Fixing Long-Term Care Act, 2021: Considerations for employers in Ontario

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Background

On December 9, 2021, Ontario's Bill 37, *Providing More Care, Protecting Seniors, and Building More Beds Act, 2021* received royal assent. Once proclaimed into force (at a date yet to be determined), Bill 37 will repeal the *Long-Term Care Homes Act, 2007* and replace it with the *Fixing Long-Term Care Act, 2021* (the Act). As set out in our prior article, the Act makes changes relating to staffing and care, accountability and transparency, enforcement, and licensing.

In this article, we highlight the changes from Bill 37 that will most impact long-term care homes in their capacity as employers – namely, the establishment of direct hours of care targets and other requirements in home operations.

Direct hours of care target

The Act establishes incremental targets for the average minimum number of hours of direct care to be provided to the residents per day. Direct care is hands-on care that includes personal care, such as help with eating, bathing and dressing, as well as other tasks such as helping residents move and providing medication. Prior to the Act, residents were receiving an average of two hours and 45 minutes of direct care from registered nurses, registered practical nurses and personal support workers.

The Act phases in the requirements gradually over time; ultimately, by March 31, 2025, the Act will require that an average of four hours of direct care be provided to residents by personal support workers and nurses, and by March 31, 2023, an average of 36 minutes of direct care must be provided to residents by allied health care professionals.

These metrics are determined by taking the total number of hours of direct care provided to residents in all long-term care homes, and dividing that number by the total number of residents in all long-term care homes. In other words, each long-term care home or resident will not be reviewed in isolation. As a result, the Act gives long-term care homes the autonomy to devise and implement individualized plans of care for residents and the flexibility to divide the time required between various care providers.

Moreover, the Act does not set out clear consequences for long-term care homes if the target is not met; rather, it aims to make system-wide changes to identify and rectify barriers to compliance.

To assist long-term care homes to achieve these targets, the Ontario government recently committed to provide $4.9 billion to hire more than 27,000 long-term care staff over four years. On March 15, 2022, the province announced that it would provide $673 million to long-term care homes in 2022 to hire and retain up to 10,000 long-term care staff across the province, leading to more direct care for residents. Further, the Ontario government has committed to provide $1.25 billion in 2023-24 and $1.82 billion in 2024-25. Further, the government has recently announced specific funding for certain regions to ensure Ontario's seniors receive the quality of care they require.

In line with the government's efforts to address staffing issues in long-term care homes, the government has also released Ontario's Long-Term Care Staffing Plan, which focuses on increasing staff, increasing education and training, supporting staff development, improving working conditions, providing effective leadership, and evaluating and measuring success.

Other obligations

The Act continues many of the existing obligations of long-term care homes, including requirements for certain operational programs. These include recreational and social activities, religious and spiritual practices, housekeeping services, volunteer programs, and an infection prevention and control program.

Additionally, the Act maintains the existing limit on temporary, casual, or agency staff. As the *Long-Term Care Homes Act* also states:

In order to provide a stable and consistent workforce and to improve continuity of care to residents, every licensee of a long-term care home shall ensure that the use of temporary, casual or agency staff is limited in accordance with the regulations.

The new Act's regulations in this respect, if any, are not yet published.

Considerations for employers

In implementing operational changes to achieve the direct hours of care targets and other obligations in the Act, employers should be mindful of the following considerations:

- **Sufficient staff will need to be engaged or available to provide the required levels of care**. Given that staffing shortages are already a challenge for employers in the sector, arrangements for contingent staffing or efforts towards recruitment and retention should be considered.
- To the extent that **employers might adjust existing employees' hours of work, availability expectations, and scope of responsibility, consideration should be given to compliance with applicable terms of employment**, including individual employment contracts and collective agreements for unionized staff. Unilateral changes could carry risk of constructive dismissal

claims or grievances alleging breach of applicable collective agreement provisions.

- **Employers should review and update their policies and procedures to incorporate these targets and methods of monitoring and complying with them**. Consider incorporating compliance with these targets as a metric for assessing overall organizational achievement, and even a basis for determining performance-based pay.
- **The term "allied health care professionals" is not defined by the Act and is open to be defined in further regulations**. Employers must be vigilant in keeping up with upcoming regulations and hire and/or allocate the specified hours to these health care professionals. It seems on the face of the Act that hours worked by personal support assistants are not counted towards the targets.

Takeaways

Employers should review the updates in the Act and amend their policies and practices accordingly to ensure compliance. This is particularly important since the Act has increased potential penalties to long-term care homes for offences under the Act: up to $1,000,000 for a corporation engaging in multiple offences. There are also administrative penalties of up to $250,000 for noncompliance under the Act, and powers to suspend or revoke licenses or place a home under management by the Ministry.

We will continue to monitor the progress of the Act and report of any related regulations. If you have any questions about the new *Fixing Long-Term Care Act, 2021*, please reach out to your BLG lawyer, or any of the key contacts listed below.

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