

2022 EMPLOYMENT, LABOUR & EQUALITIES LAW WEBINAR SERIES

BILL 88: ELECTRONIC MONITORING – PART 2

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LAND ACKNOWLEDGMENT

AGENDA

- 1. Bill 88 – Quick Refresher on Part 1**
- 2. ESA – Electronic Monitoring Policy Requirements**
- 3. What do we know now?**
- 4. Best Practices – How to draft and finalize your policy**
- 5. Other Jurisdictions – What has been done elsewhere?**
- 6. Q&A Period**

LEGAL DISCLAIMER

- The presentation today is not intended as legal advice.
- Because this is a high level overview, it is impossible to cover all relevant details.
- For specific advice, please consult qualified legal counsel before making any decisions or taking any action.
- As things evolve, your best course of action could also evolve. Follow up to date and reliable sources for your information.

BILL 88 – REFRESHER ON PART 1

Digital Platform Workers' Rights Act, 2022 (DPWRA)

- New minimum standards for 'digital platform' workers
- Not yet in force – proclamation date is still TBA

Occupational Health and Safety Act (OHSA)

- New requirement for naloxone kits – proclamation date is still TBA
- Substantial increase in penalties and enhanced limitation period in effect on July 1, 2022
- New legislated aggravated sentencing factors

BILL 88 – REFRESHER ON PART 1

- ***Fair Access to Regulated Professions and Compulsory Trades Act, 2006***
 - New timelines within which regulated professions must respond to applications for registration from domestic labour mobility applicants
 - New mechanisms for review, appeals and exemptions

- ***Employment Standards Act, 2000***
 - New rules for “business consultants” and “information technology consultants”
 - Exemptions under ESA - effective January 1, 2023
 - New “Reservist Leave” provisions as of April 11, 2022

ELECTRONIC MONITORING POLICY

Employment Standards Act, 2000

- New Part XI.1., s. 41.1.1
- January 1 of any year - **25 or more employees** = before March 1 of that year - **written policy re: electronic monitoring**
- **Deadline: October 11, 2022**
- Scope – Provincially regulated businesses (i.e. not subject to the *Canada Labour Code*)
- All employees (few narrow exceptions)

ELECTRONIC MONITORING POLICY

Required Contents:

1. *Whether* employer monitors
2. *How* employer *may* electronically monitor
3. *Circumstances may* electronically monitor
4. *Purposes* for which information *may be used* by the employer.
5. *Date* prepared and changed
6. “such other Information as may be prescribed...”

COMMENTARY FROM THE MINISTRY OF LABOUR

- No right to not be electronically monitored
- No *new* privacy rights
- All about transparency
- Standalone document or part of another document/handbook



COMMENTARY FROM THE MINISTRY OF LABOUR

Whether the employer engages in electronic monitoring of employees

- “Electronic monitoring” includes all forms of monitoring that is done electronically, e.g.:
 - GPS
 - electronic sensor to track how quickly employees scan items at a grocery store check-out
 - tracking websites employees visit during working hours
- The scope of the policy is not limited to:
 - devices or other electronic equipment *issued* by the employer
 - electronic monitoring that happens while employees are *at the workplace*

COMMENTARY FROM THE MINISTRY OF LABOUR

Example 1: Tracking employee's delivery vehicle using GPS

- **How?**
 - “The employer monitors the employee’s movement by tracking the employee’s delivery vehicle through GPS.”
- **Circumstances?**
 - “The employer monitors the employee’s movement in the vehicle for the entire workday, every workday.”
- **Purposes?**
 - “The employer uses the information obtained to assist in setting routes for employee safety, to ensure employees do not deviate from their delivery route during their shift, and to discipline employees who are untruthful about their whereabouts during working hours.”

COMMENTARY FROM THE MINISTRY OF LABOUR

Example 2: Monitoring employees' emails and online chats

- **How?**
 - “The employer monitors employee emails and online chats through a software program created specifically for this purpose.”
- **Circumstances?**
 - “The employer may monitor at any time employee emails and online chats.”
- **Purposes?**
 - “The employer uses the information obtained through electronic monitoring of employee emails and online chats to evaluate employee performance, to ensure the appropriate use of employer equipment, and to ensure work is being performed during working hours.”

COMMENTARY FROM THE MINISTRY OF LABOUR

Restrictions on Use?

- **ESA does not** affect or limit employer's ability to use information
 - ESA does not limit the employer's use of the information to the stated purposes.
- Privacy considerations?
- Common law considerations?
- What about warnings and relying on info for discipline?
- Unions?



BILL 88 – LEGAL CONCERNS

- Interaction with laws of other jurisdictions
 - Fed / BC / AB & QC
- Common law
- Contractual rights vs. statutory compliance requirements
- Risks associated with “over-disclosure”

BILL 88 – GAPS IN THE LEGISLATION

- Carve-outs / exemptions?
- Active vs. passive monitoring?
- Extent of requirement to disclose?



PRACTICAL CONSIDERATIONS

- 1. No limitation.** Bill 88 does **not** impose a limit on electronic monitoring
 - *Caveat: unionized employers*
 - *Common law or statutory privacy rights*
- 2. List network security tools.**
 - Endpoints vs network devices

PRACTICAL CONSIDERATIONS (CONT'D)

3. **Pick the right level of disclosure**
4. **Anticipate questions**
5. **Update your asset map**
 - Determine - how employees are “monitored”?
 - Invitation for improvement and the rooting out of unmanaged apps / devices
 - Prepare & finalize policy

PRACTICAL CONSIDERATIONS (CONT'D)

6. Update related policies

- Privacy Policy
- Acceptable Technology Use
- Mobile Devices Policy
 - Be prepared to cross-reference with Electronic Monitoring Policy



DRAFTING YOUR POLICY

Before you get started:

- What is your organization actually doing?
- Talk to IT

Creating your draft policy:

- Do you electronically monitor?
- Provide a definition of electronic monitoring
- Provide examples (e.g. employer-owned electronic devices and accessories, computer networks, software)

DRAFTING YOUR POLICY

- Active and passive monitoring
 - Basic activities
 - Other activities: e.g. performance monitoring, biometrics
 - “For cause” monitoring
- Defining the purpose and how it can be used
 - Group of purposes vs. listing each purpose
 - Transparency = does not hurt to say all ways it can be used

DRAFTING YOUR POLICY

- Defined scope:
 - Cross-Canada operations - Canada-wide policy?
- Application:
 - All employees, regardless of work set-up (in the office, remote, hybrid)
 - Assignment employees?
- *Who* can review the information collected and *when*
- Enforcement mechanisms and disciplinary measures

DRAFTING YOUR POLICY

- Always reserve the right to amend, replace or revoke
- Date of publishing and revisions
- Questions?
- Employee acknowledgments
- Consistently over 25? → reference to the policy in your employment agreements?

PROVIDING COPIES

- Copies to be provided to each employee:
 1. Existing staff
 2. New hires
- Wrinkles: Temporary help agency employees
- Complaint / Enforcement Mechanisms
- Retain copies 3 years after no longer in effect




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OUTSIDE ONTARIO: NEW YORK

Guest Speaker: Meghan Meade

- New legislation (Senate Bill S2628) recently came into effect in New York, amending the Civil Rights Law
- Requires written notice upon hiring informing them of the types of electronic monitoring that may occur, and obtain written acknowledgment of same
- Notice and acknowledgment can be provided electronically and notice also must be posted in a conspicuous place



NY legislation available online:

<https://www.nysenate.gov/legislation/laws/CVR/52-C%2A2>

OUTSIDE ONTARIO: NEW YORK

Applies to any NY employer who monitors or otherwise intercepts:

- telephone conversations or transmissions;
- electronic mail or transmissions;
- internet access;
- usage of any electronic device or system, including but not limited to use of a computer, telephone, wire, radio, electromagnetic, photo-electronic or photo-optical system

No private right of action exists. No carve-out for small employers



OUTSIDE ONTARIO: US

Guest Speaker: Jennifer J. Daniels

- **U.S. takes piecemeal approach to electronic monitoring in the workplace**
- **Federal Electronic Communications Privacy Act of 1986 (ECPA)**
 - Wiretap Act: regulates intentional interception, use, and disclosure of wire, oral, and electronic communications
 - Stored Communications Act (SCA): governs electronic communications already transmitted and currently in storage
- **State law**
 1. Laws specific to electronic monitoring
 2. Comprehensive privacy laws
 3. Common law – invasion of privacy claims
 4. Laws specific to GPS, biometrics, etc.

OUTSIDE ONTARIO: CONNECTICUT

- Legislation in Connecticut (section 31-48d)
- Employers engaged in electronic monitoring required to give prior notice to all employees who may be affected.
- Each employer shall post, in a conspicuous place which is readily available for viewing by its employees, a notice concerning the types of electronic monitoring which the employer may engage in. Such posting shall constitute such prior written notice.



OUTSIDE ONTARIO: CONNECTICUT

“Electronic monitoring” means the collection of information on an employer’s premises concerning employees’ activities or communications **by any means other than direct observation**, including the use of a computer, telephone, wire, radio, camera, electromagnetic, photo-electronic or photo-optical systems, **but not** including the collection of information (A) for security purposes in common areas of the employer's premises which are held out for use by the public, or (B) which is prohibited under state or federal law.

“Employee” includes any person who performs services for an employer in a business of the, if the employer has the right to control and direct the person as to (A) the result to be accomplished by the services, and (B) the details and means by which such result is accomplished.

OUTSIDE ONTARIO: DELAWARE

- Legislation in Delaware (Delaware Code, Title 19, Chapter 7)
- No monitoring or intercepting any telephone conversation or transmission, electronic mail or transmission, or Internet access or usage of or by a Delaware employee unless the employer either: (1) Provides an electronic notice of such monitoring or intercepting policies or activities to the employee **at least once during each day** the employee accesses the employer-provided e-mail or Internet access services; or (2) Has **first given a 1-time notice to the employee** of such monitoring or intercepting activity or policies that the employee has acknowledged either in writing or electronically.

Q&A

Let's talk!

We know you have questions.

ADDITIONAL RESOURCES

- **New ELE Landing Page:**
<https://gowlingwlg.com/en/topics/navigating-change-in-canada-new-age-of-employment/overview/>
- **Bill 88 – Part 1 Webinar Replay:**
<https://gowlingwlg.com/en/insights-resources/on-demand-webinars/2022/bill-88-electronic-monitoring/>
- **Remote Work Webinar Replay:**
<https://gowlingwlg.com/en/insights-resources/on-demand-webinars/2022/remote-workplace/>



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- Join us at our next webinar in the series in October!



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