

Bill 148 is now the Law in Ontario, Canada

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Bill 148, *The Fair Workplaces, Better Jobs Act, 2017*, which significantly amends Ontario labour and employment law, has received Royal Assent and is now law. Earlier in 2017, the Ontario government issued its response to a Final Report two Special Advisors drafted as part of their Changing Workplaces Review. This Final Report included 173 recommendations for amendments to Ontario employment and labour laws. The government declared that it has “a responsibility to address precarious employment and ensure Ontario workers are protected by updating the province’s labour and employment laws.” To that end, on June 1, 2017, the government introduced Bill 148, which incorporates amendments to the Ontario *Employment Standards Act, 2000* (“ESA”), the *Labour Relations Act, 1995* (“OLRA”) and the *Occupational Health and Safety Act* (“OHSA”). Thereafter, the Standing Committee on Finance and Economic Affairs received submissions, held hearings and proposed various amendments to Bill 148. Third reading of Bill 148 was passed on November 22, 2017 and Bill 148 finally received Royal Assent on November 27, 2017. The following outlines Bill 148's major changes to the ESA and the OHSA.

BILL 148 ESA AMENDMENTS

AMENDMENTS EFFECTIVE ON ROYAL ASSENT

Employee Misclassification and Penalties: Employers are prohibited from misclassifying employees as “independent contractors,” who are not entitled to the protections of the ESA. If a dispute arises, the employer will have the onus of proving that the individual is not an employee. An employer that misclassifies an employee could be subject to penalties including prosecution, monetary penalties and disclosure of a conviction.

AMENDMENTS EFFECTIVE DECEMBER 3, 2017

Parental Leave: Parental leave is increased from 35 to 61 weeks for employees who take pregnancy leave and from 37 to 63 weeks for employees who do not take pregnancy leave. This change brings the ESA in line with changes to Employment Insurance at the federal level. Employees must have 13 weeks of service to qualify for parental leave.

Critical-illness of an Adult Family Member: The ESA allows an employee with 6 months of service to take up to 37 weeks of unpaid leave to care for a critically ill child. In addition to that requirement, Bill 148 allows an employee to take 17 weeks of unpaid leave to care for a critically ill adult who is a member of the employee’s family as defined in the Bill. A child or adult is “critically ill” when his or her

baseline state of health has significantly changed and his or her life is at risk as a result of illness or injury.

The employee must have a medical certificate from a qualified health practitioner stating the child or adult is critically ill and requires the care or support of one or more family members. The certificate must also set forth the period during which the individual needs care to support. For the purposes of critical illness leave, "qualified health practitioner" is defined to include a physician, registered nurse, psychologist or a member of a prescribed class of medical practitioners.

AMENDMENTS EFFECTIVE JANUARY 1, 2018

Minimum Wage: The general minimum wage (currently \$11.60 per hour) will increase to \$14.00 per hour on January 1, 2018 (increases beyond January 1, 2018 will be discussed below). Special minimum wages for students (\$13.15), liquor servers (\$12.20) and homeworkers (\$15.40) will also be increased on January 1, 2018. (Students employed as homeworkers are entitled to the homeworker rate, not the student rate.)

Paid Vacation: The current standard provides for a minimum of two weeks' vacation and 4% of gross annual wages as vacation pay. These amounts will increase after five years for employees with the same employer. Specifically, those employees will be entitled to three weeks of vacation and 6% of their gross annual wages as vacation pay.

Public Holidays: The formula for calculating public holiday pay will be based on the number of days actually worked in the pay period immediately preceding the public holiday. The employer is required to divide the wages earned by the number of days worked in the pay period immediately prior to the public holiday. If an employer and employee agree to substitute a public holiday for another day, the employer will be required to provide the employee with a written statement before the public holiday that sets out the public holiday on which the employee will work, the date of the day that is substituted and the date on which the statement is provided to the employee.

Personal Emergency Leave and Two Paid Days: Personal Emergency Leave ("PEL") of 10 days had been limited to workplaces with 50 or more employees. This threshold of 50 employees has been eliminated. Almost all employees will be entitled to 10 PEL days per year, including two paid PEL days. Employees with less than 1 week of employment are not entitled to the paid days of leave. If an employee with less than 1 week of employment takes PEL, the leave taken will be counted against the unpaid leave days when the employee becomes eligible for paid PEL.

Doctor's Notes for Personal Emergency Leave Absences: An employer will be prohibited from requesting a medical practitioner's certificate from an employee taking personal emergency leave. This includes a certificate from a physician, registered nurse, psychologist or a member of a prescribed class of medical practitioners. An employer may still require "evidence reasonable in the circumstances" that

the employee is entitled to the leave. Bill 148 provides no examples of what may be considered “evidence reasonable under the circumstances.”

Domestic or Sexual Violence Leave:

Bill 148 provides for a new leave for employees with at least 13 consecutive weeks of employment where the employee or the employee’s child experiences domestic or sexual violence, or a threat thereof. Employee is entitled to take both up to 10 days of leave and up to 15 weeks of leave in each calendar year. The first five days of this leave taken in each calendar year must be paid and the balance of the entitlement is unpaid.

The leave may be taken for specific purposes, for the employee to the employee’s child:

1. To seek medical attention in respect of a physical or psychological injury or disability caused by the domestic or sexual violence.
2. To obtain services from a victim services organization.
3. To obtain psychological or other professional counselling.
4. To relocate temporarily or permanently.
5. To seek legal or law enforcement assistance, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from domestic or sexual violence.
6. Such other purposes as may be prescribed.

Employers may request reasonable evidence of the employee’s entitlement to the leave. Employers are also required to establish procedures to protect the confidentiality of information related to domestic or sexual violence leave and may only disclose it in limited circumstances. Circumstances include: employee consent; disclosure is made to an officer, employee, consultant or agent of the employer who needs the record in the performance of his or her duties; disclosure is authorized by law; or disclosure is prescribed.

Family Medical Leave Increase: Employees are currently entitled to 8 weeks of unpaid leave to provide care and support to a critically ill family member. A certificate from a qualified health practitioner stating that the individual has a serious medical condition with a significant risk of death occurring within a 26-week period is a precondition to the entitlement. Bill 148 increases family medical leave from 8 weeks to 28 weeks. The definition of a “qualified health practitioner” for the purposes of Family Medical Leave now includes a physician, a registered nurse or a member of a prescribed class of health practitioners.

Leave for the Death of a Child and for Crime-Related Disappearance: The existing leave of 104 weeks for death of a child now applies to death from any cause, not just a crime-related cause. In addition, there is an increase from 52 weeks to 104 weeks, for crime-related child disappearance leave. Employees must have at least 6 months of service to qualify for either leave. If the employee was on a

crime-related death or disappearance leave on December 31, 2017, the leave continues under the previous rules.

Pregnancy Leave Definition of Qualified Medical Practitioner: For the purposes of pregnancy leave, the definition of a “qualified medical practitioner” is expanded to include a physician, a midwife, registered nurse or a member of a prescribed class of medical practitioners.

Still-Birth or Miscarriage Leave: This leave is increased from 6 weeks to 12 weeks. As with pregnancy leave, the employee requires a medical certificate from a physician, midwife, registered nurse or prescribed practitioner.

Record Keeping: Employers will now be required to keep records regarding:

- The dates and times the employee worked.
- If the employee has two or more regular rates of pay and, in a work week, the employee performed work for the employer in excess of the overtime threshold, the dates and times that the employee worked in excess of the overtime threshold at each rate of pay.
- The amount of vacation pay that the employee earned during the vacation entitlement year and how that amount was calculated.
- For alternative vacation entitlement year employees: the amount of vacation pay the employee earned during the stub period and how the amount was calculated.

Retention of vacation-related records is increased from 3 years to 5 years.

Expanded Definition of Employee: The new definition of employee includes “a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer’s employees.” This definition effectively expands the ESA to include interns receiving training from the employer.

Joint Liability of Related Businesses: The ESA provision requiring proof of “intent or effect” to defeat the purpose of the ESA will be eliminated (*i.e.*, when determining whether a related business can be treated as one employer under the Act and jointly and severally liable for ESA monies owing).

Payments to Employees and Order to Pay: The authority will be created to prescribe additional methods of payment to employees. An Employment Standards Officer will be allowed to issue an order that money be paid directly to an employee when an employer or Temporary Help Agency client owes money to the employee.

Collections by the Government and Authorized Collectors: Wage collections by the government or an authorized collector will be improved by allowing a collector to issue warrants, to place liens on real and personal property, and to hold a security while a payment plan is underway. In addition, the government and the collector will be authorized to collect and share personal information.

Electronic Agreements: An electronic agreement between an employer and employee (e.g., an agreement to work excess hours) will be deemed to constitute an agreement in writing.

Interest Rate Determination: The Director of Employment Standards will be permitted to determine interest rates for different provisions of the ESA with approval of the Minister of Labour.

AMENDMENTS EFFECTIVE APRIL 1, 2018

Equal Pay for Equal Work: Full Time, Part-Time, Casual, Temporary & Seasonal Employees: Regardless of employment status (i.e. whether full time, part-time, casual, temporary or seasonal), an employee must be paid equally where he or she:

1. performs substantially the same work in the same establishment;
2. requires substantially the same skill, effort and responsibility to perform work; and
3. performs work under similar working conditions.

Performing work that is “substantially the same” is specifically defined in Bill 148 as meaning “substantially the same but not necessarily identical”.

Employees are exempt from the equal pay requirement where the wage difference is based on seniority; merit; a system that determines pay by quality or quantity of production; or other factors (employment status and sex do not qualify as exemptions).

Collective Agreements re Employment Status Equal Pay: If a collective agreement provision in effect on April 1, 2018 has pay differences based on employment status or allows pay differences, then the agreement prevails over ESA until either the collective agreement expires or until January 1, 2020, whichever is earlier.

Request for Review of Wages: Employees must be able to request a review of wages if they believe they are not receiving wages equal to those of full-time employees. The employer will then have to respond either with a pay adjustment or a written explanation as to why there will be no adjustment. Employees will also be protected against reprisals for asking their employer or other employees about wages.

Equal Pay for Equal Work: Temporary Help Agency Employees: A Temporary Help Agency employee (assignment worker) must be paid at the same rate as a client’s employee where the employee:

1. performs substantially the same work in the same establishment;
2. requires substantially the same skill, effort and responsibility to perform work; and
3. performs work under similar working conditions.

Performing work that is “substantially the same” is specifically defined in Bill 148 as meaning “substantially the same but not necessarily identical”.

Temporary Help Agency employees are exempt from the equal pay requirement where the wage difference is based on any factor other than sex, employment status or assignment employee status.

Temporary Help Agency employees will be protected from repercussions if inquiring about their wage rate or the wage rate of the client's employee.

Collective Agreements re Equal Pay for Temporary Help Agency Employees: If a collective agreement provision in effect April 1, 2018, permits differences in pay between employees of a client and an assignment employee, then the agreement prevails over ESA until the collective agreement expires or until January 1, 2020, whichever is earlier.

Ministerial Review: The Minister of Labour is required to review the sections relating to equal pay for equal work in relation to employment status and assignment employees before April 1, 2021.

Termination of Assignment: Temporary Help Agency Employees: A Temporary Help Agency will have to provide an assignment employee with at least one week’s notice of early termination of an assignment scheduled to last longer than three months. If less than one week’s notice is given, the assignment employee must be paid the difference unless offered at least one week’s worth of reasonable work during the notice period.

AMENDMENTS EFFECTIVE JANUARY 1, 2019

Minimum Wage: On January 1, 2019, the minimum wage will increase to \$15.00 per hour. Special minimum wages for students (14.10), liquor servers (13.05) and homeworkers (16.50) will also be increased. (Students employed as homeworkers are entitled to the homeworker rate, not the student rate.) Each minimum wage will be adjusted for inflation every October starting October 2019.

New Scheduling and Payment Rules:

Cancellation Pay - Guaranteed Three Paid Hours: If a scheduled shift or scheduled on-call assignment is cancelled within 48 hours of the scheduled start time, employees must be paid three hours at their regular pay rate. This is not required if the employer cannot provide work due to circumstances beyond the employer’s control (including fire, lightning, power failure, storms or similar causes, or if the work is weather dependent).

Regularly Works Three Hours - Guaranteed Three Paid Hours: Employees who regularly work more than three hours each day must be paid three hours at their regular pay rate if they are required to work and work for less than three hours despite being available to work longer.

On-Call Employees - Guaranteed Three Paid Hours: If “on call” employees are not called into work, or are called in but work less than three hours despite being available to work longer, then they must be paid three hours at their regular pay rate, and this is required for each 24-hour on-call period.

Right to Refuse – 96 Hour Rule: An employee can refuse to work or to be on-call on a day that they were not scheduled to work or be on-call if the employer does not provide 96 hours’ notice. The right to refuse does not apply if the employer requests the employee to work in order to deal with an emergency; remedy a threat to public safety, deliver essential public services; or for other reasons that may be prescribed.

Inconsistent Collective Agreements: If there is a collective agreement, that agreement will prevail in place of some of these new rules for a limited period of time. The provisions in the agreement only prevail if the collective agreement is in effect on January 1, 2019 but cease to prevail either on the expiry of the agreement or on January 1, 2020, whichever occurs earlier.

Changes to Schedule or Work Location: Employees with at least three months of service may submit a written request to change their schedule or work location. The employer must discuss the request with the employee and notify the employee of a decision within a reasonable timeframe. If the request is granted, the employer must set out the date the changes take effect and the duration of the changes. If the employer refuses, it must provide reasons for refusal.

Record Keeping Regarding Scheduling: Employers will now be required to keep records of:

- Dates and times the employee was scheduled to work or to be on call for work and any changes made to the on-call schedule.
- Any cancellations of a scheduled day of work or a scheduled on call period.

Repeal of Work Hardening Exemption: ESA currently exempts an individual who performs work in a simulated job or working environment if the primary purpose in placing the individual in the job or environment is his or her rehabilitation (referred to as “work hardening”). This exemption has been removed and its removal may well limit use of rehabilitation programs and make accommodation initiatives difficult.

ADDITIONAL ESA-RELATED UPDATES

Proposed Penalty Increases for ESA Non-Compliance and Publication of Contraventions: Flexibility would be increased with respect to the administrative monetary penalties that an Employment Standards Officer can levy against an employer that is non-compliant.

Contravention (violations)		Current Penalty	Proposed Penalty
s. 2 (poster); s. 15 (records); s. 15.1 (vacation records); s. 16 (availability of records)	1st Contravention	\$250	\$350
	2nd Contravention	\$500	\$700
	3rd Contravention	\$1000	\$1500
All other provisions	1st Contravention	\$250 x Number EEs	\$350 x Number of EEs
	2nd Contravention	\$500 x Number of EEs	\$700 x Number of EEs
	3rd Contravention	\$1000 x Number of EEs	\$1500 x Number of EEs

In addition, the Director of Employment Standards will be authorized to publish names of individuals who have been issued a penalty, the amount of the penalty, the date of the contravention and a description of the contravention.

Exclusions and Exemptions from ESA: Some of the current ESA exclusions and exemptions will be removed as follows:

- the ESA will apply to any person who receives training for work through the employer (but anyone working as part of an experiential learning program run by a university, community college, private career college or high school will still be excluded from the ESA);
- almost all existing ESA requirements will apply to Crown employees;

The Ministry of Labour is conducting a review of the ESA's hours of work and overtime exemptions and special industry rules (including exemptions for managers and supervisors, and for information technology professionals) in consultation with affected stakeholders. The Ministry of Labour will also work with affected Ministries in a consultation process with stakeholders to review the recommendation of the Special Advisors with respect to removal of exclusions under the OLRA taking into account ongoing litigation.

Enhanced Enforcement of ESA Rights and Obligations: To ensure enforcement of existing laws and amendments, Ontario will be hiring 175 additional Employment Standards Officers and will be launching an education program for employees and small- and medium-sized businesses with respect to ESA rights and obligations.

Once the new Employment Standards Officers are hired (likely by 2020–2021), all ESA claims will be resolved within 90 days of filing and 10% of Ontario workplaces will be inspected, perhaps annually. ESA compliance assistance will be provided to new employers, specifically focusing on medium and small businesses.

BILL 148 OHSА AMENDMENTS

High Heels in the Workplace: Effective November 27, 2017, employers will no longer be permitted to require a worker to wear footwear with an elevated heel unless it is required for the worker to perform work safely. Bill 148 incorporates exceptions for the entertainment and advertising industry from this prohibition.

ACTION PLAN FOR EMPLOYERS

Employers should consider the following action plan:

1. Conduct an ESA self-audit with respect to current ESA obligations as amended by Bill 148.
2. Given the increased scrutiny that will come to bear on independent contractor relationships, and potential new penalties for misclassification, review these relationships and determine whether they should be continued.
3. Review hiring letters, employment contracts, policies, handbooks and collective agreements to ensure proper revisions and compliance with Bill 148 amendments.
4. Given the emphasis placed on education and enforcement by the Special Advisors and the Ontario government, undertake appropriate training of managers with respect to amendments.

The work has just begun!