

Transparency in electronic monitoring: *Working for Workers Act, 2022* proposes new rules for Ontario employers

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On February 28, the Ontario government introduced the *Working for Workers Act, 2022* (Bill 88) (the Act). The Act proposes a number of amendments to existing employment legislation (discussed below), including a requirement for large employers to develop electronic monitoring policies. The Act also proposes the introduction of new legislation to address the rights of digital platform workers (discussed [here](#))¹.

What you need to know

- If the Act is passed, Ontario's *Employment Standards Act, 2000* (the ESA) will be amended to require Ontario employers with 25 or more employees to create an internal electronic monitoring policy, setting out whether the employer electronically monitors employees and, if so, i) a description of how and in what circumstances the employer may electronically monitor employees and ii) the purposes for which information obtained through electronic monitoring may be used by the employer.
- If this legislation is passed, Ontario will become the first province to require employers to create a policy pertaining to the electronic monitoring of employees.

Electronic monitoring policies

As noted above, if the Act is passed, all Ontario employers with 25 or more employees will be required to develop written electronic monitoring policies. These policies will need to explain whether, how, when and why employees are being electronically monitored. An employer will be required to provide a copy of the policy to each employee within 30 days of introducing the policy.

The current draft of the Act does not define “electronic monitoring”, though the government has indicated in press releases that electronic monitoring may include tracking employee location or activities through various devices, such as computers, cell phones, and GPS systems. The announcements to date do not indicate whether general IT records,

such as logs created when an employee signs on to their email account or remote working connection, will constitute electronic monitoring. It is anticipated that these details will be addressed through the promulgation of regulations to the ESA.

The proposed amendments specify that they do not “affect or limit an employer’s ability to use information obtained through electronic monitoring of its employees”.

Analysis and implications

Relationship to existing privacy law

If the Act is passed, Ontario will become the first province to require transparency around electronic monitoring of employees specifically. Ontario currently does not have private sector employee privacy legislation, so these new statutory requirements would be discrete. Employees in Ontario are currently subject only to common law privacy protections, wherein employers must show that electronic surveillance has a legitimate business purpose and is as minimally intrusive as possible in order to avoid claims of intrusion upon seclusion in circumstances where employees have an expectation of privacy.

Other provinces, such as British Columbia, Alberta and Québec, already have privacy laws that require disclosure to employees of how their personal information is collected and used. This may be read to include an obligation to inform employees of electronic monitoring measures in place, as such tools may collect personal information such as employee identity, activity, location and audio/video recordings. For example, Québec’s new privacy law requires organizations to provide information about their data handling practices in clear and simple language, and to inform individuals when they collect personal information using a technology that allows the individual to be identified².

However, these provincial laws do not necessarily permit employees to opt out of such monitoring tools – where there is a legitimate purpose and the technology is narrowly deployed, employees may simply be entitled to know how they are being monitored during work. This is consistent with the focus of the proposed Ontario legislation on transparency, without limiting employer’s ability to implement such tools when necessary and proportionate.

Other proposed changes to employment standards legislation

In addition to requiring the development of electronic monitoring policies, the Act proposes the following changes to the ESA and the *Occupational Health and Safety Act* (OHSA):

- Expanding military reservist leave to cover training time and reducing the threshold to be eligible for such a leave from six months to three months.
- Clarifying that business or information technology consultants who provide services through a corporation or a sole proprietorship and who are paid at least \$60 per hour are excluded from the application of the ESA.
- Requiring employers in workplaces where opioid overdoses are a potential hazard to provide a naloxone kit in the workplace.
- Increasing some of the fines under the OHSA.

FOOTNOTES

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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