



# What's New in HR Law

## Bill 148 – Updates regarding the *Employment Standards Act, 2000*

October 25, 2017

### **BOTTOM LINE**

This fall, the Ontario legislature completed the second reading of *Bill 148, The Fair Workplaces, Better Jobs Act, 2017*. Amendments proposed by the Standing Committee on Finance and Economic Affairs relating to the *Employment Standards Act, 2000* remain largely unchanged. This post summarizes those amendments.

### **Background**

*Bill 148: The Fair Workplaces, Better Jobs Act, 2017*, which proposes significant changes to the *Employment Standards Act, 2000*, and the *Labour Relations Act, 1995*, was introduced by the Ontario government on June 1, 2017 and passed through the first reading on that same day.

Throughout the summer, the Standing Committee on Finance and Economic Affairs (the “Committee”) heard submissions from a range of interested parties regarding the Bill’s impact. On August 21, 2017, the Committee incorporated the submissions of the interested parties by voting to add a number of significant amendments.

This fall, Bill 148 passed the second reading stage before the Ontario legislature, and the legislature finished its debates in the second reading stage on October 18, 2017. Bill 148’s proposed amendments with respect to the *Employment Standards Act, 2000*, remain largely unchanged from the Committee’s review.

## Summary of Amendments to the *Employment Standards Act, 2000*

### Domestic or Sexual Violence Leave

The Committee amendments adopted on September 11, 2017 created a new stand-alone leave specifically for victims of domestic or sexual violence.

The new leave entitles an employee who has been employed for at least 13 consecutive weeks to an **unpaid leave of absence** when that employee, or the employee's child, is the victim of domestic or sexual violence or experiences the threat of sexual or domestic violence.

Employees may take the leave for the following purposes:

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

Domestic or Sexual Violence Leave is structured as a dual entitlement. In each calendar year, an employee is entitled to claim all or some of 10 days of leave and up to a potential maximum of 15 weeks of leave.<sup>2</sup>

The provision now requires employees to advise the employer prior to claiming the leave where possible. If requested by the employer, the employee may also be required to provide "**evidence reasonable in the circumstances**".<sup>3</sup> Finally, the provision provides that any leave taken under the section will be in addition to other leaves that the employee may be entitled to take.

### Personal Emergency Leave

In addition to the new Sexual or Domestic Violence Leave, the amendments will alter Personal Emergency Leave entitlements as follows:

- The 10-day leave entitlement will be maintained, but the first 2 days of the days must be **paid leave**.
- Employees must work for their employer for at least 1 week before they are entitled to the 2 new days of paid personal emergency leave.

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<sup>1</sup> Section 49.7(2) of the *The Fair Workplaces, Better Jobs Act, 2017*

<sup>2</sup> Section 49.7(4) of the *The Fair Workplaces, Better Jobs Act, 2017*.

<sup>3</sup> Section 49.7(11) of the *The Fair Workplaces, Better Jobs Act, 2017*.

- If an employee uses a paid day of leave on a day they were entitled to overtime pay or a shift premium, they will be entitled to be paid only at their regular wage rate and not the increased rate.
- The 50-employee threshold will be eliminated, such that personal emergency leave will apply in all workplaces.
- Employers will be prohibited from requiring an employee to provide a medical note to substantiate any claim for personal emergency leave.

### **Pregnancy and Parental Leave**

Bill 148 purports to impact pregnancy and parental leave under the *Employment Standards Act, 2000* in two capacities. The first will increase the pregnancy leave for employees who suffer a still-birth or miscarriage from 6 weeks to 12 weeks after the pregnancy loss has occurred.

The second change will be to lengthen parental leaves as follows:

- From 35 weeks to 61 weeks for employees who claimed a pregnancy leave, and
- From 37 weeks to 63 weeks for employees who did not claim a pregnancy leave.

These changes would become effective on January 1, 2018.

### **Other Leaves**

Bill 148 also provides for amendments to other leave entitlements as follows:

- **Family medical leave** (to care for dying relatives) will increase from up to 8 weeks to up to 27 weeks in a 52-week period.
- There will be a new unpaid leave for the **death of an employee's child** for up to 104 weeks.
- **Crime-related child disappearance leave** will increase from 52 weeks to 104 weeks.

### **Scheduling**

Bill 148 will also amend the scheduling provisions of the *Employment Standards Act, 2000* as follows:

- Employees can **request changes to their schedule** or work location, which employers are required to discuss with the employee and either grant or provide reasons for a denial.
- Employees must be paid a minimum of 3 hours at their regular rate for shifts that are under 3 hours, for being "**on call**", and when a scheduled shift is cancelled with less than 48 hours' notice. However, an exemption exists where an employee's work is weather-dependent and the employer is unable to provide work due to weather-related reasons, or any other prescribed reasons.
  - A clarification amendment has been added to Bill 148 which notes that, in order for an employee to qualify for the minimum 3 hours of work payments, the employee must have been available to work a minimum of the 3 hours at the time in question. In addition, the clarification amendment states that the 3-hour entitlements do not compound multiple times. Thus, an employee is only eligible to receive 3 hours' pay even if an entitlement arises under multiple provisions.

- Employees can **refuse to work** on a day that they were not scheduled to work if they receive less than 96 hours' notice. However, this provision will not apply for work to deal with an emergency, to remedy a threat to public safety, or for other such reasons as may be prescribed.
- Collective agreement provisions will prevail over the new scheduling amendments for a limited period of time. For the collective agreement scheduling provisions to prevail, the collective agreement must be effective on January 1, 2019. However, the Act states that the provision enabling a collective agreement to prevail will not apply upon either the expiration of that agreement or January 1, 2020, whichever occurs first.

### **Overtime**

Bill 148 will amend the *Employment Standards Act, 2000*, such that employees who hold more than one position with an employer must be paid overtime at the rate for the position that they are working during the overtime period.

### **Minimum Wage**

Significantly, Bill 148 purports to increase the minimum wage to \$14 per hour on January 1, 2018 and to \$15 per hour on January 1, 2019, with annual inflation adjustment on October 1 of every year from 2019 onward.

The minimum wage for liquor servers will apply only if the employee also regularly receives tips or other gratuities.

The minimum wage rate for students will increase to \$13.15 in 2018 and \$14.10 in 2019.

### **Public Holidays**

Bill 148 will change the **method for calculation** of public holiday pay such that the calculation will be based on the number of days actually worked in the pay period immediately prior to the public holiday.

The original version of Bill 148 proposed to create new substitute holiday provisions; however, the Ontario Government has now scrapped that aspect of the original proposal. Therefore, the current public holiday provisions in the *Employment Standards Act, 2000* will remain in effect.

However, Bill 148 will change the *Employment Standards Act, 2000*, such that when an employee agrees to work on a public holiday, and is entitled to a substitute holiday, the employer must provide a **written statement** to the employee identifying the public holiday that the employee will work, the date substituted for the holiday, and the date upon which the statement was provided to the employee.<sup>4</sup>

### **Vacation with Pay**

Bill 148 will also increase vacation entitlement under the *Employment Standards Act, 2000*. After 5 years of employment with the same employer, vacation entitlement will **increase to 3 weeks**.

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<sup>4</sup> Sections 27, 28, 29, and 30 of The *Fair Workplaces, Better Jobs Act, 2017*.

Further, Bill 148 will increase vacation pay under the *Employment Standards Act, 2000*. After 5 years of employment with the same employer, **vacation pay will increase to 6%**.

### **Equal Pay**

**Full-time and part-time employees** are entitled to equal pay for performing the same work. Employees of temporary help agencies who perform substantially the same work as employees of the agency's client are also entitled to equal pay.

In addition, Bill 148 now provides a new definition of a "**seniority system**", which is considered an acceptable ground for pay differences. The new definition will allow for a "seniority system" that entitles workers to different pay based on the accumulated number of hours worked.

However, with respect to the new equal pay provisions, Bill 148 proposes that collective agreement provisions will prevail to a limited extent, even when in conflict with the *Employment Standards Act, 2000*. In order to prevail over the *Employment Standards Act, 2000* provisions, the conflicting collective agreement must be in effect on January 1, 2019, and further, the collective agreement will no longer prevail upon expiration of the collective agreement or January 1, 2020, whichever occurs first.

### **Temporary Help Agencies**

Bill 148 will also change the *Employment Standards Act, 2000*, such that employees must be provided with **1 week of notice or pay in lieu** if an assignment that was estimated to last 3 months or more is terminated before its estimated end, unless another assignment of at least 1 week is offered to the employee.

### **Enforcement**

Penalties for contraventions may be increased by changes to the applicable regulations, with greater discretion given to Employment Standards Officers. Bill 148 will enable Employment Standards Officers to **order employers to pay wages directly** to employees. The Director of Employment Standards can publish information related to a deemed contravention, accept security for amounts owing, and issue warrants or register a lien to collect money owing.

In addition, Bill 148 will remove the previous "self-help" mechanism whereby employees were required to bring contraventions of the *Employment Standards Act, 2000* to their employer's attention prior to going to an Employment Standards Officer. With the removal of the "self-help" mechanism, employees can go directly to Employment Standards Officers for *Employment Standards Act, 2000* contraventions.

### **Record-keeping Requirements**

Bill 148 will require employers to keep several **new records** in addition to those already required under the *Employment Standards Act, 2000*. The new records that must be kept are as follows:

- The dates and times that the employee was scheduled to work or to be on call for work, and any changes made to the on call schedule.
- The dates and times that the employee worked.
- If the employee has two or more regular rates of pay for work performed for the employer 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.

- Any cancellations of a scheduled day of work or scheduled on call period of the employee, and the date and time of the cancellation.
- Any written notice provided to employees regarding substitute holidays.
- The amount of vacation pay that 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.
- Documents related to an employee taking the new Domestic or Sexual Violence Leave.<sup>5</sup>

Further, Bill 148 will increase the **retention period** of records for vacation time and vacation pay from **three years to five years**.

## Considerations Going Forward

Bill 148 is still moving through the legislative process, so many practical aspects of Bill 148's implementation and application remain unknown.

Now that the second reading stage has concluded, Bill 148 may be referred to further committee hearings or proceed to a third reading stage before the legislature. If further committee hearings are held, employers may have a chance in the coming months to voice any concerns that they have about Bill 148 and its proposed legislative changes.

As Bill 148 proceeds toward royal assent, employers should keep informed about the potential amendments to the *Employment Standards Act, 2000*, and ensure that they are prepared to adapt to the changing landscape of labour relations law.

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<sup>5</sup> Section 15.1(2) of The *Fair Workplaces, Better Jobs Act, 2017*.

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