MANAGEMENT COUNSEL
Employment and Labour Law Update

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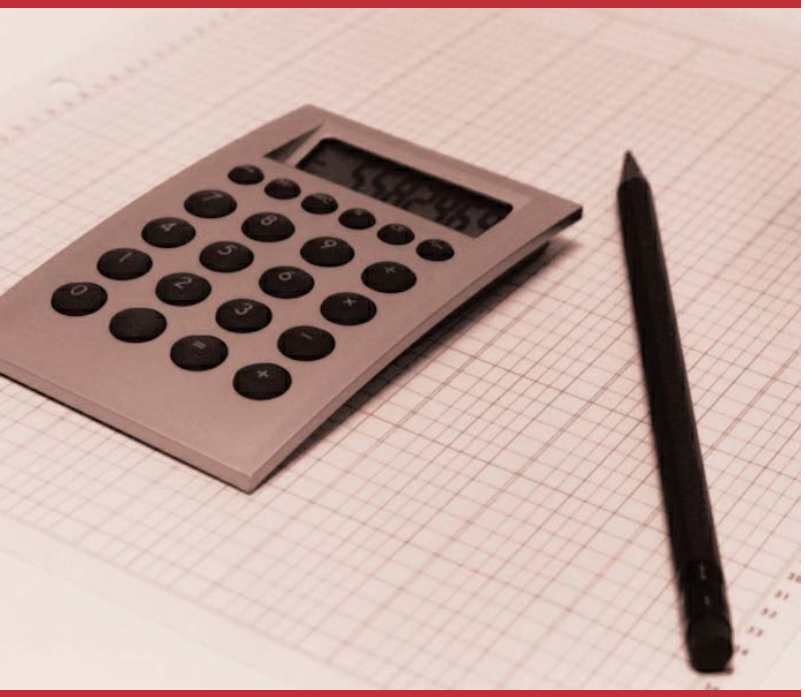

Sweeping Changes Proposed for Ontario's Labour Laws

Describing the changes as an attempt to 'rebalance' the Ontario Labour Relations Act (the "Act"), the McGuinty Government has proposed legislative amendments that could have serious consequences for business in Ontario.

AUTOMATIC CERTIFICATION

Under the proposed amendments, *how* an employer reacts to a union organizing drive will come under much greater scrutiny and be more critical than in recent years.

Under the current *Act*, if an employer violates the *Act* during a union organizing campaign (for instance, firing a union organizer or supporter or threatening to close the business if it is unionized), the Ontario Labour Relations Board can ignore the results of a vote against the union, and order a second vote. The Labour Relations Board may also attach conditions to the second vote to ensure that that it will reflect the employees' wishes concerning whether or not they want to be unionized.

Conditions may include the union being permitted to meet with the employees - during paid time - to talk about all the benefits of belonging to a union. In one case, the Labour Relations Board even went so far as to allow union have an office in the employer's plant during the period between the first and second votes, so that employees could have easy access to union representatives.

Under the proposed new amendments, where the employer has committed a serious unfair labour practice during a union organizing drive, the Labour Relations Board may grant automatic union certification, regardless of the outcome of any employee vote and regardless how many membership cards the union was able to have signed by employees.

In some cases this will mean that the employer's conduct may result in a union becoming certified to represent employees even where the employees have expressed no real interest in being represented by a trade union.

Proactive employers will not wait until the first sign of organizing to educate themselves about their rights and obligations, including the parameters of an employer's right to free speech during organizing.

CARD-BASED CERTIFICATION

Under the current *Act*, where a trade union makes an Application for Certification seeking to represent employees of a particular employer, the Board will order a secret ballot vote after the union proves that it has the support of at least 40% of

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"The Ontario Government's recently introduced amendments to the Labour Relations Act could have serious consequences for business in Ontario."

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the employees. At the vote all employees of that employer have a chance to vote either for or against the union.

Under the proposed legislation, in the construction industry, a trade union that has filed an Application for Certification and has membership cards from more than 55% of employees, would be certified without a vote.

A fundamental concern with this type of certification is that often employees sign cards because they are interested to learn more about the union or even to appease the person asking them to sign, not because they have decided that they wish to be represented by a union. In other words, employees are often unaware of the consequences of signing a card, and that signing may have the same effect as voting for the union.

Under the current *Act*, employees who sign cards - and those who do not - still have the right to vote for or against the union by secret ballot vote. Under the proposed legislation, employees would lose that very important right.

At present, the proposed "card-based certification" applies only to the construction industry. However, we can expect unions in the non-construction industries (i.e. industrial, health care, hospitality, etc.) to lobby for a similar amendment.

INTERIM REMEDIES

Currently, where a union files a complaint with the Labour Relations Board alleging that an employee was fired because he or she supported the union's organizing drive, the Board may put that employee back to work but only after the Board has had a full hearing on the matter and found that the employer violated the *Act*.

Under the proposed amendments, the union may request and the Labour Board has the power to order reinstatement even before a full hearing into the propriety of the employer's actions. The union may also request an order restricting the employer's right, generally, to change terms and conditions of employment pending the outcome of a complaint.

Given that hearings in these types of complaints often extend for a year or more, this means that a terminated employee could be returned to the workplace, or the employer's ability to set the terms and conditions of employment for its employees could be restricted, for a substantial period of time even if the employer, ultimately, successfully defends the allegation of an unfair labour practice.

This is critical. Think of the powerful message sent to every employee when a union - not yet even certified to represent those employees - is able to successfully request that the Labour Relations Board reinstate an employee.

The proposed amendments also send a powerful message to employers to be ready, informed and strategic. One misstep could be costly.

OTHER AMENDMENTS

Under the proposed amended *Act*, unions are no longer required to make public the salary and benefit information of any union employee earning more than $100,000 per year.

Employers would also be obliged to remove "How to Decertify your Trade Union' posters required by the current Act to be posted in all unionized workplaces. While removal of the poster is not itself a radical change, there is concern that it signals increased restriction on an employer's ability to communicate with its employees generally and in the context of a union organizing campaign

Lawyers at Sherrard Kuzz LLP are currently assisting various industry stakeholder groups in formulating submissions to the Minister of Labour. We will keep our readers updated as the proposed amendments make their way through the legislative process. For information on how these amendments may affect your business, please contact any member of our firm.

BREAKFAST SEMINAR

Next in our series of employment and labour law update seminars:

HReview *Seminar Series*

TOPIC: **Wrongful Dismissal Update**

- Common Law Notice - Is There a Ceiling?
- Constructive Dismissal - Can Managers Still Manage?
- *Wallace* Damages - Is The Genie Out Of The Bottle?
- Contractual Notice Periods, Non-Competition and Non-Solicitation Clauses, Fixed Term Contracts

DATE: Thursday, Jan. 20, 2005, 7:30 a.m. — 9:00 a.m. (program to start at 8:00 a.m.; breakfast provided)

VENUE: Delta Toronto East, 2035 Kennedy Rd., Scarborough, ON (just north of the 401) Tel: 416.299.1500

Watch for your faxed invitation the week of Dec. 6, 2004 or call 416.603.0700 to request an invitation.

The New Ontario Health Premium - Who Has To Pay?

Despite the abolition of Ontario Health Insurance Plan ("OHIP") premiums in 1990, and their replacement with the Employer Health Tax ("EHT"), many collective agreements continue to contain language that requires the employer to pay all, or part, of the "OHIP premium". The question before adjudicators is whether this collective agreement language can be extended to include an employer's obligations to pay the new Ontario Health Premium ("OHP"). To date, one arbitrator has held that the OHP must be borne by the employer; however three arbitrators have held the opposite.

WHAT IS THE OHP?

The OHP was introduced as part of the 2004 Ontario Budget as a means to supplement funding of health care in Ontario. It is a personal levy placed on individuals based upon their total taxable income. It has not replaced, but is in addition to, the EHT which itself is a tax payable by the employer based upon its overall payroll costs.

A number of arguments have been advanced to support the proposition that the OHP should be borne by employees. These arguments focus on two principal factors: whether the OHP is in the nature of a "tax" (generally paid by the employee) or a "premium" (often paid by the employer); and the intention of the parties at the time the collective agreement was entered into.

THE OHP - TAX OR PREMIUM?

Despite being called a "premium" the OHP is properly characterized as a "tax".

- Section 2.2 of the *Tax Act* states: "Every individual shall pay a tax, called the Ontario Health Premium, for a taxation year ending after December 31, 2003, if the individual is resident in Ontario on the last day of the taxation year."
- Unlike the EHT, the responsibility to pay the tax is that of the individual, not the employee and not the employer.
- The amount is based on the individual's taxable income - not an employer's payroll and not an individual's employment income.
- The amount collected goes into general government revenue (i.e. the legislation does not stipulate that government must spend the funds on health care).
- Non-payment is dealt with as a failure to pay income tax (i.e. the Government can withhold GST refunds or future income tax refunds for failure to pay).
- Unlike a true "premium", the amount of OHP collected varies with an individual's taxable income and bears no specific correlation to the services provided.
- The OHP need not be paid for an individual to receive health services (unlike a true "premium" where payment is a precondition to receiving service).

THE INTENTION OF THE PARTIES

Two principal arguments are made on behalf of employers. First, at the time the collective agreement was entered into, the parties could not have, and did not contemplate, the OHP. As such it is not reasonable to read into the collective agreement such an onerous obligation on the part of the employer. And second, no employer would ever agree to pay a tax based upon the employees' worldwide income, regardless of source (including investment income, employment income from other employers).

THE UNIONS' POSITION

In their effort to ensure that employers are required to pay the OHP on behalf of employees, unions have argued that:

- The OHP is properly characterized a "premium". The amount collected is a flat rate (graduated), is earmarked for health care and is not a general tax.
- The OHP funds, in part, the same services funded by the OHIP (that is, the OHP, like OHIP, is part of the universal medical insurance program in Ontario).
- The purpose of the OHP is to augment funds raised through the EHT. As such the OHP is really a part of the EHT and should be borne by the employer.

THE ARBITRAL DECISIONS

In *Lapointe Fisher Nursing Home and United Food and Commercial Workers Union, Local 175/633* (Barrett, September 15, 2004) the collective agreement contained a clause requiring the employer to pay OHIP premiums on behalf of its employees. That clause had remained in the collective agreement long after January 1990 and the introduction of the EHT. The arbitrator found that the bargain that had been reached between the employer and union - and reaffirmed with each successive agreement - was that the employer would fund the "plan of [medical] insurance" in Ontario. Accordingly, regardless of its characterization as a "premium" or "tax" the net result was the same - the employer had agreed to pay.

As for the difficulty in calculating the amount of OHP on the basis of global income, the arbitrator acknowledged the employer's concern, but held that the difficulty could not and should not determine the issue of whether the employer had an obligation to pay. [NB: This decision is under review]

In *Jazz Air Inc. and Air Line Pilots Association, International* (Teplitsky, September 27, 2004), heard two days after Lapointe, but decided several days before, the arbitrator once again focused on the bargain to which the parties had agreed in the collective agreement. The arbitrator concluded that the parties did not contemplate the OHP when negotiating the current collective agreement. As such, the "reference to premiums in the collective agreement does not include this new tax". The arbitrator also found that no employer would ever agree to pay the OHP on income earned outside of employment with that particular employer.

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Similarly, in *College Compensation and Appointments Council and Ontario Public Service Employees' Union* (Shime, October 2004) the arbitrator focused on the bargain originally reached by the parties, and in particular that clause that read: "if the government, at any time in the future, reverts to an individually paid premium for health insurance, the... [employer] will resume pay [sic] 100% of the billed premium for employees." The arbitrator found that the OHP was not a "reversion" to the old OHIP premiums, but rather something entirely different. He also found that at the time the bargain was made the parties could not have anticipated the OHP. As such, it could not reasonably be read into the collective agreement.

Finally, in *Goodyear Canada Inc. Collingwood Plant and United Steelworkers of America, Local 834L* (Tims, November 1, 2004) the collective agreement required the employer to pay the monthly premium so that the employee qualified for benefits provided by the OHIP. The arbitrator concluded that the OHP did not result in the employee qualifying for benefits under OHIP. Thus the employer was not required to pay the OHP.

The McGuinty government has indicated that it was not the intention that the OHP be paid by employers. However, absent legislative amendment, this issue is, and will continue to be, in the hands of adjudicators.

In the meantime, we encourage all employers to:

1. Review the health benefit premium language of your collective agreement to determine exposure, if any, to an increase in premium/tax payments.
2. Review all collective agreement language to identify redundant, inapplicable or vague provisions.
3. Renegotiate the removal or clarification of collective agreement language that is redundant, inapplicable or vague. This will go a long way to avoid the imposition of obligations which were either never intended by the parties or long ago expired.

Sherrard Kuzz LLP will continue to monitor this important issue, and advocate vigorously on behalf of our clients that the OHP ought not to be paid by employers.

DID YOU KNOW?

The Ontario Government has released a new version of the workplace poster, "What You Should Know About The Ontario Employment Standards Act". By law it must be posted in at least one conspicuous place in every workplace. For a free copy of the new poster, please contact any member of our firm.

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