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## Feature

# Ontario Employers Face More Changes with Bill 88

*More news on Digital Platform Workers' Rights and Electronic Monitoring*

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On April 11, 2022, Bill 88, *Working for Workers Act, 2022* received Royal Assent. It established the new *Digital Platform Workers' Rights Act, 2022* ("DPWRA"), and an amendment to the *Employment Standards Act*, 2000 ("ESA") requiring employers to prepare an electronic monitoring policy.

### *Digital Platform Workers' Rights Act, 2022*

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The DPWRA is a first-in-kind piece of legislation, which introduces a bundle of important rights for workers who perform "digital platform work," which is 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." The term "operator" includes "a person that facilitates, through the use of a digital platform, the performance of digital platform work by workers" but does not include temporary help agencies.

The Act also provides digital platform workers with considerable rights to information. For example, within twenty-four hours of being granted access to the digital platform, operators will have to advise workers how pay is calculated, whether tips or gratuities are collected and how, as well as information regarding the operator's established pay period.

Operators must also communicate information regarding the factors used to determine whether work assignments are offered to workers, and a description of how those factors are applied. Additionally, an explanation of the performance rating system, if applicable, and its impact on a worker must also be provided. The new legislation also imposes stringent record-keeping requirements on operators.

Finally, the DPWRA prevents operators from intimidating, penalizing or threatening to intimidate or penalize a worker for asking any person to comply with the Act, for making inquiries about their rights under the Act, or for taking steps to exercise a right under the Act.

The DPWRA will come into force on a day yet to be named by proclamation.

### Takeaways for Employers

First, it is important to note that the DPWRA will apply equally to any worker performing digital platform work. This includes employees, but also contractors, which represents an important expansion of statutory employee-like rights to a broader range of workers.

Employers should begin to create policies or protocols that conform to the various requirements outlined in the Act. Most importantly, employers will need to consider how the requirements prescribed by the DPWRA will affect their accounting practices, as well as their information policies and record-keeping procedures.

Finally, it is important to note that the DPWRA generally parallels the ESA, particularly with respect to its oversight and enforcement mechanisms. It will prohibit operators and workers from contracting out or otherwise waiving any of the workers' rights established by the Act, unless one or more provisions in a contract or

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in another Act that directly relate to the same subject matter as a worker right provide a greater benefit to a worker than the worker right provided in the DPWRA.

### Introduction of Electronic Monitoring Policies

The most important amendment to the ESA brought on by Bill 88 is the addition of Part XI.1, which imposes new requirements on employers as it pertains to the electronic monitoring of employees.

### Electronic Monitoring Policy

The new section to the ESA requires employers that employ 25 or more employees on January 1 of a given year, to ensure it has a written policy in place for all employees, no later than March 1 of that year that addresses to electronic monitoring of employees.

For the purposes of initial compliance, prescribed employers have until October 11, 2022 to comply with this requirement.

Under the new provisions of the ESA, the written policy must:
- indicate whether the employer electronically monitors its employees;
- a description of how, and in what circumstances, the employer may electronically monitor employees; and
- set out the purposes for which the information obtained through electronic monitoring may be used by the employer.

The written policy must also highlight the date the policy was prepared, and the date any changes were made to the policy.

In addition, employers who are required to have an electronic monitoring policy must provide a copy of the policy to each employee within thirty days of the day on which the employer is required to have implemented the policy, as well as within thirty days of any changes being made to an existing policy. New employees should also receive a copy within thirty days of commencing work.

Finally, employers must retain, or arrange for some other person to retain, copies of every written policy on electronic monitoring for three years after the policy ceases to be in effect.

### Takeaways for Employers

Although the new addition to the ESA may initially seem onerous to employers, it is important to note that nothing in the amendment to the legislation affects an employer's ability to engage in electronic monitoring of employees in Ontario.

Employers who already engage in electronic monitoring should review and update existing policies to ensure they are line with the new requirements of the ESA. Similarly, affected employers who do not currently have electronic monitoring policies should begin reviewing their electronic monitoring practices in anticipation for the disclosure required above, and should consult with legal counsel to draft an electronic monitoring policy. When preparing or revising such policies, privacy considerations should also be kept in mind.

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