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### Ontario's Human Rights Code Amendment Means New Challenges for Employers

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On December 20, 2006, the Ontario *Human Rights Code Amendment Act, 2006*, better known as Bill 107, received Royal Assent after the Act was passed on December 5, 2006. The McGuinty Government's stated goal for Bill 107 has been to "modernize the human rights system and shorten the pipeline from complaint to resolution." The bill had a rocky road in 2006, with most stakeholders being opposed to it. Now that it has passed, employers need to understand what the new system will mean for them.

#### The Old System

Under the Ontario *Human Rights Code*, employees are assured of equality and employment without discrimination because of a range of prohibited grounds, including race, ancestry, colour, creed, sex, sexual orientation, marital status, family status and disability. Employees who feel that they have been subjected to discrimination could previously file a complaint with the Ontario Human Rights Commission. That agency was empowered to investigate the complaint and endeavour to have it resolved.

Typically, the Commission would attempt to mediate the differences between the parties. If a settlement was not reached, investigators were then assigned the task of collecting evidence relating to the allegations of discrimination. They, in turn, made recommendations to the commissioners as to whether the complaint should be referred to the Ontario Human Rights Tribunal for further prosecution. If the commissioners believed that a complaint had merit, the complaint was referred to the Tribunal where the Commission would prosecute the complaint.

#### Post Bill 107

The passage of Bill 107 eliminated the Commission's investigative role. Now, an employee will have to file their own complaint directly to the Human Rights Tribunal and investigate their own case. While the government has made some funding available for access to legal services, it is not clear whether every claimant will have access or will need to pay their own legal fees in addition to a Tribunal user fee. While it could be seen as a more open system, with complainants enjoying direct access to the tribunal, the burden of assembling a case will now be on the individual

employee, not the Commission.

For employers, the process will be judicialized: the Commission will no longer be conducting investigations. Employers will be charged with marshalling all of their evidence in defence of their position. Because of the Complainant's automatic access to the Tribunal, most cases will be referred there for adjudication.

The employer's exposure to damages for violations of the Code will now be significantly increased. For example:

- the cap of \$10,000 in compensation for damages for mental distress will be revoked;
- willful or reckless conduct will no longer be required to be proven to obtain such damages;
- the limitation period for claims will double from six months to one year after the alleged infringement;
- the Tribunal will have the authority to impose fines of up to \$25,000 for violating human rights; and
- employees will now be able to sue an employer and claim damages for a breach of the *Human Rights Code* as a cause of action.

Ontario's Attorney General stated that it took an average of five years to resolve a human rights complaint using the Commission. But while the government has assured Ontario of a more streamlined process to deal with a backlog of human rights complaints, in reality, the volume of complaints will simply shift from the Commission to the Tribunal. It remains to be seen how the Tribunal will establish practices and procedures to ensure an expeditious processing of complaints and the screening out frivolous proceedings.

Employers now face the prospect of more regular litigation on human rights complaints either through the Ontario Human Rights Tribunal or through the court system. The cost of doing business in Ontario will rise significantly.

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