BILL 148 IS NOW THE LAW – MAKE SURE YOU'RE PREPARED!

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On November 27, 2017, *Bill 148* – the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148) received Royal Assent and became the law in Ontario. As a result, substantial changes have been made to the *Employment Standards Act, 2000 (ESA)* and the *Labour Relations Act, 1995 (LRA)*.

In this article we provide an overview of the key provisions of Bill 148, let you know when the provisions come into force, and highlight areas of concern for municipalities.

KEY CHANGES TO THE ESA:

IN FORCE NOVEMBER 27, 2017

Employee Classification

Bill 148 amended the ESA to expressly prohibit the misclassification of employees. This new provision is primarily aimed at the misclassification of employees as independent contractors. In addition, employers will have the onus to prove that an individual is an independent contractor and not an employee.

Municipalities should audit their use of independent contractors or other persons who are not classified as employees, as well as all documentation supporting the classification.

IN FORCE DECEMBER 3, 2017

1. Parental Leave

The length of parental leaves available has increased 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*. Significantly, the extended leave is only available where the date of the birth or the date that the child first comes into the custody, care and control of the parent is on or after December 3, 2017.

Municipalities should review any top up language found in policies or collective agreements, and consider if amendments or a Letter of Understanding are required to avoid increased costs as a result of employees opting to take an extended leave.

2. Critical Illness Leave

A new Critical Illness Leave replaces the "Critically Ill Child Care Leave." This new leave encompasses 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 broad. The provision also stipulates the conditions required to qualify for the leave. Related record-keeping obligations are also in effect December 3, 2017.

IN FORCE JANUARY 1, 2018

1. Increased Minimum Wage

There will be an increase to the general minimum wage to $14 per hour from $11.60 per hour. The other special minimum wage rates will increase by the same percentage.

2. Vacation with Pay

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. Municipalities will need to ensure their policies and/or collective agreements provide for at least this much vacation.

In addition, municipalities should review their record-keeping procedures to ensure the following new requirements are met:

- 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.

3. Public Holiday Pay

The new formula for the calculation of public holiday pay divides the wages earned in the pay period immediately preceding the pay period of the public holiday by the number of days actually worked to earn those wages. This new calculation ensures employees are paid for the same number of hours they would typically work in one shift.

This means that if a part-time or casual employee works just one shift in the pay period preceding the pay period of the public holiday, they will be entitled to be paid the equivalent of one shift as holiday pay. As a result, paramedics working for more than one service could receive the value of multiple shifts for a single statutory holiday (paid by different employers).

In addition, for employees working on statutory holidays or in cases where the holiday falls on an employee's day off, the ESA will now require employers to provide employees with a written statement regarding their substitute holiday. The statement must set out the public holiday which the employee is working (or which is otherwise substituted), the date that is the substitute holiday and the date on which the statement was provided to the employee. Municipalities should consider creating a template to utilize in cases of holiday substitution.

4. Leaves of Absence

Bill 148 will result in the following changes:

(a) **Personal Emergency Leave** – the first 2 days of this 10 day entitlement will now be paid. In addition, Bill 148 prohibits employers from requesting a medical note to substantiate any claim for personal emergency leave. The exemption for employers with less than 50 employees is being removed. For municipalities that have integrated personal emergency leave days into existing leave policies, including contractual benefits entitlements, a review should be completed to determine whether changes are required, particularly with respect to requests for medical documentation.

(b) **Pregnancy Leave** – extended from 6 weeks to 12 weeks for employees who suffer a still-birth or miscarriage. The new rules only apply to leaves commencing on or after January 1, 2018. There is also a new definition of "legally qualified medical practitioner" which will include nurses with extended certificates of registration and midwives.

(c) **Family Medical Leave** – increased to 28 weeks within a 52-week period. The leave must be certified by a qualified health practitioner, and Bill 148 expands the 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.

(d) **Crime-Related Child Disappearance Leave and Child Death Leave** – the current "Crime-Related Child Death or Disappearance Leave" will be divided into two separate leaves:(1) a Crime-Related Child Disappearance Leave, which will provide up to 104 weeks of leave without pay where a child disappears and it is probable that the disappearance was the result of a crime; and (2) a Child Death Leave, which will provide up to 104 weeks leave without pay for the death of a child for any reason. Employees must have been employed for at least 6 consecutive months to be eligible for either leave.

(e) **Domestic or Sexual Violence Leave** – this new leave entitles an employee who has been employed for at least 13 consecutive weeks to a leave of absence where that employee or the employee's child experiences domestic or sexual violence or the threat of sexual or domestic violence and the leave is 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 leave is 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 first 5 days of the leave must be paid in accordance with a new "domestic or sexual violence leave pay" calculation.

5. Overtime

The overtime provisions 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. Instead, Bill 148 establishes that overtime rates will be based on the rate of pay of the work being performed at the time overtime hours are accrued.

Municipalities will need to identify those employees working two jobs at different rates, and to ensure the hours of work for these employees is being appropriately tracked and compensated.

6. Record-Keeping Requirements

Several new record-keeping requirements have been added to the range of records currently required to be maintained by employers, including in relation to dates and times employees work or were scheduled to work or be on call, cancellations of shifts or on call periods, vacation pay and other matters. In addition, the retention period for records of vacation time and vacation pay will increase from 3 years to 5 years.

Municipalities should consult the text of the revised ESA for specific details.

7. Additional Amendments

There are a range of other changes to the ESA on January 1, 2018, including:

- amendments affecting temporary help agencies
- expansion of the related employer provision
- allowing for the use of electronic agreements
- removal of employee obligations upon filing a complaint
- increased penalties for non-compliance (primarily through increased amounts for notices of contravention and authority to publish more data on persons found to be in contravention of the ESA)
- more stringent wage collection measures, and
- a new ability for the Director of Employment Standards to provide and revoke “recognition” of employers who meet prescribed criteria presumably for compliance with the ESA

IN FORCE APRIL 1, 2018

Equal Pay for Equal Work

Bill 148 will enact a new provision that prohibits employers from paying different rates of pay to their employees because of a difference in employment status, where the employee performs 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 (1) a difference in the number of hours regularly worked by the employees, or (2) 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.”

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.

Employees have a right to request a review of their rate of pay, without reprisal, and employers will be required to respond by either increasing the pay rate or providing a written explanation of the differential. Pay rate differentials cannot be addressed by lowering an employee's rate of pay.

Municipalities should take a proactive approach and conduct a job rate analysis to determine their risk. This would include determining whether the work of part-time, full-time and casual employees is the same and determining the reasons for different rates of pay for the same work. Municipalities should also consider the pay equity implications of any changes to job rates. It would also be prudent to develop a process to respond to employees who make inquiries regarding rates of pay.

If a collective agreement is in effect on April 1, 2018, that permits different pay rates based on employment status, 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. A fulsome risk analysis will also assist municipalities in identifying collective bargaining issues to be addressed by January 1, 2020.

But there is some good news for municipalities! Thanks to the lobbying efforts of OMHRA and AMO, the Minister has advised that volunteer firefighters will be exempt from the equal pay for equal provisions. We anticipate that a regulation addressing this exemption will be issued in the near future.

IN FORCE JANUARY 1, 2019

1. Minimum Wage

There will be an increase to the general minimum wage to $15 per hour. The other special minimum wage rates will increase by the same percentage. Once the minimum wage reaches $15.00 per hour, the ESA will revert to its existing process of annual increases based on changes in the Consumer Price Index.

2. Requests for Changes to Schedule or Work Location

After three months of service, an employee will be entitled to request a schedule or work location change without reprisal from the employer. The employer must discuss the request with the employee and notify the employee of its decision within a reasonable time. If the request is granted, the employer must provide the effective date of the changes and their duration. If the request is denied, the employer must provide reasons for the denial.

Municipalities should establish a process for considering and responding to these requests, while ensuring that consideration is given to other legal obligations such as the *Human Rights Code*.

3. Scheduling

(a) **Three Hour Rule**
The three-hour rule in the ESA applies when 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. The circumstances when the rule will apply remain unchanged

by Bill 148, however the Bill does significantly change the wages owed in these circumstances. Under the new rule employees will be entitled to the greater of:

- 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.

This means that if an employee earns overtime at 1.5 times their regular rate for the one hour they work, under the new calculation, they will be entitled to the equivalent of 4.5 hours pay.

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. The existing 3-hour rule from current ESA regulations remains in force until January 1, 2019.

(b) **Minimum On-Call Pay**

The Bill includes a new entitlement for minimum on-call pay. 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 value of that 3 hours of pay will be based on the same calculation set out above with respect to the three-hour rule.

Again, thanks to the lobbying efforts of OMHRA and AMO, Bill 148 contains an exemption that will apply to municipalities. If an employee is put on call for the purposes of ensuring the continued delivery of essential public services, i.e. fire, EMS, utilities, snow removal, etc, and the person is not required to work, then the rule will not apply. However, it should be noted that the rule will still apply where the employee is called in and required to work less than three hours (but were available to work 3 hours or more).

(c) **Right to Refuse Work**

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 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 to ensure the continued delivery of essential public services.

(d) **Minimum Cancellation Pay**

Employees will be entitled to 3 hours of pay at their regular rate when a shift is cancelled within 48 hours of its scheduled start. This obligation will not apply to situations where the nature of the employee's work is weather-dependent and the employer cannot provide work for weather-related reasons, or there are causes beyond the employer's control (e.g. fire, power failure, storms) for the cancellation.

(e) **Limitation on Payment, Transition Periods and Preparations**

Bill 148 specifies an employee is only entitled under these new provisions for payment for 3 hours in respect of one scheduled day of work or on call period.

If a collective agreement is in effect on January 1, 2019 that addresses on-call pay, a right to refuse work or be placed on call, or cancellation pay, 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. These time frames mean that municipalities 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.

Municipalities should review existing policies and/or collective agreements to determine if they already provide for these entitlements, and if so, how much is provided – taking into account the new rules for "3 hours pay" under these provisions. Municipalities may also want to consider if there are alternative scheduling practices that can be utilized to minimize the instances of short notice shift cancellations and requirements to have on call employees work for less than 3 hours (once called in).

KEY CHANGES TO THE LRA

All of the changes to the LRA will come into effect on January 1, 2018. For municipalities who are concerned about potential certification drives of currently non-unionized employees, these changes are important to review. These changes make it even more important for employers to obtain legal advice as soon as they become aware of a potential certification drive.

1. Employee Lists

Unions may now apply to the Ontario Labour Relations Board (OLRB) for an order directing an employer to provide with an employee list where the union can establish more than 20% support in the proposed bargaining unit, subject to certain conditions. Employers will be required to provide the union with employee names, phone numbers and personal email addresses, where this information has been provided to the employer. The OLRB will also have discretion to order the disclosure of other information. Both the employer and the union will have obligations concerning the confidentiality and security of this information.

2. Remedial Certification

Where the OLRB is satisfied that an employer has contravened the LRA, and 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, the OLRB will now be required to automatically certify the union as the bargaining agent of the employees in the bargaining unit.

3. Expanded Just Cause Protection

Just cause protection means that Employees employers cannot discipline or terminate an employee except for just cause. Bill 148 expands these protections in two important ways. First, just cause protection will apply during the period that beings on the date on which a strike or lockout became lawful and ending on the date a new collective agreement is entered into. Second, employees will now have just cause protection from the date a union has been certified as bargaining agent.

4. Bargaining Unit Structure Review – Consolidation After Certification

Where a union already represents employees of the employer in another bargaining unit, the union or employer may request that the OLRB review the structure of the bargaining units. This is only available where a bargaining unit is newly certified, the review is requested at the time the application for certification is made or within 3 months of the certification, and a collective agreement has not yet been entered into. In these cases the Board may:

- order the consolidation of the bargaining units
- amend any certification order
- order that the collective agreement that applies to an existing bargaining unit applies to a consolidated bargaining unit
- declare that an employer is no longer bound by to an existing collective agreement where consolidation occurs
- amend the provision of a collective agreement, including expiry dates and seniority provisions
- determine the terms and conditions which apply until the collective agreement becomes applicable to the consolidated unit.

5. First Collective Agreements

The Ministry of Labour is now providing educational support in the practice of labour relations and collective bargaining where either party to a first collective agreement makes a request for such support.

A new process has been introduced whereby parties can apply for the appointment of a first collective agreement mediator and an OLRB-managed mediation process in every case. The party applying for first contract mediation would submit a list of the issues in dispute and its position with respect to those issues. The other party would then have 5 days to respond with its list of issues in dispute and its position with respect to those issues. Within 7 days of receiving the application, the Minister would appoint the first contract mediator, who would then meet with the parties to assist them in bargaining.

Once a mediator has been appointed, certain time limits apply to the timing of lawful strikes or lockouts, to when the OLRB may deal with decertification or displacement applications, and to when a party may seek the OLRB to direct the settlement of a first agreement by mediation-arbitration.

Finally, first contract mediation-arbitration is a process municipalities will be very familiar with – interest arbitration. No strike or lockout may take place where the collective agreement is being settled by mediation-arbitration, and any such strike or lockout that has already commenced must cease. Once a direction has been given for mediation-arbitration, the rates of wages and all other terms and conditions of employment and all rights, privileges and duties of the employer, the employees and the trade union in effect at the time notice to bargain was given shall continue in effect until the first collective agreement is determined, unless a change was agreed to by the employer and trade union.

6. Additional Amendments

There are a number of other changes to the LRA on January 1, 2018, including:

- expanded successor rights for building service providers
- removal of the time limit to return from strike or lockout
- expanded remedial powers of the OLRB
- changes to vote logistics
- increased fines

Hicks Morley

Stephanie Jeronimo and Julia Nanos specialize in labour and employment matters facing municipalities. Hicks Morley is now regularly conducting on-site compliance and implementation planning meetings with our clients, and would be happy to assist your municipality to ensure you are in compliance with the many changes contained in Bill 148. If you have any questions about this or any other employment matter, or to arrange an on-site compliance planning meeting, please do not hesitate to contact Stephanie at 416-864-7350 or Julia at 416-864-7341. They may also be reached by email at: stephanie-jeronimo@hicksmorley.com and julia-nanos@hicksmorley.com.