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Stronger Workplaces for a Stronger Economy Act – Bill 146

What's coming down the pipe?


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On December 4, 2013, the Ontario government introduced Bill 146, the *Stronger Workplaces for a Stronger Economy Act, 2013*. Bill 146 seeks to amend several key employment related statutes with a view to protecting workers historically considered 'vulnerable'.

At the time of writing this article, Bill 146 is not yet law, but is making its way through the legislative process. If passed, some of the Bill's amendments could significantly change how employers conduct business in Ontario. This article summarizes the key proposed amendments.

Employment Standards Act

Temporary Help Agencies and Their Workers

Many Ontario businesses use temporary workers to address seasonal and business fluctuations. Currently, as a result of 2009 amendments to the ESA, it is the temporary staffing agency ("temp agency") that has direct responsibility for payment of a temporary worker's wages and other statutory entitlements.

Under Bill 146, employers will be held *jointly and severally liable* if a temp agency fails to pay a worker overtime pay and '*regular wages*'[1]. While the temp agency will still have primary responsibility for payment of these entitlements, the proposed amendment allows a temporary worker to commence a claim to collect unpaid wages directly from an employer, prior to exhausting proceedings against the temp agency.

In some cases, this new scenario could prejudice an employer that may have already paid the temp agency's invoice, and is then pursued directly by the worker for unpaid wages. To minimize this risk, employers that use temp agencies should consider amending their contracts with these agencies to include an indemnity clause should the employer be pursued directly.

Finally, under Bill 146 both the temp agency and employer are required to retain records of the number of daily and weekly hours worked by a temporary worker.

Extending Deadlines and Raising Monetary Limits

Under the existing regime, an ESA claim is first addressed by an Employment Standards Officer ("Officer") at the Employment Standards Branch of the Ministry of Labour, following which either party can 'appeal' to the Ontario Labour Relations Board (the "Board"). Currently, there is a limitation period of 12 months for a claim for vacation pay, and six months for all other wages, as well as a $10,000 'cap' on any award.

Bill 146 proposes that all timelines be extended to two years, and the monetary cap be removed altogether. Ontario's Minister of Labour has suggested that by extending the ESA filing deadlines and removing monetary limits, claims for unpaid wages will no longer have to go through the courts and instead can be handled by Officers, increasing access to justice for workers.

While a laudable objective, we know from experience the more likely result of these amendments will not be access to justice, but an increased 'backlog' of complaints before the Employment Standards Branch. Furthermore, many Officers are not legally trained nor do they have expertise in contractual analysis or common law principles. Yet, they will be called upon to make decisions more appropriate for the courts.

All of this is likely to result in a much higher number of appeals to the Board – not necessarily a good thing for a tribunal already carrying a heavy load of cases.

Ensuring Compliance and Providing Education

Under Bill 146 an Officer can direct an employer to conduct an ESA "self-audit" and to report the results of that audit to the Officer. To ensure a thorough and accurate assessment is undertaken, Bill 146 empowers an Officer to require an employer to include in the report any information the Officer 'considers appropriate' and to identify if the employer owes outstanding wages. If wages are owed or the employer is otherwise not in compliance with the ESA, the Officer may make an order against the employer.

Bill 146 also requires an employer to provide an employee with a copy of the Ministry of Labour's most recent poster concerning ESA rights and obligations within 30 days of employment.

Occupational Health and Safety Act

Currently, the *Occupational Health and Safety Act* defines worker as a person who performs work or supplies services for monetary compensation but does not include an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation program. Bill 146 will amend the Occupational Health and Safety Act to include co-op students, trainees and other **unpaid** learners.

For the most part, this legislative change has already been recognized by the courts. In the 2013 Court of Appeal decision, *Blue Mountain*, the court held the Occupational Health and Safety Act is triggered where a worker or non-worker is either injured or could be injured in an area where work might reasonably be expected to be carried out. Bill 146 therefore codifies what the courts have already recognized – in certain circumstances, the Occupational Health and Safety Act applies to workers and non-workers alike.

Workplace Safety and Insurance Act

Under the current system, an employer (including a temp agency) governed by the *Workplace Safety and Insurance Act* must remit premiums to the Workplace Safety and Insurance Board. If a worker is injured while at work, insurance calculations related to the cost of the injury are attributed to the employer's yearly experience rating. If an employer has a particularly good year with fewer injuries than its com-

[1] The ESA defines "regular wages" in a manner that includes a worker's base salary or shift/weekend premiums and does not include public holiday, ESA termination pay, or vacation pay.

petitors, it may receive a rebate. In the case of a temporary worker's injury, the temp agency's experience rating, and not the employer's, is affected.

Bill 146 proposes to remove the impact of the costs associated with a temporary worker's injury from the temp agency's experience rating and place it with the employer using temp agency worker. As a result, if a temporary worker is injured while at work, the employer using the temp agency may be faced with a surcharge or a lower rebate at the end of the year.

It is possible this amendment could act as a deterrent to using temp agency staff. A poor experience rating can lead to costly surcharges which could now be the responsibility of the employer. As well, employers may have difficulty coordinating with a temp agency in return to work programs for which employers would not otherwise be responsible.

Finally, the Workplace Safety and Insurance Act already allows for the transfer of costs if another employer is negligent or responsible for a worker's injury. It is therefore unknown how this may be affected by the suggested changes in Bill 146.

Labour Relations Act

Bill 146 reduces from three months to two months, the 'open period' in the construction industry during which employees (or another union) may file an application to 'displace' an existing bargaining agent or to 'terminate' existing bargaining rights. While the Minister of Labour suggests this amendment is necessary to stabilize the industry, he has not yet articulated how. In our view, the proposed change will serve only to benefit incumbent unions by restricting the opportunity for employees (and other unions) to file such applications.

Employment Protection for Foreign Nationals Act

Bill 146 seeks to amend the *Employment Protection for Foreign Nationals Act* (Live-in Caregivers and Others), 2009, to extend protection to all foreign nationals working or looking for work in Ontario pursuant to an immigration or temporary foreign employee program. Currently, protection is afforded only to workers employed or seeking employment as a live-in caregiver. The amendments will also prohibit a foreign worker from being charged a fee for recruitment and placement, and from having personal documents such as passports withheld from them.

Practical Tips for Employers

While Bill 146 has yet to receive Royal Assent, the proposed amendments are likely to become law. To proactively prepare for this eventuality, employers should consider the following:

- Strengthen contractual indemnity clauses with temporary staffing agencies: Any employer that uses a temp agency should consider amending its contracts with these agencies to include (or update) an indemnity clause should the employer be pursued for unpaid amounts arising out of the temp agency's failure to pay its workers.
- Maintain records: Ensure there is a workplace protocol in place to retain records of the number of daily and weekly hours worked by a temporary worker.
- Self-audit under the ESA: Compliance with the ESA is already a requirement of the law. Non-compliance can result in expensive fines and back-pay (etc.), not to mention negative publicity for the organization. A regular self-audit is a prudent and cost effective way to ensure ongoing compliance without the participation of the Ministry of Labour. A self-audit will also proactively educate human resources and other members of the organization on the requirements of the ESA (as they are amended from time to time), and prepare the organization should an audit be ordered by an Officer under Bill 146.
- Update employee hiring protocols: Update hiring protocols to ensure within 30 days of employment, each employee is provided a copy of the Ministry of Labour's most recent poster.
- Review and update health and safety protocols and training: Employers are responsible for the health and safety of all workers, regardless whether the workers are paid for their work. Accordingly, ensure occupational health and safety policies, protocols and programs has been reviewed and updated, and all workers have been provided suitable training on the law and workplace hazards. Proof of training should be retained.

To learn more and/or for assistance in respect of any matter raised in this article contact any member of the Sherrard Kuzz LLP team.

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