



What's New in HR Law

Ministry Of Labour Releases Interpretive Guidance on Electronic Monitoring Policies

July 21, 2022 | By [Mark Van Ginkel](#)

Bottom Line

When the *Employment Standards Act, 2000* (“ESA”) was amended earlier this year to require certain employers to implement a written policy on the electronic monitoring of employees, many were left wondering what the policy should look like. The Ministry of Labour has now released [useful guidance regarding the new ESA requirements](#), including the required contents of the policy and how the requirements will be enforced.

Overview of Legislative Requirements

On April 11, 2022, the *ESA* was amended to require every employer with 25 or more employees to draft and implement a written policy with respect to the electronic monitoring of its employees. The electronic monitoring policy must contain the following information:

1. A statement regarding whether the employer electronically monitors employees. If such monitoring is performed, the policy must also include:
 - (a) a description of how and in what circumstances the employer electronically monitors employees; and

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- (b) the purposes for which information obtained through electronic monitoring may be used by the employer.
2. The date the policy was prepared and, if applicable, the date any changes were made to the policy.
3. Such other information as may be prescribed. (No such information has been prescribed by the Ontario Legislature at the time of writing.)

Which Employers Must Implement a Written Electronic Monitoring Policy?

Employers are only required to have a written electronic monitoring policy in place if they employ 25 or more employees in Ontario on January 1 of any year.

The Ministry of Labour’s interpretive guidance clarifies who is considered an “employee” for the purposes of the 25-employee threshold requirement.

First, employers are required to count the number of individual employees, not the number of “full-time equivalents”. Each part-time and casual employee will count as one employee, regardless of how many hours they work.

Second, when determining whether they meet the 25-employee threshold, employers are required to count all employees that they employ across all work locations within Ontario. Anyone who meets the definition of “employee” is counted, including homeworkers, probationary employees, officers of a corporation who perform work or supply services for wages, employees on fixed-term or specific-task contracts, employees on lay-off or leave of absence, and employees who are on strike or who are locked out. Even employees who are exempt from the application of all or part of the *ESA* are included in the count, despite the fact that they might not be covered by the electronic monitoring provisions of the *ESA*. Assignment employees of temporary help agencies, however, will be considered employees of the agency and will not be included in the client’s employee count.

In any given year, including in 2022, the 25-employee threshold is to be assessed on January 1. The size of an employer’s workforce on any other calendar date is irrelevant for the purposes of assessing whether an electronic monitoring policy is required for that year.

Who Must Be Covered By the Policy?

An employer’s electronic monitoring policy must apply to **all of the employer’s employees in Ontario to whom the new *ESA* provision applies**, including management employees, executives, and shareholders, if applicable. This does not mean, however, that the employer is required to have the same policy for all of its employees. It may choose to have multiple policies that apply to different groups of employees (e.g., one policy applying to office workers and one policy applying to production workers).

Although assignment employees are not included in the 25-employee threshold, an employer’s electronic monitoring policy must apply to all assignment employees who are assigned to perform work for the employer in Ontario. If the assignment employee is to perform work for the employer in a role that is not otherwise addressed in the employer’s electronic monitoring policy, the policy must be amended to address the role occupied by the assignment employee.

What Is Considered to Be Electronic Monitoring?

The Ministry of Labour’s interpretive guidance explains what types of activities are considered electronic monitoring for the purposes of the *ESA*’s policy requirement. The Ministry of Labour defines “electronic monitoring” to include **all forms of employee and assignment employee monitoring that is done electronically**. This broad definition would include activities such as:

- the use of GPS to track the movement of an employee’s delivery vehicle;
- the use of an electronic sensor to track how quickly employees scan items through a point-of-sale system; and
- the tracking of the websites that an employee visits during working hours.

The definition of electronic monitoring is not limited to electronic equipment issued by the employer or electronic monitoring that happens in the workplace; any monitoring of personal devices outside of the workplace must also be captured by the policy.

How Must the Policy Be Distributed?

Employers may provide employees with a copy of the electronic monitoring policy in the form of:

- a printed copy;
- an attachment to an email, if the employee can print a copy; or
- 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 the technology necessary to access the document).

How Will the New *ESA* Requirements Be Enforced?

A complaint can only be made to the Ministry of Labour, or be investigated by an employment standards officer, where there is an alleged breach of the employer’s obligation to provide its employees (and any assignment employees) with a copy of the written policy within the required timeframe. The Ministry of Labour cannot investigate any complaints alleging any other contravention of the *ESA*’s electronic monitoring provisions, such as any complaint relating to the substance of the policy or how it is applied within the workplace.

Does the *ESA* Limit How an Employer May Use Information?

The electronic monitoring provisions of the *ESA* do not in any way limit an employer’s ability to use information obtained through the electronic monitoring of its employees. The *ESA* does not create new privacy rights for employees; rather, it creates an obligation for employers to be transparent about how they expect to collect and use the information.

Importantly, the Ministry of Labour has confirmed that employers are not restricted from using information in a way that goes beyond what is written in the policy. For example, an employer’s policy may state that the employer collects information for the purposes of tracking efficiency. However, if information of employee misconduct is uncovered during the course of that collection, the employer may use the information for disciplinary purposes even if that purpose is not set out in the policy. Of course, the employer’s collection and use of information remains subject to any other relevant legal considerations, such as obligations under applicable privacy legislation or collective agreements.

Check the Box

Employers who meet the 25-employee threshold requirement must have a written policy on the electronic monitoring of employees in place by **October 11, 2022**. Although this deadline is months away, employers should begin consulting the Ministry of Labour's guidance document and legal counsel to ensure that they are designing policies that comply with all of their obligations under the *ESA* and any other applicable legislation, contracts, or collective agreements.

Need More Information?

For more information or assistance with an electronic monitoring policy for your workplace, contact [Mark Van Ginkel](#) at mvanginkel@filion.on.ca or your regular lawyer at the firm.



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