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# The 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar

Toronto – November 9, 2017

## CHANGES AND DEVELOPMENTS IN EMPLOYMENT LAW

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## Changes and Developments in Employment Law

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### A. OVERVIEW

- Bill 148 - Amendments to *Employment Standards Act, 2000* ("ESA")
  - Background of ESA
  - *Fair Workplaces, Better Jobs Act, 2017* ("Bill 148")
  - Minimum Wage
  - Equal Pay for Equal Work
  - Paid Vacation Time
  - Job Protected Leaves of Absence
  - Scheduling Provisions
  - Independent Contractors
- Relevant Case Law



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### B. Bill 148 - Amendments to Employment Standards Act, 2000 ("ESA")

#### 1. Background of Employment Standards Act, 2000 ("ESA")

- Minimum standards applicable to the employer-employee relationship in Ontario
- It applies to the vast majority of charities and not-for-profits in Ontario
- Deals with a variety of matters such as minimum wages, vacation time, hours of work, termination and severance, liability of directors, etc.



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#### 2. Background of Fair Workplaces, Better Jobs Act, 2017 ("Bill 148")

- Bill 148 came about as a result of the Changing Workplaces Review Final Report released by the Ontario Minister of Labour on May 23, 2017
  - To access the full report: <https://www.labour.gov.on.ca/english/about/workplace/>
- Special Advisors retained by the Ontario government made a total of 173 recommendations for amendments to the ESA and the *Labour Relations Act, 1995* ("LRA")
- Bill 148 was carried after Second Reading and is being considered by Standing Committee
  - To access Bill 148 and monitor its progress: [http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&BillD=4963&detailPage=bills\\_detail\\_the\\_bill](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillD=4963&detailPage=bills_detail_the_bill)

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#### 3. Minimum Wage

- Bill 148 will increase the general minimum wage to \$14/hr on January 1, 2018, and to \$15/hr on January 1, 2019, subject to further annual inflation adjustments on October 1 every year starting in 2019

**General Minimum Wage/hr**



Province/Territory	General Minimum Wage/hr
Alberta	\$13.60
British Columbia	\$11.35
Manitoba	\$11.15
New Brunswick	\$11.00
Newfoundland and Labrador	\$11.00
Northwest Territories	\$12.50
Nova Scotia	\$10.85
Nunavut	\$13.00
Ontario	\$11.60
Prince Edward Island	\$11.25
Quebec	\$11.25
Saskatchewan	\$10.96
Yukon	\$11.32

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#### 3. Minimum Wage (cont...)

- Bill 148 will increase the student minimum wage from \$10.70/hr to \$13.15/hr on January 1, 2018, and to \$14.10/hr on January 1, 2019 to employees who are students under 18 years of age, if the weekly hours of work do not exceed 28 hours or if the student is employed during a school holiday
- Overtime Costs will increase, as overtime pay to eligible employees will be based on 1.5 times the increased minimum wage rate



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#### 4. Equal Pay for Equal Work

- Currently, s.42(1) ESA prohibits differential pay on the basis of the employee's sex if employees:
  - (1) perform the same kind of work in the same establishment
  - (2) use substantially the same skill and effort and take on the same responsibilities, and
  - (3) work under similar conditions
- However, s. 42(2) ESA provides that different pay rates are permitted based on: (1) a seniority or merit system, (2) a system that measures earnings by quantity or quality of production; or (3) any other factor other than sex



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#### 4. Equal Pay for Equal Work (cont...)

- If Bill 148 passes, differential pay on the basis of "employment status" will not be permitted
- Bill 148 provides that "no employer shall pay an employee at a rate of pay less than the rate paid to another employee [...] because of a difference in employment status"
- "Difference in employment status" means
  - (a) a difference in the number of hours regularly worked by the employees; or
  - (b) a difference in the term of their employment, including a difference in permanent, temporary, seasonal or



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#### 4. Equal Pay for Equal Work (cont...)

- Bill 148 maintains the exception based on a seniority system and it states that "a seniority system includes a system that provides for different pay based on the accumulated number of hours worked"
- If the employee believes the employer is paying different rates based on sex or employment status, Bill 148 will allow the employee to request a review by the employer
- In response to the employee's request for review, the employer must either (1) adjust the employee's pay accordingly, or (2) provide a written response to the employee setting out the reasons for the disagreement

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#### 4. Equal Pay for Equal Work (cont...)

- Bill 148 also provides protection against reprisal against an employee for exercising these pay review rights



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#### 5. Paid Vacation Time

- Under the ESA, an employee is entitled to 2 weeks' vacation time for each vacation entitlement year, with minimum vacation pay of 4% of wages earned in the 12 month vacation entitlement year
- Bill 148 will provide for an increase in these entitlements to 3 weeks' vacation time and to 6% vacation pay, if the employee's period of employment is 5 years or more
- Vacation policies may need to be revised



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#### 6. Job Protected Leaves of Absence

- ESA requires an employer to reinstate an employee to former position (or comparable position) upon return from a "job protected leave of absence"
- Under Bill 148:
  - Pregnancy Leave, under certain circumstances, will be extended from 6 weeks to 12 weeks after birth, miscarriage or still-birth
  - Parental Leave will be extended from 35 weeks to 61 weeks (with pregnancy leave) and from 37 weeks 63 weeks (without pregnancy leave)
  - Parental Leave may begin 78 weeks (currently no later than 52 weeks) after the child is born or comes into custody, care and control of employee



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### 6. Job Protected Leaves of Absence (cont...)

- Bill 148 introduces new Domestic or Sexual Violence Leave
  - An employee who has been employed by an employer for at least 13 consecutive weeks may take a leave of absence without pay in the event the employee or their child experiences sexual or domestic violence (or is threatened with it)
  - It is for 10 days, but may be extended to 15 weeks, provided the employee advises in writing



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### 6. Job Protected Leaves of Absence (cont...)

- Bill 148 introduces new Domestic or Sexual Violence Leave (cont...)
  - The employer has the right to require evidence that is “reasonable in the circumstances” of the need for the leave
  - There may be very little or no warning to the employer before the employee has begun the leave



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### 6. Job Protected Leaves of Absence (cont...)

- Personal Emergency Leave currently in the ESA provides certain employees with an entitlement of up to 10 days leave without pay per calendar year
- Bill 148 amends the Personal Emergency Leave so that:
  - It will apply to all employees, not just those in organizations with 50 or more employees
  - 2 of those 10 days will have to be paid at the employee’s regular wage rate. This entitlement starts after 1 week of employment
  - The employer may require evidence that is reasonable in the circumstances, but cannot require a medical certificate



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### 6. Job Protected Leaves of Absence (cont...)

- Crime-related Child Death or Disappearance Leave currently under section 49.5 ESA
- Bill 148 will separate into two leaves:
  - Child Death Leave, for employees who have been employed for at least 6 months, leave without pay for up to 104 weeks. This leave is not limited to crime related death; and
  - Crime-related Child Disappearance Leave, also up to 104 weeks maximum leave without pay entitlement (currently at 52 weeks)



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### 6. Job Protected Leaves of Absence (cont...)

- Family Medical Leave, currently up to 8 weeks under the ESA if a qualified health practitioner issues a certificate stating that the employee has a serious medical condition with a significant risk of death occurring within a period of 26 weeks
- Bill 148 extends Family Medical Leave to a maximum of 27 weeks for serious medical conditions with significant risk of death occurring within 52 weeks



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### 6. Job Protected Leaves of Absence (cont...)

- There are a number of changes coming that will impact employee leave policies of charities and not-for-profits
- Need to make sure those policies will not conflict with Bill 148 requirements



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### 7. Scheduling Provisions

- Currently, ESA Regulations provide that employees who regularly work more than 3 hours a day have an entitlement of at least 3 hours pay for each shift they are scheduled to work (“three-hour rule”)
- Bill 148 will change the “three-hour rule” to require employers to pay those 3 hours at the employee’s regular wage rate, and will extend it to:
  - (1) employees who are on call, and
  - (2) employees whose shifts are cancelled with less than 2 days notice, except in certain cases beyond the employer’s control



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### 7. Scheduling Provisions (cont...)

- Cases include: fire, lightning, power failure, storms or similar causes or the work is weather-dependent and there are weather-related reasons



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### 7. Scheduling Provisions (cont...)

- Bill 148 will also give employees the right to refuse a shift or be on call where the employer’s request is made with less than 4 days (96 hours) notice, except where the work is to deal with an emergency, to remedy or reduce a threat to public safety, or other prescribed reasons
- Due to increased costs, employers will need to consider whether it will continue to be worthwhile to have employees on call



Service on Call

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### 8. Independent Contractors

- According to the Changing Workplaces Review Final Report, about 12% of Ontario’s workforce of 5.25 million workers are “self- employed”
- Many cases where so-called “independent contractors” were in reality employees entitled to ESA benefits, such as minimum wage, vacation pay, overtime pay, leave of absence, etc.
- However, Bill 148 will expressly prohibit the treatment of an employee as if the person were not an employee under the ESA
- A worker is deemed to be an employee, unless the employer can prove otherwise (“reverse onus of proof”)



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### 8. Independent Contractors (cont...)

- Some organizations retain workers as independent contractors to avoid statutory remittance obligations
- In some instances independent contractor status is imposed on a person who legally should be an employee
- It may be difficult to determine proper legal status



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### 8. Independent Contractors (cont...)

- The Canada Revenue Agency has a useful guide on the topic of independent contractors on its website: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4110-employee-self-employed/employee-self-employed.html>



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**9. Conclusion Regarding Bill 148**



- When Bill 148 passes, it will result in challenges for many employers, including those in the not-for-profit sector
- Identify strategies and best practices to meet proposed compliance obligations
- Need to be prepared and stay ahead of the curve

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**C. RELEVANT CASE LAW**

- Civil Lawsuit for Workplace Harassment
  - Ontario Superior Court of Justice decision in *Merrifield v AG of Canada* (Feb 28, 2017) held that an employee can sue their employer for harassment, provided this four-part test is met:
    - Was the conduct by the employer outrageous;
    - Did the employer intend to cause emotional stress or did they have a reckless disregard for causing emotional stress;
    - Did the employee suffer from severe or extreme emotional distress; and
    - Was the employer’s outrageous conduct the actual and proximate cause of the emotional distress?

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- Employer’s Right to Require Independent Medical Examination (“IME”) in Accommodation
  - Ontario Superior Court of Justice (Divisional Court) decision in *Bottiglia v Ottawa Catholic School Board* (May 19, 2017) held that employers, in certain circumstances, have a right to request an IME as part of the accommodation process under the Human Rights Code
  - The complainant was a superintendent with the School Board who was on sick leave since April 2010
  - In August 2012 he submitted a doctor’s note stating he could return to work, provided certain accommodations were made regarding his work hours

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- However, the School Board was concerned that, only 5 months prior, the same doctor had stated that the employee would be off for a “prolonged period of time”
- School Board became suspicious of the doctor’s opinion and required an IME, but the employee refused
- The Court held:
  - There must be a reasonable and *bona fide* ground to question the accommodation proposed by the employee
  - The employee has a duty to cooperate with a reasonable request by the employer for IME
  - The employer cannot take any steps that would interfere with the objectivity of the medical examiner performing the IME

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