Information and Privacy
Commissioner of Ontario

Commissaire à l'information et à la
protection de la vie privée de l'Ontario

September 20, 2024

Nicholas Robins, A/Director
Employment, Labour, and Corporate Policy Branch
Ministry of Labour, Immigration, Training and Skills Development
400 University Avenue, 15th Floor
Toronto ON M7A 1T7

Dear Nicholas Robins,

RE: Consultation on Job Postings Rules in the *Employment Standards Act, 2000*; File number 24-MLITSD015

I am writing with respect to your office's consultation paper on job posting rules in the *Employment Standards Act* (ESA), which was posted on the Ontario Regulatory Registry on August 21, 2024. Last February, my office commented on Bill 149, the *Working for Workers Four Act,* regarding the new transparency rules around the use of artificial intelligence (AI) in the hiring process. We look forward to continuing our engagement with the Ministry of Labour, Immigration, Training and Skills Development on these and other important issues impacting employees' privacy in the workplace.

Please find below our response to questions 1, 8, and 17 of your consultation paper:

Question 1. In May 2024, Bill 194, *Strengthening Cyber Security and Building Trust in the Public Sector Act, 2024* was introduced. Bill 194 proposes the following definition:

> **"Artificial intelligence" means a machine-based system that, for explicit or implicit objectives, infers from the input it receives in order to generate outputs such as predictions, content, recommendations or decisions that can influence physical or virtual environments.**

It is proposed that the definition of AI for the purpose of the ESA would be based on the above definition. *Do you agree with the proposed definition? Why or why not?*

In my office's submission to the Standing Committee on Social Policy about Bill 149, one of our key recommendations was to adopt a whole of government approach to defining AI technologies. This would allow the Ontario government to communicate with one voice about these technologies and how to use them in safe, privacy protective, transparent, accountable, and human rights affirming ways.

We agree that the ESA should use the same definition of AI currently proposed under Bill 194, which is based on the definition used by the Organisation for Economic Co-operation and Development (OECD).[1] Harmonizing against an internationally-recognized definition of AI will

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[1] OECD definition, with substantive differences from Bill 194 marked in bold: *An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, **how** to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. **Different AI systems vary in their levels of autonomy and adaptiveness after deployment.***

provide Ontario institutions, employers, and residents with the certainty and confidence they need to understand what generally constitutes "artificial intelligence" under the ESA, consistent with other legislation that may be relevant to them.

The IPC acknowledges that AI technologies and capabilities are in a state of transition given the ongoing development of new models and techniques. Using an international definition, or one closely aligned with such a definition, will provide a firm baseline against which future definitions may be adapted, and adequate protections may be developed, in light of evolving AI technologies.

Question 8. To strengthen transparency for job seekers given that there are many unanswered questions about the ethical, legal and privacy implications that these technologies introduce, employers who advertise a publicly advertised job posting and who use AI to screen, assess or select applicants for the position would be required to include in the posting a statement disclosing the use of the AI.

There is regulation-making authority to exempt postings that meet specified criteria. *Should there be exceptions to the requirement to disclose use of AI? If so, for what criteria?*

We do not see any reason for exceptions to the requirement to disclose the use of AI in any stage of the job posting or selection process. Ontarians deserve maximum transparency, as we are still in the early days of this technology and have yet to fully understand its implications. This is particularly important in situations when individuals are vulnerable and do not have strong bargaining power, such as when they are in need of a job.

In October 2023, the IPC adopted a national resolution with our federal, provincial, and territorial counterparts on *Protecting Employee Privacy in the Modern Workplace*.[2] Among other things, the resolution calls on governments to strengthen the transparency and accountability of employers' use of electronic monitoring and AI technologies in the workplace. The resolution also calls on employers to use AI technologies only for fair and appropriate purposes, and only to the extent that they are reasonably necessary to manage the employer-employee relationship.

Later that same month, the IPC co-sponsored an international resolution on *Artificial Intelligence and Employment* alongside data protection and privacy authorities from around the world at the 45th Global Privacy Assembly (GPA).[3] This international resolution amplified many of the principles of our Canadian resolution, emphasizing the importance of ensuring lawfulness, fairness, *and transparency* in relation to the use of AI and how personal data is processed in the workplace.

Neither of these resolutions by data protection regulators in Canada and around the world contemplated any exceptions to these general principles, particularly when it comes to the critical need for transparency.

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[2] Federal, Provincial, and Territorial Privacy Commissioner. (2023). "Protecting Employee Privacy in the Modern Workplace." Available at: https://www.priv.gc.ca/en/about-the-opc/what-we-do/provincial-and-territorial-collaboration/joint-resolutions-with-provinces-and-territories/res_231005_02/

[3] IPC (Co-sponsor) et al. (2023). "Resolution on Artificial Intelligence and Employment." Global Privacy Assembly. Available at: https://globalprivacyassembly.org/wp-content/uploads/2023/10/1.-Resolution-on-AI-and-employment-1.pdf

Question 17. *For any of the regulatory proposals above about the content of publicly advertised job postings and the requirement to inform job applicants that are interviewed for publicly advertised job postings, are there any consequences, benefits, or equity considerations that the government should consider?*

As we stated in our [submission on Bill 149](#), the ESA requirement for employers to disclose the use of AI in job postings is a laudable first step. However, this transparency requirement alone is not sufficient to protect the privacy and human rights of Ontario workers. It does not protect against inappropriate or unfair hiring decisions enabled by AI technologies and does not provide individuals with any recourse to challenge such decisions.

Moreover, requiring employers to disclose when they are using AI technologies during the recruitment process does nothing to protect employees once hired. Employers should be required to inform existing employees of the use of AI when managing any other aspect of the ongoing employment relationship, including employee monitoring, performance evaluation, promotion, remuneration, or termination. Employers should have to explain the resulting outputs and be held accountable for them, subject to independent regulatory oversight.

Prospective and existing employees should have correlative rights. They should be informed when any consequential decision being made about them has been made, informed, or assisted by AI. They should be able to request information about AI outputs or decisions, seek correction of inaccurate outputs, and have meaningful recourse when they believe their rights have been adversely affected.

My office continues to call for legislative action to broaden the protection of employee privacy rights throughout the entire employment relationship, beyond the initial recruitment phase. We continue to recommend that Ontario develop a more coherent and comprehensive privacy protection regime that fills significant regulatory gaps in Ontario and covers the deployment and use of all digital technologies in the workplace, including AI.

Basic privacy protections for Ontario's employees will not be achieved through periodic tweaks to the ESA. Ontario's workers deserve to have their privacy rights more firmly entrenched in a made-in-Ontario privacy law that includes considerations of privacy, accountability, and transparency around employment matters. My office stands ready and willing to support such an effort in any way we can.

In the spirit of openness and transparency, I will be posting this letter on my office's website. Thank you for receiving my responses to your consultation questions. I would be pleased to answer any questions you may have.

Sincerely,

Patricia Kosseim
Information and Privacy Commissioner of Ontario