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employment and labour relations bulletin

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Bill 139 - New Rights for Temporary Workers

Last month, the Ontario Government introduced Bill 139, the *Employment Standards Amendment Act (Temporary Help Agencies)*, 2008 (the "Bill"). The proposed legislation is part of the Government's Poverty Reduction initiative designed to aid low income workers. Over 700,000 people in Ontario have temporary jobs, many through temporary help agencies. As a result, the Bill will impact a wide range of employees and employers, if passed.

Currently, the Ontario *Employment Standards Act*, 2000 (the "ESA") does not specifically (and separately) address temporary workers or, as the Bill refers to them, "assignment employees". It is important to note that this Bill does not apply to a temporary worker performing professional services, personal support services, homemaking, or an individual or an employer of an individual who contracts with a community care access corporation.

The main purpose of the Bill is to create additional substantive protection for temporary workers, including the elimination of the "elect to work" exemption from notice of termination and severance pay requirements of the ESA. While the Bill is only in the preliminary stages (the 1st Reading was December 9th), it is expected to pass. Several critical changes are outlined below, including a change that has already been made via Regulation 432/08 to the ESA with respect to public holiday pay.

Elimination of the Finder's Fee

Temporary agencies typically charge a significant "finder's fee" to prevent or discourage a client from hiring a temporary employee permanently. Under the proposed legislation, temporary agencies would be prohibited from charging a "temporary to permanent" fee where the employee has been working for the client company for six months or more. This six-month period begins from the first day the temporary employee performs work for the client company and is not paused or interrupted by gaps in service, volume of work or the duration of the assignment. Therefore, in theory, a client company could employ an assignment employee for the month of December and hire the employee permanently the following July without incurring a finder's fee. This six-month waiting period is likely inconsequential for most employers, as most will typically wait at least this long before directly hiring an assignment employee.

Elect to Work Exemption

Currently, the ESA contains special rules for employees who are considered "elect to work" employees. Elect to work employees are individuals who are employed under an arrangement

whereby the employee may elect to work on any given day of the week, when work is offered. A temporary employee may be considered to be elect to work, if he or she can choose to accept or reject an agency assignment, without incurring negative consequences. Due to the flexible nature of elect to work employment, these employees are presently exempt from full public holiday entitlement, notice of termination and severance pay under the ESA.

Quite apart from the Bill, the Government recently passed Regulation 432/08, which eliminates the public holiday exemption for elect to work employees, effective January 2, 2009. As a result, elect to work employees now have the same rights to public holidays as any other employee in Ontario.

If Bill 139 is passed, the Government intends to enact another Regulation removing the elect to work exemptions from notice of termination and severance pay obligations. This change could result in significant cost consequences for employers in the event of restructuring or mass termination.

Termination and Severance Obligations

The Bill outlines notice of termination and severance pay requirements that specifically apply to temporary employees. Of particular note, a temporary worker's employment is deemed to be terminated where the temporary employee has not been assigned to perform client work for a period of 35 weeks or more.

Implications for Temporary Agencies

In addition to the aforementioned changes, the Bill proposes a myriad of new rights for temporary employees. Specifically, temporary agencies would be prohibited from charging fees to employees for: (i) agency employment, (ii) job search assistance, and (iii) placement and/or permanent employment with a client company. The Government's rationale is that as temporary agencies already charge the client business a fee for the placement of a temporary worker, charging the employee for the same service amounts to "double dipping".

Temporary agencies would also be required to provide workers with specific information about the agency, each work assignment and employee rights under the ESA.

What Bill 139 Means for Employers

The proposed legislation was created to address a perceived gap in employment standards legislation. The changes, however, may come as a shock to both temporary agencies and employers who have relied on temporary workers. Employers who directly employ temporary workers must be mindful of the new statutory rights and obligations proposed in this Bill.

However, the Bill is not all bad news for employers. The elimination of the finder's fee will likely remove a costly impediment to the movement of temporary workers into direct employment, where this is desired.

As noted above, this Bill is still in the early stages of development. In the interim, any member of our Employment and Labour Relations Group would be pleased to discuss the consequences of this proposed legislation.

Written by Cheryl Thacker and Darryl Hiscocks

A Cautionary Note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

About McMillan's Employment and Labour Relations Group

The members of the Employment and Labour Relations Group have the expertise and experience to deal efficiently and effectively with all matters rising out of employment and labour law, as well as planning for legislative changes, structuring of business activities, and any other related matters.

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