

# PROHIBITION OF “DIFFERENCE IN TREATMENT” PROVISIONS IN PENSION AND EMPLOYEE BENEFIT PLANS AND OTHER PROPOSED AMENDMENTS TO THE QUEBEC ACT RESPECTING LABOUR STANDARDS

On March 20, 2018, Dominique Vien, the Minister responsible for Labour, introduced Bill 176, *An Act to amend the Act respecting labour standards and other legislative provisions mainly to facilitate family-work balance*. Many employers were extremely concerned that such a bill could prohibit “difference in treatment” provisions based solely on the date of hire (commonly known as “orphan clauses”) in pension and employee benefit plans.

The Bill contains provisions dealing with, among others, the following issues:

- Orphan clauses;
- Family-work balance;
- Hours of work;
- Vacation;
- Absences owing to sickness, an organ or tissue donation, an accident, domestic violence or a criminal offence;
- Personnel placement agencies and recruitment agencies for temporary foreign workers.

## ORPHAN CLAUSES

The Bill, as tabled, prohibits orphan clauses in pension and employee benefit plans. However, the Bill includes a transitional rule stipulating that the prohibition would not apply to orphan clauses that existed on the day preceding the effective date of the prohibition (that is, the date the legislation receives assent, which remains to be determined).

In light of the substantial number of employers that have included such clauses in their pension and employee benefit plans in recent years—slightly over 40% of organizations that have pension plans according to statistics compiled by Mercer—this transitional rule will make it possible to avoid having to reopen issues that have already been settled. Reopening such issues would have been arduous and could have led to major and unwanted labour disputes. Employers who have already introduced orphan clauses will breathe a sigh of relief.

However, the prohibition of any new orphan clauses limits the flexibility offered to employers, while the possibility to continue to implement orphan clauses would have provided them with more maneuvering room for meeting the changing needs of the new generations of workers.

Mercer has concerns regarding the Bill's silence about the possibility of introducing different provisions based on hiring date that might not be considered orphan clauses; for example, the introduction of different plans, but of equivalent value.

With these options no longer being maintained, it can be expected that some employers will accelerate their transition to defined contribution plans for the future. As a result, employees who could have kept a defined benefit pension plan during the transition period will have to migrate to a defined contribution pension plan, even if they are only a few years away from retirement.

Certain clarifications will be needed regarding the application of the new provisions of the Act, particularly:

- What is the date that will determine if a pension or employee benefit plan is exempt pursuant to the transitional rule? Is it the date of the resolution adopting the amendments, the date on which the members are informed of the orphan clause, the effective date of the orphan clause, or, in the case of pension plans, the date the amendment introducing the orphan clause is registered with Retraite Québec?
- Will it be possible to introduce separate provisions if the criterion is not based solely on a date of hire? For example, would it be acceptable to provide for a distinction based on a points system (age + years of service) and not solely on a date of hire?

It should also be noted that the Bill provides a recourse for employees who believe they have been the victim of an orphan clause in a pension or employee benefit plan, thereby facilitating the complaint process for these employees.

Finally, we are of the view that the prohibition of orphan clauses in pension plans, as stipulated in the Bill, applies to all employees who are subject to the *Quebec Act respecting labour standards*, whether they are members of a pension plan that is registered in Quebec or in another Canadian province.

## FAMILY-WORK BALANCE

Among other things, the Bill increases the number of weeks of absence authorized for certain events associated with parental responsibilities. The Bill broadens the definition of "relative" and provides that certain days of absence may also be taken for the benefit of persons, other than relatives, for whom an employee acts as a caregiver. Also, the Bill provides for certain days of absence to be remunerated.

## HOURS OF WORK

The Bill reduces from four to two the number of daily overtime hours an employee is required to accept. Also, under certain conditions, the Bill allows an employee to refuse to work if he or she has not been informed of his or her work schedule at least five days in advance, and it offers increased flexibility for staggering an employee's working hours.

## VACATION

The Bill stipulates that an employee is entitled to three weeks of vacation after three years of uninterrupted service, rather than after five years of uninterrupted service.

## ABSENCES OWING TO SICKNESS, AN ORGAN OR TISSUE DONATION, AN ACCIDENT, DOMESTIC VIOLENCE OR A CRIMINAL OFFENCE

The Bill adds domestic violence to the list of causes justifying an absence from work for a period of not more than 26 weeks over a period of 12 months.

Moreover, the Bill stipulates that, in the case of an employee who has at least three months of uninterrupted service, the first two days of absence taken each year owing to sickness, an organ or tissue donation, an accident, domestic violence or a criminal offence would be remunerated.

## PERSONNEL PLACEMENT AGENCIES AND RECRUITMENT AGENCIES FOR TEMPORARY FOREIGN WORKERS

The Bill requires personnel placement agencies and recruitment agencies for temporary foreign workers to hold a licence. It also stipulates that a personnel placement agency may not remunerate an employee at a lower rate of wage than that granted to the employees of the client enterprise who perform the same tasks in the same establishment solely because of the employee's employment status, and in particular because the employee is remunerated by such an agency or usually works fewer hours each week. The Bill does not specify how the rates of wage granted to employees of the client enterprise would be obtained or communicated. The potential impact of this measure could be a reduction in the use of placement agencies. It is important to note that this measure aligns with certain recent amendments to Ontario's *Employment Standards Act, 2000*.

## MERCER'S COMMENTS

Quebec workers will appreciate the proposed amendments that will offer them greater flexibility for achieving family-work balance. Nevertheless, these amendments come on top of many other

challenges and constraints employers are facing related to workforce management. Hopefully, these additional constraints will not create an economic and social context that will limit the competitiveness of Quebec businesses globally. Also, Quebec's prohibition of orphan clauses will be an issue for Canada-wide employers that want to introduce consistent changes for all their new employees as of a certain date.

Certain employers may see the deferred application of the prohibition on orphan clauses as a last opportunity to amend their pension or employee benefit plan and thereby be able to take advantage of the transitional rule. However, this approach is not without risk as the deferred application of the prohibition could be changed before the proposed legislation receives assent.

Finally, it will be interesting to observe how this Bill evolves over the coming weeks. In particular, the exemption granted to existing orphan clauses could lead to recriminations and pressure from unions and youth associations. Certain political parties have also taken a similar position. Nevertheless, there is a certain amount of pressure to take action, in light of the National Assembly's unanimous resolution last December to prohibit orphan clauses.



## ABOUT MERCER

At Mercer, we make a difference in the lives of more than 110 million people every day by advancing their health, wealth, and careers. We're in the business of creating more secure and rewarding futures for our clients and their employees – whether we're designing affordable health plans, assuring income for retirement or aligning workers with workforce needs. Using analysis and insights as catalysts for change, we anticipate and understand the individual impact of business decisions, now and in the future. We see people's current and future needs through a lens of innovation, and our holistic view, specialized expertise, and deep analytical rigour underpin each and every idea and solution we offer. For more than 70 years, we've turned our insights into actions, enabling people around the globe to live, work, and retire well. At Mercer, we say we *Make Tomorrow, Today*.

For further information, please visit:

[www.mercer.ca](http://www.mercer.ca)

Join the conversation:

On Twitter: @MercerCanada

On LinkedIn: [www.linkedin.com/company/mercer-canada](http://www.linkedin.com/company/mercer-canada)