FTR Now

Newsflash: Ontario Government to Amend the *Employment Standards Act, 2000*

Date: December 10, 2008

Yesterday, the Ontario Government introduced Bill 139, the *Employment Standards Amendment Act (Temporary Help Agencies), 2008*, and also announced related changes to the ESA regulations. These changes will affect any employer or organization that: (1) employs "elect to work" or casual employees; (2) is a temporary help agency; or (3) uses the services of a temporary help agency. If your organization falls within any of these three categories, please read on.

ELIMINATION OF "ELECT TO WORK" EXEMPTIONS

While the focus of Bill 139 is on temporary help agencies, the government announced related changes that affect all "elect to work" employees. Elect to work employees are those who are employed on a casual basis, and have the ability to refuse work assignments offered by their employers, without suffering negative consequences. Currently, elect to work employees are exempt from the public holidays provisions of the ESA, and are exempt from the requirement to provide notice of termination (or termination pay in lieu of notice) and severance pay.

Yesterday, the government announced that it has already passed a regulation that will eliminate the elect to work exemption that relates to public holiday pay, **as of January 2, 2009**. This means that, beginning with Family Day next year, elect to work employees will be entitled to public holiday pay under the ESA, just like any other employee.

The government also announced its intention to pass a regulation that will eliminate the elect to work exemptions related to notice of termination and severance pay. When this regulation is passed, it will mean that elect to work employees will be entitled to notice of termination (or termination pay in lieu of notice) and severance pay under the ESA. At this time, it appears that the Government will wait until Bill 139 is passed (and possibly until it comes into force) before it eliminates these exemptions.

TEMPORARY HELP AGENCIES

The primary focus of Bill 139 is on temporary help agencies. The Bill will establish a new part in the ESA, Part XVIII.1, that will establish special rules that will apply in the temporary help agency environment. Some of the key aspects of the new rules are as follows:

- The amendments will clarify that the temporary help agency is the employer of the agency employees (called "assignment employees" in the legislation), provided that the assignment employees are assigned to perform work "on a temporary basis" for clients of the agency.
- The temporary help agency provisions will generally not apply to services provided under the *Long-Term Care Act, 1994*, and the assignment of work through a community care access centre. [Note, however, that the elimination of the elect to work exemptions, discussed at the outset of this update, will apply to organizations supplying these services.]
- The new rules clarify that an assignment employee does not cease to be an employee of an agency just because he or she is assigned work with a client of the agency, or, conversely, just because he or she is not assigned work with a client of the agency.
- The amendments will require all new assignment employees to be provided with information about the agency (legal name, operating name, contact information), and this must also be provided to all existing employees "as soon as possible" after the amendments come into force.

- Assignment employees must also be provided with information about each new work assignment (legal name of client, operating name of client, contact information for client, wages and benefits associated with the assignment, hours of work, general description of the work, and the pay period and pay day). This information must again be provided to all existing employees who are on an assignment “as soon as possible” after the amendments come into force.
- The Director of Employment Standards will be developing an information sheet about the rights and obligations of assignment employees, temporary help agencies and clients of the agencies. This document will have to be provided to all current and new assignment employees.
- The amendments will establish a number of prohibitions that will apply to temporary help agencies under the new rules. These are worth setting out in full, and temporary help agencies are prohibited from doing any of the following:
    1. Charging a fee to an assignment employee in connection with him or her becoming an assignment employee of the agency.
    2. Charging a fee to an assignment employee in connection with the agency assigning or attempting to assign him or her to perform work on a temporary basis for clients or potential clients of the agency.
    3. Charging a fee to an assignment employee of the agency in connection with assisting or instructing him or her on preparing resumes or preparing for job interviews.
    4. Restricting an assignment employee of the agency from entering into an employment relationship with a client.
    5. Charging a fee to an assignment employee of the agency in connection with a client of the agency entering into an employment relationship with him or her.
    6. Restricting a client from providing references in respect of an assignment employee of the agency.
    7. Restricting a client from entering into an employment relationship with an assignment employee.
    8. Charging a fee to a client in connection with the client entering into an employment relationship with an assignment employee, except as [otherwise] permitted (see discussion below).
    9. Charging a fee that is prescribed as prohibited.
    10. Imposing a restriction that is prescribed as prohibited.

With respect to item 8, charging a fee in this instance is permitted for a six-month period that runs from the first date of the work assignment. *It is important to note that any contracts that violate the above restrictions are void, even if the contract was entered into before the amendments come into force.*

- With respect to termination and severance, the amendments will set up a general rule that an assignment employee will be deemed to be terminated and severed if he or she is not assigned work for a period of thirty-five (35) consecutive weeks (subject to some limited exceptions).
- The amendments also set out detailed rules respecting how to calculate termination and severance pay for assignment employees.
- The amendments would also create a new section prohibiting reprisals by *clients* against assignment employees, which essentially mirror the reprisal prohibitions placed on employers generally.

The remainder of the amendments made by Bill 139 relate to procedural matters, some of which clarify new practices of the Employment Standards Branch, and some of which are necessitated by the new rules relating to temporary help agencies.

The Bill will come into force six months after it receives Royal Assent, which gives employers some time to prepare for the new rules. The full text of the Bill is available here:

http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2132

If you have any questions about Bill 139 and how it might affect your organization, please feel free to call any of the following or your regular Hicks Morley lawyer:

Paul Broad: 519-433-7515

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