

Bill 88 Introduces New Policy Requirement and Significant Changes for Employers in Ontario

May 2, 2022

By Daniel Wong, Seth Holland, Alfred Pepushaj

On April 11, 2022, Bill 88 the *Working for Workers Act, 2022* ("Bill 88") received royal assent, making it law in Ontario. Bill 88 makes amendments to various employment-related statutes and introduces a new piece of legislation, the *Digital Platform Workers' Rights Act, 2022*.

Below is a summary of the key legislative changes and new requirements as well as deadlines for employers to be aware of.

Requirements for Employers to have a Policy on Electronic Monitoring

Bill 88 has introduced a new policy requirement under the *Employment Standards Act, 2000* (the "ESA") for employers with 25 or more employees with respect to electronic monitoring of employees. Employers with 25 or more employees at the start of any given year must have a written policy for all employees with respect to electronic monitoring in place by March 1 of each year (for 2022, the deadline is October 11, 2022).

Electronic monitoring policies must be in writing, and must provide the following:

- whether the employer electronically monitors employees, and if so, a description of how and in what circumstances the employer may electronically monitor;
- the purposes for which information obtained through electronic monitoring may be used by the employer;
- the date the policy was prepared and any changes were made to the policy; and
- any further information prescribed by the government.

Employers and clients of temporary help agencies that meet the 25-employee threshold must provide new employees and assignment employees with a copy of the electronic monitoring policy within 30 days of starting work.

Notably, while Bill 88 mandates electronic monitoring policies for some employers, it does not impose limitations on how employers can use information obtained through electronic monitoring. Bill 88 also does not create any freestanding right of employees to be free from electronic monitoring, or create new privacy rights for employees.

Consultant Exemptions from the ESA

Effective January 1, 2023, Bill 88 excludes business consultants and information technology ("IT") consultants from the ESA, meaning consultants who meet these new definitions under the ESA will not be entitled to minimum employee standards provided under the legislation.

The business consultant exemption is available for individuals who provide advice or services to a business or organization regarding the performance of the business or organization (which can include a broad range of topics including operations, management, finance or accounting or human resources). Individuals may qualify for the IT consultant exemption if they provide advice and services regarding information technology systems.

In order to qualify as either a business consultant or IT consultant, the following requirements must be met:

1. the consultant must provide services through:
 - a corporation of which the consultant is a director or shareholder party to a unanimous shareholder agreement; or
 - a sole proprietorship of which the consultant is the sole proprietor;
2. there must be in place an agreement for the consultant's services that expressly provides the consultant with a minimum hourly rate of \$60 per hour excluding bonus, commission, expenses and travelling allowances; and
3. the consultant must be paid in accordance with the consulting agreement.

Expansion of Military Reservist Leave under the ESA

Effective immediately, Bill 88 has also expanded Reservist leave under the ESA. Ontario employees are now entitled to a job-protected unpaid leave of absence if the employee is unable to work because they are participating in Canadian Armed Forces military skills training, in addition to the preexisting eligible conditions for the leave.

Bill 88 has also lowered the service requirement to become eligible for Reservist leave. Employees must now only be employed for a minimum period of three (3) months (previously six (6) months) to qualify for Reservist leave under the ESA.

Increased Fines and Changes to *Occupational Health and Safety Act*

Bill 88 has made impactful amendments to the *Occupational Health and Safety Act* (the "OHSA"), as follows:

- The maximum penalties for contraventions of the OHSA by a director or officer of a corporation have been increased to a fine of \$1,500,000, and/or imprisonment for a term of 12 months, effective July 1, 2022.
- The maximum fine for contravention of the OHSA has been raised from \$100,000 to \$500,000 for other individuals, effective July 1, 2022.
- The limitation period for prosecutions to be brought under the OHSA has been increased to two (2) years (previously one (1) year) from the later of: the date of the alleged offence or date an occupational health and safety inspector becomes aware of the alleged offence, effective July 1, 2022.
- The OHSA now requires employers to provide naloxone kits and related maintenance and training related to those kits when an employer becomes aware, or ought to be aware of any a risk of a worker having an opioid overdose in the workplace. This change is not yet in effect and will come into effect on a future date to be named by the Lieutenant Governor.

The *Digital Platform Workers' Rights Act, 2022*

Bill 88 also enacts the *Digital Platform Workers' Rights Act, 2022* (the "DPWRA"), which establishes minimum standards and protections for workers performing digital platform work, commonly known as "gig workers". The DPWRA provides a comprehensive set of protections for workers and requirements for digital platform operators, specifically those related to the following:

- rights to certain work-related information;
- recurring pay periods and a minimum wage rate consistent with the ESA;
- rights to amounts earned while performing digital platform work, and to tips and gratuities provided to the worker;

- minimum notice requirements and other rights related to the removal from a digital platform;
- the right to resolve work-related disputes within the province of Ontario; and
- reprisal protections.

Notably, while the DPWRA provides minimum wage protections, workers covered under the DPWRA are only entitled to minimum wage for *each work assignment* performed by the worker, rather than total time the worker makes themselves available to provide work.

The DPWRA also provides that digital platform related disputes shall be resolved within Ontario, which prevents digital platform operators from contracting to resolve disputes by arbitration or otherwise in foreign jurisdictions.

Takeaways for Employers

Bill 88 introduces a number of significant changes affecting a wide range of Ontario employers depending on size, industry and nature of work. Employers should be aware of the changes made by Bill 88 and assess whether changes are necessary to their operations to comply with the changes to Ontario law.

If you would like to discuss how the changes discussed above may impact your business or need assistance to comply, please contact a member of WeirFoulds' Employment Law Group.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:



Daniel Wong

Toronto
416.947.5042

Email:
dwong@weirfoulds.com

Daniel Wong is Chair of the Firm's Employment & Labour Practice Group with a practice that is focused on employment and labour relations.



Seth Holland

Toronto
416.947.5004

Email:
sholland@weirfoulds.com

Seth Holland is an Associate in the Employment and Labour Law Practice Group at WeirFoulds LLP.



Alfred Pepushaj

Toronto
416.619.6293

Email:
apepushaj@weirfoulds.com

Alfred Pepushaj is an Associate in the Commercial Litigation Practice Group at WeirFoulds LLP.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035