

MANITOBA LABOUR BOARD

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MANITOBA LABOUR BOARD INFORMATION BULLETIN NO. 10 *THE EMPLOYMENT STANDARDS CODE - APPEAL HEARINGS*

This bulletin is intended to help you prepare for your hearing at the Manitoba Labour Board. It is a general guideline and does not attempt to address every issue that may arise.

What is the Manitoba Labour Board?

The Manitoba Labour Board (the "Labour Board") is an independent and autonomous tribunal, separate from the Employment Standards Division (the "Division"). The Labour Board decides disputes between employees and employers when an order of the Division is appealed by one of the parties named in that order.

What is an Appeal Hearing?

An appeal hearing gives you and the opposing party the opportunity to present your case to the Labour Board. It is a new hearing and is open to the public. It is **not** a continuation of the investigation conducted by the Division. If you filed an appeal, then you must prove your case at the hearing. You are welcome to attend a hearing as an observer before your case is heard in order to get a feel for the process.

The matters which the Labour Board will consider are the issues identified in the written statement(s) of appeal filed by either or both parties and the Division's order. The Labour Board may confirm, vary or revoke the order issued by the Division. Remember, if you wish to contest any aspect of the Director's Order, then you must have filed a written **Notice of Appeal** with the Director, specifying the grounds for your appeal. If you did not appeal, then you cannot raise any new grounds of your own at the hearing and you will be limited to dealing with the items raised by the appealing party in its **Notice of Appeal**.

Sections 122(3) and 122(4) of **The Employment Standards Code**, C.C.S.M. c. E110, (the "**Code**") provide the statutory framework for an appeal. For your information, these sections provide:

Board not bound by rules of evidence

122(3) The board may receive information and evidence under oath affirmation, declaration or otherwise, and is not bound by the rules of law respecting evidence that apply to judicial proceedings.

Procedure

122(4) The board may make rules of practice and procedure that it considers necessary to govern the conduct of business before it under this Code.

The Referral Package

The documents contained in the Referral Package, which all parties recently received from the Division, were also sent to the Labour Board. These basic documents provide the necessary framework and context for the Labour Board and may be relied on by the Labour Board in deciding your case. These are the **only** documents which the Labour Board receives in advance of the hearing regarding your case. Therefore, you **cannot** and **should not** assume that the Labour Board has **any** knowledge of this case beyond what is contained in the Referral Package.

You must bring your Referral Package with you to the hearing. If there are any other facts or documents that you wish the Labour Board to consider, then it is your responsibility to provide these facts or documents at the hearing.

Remember, the fact that the Labour Board received the Referral Package does **not** mean that you are prohibited from challenging the contents of any document in the package. The Labour Board recognizes that an appeal is often based on a claim that the factual findings of the Division underlying the initial order were wrong. Such claims will be addressed at the appeal.

During the Division's investigation, you may have furnished information to the Investigating Officer, other than the documents contained in the Referral Package (e.g. letters or statements). If you require any of the documents you gave to the Investigating Officer then you should contact the Investigating Officer who had been assigned to your case or the Division's general enquiry office at (204) 945-3352 or 1-800-821-4307 (toll free in Manitoba).

Will the Labour Board Give Me Advice About My Appeal?

No. The Labour Board is responsible for deciding the appeal. Neither it nor its staff can provide legal advice. However, the Labour Board's staff can answer procedural questions about the process and will be happy to answer your questions in that regard.

Can I Bring a Lawyer or Other Representative to the Hearing?

Yes. Either party may choose to be represented by a lawyer or other person, or you may represent yourself. Many cases proceed without either party retaining a lawyer. The Director of the Division (the "Director") has the right to appear before the Labour Board as a party in any case and occasionally does appear. However, if the Director does appear, the Director is not there to represent either party.

What if I Cannot Be There on the Scheduled Hearing Day?

It is your responsibility to attend the hearing and state your case. If you do not attend, the hearing will proceed and your rights and obligations will be determined in your absence, meaning that an immediate order for wages can be issued or a complaint can be immediately dismissed.

However, if you become aware of a serious conflict with the hearing date, a written request to adjourn the hearing to a new date must be immediately filed with the Labour Board, stating the reasons for the request. The Labour Board will confirm any adjournments granted and the new hearing dates in writing. Proper consideration must be given to the Labour Board's operations and to the other parties. Last minute adjournments due to unforeseeable situations or last minute emergencies will ordinarily be dealt with by the Labour Board at the start of the hearing. You will be expected to proceed with the hearing if a request is denied. To contact the Labour Board, please see the information provided at the top of page 1.

Is There a Way to Settle Without a Hearing?

Yes. Cases often settle without going to hearing. Whether or not you participated in the Alternative Dispute Resolution process provided by the Division, a Labour Board Officer is available to assist the parties to attempt a resolution of the outstanding issues in an informal manner prior to the hearing. You can initiate mediation discussions yourself by contacting the Labour Board Officer. However, you should only take this step if you are serious about settling the dispute or, at the very least, wanting to narrow the issues in dispute. Mediation will not delay a scheduled hearing date unless **both** parties agree to an adjournment.

Everything said in mediation is strictly confidential. The Labour Board is not told anything regarding the content or nature of any unsuccessful settlement discussions.

What Will My Hearing Be Like?

The vast majority of appeals are heard by a panel composed of three (3) Members of the Labour Board. Occasionally, the Chairperson or a Vice-Chairperson of the Labour Board may sit alone. The opposing party is entitled to and will be present throughout the hearing. All witnesses who give evidence before the Labour Board must swear an oath to tell the truth. Witnesses will sit in a separate room until it is their time to testify. The Chairperson or a Vice-Chairperson of the Labour Board will conduct the hearing. It will begin with the Chair of the Labour Board explaining what will happen during the hearing and answering questions you have about the process.

The party appealing the order (the appellant) will proceed with its case first. If both parties filed an appeal, then the Labour Board will decide which appellant will proceed first. This will normally be the party who filed an appeal first but the Labour Board may decide otherwise depending on what makes the most sense from a procedural point of view. Evidence can be your own verbal testimony, the verbal testimony of other witnesses and documents submitted through a witness. You must bring **six (6) copies** of any document you intend to file to the hearing. Each document submitted will be marked with an exhibit number.

After each individual witness (including a party) has finished giving their initial evidence regarding the facts (commonly known as direct examination), the opposing party is entitled to ask that witness questions at that time (commonly known as cross-examination). This will be the **only** opportunity to ask **this** witness questions should you wish to clarify the facts or challenge points raised during that person's initial testimony. It is a good idea to take notes as you think of questions so that you will be prepared. The Labour Board is entitled to ask questions of a witness to clarify matters.

When the party who starts has finished presenting its entire case, the opposing party will follow the same process. After both sides have presented their evidence, the Chair or Vice-Chair of the Labour Board will give each party the opportunity to make a closing statement. Closing statements can only address the facts brought out in testimony or documents received into evidence. Your closing statement is not a time when you can mention new facts that were not received in evidence.

Remember, the purpose of the hearing is to present the facts. Arguing or getting angry during a hearing prevents you from clearly stating the facts of your case. You will give a much better presentation if you stay calm and do not allow emotions to cloud the issues.

After the hearing, the Labour Board will convene privately to decide the appeal. The Labour Board's decision will be sent to you by the Division. You can usually expect to receive the Labour Board's decision some three (3) to four (4) weeks after the hearing has concluded but this estimate depends on the Labour Board's schedule and the complexity of the case.

What Kind of Evidence Will I Need to Bring to the Hearing?

Carefully think through your case to decide what information and documents will help to establish **the facts**. Depending on the nature of your case, you may bring witnesses who have personal knowledge of the facts which you want the Labour Board to know. As a party, you (or your representative) will be responsible for asking a witness clear and direct questions in order to have that witness testify to the facts you wish to bring out. Documents such as letters, contracts, business records, spread sheets, photos or cheques can be submitted to the Labour Board when you testify or through another witness who can identify the document and confirm its accuracy, based on personal knowledge.

Unsworn written statements made by a person who is not present at the hearing cannot be entered into evidence. Letters written to the Minister or to the Board do not qualify as evidence at a hearing or adjudication. In exceptional circumstances only, the Labour Board may receive evidence in the form of a written Statutory Declaration or a letter which is supported by a sworn declaration, where the facts recited in the Declaration or the letter are supported by the person swearing an oath or taking a solemn affirmation that those facts are true. If you wish to file such evidence, then the Labour Board recommends that you make a copy of the sworn Declaration proposed to be submitted available to the other party prior to the hearing. You must also be prepared to give an acceptable reason to the Labour Board why such evidence ought to be accepted from a person who is not available to testify in person. For example, a serious illness or a person having moved away from Manitoba may be sufficient reasons. You should make enquiries of the Labour Board if you contemplate filing evidence in this manner.

How Do I Get a Witness to Come to the Hearing?

Witnesses often come to the hearing voluntarily. However, a subpoena ensures your right to have that person testify. A subpoena legally compels a witness to attend the hearing. Contact the Labour Board well before the hearing if you need a subpoena. The Labour Board will prepare the subpoena but you are responsible for serving the subpoena on the witness and for paying the required conduct money to the witness. The Labour Board's staff can assist you here.

The Awarding of Costs

In certain circumstances, the Board has the power under the **Code** to award costs to a successful party on an appeal. The power of the Board to award costs and the basis upon which it may do so is found in Section 125(5) of the **Code** which states as follows:

Board may award costs

125(5) The board may, as part of any order it issues to a person under this Code, require the person to pay all or any part of any other party's costs in relation to the hearing, as the board considers reasonable, if in the board's opinion

- (a) the person's conduct before the board was unreasonable; or
- (b) having the matter referred to the board was frivolous or vexatious.

The Board wishes all parties appearing before it to know that a **failure to appear** before the Board for a scheduled hearing, without an adjournment having been obtained in advance or without a reasonable excuse in the event of extraordinary circumstances, may result in the Board awarding costs to the party who does appear. Costs can include reimbursement for lost wages (if applicable); conduct money paid to witnesses who may have been subpoenaed to appear; transportation and accommodation costs/expenses (if applicable); and payment of all or part of a lawyer's expenses and fees, if the party appearing has engaged a lawyer.

Disclosure of Information:

All information contained in the Referral Package received from the Division and all information provided to the Board at the hearing of any appeal is available to all parties to the appeal. Further, such information may be referred to in the order or reasons issued by the Board at the conclusion of the case, or on the Board's website and in print and online reporting services that may publish the Board's decision.

Copies of **The Employment Standards Code**, C.C.S.M. c. E110, may be viewed on the Provincial Government website at <http://web2.gov.mb.ca/laws/statutes/ccsm/e110e.php> and/or obtained from Statutory Publications, 10th Floor – 155 Carlton Street, Winnipeg MB R3C 1T5, phone: 204-945-3101.

If you require additional information, please contact the Board's office at 204-945-2089.
