FTR Now

Bill 148 and Collective Bargaining in the Social Services Sector

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Many Social Services agencies across Ontario are currently in collective bargaining, or will be shortly. With key Bill 148 amendments to the *Employment Standards Act, 2000* (ESA), the *Labour Relations Act, 1995* (LRA) and the *Occupational Health and Safety Act* now in force, planning your strategic approach is essential to achieving outcomes that will work for your organization, and support your mandate. Learn how you can prepare for the bargaining table in this *FTR Now*.

Background

Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*, makes substantial changes to the ESA, the LRA and the OHSA. While a number of the provisions of Bill 148 were in effect immediately upon Royal Assent on November 27, 2017 or shortly thereafter, others came into force on January 1, 2018 and April 1, 2018. Still others have yet to come into force.

The Bill 148 ESA reforms in particular have the potential to impact on your employment arrangements in a variety of ways, and have been the subject of a number of earlier *FTR Now* publications, such as *The Road Ahead: Are You Prepared for Bill 148?* from December 5, 2017. In this *FTR Now*, we focus more specifically on changes to the ESA of particular interest to employers in the Social Services sector, in order to assist you in planning your approach to bargaining in light of these changes.

Vacation with Pay

Effective January 1, 2018, employees are entitled to a minimum of 3 weeks of paid vacation where they have been employed for 5 years or more. Vacation pay also increases to 6% of wages where the employee has a period of employment of 5 years or more. Employers should consider whether their collective agreements, policies and employment agreements comply with these amendments. For those types of employees who receive vacation pay with each paycheque, special consideration should be given to the timing of the increase from 4% to 6%.

Public Holiday Pay

Effective January 1, 2018, there is a new formula for the calculation of public holiday pay, which divides the wages earned in the pay period immediately preceding the pay period of the public holiday by the number of days worked in that period. The most significant impact will be on part-

time and casual employees who may see a substantial increase in their public holiday pay entitlement. Employers should be considering whether their collective agreements and policies reflect these changes.

Parental Leave

Effective December 3, 2017, Bill 148 increased ESA parental leave entitlement 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.

These changes brought the ESA into line with changes to the *Employment Insurance Act*.

Under the *Employment Insurance Act*, an employee may apply for “standard parental benefits” or “extended parental benefits.” Standard parental benefits are paid at a weekly benefit rate of 55% of the employee’s average weekly insurable earnings for up to 35 weeks. Extended parental benefits are paid at a weekly benefit rate of 33% of the employee’s average weekly insurable earnings for up to 61 weeks. Both are subject to fixed weekly maximum amounts.

Employers who provide pregnancy/parental leave top-up payments should closely examine the collective agreement or policy language dealing with the top-up. These changes to the ESA and *Employment Insurance Act* could result in top-up being far more costly than expected when employees opt for extended parental benefits. Depending on the language in their collective agreements, agencies may well need to negotiate changes in order to avoid this unintended liability.

Personal Emergency Leave

Bill 148 enhances the Personal Emergency Leave (PEL) provisions of the ESA. These changes came into effect on January 1, 2018. Employees are still entitled to 10 days of PEL per calendar year, but now the first 2 days of PEL in each calendar year are to be paid days off for those employed one week or more.

Another key change is that employers are prohibited from requiring an employee to provide a medical certificate from a physician, registered nurse or psychologist to validate a claim for PEL. Employers may require reasonable evidence for the leave, but it may not include medical certification.

The ESA entitles employees to PEL for the following:

1. A personal illness, injury or medical emergency.

2. The death, illness, injury or medical emergency of a listed family member.
3. An urgent matter that concerns a listed family member.

As such, ESA PEL will overlap in purpose with leaves already contained in many collective agreements and employer policies, such as sick leave and bereavement leave. Some employers also provide for paid “family leave” days to allow employees to care for sick family members.

Provisions in collective agreements, contracts and policies which provide a greater right or benefit than the ESA personal emergency leave provisions may effectively replace them. Even if a greater benefit is not provided, the ESA guide produced by the Ministry of Labour suggests that employers may be able to count overlapping contractual leaves against the ESA PEL entitlement. However, an employer’s ability to count days of sick leave, bereavement leave or “family leave” toward an employee’s entitlement to PEL under the ESA may depend on the relevant contract or policy language, and labour arbitrators have divided on the application of this principle. Thus, the wrong language in a collective agreement, contract or policy could leave an employer at risk of being obligated to provide ESA PEL in addition to other overlapping leaves.

Other Leaves of Absence

Bill 148 included several amendments to existing leaves of absence under the ESA, and created some new ones.

Effective December 3, 2017, **Critical Illness Leave** replaced Critically Ill Child Care Leave. It now covers:

1. Care or support provided to a critically ill minor child family member for up to 37 weeks in a 52-week period
2. Care or support provided to a critically ill adult family member for up to 17 weeks in a 52-week period.

The list of eligible family members has also been expanded.

Amendments to the ESA’s **Family Medical Leave** provisions came into force on January 1, 2018. Family Medical Leave was increased from a leave of up to 8 weeks in a 26 week period to a leave of up to 28 weeks in a 52-week period. The definition of a qualified health practitioner who can certify the leave has also been expanded.

Other changes to unpaid leaves that came into force on January 1, 2018 include:

- **Child Death Leave** of up to 104 weeks for the death of a minor child for any reason
- **Crime-Related Child Disappearance Leave** of up to 104 weeks if a minor child disappears as a probable result of a crime

Finally there is a new **Domestic or Sexual Violence Leave**. An employee employed for at least 13 weeks can take a leave if the employee, or the employee's child, experiences domestic or sexual violence, or the threat of domestic or sexual violence, and the leave is taken for any of the following purposes:

- to seek medical attention
- to obtain services from a victim services organization
- to obtain psychological or other professional counselling
- to relocate temporarily or permanently, or
- to seek legal or law enforcement assistance including preparing for legal proceedings.

The leave is structured as a dual entitlement. In each calendar year, an employee may take up to 10 days' leave and up to 15 weeks' leave. The first 5 days are paid in accordance with a new "domestic or sexual violence leave pay" calculation.

Equal Pay for Equal Work – Difference in Employment Status

Effective April 1, 2018, Bill 148 enacted a new provision which prohibits employers from paying different rates of pay to their employees because of a difference in employment status, where the employees:

- perform substantially the same kind of work in the same establishment;
- the performance of the work requires substantially the same skill, effort and responsibility; and
- the work is performed under similar working conditions.

"Difference in employment status" means either:

- a difference in the number of hours regularly worked by the employees; or
- a difference in their term of employment including a difference in permanent, temporary, casual or seasonal status.

"Substantially the same" is defined to mean substantially the same but does not mean "necessarily identical."

A differential pay rate can be justified on objective grounds, 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.

If a collective agreement which is in effect on April 1, 2018 permits different pay rates based on employment status in conflict with the new ESA provisions, the collective agreement will prevail over the ESA provisions until the earlier of (1) the date that the collective agreement expires or (2) January 1, 2020.

Employers should be examining whether the work of part-time, full-time and casual employees is substantially the same and, if so, whether any of the justifications outlined above apply. Due to the various types of casual, on-call and roster staff employed by Social Services agencies (e.g. COSA, After Hours), these amendments are likely to have a significant impact in the sector. Employers are well-advised to conduct a thorough comparison of the work of bargaining unit employees of different status and to prepare to respond effectively to union proposals based on these new ESA provisions. Potential pay equity implications should also be considered.

Equal Pay for Equal Work – Difference in Assignment Employee Status

This new provision will similarly prohibit temporary help agencies from paying an assignment employee at a rate below the rate paid to an employee of their client where they perform substantially the same kind of work in the same establishment, their performance requires substantially the same skill, effort and responsibility, and their work is performed under similar working conditions.

Social Service agencies which make use of temp agencies may find that the resulting increased costs to temporary help agencies are passed on to them.

Scheduling

Please note that, if a collective agreement is in effect on January 1, 2019 and addresses the right to minimum on-call pay, minimum cancellation pay or the right to refuse work described below in a manner that conflicts with the new ESA provisions, the collective agreement will prevail over those ESA provisions until the earlier of (1) the date that the collective agreement expires or (2) January 1, 2020. This does not apply to the three hour rule, also described below, which comes into effect on January 1, 2019.

Minimum On-Call Pay

Bill 148 creates 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 employee will be entitled to be paid wages for 3 hours, which is the greater of two amounts:

- 3 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.

These provisions will impact on Social Services agencies in particular due to the prevalence of on-call staff.

Social Services agencies in particular should note that the new entitlement will not 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. Unfortunately, at this point, there is little information to assist in determining what "essential public services" are for the purposes of the new ESA provision.

Right to Refuse Work

An employee will have the right to refuse a request or demand to work or to be on call on a day that the employee was not scheduled if the request or demand is made less than 96 hours before the start of the shift. As such, employers will want to ensure that their scheduling procedure involves more than 96 hours' notice.

The provision will not apply where the employer's request or demand is to deal with an emergency, to remedy or reduce a threat to public safety, or "to ensure the continued delivery of essential public services." Again, there is little guidance as to whether any particular Social Service agency would be deemed to be delivering "essential public services" for the purposes of the ESA.

Minimum Cancellation Pay

If an employer cancels an employee's entire scheduled day of work or scheduled on call period within 48 hours before the time it was to commence, the employee is entitled to regular wages for 3 hours of work.

The provision will not apply where the employment is weather-dependent and the employer cannot provide work for weather-related reasons or there are causes outside the employers control (e.g. fire, lightening, power failures) for the cancellation.

Three-Hour Rule

The ESA currently contains a three-hour rule, but the existing rule will be amended by Bill 148. This change comes into effect on January 1, 2019 and applies if an employee who regularly works more than three hours a day is required to attend work but works fewer than 3 hours, despite being available to work longer. The employee will be entitled to be paid wages for 3 hours, which is the greater of two amounts:

- 3 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.

Next Steps for Social Services Agencies

We would be pleased to assist in assessing your collective agreements, policies and employment agreements to determine whether amendments are required. We are also well-positioned to assist you in determining the extent to which the provisions of Bill 148 apply to your organization, and the associated potential liability.

Hicks Morley has created several very useful resources for its clients which can assist you in taking the steps required to plan for Bill 148 and to properly tackle the issues at the bargaining table. These include *FTR Now* bulletins and easy-to-use Client Toolkits. We are also available to conduct on-site Bill 148 training tailored to your needs. To obtain a copy of any such materials, please contact your regular Hicks Morley lawyer by phone or by email.

If you have any questions about Bill 148, please feel free to reach out to Daniel Fogel, Michael Smyth or your regular Hicks Morley lawyer.
