Bill 88, Working For Workers Act, 2022: Ontario Introducing More Changes For Employers

written by Tina Tsonis | March 10, 2022

In a lead up to the upcoming provincial election, the Ontario legislature is busy again introducing significant changes to employment related legislation. On February 28, 2022, Ontario introduced Bill 88, the *Working for Workers Act, 2022*.

Bill 88 follows shortly after last year's Bill 27 the *Working for Workers Act, 2021*, which amended a number of employment related statutes to introduce a prohibition on non-competition agreements, and a new requirement on employers to implement a Disconnecting from Work Policy.

If passed, Bill 88 will enact a new *Digital Platform Workers' Rights Act, 2022* (DPWRA) and make amendments to the *Employment Standards Act, 2000* (ESA) and the *Occupational Health and Safety Act* (OHSA). The changes will create new rights for ride share, delivery, and courier workers using "digital platforms," impose a requirement on employers to disclose electronic monitoring of employees, and increase obligations and fines under OHSA.

New Digital Platform Workers' Rights Act, 2022

Bill 88 will enact the new DPWRA to establish minimum rights and protections for workers who perform "digital platform work" defined as, "ride share, delivery, courier or other prescribed services based on work assignments offered by an operator through a digital platform." A "digital platform" is defined as "an online platform that allows workers to choose to accept or decline digital platform work."

Although a number of the new rights and protections under the DPWRA are similar to those under the ESA, the legislation avoids classifying ride share, delivery, or courier workers as employees. Instead, the stated purpose of the legislation is to, "establish certain worker rights that would apply to all digital platform workers (as defined), regardless of the worker's employment status."

The proposed rights and protections under the DPWRA include the following:

1. **Right to Information:** The DPWRA sets out certain information that must be provided in writing to a worker at various times, including: (a) when they are first given access to the digital platform; (b) when they are offered a work assignment; and (c) when they complete a work assignment. The information is

intended to improve pay transparency for workers, and includes, for example: a description of how their pay is calculated, when and how tips or other gratuities are collected, any factors used to determine whether work assignments are offered to workers, whether the digital platform uses a performance system, and the amount the worker will be paid for a work assignment, including a description of how it was calculated and when it will be paid.

2. **Right to Minimum Wage:** Workers under the DPWRA will be entitled to at least the minimum wage payable under the ESA, which is currently $15.00 per hour. Compliance with this obligation is to be determined with respect to each work assignment performed by a worker. Tips and other gratuities are not to be included in determining compliance.
3. **Right to Recurring Pay Period**: The DPWRA will also require an operator of a digital platform to establish a recurring pay period and pay day, and pay all amounts earned during each pay period (including all tips or other gratuities the operator collected) no later than the pay day for that period.
4. **Right to Amounts Earned and Tips and Other Gratuities:** Similar to wages under the ESA, the DPWRA will prohibit an operator from withholding, deducting, or causing a worker to return amounts earned by the worker or the worker's tips or other gratuities, unless authorized to do so under another statute or court order.
5. **Right to Notice of Removal:** Similar to a notice of termination requirement, the DPWRA will prohibit an operator from removing a worker's access to the operator's digital platform unless the operator has provided the worker with a written explanation of why access is being removed. Where a worker is to be removed for a period of 24 hours or more, the operator must give the worker two weeks' written notice of the removal unless the worker has been guilty of willful misconduct.
6. **Right to Dispute Resolution in Ontario**: The DPWRA provides that all digital platform work-related disputes between a worker and operator must be resolved in Ontario.
7. **Right to be Protected Against Reprisal and No Contracting Out:** Again mirroring the ESA, the DPWRA establishes that no operator shall intimidate or penalize or attempt or threaten to intimidate or penalize a worker as a result of the worker making inquiries about or exercising their rights under the Act. Operators and workers are also prohibited from contracting out of any of the worker rights unless a provision in a contract or in another act that directly relates to the same subject matter provides a greater benefit to the worker.

In addition to the rights outlined above, the DPWRA also imposes significant obligations on an operator of a digital platform to record and retain certain information for each worker for a period of three years after the worker's access to the digital platform is terminated, including: (a) name and address; (b) the dates the worker was given access to the digital platform to perform work; (c) any dates the worker's access to the operator's digital platform was removed or reinstated; (d) dates the worker performed work assignments and the times each one started and finished and any amounts paid to the worker for a work assignment; and (e) the dates they were paid, and a description of the payments, including any tips, or other amounts included in the payment.

With respect to enforcement, the DPWRA sets out compliance and enforcement provisions that are similar to the ESA, including the appointment of compliance officers with powers and duties similar to those of employment standards officers. The DPRWA also creates director's liability for amounts owing to workers in certain scenarios.

Amendments to the ESA

In addition to enacting the DPWRA, if passed, Bill 88 also amends employee rights and protections under the ESA, as follows:

1. **Requirement for Written Policy on Electronic Monitoring:** Bill 88 introduces a new Part XI.1 of the ESA which will require employers with 25 or more employees as of January 1 of any year to ensure, before March 1 of that year, that they have a written policy in place for all employees with respect to "electronic monitoring" of employees. The policy must contain the following information: (a) 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 employee. A copy of the policy will have to be provided to employees within 30 days from the day the employer is required to have the policy in place or, if an existing policy is changed, within 30 days of the changes being made, and to new hires, within 30 days of their start date.

The proposed amendments to the ESA clarify that the requirement to implement a written policy on electronic monitoring does not limit or affect an employer's ability to use information obtained through electronic monitoring of its employees.

2. **Expanded Reservist Leave:** Bill 88 will amend Section 50.2 of the ESA, which governs reservist leaves of absence, to provide that an employee is entitled to leave under that section if the employee is participating in Canadian Armed Forces military skills training. The section will also be amended to provide that an employee is entitled to leave after being employed for three consecutive months, instead of the previous six months.
3. **Exemption of Information Technology and Business Consultants:** Bill 88 will amend Section 3 of the ESA to provide that the ESA does not apply to certain information technology consultants and business consultants if the consultant provides services through: (a) a corporation of which the consultant is either a director, or a shareholder who is a party to a unanimous shareholder agreement, or (b) 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*; and (c) 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 allowances and benefits, or such other amount as may be prescribed, and must be expressed as an hourly rate.

Amendments to OHSA

If passed, Bill 88 will also amend OHSA to impose new obligations on employers and expand potential liability for workplace safety issues. Specifically, Bill 88 will require employers to provide naloxone kits (medication that can temporarily reverse the effects of an opioid overdose) 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 certain prescribed circumstances exist. Employers who operate construction sites, bars, and nightclubs should especially prepare for the proposed mandates in respect of naloxone kits, as the Ontario Government has identified these businesses as having a higher risk of opioid overdose in the workplace.

Various amendments are also made to OHSA under Bill 88 in respect of fines applicable for convictions under OHSA. The maximum fine will be increased from $100,000 to $1,500,000 for directors or officers of corporations and to $500,000 for other individuals. A list of aggravating factors to be considered in determining a penalty will also be added to OHSA. Lastly, the limitation period for instituting a prosecution will be extended from one year to two years.

Key Takeaways

Although the DPWRA applies to a relatively small number of organizations in Ontario who engage ride share, delivery, or courier workers through digital platforms, it represents a significant expansion of statutory employee-like rights to a broader range of workers. Businesses who would be considered “operators” under the DPWRA should begin to develop a plan now to comply with the requirements of the proposed legislation, including the substantial information and record keeping requirements and potential changes to their payment practices.

With respect to the ESA, employers should review their electronic monitoring practices and be prepared to develop a written policy meeting the requirements set out above. We will continue to monitor the progress of Bill 88 through the legislative process. In the meantime, please reach out to a member of our Employment & Labour group with any questions.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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