Federal Post

Federal Government Proposes Significant Workplace Law Reforms

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On October 29, 2018, the federal government tabled Bill C-86, the *Budget Implementation Act, 2018, No. 2*, omnibus legislation giving effect to certain initiatives in its 2018 Federal Budget. If passed, the Bill will make substantial changes to the *Canada Labour Code* and enact a federal *Pay Equity Act*, among other things. For federally regulated employers these amendments will likely impact the operation of your business.

In this *Federal Post*, we discuss these proposed changes. We also discuss recent amendments made to the federal *Non-Smokers' Health Act*, in light of the coming into force of the federal *Cannabis Act* on October 17, 2018.

Bill C-86 – Proposed Changes to Workplace Laws

Canada Labour Code Amendments

Bill C-86, if passed, would significantly amend the *Canada Labour Code* (Code). The proposed amendments flow in part from the consultation held between May 2017 and March 2018 by the Minister of Employment, Workforce Development and Labour and officials from the Labour Program of Employment and Social Development Canada and the August 20, 2018 Report that followed titled "Modernizing Federal Labour Standards".

Some important highlights relating to the proposed Code provisions are reviewed below. Note that wherever we have used the word "employers" we are referring only to federally regulated employers unless the context requires otherwise.

Hours of Work and Rest Periods

Meal Breaks

A new entitlement to a 30 minute unpaid break during every period of 5 consecutive hours of work has been proposed. However, where the employee is required to be available during the break, it must be paid. The break would be subject to postponement or cancellation in the case of emergency where unforeseen circumstances could result in the imminent or serious threat to persons, property or the workings of the employer's industrial establishment.

Minimum Rest Periods

Similar to the provisions found in a number of provincial employment standards statutes, employees would be entitled to a rest period of at least 8 hours between shifts. However, unlike the Ontario *Employment Standards Act, 2000* (ESA), the proposed amendments to the Code make no provision for "split shifts" or the ability of the employee and employer to agree otherwise. As with the new meal breaks provision, this provision will not apply in the case of emergency.

Notice of Schedule

Employers would be required to provide a minimum of 96 hours notice before implementation of a schedule. Where less than 96 hours are provided, an employee could refuse any shift within 96 hours of receiving notification of the schedule, and would be protected from reprisal should he or she refuse such a shift. This provision would not apply:

- in the case of emergency
- where a collective agreement “specifies an alternate time frame for providing the work schedule or provides that this section does not apply to those employees,” or
- where the change in schedule was requested by the employee under the new Flexible Work Arrangements which have yet to come into force.

Medical and Nursing Breaks

Employers would be required to provide employees with any unpaid breaks that are necessary for medical reasons, or that are necessary for an employee who is nursing to nurse or to express breast milk. In the case of medical breaks, a medical certificate can be requested in writing. Regulatory powers would be established that would address:

- modification of the provisions for the purpose of the application to any class of employees
- the exemption of any class of employees from the application of the provisions
- the breaks set out in the provisions, including circumstances in which those breaks cannot be taken, and
- information to be included in the above-noted medical certificate.

Leaves of Absence

Personal Leave

Bill C-86 would replace the new Family Responsibility Leave, which was enacted in Bill C-63, the *Budget Implementation Act, 2017, No. 2* (Bill C-63) but which has not yet come into force, with 5 days of personal leave. The first 3 days would be paid after three 3 months of continuous employment. Employees would be eligible for personal leave under the following circumstances:

- treating their illness or injury
- carrying out responsibilities related to the health or care of any of their family members
- carrying out responsibilities related to the education of any of their family members who are under 18 years of age
- addressing any urgent matter concerning themselves or their family members
- attending their citizenship ceremony under the *Citizenship Act*, and
- any other reason prescribed by regulation.

Leave for Victims of Family Violence

Leave for Victims of Family Violence, which was enacted in Bill C-63 but is not yet in force, provided for 10 days of unpaid leave. Under Bill C-86, the first 5 days of such leave would be paid after 3 months of continuous employment.

Medical Leave

The existing 17-week Sick Leave provisions would be revised and renamed “Medical Leave.” Although Sick Leave addresses personal illness or injury, the proposed Medical Leave would address personal illness or injury, organ or tissue donation, or medical appointments during working hours. The entitlement would remain at the current 17-weeks.

In the case of an absence of 3 days or longer, the employer could require a certificate issued by a health care practitioner “certifying that the employee was incapable of working for the period of time that they were absent from work.”

Anti-reprisal protections would apply to prevent disciplinary action against employees who take or intend to take Medical Leave, and to prevent employers from “taking such an intention or absence into account in any decision to promote or train the employee.”

Additionally, employees would be entitled, upon written request, to be advised of every employment, promotion or training opportunity for which the employee is qualified that arises during the period during the period of their absence.

Maternity Leave, Parental Leave, Leave Related to Critical Illness and Leave Related to Death or Disappearance

Bill C-86 would remove the current requirement that an employee complete 6 months of continuous service before being entitled to Maternity Leave, Parental Leave, a Leave Related to Critical Illness or a Leave Related to Death or Disappearance.

Court or Jury Duty Leave

Employees would be entitled to a leave of absence to attend court to appear as witness, act as juror or participate in jury selection process. No limitation is put on the length or frequency of such leaves.

Vacation and Holiday Pay

Vacation Pay

Vacation pay and time entitlements would be amended and increased for longer service to the following levels:

- 2 weeks' vacation (and 4% vacation pay) after 1 year
- 3 weeks vacation (and 6% vacation pay) after 5 years, and
- 4 weeks' vacation (and 8% vacation pay) after 10 years

While continuity of employment for the purpose of vacation entitlement would continue to apply in the case of the sale of a business, the provision now explicitly references prior service with a provincially regulated entity should the sale or transfer result in the Code applying to the work. Additionally, a new "retendering" of contract provision would recognize service with the prior contractor if the employee continues to perform work for the new contractor.

Holiday Pay

The current exclusion for general holiday pay for holidays that occur within an employee's first 30 days of employment would be removed. The method of calculating general holiday pay would remain the same.

Termination of Employment

Group Termination of Employment

Although the existing 16 week notice to the Minister would remain, Bill C-86 would supplement that requirement with a concurrent requirement for notification to all affected employees, who would be defined as "redundant employees" under the Code. Redundant employees would be entitled to individual notice of at least 8 weeks, which could be satisfied by way of notice, pay in lieu of notice, or a combination of both. Employers would also be required to provide a statement of benefits setting out the affected employee's vacation benefits, wages, severance pay and any other benefits and pay arising from their employment.

Individual Termination of Employment

The current termination of employment provisions, which provide for 2 weeks' notice of termination, will be replaced with a graduated notice system similar to that used under provincial employment standards legislation. Bill C-86 would entitle employees, other than those terminated for just cause or who receive notice as a redundant employee under the new group termination provisions, to the following notice or pay in lieu of notice:

- 2 weeks' notice, if the employee has at least 3 months of continuous service
- 3 weeks' notice, if the employee has at least 3 years of continuous service
- 4 weeks' notice, if the employee has at least 4 years of continuous service
- 5 weeks' notice, if the employee has at least 5 years of continuous service
- 6 weeks' notice, if the employee has at least 6 years of continuous service
- 7 weeks' notice, if the employee has at least 7 years of continuous service, and
- 8 weeks' notice, if the employee has at least 8 years of continuous service.

As with the group notice provisions, employers would be required to provide a statement of benefits setting out the affected employee's vacation benefits, wages, severance pay and any other benefits and pay arising from their employment.

Unjust Dismissal

Bill C-86 would further amend the unjust dismissal complaint mechanism under the Code, which was last updated by Bill C-44, the *Budget Implementation Act, 2017, No. 1*, and which has yet to come into force. Where Bill C-44 set out a new process for complaints to be referred to the Canada Industrial Relations Board (CIRB) rather than an adjudicator, Bill C-86 would create new mechanisms for summary dismissal of complaints before or at the CIRB.

Under Bill C-86, inspectors with the federal Labour Program would be permitted to deem a complaint as withdrawn if an unsettled manner was not referred to the CIRB for adjudication by the complainant following notification by the Labour Program. Bill C-86 would also allow the CIRB to suspend a complaint where it is satisfied that the complainant must take additional measures, or reject a complaint in its entirety if:

- the complaint is not within its jurisdiction
- the complaint is frivolous, vexatious or not made in good faith
- the complaint has been settled in writing between the employer and the complainant
- there are other means available to the complainant to resolve the subject matter of the complaint that should be pursued
- the subject matter of the complaint has been adequately dealt with through another proceeding, or
- if previously suspended by the CIRB, the measures specified in the notice to the complainant were not taken within the specified period.

Additionally, Bill C-86 would amend the Genetic Testing provisions of the Code to prohibit a complainant from making a complaint under that section where an unjust dismissal complaint based on substantially the same facts has been filed but not withdrawn. Summary dismissal and suspension provisions, as are proposed for the unjust dismissal provisions, would apply to genetic testing complaints as well.

Equal Pay for Part-time, Casual, Temporary and Seasonal Employees

Bill C-86 would implement a general rule that no employee may be paid less than what is paid to full-time employees of the same employer who perform the same job. This is accomplished by prohibiting differential pay where this is based on "difference in employment status." The rule would apply unless there are objective reasons to justify a differential wage rate, including systems that are based on seniority, merit, where earnings are measured by quantity or quality of production or on any other factor set out by regulation.

Employees would have a right to request a review of their wages, and employers would be required to respond by either increasing the wage rate or providing a written explanation of the differential. Bill C-86 contains anti-reprisal protections for such requests.

Additionally, where an employer has a practice of informing employees of employment or promotion opportunities in writing, the employer would be required to inform all their employees, regardless of their employment status, of such opportunities.

Temporary Help Agencies

Temporary help agencies would be subject to a number of prohibitions regarding the payment of fees and the restriction of employees of the temporary help agency entering into employment relationships with clients of the agency, similar to those found under the ESA.

Additionally, temporary help agencies would be prohibited from paying an employee less than what is paid to employees of the client who perform the same job unless there are objective reasons to justify a differential wage rate, including systems that are based on seniority, merit, where earnings are measured by quantity or quality of production or on any other factor set out in regulation.

Employees would have a right to request a review of their wages, and employers would be required to respond by either increasing the wage rate or providing a written explanation of the differential. Bill C-86 contains anti-reprisal protections for such requests.

Miscellaneous

There are a range of other changes, including:

- an increase of the minimum age of employment from 17 years of age to 18 years of age
- a requirement to provide employees with Ministerial publications on rights and obligations within a specified time period
- a requirement to provide employees with a “written statement containing information relating to their employment that is prescribed by regulation” as well as any updates, as they may be, within a specified time period
- an update to requests for medical documentation in support of leaves of absences to require certificates from a broader class of “health care practitioners” rather than “qualified medical practitioners.”

Head of Compliance and Enforcement

Bill C-86 would amend Part II of the Code (Occupational Health and Safety) to empower the position of Head of Compliance and Enforcement within the Ministry. In some instances where the Minister in the past would have been accountable for certain decisions around workplace safety, the Head will now be accountable. In others, the decision and determination may be made by the Head or the Minister.

A Legislative Framework for Federal Pay Equity

If passed, Bill C-86 would introduce a new framework for pay equity within the federal sector. The stated purpose of the new *Pay Equity Act* (Act) is to redress “the systemic gender-based discrimination in the compensation practices and systems of employers that is experienced by employees who occupy positions in predominantly female job classes so that they receive equal compensation for work of equal value… .”

Application

The Act would apply to federally regulated employers with more than 10 employees, including the federal private and public sectors, the federal public service, Parliamentary workplaces and Ministers’ offices.

A Requirement to Develop a Pay Equity Plan

Employers (or group of employers) are required to establish a pay equity plan (Plan) within three years. Generally, for unionized employers and employers with 100 employees or more, a joint pay equity committee (Committee) must be

established. The Committee must be composed of least three members and meet certain statutory requirements (for example, at least 50% of the members must be women, at least two-thirds of the members must represent the employees to whom the plan relates). Note that these obligations may differ depending on the number of employees in the workplace and whether the workplace is unionized or non-unionized.

The employer, or the Committee where one has been established, must :

- identify job classes occupied by those to whom the Plan relates by generally examining whether the employee positions have similar duties and responsibilities, require similar qualifications and are part of the same compensation plan within the same range of salary rates
- determine whether the job classes are predominantly male or predominantly female
- determine the value of the work performed in the predominantly male or predominantly female job class
- calculate the compensation associated with each job class (which would exclude certain prescribed differences, such as those based on seniority or geographic area)
- conduct a comparison of the compensation, using prescribed comparison methods.

A Plan must then be prepared. The Act sets out the requirements for the contents of the Plan and the posting obligations. Once posted, employees have 60 days to provide comments on the Plan. A final version of the Plan must be posted no later than the third anniversary of the date on which the employer, or the group of employers, became subject to the Act.

Where the Plan discloses differences in compensation between predominantly male or predominantly female job classes, there is an obligation to increase compensation accordingly. Depending on the amounts involved, the Act provides for a phase-in period for any increases.

Where there is a inconsistency between the Plan and a collective agreement, the Plan will prevail.

The Act requires employers to review and update the Plan at least once every five years to identify any gaps that may have emerged during that period. It includes a process for the review, and includes new posting requirements.

Employers are also required to:

- provide an annual statement to the Commissioner, which contains prescribed information (subject to exceptions)
- maintain certain records relating to the Plan or any update to the Plan

Where a federal private sector employer, or any part thereof, is transferred or leased to a new employer, the new employer is deemed to be the employer for the purposes of the Plan.

The Pay Equity Commissioner

Part 5 of the Act creates a Pay Equity Commissioner (Commissioner) role, which includes the obligation to monitor the implementation of the Act, offer assistance to employers, educate the parties of their rights and obligations under the Act and to ensure compliance with the Act. As well, the Commissioner may provide reports to the Minister in respect of systemic or emerging pay equity issues.

The Commissioner also has oversight over the significant compliance obligations in the Act. The Commissioner may conduct a compliance audit of any employer or bargaining agent and has extensive powers to conduct the audit and conduct an investigation, where required. The Commissioner may also order an employer to conduct an internal audit and report on the results. Significant administrative monetary penalties may be levied for non-compliance. There are also rules about violations, including continuing violations.

Finally, the Act establishes a dispute resolution mechanism. A matter in dispute, or a notice of objection or complaint, may be

filed with the Commissioner who must then attempt to assist the parties to settle the matter or determine whether any matters are not appropriate for settlement or cannot be settled by the parties. In certain instances, the matter may be dismissed, for example where it is frivolous or vexatious, or beyond the Commissioner's jurisdiction. The Commissioner may also refer certain questions to the Canadian Human Rights Tribunal for determination.

An appeal mechanism would allow an affected party to appeal a decision of the Commissioner to the Tribunal.

The Act must be consulted for coming into force information.

Canadian Human Rights Act

The role of the Commissioner and any disputes under the Act will be added to the responsibilities of the Canadian Human Rights Commission, and corresponding amendments are made to the *Canadian Human Rights Act* to ensure consistency with, and refer to, the *Pay Equity Act*.

The "Pay Equity Commissioner" is added to the members of the Canadian Human Rights Commission and a "Pay Equity Unit" within the Commission is to be established. In addition, a "Pay Equity Division" to deal with complaints of discriminatory practices related to pay equity is also to be established.

Parliamentary Employment and Staff Relations Act (PESRA)

Bill C-86 sets out amendments to the PESRA regarding the pay equity obligations as they apply to Parliamentary staff.

Federal Contractors Program

Bill C-86 makes the Minister of Labour responsible for the administration of the Federal Contractors Program for pay equity.

Wage Earner's Protection Program Act (WEPPA)

Bill C-86 would make amendments to WEPPA to, among other things, clarify that the WEPPA applies to insolvent employers, expand the definition of eligible wages, increase the maximum amount payable to an individual, and set out additional provisions where an overpayment has occurred.

Tax Changes to Prepare for the Enhanced Québec Pension Plan

To align tax treatment of Québec Pension Plan and *Canada Pension Plan* contributions, Bill C-86 would amend the *Income Tax Act* to make an employee's contributions to the enhanced portion of the Québec Pension Plan deductible from that employee's income. Previously, proposed amendments to the *Income Tax Act* only provided that contributions to the enhanced portion of the Canada Pension Plan were deductible from a taxpayer's income.

The proposed amendment would come into force on January 1, 2019.

Changes to Implement the New Parental Sharing Benefit

Bill C-86 would also amend the *Employment Insurance Act* (EI Act) to implement a new parental sharing benefit previously announced in the 2018 Budget. These changes are intended to encourage two-parent families to share parental leave by making additional weeks of employment insurance (EI) benefits available where sharing of EI benefits occurs. Additional regular parental benefits of up to 5 weeks (or up to 8 weeks of extended parental benefits) may be used by two-parent families where the second parent agrees to share the parental leave (subject to certain minimums).

The new parental sharing benefits will only be available to parents of children who were born or placed with the claimants for adoption on or after the amendments to the EI Act in Bill C-86 come into force.

Conclusion

As is apparent from the summary above, if passed, Bill C-86 will have a significant impact on the employment conditions of federally regulated workplaces.

The Bill must still proceed through the legislative process and there may be amendments before final passage. We will continue to monitor its progress. Note as well that the Bill should be consulted for coming into force information.

The *Cannabis Act* Amends the *Non-Smokers' Health Act*: What Federal Employers Need to Know

The coming into force of the *Cannabis Act* on October 17, 2018 also brought into force consequential amendments to other pieces of legislation, including the *Non-Smokers' Health Act* (Act).

Significantly, the definition of "smoke" under the Act has been amended to include "ignited cannabis" and now states "smoke means to smoke, hold or otherwise have control over an ignited tobacco product or ignited cannabis or to vape using a vaping product."

Subject to limited exceptions, the Act requires employers and any person acting on their behalf to ensure that "persons refrain from smoking in any work space under the control of the employer." The definition of "work space" has been expanded to include "any outdoor space or class of outdoor space designated in the regulations" and reads:

work space means any indoor or other enclosed space — or any outdoor space or class of outdoor space designated in the regulations — in which employees perform the duties of their employment, and includes any adjacent corridor, lobby, stairwell, elevator, cafeteria, washroom or other common area — and any outdoor space or class of outdoor space designated in the regulations — that is frequented by employees during the course of their employment.

The scope of "outdoor spaces or class of outdoor spaces" remains to be seen as the regulation has not yet been promulgated.

The current *Non-smokers' Health Regulations* set out an employer's obligations with respect to the posting, content and form of signs which must state that smoking is prohibited in the work space subject to designated smoking areas, as may be applicable.

No changes to the signage requirements are necessary as the usage of cannabis, whether ignited or through a vaping product, is now included in the definition of "smoke" under the Act.

Should you have any questions regarding the changes proposed by Bill C-86, or the amendments to the *Non-Smokers' Health Act*, please contact Simon E. Mortimer at 416.864.7311, Jodi Gallagher Healy at 519.931.5605, Lauri A. Reesor at 416.864.7288 or your regular Hicks Morley lawyer.

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