LEGISLATIVE update

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
SOLUTIONS AT WORK

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Impact of the *Employment Standards Act* and *Labour Relations Code* on K-12 Public Education Sector

Two Bills introduced by the provincial government — Bill 8 – 2019: *Employment Standards Amendment Act, 2019* and Bill 30 – 2019: *Labour Relations Code Amendment Act, 2019* — received Royal Assent and became law on May 30, 2019. The changes brought by the legislation will enhance the rights of all employees — both union and non-union — through changes to the BC *Employment Standards Act* (ESA) and *Labour Relations Code* (the Code), respectively and may impact how school districts approach collective bargaining.

Bill 8: Changes to the *Employment Standards Act*

The *Employment Standards Amendment Act, 2019* includes significant changes of relevance to the K-12 public education sector. Most significantly, all future collective agreement entitlements must now "meet or exceed" corresponding entitlements set out in the ESA. Among other matters, employees now also have greater entitlements to unpaid leaves, to recover unpaid wages, and to receive information on their rights. The key changes are set out below.

❖ Collective Agreements Must Now "Meet or Exceed" ESA Minimums (Section 3)

Previously, employers were able to limit their exposure to the ESA by including in their collective agreements provisions that govern such matters as hours of work, overtime, statutory holidays, vacation, and vacation pay. Now, the law requires that each provision in a collective agreement is required to "meet or exceed" ESA minimums, so employers will not be able to limit their exposure by agreement with the union. This applies to all minimum entitlements set out in the ESA, **except** for those employees who are exempt from the Act or certain provisions of the Act under the *Employment Standards Regulation* (the Regulation).

The amendments to the ESA therefore create a floor of rights for employees, which cannot be avoided or traded away in the context of collective bargaining. This change reverts back to the situation that existed before 2002. Based on the case law from that era, a comprehensive comparison may be needed to evaluate the extent to which collective agreement provisions "meet or exceed" ESA minimum standards. It is also likely that the change will result in a greater number of potentially costly arbitrations, which require an arbitrator to determine whether the collective agreement language "meets or exceeds" ESA minimums.

It is important to note that the "meet or exceed" requirement does not commence until an existing collective agreement expires and a new or renewed collective agreement comes into effect. However, that means it is essential to give consideration to how the ESA minimums will apply against existing or proposed collective agreement language in the current round of bargaining.

It is also important to note the categories of employees that continue to be exempt from certain provisions of the ESA under the Regulation, specifically:

- The pay day provision (Section 17) and hours of work and overtime provisions of the Act (Part 4) do not apply to[1]:
  - Teachers
  - Teachers' aides
  - Noon hour supervisors
  - Supervision aides
- The hours of work and overtime provisions (Part 4) also do not apply to:
  - an operator of a motor vehicle who is employed exclusively to transport students, teachers and other persons accompanying them on school-related and district-approved activities.[2]

❖ Employees Entitled to New, More Expansive Leaves of Absence (Sections 52.5 and 52.11)

Employees have new entitlements to be granted up to 16 weeks to care for an ill parent and up to 36 weeks for an ill child. These leaves require a "certificate" from a medical practitioner or nurse practitioner that set out (1) the time period for which care is required; (2) that "the baseline state of health of the family member has changed and the life of the family member is at risk as a result of illness or injury"; and (3) that the "care or support required…can be met by one or more persons who are not medical professionals." The employee is only entitled to the amount of time actually specified by the certificate up to the maximum of 16 or 36 weeks, respectively. While an employee can obtain a second certificate should the circumstances warrant it, the total amount of time off to which the employee is entitled across the two certificates cannot exceed the statutory maximum.

In addition, there is a new entitlement to unpaid leave for employees who experience domestic violence. This provides up to 10 consecutive or non-consecutive unpaid days off work to be granted for the purpose of seeking various forms of assistance. In addition, such employees can elect to have a further 15 consecutive weeks off, unpaid. Such requests cannot be refused, but if the employee wishes to have the 15-week leave in more than one unit of time, it is subject to the employer's consent. The employer is entitled to ask for "reasonably sufficient proof" that the employee is entitled to the leave. In practice, we expect that will likely take the form of requesting confirmation of relevant appointments and so on.

❖ Unpaid Wages (Section 80)

Another change includes the right of a non-union employee to recover unpaid wages for up to the last 12 months (and 24 month in cases of willful or severe contraventions of the ESA) of their employment through a complaint to the Employment Standards Branch. This is up from the previous limit of six months.

[1] Section 34(c), (d), and Section 40, Regulation
[2] Section 34(m), Regulation

❖ Informing Employees of Their Rights (Section 6)

The new law now creates a positive obligation on employers to "make available or provide to each employee" information about the rights of the employee under the ESA. The Director of Employment Standards has published two versions of a standard document that can either be posted in the workplace or given to each employee.

❖ Hiring of Children (Sections 9)

The new law prohibits hiring of children under 14 years of age without specific permission of the Director of Employment Standards. Children 14 or 15 years of age may only do "light work" with the written consent of a parent or guardian. "Light work" is defined as "unlikely to be harmful to the health or development" of the child. The Director may set conditions for a child's employment in any circumstance.

A transitional provision, which will be repealed in three years, allows the Lieutenant Governor in Council to exempt certain persons from the new hiring of children rules.

❖ More to Come

It is anticipated that more changes are coming. Bill 8 was intended as the first of two phases in reforming the ESA. The next set of changes will address less pressing matters, but will likely include matters such as shift schedules and overtime rates. We will provide further information as it becomes available.

Bill 30 – Changes to the *Labour Relations Code*

The *Labour Relations Code Amendment Act, 2019* affects all unionized employers in British Columbia. The notable changes for school districts follow.

❖ Automatic Successorship for Contractors in Specific Industries (Section 35)

Under the new law, contractors for certain named services must adopt the provisions of a predecessor contractor's collective agreement. Previously, successorship only applied when a business was sold, leased, or transferred by other means. This meant that successorship was not triggered when contracted services were re-tendered and awarded to a new service provider in good faith. That is no longer the case for certain identified services.

Specifically, Bill 30 provides mandatory successorship for the following contracted services:

- building cleaning services;
- security services;
- bus transportation services;
- food services;
- non-clinical services provided in the health sector; and
- other services that may be determined and prescribed by Regulation.

The Code does not define the scope of any of these terms, so whether particular services will fall within the requirement may not always be easy to identify.

Where it applies, the change is significant since it means that any existing collective agreement applicable to a predecessor contractor applies to a successor contractor. Put another way, if a contractor, under a collective agreement, loses a contract because of re-tendering, the new

contractor is bound by the former contractor's collective agreement. This is so even if the companies are wholly unrelated. Essentially, contractors bidding on a new contract will be subject to the terms of the previous contractor's collective agreement.

As this change is completely new, it remains to be seen how it will be interpreted by adjudicators. For school districts, the most significant potential outcome may be an increased difficulty to seek competitive bids in the marketplace. This is because contractors may find it difficult to compete on price if they are subject to the same provisions (including wages, benefits, etc.) that existed under the predecessor contractor.

❖ Limits to Employer Speech (Sections 6 and 8)

The amendments to the Code have narrowed the existing employer free speech provisions. Previously, employers had the "freedom to express [their] views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion." That language has been eliminated. Now, the language reads, "nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business." While this may not seem unduly restrictive, it reflects language that was in the Code before 2002 and which was interpreted at that time as providing for a more circumscribed range of permissible communication. The extent of the limitation will be dependent on the way the amendment is interpreted by the Labour Relations Board, but the pre-2002 case law will likely be highly influential in this regard.

In addition, the new law adds to section 6 of the Code, and specifically provides that an employer's prohibited expression can constitute an unfair labour practice.

Given the foregoing, districts will want to be cautious when expressing opinions or otherwise communicating directly with employees about labour relations matters, especially around bargaining time.

❖ Adjustment Plans (Section 54)

Under section 54 of the Code, an employer that plans to introduce a measure, policy, practice, or change that affects the terms and conditions or security of employment of a significant number of employees to whom a collective agreement applies must give the union 60 days' notice, and the parties must then engage in good faith negotiations regarding an adjustment plan.

The amendments to the Code include language enabling either party to apply to the Labour Relations Board for the appointment of a mediator to assist them in developing the adjustment plan. The mediator may make recommendations, but may not impose an adjustment plan.

❖ Essential Services (Section 72)

The amendments to the Code eliminate the provisions that deemed "the provision of educational programs for students and eligible children under the School Act" as an essential service. This means that educational programs will not be protected from strike or lockout activity. However, the Labour Relations Board maintains discretion to designate an essential service, with the "welfare" of British Columbians as an important criterion for such a designation. As such, it remains possible that some aspects of the delivery of education in the K-12 public education sector may be designated as an essential service should the need arise.

❖ Expedited Arbitration (Section 104)

An application for expedited arbitration under Section 104 of the Code now must be made within 15 days of the completion of the steps of the grievance procedure. The Director of the Collective Agreement Arbitration Bureau may appoint a Settlement Officer without the consent of the parties.

Existing time limits for an expedited arbitration hearing and the issuance of a decision have been eliminated and replaced with the requirement that an expedited arbitrator appointed under the Code must conduct a case management conference within seven days of the appointment, and conclude the arbitration within 90 days. In addition, the arbitrator must, if jointly requested by the parties, issue an oral decision within one day after the conclusion of a hearing or issue a written decision not to exceed seven pages within 30 days after the conclusion of the hearing.

❖ Display or Provision of Information (Section 123.1)

Similar to the ESA changes obligating employers to inform employees of their rights, the new Code provisions require the Labour Relations Board to make information available to the public about rights and obligations under the Code. The Labour Relations Board may direct an employer to display or make available to employees information about rights and obligations under the Code.

❖ Obligation to Properly File Collective Agreements with the Labour Relations Board (Section 51)

Bill 30 adds a provision which gives the Labour Relations Board discretion to not consider any agreement which is not properly filed. Accordingly, it will be essential to ensure that collective agreements are properly filed within 30 days after execution.

❖ Financial Penalties

The maximum fine for corporations or trade unions that refuse to carry out orders made under the Code has been increased from $10,000 to $50,000.

❖ Implications for Bargaining

From a bargaining standpoint, the most significant change is that all collective agreements must now “meet or exceed” corresponding provisions in the ESA. This has fairly widespread implications, as it includes all minimum-standard provisions contained in the ESA. Districts currently or soon to be engaged in bargaining will need to be mindful that their collective agreements take into account this new requirement and address existing provisions that do not “meet or exceed” ESA minimums.

In addition, increased limitations on employer speech serve as a reminder of the need for caution in communicating directly with employees about labour relations matters, in particular during the conduct of bargaining. To minimize the risk of unfair labour practices complaints, legal advice should always be sought before such communications are made.

Questions

Please contact your BCPSEA liaison if you have any questions.