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LAWYERS FOR EMPLOYERS

EMPLAWYERS'™ UPDATE

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A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

- Naloxone Kit Requirement 1
- Bill 124 2
- Employment Insurance 3
- Hybrid Return-to-Work Plan 3

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Naloxone Kit Requirement

Lifesaving Kits with Mandatory Policy Effective June 1st, 2023

Each year, there is an increasing number of deaths caused by opioid overdoses. The Ontario government has reported 2819 fatalities in 2021. The Naloxone kit will provide employers with the ability to reverse an opioid overdose allowing adequate time for the ambulance to arrive. This temporary solution will restore the individual's breathing within 2-5 minutes. The program offers employers with free training sessions for up to two employees. Those who believe their employees are at-risk or may witness an opioid overdose can also obtain a Naloxone kit for free through the training program or their local pharmacies.

The requirement will come into effect in Spring 2023, and is required if employers have reason to believe that any of their employees may require this kit. This is extremely vague but if there is a suspicion of opioid abuse in the workplace, employers should inform themselves of the province's new obligation through the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

The risks of opioid overdoses may be relevant in different workplaces therefore, the employer may want to consider:

1. The risk of worker opioid overdose;
2. The risk that the worker overdoses while in the workplace; and
3. The risk that is posed by a worker.

The contents of the kits are reflective of different medical conditions, ensuring that all who may require usage of the Naloxone kit will be using the approved and licensed medical devices of Health Canada. Employers may want to update their policies to reflect the restrictions regarding access to the kit. They may consider clarifying the limited access as it is strictly for those who have been trained. For example, the "ought to be aware" element suggests that an employer

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may be required to be informed if there are circumstances that raise suspicion (i.e., employee acting strange, pills at the workplace, co-worker complaint). Furthermore, the "fitness for duty" policy can require that when the employee comes to work, their physical, mental and emotional state does not pose a risk to themselves or others.

The new requirement has specific maintenance standards that are outlined in the *Occupational Health and Safety Act*, subsection 25.2 under *Ontario Regulation* 559/22, including:

- Every naloxone kit shall be used, stored and maintained in accordance with the manufacturer's instructions;
- The contents of each naloxone kit must be kept in a hard case;
- The contents of each naloxone kit must be for a single use and promptly replaced after such use;
- The contents of each naloxone kit must not have expired;
- The names and workplace locations of the workers who are in charge of the naloxone kit in the workplace and who have received the training referred to in subsection 25.2 (3) of the *Act* shall be posted in a conspicuous place in the vicinity of the kit where their names and workplace locations are most likely to come to the attention of other workers.

Bill 124

Premier Doug Ford has formally appealed the Court's decision that deems Bill 124 to be unconstitutional and therefore is void

What Bill 124 Means:

Bill 124 came into effect on November 8, 2019 providing a three-year compensation window for non-union and unionized employees. The *Act* restricts wage increases to 1% per year for a three-year moderation period applying to both collective agreements and arbitration awards.

The purpose of Bill has been consistent in ensuring that Ontario's public services remain protected. As a result, the *Act* sought to consider the province's fiscal management responsibilities, seeking sustainability, which is significantly impacted by public sector compensation.

Decision:

In the recent decision of *Ontario English Catholic Teachers Assoc. v. His Majesty*, 2022, ONSC 6658, the Court struck down the legislation as contrary to section 2(d) of the Charter of Rights and Freedoms, the right to freedom of association. In doing so, it noted six ways that Bill 124 challenged collective bargaining and workers' rights:

- It limits "the scope of bargaining over wage increases";
- It prevents unions from "trading off salary demands against non-monetary benefits";
- It prevents the collective bargaining process from addressing staff shortages;
- It interferes with the convenience of the right to strike;
- It intervenes with the autonomy of interest arbitration; and
- It contributes to an imbalance of power, jeopardizing the employer and employee relationship.

Justice Markus Koehnen concluded that:

"In determining whether the right to a process of collective bargaining has been infringed, the courts assess whether the measure disrupts the balance of power between employees and employer necessary to ensure the meaningful pursuit of workplace goals so as to "substantially interfere" with meaningful collective bargaining."

The Ontario Government has formally appealed the decision.

The province has argued that the law did not necessarily infringe on constitutional rights. The consideration is that the *Charter* is meant to protect the process of bargaining and not the outcome and that ensuring sustainability is a valid objective. The Ontario Government also notes the Bill is a time-limited approach, which has clearly outlined the intention to control costs, eliminating the deficit that has been increasingly affecting the province. For now, Bill 124 does not exist, which will surely have an impact on collective bargaining for the public sector. We will keep you posted.

Employment Insurance

The Extension of Sickness Benefits from 15 to 26 Weeks

As provided for in Bill C-30, which came into effect on June 29, 2021, the Government of Canada has extended the maximum sickness benefit allowance. The 15-week period has now permanently changed to 26 weeks, which was implemented as December 18, 2022. The extension of the program provides employees with a wider-variety of criteria to accommodate reasonable circumstances. It will also provide access to seasonal workers in specific areas of the country.

Section 9 (s.s. 13) of the *Employment Insurance Act* has been amended accordingly to ensure that the sickness benefits cover new circumstances that have arisen from the pandemic. An example of this is the quarantine period, which has had a major effect on employers.

Sickness Benefits

To obtain sickness benefits through the Employment Insurance program, employees must prove their eligibility meets with EI standards. In order to be eligible, an employee must establish, through a signed certificate by the claimant's medical practitioner:

- They are unable to work for medical reasons;
- Their regular weekly earnings from work have decreased by more than 40% for at least one week;
- They accumulated at least 600 insured hours of work in the 52 weeks before the start of their claim or since the start of their last claim, whichever is shorter; and
- If it weren't for their medical condition, they would otherwise be available for work.

The Government of Canada has mentioned that their updated benefit program is intended to reflect the changes resulting from the pandemic. An example of this is considering quarantine, a "special" benefit, equivalent to regular sickness benefits, qualifying applicants with for 26-week maximum period. The efforts of considering societal changes are expected to continue to ensure that the EI program reflects the various circumstances of employees.

Following this amendment, employers may want to review their employment agreements and collective agreement provisions related to short-term and long-term sick leave policies. The extension of EI sickness benefits from 15 weeks to 26 weeks may also have an impact on eligibility for long-term disability benefits and applicable waiting periods.

Hybrid Return-to-Work Plan

PSAC opposed to the government's hybrid work plan implementation

What is the Government's Hybrid Work Plan?

In December 2022, the Federal Public Sector Labour Relations and Employment Board announced their plan to transition workers to a hybrid work system. This plan was expected to commence on March 31, 2023, with a mandatory policy for federal public servants to return to their offices at least 2-3 days a week or equivalent to 40-60% of their schedule.

The Public Service Alliance of Canada has publicly stated its intention to challenge this, implying that the implementation of such a plan is illegal, as there are ongoing negotiations that have yet to be resolved in bargaining. By implementing such a plan, the union is filing a "statutory freeze complaint". With over 80% of its members in agreement, they seek to challenge

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the hybrid return-to-work plan, claiming it has failed to prioritize more pressing bargaining concerns, such as:

- The need for work-life balance;
- The inability to produce fair wages;
- Protections against harassment and discrimination in the workplace; and
- Accommodation in the workplace and other significant topics of discussion in labour relations.

The union began advocating remote work in the spring of 2022 when the Canada Revenue Agency announced that changes were being considered. As of December 20, 2022, the union decided to proceed with this challenge when breaking off their mediation with CRA on the first day. As this new policy becomes mandatory, PSAC advocates that by its next collective agreement, a remote work program would have already been implemented. Since they believe there was no consideration for the ongoing bargaining, they plan on collectively challenging the hybrid return-to-work plan before it is implemented. The plan advocates for a hybrid program, considering the challenges the pandemic has created for federal public servants and allowing there to be a reasonable expectation that they return to the office partially.

The Statutory Freeze Complaint

It is important to note that a statutory freeze does not prohibit the employer from making normal business changes or operating as usual (i.e. implementing reasonable workplace policies). The purpose of filing a statutory freeze complaint against the Treasury Board and such agencies is to emphasize that there are ongoing negotiations with 80% of federal public service workers. The statutory freeze provision can put a "freeze" on changing the wages, working conditions and conditions of employment during bargaining.

The Treasury Board (as employer) will argue that such changes are entirely within their management rights and that the imposition of a hybrid work system is a reasonable exercise of that power. The significance is that prior to the pandemic, employees were not guaranteed any right to work from home. There is no question that the pandemic altered the landscape, but it may not be reasonable to suggest that management does not have the right to require its employees to attend the workplace. This may be viewed as an arbitrary intrusion upon legitimate management rights.