Bill 47 Given Royal Assent

On November 21, 2018, Bill 47, *Making Ontario Open for Business Act, 2018* received Royal Assent. In terms of "coming into force" heres the timing:

- The amendments to the *Labour Relations Act, 1995* are effective on November 21, 2018; and
- The amendments to the *Employment Standards Act, 2000* are effective on January 1, 2019.

The amendments that received Royal Assent are substantially those that were summarized in the Special Alert sent out on October 24, 2018. The notable exception is the removal of the Ontario Labour Relations Board's ("OLRB") power to review bargaining structures. In the First Reading version, Bill 47 repealed the power of the OLRB to review and consolidate newly certified bargaining units with existing bargaining units. The OLRB would have been empowered to review the structure of bargaining units where the existing bargaining units were no longer appropriate for collective bargaining. In the Royal Assent version the legislation simply removed this power from the OLRB. Of course, this only impacts unionized employers.

At this point, I would encourage you to review your policies to ensure that they comply with the Bill 47 amendments, in particular to the *Employment Standards Act, 2000*.

That said you should proceed cautiously in reversing any improved terms of employment that you put in place as a result of the Liberal government amendments found in Bill 148, *Fair Workplaces, Better Jobs Act, 2017* passed on November 22, 2017.

Leaving aside the legal issues, including constructive dismissal, there may well be human resources issues associated with "taking away" benefits that employees have enjoyed. It is important to consider the implications associated with winding back the clock both from a legal and employee relations perspective.

The following are some of the amendments introduced by Bill 47 which, as noted above, will come into force, in the case of the *Employment Standards Act, 2000* on January 1, 2019 and, in the case of the *Labour Relations Act, 1995* on November 21, 2018:

Employment Standards Act, 2000

- Maintain the hourly minimum wage at $14 and not increase it to $15 on January 1, 2019. This had already been announced by the Ford government.
- The minimum wage is maintained with annual increases to the minimum wage, tied to inflation, commencing on October 1, 2020.
- Repealing the following scheduling changes that were to come into force on January 1, 2019:
  - Right to request changes to schedule or work location after an employee has been employed for at least three months.
  - Minimum of three hours' pay for being on-call if the employee is available to work but is not called in to work, or works less than three hours.
  - Right to refuse requests or demands to work or to be on-call on a day that an employee is not scheduled to work or to be on-call with less than 96 hours' notice.
  - Three hours' pay in the event of cancellation of a scheduled shift or an on-call shift within 48 hours before the shift was to begin.
- With respect to the current three (3) hour rule in the *ESA,* the Act would provide that employees are guaranteed three hours pay where they are required to report for work and work less than three hours. The exception is where the employer is unable to provide work for the employee because of fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work.
- Bill 47 will repeal the Public Holiday Pay Regulation, including the complex holiday pay calculation under Bill 148, and would return to the calculation based on the total amount of regular wages earned and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20.
- The *Act* will repeal what the PCs call the "previous government's disastrous Personal Emergency Leave reforms with a straightforward package of annual leave days for every worker". Specifically, every worker will be allowed to take up to three days for personal illness, two for bereavement and three for family responsibilities.
- The Act will preserve the vacation with pay of three (3) weeks for an employee with five (5) or more years of service.
- Employers will be permitted to request that an employee provide a medical note from a qualified health practitioner in support of an employee requesting a leave under the ESA. In other words, the Act will repeal those provisions that prevent employers from asking for this supporting evidence where a personal leave is requested. The Ontario Medical Association (OMA) made submissions on Bill 47 specifically with respect to the ability of employers to ask employees to provide sick notes for short medical leaves. Obviously, the government did not accept these submissions or the OMA recommendation.
- Repealing the Act to remove the reverse onus on the employer to prove that an individual is not an employee where there is a dispute about whether the individual is an employee or, for example, independent contractor.
- Repealing the equal pay for equal work provisions as relate to the employment status (part-time, casual, and temporary) and assignment employee status (temporary help agency status).
- Returning to the previous administrative penalties for contraventions of the ESA by decreasing the maximum penalties from $350/$700/$1500 to $250/$500/$1000, respectively.

Importantly, a number of entitlements introduced by Bill 148 survived the Bill 47 amendments including, among others:

- Maintaining the elimination of the requirement to show an intent to defeat rights under the *Employment Standards Act, 2000* when loking at the common employer provisions;

- An extra week of paid vacation for employees who have been employed for 5 years or more;

- Paid leave for victims of domestic & sexual violence;

- Amendments to the ESA relating to pregnancy, parental, critical illness and family medical leave that correspond to amendments made by the federal government to the *Employment Insurance Act;* and

- Employers need not complain to the employer before filing a complaint with the Ministry of Labour.

Labour Relations Act, 1995

- Repealing the card-based certification option for employees working in home care, building services, and temporary help agencies. A secret ballot vote is maintained.

- Repealing the "employee list" provisions where a union can establish that they have 20% or more of the individuals in the bargaining unit proposed in the application appear to be members of the union at the time the application was filed. Further, and importantly, to the extent that a union obtained a list of employees in accordance with a direction of the Ontario Labour Relations Board ("OLRB") under this LRA, as it read immediately before Bill 47 came into force, the trade union will, on or immediately after that day, destroy the list in such a way that it cannot be reconstructed or retrieved.

- Reinstating the pre-Bill 148 test and preconditions for the OLRB to certify a union as a remedy for employer misconduct.

- Repealing the regulation-making authority to expand successor rights to contract tendering for publicly-funded services such as home-care.

- Repealing the power of the OLRB to review and consolidate newly certified bargaining units with existing bargaining units.

- The current legal strike and lockout timing provisions are repealed and Bill 47 will provide that, where no collective agreement is in operation, no employee will strike and no employer will lock out an employee until the Minister of Labour has appointed a conciliation officer or a mediator under this Act and,

  (a) seven days have elapsed after the day the Minister has released or is deemed pursuant to the Act to have released to the parties the report of a conciliation board or mediator; or

  (b) 14 days have elapsed after the day the Minister has released or is deemed pursuant to the Act to have released to the parties a no board report.

- Bill 148 removed the six-month limitation under which striking employees may apply to return to work following a lawful strike or lockout. Bill 47 returns to the six month limitation on an employee's right to reinstatement following the start of a lawful strike or lock-out.

- Repealing the Bill 148 "first agreement arbitration" provisions and return to the conditions for access to first agreement arbitration (where it appears to the OLRB that collective bargaining has been unsuccessful for specified reasons) that were in place prior to Bill 148.

- Maximum fines for offences under the LRA will be decreased under Bill 47 from $5,000 to $2,000 for individuals and from $100,000 to $25,000 for organizations who violate the LRA.

- Expanding and recognizing alternative means of communications under the Act. According to Bill 47, for the purposes of the Act, and any proceedings taken under the Act, any notice or communication may be sent by mail, courier, fax, or e-mail. There are also deeming provisions with respect to the time of the release or receipt of the document.

- Facilitating and requiring the publication of documents (collective agreements and arbitration awards) filed with the Minister, including publication on the Government website.

Employers have a little over a month to sort out how (if at all) they will respond to the Bill 47 amendments to the *Employment Standards Act, 2000*. We should expect that unions and employee advocacy groups will continue to voice their displeasure not only with the amendments introduced by Bill 47 but also with the process that was followed to bring about those amendments.

CONTACT

Fitzgibbon Workplace Law
Management Labour & Employment Law
2275 Upper Middle Rd East I Suite 101 I Oakville I ON I L6H 0C3
Direct Tel: 905-637-7927 I Fax: 905-637-0735
Email: michael@fitzgibbonworklaw.com