

NEW GUIDANCE ON ONTARIO'S WORKPLACE MONITORING DISCLOSURE REGIME

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This is an update to our previous [bulletin](#) regarding the Ontario government's *Bill 88, the Working for Workers Act, 2022*, which proposed disclosure requirements for employers related to the electronic monitoring of workers.

On April 11, 2022 the Ontario government passed Bill 88, which subsequently amended the *Employment Standards Act, 2000* (“**ESA**”) to require employers with 25 or more employees to create a written policy containing information on whether, how, and in what circumstances the employer monitors employee behaviour through electronic devices. The policy deadline is **October 11, 2022**.

Importantly, the policy requirement does not provide Ontario provincially regulated employees with a “right to privacy” similar to how other recent legislation did not provide employees with a “right to disconnect”. The new policy requirement is only meant to provide transparency to employees regarding the use of their electronic data by employers for monitoring purposes.

The Ontario Ministry of Labour (the “**Ministry**”) has provided some helpful [guidance](#) to assist employers with understanding their responsibilities under the new legislation, which we summarize below.

What Constitutes Electronic Monitoring?

While the *ESA* does not define “electronic monitoring”, the Ministry has confirmed that it includes all forms of employee monitoring done electronically. This would include computer monitoring systems (e.g., keystroke or cursor tracking, screen recording, website tracking), GPS tracking in company vehicles, smartphones or other devices, emails and online chats, and facial recognition technology run through computer cameras or video surveillance.

Which Employers Are Covered?

An employer that employs 25 or more employees cumulatively across Ontario as of January 1, 2022 will be required to implement a written policy on the electronic monitoring of employees by October 11, 2022. Each year thereafter, employers that meet the threshold of employing 25 or more employees on January 1st of each

year must have a written policy in place by March 1st of that year.

An employer must count all employees across all its locations in Ontario, regardless of the number of hours they work. The Ministry has confirmed that this would include part-time and casual workers, as well as probationary employees, employees who are laid off or on a leave of absence, and trainees.

Policy Requirements

Employers may adopt the written policy on electronic monitoring as a stand-alone document, or as part of an employee-facing privacy policy or handbook. An employer may also decide to implement one standard policy for all employees or different policies for specific groups of employees depending on its monitoring practices. Regardless, the policy must include the following:

1. a statement as to whether the employer engages in electronic monitoring of employees. If the employer does not engage in electronic monitoring, the employer must still adopt a written policy stating this;
2. a description of how the employer may electronically monitor employees;
3. a description of the circumstances in which the employer may electronically monitor employees;
4. the purposes for which information obtained through electronic monitoring may be used by the employer; and
5. the date the policy was prepared and the date any changes were made to the policy.

Disclosure and Record Keeping Requirements

Employers will now have several disclosure obligations toward employees. They must provide a copy of their electronic monitoring policy:

1. to current employees in Ontario within 30 calendar days after the policy is prepared or changed;
2. to new employees within 30 calendar days of hire; and
3. as a printed copy, as an attachment to an email (as long as the employee can print it), or as a link to the document online if the employee has a reasonable opportunity to access the document and a printer.

Finally, employers are required to keep all previously implemented policies on electronic monitoring for a period of three years after the policy is no longer in effect.

Complaints

Employers may face an employee complaint to the Ministry for not providing a copy of the electronic monitoring policy to employees, which may initiate an investigation by an employment standards officer. However, employees will not be able to complain to the Ministry about any other contravention of the policy requirements or of overly intrusive employer monitoring.

Employers should take note though that there are less common, yet [long-standing privacy torts](#) employees may allege, usually in the context of wrongful dismissal litigation.

Takeaways

Employers should consider their obligations under the new workplace monitoring disclosure regime ahead of the October 11, 2022 deadline. This will require employers to fulsomely assess their use of electronic monitoring in day-to-day operations, as well as the purpose for its use.

In addition to preparing their policies for the new legislation, employers should turn their mind to the possibility of future privacy reforms that could impose additional obligations on the use of employee data. As new and potentially more privacy-invasive monitoring technologies emerge, businesses should consider how to best balance their management priorities with the individual privacy interests of their employees.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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