…Introducing Electronic Monitoring Legislation, A First Of Its Kind

On February 28, the Ontario government tabled Bill 88, the *Working for Workers Act, 2022*, which, if passed, would enact the *Digital Platform Workers' Rights Act, 2022* and make amendments to the *Employment Standards Act, 2000* (*ESA*) and other employment-related legislation. This Bill marks a first of its kind workplace electronic monitoring legislation requiring Ontario employers to give notice to their employees of "electronic monitoring."

The New Requirements

Bill 88, will bring a new part to the *Employment Standards Act, 2000* (the ESA) titled "Written Policy on Electronic Monitoring."

Similar in design to the recently enacted right to disconnect policy under Bill 187, all employers with 25 or more employees will be required to create and publish an electronic monitoring policy before March 1st of that year where the employer has 25 employees or more as of the preceding January 1, or alternatively within six months after Bill 88 receives Royal Assent.

The proposed policy must identify whether an employer electronically monitors employees and, if so, provide:

- a description of how and in what circumstances the employer may electronically monitor employees, and
- the purposes for which information obtained through electronic monitoring may be used by the employer.

The Policy must also set out the date it was prepared, the date of any changes made to it, and such other information as may be prescribed by regulation. Employers must provide copies to new and current employees within 30 days of the date that the Policy is in place, or where an amendment to the Policy is made. Additionally, copies must be provided to employees assigned by temporary help agencies. Employers should note that this new provision does not affect or limit an employer's ability to use information obtained through electronic monitoring of its employees.

Bill 88 does not currently define "electronic monitoring," but will likely apply to technologies used on corporate networks, personal devices, as well as any work tools with embedded sensors (*e.g.*, telematics and similar technologies).

The requirement to disclose the "circumstances" in which monitoring is employed suggests that the disclosure requirement applies to monitoring that occurs on a periodic or non-routine basis, *i.e.*, as part of an audit or investigation.

Exemptions

If passed, Bill 88 will amend the *ESA* to provide that the *ESA* does not apply to certain business and information technology consultants if certain requirements are met.

These requirements are set out below:

- The business consultant or information technology consultant provides services through:
    1. a corporation of which the consultant is either a director or a shareholder who is a party to a unanimous shareholder agreement, or

1. 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*.

- 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 amounts as may be prescribed, and must be expressed as an hourly rate.
- The consultant is paid the amount set out in the agreement.
- Such other requirements as may be prescribed.

These provisions would come into effect on January 1, 2023.

Key Takeaways for Employers

Employers should consider the following:

1. Employers should note that this new legislation does not affect or limit an employer's ability to use information obtained through electronic monitoring of its employees.
2. Although a monitoring policy does not need to be lengthy or complex, employers should anticipate employee questions and prepare to be transparent.
3. Bill 88 does not impose a limit on electronic monitoring, which is permissible in Ontario absent an express contractual or collective agreement restriction. Unionized employers are likely to continue to face the possibility of grievances alleging that monitoring constitutes a privacy violation under their collective agreements.
4. Every employer ought to employ "information technology asset management" – a process for regulating their network hardware and software. Organizations with strong asset management practices will be in a better position to more easily identify how employees are "monitored."
5. Employers should consider updating their acceptable use policies to make clear employees' expectation of privacy. Within this policy, employers should stipulate all purposes for which they may require access to network data, including information in user accounts – *e.g.*, to maintain the network, to investigate misconduct, among other reasons.

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