NORTON ROSE FULBRIGHT

Legal update

How do Bill 148 amendments to the ESA affect existing collective agreements?

December 2017
Employment and labour

It is hard to imagine a question more pressing for Ontario employers of unionized employees.

For the most part, the Bill 148 amendments to the minimum standard in the Ontario *Employment Standards Act, 2000* (ESA) will apply to unionized workplaces as of the effective date of the particular amendment. More specifically, Bill 148 ESA amendments – including with respect to the minimum wage, vacation entitlements, personal emergency leave and the new domestic and sexual violence leave – will "trump" a collective agreement if:

- the amendment provides a greater right or benefit than the employees are entitled to under the collective agreement;
- the amendment imposes a more onerous obligation on the employer than in the collective agreement; or
- the collective agreement is silent on the Bill 148 obligation or entitlement.

However, there are five circumstances in which an existing collective agreement will prevail over Bill 148 ESA amendments, albeit only for a designated transition period.

Collective agreement may prevail over "equal pay for equal work" provisions

There are two circumstances in which a collective agreement in effect on April 1, 2018, will temporarily prevail over certain Bill 148 amendments requiring "equal pay for equal work."

Difference in employment status (ESA section 42.1)

Under the Bill 148 reforms, an employer is prohibited from paying part-time, casual and other employees who do not have regular full-time status at a lower rate than what it pays regular full-time employees 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 their work is performed under similar working conditions. Further, an employer is not permitted to lower any employee's rate of pay in order to comply with the new statutory obligation. Bill 148 provides an exception to this "equal pay" requirement when the difference in the rate of pay is made on the basis of: a seniority system; a merit system; a system that measures earnings by quantity or quality of production; or any factor other than sex or employment status.

Employers with unionized employees may find temporary relief from the "equal pay" rule in section 42.1. If a collective agreement in effect on April 1, 2018, contains a provision that permits differences in pay based on employment status and there is a conflict between the provision of the collective agreement and section 42.1, the provision of the collective agreement will prevail until the earlier of the date the collective agreement expires and January 1, 2020.

Difference in assignment employee status (ESA section 42.2)

Bill 148 amendments prohibit temporary help agencies to pay assignment (i.e., agency) employees assigned to perform work for a client at a rate of pay less than the rate paid to an employee of the client if the following conditions apply: they perform substantially the same kind of work in the same establishment; their performance requires substantially the same skill, effort and responsibility; and their work is performed under similar working conditions. Note that Bill 148 provides an exception to this new requirement if the difference in the rate of pay is made on the basis of any factor other than sex, employment status or assignment employee status.

Clients of a temporary help agency may not reduce the rate of pay of an employee in order to assist a temporary help agency in complying with this new "equal pay" obligation. Similarly, trade unions or other organizations are not permitted to cause or attempt to cause a temporary help agency to contravene this obligation.

Again, there is some relief for unionized workplaces for a transition period. If a collective agreement in effect on April 1, 2018, contains a provision that permits differences in pay between employees of a client and an assignment employee, and there is a conflict between the provision of the collective agreement and section 42.2, the provision of the collective agreement will prevail until the earlier of the date the collective agreement expires and January 1, 2020.

Collective agreement may prevail over some Bill 148 scheduling provisions

There are only three circumstances in which a collective agreement in effect on January 1, 2019, will temporarily prevail over corresponding on-call and scheduling provisions in Bill 148.

Minimum pay for being on call (ESA section 21.4)

Under Bill 148, when an employee who is on call is not required to work, or is required to work but works less than three hours, the employer must pay the employee wages equal to at least three hours at his or her regular rate. An exception applies if the employer required the employee to be on call to ensure the continued delivery of essential public services, regardless of who delivers those services, and the on-call employee was not required to work.

This new three-hour rule comes into effect on January 1, 2019. However, employers of unionized workforces may be able to delay its implementation. The amendment expressly states that if a collective agreement in effect on January 1, 2019, contains a provision that addresses payment for being on call and there is a conflict between the provision of the collective agreement and section 21.4 of the ESA, then the collective agreement provision will prevail until the earlier of the date the collective agreement expires or January 1, 2020.

Right to refuse to work or be on call (ESA section 21.5)

Bill 148 gives employees the right to refuse a request to work/be on call on a day that they were not scheduled to work/be on call if the employer makes the request less than 96 hours in advance. However, an employee has no right to refuse the request to work/be on call if it is made to: deal with an emergency; remedy or reduce a threat to public safety; ensure the continued delivery of essential public services; or for any other reason that may be prescribed.

While this provision is set to come into effect on January 1, 2019, employers of unionized workforces can delay its implementation. If the collective agreement in effect on January 1, 2019, contains a provision that addresses an employee's ability to refuse the employer's request or demand to perform work/be on call on a day the employee is not scheduled to work/ be on call and there is a conflict between the collective agreement provision and section 21.5 of the ESA, the collective agreement prevails until the earlier of the date the collective agreement expires or January 1, 2020.

Cancelling a scheduled day of work or scheduled on-call period without sufficient notice (ESA section 21.6)

Bill 148 requires an employer to pay employees three hours of wages at their regular rate if the employer cancels their entire scheduled day of work or entire scheduled on-call period with less than 48 hours advance notice. Note that this new three-hour rule does not apply if the day of work or on-call period is shortened or extended.

Further, this three-hour rule does not apply if: (a) the employer is unable to provide work for the employee because of fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work; (b) the nature of the employee's work is weather dependent and the employer is unable to provide work for the employee for weather-related reasons; or (c) the employer is unable to provide work for the employee for such other reasons as may be prescribed.

As above, if the collective agreement in effect on January 1, 2019, contains a provision that addresses payment when the employer cancels the employee's scheduled day of work or on-call period**,** and there is a conflict between the collective agreement provision and section 21.6 of the ESA, the collective agreement prevails until the earlier of the date the collective agreement expires or January 1, 2020.

Rhonda Shirreff

For further information, please contact one of the following lawyers:

> Karen Jensen	Ottawa	+1 613.780.8673	karen.jensen@nortonrosefulbright.com
> Anne K. Gallop	Toronto	+1 416.216.4038	anne.gallop@nortonrosefulbright.com
> Rhonda Shirreff	Toronto	+1 416.203.4444	rhonda.shirreff@nortonrosefulbright.com