

BILL 148 PASSES BRINGING MAJOR CHANGES TO ONTARIO EMPLOYMENT LEGISLATION

*By Barry Kwasniewski**

A. INTRODUCTION

As anticipated in *Charity & NFP Law Bulletin* No. 405,¹ the Ontario Government has moved swiftly to pass Bill 148, *Fair Workplaces, Better Jobs Act, 2017* (“Bill 148”),² which received Royal Assent on November 27, 2017. The final version of Bill 148 contains several changes to what was first introduced on June 1, 2017, including a new Schedule 3 amending the *Occupational Health and Safety Act*,³ and other amendments to the *Labour Relations Act, 1995*.⁴ However, the focus of this Bulletin is on the amendments to the *Employment Standards Act, 2000* (“ESA”),⁵ including changes to the minimum wage, paid vacation entitlements, job protected leaves of absence, scheduling rules and the treatment of independent contractors, as the most relevant to charities and not-for-profits in Ontario. With the significant changes made to Bill 148 since *Charity & NFP Law Bulletin* No. 405 was posted in June 2017, this Bulletin provides an update to Bill 148 now that it has received Royal Assent.

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¹ Barry Kwasniewski, *Charity & NFP Law Bulletin* No. 405, “Ontario Employment Standards Act Changes Proposed” (28 June 2017), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2017/chylb405.pdf>>.

² Bill 148, *An Act to amend the Employment Standards Act, 2000, the Labour Relations Act, 1995 and the Occupational Health and Safety Act and to make related amendments to other Acts*, 2nd Sess, 41st Parl, Ontario, 2017 (passed 22 November 2017).

³ RSO 1990, c O.1. New section 25.1 in force as of November 27, 2017, prohibits mandatory footwear with elevated heels in the workplace unless it is required to perform the work safely, and with exceptions for the entertainment and advertising industry, as defined in the Act.

⁴ SO 1995, c 1, Sch A.

⁵ SO 2000, c 41.

B. CHANGES TO THE ESA

1. Minimum Wage Provisions

Bill 148 increases the general minimum wage to \$14.00 per hour starting on January 1, 2018 and to \$15.00 per hour starting on January 1, 2019.⁶ The general minimum wage in Ontario (currently \$11.60 per hour since October 1, 2017),⁷ will thereafter continue to be increased in line with the Consumer Price index on October 1 every year.⁸ Bill 148 will also increase the student minimum wage from \$10.90 per hour to \$13.15 per hour on January 1, 2018, and to \$14.10 per hour on January 1, 2019.⁹ The student minimum wage applies 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.¹⁰

These minimum wage provisions have been the subject of intense public debate, including from charities and not-for-profits that depend on fixed governmental funding or generally those that hire employees at minimum wage, as they will need to take these additional costs into account in their operational budget planning.

2. Equal Pay for Equal Work

Starting on April 1, 2018, Bill 148 will prohibit differential pay on the basis of “employment status”. This means that notwithstanding “differences in employment status” employers must pay such employees at the same wage rate if their employees perform the same kind of work in the same establishment and under similar conditions, and use substantially the same but not necessarily identical skill and effort and take on the same responsibilities.¹¹ Bill 148 defines “difference in employment status” as a difference in the number of hours regularly worked by the employees; or a difference in the term of their employment, including a difference in permanent, temporary, seasonal or casual status.¹²

⁶ *Ibid*, amended s. 23.1.

⁷ Ontario, Ministry of Labour, “Minimum Wage Increases for October 1, 2017” (28 September 2017), online: <https://news.ontario.ca/mol/en/2017/09/minimum-wage-increases-for-october-1-2017.html>.

⁸ *Supra* note 6.

⁹ *Idem*.

¹⁰ *Idem*.

¹¹ *Supra* note 5, amended s. 42 and new s. 42.1.

¹² *Ibid*, amended s. 1(1).

The result of this change is that full-time, part-time, casual, temporary and help agency staff will all have to be paid the same wage rate, unless the employer can justify the different pay rate on one of the exceptions based on a seniority or merit system, on the quantity or quality of production, or on any other factor other than sex or employment status. The definition of a “seniority system”, based on accumulated number of hours worked, introduced in earlier versions of Bill 148 was removed from the version of the Bill that was passed into law.

Bill 148 also introduces a review process whereby an employee who believes the employer is paying different rates based on sex or employment status may request a review by the employer.¹³ 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.¹⁴ Bill 148 also provides protection against reprisal of an employee who asks for a review.¹⁵

Similar to the existing provision in the ESA with regard to equal pay based on sex, Bill 148 also provides that no employer may reduce the rate of pay of an employee in order to comply with the equal pay regardless of employment status requirement.¹⁶

3. Paid Vacation Time

Under the ESA, an employee is currently entitled to 2 weeks of vacation time for each vacation entitlement year, with minimum vacation pay of 4% of wages earned in the 12-month vacation entitlement year.¹⁷ Starting on January 1, 2018, Bill 148 provides for an increase in these entitlements to 3 weeks of vacation time and to 6% vacation pay, if the employee’s period of employment with the same employer is 5 years or more.¹⁸ The requirement that the vacation be taken in increments of 1-week periods, unless the employee requests to take vacation in shorter periods and the employer agrees, remains as before but now considers the 3-week period.¹⁹

¹³ *Ibid*, new s. 42.1(6).

¹⁴ *Idem*.

¹⁵ *Ibid*, amended clause 74(1)(a).

¹⁶ *Ibid*, amended ss. 42.1(3) and 42.2(3).

¹⁷ *Ibid*, ss. 33 and 35.2.

¹⁸ *Ibid*, amended ss. 33 and 35.2.

¹⁹ *Ibid*, amended s. 35.

4. Job Protected Leaves of Absence

Among other protections, the ESA requires employers 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 and will come into force at different times, starting as early as December 3, 2017, for Parental Leave and Critical Illness Leave.

a) Pregnancy Leave

Pregnancy Leave in the ESA is a leave without pay currently provided on the following terms:²⁰

- 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,
 - o 17 weeks after the Pregnancy Leave began, and
 - o 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, will be extended from 6 weeks to 12 weeks after birth, miscarriage or still-birth.²¹

b) Parental Leave

Parental Leave is also amended by Bill 148. This leave without pay will be amended from 35 weeks to 61 weeks if the employee also took Pregnancy Leave, and from 37 weeks to 63 weeks otherwise.²² This leave will be allowed to begin 78 weeks after the child is born or comes into the custody, care and control of employee for the first time, rather than 52 weeks as is currently the case.²³

c) Personal Emergency Leave

Personal Emergency Leave is currently available in the ESA to employees of organizations with 50 or more employees and consists of an entitlement of up to 10 days of leave without pay per calendar year due to personal illness, injury or medical emergency of the employee or the death, illness, injury or medical emergency of an individual described in the ESA or an urgent matter that concerns one of those

²⁰ *Ibid*, s. 47.

²¹ *Ibid*, amended s. 47(1)(b)(ii).

²² *Ibid*, amended s. 49(1).

²³ *Ibid*, amended s. 48(2).

individuals.²⁴ Bill 148 amends this leave so that it will apply to all employees, not just those employed by organizations with 50 or more employees, and it requires that 2 of those 10 days be paid at the employee's regular wage rate.²⁵ The employer may require evidence that is reasonable in the circumstances, but cannot require a medical certificate for those 10 days of Personal Emergency Leave.²⁶

d) Crime-related Child Death or Disappearance Leave

Crime-related Child Death or Disappearance Leave under the ESA currently provides 104 weeks in case of the crime-related death of a child of the employee and 52 weeks in case of crime-related disappearance of the employee's child.²⁷ Bill 148 will separate this leave into two leaves (*i.e.* Child Death Leave *and* Crime-related Child Disappearance Leave), both up to 104 weeks. The Child Death Leave now removes the requirement that the death of the employee's child be crime-related.²⁸ Transitional provisions in Bill 148 provide that if an employee is on leave under these provisions on December 31, 2017, the current periods continue to apply to that employee after January 1, 2018.²⁹

e) Family Medical Leave

Family Medical Leave under the ESA is currently up to 8 weeks without pay to provide care or support to the employee's spouse, parent, step-parent or foster parent; child, step-child or foster child; or any other individual prescribed as a family member, provided a qualified health practitioner issues a certificate stating that the individual has a serious medical condition with a significant risk of death occurring within a period of 26 weeks.³⁰ Bill 148 extends this leave to a maximum of 28 weeks without pay and provides an expanded list of individuals, including brother, sister, uncle, aunt, nephew, niece, grandparent, or the

²⁴ *Ibid*, ss. 50(1), (2) and (5). The individuals described are the employee's spouse, parent (including step-parent or foster parent), child (including step-child and foster child of the employee or the employee's spouse), spouse of the employee's child, grandparent (including step-grandparent), grandchild (including step-grandchild), the employee's brother or sister, as well as a relative who is dependent on the employee for care or assistance.

²⁵ *Ibid*, amended ss 50(1) and (5) and new ss. 50(8.1) and (9).

²⁶ *Ibid*, new ss. 50(10) and (11).

²⁷ *Ibid*, ss. 49.5(2) and (3).

²⁸ *Ibid*, amended s. 49.5 and new s. 49.6.

²⁹ *Ibid*, new ss. 49.5(12) and 49.6(2.1).

³⁰ *Ibid*, s. 49.1.

spouse of any of those individuals.³¹ Bill 148 also re-defines the term “qualified health practitioner” for purposes of this leave to include a registered nurse or an individual with equivalent qualification.³²

f) New Critical Illness Leave

Critically Ill Child Care Leave in the ESA, as of December 3, 2017, will be replaced by a new Critical Illness Leave in Bill 148.³³ The Critically Ill Child Care Leave in the ESA is currently 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. Bill 148 replaces this leave with a new Critical Illness Leave 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. With this new leave, if the family member is a child, the leave without pay can be up to 37 weeks; and if the family member is an adult, the leave without pay can be up to 17 weeks. In both cases, a qualified health practitioner must issue a certificate stating the number of weeks the critically ill family member will require the support of the employee.³⁴

g) New Domestic or Sexual Violence Leave

Bill 148 introduces a new Domestic or Sexual Violence Leave.³⁵ 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, or is threatened with, sexual or domestic violence. This leave may be taken for specific purposes, such as to relocate, seek legal or law enforcement assistance, or seek medical attention in respect of physical or psychological injury or disability caused by the domestic abuse or violence, among other purposes.³⁶ The first 5 days of this leave are to be paid at the same rate that would have been payable had the employee not taken the leave, or the rate calculated in accordance with this new section in the ESA.³⁷

³¹ *Ibid*, amended s. 49.1.

³² *Idem*.

³³ *Ibid*, amended s. 49.4.

³⁴ *Idem*. A “qualified health practitioner” is defined in this section as (a) a person who is qualified to practise as a physician, a registered nurse or a psychologist under the laws of the jurisdiction in which care or treatment is provided to the individual described in subsection (2) or (5), or (b) in the prescribed circumstances, a member of a prescribed class of health practitioners.

³⁵ *Ibid*, new s. 49.7.

³⁶ *Ibid*, new s. 49.7(2).

³⁷ *Ibid*, new ss. 49.7(4.1) and (4.2).

This new 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 the employer in writing of any weekly leaves.³⁸ Where an employee takes only a portion of a weekly leave, the employer may deem the employee to have taken a full week of leave.³⁹

There may be very little or no warning to the employer before the employee has begun this leave,⁴⁰ but the employer has the right to require evidence that is “reasonable in the circumstances” of the need for the leave.⁴¹ Furthermore, the employer must ensure appropriate mechanisms are in place to protect the confidentiality of records that relate to an employee taking this leave.⁴²

In light of these changes to job-protected leaves, organizations will need to make sure that their various employee leave policies are updated to reflect the changes introduced by Bill 148. There should also be operational plans in place for potentially long absences with little advance warning.

5. Scheduling provisions

Ontario Regulation 285/01 under the ESA currently provides 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.⁴³ This is known as the “three-hour rule”. Bill 148 will incorporate the “three-hour rule” in the ESA starting on January 1, 2019, requiring employers to pay those 3 hours at the employee’s regular wage rate or higher, if applicable in the circumstances, and will extend it to employees who are on call, and employees whose shifts are cancelled with less than 48-hours’ notice. Only when this short-notice cancellation is beyond the employer’s control, such as in case of fire, lightning, power failure, storms or similar causes or the work is weather-dependent and there are weather-related reasons, will the employer be excused from this requirement to pay.⁴⁴

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 96-hours’ notice, except where the work is to deal with an emergency, as defined in

³⁸ *Ibid*, new s. 49.7(9).

³⁹ *Ibid*, new s. 49.7(8).

⁴⁰ *Ibid*, new s. 49.7(10).

⁴¹ *Ibid*, new s. 49.7(11).

⁴² *Ibid*, new ss. 49.7(13) and (14).

⁴³ O Reg 285/01, s. 5(7). This regulation is subject to consequential amendments conditional on the coming into force of Bill 148, see online: <http://www.ontariocanada.com/registry/view.do?postingId=25086&language=en>

⁴⁴ *Supra* note 5, new ss. 21.3(2) and 21.6(3).

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.⁴⁵

Due to increased costs, charities and not-for-profit employers will need to consider whether it will continue to be worthwhile to have employees on call.

Bill 148 also introduces the ability of employees who have been employed for at least 3 months to request changes to their work schedule or location with the corresponding obligation of the employer to discuss such requests with the employee and, within a reasonable time, either grant them or provide reasons for refusal.⁴⁶

6. Other Changes: Independent Contractors, Public Holiday Pay

Some employers, including charities and not-for-profits, retain workers as “independent contractors” for various reasons, some of which are contrary to law (such as to avoid statutory remittance obligations). In some situations “independent contractor” status is imposed on a person who legally should be an employee. Bill 148 recognizes that such workers should legally be employees entitled to ESA protections and benefits, such as minimum wage, vacation pay, overtime pay, and job-protected leaves of absence.⁴⁷ Consequently, Bill 148 expressly prohibits the treatment of an employee as if the person were not an employee under the ESA.⁴⁸ Moreover, during the course of an employment standards officer’s investigation or inspection, or any proceeding under the ESA (other than a prosecution), a worker is deemed to be an employee unless the employer can prove otherwise.⁴⁹

Bill 148 also amends the rules for the calculation of public holiday pay to be based on the number of days actually worked in the pay period immediately preceding the public holiday, rather than the 4 weeks prior to the work week in which the public holiday occurred.⁵⁰ Therefore, pay departments will need to make changes to public holiday pay calculations accordingly.

⁴⁵ *Ibid*, new ss. 21.5.

⁴⁶ *Ibid*, new s. 21.2.

⁴⁷ For additional information, see: Canada Revenue Agency, “Employee or Self-employed”, online: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4110-employee-self-employed/employee-self-employed.html>

⁴⁸ *Supra* note 5, new s. 5.1(1).

⁴⁹ *Ibid*, new s. 5.1(2).

⁵⁰ *Ibid*, amended s. 24.

C. CONCLUSION

The changes brought about by Bill 148 are significant and wide-ranging for Ontario employers, including charities and not-for-profits. A sense of the anticipated large-scale impact of Bill 148 can be drawn from the announcement that the province will hire up to 175 new employment standards officers and launch an education program about the rights and obligations under the ESA. The reality is that when 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. Not only the increases to the general minimum wage, but also the provisions of expanded leave entitlements combined with the requirement to pay temporary replacement staff the same rate as the employees on leave, may all pose significant challenges to charities and not-for-profits. Charities and not-for-profits will need to identify and implement strategies to meet the new statutory obligations as different sections of Bill 148 come into force.



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