REVIEW OF *SASKATCHEWAN EMPLOYMENT ACT*
BY
RICK ENGEL, Q.C.
GREG FINGAS
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1. Current Status

The Saskatchewan Employment Act has been passed by the Legislature, but has not been proclaimed in force

Some differences between first version presented and those passed after amendments

The SEA Regulations not yet publicly available, and are expected to be developed by part

- Employment standards (Part II), appeals process (Part IV), and labour relations (Part VI) are expected first, expected to be proclaimed in force once regulations are finalized (new year 2014)
- Occupational Health and Safety (Part III, V) will follow

Essential services provisions (Part VII) were introduced as separate legislation in fall 2013 and are now being considered by Legislature (Bill 128)

- I'll talk about the first reading version – but note that it may be amended before it gets passed

2. Employment Standards

Hours of Work

The SEA **eliminates the weekend** as a normal requirement

- The Trade Union Act (TUA) requires most employers to grant two consecutive days off per week, one to be Sunday wherever possible
- SEA requires only "one day off every week" except for prescribed workplaces (section 2-13(3), (5))
- Regulations will thus govern

The SEA affects an employee's **right to refuse overtime over 44 hours per week**

- "unexpected" or "unusual" circumstances are added to "emergency" as allowing an employer to require employees to work beyond this level (section 2-12)
    - an "Emergency circumstance" is defined (unforeseeable and imminent risk to person, property or business, section 2-1(e)) – part of House amendments
    - "unexpected" and "unusual" are not defined, and will likely apply to a broader range of circumstances

SEA affects an employee's **entitlement to a meal break**

- again "unexpected", "unusual" and "emergency" circumstances are all permitted as grounds to dispense with normal employment standards (section 2-14)

SEA allows for **broad overtime averaging over extended periods** (section 2-20)

- an employer is allowed to avoid paying overtime for work far beyond 40 hours by arranging for time off later
- In addition, Bill 128 allows a union to contract out of overtime – watch for employer demands which could override employment standards provisions

Employment Leave

The SEA somewhat improves the availability of some types of leave – employees must work 13 weeks to be eligible, rather than 20 for most types under the Labour Standards Act

The SEA includes new types of leave

- Care for critically ill child (section 2-57)
- Crime-related child death or disappearance (section 2-58)

The SEA also prohibits employers from discriminating against employees for taking leave (section 2-8(1)(d))

Minimum Wage

The SEA does not make any change in substance

As before, both the base amount of the minimum wage and any indexing are left to the regulations

- Indexation is anticipated to be based only on Cabinet's annual approval

Employee Notice

Employees are now required to give two weeks' written notice after working 13 weeks (section 2-63)

- Exceptions for custom/practice, health/safety, layoff, reduction in pay

Note that this creates a disparity in notice requirements – where an employee has work for less than a year, the employee must give more notice than the employer to sever the employment relationship (as the employer may dismiss an employee with one week's notice)

3. Occupational Health and Safety

Summary Offence Ticketing

Pending release of the regulations, the SEA does not substantially change existing Occupational Health and Safety principles. However, the implementation of OHS is being changed alongside the statutory changes.

Workers, employers, supervisors and other parties all bear numerous duties under the OHS Act, including a general duty to ensure a safe workplace.

Under the new ticketing regime to be implemented beginning July 1, 2014, an Occupational Health Officer from the Ministry of Labour and Workplace Safety may issue a ticket where the Officer observes a violation of specific duties. It normally directs such a ticket toward the party with the greatest degree of control over the non-compliance.

Only one worker offence is subject to ticketing: a clear failure to use personal protective equipment provided by an employer. A ticket will be issued only if the worker was provided with equipment and training on its use, but nonetheless refused or ignored a direction to use it.

Fines for ticketable offences range from a flat $250 for a violation by a worker, to $400 for a violation by a supervisor, to up to $1,000 for a violation by an employer. A ticketed worker may either make a voluntary payment, or choose to go to trial to argue that no offence was committed.

4. Labour Relations

Scope Provision

Drastic changes in early versions of the SEA, softened only somewhat in amendments

Other Canadian labour legislation distinguishes between "management team" (general decision-makers) and "confidential employee" (labour relations) in all other legislation

- The SEA mixes the two, as an employee's confidential role in strategic planning, policy advice or budget implementation/planning can lead to exclusion
- But exclusion is based on "primary duties" in conflict with employee's own bargaining unit
- Effects of the SEA's changes are unpredictable
    - The Board could apply fairly similar tests, or could strip collective bargaining rights from wide swaths of employees
    - In some cases, more employees could be able to access collective bargaining through a different bargaining unit
        - In theory, an "employee" for the purposes of one unit may not be for the purposes of another – so a high-level managers' unit might be permitted among employees who were previously excluded

Supervisory Employees

The definition of "supervisory employee" was narrowed in amendments (section 6-1(o)) to exclude team leaders, persons exercising temporary duties

However, the amendments also provide for the mandatory removal of supervisory employees from all-employee bargaining units under all circumstances (even employer consent/election removed)

Removal is only from bargaining unit – the same union or a new union may organize a supervisory unit

Union may wish to apply to split existing all-employee units into two or more units before the expiry of the two-year grace period

Carve-Out Raids

Carve-out raids are currently permitted under the TUA, but not generally favoured by Board which prefers broader bargaining units

- The SEA provides some new legal basis for small units to break off from larger ones, including:
    - Mandatory separation of supervisory units
    - Explicit authority to replace representation for "a portion of (a) bargaining unit" (section 6-10(b)), with particular reference to health sector

Confusing Open Periods

Permanent open period for decertifications – effective preference for decertifications over raids

Changed and confusing open periods for raids

- Especially in multi-union workplaces where several different cert and CBA dates all create separate open periods
- Again, health sector a prime example (section 6-10(4)(b)) – open periods are linked to anniversaries of all collective agreements and certification orders governing "an employer" (and multiple employers may be involved)

Contracting-Out Provisions

Current law protects services within public facilities

SEA will remove that protection, prevent finding of successorship unless an actual business is transferred

Easier to shed collective bargaining rights while contracting out services

Collective Bargaining Process

TUA requirements before a strike – expiry of collective bargaining agreement, strike vote, 48 hours written notice

Under SEA, new mandatory steps are required before:

- strike votes (some collective bargaining)

- strikes (impasse, mandatory mediation/conciliation, cooling-off period, plus essential services process under Bill 128 where applicable)

SEA does not allow for consideration of the specific circumstances of a particular negotiation – both parties are stuck at the table, and required to proceed through mediation/conciliation even if neither sees value in being there

Final offer votes are available to employer, employees at any time after collective bargaining has started

Strike Assessments

The TUA protects a union's ability to enforce a strike fine for money earned while employee crosses picket lines

The SEA eliminates this statutory protection

- Unclear whether and when fines can then be enforced

- Generally a union will be required to demonstrate application and reasonableness of its own rules as applied to particular employee in order to make a contractual claim

Benefit Plans

A union is now required to continue providing benefits to former members receiving benefits under a plan

The Board may order that plans be transferred or divided (section 6-104(4)-(5))

Unfair Labour Practices

The SEA creates a new unfair labour practice where union fails to "facilitate…transition" to a successor union or to employees in decertified unit (section 6-63(1)(g))

The SEA also establishes a new unfair labour practice where a party contravenes "an obligation, a prohibition or other provision of this Part" (sections 6-62(1)(r), 6-63(1)(h)), which includes the terms of CBAs (section 6-41)

- All breaches of CBA can then theoretically be treated as ULPs – allowing for Board jurisdiction and remedies

5. Essential Services

Again, this review is based on the first-reading version of new essential services legislation

- Bill looks to include important changes from PSESA

Application

Essential services provisions again take precedence over normal labour relations provisions and agreements: section 7-2(2)

Essential services provisions apply to all employers who provide essential services, as well as prescribed bodies

- Definition of essential services is now linked to closed list of factors (danger to life, health, safety, property, environment or court services), not subject to prescription by regulation

Essential Services Agreements

ESAs may be negotiated at any time, and remain in effect unless notice is given over 120 days before the expiry of a collective bargaining agreement

Parties are under no obligation to negotiate an ESA until after a labour relations officer, special mediator or conciliation board issues a report determining that a labour relations dispute has not been resolved

The employer must provide notice of the services it deems essential; the parties must then agree on the following (section 7-4):

- Essential services
- Classifications and numbers of employees required to maintain essential services
- Locations where essential services employees are required to work
- Process for notifying employees
- Process governing increases or decreases in the need for essential services during a work stoppage
- Provisions governing emergency circumstances which arise during a work stoppage, and
- Dispute resolution respecting changes to the ESA.

Prohibitions Against Strikes

Lockouts and strikes are prohibited unless:

- the parties have negotiated an ESA;
- an arbitrator or the Board has reviewed an employer notice; or
- the union provides essential services: section 7-5

Phrasing says "no union shall engage in a strike" – which might extend prohibition beyond unions certified for public employers

Individual restrictions apply to "essential services employees" only during scheduled work hours

Employer Notices

The employer notice process will start only after notice of a strike or lockout has been served and no ESA has been concluded

The employer notice includes essential services, classifications, numbers and locations

- Employers will be required to take its own employees into account (i.e. management) in determining which employees are required, but not outside resources

All aspects of an employer notice may be challenged by a union – either before an arbitrator if the parties agree, or before the Board otherwise

The employer must also provide work schedules for a period of no less than a week

Minimal Impairment

Minimal impairment determination

- Employer or union may apply to Board to determine whether "the level of activity to be continued in compliance with an (ESA)…or a decision or order" is "minimally impairing" of right to strike or lock out
- Note that there are significant limitations on this process: the determination must be based on the level of activity permitted by a specific ESA or order rather than the essential services process as a whole, and might not be available in response to an unchallenged employer's notice

- If an ESA or order minimally impairs the right to strike/lockout, then strikes/lockouts are permitted
- If an ESA or order goes beyond minimally impairing the right to strike/lockout, then arbitration is triggered to decide matters which remain in dispute

    - Arbitration is based on a closed list of factors – including requiring the arbitrator to consider private-sector and non-union wages and benefits

Conclusion

The new essential services provisions are a substantial improvement on the PSESA

However, they still create a process which will delay access to strike activity, and which will impose questionable standards in assessing which employees are essential, when the right to strike has been impaired and which considerations should be taken into account in arbitration