

BILL 148 AND CHANGES TO THE ESA – ARE YOU PREPARED?

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On June 1, 2017, the Government of Ontario introduced *Bill 148 – the Fair Workplaces, Better Jobs Act, 2017* (Bill 148). 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.

Bill 148 immediately passed First Reading and was referred to the Standing Committee on Finance and Economic Affairs to be considered over the summer. The Committee held public consultations across the province throughout July. The Committee met in August for clause-by-clause consideration of the Bill.

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

In this article we provide an overview of the key provisions of Bill 148 with respect to the *ESA*, including the recent amendments, and highlight areas of concern for municipalities.

KEY CHANGES TO THE ESA

Increased Minimum Wage

Effective January 1, 2018, there will be an increase to the general minimum wage to \$14 per hour from \$11.60 per hour, with another increase effective January 1, 2019 to \$15 per hour. After the minimum wage reaches \$15 per hour, the *ESA* will revert to its existing process of annual increases each October based on changes in the Consumer Price Index.

Equal Pay for Equal Work

Effective April 1, 2018, no employee may be paid less than what is paid to other employees who perform the same job with the same employer, regardless of their employment status. This includes part-time, casual, temporary and seasonal employees.

Wage differentials may only be justified through an objective system such as seniority, merit, when earnings are measured by production quality or quantity or any other objective factor or system that does not include sex or employment status. 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.

Scheduling

Effective January 1, 2019, the following provisions will be implemented in regards to scheduling:

- Employees will be entitled to either refuse a shift or refuse being placed “on call,” when the request is made with less than four days (or 96 hours) notice, without reprisal. 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.
- Employees will be paid for three (3) hours of pay at their regular rate of pay when a shift is cancelled within 48 hours of its scheduled start. 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.
- If an employee is “on call” and is either not called in or called in for less than three (3) hours of work, the employee will be entitled to three (3) hours of pay at their regular rate of pay, per 24 hour “on call” period. 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.
- After three months of service, an employee will be entitled to request a schedule or work location change without reprisal from the employer.

Significantly, the leeway for collective agreements to override these “on call” rules that was originally proposed has been limited and curtailed by the new amendments. While Bill 148 originally stated that if a collective agreement provides for a provision that specifically addresses one of the above mentioned scheduling provisions and the collective agreement conflicts with the new provision the collective agreement will prevail. However, 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.

Vacation

Effective January 1, 2018, after five (5) years of service with an employer, an employee’s vacation entitlement will increase to three (3) weeks (or 15 days) and 6% vacation pay.

Public Holidays

Effective January 1, 2018:

- The calculation for public holiday pay will be amended to ensure that the new 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 by the employee. The new calculation ensures employees are paid for the same number of hours they would typically work in one shift. In contrast, the current calculation for public holiday pay is equal to the regular wages paid to an employee in the four weeks preceding the public holiday, divided by 20. The current formula effectively prorates holiday pay for employees who work less than 5 days per week.
- By way of example, under the new calculation:

- If Employee X works 10 days in the pay period preceding the public holiday and earns \$100 every day, the employee will be owed \$100 for public holiday pay.
- If Employee Y works 1 day in the pay period preceding the public holiday and earns \$100 on that day, the employee will also be owed \$100 for public holiday pay.
- An employee who works on a public holiday will be entitled to public holiday pay plus premium pay for the hours worked. The Committee has amended Bill 148 to retain the existing public holiday framework (including the ability for employees to substitute a day off with public holiday pay where employees work on public holidays). However, 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

Effective January 1, 2018, the following changes will be made to the existing personal emergency leave provision of the ESA:

- Employees will still be entitled to ten (10) days of personal emergency leave, but the first two (2) days will now be paid days off. 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.
- The 50-employee threshold will be removed, such that all employees in Ontario are eligible.
- Employers will be prohibited from requiring a medical note to validate a claim. Employers may still require reasonable evidence for the leave, and may ask for a medical note but may not require it.

Pregnancy/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.

Family Medical Leave

Effective January 1, 2018, the length of family medical leave will be increased to 27 weeks in a 52 week period.

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 counseling
- 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).

Crime-Related Child Death Leave & Child Disappearance Leave

An employee with at least six (6) months of employment with the same employer will be entitled to up to 104 weeks of unpaid leave in the event of the crime-related death of a child or a child disappearance. Note that these leaves will not apply if the employee is charged with the death or disappearance or if it is probable they are party to the crime.

Overtime Pay

The ESA provisions with respect to overtime will be amended for employees who have two or more regular rates of work for the same employer. Bill 148 eliminates the blended overtime rate for employees who work different jobs at different rates for the same employer, and instead, establishes that overtime rates will be based on the rate of pay of the work being performed at the time overtime hours are accrued.

Temporary Help Agencies

Effective April 1, 2018, assignment employees will be subject to “Equal Pay for Equal Work.” Essentially, assignment employees must be paid equally to employees of the temporary help agency’s client, where assignment employees perform substantially the same work as the client’s employees, by using the same skill, effort and responsibility, and under the same working conditions, unless the pay differential is based on factors other than sex, employment status, or assignment employee status.

Effective January 1, 2018, assignment employees will be entitled to at least one week of notice of early termination from an assignment that is scheduled to last at least three months. If notice is not provided to the assignment employee, 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. However, note that pay in lieu of notice will not be owed in some circumstances, such as where the agency offers a reasonable alternative assignment during the one-week period.

Additional Changes

In addition the above key changes, Bill 148 also introduces:

- increased record-keeping requirements, including increased retention periods for records of vacation time and vacation pay from three years to five years;
- prohibitions on misclassifying employees as independent contractors;
- elimination of the “intent or effect” requirement to establish a related employer;
- any written agreement required by the ESA will be accepted electronically;
- the elimination of the requirement to engage in “self help” before filing a claim with the Ministry of Labour;
- the elimination of the majority of exemptions related to Crown employees; and,
- a new definition of employee which specifically includes trainees.

The Government has committed to hiring 170 Employment Standards Officers with the aim at increasing compliance of ESA and increasing penalties for non-compliance.

IMPLICATIONS FOR MUNICIPAL EMPLOYERS

Bill 148 proposes significant and costly changes to the *ESA*. Of particular concern for many municipalities are the implications these amendments could have on the provision of on-call and volunteer firefighters.

As explained above, Bill 148 proposes a requirement that if an employee is on call and is not called into work, or is called into work, then they shall be paid wages equal to the employee's regular rate for three hours of work. In the fire sector, there is a need for many additional firefighters when incidents occur. Therefore full-time fire departments (32) and composite fire departments (191) rely upon on call firefighters to supplement their scheduled firefighters. Volunteer departments (226) rely upon on call volunteer firefighters to provide the complete response in these municipalities.

Every volunteer firefighter is essentially on call every day of the year (except when they "book off" for vacation). Given that the average wage is \$25 per hour this means that the cost of a volunteer firefighter will increase to \$75 per day x 365 days per year = \$27,375 per volunteer firefighter per year. This is an increase in cost per volunteer firefighter from the current \$1,500 to \$10,000. If a municipality had 200 volunteer firefighters the cost would be \$5,475,000 per year for no increase in service to the community.

Similarly, some full-time firefighters are on call when they are off duty. They can carry pagers and are required to attend for a few times per year to assist with large emergencies. Alternatively, many fire departments will informally have their full-time firefighters on call and they can decide to attend or not (like volunteers) when they are called. Paying these full-time firefighters a three hour minimum would be tremendously expensive. Three hours of a first class firefighter is worth roughly \$138 per day x 365 days/yr. = \$50,370.

Another provision of considerable concern for municipalities are the equal pay for equal work provisions. Arguably, these provisions would require municipalities to pay volunteer firefighters the **same** hourly rates as full-time firefighters, or to consider the implementation of an objective system which could justify differentials in pay, for example a seniority system based on accumulated hours worked.

Given that the average first class full-time firefighter earns about \$46 per hour and the average volunteer firefighter earns about \$25 per hour, the implementation of this part of Bill 148 could **almost double** the cost of running a volunteer fire service.

Unless further amendments or regulations are introduced exempting firefighters as defined in s. 1(1) of the *Fire Prevention and Protection Act*, which includes volunteer, full-time and managerial firefighters, from the application of these provisions, Bill 148 will have a tremendous impact on municipal budgets. Municipalities should begin planning now how to address this economic impact and consider if any mitigating strategies can be implemented.



Stephanie Jeronimo and Julia Nanos specialize in labour and employment matters facing municipalities. Elizabeth Winter is one of the Firm's thought leaders with respect to Bill 148. If you have any questions about this or any other employment matter, do not hesitate to contact Stephanie at 416-864-7350, Julia at 416-864-7341 or Elizabeth at 416-864-7016. They may also be reached by email at: stephanie-jeronimo@hicksmorley.com, julia-nanos@hicksmorley.com and elizabeth-winter@hicksmorley.com.