Third Big Change To The Labour Relations Act: Essential Services

This is the third article in a series about major amendments to The Labour Relations Act of Manitoba (the "Act"), which came into force November 7, 2024. You can read the previous article on amendments regarding automatic certification here: Second Big Change to The Labour Relations Act: Prohibition on Replacement Workers During a Strike or Lockout
And you can read the article on the replacement worker ban during a strike or lockout here: They're Here . . . . New Labour Relations Act Amendments Make Unionizing Easier

This article addresses the maintenance of essential services during a strike or lockout in provincially regulated workplaces in Manitoba that are subject to a collective agreement. (Federally regulated workplaces are subject to essential services provisions of the Canada Labour Code.)

Before the newly amended Act came into force, essential services in Manitoba during a strike or lockout were limited to the healthcare sector and government employees by specific essential services legislation. Those laws have now been repealed, and the new essential services provisions of the Act apply to every provincially regulated workplace in Manitoba that is covered by a collective agreement.

The Act now requires that the employer, union and bargaining unit employees continue services, operations or production during a strike or lockout to the extent necessary to:

1. prevent a threat to the health, safety or welfare of residents of Manitoba;
2. maintain the administration of justice; or
3. prevent a threat of serious environmental damage.

The Act sets out a two-stage process, which generally involves:

1. Determining if there are essential services, and identifying them; and
2. Reaching an Essential Services Agreement.

Determination of Essential Services

The employer and union are required to file a determination with the Labour Board 180 days before expiry of their collective agreement. Even if the parties agree that no essential services are required, they still must file a joint determination to that effect with the Board.

If the employer and union can't reach a joint determination, then either party may apply to the Board for a determination. The Board would then order whether and what essential services are required to be maintained during a strike or lockout. The Board may also intervene and change the agreement made between the employer and union if it disagrees with the parties' joint determination, whether that be to declare certain things essential or not.

Essential Services Agreement ("ESA")

After the determination is made as to what is essential, an ESA must be negotiated. The parties must file an ESA with the Board at least 90 days before expiry of the collective agreement. The ESA must set out the manner and extent to which performance of essential services will be continued. This includes the number of employees required and scheduling of the work under the ESA.

If the parties don't agree, either party may apply to the Board, which has the power to order terms for an ESA to comply with the required provision of essential service. The Minister responsible (currently the Minister of Labour and Immigration), may also refer a question to the Board as to whether an ESA provides the required essential services.

Substantial Interference

Depending on the nature of the operation, an ESA may have little impact or a material impact on bargaining unit work that would otherwise cease during a strike or lockout. If either a union or employer believe that an ESA "substantially interferes with meaningful collective bargaining" either can apply to the Board for such a determination. If the Board makes such a finding, the Board "may" order that all matters in dispute be imposed using the Board's existing collective agreement imposition procedures (for strikes or lockouts of at least 60 days).

Procedure

Note that these requirements apply to every round of collective bargaining. It may be the case that it is "rinse and repeat" after an initial determination and agreement. However, many workplaces evolve over time to add or subtract certain elements that may be essential services for the purposes of the Act, and so it may not be quite as simple as being able to re-file the previous ESA.

The Labour Board has recognized the potential for litigation over these issues, with aggressive deadlines in the Act. The Board must make an order on a disputed essential services determination or ESA within 30 days of filing with the Board. It has created procedures specific to essential services, which are published in its Rules of Procedure. The timelines in the Act are very short and unforgiving for replies to applications, and for the Board to order on disputed determinations and ESAs. Parties will have to serve materials on each other (normally done by the Board for other applications under the Act). Affidavit evidence will be required. In order to facilitate the expedited nature of these issues, new forms have been created.

The new Rules also provide that Board may appoint a Board representative or another person to assist in resolving issues. The Board has also indicated in a recent informational session that it is willing provide assistance to parties if they contact the Board prior to an application, working collaboratively rather than resorting to litigation.

In that informational session, the Labour Board acknowledges that they don't know the expiry dates of all collective agreements and they are not in a position to "police"

the essential services requirements by prompting parties to collective agreements about these new essential services requirements, at least yet. However, the Board indicated that it intends to begin compiling essential services determinations and agreements for future reference.

In any event, an obvious and substantive requirement of these amendments is that there can be no legal strike or lockout without first having gone through the essential services determination and agreement (if applicable) processes.

Interpretation

Essential services legislation and language is not uniform across Canadian jurisdictions. It remains to be seen how the essential services language will be interpreted by the Labour Board. Specifically, what will be considered a threat to the apparently broad word “welfare” or what will have to be demonstrated to reach the level of “serious environmental damage” if disputed.

Next Steps

There is a lot to unpack here. Every provincially regulated workplace in Manitoba with a collective agreement will be subject to the essential services amendments, to a greater or lesser extent.

The Board is going to hold two public information sessions via Teams and has invited employers and unions to attend by emailing MLB@gov.mb.ca with name, email organization and the date of attendance. These sessions are scheduled for Wednesday, December 11, 2024 from 1:30 p.m. to 3:00 p.m. and Tuesday, December 17, 2024 from 12:00 p.m. (noon) to 1:30 p.m.

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.

Authors: Ken Dolinsky, Mark Alward

Taylor McCaffrey LLP