Bill 148: What Could It Mean to the Retail, Service and Hospitality Sectors

June 13, 2017

On June 1, 2017, the first reading of Bill 148, *An Act to Amend the Employment Standards Act, 2000* (hereinafter referred to as the "ESA") *and the Labour Relations Act, 1995* (hereinafter referred to as the "LRA") *and to make related amendments to other acts*, was tabled by the Honourable K. Flynn, Minister of Labour.

As a general rule, the retail sector has suffered over the last few years and this is especially true in the brick and mortar space of the retail industry. Unfortunately, at first glance, some of the proposed amendments in Bill 148 will not make it any easier for retailers, service providers and the hospitality industry (hereinafter referred to as "employers") in the Province of Ontario.

These amendments fall into two specific categories. As you will see below, the first category encompasses those amendments which have a clear immediate effect on these employers in the province. The second category of amendments may have both either immediate or no effect on the employers depending, of course, on whether they are national employers with a national set of working conditions or, simply, operating from working conditions based on a province by province application. In this latter category, employers in Ontario will now need to carefully consider what changes to, among others, vacation entitlement, public holidays, and leaves of absence, they are both ready to make or need to make.

The most direct and major impact of Bill 148 is felt by the change to both the determination of minimum wage and the appearance of the concept of equal pay regardless of employment status under the ESA. As employers are now aware, the minimum wage will increase to $11.60 on October 1, 2017. However, based on the proposed amendments contained in Bill 148, the minimum wage will then increase to $14.00 on January 1, 2018 and then to $15.00 on January 1, 2019. A simple calculation between the October 1, 2017 minimum wage and the proposed increase for January 1, 2018 represents a **21%** increase in just the minimum wage, let alone, the direct effect on payroll deductions borne by these employers.

This is not only startling for employers but, at the same time, has certain direct implications for employers who have wage scales which provide employees with a higher hourly rate based on having completed a given number of hours within the

organization. As an example, many employers have wage scales which provide for a fixed hourly rate which will then increase upon the completion of a given number of hours of service within the operation.

Consequently, a 21% increase to the minimum wage in 2018 and then an additional 7% increase on January 1, 2019 will have a serious impact on the wage scales that an employer may pay in Ontario. As an example, any and all hourly rates less than $14.00 an hour as of January 1, 2018 and $15.00 an hour as of January 1, 2019 on the existing scale must be eliminated. This elimination will mean that employees will attain the higher rates more quickly and, at the same time, there will be an impulse on the part of these employees to increase the maximum rates beyond the existing maximum rates based on a higher start rate in 2018 and 2019.

In real terms, it is very likely that these employers will have to redraft their entire wage scales which will result not only in a higher initial start rate of, at least, $14.00 and then $15.00 but will, at the same time, force employers to give salary increases beyond $14.00 or $15.00 at threshold points (completed hours of work) which are much shorter than the required thresholds under present salary scales. As an example, under an existing wage scale, an employee who is entitled to $15.50 after completing 2,000 hours of accumulated service would under a proposed wage scale which commences at $14.00 or $15.00 an hour likely see a payment of $16.00 an hour upon completion of 1,000 hours as opposed to 2,000 hours under the old structure. This will mean, quite simply, that an employee would receive $16.00 an hour in half the time.

While these increases and the direct costs are difficult to compute at the present time, one can only imagine the consequences for an employer who does not increase its salary scales beyond the $14.00 an hour or $15.00 an hour minimum wage start rate. These could include, among others, the inability to attract proper talent to an employer or, at the same time, cause the rapid departure of long-service and well-trained staff who are “now” only being paid the minimum wage. Longer service employees may be upset that the wage differential between them and newly hired employees, who are paid the minimum wage, has diminished. Moreover, employers who do not adjust their salary scales could be met with union organizing campaigns as lost will be the argument that the employer pays "X" over the minimum wage. The potential consequences are both startling and extremely important for these employers to consider. Consequently, retailers should now consider what their salary scales may look like not only in early 2018, but also a more detailed and elaborate study should be done for the $15.00 an hour minimum wage proposed for January 1, 2019.

In addition to an increase in the minimum wage rate, the proposed amendments include other potential wage-driven costs for employers. Specifically, the amendments provide for a revised calculation of public holiday pay (discussed in further detail below) and they include a requirement that employees who hold more than one position be paid for overtime hours at the rate of the position they are working during the overtime period.

At the same time, Part XII of the ESA provides at Section 42.1 the following:

42.1 (1) No employer shall pay an employee at a rate of pay less than the rate paid to another employee of the employer because of a difference in employment status when,

(a) they perform substantially the same kind of work in the same establishment;

(b) their performance requires substantially the same skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

Exception

(2) Subsection (1) does not apply when the difference in the rate of pay is made on the basis of,

(a) a seniority system;

(b) a merit system;

(c) a system that measures earnings by quantity or quality of production; or

(d) any other factor other than sex or employment status.

Reduction prohibited

(3) No employer shall reduce the rate of pay of an employee in order to comply with subsection (1).

Based on this amendment, full-time and part-time employees performing the same duties will be entitled to the same salary. Although this type of provision already exists in, among others, the Province of Québec, Ontario employers must carefully examine whether their existing policies regarding wages are national in scope or province by province. In the latter case, these employers should look at not only the effect within the Province of Ontario, but also in other provinces where this type of provision does not exist. Consequently, these employers should carefully consider whether to implement such a rule as soon as possible nationally, including those provinces where language similar to Section 42.1 is not found.

Similarly, there are other amendments which may have a similar effect depending on whether, for example, a retailer has either a national set of working conditions or operates on a province by province basis. These amendments apply to, among others, Part X dealing with public holidays and the rules for calculating entitlement to pay under Sections 27, 28 and 30 of the ESA which are amended to require payment of premium pay for work on a public holiday instead of allowing a different date of celebration to be substituted. Further, Section 29 has been amended to establish new substitution rules when a public holiday falls on a day that would not ordinarily be a working day for an employee.

Previously, if employees were not scheduled to work on the day of the occurrence of the public holiday, such employee would receive public holiday pay equivalent to his or her wages earned in the preceding four weeks, divided by 20. Under the new amendments, an employer must calculate public holiday pay by taking the employee's wages earned in the previous pay cycle and dividing them by the number of days the employee worked.

Part XIV which deals with leave of absences have been amended to increase the entitlement to family medical leave from up to eight (8) weeks to up to twenty-seven

(27) weeks. While the leave of absence is without pay, this will, of course, oblige retailers to properly ensure that these absences are well-covered and human resources departments within these employers should be properly made aware of both their rights to require a medical certificate from a qualified health practitioner regarding the nature of the medical leave and, at the same time, properly understand the meaning of such terms such as "serious medical condition" with a "significant risk of death" as found in the proposed language of the ESA.

At the same time, significant changes have been made to the Personal Emergency Leave provisions, so that ten (10) days of leave, including two (2) newly paid days, will be available to all employees for such reasons as sexual violence, illness, injury or other urgent matters related to an individual or certain family members. The paid days will be required to be taken before the unpaid days. Under the amendments, employers would be prohibited from requiring employees to obtain and provide medical certificates to justify these leaves, even if an employer policy and/or collective agreement afforded the employer that right. The already difficult issue of attendance management appears set to become even more challenging for employers.

Your attention is drawn to Parts VII.1 and VII.2 of the proposed amendments which relate to requests regarding changes to schedule or work location and the specific issue of scheduling. First, at Section 21.2 of the proposed amendments, an employee who has been employed by his or her employer for at least three (3) months may submit a request, in writing, to the employer requesting changes to his employee schedule or work location. While the employer is given the right to accept or refuse the request, one can only imagine what future amendments to the ESA may be on the horizon or, sooner, what case law may be created under this section which could be along the lines of imposing on employers the obligations akin to workplace accommodation found in human rights cases. While time will only tell the levels to which the authorities may go to protect employees who make such requests, the amendments are also silent as to what are the obligations of the employer to respect the new location or, for that matter, the new schedule.

In this regard, one can easily ascertain the difficulty for employers in the retail sector to abide by these rules when one considers that hours within a store are developed over the years by studying customer tendencies, the number of customers that visit a store at given hours and the effect of special promotions on the number of customers in a store. These factors are used to determine the number of employees required at any given time during the retailers' hours of operation. Based on this, does this mean that the retailer will have to accommodate the transferring employee by removing one or more of the existing store employees from the schedule or would it be sufficient for an employer to be able to say that there are no hours available as requested and, equally as applicable, there are no positions available at the location required. Therefore, we cannot accommodate the request. The amendments are silent on this point.

At the same time, there are scheduling amendments of three (3) hours which will be applicable to employees who are regularly scheduled to work more than three (3) hours a day, required to present themselves for work, but work less than three (3) hours in the day. There are, of course, exceptions to the rule found at Section 21.3(2) which include, fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work. However, there is now an added obligation to a minimum of three (3) hours as set forth in the proposed amendments. Here again, the

legislation in Québec is identical and, therefore, retailers may be well wise to revisit this issue along with the issues mentioned above to determine whether a scheduling policy should apply nationally or on a province by province basis.

Putting aside the administrative amendments to the powers of investigators under the ESA, there remains one last important consideration which relates to practice of retailers hiring personnel staffing agencies to provide part-time staff to help during rush periods, such as, back-to-school or the holiday season. In this regard, Article 42.2 of the proposed amendments clearly states that a temporary help agency cannot pay an assignment employee who is assigned to perform work for a client at a rate paid less than the rate paid to an employee of the client where they perform the same kind of work in the establishment and which requires substantially the same skill, effort and responsibility and are performed under similar working conditions.

While this provision may seem difficult to understand, there are certain other jurisdictions in the world, including, the UK, where agency employees after forty five (45) days of work are required to receive the same salary as the regular employees of the employer working beside them.

Based on this last point, it is clear from the proposed amendments, that the Ontario Government is looking to help the lower paid and more vulnerable workers. Interestingly enough, this would not seem to be an isolated attempt, but rather in keeping with certain other jurisdictions including, Ireland, where in May 2017, the Irish government approved proposals for new legislation to increase the protection of the lower paid vulnerable workers. One thing is, however, abundantly clear, the idea here was to protect against violations which had been abundant in the Irish workforce as related to these low paid vulnerable workers. However, under the Irish law, there was no attempt to increase the minimum wage within a short period of time based on totally unreasonable and unrealistic percentage increases.

Aside from the ESA amendments, several changes to the LRA were also proposed. While these are more general in application, there are certainly, at least, a couple of amendments which are of particular importance to the employers within these sectors.

The first is found at Section 6.1(6) which states the following:

Board determinations, etc., no notice of disagreement

(6) The following rules apply if the Board does not receive a notice under without a vote b section (4):

1. If the Board determines that 20 per cent or more of the individuals in the bargaining unit proposed in the application under subsection (1) appear to be members of the union at the time the application was filed, the Board shall direct the employer to provide the list to the trade union.

2. If the Board determines that fewer than 20 per cent of the individuals in the bargaining unit proposed in the application under subsection (1) appear to be members of the union at the time the application was filed, the Board shall dismiss the application.

Leaving aside the entire question of the artificial threshold of 20%, subparagraph 1 of this subsection is particularly difficult to understand. There seems to be no logical justification for this provision other than making it more simple for trade unions to gain access to potential membership lists which, in our view, is contrary to the basic rule that employees are, at the same time, free to join or not join a trade union. It would also seem to give unions a greater right to file an initial application for certification, withdraw it before a vote (to avoid a bar from reapplying), and file a subsequent one shortly thereafter. We suggest that the proposed amendment may violate the right of employees in the Province of Ontario who do not wish to be represented by a trade union.

In addition, when one considers the decisions of the Supreme Court of Canada which accept both international treaties and international rules relating to labour and employment, it will be interesting to see whether this specific proposed amendment can withstand scrutiny in light of the right of employees to join or not join a trade union based on Convention No 87 and/or Convention No 98 of the International Labour Organization (hereinafter referred to as the "ILO"). As indicated, some days ago, our federal Liberal Government is proposing to sign Convention No 98 which, to date, Canada has not signed. Consequently, employers would be wise to consider the application of these conventions based on the reasoning of the Supreme Court of Canada in certain of its previous decisions and its effect on the individual rights of the employees contemplated by an application in certification and the proposed amendments contemplated by Section 6.1(6) (1).

The same types of consideration will apply in respect of a second amendment proposed dealing with the issue of applications for certification **without a vote** within certain industries as contemplated by Section 15.3. These types of employers are:

Application for certification without a vote, certain industries

Definitions

15.3 (1) In this section,

"building services industry" means, subject to the regulations, businesses engaged in providing services directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, **food services** and security services; ("*industrie des services de gestion d'immeubles*")

"home care and community services industry" means, subject to the regulations, businesses engaged in providing community services under the Home Care and Community Services Act, 1994 ; ("*industrie des services de soins à domicile et des services communautaires*")

"specified industry employer" means a person who operates a business in the building services industry, the home care and community services industry or the temporary help agency industry; ("*employeur d'une industrie déterminée"*)

"temporary help agency industry" means, subject to the regulations, businesses engaged in employing persons for the purpose of assigning them to perform work on a

temporary basis for clients of the employer. ("*industrie des agences de placement temporaire*")

The inclusion of the temporary help agency industry in these proposed amendments is of particular importance to employers in the retail industry who commonly increase staffing levels during inventory-taking, back-to-school and holiday seasons both their stores and distribution centres. We expect to see an increase in union organizing campaigns as a result.

Here again, attention must be drawn to the reasoning contained in the ILO's Committee of Experts' decision (ILO, 1996e, Case No. 1765, para. 100) wherein it was decided:

[W]hen national legislation provides for a compulsory procedure for recognizing unions as exclusive bargaining agents [representing all the workers, and not just their members], certain safeguards should be attached, such as: (a) the certification to be made by an independent body; (b) the representative organization to be chosen by a majority vote of the employee in the unit concerned; (c) the right of an organisation, which in a previous trade union election failed to secure a sufficiently large number of votes, to request a new election after a stipulated period; (d) the right of any new organization other than the certified organisation to demand a new election after a reasonable period has elapsed. *(highlighting ours)*

Therefore, based on the same considerations set out above in respect of Section 6.1 (6) of the proposed amendments, the application of ILO principles as determined by the Supreme Court of Canada which favour trade unions and their rights should also be applicable to employers and employees alike.

In essence, if the ILO principles are to be used to interpret and extend rights under labour relations statutes in Canada, the same reasoning should apply to provisions which attempt to ignore the ILO principles and diminish the rights of employers and employees.

Based on the reasoning of the Committee of Experts, the labour relations systems which exist in Canada (and the United States) should provide for a secret ballot vote of those individuals contemplated by the application in certification and not a card check basis for certification as contemplated by Section 15.1 of the proposed amendments under the LRA.

Finally, the amendments provide the OLRB with the authority to review the structure of bargaining units and, in certain circumstances, consolidate bargaining units of the employer that are represented by the same trade union. Any existing collective agreement between the employer and the union would then apply without modification to the consolidated bargaining unit. This is of particular concern to retailers with locations that are separately represented. Under the existing LRA, there is no process to consolidate bargaining units.

While time will tell whether these amendments will, in effect, come into law, it still remains prudent that employer groups and employers carefully consider potential challenges to the legality of, at least, these two (2) proposed amendments discussed above in light of the reasoning which our Supreme Court of Canada has followed over

the last number of years and the interpretation given to the ILO Conventions No. 87 and 98 by the Committee of Experts.

The road ahead is yet to be determined.

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