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Bill 148 – The Fair Workplaces, Better Jobs Act, 2017

Date : July 20, 2017

Readers of Focus will recall that on May 31, 2017, prior to the introduction of Bill 148, we highlighted the key changes being proposed by the government of Ontario to the *Employment Standards Act, 2000*, and the *Labour Relations Act, 1995*, in a Focus Alert entitled, "*Ontario proposes major changes to employment and labour laws*." The following day, on June 1, 2017, Bill 148 – the *Fair Workplaces, Better Jobs Act, 2017*, was introduced in the legislature and was referred to the Standing Committee on Finance and Economic Affairs.

Following our Breakfast Seminar on June 28, 2017, in which our lawyers provided a general overview of the changes proposed in Bill 148, and some of the practical implications for employers, we felt that it would be timely to provide a more detailed summary of the proposed legislative changes.

Our firm sent a representative to sit in and observe the public hearings of the Standing Committee on Finance and Economic Affairs that were held in Ottawa on July 12, 2017. The overwhelming message conveyed to the Committee by those presenters representing employers or small business was that the changes proposed in Bill 148 are "too much, too fast!" It was not possible to tell from the questions posed by Committee members whether (or where) there might be room for changes or amendments to the Bill, however, we would note that the Committee is accepting written submissions, which must be filed with the Clerk of the Committee by July 21, 2017 at 5:30 p.m. We will be following the Committee's review of the Bill closely and will keep readers apprised of any significant developments.

Some Highlights and Implications of Bill 148

Changes to the *Employment Standards Act, 2000*

Increases to Minimum Wage Rates

Following the regularly-scheduled increase to minimum wage rates in October of 2017, all of the various minimum wage rates would be increased on January 1, 2018 and again on January 1, 2019. As a result of these increases, minimum wage rates will increase by almost 1/3 over the next 18 months.

The general minimum wage rate will be increased as follows:

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- $11.60/hour on October 1, 2017;
- $14.00/hour on January 1, 2018; and
- $15.00/hour on January 1, 2019

The special minimum wage rates for liquor servers, students under 18, homeworkers and hunting and fishing guides will also be increased by the same percentages as the general minimum wage on January 1, 2018 and January 1, 2019. Effective January 1, 2018, those rates will be as follows:

- Students under 18 - $13.15/hour
- Liquor servers - $12.20/hour
- Hunting and fishing guides - $70.00 for less than 5 consecutive hours; $140.00 for more than 5 hours
- Homeworkers - $15.40/hour

After January 1, 2019, annual increases in minimum wage rates will be based on the rate of inflation.

These increases are significant and are expected to have serious impacts, especially for smaller businesses. In addition to a dramatic increase in basic wages, these changes will have a major impact on overtime costs. The impact of the proposed increases to the minimum wage rates, and the likely need for employers to increase the wages they pay to other workers proportionally, was a central theme of the presentations made to the Standing Committee at the public hearings held in Ottawa.

Equal Pay Regardless of Employment Status

Effective April 1, 2018, employers will be required to pay employees the same rate of pay for doing the same work regardless of their employment status (*i.e.*, full-time, part-time, casual, temporary or seasonal). While employers will be precluded from paying different rates based on employment status, there will be exceptions for differences in wages that are based on:

- A seniority system (for example, under a collective agreement)
- Performance or merit-based
- Pay determined by quality or quantity of production
- Other factors (not sex or employment status)

In order to ensure that employers comply with this new obligation, employees will be entitled to request a review of their rate of pay. In response to such a request, employers will be required to either adjust the employee’s pay or provide written reasons explaining why such an adjustment is not warranted. Employers may not reduce the rate of any other employees in order to comply with this obligation, and unions (and other organizations) are prohibited from causing or attempting to cause the employer to contravene these obligations.

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If a collective agreement is in place on April 1, 2018 which contains provisions that are not consistent with this obligation, those provisions will prevail until a new or renewal collective agreement comes into effect. However, pay differences that are based on seniority or other factors besides employment status, are not inconsistent with these new provisions and will continue to be permissible.

In response to this proposed change, employers that do not already have in place pay scales or wage grids that are based on seniority or service, performance or qualifications, may wish to consider implementing such a system prior to April 1, 2018, when these changes are scheduled to come into effect.

Equal Pay for Temporary Help Agency (THA) Workers

Temporary help agencies will be required to pay their employees ("assignment employees") the same rate of pay as permanent employees of the THA client when:

- they perform substantially the same kind of work in the same establishment;
- their performance requires substantially the same skill, effort and responsibility; and
- their work is performed under similar working conditions.

This requirement will not apply where the differences in rates of pay are based on factors other than sex or employment status.

As with the requirement for equal pay based on employment status, clients of THAs will not be allowed to reduce the rate of pay paid to their employees in order to assist THAs to meet this requirement, and nor will a union (or other organization) be allowed to cause or attempt to cause a THA to violate this provision.

Assignment workers will be entitled to inquire about their wage rate or the wage rate of an employee of the client, without repercussions. As with employees who believe they are not being paid fairly based on their employment status, assignment employees will also be entitled to request a review of their wage rate. In the face of such a request, the THA will be required to either adjust their rate of pay or provide a written response explaining their reasons for refusing to so.

If a collective agreement is in place on April 1, 2018 that permits differences in pay between a client's employees and assignment employees, then that collective agreement will prevail until a new or renewal agreement comes into effect.

This requirement will be quite onerous for temporary help agencies, who aren't generally privy to information about the wages paid by their clients to that client's own employees. These changes can be expected to have a significant impact on a temporary help agency's costs. THAs will want to start thinking now about how these changes will affect the pricing of their contracts, and to take

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whatever steps they can in advance in order to prepare themselves for these changes.

Increased Vacation Leave and Vacation Pay

Effective January 1, 2018, employees with less than five (5) years of service with their employer will continue to be entitled to two (2) weeks of vacation after each vacation entitlement year. However, effective on that same date, employees with five (5) or more years of service will become entitled to three (3) weeks of vacation after each vacation entitlement year. This increase in vacation entitlement for employees with at least five (5) years of service will take effect for a vacation entitlement year that ends on or after December 31, 2017. Employers will not be required to provide employees with additional vacation days for a vacation entitlement year that ended before that date.

Employees who reach five (5) years or more of service and become entitled to the additional week of vacation under this provision will also be entitled to receive 6% of the wages, excluding vacation pay, that they earned during the period for which vacation is given as vacation pay.

Public Holiday Pay

There are several important changes to public holiday pay that will take effect on January 1, 2018.

The calculation of the amount of holiday pay to which an employee will be entitled for a public holiday will be simplified. Commencing on January 1, 2018, an employee's public holiday pay is to be calculated as follows:

Public Holiday Pay = total regular wages earned in pay period immediately preceding the public holiday / # of days worked in that pay period

Under this new formula, if an employee worked four (4) shifts and earned $600 in regular wages in the pay period (2 weeks) immediately preceding the public holiday, then her holiday pay entitlement would be $150.00 ($600 / 4 days). Under the existing rules, assuming this same employee had worked 8 shifts and earned $1200 in the four (4) weeks before the work week in which the public holiday occurred, then her public holiday pay entitlement would be $62.40 ($1200 + $48 vacation pay / 20 days).

Where an employee is on leave or vacation during the pay period preceding the holiday, their holiday pay entitlement is to be calculated based on the pay period before the start of that vacation or leave. For employees who were not employed during the pay period preceding the public holiday, their holiday pay entitlement is to be calculated based on the number of days they worked and regular wages they earned during the pay period that includes the public holiday.

For employees who are required to work on a public holiday, they will become entitled to receive:

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(i) public holiday pay, plus (ii) premium pay for the hours worked. The proposed changes would remove the option for the employer to provide employees who are required to work with a substitute day off in place of the public holiday.

There will also be new substitution rules where a public holiday falls on an employee's day off, and the employee does not work, or when the employee is on vacation. The new provisions would require that the substitute day given to the employee be either the first work day after the public holiday, or the last work day prior to it. Under the current ESA, a substitute holiday must be scheduled for a day that is no later than three (3) months after the public holiday for which it was earned, or, if the employer and employee agree in writing, the substitute day off can be scheduled up to 12 months after the public holiday. An employer and an employee will still be entitled to agree that the employee will be paid public holiday pay instead (in which case no substitute day off need be given).

The increased cost of paying out public holiday pay is expected to be significant as employees who work less than full-time hours, will be entitled to a significant increase in their public holiday pay.

Changes to Scheduling Rules

The following changes to the scheduling rules under the *Employment Standards Act* are proposed in Bill 148, and would come into effect on January 1, 2019:

- **Request to change schedule or location** – after being employed for three (3) months, an employee will be entitled to request a change in work location or schedule. The employer must discuss the request with the employee and notify him/her of their decision within a reasonable period of time, including the reasons where the request is denied.
- **Three Hour Rule** – employees who regularly work more than three (3) hours per day, who report to work but are given less than three (3) hours of work, will be entitled to be paid three (3) hours at their regular rate of pay (current exceptions will continue to apply).
- **Right to refuse shift or on-call with less than 96 hours' notice*** – employees will be entitled to refuse a shift or being placed on call, without repercussion, if their employer asks them to work with less than 96 hours (4 days) notice
- **Shift cancellation within 48 hours of its start*** – employees will have to be paid three (3) hours at their regular rate of pay if their scheduled shift or on call period is cancelled within 48 hours of its start
- **Minimum pay for being on call*** – employees who are on-call and are either not called in or are called in and work for less than three (3) hours will have to be paid for three (3) hours at their regular rate of pay (for each 24 hour on-call period).

For the last three of these changes (marked with an *), if a collective agreement is in place on January 1, 2019 (when these changes come into effect) that addresses the issue and there is a conflict with the legislation, then the collective agreement provision will prevail.

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We anticipate that these changes will have a particularly significant impact (i.e., cost) on employers in the retail, hospitality and service industries, which rely to a large extent on a flexible workforce, and where there is a real need to be able to adapt to changes in workload (i.e., peaks and slow periods) that cannot always be predicted in advance. As a result of these changes, we expect that employers will require a larger pool of casual employees, given the right to refuse work that is offered with less than 96 hours' notice. Employers with unionized employees who are in bargaining for a new collective agreement should consider negotiating language to address availability for casual staff in their collective agreements.

Leaves of Absence

Bill 148 includes the following proposed changes to the provisions of the *Employment Standards Act* dealing with leaves of absence and would come into effect January 1, 2018:

- **Personal Emergency Leave** – under s. 50 of the *ESA*, personal emergency leave is currently only available to employees if their employer has 50 or more employees. Ten (10) days of personal emergency leave (PEL) will be extended to employees of employers with fewer than 50 employees. The first two (2) days of PEL must now be paid, while the remaining eight (8) will be unpaid. The list of reasons for which PEL may be taken will be expanded to include domestic violence or sexual violence or the threat of either. Employers will be entitled to ask for evidence that is "reasonable in the circumstances" confirming that an employee is entitled to PEL, but will not be permitted to require an employee to provide a medical certificate to confirm entitlement to PEL.

- **Family Medical Leave** – under s. 49.1 of the *ESA*, employees are currently entitled to take eight (8) weeks of unpaid leave to care for a family member where a qualified health practitioner has certified that there is a significant risk of them dying within a period of 26 weeks. Under the proposed changes, employees will be entitled to 27 weeks of leave without pay in a 52 week period to provide care to a family member if there is a significant risk of them dying within 52 weeks and the leave can be extended for a further 27 weeks if the family member does not die.
- **Leave without pay for child death** – under s. 49.5 of the *ESA*, employees who have been employed for at least six (6) months are currently entitled to take up to 104 weeks of unpaid leave if a child of the employee (includes a child, step-child, foster child or child under their legal guardianship who is under 18) dies and it is probable that they died as a result of crime. Under the proposed changes, this leave will be expanded so that employees who have been employed for at least six (6) months will be entitled to a single period of unpaid leave of up to 104 weeks if their child dies, regardless of the circumstances.
- **Leave without pay for crime-related child disappearance** – under s. 49.5 of the *ESA*, employees who have been employed for at least six (6) months are currently entitled to an unpaid leave of absence of up to 52 weeks if a child of the employee (same definition as immediately above) disappears and it is probable that the child disappeared as a result of a

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crime. Under the proposed changes, these same employees will be entitled to a single period of unpaid leave of up to 104 weeks.

The most significant of these changes for employers is sure to be the changes in personal emergency leave. The requirement to pay all employees, regardless of how long they've been working for the employer, for the first two (2) days of leave will be costly. In addition, the inability of employers to request a medical note for these two (2) paid days is likely to open this up to abuse by some employees. We expect to see legal challenges around whether employers are entitled to request a medical note from employees when they provide paid sick leave (is this a "greater right or benefit"?) and in relation to how these changes might affect an employer's attendance management program.

Other Changes of Note

- **Misclassification of employees as independent contractors** – employers will be subject to penalties, including prosecution, public disclosure of a conviction and monetary penalties for misclassifying employees as independent contractors. In the event of a dispute, the employer will be required to prove that the individual is truly an independent contractor.
- **Assignment employees entitled to notice of termination** – THAs will be required to give assignment workers one week's notice (or pay in lieu thereof) when an assignment that was scheduled to last longer than three (3) months is terminated early.
- **Overtime pay** – where an employee holds more than one position with an employer, the employer will be required to pay them for overtime at the rate of the position they were working during the overtime period.

Changes to the *Labour Relations Act, 1995*

Application for Employee Lists

In workplaces where no union has yet been certified, a union which can show that it has the support of 20% of the employees in the proposed bargaining unit will be able to apply to the Ontario Labour Relations Board (OLRB) for an order directing the employer to provide the union with a list of employees, including their names, phone numbers and personal email addresses. Under Bill 148, the disclosure of employee information is deemed to comply with the applicable privacy legislation. The fact that unions will be entitled to request this information from an employer means that employers will become aware of a union's certification campaign sooner than it might have under the current process.

In response to such an application, the employer will be able to file a Notice of Disagreement, disagreeing with either the proposed bargaining unit or the number of employees in the proposed bargaining unit. The employer will know how many employees support the union, but will not know

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the identity of those employees. The union will be required to use the same bargaining unit description in the event that an application for certification is later filed, subject to limited exceptions. In this regard, employers will want to dispute the bargaining unit description up front when a union requests the list of employees.

The OLRB will be empowered to decide such an application without a hearing or consultation.

Union Certification

The option of card-based certification will be introduced for the following sectors: (i) the temporary help agency industry; (ii) the building services industry; and (iii) the home care and community services industry.

Remedial union certification will be made mandatory where the OLRB determines that an employer has committed an unfair labour practice that impacted upon the support for the union.

A union will be required to file membership cards with its application for certification. Upon receipt of such an application, the employer will have two (2) days to respond and provide the names of all employees in the proposed bargaining unit to the union. The union's application will be dismissed if it has the support of less than 40% of the proposed bargaining unit. If the union can show that it has the support of between 40 and 55% of the employees in the unit, then a vote will be ordered. If the union files membership evidence of more than 55% of the employees in the unit on the date of the application, then the union will be certified.

Under the provisions proposed in Bill 148, the OLRB will be empowered to conduct votes outside the workplace, including electronically or by telephone. The OLRB will also have the option of authorizing a labour relations officer (LRO) to give directions relating to the voting process and voting arrangements, in order to ensure the neutrality of that process.

First Contract Mediation and Arbitration

Bill 148 would make it much easier to access first contract arbitration, and would add an intensive mediation component to the process. The OLRB will be required to address first contract mediation-arbitration applications before dealing with displacement and decertification applications.

Under the proposed changes to the LRA, it will be possible for a party to file an application for arbitration 20 days after a mediator has been appointed, regardless of the progress of the mediation process. The applicant will be required to include a list of the issues in dispute and its position on those issues with its application. The OLRB will have the power to dismiss the application, order more mediation or direct an interest arbitration process. Where the OLRB directs mediation-arbitration, no strikes or lockouts can occur.

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Successor Rights

Successor rights would be extended to the retendering of building services contracts, including:

- Food services
- Building/cleaning services
- Security services

The government will also be empowered to apply this extended notion of successor rights, by regulation, to the retendering of other publically funded contracted services

Review and Consolidation of Bargaining Units

The OLRB would be given the authority to change the structure of existing bargaining units within a single employer where it determines that they are no longer appropriate for collective bargaining. The OLRB could also consolidate newly certified bargaining units with other existing bargaining units under a single employer, where they are represented by the same bargaining agent.

For newly certified bargaining units, the OLRB will be required to consider whether consolidation:

- Contributes to effective collective bargaining relationships; and/or
- Contributes to the development of collective bargaining in the industry

The OLRB will also be entitled to consider such other factors as it deems relevant.

The OLRB will be authorized to review bargaining unit structures where the following criteria are met:

- An employer or trade union representing employees in the unit files an application requesting a review; and
- The OLRB is satisfied the bargaining units are no longer appropriate

Return to Work Rights and Procedures Following Strike or Lock-Out

Bill 148 would remove the six (6) month limitation on an employee's right to return to work following the commencement of a lawful strike. Under the proposed changes there will no longer be any limit on the right to return to work following a strike or lockout. Employers will be required to reinstate an employee at the conclusion of a legal strike or lock-out (subject to certain conditions), which will be enforceable through grievance arbitration.

Just Cause Protection

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Employees will be protected from being disciplined or discharged without just cause during the following two periods:

- the period between certification and conclusion of a first contract; and
- the period between the date employees are in a legal strike or lock-out position and the date that the new collective agreement takes effect.

What can employers do to prepare?

Assuming that Bill 148 will be passed in the fall, with only minor changes coming out of the Standing Committee review process, we would suggest that employers undertake a review of their existing policies, employment contracts and collective agreement language (if applicable) in order to consider whether these comply with the new rules and requirements. Employers will want to take steps now to put into place contracts and policies, and collective agreement provisions, to ensure compliance with these new legislative provisions when they come into force.

For further information please contact Colleen Dunlop at 613-940-2734 or Jacques Emond at 613-940-2730.

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