FTR Now

More Changes to Bill 148 after Second Committee Review

Date: November 17, 2017

On November 16, 2017, the Standing Committee on Finance and Economic Affairs (the Committee) adopted significant amendments to Bill 148, the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148). These amendments are in addition to amendments the Committee made in August of this year after First Reading of Bill 148, and are expected to be adopted by the Legislature in the near future.

As we have previously reported, Bill 148 will primarily 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. New provisions in Bill 148 will now also amend the *Occupational Health and Safety Act* (OHSA).

In our previous *FTR Now* publications, we considered the original provisions of the Bill: *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). Subsequently, we reviewed the first round of Committee amendments to the Bill in our publication, *Big Changes to Bill 148 after Committee Review* (published August 25, 2017).

In this *FTR Now*, we review the most recent amendments to Bill 148 adopted by the Committee in its second review of Bill 148, with a focus on key changes that will impact employers. We strongly recommend that you read this *FTR Now* in conjunction with our three prior Bill 148 *FTR Now* publications.

ESA Amendments

The amendments to the ESA provisions of Bill 148 focus on three key areas – (1) a range of enhancements to various leaves of absence, (2) amendments to some of the new scheduling provisions, and (3) amendments to the equal pay for equal work provisions. In addition, there is some clarity provided on the timing when the new parental and other leave provisions will come into effect.

Leaves of Absence

The Committee amendments will impact a number of different leaves under the ESA in a range of ways. For example, where a leave has been significantly changed, the Bill has been amended to allow for transition from the current leave provisions to the new leave provisions. While we cannot review all of the changes in this *FTR Now*, we will comment on some of the more significant Committee amendments.

Domestic or Sexual Violence Leave – New Paid Leave Entitlement

The prior round of Committee amendments to Bill 148 introduced a new leave of absence to the ESA, Domestic or Sexual Violence Leave, which we reviewed in some detail in our August 25th *FTR Now*. 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.

As we previously described, 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.

The government has now determined that the first 5 days of the leave will be paid, and has defined a new term "domestic or sexual violence leave pay." The payment will generally be equal to the wages that the employee would have earned had they not taken the leave, although an alternate calculation is provided for employees who receive performance-related wages, such as commissions or a piece work rate. It appears that the payment may be owing regardless of whether the first 5 days of the leave are taken in weekly or daily increments.

The leave was also amended to require employers to establish mechanisms to ensure confidentiality of records related to a leave, and to specify a limited range of permitted disclosures.

Critical Illness Leave

Currently, the ESA contains a leave entitled "Critically Ill Child Care Leave", which provides up to 37 weeks of leave within a 52-week period for a parent or legal guardian to provide care and support to a critically ill child under the age of 18. The ESA establishes a range of conditions on the leave, and allows for an extended leave in certain circumstances. This ESA leave corresponds to the entitlement under the federal *Employment Insurance Act* (EI Act) for special benefits for Parents of Critically Ill Children (an entitlement that can last up to 35 weeks).

As part of its 2017 Budget Bill, the federal government amended the EI Act in relation to the special benefits for Parents of Critically Ill Children, and to establish a new adult caregiving benefit of up to 15 weeks in a 52-week period for individuals providing significant care to an adult family member in need of support to recover from a critical illness or injury. Please see our *FTR Now* publication, *New and Longer EI Benefits are Coming* (published July 4, 2017) for details of the EI Act changes, which will take effect on December 3, 2017.

The Committee has amended Bill 148 to account for these changes to the EI Act and the benefits available under it. Thus, the "Critically Ill Child Care Leave" will be replaced by a new leave, "Critical Illness Leave".

The new Critical Illness Leave will encompass two basic entitlements:

- a leave of up to 37 weeks in a 52-week period for an employee to provide care or support to a critically ill minor child (i.e. who is under 18 years of age) who is a family member of the employee; and
- a leave of up to 17 weeks in a 52-week period for an employee to provide care or support to a critically ill adult who is a family member of the employee.

The range of “family members” who can take the leave is quite broad, encompassing spouses, parents, grandparents, siblings, aunts and uncles, and more. These relationships can extend to “step” relatives, and to certain in-laws as well, and may include non-relations who are considered by the employee to be like a family member (subject to any prescribed requirements).

There remain a range of conditions to qualify for the leave – e.g. the leave is only available to employees who have been employed for at least 6 consecutive months – and the new provision regulates such matters as time limits on the leave and extensions of a leave. The final text of Bill 148 should be consulted for the full details.

This new leave will come into effect on the later of December 3, 2017 or the date that Bill 148 receives Royal Assent. This is to coordinate with the timing of the EI Act changes. Transitional provisions address whether an employee can avail themselves of the new leave entitlements.

Pregnancy and Parental Leave

Bill 148 will make a few changes to the pregnancy and parental leave provisions of the ESA.

For pregnancy leave, the primary change is an extension of the leave available for employees who suffer a still-birth or miscarriage from 6 weeks to 12 weeks. Amendments to the Bill adopted by the Committee clarify that the new rules will apply only where a pregnancy leave begins on January 1, 2018 or later. If the pregnancy leave in question begins at any point before January 1, 2018, the current rules will apply.

The amendments also include a definition of “legally qualified medical practitioner” for pregnancy leave purposes. This amendment extends the scope of who can provide a certificate stating the due date (if such a certificate is requested by an employer) or who can certify that the employee is unable to perform her duties because of complications during the pregnancy, to include nurses with extended certificates of registration and midwives.

For parental leave, the primary change is an increased leave entitlement from 35 weeks to 61 weeks (for employees who took a pregnancy leave), and from 37 to 63 weeks (for employees who did not take a pregnancy leave). This change reflects the pending amendments to the EI Act allowing parents to spread out their parental leave benefits over a longer period of time (which will take effect on December 3, 2017).

The amendments to Bill 148 will come into effect on the later of December 3, 2017 or the date that Bill 148 receives Royal Assent, again coordinating with the EI Act changes.

The Bill 148 amendments also clarify that the extended parental leave is only available where the date of birth or the date that the child first comes into the custody, care and control of the parent is on or after the effective date of the new provisions. To put it another way, if the child is born or first comes into the custody, care and control of the parent before the effective date of the new provisions, the current (shorter) leave provisions apply. This parallels how the EI Act benefits entitlement will apply.

Family Medical Leave

Family medical leave is a current leave under the ESA that permits a leave of absence without pay for up to 8 weeks to provide care or support to certain family members where the individual has a serious medical condition with a significant risk of death within a period of 26 weeks. This needs to be certified by a qualified health practitioner for the leave to be engaged.

In our initial review of Bill 148, we noted that the Bill would increase the length of family medical leave from 8 weeks in a 26-week period to 27 weeks in a 52-week period. The Committee amendments make additional changes to the leave, including:

- a further extension of the leave to 28 weeks in a 52-week period and

- an expanded definition of “qualified health practitioner” to include physicians, registered nurses with an extended certificate of registration (or an individual with equivalent qualifications) and prescribed health practitioners.

Scheduling/On-Call Provisions

As readers will no doubt be aware, Bill 148 will create a new Part VII.2, “Scheduling”, to the ESA, which will establish a range of rules regulating scheduling and on-call assignments. We reviewed these provisions in greater detail in our *FTR Nows* of June 7 and August 25, 2017. The Committee has adopted more changes to the scheduling provisions, which we summarize here.

Three-Hour Rule

For the 3-hour rule, the Committee adopted a revised rule that makes two changes to prior versions. First, the prior amendment deleted language stating that the rule was engaged where an employee “…is required to present himself or herself for work… .” This language has been reinserted into the Bill, and corresponds to the language that is used in the current regulations.

Second, the Committee amendments will change how the 3 hours of pay required are calculated. The new calculation requires the payment of “wages for three hours”, which is now defined as the greater of two amounts:

- three hours of pay at the employee’s regular rate or
- the sum of (1) the amount that the employee earned while working, plus (2) the remaining time calculated at the employee’s regular rate.

Under this change, if an employee is entitled to some form of premium pay while actually working, the employee would remain entitled to that premium. For example, if an employee reports for work and works 2 hours, and those 2 hours would qualify for overtime pay, the employee would be owed:

(2 hours x 1.5) + 1 hour = 4 hours at the regular rate

Minimum On-Call Pay

As we have described in our prior publications, Bill 148 will create a new entitlement to minimum on-call pay, which applies where an employee is placed on call, but is either not called into work or is required to work but for less than 3 hours (despite being available to work longer). The Committee amendments make two important changes to this new entitlement.

First, the entitlement will be amended to change how the 3 hours of pay required are calculated. As with the 3-hour rule, the new calculation requires the payment of “wages for three hours”, calculated as the greater of the same two amounts described in the preceding section.

Second, the Committee adopted a new exception to the minimum on-call pay rule, which will apply where a person is put on call for the purposes of ensuring the continued delivery of essential public services, and the person is not required to work. This will apply regardless of who delivers the essential public services.

Right to Refuse Work

Bill 148 creates a right to refuse work or an on-call assignment if insufficient notice is provided (at least 96 hours of the start of the shift). As with the minimum on-call pay provisions, the Committee adopted amendments for these provisions to create a new exception to ensure the continued delivery of essential public services, regardless of who delivers those services. This new exception is added to the three other exceptions already included in the Bill which are:

- to deal with an emergency
- to remedy or reduce a threat to public safety
- other reasons as prescribed.

The recent amendments also add a provision defining what is an “emergency”. The new definition includes search and rescue operations, as well as “a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise.”

General

Bill 148 specifies that the payments provided to an employee under the new scheduling rules are limited to 3 hours of pay in respect of a single day or work or scheduled on-call period. Committee amendments clarify that the payment is limited to the amounts payable under the new calculations outlined above, which may exceed 3 hours’ pay in some circumstances.

Equal Pay for Equal Work

While the amendments to the Equal Pay for Equal Work provisions are not numerous, they are quite significant. When the Committee last amended Bill 148, it added a new definition of “seniority system” to include one which provides for different pay based on the accumulated hours worked. This was an important change as a “seniority system” is one basis upon which pay differences may be justified, and it reflected how seniority accrues in a fair number of workplaces and collective agreements.

This amendment received significant negative commentary from employee stakeholder groups and the government has reversed course. The Committee has now deleted its prior amendment. Therefore, Bill 148 will no longer define “seniority system” to include those that base seniority on accumulated hours worked.

In addition to this change, a new definition of “substantially the same” clarifies that the phrase does not mean “necessarily identical”, presumably to reinforce that non-identical positions may still meet the test for the new equal pay for equal work provisions. It is not clear yet whether this change will impact how the new provision is interpreted.

Finally, the government has committed to reviewing the equal pay for equal work provisions by not later than April 1, 2021.

LRA Changes

The Committee adopted only a few amendments to the LRA provisions of Bill 148.

Employee Lists

The first changes relate to the new right for trade unions to apply to the Ontario Labour Relations Board (OLRB) for an order directing an employer to provide it with an employee list where the trade union could establish 20% support in the proposed bargaining unit, subject to certain requirements being met. Prior Committee amendments addressed the confidentiality of the information provided to the trade union.

This round of Committee amendments provide that the disclosure of certain employee information is mandatory – employee name and a phone number and personal email, where the employee has provided the information to the employer – but expressly provides the OLRB with the discretion to order the disclosure of other information:

- other information relating to the employee, including job title and business address, and
- any other means of contact that the employee has provided to the employer (except for a home address).

The other change to these provisions is the removal of a requirement that the trade union must use the same proposed bargaining unit in a subsequent certification application that it used in its application to obtain the employee list. The result of this amendment is that neither the union nor the employer are required to litigate the appropriateness of a potential bargaining unit at this preliminary stage in a union organizing drive. However, it may open the door to “fishing expedition” applications.

Bargaining Unit Structure Review

The Committee also adopted a new amendment to the LRA, which would allow an employer and a trade union (or council of trade unions) that represents multiple bargaining units to jointly agree in writing to review the structure of the bargaining units. The new provisions would allow the parties to agree to a number of changes, subject to the consent of the OLRB on the joint application of the parties, including:

- consolidating bargaining units
- amending descriptions of bargaining units
- making a collective agreement to apply to the consolidated units and terminating the existing collective agreements that applied to the pre-consolidated units, and
- amending collective agreements, including expiry dates and seniority provisions.

Coming Into Force Date

A very significant change is that the Committee amended Bill 148 such that all LRA amendments **will now come into force on the later of January 1, 2018 or the date that Bill 148 receives Royal Assent. This is approximately 6 months earlier than originally scheduled in the Bill.**

OHSA Amendments

The Committee amendments include a new provision that would amend the *Occupational Health and Safety Act* – a feature not found in earlier versions of Bill 148.

Bill 148 will add a new provision to OHSA that would prevent an employer from requiring a worker to wear footwear with an elevated heel unless it is required to perform the work safely. There is an exception for workers who are employed as performers in the entertainment and advertising industry. This industry is defined as the producing of live or broadcast performances or audio, visual or audio-visual recordings of performances in any medium or format.

Concluding Comments

The changes adopted yesterday are significant. Many of the Bill’s changes will take place at the start of the new year, or even sooner. We strongly encourage you to work with your Hicks Morley contact to ensure that your organization is ready to comply with all of Bill 148’s many changes.

Should you have any questions or require further information, please contact any of the authors or your regular Hicks Morley lawyer.
