Manitoba’s New Labour Landscape: What You Need To Know About The Amendments To The Labour Relations Act

Whether you have been actively following along or have heard it mentioned in passing, if you work in the unionized context, you are probably aware that the labour landscape in Manitoba recently underwent a fundamental shift.

With the passing of Bill 37 on November 7, 2024, and more specifically, its associated Schedule D, *The Labour Relations Amendment Act*, employers and unions alike will now have to learn how to navigate what can only be characterized as a radically different legal terrain relating to strikes and lockouts.

Below, we discuss some of the key changes that employers and unions would do well to make note of as we enter into this new era of labour relations.

(1) Certification

Under previous legislation, a union wishing to certify a new bargaining unit was required to file an application with the Labour Board demonstrating that they had the support of at least 40% of the employees in the proposed unit. If that threshold was reached, the matter then proceeded to a representation vote. Barring any challenges by the employer, the ballots cast would be counted, and if a majority of employees voted in support of it, the union would be certified.

Although the representation vote still exists, the legislative changes have reintroduced the concept of automatic certification. Now, where a union can demonstrate the support of more than 50% of the employees in a unit, the Labour Board is required to declare it as the certified bargaining agent without a vote.

To be sure, the change is not entirely unexpected. Prior to it being repealed by the PC government in 2016, unions could be automatically certified upon demonstrating the support of 65% or more of the employees in any proposed unit. So, the amendments are not necessarily new, but they certainly demonstrate a more union-friendly shift, even from the previous NDP government.

Despite the change to the certification procedures, there have been no corresponding amendments to the provisions relating to the termination and cancellation of bargaining rights. Still required by those provisions is the support of “a majority

of employees in a unit" and, even then, a vote is mandatory unless the union does not oppose the application.

The amendments will also allow for certification on an interim basis, where a dispute about the composition of a proposed unit will not affect the ultimate outcome. While seemingly innocuous, these provisions provide a significant tool to the parties, permitting them to begin the bargaining process pending the issuance of a final certificate, avoiding any unnecessary delays.

(2) Essential Services

The second, and arguably more substantial change, is the introduction of new provisions relating to essential services. With the passing of these amendments, unions and employers in a unionized workplace will have to turn their minds to whether they provide essential services or not. Under the new legislation, parties are now, during a strike or lockout, obligated to continue the supply of services, operation of facilities or the production of goods to the extent necessary to:

(a) prevent a threat to the health, safety or welfare of residents of Manitoba;

(b) maintain the administration of justice; or

(c) prevent a threat of serious environmental damage.

The exact parameters of what will qualify as an 'essential service' remain to be seen as our Labour Board adjudicates disputes over the issue and develops case law accordingly. However, parties will now have to engage in what is, effectively, a multi-step process to ensure that they comply with their obligations under the legislation. No strike or lockout can occur unless those steps are taken.

At the first stage of the process, the parties must determine no later than 180 days before the expiry of their collective agreement whether an essential services agreement (ESA) is required or not. If the parties are unable to agree within this timeframe, then either party may make an application to the Labour Board, which can designate the supply of services that it considers necessary to comply with the essential services provisions.

Important to note is where it is agreed by the parties that no ESA is required, for example, where the collective agreement contains an interest arbitration provision or where the affected industry is simply not "essential," that agreement still needs to be filed with the Labour Board.

While the Board has, pursuant to the amendments, the ability to issue guidelines to assist in determining whether an ESA is required, parties should not expect these to be forthcoming any time soon. It will likely take the Board some time to build up the body of case law necessary to provide meaningful direction. In the interim, parties may want to look toward British Columbia, where similar provisions have been in place for some time, for guidance on how our Labour Board may apply and interpret the new amendments.

Once it has been determined that an ESA is required (either by consent or Board order), the parties must enter into such agreement no later than 90 days before the expiry of the collective agreement. The ESA is required to set out the level of services needed, as well as the minimum staffing levels required to ensure continued operation.

If the parties cannot agree on an ESA within the prescribed timelines then, again, either party may make an application to the Board, which has the authority to

determine the manner and extent to which the parties must continue to supply services. The parties can, however, enter into an agreement themselves at any time prior to the Board making a determination.

Where the Board has made an order with respect to the ESA, either party can subsequently re-apply to the Board for a finding that the order substantially interferes with meaningful collective bargaining. Where the Board finds that this is the case, it can order that all matters remaining in dispute between the parties be settled by way of an interest arbitration and a subsequent imposed agreement. Again, how the Board will be defining "substantial interference" remains to be seen as the case law develops.

The formal process by which parties can apply to the Board for either an essential service designation or an ESA has now been established and is available on their website, along with the necessary forms. Notably, as the amendments require the Board to render a decision within 30 days of receiving an application, relatively short filing deadlines (days versus weeks) have been imposed:

- any party wishing to file an Application for Determination if an Essential Service Exists or an Application for the Settlement of an Essential Services Agreement must first complete the Application package and serve it on the other party prior to filing it with the Board;
- within three (3) working days of the Application being accepted by the Board, the responding party must file its reply;
- on the next business day following the deadline for the filing of a reply, the Board will hold a case management conference to set hearing dates; and
- the hearing must commence within 14 days of the Application being filed.

Given the compressed timelines, parties would be well advised to plan and prepare accordingly. This includes ensuring the availability of counsel, as the Board has indicated that extensions of time will only be granted in extenuating circumstances. It also includes ensuring that the affiant of any supporting affidavit evidence is available for cross-examination at the hearing.

The takeaway from all of this for both employers and unions is that the parties would do well to turn their minds to the issue of essential services well in advance of the timelines set out in the legislation. Failing that, the parties could find themselves having their time and attention diverted away from collective bargaining to what will likely be a fast-paced and involved process at the Board.

To try and assist parties, the Board has confirmed that, even outside of the prescribed timelines regarding essential services, it is available to provide support and assistance. This includes allowing unions and employers to seek a Board determination pursuant to s.142 of *The Labour Relations Act* at any time.

At the end of the day, an ESA bargained between the parties can contain whatever terms and conditions the parties can agree upon, not only in terms of how the essential services will be carried out, but any premiums or other concessions that might be warranted, whereas the Board will simply impose the terms of the collective agreement. The parties may, accordingly, be much better off agreeing upon an ESA than having one imposed on them.

(3) Replacement Workers

Assuming that the parties have agreed that an ESA is required (or not as the case may be), and have managed to work out the terms of any such agreement, the legislated amendments set out strict rules regarding the use of replacement workers.

Now, if the union has initiated a strike or the employer has commenced a lockout, the employer is prohibited from hiring a person outside the organization to perform the work of a unionized worker. In addition, an employer also cannot:

- use the services of employee who normally works at another workplace of the employer, other than management or individuals employed in a confidential labour relations capacity, such as human resources;
- transfer someone in from another location of the employers;
- use the services of an employee who is in a unit not involved in the strike or lockout; or
- engage the services of a person in the unit on strike or lockout to perform work.

There are, of course, exceptions to these general rules, but they are limited. Broadly speaking, the use of replacement workers may be permitted if the employer can demonstrate that, not to allow it, could result in:

1. a threat to life, health or safety of any person;
2. a threat of destruction or serious damages to the employer's property or premises; or
3. a threat of serious environmental damage,

and they are unable to address the situation by any other means. Again, the exact parameters of these exceptions are currently unclear, and more guidance from the Board on the issue is required. That said, parties would do well to exercise caution when considering this exception as failure to properly adhere to the legislation could result in an unfair labour practice complaint being filed.

The Fine Print

Employers and unions should obtain specific legal advice as this article is intended only to raise awareness of the changes and issues posed by *The Labour Relations Act* amendments.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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