

2022 EMPLOYMENT, LABOUR & EQUALITIES LAW WEBINAR SERIES

RIGHT TO DISCONNECT

Bettina Burgess, **Partner** – Waterloo
Hina Ghaus, **Associate** – Waterloo

MARCH 23, 2022

EMPLOYMENT STANDARDS ACT AMENDMENT

- S. 21.1.2 of the *Employment Standards Act, 2000* now provides:
 - Employer who employs 25 or more employees must ensure that it has a written policy dealing with disconnecting from work



THE RATIONALE

- **Cynical View:** political move on the part of the Ontario Conservative Government
- **Benefit of the Doubt View:** response to mental health, burn out concerns
- **Practical View:** Ongoing advancement of increasingly intrusive technology

WHAT EMPLOYERS?

- Applies to provincially regulated employers only.
- Applies to all industries.
- Status as for profit, not-for-profit, charitable, sole proprietor, corporation irrelevant.

WHEN ARE EMPLOYEES COUNTED?

- The trigger is whether an employer has 25 or more employees as of January 1st each year.
- The seminal date is January 1, 2022.
- Whether a policy is required may change from year to year. An employer may be required to have a policy in 2022, but not in 2023.
- If the employer does not have 25 employees as of January 1st, but at some point through year reaches 25 or more employees, the requirement to develop this policy is not triggered until the following year so long as the employer still has at least 25 employees as of the following January 1st.
- Conversely, if the employer has 25 or more employees as of January 1st, but the number of employees falls below 25 throughout the year, the policy must stay in place until the following January 1st when the count is repeated and a determination made at that time as to whether the policy must remain in place for that new year.

WHO IS INCLUDED IN THE COUNT?

- The policy requirement applies to all employees. There are no exemptions other than Crown employees.
- All employees are counted regardless of status as probationary, part-time, full-time, casual, fixed-term, on layoff, on leave of absence, on strike or lockout or working remotely in Ontario.
- If an employer has multiple locations within Ontario, the employee count is collective from all locations.

WHO IS INCLUDED IN THE COUNT FOR ASSIGNMENT EMPLOYEES AND RELATED EMPLOYERS?

- Temporary/assignment employees employed through an agency are *not* included in the employer count; they are included in the agency's count.
- If you are a temporary/assignment agency, you must include all employees still employed by the agency whether active or inactive as at January 1st.
- There may be circumstances where one or more separate entities are considered “related employers” in which case, employees of all related employers will be counted in the aggregate for each related employer.

WHEN MUST THE POLICY BE COMPLETED AND POSTED/PROVIDED?

- The policy must be in place for the first time by June 2, 2022.
- Each year thereafter must review and update policy, if necessary, by March 1st of each year.
- The policy must indicate when it was prepared, and the date any changes were made to it.
- A copy of the policy must be provided to all employees within 30 days of: i) preparing the policy for the first time; ii) making any changes; or iii) employee's first day of work.
- If the policy does not change from its original implementation, it only needs to be provided to employees once.
- Policies must be maintained for 3 years from the date that they are no longer in effect.

HOW MUST THE POLICY BE DELIVERED TO EMPLOYEES?

- The policy may be provided to employees by:
 - Printed copy;
 - Attachment to an email;
 - Link to the policy online so long as employees have a reasonable opportunity to access the policy, have the ability to print it, and know how to do the foregoing.
- The policy may be stand alone, or included in an employee manual/handbook.



WHAT MUST BE INCLUDED IN THE POLICY?

Legislation provides:

- “Disconnecting from Work” means not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.
- A written policy required under subsection (1) shall contain such information as may be prescribed.
- There is no prescribed information as of yet, and thus far, the stated intention of government is not to impose any such requirements.

IS THE LEGISLATION SUFFICIENT?

- The legislation does not even specify that it is a right of employees to disconnect from work or be free from the obligation to engage in work-related communications.
- Guidance from the ES Branch indicates that although there is a requirement to have a policy, there is no requirement that employers create *new rights* with respect to not performing work as those rights are already in existence pursuant to the ESA.
 - e.g. hours of work maximums, breaks, days of rest, no work between shifts, etc.

WHAT IS A WORK-RELATED COMMUNICATION?

- The list of “work-related communications” as described in the statutory definition is to be interpreted as inclusive, not exhaustive – the list is potentially endless as technology develops.
- For example, work-related communications include any form of communication, such as iMessage, Slack, any apps developed in-house, notes delivered through Hogwarts’s Owl Post, Howlers, etc.



DEVELOPING THE POLICY: AVOIDING/CREATING LIABILITY

- Employers must have a policy that addresses all employees either as a single policy or by way of separate policies. This means that the policy must apply to everyone from entry level to executive.
- It will be considered a violation of the ESA if the policy addresses only some employees.
- Any term that is included in the policy, if it is a greater right or benefit than minimum ESA entitlements, will likely be interpreted by the Labour Board as a statutory right, and enforceable as a statutory right. (s.5(2) of the ESA).
- Terms may otherwise be deemed to create contractual rights.

EXISTING EMPLOYEE RIGHTS

- **Daily Hours of Work Limit:** 8 hours or the number of regular daily working hours if longer than 8, unless you have an excess hour agreement where employee agrees to work up to 13 hours in a day (s.17(1)(a) and s.17(2))
- **Daily Hours Free From Work:** 11 consecutive hours (s.18(1))
- **Free From Work Between Shifts:** 8 hours, unless the total time worked on successive shifts does not exceed 13 hours
- **Weekly Hours Limit:** 48 hours in a week, unless you have an excess hour agreement where employee agrees to work up to 60 hours in a week (s.17(1)(b) and s.17(2))
- **Weekly Hours Free From Work:** 24 consecutive hours every week or 48 consecutive hours every 2 weeks (s.18(4))

EXISTING EMPLOYEE RIGHTS

- **Meal Period:** 30 consecutive minutes every 5 hours unless employee agrees to break up the 30 minutes into two 15 minute periods (s.20(1) and s.20(2))
- **Public Holidays:** employees must be given these days off unless the employee agrees to work (Part X)
- **Vacation:** employees must take at least 2/3 weeks of vacation time and can only forego that time with written approval from the Director of Employment Standards (Part XI)
- **Leaves of Absence:** Employees cannot be required to work when on any statutory leave (Part XIV)

CONSEQUENCES FOR FAILING TO COMPLY

- **ESA Offence**

- It will be an offence under the ESA to not have the policy if all of the triggering thresholds are met;
- Will be ordered to comply;
- May be ordered to pay a fine.

- **Compensatory claims under ESA?**

- Likely none for simply failing to have a policy or meeting the strict ESA requirements.
- Could be if an employee is able to establish reprisal associated with exercising their rights under the policy e.g. poor performance reviews, unpaid suspension, termination of employment

WHY HAVING A ROBUST, THOUGHTFUL POLICY WILL MATTER

- It is very likely that future investigations/determinations following mental health or workplace harassment complaints will take into consideration what is included in the employer's right to disconnect policy
- We may start to see work refusals under the OHSA as mental health and burn out continues to rise in non-stop work environments
- Constructive dismissal claims for failure to ensure a healthy working environment
- Internal employee relations issues
- External reputational harm

TRAINING AND ENFORCEMENT

- Managers
- Employees
- Monitor
- Enforce
- Retrain



DEVELOPING THE POLICY: TALK TO THE BUSINESS/EXECUTIVE

- The first step after educating yourself and educating your company on the minimum requirements of the legislation is determining what the company wants to achieve with respect to its compliance with the legislation.
- **Bare minimum compliance:** This policy applies to all employees. All employees have the right to disconnect. At all times the company will comply with its obligations pursuant to the ESA with respect to providing all employees with time off from work and time within which all employees are free from the duty to perform work. Notwithstanding the foregoing, all employees are expected to satisfy the demands of their position, and the company's customers, subject at all times to the ESA. **GWLG does not representing that this language will satisfy ESA requirements.*
- **Meaningful policy:** The purpose of this policy is to ensure that to the greatest extent possible, all employees have meaningful and rejuvenating breaks from work. While this policy applies to all employees, it is broken out by categories of position/duties recognizing that it is not possible for us to take a one-size-fits-all approach given the nature of our business.

DEVELOPING THE POLICY: TALK TO PEOPLE MANAGERS AND PROJECT MANAGERS

- Once you have direction from the business/executive that you are developing more than a bare minimum policy, you should consult with managers of your various business units to find out:
 - Are there periods of time when employees do not need to review messages or respond to messages? Review and respond are VERY different. If you expect employees to monitor/review messages at all times, but may not require them to respond to those messages, that distinction ought to be addressed.
- What would this business unit consider to be an emergency requiring a response?
- Can this business unit create “on-call” positions? Add more staff?

DEVELOPING THE POLICY: REVIEW CERTAIN POSITIONS VIS À VIS CERTAIN PERIODS

- Although the policy must apply to all positions, not all positions must be treated the same. Employers may have different expectations applicable to different positions.
- Are there positions where you can have 100%, absolute, total black out periods or varying degrees of black out periods? Examples:

Tier One Black Out Period – Absolutely No Communications

- Meal breaks
- Public holidays
- Vacation
- For a particular period of time each week day i.e. from 6 p.m. to 8 a.m.
- For certain days i.e. Saturdays and Sundays

Tier Two Black Out Periods – Only when there is an emergency (define emergency)

- No communications during any of the periods described above, but if there is an emergency during the following periods, the employee must respond:
 - For a particular period of time each week day i.e. from 6 p.m. to 8 a.m.
 - For certain days i.e. Saturdays and Sundays

PLANNING YOUR COMPANY'S POLICY: REVIEW CERTAIN POSITIONS/COMMUNICATIONS VIS À VIS SENDER

- Can the employee suspend responding to communications from other employees or management?
- Can the employee suspend responding to communications from vendors/suppliers?
- Can the employee suspend responding to communications from clients/customers?



PLANNING YOUR COMPANY'S POLICY: REVIEW CERTAIN POSITIONS/COMMUNICATIONS VIS À VIS SUBJECT MATTER

- Determine whether there are certain subject matters that can be part of a black out period or conversely, say all communications can be ignored during black out periods other than.....
Examples:
 - Communications dealing with the following subject matters need not be addressed by an employee during a blackout period: Administrative matters include anything relating to: expense reimbursement, billing, pay, scheduling time off, etc.
 - All communications during a blackout period may be addressed by the employee on the following business day other than the following, which must continue to be addressed within the stipulated 2 hour period: Any communications from clients dealing with scheduling of their shipments.
 - All communications during a blackout period may be addressed by the employee on the following business day other than those that are considered to be urgent/emergencies. Examples of urgent/emergencies include.....

TECHNOLOGY

- What company technology creates problems? Can it be adjusted?
- Will the company turn off access so that policies cannot be violated?
- Update policy as technology changes.



INTERNAL AND EXTERNAL AUTOMATIC NOTIFICATIONS

- Many email systems allow for distinct absence notifications, otherwise known as out of office or OOO, for those within the company and those external to the company.
- Consider whether employees should now have constant OOO notifications to address their blackout periods.
- What should those OOO notifications say?
- Same goes for voice mail.



SPEAKERS



BETTINA BURGESS

Partner, Gowling WLG

bettina.burgess@gowlingwlg.com
+1 519 569 4557



HINA GHAS

Associate, Gowling WLG

hina.ghaus@gowlingwlg.com
+1 519 575 7544



STEFANO BIAGIOLI

Counsel, Gianni & Origoni (Milan)

sbiagioli@gop.it
+39 02 763741



KEVIN LANGFORD

Partner, Arthur Cox LLP (Dublin)

kevin.langford@arthurcox.com
+353 1 920 1226



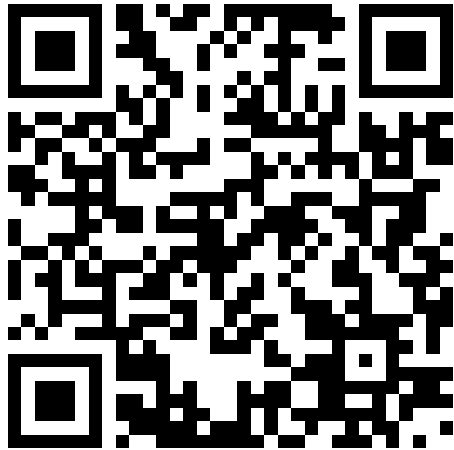
**ANDRÉ PESTANA
NASCIMENTO**

Partner, Uría Menéndez (Portugal)

andre.pestana@uria.com
+35121 092 0126

THANK YOU FOR ATTENDING

- Please scan the QR code below to complete our survey



- Join us at our next webinar in the series on Remote Workplace on April 20. Invitations will be sent out soon!



GOWLING WLG