FTR Now

End of the Bill 148 Era: Ontario Bill to Reverse Employment and Labour Reforms

Date: October 24, 2018

On October 23, 2018, the Ontario government introduced Bill 47, the *Making Ontario Open for Business Act, 2018* (Bill 47), new legislation that if passed in its present form would effectively "undo" many of the key changes to workplace laws implemented by Bill 148. The range of changes to the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act, 1995* (LRA) proposed in Bill 47 will significantly impact your business, and all employers need to be aware of what the government has introduced.

In this *FTR Now*, we will review some of the key changes proposed for the ESA and LRA, and will briefly highlight some proposed changes to Ontario's skilled trades and apprenticeships system.

1. ESA Amendments

Bill 47 proposes a wide range of changes to the ESA. As noted above, many of the changes proposed in Bill 47 would "undo" the recent and pending Bill 148 changes made by the previous Liberal government. In at least one instance – the reformation of the ESA's personal emergency leave provisions – Bill 47 significantly changes the nature of the entitlement.

Minimum Wage

Bill 47 would cancel the scheduled increase in minimum wage from $14.00 to $15.00 per hour that was to have taken place on January 1, 2019. In its stead, the following minimum wage rules will apply:

- The general minimum wage will remain at $14.00 per hour through all of 2019.
- Commencing in 2020, the ESA will revert to annual minimum wage increases tied to the consumer price index, with the first potential adjustment occurring on October 1, 2020.

Equal Pay for Equal Work

For many years, the ESA has had provisions prohibiting employers from paying different rates of pay to employees on the basis of their sex. Bill 148 expanded the equal pay for equal work provisions of the ESA by prohibiting different rates of pay based on:

- employee status (defined as including both a difference in number of hours regularly worked and as a difference in a term of employment, such as permanent versus casual), and
- assignment employee status (which applied to assignment employees placed by a temporary help agency with a

client of the agency).

These expanded provisions came into effect on April 1, 2018.

Bill 47 would fully repeal the expanded equal pay for equal work provisions introduced by Bill 148 – i.e. the provisions based on employment status and on assignment employee status. However, the ESA will continue to require equal pay for equal work on the basis of sex.

Personal Emergency Leave

One of the more significant changes that would be enacted by Bill 47 would be to the personal emergency leave (PEL) provisions of the ESA. The *Employment Standards Act, 2000* first introduced the concept of "emergency leave" in 2001 as a leave of absence of 10 unpaid days per year to deal with a range of personal matters – personal illness/injury/medical emergency, death or illness/injury/medical emergency of certain family members or urgent matters affecting those family members.

Bill 148 maintained this basic entitlement for most employees, but introduced two significant changes – (1) the first two PEL days were to be paid, and (2) employers could not require a medical note to substantiate the absence.

Bill 47 proposes an entirely new structure to PEL. It does this by repealing the current PEL entitlement in its entirety, and replacing it with three new leaves of absence. All of the new leaves will be unpaid, and will be available to any employee in the province regardless of the size of the employer that they work for. We will briefly summarize each new entitlement.

(a) Sick Leave

Once employees have been employed for two consecutive weeks, they will have an entitlement to **three unpaid sick days** each calendar year for their own personal illness, injury or medical emergency. While the same notification rules that applied to PEL will continue to apply to the new sick leave, there are some changes of note.

First, the prohibition on requiring medical notes will be removed, and employers can ask for evidence reasonable in the circumstances of entitlement to the leave.

Second, the ESA will include new provisions deeming an employee to have taken a statutory leave day when the employee takes a paid or unpaid leave under an employment contract. This means, for example, that if an employee has a contractual entitlement to paid sick leave, when they take a sick day under their contract, they will be deemed to have used one of their statutory sick days as well. This will prevent the stacking of the statutory entitlement onto existing contractual entitlements.

(b) Family Responsibility Leave

Again, once employees have been employed for two consecutive weeks, they will have an entitlement to **three unpaid family responsibility days** each calendar year. These days can be used for the illness, injury or medical emergency of a listed family member, or for an urgent matter that affects a listed family member. The list of family members is the same as the current PEL list.

The same PEL notification rules will continue to apply. However, the new entitlement will be subject to the same deeming rule that we described above, under Sick Leave, which will deem a statutory leave day to have been taken if the employee uses a contractual entitlement that covers the same type of absence.

(c) Bereavement Leave

Again, once employees have been employed for two consecutive weeks, they will have an entitlement to **two unpaid**

bereavement days each calendar year. These days can be used for the death of a listed family member. The list of family members is the same as the current PEL list.

It appears that the intention of the new provision is to provide two days' bereavement leave in total for the calendar year, and not two days per listed family member each year. The bereavement leave provisions also contain the same deeming rules that would apply if an employee has a contractual entitlement to bereavement leave for the same family members.

Misclassification of Employees

Bill 148 amended the ESA to expressly prohibit the misclassification of employees, and created a reverse onus such that employers have to prove that a person is properly classified. That provision was primarily aimed at the misclassification of employees as independent contractors, and the reverse onus created significant issues for organizations.

While the general prohibition against the misclassification of employees will remain in the ESA, Bill 47 will repeal the reverse onus provision introduced by Bill 148.

Scheduling

Bill 148 introduced a range of new scheduling requirements to the ESA, which were all scheduled to take effect on January 1, 2019:

- Employee right to Request Changes to Schedule or Work Location
- Modified 3-Hour Rule
- Minimum On-Call Pay
- Right to Refuse Work
- Minimum Cancellation Pay

Bill 47 will repeal all of these new scheduling rules with the exception of the Modified 3-Hour Rule. That is, assuming that Bill 47 is passed before the end of 2018, the new scheduling provisions introduced by Bill 148 will never take effect and employers will not have to comply with them.

As noted, the sole exception is the Modified 3-Hour Rule, and Bill 47 would maintain the new rule that was part of Bill 148. That modified rule will take effect on January 1, 2019 and can be summarized as follows. The rule applies where an employee who regularly works more than 3 hours a day is required to present themselves for work, but works less than 3 hours, despite being available to work longer.

Under the modified rule, the employee is 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.

The rule will not apply where the employer is unable to provide work due to fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work.

Other Bill 148 Amendments

Not all changes made by Bill 148 to the ESA will be reversed by Bill 47, and we will just comment on a few here.

Bill 47 does not affect the new vacation entitlements introduced by Bill 148, which increased the vacation time entitlement to

three weeks and the vacation pay entitlement to 6% where the employee's period of employment is five years or more.

Similarly, with the exception of PEL, described earlier, Bill 47 does not affect any of the changes to the other leaves of absence introduced by Bill 148. This includes the new domestic or sexual violence leave, which will remain in the ESA, including its paid days requirements.

Readers may recall that Bill 148 had introduced a new formula for the calculation of public holiday pay, which the former Liberal government reversed by regulation as of July 1, 2018. Bill 47 would formalize this change and revert to the original formula in the statute.

Other Bill 148 changes will also remain in effect, including:

- the new Notice of Termination of Assignment requirement, which applies to temporary help agencies
- the expanded application of all provisions of the ESA to the Crown and Crown agencies (excepting the related employer provisions)
- the expanded related employer provisions.

Coming Into Force

The key amendments to the ESA in Bill 47 are scheduled to come into force on the later of (1) January 1, 2019, and (2) the day that Bill 47 receives Royal Assent. Assuming that there are no delays in the legislative process, this means that the most likely effective date for the changes to the ESA will be January 1, 2019.

Employers should note that the repeal of ESA provisions does not necessarily affect changes that were made under the rules that existed throughout 2018. This will be most noticeable in situations where wage adjustments were made to comply with the ESA's equal pay for equal work provisions. Bill 47 does not contain any provisions that would nullify such changes, and employers will need to consider carefully how to address these types of situations.

Editor's Note: Readers should also be aware that on October 24, 2018, the Ontario government filed O. Reg. 448/18 *which amends* O. Reg. 285/01 (When Work Deemed to be Performed, Exemptions and Special Rules) *to exempt Crown employees from the hours of work/eating periods and overtime provisions of the ESA. Specifically, the exemption applies to "a person whose employer is the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown." O. Reg. 448/18 came into force on October 24, 2018.*

2. LRA Amendments

As with the ESA, Bill 47 would "undo" many of the changes that were made to the LRA by Bill 148. Since those changes occurred on January 1, 2018, Bill 47 contains a number of transition provisions to address matters that have commenced under the current rules. We will briefly summarize the key changes here.

Employee Lists

Bill 148 permitted trade unions to apply to the Ontario Labour Relations Board (OLRB or Board) 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.

Bill 47 will repeal these provisions of the LRA. If there is an application before the OLRB regarding the provision of an employee list that has not been determined by the Board on the day that the new LRA provisions take effect, the application will be deemed terminated. If trade unions already received employee lists under the current provisions, they will be required to immediately destroy them in a manner that ensures that the list cannot be reconstructed or retrieved.

Remedial Certification

Bill 148 had introduced a provision requiring the Board to automatically certify a trade union without a vote where the OLRB is satisfied that an employer has contravened the LRA, if as a result the union was not able to obtain 40% support, or if the true wishes of the employees were not likely reflected in a representation vote.

Bill 47 will repeal this provision of the LRA, and provide that the Board has a range of remedial options:

- order a representation vote to be taken and order steps to be taken to ensure that the vote reflects the true wishes of employees
- order another representation vote to be taken with necessary steps to ensure it reflects the true wishes of employees
- if the Board determines that no other remedy will be sufficient to counter the effects of the employer's breach of the LRA, certify the trade union.

Consolidation of Bargaining Units

Bill 148 introduced provisions to the LRA giving the OLRB the authority to review and potentially consolidate bargaining unit structures in two situations (subject to a range of requirements we will not review here):

- following the certification of a new bargaining unit at the request of either the trade union or employer
- at any time but only at the mutual request of both the trade union and the employer.

Bill 47 would repeal these provisions of the LRA. In their stead, Bill 47 is proposing a more general review power for the Board, provided two conditions are met:

- first, either the trade union or employer requests the review, and
- second, the Board is satisfied that the bargaining units are no longer appropriate for bargaining.

The new provision obligates the Board to allow the parties to come to an agreement on the bargaining unit structure, but the Board will ultimately have the power to issue a range of orders, including:

- consolidating or restructuring bargaining units
- creating new bargaining units
- amending certification orders or descriptions of bargaining units
- determining which collective agreement applies to a bargaining unit; and
- amending collective agreements, including expiry dates and seniority provisions.

Transitionally, it appears that if an application is before the Board when the new section takes effect, but has not yet been determined by the Board, the application will be determined under the new provisions.

Card-Based Certification – Certain Industries

Bill 148 introduced card-based certification rules for three industries – the building services industry, the home care and community services industry and the temporary help industry.

Bill 47 repeals these provisions, and the usual voting rules will apply once Bill 47 comes into effect.

For certification applications that precede that date, the transition provisions depend on when the application was filed. If an application was filed before October 23, 2018, the current card-based rules apply. If an application is filed on or after October 23, 2018, the vote rules will apply. If an employer was certified under the Bill 148 card check system, that certificate remains

in force and there is no transitional provision allowing for a secret ballot vote.

First Collective Agreements

Bill 148 added a range of new provisions for first collective agreements, including:

- educational supports provided by the Ministry of Labour
- first collective agreement mediation under an OLRB-managed mediation process
- first collective agreement mediation-arbitration overseen by an appointed mediator-arbitrator.

Bill 47 will repeal these provisions in their entirety, and introduce a new provision that reverts to the first collective agreement arbitration process that had been in the LRA prior to the Bill 148 changes. This process allows the OLRB to order first agreement arbitration if the Board determines that collective bargaining has been unsuccessful because of:

- the refusal of the employer to recognize the bargaining authority of the trade union
- the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification
- the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement, or
- any other reason the Board considers relevant.

Bill 47 contains transition provisions that address applications that commenced before the new provisions take effect. Essentially, if the Board has directed a mediation-arbitration to take place, that process will continue. If a mediation has been ordered, the mediation will terminate. If a mediation-arbitration has been requested, but not yet determined by the Board, it will continue as an application for first collective agreement arbitration.

Just Cause Protection

Bill 148 had introduced just cause protection to cover the period that begins on the date on which a strike or lockout became lawful and ending on the date a new collective agreement is entered into. This provision would not be repealed by Bill 47.

Bill 148 also introduced new just cause protections allowing for an employee and union to arbitrate a termination that occurred following certification and yet before a first collective agreement was reached (section 12.1). This provision would not be repealed by Bill 47.

Successor Employer Provisions

Bill 148 introduced a new provision (section 69.1) which applied only with respect to services provided directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services. That provision deems a sale of business to have occurred, and the union rights to follow, when one service provider displaced another service provider or if the work flows back to the premises or business owner. This provision has remained unchanged under Bill 47, as proposed.

Coming Into Force

The proposed changes to the LRA will come into force on the date that Bill 47 receives Royal Assent. Based on the provisions related to the ESA, that is likely to be no later than the end of 2018.

3. Skilled Trades and Apprenticeships

As announced, the government is proposing to make changes to the skilled trades and apprenticeships system in Ontario. This is addressed in Schedule 3 of the Bill. We do not intend to review the changes in any detail, but some of the key

changes being proposed to the *Ontario College of Trades and Apprenticeship Act, 2009* include:

- a new section providing that the journeyperson to apprentice ratio for all trades that are subject to ratios shall not exceed one apprentice for each journeyperson (along with the repeal of provisions that currently requires ratios to be established by review panels)
- the creation of a moratorium on the referral of trades to the Classification Roster
- the addition of a new Part that would give the Minister the authority to make a regulation vesting control and charge of the affairs of the board of the College in the Minister (along with a range of other authority)
- provide for the future repeal of the Act (which is consistent with the government pledge to wind down the affairs of the College).

This part of Bill 47 will generally come into force on Royal Assent, although the repeal of the *Ontario College of Trades and Apprenticeship Act, 2009* will occur at a future date to be proclaimed by the Lieutenant Governor.

Conclusion

As can be appreciated from this review, Bill 47 will have a significant impact on workplaces in Ontario. Employers will want to review their policies and practices in light of the proposed new rules to determine what changes should be made as a result. Since Bill 47 has just been introduced, there is some possibility that it will be amended as it proceeds through the legislative process. We will continue to monitor the progress of the Bill and will report on any significant changes that occur.

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

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