

Recruitment, terminations could be affected by Bill 164

Ontario legislation would add four new grounds for discrimination: social condition, police records, immigration status and genetics

BY MARCEL VANDER WIER

CURRENTLY before a standing committee at Queen's Park, Ontario's Bill 164, Human Rights Code Amendment Act, 2017, could have a significant impact on the way employers recruit and terminate workers, according to lawyers.

The proposed legislation was unveiled in October and aims to outlaw discrimination against individuals based on genetics, immigration status, social condition and police records.

Through the addition of these four grounds to the provincial Human Rights Code, protection would extend to jobseekers within the province.

The proposed amendment includes language borrowed from Manitoba and Quebec legislation that could affect human resources policy in many areas, according to Kyle Lambert, an associate at McMillan's Ottawa office.

"I don't know that the bill's been drafted with the labour force necessarily in mind," he said. "It seems as though the target is more service provision, making sure that people don't miss out on housing opportunities, for example, because they have a really low income or they're newly immigrated to Canada."

"But I would say that there are changes of which employers need to be aware and that will require an added level of caution," said Lambert.

"Employers are going to have to think more carefully about individual job requirements, hiring requirements, and the wording they use when managing their employees."

Background

The bill was put forward by Liberal MPP Nathalie Des Rosiers, who represents Ottawa-Vanier. It passed second reading and was referred to standing committee, where it remains.

"There's no date as to when it will be discussed at committee, so therefore it's a little bit in the stratosphere," said Des Rosiers.

From an organizational perspective, the purpose of the legislation is to start "a conversation about how we go about making selections on different types of employees but also the way in which we want to ensure a fair workplace," she said.

"The Human Rights Code should be amended constantly to reflect the new realities or the new types of discrimination that people may experience."

The proposed alterations stem from various research studies as well as anecdotal evidence, and aim to bring the Human Rights Code up to speed in Ontario, said Des Rosiers.

"My sense is that the addition of these grounds will give jurisdiction to the human rights commission to issue best practice guidelines... the same way they've done in other areas — disability, transgender and so on."

Social condition

The ground of social condition is broadly defined, referring to social or economic disadvantage that results from employment status, source or level of income, housing status (including homelessness), level of education, or any other similar circumstance, said Lambert.

At this point, discrimination is acceptable in instances where bona fide occupational requirements are necessary, he said. But going forward, it would be the responsibility of the employer to prove this.

"If it's a bona fide requirement of a job, you certainly can discriminate," said Des Rosiers.

"But what it forces you to do is ensure that it's relevant. My sense is that the search for relevant criteria as opposed to irrelevant criteria just makes for better decision-making."

"The point of a Human Rights Code is to highlight that some irrelevant criteria stemming from discriminatory attitude, ignorance or prejudice does not taint the ability of people to access employment or services."

This ground already exists in Quebec's legislation and also relates to access of services, she said.

If the bill were to pass as is, employers would need "crystal clear" guidelines to determine what is and isn't permissible, said Ron Minken, senior lawyer at Minken Employment Lawyers in Markham, Ont.

"They shouldn't be in a situation where they're not sure what's permissible," he said.

"The more definition we can have, the more clarity we can have in the legislation."

While the bill is expected to impact employers in terms of compliance and policy review, the extent of that depends on what version of the bill passes.

At present, educational requirements for job positions could be affected if the current legislation were to pass, said Nadia Halum, la-

bour lawyer at MacLeod Law Firm in Toronto.

"It's saying employers can't discriminate between hiring on the basis of someone's level of education, when education is a pretty big factor that employers look at," she said.

"As it stands right now, that would have a huge impact on employers, if education can't be a criteria that you use in selecting employees... I'm curious to see how it's going to work."

Police records

The proposed ground of police records would provide protection from discrimination stemming from charges and convictions — with or without a record suspension — and any police records, including records of a person's contact with police.

The current prohibited ground provides protection from only a record of offences in which a pardon has been granted, said Minken.

If the bill was to pass, a recruitment situation that comes down to two recruits — one of whom has had a brush-in with police — could put the employer in an "awkward position," potentially hiring said recruit in an effort to show abundant caution with respect to the Human Rights Code, he said.

But the legislation would close a gap that exists between individuals who have police records, but not specifically a pardon, according to Halum.

"The way the code is written now, there is a gap that needs to be addressed," she said. "That's probably one of the biggest changes for employers, who will need to ensure

their recruiting practices are in line with the code.”

But this change is simply meant to bring the code’s language up to speed with the legal landscape, said Des Rosiers.

“Currently in the Human Rights Code, you cannot discriminate towards someone who has a pardon. If somebody has a criminal record but they have a pardon and they come to seek employment, you cannot discriminate against them.”

However, those who simply have a dismissed charge could be repeatedly discriminated against, despite never actually being convicted, she said.

“To me, that’s an anomaly and I’m trying to rectify that,” said Des Rosiers, noting that vulnerable sectors would still be allowed to perform police checks prior to employment.

Immigration status, genetics

Meanwhile, the addition of immigration status to the code is meant

to free up restrictions felt by some employers that are unable to hire a recruit without permanent residency, she said.

As such, employers will need to be careful when defining residency-based requirements for a position, said Lambert.

“To say that you must be a legal resident may end up being discriminatory if there’s another legal definition by which a person can be residing in Canada and able to work in Canada that applies to that person,” he said.

“Employers just have to be very careful with language.”

As for genetic characteristics, Ontario will become the first province to prohibit discrimination stemming from genetic characteristics if Bill 164 proceeds, following in the footsteps of the federal government which passed the Genetic Non-Discrimination Act in May of last year, said Lambert.

This change could have a more

significant impact on insurers rather than employers, said Halum.

Advice for HR

A wait-and-see approach may be the most advisable action in terms of anticipating this legislation’s effect on the world of work, said Minken.

“If it does pass as is, it will certainly change the landscape of human rights in the area of employment,” he said. “HR people will need to exercise greater caution in the questions being asked.”

And given all of the changes that are taking place to Ontario workplace law right now, employers need to be cautious in using a run-of-the-mill, precedent-based standard approach, according to Lambert.

“Documents — things like letters of offer, termination letters, and even day-to-day dealings with employees on things like performance management — are going to have to be more particularized, especially

when you’re looking at four new grounds added to the Human Rights Code,” he said.

“For example, employers will often include language in a letter of offer, requiring proof of one’s ability to work legally in Canada, and say that the employer has a right, at its discretion, to conduct a police background check,” said Lambert.

“I’m not sure that either of those things will necessarily be illegal going forward, but employers will certainly need to use caution given the fact that... police records and immigration status are going to be included as listed grounds in the Human Rights Code.”

Human resources practitioners need to be aware of legislative changes being discussed, and identify policies that will need to change if the bill comes into effect to avoid being caught off-guard, said Halum.

“In the last six months or so, we’ve seen a lot of upheaval in employment legislation,” she said.