FTR Now

Ontario Introduces Bill 88, *Working for Workers Act, 2022*

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On February 28, 2022, the Ontario government tabled Bill 88, *Working for Workers Act, 2022*, omnibus legislation which, if passed, would enact the *Digital Platform Workers' Rights Act, 2022* and make amendments to the *Employment Standards Act, 2000* (*ESA*) and other employment-related legislation.

In this *FTR Now*, we review some of the key features of Bill 88 of interest to employers.

A New *Digital Platform Workers' Rights Act, 2022*

Bill 88 would enact the *Digital Platform Workers' Rights Act, 2022* (*Act*). The *Act* would establish minimum wage and other rights for workers who perform "digital platform work," which the *Act* defines as "the provision of for payment ride share, delivery, courier or other prescribed services by workers who are offered work assignments by an operator through the use of a digital platform." An "operator" is broadly defined to include "a person that facilitates, through the use of a digital platform, the performance of digital platform work by workers," but expressly excludes temporary help agencies (as defined in the *ESA*).

Of note, the *Act* would apply to any worker who performs digital platform work, regardless of whether they are employees at law. That is, the rights afforded under the new *Act* would also apply to contractors.

In many respects the new *Act* parallels the *ESA*, with similar oversight and enforcement mechanisms. Here, we provide a summary of some of the *Act's* key provisions.

Workers' Rights

Right to Minimum Wage & Right to Recurring Pay Period and Pay Day

Under the *Act*, workers who perform digital platform work would be entitled to the minimum wage rate payable under the *ESA* (currently $15.00 per hour). Compliance with this obligation is to be determined with respect to each work assignment, and the *Act* specifies that tips and other gratuities are not to be included in determining compliance.

In addition, an operator must establish a recurring pay period and a recurring pay day, and must pay all amounts earned during each pay period (including all tips or other gratuities the operator collected) no later than the pay day for that period.

Right to Amounts Earned and Tips and Other Gratuities

Under the *Act*, an operator is prohibited from withholding, deducting, or causing a worker to return amounts earned by the worker or the worker's tips or other gratuities, unless authorized to do so under the *Act*. This would include where a statute of Ontario or Canada or a court order authorizes the deduction, etc., and the operator complies with any requirement to remit the amount to a third party.

Right to Information

The *Act* sets out a range of information that an operator must provide in writing to a worker (e.g. a description of how pay for digital platform work is calculated, whether tips or other gratuities are collected by the operator and, if so, when and how they

are collected). This information must be provided in a number of scenarios, including the following:

- within 24 hours after a worker is given access to the operator's digital platform,
- when an operator offers a work assignment to a worker,
- within 24 hours after a worker completes a work assignment, and
- when a worker does not complete a work assignment that the worker agreed to perform.

Note that the specific information that must be provided by an operator varies in each of these scenarios, and the *Act* should be consulted for details.

Right to Notice of Removal

The *Act* would prohibit an operator from removing a worker's access to the operator's digital platform unless the operator has provided the worker with a written explanation of why access is being removed. Where a worker is to be removed for a period of 24 hours or more, the operator must give the worker two weeks' written notice of the removal. Two weeks' written notice would not be required if, for example, the worker has been guilty of wilful misconduct.

Right to Resolve Disputes in Ontario

Under the *Act*, all digital platform work-related disputes between an operator and a worker must be resolved in Ontario.

Right to be Free from Reprisal

The *Act* establishes that no operator, and no person acting on the operator's behalf, shall intimidate or penalize or attempt or threaten to intimidate or penalize a worker as a result of the worker making inquiries about or exercising their rights under the *Act*.

Operators and workers cannot contract out of or waive any of the worker rights set out in the *Act*, unless a provision in a contract or in another act that directly relates to the same subject matter provides a greater benefit to the worker.

Other Requirements

In addition to setting out the rights of digital platform workers, the *Act* includes a number of other requirements including the following:

Record keeping: An operator must record, retain, and keep readily available for inspection information with respect to each worker who accesses their digital platform (e.g. worker names and addresses, as well as any dates on which workers were given access to the platform for the purpose of performing work).

Director liability: The *Act* sets out the details and circumstances under which a director of a corporation would be jointly and severally liable for amounts owing to a digital platform worker.

Compliance officers: The government will appoint compliance officers who would have powers and duties under the *Act* similar to those of an employment standards officer under the *ESA*, including the power to enter and inspect any place in order to investigate a possible contravention of the *Act*.

Enforcement: This section of the *Act* includes provisions on the complaints process, collection, and offences, which are also similar to the provisions of the *ESA*.

Practical Impacts

The new *Act* will apply to a limited range of organizations in Ontario which facilitate digital platform work for workers, but will not apply to employers more generally if they do not operate such services.

For organizations that are “operators” within the meaning of the legislation, the *Act* will create a range of new obligations that will apply to all of their workers. Such organizations will need to consider how best to develop practices to ensure that they are meeting the new obligations, including those granting workers access rights to information and the related record-keeping obligations.

The new *Act* would come into force at a future date by proclamation.

Amendments to the *ESA*

Written Policy On Electronic Monitoring

Bill 88 would add a new Part XI.1 “Written Policy on Electronic Monitoring” to the *ESA*.

Similar in design to the recently enacted right to disconnect policy, employers who employ 25 or more employees on January 1 of each year must ensure they have a written policy (Policy) in place with respect to electronic monitoring of employees before March 1 of that year. A transitional provision would permit the initial Policy be put in place six months from the date of Royal Assent of Bill 88, rather than March 1, where the employer has 25 employees or more as of the preceding January 1.

The Policy must contain information as to whether an employer electronically monitors its employees. If the employer does engage in electronic monitoring, the Policy must contain a description of how and in what circumstances the employer may electronically monitor employees, and the purposes for which information obtained through electronic monitoring may be used by the employer. The Policy must also set out the date it was prepared, the date of any changes made to it, and such other information as may be prescribed.

This new provision does not affect or limit an employer’s ability to use information obtained through electronic monitoring of its employees.

A copy of the Policy must be provided to each employee within 30 days of the date the Policy is in place or, where a change is made to the Policy, within 30 days of that change. The Policy must be provided to new hires within 30 days of their hire or be provided within 30 days from the date the Policy is in place, if applicable. If a client of a temporary help agency is required to have a Policy, the client is responsible to provide a copy to any assignment employees within 24 hours of the start of the assignment or within 30 days of when the employer is required have the Policy in place, whichever is later.

Any complaints related to this new provision *may be made only* with respect to the obligation to provide copies of the written Policy to employees, new employees or assignment employees.

The Policy must be retained by the employer—or it must make arrangements for the Policy to be retained—for three years after the Policy ceases to be in effect.

These amendments would come into effect on the date that Bill 88 receives Royal Assent.

Business and Technology Consultants

If passed, Bill 88 will amend the *ESA* to provide that the *ESA* does not apply to certain business and information technology consultants, as those terms are defined, if certain requirements are met. These requirements are set out below:

- The business consultant or information technology consultant provides services through a corporation of which the

consultant is either a director or a shareholder who is a party to a unanimous shareholder agreement, or a sole proprietorship of which the consultant is the sole proprietor, if the services are provided under a business name of the sole proprietorship that is registered under the *Business Names Act*.
- There is an agreement for the consultant's services that sets out when the consultant will be paid and the amount the consultant will be paid, which must be equal to or greater than $60 per hour, excluding bonuses, commissions, expenses and travelling allowances and benefits, or such other amounts as may be prescribed, and must be expressed as an hourly rate.
- The consultant is paid the amount set out in the agreement.
- Such other requirements as may be prescribed.

These provisions would come into effect on January 1, 2023.

Amendment to Reservist Leave

Bill 88 would also amend section 50.2 of the *ESA* with respect to reservist leaves of absence. Employees with three consecutive months of employment with the employer would now be entitled to the leave (rather than the existing six months). Employees participating in Canadian Armed Forces military skills training would also be entitled to the leave.

These amendments would come into effect on the date that Bill 88 receives Royal Assent.

Amendments to the *Occupational Health and Safety Act* (*OHSA*)

Naloxone Kits

Bill 88 would require employers, who become aware or ought reasonably to be aware that there may be a risk of a worker having an opioid overdose in the workplace (or where the prescribed circumstances exist), to provide and maintain in good condition a naloxone kit (as defined) in that workplace. It must also comply with any prescribed requirements respecting the provision and maintenance of naloxone kits and training. This would include training on being able to identify an opioid overdose, and the administration of naloxone.

Increased Penalties

Bill 88 would also increase the fines for a contravention by a person under *OHSA* to $500,000 (from $100,000).

A new section would provide that a director or officer who contravenes *OHSA* or fails to comply with their duty to take reasonable care to ensure that the corporation complies with *OHSA* and its regulations and any orders and requirements of inspectors, Directors and the Minister, would be guilty of an offence and on conviction would be liable to a fine of not more than $1,500,000 or to imprisonment for a term of not more than 12 months, or both. For the purpose of determining the penalty under this section, the Bill would provide for aggravating factors that may be taken into account by a court.

If a person is convicted of an offence, courts would now be able to make any prescribed order in addition to any fine or imprisonment that is imposed.

The limitation period on instituting prosecutions under *OHSA* would also be increased to two years (from one) after the later of the occurrence of the last act or default upon which the prosecution is based, or the day upon which an inspector becomes aware of the alleged offence.

The amendments related to naloxone kits will come into force at a future date upon proclamation. The remaining amendments will come into force on the later of July 1, 2022 and the date that Bill 88 receives Royal Assent.

Amendments to the *Fair Access to Regulated Professions and Compulsory Trades Act, 2006* (*2006 Act*)

Bill 88 would amend the *2006 Act* to require regulated professions to respond to applications for registration from domestic labour mobility applicants (as defined) and to provide a decision on their applications within specified time frames, unless an exemption is granted from the requirement. The Bill would also provide for an appeal process. Related amendments are also made.

Readers should consult the text of the Bill for details of when the various amendments to the *2006 Act* will come into force.

We will continue to monitor the progress of Bill 88 through the legislative process. In the meantime, please feel free to reach out to your regular Hicks Morley lawyer should you have questions about the changes proposed by the Bill.
