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THE IMPACT OF BILL 148 ON CHARITIES AND NOT-FOR- PROFITS

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Mr. Kwasniewski joined Carters' Ottawa office in 2008, becoming a partner in 2014, to practice in the areas of employment law, charity related litigation, and risk management. After practicing for many years as a litigation lawyer in Ottawa, Barry's focus is now on providing advice to charities and not-for-profits with respect to their employment and legal risk management issues. Barry has developed an expertise in insurance law, and provides legal advice pertaining to insurance coverage matters to charities and not-for-profits.

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A. OVERVIEW

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



B. *Fair Workplaces, Better Jobs Act, 2017* (“Bill 148”)

1. Background of *Employment Standards Act, 2000* (“ESA”)

- Minimum standards applicable to the employer-employee relationship in Ontario
- It applies to for profits and the vast majority of charities, and not-for-profits in Ontario (“Organizations”)
- Deals with a variety of matters such as minimum wages, vacation time, hours of work, termination and severance, liability of directors, etc.
- To access the latest version of the ESA, see:
 - <https://www.ontario.ca/laws/statute/00e41?search=employment+standard>

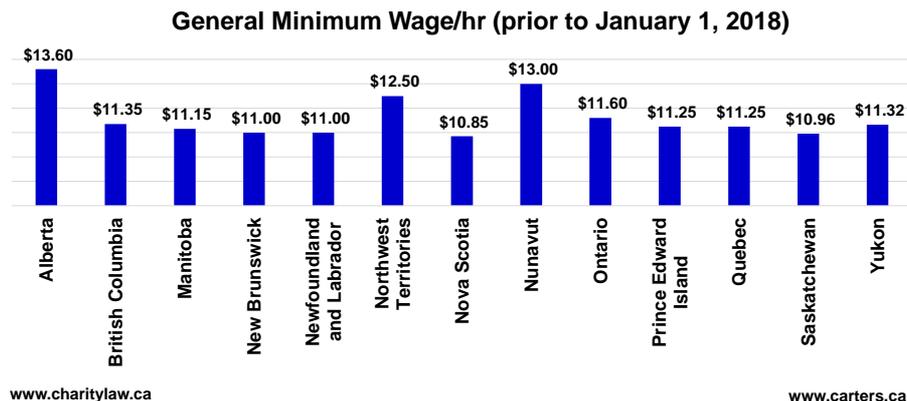


2. Background of Bill 148

- 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 passed on November 22, 2017, with several provisions having come into force since then
 - To access Bill 148, see:
 - http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4963&detailPage=bills_detail_the_bill

3. Minimum Wage

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



3. Minimum Wage (cont...)

- Bill 148 increased the student minimum wage from \$10.90/hr to \$13.15/hr on January 1, 2018, and will increase it 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
- There may also be upward pressure from other employees currently earning above minimum wage



4. Equal Pay for Equal Work

- Formerly, s.42(1) ESA prohibited different pay rates on the basis of the employee's sex if the employees:
 - (1) perform the same kind of work in the same establishment
 - (2) use substantially the same (but not necessarily identical) skill and effort and take on the same responsibilities, and
 - (3) work under similar conditions
- However, s. 42(2) ESA provided 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



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

- As of April 1, 2018, Bill 148 prohibits differential pay on the basis of “employment status”
- 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 casual status



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

- Bill 148 maintains the exception based on a “seniority or merit system”, quantity or quality of production, or any other factor other than sex or employment status
- However, there is no definition of a “seniority system”
- 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

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

- Bill 148 also provides protection against reprisal against an employee for exercising these pay review rights
- Bill 148 further provides that no employer may reduce the rate of pay of an employee in order to comply with the equal pay requirement
- Paying part-time and casual employees the same rate as full-time employees may have an even bigger impact on some Organizations than the increases to the minimum wage



5. Paid Vacation Time

- Formerly under the ESA, an employee was 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 provides 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
- The vacation must be taken in increments of 1 week periods, unless the employee requests to take vacation in shorter periods and the employer agrees
- Vacation policies may need to be revised



6. Job Protected Leaves of Absence

- ESA requires an employer to reinstate employees to their former position (or comparable position) upon return from a “job protected leave of absence”
- The following leaves of absence have been either modified or newly introduced in Bill 148



- Pregnancy Leave
- Parental Leave
- Personal Emergency Leave
- Crime-related Child Death or Disappearance Leave
- Family Medical Leave
- Critically Ill Child Care Leave (replaced by *New Critical Illness Leave*)
- *New Domestic or Sexual Violence Leave*

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

- **Pregnancy Leave** in ESA is a leave without pay provided, prior to Bill 148, on the following terms:
 - if the employee is entitled to parental leave, 17 weeks after the pregnancy leave began;
 - if the employee is not entitled to parental leave, on the day that is the later of,
 - 17 weeks after the pregnancy leave began, and
 - 6 weeks after the birth, still-birth or miscarriage
- Under Bill 148, Pregnancy Leave for employees not entitled to parental leave, and where the 17 weeks cap does not apply, is extended from 6 weeks to 12 weeks after birth, miscarriage or still-birth

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

- **Parental Leave** was formerly in ESA as follows:
 - Leave without pay for 35 weeks if the employee also took pregnancy leave, and 37 weeks otherwise
 - This leave may begin no later than 52 weeks after the child is born or comes into the custody, care and control of the employee for the first time
- Under Bill 148:
 - This leave is now extended from 35 weeks to 61 weeks (with pregnancy leave) and from 37 weeks 63 weeks (without pregnancy leave)
 - This leave is now allowed to begin 78 weeks after the child is born or comes into the custody, care and control of employee for the first time

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

- **Personal Emergency Leave** formerly provided employees of Organizations with 50 or more employees with an entitlement of up to 10 days leave without pay per calendar year
- Bill 148 amends this leave so that:
 - It applies to all employees, not just those in organizations with 50 or more employees
 - 2 of those 10 days 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
- Need to coordinate with existing policies



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

- **Crime-related Child Death or Disappearance Leave** formerly provided 104 weeks in case of crime-related death and 52 weeks in case of crime-related disappearance of the employee's child
- Bill 148 separates this leave into two leaves:
 - **Child Death Leave** now provides employees with a leave without pay for up to 104 weeks and it is not limited to crime-related death; and
 - **Crime-related Child Disappearance Leave**, also up to 104 weeks maximum leave without pay entitlement
 - If on leave under these provisions on December 31, 2017, the former periods continue to apply to that employee after January 1, 2018



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

- **Family Medical Leave** was formerly up to 8 weeks without pay provided that:
 - It was required to provide care or support to the employee's spouse, a parent, step-parent or foster parent of the employee; a child, step-child or foster child of the employee or the employee's spouse; or any other prescribed as a family member
 - A "qualified health practitioner", as defined in the ESA, issued a certificate stating that the individual had a serious medical condition with a significant risk of death occurring within a period of 26 weeks



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

- **Family Medical Leave** under Bill 148 extends this leave to a maximum of 28 weeks without pay provided that:
 - It is required to provide care or support to an expanded list of individuals, including brother, sister, uncle, aunt, nephew, niece, grandparent, or the spouse of any of those individuals
 - A “qualified health practitioner”, now re-defined for purposes of this leave to include a registered nurse or an individual with equivalent qualification, issues a certificate stating that the individual has a serious medical condition with significant risk of death occurring within 26 weeks

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

- **Critically Ill Child Care Leave** was formerly a leave without pay for the care or support of a critically ill child of the employee and it can be up to 37 weeks as prescribed by a qualified health practitioner
- **New Critical Illness Leave** replaced the above leave in Bill 148 and is available for the care or support of any critically ill family member, including the employee’s spouse, brother, sister, uncle, aunt, nephew, niece, grandparent, or the spouse of those individuals, where applicable
 - If the family member is a child, the leave without pay can be up to 37 weeks
 - If the family member is an adult, the leave without pay can be up to 17 weeks

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

- **New Domestic or Sexual Violence Leave** is introduced in Bill 148
 - An employee who has been employed by an employer for at least 13 consecutive weeks may take a leave of absence in the event the employee or their child experiences sexual or domestic violence (or is threatened with it)
 - The first 5 days of this leave are to be paid at the same rate payable if the employee had not taken the leave or the rate calculated as prescribed
 - This leave is for 17 weeks in each calendar year, with 10 days that may be taken a day at a time, and 15 weeks that may be taken on a weekly basis provided the employee advises in writing



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

- **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
 - The employer must ensure appropriate mechanisms are in place to protect the confidentiality of records that relate to an employee taking this leave



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

- Organizations need to make sure that their employee leave policies are updated to reflect Bill 148 requirements
- Any replacement staff will need to be paid at the same rate as the staff on leave
- Also need to consider how to plan for potentially long absences with little advance warning



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” starting on January 1, 2019, to require employers to pay those 3 hours at the employee’s regular wage rate (or higher, if applicable), and will extend it to:
 - (1) employees who are on call, and
 - (2) employees whose shifts are cancelled with less than 48 hours notice, except in certain cases beyond the employer’s control



7. Scheduling Provisions (cont...)

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



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, as defined in Bill 148, to remedy or reduce a threat to public safety, to ensure the continued delivery of essential public services, regardless of who delivers those services, 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

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 expressly prohibits 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”)



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



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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C. CONCLUSION



- As Bill 148 comes into force, it will result in significant challenges for many employers in Ontario, including those in the not-for-profit and charitable sector
- Organizations need to identify strategies and best practices to meet the new compliance obligations
- Need to be prepared and stay ahead of the curve

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