What's New in HR Law

Ontario's Bill 47 Receives Royal Assent, Reversing 2017 Labour and Employment Reforms

November 22, 2018

BOTTOM LINE

On November 21, 2018, the Ontario government passed Bill 47, *the Making Ontario Open for Business Act, 2018*. Bill 47 received Royal Assent on the same day, repealing many of the amendments that were enacted by the previous Liberal government under the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148). In particular, Bill 47 amends 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*

The following amendments to the *ESA* will come into force beginning January 1, 2019.

Minimum Wage

Under Bill 47, the minimum wage will no longer increase to $15/hour on January 1, 2019. Instead, the minimum wage will be frozen at $14/hour until October 1, 2020, at which point the minimum wage will begin to increase annually, tied to the rate of inflation.

Leaves of Absence

The “personal emergency leave” regime that was enacted in 2006 and subsequently revised under Bill 148 will be eliminated. In its place, after two weeks of employment an employee will be entitled to the following package of annual unpaid leave days:

- **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 will 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 will be counted as a full day with respect to the employee’s entitlement to that leave under the *ESA*.

Medical Notes

Effective January 1, 2019, an employer will once again be able to request that an employee provide a medical note to substantiate his or her medical leave of absence.

Equal Pay for Equal Work

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, will be eliminated. Employers will still be prohibited from assigning different rates of pay to employees based on their sex.

Scheduling

The new scheduling provisions and associated record-keeping requirements, which were previously enacted under Bill 148 and were scheduled to come into effect beginning January 1, 2019, have been eliminated. In particular, employees will no longer be entitled to receive the following rights on 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 will eliminate the reverse onus provision, and therefore employers will 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.

Effective January 1, 2019, public holiday pay will once again be calculated in accordance with the old formula which effectively prorated holiday pay for employees who work fewer than 5 days per week. In particular, public holiday pay will 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, *Public Holiday Pay*, Ontario Regulation 375/18, will also be revoked.

Penalties for Contravention

Bill 47 reduces 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 will match those that existed prior to Bill 148.

Amendments to the *LRA*

The following amendments to the *LRA* came into effect on November 21, 2018.

Employee Lists

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

With the passage of Bill 47, unions no longer have the right to apply for employee lists. Any outstanding application for an employee list will be automatically terminated, and any union that previously obtained an employee list is required to destroy the list.

Remedial Certification

Bill 148 amended the *LRA* to provide that remedial certification would occur if the Board determined that an employer committed an unfair labour practice that impacted its employees' support for a union.

Bill 47 has now reinstated the pre-Bill 148 test and preconditions for the Board to certify a union as a remedy for employer misconduct. Remedial certification will only be available where no other remedy is capable of remedying the negative impact that the employer's actions had on the employees' support for the union. Depending on the circumstances, the Board may order a representation vote, order a new representation vote if one had already been conducted, or order remedial certification. These provisions apply to all decisions of the Board that are made on or after November 21, 2018, 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. In the first draft of Bill 47, the Ontario government proposed to amend the Bill 148 provisions by eliminating the Board's power to consolidate newly certified bargaining units with existing bargaining units, while maintaining the power of the Board to review the structure of existing bargaining units that are no longer appropriate for collective bargaining. At the time Bill 47 received Royal Assent, this power had been eliminated entirely and therefore, going forward, the Board will no longer have the power to review, consolidate and restructure bargaining units.

Card-Based Union Certification

Certification applications in the building services, home care and community services, and temporary help agency industries will once again be determined by secret ballot voting. Any application for certification filed within these industries prior to October 23, 2018 will 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 will be determined by secret-ballot voting.

Educational Support

Employers and unions are no longer able 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 has repealed those rules and introduced the following in their place:

- After a conciliation officer issues a report or the Minister issues a no-board report, either the union or the employer may apply to the Board to have the first collective agreement settled by arbitration.
- The Board will 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 must be conducted before either a board of arbitration or the Board.
- The hearing must commence within 21 days of the arbitration board or the Board being appointed to oversee the arbitration.
- A decision must be issued within 45 days of the date that the hearing commenced.
- A collective agreement reached via first collective agreement arbitration must have a term of 2 years.
- The Minister will have the power to appoint a mediator to promote settlement between the parties.

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

The provisions relating to first collective agreement arbitration will 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 within the industrial, commercial and institutional sector of the construction industry.

Successor Rights

Successor rights no longer apply to the re-tendering of publicly-funded contract services. Bill 47 does not address what will happen in the event that a successor employer application relating to publicly-funded contract services is already underway at the time that Bill 47 received Royal Assent on November 21, 2018.

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.

Previously, the *LRA* provided that a union or employer could not legally strike or lockout until either (i) seven full days had elapsed since the day that a conciliation officer or mediator issued a report under the *LRA*, or (ii) until fourteen full days had elapsed since the day that the Minister issued a no-board report. Previously, the *LRA* deemed the report or no-board report to have been issued the second day after it was mailed. Because the countdown required clear days, the period for striking/locking out did not actually begin until the beginning of the tenth or seventeenth day, respectively, after the report or no-board report was mailed.

As of November 21, 2018, a report or no-board report will now 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* has also been amended to increase the wait times for striking/locking out 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 Minister issues a no-board report. The period for striking/locking out therefore remains the tenth or seventeenth day, respectively, after the report or no-board report is sent.

Return to Work After a Strike or Lock-Out

Previously, Bill 148 removed the time limit during which an employee on strike could apply to return to work. This made it so that employees had to be reinstated to employment following a strike or lockout on terms that the employer and trade union agreed upon.

Bill 47 has now reinstated the previous six-month time limit during which an employee on strike can apply to return to work. Now, employees are once again required to make an application to return to work within six-months of a strike commencing in order to be reinstated. Any application for reinstatement that was made prior to November 21, 2018 will continue to be governed by the rules that were enacted under Bill 148.

Fines and Enforcement

Maximum fines under the *LRA* have been reduced to their pre-Bill 148 levels. The maximum fine for individuals is now $2,000 and the maximum fine for corporations, trade unions, councils of trade unions and employers' organizations is $25,000.

Amendments to the *OCTAA*

Ratios of Journeypersons to Apprentices

Effective November 21, 2018, the Ontario College of Trades will no longer have the authority to determine appropriate journeyperson to apprentice ratios for those trades that are subject to a ratio. Instead, the Minister will now have the power to fix journeyperson to apprentice ratios by regulation. Unless a different ratio is specifically established by regulation, employers must abide by a 1:1 journeyperson to apprentice ratio for those trades that are designated as being subject to a ratio. Check the Box

Check the Box

Bill 47 has now received Royal Assent. The Bill's amendments to the *LRA* and *OCTAA* are now in effect, while the Bill's amendments to the *ESA* will come into effect on January 1, 2019. As the new year approaches, employers should ensure that they are prepared to adapt to the changing landscape of 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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