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January 31, 2023

The Honourable Seamus O'Regan Jr.
Minister of Labour
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Subject: Consultations in view of improving the collective bargaining process (replacement workers and maintenance of activities)

Dear Minister O'Regan,

The Canadian government has committed to introducing a bill that would amend the Canada Labour Code to prohibit the use of replacement workers in federally regulated sectors. To start the process, you launched consultations in the fall on this issue and another key matter: maintenance of activities necessary to protect the public during labour stoppages.

Approximately 22,000 employers and 985,000 employees may be affected by these changes. A large number of these employers are advised by members of our profession. CPHR Canada, which represents 27,000 human resources professionals in nine provinces and three territories of Canada, is the voice of HR in Canada. Our actions are always aimed at striking a balance between an organization's performance and the well-being of its workers.

For employers, work stoppages can heavily impact their ability to continue delivering their products and services. For unions, strikes are the main pressure tactic used to improve the working conditions of their members. As you mentioned when announcing the consultations, the government would like to maintain a fair and balanced approach to labour relations. This is also our approach. Here are our main comments on the two consultations in progress.

1. Expanding the prohibition on replacement workers
The Canada Labour Code currently prohibits federally regulated employers from using replacement workers if they use these workers with the intention of undermining a union's representational capacity.

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Otherwise, the current legal framework allows the use of replacement workers. In fact, the Ministry's Labour Program estimates that employers have used other workers or managers in 42% of strikes or lockouts in the last decade (2012-2022). Transportation (air, rail and maritime) and telecommunications are two sectors where businesses have felt it necessary to use replacement workers in the last five years.

To give more weight to workers in the collective bargaining process, the government is now considering the possibility of an outright ban on replacement workers.

Since two provinces (Quebec and British Columbia) have already implemented this prohibition, its effects have been studied by a diverse group of researchers. Their general conclusions, which were covered in the Ministry's discussion document, are worth mentioning again here.

Neutral effect

- increase in the unionization rate (Legree et coll. 2017; Martinello, 2000)

Positive effects

- less violence on picket lines and contribution to safer workplaces (Singh and Jain, 2001)
- reduction in the average duration of strikes, which were returning to their normal durations after two years of implementing the measure (Duffy and Johnson, 2009)

Negative effects

- increase in the frequency of strikes and lockouts, at least in some sectors (Tu, 2011; C.D. Howe Intitute, 2010; Gunderson, 2008; Landeo and Nikitin, 2005).
- lower employment rates (C.D. Howe Institute, 2010; Budd, 2000)

In theory, there may be some advantages to adopting these provisions at the federal level, but there will also be a number of disadvantages.

Federally regulated sectors (transportation, telecommunications, and financial services) are key sectors for a properly functioning Canadian economy and also impact the way many other provincially regulated sectors function. More frequent work stoppages in these sectors would increase the risk of compromising the maintenance of services that are considered essential or necessary, especially for the health and safety of Canadians.

To keep an expanded prohibition on replacement workers from compromising the maintenance of essential activities, CPHR Canada recommends that the government set the following as a prerequisite: The maintenance of essential activities process must be effectively strengthened before an expanded prohibition may take effect.

2. Improving the maintenance of activities process

To ensure the maintenance of essential activities, lawmakers could choose to name more essential services in the Canada Labour Code, even though very few activities are currently maintained in this manner (see section 87.7 (1) of the Code).

Instead, the Code lays out a process based on the agreement between the parties, or on the orders of the Canada Industrial Relations Board (CIRB) to decide which activities need to continue in order to protect the public from serious and immediate danger. Yet, the government itself admits that this process does not work as effectively as it should, and that it could be improved.

Increasing agreement monitoring – The government has no way of checking whether agreements between employers and unions are being implemented to maintain essential activities. In fact, the Code does not require the parties to submit their agreement to an external body. To ensure a minimum level of oversight over these agreements, which are intended to protect the public from serious and immediate danger, the federal government could draw inspiration from the methods used by provincial governments. For example, Quebec's Administrative Labour Tribunal (which incorporated the former Essential Services Council into its structure) must approve agreements or lists of essential services before any work stoppages in certain sectors (e.g. health). Lawmakers could also stipulate that work stoppages may not be initiated until a maintenance of essential activities agreement has been verified.

Shortening processing times for contentious cases – When parties cannot come to an agreement, the CIRB – at the request of the employer or union, or based on a referral from the Minister of Labour – investigates and decides whether certain activities need to be continued. Where appropriate, the CIRB issues an order that lists the activities and specifies how they must be continued if there is a strike or a lockout. Nevertheless, it can take an especially long time to process these cases: In 2021-2022, the average processing time for 11 cases was 170 days. Many stakeholders would like the government to find ways of reducing these times, which is a completely legitimate concern. The federal government may also find it useful to consider the experiences of

provinces. For example, a Vice-Chair of the Alberta Labour Relations Board is designated to serve as Essential Services Commissioner in that province. He has expanded powers to make decisions on matters related to essential services. The government could also create a separate body that has the expertise required to evaluate whether a work stoppage is a danger. This body would be accountable for maintaining essential activities.

Conclusion

For workers and their unions, expanding the prohibition on replacement workers would give their pressure tactics more teeth. For employers, this change would further complicate the maintenance of activities.

To keep this change from compromising the maintenance of essential activities, CPHR Canada recommends that the government set the following as a prerequisite before such a prohibition may take effect: The maintenance of essential activities process must be effectively strengthened.

Whatever lawmakers decide, the final result should seek to establish a fair balance of power between both parties.

CPHR Canada will continue to monitor future developments in this issue and help improve the collective bargaining process by sharing the perspective of the HR profession.

Cordially yours,

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