

## Federal Post

# Budget Bill Passes, Making Significant Changes to the *Canada Labour Code*

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In our [Federal Post of May 30, 2017](#), we undertook to bring you a more detailed analysis of the changes to the *Canada Labour Code* (Code) enacted by Bill C-44, the *Budget Implementation Act, 2017, No. 1*, after it received Royal Assent.

Royal Assent was granted on June 22, 2017 and, as promised, set out below is a discussion of the amendments made to the Code that will have a significant impact on employers in the federal sector.

## Canada Industrial Relations Board

Bill C-44 amends the Code to make significant changes to the powers of the Canada Industrial Relations Board (CIRB). Among other things, it transfers to the CIRB the powers, duties and functions of appeals officers under Part II of the Code and of referees and adjudicators under Part III of the Code.

## Administrative Monetary Penalties

Significantly, Bill C-44 adds a new Part (Part IV) to the Code which establishes a penalty system to promote compliance with Parts II and III of the Code.

Part IV sets out a comprehensive framework for establishing: the contraventions that constitute violations; the penalties; the review process; and the appeal process related to violations.

While the specific contraventions and penalties remain to be identified by Regulation, there are significant elements included in the Code.

Part IV provides that the government may make Regulations that, among other things, designate the contraventions under Part II or III that may be considered violations, determine or establish the method of determining the amount payable as the penalty for each violation, and establish the circumstances under which, and the criteria by which, a penalty may be reduced. The Minister can designate persons or classes of persons with the authority to issue notices of violation.

The only reference in the legislation to the size of the penalty is that it may not exceed \$250,000.

Liability for violations will apply broadly. If a corporation or department commits a violation, liability for the penalty will apply to any officer, director, agent or mandatary of the corporation, or any senior official in the department, or any other person exercising managerial or supervisory functions in the corporation or department, if they directed, authorized, assented to, acquiesced in or participated in the commission of the violation.

The Code also states that certain defences are not available to a person or department named in a notice of violation. Specifically, it is no defence that the person or department exercised due diligence to prevent the violation, or that they reasonably and honestly believed in the existence of facts that, if true, would exonerate the person or department.

No notice of violation may be issued more than two years after the day on which the subject-matter of the violation arises.

A person or department that is served with a notice of violation may within 30 days after receiving the notice request a review

of the notice. The Minister or designate will then make a decision on the review, and the person or department will have 15 days to appeal the decision of the Minister or their designate. The appeal is to be made to the CIRB, and its decision is final.

We will continue to monitor and report on any Regulations made under this Part.

## **External Adjudicators and Elimination of Appeals Officers**

The Code will be amended to give the Chair of the CIRB the power to appoint an external adjudicator to determine any matter that comes before the CIRB under Parts II, III, or IV of the Code. These are the provisions dealing with Occupational Health and Safety, Standards Hours, Wages, Vacations and Holidays, and the new provisions on Administrative Monetary Penalties.

These external adjudicators will have all the powers, duties and functions of the CIRB with respect to any matter for which they have been appointed.

There is no guidance with respect to the qualifications required of external adjudicators, their appointment process, or when the CIRB should decide to appoint them to determine matters.

The Code has been amended to remove all references to appeals officers. Appeals from decisions of the Minister under Part II will no longer be made to appeals officers; rather, they will be made to the CIRB.

## **Unjust Dismissal**

The Code has been amended to provide that unjust dismissal complaints that are not settled will be referred to the CIRB rather than to an adjudicator, and the CIRB will exercise all of the powers of an adjudicator.

## **Complaints Relating to Reprisals**

Division XIV.1 “Complaints Relating to Reprisals” has been added. It provides that employees may make a complaint in writing to the CIRB if they believe that their employers have taken reprisals against them.

The identified reprisals include, among other things:

- dismissing, suspending, laying off, or demoting the employee
- imposing a financial or other penalty on the employee
- taking any disciplinary action against the employee because they made a complaint under Part III of the Code, or provided information or assistance to an external adjudicator or the CIRB in the exercise or performance of their duties under Part III, or had exercised or sought to exercise any right conferred on the employee by Part III.

The time limit for making such a complaint is 90 days after the day on which the employee knew, or ought to have known, of the action or circumstances giving rise to the complaint.

Significantly, once a complaint has been made, the burden of proof shifts to the employer to establish that the reprisal was not taken.

The Code sets out a number of grounds upon which the CIRB may reject a complaint including:

- where it is satisfied that the complaint is not within its jurisdiction
- the complaint is frivolous, vexatious, or made in bad faith
- there are other means available to the employee to resolve the complaint that the CIRB thinks should be pursued
- the complaint has been adequately dealt with through recourse obtained before a court, tribunal, arbitrator or

adjudicator

- the employee is subject to a collective agreement, and the collective agreement covers the subject matter of the complaint and provides a third party dispute resolution process.

The CIRB has broad powers if it finds there has been a reprisal, including the power to order reinstatement, order compensation, or any other thing that it considers equitable for the employer to do to remedy or counteract any consequences of the reprisal.

## **Powers of an Inspector**

The Code has been amended to clarify that an inspector appointed under section 249 has the power to make a finding that an employee was dismissed for just cause for the purposes of section 230 (notice or wages in lieu of notice) or 235 (severance pay).

## **Internal Audit**

Significantly, the Code has been amended to provide the Minister with the power to order an employer to conduct an internal audit of its practices, books, payrolls and other records to determine whether the employer is in compliance with any provision in Part III, and provide a report of the results to the Minister and to any inspector named in the order.

The Minister has broad powers to specify the industrial establishment and class of employees to which it applies, the period of time to be covered by the internal audit, the provisions of Part III or the Regulations with respect to which the internal audit has been ordered, the date by which the employer is to provide the report and the form of the report.

If the employer determines that it had not complied with any provision referred to in the order, it must set out the nature of its non-compliance and the steps that have been or will be taken by it to comply with the provision.

If the employer determines that wages or any other amounts to which an employee is entitled under Part III are owed, it must state the employee's name, the amount owed for the period of time covered by the internal audit, the method used to determine the amount owed and any payment subsequently made to the employee with respect to the amount owed.

The Code provides that no employer shall make a false or misleading statement in a report, although it is not an offence to do so.

## **Inspector's Orders**

Bill C-44 expands the authority of inspectors under the Code. They are now able to issue compliance orders if they are of the opinion that an employer is contravening or has contravened Part III of the Code or any provision of a permit issued under subsection 176(1). The inspector can require the employer to terminate the contravention within any time limit the inspector may specify and to take any step as specified by the inspector to ensure the contravention does not occur in the future.

However, the inspector cannot issue a compliance order to take any measure that could be set out in an order made under subsection 242(4) (unjust dismissal) or section 246.4 (reprisal).

The time period for the recovery of wages or other amounts has been extended from 12 months to 24 months. That is, an inspector can now issue an order for the recovery of wages for the time period 24 months before the complaint was made.

## **Review of Payment Orders**

Employers who seek to request a review of a payment order will now have to pay an administrative fee specified in the payment order in addition to the amount of the order. The administrative fee is equal to the greater of \$200 and 15% of the amounts indicated in the payment order or decision that the employer is to pay.

The Minister may treat a request for review as an appeal and refer the request for review to the CIRB.

If an employer seeks to appeal the decision made after the review of a payment order, it will do so to the CIRB and must pay the Minister the amount indicated in the decision, and an administrative fee specified in the decision, less any amount paid for the initial review. Under the previous process, the Minister would appoint a referee to hear the appeal.

In addition to the powers that a referee had, the CIRB has the power to order a party, whose conduct in the proceedings has, in the CIRB's opinion, unduly delayed the determination of the appeal, to pay to the Receiver General an amount that is equal to all or part of the expenses incurred in the proceedings by the CIRB.

## **Powers Regarding Orders and Ability to Make Public**

Regional Directors will have an expanded power to issue written orders to a person who may become indebted to a director of a corporation to whom a payment order has been issued, to pay any amount owing to the director directly to the Minister. Previously, this power was limited to persons who may be indebted to a corporation.

The Minister is also given the power, subject to any Regulations, to make public the name of an employer convicted of an offence under Part III, the nature of the offence, the punishment imposed and any other information prescribed by Regulation.

## **Unpaid Leaves of Absence**

Bill C-44 amends the Code to provide federally regulated workers with an unpaid parental leave of absence of up to 63 weeks to care for a new-born child of the worker or a child who is adopted by the worker, reflecting the new benefits that will be provided in the EI Act. Previously, the maximum period of leave was 37 weeks.

The aggregate amount of maternity and parental leave that may be taken by one or two employees with respect to the same birth or adoption shall not exceed 78 weeks. This is an increase from 52 weeks.

Maternity leave remains unchanged as a period of up to 17 weeks unpaid leave. However, women will be permitted to begin their maternity leave up to 13 weeks prior to their due date.

Further amendments to the Code incorporate a number of definitions from the *Employment Insurance Act* related to leaves to provide care and support for a critically ill child or a family member with a serious medical condition. Those eligible to take a leave of absence to care for a critically ill child has been expanded beyond a parent to a family member of a critically ill child.

In addition, the Code now provides for an unpaid leave of absence to care for a critically ill adult. A federally regulated employee who has completed six months of continuous employment and who is a family member of a critically ill adult will be eligible to take up to 17 weeks of unpaid leave to care for or support that adult.

## ***Employment Insurance Act* Amendments**

Bill C-44 amends the Code to make it consistent with the Bill's amendments to the *Employment Insurance Act*. We discussed those changes in our *FTR Now* of July 4, 2017, [New and Longer EI Benefits are Coming](#).

## **Next Steps**

The proposed amendments have the potential to dramatically change the enforcement of violations of the Code. Not only do the amendments establish monetary penalties, they also spread liability broadly and limit potential defences available to protect against liability.

In addition, the establishment of a process for addressing claims by employees that their employer has taken reprisals against them also expands the potential for complaints by employees, and the remedies available. It will be important for the CIRB to send a strong signal that it intends to strictly enforce the grounds upon which it is able to reject such complaints where they are frivolous, vexatious or made in bad faith.

The ability to order an employer to undertake a self-audit is also a significant new power that has the potential to create a substantial amount of work for employers. It reinforces the importance of employers ensuring that they have comprehensive and up-to-date records available to establish that they are in compliance with their obligations under the Code.

The expansion of the time period for the recovery of unpaid wages or other amounts from 12 months to 24 months obviously has the potential to increase liability for employers.

It is difficult to know at this stage what the significance will be of the decision to eliminate appeals officers and give the CIRB the authority to hear unjust dismissal complaints and appoint external adjudicators. It remains to be seen how the CIRB will exercise these new powers.

These amendments will not come into force until a date fixed by order of the Governor in Council. We will continue to monitor for this date, and will advise as information comes to light.

Should you have any questions or require further information, please contact your [regular Hicks Morley lawyer](#).

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