Electronic Monitoring Policies Mandatory in Ontario as of October 11, 2022

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As we have previously reported, the pandemic has profoundly impacted both the Canadian workplace and the laws governing the employer/employee relationship. In Ontario, the pandemic (and a recent provincial election) precipitated several legislative changes, including the recent enactment of the *Working for Workers Act, 2022* (the "**Act**"). The Act amended the Ontario *Employment Standards Act, 2000* (the "**ESA**") and created a new employer obligation to develop a written policy with respect to the electronic monitoring of employees.

- The new obligation only applies to employers with **25 or more employees** in Ontario.
- The deadline for developing and implementing an Electronic Monitoring Policy is **October 11, 2022**.

In many ways, the new obligation to develop an Electronic Monitoring Policy is similar to the requirement for having a Disconnecting From Work Policy. Despite misleading reports in the media, neither policy provides any new statutory rights: employers are entitled to have a Disconnecting From Work Policy that requires employees to be responsive to clients, even after hours; and they are also entitled to have an Electronic Monitoring Policy that clearly states management reserves the right to monitor the use of the organization's email, internet, and other IT systems.

There are very few statutory requirements for an Electronic Monitoring Policy, and management is entitled to create different policies for different classes of employees, which is also true of the Disconnecting From Work Policy. The principal policy objective is simple transparency.

A compliant Electronic Monitoring Policy must include the following elements:

1. A statement as to whether the employer engages in electronic monitoring of employees.
2. A description of how the employer may electronically monitor employees.
3. A description of the circumstances in which the employer may electronically monitor employees.
4. The purposes for which information obtained through electronic monitoring may be used by the employer.

Common examples of electronic monitoring include the ability to monitor email systems and web browsers on corporate systems. Depending on the industry, management may monitor a work vehicle's GPS location or the pace at which a worker completes discrete tasks, such as in a manufacturing setting. Even if there is no electronic monitoring taking place, an Electronic Monitoring Policy would still need to expressly make this point in writing. Note that all forms of electronic monitoring must be disclosed, even if they occur after hours or outside the workplace.

We are happy to assist with the preparation of Electronic Monitoring Policies. They can stand alone or work in concert with an Employee Handbook. Although it is not statutorily mandatory, we always recommend having clear policies about the protection of confidential information and intellectual property, as well as clear expectations around the use of corporate systems. Development of the Electronic Monitoring Policy may be a useful time to audit and update these other critical business protections.

We encourage you to reach out to Fiona Brown or Alex Kagan to learn more.

Disclaimer: This article offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal advice. Readers should seek professional legal advice on the particular issues that concern them.

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Fiona has extensive experience advising international businesses entering the Canadian market. To date, she has advised over 100 companies expanding into Canada. Fiona advises clients in this space all day, every day. She has been practising for over a decade, and is a regular speaker and writer on market expansion matters. Fiona is proud to be recognized by *The Best Lawyers in Canada* and *The Canadian Legal Lexpert Directory.*

A proactive and comprehensive approach is required to succeed in a new market. Fiona takes great care to understand her clients' business objectives and to help her clients leverage the firm's strengths across all practice areas. She leads multi-disciplinary teams of lawyers to provide clients with comprehensive service across all areas of business law.

Clients appreciate her hands-on approach to managing the relationship and her guidance on complex matters. Fiona's responsiveness, focus on clear communication and project management skills show that she is personally invested in their success.



Alex Kagan
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Alex prides himself on identifying practical solutions for complex employment issues. Prior to law school, Alex had a career in marketing and advertising and developed original brand strategy for some of the country's largest businesses and not-for-profit organizations. He appreciates that the modern workplace is increasingly fluid and the only constant is change.

As a litigator and member of the firm's Workplace Law Group, Alex assists employers in defending a variety of employment and labour claims. Alex also works closely with clients to identify strategic vulnerabilities with the goal of resolving issues before litigation arises. In addition to diligent advocacy, Alex leverages his experience conducting workplace investigations as well as drafting and implementing employment agreements and various workplace policies.