LABOUR AND EMPLOYMENT

IMPACT ON CROSS-BORDER EMPLOYERS OF PROPOSED CHANGES TO ONTARIO EMPLOYMENT AND LABOUR LAWS*

by W. Eric Kay and Andrew J. Skinner

In order to limit their employment law obligations, cross-border employers need to understand the laws governing their employees who perform work in Ontario. It is particularly important for employers headquartered in the United States to understand that there is no "at will" employment in Ontario. Rather employees in Ontario are governed by a contract of employment, either express or implied. If an employee does not have a written contract of employment, there is an implied contract of employment incorporating the minimum statutory protections provided by Ontario's Employment Standards Act plus additional rights of the employee under the common law.

With this in mind, employers headquartered outside of Ontario should enter into written employment agreements in order to set out the mutual obligations of the employment relationship and to limit common law liability to their employees in Ontario. It is particularly important in such areas as termination, confidentiality/non-disclosure and non-competition/non-solicitation. In Ontario it is also essential that employer's policies and procedures become part of the contract of employment. Of note are employee handbooks or policies/procedure manuals, which in many jurisdictions are expressed not to be or form part of a contract of employment, but should be incorporated into the contract of employment in Ontario so that the employer may rely upon their provisions with respect to managing or disciplining employees in Ontario.

Highlights of Proposed Changes to the Ontario Employment Standards Act ("ESA"):

Minimum Wage Increases – The general minimum wage would increase to $14 per hour in 2018 and to $15 per hour in 2019. The special minimum wage rates for liquor servers, students under 18, and homeworkers would increase by the same percentage as the general minimum wage.

Paid Vacation – Employees with at least five years of service would be entitled to three weeks paid vacation.

Paid Personal Emergency Leave – All employers would be provided 10 days of emergency leave ("PEL") per year, two of which would be paid. Employers would be prohibited from requesting a doctor's sick note from an employee taking PEL.

Family Medical Leave – This would be increased from 8 to 27 weeks.

Overtime Pay – Employees who hold more than one position with an employer would be paid at the rate for the position in which they are working during any overtime period.

Equal Pay for Equal Work – Employers would be required to pay casual, part-time, temporary and seasonal employees the full-time employee rate when performing the same job for the same employer. Exceptions include where a wage difference is based on a seniority system, a merit system or systems that determine pay by quantity or quality of production.

Similarly, temporary help agency ("**THA**") employees ("**assignment workers**") would be paid at the same rate as permanent employees of the THA client when performing the same job and such assignment workers would be entitled to request a review of their wages. THAs would be required to provide assignment workers with at least one week's notice when an assignment scheduled to last longer than three months will be terminated early.

Scheduling – Employees would be entitled to request schedule or location changes after having been employed for three months.

Employees who regularly work more than three hours per day, but upon reporting to work are given less than three hours, would be paid three hours at their regular rate of pay.

Employees could refuse to accept shifts if their employer asks them to work with less than four days' notice.

If an employer cancels a shift within 48 hours of its start, employees would be paid three hours at their regular rate of pay.

When employees are "on-call" and not called in to work, the employer would pay them three hours at their regular rate of pay for each 24-hour period that employees were on-call.

Employee Misclassification – Employers that misclassify their employees would be subject to penalties including prosecution, public disclosure of convictions and monetary penalties. Such measures are intended to address cases where employers improperly classify their employees as independent contractors and thus preclude them from being entitled to the protections under the ESA. In the event of a dispute, the employer would have the burden of proving that the individual is not an employee.

This new method of dealing with misclassification may require employers headquartered outside Ontario to take a more careful approach to the classification of their employees of Ontario than in the past because of the new penalties contemplated by Bill 148.

Joint or Related Employer Liability – Proof of "intent or effect" to defeat the purpose of the ESA would be removed when determining whether related businesses can be treated as one employer and held jointly and severally liable for monies owing under the ESA.
This change in approach to the issue of joint or related employer liability will be of particular importance to employers headquartered outside of Ontario which conduct business in Ontario through a subsidiary which is subjected to significant control by a non-Ontario

parent and also for franchisors which are found to exercise an unusual degree of control over the operations of their franchisees.

Highlights of Proposed Changes to the Ontario Labour Relations Act ("LRA")

Proposed changes to the LRA would affect union certification rules in order to more easily facilitate unionization and will enable the Ontario Labour Relations Board ("**OLRB**") to change existing bargaining units.

Union Certification – The following in respect of union certification are proposed:

- establishing card-based union certification for the THA industry, the building services industry and home care and community services industry;
- allowing unions to access employee lists and certain contact information, provided the union can demonstrate that it has already achieved the support of 20% of employees in the proposed bargaining unit;
- empowering the OLRB to conduct votes outside the workplace, including electronically and by telephone;
- eliminating certain conditions for remedial union certification, allowing unions to more easily certify when an employer engages in misconduct that contravenes the LRA;
- making access to first contract arbitration easier, and also add an intensive mediation component to the process before dealing with displacement and decertification applications; and
- empowering the OLRB to authorize Labour Relations Officers to give directions relating to the voting process and voting arrangements with a view to facilitating the neutrality of the voting process.

Structure of Bargaining Units – The OLRB would be allowed to change the structure of bargaining units within a single employer, where the existing bargaining units are no longer appropriate for collective bargaining, and to consolidate newly certified bargaining units with other existing bargaining units under a single employer, where those units are represented by the same union. This proposal could impact multi-unit franchisees and franchisors with multiple corporate stores in close geographic proximity.

Additional proposed amendments to the LRA would impact return-to-work rights and procedures, just cause job protection in the period between certification and conclusion of a first contract, and during the period between the date the employees are in a legal strike or lock-out position and the new collective agreement, and with respect to fines and penalties against offending employers under the LRA.

Conclusion

If enacted, the proposed amendments to the ESA and LRA would undoubtedly result in increased operational and compliance costs for employers and require reconsideration of some current strategies for dealing with both unionized and non-unionized employees.

Currently the proposed legislation (Bill 148) is before the Ontario Legislature's Standing Committee on Finance and Economic Affairs. The Ontario government's intention has been to enact Bill 148 in the fall of 2017 so that would begin coming into effect on 1 January 2018.

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