
NEW ONTARIO GOVERNMENT MAKES MAJOR CHANGES TO ESA

By Barry W. Kwasniewski*

A. INTRODUCTION

After being introduced by the Ontario Government only one month ago on October 23, 2018,¹ Bill 47, *Making Ontario Open for Business Act, 2018* (“Bill 47”),² received Royal Assent on November 21, 2018, making amendments to the *Employment Standards Act, 2000* (“ESA”)³ and other legislation.⁴ The passing of Bill 47 represents a significant roll-back of certain amendments to the ESA passed by the former Ontario Liberal government in 2017 pursuant to Bill 148, *Fair Workplaces, Better Jobs Act, 2017* (“Bill 148”),⁵ which increased employee entitlements with respect to minimum wage, leaves of absences, scheduling, and more. Since almost all the latest ESA amendments introduced in Bill 47 will come into effect January 1, 2019, charities and not-for-profits have only a month to modify their policies and practices so as to bring them into compliance. As such, the focus of this *Charity & NFP Bulletin* is to provide a summary of the ESA changes made by Bill 47.

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¹ For more information see Barry W Kwasniewski, October 2018 *Charity & NFP Law Update*, “Ontario Bill Introduces Significant Changes to the *Employment Standards Act*” online: <<http://www.carters.ca/pub/update/charity/18/oct18.pdf>>.

² Bill 47, *Making Ontario Open for Business Act, 2018*, 1st Sess, 42nd Parl, Ontario, 2018 (passed 21 November 2018) [*Bill 47*].

³ *Employment Standards Act, 2000*, SO 2000, c 41, s 24(1) [ESA].

⁴ Bill 47 also made changes to the *Labour Relations Act, 1995*, SO 1995, c 1, the *Ontario College of Trades and Apprenticeship Act, 2009*, SO 2009, c 22, and complementary amendments to other Acts.

⁵ Bill 148, *Fair Workplaces, Better Jobs Act, 2017*, 2nd Sess, 41st Parl, Ontario, 2017 (passed 22 November 2017) [*Bill 148*]. For more information, see Barry W Kwasniewski, November 2017 *Charity & NFP Law Bulletin No. 411*, “Bill 148 Passes Bringing Major Changes to Ontario Employment Legislation” online: <<http://www.carters.ca/pub/bulletin/charity/2017/chylb411.pdf>>.

B. CHANGES TO WAGES AND SCHEDULING

1. Minimum Wage Frozen Until October 1, 2020

Bill 47 freezes the current minimum wages under the ESA until October 1, 2020, after which time the minimum wage will be subject to an annual inflation adjustment as provided for in subsection 23.1(4) of the ESA.⁶ In Bill 148, the general and student minimum hourly wages were set to reach \$15.00 and \$14.10 per hour, respectively, starting January 1, 2019. However, the effect of Bill 47 means that the general minimum wage will remain at \$14.00 per hour and the student minimum wage will remain at \$13.15 per hour until October 1, 2020. Bill 47 also repeals subsections 23.1(10) and (11), which require the Minister of Labour to cause a review of the minimum wage before October 1, 2024, and every five years thereafter, as well as to commence the process to adjust the minimum wage accordingly.

2. Public Holiday Vacation Pay

The calculation for public holiday pay has been amended. Currently, clause 24(1)(a) of the ESA provides that the public holiday pay of an employee is to be calculated by taking the total amount of regular wages earned in the pay period immediately preceding the public holiday, and dividing that amount by the number of days the employee worked in that period.⁷ Under Bill 47, the amount of public holiday pay will be calculated by taking the total amount of regular wages earned in the *four work weeks* before the work week in which the public holiday occurred, and dividing that amount by 20.⁸

The public holiday pay amendments under Bill 148⁹ had caused confusion and prompted the former Ontario Liberal government to pass a temporary regulation to revert back to the method of public holiday pay calculation in force prior to the passage of Bill 148. Bill 47 now changes the public holiday pay calculation back to the pre-Bill 148 ESA method.

⁶ Bill 47, *supra* note 2, s 6(1) and ESA, *supra* note 3, s 23.1(4).

⁷ Or if some other manner of calculation is prescribed, the amount determined using that manner of calculation. See ESA, *supra* note 3, s 24(1) [ESA].

⁸ Bill 47, *supra* note 2, s 7(1).

⁹ For more information see Barry W Kwasniewski, May 2018 *Charity & NFP Law Update*, “Public Holiday Pay Review” online: <<http://www.carters.ca/pub/update/charity/18/may18.pdf>>.

3. Three Hour Rule and Repeal of Other Scheduling Rules

Bill 47 repeals the scheduling regime introduced in Bill 148, which was to come into effect January 1, 2019. Bill 148 incorporated into the ESA the existing “three hour rule” (“Three Hour Rule”), currently found in Ontario Regulation 285/01,¹⁰ which requires employers to pay an employee for a minimum of three hours in the event that such an employee: 1) regularly works for more than three hours a day; 2) was required to present himself or herself for work but worked less than three hours, and 3) was available to work longer.¹¹ Bill 148 also extended the Three Hour Rule to employees who are on call and employees whose shifts are cancelled with inadequate notice.¹² Additionally, the Bill 148 scheduling regime introduced the employee’s right to refuse work or to be on call in certain circumstances.¹³

In repealing and replacing the scheduling regime of Bill 148, Bill 47 now consists of only the original Three Hour Rule.¹⁴ The Three Hour Rule in Bill 47 means that employees will still be entitled to a minimum three hours’ pay if the other requirements as discussed above are met. However, the passing of Bill 47 means that the other entitlements that were provided for in Bill 148 will not come into effect as originally intended on January 1, 2019.

Furthermore, Bill 47 also repealed another change that was to come into effect January 1, 2019 with respect to requests for changes to schedule or work location.¹⁵ Bill 148 had provided an entitlement to an employee to submit a request for changes to his or her schedule or work location.¹⁶ However, with the passing of Bill 47, this rule will not come into effect.

4. Equal Pay for Equal Work

Bill 47 repeals section 42.1 of the ESA, which prohibits an employer from paying an employee a different rate of pay on the basis of employment status, as defined in Bill 148 as a difference in the number of hours regularly worked by the employee or a difference in the term of his or her

¹⁰ O Reg 285/01, s 5(7) [O Reg].

¹¹ *Ibid.*

¹² Bill 148, *supra* note 5, s 12.

¹³ *Ibid.*

¹⁴ Bill 47, *supra* note 2, ss 5, 27(5).

¹⁵ *Ibid.*, s 27(4).

¹⁶ Bill 148, *supra* note 5, s 11 which adds to the ESA new s 21.2.

employment.¹⁷ Originally added to the ESA through Bill 148,¹⁸ the repeal of section 42.1 will allow employers to pay different rates to employees depending on whether they are working full-time or part-time, even if they are performing substantially the same work.

While the equal pay for equal work provision in the ESA with respect to sex (which existed prior to Bill 148) will be maintained, Bill 47 removes an employee's entitlement to request a review of his or her rate of pay from the employer.¹⁹

C. CHANGES TO LEAVES OF ABSENCE

1. Removal and Replacement of Current Personal Emergency Leave Regime

One of the most significant changes introduced in Bill 47 is the removal of the Personal Emergency Leave ("PEL"), which entitled employees to up to ten days of leave per calendar year on any of three grounds: 1) personal illness, injury, or 2) medical emergency of the employee or the death, illness, injury, or medical emergency of an individual as described under section 50(2) of the ESA, or 3) an urgent matter that concerns one of those individuals.²⁰ Further, the current regime, as enacted through Bill 148, required employers to pay the employee for the first two of the ten PEL days,²¹ and also prohibited employers from requiring a medical certificate from an employee who has chosen to take a PEL.²²

Bill 47 repeals the PEL regime and replaces it with a new section 50, which is comprised of three separate categories of unpaid leave adding up to a total of eight days: three days of Sick Leave; three days of Family Responsibility Leave; and two days of Bereavement Leave.²³ Sick Leave applies to a leave of absence that occurs because of a personal illness, injury, or medical emergency of the employee, which mirrors the first ground of leave under the current PEL regime.²⁴ Family Responsibility Leave may be taken by the employee due to the illness, injury, or medical emergency

¹⁷ Bill 47, *supra* note 2, s 9.

¹⁸ *Ibid*, s 27.

¹⁹ *Ibid*, s 8(2).

²⁰ ESA, *supra* note 3, s 50(1).

²¹ *Ibid*, s 50(8).

²² *Ibid*, s 50(13).

²³ Bill 47, *supra* note 2, s 19.

²⁴ *Ibid*, s 19, which adds to the ESA new s 50(1).

of an individual as described in the new section 50, or if there is an urgent matter that concerns that individual as provided for in the section;²⁵ the list of individuals in the new section 50 remain the same as the list presented under the PEL regime. Lastly, Bereavement Leave may be used by an employee because of the death of an individual as described in the new section 50.

While the three categories of leave introduced in Bill 47 cover the same grounds for leave as the current PEL regime, there are marked differences. Aside from the fact that the total number of days of leave has decreased, an employee is more restricted in taking leave under the new section 50, as each category has its own limit.

There are other notable differences between the current PEL regime and the new section 50 provision. Unlike the existing PEL regime which entitles an employee to two paid days of leave, all of the leaves of absence under the new section 50 are unpaid. Further, the threshold for entitlement to section 50 leave has been slightly raised; while entitlement to PEL was available to employees who had worked for a period of at least one week with the employer, the new section 50 requires that employees must be employed by the employer for at least two consecutive weeks to be entitled to a leave of absence.²⁶ Lastly, the new section 50 as introduced through Bill 47 does not prohibit employers from requiring employees to provide a medical note as evidence in support of the leave.

D. OTHER CHANGES

Other amendments that will take place starting January 1, 2019 in relation to the changes introduced in Bill 47 deal with the penalties for the administrative contravention of certain ESA provisions. On November 10, 2018, the *Ontario Gazette* published amendments to Ontario Regulation 289/01,²⁷ lowering the penalties for contravention of certain sections the ESA.²⁸ Penalty amounts of \$350 have been lowered to \$250; \$700 have been lowered to \$500; and \$1,500 has been lowered to \$1,000.

²⁵ *Ibid*, s 19, which adds to the ESA new s 50.0.1(1).

²⁶ *Ibid*, s 19.

²⁷ *O Reg 450/18*.

²⁸ *Ibid*.

E. CONCLUSION

Given that Ontario employers, including charities and not-for-profits, have only recently had to adjust to the changes to the ESA brought about by Bill 148, the new changes introduced in Bill 47 will require another set of substantive changes to employer policies and practices. Therefore, charities and not-for-profits which have revised their policies and practices in light of Bill 148 will need to revisit and revise them in order to remain compliant with the ESA. In doing so, it is important for charities and not-for-profits to remember that the ESA sets out the *minimum* standards. Accordingly, employers may at their discretion provide employees with entitlements which exceed ESA minimum standards. For example, with respect to the three new types of leave replacing the current Personal Emergency Leave, employers may decide to offer some or all of these new leave days as *paid* days, even though the ESA does not require those particular leave days to be paid. Therefore, charities and not-for-profits may also need to consider and make policy decisions with respect to increasing any ESA minimum standards for the benefit of their employees.



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