



October 4, 2022

IMPORTANT INFORMATION ON THE ELECTRONIC MONITORING POLICY REQUIREMENTS

The new law regarding the Electronic Monitoring Policy (“**EM Policy**”) is under [section 41.1.1 of the Employment Standards Act](#) (ESA) , for those of you who love to read legislation.

For those of you who would rather not, the information below sets out the most important requirements. In addition, the [Ministry of Labour has established Guidelines](#) to help organizations comply with the law.

If you still have questions, I am always available to help sort out any issue you may have.

The 25 employee threshold and what it means for organizations

Organizations with 25 employees as of January 1, 2022 must provide employees with an Electronic Monitoring Policy (“EM Policy”) by November 10, 2022. The EM Policy can be provided as:

- a written policy
- an attachment to an email if the employee can print the copy
- a link to the document online if the employee can access it and has a printer

If your organization did not have 25 employees as of January 1, 2022, the EM Policy law does not impact you in 2022. Check the [Ministry of Labour Guidelines](#) for relevant timelines (and other information) if your organization did not have 25 employees on January 1, 2022 but achieves the 25 employee threshold on January 1st of 2023 or any other subsequent year.

If your organization meets the 25 employee threshold and is required to have an EM Policy, you must also provide the EM Policy to new hires within 30 days of hire. I recommend you give new employees a copy of the EM Policy with the [ESA Poster](#) (which is also a requirement under the ESA) at the time of hire. Either attach it to the employment contract or give it to employees during orientation.

Counting the number of employees

Organizations must count all employees to determine the 25 employee threshold; this includes part/full time, temporary/casual/contract, and those on leave of absence for any reason.

Don't count independent contractors or employees who belong to a temp agency in your organization's 25 count. Although you should give Independent contractors and temp agency employees a copy of the organization's EM Policy, especially if they are subject to electronic monitoring.

The limits of the ESA law on EM Policies

- The EM Policy provisions of the ESA governs any type of employee monitoring that is done electronically.
- But the **only purpose of the EM Policy provisions** is to ensure employers are transparent (by way of a written policy) about whether an organization electronically monitors employees and if so, how, when and why such monitoring is conducted (which must be set out in the policy).
- The EM Policy provisions do **not** take away an employer's right to monitor. Organizations always had the right to monitor their employees' use of employer owned electronic equipment at work. Specifically, organizations can monitor computers, laptops, cell phones (employer owned), work calendars, office email, interoffice chat groups, and social media platforms to ensure their operations are running efficiently and laws and policies are being adhered to. This has always been the law and employee privacy protections are limited. This has not changed with the new law on EM Policies.
- The EM Policy provisions do not create any new rights for employees. The [Ministry of Labour's Guidelines on the EM Policy](#) provision specifically states, *"The ESA does not require the employer to provide employees with a right to privacy. The ESA requirements give some employees the right to be provided with specified information about electronic monitoring by their employer."*

This Ministry statement highlights the requirement of transparency, so employees know what is being monitored and why. The law has always required transparency and this has now been codified in the ESA provisions on EM Policies.

Note: Transparency does not mean you have to notify an employee if and when they are specifically being monitored. For example, you don't have to tell Mary that today you are going to check her emails to ensure she is not breaching work policies. But you do have to warn employees in advance, through the EM Policy, that such monitoring is possible.

- The ESA imposes a limit (see ESA Section 41.1.1.(6)) on what employees can file a complaint about with the Ministry and what the Ministry can investigate. This is very rare. Usually, all provisions of the ESA are open to complaint or investigation. But the ESA provisions on EM Policies are different.
 - ESA Section 41.1.1.(6) specifically states that a complaint can only be made to the Ministry of Labour, or be investigated by the Ministry of Labour, where there is an alleged contravention of the organization's obligation to **provide a copy of the EM Policy to an employee(s) within the required time frame.**
 - Therefore, the Ministry of Labour should not accept employee complaints about and should not investigate an allegation that:
 - an organization is electronically monitoring its employees rightly or wrongly,
 - the content of the organization's EM Policy does not comply with the ESA, or
 - that the organization is not complying with its own EM Policy
- Despite the limits on employee complaints about EM Policies under the ESA, employees may claim against employers for unreasonable monitoring in a civil action (common law actions before the courts).

Employees can bring common law claims for unreasonable monitoring, under the tort of intrusion upon seclusion, or based on harassment and constructive dismissal. Any of these common law claims can lead to massive legal costs and damage awards against organizations.

The law has been and remains as follows: Organizations should only monitor employees:

- where it is needed for legitimate organizational purposes, and
- only as reasonable to achieve that purpose

What are the EM Policy requirements?

- The ESA sets out 5 requirements for the content of the EM Policy. But note that as set out above, section 41.1.1.(6) indicates the Ministry of Labour will not investigate complaints about the policy contents. Nonetheless, we recommend organizations follow the ESA policy requirements of transparency, as this is also a requirement at common law. The 5 EM Policy requirements are as follows.

1) A Statement of whether an organization does or does not engage in electronic monitoring.

- Most organizations will monitor in some respect. As such, the EM Policy will likely state that the organization engages in electronic monitoring. I do not expect to see any organization state it will NOT monitor its electronic systems. This could preclude any future monitoring which may be required and, as such, this is not recommended.
- I recommend employers include a statement that all employer owned electronic systems (computer, laptops, telephones, cell phones (organization owned), fax machines, work calendars, office email, internet, interoffice chatrooms, and the EMR) will be subject to monitoring at any time for any reasonable business related reason (and then flush out the specific reasons in the remainder of the EM Policy). Keep it broad and general. Organizations should resist limiting their ability to monitor.
- I recommend organizations DO NOT monitor personal devices. However, organizations should advise employees that personal devices which are connected to the organization's network systems, are subject to monitoring.

2) A description of how the organization does or may monitor its employees. For example:

- general regular systems monitoring for maintenance and systems performance
- general audits such as privacy audits of the Electronic Medical Record
- specific monitoring of a device (i.e. reviewing email or internet search history) generally where necessary for reasonable business reasons and/or in response to a specific complaint of potential employee misconduct
- keyboard tracking (recording actual strokes) or mouse tracking
- recording telephone conversations for training or other purposes.
- Be general and don't over disclose how devices will be monitored. For example, do not specify which software programs are being used; only generally that software programs are or might be used for monitoring.

- 3) a description of the circumstances in which the organization does or may engage in electronic monitoring of its employees. Some examples are:
- all the time (that may be a little extreme and hopefully is not the norm in your organization)
 - at any time, random checks to ensure employer policies are being adhered to
 - during regular systems maintenance to monitor systems performance and efficiency on an ongoing basis
 - to respond to an alleged or potential incident of misconduct
 - keyboard or mouse tracking may be used to monitor work efficiency and performance on an ongoing daily basis or on a more limited basis
 - telephone recordings may be monitored on an ongoing daily basis or during the probationary period or some other limited period
- 4) The purposes for which monitoring may be used. Some examples are:
- to comply with legislative requirements, i.e. PHI privacy audits
 - to evaluate performance or for training purposes
 - to ensure employees working remotely are working the required hours
 - to ensure appropriate use of equipment
 - to ensure productivity during work hours
 - to respond to specific complaints (i.e. online harassment or downloading child pornography)
 - for performance management, discipline and termination of employment
 - for any other reasonable business purpose
- 5) The date the policy was prepared and the date any changes were made to the EM Policy.

Comments on the sample policy provided with this E-Alert

I am providing a sample policy for organizations to use as a starting point for their own EM Policy. This is not legal advice and is not specific to any organization. Each organization must customize their own policy based on their monitoring practices.

This sample policy covers:

- a. general monitoring, such as with systems maintenance, privacy audits, etc.
- b. targeted monitoring in response to a complaint or incident of potential misconduct

But there are many different types of monitoring that are not covered by this sample policy. For example, such as time keeping system monitoring, GPS monitoring, keyboard tracking , tracking mouse movements and downloading copies of employee's screens.

Organizations should consider all the different ways it monitors employees and add any which are not set out in the sample policy. Remember to disclose when you do or may monitor, how you monitor (generally) and what you can use the information for.

The sample policy also does not cover social media monitoring. We recommend organizations have a standalone social media policy to cover expectations on usage of social media, especially as it relates to comments about the organization. Monitoring and usage of information obtained from social media accounts can be addressed in the social media policy.

You can contact Maria McDonald if you have any questions or for a policy review.

Kind regards,

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DISCLAIMER

Please read: The following is legal information. It is not legal advice. If you have any questions or concerns about the matters raised in this E-Alert, please contact Maria McDonald for legal advice.