Insight

IN-DEPTH DISCUSSION

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Canada: Ontario Government's Proposed Legislation to "Create Fairer and Better Workplaces" Includes $15 Minimum Wage and Equal Pay for Part-Time and Full-Time Workers

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On May 30, 2017, the Ontario government issued its response to a Final Report recently released by two Special Advisors as part of their Changing Workplaces Review.[1] This Report included 173 recommendations for amendments to Ontario employment and labour laws. The government has declared that it has "a responsibility to address precarious employment and ensure Ontario workers are protected by updating the province's labour and employment laws." To that end, the government intends to introduce proposed legislation, The Fair Workplaces, Better Jobs Act, 2017, which will incorporate amendments to the Ontario *Employment Standards Act*, 2000 ("ESA") and the *Ontario Labour Relations Act* ("OLRA").

Proposed ESA Amendments

If the proposed legislation is passed, all of the proposed amendments to the ESA noted below will be effective January 1, 2018 (except where specified otherwise). To further the stated purposes of creating fairer and better workplaces and safeguarding employees, the government announced that it is moving forward with a number of ESA amendments, including:

Minimum Wage

The general minimum wage (currently $11.40 per hour) would increase 22.8% to $14 on January 1, 2018. On January 1, 2019, the minimum wage would increase an additional 7.1% to $15 per hour, and be adjusted for inflation thereafter. Special minimum wages (including those for students, liquor servers, hunting and fishing guides and homeworkers) also will be

1 *See* George Vassos, *Canada: Ontario Special Advisors Make 173 Recommendations in their Final Report on the Changing Workplace*, Littler Insight (May 25, 2017).

increased on January 1, 2018 and January 1, 2019 (but not to the same level as the general minimum wage). In the context of the Changing Workplaces Review, it is surprising that these proposed amendments to minimum wages have been announced, as the Special Advisors' mandate excluded any review of minimum wages; accordingly no mention of minimum wages was made in the Final Report. However, it is perhaps not surprising in the context of the pending provincial election in June 2018.

Equal Pay for Equal Work: Part-Time, Casual, Temporary & Seasonal Employees v. Full-Time Employees

Each part-time, casual, temporary and seasonal employee performing the same job as a full-time employee would be paid the same, except where the wage difference is based on seniority; merit; a system that determines pay by quality or quantity of production; or other factors (employment status and sex do not qualify as exceptions).

Employees would be able to request a review of wages if they believe they are not receiving equal wages to those of full-time employees. The employer would then have to respond either with a pay adjustment or a written explanation why there will be no adjustment. Employees also would be protected against reprisals for asking their employer or other employees about wages.

These proposals would come into force on April 1, 2018.

Equal Pay for Equal Work: Temporary Help Agency Employees

A Temporary Help Agency employee (assignment worker) performing the same job as a permanent employee of the agency's client would be paid the same. Temporary Help Agency employees would be protected from repercussions if inquiring about their wage rate or the wage rate of the client's employee.

These proposals would come into force on April 1, 2018.

Termination of Assignment: Temporary Help Agency Employees

A Temporary Help Agency would have to provide an assignment employee with at least one week's notice of early termination of an assignment scheduled to last longer than three months. If less than one week's notice is given, the assignment employee must be paid the difference unless offered at least one week's worth of reasonable work during the notice period.

Employee Misclassification and Penalties

Employers would be prohibited from misclassifying employees as "independent contractors" who are not entitled to the protections of the ESA. If a dispute arises, the employer would have the onus of proving that the individual is not an employee.

The definition of "employee" would not be amended to include "dependent contractor." The real issue is misclassification; any change to the definition would likely have unintended consequences. An employer that misclassifies an employee could be subject to penalties including prosecution, monetary penalties and disclosure of a conviction.

These proposals would come into force on Royal Assent.

New Scheduling and Payment Rules

New scheduling and payment rules would be implemented as follows:

- If a shift is cancelled within 48 hours of the scheduled start time, employees must be paid three hours at their regular pay rate.
- Employees who regularly work more than three hours each day must be paid three hours at their regular pay rate if assigned less than three hours upon reporting to work.

- A student employed and regularly working more than three hours would be paid for at least three hours even if the student works less than three hours (proposed to come into force on January 1, 2019).
- If "on call" employees are not called into work, they must be paid three hours at their regular pay rate, and this is required for each 24-hour on-call period.
- After employment for three months, employees would have the right to request location or schedule changes without fear of reprisal.
- If there is a collective agreement, that agreement would prevail in place of some of these new rules.

These proposals would come into force on January 1, 2019.

Paid Vacation

The minimum two weeks' paid vacation would be increased to a minimum three weeks' paid vacation after five years with the same employer.

Public Holiday Pay

The formula for calculating public holiday pay would be simplified so that an employee is entitled to the employee's average regular daily wage. Other aspects of the public holiday provisions also would be simplified.

Personal Emergency Leave and Two Paid Days

Personal Emergency Leave ("PEL") of 10 days is currently limited to workplaces with 50 or more employees. This threshold of 50 employees would be eliminated. All employees would be entitled to 10 PEL days per year, including two paid PEL days (notwithstanding that the Special Advisors did not make any recommendation to institute paid PEL days). PEL would be expanded to encompass leave for employees experiencing sexual or domestic violence or the threat of same.

Leave for the Death of a Child and for Crime Related Disappearance

A new leave for up to 104 weeks would be created for a child's death from any cause, as well as a separate leave for crime-related child disappearance.

Family Medical Leave

Family Medical Leave would be increased from up to 8 weeks in a 26-week period to up to 27 weeks in a 52-week period.

Doctor's Notes for Personal Emergency Leave Absences

An employer would be prohibited from requesting a sick note from an employee taking personal emergency leave.

Joint Liability of Related Businesses

The ESA provision requiring proof of "intent or effect" to defeat the purpose of the ESA would be eliminated (*i.e.,* when determining whether a related business can be treated as one employer under the Act and jointly and severally liable for ESA monies owing).

Payments to Employees and Order to Pay

The authority would be created to prescribe additional methods of payment to employees. An Employment Standards Officer would be allowed to issue an order that money be paid directly to an employee when an employer or Temporary Help Agency client owes money to the employee.

Collections by Government and Authorized Collectors

Wage collections by the government or an authorized collector would be improved by allowing a collector to issue warrants, to place liens on real and personal property, and to hold a security while a payment plan is underway. In addition, the government and the collector would be authorized to collect and share personal information.

Electronic Agreements

An electronic agreement between an employer and employee (*e.g.,* an agreement to work excess hours) would be deemed to constitute an agreement in writing.

ESA Claims

Employees would no longer be required to contact their employer before filing an ESA claim. The Director of Employment Standards would no longer be able to refuse to assign an Employment Standards Officer to investigate an ESA claim due to insufficient information from the claimant.

Interest on Unpaid Wages

An Employment Standards Officer would be able to award interest on unpaid wages and any fees unlawfully charged to employees. The Director of Employment Standards would determine interest rates for different provisions of the ESA.

Penalties for ESA Non-Compliance and Publication of Contraventions

Flexibility would be increased with respect to the administrative monetary penalties that an Employment Standards Officer can levy against an employer who is non-compliant. The penalties for non-compliant employers would increase from $250/$500/$1,000 to $350/$700/$1,500. In addition, the Director of Employment Standards would be authorized to publish names of individuals who have been issued a penalty, the amount of the penalty, the date of the contravention and a description of the contravention.

Exclusions and Exemptions from ESA

Some of the current ESA exclusions and exemptions would be removed as follows:

- the ESA would apply to any person who receives training for work through the employer (but anyone working as part of an experiential learning program run by a university, community college, private career college or high school would still be excluded from the ESA);
- the ESA would apply to an employee working in a simulated job working environment for rehabilitation ("sheltered workshop") (proposed to come into force January 1, 2019);
- almost all existing ESA requirements would apply to Crown employees;

Commencing in the fall of 2017, the Ministry of Labour would conduct a review of ESA exemptions and special industry rules (including exemptions for manager and supervisors) in consultation with affected stakeholders.

The Ministry of Labour would work with affected Ministries in a consultation process with stakeholders to review the recommendation of the Special Advisors with respect to removal of exclusions under the OLRA taking into account ongoing litigation.

Enhanced Enforcement of ESA Rights and Obligations

To ensure enforcement of existing ESA laws and these proposed amendments, Ontario would hire 175 more Employment Standards Officers and would launch an education program for employees and small- and medium-sized businesses with respect to ESA rights and obligations.

Once the new Employment Standards Officers are hired by 20202021, all ESA claims would be resolved within 90 days of filing and 10% of Ontario workplaces would be inspected annually. ESA compliance assistance would be provided to new employers, specifically focusing on medium and small businesses.

Proposed OLRA Amendments

If the proposed legislation, The Fair Workplaces, Better Jobs Act, 2017, is passed, then all of the proposed amendments to the OLRA noted below will be effective six months after the Act comes into force. The proposed OLRA amendments include the following:

Union Certification

Card-based union certification would be introduced for the following industries: homecare and community services; building services; and temporary help agencies.

The following changes would be made to the process for certification:

- certain conditions for remedial certification would be removed to allow for easier certification when an employer engages in misconduct in contravention of the OLRA;
- access to first contract arbitration would be easier and an intensive mediation component would be added to the process;
- the Ontario Labour Relations Board ("OLRB") would be required to address first contract mediation/arbitration applications before addressing displacement/decertification applications.

If a union can establish at least 20% support of the employees involved, then the union would be granted access to a list of employees and certain contact information.

The OLRB would be able to conduct votes outside the workplace, including telephone and electronic voting, and to authorize Labour Relations Officers to give directions relating to a vote and voting arrangements to ensure neutrality of the voting process.

Restructuring of Bargaining Units

The OLRB would be able to change the structure of bargaining units for a single employer if existing units are no longer appropriate for collective bargaining. In addition, the OLRB would be able to consolidate newly certified units with other existing units under a single employer where all units are represented by the same union.

Just Cause Protection

Employees would be protected from discipline or discharge without just cause in the period between certification and conclusion of a first contract, as well as between the date of a legal strike or lockout and a new collective agreement.

Return to Work Rights and Procedures

Under the current OLRA, an employee has the right under certain conditions to return to work within six months after commencement of a lawful strike. Under the proposed Act, this six-month limitation would be removed. An employer would be obligated to reinstate an employee at the end of a legal strike or lockout (subject to certain conditions not yet identified) and to provide access to arbitration for enforcement of that obligation.

Successor Rights

Successor rights would be extended to the retendering of building services contracts. The government would also be able to apply expanded successor rights by regulation to the retendering of other contracted services that are publicly funded.

Fines for OLRA Violations

Maximum fines for OLRA violations would be increased to $5,000 for individuals (up from $2,000) and $100,000 for organizations (up from $25,000).

Fast Forward

The government has proposed a broad consultation process for feedback from all stakeholders on the draft legislation that the government will be introducing, but no timetable has been confirmed. Given that the summer recess for the Ontario Legislative Assembly is scheduled from June 5 to September 8, 2017, that most of the proposed ESA amendments are scheduled to be effective January 1, 2018, and that the date of the next Ontario election is June 7, 2018, it can be expected that the Ontario government will move quickly (and likely too quickly for most employers).

The Keep Ontario Working Coalition is a broadly based group of industry associations for various business sectors. The Coalition's focus is to develop sound public policy for creating jobs and growing the Ontario economy. The Coalition is urging the Ontario government "to have an independent third party conduct a comprehensive economic impact analysis on the proposed reforms to consider the unintended consequences to employers." The Coalition also notes that the Ontario government, as the province's biggest employer, must fully understand the cost of the proposed amendments, and the impact on taxpayers, social services and other government agencies. The Coalition concludes that the amendments outlined in The Fair Workplaces, Better Jobs Act, 2017 "do not provide the balance needed to help ensure a competitive environment for Ontario." With the government's promised "broad consultation process" on the proposed amendments, it remains to be seen whether the Ontario government will pay any real heed to the Coalition's important cautions.

Action Plan for Employers

Given the emphasis placed on education and enforcement by the Special Advisors and the Ontario government, it will be important for employers to undertake appropriate employee training with respect to all of the final amendments that are passed. In addition, given the increased scrutiny that will come to bear on "independent contractor" relationships, and potential new penalties for "misclassification," employers would be well-advised to review these relationships and determine whether they should be continued. Finally, employers will have to review hiring letters, employment contracts, policies and handbooks to ensure compliance with the final amendments.

The work has just begun!