

# 'Working For Workers' Means More Work For Employers



The Ontario Ministry of Labour, Immigration, Training and Skills Development (the Ministry) has issued a [Consultation Paper](#) with a request for public input and feedback as the Ministry develops, and anticipates developing, regulations regarding new rules in respect of job postings. The new job posting requirements are as a result of the *Working for Workers Four Act, 2024* which amended the *Employment Standards Act, 2000* (ESA), to [add a new Part III.1](#) and [Working for Workers Five Act, 2024](#) (Bill 190), which, at the date of this posting, is at second reading. The changes are therefore not yet in force. The Ministry asks interested members of the public (including employers) to respond by Friday, September 20, 2024.

## **New job posting requirements**

The new job posting requirements include significant changes that will alter the way employers hire and recruit in Ontario. With the addition of Part III.1, and the proposed Bill 190, the ESA will require job postings to

- disclose a compensation range for the role
- disclose any use of artificial intelligence (AI) in the hiring process to “screen, assess or select applicants”
- omit any reference to Canadian experience requirements
- disclose whether the job posting is for an existing vacancy
- provide certain information to job applicants who have been given an interview

## **Definitions**

The implementation of these new job posting regulations requires specific definitions. The Ministry requests public input on the definition of key terms including “artificial intelligence”, “publicly advertised job posting” and “interview.” The breadth of these definitions will impact the scope of an employer’s obligations.

## **Compensation range requirements**

To give job applicants more transparency in the hiring process, the proposed changes to the ESA will require publicly advertised job postings to include expected compensation or a compensation range. The Ministry requests feedback on a reasonable limit on the length of the range and potential exemptions to this requirement at

higher compensations. The Ministry has specifically requested comments on whether a \$40,000 range cap is appropriate; and if roles for which the expected compensation is at least \$200,000 should be exempt.

Given the variability in the range of experience and educational background that applicants may have for certain roles, we expect that a \$40,000 range will present practical challenges for many employers, especially in light of the proposed \$200,000 exemption threshold, which is arguably too high.

## **Disclosure of AI use in hiring process**

The proliferation of AI across various industries has sparked discussion regarding the ethical, legal, and privacy implications of implementing AI-related new technologies. The changes to the ESA will require employers to disclose whether they use AI to “screen, assess or select applicants” in publicly advertised job postings. The proposed definition of AI is as follows:

A machine-based system that, for explicit or implicit objectives, infers from the input it receives in order to generate outputs such as predictions, content, recommendations or decisions that can influence physical or virtual environments.

Given that AI is an evolving concept, various standards, principles and regulatory frameworks offer slightly different definitions. As organizations strive to comply, these varying definitions can pose challenges – particularly for employers operating across multiple jurisdictions.

For example, while this proposed definition closely aligns with the Organisation for Economic Co-operation and Development’s (OECD) [definition of an “AI System,”](#) it is still called “AI” rather than an AI System. This definition also differs from the definitions under Canada’s proposed *Artificial Intelligence and Data Act* (Part 3 of Bill C-27), the European Union *Artificial Intelligence Act*, the AI National Institute of Standards and Technology (NIST) Risk Management Framework in the United States, and International Organization for Standardization (ISO) AI-related Standards (e.g., ISO/IEC 22989:2022). Nevertheless, the OECD’s definition is influential globally and may serve as a valuable starting point.

Several aspects of the proposed definition require thoughtful analysis as part of this consultation. For example

- whether this definition is too complex and vague, making it difficult for organizations to understand and apply
- whether terms such as “infers” or “influencing physical or virtual environments” are sufficiently clear or open to interpretation. For instance, does “infers” refer exclusively to machine learning or is it intended to capture even traditional rule-based methods?
- whether the distinction between explicit vs. implicit objectives is clear or meaningful

Not all AI applications have a significant impact on the hiring process. For example, basic keyword screening (e.g., akin to a keyword search) may have a negligible influence on the hiring decisions. It will be critical for exemptions to strike a balance between protecting employees and addressing employer’s concerns. Such concerns may include the administrative burden of disclosure and managing the implications of disclosure, such as maintaining a competitive advantage.

Without sufficient clarity, organizations may interpret the definition inconsistently, leading to compliance issues or legal disputes. A complex or vague

definition could hinder effective implementation and deter employers from adopting AI due to compliance risks. As a result, employers may potentially miss out on the advantages that AI can offer in the hiring process.

In addition to feedback on the definition of AI, the Ministry requests input on whether there should be exemptions to this requirement, and whether an employer's stated use of AI in the hiring process would deter job applicants from applying to a posted position.

## **Prohibition on requiring Canadian experience**

The changes to the ESA will prohibit employers from requiring Canadian experience in a publicly advertised job posting or any associated application form. The Ministry requests input on whether this prohibition would make Ontario more attractive to newcomers and whether certain jobs should be exempt from this prohibition.

## **Disclosure of existing job vacancy**

The Ministry cites a 2023 survey that suggests 50% of hiring managers create job postings without the intention to hire in the immediate term. While we have not reviewed the study and cannot comment on its methodology, this is not consistent with our experience in advising employers. However, on this basis of this survey, Bill 190 proposes a requirement that publicly advertised job postings disclose whether there is an actual existing vacancy. The Ministry seeks feedback on whether employers should also be required to disclose a "timeframe" for the vacancy (the meaning of "timeframe" in this context is not explained); and if employers with fewer than 25 employees should be exempt.

## **Duty to inform applicants interviewed**

The Ministry is apparently concerned about employers "ghosting" interviewees by failing to advise them about the status of their candidacy, even following an interview. Bill 190 proposes a requirement that employers must provide certain information about the status of the application to job applicants *the employer has interviewed*, meaning that candidates not selected for an interview would be excluded. The Ministry requests public input on

- the definition of "interview"
- the nature of the information the employer should be required to provide
- the timeframe in which the employer must provide the information (30 days has been proposed)
- whether the method of communication should also be regulated
- whether employers with fewer than 25 employees should be exempt

## **Participating in the public consultation**

The stated objective for the Ministry is: "to seek input to inform the smooth implementation of these new areas of regulation in a manner that does not cause undue red tape for employers while giving prospective employees the certainty they deserve." Notwithstanding the cursory nod from the Ministry to wanting to avoid "red tape," at least some employers may find that the new regulations under the ESA add cumbersome compliance requirements to the hiring process. We are hearing from our clients that imposing new hurdles in the hiring process, when combined with other recent changes to the ESA (some recent changes include an [electronic monitoring policy](#) and framework for [digital platform workers](#)) may not make Ontario an attractive jurisdiction in which to do business or help reduce the productivity gap between Canada and its global counterparts.

The Ministry is accepting public input until Friday September 20, 2024, to the address and email address below.

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*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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