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Bill 148 - Six Months Later - Changes to the *Labour Relations Act*

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Bill 148 and the *Labour Relations Act*

Bill 148 was widely covered by lawyers and the media; however most of the discussion and coverage focused on the changes to the *Employment Standards Act* and specifically the increase to minimum wage. The lesser publicized changes included those to the *Labour Relations Act* ("*LRA*"). These changes impact unionized workplaces and workplaces that would like to remain non-union.

Although Bill 148 established some significant changes to the *LRA,* not all recommendations from the Changing Workplaces Report were included. Bill 148 did not remove exclusions from the *LRA* including the exception for agricultural workers, home workers and many professionals. However, many proposals were adopted; below is a review of the changes to the *LRA*.

Increased Risks and Obligations in the Certification Process

1. Access to Employee Lists

Bill 148 establishes an increased disclosure requirement. If a union requests the names and contact information of employees in the bargaining unit and can demonstrate that it has at least 20% membership support in the unit, the employer must provide the names and contact information of employees. Contact information includes telephone numbers and personal email addresses, if within the knowledge of the employer. It is possible that the Ontario Labour Relations Board ("OLRB") may order further information to be provided but will not order a home address.

Any information provided must be kept confidential and steps to protect the security and confidentiality of the information must be taken by both the employer and the union.

The good news is that this requirement does not apply in circumstances where a new union is seeking to displace an established union in the workplace or in the construction industry. An employer can also challenge the 20% threshold by filing a notice of disagreement, but this challenge must be made within two days of the application.

If faced with a request for employee lists, employers should consider whether an argument can be made that their business fits within an exemption or whether a challenge should be made to the union's support. If the request is complied with, employers should consider how the disclosure will be communicated to employees with consideration for their privacy rights. When collecting personal information employers may wish to consider advising employees that the information will be disclosed if required by law.

2. The Expansion of Card Based Certification

Card based certification is a common election issue. In 1995 a mandatory voting model was introduced which permits certification only when the union receives the majority of votes. The mandatory voting model was eroded in 2005 when the card based certification was re-introduced to the construction industry. The voting model was further eroded by Bill 148 which allows card based certification in the business services industry, the home care and community services industry, and for a temporary help agency.

Employers affected by the change to the certification process should keep up to date on the procedure. When an employer receives a certification application a response is due within two days. The dispute in the application is typically about what employees were at work on the application date and the description of the proposed bargaining unit. Once the pleadings are received by the OLRB a

determination is made on what percentage of the bargaining unit employees are union members on the date the application was filed. If the union provides membership evidence for 55%+ of the proposed bargaining unit the OLRB can either certify the union or direct a representation vote. A vote will be extremely rare.

The risk for employers now subject to card based certification is that unlike in the vote based model the employer loses the opportunity to campaign against unionization or discuss concerns with employees. Instead the deciding factor on unionization of a company is based on the wishes of the employees at work on a specific day. The employer also has no control or knowledge of what information was provided to the employee to entice the employee into signing the membership card.

Employers should be proactive in communications on workplace matters to minimize the interest of employees seeking union certification and if served with an application ensure a timely response is filed.

3. Remedial Certification

Remedial certification is an extraordinary remedy. The effect of remedial certification is that the OLRB certifies an employer and grants the union's application without a vote or despite the results of a vote.

Bill 148 has potentially facilitated access to this remedy. Remedial certification is now the presumptive remedy where unfair labour practices are committed or where the OLRB finds that the true wishes of the employees cannot be determined by a vote or the employer's actions prevented the union from obtaining the required support. The key shift is that remedial certification has been modified from a rare and extraordinary remedy to the presumptive remedy in many situations.

Employers seeking to thwart a union drive must be extremely careful in the approach used on communications and counter measures during the organizing campaign. Prior to Bill 148 employers could step offside the *LRA* but not face remedial certification. Under the new legislation the risk of remedial certification is much greater and should be treated with caution.

<u>The Bargaining Process</u>

4. First Agreement Mediation and Arbitration

Bill 148 endeavours to encourage and facilitate agreements being reached once a union is certified. Now, first agreement mediation and arbitration must be completed prior to the determination of a new application for decertification or a displacement certification. Employees are no longer able to seek to terminate or displace a union until after the mediation and arbitration process has started.

For employers new to the unionization and bargaining process it may be beneficial to take advantage of the new educational supports on labour relations and bargaining that are available on request from the Ministry of Labour. This may assist in negotiations being more productive.

As a result of the changes, employers faced with a first collective agreement should endeavour to reach an acceptable agreement and develop a functional bargaining relationship.

Keeping Employees Employed

5. Just Cause Protection

Employees, including probationary employees, now benefit from just cause protection from the date of certification to the time that a first collective agreement is reached or the trade union loses representation rights. Just cause protection is usually continued within a collective agreement.

Employers are now limited in disciplining employees while the collective agreement process is ongoing. Once certified, employers should ensure that all management personnel are aware of the just cause standard and a progressive discipline policy should be implemented, if not already in force.

6. The Aftermath of a Work Stoppage

Employees can make an application to be returned to work after a lawful strike. Bill 148 removed the six month timeframe that a request had to be made within. This is unlikely to impact employers as the return to work process is usually negotiated with the union as a condition of settlement.

More Power for the OLRB

7. Restructuring and Combining Bargaining Units

Bill 148 increased the powers of the OLRB. An employer and union, working together can apply to the OLRB for a review of the structure of bargaining units.

The parties can agree to consolidate bargaining units, amend the bargaining unit description, make a collective agreement apply to the consolidated units, amend collective agreements, terminate the operation of a collective agreement that applied to a unit before consolidation, and permit a party to give notice to bargain. The OLRB must consent to the agreement proposed. This is similar to the powers available to the OLRB under the *Public Service Labour Relations Transition Act* ("*PSLRTA*") and may assist employers who would benefit from a more streamlined bargaining structure by reducing the amount of negotiations and different procedures and entitlements.

8. Interim Relief

Prior to Bill 148 the OLRB could only grant procedural interim relief save for the single exception of granting interim reinstatement in the face of an employee termination during an organizing campaign. Now, the OLRB can make interim decisions and orders in any proceeding including substantive relief – again this parallels the powers that the OLRB has in *PSLRTA* proceedings and standardizes the OLRB's powers. Interim orders do not need to be accompanied by reasons.

Employers should be prepared for increased litigation. In order to be prepared for requests for interim relief employers should document and communicate reasons for changes.