

Summary of the *Fair Workplaces, Better Jobs Act, 2017 (Bill 148)*¹

Employment Standards Act (ESA)

Minimum Wage:

- The bill will increase current general minimum wage from \$11.60/hr to \$14.00/hr in January 2018 and \$15.00/hr in January 2019 (after June 2018 election) and it will be tied to CPI every October, starting 2019.
- It will maintain the lower wage structure for certain jobs such as liquor servers and students under 18 years, however their wages will increase by the same percentage as the general minimum wage at each of the above mentioned dates. It will move minimum wage out of regulations and into legislation as part of the ESA so that any future changes require legislation.

Overtime Pay:

- Currently, where an employee holds more than one position with an employer, their overtime entitlement is based on a complicated blended rate.
- Bill 148 would simplify this by specifying that overtime pay is to be based on the wage rate performed during an overtime period.

Equal Pay for Equal Work:

- The Government has proposed changes that would better ensure equal pay for equal work performed by casual, part-time and seasonal employees, as well as those employed through temporary help agencies.
- Part-time, casual, temporary and seasonal employees would be entitled to the same rate of pay as regular employees when they perform substantially the same work, in the same establishment, under the same conditions, and require the same skill, effort and responsibility.
- However, employers could justify differential pay on the basis of seniority, merit, quantity or quality of employee production or “other factors”.

¹ Summary of work from Goldblatt Partners. For a detailed review: <http://goldblattpartners.com/wp-content/uploads/Bill-148-Summary-November-22-2017-01070674.pdf>

- A temporary help agency would be prevented from paying its employees a lower wage than that paid to its client's own employees performing the same work in the same establishment, under the same conditions, and requiring the same skill, effort and responsibility based solely on their status as a temp-agency employee.
- However, the grounds to justify differential pay for these workers are not limited to the seniority, etc., grounds listed above. Any ground other than sex, status as a temporary help agency employee, or part time/temporary/casual/seasonal work for the client could justify differential pay. This ability to rely on other undefined factors may prove troublesome in enforcing these protections.
- In response to concerns expressed by Labour that these provisions merely replicate the ESA's flawed equal pay provisions relate to sex, the Legislature introduced an amendment that states that work make be "substantially the same" even if it is not necessarily "identical".
- Also, where workplace wage rates violate these rules, the employer would be required to adjust the wages of lower paid employees upwards.
- Employees, including temporary help agency employees, would be protected from reprisal where they make inquiries or disclose wage information for the purpose of determining an employer's compliance with equal pay rules.
- Employees who believe their pay does not comply with these rules would be able to request a review by their employer.
- However, collective agreements that may violate these rules would be grandparented if they are in effect as of April 1, 2018. This grandparenting would continue until the earlier of the expiry of the agreement or January 1, 2020.

Vacation and Leave Entitlements:

- Under the current ESA, employees are entitled to two weeks of paid vacation (or 4% vacation pay in lieu of vacation).
- Bill 148 would increase this entitlement to three weeks of paid vacation after five years of service with the same employer. Vacation pay would correspondingly increase from 4% to 6% of wages.
- Bill 148 would also expand the entitlement to personal emergency leave ("PEL"). Currently, employers are only required to provide 10 days of unpaid personal emergency leave per calendar year if they employ 50 or more employees. The 50 employee threshold would be eliminated, extending the right to personal emergency leave to smaller workplaces.
- Bill 148 would require an employer to pay for the first two days of personal emergency leave for employees with at least one week's employment.
- It would also prohibit employers from requiring doctors' notes when an employee claims leave due to illness.

- Family medical leave would be extended from 8 weeks to 28 weeks. The list of covered family members is expanded significantly to include siblings, grand-parents, in-laws, uncles, aunts, nieces and nephews, and other prescribed individuals.
- The length of pregnancy leave for workers who are not entitled to also take parental leave is extended. Currently such leaves are the longer of 17 weeks from their start date, or 6 weeks after birth, still-birth or miscarriage. This latter figure is extended to 12 weeks.
- Parental leave entitlements are also extended to match changes to parental leave benefits under the Employment Insurance Act. Currently workers must begin to take parental leave within 52 weeks of the birth of a child, and may last for a maximum of 35 or 37 weeks, depending on whether or not the employee also took pregnancy leave. Under Bill 148, parental leave may now be taken within 78 weeks and lasts for a maximum of 61 or 63 weeks. These changes now correspond to the ability of workers to prorate their parental leave Employment Insurance benefits over an 18 month period.
- Finally, three new leave entitlements would be introduced: two related to missing or deceased children – which replaces the previous “Crime-Related Child Death or Disappearance Leave” – and one for victims of domestic or sexual violence. Employees who have been employed for at least six months would be entitled to a single leave of up to 2 years following the death of their child, subject to certain conditions.
- Bill 148 would also introduce a separate leave where an employee’s child disappears as a probable result of a crime.
- Bill 148 introduced a new Domestic or Sexual Violence Leave (“DV/SV Leave”).
- DV/SV Leave is available to workers with at least 13 consecutive weeks of employment who have experienced domestic or sexual violence, or whose child, step child, foster child or child under their legal guardianship has experienced such violence.
- Employees taking this leave are entitled to a total of 10 days and 15 weeks of leave per calendar year. The first five days of leave taken (whether taken from the “day” or “week” pool) are paid days, while the remainder are unpaid.

Holidays & Holiday Pay:

- Bill 148 makes Family Day a statutory public holiday.

Additional Protections for Employees of Temporary Help Agencies:

- Bill 148 would provide employees of temporary help agencies with protections analogous to (but weaker than) termination pay rights for permanent employees.
- If a temporary help agency employee is put on an assignment estimated to last for three months or more, but is terminated early, the agency would be required to provide one week's written notice or pay in lieu thereof.

Scheduling Rights:

- Currently, employers are not required to provide advance notice of shift schedules or last minute changes to existing schedules. The only protection is the “three hour rule”. That rule provides, subject to certain exceptions, that an employee who regularly works more than 3-hour shifts, and reports to work only to be given less than 3 hours of work, must be paid 3 hours at the minimum wage, or the employee’s regular wage for the time worked, whichever is greater.
- Bill 148 would introduce several new protections with respect to scheduling:
 - The three hour rule would be strengthened to require three hours pay at the employee’s regular rate of pay, not at the minimum wage.
 - Where employees are on call (i.e. required to be available for work), and are called into work for less than 3 hours despite being able to work longer, they must be paid three hours at their regular wage. These protections do not apply to workers required to be on call for the purpose of ensuring the continued delivery of essential public services.
 - Employees would have a right to refuse a shift without repercussion if offered the shift on less than 96 hours notice, unless called in to ensure continued delivery of essential public services.
 - Employers would have to pay 3 hours’ wages where they cancel a scheduled shift on less than 48 hours’ notice, unless the cancellation is owing to certain factors beyond an employer’s control.
 - However, with the exception of the three hour rule, all of these rights are subject to any conflicting provision of a collective agreement that is in force as of January 1, 2019. This grandparenting would continue until the earlier of the expiry of the agreement or January 1, 2020.

Misclassification of Employees as Contractors:

- Bill 148 would amend the ESA to expressly prohibit employers from treating employees as if they were not employees, and establishing a reverse onus provision.
- The reverse onus means an employer has to prove the worker is properly classified, the worker does not have to prove that they are improperly classified.

Coverage:

- The ESA currently contains some 85 exemptions.
- Effective January 1, 2018, Bill 148 would extend almost all ESA provisions to Crown employees.
- The Ministry of Labour will begin reviewing other ESA exemptions.

Enforcement:

- The Ministry of Labour is attempting to evolve towards a culture of enforcement, and to take on a role akin to a law enforcement agency in terms of ensuring compliance with the ESA.
- Hiring 175 new employment standards officers by 2021
- Inspecting 1 in 10 Ontario workplaces annually

Commencement:

- All of the ESA amendments would come into force on January 1, 2018, with the following exceptions:
 - Provisions respecting misclassification of employees – November 27, 2017
 - Critical Illness Leave and expanded Parental Leave –December 3, 2017
 - Equal pay for equal work rules - April 1, 2018
 - Act binding on the Crown, right to request shift changes and new scheduling protections – January 1, 2019

Labour Relations Act (LRA)

Employee List During Organizing Campaigns:

- Bill 148 would give a union the right to a list of employee names, phone numbers and personal email addresses where it can show it has obtained membership evidence for 20% of employees in the bargaining unit it seeks to organize.
- An employee list must include the name of each employee in the proposed unit and, if the employer has it, the telephone number and personal email address for each employee.
- Previously, these provisions would have required a union to seek certification of the same unit that it described in an employee list application filed within the previous year. However, following extensive pressure from labour groups, this rule was removed.
- The amendments would not authorize access to employee lists for individuals seeking to decertify a union. Similarly, a union could not apply for a list of employees already covered by a collective agreement or represented by a union. This would prevent the membership list provision from being used as a tool for raiding.

Certification:

- Bill 148 would extend card-based certification on a very limited basis to three sectors: temporary help agencies, building services, and home care and community services.
- It is not clear how extending card-based certification to temporary help agencies will have any meaningful impact.

- The Ontario Labour Relations Board (OLRB) will have the power to conduct votes outside of the workplace, including through electronic or telephone voting, and to give directions about the voting process and arrangements.

Remedial Certification:

- Currently, where a certification vote fails, and the true wishes of employees cannot be ascertained due to employer misconduct, the OLRB may certify the union as the bargaining agent of the employees of the bargaining unit. However, it may also order a second vote, and must consider whether the trade union appears to have membership support adequate for the purposes of collective bargaining.
- Under Bill 148, where it concludes that employer misconduct has made the true wishes of employees unascertainable, the Board will be required to grant remedial certification.

First Contract Arbitration (FCA) Following Certification:

- Currently, first contract arbitration following certification is available only in limited circumstances, such as where an employer refuses to recognize the union.
- Bill 148 will require the use of an intensive mediation process before seeking arbitration whether remedial certified or not.

Displacement & Decertification Following Certification:

- Bill 148 would give priority to mediation and arbitration proceeding over any displacement or decertification application, even if brought before the intensive mediation process was triggered.

Just Cause Following Certification:

- Bill 148 would extend just cause protection to employees against discharge or discipline during the period between certification and the earlier of the conclusion of the first collective agreement or the date that the union no longer represents employees of the bargaining unit.

Return to Work Protection Following Strike:

- Currently, a striking employee has a right to return to work if he or she makes an unqualified request to the employer within 6 months of the commencement of the strike.
- Bill 148 would eliminate the 6 month cut-off.
- Bill 148 would also protect employees from being disciplined or discharged without just cause in the period between being in a legal strike/lock-out position, and the conclusion of the new collective agreement or the decertification of the union, whichever is earlier.

Modification and Consolidation of Bargaining Units:

- Bill 148 would give the OLRB new powers to consolidate a newly certified bargaining unit with existing units of the same employer when all units are represented by the same union will create an ability for unions and employers to agree to review the structure of bargaining units.
- Bill 148 would allow the OLRB to merge newly certified units with already existing units under a single employer, where the employer or union request a review of bargaining unit structure at the same time as, or within three months of a certification application and no collective agreement has been entered into. The same union must represent other units of employees, whether at the same location as the new unit or at a different location.

Protecting Successor Rights in Re-Tendering Cases:

- Bill 148 would provide only a limited set of protections for successor rights in the building services industry.

Interim Relief:

- Currently, the OLRB has the power to make interim procedural orders. It may also make substantive interim orders related to reinstatement and terms and conditions of employment. However, its power to make such substantive interim orders is severely restricted by a number of conditions set out in the LRA which must be met before the power may be exercised.
- Bill 148 would give the OLRB a broad power to make any interim order without legislated tests or restrictions.

Penalties for Violations:

- Currently the maximum penalties on conviction are \$2000 for an individual, and \$25,000 for an organization. Bill 148 would increase these penalties to \$5000 and \$100,000 respectively.

Commencement:

- All of these amendments will come into force as of January 1st, 2018.

Occupational Health and Safety Act

- Bill 148 will prohibit employers from requiring employees to wear footwear with an elevated heel unless:
 - Wearing such footwear is required for the worker to perform their work safely; or
 - The employee is a performer in the entertainment and advertising industry
 - This came into effect on November 27, 2017

What's Next?

- The Ministry of Labour is currently consulting with respect to LRA exemptions for domestic workers. It has also announced its first phase of reviewing ESA exclusions for the following types of workers:
 - Architects
 - Domestic Workers
 - Homemakers
 - IT Professionals
 - Managerial and Supervisory Employees
 - Pharmacists
 - Residential Building Superintendents, Janitors and Caretakers
 - Residential Care workers.
- Submissions are due January 1st, 2018

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