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Ontario's electronic monitoring policy requirements now in effect

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As of October 11, 2022, all employers in Ontario with 25 or more employees must have a written policy in place disclosing whether and how they electronically monitor their employees. Beginning in 2023, employers who meet the threshold of 25 or more employees on January 1 of each year must have the policy in place before March 1 of that year.

The *Employment Standards Act, 2000* (the ESA) was amended to include such requirement pursuant to Bill 88, *Working for Workers Act, 2022 (Working for Workers Act 2)*.

What is electronic monitoring?

"Electronic monitoring" is not defined in the ESA; however, guidance issued by the Ministry of Labour describes electronic monitoring as all forms of employee and assignment employee monitoring that is done electronically, irrespective as to whether such monitoring occurs on equipment issued by the employer or whether it occurs while employees are at, or away from, the workplace.

Notably, the new ESA requirement to implement an electronic monitoring policy does not affect or limit an employer's ability to use the information obtained through policy. In other words, there is no new right to privacy or increase in privacy rights to employees as a result of the new requirement. However, employers should exercise caution when developing their own electronic monitoring policies so as not to unintentionally grant new contractual rights to employees.

Application of the electronic monitoring policy

Employers who meet the above-noted employee threshold must implement an electronic monitoring policy in respect of all its employees in Ontario, including management and probationary employees. The ESA Guidance clarifies that employers are not required to implement the same policy in respect of all such employees.

Currently, provinces outside of Ontario do not require employers to adopt an electronic monitoring policy. Some provinces, such as British Columbia, Alberta and Québec, as well as federally regulated workplaces, have privacy laws that may impact the adoption of an electronic monitoring policy. If your organization is considering adopting an electronic monitoring policy outside Ontario or in a federally regulated workplace, consult with Osler to learn about the implication of privacy laws on the development of electronic monitoring policies.

Policy requirements

The electronic monitoring policy must contain the following information:

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

The electronic monitoring policy must be provided to every employee within 30 days from the day the employer is required to enact the policy. If an existing policy is changed, the updated policy must be provided to every employee within 30 days from the date of revision.

Considerations for developing an electronic monitoring policy

Consider the following when drafting an electronic monitoring policy:

1. **What does the organization intend to monitor electronically?** This may include, for example, the Internet, computers, laptops, phones, virtual private network (VPN) remote access, computer file access, electronic databases, email and other electronic communications, business applications (e.g., records management software), electronic programs, surveillance cameras, security cards and other tokens, geolocation tracking, printers, scanners, etc.
2. **In what circumstances will the monitoring occur?** For example, will it take place at all times? Only during regular business hours? Only during the employee's scheduled work hours?
3. **For what purposes will the organization electronically monitor employees?** Consider, for example, whether the monitoring may be used for purposes related to business operations, business administration, compliance, safety, security, workplace investigations, productivity and/or performance management. Consider situations in which monitoring that is intended to be done for one purpose may disclose information that could be used for a different purpose.
4. **Interaction with other organizational policies.** Consider how the Electronic Monitoring Policy interacts with other organizational policies, for example such as those pertaining to information technology. Ensure that such policies establish consistent standards and do not contradict one another.

To learn more about your organization's obligations with respect to adopting an electronic monitoring policy and strategies to achieve compliance, contact Osler's Employment and Labour group.