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Working for Workers Act: Reminders for 2023

By Peter C. Straszynski

In our March 2022 insight, *Working for Workers Act - Take Two*, we reported on the Ontario government's introduction of *Bill 88: The Working for Workers Act*, which received Royal Assent and became law in April of 2022.

Among other things, Bill 88 made some important changes to the *Employment Standards Act* ("ESA"). Some of these changes did not take effect until January of 2023. Here are a couple of important reminders for Ontario employers arising out of Bill 88 as we start the new year.

Business and IT Consultants

The ESA already provided for certain exemptions from specified minimum employment standards, including a limited exemption for "information technology professionals".

Effective January 1, 2023, the ESA does not apply (at all) to "business consultants" (persons providing "advice or services to a business or organization in respect of its performance, including advice or services in respect of the operations, profitability, management, structure, processes, finances, accounting, procurements, human resources, environmental impacts, marketing, risk management, compliance or strategy of the business or organization") or to "information technology consultants" (persons providing "advice or services to a business or organization in respect of its information technology systems, including advice about or services in respect of planning, designing, analyzing, documenting, configuring, developing, testing and installing the business or organization's information technology systems"), so long as the following conditions are met:

- The consultant's services are provided either through a corporation (of which they are an owner or director) or through a sole proprietorship (operating under a registered business name); and
- The consultant is paid at least \$60/hr excluding bonuses, commissions, expenses, and travelling allowances and benefits.

If these workers are employed directly by your business, the ESA will continue to apply to them, subject to other applicable exemptions, if any. If you are engaging these workers as independent contractors (or “consultants”), it is important that the above conditions are met in order to avoid “mis-classification”. It is also important to remember that these changes to the ESA do not affect or limit the jurisdiction of the Canada Revenue Agency to find these individuals to be “employees” for *Income Tax Act* purposes.

Electronic Monitoring Policies

As of October 11, 2022, businesses with at least 25 employees on January 1 (of any given year) are required to prepare and distribute electronic monitoring policies in their workplace. If your business does not already have an electronic monitoring policy in place, and if you employed at least 25 people as of January 1, 2022, or 2023, then you are required to implement such a policy.

The policy must disclose whether you electronically monitor employees, and if so, it must also describe:

- How and in what circumstances you may electronically monitor employees; and
- The purposes for which information obtained through electronic monitoring may be used.

The policy must be provided to existing employees, to new employees and to any onsite “assignment” employees employed by an outside placement agency.

For more information or assistance, please reach out to any member of our Employment & Labour Law Group.

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