What's New in HR Law

Ontario Government Proposes to Reverse 2017 Labour and Employment Reforms

October 25, 2018

BOTTOM LINE

On October 23, 2018, the Ontario government introduced Bill 47, the *Making Ontario Open for Business Act, 2018*. Bill 47 is intended to repeal many of the amendments that were enacted by the previous Liberal government under the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148).

Purpose of the New Act

The government has indicated that Bill 47 is intended to stimulate job growth and investment in the province by lightening some of the statutory obligations that Bill 148 placed on Ontario businesses. It proposes to do so through amendments to the *Employment Standards Act, 2000* (the "*ESA*"), the *Labour Relations Act, 1995* (the "*LRA*"), and the *Ontario College of Trades and Apprenticeship Act, 2009* (the "*OCTAA*").

Amendments to the *ESA*

If passed, the following amendments to the *ESA* will come into force on the later of January 1, 2019 or the day that Bill 47 receives Royal Assent.

Minimum Wage

Under Bill 47, the minimum wage would not increase to $15/hour on January 1, 2019. Instead, the minimum wage would be frozen at $14/hour until October 1, 2020, at which point the minimum wage would begin to increase annually, tied to the rate of inflation.

Leaves of Absence

Under Bill 47, the "personal emergency leave" regime that was enacted in 2006 and subsequently revised under Bill 148 would be eliminated and replaced with a package of annual leave days that includes entitlement to sick leave, family responsibility leave, and bereavement leave.

After two consecutive weeks of employment, employees would become entitled to receive:

- **Sick leave:** three unpaid days off per calendar year in the event of personal illness, injury or a medical emergency.
- **Family responsibility leave:** three unpaid days off per calendar year in the event of (i) an illness, injury or medical emergency involving certain classes of family members or (ii) another "urgent matter" that involves one of those family members.
- **Bereavement leave:** two unpaid days off per calendar year in the event of the death of certain classes of family members.

Employees would be required to notify their employer that they are claiming one of these leaves. Part of a day taken off on account of sick leave, family responsibility leave or bereavement leave would be counted as a full day with respect to the employee's entitlement to that leave under the *ESA*.

Bill 47 maintains employees' entitlement to paid leave in the event of domestic or sexual violence.

Medical Notes

Bill 47 would repeal the provision of the *ESA* that currently prohibits employers from requiring employees to provide a medical note to substantiate a medical leave of absence.

Equal Pay for Equal Work

Bill 47 proposes to eliminate the "equal pay for equal work" provisions that currently prohibit employers from assigning different rates of pay to part-time, casual, or temporary employees, or temporary help agency workers, than are assigned to the business's full-time employees. Employers would still be prohibited from assigning different rates of pay to employees based on their sex.

Scheduling

Under Bill 47, the Ontario government proposes to repeal all of the new scheduling provisions and associated record-keeping requirements previously enacted under Bill 148.

In particular, the Ontario government proposes to repeal the provisions of the *ESA* that would have granted employees the following rights beginning January 1, 2019:

- The right, after three months of employment, to request changes to their schedule or work location;
- The right to receive a minimum of three hours' pay for being on-call, if the employee was available to work but was not called in to work, or if they were called in but worked fewer than three hours. This does not affect the "three hour rule." Under the three-hour rule, an employee who regularly works more than three hours a day must be paid for three hours of work in the event they are required to report to work but work fewer than three hours;
- The right to refuse requests or demands to work or to be on-call on a day that an employee is not scheduled to work, or to be on-call with less than 96 hours' notice; and
- The right to receive three hours' pay in the event that a scheduled shift is cancelled, or an on-call shift is cancelled within 48 hours of the start of that shift.

Employees vs. Independent Contractors

Bill 148 instituted a "reverse onus" provision which provided that, in a legal proceeding, the employer bears the burden of proving that a worker is properly classified as an independent contractor rather than an employee. Bill 47 proposes to eliminate the reverse onus provision. Therefore, employers would no longer bear the evidentiary burden of establishing that a worker is not an employee.

Public Holiday Pay

Bill 148 changed the method for calculating public holiday pay. Post-Bill 148, public holiday pay is calculated by taking the wages earned by an employee in the pay period immediately preceding the public holiday and dividing them by the number of days worked by the employee during that pay period. Bill 47 proposes to return to the old formula for calculating public holiday pay. This effectively prorated holiday pay for employees who work fewer than 5 days per week.

Under Bill 47, public holiday pay would be calculated by taking the total amount of an employee's regular wages and vacation pay that was earned during the four work weeks preceding the work week in which the public holiday occurred, then dividing that amount by 20.

As part of these changes, Bill 47 will revoke *Public Holiday Pay*, Ontario Regulation 375/18.

Penalties for Contravention

Bill 47 would reduce the administrative penalties for contraventions of the *ESA* by decreasing the maximum penalties from $350/$700/$1500 to $250/$500/$1000, respectively. The new maximum penalties would match those that existed prior to Bill 148.

Amendments to the *LRA*

If passed, Bill 47's proposed amendments to the *LRA* would come into effect on the same day that Bill 47 receives Royal Assent.

Employee Lists

Previously, Bill 148 amended the *LRA* to allow unions to apply to the Board for an order directing an employer to provide the union with an employee list. In order to apply, the union must demonstrate that it has achieved the support of 20% of the employees in the proposed bargaining unit.

Bill 47 would eliminate unions' right to apply for employee lists. Any application for an employee list that is outstanding at the time Bill 47 comes into effect would be automatically terminated, and any union that previously obtained an employee list would be required to destroy the list.

Remedial Certification

Bill 148 amended the *LRA* to provide that remedial certification will occur where the Board (the "Board") determines that an employer has committed an unfair labour practice that impacted its employees' support for a union.

Bill 47 would reinstate the pre-Bill 148 test and preconditions for the Board to certify a union as a remedy for employer misconduct. Under Bill 47, the Board could choose to order a representation vote, a new representation vote, if one had already been conducted, or remedial certification.

The provisions under Bill 47 would apply to all decisions of the Board that are made on or after the date Bill 47 receives Royal Assent, even if the proceeding itself was commenced before that date.

Reviewing the Structure of Bargaining Units

Post-Bill 148, the Board was granted the authority to review and consolidate newly certified bargaining units with existing bargaining units. Additionally, the review process could be initiated in two different ways: (i) one of the parties to a collective agreement could apply to the Board; or (ii) the employer and union could mutually agree in writing to review the bargaining units and, with the consent of the Board, agree to consolidate the bargaining units or take a number of other actions in relation to the bargaining unit.

Under Bill 47, the Ontario government would repeal the power of the Board to review and consolidate newly certified bargaining units with existing bargaining units. Additionally, it appears that the only method for initiating the review process under Bill 47 would be for an employer or trade union to file an application with the Board, with no express provision being made for the parties to mutually agree in writing.

Under Bill 47, the Board would be able to make any of the following orders relating to an application to review the structure of a bargaining unit:

- Consolidate, restructure or otherwise reconfigure bargaining units;
- Create new bargaining units;
- Determine which trade union shall be the bargaining agent for the employees in each bargaining unit that results from the review;
- Amend the description of a bargaining unit;
- In response to a consolidation, make one collective agreement apply to the consolidated unit while terminating the other agreements;

- Amend an existing collective agreement;
- Make arrangements to account for a situation in which only some employees in a consolidated bargaining unit are in a legal strike position; and
- Authorize a party to give notice to bargain collectively.

These provisions would apply to all decisions of the Board that are made on or after the date Bill 47 receives Royal Assent, even if the application itself was made before that date.

Card-Based Union Certification

Bill 47 would reinstate certification by secret ballot voting in the building services, home care and community services, and temporary help agency industries. Any application for certification filed within these industries prior to October 23, 2018, would be determined in accordance with the card-based certification system. Any application for certification within these industries that was filed on or after October 23, 2018 would be determined by secret-ballot voting.

Educational Support

Bill 47 would eliminate the provision of the *LRA* that allows employers and unions to request educational support from the Ministry of Labour regarding labour relations and collective bargaining.

First Collective Agreements

Under Bill 148, the previous Liberal government enacted a series of rules relating to the mediation and mediation-arbitration of first collective agreements.

Bill 47 would repeal those rules and introduce the following in their place:

- After a conciliation officer issues a report or a no-board report, either the union or the employer would be able to apply to the Board to have the first collective agreement settled by arbitration.
- The Board would be required to determine within 30 days of receiving the application whether to order the parties to proceed to arbitration. The Board will refer the parties to arbitration where the process of collective bargaining has been unsuccessful because of:
    - The employer refusing to recognize the bargaining authority of the trade union;
    - The employer or the union taking an uncompromising bargaining position without reasonable justification;
    - The employer or the union failing to take reasonable efforts to conclude a collective agreement; or
    - Any other reason the Board considers relevant.
- The arbitration would be conducted before either a board of arbitration or the Board.
- The hearing would commence within 21 days of the arbitration board or the Board being appointed to oversee the arbitration.
- A decision would be issued within 45 days of the date that the hearing commenced.
- A collective agreement reached via first collective agreement arbitration would be required to have a term of 2 years.
- The Minister would have the power to appoint a mediator to promote settlement between the parties.

The above time limits could be extended, either by written agreement between the parties or by the Minister. A conciliation officer's report or no-board report would be deemed to have been issued on the day that it is sent.

The provisions relating to first collective agreement arbitration would not apply where one of the parties is an accredited employers' organization in the construction industry or if the collective agreement is a province-wide collective agreement under section 151 of the *LRA*.

Successor Rights

Bill 47 would revoke the provisions of the *LRA* that grant successor rights to the re-tendering of public-funded contract services. Bill 47 does not say what would happen in the event that a successor employer application relating to public-funded contract services is already underway at the time that Bill 47 receives Royal Assent.

Strikes and Lockouts

Under Bill 47, the Ontario government has amended the statutory provisions relating to when a trade union or employer is legally entitled to strike or lockout. However, the actual timing of when a union or employer may strike or lockout remains largely the same.

Currently, the *LRA* provides that a union or employer may not legally strike or lockout until either (i) seven full days have elapsed since the day that a conciliation officer or mediator issued a report under the *LRA*, or (ii) until fourteen full days have elapsed since the day that a conciliation officer or mediator issued a no-board report. Currently, the *LRA* deems the report or no-board report to have been issued the second day after it was mailed. Because the countdown requires clear days, the period for striking/locking out does not actually begin until the beginning of the tenth or seventeenth day, respectively, after the report or no-board report is sent.

Under Bill 47, a report would be deemed to be issued on the day that it is sent to the parties, rather than the second day after it was mailed. In order to maintain the same window for striking and locking out, section 79(2) of the *LRA* would be amended to increase the wait times from seven to nine full days from the date that a conciliation officer or mediator issues a report under the *LRA* and from fourteen to sixteen full days from the date that the conciliation officer or mediator issues a no-board report. The period for striking/locking out would therefore remain the tenth or seventeenth day, respectively, after the report or no-board report is sent.

Return to Work After a Strike or Lock-Out

Bill 148 removed the time limit during which an employee on strike could apply to return to work. Currently, employees must be reinstated to employment following a strike or lockout on terms that the employer and trade union may agree upon. This right may be enforced through the collective agreement's grievance and arbitration procedure.

Bill 47 would reinstate the previous six-month time limit during which an employee on strike can apply to return to work. Employees would be required to make an application to return to work within six-months of the strike commencing in order to be reinstated. Any application for reinstatement that is made prior to Bill 47 coming into force would continue to be governed by the rules that were enacted under Bill 148.

Fines and Enforcement

Under Bill 47, maximum fines under the *LRA* would be reduced to their pre-Bill 148 levels. The maximum fine for individuals would be set at $2,000 and the maximum fine for corporations, trade unions, councils of trade unions and employers' organizations would be set at $25,000.

Amendments to the *OCTAA*

Ratios of Journeypersons to Apprentices

Bill 47 proposes to remove the Ontario College of Trades' authority to determine appropriate journeyperson to apprentice ratios for those trades that are subject to ratios. The Minister would be given the power to fix journeyperson to apprentice ratios by regulation. Unless a different ratio is specifically established by regulation, employers would be subject to a 1:1 journeyperson to apprentice ratio for those trades that are designated as being subject to a ratio. If enacted, this change would come into effect on the date that Bill 47 receives Royal Assent.

Check the Box

Bill 47 is still moving through the legislative process, so many practical aspects relating to the Bill's implementation and application remain unknown.

Now that Bill 47 has passed first reading, the Ontario legislature will likely either refer Bill 47 to second reading, or refer the Bill to a Standing Committee for further review. If the bill is referred to a Standing Committee, employers may have a chance to voice their thoughts and concerns about the bill and its proposed legislative changes.

As Bill 47 proceeds toward Royal Assent, employers should keep informed about the potential amendments to the *ESA* and *LRA*, and ensure that they are prepared to adapt to the changing landscape of labour and employment law in Ontario.

Need more information?

For more information, please contact James Jennings at 416-408-5503 or speak to your regular lawyer at the firm.

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