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Year End Review: Legislative Update and Compliance Items

November 20, 2023

With 2024 fast approaching, there are a number of proposed changes to labour and employment legislation that may impact businesses regulated by the Province of Ontario and those regulated federally. The end of the year also reminds us of a host of 'to dos' both in terms of legislative compliance and 'best practice.' In this briefing note we overview the following:

PROVINCIALLY REGULATED EMPLOYERS (Ontario)

Ontario Employment Standards Act, 2000:

- An employee in a "trial period' is an "employee"
- Disclosure of salary range
- Canadian experience cannot be required
- Retention of job postings
- Disclosure of artificial intelligence ("AI") in the hiring process
- Direct deposit of wages
- New requirements related to tips and gratuities
- No deduction for cash shortages or lost property
- Clarity re: vacation pay agreement

Digital Platform Workers' Rights Act, 2022

Fair Access to Regulated Professions and Compulsory Trades Act, 2006

Workplace Safety and Insurance Act, 1997

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FEDERALLY REGULATED EMPLOYERS

Canada Labour Code

- Limitation on use of replacement workers
- Expedited process to address maintenance of activities

ONGOING COMPLIANCE REQUIREMENTS (Ontario)

Accessibility for Ontarians with Disabilities Act, 2005

- December 31, 2023 deadline to file Accessibility Compliance Report

Annual Compliance Requirements and Best Practices for Ontario, Provincially-Regulated Employers

PROVINCIALLY REGULATED EMPLOYERS (Ontario)

On November 14, 2023, the Government of Ontario introduced Bill 149, the *Working for Workers Four Act, 2023* ("Bill 149"). If enacted, Bill 149 will amend various work-related statutes, specifically, the *Employment Standards Act, 2000*, *Digital Platform Workers' Rights Act, 2022*, *Fair Access to Regulated Professions and Compulsory Trades Act, 2006* and *Workplace Safety and Insurance Act, 1997.*

Employment Standards Act, 2000 ("ESA")

An employee in a "trial period" is an "employee"

At present, the definition of employee includes a person who receives training from an employer if the skills on which they are trained are those used by the employer's employees. The amendment makes clear that an employee who performs work in a trial period is considered to be in training and, as such, must be treated as an employee for the purposes of the ESA.

Disclosure of salary range

At present, an employer in Ontario is not obligated to publish salary information on a job posting.

Bill 149 will require an employer or prospective employer to include information about the expected compensation, or range of expected compensation, in any publicly advertised job posting. This requirement may be subject to limitations and exemptions prescribed by Regulation.

Canadian experience cannot be required

Bill 149 will prohibit an employer or prospective employer from including, in a publicly advertised job posting or any associated application form, any requirement related to *Canadian experience*. This prohibition may be subject to exemptions prescribed by Regulation.

If passed, Ontario will be the first province in Canada with an express legislative prohibition on requiring Canadian experience in employment.

Retention of job postings

To aid in the enforcement of the two amendments noted above, Bill 149 will require an employer to retain a copy of every publicly advertised job posting and any associated application for three years from the date the public ceased to have access to the posting.

Disclosure of artificial intelligence ("AI") in the hiring process

If an employer or prospective employer uses AI to screen, assess, or select applicants for a position, Bill 149 will require the employer or prospective employer to include a statement disclosing such use of AI in any publicly advertised job posting. This requirement may be subject to exemptions prescribed by Regulation.

As noted in our November 7, 2023 briefing note, if Bill 149 is passed, Ontario will be the first province in Canada with legislation aimed at AI in the hiring process.

Direct deposit of wages

At present, an employer may pay an employee's wages by direct deposit into an account of a financial institution if the account is in the employee's name and no person other than the employee or person authorized by the employee has access to the account.

Bill 149 will require that, in addition to being in the employee's name, the account must be selected by the employee. Regulations may be enacted at a later date to prescribe additional criteria.

New requirements related to tips and gratuities

At present, if an employee is paid a tip or gratuity in the workplace, an employer may use a digital payment platform which may, in turn, charge a fee to an employee to access their tip or gratuity.

Bill 149 will require an employee's tips or gratuities be paid either by cash, cheque payable only to the employee, direct deposit (subject to the requirements on direct deposit contained in the ESA), or any other prescribed method. If payment is made by cash or cheque, the employer must ensure the payment is provided at the employee's workplace or another agreed-upon location. Practically, this means a tip or gratuity can no longer be paid out through a digital payment platform.

At present, an employer may also 'pool' tips and gratuities among employees. However, a pool may only include a sole proprietor, partner, director, or shareholder of the employer if that individual regularly performs, to a substantial degree, the same work performed by some or all of the employees in the pool, or employees of other employers in the same industry who commonly receive or share tips or other gratuities.

Bill 149 will require an employer to post a copy of its policy on the sharing of tips in the workplace where it is likely to come to the attention of employees if the "pool" includes the sole proprietor, partner, director, or shareholder of the employer. The amendment is intended to ensure employees understand how their tips are calculated and distributed. A copy of any tip policy must be retained for three years after it ceases to be in effect.

No deduction for cash shortages or lost property

At present, the ESA prohibits an employer from making any deduction from wages unless authorized to do so under the ESA. For example, an employee may authorize a deduction in writing. However, written authorization is invalid if it relates to wages withheld, deducted, or returned because (among other things) the employer had a cash shortage, lost property, or had property stolen and another person, other than the employee, had access to the cash or property.

Bill 149 will clarify that an employee cannot authorize a deduction in wages if a customer of a restaurant, gas station or other establishment leaves the establishment without paying for the goods or services taken from, consumed at, or received at the establishment (e.g., "dine and dash").

Clarity re: vacation pay agreement

At present, an employer is required to pay an employee vacation pay in a lump sump prior to commencement of vacation. If the employee is paid by direct deposit or does not take vacation in complete weeks, this payment must be made on or before the pay day for the period in which the vacation falls. However, the employer can pay vacation pay during the pay period it which it accrues, or at any other time, if the employee agrees.

Bill 149 will require that, if an employee has vacation pay paid on each pay period or in another agreed-upon manner, this is set out in an agreement between the employer and employee. This amendment is intended to ensure the agreement falls within section 1(3) of the ESA which requires any agreement between an employer and employee under the ESA to be made in writing or electronically.

Digital Platform Workers' Rights Act, 2022 **("DPWRA")**

Bill 149 will amend the DPWRA to provide that (1) limits on recurring pay periods and pay days and (2) rules to determine compliance with minimum wage requirements may be prescribed. Any prescribed requirements will be enacted at a later date through Regulation.

Fair Access to Regulated Professions and Compulsory Trades Act, 2006 **("FARPCTA")**

Under FARPCTA, if a regulated profession makes its own assessment of an individual's qualifications, it is required to do so in a way that is transparent, objective, impartial and fair. It also must take reasonable measures to ensure that any third party it uses to assess qualifications does the same.

Bill 149 will amend FARPCTA to provide that prescribed requirements must be met to determine if a regulated profession, or third party it engages, assesses qualifications in a way that is transparent, objective, impartial and fair. Any prescribed requirements will be enacted at a later date through Regulation.

Workplace Safety and Insurance Act, 1997 **("WSIA")**

Bill 149 will amend the WSIA to allow the Province to prescribe an additional indexing factor in the annual adjustment of payments. The Province has indicated this will enable it to "super index" increases to benefits above the annual rate of inflation.

Bill 149 will also amend the WSIA such that, if certain firefighters and fire inspectors have primary-site esophageal cancer, it is presumed to be an occupational disease unless the contrary is shown.

FEDERALLY REGULATED EMPLOYERS

Please note these proposed amendments apply ONLY to a federally-regulated employer.

Canada Labour Code ("CLC")

On November 9, 2023, the Government of Canada introduced Bill C-58, *An Act to amend the Canada Labour Code and the Canada Industrial Relations Board Regulations, 2012* ("Bill C-58). If passed, Bill C-58 will come into force 18 months after Royal Assent.

Limitation on use of replacement workers

At present, the CLC allows a federally-regulated employer to use replacement workers to temporarily provide services during a strike or lockout, provided the workers have not been engaged for the demonstrated purpose of undermining a union's representational capacity. Essentially, replacement workers cannot be used to allow the employer to continue to operate and refuse to bargain with the union in good faith.

Bill C-58 will repeal this provision and introduce a more expansive prohibition that applies not only to replacement workers but also existing bargaining unit members who would otherwise want to cross the picket line and continue to work. Specifically, Bill C-58 prohibits an employer from using three classes of people to perform bargaining unit work during a legal strike or lockout:

1. Any employee or manager hired after notice to bargain was given;

2. Contractors (other than dependant contractors) or employees of another employer (*i.e.*, "traditional" replacement workers); and

3. Employees in the bargaining unit.

The penalty to an employer for using any individual in one of the prohibited classes is a fine of up to $100,000 per day.

There are two exceptions to these prohibitions:

1. If an employer utilized the services of any contractor or employee of another employer to perform bargaining unit work **before notice to bargain was given**, they can continue to use these workers during a strike or lockout, but only in the same manner, to the same extent and in the same circumstances as they were used before notice to bargain was given.

2. To address an imminent and serious threat to life, health or safety, destruction of property, or environmental damage and there are no other means to deal with the situation.

Bill C-58 does not prevent an employer from using non-bargaining unit employees or managers employed prior to the date on which notice to bargain was given from performing bargaining unit work.

If passed, Bill C-58 will make it much more difficult for an employer to continue to operate during a strike or lockout and will also prevent striking employees from exercising their right to cross the picket line if they wish to continue working.

Expedited process to address maintenance of activities

Maintenance of activities applies when the cessation of work during a strike or lockout would result in an immediate or serious danger to the safety or health of the public. Bill C-58 expedites the process to determine maintenance of activities and removes certain notice requirements. At present, within 15 days from when notice to bargain is given, a party may give the other party notice of the services, operation of facilities or production of goods, that in its opinion, must be continued during a strike or lockout. If the parties agree, the agreement is filed with the Canada Industrial Relations Board (the "CIRB"). If no agreement is reached, either party may refer the matter to the apply to the CIRB for a determination no later than 15 days after the notice of dispute.

Under Bill C-58, the parties **must** come to an agreement on maintenance of activities within 15 days from when notice to bargain is given. If an agreement is reached it must be immediately filed with the Minister of Labour and the CIRB. If no agreement is reached, either party may refer the matter to the CIRB and the CIRB must then issue a decision within 90 days of the application. Bill C-58 also requires that if the parties agree no activities must be maintained, they must submit that agreement to the Minister of Labour and the CIRB.

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ONGOING COMPLIANCE REQUIREMENTS (Ontario)

Accessibility for Ontarians with Disabilities Act, 2005 ("AODA")

December 31, 2023 deadline to file Accessibility Compliance Report

A business or non-profit organization with 20 or more employees in Ontario, or a designated public sector organization, is required to file an accessibility compliance report by **December 31, 2023**, confirming it has met its current accessibility requirements under the AODA and its Regulation, the Integrated Accessibility Standards (the "Accessibility Standards").

It is relatively simple and quick to file the compliance report, found here. However, it can take time to comply with the requirements under the AODA if an organization has not yet done so. Each organization must develop, implement, and maintain various accessibility-related policies, including certain policies which must be made publicly available upon request and/or posted on the organization's website. It must also provide training on the requirements of the Accessibility Standards and its obligations under the Ontario *Human Rights Code* as it pertains to persons with disabilities.

Accordingly, an organization should move quickly to confirm it is following the applicable requirements under the AODA and, if not, takes the necessary steps to comply prior to the December 31, 2023.

If you require assistance, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com.

Annual Compliance Requirements and Best Practices for Ontario, Provincially-Regulated Employers

Year-end is a good time to review certain **legal requirements** and **annual best practices**.

Legal requirements

Occupational Health and Safety Act		
	Completed	**Not Applicable**
Review, at least annually: ➢ Occupational Health and Safety Policy, ➢ Implementation program.		
Review, at least annually: ➢ Workplace Violence Policy and Workplace Harassment Policy (these two policies can be incorporated into one policy), ➢ Implementation program.		
IF a worker is exposed to or likely to be exposed to a hazardous material or hazardous physical agent, review, at least annually and in consultation with the joint health and safety committee or representative: ➢ Health and safety training provided to workers, ➢ Each worker's familiarity with that training. NOTE: An employer must review the health and safety training more than annually if the employer determines, on the advice of the joint health and safety committee or representative, an additional review is necessary or if there is a change in circumstances that may affect the health or safety of a worker.		
Employment Standards Act, 2000		
	Completed	**Not Applicable**
IF an employer has 25 employees or more as of January 1, 2024, prepare a written policy on **disconnecting from work** by March 1, 2024. Each employee must be given a copy of the policy within 30 calendar days of the policy having been developed or amended, or the employee having commenced employment (as applicable).		
IF an employer has 25 employees or more as of January 1, 2024, prepare a written policy on **electronic monitoring of employees** by March 1, 2024. Each employee must be given a copy of the policy within 30 calendar days of the policy having been developed or amended, or the employee having commenced employment (as applicable).		

Workplace Safety and Insurance Act, 1997		
	Completed	**Not Applicable**
IF an employer is a Schedule 1 employer, provide the WSIB with an annual statement setting out the total wages earned during the preceding year by all workers (as well as any other information requested by the WSIB, which may include the estimated wages for the current year).		
IF an employer reports and pays premiums monthly, file an annual Reconciliation Form by March 31, 2024.		
Accessibility for Ontarians with Disabilities Act		
	Completed	**Not Applicable**
IF an employer is a business or non-profit organization with 20 or more employees in Ontario, or a designated public sector organization, file an accessibility compliance report by **December 31, 2023** (discussed in detail above).		

Annual Best Practices

	Completed	**Not Applicable**
Review written employment agreements to ensure they remain compliant with current law (legislation and caselaw).		
Review written independent contractor agreements to ensure they remain compliant with current law (legislation and caselaw).		
If employer has a vacation year that corresponds with the calendar year, review vacation pay practices to ensure any employee who receives commission and/or bonus payments has been given the minimum statutory vacation pay.		

For questions about, or assistance with, workplace issues, please contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com.