



# Bill 148: Implementation Challenges and Strategies

---

March 21, 2018

The content of this presentation is for general information purposes only. It is not intended to provide legal advice or opinions of any kind and may not be used for professional or commercial purposes.  
Le contenu de cette présentation est uniquement à but informatif et ne constitue pas, ni ne vise à constituer un quelconque avis juridique ou un conseil d'ordre professionnel engageant notre cabinet.



As a boutique labour and employment law firm, Emond Harnden has represented the interests of management in both official languages for over 30 years.

Originally rooted in the Ottawa community, we have grown to represent employers in all territories and provinces of Canada.


---

The content of this presentation is for general information purposes only. It is not intended to provide legal advice or opinions of any kind and may not be used for professional or commercial purposes.



**PORTER  
HEFFERNAN**

 613-940-2764

 pheffernan@ehlaw.ca



**EMOND HARNDEN** | LABOUR AND EMPLOYMENT LAW | DROIT DU TRAVAIL ET DE L'EMPLOI

4

## ABOUT

Porter is a partner of Emond Harnden. He advises his public and private sector clients in respect of all aspects of labour and employment law, and provides representation before numerous tribunals and all levels of courts.

Porter's practice is focused on labour and employment advocacy. For his unionized clients, Porter frequently appears before labour arbitrators in response to grievances filed on behalf of employees. In the case of non-unionized employers, he is regularly called on to represent clients in defence of wrongful dismissal and other employment related claims.

In addition to his employment and labour law advocacy practice, Porter provides strategic advice and guidance to a number of public and private sector clients in respect of information management issues, including in particular in respect of privacy and access to information matters. Porter has particular experience in freedom of information/access to information matters and is pleased to be able to assist his public sector clients in this challenging field.

Porter is a member of the County of Carleton Law Association, the Ontario and Canadian Bar Associations, the Advocates' Society, and the International Association of Privacy Professionals.



**ADAM GAMWELL**

 613-940-2736

 agamwell@ehlaw.ca



**EMOND HARNDEN** | LABOUR AND EMPLOYMENT LAW | DROIT DU TRAVAIL ET DE L'EMPLOI

5

## ABOUT

A native of Newfoundland, Adam graduated in 2013 with a J.D. from the University of Ottawa Faculty of Law. He joined Emond Harnden as an articling student and has been with the firm ever since.

Adam provides advice and representation to a variety of public and private sector employers on a wide variety of labour and employment matters. He offers practical and strategic advice on matters such as wrongful dismissal allegations, human rights complaints, performance management, harassment investigations, and contract interpretation.

Adam has acted for clients in a variety of litigation and arbitration proceedings in the labour and employment context and had experience leading collective bargaining negotiations for unionized clients.

Adam is a member of the Law Society of Upper Canada, the Ontario Bar Association, the Canadian Bar Association and the County of Carleton Law Association.

## Session Overview

- Dealing with pay and benefits changes, including:
  - Minimum wage increase
  - Equal pay for different employment statuses
  - Increased vacation
  - New public holiday pay calculation
  - Making changes and avoiding constructive dismissals



## Session Overview Cont'd

- Enhanced time away from work, including:
  - Personal emergency leave
  - Family medical leave
  - Critical illness leave
  - Domestic or sexual violence leave
  - Pregnancy and parental leave
  - Other leave changes
- New record keeping obligations
- Misclassification of employees as independent contractors
- Changes to the *Labour Relations Act*





## Changes to Pay and Benefits

---

### Minimum Wage Increases

#### The Change:

- Minimum wage increases:
  - Jan. 1, 2018: \$14 per hour
  - Jan. 1, 2019: \$15 per hour
- Same percentage increase for special minimum wage rates (e.g. students under age 18)



## Minimum Wage Increases

Category	Oct 1, 2017	Jan 1, 2018	Jan 1, 2019
General	\$11.60/hr	\$14.00/hr	\$15.00/hr
Students under 18	\$10.90/hr	\$13.15/hr	\$14.10/hr



## Minimum Wage Increases

### The Challenge:

- Do higher earners need a wage increase too?

### The Strategy:

- No legal obligation to do so
- In practice, however, you may need to
  - For morale
  - For retention



## Equal Pay regardless of Employment Status

### The Change:

- Apr. 1, 2018: same rate of pay for doing the same work, regardless of employment status
- “Same work” means:
  - Substantially same kind of work;
  - Using substantially the same skill, effort, responsibility; and
  - Under similar working conditions



## Equal Pay regardless of Employment Status

### The Change Cont'd:

- Exception: students under age 18 who work max. 28 hours per week or during school holidays
- Exceptions also allowed if:
  - Based on seniority system;
  - Merit or performance-based;
  - Production (quality or quantity)-based; or
  - Based on other factors



## Equal Pay regardless of Employment Status

### The Challenge:

- Must all employees receive the same **benefits**?

### The Strategy:

- Rate of pay not defined
- Likely requires only that employees receive same wage rate, **not** same benefits, vacation, pension entitlements, etc.



## Increased Vacation Time and Pay

### The Change:

- Jan. 1, 2018: 3 weeks' vacation time (and 6% vacation pay) for 5 years or more of service with same employer

### The Challenge:

- When exactly does an employee hit 5 years of service?



## Increased Vacation Time and Pay

### The Strategy:

- Trigger point = “period of employment”, regardless of hours worked
- Exact timing depends on whether employer uses:
  - Standard vacation year (i.e., the employee’s start date); or
  - Alternate (i.e., calendar or fiscal) vacation year



## Public Holiday Pay

### The Change:

- Jan. 1, 2018:

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





## Public Holiday Pay

### The Change Cont'd:

- If employee on PEL or vacation during pay period, look to **pay period before leave/vacation started**
- If employee new as of this pay period, look to **current pay period**
- Employee still must work last regularly scheduled shift before and after the holiday (unless they have “reasonable cause” not to)



## Public Holiday Pay

### The Change Cont'd:

- If giving substitute day off, must provide written statement, before the public holiday, indicating:
  1. Name of holiday worked;
  2. Date of the substitute holiday; and
  3. Date statement is provided.



## Public Holiday Pay

### The Challenges:

- No cap on holiday pay
  - e.g., employee on compressed work week may get more than 8 hours' pay
- Big increases possible for part-timers and casuals
  - e.g., Employee earns \$500 for working 3 days
    - Old formula -  $\$500 / 20 = \$25$
    - New formula -  $\$500 / 3 \text{ days} = \$166.67$



## Public Holiday Pay

### The Strategy

- Revise scheduling practices:
  - Strategically schedule part-time employees
    - Employee who works only 1 full day in pay period gets 1 full day's holiday pay
  - vs.
  - Employee who works every day for 4 hours gets only 4 hours' holiday pay
- Avoid use of casuals



## Pay and Benefits Changes Taken Together

### The Change:

- Increased costs

### The Challenge:

- *ESA* prohibition on reducing employees' pay to comply with equal pay requirements
- How to pass on the increased costs?
  - Beware of constructive dismissal



## What is Constructive Dismissal?

- Definition:
  1. Important or significant change
  2. To a fundamental/essential term of employment contract
  3. By the employer unilaterally (i.e., without employee's consent)
- Amounts to breach of contract
- Employee may treat contract as at an end, resign, and sue for wrongful dismissal



## Examples of Constructive Dismissal

- Potential constructive dismissals can arise from changes to:
  - Employment status
  - Hours of work
  - Work location
  - Compensation
  - Benefits (including increased benefit costs)
  - Vacation time or pay
  - Other terms of employment (e.g., paid breaks)



## How to Avoid a Constructive Dismissal

### The Strategy:

1. Give “fresh consideration” in exchange for the change
  - e.g., signing bonus, promotion, additional compensation, additional vacation time

OR:

2. Give reasonable notice that failure to accept new terms will lead to dismissal; re-offer employment on new terms when notice period ends



## Constructive Dismissal

### Key Takeaways:

- Organizational/policy changes = constructive dismissal risks
- Give reasonable notice of termination or consideration when making a change



## Enhanced Time Away from Work

## Personal Emergency Leave

### The Change:

- Jan. 1, 2018: **all** employees entitled to 10 PEL days, regardless of size of employer and length of time employed
- First 2 PEL days must be **paid**
- Paid days must be taken first



## Personal Emergency Leave

### The Change Cont'd:

- Reasons for taking PEL:
  - Personal illness/injury/medical emergency
  - Death/illness/injury/medical emergency of defined individuals
  - Urgent matter concerning defined individual
- Can't require medical note, but can request other evidence "reasonable in the circumstances"
- If any part day taken as PEL, employee deemed to have taken full day



## Personal Emergency Leave

### The Challenge:

- Do you already provide a greater right or benefit (i.e., 2+ paid days off for same reasons employees may take PEL)?

### The Strategy:

- Consider:
  - # of leave days given;
  - whether with or without pay;
  - purposes for which leave can be taken; and
  - eligibility criteria for leave



## Family Medical Leave

- Unpaid leave to provide care and support for family member at significant risk of death within next 26 weeks
- No minimum service required
- Jan. 1, 2018: increased to 28 weeks in a 52-week period



## Critical Illness Leave

- As of Dec. 3, 2017
- Replaces Critically Ill Child Care Leave
- For employees with 6+ months' service
- Unpaid leave up to:
  - 37 weeks in a 52-week period to provide care or support to critically ill minor child who is a family member (under age 18); and
  - 17 weeks in a 52-week period to provide care or support to critically ill adult family member



## Domestic or Sexual Violence Leave

- As of Jan. 1, 2018
- For employees with 13+ weeks' service
- Leave for up to 10 days + 15 weeks per year if employee or their child experiences actual or threatened domestic or sexual violence and:
  - Seeks medical attention for injury/disability caused by the violence;
  - Obtains services from victim services organization;
  - Obtains counselling;
  - Relocates (temporarily or permanently);
  - Seeks legal/law enforcement assistance; or
  - As otherwise prescribed
- First 5 days are paid
- Confidentiality of records





## Pregnancy and Parental Leave

- Dec. 3, 2017: Choice of unpaid combined pregnancy and parental leave for:
  - 12 months (status quo); or
  - 18 months
- Consistent with changes to Employment Insurance benefits
- Jan. 1, 2018: leave for employees who suffer stillbirth or miscarriage increased from 6 to 12 weeks



## Other Leave Changes Effective January 1, 2018

- Family Caregiver Leave
  - Added provision that leave may be deemed to be taken in entire weeks
- Child Death Leave (under 18)
  - No longer restricted to crime related death
  - 104 weeks; single period
  - Employed 6 consecutive months
- Crime Related Child Disappearance Leave (under 18)
  - Increased from 52 weeks to 104 weeks; single period
  - Employed 6 consecutive months



## Enhanced Leave Provisions Taken Together

### The Challenge:

- More, longer-term replacement employees (recruitment and training costs)
- Costs of retraining employees returning from extended absences

### The Strategy:

- Increase/decrease workforce?
- Change hiring practices/policies?



## New Scheduling Rules Effective January 1, 2019

---

## New Scheduling Rules Effective January 1, 2019

- Right to request change in work schedule or location
- Three hour rule
- On call rule – minimum pay for being on call
- Right to refuse shifts or on call
- Shift or on call cancellation



## New Record Keeping Obligations

---

## New Record Keeping Requirements

As of January 1, 2018

### Keep...

- Dates and times employee worked
- Employee has 2 or more regular rates of pay, dates and times employee worked in excess of overtime threshold at each rate
- Annual vacation pay and how calculated
- Vacation pay earned during the stub period and how calculated

### ...For

- 3 years
- 3 years
- 5 years
- 5 years



## New Record Keeping Requirements

### Keep...

- Date of public holidays employee worked, date of substitute holidays taken, and date substitute holiday statement provided to employee

As of January 1, 2019:

- The dates and times employees were scheduled to work and any changes to the schedule
- Any cancellations of a scheduled work day or on call period and the date and time of the cancellation

### ...For

- 3 years
- 3 years
- 3 years



## New Record Keeping Requirements

### The Challenges:

- More items for Ministry of Labour inspectors to ask about
- Increased administrative responsibilities

### The Strategy:

- Enhance Human Resources capacity as required



## New ESA Poster (Version 7.0)

- Former poster (Version 6.0) out of date with Bill 148 changes
- January 2018, MOL published a new streamlined version
- Employers are required to:
  - Post and keep posted in at least 1 conspicuous place in every workplace
  - Provide copy to each employee
  - Provide copy to each new hire within 30 days of hiring
  - Where majority language spoken in the workplace is other than English and MOL has published a poster in that language, copy of the translation to be posted alongside the English version

<https://www.labour.gov.on.ca/english/es/pubs/poster.php>



## Changes to the *Labour Relations Act*

### The Change:

- With 20% employee support, unions can seek order for disclosure of employee lists, including personal phone numbers and email addresses
- OLRB can order disclosure without hearing or consultation

### The Challenge:

- Increased unionization risk during times of organizational/policy change



## Changes to the *Labour Relations Act*

### The Strategy:

- Look out for organizing drives
- Communicate openly, early and often with employees about any and all workplace changes, and the reasons for them
- Listen and react to employee concerns



QUESTIONS?



EMOND HARNDEN | LABOUR AND EMPLOYMENT LAW | DROIT DU TRAVAIL ET DE L'EMPLOI

AN INTEGRAL  
PART OF  
YOUR TEAM

---

PARTIE  
INTÉGRANTE  
DE VOTRE  
ÉQUIPE



EMOND  
HARNDEN

LABOUR & EMPLOYMENT LAW  
DROIT DU TRAVAIL ET DE L'EMPLOI

---