Ontario Employment Law Updates: Working For Workers Four Act, 2024 Passes, Working For Workers Five Act, 2024 Introduced

In Ontario, the pace of change to employment standards legislation remains relentless.

Bill 149, the *Working for Workers Four Act, 2024* ("**Bill 149**"), received royal assent on March 21, 2024. Further, Bill 190, the *Working for Workers Five Act, 2024* ("**Bill 190**"), was presented for first reading on May 6, 2024, and is now open to public consultation and comments.

Both Bill 149 and Bill 190 are the latest in a series of legislative initiatives that have been introduced under the "*Working for Workers*" banner since 2021. Each piece of legislation seeks to address various contemporary issues within Ontario workplaces. For example, Bill 149 addresses pay transparency and artificial intelligence used by employers in hiring processes. Bill 190 similarly proposes to implement legislation to increase transparency in hiring processes and limit what documentation an employer can request from an employee on sick leave.

Working for Workers Four Act, 2024: Pay Transparency, Disclosure of AI and Other ESA Amendments

Among other amendments to various pieces of legislation, Bill 149 introduced several amendments to the Ontario *Employment Standards Act, 2000* (the "**ESA**"). As set out below, certain notable amendments come into effect as of June 21. Other amendments will come into effect at some point in the future, as proclaimed by the Lieutenant-Governor.

Changes Effective June 21, 2024

a) Vacation Pay Arrangements

Effective June 21, 2024, the ESA will be amended to require employers to make express agreements with employees in respect of the timing for the payment of vacation pay.

Under the current regime, employers are required to pay vacation pay to an employee in a lump sum *before* an employee commences their vacation. However, employers may

alternatively pay vacation pay as wages are earned (i.e., as a percentage on each paycheque), provided that the employee consents to this payment timeline. When an employee then takes their vacation time, they do so on an unpaid basis. Such an arrangement is often preferred by employers with hourly or short-term employees.

However, Bill 149 modifies the current regime and indicates that the alternative pay structure is only permissible if it is set out in an agreement between an employee and employer.

In addition, while the current regime permits employers to pay vacation pay at a time mutually agreed upon with the employee, **Bill 149 modifies this by requiring that the timing of vacation pay must be specifically set out in an agreement between an employee and employer.**

Employers should review the vacation pay practices and provisions in their employment agreements and/or workplace policies to ensure that the timing of vacation pay is expressly set out, and therefore expressly agreed to, by employees.

b) Tips and Gratuities

Bill 149 introduces several amendments concerning the handling of tips and gratuities.

Effective June 21, 2024, employers may disburse employee tips by way of cash, cheque payable to only the employee, direct deposit or some other prescribed method of payment. If payment is made by cash or cheque, the employer must ensure that this is given to an employee at his or her workplace or some other place agreeable to the employee. If payment is processed by direct deposit, the employer can pay tips or gratuities into a bank account only if certain criteria have been met, that is, if the account is selected by the employee and is in the employee's name, and no other person other than the employee, or a person authorized by them, has access to the account.

Further, if an employer has a policy in respect of sharing of tips (commonly referred to as "tip pooling"), the employer is required to post and keep posted a copy of the policy in at least one place in their establishment where the policy is likely to come to the attention of employees. In addition, an employer is required to retain copies of any written policy in respect of sharing of tips or other gratuities that is required to be posted for a period of three years after it is no longer in effect.

Changes Coming Soon

The following amendments will come into force on a future date and, specifically, on a date to be proclaimed by the Lieutenant-Governor:

a) Pay Transparency

Employers who post a publicly advertised job posting are required to disclose either the expected compensation or a range of expected compensation. The range of expected compensation shall be subject to conditions, limitations, restrictions or requirements as may be prescribed.

b) Artificial Intelligence

Employers who post a publicly advertised job posting and who use artificial intelligence to screen, assess or select applicants for the position must include in the posting a statement disclosing the use of artificial intelligence. Select publicly advertised job postings may be exempt from this requirement, as may be prescribed.

c) Canadian Experience Requirements

Employers who post a publicly advertised job posting are prohibited from including any requirements relating to Canadian experience in the posting or any associated application form. Select publicly advertised job postings may be exempt from this requirement, as may be prescribed.

d) Retention Obligations: Publicly Advertised Job Postings

Employers are required to retain or arrange for the retention of every publicly advertised job posting and any associated application form for a period of three years after public access to the posting is removed.

e) Further Guidance Anticipated

As set out above, **Bill 149 contemplates the release of clarifying regulations in respect of the amendments set out in this article.** In addition to stipulating the conditions, limitations, restrictions or requirements that may be prescribed in respect of pay transparency requirements, or the various potential exemptions in respect of disclosure of artificial intelligence or Canadian experience requirements, Bill 149 is express that the phrases "*artificial intelligence*" and "*publicly advertised job postings*" are to be defined by way of a regulation.

Employers can expect guidance from the Ontario government in the coming months and in respect of the new requirements, in addition to confirmation from the legislature as to the date on which select requirements will come into force.

In the interim, Ontario employers should start to review their practices in respect of job postings and the manner in which candidates are screened for publicly posted positions. When clarifying regulations are introduced, and when the Ontario government sets a date for such amendments to have effect, employers will want to be in a position of readiness.

Introduction of *Working for Workers Five Act, 2024*

Bill 190 proposes several notable amendments to the ESA, alongside amendments to other pieces of legislation, including the *Occupational Health and Safety Act* ("**OHSA**").

Notable Proposed Amendments to the ESA

a) Job Applications and Interviews

Bill 190 proposes that all publicly advertised job postings must include a statement disclosing whether the posting is for an existing vacancy or not. This is meant to

address the practice of posting jobs to survey the market rather than fill a vacancy. Further under Bill 190, when an employee has interviewed for such a position, employers will be required to provide, within a defined period of time, certain prescribed information to an applicant in respect of the interview. In addition, Bill 190 contemplates retention obligations for employers in respect of the information provided to applicants for a period of three years after the day the information was distributed.

Again, clarity in respect of the above requirements is expected as Bill 190 goes through the legislative process and, further, as regulations are introduced.

b) Sick Leave and Employer Requests for Evidence

Under the current regime, employees who have been employed with an employer at least two consecutive weeks are entitled to an unpaid leave of absence of up to three days per calendar year due to a personal illness, injury or medical emergency. Note that this type of leave is separate and distinct from any unpaid leave of absence that an employee may be entitled to pursuant to the Ontario *Human Rights Code*.

The ESA presently permits employers to request evidence that is reasonable in the circumstances from an employee who requests this type of leave. **Bill 190, however, introduces a prohibition on employers requiring an employee to provide a certificate from a "qualified health practitioner" as reasonable evidence.**

Employers should take note of this change when addressing employee absences.

c) Increased Penalties for Offences by Individuals

Bill 190 proposes to increase the fines for individuals who contravene the ESA or fail to comply with an order, direction or other requirement under the legislation. If passed, such individuals will be subject to a maximum fine of $100,000 (increased from $50,000).

Proposed OHSA Amendments and in Relation to Virtual Workplaces

In recognition of the fact that more and more workplaces are allowing their employees to perform their work remotely or on a hybrid basis, Bill 190 proposes expanded definitions of "*workplace harassment*"and "*workplace sexual harassment*"in the OHSA.Bill 190 proposes to expand these definitions by including conduct that occurs virtually through the use of information and communications technology so as to address any form of virtual harassment.

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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