An act to modernize the occupational health and safety regime

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The long-awaited *Bill to modernize the occupational health and safety regime* was finally tabled on October 27, 2020 by Jean Boulet, Minister of Labour, Employment and Social Solidarity (the Minister).

Essentially, the Bill aims to modernize the *Act respecting industrial accidents and occupational diseases* (the AIAOD) and the *Act respecting occupational health and safety* (the AOHS), as well as a number of other regulations relating to health and safety.

We will outline here the principal changes proposed to the occupational health and safety regime, under six major headings:

1. Occupational diseases: modernizing processes and listing diseases
2. Preventive measures: large and small employers involved
3. Rehabilitation measures: new guidelines
4. Cost allocation: tightening the purse-strings
5. The contestation process: a plea for greater efficiency
6. Construction sites: updating measures
7. Varia.

The changes mentioned in this article are not final and may well be amended in the months ahead during the coming parliamentary session.

1. Occupational diseases: modernizing processes and listing diseases

The Bill proposes to create new committees and to revise the list of occupational diseases enumerated at sect. 29 of the AIAOD.

- The Bill proposes to create a *Comité scientifique sur les maladies professionnelles,* a scientific committee on occupational diseases (the Scientific Committee), tasked with making recommendations concerning occupational diseases to the Minister and the *Commission des normes, de l'équité, de la santé*

et de la sécurité du travail (the Commission), after studying various occupational diseases, analyzing contaminants and identifying particular risks and the criteria for determining occupational diseases.

- Claims for oncological occupational diseases will be reviewed and processed under a unique procedure. The *Comité sur les maladies professionnelles oncologiques*, a committee on oncological occupational diseases (the Oncological Committee), will be established. It will automatically assess the state of health of all workers who have filed claims for oncological diseases, except where they are deemed to be suffering from an occupational disease contemplated by sect. 29 of the AIAOD or where they are subject to the medical assessment procedure established for lung occupational diseases. The Oncology Committee will evaluate the worker's illness and determine if there is a link between the occupational disease and the particular characteristics or risks associated with the work performed. The Oncological Committee must also take into account the opinions and recommendations of the Scientific Committee. The Commission will be bound by the conclusions of the Oncological Committee's reports.
- The Bill will establish a *Regulation on occupational diseases* (the Regulation), to determine which diseases fall under the occupational disease presumption enacted by sect. 29 of the AIAOD, as well as the eligibility criteria for making claims. The new *Regulation* will replace the AIAOD's present Schedule 1. Occupational diseases and their special conditions will be identified in Schedules A and B of the *Regulation*. Some diseases will be added to the list, for example post-traumatic stress disorder, as well as a whole division on oncological diseases that will add various types of cancer to the list, such as kidney cancer, bladder cancer, skin cancer, laryngeal cancer and prostate cancer. In addition, the special conditions related to hearing impairment caused by noise will be specified, which conditions and criteria are now set forth in the jurisprudence.

2. Preventive measures: large and small employers involved

The Bill proposes to enact a number of major amendments to the AOHS, particularly regarding prevention and worker participation mechanisms, based on the size of the concerned establishments and the risk levels of the activities conducted there. The Bill further enacts a *Regulation on prevention mechanisms*, providing rules applicable to prevention programs, health and safety committees and health and safety representatives. More specifically:

- A prevention program must be prepared and implemented in all establishments where at least 20 workers are employed during the year. Employers newly subjected to this provision will benefit from a grace period to facilitate the implementation of the prevention program, and the program must be updated annually thereafter.
- An employer hiring workers in more than one establishment where activities of the same nature are carried out may prepare and implement a single prevention program for all or part of its establishments. Such a prevention program must take account of all the activities carried out in those establishments and must be applicable for a period of at least three years.

- The prevention program must include, in particular, an analysis of the risks that could affect the health and safety of workers in the establishments, the measures or actions taken to address those risks, the supervision measures, the methods used to identify individual protective equipment and training programs.
- Every three years, employers must send to the *Commission des normes, de l'équité, de la santé et de la sécurité du travail* (the Commission), on a prescribed form, the priority of action items determined in its prevention program, as well as a follow-up report regarding the measures implemented to eliminate and control the risks identified by those priorities.
- Where a health and safety committee exists in an establishment, at least one health and safety representative shall be designated among the workers in that establishment. When the health and safety committee acting for establishments covered by a prevention program is formed, at least one health and safety representative is assigned to these establishments. The representative will have to follow a theoretical training approved by the Commission.
- Prevention mechanisms may also be required, as determined by regulation, where the employer hires less than 20 workers, because of associated risk levels (deemed medium or high, according to the North American Industry Classification System (NAICS Canada)). Under that Classification System, a number of merchant wholesalers (for example, in the food and beverage industry, large retail stores, construction materials and gardening) have, on average, a medium risk level rating. The mode of operation of these mechanisms will be flexible, but in the absence any agreement between the employer and the workers, the mode of operation will be that prescribed by the regulation.
- A register of contaminants and dangerous substances will replace the workstation risks specifications registry associated with certain jobs, provided for in section 52 of the AOHS.
- The Bill will modernize the creation of occupational health programs, under the general direction of the public health network.
  The preventive withdrawal program will be standardized. The Bill provides that the national public health director shall develop protocols to identify hazards and associated conditions of employment for the purpose of the exercising the rights provided for in sections 40, 43 46 and 47 of the AOHS that meet, in particular, the needs communicated to him by the Commission.
- The Bill also proposes to amend the AOHS to require employers to take the necessary measures to ensure the protection of a worker exposed in the workplace to a situation of physical or psychological violence, including spousal or family violence, by adding a paragraph to this effect to section 51 of the AOHS.

3. Rehabilitation measures: new guidelines

The Bill includes some major changes regarding rehabilitation measures:

- On accepting a claim for an employment injury, and before the consolidation of the injury, the Commission may grant the worker rehabilitation measures that are adapted to the state of his or her health and favour his or her vocational reintegration, in the cases and on the conditions set out in the AIAOD and the regulations. For that purpose, the Commission, in collaboration with the worker and the employer, may implement measures with the employer that favour the worker's reinstatement, in particular by developing his or her capacity to

gradually resume the tasks involved in his or her employment. Where the employer temporarily assigns work during the completion of the rehabilitation measures before consolidation, only the measures that compromise the assignment must be interrupted.

With respect to rehabilitation measures after consolidation, it is specifically provided that the employer's collaboration may be required, depending on the circumstances. Progressive return to work may also be imposed by the Commission.

- The Bill grants the Commission regulatory powers, including the power to establish guidelines concerning adapted equipment and the health services to which a worker who has suffered an employment injury is entitled, as well as medications and other pharmaceutical products. The Bill also intends to allow the Commission to provide rehabilitation measures prior to the consolidation of an employment injury, to expand the measures that ca be taken by the Commission and employers to promote reintegration into the workplace, including a requirement for the Commission to provide the worker with job search support services, and to make rehabilitation measures available to workers 60 years of age and older.
- Certain amendments concern the exercise of the right to return to work of a worker who has suffered work-related injury. The process of reviewing suitable employment is strengthened. For example, under the new section 170.3 AIAOD, the employer may presume to be able to reinstate the worker when they regain their ability to perform his or her job, an equivalent job or a suitable job available, even after the period for exercising the right to return to work has expired. In order to rebut that presumption, the employer must demonstrate the existence of undue hardship related to this return to work. This is a direct result of the Supreme Court of Canada's decision in the *Caron* case,[1] which held that the duty of reasonable accommodation in employment injury cases applies to the rehabilitation process and the determination of suitable employment.
- The Commission may order an employer who refuses to comply with the obligations set out in sections 170.1 and 170.2 AIAOD, or refuses to reinstate a worker despite a decision that establishes the worker's capacity to hold his or her employment, an equivalent job or a suitable employment, to pay the worker, within the period it specifies. The worker would be eligible to receive a monetary administrative penalty equivalent to the cost of the benefits to which the worker could have been entitled during the period of the employer's default, if any. That amount may not be greater than the annual amount of the income replacement indemnity to which the worker is entitled.
- The Commission provides job search support services to a worker who has suffered an employment injury when he or she is unable, as a result of the injury, to perform his or her job and becomes capable of suitable employment that is not available.

  The Commission also provides these services to a worker who has suffered an employment injury, whether or not he has suffered permanent physical or mental impairment. These services are also extended to the worker when he becomes capable of performing his job again after the expiry of the period for exercising his right to return to work and his employer does not reinstate him in his job or in an equivalent job.
- The Bill also contains certain rules applying to temporary work assignments. Section 179 AIAOD will be amended to provide that the employer is obliged to use a new form prescribed by the Commission to temporarily assign work to a worker. The physician in charge of the worker must also indicate on the form his

or her findings regarding the worker's temporary functional limitations resulting from the injury. That information cannot be the subject of any request from the *Bureau d'évaluation médicale* (the BEM) or of any contestation.

- In the event that a worker is assigned to work fewer hours than those normally provided in the course of employment, the employer will be required to indicate on the temporary assignment form the option it chooses with respect to the payment of the worker's chosen salary. The employer must therefore specify (1) whether it will pay the worker the same salary or wages and the same benefits to which the worker is usually entitled, or (2) whether it will pay the salary or wages and benefits but only for the of work provided for in the temporary assignment. The Bill also provides the employer with the possibility of modifying the option that it has chosen. However, this modification may only be made once for the same employment injury.

4. Cost Allocation: tightening the purse-strings

Major changes are expected to be made to the cost allocation items, and cost transfers and cost sharing are likely to be more difficult for employers to obtain:

- The Bill expands section 327 of the AIAOD which outlines the circumstances under which the costs of an injury will be imputed to the employers of all the units. According to the proposed changes, the Commission will now charge to employers in all the units the costs of:
    1. benefits due to an injury or disease that is recognized as an employment injury, despite having arisen solely as the result of a worker's gross and wilful negligence;
    2. benefits due to an injury or disease that is recognized as an employment injury, despite having arisen solely as the result of a worker's gross and wilful negligence;
- benefits for the health services, adapted equipment and other costs provided by reason of an employment injury, other than a hearing impairment caused by noise not resulting from an industrial accident, that does not render the worker unable to carry on his or her employment beyond the day on which this injury appeared. For example, the costs associated with occupational deafness (a hearing impairment caused by noise) would be officially imputed to all the employers.
- Section 327 of the AIAOD also maintains the rule imputing to all the employers the costs of an injury arising out of or in the course of care, medical activities or personal rehabilitation activities.
- The cost transfer provided for by section 326 of the AIAOD will be possible only if the imputation would have the effect of causing an employer to support unduly the cost of these benefits. The wording about the transfer of costs being possible if the employer is "unduly burdened" will be removed. In addition, the concept of "unduly burdening" will also be eliminated from section 328 of the AIAOD, which deals with occupational diseases. We must await the courts' interpretation of this change, but cost transfers under sections 326 and 328 of the AIAOD will probably be more difficult to obtain.
- With respect to cost sharing under section 329 of the AIAOD, the legislator will define what constitutes a "already handicapped worker" means, a notion that has been defined until now by case law. The proposed definition is the following: "a worker is already handicapped if, before his employment injury, he had a

deficiency causing a significant and persistent disability and if he is liable to encounter barriers in performing everyday activities".

- In light of the above-mentioned definition, we note that demonstrating a pre-existing handicap is likely to be much more difficult for employers. This proposed amendment to the AIAOD is a major one. Indeed, the definition provides that the disability must be "significant and persistent" and that the affected worker must encounter "barriers in performing everyday activities". Case law currently provides that a worker is suffering from a handicap if he has, at the time of the occurrence of the employment injury, a (physical or mental) disability that has an effect on production of the injury or its consequences.

Under the transitional provisions, the proposed modifications to the sections dealing with cost allocation will apply to applications for imputation made from the date when the Bill is sanctioned. We therefore recommend that employers file their cost sharing or cost transfer applications quickly.

5. The contestation process: a plea for greater efficiency

The contestation process will be more efficient and the Bill also provides for measures to counteract quarrelsome or vexatious litigators:

- The process for contesting Commission decisions will now allow the contesting party, in certain circumstances, to refer the dispute directly to the Administrative Labour Tribunal (the Tribunal), without first obtaining a decision from the *Direction de la révision administrative* of the Commission. Accordingly, any party who believes he or she has been wronged by a decision rendered by the Commission will be able, at his or her option, to apply for a review of the decision within 30 days of its notification or to contest it directly before the Tribunal within 60 days of its notification. However, only certain decisions may be contested directly before the Tribunal, namely:
    1. those dealing with a matter referred to in subparagraphs 1 to 5 of the first paragraph of section 212 AIAOD, following an opinion given by the BEM;
    2. those rendered under the second paragraph of section 230 AIAOD following an opinion rendered by a special committee;
    3. those rendered under the second paragraph of section 233.5 AIAOD following a report made by committee on oncological occupational diseases; or
    4. those rendered under Chapters IX (Financing) or X (Special Provisions for Employers Held Personally Responsible for the Payment of Benefits) of the AIAOD.
- When a decision that is the subject of a request for review is also challenged before the Tribunal, the Tribunal will refer the matter to the Commission for review. For example, if both parties contest the same decision, but do not seek the same type of challenge.
- Finally, section 365 AIAOD will be amended to allow the Commission to reconsider any decision it has rendered within six months (previously 90 days) to correct any errors, unless the decision has been challenged before the Tribunal.
- An amendment is proposed to the *Act to establish the Administrative Labour Tribunal* that will allow the Tribunal to prohibit, on application or on its own

initiative, any party whose conduct is vexatious or quarrelsome from commencing a matter, except with the prior authorization of the president or any other member designated by the latter, and subject to the conditions stipulated by the president or any other member designated by the latter.

6. Construction sites: updating measures

The Bill proposes interesting changes to prevent accidents on construction sites:

- When activities on a construction site simultaneously occupy at least 10 construction workers simultaneously at any stage of the work, at least one health and safety representative must be designated, as soon as the work begins, from among the majority of workers on the site. The minimum number of representatives and the minimum time spent on their duties will be determined by the new *Regulation respecting prevention mechanisms*. The representative will now also have to make recommendations concerning the work related psychosocial risks.
- The Bill provides for the addition of health and safety coordinators. Where activities on a construction site will require at least 100 construction workers simultaneously at any stage of the work, or where the total cost of the work exceeds $25,000,000, the principal contractor must, as soon as work begins, designate one or more health and safety coordinators. The minimum number of health and safety coordinators and the minimum time spent on their duties will be determined by the new *Regulation respecting prevention mechanisms*. The coordinator's duties will be set out in the Act, but will include, in particular, inspecting workplaces, identifying sources of danger, participating in the development of the prevention program, supervising the mechanisms for coordinating activities and ensuring that all workers are aware of the risks related to their work.
- The composition of work-site committee will be reviewed to include a health and safety coordinator, a representative from each of the employers, a health and safety representative and a representative from each of the representative associations. A work-site committee for a construction site employing 100 workers or more must meet at least once a week. Below that number, meetings remain mandatory every two weeks. The rules applicable to worksite committees will be set out in the new *Regulation respecting prevention mechanisms*.

7. Varia

Finally, the right to death indemnities for a worker's family, the discretionary powers of the BEM and the AIAOD fines will also be reshuffled:

- The right to claim compensation upon the death of a worker will henceforth be prescribed by five years from the date of the worker’s death.
- The discretionary power of the BEM will disappear. The member of the BEM will now be required to rule on points 4 and 5 when the employment injury is deemed o be consolidated by the BEM, unless medical reasons prevent him or her from doing so. Point 4 concerns the existence or the percentage of permanent physical or mental disability and point and 5 concerns the existence or assessment of the worker’s functional limitations.

- There will be a significant increase in the fines for non-compliance with the AIAOD[2]. In particular, fines for natural persons will be at least $1,000 and no more than $10,000 and for any other person (including legal persons), not less than $2,000 and no more than $20,000, if a person acts to obtain a benefit to which he or she does not know he or she is entitled, makes a false statement, obstructs or attempts to obstruct an investigation, audit or examination by the Commission or refuses to comply with an order. If there is no specific section of the AIAOD that addresses the offence committed, then the fine for an individual will be a minimum of $500 and a maximum of $1,000 and for any other person (including an individual) a minimum of $1,000 and a maximum of $2,000.

[1] *CNESST* v. *Caron*, 2018 SCC 3.

[2] Sections 461 to 465 of the AIAOD.

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