BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

Winter 2018

A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

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New *ESA* Obligations now in Force

Bill 148, which makes a number of amendments to the *Employment Standards Act, 2000* (ESA), the *Labour Relations Act, 1995*, and the *Occupational Health and Safety Act* (OHSA) received Royal Assent on November 27, 2017. This article will address the timeline of the coming into force of Bill 148's main amendments to the *ESA* and the *OSHA*.

November 27, 2017: Employers are now prohibited from treating a person who is their employee as if the person were not an employee under the *ESA*. The *OHSA* was amended that same day to prohibit an employer from requiring a worker to wear footwear with an elevated heel, unless it is required for the worker to perform his or her work safely.

December 3, 2017: The length of parental leave entitlement for employees was increased to 61 and 63 weeks.

January 1, 2018: The minimum wage was increased to $14.00 per hour, subject to certain employee exceptions.

All employees are now entitled to 10 days of personal emergency leave, two of which must be paid.

Employees whose period of employment is five years or more are now entitled to a minimum of three weeks of vacation per year.

Employees are now entitled to 12 weeks of pregnancy leave, instead of six weeks, in certain circumstances.

Employees are now entitled to up to 15 weeks of domestic or sexual violence leave for which the first five days are paid, under certain circumstances.

Certain rules regarding the calculation of overtime for employees who have two or more regular rates, and for the calculation of public holiday pay, are now into force.

Entitlements to family medical leave to support to any critically ill family member are now increased to 28 weeks.

April 1, 2018: The new Equal Pay for Equal Work provisions will come into force.

January 1, 2019: The minimum wage will be increased to $15.00, subject to certain exempted employees, and will be subject to an annual inflation adjustment on October 1st of every year, starting in 2019.

Certain requirements to provide employees a minimum of three hours' pay for shifts that are under three hours, as minimum pay for being on call, and in the event of cancellation of a shift with insufficient notice, come into force.

Employees will be permitted to refuse requests or demands to work on a day that they were not scheduled to work with insufficient notice.

Employees will be permitted to request changes to their schedule or work location and employers who receive these requests will be required to discuss them with the employee, and either grant them or provide reasons for a denial.

Bill 148 will implement a number of new requirements gradually throughout the year which will apply most provincially-regulated workplaces. Employers may wish to review their policies closely to ensure compliance with these new obligations.

Bill 164: "Catch-all" Prohibited Grounds under the *Human Rights Code*?

Bill 164, *An Act to amend the Human Rights Code with respect to immigration status, genetic characteristics, police records and social conditions*, was at its second reading on October 26, 2017. The Bill amends Ontario's *Human Rights Code* (Code) to add new prohibited grounds of discrimination: immigration status, genetic characteristics, police records and social condition.

The Bill defines these new grounds as follows:

- "immigration status" means the status according to Canadian immigration law;
- "police records" includes charges and convictions, with or without a record suspension, and any police records, including records of a person's contact with police;
- "social condition" means social or economic disadvantage resulting from, employment status, source or level of income, housing status, including homelessness, level of education, or any other circumstance similar to those aforementioned;
- "genetic characteristics" includes the right to equal treatment without discrimination because a person refuses to undergo a genetic test or refuses to disclose, or authorize the disclosure of, the results of a genetic test.

The Bill would further amend the provisions with respect to harassment and discrimination in employment to add these new prohibited grounds.

For provincially regulated employers, the broad definitions of "police records" and "social condition" contained in Bill 164's amendments to the Code appear to create catch-all grounds for individuals. These new grounds could thus likely augment the number of workplace complaints, and applications to the Human Rights Tribunal. The Bill is slated to come into force on the day it receives Royal Assent. Bird Richard will keep you apprised of the developments of this Bill.

Provincial Government Prepares for the Legalization of Recreational Cannabis

The provincial government of Ontario has introduced Bill 174 in preparation for the coming into force of the *Cannabis Act* (or Bill C-45). As previously reported, if it is approved by Parliament, Bill C-45 could become law with a target date of no later than July 2018, legalizing recreational cannabis across Canada.

Bill 174 was at its second reading on November 23, 2017, and enacts the *Cannabis Act, 2017*, the *Ontario Cannabis Retail Corporation Act*, *2017* and the *Smoke-free Ontario Act, 2017.*

The *Smoke-Free Ontario Act, 2017* will restrict the places where cannabis may be consumed. Specifically, no person will be permitted smoke or hold lighted medical cannabis, or consume a prescribed product or substance, in:

- an enclosed public place;
- an enclosed workplace
- a school;
- a building or the grounds surrounding the building of a private school, or the grounds annexed to a private school;
- any indoor common area in a condominium, apartment building or university or college residence, including, without being limited to, elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, lobbies and exercise areas;
- a child care centre;
- a place where home child care is provided, whether or not children are present;
- a place where an early years program or service is provided;
- the reserved seating area of a sports arena or entertainment venue.

"Enclosed workplace" is defined in Bill 174 as the inside of any place, building or structure or vehicle or conveyance, or a part of any of them, that is covered by a roof, that employees

work in or frequent during the course of their employment whether or not they are acting in the course of their employment at the time, and that is not primarily a private dwelling.

These restrictions are subject to certain exemptions, such as controlled use areas in long-term care homes, and designated hotel rooms.

The *Smoke-Free Ontario Act, 2017* will place obligations on employers and proprietors with respect to the places where the prohibitions apply such as:

- ensuring compliance with the prohibitions on consumption noted above;
- providing notice regarding the prohibitions to consumption to each employee in the enclosed workplace or other place or area;
- post any prescribed signs respecting these prohibitions throughout the enclosed workplace, place, or area, including washrooms;
- ensure that no ashtrays or similar equipment remain in the enclosed workplace, place, or area, other than a vehicle in which the manufacturer has installed an ashtray;
- ensure that a person who refuses to comply the restrictions on consumption does not remain in the enclosed workplace, place, or area.

Bill 174 prohibits reprisals against employees for acting in accordance with, or seeking enforcement of their rights under the *Smoke-Free Ontario Act, 2017.*

Bill 174 further provides that an inspector may, without a warrant or notice, and at any time, enter and inspect any of the places where prohibition on consumption apply, the establishments of the manufacturers, wholesalers, distributors and retailers, and any place where the inspector has reasonable grounds to believe that an activity regulated or prohibited under the *Smoke-Free Ontario Act, 2017* is taking place.

If the inspector finds that an employer is not complying with its obligations under the provisions of the *Smoke-Free Ontario Act, 2017*, it may direct the employer or a person whom the inspector believes to be in charge of the enclosed workplace, place, or area to comply with the provision and may require the direction to be carried out forthwith, or within such period of time as the inspector determines.

The Bill in its current form essentially mirrors existing employer obligations regarding tobacco products and extends these obligations to cannabis products. Bird Richard will keep you apprised of the coming into force of this Bill.

EI Extended Parental Benefits are now in Force

Changes to the Employment Insurance (EI) parental benefits regime and related leaves under the *Employment Insurance Act* and *Canada Labour Code* came into force on December 3, 2017. As previously reported, this new regime, enacted under Bill C-44, will to allow parents to choose between:

- an extended period of EI parental benefits of up to 18 months at a lower benefit rate of 33 per cent of average weekly earnings; or
- to remain at the existing benefit rate of 55 per cent of average weekly earnings over a period of up to 12 months.

In other words, employees will be able to opt for a prolonged parental leave, will receive the same amount of EI benefits in total, but spread out in smaller payments over the longer period.

The new amendments also include a benefit for family members to care for a critically ill adult, and allow for benefits to care for a critically ill child to be payable to family members.

Before making any revisions to your workplace policies, we recommend consulting a labour and employment lawyer.

Policy on Mandatory Standby Shifts was Unreasonable and Unfair, Supreme Court of Canada Holds

In *Association of Justice Counsel v. Canada (Attorney General),* the Supreme Court of Canada considered the scope of the "management rights" clause contained in a Collective Agreement between the Government of Canada and the Association of Justice Counsel (AJC) and struck down a mandatory requirement for government lawyers to be available for standby shifts for urgent immigration applications that might occur outside of regular working hours.

In unionized workplaces, labour arbitrators recognize management's residual right to control the workplace and unilaterally impose workplace policies that do not conflict with the terms of the collective agreement. Management rights must be exercised reasonably and consistently with the collective agreement. In this case, the Collective Agreement, provided that the management rights clause had to be exercised "… *reasonably, fairly and in good faith.*"

At issue was a workplace policy that imposed mandatory after-hours standby shifts for the lawyers who worked in the Immigration Law Directorate in the Quebec Regional Office of the Department of Justice. The Government claimed that

the policy was necessary to deal with urgent immigration applications that occur after-hours. Before the implementation of the policy, the employer had created a voluntary standby shift system whereby lawyers were given time off as compensation irrespective of whether or not they were actually called into work while on standby duty.

In the fall of 2009, the AJC and the employer finalized a Collective Agreement. As a result, many lawyers became eligible for overtime pay. In March 2010, the Director of Immigration Law Directorate in the Quebec Regional Office informed the lawyers that they would no longer be paid for periods of time on standby, and would only receive compensation for hours worked. Each qualified lawyer was required to cover 1-3 weeks per year. A grievance was filed claiming that the directive was unreasonable and unfair. The adjudicator agreed and ordered the employer to stop applying the directive.

The Supreme Court upheld the adjudicator's decision. The Supreme Court cited the well-established approach to determining whether a policy that affects employees is a reasonable exercise of management rights in the "balancing of interests" assessment. This requires a consideration of all of the surrounding circumstances such as the nature of the employer's interests, whether less intrusive measures were available and the policy's impact on the employees. In this case, the Supreme Court agreed that the adjudicator's decision fell within a range of acceptable outcomes and that the policy was not a reasonable exercise of management's rights. The key factors were:

i. Similar "availability clauses" are generally negotiated in exchange for some form of compensation;

ii. Policies that impacted the workplace during normal working hours are distinguishable from policies that impact time outside of regular working hours;

iii. There was no mention of standby time in the lawyer's employment contracts or job descriptions so the adjudicator questioned the necessity of mandatory standby availability without compensation;

iv. While standby duty may not have been taxing or onerous work (1-3 weeks per year), the adjudicator recognized that was a period of time during which the employer exercised a degree of control over the movements and activities of lawyers in their personal time.

The takeaway for employers is that this decision appears to focus on the negative impact that the policy had on the lives of the employees outside of their regular working hours. Conversely then, it could be argued that an employer has a wider latitude for making operational policy decisions that impact the workplace during regular working hours, provided that there is no conflict with other terms and conditions of a collective agreement.

Court of Appeal of Alberta Upholds Random Drug and Alcohol Testing Policy

In *Suncor Energy Inc. v Unifor Local 707A*, the Court of Appeal of Alberta held that arbitration panel's decision to strike down Suncor's random drug and alcohol policy was unreasonable.

You may recall that Bird Richard previously reported on the arbitration award and the lower court decision of this case. The employer, Suncor, implemented random drug and alcohol testing for workers in safety-sensitive positions at some of its sites in the Fort McMurray area. Unifor, the union, grieved the policy on the basis that it infringed the unionized workers' privacy rights. The majority of the arbitration panel ruled in favour of the union. The Court of Appeal agreed with Suncor that the arbitration decision was unreasonable because:

- The arbitration panel set a higher threshold than articulated by the Supreme Court in *Irving* by requiring evidence of a serious or significant problem with drugs and alcohol rather than a general one.
- The arbitration panel only considered evidence of drug and alcohol use amongst employees who were members of the bargaining unit. The entire workplace ought to be considered.
- The arbitration panel overlooked important evidence presented by Suncor relating to "security incidents". This resulted in the exclusion of evidence regarding alcohol and drug use pertaining to almost two-thirds of the oil sands operations workers.

The Court of Appeal of Alberta reiterated that the test to meet to justify a random drug and alcohol testing policy was whether there was sufficient evidence of enhanced safety risks, such as a general problem with substance abuse in the workplace.

As previously reported, for employers, this decision provides clarification into the standard for implementation of random drug and alcohol testing policies in the workplace. In particular, employers who can demonstrate that there is a "general" problem with drugs and alcohol may be able to justify the implementation of random drug and alcohol testing for safety-sensitive positions.