Amendments to Quebec's Act Respecting Labour Standards: Employers, Please Fasten Your Seat Belts, This May be a Bumpy Ride

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Now that the summer is nearly over and the year-end period is not far away, many employers take this time to review their practices and policies and ensure that they are well equipped to address new legal and human resources challenges.

When so doing, employers must remain mindful of Bill 176, which has received royal assent and which amends the *Act Respecting Labour Standards* (the "**Act**"). The very name of the *Act to amend the Act respecting labour standards and other legislative provisions mainly to facilitate family-work balance*, suggests a focus on the theme of family-work balance, which coincides with one of the focus of the 2018 provincial election. While many of these amendments became effective as of June 12, 2018, many others only enter into effect on later dates, including on January 1, 2019.

The statutory amendments to the Act essentially center on four (4) general themes: (i) Work-life balance; (ii) Equity, including intergenerational equity; (iii) Stricter regulation of employee leasing agencies and (iv) Psychological harassment. The key amendments to the Act are summarized below.

Work-life balance

As opposed to Ontario's decision to raise the minimum wage significantly, the Quebec government's position is that workers, and particularly younger workers, are looking for work-life balance. The amendments to the Act reflect this rationale.

Among other modifications, employees are now entitled to more vacation time and employers are subject to additional restrictions with respect to working hours. Below are some examples of key amendments:

1. Vacation: Effective January 1, 2019, employees will be entitled to three (3) weeks of vacation per year upon reaching three (3) years of service (as opposed to as of five (5) years under the previous version of Section 69 of the Act).

2. Work hours: Effective January 1, 2019, Section 59.0.1 of the Act is amended so that employees can refuse to work more than two (2) hours after regular daily working hours (as opposed to four (4) hours under the previous Act). Employees will also have the right to refuse work outside of their normal schedule, when they are not advised that they would be required to work at least five days in advance, subject to certain exceptions.

In addition, an employer and an employee may agree in writing on the staggering of working hours on a basis other than a weekly basis, without the authorization of the CNESST, subject to certain prescribed conditions.

3. Statutory holidays: Where a statutory holiday falls on a day that is not part of an employee's regular work schedule, the employee is now entitled to the statutory holiday indemnity, under Section 64 of the Act.

4. Sick leave: Statutory leave in case of sickness, accident or organ or tissue donation (under Section 79.1 of the Act), remains at 26 weeks over a 12-month period, but now also applies to leaves in cases of domestic violence or sexual violence of which the employee has been a victim. Moreover, effective January 1, 2019, the requirement for employees to have three (3) months of service in order to be eligible for statutory sick leave will be removed.

   Effective January 1, 2019, an employee with three (3) months of continuous service or more, will be entitled to a maximum of two (2) days of paid leave during a given year due to sickness, an organ donation, an accident, domestic violence or sexual violence or for reasons related to the care, health or education of family members.

5. Family or parental leaves and absences: The provisions respecting statutory leave for the fulfillment of family or parental obligations now clarify the term "relative" and are broadened to include certain days of absence for the benefit of a relative, other than a family member, including a person for whom an employee acts as caregiver.

   Effective January 1, 2019, Section 79.7 of the Act is amended to add that an employer may request that an employee who is absent for reasons relating to the care, health or education of family members provide a document attesting to the reasons for the absence where circumstances so warrant.

   The statutory leave in the case where the employee must stay with a relative because of a serious illness or a serious accident (under Section 79.8 of the Act) is broadened to include, in addition to relatives, a person for whom the employee acts as caregiver. Moreover, the leave is increased to 16 weeks (previously 12 weeks) over a 12 month-period, and 36 weeks over a 12-month period if the relative or person is a minor child.

   Section 79.8.1, added to the Act, provides for a statutory leave of not more than 27 weeks over a 12 month-period where the employee must stay with a relative or person for whom the employee acts as a caregiver as a result of a serious and potentially deadly illness, attested by a medical certificate.The statutory leave following the disappearance of a minor child (under Section 79.10 of the Act) is increased from 52 weeks to 104 weeks, and employees are now entitled to a leave of 104 weeks in the event of the death of a minor child. Moreover, employees are now also entitled to a leave of up to 104 weeks (previously 52 weeks) in the event of the death of a spouse, father, mother or major child as a result of a suicide.

   Effective January 1, 2019, the paid days of absences for the statutory bereavement leave (under Section 80 of the Act) will be increased to two (2) days, whereas the Act previously provided that only one (1) of the five (5) days of absence was paid.Effective January 1, 2019, the two (2) first days of absence as a result of the birth or adoption of a child or where there is a termination of pregnancy in or after the twentieth week of pregnancy (under Section 81.1 of the Act) will be paid notwithstanding the length of service of the employee.

Equity and Intergenerational Equity

The amended Act also aims to enhance workplace equity with respect to wages, including by amending Section 41.1 of the Act, to ensure that an employee does not receive a lower remuneration than colleagues performing the same tasks at the same establishment, "solely because of the employee's employment status", and in particular because the employee works fewer hours each week. By contrast, the previous version of the Act prohibited lesser remuneration on the sole basis that an employee works fewer hours each week, but did not incorporate the more general, and potentially vague, concept of "employment status". These provisions will enter into effect on January 1, 2019.

Moreover, in what may be its most controversial provision, Section 87.1 of the amended Act adds a new restriction regarding so-called "orphan clauses".

The previous version of Section 87.1 of the Act already prohibited orphan clauses, meaning the application of less favourable conditions of employment to an employee solely on the basis of the hiring date, but only with respect to certain matters covered by the Act itself, which according to case law, did not encompass orphan clauses with respect to group insurance and pension plans.

As such, many employers created two-track benefit and pension plans. For example, many employers grandfathered existing employees under Defined Benefit pension plans, but provided that all employees hired after a certain date would only participate in a Defined Contribution pension plan.

The amendments to the Act would no longer permit these arrangements, as they expand the scope of the prohibition of orphan clauses under the Act, to specifically encompass "pension plans and other employee benefits".

That said, the modification of Section 87.1 of the Act would only apply prospectively as of June 12, 2018, and would not apply retroactively to prohibit orphan clauses which existed prior to that date.

Employee Leasing Agencies and Temporary Foreign Workers

The Act also incorporates substantial modifications which are aimed at regulating employee leasing agencies. These provisions will come into force upon adoption by the government and entry into force of a regulation pertaining to employee leasing agencies..

Firstly, the prohibition against paying workers less because of their employment status is expressly expanded to cover agency employees (under Section 41.2 of the Act). This means that an agency worker may not be paid less than employees performing the same tasks at the same establishment, solely because of his or her employment status, including the fact that he or she is paid by an agency or typically works fewer hours per week.

Secondly, personnel placement agencies and recruitment agencies for temporary foreign workers (e.g. employed under work permits), will be subject to a requirement to obtain a license from the *Commission des normes, de l'équité, de la santé et de la sécurité du travail* (CNESST) in accordance with regulations (to be enacted). Employers will not be permitted to retain the services of such agencies who do not possess the required license.

Thirdly, employers hiring temporary foreign workers are subject to additional obligations, including the obligation of advising the CNESST upon hiring a temporary foreign worker of the worker's date of arrival, the duration of his or her contract and, if the date of departure does not coincide with the date of termination of his or her contract, the date and reasons for the departure. Furthermore, employers cannot charge fees to temporary foreign workers for their recruitment except those authorized under a Canadian government program, and they may not require temporary foreign workers to entrust them with personal documents or property (presumably, such as passports or permits).

Psychological Harassment

Presumably influenced by current social issues and movements and the recent legislative changes in Ontario, the legislator has chosen to expand the definition of psychological harassment, provided at Section 81.18 of the Act, to now expressly include sexual harassment. This amendment essentially codifies existing jurisprudence.

Moreover, effective January 1, 2019, Section 81.19 of the Act is amended to expressly require employers to adopt psychological harassment prevention policies and the handling of complaints, including a component concerning conduct manifested by verbal comments, actions or gestures of a sexual nature. This new legislative requirement is consistent with the importance given in case law to the adoption of such policies.

Importantly, the time limit for the filing a complaint by an employee alleging psychological harassment is increased from 90 days to two (2) years from the last incident of the offending behaviour. This is an important change that was not provided in the original Bill but later introduced through amendments.

Finally, subject to employee consent and procedures to be agreed to between the two entities, the CNESST must now advise the Human Rights Commission (the *Commission des droits de la personne et des droits de la jeunesse,* "**CDPDJ**") of any harassment claims filed before the CNESST which includes a discrimination component. This provision may create a systemic tendency for multiplication of procedures and recourses.

Conclusion

While concerns over intergenerational equity are laudable, it must be noted that the amended Act introduces certain potentially vague concepts, such as the concept of "employment status" as a prohibited basis of reduced pay. Moreover, the amendments to the Act impose severe measures that can have a significant impact on the costs associated with the use of agency workers, and could ultimately deprive many companies of crucial flexibility in this regard.

More generally, the amendments to the Act appear to be fundamentally driven by concerns over equity and work-life balance, but fail to account for concerns of flexibility in the workplace and the ability of the Act to keep up with the pace of technological developments.

In fact, even when they attempt to take common sense measures that are self-evident nowadays, the amendments tend to fall short of addressing some legitimate employer concerns. For example, the Act is amended to allow payment of wages by bank transfer, but it fails to clarify how employers may issue electronic pay stubs and fails to resolve jurisprudential debate on that issue.

Moreover, considering that existing provisions of the Act with respect to psychological harassment already protected against sexual harassment, the modifications in this regard appear more esthetic than substantive, except for two key modifications: the extension of the prescription period for psychological harassment claims from 90 days to two (2) years, and the CNESST's new obligation of systematically advising the CDPDJ of harassment claims with a discrimination component. These key modifications will continue the steady increase that employers are witnessing of sexual harassment and gender-based discrimination complaints. Employers must ensure that they are well-equipped to address these issues so as to protect their legitimate interests as well as the rights of their employees.

In terms of next steps, among other things, employers should :

1. Ensure that they have a harassment policy in place, and if so, update the policy to reflect the new legal requirements;
2. Ensure that employees receive frequent training on the harassment policy, and that managers and HR professionals are well equipped to handle complaints;
3. Review the compensation of agency workers to identify any potential exposure with respect to wage discrepancies between agency workers and direct employees performing the same tasks at the same establishment; and
4. Review handbooks, vacation and other policies to make sure that the company is compliant with the new requirements of the Act and the enhanced vacation and leave entitlements of employees.