



FTR Now

Bill 148 and the ESA – Changes are on the Horizon for Ontario Employers

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On June 1, 2017, the Ontario government introduced Bill 148, the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148), its highly anticipated response to the Final Report from the Changing Workplaces Review. If passed, Bill 148 would introduce a range of changes to the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act, 1995* (LRA). On June 5th, we reported on the proposed amendments to the LRA. This *FTR Now* will focus on proposed amendments to the ESA, which will significantly impact your business. All employers need to be aware of what the government has introduced.

Bill 148 and the ESA

We have previously reported on the Ontario government's proposed legislative amendments, based on the government's detailed Backgrounder of May 30, 2017. Bill 148 is the legislation that will implement the changes being proposed by the government, and if passed, will implement significant amendments to the ESA. Some important highlights are reviewed here.

Increased Minimum Wage

Bill 148 would significantly increase the general minimum wage to:

- \$14.00 per hour on January 1, 2018, and
- \$15.00 per hour on January 1, 2019.

The government does not intend to eliminate any of the special minimum wage rates, but they will be increased by the same percentage applied to the general minimum wage. Once the minimum wage rate reaches \$15.00 per hour, the ESA will revert to its existing process of annual increases based on changes in the Consumer Price Index.

Equal Pay for Part-time, Casual, Temporary and Seasonal Employees

Bill 148 would implement a general rule that no employee may be paid less than what is paid to full-time employees of the same employer who perform the same job. This is accomplished by prohibiting differential pay where this is based on "difference in employment status." The rule would apply to part-time, casual, temporary and seasonal employees, unless there are objective reasons to justify a differential wage rate, including systems that are based on seniority, merit, where earnings are measured by quantity or quality of production or on any other factor other than sex or employment status.

Employees would have a right to request a review of their wages, and employers would be required to respond by either increasing the wage rate or providing a written explanation of the differential. Bill 148 contains anti-reprisal protections for

such requests.

These rules would come into effect on April 1, 2018.

Scheduling

Bill 148 would implement a range of measures related to the scheduling of work:

- A new employee right to request schedule or work location changes without reprisal (available to any employee with at least 3 months' service).
- Amending the 3-hour reporting rule to require payment at the regular rate of pay (as opposed to the minimum wage rate as the current rule has been interpreted as requiring).
- An employee right to refuse a shift or to refuse being placed "on call" without reprisal if there is less than 4 days' notice provided.
- An obligation to provide 3 hours' pay at the regular rate if a shift is cancelled within 48 hours of its scheduled start. This obligation would also apply if an employee is scheduled to be "on call", but that status is cancelled within the same 48-hour window.
- A new minimum "on call" payment – 3 hours' pay at the regular rate – if an employee is placed on call and not called into work. This applies to each day of "on call" status, but would only apply once per day.

There would be some leeway for collective agreements to override the new rules. These provisions would come into effect on January 1, 2019.

Vacation and Public Holidays

Vacation entitlement would increase to 3 weeks' vacation time and 6% vacation pay after 5 years of service with an employer. Bill 148 makes a range of complementary changes to the ESA to take into account this new entitlement.

There are several important changes to the public holiday provisions of the ESA, including:

- A new formula for the calculation of "public holiday pay" designed to better ensure that the calculation reflects an employee's regular wages that they would have earned but for the holiday. The new calculation divides the wages earned in the pay period immediately preceding the public holiday by the number of days actually worked to earn those wages. This is very different from the current formula which effectively prorates holiday pay for employees who work less than 5 days per week. Under the new rule, an employee who works 3 days per week, 8 hours per day, will be entitled to 8 hours' pay for the holiday, whereas under the current rule, the employee would only be entitled to 4.8 hours' pay.
- Where an employee works on any public holiday, payment will be public holiday pay plus premium pay for the hours worked. Thus, Bill 148 would remove the option of providing employees with a substitute day off in this circumstance.
- Where a public holiday falls on an employee's day off, and the employee does not agree to work on the holiday, the general rule will be that the employer must provide a substitute day off with public holiday pay. However, Bill 148 would require the substitute day to be either the last work day prior to the public holiday or the first work day after (the current ESA has greater scheduling flexibility). Employers and employees can still agree to forego the substitute day off and just pay public holiday pay for the holiday.

Both of these sets of changes would come into effect on January 1, 2018.

Personal Emergency Leave

Bill 148 would make significant changes to the personal emergency leave provisions of the ESA, including:

- maintaining the 10-day entitlement, but requiring that 2 of the days be paid leave (the 2 paid days must be granted before the 8 unpaid days)
- eliminating the 50-employee threshold so that personal emergency leave will apply in all workplaces
- expanding coverage to include domestic or sexual violence or the threat of such violence
- prohibiting employers from requiring an employee to provide a medical note to substantiate any claim for personal emergency leave.

This last change will significantly limit an employer's ability to ensure that personal emergency leave is taken for appropriate reasons and to manage employee attendance. While Bill 148 does not go so far as prohibiting an employer from asking for a medical note, employers will not be able to require them to be provided.

These changes would take effect on January 1, 2018.

Other Leaves of Absence

Bill 148 would increase the length of family medical leave from 8 weeks in a 26-week period to 27 weeks in a 52-week period, and would create a new leave applying to the death of any child (this is an expansion of the existing crime-related child death leave).

These changes would also take effect on January 1, 2018.

Temporary Help Agency Employees

Bill 148 would implement several changes related to the use of assignment employees by temporary help agencies and their clients. First, the ESA would be amended to include "equal pay for equal work" principles, requiring assignment employees to be paid equally to employees of the agency's client where:

- they perform substantially the same work in the same establishment,
- they utilize substantially the same skill, effort and responsibility, and
- the work is performed under similar working conditions.

It appears that this equal pay obligation will apply from the first day of the assignment. The new requirement would not apply if the difference in pay rate is based on "any factor other than sex, employment status or assignment employee status." Assignment employees will have the right to inquire about their own rate of pay and the rate provided to employees of the client, without fear of reprisal. Agency employers would have an obligation to reply. There appears to be no mechanism, however, to require a client to provide pay-related information to the agency.

Second, Bill 148 would amend the ESA to require one week's notice of termination of an assignment that was scheduled to last more than 3 months and is ended early. If notice is not provided, the agency would be required to provide pay in lieu of notice equal to the wages that the assignment employee would have earned had the notice been given. Pay in lieu would not be owed in limited circumstances, including situations where the agency offers a reasonable alternative assignment during the one-week period.

The change related to equal pay would take effect on April 1, 2018. The change related to termination of an assignment would take effect on January 1, 2018.

Application of the ESA

On May 30, the government announced that it will not add "dependent contractors" to the definition of "employee" under the ESA. However, Bill 148 would amend the ESA to prohibit the misclassification of employees. This prohibition is primarily

aimed at the misclassification of employees as independent contractors. The employer will have the onus to prove that an individual is an independent contractor and not an employee. Therefore, employers will want to ensure that they conduct appropriate due diligence when engaging contractors to ensure that they can meet this new onus. This provision will begin to apply when Bill 148 is passed into law.

Bill 148 will eliminate most of the exclusions that apply to Crown employees, and will make the ESA applicable to trainees. However, individuals working through an experiential learning program run through a university, college (including a registered private career college) or high school would continue to be excluded.

As we discussed in our May 30, 2017 *FTR Now*, "[Ontario Proposes Significant Amendments to Employment and Labour Laws](#)," the government has committed to conducting a review of all ESA exemptions and special industry rules, beginning this Fall. This review will include a review of the managerial and supervisory exemption from hours of work and overtime pay. There are no changes at this time to these exemptions in Bill 148.

Miscellaneous

There are a range of other changes, including:

- clarification and expansion of the related employer provision of the ESA
- allowing for the use of electronic agreements
- eliminating the blended overtime rate for employees who work different jobs at different rates for the same employer
- increased penalties for non-compliance (primarily through increased amounts for notices of contravention and authority to publish more data on individuals found to be in contravention)
- improved wage collection measures
- a new ability for the Director to provide and revoke "recognition" of employers who meet prescribed criteria presumably for compliance with the ESA but the Bill is not very descriptive of what an employer can be given recognition for having done.

The government has also pledged to hire an additional 175 employment standards officers to enforce the ESA, and will launch a new education program aimed at both employees and small to medium-sized businesses.

Not Covered

In our May 25, 2017 *FTR Now*, "[Changing Workplaces Review Final Report – Focus on Employment Standards](#)," we summarized some of the key recommendations of the Special Advisors. Bill 148 does not address many of the recommendations including the recommendation to remove the requirement for Director's approval to work hours in excess of 48 per week up to 60 per week, the recommendations regarding overtime averaging agreements and the recommendation to create an internal responsibility system for minimum standards similar to the one under the *Occupational Health and Safety Act* for health and safety in the workplace.

While we did not report on this in our May 25th *FTR Now*, in their Final Report the Special Advisors had made a number of recommendations related to the liability of corporate directors for unpaid wages under the ESA. Bill 148 does not address any directors' liability issues in its current form.

Conclusion

As readers can appreciate from this review, the *Fair Workplaces, Better Jobs Act, 2017* would make significant changes to the ESA and will have a major impact on your operations. Bill 148 passed First Reading on the day that it was introduced in the Legislature, and was immediately referred to the Standing Committee on Finance and Economic Affairs to be considered over the summer. While details are not yet available, it appears the Committee will conduct hearings on June 22 and 23,

during the weeks of July 10-14 and 17-21, and again during the week of August 21-25. This schedule is preliminary and is subject to change.

Employers should consider whether they would like to participate in the Committee process, as this will likely be the last chance to have your voice heard by the government before Bill 148 is passed and becomes law. We will continue to monitor the Bill and the Committee process, and will inform clients once more definitive information is available.

Should you have any questions or require further information, please contact [your regular Hicks Morley lawyer](#).

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