Federal government seeks feedback on exemptions and modifications to the new “hours of work” provisions of the Canada Labour Code

Date : March 4, 2020

As many readers of Focus will recall, Part III of the *Canada Labour Code* (“*Code*”) was recently amended to provide certain rights and entitlements to federally-regulated employees relating to hours of work (see “*Federal Government Proposes Significant Amendments to the Canada Labour Code in Bill C-86*” and “*Federal Government appoints expert panel to advise on further changes to the Canada Labour Code*” for more details). Commonly referred to as the “hours of work” provisions, the amendments came into force on September 1, 2019 although not with “full application”. Pursuant to Interpretation, Policy and Guideline 101 (“IPG-101”), entitled “Scope of Application” which came into effect the same day as the amendments, the federal government is permitting employers to “carry on business as usual” for certain classes of employees in respect of certain hours of work requirements.

The “business as usual” period authorized by IPG-101 will continue until the hours of work provisions are fully developed by regulations made under the *Code*. These regulations will operate to modify the application of the hours of work provisions for certain classes of employees, or to exempt classes of employees from the hours of work provisions entirely.

With a view to those future regulatory modifications and exemptions, Employment and Social Development Canada released a discussion paper seeking stakeholder feedback. Entitled “*Proposed regulatory exemptions and modifications for new hours of work provisions in the Canada Labour Code*,” the discussion paper was issued on February 19 and represents the latest installment in an engagement process that started in May of 2019 and will likely continue through the early part of 2020.

The discussion paper focuses its request for input on the following four hours of work provisions:

- Section 173.01 - the requirement for an employer to provide 96 hours’ notice of work schedule (as well as the corresponding right of the employee to refuse a work shift starting less than 96 hours after notice is given);
- Section 173.1 - the requirement for an employer to provide 24 hours’ notice for shift changes;
- Section 169.1 - the requirement for an employer to provide a break of 30 minutes within each five consecutive hours of work; and
- Section 169.2 - the requirement for an employer to provide an 8-hour rest period at the end of any shift.

It should be noted that the above entitlements are not absolute. For example, the hours of work provisions do not apply to managers and certain professionals (architects, lawyers, medical doctors, dentists and engineers). Also, the hours of work provisions do not apply in the event of an "unforeseeable emergency" (defined to capture unforeseeable situations that could present an imminent or serious threat to life, health or safety, damage or loss of property, or serious interference with the ordinary working of the establishment). The 96 hours' notice requirement for work schedules may be reduced by collective agreement, or not applicable at all if the employee requested a flexible work arrangement under Division I.1 of Part III of the *Code*.

With that as the legislative backdrop, the discussion paper briefly summarizes the conflicting views that have already been put forward by employers and employee representatives. Employers have noted that the hours of work provisions impose a level of rigidity that will interfere with their ability to respond to various conditions over which they have little or no control (e.g. employee absences, weather, etc.). Some employers expressed the view that the exception for unforeseeable emergencies is too narrow to assist in these situations. Employers have also raised concerns relating to their ability to comply with other regulatory requirements, such as Transport Canada requirements applicable to the transportation sector.

Employee groups generally view the hours of work provisions as minimum standards that should apply to all employees. Naturally they were opposed to any exemptions and viewed the exemption requests made by employers as overly broad and without justification. Employee groups indicated that they prefer a "wait and see" approach as any need for exemptions or modifications will become evident over time. Employee groups indicated that exemptions and modifications should only be considered in order to address a demonstrated problem.

Employers that are considering providing input on the regulations should be cognizant of section 175 of the *Code*. This section sets out the parameters of the regulation-making authority with respect to the hours of work provisions. It states that the Governor in Council may make regulations that modify the hours of work provisions for classes of employees if the application of those sections without modification would be unduly prejudicial to the interests of the employees in those classes, or would be seriously detrimental to the operation of the industrial establishment. The Governor in Council may also make regulations exempting classes of employees to whom the provisions could not reasonably be applied.

Although the authority set out above may appear to be very broad, it will likely be constrained by the government's approach. The discussion paper indicates that the government's view is that the hours of work provisions are akin to "minimum conditions of employment" and therefore should apply "to as many employees as possible". The paper goes on to state that any modification or exemption must be "clearly and narrowly targeted".

The government also provides its current regulatory proposal in the discussion paper. This proposal is based on stakeholder feedback and the government's analysis to date. The discussion

paper makes it clear that the proposal will likely be refined and changed based on the stakeholder feedback, and the resulting greater understanding of the scheduling practices and operation realities of the various impacted sectors. The regulatory proposal is presented in three categories:

- employee classes for which an exemption or modification is proposed;
- employee classes for which more information is needed to determine whether a modification or exemption is warranted; and
- employee classes for which no exemption or modification is proposed.

It should also be noted that on February 22, the government published a notice in the Canada Gazette advising that the Minister of Labour does not consider that regulations are required in respect of on-call or standby employees regarding section 173.01 (96 hours' notice) or section 173.1 (24 hours' notice). In the Minister's view, if an employee is provided with their work schedule at least 96 hours in advance and any on-call or standby periods are included in that schedule, the requirements of section 173.01 are satisfied. Additionally, the provision of 24 hours' written notice before adding or changing a period where the employee is scheduled to be on-call or on standby satisfies the requirements of section 173.1.

In our view

Employers falling within federal jurisdiction should review the discussion paper and in particular the regulatory proposal in order to determine whether, and if so how, their employees may be impacted by the future regulations. Employers that are interested in providing feedback and input should be aware that the deadline for submissions is March 13, 2020. We would be pleased assist with the preparation of any such submissions. Written submissions can be provided as follows:

By e-mail to:

EDSC.DMT.ConsultationNTModernes-ConsultationModernLS.WD.ESDC@labour-travail.gc.ca

By mail to:

Labour Standards – Wage Earner Protection Program

165 rue Hôtel-de-ville, Phase II du Portage, 10th Floor

Gatineau, Quebec

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For further information, please contact Steven Williams at 613 940-2737 or Lauren Jamieson at 613-563-7660 ext. 236.