More New Requirements On The Horizon For Ontario Employers



On February 24, 2022, the Ontario government announced it would be introducing legislation requiring large employers to “tell their workers if, how and why” they are being monitored electronically. This was followed by an announcement on February 28, 2022 that new legislation was being introduced to “establish a minimum wage and other foundation rights for digital platform workers” such as rideshare drivers. The government has now introduced its legislation.

Bill 88, the *Working for Workers Act, 2022*, proposes to enact a new law called the *Digital Platform Workers’ Rights Act, 2022*, (the “Act”) and amend, amongst other legislation, the *Employment Standards Act, 2000* (the “ESA”) and the *Occupational Health and Safety Act* (the “OHSA”). We discuss these proposals below.

Digital Worker Rights

The Act contains a number of protections for workers engaged in *digital platform work*, defined as “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 “an online platform that allows workers to choose to accept or decline digital platform work.” These workers do not have to be an employee to be entitled to the Act’s protections.

Responsibility for providing these entitlements will rest with the *operator*; defined as a person that is not a temporary help agency, which “facilitates, through the use of a digital platform, the performance of digital platform work by workers.” Workers and operators may not contract out of these rights.

Amongst other things, operators will have to establish a recurring pay period and pay day and advise workers of same, and they must ensure that workers receive at least the applicable minimum wage set out in the ESA.

Operators must also provide specific information to workers, including: how their pay is calculated and how much they will be paid for each work assignment that is offered; any factors that were used in determining to offer an assignment to the worker; how tips are collected and when they will be paid; how work is allocated; whether the digital platform uses a performance rating system and what impact ratings may have on the worker; and any other prescribed information.

Unless workers are guilty of wilful misconduct or any other prescribed circumstances exist, operators will not be allowed to remove workers' access to the digital platform without providing them with a written explanation of why and, if the removal is for 24 hours or longer, having given the worker two weeks' written notice. Disputes about removals are to be resolved in Ontario.

Finally, the Act contains a number of number of recordkeeping and directors' liability provisions, as well as enforcement provisions that are similar in nature to those set out in the ESA.

Workplace Electronic Monitoring Policies

Regulating electronic monitoring is not new. As technology has evolved, employers have obtained a number of means to monitor employees electronically, including GPS devices on company vehicles, monitoring email and internet use, and tracking employee logins on company computers and devices. For many years now, adjudicators have placed restrictions on electronic monitoring and have, at a minimum, required employers to notify employees of when and how such monitoring may occur.

Bill 88 will amend the ESA to require employers with 25 or more employees to have a written electronic monitoring policy. The policy must advise whether the employer electronically monitors employees and, if so, provide a description of how and in what circumstances the employer may do so. The policy must also outline the purposes for which the employer may use information obtained through electronic monitoring, the date the policy was prepared, the date of any changes to the policy, and any other information that is prescribed.

Employers will be subject to these requirements if they employ 25 or more employees as of January 1 in any year, and must have the policy in place before March 1 of that year. Employers will have to provide a copy of the policy to each employee (including assignment employees from temporary help agencies) within certain time limits.

Interestingly, the amendments state that complaints may only be filed with respect to the obligations to provide copies of the policy to employees.

Employers will have six months following Royal Assent, to establish their policies.

New ESA Exclusions

Under Bill 88, business and information technology consultants will be exempt from the ESA under certain circumstances.

Business consultant is defined as "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."

Information technology consultant is defined as "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."

Business and information technology consultants will not be subject to the ESA if:

1. They provide services through a corporation in which they are a director or a shareholder that is subject to a unanimous shareholder agreement, or through a

sole proprietorship in which they are the sole proprietor and the services are provided under a business name of the sole proprietorship that is registered under the *Business Names Act*;
2. There is an agreement for their services which sets out when they will be paid and the hourly amount that they will be paid (which must be at least $60 per hour or such other prescribed amount, excluding bonuses, commissions, expenses, travelling allowances and benefits);
3. The consultant is paid the amount set out above; and
4. Any other prescribed requirements are met.

Reservist Leave

Bill 88 will amend the ESA's reservist leave to extend entitlement to employees participating in Canadian Armed Forces military skills training. In addition, eligible employees will be entitled to reservist leave after only three months of employment and not the current six.

Naloxone Kits

Bill 88 adds a new section to the OHSA, aimed directly at opioid abuse. Where an employer becomes aware (or ought reasonably to be aware) that there may be a risk of a worker having an opioid overdose in the workplace, or where any prescribed circumstances exist, the employer will be required to provide a naloxone kit in the workplace, maintain it in good condition, and comply with any other prescribed requirements.

Employers will be required to ensure that, whenever there are workers in the workplace, the kit is left in the charge of a worker who works in its vicinity, and who has received training to recognize an opioid overdose, to administer naloxone, understand any hazards related to the administration of naloxone, and met any other prescribed requirements.

Increased OHSA Penalties

Bill 88 will increase the maximum fine for contraventions of the *Occupational Health and Safety Act* by individuals from $100,000 to $500,000. The Bill also includes a new section which provides for a maximum fine of $1,500,000 or imprisonment for no more than 12 months (or both) for directors or officers of a corporation who fail to take reasonable care to ensure that the corporation complies with the OHSA and its regulations, orders and requirements of inspectors or Directors, or orders of the Minister.

Bill 88 will add a new section to the OHSA which outlines a series of aggravating factors for the purposes of sentencing, including: an element of moral blameworthiness in the defendant's conduct; the defendant was motivated by a desire to increase revenue or decrease costs; or the defendant attempted to conceal the offence from or failed to cooperate with, the Ministry or public authorities.

Courts will be allowed to make any other prescribed orders in addition to any fine or imprisonment that is imposed. Lastly, the limitation period for commencing prosecutions will be increased from one year to two.

Key Takeaways for Employers

Through these measures, the Ontario government is requiring employers to turn their minds to issues that have been emerging in society for some time, and which have had growing impact on workplaces. Expanding technology has led to creative gig employment

models and increased monitoring capabilities. At the same time, underlying social health and welfare issues, such as opioid abuse, must be addressed on many fronts, including employment.

Miller Thomson LLP will continue to follow and provide updates on these legislative developments. In the meantime, please reach out to your Miller Thomson lawyer to discuss Bill 88’s impact in your workplace.

Source: Miller Thomson

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