Federal Post

Federal Government Tables Legislation to Ban Replacement Workers

Date: November 13, 2023

On November 9, 2023, the federal government tabled legislation which would ban the use of replacement workers in federally regulated workplaces to do the work of striking or locked out workers once notice of bargaining has been given. This ban would be subject to certain exceptions.

If passed, Bill C-58, *An Act to amend the Canada Labour Code and the Canada Industrial Relations Board Regulations, 2012* , would amend Part I (Industrial Relations) of the *Canada Labour Code* (*Code*) as set out below.

Prohibition of Replacement Workers

Bill C-58 would repeal the existing *Code* provision relating to the limited prohibition of replacement workers and replace it with the following expanded prohibition:

- During a legal strike or lockout, employers (or persons acting on their behalf) would be prohibited from using the services of any of the following persons to perform all or part of the duties of a bargaining unit employee who is on strike or locked out:
    - any employee or any person who performs management functions or who is employed in a confidential capacity in matters related to industrial relations, if that employee or person is hired after the day on which notice to bargain collectively is given
    - any contractor other than a dependent contractor or any employee of another employer (s. 94(4))

Employers that were using the services of a contractor whose services were the same as or substantially similar to the duties of an employee in the bargaining unit before the notice to collectively bargain was given may continue to use those services throughout a legal strike or lockout. The contractor's services, however, must be done in the same manner, to the same extent and in the same circumstances as before the notice was given.

Notwithstanding the prohibition described above, employers would continue to have the right to deploy their existing workforce (i.e., those hired prior to the notice to bargain and who are not in the bargaining unit) to perform activities that were previously performed by members of the striking or locked out bargaining unit.

Bill C-58 would permit employers to use replacement workers to perform bargaining unit work where the services are used solely to deal with a situation that presents or could reasonably be expected to present an imminent or serious threat:

- to the life, health or safety of any person
- of destruction of, or serious damage to, the employer's property or premises
- of serious environmental damage affecting the employer's property or premises

The use of these services must be necessary in order to deal with the situation because the employer or person acting on behalf of the employer is unable to do so by any other means.

During a strike or lockout, employers would be prohibited from using any employee in the bargaining unit for a purpose other than for maintenance of activities to "the extent necessary to prevent an immediate and serious danger to the safety or health of the public" and for the service of grain vessels.

Penalties for Illegal Use of Replacement Workers

Under Bill C-58, the illegal use of replacement workers during a strike or lockout would constitute an unfair labour practice. If the Canadian Industrial Relations Board (CIRB) concludes that a contravention has taken place, it could order the employer to cease the use of the replacement workers and fine employers a fine not exceeding $100,000 for each day during which the offence is committed or continued.

Bill C-58 would also provide a regulatory-making authority for establishing an administrative monetary penalty scheme for the purpose of compliance with the ban on replacement workers.

Maintenance of Activities Provision

Bill C-58 would amend the *Code*'s maintenance of activities provisions such that the employer and union **must**, no later than 15 days after the day on which the notice to bargain collectively has been given, enter into an agreement identifying the supply of services, operation of facilities or production of goods which must continue to prevent an immediate and serious danger to the safety or health of the public.

If the parties conclude that it is not necessary to "continue any supply of services, operation of facilities or production of goods in order," this conclusion must be set out in the agreement. The agreement must be filed with the Minister of Labour and the CIRB. If no agreement is reached, the parties would be required to apply to the CIRB to determine which activities must be maintained. Among other things, the CIRB must resolve these issues within 90 days. Employers and unions would be required to have a maintenance of activities agreement in place before they can issue 72 hours' notice for a strike or lockout.

CIRB

Bill C-58 would expand the powers of the CIRB "to make any order and give any direction that the Board considers appropriate for the purpose of expediting proceedings or preventing an abuse of process."

Bill C-58 would also make consequential amendments to the *Canada Industrial Relations Board Regulations, 2012*.

Coming Into Force

If passed, Bill C-58 would come into force 18 months after it receives Royal Assent.

Conclusion

If Bill C-58 is passed, the prohibition against the use of replacement workers and those hired after the date on which the notice to bargain is given will change the dynamics of a strike or lockout. Employers that fail to comply with the new limitations on using replacement workers could be subject to significant penalties.

If you have questions about the potential changes introduced by Bill C-58, please reach out to your regular Hicks Morley lawyer.