

TRANSPORTATION

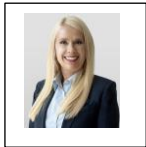
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IN THIS ISSUE

Due to recent legislative changes, some Ontario-based motor carriers must implement a written policy on “disconnecting from work” – but there is no guarantee of disconnection...yet.

A Disconnect from Work Policy Does Not Require Employee Disconnection... Yet!

ABOUT THE AUTHORS



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Ontario recently implemented a requirement for Ontario-based Motor Carrier employers with at least 25 employees to draft a written policy regarding disconnecting from work and to share it with all their employees. ('See recent changes to the *ESA*')¹ Note: since this legislation is Ontario-based, it will only apply to Ontario-based trucking companies, not those which are federally regulated.²

To comply, a Motor Carrier must prepare a written policy setting out expectations regarding communications --although one does not have to go so far as to guarantee a right to disconnect from work. Interestingly, while a carrier must implement and distribute a disconnecting from work policy, Bill 27 does not set out any requirements on what an employer's disconnecting from work policy *must* include, and the Ontario Ministry of Labour's guide on this policy expressly states that employers are not required to provide their employees a right to disconnect from work.³

However, this situation may change if Ontario introduces regulations setting out what a disconnecting from work policy must include. Therefore, we examine ways Motor Carriers could respond to future legislation requiring them to provide a right to

disconnect beyond what they are already required to do under existing legislation.

Implementing Bill 27 in the Transportation Industry:

What Does Bill 27 Do?

Bill 27 defines what the term "*disconnecting from work*" means and imposes several requirements on employers with at least 25 employees concerning a written policy on disconnecting from work. If you are an employer, with at least 25 employees, governed by Ontario legislation (Ontario-based) then it applies to you.

Defining 'Disconnecting from Work':

Bill 27 defines disconnecting from work as "*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*".⁴ Importantly, the list of examples is open-ended, meaning that if a person engages in any form of communication that is "*work-related*" or prevents them from being "*free from the performance of work*", they are not disconnecting from work.

¹ *Employment Standards Act, 2000*, SO 2000, c 41, <<https://canlii.ca/t/30f>>.

² *Working for Workers Act, 2021*, SO 2021, C 35, <<https://www.ontario.ca/laws/statute/S21035#schemed2s3>>.

³ Ontario, *Written Policy on Disconnecting from Work | Your Guide to the Employment Standards Act*

(Toronto: Ministry of Labour, 18 February 2022) <<https://www.ontario.ca/document/your-guide-employment-standards-act-0/written-policy-disconnecting-from-work#section-6>>.

⁴ *Working for Workers Act*, *supra* note 1, s 21.1.1.

But what if disconnecting [from work] is
virtually impossible...

From a Motor Carrier's perspective, this definition means that an employee may be found not to be disconnecting from work if, for example, they are not driving but nonetheless communicating with dispatch regarding scheduling, road hazard updates, or emergency shifts.

Requirements Imposed:

Under Bill 27, employers with 25 or more employees as of January 1 of a given year are required to ensure that they have a written policy in place "with respect to disconnecting from work" before March 1 of the same year.⁵ The employer must also provide a copy of the policy to each of their employees within 30 days of "preparing the policy".⁶ This policy must apply to all employees, and a copy of every written policy must be kept for three years after the policy is no longer in effect.⁷

Additionally, if the employer makes any changes to the policy, they must provide the new policy to each of their employees within 30 days of the changes.⁸ If the employer hires a new employee, they must provide that employee with a copy of their written policy within 30 days of the day "the employee becomes an employee of the employer".⁹

⁵ *Ibid* at s 21.1.2(1).

⁶ *Ibid* at s 21.1.2(2).

⁷ *Written Policy on Disconnecting from Work | Your Guide to the Employment Standards Act*, *supra* note 3.

⁸ *Employment Standards Act*, *supra* note 2 at s 21.1.2(2).

Currently, there are no requirements in place as to what a policy on disconnecting from work must include.¹⁰ However, Bill 27 opens the door for such requirements, stipulating that such policies "shall contain such information as may be prescribed".¹¹ The question is: what will be prescribed?

How does Bill 27 Apply to the Trucking
Industry?

For any particular year, Bill 27 likely applies to a company if the following two conditions are met. First, the Ontario *ESA* must apply to that company. Second, the company must employ 25 or more employees as of January 1 of that year. As will be shown, Bill 27 likely applies to a minority of trucking companies operating in Ontario.

Does Ontario's Employment Standards
Act Apply?

As mentioned above, Bill 27 amends Ontario's *ESA* to require that companies create a disconnecting from work policy. In other words, it is technically the *ESA* that creates these requirements. Therefore, if a company is not subject to the *ESA*, it is not required to create a disconnecting from work policy.

Motor Carriers transporting goods between provinces or internationally are unlikely to be subject to the *ESA*; it does not apply to employees and their employers if their

⁹ *Ibid* at s 21.1.2(3).

¹⁰ *Written Policy on Disconnecting from Work | Your Guide to the Employment Standards Act*, *supra* note 3.

¹¹ *Employment Standards Act* at s 21.1.2(4).

“employment relationship is within the legislative jurisdiction” of the Federal Government, and motor carrier services which cross provincial or international borders are federally regulated.¹²

However, Motor Carriers which transport goods only within a given province have been found to be within the jurisdiction of that province, and not the Federal Government.¹³ Therefore, it is likely that Motor Carriers which limit their activities to Ontario would be subject to Bill 27’s requirements.

Does the Motor Carrier employ 25 or more employees?

In determining whether a company has at least 25 employees, anyone who meets the definition of “employee” in the *Employment Standards Act* should be counted.¹⁴ This includes part-time and casual employees, as well as all employees in all the company’s locations within Ontario.¹⁵ Additionally, in some circumstances, two or more employers may be treated as a single employer.¹⁶

Most Motor Carriers operating in Ontario are unlikely to have at least 25 employees. According to the Government of Canada, 18,873 trucking companies were classified as “employers”, while 29,019 were classified as “non-employers / Indeterminate”.¹⁷ Of these 18,873 companies, 17,451 reported less than 4 employees.

Therefore, it is likely compliance with Bill 27 will be an issue for only a minority of Motor Carriers.

How Can Motor Carriers Comply with Bill 27?

Bill 27 has been criticized for providing few details regarding compliance.¹⁸ However, the Ontario Ministry of Labour published a guide on Bill 27 entitled “*Written policy on disconnecting from work*”. In addition to the above requirements, this guide confirms that Bill 27 does not require employers to “specify that the policy provide a right for the employee to disconnect from work and be free from the obligation to engage in work-related communications.”¹⁹

¹² *Ibid* at s 3(2); “[List of federally regulated industries and workplaces](#), (last modified 28 April 2022), online: *Canada.ca* <<https://www.canada.ca/en/services/jobs/workplace/federally-regulated-industries.html>>. See also *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53 (CanLII) <<https://canlii.ca/t/26s7t>> (*Consolidated Fastfrate*) para 44.

¹³ *Consolidated Fastfrate* at paras 68-81.

¹⁴ *Written Policy on Disconnecting from Work | Your Guide to the Employment Standards Act*, *supra* note 3; *Employment Standards Act*, *supra* note 2 at s 1.

¹⁵ *Written Policy on Disconnecting from Work | Your Guide to the Employment Standards Act*, *supra* note 3.

¹⁶ *Ibid*; *Employment Standards Act*, *supra* note 2 at s 4.

¹⁷ Innovation, Science and Economic Development Canada, “General freight trucking – 4841” (last modified 28 April 2022), online: *Canadian Industry Statistics*.

¹⁸ Vanmala Subramaniam, “Ontario’s right-to-disconnect policy is in effect. Here’s what employers have come up with”, *The Globe and Mail* (3 June 2022), online:

<<https://www.theglobeandmail.com/business/article-ontarios-right-to-disconnect-policy-takes-effect-today-heres-what/>>.

¹⁹ *Written Policy on Disconnecting from Work | Your Guide to the Employment Standards Act*, *supra* note 3.

Therefore, a straightforward way for Motor Carriers to implement Bill 27 is to draft a policy which sets out clear expectations regarding communication without granting employees a right to disconnect from work beyond what is already legally mandated. Currently, this is advisable; if an employer's policy on disconnecting from work creates a right that is not already guaranteed by the *ESA*, this right may become legally enforceable.²⁰

The Broader Context: Possible Changes to the Current Legislation

It is possible that the Ontario government will introduce regulations that specify additional requirements for a disconnecting from work policy; as mentioned, Bill 27 expressly leaves this possibility open. If this occurs, trucking companies have several options. We discuss two:

Avoid Being Subject to Bill 27?

The first option is to avoid being subject to Bill 27's additions to the *ESA*. This may be possible by restructuring businesses with over 25 employees to decrease their number

of employees or rely on independent contractors instead. However, pursuing this option could lead to numerous legal issues, and it is highly recommended that these be explored with the assistance of a qualified lawyer licensed to practice in Ontario.

For example: if a Motor Carrier wished to switch to relying on independent contractors instead of employees, it would need to ensure that its relationship with these contractors would not be classified as an employment relationship under laws including the *ESA* and *Income Tax Act*.²¹ This is a timely issue: many trucking companies have recently come under increased industry and government scrutiny for misclassifying employees as independent contractors.²²

Another way to avoid being subject to Bill 27 is to avoid being subject to the *ESA* entirely. A Motor Carrier might accomplish this by regularly transporting goods across provincial or international borders, thus becoming a federally regulated industry that is exempted from the *ESA*.²³ Again, advice from a qualified lawyer would be highly

²⁰ Abby Neufeld, "Right to Disconnect in Ontario: What could these policies look like?", *CTV News* (31 January 2022), online:

<https://toronto.ctvnews.ca/many-ontario-employers-have-to-create-policies-to-improve-work-life-balance-soon-what-will-they-look-like-1.5761188>.

²¹ *Employment Standards Act*, *supra* note 2 at s 5, 5.1.

²² John G. Smith, "More inspections, fines coming to Driver Inc. fleets - Truck News", *Trucknews.com* (4 June 2021), online:

<https://www.trucknews.com/business-management/more-inspections-fines-coming-to-driver-inc-fleets/1003151545/>; Sara

Mojtehdzadeh, "They call it Driver Inc. and it's a 'billion dollar scam.' Inside Brampton truckers' fight against wage theft", *The Star* (14 December 2021) online:

<https://www.thestar.com/news/gta/2021/12/12/inside-brampton-truckers-fight-against-a-billion-dollar-scam.html?>.

²³ *Employment Standards Act*, *supra* note 2 at s 3(2 "[List of federally regulated industries and workplaces](#)"), (last modified 28 April 2022), online: *Canada.ca*

<https://www.canada.ca/en/services/jobs/workplace/federally-regulated-industries.html>>. See also *Consolidated Fastfrate*, *supra* note 12 at para 44.

recommended considering issues such as ensuring compliance with the federal *Canada Labour Code*.²⁴

Incorporate ‘Disconnecting from work’
into pre-existing breaks

The second option is to include a right to disconnect from work as part of a Motor Carrier’s pre-existing structure of employee rest breaks. Depending on the carrier’s specific context, these breaks may be already legally mandated or arise from company practices.²⁵ However, given the practical realities of the industry—where drivers often work alone, receive dispatches at all hours, and rely on communication with dispatchers for information ranging from scheduling to route changes and road hazards—it is not surprising that many drivers reported that “*disconnecting [from work] is virtually impossible*”.²⁶

To the extent that a right to disconnect policy is possible for motor carriers, it would likely need to carve out exceptions where employees are expected to communicate regarding matters including scheduling, dispatching, or logging via an electronic logging device.²⁷

Additionally, it may be necessary to structure such breaks to ensure dispatchers always have a means of contacting drivers in

the case of an emergency, or always have a pool of available drivers on-call.

One possible solution is pre-scheduled ‘blackout periods’ during which a particular driver is able to disconnect from work according to Bill 27 while other drivers remain on-call, although, in addition to careful and coordinated implementation, this would almost certainly require solving the Canada’s current driver labour shortage....²⁸

The Bottom Line: “Disconnecting from Work” in the Trucking Industry

Most Motor Carriers will not be required to comply with Bill 27. Those that do will not need to do much; in its current form, Bill 27 does not require carriers to guarantee a right to disconnect from work other than what they are already required to do under existing legislation.

However, Motor Carriers may wish to review their operating procedures to identify ways in which a right to disconnect from work could be introduced; while there are no legal requirements on what a disconnecting from work policy must include, these requirements could be added in the future. Given the growing tide of international legislation mandating policies on disconnecting from work, as well as Bill 27’s

²⁴ *Canada Labour Code*, RSC 1985, C. L-2.

²⁵ Ontario, *Hours of Work | Your Guide to the Employment Standards Act* (Toronto: Ministry of Labour, last updated 15 June 2022) online: <<https://www.ontario.ca/document/your-guide-employment-standards-act-0/hours-work>>. See also O Reg 555/06, ss 3-15.

²⁶ ²⁶Canada, The Expert Panel on Modern Federal Labour Standards, *Report of the Expert Panel on*

Modern Federal Labour Standards (Ottawa, June 2019) at 98.

²⁷ *Ibid.*

²⁸ “THRC’s New Labour Market Snapshot Shows Driver Shortage to Threaten Economic Recovery” (22 April 2022), online: *Ontario Trucking Association* <<https://ontruck.org/thrcs-new-labour-market-snapshot-shows-driver-shortage-to-threaten-economic-recovery/>>

provision that the substance of disconnecting from work policies may be legislated upon in the future, it is foreseeable that laws requiring an expanded right to disconnect may arise in the not-so-distant future.²⁹

²⁹Canada, The Right to Disconnect Advisory Committee, *Final Report of the Right to Disconnect Advisory Committee* (Ottawa, February 2022) at 11.

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