FTR Now

ESA Amendments Now In Force, Others Proposed

Date: November 6, 2009

In our *FTR Now* of April 24, 2009, "Amendments Made to Temporary Help Agencies", we discussed important new amendments to the *Employment Standards Act, 2000* ("*ESA, 2000*") outlined in Bill 139, the *Employment Standards Amendment Act (Temporary Help Agencies), 2008* ("Bill 139").

Today, Bill 139 comes into force. As anticipated, the government of Ontario has now enacted a Regulation eliminating the exemption from termination and severance pay for elect to work employees. In addition, the government has proposed new legislation that if passed, would further amend the *ESA, 2000* to restrict the circumstances in which the termination of assignment employees is a "mass termination" for the purposes of Part XV of the *ESA, 2000*.

In this *FTR Now*, we highlight these key legislative developments.

ELECT TO WORK EMPLOYEES ENTITLED TO TERMINATION AND SEVERANCE PAY – EXEMPTION FOR COMMUNITY CARE ACCESS CORPORATIONS – O.REG. 397/09

Previously, "elect to work" employees were exempt from the termination and severance pay provisions of the *ESA, 2000.* Regulation 397/09 removes the exemption of elect to work employees as of today, November 6, 2009. However, there is a temporary exception for elect to work employees who are employed to provide professional services, personal support services or homemaking services as defined in the *Long-Term Care Act, 1994* for an employer who has a contract to provide those services with a community care access corporation. That exception will cease to apply on October 1, 2012.

TEMPORARY LAY-OFFS – O.REG. 398/09

As previously reported, effective today, the temporary lay-off provisions of the *ESA, 2000* will apply to employees of temporary help agencies who are temporarily assigned to clients ("assignment employees"). Regulation 398/09, *Terms and Conditions of Employment in Defined Industries – Temporary Help Agency Industry*, stipulates that for the purposes of temporary lay-off provisions of the *ESA, 2000*, the relevant date for calculation is November 6, 2009. Only a period of 20 consecutive weeks or 52 consecutive weeks that begins after November 5, 2009 shall be taken into account. In the case of a lay-off that begins on or before November 5, 2009, only the part of the lay-off that occurs after November 5, 2009 shall be taken into account. Where a lay-off exceeds the temporary lay-off period, employees will be deemed terminated on November 6, 2009.

However, if a temporary help agency has to pay an assignment employment termination or severance pay, the assignment employee's service prior to November 6, 2009 will be included for the purposes of calculating his or her notice and/or severance entitlement.

The full text of Bill 139 and the new regulations are available here:

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

http://www.e-laws.gov.on.ca/html/source/regs/english/2009/elaws_src_regs_r09397_e.htm

http://www.e-laws.gov.on.ca/html/source/regs/english/2009/elaws_src_regs_r09398_e.htm

MASS TERMINATION PROVISIONS – BILL 212

Presently, and also effective today, the mass termination provisions of the *ESA, 2000* apply to assignment employees as a result of Bill 139. However, recently the government of Ontario introduced new legislation that if passed, would further amend the *ESA, 2000* to restrict the circumstances in which the termination of assignment employees is a “mass termination” for the purposes of Part XV of the *ESA, 2000*.

Bill 212, the *Good Government Act 2009*, is good news for temporary help agencies, as it would require a temporary help agency to give notice of mass termination only if:

i) 50 or more assignment employees of the agency who were assigned to perform work for the same client of the agency at the same establishment of that client were terminated in the same four-week period, and

ii) the terminations resulted from the term of assignments ending or from the assignments being ended by the agency or by the client.

Interestingly, pursuant to the transitional provisions of Bill 212, if a temporary help agency fails to meet the notice requirements as set out in Bill 212, between November 6, 2009 and the day that Bill 212 comes into force, the temporary help agency has the obligations that the agency would have had if the failure had *occurred on or after* Bill 212 was in force. In other words, if passed, the Bill will have retroactive effect and will deem those temporary help agencies who failed to comply with the current *ESA, 2000* mass termination provisions, to only be liable for the notice requirements where the circumstances set out in i) and ii) are met.

Bill 212 is presently at Second Reading, and is not yet law. The full text of Bill 212 is available here.

If you have any questions about the impact of Bill 139 or the associated regulations, please contact Kathryn L. Meehan at 519.883.3120 or your regular Hicks Morley lawyer.

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