging from Fortune  
19      100 companies to sole proprietors, and crosses  
20      all industry sectors. Many of these employers  
21      monitor their employees' use of their computer  
22      systems. House Bill 1298 proposes a specific  
23      standard for notifying employees about such  
24      monitoring. This bill is not necessary  
25      because the norms for notifying employees are

1 already well established, in Pennsylvania and  
2 throughout the country. Moreover, the bill  
3 poses substantial burdens for many  
4 Pennsylvania businesses that have employees in  
5 multiple states and would have to comply with  
6 this unique proposed Pennsylvania standard in  
7 addition to the norm in other states.

8           The caselaw regarding an employers'  
9 practices for monitoring employees' use of the  
10 employers' computers in Pennsylvania and  
11 elsewhere is uniform: an employer that  
12 notifies its employees or obtains their  
13 consent may monitor their communications  
14 through the employers' computer and computer  
15 system. The employer may do so to properly  
16 administer its system, to prevent unauthorized  
17 access, to ensure the system is being used for  
18 legitimate corporate business and to  
19 investigate improper access or use. In  
20 Pennsylvania case of Commonwealth v. Sodomsky,  
21 939 A.2d 363, 369 (Pa. Super 2007), the court  
22 explained that "if a person is aware of, or  
23 freely grants to a third party, potential  
24 access to his computer contents, he has  
25 knowingly exposed the contents of his computer

1 to the public and has lost any reasonable  
2 expectation of privacy in those contents."  
3 This requirement to inform employees before  
4 monitoring is rooted in the federal and state  
5 wiretap acts, including Pennsylvania's Act.

6 An earlier federal case, decided  
7 under Pennsylvania law, evidenced the  
8 employer's strong interest in monitoring its  
9 employees use of its computer system. In that  
10 case the court held that "an employee did not  
11 have a reasonable expectation of privacy in  
12 email communications voluntarily made by an  
13 employee" and that "the company's interest in  
14 preventing inappropriate and unprofessional  
15 comments or even illegal activity over its  
16 e-mail system outweighs any privacy interest  
17 the employee may have in those comments."  
18 *Smyth v. Pillsbury Company*, 914 F.Supp. 97,  
19 101(E.D. Pa. 1996).

20 Pennsylvania cases show that there is  
21 no magic formula for notifying employees of an  
22 employer's practice of monitoring. *Sodomsky*  
23 cited to three cases from three different  
24 parts of the country where employers were  
25 permitted to monitor their employees' computer



1 use because the employers informed their  
2 employees of such monitoring. Similarly, in  
3 another recent case, *Ober v. Miller, et al*,  
4 2007 U.S. Dist. Lexis 93236, \*59 (M.D. Pa.  
5 Dec. 18, 2007), the court addressed "the  
6 prevalence of workplace monitoring on  
7 computers" and cited to a half-dozen cases  
8 also evidencing that an employer can monitor  
9 its employees upon notice to them.

10 Many Pennsylvania employers actually  
11 obtain the consent of their employees before  
12 monitoring their computer use. Indeed, many  
13 of these employers actually obtain the consent  
14 of their employees each day as their employees  
15 sign on to their computers; that is, the  
16 employee cannot even access their computer  
17 unless they consent to such monitoring. Some  
18 of the cases referenced above specifically  
19 addressed and approved of such frequency.  
20 Other Pennsylvania employers provide notice to  
21 employees in a Code of Conduct or Employee  
22 Manual near the start of their employment.  
23 Again, some of the cases referred to above  
24 approved of such practices.

25 Against this background of settled

1 law and practice, and in light of the various  
2 manners by which an employer may permissibly  
3 inform its employees of a practice of  
4 monitoring, we do not believe it makes sense  
5 for Pennsylvania to direct that a specific  
6 approach be observed. The facts and  
7 circumstances regarding each monitoring  
8 program and each employer are different: an  
9 established body of caselaw, rather than the  
10 short notice proposed in House Bill No. 1298,  
11 is most appropriate for guiding Pennsylvania  
12 employers.

13 The Chamber also believes that House  
14 Bill 1298, as currently drafted, dictates a  
15 disclosure process that creates the risk of  
16 the adoption of different standards in  
17 different states. Separate disclosure  
18 requirements in each state present costly and  
19 logistically complex hurdles for Pennsylvania  
20 employers that have employees in other states.  
21 We believe that informing employees before  
22 monitoring their computer use satisfies the  
23 standard in caselaw and that such an approach  
24 should be sufficient.

25 We appreciate the House's concern

1 that there be some specific requirement that  
2 ensures that Pennsylvania employers provide  
3 some form of information to their employees  
4 about their monitoring processes. We  
5 respectfully submit that in light of the  
6 caselaw referenced above, and the Pennsylvania  
7 wiretap statute, that additional legislation  
8 is not required. Nevertheless, if the House  
9 believes that some additional requirement is  
10 needed, we have proposed amendments to the  
11 Bill (attached) to allow for monitoring after  
12 written general notice of the employers'  
13 intent to monitor.

14 Today more than ever, Pennsylvania  
15 businesses are being forced to improve their  
16 efficiency and security while competing and in  
17 ever-changing technologically driven global  
18 environment. Monitoring employee email and  
19 Internet activity over corporate networks is  
20 necessary to discourage the use of employer-  
21 owned computers and Internet services to  
22 facilitate harm to the employers' network or  
23 protect the company's intellectual property or  
24 its customers' information. Employers also  
25 want to make sure their employees are using

1 company time productively and not creating a  
2 legal liability for their business as a result  
3 of harassing or offensive communications or by  
4 accessing pornography. In addition, employers  
5 have security concerns relating to the  
6 intentional or accidental sending of sensitive  
7 data via email attachments as well as the  
8 ongoing concern of viruses entering the  
9 business from outside communications. As a  
10 result, both public and private sector  
11 employers are monitoring employee's computer  
12 and Internet access to a greater degree than  
13 in the past and are using the surveillance of  
14 corporate networks to moderate the temptations  
15 to use employer resources for personal use and  
16 encourage employees to adhere to company  
17 policies.

18           Again, thank you for allowing the  
19 Pennsylvania Chamber of Business and Industry  
20 the opportunity to testify on behalf of its  
21 members.

22  
23           (This completes the written testimony  
24 submitted. The content was not altered to  
25 correct errors in spelling, grammar, or

1 punctuation.)

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## REPORTER'S CERTIFICATE

I HEREBY CERTIFY that I was present upon the hearing of the above-entitled matter and there reported stenographically the proceedings had and the testimony produced; and I further certify that the foregoing is a true and correct transcript of my said stenographic notes.

\_\_\_\_\_  
BRENDA J. PARDUN, RPR  
Court Reporter  
Notary Public