Working for Workers Four Act, 2023: Changes to Canadian employment law coming soon

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Salary ranges in job postings, disclosure of use of AI in the hiring process and other changes are coming soon for Ontario employers. The Ontario Government has laid out a roadmap for these changes in Bill 149, the *Working for Workers Four Act, 2023* (the Act).

On Nov. 14, 2023, the Ontario Government introduced Bill 149, the *Working for Workers Four Act, 2023.*

This new legislation would amend the Employment Standards Act, 2000 to (1) require employers to include expected salary ranges in job postings; (2) disclose if artificial intelligence (AI) is used in the hiring process; (3) clarify vacation pay timing requirements; and (4) create additional wage protections, including "trial periods" amendments. Amendments to other labour and employment-related legislation will also be made as part of this new legislation.

The Ontario Government has also indicated it will be launching NDA and critical illness leave-related consultations, which employers will want to keep a close eye on. Employers will need to take steps to comply with the new legislation, including the new job posting requirements (including record retention requirements) and ensuring "trial periods" are paid. It would also be an opportune time to consider a legal update of job postings, record retention policies and trial period policies, including employment agreements. While more details of this new legislation are forthcoming from the Ontario Government, the introduction of this new legislation provides employers with runway to plan for the impending changes.

This article builds on our article dated Nov. 7, 2023, in which we summarized the Ontario Government's announcement that this Bill would be forthcoming. Now that the Bill has been introduced in the legislature and it is a government priority, we expect it will only be a matter of time before it becomes law.

Job posting requirements

The Act will add a new job postings section to the ESA, containing three key requirements.

1. **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.** Parameters on the range of expected compensation and "publicly advertised job postings" are expected to be set out in regulations.
2. **Employers will be prohibited from including any requirements related to Canadian experience in a publicly advertised job posting or in any associated application forms.** The Act will create a carve out for publicly advertised job postings that meet criteria in regulations.
3. **If an employer advertises a publicly advertised job postings 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. "Artificial intelligence" will be defined in the regulations. Similar to the Canadian experience prohibition, the Act will create a carve out from this that meet criteria in regulations.

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. This will create yet another record retention requirement for employers.

The Act also amends the definition of "employer" to include "prospective employer", such that these new requirements will clearly apply to both employers and prospective employers.

These requirements will come into force "on a day to be named by proclamation of the Lieutenant Governor".

Vacation pay

The Act will amend the vacation pay sections of the ESA to clarify that employers cannot pay vacation pay at any time other than the "default"– including from paying vacation pay on each pay deposit – unless the employee has made an agreement with the employer that their vacation pay may be paid in a manner other than the default. In general, the "default" for when vacation pay is to be paid are: (1) in a lump sum before the employee commences their vacation; or (2) on the pay day on or before the pay period in which the vacation falls, if the employee does not take their vacation in complete weeks or if the employer pays the employee via permitted direct deposit. This set of amendments will come into force three months after the Act receives Royal Assent.

Trial shifts, deductions from wages and tips

The Act will amend the definition of "employee" in the ESA to include an individual completing a trial period. This effectively will prohibit unpaid trial periods (e.g., shifts). This prohibition does not appear to be restricted to the restaurant industry, so employers in general will want to take note.

The Act also would also state expressly that an employer 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.

Finally, the Act will amend the "tips and gratuities" section of the ESA, to create transparency requirements. Specifically, 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. This set of amendments will come into force on the day the Act receives Royal Assent, except that the amendments pertaining to tip pooling policies will come into force three months after the Act receives Royal Assent.

Other employment-related legislation changes

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

The Ontario Government has also announced that it will be launching consultations to restrict the use of NDAs in the settlement of cases of workplace sexual harassment, misconduct or violence. It will also be launching consultations to create and the creation of a new, job-protected leave for critical illnesses (like cancer) to match the length of the 26-week federal employment insurance sickness benefits.

Conclusion

Employers will need to take steps to comply with the new legislation, including the new job posting requirements (including record retention requirements) and ensuring trial periods are paid. In relation to this, it would be an opportune time to consider a legal update of job postings, record retention policies and trial period policies, including employment agreements. While more details of this bill will be forthcoming from the Ontario Government, the introduction of Bill 149 provides employers with runway to plan for the impending changes.

This article builds on our insight from Nov. 7, 2023, which summarizes the Ontario Government's announcement that this bill would be forthcoming. Now that the bill has been introduced in the legislature and it is a government priority, we expect it will only be a matter of time before it becomes law. 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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