Recent Employment Law Amendments in Ontario: What Do They Mean for Employers Going Forward?

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The term “precarious worker” has taken on greater importance and a wider meaning over the last few months in Canada as well as elsewhere in the world.

Historically, the term applied to lower-skilled, lower-paid employees who had little or no protection in their employment, and often included those who had to take on multiple jobs to make a living. However, with the emergence of e-commerce and the gig economy, the term now also covers a different class of worker — one who may own his/her business, or at least controls much of it, but is nonetheless dependent on another entity. This class of worker includes the “dependant contractor” — a status that exists in Canada and elsewhere, but not in the United States.

Changes to statutory law in Ontario and Alberta will significantly impact this wider category. That being said, we point out that this shift is not solely a Canadian phenomenon.

The U.K. is looking at “rebranding” its worker categories (notably, the “dependent contactor” category, similar to Canada’s dependent contractor status) as evidenced by the Taylor Review. In addition, certain of the proposed changes tabled by the Macron government in France point in the same direction, and to a much wider protection in the future.

The changes are both startling and troubling in certain respects.

Limiting ourselves to the Ontario experience, Ontario is both Canada’s most populous province and the province with the highest number of private sector employees. The changes implemented have had both a financial and an operational effect on many of these employers, including small and medium-sized employers in Ontario.

While the changes to Ontario’s laws are expansive, some will directly relate to and/or impact these “precarious workers”.

Ontario’s Recent Employment Law Amendments

First, as of January 1, 2018, the minimum wage increased to $14.00 an hour, with an additional jump to $15.00 an hour on January 1, 2019. The January 1, 2018 increase represented an immediate and impactful boost of 21.7 per cent to the minimum wage in Ontario. One can only imagine the effect this change has had on small employers in the province. While it is true that all employers in Ontario have to follow the law, this disproportionately burdens employers who were fighting to survive before the increase.

Of equal if not even greater significance is that the change to the bottom of the wage scale will impact wage gaps and lead to the compression of wage scales. How will an employer explain to an employee with 20 years of service, for instance, that a relatively recent hire is earning close to the same figure? We suggest that the compression of wage scales may be the Achilles' heel for many Ontario employers in the months and years to come.

Second, there has been a major change to the rights afforded to these "precarious workers" in our economy. In an attempt to correct certain abuses which have existed in the past, contract employees who were often misclassified as independent contractors and not employees must now receive the same pay as regular employees unless there is some work responsibility justification to allow for a differentiation in pay. In short, it is only where such individuals perform different responsibilities or have similar but less responsibilities than regular employees that a difference in compensation will be allowed. These "equal pay for equal work" changes will have wide-ranging effect.

It should be noted that the province of Québec has had similar legislation since at least 1990 and which reads as follows:

Section 41.1 of Labor Standards Law
No employer may remunerate an employee at a lower rate of wage than that granted to other employees performing the same tasks in the same establishment for the sole reason that the employee usually works less hours each week.
The first paragraph does not apply to an employee remunerated at a rate of pay which is more than twice the rate of the minimum wage.

While the increase to minimum wage and/or the application of the equal pay for equal work provisions on contract employees are not unique to Ontario, the combined effect of both a 21.7 per cent increase to the minimum wage and a reconfiguration of the compensation models within a company will have long-standing and dramatic changes to both the economics of a business in Ontario and the desire of companies wanting to enter or stay in Ontario if, for example, their operations can be conducted elsewhere by engaging contract employees in other Canadian provinces or even abroad. To be clear, no one is suggesting that workers are not entitled to fair and just compensation and fair working conditions. In reality, the issue of contractuals and their right to benefits have been the subject of legislative change in other foreign jurisdictions such as the U.K., since at least 2013. However, where significant monetary changes occur rapidly in conjunction with other changes, there are enhanced risks and concerns for employers operating within that jurisdiction.

Third, effective January 1, 2019, employers will be restricted in changing employees' schedules, and employees with three or more months employment will be permitted to request schedule or work location changes. This represents more of an indirect cost to employers.

While there are many examples of abuse and unfair treatment in this area, there are many situations where, in good faith, employers should be able to either change hours or, in certain cases, cut back on hours. Interestingly enough, the amendment coming into force in 2019 raises the question of whether an employee has the right to request and receive a transfer to another location of the employer even if the employer does not require an additional employee in that location.

It is interesting to note that other Canadian provinces, including Ontario's neighbour, Québec, are looking at similar restrictions on changing schedules. Further, it is also interesting to note that Québec recently announced the largest increase to its minimum wage ever by moving from $11.25 to $12 as of May 1, 2018. Still, a far cry from the $14.00 in Ontario.

Impact of Ontario's Employment Law Amendments

While the reaction of employers in Ontario has been swift, it is the consequences of the above changes that have been most interesting.

For example, reacting to the changes and the need to find ways to finance the increased economic costs of a higher minimum statutory wage, certain employers announced that they were, among other things, cutting employee paid breaks and changing certain other benefits to "recoup" some of these added costs. Indeed, this occurred with a franchise that cut paid breaks and other benefits almost immediately after the legislative changes came into force.

The backlash, both from the public and the government, was equally immediate. And in response to same, the franchisor forced the franchisees to revert back to the existing practice of paid breaks. While at first glance, this was the correct thing to do from public image and legal points of view, it was the subsequent reaction that was noteworthy.

Many groups, including trade unions, publicly reacted by asking through the press, the question of who, in effect, was the employer of these franchise restaurant workers? Was it the franchisee or the franchisor? This very issue has been the object of a much publicized legal debate in the United States involving McDonalds and its cases before the NLRB. While it must be noted that McDonalds was not the restaurant in question in Canada, this issue in Canada should be of interest to our American friends.

Putting aside the issue of the effective employer, the only thing certain is that employers in Ontario and Alberta (and with proposed changes in both Québec and British Columbia looming) will need to carefully consider how to "fund" these added without resorting to downloading the cost to the consumer. The more novel the approach taken by these employers will be the real test of success.

In retrospect, the attempt to protect the "precarious worker" with these legislative changes has had, and will continue to have, a ripple effect throughout the entire Ontario economy and companies operating there.

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