FTR Now

Ontario Proposes Significant Changes to Workplace Laws

Date: December 5, 2013

On December 4, 2013, the Ontario government introduced Bill 146, the *Stronger Workplaces for a Stronger Economy Act, 2013* ("Bill 146"). If passed, Bill 146 would make significant changes to a number of employment-related statutes, including the *Employment Standards Act, 2000* ("ESA"), the *Occupational Health and Safety Act* ("OHSA") and the *Workplace Safety and Insurance Act, 1997* ("WSIA"). Of particular note are amendments that would have a substantial impact on temporary help agencies as well as any organization in Ontario that uses the services of temporary help agencies.

In this *FTR Now*, we will review the proposed changes, and consider the impact that these legislative reforms would have on employers in Ontario.

INCREASED WAGE CLAIMS UNDER THE ESA

Under the current ESA, a claim for unpaid wages by an employee is limited in two key ways:

- first, there is a 6-month time limit imposed on most wage claims (increased to 12 months for repeat violations and claims for unpaid vacation pay); and
- second, there is a $10,000 cap imposed on the amount that an employment standards officer ("ESO") or the Ontario Labour Relations Board ("OLRB") can award in a Wage Order. [1]

These limits have traditionally been viewed as a reasonable trade-off to allow employees to make claims for minimum standards entitlements at little or no cost to themselves by utilizing the Ministry of Labour's administrative processes. Bill 146 would significantly amend both of these existing limits on Wage Orders:

- the current 6-month/12-month time limitations would be replaced by a single two-year time limit for all wage claims; and
- the $10,000 cap on Wage Orders would be eliminated and no cap would be imposed on a go-forward basis.

The combined effect of these changes would be to permit much larger wage claims to be processed under the ESA, potentially including claims for unpaid bonuses or other contractual entitlements (based on the current expansive reading of section 11 of the statute). Yet, employers

responding to such claims would not have the benefit of the procedural safeguards found in the *Rules of Civil Procedure*, nor could they recoup any of their costs spent in successfully defending unmeritorious claims.

The Bill contemplates that these new rules will take effect immediately for all claims filed on or after the date that these new provisions come into force, **which would be six months after Bill 146 receives Royal Assent**. The Bill contains complex transitional provisions to ensure that the current limitations would remain in effect for all claims filed before that date.

SHARED LIABILITY FOR TEMPORARY HELP AGENCIES AND THEIR CLIENTS

Bill 146 would also effect significant changes to the temporary help industry in Ontario. This would be accomplished by legislating shared liability for certain wages and workplace injuries.

Where a temporary help agency supplied the services of an assignment employee to a client of the agency, Bill 146 would amend the ESA to create joint and several liability for the regular wages and overtime pay earned by the assignment employee during each pay period that the employee supplied services to the client of the agency. The amendments confirm that primary responsibility would rest with the agency, but a claim against the agency's client could proceed before the proceedings against the agency were exhausted.

The ESA would also be amended to require both the agency and the client to maintain records of the hours worked by each assignment employee.

Bill 146 would also amend the WSIA in a very significant fashion. Where an assignment employee was injured while working for a client of the agency, Bill 146 would automatically shift the full cost of the resulting compensation claim onto the client of the agency.

The proposed amendments make it clear that the increased costs would be applied to clients who are subject to any of the three main experience ratings systems – NEER, CAD-7 or MAP. As well, the intention is that the deemed claims would be taken into account when determining premium rates to be paid by the client.

Finally, Bill 146 would also amend the WSIA to impose a reporting obligation on the client in addition to the reporting obligation already owed by the agency, and the client would be required to notify the Workplace Safety and Insurance Board within three days of learning of the assignment employee's injury.

The ESA amendments discussed in this section would come into force one year after Bill 146 received Royal Assent. The WSIA amendments would come into force on proclamation (with no date currently specified).

ENHANCED ESA COMPLIANCE MEASURES

Bill 146 would make additional amendments to the ESA intended to enhance the Ministry's compliance initiatives. Currently, employers are required to post a poster prepared by the Minister in a conspicuous location in the workplace. The poster, which is available for download from the Ministry of Labour's website, contains basic information about employees' rights under the ESA.

Bill 146 would amend the ESA to require employers to provide a copy of the poster to each employee. For new employees, the poster would have to be provided within 30 days of hire. For existing employees, employers would need to provide the poster **to all current employees** within 30 days of the new requirement coming into force.

Bill 146 would also create a new "self-audit". Under the proposed provisions, an ESO could require an employer to conduct a detailed self-audit and report its results to the ESO within the time frame established by the officer. The report could contain an obligation to report unpaid wages or other instances of non-compliance. Where a self-audit was ordered, the ESO would retain the authority to conduct inspections or investigations, presumably to verify the results of the self-audit.

These ESA changes would come into force six months after Bill 146 received Royal Assent.

AN EXPANDED DEFINITION OF "WORKER" UNDER THE OHSA

Bill 146 would also establish a new, expanded definition of "worker" for the purposes of the OHSA. Currently, the rights and obligations under the OHSA in relation to workers apply to persons "who perform work or supply services for monetary compensation" subject to certain narrow exemptions. This definition has traditionally excluded unpaid workers like interns.

Bill 146 would extend the definition of "worker" to include:

- a person who performs work or supplies services for monetary compensation;
- secondary school students who perform work or supply services under authorized work experience programs, even if they do not receive monetary compensation;
- a person who performs work or supplies services under a program approved by a College, University or other post-secondary institution, even if he or she does not receive monetary compensation;
- a trainee who meets the conditions of section 1(2) under the ESA; and
- any other prescribed person.

The proposed amendment of the definition of "worker" to include these classes of unpaid workers is significant because it enshrines their rights and obligation in statute, and they would be owed the same duties from employers and granted the same statutory rights and obligations as paid workers, including the right to refuse or stop work where there is a danger to health and safety.

These amendments would come into force on the day Bill 146 received Royal Assent.

A SHORTENED OPEN PERIOD IN THE CONSTRUCTION SECTOR

Bill 146 would also amend the *Labour Relations Act, 1995* ("LRA") with respect to the construction industry. Bill 146 would reduce the open period during which a displacement application or decertification application could be brought from three months to two months. This change would likely reduce the time and resources spent by the parties and the OLRB on displacement application litigation and reduce the likelihood of multiple applications relating to the same employer.

These amendments would come into force six months after Bill 146 received Royal Assent.

EXPANDED PROTECTIONS FOR FOREIGN WORKERS

Finally, Bill 146 would expand the protections afforded to foreign workers in Ontario. This would be accomplished by expanding the scope of the *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009* beyond its current limited application to live-in caregivers.

Rather, should Bill 146 pass, the Act would be expanded to apply to all foreign nationals working in Ontario or seeking to find work in Ontario. Among other matters, this Act:

- requires employers and recruiters to provide Ministry-prepared information sheets to foreign workers; and
- limits or prohibits employers and recruiters from recovering fees and other costs from foreign workers.

These amendments would come into force one year after Bill 146 received Royal Assent.

CONCLUDING COMMENTS

If passed, Bill 146 would have a significant impact on all employers in Ontario. For temporary help agencies and the clients who use their services, the changes under Bill 146 would potentially effect a profound change in the current business model, and will require a careful assessment of how best to respond to those changes.

In addition, employers could expect to see higher value, more complex claims being determined by ESOs and being litigated in front of the OLRB. The various other changes being proposed would require a careful assessment of the employer's practices and will entail some administrative changes to ensure that they are properly carried out.

The Legislature is currently scheduled to sit only until December 12, 2013, at which point it is scheduled to adjourn until February 18, 2014. With only four sitting days prior to the scheduled break, it seems unlikely that Bill 146 would pass before the new year. Moreover, considering the current minority government situation and the possibility of a spring election, there is some possibility that the Bill would not be passed in its current form. Nonetheless, we will continue to monitor all developments relating to Bill 146 and will report on any changes of interest to employers.

If you have any questions relating to Bill 146, please contact your regular Hicks Morley lawyer.

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[1] Compensation Orders, which are issued in response to an employer reprisal or failure to reinstate following an ESA leave, for example, are not subject to any caps. These orders are also subject to the ESA's standard two-year time limit.
