FTR Now

Big Changes to Bill 148 after Committee Review

Date: August 25, 2017

On August 21, 2017, the Standing Committee on Finance and Economic Affairs (Committee) adopted significant amendments to Bill 148, the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148) which will be reported back to the Ontario Legislature when it resumes sitting on September 11, 2017.

As we have previously reported, if passed, Bill 148 will amend the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act, 1995* (LRA), substantially changing the landscape of employment and labour law in Ontario.

In this *FTR Now*, we review the key amendments to Bill 148 adopted by the Committee. We recommend that you read this *FTR Now* in conjunction with our two prior *FTR Now* publications on Bill 148: *Ontario Proposes Legislative Overhaul of Labour Relations Act, 1995 in Bill 148 – Are you Prepared?* (published June 5, 2017), and Bill 148 and the ESA – Changes are on the Horizon for Ontario Employers (published June 7, 2017).

ESA Amendments

Domestic or Sexual Violence Leave

The original version of Bill 148 would have added “sexual or domestic violence, or the threat of sexual or domestic violence” experienced by an employee or a listed family member as a specific ground for claiming personal emergency leave under the ESA. The Committee adopted an amendment which replaced this proposal with a new standalone leave for domestic or sexual violence.

Under the new leave, an employee who has been employed for at least 13 consecutive weeks is entitled to an unpaid leave of absence where that employee or the employee’s child experiences domestic or sexual violence or the threat of sexual or domestic violence. The leave must be taken for one of the following purposes:

- to seek medical attention for a physical or psychological injury or disability caused by the domestic or sexual violence
- to obtain services from a victim services organization
- to obtain psychological or other professional counselling
- to relocate temporarily or permanently
- to seek legal or law enforcement assistance or
- any other prescribed purposes

The new leave will be structured as a dual entitlement. In each calendar year, an employee may take up to 10 days of leave and may take up to 15 weeks of leave as well. This structure is intended to provide a greater degree of flexibility to the employee to respond to the circumstances necessitating the leave. Employees are to advise the employer prior to taking leave, where that is possible, and provide evidence reasonable in the circumstances if the employer requests it. The new provision makes it clear that an employee may be able to access other leaves under the ESA, such as personal emergency leave, in addition to the new leave (assuming that the employee qualifies for that other leave).

Pregnancy and Parental Leave

The Committee adopted two amendments of note in relation to pregnancy and parental leave. First, the length of pregnancy leave for employees who suffer a still-birth or miscarriage will be extended from 6 weeks to 12 weeks after the pregnancy loss occurs. This change will come into effect on January 1, 2018.

Second, the length of parental leaves will increase by a total of 26 weeks:

- from 35 weeks to 61 weeks for employees who took a pregnancy leave and
- from 37 weeks to 63 weeks for employees who did not

Related amendments will adjust the timing of when parental leaves must begin and end to reflect the longer period of leave. These changes will bring the ESA into line with recent changes to the *Employment Insurance Act* and will come into effect on a day to be named by proclamation by the Lieutenant Governor in Council.

Record-Keeping for Employers

The ESA currently requires that employers maintain a range of records with respect to their employees. Amendments adopted by the Committee will add several new record-keeping requirements in addition to what already exists:

- the dates and times an employee was scheduled to work or to be on-call for work, and any changes to the on-call schedule
- the dates and times an employee worked
- where an employer has two or more regular rates of pay, the dates and times an employee worked in excess of the overtime threshold at each rate of pay
- any cancellations of a scheduled day of work or a scheduled on-call period and the date and time of the cancellation
- any written notice provided to employees regarding substitute holidays (discussed below)
- the amount of vacation pay an employee earned during a vacation entitlement year and how the amount was calculated
- in cases of an alternative vacation entitlement year, the amount of vacation pay an employee earned during the stub period and how that amount was calculated and
- documents related to an employee taking the new Domestic or Sexual Violence Leave

The retention period for records of vacation time and vacation pay will increase from three years to five years.

Record Keeping for Temporary Help Agencies

The Committee will change the record-keeping obligations for temporary help agencies. Currently, the ESA requires agencies to record the number of hours worked by each assignment employee for each client of the agency in each day and each week, in addition to the record-keeping obligations that apply to all employers. The amendment adopted by the Committee will add a new provision that agencies must also retain a copy of any written notice provided to an assignment employee relating to the termination of assignment.

Scheduling/On-Call provisions

Bill 148 will introduce a new Part VII.2 “Scheduling” to the ESA, which we reviewed in our June 7 *FTR Now*. The Committee adopted several significant amendments to this new Part:

- Bill 148 will provide an employee the right to refuse a work or on-call assignment, where the request is made within 96 hours of the start of the shift. The Committee amended the provision so that it will not apply where the work is to deal with an emergency, to remedy or reduce a threat to public safety or for other prescribed reasons.
- Bill 148 will create an obligation to pay 3 hours wages at the regular rate where an employer cancels a scheduled work or on-call shift within 48 hours of its commencement. This obligation will not apply in certain cases beyond the employer’s control (e.g. fire, power failure, storms). The Committee expanded that exemption to situations where the nature of the employee’s work is weather-dependent and the employer cannot provide work for weather-related reasons, or for any other prescribed reasons.
- Bill 148 amended the ESA’s existing 3-hour rule (i.e. the requirement to provide at least 3 hours pay at the regular rate where an employee reports for work and is provided less than 3 hours work) and created a new on-call rule (i.e. a requirement to pay at least 3 hours pay for employees who are on-call and who are either not called in to work or who are called in but work less than 3 hours). The Committee amendments clarify that in order to qualify for these payments, the employee must have been available to work for at least 3 hours at the relevant time.
- Bill 148 originally provided that where the terms of a collective agreement conflict with the new scheduling provisions, the collective agreement was to prevail. Amendments adopted by the Committee will place limits on this provision: (1) the collective agreement must be in effect on January 1, 2019 and (2) the provision ceases to apply upon the expiry of that agreement or January 1, 2020, *whichever is earlier*. This means that employers may be required to renegotiate some of the scheduling provisions during the currency of their collective agreement, or have them overridden by the ESA’s new rules.

Finally, Part VII.2 was amended to clarify that the 3-hour entitlements do not pyramid, and an employee is limited to receiving only 3 hours pay even if the entitlement arises under more than one provision.

Substitute Holidays

As originally introduced, Bill 148 would have made significant changes to the public holidays provisions of the ESA. First, Bill 148 created a new formula for the calculation of public holiday pay that will have the effect of increasing holiday pay amounts for many employees. Second, Bill 148 would have removed most of the substitute holiday provisions of the ESA for employees who work on public holidays (i.e. the right to a substitute day off with public holiday pay where employees work on a public holiday).

The new formula for calculating public holiday pay was not amended by the Committee, which means that Bill 148 will amend the ESA to include the new formula. Employers should review our June 7 *FTR Now* to better understand how this change may affect your operations.

However, the government has done an about-face on the second of these issues, and the changes related to substitute days off with public holiday pay have been entirely removed from the Bill. Rather, the existing public holiday framework will remain in place, but the Committee amendments add a new requirement that, where employees agree to work on a public holiday and are entitled to a substitute holiday, the employer must provide the employee with a written statement which sets out the public holiday on which the employee will work, the date that is the substitute holiday, and the date on which the statement was provided to the employee. Employers will also be required to keep records of that information.

Personal Emergency Leave

As we previously reported, Bill 148 will provide two paid days of personal emergency leave, of the total ten day allotment.

Committee amendments include a qualifying period for the paid leave, such that an employee must have worked for an employer for one week before becoming entitled to the two paid days (if a personal emergency leave is required in the first week of employment, it will be taken from the 8 unpaid days).

In addition, where a paid day of leave occurs when the employee is entitled to overtime pay or a shift premium, the employee will only be entitled to pay at their regular wages and not at the higher rate.

Equal Pay for Equal Work:

The Committee amendments to the new equal pay for equal work provisions add a new definition of a seniority system (one of the grounds on which pay differences can be justified) to include one which provides for different pay based on the accumulated number of hours worked.

LRA Amendments

Purposes of LRA

As introduced, Bill 148 would have repealed section 2 of the LRA, which set out the “Purposes” of the Act. The Committee voted against that change and section 2 will remain in the LRA.

Security and Confidentiality of Employee Lists

Bill 148 will add a provision to the LRA to permit a trade union, in certain circumstances, to apply to the Ontario Labour Relations Board (OLRB) for an order directing an employer to provide it with an employee list. The Committee amendments address the confidentiality of the information:

- the employer must ensure that all reasonable steps are taken to protect the security and confidentiality of the list, including during its creation, compilation, storage, handling, transportation, transfer and transmission
- the trade union must ensure that all reasonable steps are taken to protect the security and confidentiality of the list, and to prevent unauthorized access to the list and
- where the list is required to be destroyed, destruction of the list must be in such a way that it cannot be reconstructed or retrieved

Review of Structure of Bargaining Units

Bill 148 would have added a provision to the LRA which would have given the OLRB the power to review and change the structure of bargaining units where the existing units are no longer appropriate. The Committee has struck that provision in its entirety. Note, however, that the new OLRB power to consolidate bargaining units after a successful certification was not revoked, and remains in the Bill.

Educational Support

Where the union has given notice of intent to bargain or where there is a first agreement arbitration, Committee amendments will permit either party to request educational support in the practice of labour relations and collective bargaining and will require the Minister or first collective agreement mediator, as applicable, to make such supports available. The scope and scale of such supports are not spelled out in the amended Bill.

Extension to Time Limits

The Committee will extend the following time limits with respect to first collective agreement mediation:

- no employee can strike and no person or trade union can authorize or threaten a strike during a period beginning at the time the Minister appoints a mediator and ending 45 days later (increased from 20 days)
- the OLRB shall not deal with a decertification or displacement application until 45 days after the Minister appoints a mediator (increased from 20 days) and
- at any time after 45 days after the Minister has appointed a mediator and the parties have not entered into a collective agreement, they may apply to the OLRB to direct the settlement of a first agreement by mediation-arbitration (increased from 20 days)

Takeaways

As can be appreciated from this review, the amendments to Bill 148 adopted by the Committee are a mixed bag. Some will likely not be welcomed by the employer community – e.g. increased record-keeping obligations, increased employee leaves or the imposition of the new scheduling rules on existing collective agreements. Other changes, such as the modest limitations on the new scheduling rules or paid personal emergency leave, may go some way to address employer concerns. Most of the changes requested by employers and employer organizations were not adopted.

The Committee was comprised of a majority of Liberal MPPs, thus we can assume that the amendments are reflective of government policy and are likely to be adopted by the Legislature. Of interest, the Progressive Conservative members of the Committee tabled a motion requiring the government to commit to an economic impact analysis, but it was rejected by the Liberal majority and lone NDP member.

We understand that the Bill may be returned to Committee after it receives Second Reading in the Legislature, so there may yet be more opportunity for the employer community to express its views to the government in the hopes of changing some of the more far-reaching elements of the Bill.

We will continue to monitor the progress of Bill 148, and will report on any further changes of interest to employers.

Note that on October 11, 2017, we will be holding an Advantage session in Toronto on Bill 148 and the key amendments to the ESA and the LRA that will impact employers, including the changes to the minimum wage, equal pay for equal work, scheduling, personal emergency leave, temporary help agency employees, card-based certification for certain industries, first collective agreement arbitration and more. A similar session will be held in London on October 25, 2017.

If you have any questions or require further information about Bill 148, please contact Craig Rix at 416.864.7284, Paul Broad at 519.931.5604 or your regular Hicks Morley lawyer.
