

MANITOBA LABOUR BOARD

Suite 500, 5th Floor – 175 Hargrave Street, Winnipeg, Manitoba, Canada R3C 3R8

T 204 945-2089 F 204 945-1296

www.manitoba.ca/labour/labbrd

MLBRegistrar@gov.mb.ca

ESSENTIAL SERVICES INFORMATION BULLETIN

This Information Bulletin relates to the coming into force of *The Labour Relations Amendment Act* concerning essential services

INTRODUCTION

The Labour Relations Act requires that, during a strike or lockout, the employer, bargaining agent and employees continue the supply of services, operation of facilities or production of goods to the extent necessary to

- a. prevent a threat to the health, safety or welfare of residents of Manitoba;
- b. maintain the administration of justice; or
- c. prevent a threat of serious environmental damage.

To achieve this, bargaining agents and employers must first determine whether an Essential Services Agreement (“ESA”) is required, and then file an ESA with the Manitoba Labour Board (“Board”).

If the employer and bargaining agent are unable to agree, the matters are to be settled by the Board.

Determining if essential services exist

The first step for parties will be to determine whether an ESA is required in the event of a lockout or legal strike (the “ESA Determination”). This determination, whether essential services are required to be maintained or not, must be filed with the Board 180 days prior to the expiry of their collective agreement.

If the parties are unable to come to an agreement on this threshold issue, either party may file an application requesting the Board to make the determination. If the Board is of the opinion that a lockout or legal strike could result in a failure to provide essential services, it may designate the supply of services, operation of facilities or production of goods necessary to ensure essential services are maintained.

Essential Services Agreement

If the parties, or the Board, determine that essential services exist in the workplace the next task will be for them negotiate an ESA.

The ESA must set out the manner and extent to which the employer, the bargaining agent and the employees in the unit must continue the supply of services, operate facilities and produce goods, including the number of employees that are necessary to

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maintain these essential services. The ESA must be completed and filed electronically with the Board at least 90 days prior to the expiry of the collective agreement.

If the parties are unable to agree either party may file an application requesting the Board to settle the ESA. Employers and bargaining agents may also choose to have the ESA settled by an arbitrator, with the cost of the arbitrator being shared equally by the bargaining agent and the employer.

Parties to a collective agreement who have determined that essential services exist in the workplace may not strike or lockout without an ESA filed with the Board.

Employers, bargaining agents and employees must comply with the ESA. The terms and conditions of the expired collective agreement continue to apply for any employee required to work in accordance with an ESA, unless otherwise negotiated between the parties, or imposed by the Board.

During a lockout or legal strike, either the employer or the bargaining agent may request a review of the ESA.

Substantial Interference with Collective Bargaining

If the bargaining agent or the employer believes that the ESA's effect is so significant that it will substantially interfere with collective bargaining, they may file an application with the Board for a determination. If the Board finds substantial interference with collective bargaining, there can be no further strike or lockout action, and either party may apply to the Board to settle the collective agreement.

Assistance to Parties

A negotiated agreement is preferable to a determination of the Board. Accordingly, the parties are encouraged to come to the Board for assistance at any time:

- a. by requesting the appointment of a Board representative, or;
- b. by seeking a Board determination of a question for the purposes of *The Labour Relations Act* pursuant to section 142(5).

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QUESTION AND ANSWER

Who is required to consider essential services?

All employers, bargaining agents, and employees who work under a collective agreement in Manitoba are covered by the essential services sections of the *Act*.

Are there exemptions from ESA requirements?

The only exception from compliance with the essential services sections of the *Act* are for employees in a unit, such as police or firefighters, who are prohibited from striking.

The *Act* applies to every union, employer and employee who is covered by a collective agreement. All unionized workplaces in Manitoba must determine whether or not a lockout or legal strike would interfere with essential services.

What is an *ESA Determination* and what is the requirement?

Parties are required to determine whether an essential service will be required in the event of a lockout or legal strike. The *Act* sets out that this determination must be made 180 days prior to the expiry of their collective agreement, and that they are required to file with the Board their determination by that day. If no agreement is reached on the 180th day prior to the expiry of their collective agreement, either party may file an application for an *ESA Determination*.

The Board will then have 30 days from the date of application to determine the issue.

What if the bargaining agent and employer agree that there are no essential services?

The *Act* still requires the parties to file an *ESA Determination* setting out the agreement that there are no essential services.

Can job action be taken in the absence of an *ESA*?

No. Section 89(3) of the *Act* requires that the bargaining agent and the employer must either file a determination with the Board that a strike or lockout will not interfere with essential services, or they must file an *ESA* before an employer can declare or cause a lockout of employees or for employees in a unit to go on strike.

Further, even if an *ESA* is concluded, notice of a lockout or of a strike must be served upon the other party at least three days prior to any job action.

When should I start negotiating the terms of an *ESA*?

At any time, the parties can negotiate and settle the terms of an *ESA*, and they may approach the Board for assistance. Even if they are outside of the timelines specified in the *Act*, they may file for a Board determination under section 142(5) of the *Act*.

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Parties can also hire a conciliator to assist them in reaching an ESA. Either way, an ESA Determination must be filed with the Board 180 days prior to the expiry of the collective agreement and if it has been determined that an ESA is necessary, it must be concluded 90 days prior to the expiry of the collective agreement.

What should be included in an ESA?

The negotiation of an ESA is primarily the responsibility of the parties to the bargaining relationship. The parties best understand which services are essential to protect health, safety or welfare of residents of Manitoba, to maintain the administration of justice and to prevent a threat of serious environmental damage.

An ESA should identify:

- the manner and extent to which the employer, the bargaining unit and the employees in the unit must continue the supply of services, operations of facilities or production of goods during a strike or lockout,
- the functions and duties of employees in the bargaining unit that are necessary to maintain essential services
- the classifications, and the number of positions in each classification, required to perform those essential services,
- the number of employees in the bargaining unit required to perform the essential duties and functions
- the method by which employees capable of performing the essential services will be assigned to perform those services during a strike or lockout,
- the procedures to be followed in responding to emergencies or foreseeable changes to the essential services that need to be maintained during a strike or lockout. These procedures should be sufficiently flexible to allow the parties to quickly respond to emergent changes to necessary essential services; and
- if applicable, permissible changes to the terms and conditions of employment which will apply to designated essential services workers during a strike or lockout.

How do I file an ESA Determination or ESA with the Board?

Section 94.3(1.1) of the *Act* requires the parties to a collective agreement to file their ESA Determination 180 days prior to the expiry of their collective agreement.

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Section 94.3(4) of the *Act* requires that an ESA be filed with the Board 90 days prior to the expiry of their collective agreement.

When the agreement is filed, it has the same effect as an order of the Board.

ESA Determinations and ESAs, together with the expiring collective agreement, must be sent to mlb@gov.mb.ca.

We have some agreement on essential services, but we have reached an impasse. How can the Board assist?

The Board is prepared to work with the parties at any time, without application, to help resolve essential services disputes. Parties are encouraged to contact the Board to discuss manners in which the Board can assist in coming to an agreement on an ESA Determination or an ESA.

If the parties are unable to reach agreement by themselves or with the assistance of a mediator, they may file with the Board to have the matter determined. For ESA Determinations, the application must be filed no earlier than 180 days before the expiry of the collective agreement. An application to settle an ESA must be filed no earlier than 90 days before the expiry of the collective agreement. In either case, the Board must determine the matter within 30 days of the Application.

How do I apply for an ESA Determination or an ESA?

The Board has developed a comprehensive application package that must be completed when filing an application regarding ESA Determinations and settlement of an ESA. The Board will require the applicant to file its direct evidence by way of affidavit, with the affiant being subject to cross examination by the replying party. Before an application is filed with the Board, it must be served on the respondent.

The Board will not accept an incomplete application package. Care must be taken to ensure the information requested is sufficiently detailed. The Board will inform the parties once it has accepted the application as complete and the timelines start once notice is effected.

Once the Board has accepted an application package as complete, the respondent will need to file its reply within three days. The reply must contain all the material facts on which the respondent intends to rely. The respondent may not be entitled to present evidence or make any representations about any additional material fact that was not set out in the reply, except with the permission of the Board.

The Board will schedule a Case Management Conference (CMC) on the day following the deadline for the filing of the reply. At the CMC, the Board will schedule the hearing,

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which must commence no later than the 14th calendar day after the acceptance of the application.

Please remember that the Board will have limited opportunity to conduct the hearing, assess the evidence and render a decision within the allotted time, and timelines must be strictly adhered to for decisions to be rendered in a timely manner. The Board will require that hearings proceed in a concise and timely fashion. Extensions will be exceptionally rare, and the availability of counsel will not be deemed an exceptional circumstance.

Are there any other alternatives to coming to the Board for settlement of an ESA?

Yes, the parties may jointly agree to appoint an arbitrator to settle their ESA. If the parties prefer to appoint an arbitrator, within 2 days of filing their application with the Board, they must inform the Board in writing of their agreement to settle the dispute by arbitration, along with the name of the individual who has agreed to act as arbitrator. The arbitrator is required to settle the terms of the ESA within 30 days after notice is served on the Board. The cost of the arbitrator is split equally between the bargaining agent and the employer.

If an arbitrator is selected to settle the ESA, they continue to have jurisdiction to settle requests for amendments. They must determine any matter in dispute between the parties during a lockout or legal strike within 2 days of the application, unless the arbitrator is unable or unwilling to act. In such cases, the parties may agree to another arbitrator, or if the parties are unable to agree, either party may request the Board to settle the issue.

Can I access mediation once an application is received?

Yes. A Board representative will be assigned to every matter that is received by the Board, who will continue to work with the parties to narrow or resolve matters.

What can I expect at the Case Management Conference?

The Board may inquire into any of the following:

1. Schedule a hearing, which must be scheduled to start before the 14th calendar day from the date that the Application is accepted by the Board and must be completed with enough time for the Board to render its decision within 30 days.
2. Develop an agreed statement of facts and obtain admissions which might facilitate the hearing.
3. Direct the parties to provide further facts or details of the position it is taking in the proceeding or prepare a sworn statement of the evidence which will be elicited from a witness in the proceeding;

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4. Direct the pre-hearing disclosure of documents by a party or by any other person who may be called as a witness in the proceeding.
5. Discuss the conduct of the hearing, including the order in which the parties will proceed, the number and identity of witnesses, and the estimated length of time required.
6. Direct that a written submission be filed respecting any aspect of the proceeding.
7. Direct that the parties engage in mediation to narrow or resolve the issues in dispute.

Can my ESA be amended by the Board?

Yes. Parties may agree to amendments to an ESA at any time and file them with the Board.

However, Section 94.3(12) of the *Act* states that on application by an employer or the bargaining agent during a lockout of legal strike, the Board may review, confirm, amend or cancel an ESA or make any order that it considers appropriate.

What happens if the ESA is not respected?

Section 94.4(4) of the *Act* indicates that any employer, union or other person who fails to comply with an ESA commits an unfair labour practice.

We are in the process of negotiating a new collective agreement and have not even discussed the issue of essential services. What now?

The *Act* contains transitional positions which enable parties whose collective agreements have already expired to immediately proceed to have the matters settled on application to the Board.