Bill 21: Key Aspects for Alberta Employers

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People
Geoffrey Hope Partner
ghope@fieldlaw.com

The Alberta government introduced Bill 21: *Ensuring Fiscal Sustainability Act, 2019* on October 28, 2019. This bill proposes several legislative changes that will impact labour and employment relations in the Province and which raise various considerations for employers. The changes include amendments to several pieces of existing legislation and the introduction of a new statute, the *Public Sector Employers Act*.

As a summary, some of Bill 21's elements which stand to impact employers include:

- Changes to the definition of "employee" in the *Employment Standards Code.*
- Requiring employment standards officers to refuse employment standards complaints by unionized employees.
- A lifting of the ban on the use of replacement workers during a strike or lockout by essential services workers (changes to the *Labour Relations Code*).
- Capping termination notice and severance pay for some public service employees under the *Public Service Act.*
- Reinstating bargaining unit exclusions for budget officers, systems analysts, auditors, and employees performing substantially similar duties (changes to the *Public Service Employee Relations Act*).
- Authorizing the Minister to issue directives that employers listed in the new *Public Sector Employers Act* must follow before, during, and after engaging in collective bargaining.

These changes are summarized below according to the legislation that Bill 21 modifies.

***Employment Standards Code* - Amended**

Bill 21 makes two main changes to the *Employment Standards Code*:

1. *The definition of "employee".*

The definition of "employee" under the *Code* has been updated to mean "an individual employed to do work who receives or is entitled to wages and includes a former employee, <u>but does not include an individual who is a member of a class of individuals excluded by the regulations</u>" (change underlined). It also changes section 138 of the *Code* to allow the government to make regulations that exclude members of described classes of individuals from qualifying as an "employee" under the *Code*.

This will change who will be subject to the limits and benefits provided by the *Code*, depending on whether and what regulations the government next passes to exclude classes of individuals working in specific industries. Those regulations will ultimately tell us exactly what types of employees will not be subject to the *Code*.

2. *Who can make employment standards complaints under the Code.*

Bill 21 changes the *Code* by adding section 83.1, which says that an employment standards officer "shall refuse to accept a complaint made by an employee who is bound by a collective agreement."

This means that unionized employees can no longer pursue a complaint under the Code, and are instead limited to dispute resolution processes set out by their collective agreement and other legislation.

***Labour Relations Code* - Amended**

Bill 21 changes the Labour Relations Code by reversing the ban on the use of replacement workers during a strike or lockout by essential services workers.

The previous government introduced a prohibition on the use of replacement workers in essential services in 2016. The ban means that currently, if there is an essential services agreement in place which guarantees a minimum number of workers continue to work during a strike or lockout, the employer cannot hire temporary replacement workers to fill the spots of the striking or locked out workers.

Bill 21 adds section 95.201 to the *Code*, which says the employer shall elect to use either designated essential services workers or replacement workers to perform essential services during a strike or lockout. The employer must make that election within a reasonable time after the parties are required to begin negotiations for an essential services agreement.

If an employer decides to use the services of replacement workers, they have to apply to the Commissioner for an order granted under section 95.21(2), which can exempt the employer from having to begin negotiations for an essential services agreement. If instead the employer elects to use the services of designated essential services workers, they have to begin negotiations for an essential services agreement. Importantly, once the Commissioner has granted an order under section 95.21(2), the employer cannot change their election.

An employer is not required to make an election between the use of designated essential service workers and replacement workers if:

- Employees in the bargaining unit do not perform essential services; or
- The employer intends to use "other capable and qualified persons who are neither members of the bargaining unit nor replacement workers" to maintain essential services during a strike or lockout.

***Public Service Act* - Amended**

This *Act* only affects the employment of individuals appointed to a position under the *Public Service Act.* Bill 21 makes three main changes to the *Public Service Act*:

1. *Capping termination notice and severance pay for certain public service employees.*

Bill 21 adds section 25.01 to the *Act* to place a limit on the termination notice period that an employee is entitled to for employees who:

a. Are not a member of a bargaining unit under the *Public Service Employee Relations Act*; or
b. Hold a position excluded from a classification plan pursuant to section 11, and are employed under a contract of employment that specifies entitlement to termination notice or severance payments.

For an employee addressed by section 25.01, notwithstanding any common law rights, the notice period they are entitled to if they are terminated without cause is now to be capped as follows:

a. Where the employee has less than one year of continuous service, 2 weeks.
b. Where the employee has one or more years of continuous service, 4 weeks for every full year of continuous service up to a maximum of 78 weeks.

Severance pay may be paid in lieu of all or any portion of the notice period if it is approved by the Commissioner and the Deputy Attorney General. Where it is approved, the severance pay will be calculated with the following formula:

1.16 × "base salary" x # of weeks for which severance pay is to be provided in lieu of notice

2. *In some cases, requiring repayment for a portion of notice period if the employee gains new employment.*

Bill 21 also adds section 25.02(1), which says where an employee who has received severance pay becomes employed either by the Alberta Crown or a public agency under the *Alberta Public Agencies Governance Act* during the employee's notice period in section 25.01, they will have to repay the severance pay for the portion of the notice period that overlaps the start of their new employment.

3. *Clarifying that no constructive dismissal, no cause of action, and no compensation arise from the changes.*

Bill 21 adds to the *Act* sections 25.03 to 25.04 which provide that none of the changes to notice period entitlement and severance pay will be considered constructive dismissal or breach of contract and will not give an employee a cause of action or claim to compensation against the government.

***Public Service Employee Relations Act* - Amended**

Bill 21 changes section 12 of the *Public Service Employee Relations Act* to exclude budget officers, systems analysts, and auditors from bargaining units or any other units for collective bargaining. It also adds that regulations may be passed to make this exclusion retroactive.

Budget officers, systems analysts, and auditors were previously excluded from bargaining units in Alberta before 2018, when those employee groups were removed from the exemption list. That change will be reversed.

***Public Sector Employers Act* - New**

Bill 21 introduces the *Public Sector Employers Act*, a new *Act* that will change how the following "employers" as defined in the *Act* may engage in collective bargaining:

- An institution that forms part of the publicly funded post-secondary system other than an independent academic institution under the *Post-secondary Learning Act*
- A board as defined in the *Education Act* or the *Northland School Division Act*
- A Francophone regional authority as defined in the *Education Act*
- A regional health authority established under the *Regional Health Authorities Act*
- The following entities:
  - Alberta Gaming, Liquor and Cannabis Commission
  - Alberta Innovates
  - Alberta Pensions Services Corporation
  - ATB Financial
  - Covenant Health
  - Lamont Health Care Centre
  - Travel Alberta
  - The Workers' Compensation Board

The *Act* says that the Minister may issue directives that these employers must follow before, during, and after engaging in collective bargaining or a related process. The directives may be with respect to:

a. The term of a collective agreement an employer may propose or agree to.
b. Fiscal limits the employer has to operate within when engaging in collective bargaining.
c. Specifying information an employer has to provide to the Minister, including such information as:
  i. compensation data and related information
  ii. employment and labour market data and related information
  iii. information for the purpose of monitoring the employer's compliance with the directives
  iv. any other information the Minister considers necessary respecting collective bargaining or a related process as set out in the directive

The *Act* also says that a Minister's directives issued under the *Act* are confidential and may not be disclosed by the employer to any third party without the Minister's prior consent. Likewise, information that the employer gives to the Minister pursuant to the directives is confidential and, subject to the regulations, the Minister may only disclose to another employer, an employee of a department or a member of Executive Council as the Minister considers necessary. This restriction on the employer sharing certain directives from the Minister at the bargaining table will be an interesting one to watch, as there is a chance it could be challenged by unions in light of certain other case law dealing with the propriety of withholding certain information in certain contexts of bargaining.

The *Act* will not apply to collective bargaining under the *Public Education Collective Bargaining Act* or a related process.

How these various legislative changes will affect any particular employer will obviously depend on various circumstances. Field Law acts as legal counsel for employers of all sizes throughout Alberta, and Field Law's Labour + Employment Law Group would be happy to assist

with any issues that employers may have arising from this new legislation and strategies that may be important to address the changing legal landscape.

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