

Breakfast Seminar Series
Bill 148: Changes Coming to
Ontario's Employment Standards
and Labour Relations Legislation -
ARE YOU READY?

Colleen Dunlop
Jacques Emond
www.ehlaw.ca

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Emond Harnden SRL
LLP

Session Overview

- Backdrop to Bill 148 – the Changing Workplaces Review
- Overview: Bill 148 and the changes it proposes
 - Proposed changes to the ESA
 - Changes affecting pay and benefits
 - Scheduling changes
 - Changes to leave provisions
 - Proposed changes to the LRA

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LLP

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Bill 148 – How did we get here?

- In February 2015, the Minister of Labour appointed Special Advisors Michael Mitchell and John Murray to conduct the Changing Workplaces Review
- The Final Report of the Special Advisors was released by the government on May 23, 2017
- The Response: Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*, was introduced in the legislature on June 1, 2017
 - Second reading of the Bill was dispensed with;
 - Bill was immediately referred to the Standing Committee on Finance and Economic Affairs
- Standing Committee scheduled to review the Bill over the summer

Bill 148 – Proposed Changes to the *Employment Standards Act*

Provisions Affecting Pay and Benefits

Minimum Wage Increases

- Minimum wage rates to be increased over the next 18 months
- Proposal to increase the general minimum wage to:
 - \$14 per hour on January 1, 2018
 - \$15 per hour on January 1, 2019
- Special minimum wage rates for liquor servers, students under 18, hunting and fishing guides, and homeworkers will be increased by the same percentage as the general minimum wage

Minimum Wage Increases

Category	Current	Oct 1, 2017	Jan 1, 2018	Jan 1, 2019
General	\$11.40/hr	\$11.60/hr	\$14.00/hr	\$15.00/hr
Students under 18	\$10.70/hr	\$10.90/hr	\$13.15/hr	\$14.10/hr
Liquor servers	\$9.90/hr	\$10.10/hr	\$12.20/hr	\$13.05/hr
Hunting and fishing guides	\$56.95 < 5 consecutive hrs;	\$58.00	\$70.00	\$75.00
	\$113.95 > 5 hrs.	\$116.00	\$140.00	\$150.00
Homeworkers	\$12.55/hr	\$12.80/hr	\$15.40/hr	\$16.50/hr

Equal Pay Regardless of Employment Status

- Employees to be paid **same rate of pay** for doing the **same work**, regardless of employment status (i.e., full-time, part-time, casual, temporary, or seasonal)
- “Rate of pay” not defined – likely requires same wage rate but not same benefits, vacation, pension entitlements, etc.
- Exceptions for wage differences based on:
 - Seniority system – under collective agreements
 - Merit-based or performance-based
 - Pay determined by quality or quantity of production
 - Other factors (not sex or employment status)

Equal Pay Regardless of Employment Status

- Probationary rate?
 - If probationary employee doing the same work as full-time employees, must be paid the same rate (unless unionized and collective agreement provision applies)
- Where employee requests a review of their rate of pay, employer must adjust pay or provide written response with reasons
- Employers cannot reduce rate of pay of any employee in order to comply with equal pay obligations

Equal Pay Regardless of Employment Status

- No trade union (or other organization) can cause or attempt to cause an employer to contravene these obligations
- Collective agreement provisions establishing different rates of pay based on employment status in effect on April 1, 2018 will prevail until a new or renewal agreement comes into effect
- Obligations come into force on **April 1, 2018**

Equal Pay for Temporary Help Agency Workers

- Temporary Help Agency (THA) employees (assignment workers) are to be paid **same rate of pay** as permanent employees of the THA client when:
 - 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.
- Requirement does not apply where differences in rates of pay are based on any factor other than sex, employment status or assignment employee status

Equal Pay for Temporary Help Agency Workers

- “Rate of pay” not defined – likely requires same wage rate but not same benefits, vacation, pension entitlements, etc.
- Clients of THAs cannot reduce rate of pay of their employees to ensure compliance
- THA workers entitled to inquire about their wage rate or the wage rate of an employee of the client without repercussions
- Where assignment employee requests review of wage rate, the THA must adjust rate or provide written response with reasons

Equal Pay for Temporary Help Agency Workers

- No trade union (or other organization) can cause or attempt to cause a THA to contravene this obligation
- Where collective agreement in force on April 1, 2018 that permits differences in pay between client's employees and assignment employees, collective agreement will prevail until new or renewal agreement comes into effect
- Provisions come into effect on **April 1, 2018**

Increased Vacation Leave and Vacation Pay

- Paid vacation – extended to 3 weeks vacation leave (and 6% vacation pay) after 5 years of service with same employer
- Applies to vacation entitlement years that end on or after December 31, 2017
- To take vacation in periods of less than 1 week, employee must submit written request and employer must agree
- Changes to take effect **January 1, 2018**

Public Holiday Pay

- Calculation of public holiday pay simplified:

$$\text{Public Holiday Pay} = \frac{\text{Total regular wages in pay period}}{\text{\# of days worked in pay period}}$$

- Comes into force on **January 1, 2018**

Public Holiday Pay

- For employees on leave or vacation during the pay period, holiday pay is to be calculated based on the **pay period before the start of that vacation or leave**
- For employees not employed during preceding pay period, pay to be calculated based on the **pay period that includes the public holiday**
- Employee must still work their last regularly scheduled shift before and after the holiday to be paid, unless “reasonable cause” for not working

Public Holidays

- Where an employee works on a public holiday, payment would be:
 - Public holiday pay plus premium pay for hours worked
 - Bill 148 would remove option to provide employee with a substitute day
- New substitution rules when a public holiday falls on employee's day off or employee is on vacation
 - Bill 148 would require substitute day be either the 1st work day after the public holiday or the last work day prior to the public holiday (currently 3 months after public holiday or up to 12 months where employer and employee agree)
 - Employer and employee can still agree to pay public holiday pay (no substitute day off given in this case)
- Comes into force on **January 1, 2018**

Practical Implications of Pay and Benefits Changes

- Increased costs of doing business
 - Increased minimum wage rates, vacation pay, public holiday pay, equal wages
 - Potentially ratcheting up of wage scales
- Implications for hiring
 - Do I need more employees? Fewer employees?
- Consider implementing pay scales that take account of service/seniority, qualifications, performance-based wage rates/salary
- In non-unionized workplaces, can expect more inquiries from staff about wage rates; must be prepared to justify differences

Practical Implications of Pay and Benefits Changes

- Significant impacts for temporary help agencies
 - Knowing what client's employees earn
 - Comparing skill, effort, responsibility, etc. of assignment employees and client's employees
 - Pricing contracts accordingly
- Significant increase in public holiday pay for part-time employees based on new formula
 - e.g. Employee who earned \$500 for working 3 days
 - Old formula - $\$500 / 20 = \25
 - New formula - $\$500 / 3 \text{ days} = \166.67

Changes to Scheduling Rules (effective January 1, 2019)

Changes to Scheduling Rules

Request to change schedule or location

- After being employed for 3 months, employees would have right to request schedule or location changes without fear of reprisal
 - Request must be in writing
 - Employer must discuss request with employee
 - Employer must notify employee of its decision within a reasonable time, including reasons where request denied

Changes to Scheduling Rules

Three Hour Rule

- Employees who regularly work > 3 hours per day, but upon reporting to work are given < 3 hours work, must be paid 3 hours at their regular rate of pay (**NOT** at minimum wage rate)
- Does not apply if employer unable to provide work due to fire, lightning, power failure, storms or similar causes beyond employer's control

Changes to Scheduling Rules

Right to refuse shift where < 96 hours' notice

- Employees can refuse to accept shifts (or being placed “on call”) without repercussion if their employer asks them to work with less than 96 hours' (4 days) notice
- If a collective agreement addresses right to refuse and there is a conflict with the legislation, then collective agreement provision prevails

Changes to Scheduling Rules

Shift cancellation on < 48 hours' notice

- If a scheduled day of work or on call period is cancelled within 48 hours of its start, employee must be paid 3 hours at their regular rate of pay
- A scheduled day of work or on call period is cancelled if the entire day of work or on call period is cancelled, but not if it is shortened or extended
- If a collective agreement addresses right to refuse and there is a conflict with the legislation, then collective agreement provision prevails

Changes to Scheduling Rules

Employees on call

- When employee is "on-call" and not called in to work or is called in and works < 3 hours, they must be paid 3 hours at their regular rate of pay (for each 24 hour period on-call)
- If a collective agreement addresses right to refuse and there is a conflict with the legislation, then collective agreement provision prevails
- All changes to scheduling rule will come into force on **January 1, 2019**

Practical Implications of Changes to Scheduling Rules

- Significant impact/cost for employers in certain sectors
 - retail, hospitality, service industry
- Allows employers less flexibility in adapting to changes in workload, peak vs. slow periods

Amendments to Leave Provisions (effective January 1, 2018)

Leaves of Absence Provisions

Personal emergency leave (PEL)

- 50+ employee threshold to be removed; will now apply to all employers in Ontario
- All employees entitled to 10 PEL days regardless of size of employer
- The first 2 PEL days must be **paid**; remaining 8 unpaid

Leaves of Absence Provisions

Personal emergency leave (PEL)

- Reasons for taking PEL expanded to include domestic or sexual violence or the threat of domestic or sexual violence
- Employers prohibited from requiring a medical note to confirm entitlement to leave
- Employer can request evidence that is “reasonable in the circumstances” to confirm that employee is entitled to the leave
- No minimum employment requirement

Leaves of Absence Provisions

Unpaid leave for child death (any cause) (NEW)

- Employees who have been employed for at least six (6) consecutive months entitled to a single period of unpaid leave of up to **104 weeks** if child dies

Unpaid leave for crime-related child disappearance

- Employees who have been employed for at least six (6) consecutive months entitled to a single period of unpaid leave of up to **104 weeks** if child disappears

Leaves of Absence Provisions

Family Medical Leave

- Leave to provide care and support to a family member at significant risk of death – increased from 8 weeks in a 26-week period to 27-weeks in a 52 week period
- No minimum employment requirement
- All changes to leave provisions would take effect **January 1, 2018**

Practical Implications of Changes to Leaves of Absence Provisions

- Significant cost for 2 paid PEL days (for employees not entitled to paid sick leave and/or bereavement leave)
- Inability to require a medical note – potential for abuse
- Legal challenges likely around when an employer can require a medical note
 - e.g. where employer provides paid leave which arguably amounts to a greater right or benefit
- Impact on attendance management programs and threshold to enter or progress through program

Other Significant Changes

Penalties for Misclassification of Employees as Independent Contractors

New Section 5.1

- Employers prohibited from misclassifying employees as "independent contractors"
- Employers who misclassify employees could be subject to penalties including prosecution, public disclosure of a conviction and monetary penalties
- Reverse onus – in the event of a dispute, employer will be required to prove that the individual is **not** an employee
- Will become effective upon **Royal Assent**

THA Workers – Notice of Termination

- Temporary Help Agency required to give assignment workers at least one week's notice when an assignment scheduled to last longer than three months will be terminated early
- If less than one week's notice is given, assignment employee must be paid for the difference or offered at least one week's worth of reasonable work during the notice period
- To take effect on **January 1, 2018**

THA Workers – Notice of Termination

Exceptions:

- Where assignment employee guilty of wilful misconduct, disobedience or wilful neglect of duty;
- Where assignment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event; or
- Where assignment is terminated as a result of a strike or lock-out at the location of the assignment

Joint Liability for Related Employers

- Removal of requirement to prove "intent or effect" to defeat the purpose of the ESA when determining whether related businesses can be treated as one employer for purposes of the Act
- Amendment intended to restore original intent
- Related employers/businesses to be treated as one employer
- Changes would come into force on **January 1, 2018**

Other Changes

- Overtime pay – employees who hold more than one position with an employer to be paid overtime at the rate for the position they are working during the overtime period (**January 1, 2018**)
- More ESA complaints – Director of Employment Standards could no longer refuse to assign an Employment Standards Officer to investigate an ESA claim due to insufficient information from the claimant (s. 96.1 repealed)

Other Changes

- Increased penalties for non-compliance with the ESA
 - Maximum administrative monetary penalties for non-compliance to be increased to maximum of \$1,500
 - Employment Standards Officers (ESOs) to be given discretion in assessing penalties within a range
- ESOs will be authorized to award interest on unpaid wages owing and fees unlawfully charged to employees (rates to be determined by Director and approved by Minister)
- Measures will be implemented to improve wage collections by the government or an authorized collector
- New ability to order that employees be paid directly, rather than in trust to the Director

Issues for Employers to Consider

- Do I need to reconsider my hiring practices?
- Do I need to update my policies? Or the language of my employment contracts?
- Do I need to review independent contractor arrangements to ensure that they meet the test?
- Do I need to change my scheduling practices?
- Are there provisions in my collective agreement that may need to be changed in the next round of collective bargaining?

Bill 148 – Proposed Changes to the *Labour Relations Act*

Application for Employee Lists

- Applies to workplaces where no union has been certified
- A union may apply to the OLRB for an order directing an employer to provide a list of employees
- Includes providing names, phone numbers and personal email addresses
- A union must demonstrate it has at least 20% employee support for an order

Application for Employee Lists

- An employer can file a Notice of Disagreement
 - Disagree with the proposed bargaining unit
 - Disagree with the number of employees in the unit
- The employer will not know the identity of the employees who have supported the union
- The OLRB can decide without a hearing or consultation

Practical Implications

- The disclosure of lists by order of the OLRB is deemed to comply with privacy legislation
- The OLRB only decides if the proposed unit *could* be appropriate
- Does not apply in raids or in the construction sector
- May result in additional litigation regarding whether the 20% support threshold has been met

Union Certification

- Option of card-based union certification introduced for:
 - Temporary Help Agency Industry
 - Building Services Industry
 - Home Care and Community Services Industry
- Remedial union certification will be mandatory where OLRB determines that employer has committed an unfair labour practice that impacted union support

Union Certification

- A union files membership cards with its Application
- An employer has two days to respond and provide the names of employees in the proposed unit
- If the union files membership evidence of more than 55% of employees in the unit on the date of the Application, the union is certified
- If the union files membership evidence on behalf of between 40% to 55% of employees in the unit, a vote is ordered
- The application is dismissed if evidence on behalf of fewer than 40% is filed

Union Certification

- OLRB empowered to conduct votes outside the workplace, including electronically and by telephone
- OLRB can authorize an LRO to give directions relating to the voting process and voting arrangements, to ensure neutrality of the voting process

First Contract Mediation and Arbitration

- Access to first contract arbitrator to be made easier, and an intensive mediation component to be added
- Where union obtains remedial certification it can apply for settlement of first contract by mediation-arbitration
- OLRB will be required to address first contract mediation-arbitration applications before dealing with displacement and decertification applications

First Contract Mediation and Arbitration

- An application for arbitration can be filed 20 days after the mediator has been appointed
- The applicant must include the issues in dispute and its position on the issues
- The OLRB can dismiss the application, order more mediation, or direct an interest arbitration
- No strikes or lockouts can take place where the OLRB directs mediation-arbitration

Successor Rights

- Successor rights would be extended to the retendering of building services contracts
 - Food services
 - Building/cleaning services
 - Security services
- Government could, by regulation, apply this expanded notion of successor rights to the retendering of other publically funded contracted services

Review and Consolidation of Bargaining Units

- OLRB could change structure of existing bargaining units within a single employer where it determines that they are no longer appropriate for collective bargaining
- OLRB could also consolidate newly certified bargaining units with other existing bargaining units under a single employer, where they are represented by the same bargaining agent

Review and Consolidation of Bargaining Units

- For newly certified units the OLRB to consider whether consolidation
 - Contributes to effective collective bargaining relationships
 - Contributes to the development of collective bargaining in the industry
- The OLRB will consider other factors it deems relevant

Review and Consolidation of Bargaining Units

- The OLRB may review bargaining unit structures where the following are met:
 - An employer or trade union representing employees in the unit files an application requesting a review
 - The OLRB is satisfied the bargaining units are no longer appropriate
- Employers can now apply to have bargaining units consolidated

Return to Work Rights and Procedures Following Strike or Lock-Out

- Removal of the six month limitation for right to return to work following the commencement of a lawful strike
- No limit on the right to return following a strike or lockout
- Employers will be required to reinstate an employee at the conclusion of a legal strike or lock-out (subject to certain conditions), which is enforceable through grievance arbitration

Just Cause Protection

- Employees to be protected from being disciplined or discharged without just cause:
 - in the period between certification and conclusion of a first contract, and
 - during the period between the date employees are in a legal strike or lock-out position and the new collective agreement takes effect

Practical Implications

- Unions may request employee information for an employer
 - The employer has knowledge of a certification campaign
 - The unfair labour practice provisions apply once there is knowledge of a campaign
 - Employer must be careful when communicating with employees
 - Remedial certification may result if a ULP

Practical Implications

- Employers in the designated industries may face card-based certification
 - Ensure that staff know what OLRB material looks like
 - Contact labour relations immediately
- Successor rights when contracts re-tendered
 - A collective agreement can follow where contractors changed
- OLRB will have powers to reconfigure bargaining units

Increased Fines

- Maximum fines under the OLRA would be increased to:
 - \$5,000 for individuals (increased from current \$2,000), and
 - \$100,000 for organizations (increased from current \$25,000)

New Provisions to Come into Force

- All proposed changes to the *Labour Relations Act* will come into force six months after Bill 148 comes into force

Exemptions

- Ministry of Labour has indicated that it will consult stakeholders on Special Advisors' recommendation to remove the employee status exclusions for:
 - Horticultural and agricultural works
 - Architects, lawyers, dentists, doctors and land surveyors
 - Managerial employees
- Ongoing litigation regarding some of these exclusions to be taken into account

Bill 148 – Standing Committee Review

- The Standing Committee is scheduled to hold public hearings on the Bill over the summer
- Public hearings will be held in Ottawa on July 12th
- http://www.ontla.on.ca/committee-proceedings/committee-hearings-notices/files_html/Bill%20148%20-%20Advertising%20EN%20REVISED.htm

Questions?

http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4963