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EMPLOYMENT & LABOUR

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Much More than a 15 Dollar Minimum Wage...

Bill 148 and the Government's Major Reforms to Labour and Employment Laws

Daniel Pugen
Partner, Employment & Labour

PHONE
416 777 5194

EMAIL
dpugen@torkinmanes.com

Daniel is a partner of the firm and a member of our Employment & Labour Group. He represents and advises management and employers on a wide variety of labour, employment and human resources/workplace issues.

On November 22, 2017, the Government passed Bill 148, the "*Fair Workplaces, Better Jobs Act, 2017*". Bill 148 significantly amends the *Employment Standards Act, 2000* ("ESA"), the *Labour Relations Act, 1995* ("LRA") and, to a lesser extent, other workplace legislation with the goal of protecting "vulnerable" and "precarious" workers. While most of the coverage has been on the increase to the minimum wage ($14.00/hour on January 1, 2018 and $15.00/hour on January 1, 2019), Bill 148 does not stop there. The changes made by Bill 148 represent a major overhaul of workplace legislation and will impose major burdens on employers.

As many readers know, and as we have previously written, the Government commissioned an expert panel to report on the state of labour and employment laws. That report was titled the "Changing Workplaces Review". The mandate of the Review was to make recommendations on how workplace legislation should be modernized with the goal of protecting "vulnerable" and "precarious" workers. The final report – 2 years in the making – was released on May 23, 2017. It had 173 recommendations and measured 420 pages. The Government was quick to introduce Bill 148 in June 2017. While there have been a few notable changes since Bill 148 was first introduced, including increased leave of absence rights, the main components of Bill 148 remain in place and are summarized below

Please note that Bill 148 is not described in its entirety in this article. This article is merely a summary of some of the more material provisions of Bill 148 according to the author. This article should be used in conjunction with the actual text of Bill 148:

Employment Standards

1. Increased Minimum Wage

Effective January 1, 2018, the general minimum wage will increase to $14.00/hour. A further increase to $15.00/hour will occur on January 1, 2019. The minimum wage will continue to be subject to an annual

inflation adjustment on October of every year, starting October 2019.

2. Increased Vacation Entitlement

Employees with 5 years' service or more must now receive at least 3 weeks' vacation time per year and 6% vacation pay per year. Employees with less than 5 years' service are still only entitled to 2 weeks' vacation time per year and 4% vacation pay per year. While many workplaces already provide 3 weeks' vacation, for employers with casual or part time staff with tenure over 5 years currently being paid 4% vacation pay, those employees will receive a 2% increase in vacation pay annually.

3. Misclassification Offence

The ESA now prohibits employers from treating an employee as an independent contractor – commonly referred to as a misclassification. The specific wording is as follows:

> *"An employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act."*

In any misclassification proceeding under the ESA, except for a prosecution, the employer will have the burden of proving that the individual has been properly classified. Employers can expect more severe penalties for misclassification going forward.

4. Scheduling

Bill 148 adds Parts VII.1 ("Requests for Changes to Schedule or Work Location") and VII.2 ("Scheduling") to the ESA. The goal of these new Parts is to provide disincentives to employers to change an employee's schedule and (to the extent possible) give employees more control and certainty over their work lives.

- *Call-In Pay* – If an employee reports to work and does not receive 3 hours of work despite being available to work longer, the employer must pay the employee 3 hours' wages. There are limited exceptions that apply in the event that causes beyond the employer's control (e.g. flood, power failure, etc.) result in the stopping of work.

- *On Call Pay* – If an employee is on call to work and is then not required to work (or if the employee works less than 3 hours despite being available to work longer), the employer must pay the employee 3 hours' wages. A limited exception exists in the event that the employee is required to be on call for the "purposes of ensuring the continued delivery of essential public services" and the employee on call was not required to work.

- *Right to Refuse Work* – An employee can refuse an employer's request to work on a day the employee was not scheduled to work if the request is made less than 96 hours before the time the employee would commence work. Limited exceptions exist if the employer's request to work is to deal with an emergency, remedy or reduce a threat to public safety, or continue the delivery of essential public services. An employee must notify the employer of the refusal to work "as soon as possible". The right to refuse work also applies to being on call.

- *Payment for Shift Cancellation* – An employer must pay an employee 3 hours' wages if the employer cancels an employee's scheduled shift within 48 hours before the start of the shift. A shift would only be considered "cancelled" if the entire shift was cancelled (but not if the shift was shortened or extended). Limited exceptions exist if the employer must cancel the shift due to causes beyond the employer's control (e.g. flood, power failure, etc.) or if the nature of the employee's work is weather-dependent and work cannot be provided for weather-related reasons. An employer's obligation to pay for cancelling a shift applies to cancelling an on call shift.

- *Right to Request Change in Scheduling or Work Location* – An employee with at least 3 months' service has a statutory right to request a change to his/her shift schedule and work location. The employer must consider the request and discuss it with the employee. If the employer does not grant the request, reasons must be provided. An employer cannot retaliate against an employee for seeking a change in schedule or work location.

Unionized workplaces with collective agreements that have similar provisions will be grandfathered for a certain length of time.

5. Equal Pay Based on Employment Status

Bill 148 seeks to ensure that employees are not paid differently based on their employment status. The intent is that employees working side by side and doing the same type of work should not be paid differently just because their "status" is full time, part-time, temporary, casual, etc.

- *Equal Pay for Part Time Employees* – An employer may not differentiate pay rates amongst employees based on employment status (e.g. full time vs. part-time) if: (a) they perform substantially the same kind of work in the same establishment; (b) the work requires substantially the same skill, effort and responsibility; and (c) the work is performed under similar working conditions. This means that, provided the above conditions are met, employers must pay full-time employees the same as part-time, temporary or casual employees. Fortunately, there are exceptions if the differential is based on objective grounds. In particular, a pay differential is permissible based on employment status where the difference in the rate of pay is based on:
  - a seniority system;
  - a merit system;
  - a system that measures earnings by quantity or quality of production; or
  - any other factor other than sex or employment status.
- *Equal Pay for Temporary Assignment Employees* – Bill 148 prevents a pay differential between temporary employees assigned by an agency and the employer's own staff if (a) they perform substantially the same kind of work in the same establishment; (b) the work requires substantially the same skill, effort and responsibility; and (c) the work is performed under similar working conditions. Fortunately, exceptions exist such that a difference in the rate of pay will be permissible if the differential is made on the basis of any factor other than sex, employment status or assignment employee status.

The equal pay provisions do not require an employer to provide benefits to all classes of employees.

An employer cannot reduce an individual's pay to comply with the equal pay provisions.

A compliance mechanism has been built into Bill 148. Any employee who believes that their rate of pay is not equal to another individual because of employment status can request that the employer (or temporary agency) review and adjust their rate of pay. If the employer (or temporary agency) disagrees with the employee's request, the employee must receive a written response setting out the reasons for the disagreement. An employer cannot retaliate against an employee for seeking compliance with the equal pay provisions. Moreover, an employer cannot retaliate against a worker who discloses their rate of pay to another worker who is seeking enforcement with the equal pay provisions.

Unionized workplaces with collective agreements that have similar provisions will be grandfathered for a certain length of time.

6. Enhanced Parental Leave

Bill 148 increases the length of parental leave to match the recently increased EI period under the federal employment insurance regime. Employees are entitled to start parental leave up to 78 weeks after a child is born (an increase from 52 weeks). The actual length of the leave has been extended from 35 weeks to 61 weeks for employees who take pregnancy leave, and from 37 weeks to 63 weeks otherwise. Pregnancy leave remains at 17 weeks.

Transitional provisions exist if an employee is already on pregnancy/parental leave prior to Bill 148 coming into effect.

7. Paid Personal Emergency Leave ("PEL") and the Expansion of PEL to Small Business

With Bill 148, all employers are now subject to the ESA's PEL provisions. Previously, PEL only applied to employers with 50 or more employees. In addition, of the 10 PEL days prescribed by the ESA, Bill 148 requires that 2 of the 10 days be paid. Practically speaking, this means that all employees (with at least 1 week's service) will have a statutory right to 2 paid sick days (or 2 paid sick days based on a family illness).

Notably, an employer cannot request a doctor's note in order for the employee to take advantage of PEL days. Instead, an employer can only request "evidence reasonable in the circumstances". This will not generally impact an employer's right to request a doctor's note for return to work or accommodation purposes.

8. Domestic or Sexual Violence Leave

Bill 148 introduces a new leave of absence to the ESA. Under this leave, employees with at least 13 weeks' service may take up to 10 days and up to 15 weeks' leave each calendar year. If the employee or the employee's child experiences domestic or sexual violence, or the threat thereof, and the leave is taken for certain listed purposes, including seeking medical attention relating to the violence, obtaining services from a victim services organization, obtaining counselling, relocating, or seeking legal or law enforcement assistance. The amount of the leave (10 days and 15 weeks) is ambiguously worded, but seems to indicate that employees have the flexibility of taking up to 10 days on an *ad hoc* basis, or longer portions of leave as needed.

9. Overtime Pay Calculation – No Rate Blending

While the overtime threshold was not changed (it remains at 44 hours per week for most employees), Bill 148 did change how overtime pay is calculated for employees who have two or more rates of pay. Going forward, an employer cannot blend the rates together for calculating weekly overtime. Instead, the rate the employee earned at the time the overtime hours were worked is used for calculation purposes.

10. Public Holiday Pay – Guarantee of a Day's Pay

The public holiday pay formula has been changed from reviewing wages earned over a 4 week period divided by 20 to now considering the number of days actually worked in the pay period immediately before the public holiday. The new formula reads:

> *"An employee's public holiday pay for a given public holiday shall be equal to…the total amount of regular wages earned in the pay period immediately preceding the public holiday, divided by the number of days the employee worked in that period."*

Practically speaking, this means that most employees, provided they worked at least one day in the pay period, will receive a day's pay on the public holiday.

Bill 148 requires employers to also provide a written statement setting out any public holiday the employee is required to work and any substitute holiday given.

11. More Record Keeping

Bill 148 mandates that employers keep additional records, including (amongst other things) the dates and times employees work, the dates and times employees worked in excess of an overtime threshold and the applicable rate of pay at the time of such work, the dates and times that employees were scheduled to work or to be on call along with any changes, any cancellations of a shift or on call period, and the amount of vacation earned during a vacation year and how this amount was calculated.

Labour Relations

1. Card Based Certification for Certain Industries

Bill 148 did not change the process for unionization in most industries (i.e. a union must still establish 40% membership support in the proposed bargaining unit and then win a secret ballot vote to obtain bargaining rights). However, Bill 148 did change the unionization process under the LRA for the following industries (which are more specifically defined in Bill 148):

- Temporary help agencies
- Building services
- Home care and community services

In these industries, the workplace can become unionized by the union only having to demonstrate 55% membership support in the proposed bargaining unit. There would be no secret ballot vote. In other words, "card based" certification (similar to the construction industry) applies. This will make it easier for unions to organize and obtain bargaining rights in these industries.

2. Disclosure of Employee List to Union

Bill 148 requires an employer to disclose employee contact information to a union if the union has established 20% membership support in a proposed bargaining unit it wishes to represent. The union must apply to the Ontario Labour Relations Board ("OLRB")

to compel the disclosure of the list. The employee list must include the names of each employee in the proposed bargaining unit as well as a phone number and personal email for each employee (if the employee has provided such information to the employer). Additionally, the OLRB has the discretion to order "information relating to the employee, including the employee's job title and business address" and "any other means of contact that the employee has provided to the employer, other than a home address".

Privacy protections are included in Bill 148 such that a union cannot disclose the information provided by the employer and must destroy the information in certain circumstances.

This provision will facilitate union organizing campaigns, and especially those campaigns that may be stalled.

3. Alternative Forms of Voting

Bill 148 has made it easier for employees to vote in a union certification proceeding by permitting the OLRB to order telephone or electronic voting to supplement the traditional voting process.

4. Consolidation of Bargaining Units

Under Bill 148, unions will be able to apply to the OLRB for an order consolidating or changing the structure of bargaining units within a single employer. A union can only do so if it already represents employees at the workplace and is applying to certify another bargaining unit at the same workplace. The OLRB has wide powers to not only consolidate the bargaining units but to also, amongst other things, amend a certification order or description of a bargaining unit, order that an existing collective agreement should apply (with or without modifications) to the consolidated bargaining unit, and amend the terms of a collective agreement. This gives unions a powerful new tool to consolidate bargaining units and amend the terms of a collective agreement outside of bargaining. It is conceivable that unions will use this provision to have the OLRB adopt mature collective agreement terms to a new bargaining unit.

Outside of a certification application, a union and employer can now agree to have the OLRB review the structure of multiple bargaining units to seek similar remedies.

5. Just Cause Protection During First Collective Agreement Negotiations

Employees subject to a collective agreement have just cause protection from dismissal under the LRA. However, such protection was absent during the time period between certification of the union and the negotiation of a first collective agreement. Bill 148 has now applied the just cause protection for employees during this time period. Also, just cause protection has now been extended to the time period between a legal strike/lock-out position and the renegotiation of a collective agreement. This will provide greater job security to unionized employees during these time periods.

6. Successor Employer

Bill 148 has changed the successor employer provisions of the LRA such that a successorship will be deemed to have occurred – and bargaining rights will have transferred – if a building services provider merely takes over a contract from another unionized provider. The result is that a non-unionized building services provider (e.g. a cleaning company) would become unionized simply by taking over a contract at a building from a unionized provider. Employers in this industry should be extra diligent in bidding on new projects.

7. Automatic Certification

To facilitate union certification in the event of employer misconduct, Bill 148 has changed the remedial sections of the LRA to make it easier for the OLRB to award automatic certification (without a vote) in the event of an employer unfair labour practice. Automatic certification has been rarely used by the OLRB. With Bill 148, this is likely to change. Therefore, employers should be extra diligent to ensure lawful responses to a union organizing drive.

8. First Contract Arbitration

Bill 148 has significantly changed the process of first collective agreement negotiations by making it easier to apply to the OLRB for an order directing first collective agreement mediation or arbitration. While the rules have been relaxed, a party will not be able to apply to the OLRB for such an order if that party does not come to the OLRB with 'clean hands'. For example, the OLRB will not direct

first contract mediation/arbitration where the party applying to the OLRB for such an order has engaged in bad faith bargaining or taken an "uncompromising" bargaining position "without reasonable justification".

One significant consequence of these changes is that a decertification application (or a strike or lockout) can be blocked by making an application for first contract arbitration/mediation.

Occupational Health and Safety

While not in previous versions of Bill 148, the final version included an interesting amendment to the *Occupational Health and Safety Act* ("OHSA").

Employers may not require staff to wear "footwear with an elevated heel", unless such footwear is required for safety reasons. This does not apply to those working as a "performer in the entertainment and advertising industry." Accordingly, a restaurant will not be able to mandate that servers wear high heels as part of their work uniform.

When does all of this take effect?

Most of the changes will come into force January 1, 2018 or the date of royal assent. However, the changes to the parental leave provisions will come into force on the later of December 3, 2017 or the date of royal assent. Further, changes in regards to equal pay (with the related reprisal provisions) will come into force April 1, 2018. Finally, the scheduling provisions and record keeping provisions in relation to scheduling will come into force January 1, 2019.

Conclusion

Bill 148 goes far beyond a 15 dollar minimum wage. It represents transformational changes to workplace legislation. It has broad support amongst labour and worker advocacy groups. This is understandable given that employees and trade unions now have additional rights and protections. However, it is clear that employers will be faced with additional burdens and costs. Employers should carefully study the changes, amend workplace policies, train management, and adopt strategies to contain costs and to counter the likely increase in employee complaints and union activity.

Should you require any advice on these changes, including additional specifics on Bill 148 and its application to your workplace, please contact Daniel Pugen at dpugen@torkinmanes.com.