



What's New in HR Law

“Notwithstanding” Rare Use, Ontario Government Suspends Charter Rights to Keep Students in Class

November 4, 2022 | By [Natalie Garvin](#)

Bottom Line

On November 3, 2022, the Ontario government passed [Bill 28, Keeping Students in Class Act, 2022](#) (“Bill 28”) in an effort to prevent a strike by education workers represented by the Canadian Union of Public Employees (“CUPE”). Bill 28 imposes a new four-year collective agreement and prohibits any strikes or lock-outs during the term of the collective agreement.

To protect Bill 28 from constitutional challenge, the Ontario government invoked section 33 of the *Canadian Charter of Rights and Freedoms* (the “Charter”) in order to implement these measures, notwithstanding sections 2, 7 and 15 of the *Charter* and despite the *Human Rights Code*.

Despite Bill 28, CUPE has publicly stated that it will strike beginning Friday, November 4, 2022, “until further notice.”

Background

During negotiations, CUPE initially asked for, among other things, an 11.7% annual raise for 55,000 education workers (*i.e.*, education assistants, early childhood educators, custodians, administrative

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assistants, etc.) after years of low or frozen wage rate increases, most recently as a result of [Bill 124](#) which capped public sector wage rates to a 1% increase. This offer was later reduced to a 6% increase.

On October 30, 2022, CUPE provided five days' notice of a province-wide strike to begin Friday, November 4, 2022, unless an agreement between the parties was reached. In response, the Ontario Government tabled Bill 28, which will effectively eliminate CUPE's legal ability to strike and force new collective agreement terms and conditions on the education workers without further negotiations.

The Contents of Bill 28

Prohibition of Strikes and Lockouts

Under Bill 28, any active strike or lockout occurring at the time the Bill receives Royal Assent must immediately terminate. Furthermore, the legislation prohibits the calling or authorization of, or threatening to call or authorize, a strike or lockout during the four-year term of the newly imposed collective agreement. Participating in a strike or any other contravention of these statutory provisions will constitute a finable offence, up to \$4,000 for individuals and \$500,000 in all other cases (*i.e.*, CUPE) with each day of contravention being a separate offence.

The Ontario Government has also included provisions in Bill 28 that limit the jurisdiction of arbitrators (including mediator-arbitrators and arbitration boards) and administrative tribunals (including the Ontario Labour Relations Board (the "OLRB")) from inquiring into or coming to a decision on whether a provision under Bill 28 or an action by the Crown or the Crown's current or former ministers, agents, appointees, or employees under Bill 28 is constitutional or violates the *Human Rights Code*. Parties will also be unable to file unfair labour practice complaints with the OLRB under sections 17, 59, and 70-88 of the *Labour Relations Act, 1995* or to any other legal proceeding against the Crown or the Crown's current or former ministers, agents, appointees, and employees as a result of the enactment of Bill 28.

Bill 28 also stipulates that no court, arbitrators (including mediator-arbitrators and arbitration boards), and administrative tribunals (*i.e.*, OLRB) may issue a decision that would alter the compensation provided to education workers under the new collective agreement implemented under Bill 28.

Ontario Government to Impose New Collective Agreement on Education Workers

The 59-page legislation sets out, among other things, the central terms of a new collective agreement between school boards and CUPE members. The collective agreement would have a term of nearly four years, beginning when Bill 28 receives Royal Assent and ending August 31, 2026. The collective agreement consists of the central terms; the local terms that applied August 31, 2022, subject to certain exceptions; and terms required by the *Labour Relations Act, 1995* and *School Boards Collective Bargaining Act*.

The central terms include provisions addressing:

- a central dispute resolution process;
- participation in the Provincial Benefit Trust as set out in the CUPE Education Workers Benefit Trust Agreement and Declaration of Trust;
- a sick leave and short-term leave disability plan;
- a central labour relations committee; and
- statutory leaves of absences and Supplemental Employment Benefit (SEB).

There are also letters of understanding addressing a variety of topics, including but not limited to various committees, job security, sick leave, bereavement leave, long-term disability, short-term paid leave, committees, and compensation.

In terms of compensation, education workers with full-time positions earning less than \$43,000 or who are paid an hourly rate less than \$25.95 based on the highest step of the applicable job classification pay grid will receive a 2.5% wage increase on November 7, 2022 (with pay retroactive to September 1, 2022), and on September 1, 2023, 2024, and 2025.

Education workers with an annualized full-time equivalency salary rate of \$43,000 or more or who are paid an hourly rate of \$25.95 or more based on the highest step of the applicable job classification pay grid will receive a 1.5% wage increase on November 7, 2022 (with pay retroactive to September 1, 2022), and on September 1, 2023, 2024, and 2025.

With respect to sick leave, permanent employees and employees completing a full-year long-term supply assignment will be entitled to 11 paid sick days per year and, if an employee exhausts their 11 days and is not approved for the Short Term Leave Disability Plan (“STLDP”), they will be entitled to take an additional five days, compensated at 50% of wages, each year. However, these five days will be deducted from the employee’s STLDP. An employee who works a long-term supply assignment that is less than a full year will receive a prorated entitlement to sick days.

The Legality of the Legislation

In Canada, most unions and employees are permitted to strike as long as they do so in accordance with the timelines and procedures under the applicable labour relations legislation. The right to strike has been found by Canadian courts to be protected under section 2(d) of the *Charter*, which grants Canadians the right to freedom of association.

Section 33 of the *Charter* (often referred to as the “notwithstanding clause”) permits the federal and provincial governments to override sections 2, 7, and 15 of the Charter for a period of five years. While there is a long history of governments implementing “back-to-work” legislation across Canada (often after a period of striking), the use (and especially the pre-emptive use) of the notwithstanding clause is rare. Section 33 has been used in Ontario on only one other occasion in June 2021 with respect to the *Election Finances Act*.

Moreover, back-to-work legislation typically appoints a third-party adjudicator to determine terms of a collective agreement, whereas Bill 28 unilaterally imposes a collective agreement on the education workers. The provisions under Bill 28 also prevent CUPE’s ability to challenge of the constitutionality of the legislation.

Check the Box

In the face of Bill 28, CUPE has announced that Friday’s planned labour strike will proceed as a political protest against the Ontario Government’s actions. Moreover, CUPE appears prepared to continue the strike indefinitely unless a negotiated agreement is reached.

The Ontario Public Service Employees Union (OPSEU) announced that its education workers will be walking off the job on Friday in solidarity with CUPE. Unifor has asked its local unions with school board members to respect picket lines, and stated that it would “support” those who face a loss of pay or discipline. As of November 3, 2022, several other education sector unions have announced their

solidarity and support of CUPE, including, but not limited to, the Ontario English Catholic Teachers Association (OECTA), the Elementary Teachers' Federation of Ontario (ETFO), Ontario Secondary School Teachers' Federation (OSSTF/FEESO).

Check in for further updates on this developing story.

Need More Information?

For more information on the education worker labour dispute, contact [Natalie Garvin](#) at ngarvin@filion.on.ca or your regular lawyer at the firm.



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