Bill 88 Will Result In Changes For Workers Across Ontario

On Feb. 28, 2022, the Ford government introduced a new bill in the Legislature: the *Working for Workers Act, 2022* (Bill 88).

If passed, Bill 88 will result in several considerable changes for workers across the province.

Bill 88 is divided into five schedules, each of which address different statutes. Most importantly for employment law purposes, Schedule 1 of the Bill introduces an entirely new statute: the *Digital Platform Workers' Rights Act, 2022*, while Schedules 2 and 4 amend the *Employment Standards Act, 2000* (**ESA**) and the *Occupational Health and Safety Act* (**OHSA**).

The *Digital Platform Workers' Rights Act, 2022* (DPWRA)

The DPWRA aims to establish various rights for workers who perform digital platform work.

This immediately raises two questions: (1) who is considered a worker; and (2) what is "digital platform work"?

In the past few years, we have seen significant decisions from courts and administrative tribunals that discuss workplace protections for those offering services in the gig economy. One question that frequently arises is whether the individual performing work is an employee, an independent contractor or something in between. In the *Labour Relations Act, 1995*, the definition of "employee" already includes a "dependent contractor". However, for the ESA, this distinction of "employee" versus "independent contractor" is critical because true independent contractors are exempt from the ESA (but see our comments below regarding Bill 88's proposed ESA amendments), albeit that would not preclude an independent contractor from asserting that they are, in fact, an employee.

The DPWRA proposes to side step this issue entirely by (deliberately) giving the term "worker" a broad meaning. A "worker" means "subject to the regulations, an individual who performs digital platform work and includes a person who was a worker." The DPWRA is intended to capture both those who *presently* perform digital platform work and those who *previously* performed digital platform work. If enacted, Bill 88 presently specifies that the DPWRA would come into force on a day to be named by proclamation,

though a regulation filed under the statute may have retroactive effect so it is unclear to what extent those who previously performed digital platform work may benefit from the DPWRA.

Section 2 of the DPWRA indicates the purpose of the act is to establish certain rights for workers *regardless of whether those workers are employees*. Therefore, the DPWRA does not dictate that a worker under the DPWRA is an employee or not an employee. This means it is still arguably open to those workers to claim employee status (and therefore, greater entitlements) under the ESA or other entitlements associated with a typical employer-employee relationship.

The term "digital platform work" is intended to capture those who perform temporary work assignments through apps: "subject to the regulations, the provision of for payment ride share, delivery, courier or other prescribed services by workers who are offered work assignments by an operator through the use of a digital platform." A "digital platform" is "subject to the regulations, an online platform that allows workers to choose to accept or decline digital platform work."

Section 3 of the DPWRA states that the act applies to the worker if their work assignment is to be performed in Ontario or performed in Ontario and outside Ontario, but the work performed outside Ontario is a continuation of the work performed in Ontario, subject to workers being covered under federal jurisdiction. This language is substantially similar to section 3 of the ESA, which also addresses to whom that act applies with various exemptions.

The DPWRA, as presently drafted, contains 68 sections. We do not propose to address all those sections here. Most importantly, the DPWRA proposes the following worker protections.

Section 9: The right to minimum wage

The DPWRA specifies that each worker must receive *at least* the general minimum wage rate payable under the ESA, which is, as of the date of this summary, set at $15.00 per hour. The act further requires that minimum wage (excluding tips and other gratuities) be paid for *each* work assignment. The term work assignment is not defined in Bill 88 but the context suggests it applies to each fare (e.g. a delivery, courier or ride) and an explanation or definition may be provided in the future in a regulation. This language under section 9 would preclude averaging across active versus inactive periods of digital platform work or even averaging between assignments performed within the same hour. In effect, the digital platform worker could receive an hourly wage rate higher than the general minimum wage based on active working time.

Unlike employees subject to the ESA, there are no proposed restrictions with respect to limits on hours of work nor is there an overtime pay requirement.

Section 10: The right to amounts earned by the worker and to tips and other gratuities

Similar to the restrictions on reductions from wages under the ESA, an operator (who facilitates the performance of digital platform work but does not include a temporary help agency) will be prohibited from withholding amounts earned and tips or other gratuities from a worker or making a deduction from an amount earned or a worker's tips or other gratuities. An operator may not cause a worker to return or give the amount earned by the worker or the worker's tips or other gratuities to the operator unless authorized to do so under the act or in such circumstances as may be prescribed. Notably, the operator can make a deduction from amounts earned or tips

and gratuities where permitted by court order or a statute of Canada or Ontario.

This section, while seemingly straightforward, raises several questions on the implementation side. Considerations such as whether the amounts earned or tips and gratuities received by the worker will be subject to withholdings at source for income tax, the Canada Pension Plan or employment insurance will require further consideration.

Section 7: The right to information

After an individual is given access to a digital platform for the purpose of accepting or declining to digital platform work, the operator must provide the following information in writing to the individual within 24 hours:

a. A description of how pay for digital platform work is calculated;
b. Whether tips or other gratuities are collected by the operator and, if so, when and how they are collected;
c. The recurring pay period and recurring pay day established by the operator under section 8;
d. Any factors used to determine whether work assignments are offered to workers and a description of how those factors are applied;
e. Whether the digital platform uses a performance rating system and whether there are consequences based on a worker's performance rating or a worker's failure to perform a work assignment and a description of those consequences; and
f. Such other information as may be prescribed.

The operator must also provide advance notice of any changes to these items in writing.

In addition, an operator must provide certain information in writing when offering a new work assignment. The operator must provide:

a. The estimated amount the worker will be paid for the work and a description of how that amount was calculated;
b. Any factors used in determining to offer the work assignment to the worker;
c. Whether there will be consequences based on the worker's performance rating for the work assignment or the worker's failure to perform the work assignment and, if applicable, a description of those consequences; and
d. Such other information as may be prescribed.

Within 24 hours following the completion of the work assignment, the operator must provide details to the worker about, among other things, the actual amount the worker will be paid (including tips and gratuities), how those were calculated and when they will be paid, details on any performance rating given and such other information as prescribed. The operator must also provide an advance written description of the consequences, if any, that will result from the worker's failure to complete a work assignment.

Section 8: The right to a recurring pay period and pay day

Similar to a regular payday for employees, an operator will be required to establish a recurring pay period and a recurring pay day, on which it must pay out all amounts earned during that pay period including all tips or other gratuities collected by the operator during that period.

Section 11: The right to notice of removal from an operator's digital platform

The DPWRA also requires an operator to provide a written explanation of why it has

restricted a worker's access to the digital platform plus a minimum notice period of two weeks where an operator removes a worker's access to the digital platform for a period of 24 hours or longer. The latter does not apply where a worker is guilty of wilful misconduct or in such other circumstances as may be prescribed.

The term "wilful misconduct" is not defined. Given the DPWRA's similarity to the ESA, this term could be subject to a similar analysis as whether an employer has reason to terminate without notice or pay in lieu of notice under the ESA.

Section 12: The right to resolve digital platform work-related disputes in Ontario

This is almost certainly a response to the case, *Uber Technologies Inc. v Heller* (2020 SCC 16), and was ultimately heard by the Supreme Court of Canada in 2020. At issue in that particular case was the validity of an arbitration clause that required the food delivery driver to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The Supreme Court determined the arbitration clause was unconscionable and therefore invalid.

By limiting all digital platform work-related disputes between an operator and worker to Ontario, the DPWRA precludes the validity of any clause in an agreement that would require adjudication or dispute resolution outside the province.

Section 13: The right to be free from reprisal

If enacted, the DPWRA will prohibit operators from intimidating or penalizing, or attempting or threatening to intimidate or penalize a worker, because the worker, among other things: (i) makes inquiries about their rights under the DPWRA, (ii) files a complaint with the Ministry, (iii) exercises or attempts to exercise a right under the DPWRA, or (iv) testifies or is required to testify or otherwise participates or is going to participate in a proceeding under the DPWRA.

Despite Bill 88 being introduced by the Minister of Labour, Training and Skills Development, the DPWRA does not specifically address which ministry will be responsible for the administration and enforcement of this statute, if enacted. However, there are several references to the Ontario Labour Relations Board, including its ability to hear applications for review, much like the ESA. By inference, the responsible Minister may end up being the Minister of Labour, Training and Skills Development. The responsible Minister, once selected, will be required to appoint a Director of Digital Platform Work to administer the act and regulations. This is similar to how the Director of Employment Standards is responsible for the administration of the ESA.

The rest of the DPWRA sets out rules, processes and requirements with respect to record keeping, director liability, complaints, inspections by compliance officers, enforcement, collections, and offences and prosecutions. Miscellaneous provisions are included addressing limitation periods and other matters, and related regulation-making powers are added. Many of these sections appear to be substantially similar to the corresponding sections of the ESA.

The DPWRA does not affect the right of civil proceedings as per section 6. However, should the worker wish to make a complaint to the Director, the worker will be required to make an election in the same way an employee would need to make an election with filing a complaint under the ESA. Where the worker files a complaint under the DPWRA with respect to an alleged failure to pay for work performed, they cannot commence a civil proceeding regarding the same matter unless the complaint is withdrawn within two weeks. Separate considerations apply for workers in unionized settings.

Amendments to the ESA: Electronic monitoring

On Feb. 24, 2022, the Ford government announced it would introduce legislation requiring large employers to inform workers if and how they are being monitored electronically. This is now addressed under Schedule 2 of Bill 88.

We will address these proposed amendments under a separate bulletin.

Amendments to the ESA: Definition of "business consultant" and "information technology consultant"

Bill 88 may also implement considerable changes with respect to distinctions between independent contractors versus employees.

If passed, section 3 of the ESA, which discusses to whom the act applies, will be amended to specify that the ESA does *not* apply to certain business consultants and information technology consultants.

A "business consultant" means an individual who provides advice or services to a business or organization in respect of its performance, including advice or services in respect of the operations, profitability, management, structure, processes, finances, accounting, procurements, human resources, environmental impacts, marketing, risk management, compliance or strategy of the business or organization.

An "information technology consultant" means an individual who provides advice or services to a business or organization in respect of its information technology systems, including advice about or services in respect of planning, designing, analyzing, documenting, configuring, developing, testing and installing the business or organization's information technology systems.

Subject to certain narrow exclusions, the ESA applies only to "employees" and so, at first blush, this amendment seems superfluous. While this amendment seems like an enhanced exclusion or clarification of an existing exclusion, it in fact suggests that there could be an *expansion* of coverage under the ESA as applicable to certain types of contractors or consultants. This is because the ESA exclusion with respect to business consultants and information technology consultants would apply *only* if certain requirements are met:

a. The business consultant or information technology consultant provides services through, (i) a corporation of which the consultant is either a director or a shareholder who is a party to a unanimous shareholder agreement, or (ii) a sole proprietorship of which the consultant is the sole proprietor, if the services are provided under a business name of the sole proprietorship that is registered under the *Business Names Act*;
b. There is an agreement for the consultant's services that sets out when the consultant will be paid and the amount the consultant will be paid, *which must be equal to or greater than $60 per hour*, excluding bonuses, commissions, expenses and travelling allowances and benefits, or such other amount as may be prescribed, and must be expressed as an hourly rate;
c. The consultant is paid the amount set out in the agreement as required by paragraph b (above); and
d. Such other requirements as may be prescribed.

Amendments to the ESA: Reservist leave

As a minor point, Bill 88 also proposes some amendments under the ESA with respect to reservist leaves of absence. If enacted, an employee would be entitled to a leave if

they are participating in Canadian Armed Forces military skills training. The employee will also be entitled to a reservist leave after being employed for only three consecutive months instead of the existing six consecutive months.

Amendments to the *Occupational Health and Safety Act*

Schedule 4 of Bill 88 addresses two important changes to the OHSA.

First, the OHSA would be amended to require employers to provide naloxone kits and comply with related requirements if the employer becomes aware, or ought reasonably to be aware, that there may be a risk of a worker having an opioid overdose at a workplace where that worker performs work for the employer, or where the prescribed circumstances exist. The contents of the naloxone kit would be prescribed but generally will contain an opioid antidote to be administered to a worker who may be overdosing.

Where applicable, the employer will also be required to provide training to recognize an opioid overdose, to administer naloxone and to acquaint the worker with any hazards related to the administration of naloxone, and shall meet such other requirements as may be prescribed. For the avoidance of doubt, the proposed amendments specifically indicate that the employer's duties under section 25 of the OHSA will apply to the administration of naloxone in the workplace.

Second, there are various amendments proposed in respect of fines applicable for convictions under the OHSA. The limitation period for instituting a prosecution is extended from one year to two years.

While the maximum fine for a corporation remains at $1.5M, a new subsection would make the maximum fine applicable to officers and directors who fail to comply with section 32 (ensuring the corporation is compliant with the OHSA, its regulations, and applicable orders) **also liable for up to $1.5M or to imprisonment for a term of not more than 12 months, or both**. Other individuals may face enhanced liability **up to $500,000** for failing to adhere with the OHSA, its regulations or an order/requirement of an inspector, director or the Minister (increased from $100,000). Bill 88 also proposes a list of circumstances, each of which would be an *aggravating* factor, to consider in determining a penalty:

a. The offence resulted in the death, serious injury or illness of one or more workers.
b. The defendant committed the offence recklessly.
c. The defendant disregarded an order of an inspector.
d. The defendant was previously convicted of an offence under the OHSA or another act.
e. The defendant has a record of prior non-compliance with the OHSA or the regulations.
f. The defendant lacks remorse.
g. There is an element of moral blameworthiness to the defendant's conduct.
h. In committing the offence, the defendant was motivated by a desire to increase revenue or decrease costs.
i. After the commission of the offence, the defendant (i) attempted to conceal the commission of the offence from the Ministry or other public authorities, or (ii) failed to co-operate with the Ministry or other public authorities.
j. Any other circumstance that is prescribed as an aggravating factor.

What happens next?

While Bill 88 was only introduced on Feb, 28, 2022, it may be enacted into law

rapidly as was seen with Bill 27, the *Working for Workers Act, 2021*.

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