



Legal Corner

By
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Costly consequences when grievance referrals ignored

Employers that ignore or delay responding to employee grievances, or documentation from trade unions or the Ontario Labour Relations Board (OLRB) do so at considerable financial risk, not only to the employer, but also to its officers and directors personally.

In Ontario's construction industry a copy of any grievance filed by a trade union must be provided to the employer. Similarly, if the union wishes to refer the grievance to the OLRB for litigation, a copy of the referral must be provided to the employer. The board then provides to the employer written notice the grievance has been received (called the "confirmation").

The board's confirmation starts a process that, if ignored by the employer, can have costly—even devastating—consequences.

Under the board's rules, within five business days of the board issuing the confirmation (normally sent to the employer by fax), the employer must file a document called a "Notice of Intent to Defend" together with a filing fee. This notice must also be served on any other party involved in the grievance (such as the union and any relevant employer organization).

Under the Ontario Labour Relations Act, if the employer fails to file its notice, the board is expressly permitted to decide the outcome of the grievance without any further input from the employer. This can include deciding whether the employer violated the collective agreement and the amount of damages (if any).

Significantly, the board is not required to hold a hearing before deciding the case. As well, even if a hearing is held the employer may not be allowed to participate or raise a defence.

This is critical because without a hearing—where the employer can present evidence and argue its position—statements and allegations made by the trade union will be accepted by the board as true. They will also form the sole basis of the board's decision against the employer.

For example, if a union were to claim that an employer had failed to employ only members of the union, then if the employer fails to file its Notice of Intent to Defend, based only on the statements contained in the union's grievance the board could find the employer to have violated the collective agreement and order payment of substantial damages. Once the board issues a decision, the union need only file it in court in order to go after the employer for the damages.

In many of these cases (where employers have not responded, or responded late), damages have been in the thousands of dollars, and in some instances hundreds of thousands of dollars. In other cases, when the union has proven that the employer cannot pay the damage award, officers and directors have been held personally responsible for unpaid wages, including hourly wages, vacation or statutory holiday pay.

You might ask: What if the confirmation was accidentally left unanswered because it sat on the fax machine, someone's desk, or in a jobsite trailer past the deadline?

The board is very strict about when it will permit late filing of a Notice of Intent to Defend. Only in extreme circumstances, such as when an employer can prove the union did not serve the grievance or referral, has the board permitted an employer to serve its notice late.

What should employers do?

Three critical steps can considerably reduce the potential for financially devastating consequences:

1. Take seriously every grievance or document received from a trade union, whether or not it has been referred to the board.
2. Ensure staff, both at the office and at the site, is trained to regularly check for faxes (etc.) and to bring all documentation to the attention of appropriate management.
3. When you receive a grievance or referral, immediately contact legal counsel so that important due dates are not accidentally missed and the company's interests are protected.

As with most legal matters, addressing them quickly, through experienced counsel, can help to avoid devastating financial consequences.

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