Steps Ontario employers need to take to comply with newest employment legislation changes

March 22, 2024

Ontario has passed legislation requiring salary ranges in job postings, disclosure of the use of AI in the hiring process and other changes. Bill 149, the *Working for Workers Four Act, 2023* (the Act) received royal assent on March 21, 2024. Employers will be well advised to update and implement.

We have written extensively on Bill 149 in the leadup to the passage of this legislation, including our articles from November 7, 2023 and November 15, 2023 summarizing the Ontario Government's announcement of such legislation and the Ontario Government's tabling of such legislation in the legislature, respectively. Those articles continue to be relevant and helpful, and this article focuses on "next steps".

Coming into force at your workplace

Below is a high-level summary of the timing for when the Act's ESA amendments come into force.

1. **March 21, 2024:** Certain amendments to the ESA come into force with immediate effect as of March 21, 2024, which means employers must take immediate steps to be in compliance with these requirements:
    - The definition of "employee" in the ESA is amended to include an individual completing a trial period. This effectively prohibits unpaid trial periods (e.g., shifts).
    - Section 13(6) of the ESA is amended to expressly state that employers cannot withhold, deduct or require the return of wages in situations where 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.

2. **June 21, 2024:** The below amendments will come into force on June 21, 2024, which means employers have a bit of a runway to plan for these specific changes:

- The vacation pay sections of the ESA will be amended to clarify that employers cannot pay vacation pay at any time other than the "default" unless the employee has made an agreement with the employer that their vacation pay may be paid in a manner other than the default.
- Section 14.4 of the ESA will be amended to require that if an employer has a policy in place with respect to the employer or a director or shareholder of the employer sharing in tips or other gratuities where the ESA permits this, employers must post and keep posted a copy of the policy in at least one conspicuous place in the employer's establishment where it is likely to come to the attention of the employer's employees. Employers will also be required to retain a copy of the policy for at least three years after it ceases to be in effect.

3. **"On a date to be proclaimed":** A bit harder for planning purposes, the Act left it unclear when the other notable ESA amendments – for example, the salary ranges in job postings and disclosure of AI used in the hiring process – will come into force. This means that employers will have to stay tuned but should be "on their way" to planning how to comply given that the Act is now law. It is only a matter of time before these changes take effect and it cannot happen overnight. These changes include:

- Employers will be required to include the expected compensation for a position or range of expected compensation for a position in publicly advertised job postings.
- Employers will be prohibited from including any requirements related to Canadian experience in a publicly advertised job posting or in any associated application forms.
- If an employer advertises a publicly advertised job posting and if the employer uses AI to screen, select or assess applicants for the position, the employer will be required to include a statement on the posting disclosing the use of AI. It appears that the obligation to disclose the use of AI in the hiring process will be limited to a disclosure of the fact that AI is used and will only be required in relation to publicly advertised jobs.
- In addition to the requirements above, employers will be required to retain copies of every publicly advertised job posting and any associated application forms for three years after access to the posting by the general public is removed.
- The definition of "employer" in the ESA will also be amended to include "prospective employer", such that the above requirements will clearly apply to both employers and prospective employers.

We also expect regulations to be announced soon, and in particular, we expect the following some or all of the following to be included in the impending regulations:

- parameters on the range of expected compensation that must be included in publicly advertised job postings;
- a definition of "publicly advertised job postings";
- a definition of "artificial intelligence";
- a carve out to the prohibition on requirements related to Canadian experience for publicly advertised job postings that meet certain defined criteria; and
- a carve out of the requirements to disclose the use of AI in the hiring process.

Stay tuned for these regulations from the Ontario Government.

Other employment-related legislation changes

As noted previously, the Act will also amend the (not yet in force) *Digital Platform Workers' Rights Act*, *2022,* the *Workplace Safety and Insurance Act, 1997,* including permitting "super indexing" increases to Workplace Safety and Insurance Board benefits above the annual rate of inflation to increase pay for injured workers and improving cancer coverage for firefighters, *and the Fair Access to Regulated Professions and Compulsory Trades Act*, *2006.*

Consultations going ahead on NDAs and new job-protected leave

The Ontario Government has confirmed that it is launching consultations to identify legislative options to restrict the use of NDAs in the settlement of cases of workplace sexual harassment, misconduct or violence, while protecting the rights of victims and survivors. It will also launch consultations on options to create a new job-protected leave for critical illnesses (like cancer) to match the length of the 26-week federal employment insurance sickness benefits.

The time is nigh

Employers will need to take both immediate and future steps to comply with the newly passed legislation, including ensuring trial periods are paid and the new job posting requirements (including record retention requirements). In relation to this, especially since the legislation has received royal assent, it would be an opportune time to consider a legal update of job postings, record retention policies and trial period policies, including employment agreements.

We will continue to monitor the introduction of this new legislation. Please contact your BLG lawyer or any member of our Labour and Employment Group for any questions about this bill, including steps to take to be compliant with the new changes.

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