

Employment Update: Electronic Monitoring in Ontario - Employers Require Written Policy by Oct. 11

Date: September 21, 2022

[Bill 88, An Act to enact the Digital Platform Workers' Rights Act, 2022 and to amend various Acts](#) came into force in April of 2022 and introduced a new requirement that Ontario employers with 25 or more employees must develop a written policy regarding the electronic monitoring of employees. Employers captured by this new requirement have until **October 11, 2022** to get a written policy in place.

The Ontario Ministry of Labour recently published new [guidance](#) highlighting what is required of employers under the new electronic monitoring written policy requirement.

A summary of what employers need to know is set out below:

When is an Employer Required to have a Written Electronic Monitoring Policy?

An employer is required to have a written electronic monitoring policy ("written policy") if they employ **25 or more** employees in Ontario on January 1 of any year. When calculating the number of employees, an employer must count all employees, including part-time and casual employees.

As outlined above, for 2022, employers that meet the "25 or more employees" threshold are required to have a written policy in place by October 11, 2022.

In any year going forward, employers that meet the "25 or more employees" threshold as of January 1 of that year will be required to have a written policy in place by March 1 of that year.

Changes in Employee Numbers Throughout the Year

For the purposes of determining whether an employer is required to have a written policy, the calculation of the number of employees is made each year on January 1. After January 1, fluctuations in employee numbers throughout the year have no effect on what is required of the employer until the subsequent year's calculation.

For example, if an employer employed 20 employees on January 1, 2022 then later hired 10 more employees in March 2022, they would not be required to implement a written policy for 2022 even though they would now employ over 25 employees. However, the employer would be required to implement a written policy the following year if the employee count remained at 25 or more as of January 1, 2023.

Similarly, if an employer employed 25 employees on January 1, 2022 (and was therefore required to implement a written policy) and 5 employees subsequently left the employer in February 2022, the employer would still be required to have a written policy in place for 2022. However, come January 1, 2023, if the employer still had less than 25 employees, they would no longer be required to have a written policy in place for that calendar year (although an employer may nevertheless elect to leave its policy in place).

What is Electronic Monitoring?

“Electronic monitoring” is not defined under the *Employment Standards Act, 2000* (the “ESA”) but is stated in the guide to include “**all forms of employee monitoring that is done electronically**”. Some examples include when an employer:

- uses GPS to track the movement of an employee’s delivery vehicle;
- uses an electronic sensor to track how quickly employees scan items at a grocery store check-out; and
- tracks the websites that employees visit during working hours.

Importantly, the electronic monitoring required to be captured in an employer’s written policy is **not** limited to:

- electronic monitoring that happens while employees are at the workplace; or
- electronic monitoring that occurs on devices or electronic equipment issued by the employer.

In sum, any form of electronic monitoring of the employee, regardless of when or on what device, is required to be captured in an employer’s written electronic monitoring policy.

What Needs to be Included in a Written Electronic Monitoring Policy?

An employer’s written policy is required to contain the following information:

1. A statement as to whether the employer engages in electronic monitoring of employees;
2. Where the employer **does** electronically monitor employees, the policy must contain the following information:
 - a. A description of how the employer may electronically monitor employees;
 - b. A description of the circumstances in which the employer may electronically monitor employees; and
 - c. The purposes for which information obtained through electronic monitoring may be used by the employer.

3. The date the policy was prepared and the date any changes were made to the policy.

Scope of the Policy

The written policy is required to apply to **all** of an employer's employees in Ontario. This includes management, executives, and shareholders if they are employees. However, an employer is not required to have the **same** policy for all employees.

For example, the written policy can contain different policies (either in the same document, or in multiple documents) for different groups of employees.

Record Keeping and Deadlines

Employers are required to retain a copy of every written electronic monitoring policy for **three years** after the policy is no longer in effect.

If required to have a written policy in place, employers are required to provide a copy of the written policy to its employees within **30 calendar days** of:

- The day the employer is required to have the policy in place; or
- The policy being changed (if an existing policy is changed).

When an employer hires a new employee, they are required to provide the new employee with a copy of the written policy within **30 calendar days** of the **later** of these two events:

- The day the employer is required to have the policy in place;
- The day the individual becomes an employee of the employer.

Employers can provide the written policy as a printed copy, an email attachment (if the employee can print a copy), or as a link to the document online (if the employee has a reasonable opportunity to access the document and a printer, and knows how to use same).

Use of Electronic Information

As set out earlier, an employer is required to outline in their written policy the purposes for which information obtained through electronic monitoring may be used by the employer. However, the guide indicates that the *ESA* does **not** limit an employer's use of the information to the purposes stated in the written policy.

For example, if an employer's stated purpose regarding the use of information collected through electronic monitoring is to "assess employee productivity", they would **not** be precluded from using information collected for other purposes, such as to discipline or terminate an employee.

In sum, the *ESA* does not limit an employer's use of the information they collect to what is stated in the policy.

Limitations on Complaints

The guide also indicates employees can only make a complaint to the Ministry of Labour where there is an alleged contravention of the employer's obligation to provide a copy of the written policy within the required timeframe to its employees.

Essentially, this means employees are not permitted to bring a complaint regarding the types of electronic monitoring their employer uses or the manner in which the employer uses the information collected. The guide specifically states that the new electronic monitoring requirements **do not** establish a right for employees not to be electronically monitored by their employer, and **do not** create any new privacy rights for employees.

However, employers should be mindful when drafting their policies and may wish to seek legal advice about whether their policy would create any entitlements that an employee could enforce outside of the *ESA*.

Employer Takeaways

To prepare for the looming October 11, 2022 deadline, employers with 25 or more employees in Ontario as of January 1, 2022 should review the ways in which they electronically monitor their employees (whether inside or outside of the workplace), which will inform the content of their written policy.

Employers should also review the guide's [employer checklist for a creating a policy](#) when preparing their written policy.

For specifically tailored advice on the impact of these amendments to the *ESA* on your business, please reach out to a member of the [Labour and Employment Group](#).

The information contained in this article is intended to provide information and comment, in a general fashion, about recent developments in the law and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.