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Working for Workers Act - Take Two

By Daniel Pugen

On February 28, 2022, the Government of Ontario introduced major changes to workplace legislation via Bill 88. This follows up on the government's *Working for Workers Act 2021*. The government has aptly named Bill 88 as the *Working for Workers Act 2022*.

The changes are significant and, as noted by the government, "foundational." The government appears very keen to pass modernized workplace legislation to account for some of the realities of working life in 2022. While the *Working for Workers Act 2021* tackled some of these issues (e.g., requiring a "disconnecting from work" policy), the government now feels compelled to regulate workers who perform work via a digital platform (e.g., Uber drivers), clarify employment standards exemptions for business and IT consultants, and force employers to, yet again, create another policy (this time on electronic surveillance).

The *Working for Workers Act 2022*, has passed first reading. While in its infancy, with an election on the horizon, the law is expected to pass. And, if the *Working for Workers Act 2021* is any indication, we can expect it to pass relatively swiftly.

What follows is a very brief summary:

Digital Platform Workers

New minimum standards workplace legislation titled, the *Digital Platform Workers' Rights Act, 2022*, is being proposed. The purpose of this legislation would be to ensure that those who perform "digital platform work" have certain minimum workplace rights, even if they are not formally classified as employees. The phrase "digital platform work" refers to ride sharing, delivery, courier or other services offered to workers "by an operator through the use of a digital platform."

While this legislation is not as comprehensive as the *Employment Standards Act, 2000* ("ESA"), it does provide digital platform workers with the following entitlements/rights:

- The right to obtain certain information (e.g., how pay is calculated, how work is assigned and how work performance is measured);
- The right to a minimum wage (as calculated by the ESA) for “each work assignment performed by a worker”;
- Ensuring that tips and gratuities are not deducted from amounts earned by the worker;
- Absent wilful misconduct, receiving two weeks’ notice of termination (i.e. “notice of removal” from the digital platform) if access to the platform is removed for a period of 24 hours or longer; and
- The protection of anti-retaliation provisions.

ESA Changes

The *Working for Workers Act 2022* clarifies that a “business consultant” and an “information technology consultant” would be excluded from the ESA provided that certain conditions are met, including that the consultant provides services through a business or corporation and the consultant earns at least \$60 per hour (excluding bonuses, commissions, expenses, and other perquisites or benefits). It is curious that, on the one hand, the government is increasing workplace protections for one class of workers (digital platform workers), while, on the other hand, potentially making it harder for these consultants to access employment standards protections.

Employers with 25 or more employees (the same threshold required to establish a disconnect from work policy) must ensure that an “electronic monitoring of employees” policy is created. The policy must specify whether the employer electronically monitors employees and, if so, a description of “how and in what circumstances” employees are monitored and the purposes for which the information obtained through the monitoring may be used. Notably for employers, there is a clarifying note that states that “nothing in this section affects or limits an employer’s ability to use information obtained through electronic monitoring of its employees.” As such, the intent of these changes is for employers to be transparent with employees regarding electronic monitoring. It is not to prevent employers from monitoring. As stated by the government in its briefing note, the legislation would: “Require greater transparency and address privacy concerns by mandating larger employers to establish and share policies with their employees on how they are monitoring electronic devices like computers, cell phones and GPS systems.”

A copy of the policy must be provided to all employees, including when the policy is changed.

Occupational Health and Safety Act (“OHSA”) Changes

The *Working for Workers Act 2022* imposes an obligation on employers to “provide and maintain in good condition a naloxone kit” where there is a risk of a worker having an opioid overdose at their workplace. There must be a worker who is trained to recognize an opioid overdose and administer naloxone. The worker must also be acquainted with any hazards related to the administration of naloxone.

The government has stiffened fines for a breach of the OHSA to \$1.5 million for directors/officers of a corporation and \$500,000 for other individuals. Further, a list of “aggravating factors” for a judge to consider in determining an appropriate penalty has been added. These factors align with some of the factors that judges already consider as developed in the case law.

Perhaps most notably for employers, the government has increased the limitation period from one year to two years to commence proceedings for a breach of the OHSA. This would apply to all offences (whether the accident resulted in no injury or a serious one). It is common for the Ministry of Labour to institute charges close to the one-year limitation period. Accordingly, employers can expect further and prolonged investigations by the Ministry of Labour in order to build a case to prosecute. Given this time period, it will be critical for employers to accurately document all aspects of an accident, retain records and ensure witnesses remain available for years after an accident.

As noted above, we expect the *Working for Workers Act, 2022* to pass in short order. As the law moves through the legislative process, significant amendments will be noted in future bulletins.

If you have any questions or require more information, please contact any member of our Employment & Labour Group.

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