



# What's New in HR Law

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

November 23, 2017

### **BOTTOM LINE**

On November 22, 2017, Bill 148, *The Fair Workplaces, Better Jobs Act, 2017* passed its Third Reading in the Ontario Legislature. At the end of Third Reading, the Legislature endorsed a number of amendments proposed by the Standing Committee on Finance and Economic Affairs (the "Committee") relating to the *Employment Standards Act, 2000* (the "ESA"). This post summarizes those amendments, and provides a comprehensive overview of the current state of Bill 148.

### **Summary of Committee Amendments to Bill 148 since Second Reading**

- Domestic or Sexual Violence Leave converted to a partially paid leave of absence.
- New Critical Illness Leave to replace current Critically Ill Child Care leave.
- New method of calculation for "three-hour minimum pay" rules.
- Continuation of essential services exception added to "three-hour minimum pay" rules.
- Seniority based on total hours worked no longer a basis for providing unequal pay to employees.

### **Comprehensive Discussion of Amendments to the ESA**

#### **Domestic or Sexual Violence Leave**

This update is for general discussion purposes and does not constitute legal advice or an opinion.

Domestic or Sexual Violence Leave will provide a new stand-alone leave specifically for victims of domestic or sexual violence. The leave entitles an employee who has been employed for at least 13 consecutive weeks to a **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 are entitled to claim 10 days of Domestic or Sexual Violence Leave and/or up to a potential maximum of 15 weeks of leave.

The employer will be required to pay the employee for the first 5 days of Domestic or Sexual Violence Leave. This payment, referred to as "**domestic or sexual violence leave pay**", will generally be equivalent to the wages that the employee would have earned but for the leave. An alternative calculation is available for those employees who receive performance-based compensation such as commissions.

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>

The provision 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>2</sup>. Further, 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**

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 leave 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.
- 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.

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

<sup>2</sup> Section 49.7(11) of *The Fair Workplaces, Better Jobs Act, 2017*.

## Pregnancy Leave

Beginning on or after January 1, 2018, pregnancy leave for employees who suffer a still-birth or miscarriage will increase from 6 weeks to 12 weeks after the pregnancy loss has occurred.

In addition, the Bill specifies that nurses with extended certificates of registration and midwives are "legally qualified medical practitioners" who may provide a certificate identifying the due date of the baby, or who may certify that an employee is incapable of performing her employment duties due to complications arising from the pregnancy.

## Parental Leave

Parental leaves will be increased 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.

The changes to the parental leave were designed to conform to the federal government's changes to the *Employment Insurance Act*, which are set to become effective on **December 3, 2017**. Accordingly, the changes to the parental leave provision will become effective on the later of either December 3, 2017 or the date that Bill 148 receives Royal Assent.

Finally, the extended parental leave provision will only be applicable where the child's date of birth or the date the child first comes into the custody, care and control of the parents is **on or after the effective date** of the new provisions.

## Critical Illness Leave

The current iteration of the *ESA* contains the "**Critically Ill Child Care Leave**", which provides up to 37 weeks of leave within a 52-week period for a parent or legal guardian to provide care and support to a critically ill child under the age of 18. This leave is consistent with the entitlement under the federal *Employment Insurance Act*, which provides benefits to parents of critically ill children.

Bill 148 will mimic the changes to the new adult caregiving benefit under the *Employment Insurance Act*. Accordingly, the Critically Ill Child Care Leave is being replaced by a new leave, the **Critical Illness Leave**. Notably, an employee must have been employed for at least 6 consecutive months in order to be eligible for the new leave.

The new Critical Illness Leave will provide two basic entitlements:

- a leave of up to 37 weeks in a 52-week period for an employee to provide care or support to a **critically ill minor child** (under the age of 18) who is a family member of the employee; and
- a leave of up to 17 weeks in a 52-week period for an employee to provide care or support to a critically ill adult who is a **family member of the employee**.

The "family member" requirement of the new leave is considerably wider than what is currently provided for under the *ESA*'s family medical leave provisions. Under the Critical Illness Leave provisions, a "family member" will include: aunts, uncles, "step" relatives, and some "in-law" relationships. The definition is even broad enough to include persons who are considered by the employee to be akin to a family member.

However, the new leave does contain further restrictions regarding time limits on the leave and potential extensions that will be dependent upon the individual circumstances.

As this new leave has been created in accordance with the federal government's changes to the *Employment Insurance Act*, the new leave will become effective on either the later of December 3, 2017 or the date that Bill 148 receives Royal Assent.

### Other Leaves

The newest Committee amendments to Bill 148 provide further changes to other leave entitlements as follows:

- **Family medical leave** (to care for dying relatives) will increase from up to 8 weeks to up to 28 weeks in a 52-week period. The definition of a "qualified health practitioner" under this provision will include physicians, registered nurses with an extended certificate or registrations (or an individual with equivalent credentials), and other health practitioners as prescribed.
- **Crime-related child disappearance** leave will increase from 52 weeks to 104 weeks.

### Scheduling

Bill 148 will amend the scheduling provisions of ESA 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, as described below.

- If an employee who regularly works more than 3 hours a day is required to attend work and works less than 3 hours, despite being available to work longer, the employer shall pay wages for 3 hours. This provision does not apply if the employer is unable to provide work due to fire, power failure, storms or similar causes beyond the employer's control.
- If an employee who is on call is not required to work or works for less than 3 hours, despite being available to work longer, the employer shall pay wages for 3 hours. This provision does not apply when an individual is put on call for the purposes of ensuring the continued delivery of essential public services, and the person is not required to work. Further, an employee is entitled to only one 3-hour payment per 24 hour period, even if on-call more than once.
- If an employee's scheduled day of work or scheduled on call period is cancelled with less than 48 hours' notice, the employer shall pay wages for 3 hours. This provision does not apply if the employer is unable to provide work due to fire, power failure, storms or similar causes beyond the employer's control, or where the employee's work is weather-dependent and the employer is unable to provide work due to weather-related reasons, or any other prescribed reasons.

In the above circumstances, Bill 148 specifies that an employer must pay "**wages for three hours**", which is defined as the greater of the following:

- 1) the amount the employee earned for the time worked; **or**

2) the sum of:

- the amount the employee earned for the time worked, and
- wages equal to the employee's regular rate for the remainder of the time.

The effect of this change is to allow employees who may be entitled to a form of premium pay while actually working to retain that entitlement.

Payments provided to an employee under the new scheduling rules are limited to 3 hours of pay in respect of a single day of work or schedule on-call period. Also, the amendments indicate that pay for "wages for three hours" is limited to the amounts payable under the new calculations (as outlined above), which in some circumstances may exceed 3 hours' pay.

In addition, employees can **refuse to work** on a day that they were not scheduled to work if they receive less than 96 hours' notice.

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 *ESA*, 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.

Bill 148 will also change the *ESA* 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>3</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, employees will be entitled to 3 weeks' vacation, after the end of the employee's vacation entitlement year.

### **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.

Employers no longer have the ability to create pay differences based on the accumulated number of hours worked. Further, non-identical employment positions may still meet the test for the new equal pay for equal work provisions, so long as the positions are "substantially the same".

The Committee also recommended an amendment which would commit the government to reviewing the equal pay for equal work provisions by April 1, 2021.

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 *ESA*. In order to prevail over the *ESA* 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 require 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 *ESA* 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 *ESA* contraventions.

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<sup>3</sup> Sections 27, 28, 29 and 30 of *The Fair Workplaces, Better Jobs Act, 2017*.

## **Record-keeping Requirements**

Bill 148 will require employers to keep several **new records** in addition to those already required under the ESA. 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>4</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**

As Bill 148 awaits Royal Assent, it has nearly completed the legislative process. As such, the many practical aspects of Bill 148's implementation and application are becoming clearer. Employers should review policies and procedures to determine what changes will be necessary to ensure compliance with their new obligations under employment standards law.

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<sup>4</sup> Section 15.1(2) of *The Fair Workplaces, Better Jobs Act, 2017*.

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