Disconnecting From Work



Disconnecting From Work: Ontario Updates Its Guide To The Employment Standards Act, 2000

Ontario's *Working for Workers Act, 2021* ("WWA") received Royal Assent on December 2, 2021. Among other things, the WWA amended the *Employment Standards Act, 2000* ("ESA") to include a requirement for employers with 25 or more employees to have a written workplace policy with respect to disconnection from work.

On February 22, 2022, Ontario updated its Guide to the *Employment Standards Act* ("Guide") to include information on disconnection from work policies. For reference, the term "disconnecting from work" is defined in the ESA to mean not engaging in work-related communications, including emails, telephone calls, video calls or sending or reviewing other messages, to be free from the performance of work.

As a key starting point, despite the framing of this change to the ESA in various media reports as creating a "right to disconnect", the Guide clarifies and confirms that the ESA **does not require that employers create a new "right" for employees to disconnect from work**. Rather, it requires that employers put in place a policy to inform employees of what the organizational approach is to disconnection (whether new or existing, and whether based on existing ESA rules regarding time free from work or based on an organizational approach that exceeds those rules).

The Guide provides examples of what a disconnecting from work policy may address, including:

- expectations, if any, to read or reply to work-related emails or answer work-related phone calls after their shift or working hours;
- expectations regarding communication and availability. For example, response time to communications may change depending on the time of day of the communication or who is contacting the employee; and
- requirements for out-of-office notifications and/or voicemail messages advising when they are not scheduled to work, to communicate the expected time for responding.

The Guide further highlights the following helpful points concerning the policy requirements under the ESA:

- **Who is covered:** The policy on disconnecting from work must apply to **all of the**

employer's employees in Ontario that are covered by the ESA. This includes management and executives as well as other groups of employees who might otherwise be subject to exemption categories under the ESA.

- **Determining the employee threshold:** To determine how many employees they have, the employer must count the **number of employees it employs in Ontario as of January 1 of each year**. Where an employer has multiple locations in Ontario, all employees employed at each location must be included when determining whether the 25-employee threshold has been met. If as of January 1, there are 25+ employees in Ontario, a policy is required. If there are less than 25 employees on January 1, there is no policy requirement in that year, even if that threshold is exceeded at any point in the year thereafter. This assessment must be done **annually**. Employers who do not meet the threshold can still elect to have a policy in place, but this is not required.
- **What is the deadline**: In 2022, the deadline is **June 2, 2022**. In all years thereafter, the deadline is **March 1** of that year.
- **No one-size-fits all needed**: The employer can have a single policy that applies to all employees or multiple policies (either in a single document or in multiple documents) for different groups of employees.
- **What the policy must include:** The employer's written policy must be on "disconnecting from work". It must include (i) the **date the policy was prepared** and (ii) if applicable, **the date any changes were made** to the policy. Outside of these requirements, the ESA does not specify the information the employer must include in the policy, nor does it specify that the policy must be a certain length. **The employer determines the content of the policy.**
- **What do we do once we have a policy:** The written policy must be provided to all employees within **30 calendar days** of the policy being prepared or changed.
- **Greater right or benefit:** While it is not required, in some cases, an employer may choose to include a provision in their written policy that gives employees the right not to perform work when the rules in the ESA would otherwise allow work to be performed (which may amount to a greater right or benefit under the ESA). If the employer's policy on disconnecting from work does not create a greater right or benefit and if the employer subsequently does not honour the policy, enforcement action cannot be pursued by an Employment Standards Officer.
- **Record retention requirements:** Employers must retain a copy of their policy for three years after the policy is no longer in effect.

For purposes of this year, employers in Ontario with 25 or more employees on January 1, 2022 have until **June 2, 2022** to have a written policy on disconnecting from work in place. As such, employers who meet the threshold ought to be engaging their internal teams to determine what disconnection means (or could mean) to them in their workplace, so that those concepts or approaches can be reduced to writing in advance of June 2022.

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