

School Board Update

Two Significant Developments of Importance to School Boards

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In this edition of our *School Board Update*, we discuss two recent and significant developments relating to school boards:

- on October 15, 2020, the Ontario government announced it will be revoking its hiring practices regulation and issued an Interim Policy for School Board Hiring Practices (effective October 29), and
- on October 14, Arbitrator Davie considered the provision for allocation of sick days and short-term disability days in the collective agreement between the Canadian Union of Public Employees, Local 4400 (CUPE) and the Toronto District School Board (TDSB). She concluded that when an employee is absent due to illness at the end of a fiscal (school) year, the employee must both return to work and work 11 consecutive days before their sick leave allocation will be refreshed. This language is found in the central terms between CUPE and the Council of Trustees' Association (CTA).

Ontario Government Revokes Seniority Rule for Teacher Hiring and Introduces Interim Hiring Policy Based on Merit and Diversity

By [Dolores M. Barbini](#) and [Rebecca Liu](#)

On October 15, 2020, the Ontario government filed [Ontario Regulation \(O. Reg.\) 576/20](#), which will revoke [O. Reg. 274/12, Hiring Practices](#) when it comes into force on October 29, 2020.

Currently, under O. Reg. 274/12, school boards are required to rank occasional teachers by seniority and establish a seniority-based framework for assignments or appointments to long-term assignments and permanent positions.

The Ministry of Education has developed an [Interim Policy For School Board Hiring Practices](#) (Interim Policy) that will take effect upon revocation of O. Reg. 274/12 on October 29, 2020. The Interim Policy is intended to guide teacher hiring until school boards develop their own teacher hiring policies consistent with the PPM to be issued by the Ministry of Education in November. Publicly funded school boards and school authorities will have until December 31, 2020 to develop and post their own teacher hiring policies that align with the PPM and respect existing collective agreements.

The [government has stated](#) that the PPM will provide clear and transparent processes and principles that boards will use in finalizing their teacher hiring policies. These principles include:

- Promoting diversity, equity and human rights
 - Qualifications and merit
 - Enhanced teacher employment mobility
 - Fair and transparent processes
 - Monitoring and evaluation.

Some of the key highlights of the Interim Policy are as follows:

- It addresses a fair hiring process by requiring that job advertisements:
 - include *bona fide* job requirements and qualifications, while following the requirements as outlined in R.R.O. 1990, Reg. 298
 - are written using unbiased and inclusive language, and
 - clearly state that accommodation needs for an interview will be respected.
- It requires that five teachers who have the required qualifications be interviewed. The teachers interviewed should include, among other candidates, one teacher who has the most seniority on the board's long-term occasional teachers list who has applied to the position and has the required qualifications.
- It mandates school boards to consider the following factors in selecting a teacher for a daily supply, occasional, long-term occasional or permanent teaching position:
 - Diversity and equity
 - Merit, additional qualifications and experience
 - Early career educators (defined as a teacher who has completed an initial teacher education program within the last five years).
- It requires school boards to consider using multiple sources and methods to evaluate teachers during the interview process, including an interview, a presentation, or a written component.
- It requires school boards to ensure diversity on hiring panels to include individuals who have the knowledge and experience, including lived experience, to reflect the needs and interests of communities in the school that have been historically under-represented in decision-making.
- In assigning positions, it requires school boards to:
 - Consider merit to include formal qualifications and credentials as well as professional skills and aptitudes demonstrated in the hiring process.
 - Require hiring panels to review additional qualifications, including lived experiences, skillsets, backgrounds and varied work experience that may be considered valuable to the position (e.g. unique perspectives of under-represented groups, such as Indigenous peoples, Black or other racialized people, people with a disability (among others), ability to speak multiple languages in addition to English or French, ability to work with diverse communities locally or abroad, ability to lead a school

- band, or professional experience outside of the classroom).
- Maintain due regard for the provision of the best possible program with evidence of:
 - teaching commitment to students
 - experience/time spent in a particular school
 - suitability for a particular assignment
 - responsiveness to local promoting equity and diversity.
 - It affirms that having a diverse teaching workforce is vital to serve the needs of all students and communities within school boards and that inequitable representation of historically disadvantaged groups in the workforce can lead to inequities in the educational experience and outcomes for excluded or marginalized students.
 - It affirms that equity and diversity are critical factors that can be applied in the interview and hiring process
 - It addresses Enhanced Teacher Employment Mobility by requiring school boards to grant an interview to a relocating permanent teacher who applies to be placed on the long-term occasional teachers list if that teacher is currently or has been employed by a public-school board in Ontario within the last calendar year.
 - It requires school boards to give due regard throughout the hiring process to avoiding any conflicts of interest, including nepotism and favouritism and bars anyone with a familial or intimate relationship with a candidate from participating in or influencing the hiring process.

Finally, the Interim Policy expressly states that where there is a conflict between the Interim Policy and a collective agreement, the collective agreement prevails.

Arbitrator Confirms Application of CUPE Sick Leave Refresh Provisions

By [Nadine S. Zacks](#)

In [Toronto District School Board and Canadian Union of Public Employees, Local 4400](#) (14 October 2020, Davie), Arbitrator Davie found that when an employee is absent due to illness at the end of a fiscal (school) year, the employee must both return to work and work 11 consecutive days before their sick leave allocation will be refreshed. This is the case even when an employee attends on the first regularly scheduled day of the year, which is when sick leave banks are usually refreshed. The Arbitrator also found that a school board is entitled to presume that an employee's absence within the first 11 consecutive days of the following year is for the same medical condition that caused their absence on the last day of the prior year, and the onus is on the employee to establish otherwise.

The collective agreement provision in question states:

C.6.01 Sick Leave Short Term Leave and Disability Plan

d) Eligibility and Allocation ...

Permanent Employees

The allocations outlined in paragraphs b) and c) above will be provided on the first day of each fiscal year, or the first day of employment, subject to the exceptions below:

Where a permanent Employee is accessing sick leave and/or the short-term disability plan in a fiscal year and the absence continues into the following fiscal year for the same medical condition, the permanent Employee will continue to access any unused sick leave days or short-term disability days from the previous fiscal year's allocation.

A new allocation will not be provided to the permanent Employee until s/he has returned to work and completed eleven (11) consecutive working days at their regular working hours.

...If a permanent Employee is absent on his/her last regularly scheduled work day and the first regularly scheduled work day of the following year for unrelated reasons, the allocation outlined above will be provided on the first day of the fiscal year, provided the employee submits medical documentation to support the absence, in accordance with paragraph (h). (emphasis added by Arbitrator)

Among other things, CUPE argued that Article 6.01(d) only permits the TDSB to impose an 11 consecutive working day requirement where an absence "continues" from one fiscal year to the following fiscal year "for the same medical condition." Thus, it argued, if an employee attends work on the first regularly scheduled day of the fiscal year, the sick leave bank must be refreshed, because the absence does not continue from one year to the next.

The TDSB argued that the proper interpretation of the provision was that when an employee had accessed sick leave in the prior fiscal year, the employee must both return to work and complete 11 consecutive days of work in order to receive a new allocation of sick leave days.

The Arbitrator agreed with the TDSB's position, finding that a contextual analysis of the language supported such an interpretation. She noted that the language in article 6.01(d) did not focus on an employee's attendance or absence from work on a particular day, but rather focused on "accessing sick leave." Further, the fact that the language contained a requirement in certain circumstances to work 11 consecutive days supported that the exception was intended to address circumstances where there is a recurrence of the illness for which the employee was accessing sick leave.

In that regard, the Arbitrator noted that the purpose of the short-term disability coverage was intended to provide short-term income protection: "These sick leave and short term disability days are not intended to go on forever or in perpetuity which is the result if employees automatically receive a new sick leave allocation merely by attending at work on the first day of each fiscal year."

She further noted that the purpose of the 11 day refresh period was “to establish and ensure that the employee is ready to resume his/her duties.”

Arbitrator Davie went on to state that where an employee advances a claim that the absences were not for the same medical condition, the onus is on the employee to establish that fact. In the absence of such an assertion or claim, the TDSB is entitled to presume that the continued absence in the following year is for the same medical condition which caused the employee’s absence on the last day of the prior fiscal year and for which the employee accessed sick leave.

Given that this language appears in the central terms of the collective agreements between all public school boards and CUPE, school boards should take note of this decision. There is also similar language in many of the other central terms.

Hicks Morley’s Nadine Zacks was counsel for the TDSB.

If you have any questions about the topics discussed above, please contact the authors or any member of our School Board practice group.