

Ontario government introduces Bill 47, Making Ontario Open for Business Act, 2018 – repeals much of labour-friendly Bill 148

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On October 23, 2018, the Ontario government introduced Bill 47, the *Making Ontario Open for Business Act, 2018*. If passed into law, Bill 47 would amend the *Employment Standards Act, 2000* (the “ESA”), and the *Labour Relations Act, 1995* (the “LRA”) to repeal many of the changes implemented by the former Liberal government through Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*. Readers of Focus will recall the more significant aspects of Bill 148 (which received Royal Assent in November of 2017), which included a significant increase to the minimum wage and equal pay for equal work rules under the ESA, as well as facilitated first agreement mediation-arbitration and card-based certification under the LRA (see [“Update on Bill 148 The Fair Workplaces, Better Jobs Act, 2017”](#) and [Bill 148 – The Fair Workplaces, Better Jobs Act, 2017](#)).

Proposed Amendments to the ESA

Minimum Wage

Pursuant to last year’s (and the last government’s) Bill 148, the minimum wage was scheduled to increase again, from \$14 to \$15 per hour, on January 1, 2019. This was to be followed by yearly adjustments based on the Consumer Price Index (the “CPI”). The recently-introduced Bill 47 would freeze the minimum wage at \$14 and defer any CPI adjustments until October 2020. The proposed legislation would also repeal the provisions providing for the Minister’s mandatory review of the minimum wage, currently scheduled for 2024 and every five years thereafter.

Personal Emergency Leave

Bill 47 would also repeal the Personal Emergency Leave (“PEL”) provisions that were expanded by Bill 148. These provisions entitled an employee to take a maximum of ten (10) days of PEL, and required employers to pay for the first two (2) days. Bill 47 would remove the PEL regime in its entirety and replace it with the following unpaid leaves:

- Sick Leave – up to three (3) days in each calendar year for personal illness, injury or medical emergency.
- Family Responsibility Leave – up to three (3) days in each calendar year for the illness, injury, medical emergency or urgent matter of defined family members. The list of family members is the same as currently exists for PEL.

- Bereavement Leave – up to two (2) days in each calendar year to be used for the death of defined family members. The list of family members is the same as currently exists for PEL.

An employee would need to be employed for at least two (2) consecutive weeks in order to be entitled to these proposed leaves. For each of these leaves, Bill 47 would permit an employer to require an employee to provide evidence reasonable in the circumstances that the employee is entitled to the leave, which may include a medical note from a qualified health practitioner. Under Bill 148, by contrast, employers are prohibited from requesting a medical note to substantiate a PEL leave.

Bill 47 also specifically provides that, where an employee takes a paid or unpaid leave under an employment contract for circumstances in respect of which the new leaves would be available, the employee will be deemed to have taken applicable leave under the ESA.

Equal Pay for Equal Work

Bill 47 would also change the Bill 148 “equal pay for equal work” regime under the ESA, which came into effect on April 1, 2018. Under Bill 148, employers were prohibited from differentiating employees’ pay on the basis of their employment status (i.e., whether an employee was full-time, part-time, casual, temporary or seasonal). Bill 47 would remove the employment status restriction, while leaving the original equal pay for equal work provisions based on sex in place.

Bill 47 would also repeal the provisions that require temporary help agencies (“THA”) to pay their employees the same rate of pay as permanent employees of the THA’s client when they perform substantially the same kind of work in the same establishment.

Public Holiday Pay

Bill 148 introduced a new public holiday pay formula that took effect on January 1, 2018, and which resulted in significant inequities between full-time employees and certain part-time and casual employees, and may have created a disincentive for employers to schedule part-time employees in the weeks leading up to a public holiday. Readers of Focus will recall that the former government filed a regulation to revert to the former formula for calculating public holiday pay effective July 1, 2018. Bill 47 would bring back the prorating formula in place prior to Bill 148, which reads as follows:

the total amount of the regular wages earned and vacation pay payable to the employee in the four weeks before the work week in which the public holiday occurred, divided by 20.

Misclassification of Employees

Bill 148 introduced an express prohibition against treating employees as though they were independent contractors or otherwise not employees, and placed the onus to prove that an individual was in fact not an employee on the employer. Bill 47 would however repeal the employer's onus of proof in cases of alleged misclassification of employees as independent contractors.

Scheduling

Bill 47 would also repeal most of the Bill 148 "scheduling" changes that would have come into force on January 1, 2019. These include:

- an employee's right (after being employed for at least three (3) months) to request a change to their schedule or work location, and the corresponding obligations on the employer to discuss the request with the employee, provide a decision within a reasonable period of time, and to provide reasons in the case of a denial;
- the "minimum pay for being on call" provisions, essentially requiring an employer to pay an employee three (3) hours of regular pay where the employee is on call and is available to work and is either not called in or is called in but works less than three (3) hours;
- an employee's right to refuse a shift or being placed on call, without repercussion, if their employer asks them to work with less than 96 hours' notice;
- the "minimum pay for shift cancellation" provisions, essentially requiring an employer to pay an employee three (3) hours of regular pay if a scheduled shift or on call period is cancelled within 48 hours of its start; and
- the employer's obligation to keep records relating to all of the above.

Three Hour Rule

Bill 47 would preserve the "Three Hour Rule", which was amended by Bill 148 and scheduled to take effect on January 1, 2019. Bill 47 moves the three-hour rule, which provides that an employee must be paid a minimum of three (3) hours of regular pay where the employee regularly works more than three (3) hours and reports to work but works less than three (3) hours, to a newly created section of the ESA. The three-hour rule would continue not to apply if an employer were unable to provide the employee with work because of fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work.

Bill 148 Amendments not Impacted by Bill 47

Some of the Bill 148 items that will not be repealed or otherwise changed by Bill 47 include the changes to vacation entitlement (i.e., three (3) weeks' vacation and vacation pay at 6% upon five (5) years of service), and the provisions providing paid leaves of absence for domestic and sexual violence. Other leaves that were amended by Bill 148 and also remain unchanged by Bill 47 include the following: pregnancy leave, extended parental leave, critical illness leave, family medical leave, child death leave and crime-related child disappearance leave.

Proposed amendments to LRA

Bill 47 also proposes to repeal many of the Bill 148 changes to the LRA. Some of those changes include the following:

Employee Lists

Bill 47 would repeal the ability of a union to apply to the Ontario Labour Relations Board (the "Board") for an order directing an employer to provide a list of employees. Under Bill 148, a union could make this application, provided that it could demonstrate that it had the support of at least 20% of the employees in the proposed bargaining unit. Bill 47 would remove this right and require that any application before the Board upon the day that Bill 47 comes into force be immediately terminated. Bill 47 also states that any employee list obtained through the application process must be destroyed on the day Bill 47 comes into force.

Remedial Certification

The mandatory remedial certification regime in Bill 148 would also be repealed by Bill 47. The Bill 148 regime required the Board to certify a union if it found that an employer had contravened the LRA and, as a result, the true wishes of the employees had not been reflected in the representation vote, or the union could not demonstrate that the union had 40% membership. Bill 47 would reinstate the previous regime whereby certification was not mandatory, and the Board has the discretion to order another vote.

Consolidation of Bargaining Units

Bill 47 would also claw back the Board's authority to review and consolidate newly-certified bargaining units with other existing bargaining units under a single employer. The Board would still, however, have the authority to review the structure of existing bargaining units if satisfied that the bargaining units were no longer appropriate for collective bargaining.

First Collective Agreement Mediation and Mediation-Arbitration

Access to first contract mediation and arbitration would revert to the pre-Bill 148 regime, should Bill 47 become law. As readers of Focus will recall, Bill 148 added an intensive mediation component to the process and facilitated access to mediation-arbitration. This regime would be repealed and replaced with the previous regime whereby the Board could direct first collective agreement arbitration when of the view that collective bargaining was unsuccessful for the following reasons, as specified in the legislation: (a) the refusal of the employer to recognize the bargaining authority of the trade union; (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification; (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or (d) any other reason the Board considers relevant.

Card-Based Certification

Another Bill 148 amendment that would be repealed by Bill 47 is the option of card-based certification for (a) the temporary help agency industry; (b) the building services industry; and (c) the home care and community services industry. Workers in these industries would once again have the right to vote through secret ballot, as was the case in the pre-Bill 148 era.

Other Proposed LRA Amendments

Bill 47 also modifies unions' return to work rights and successor rights. In terms of the former, Bill 148 had removed the six (6) month limitation on an employee's right to return to work following the commencement of a lawful strike or lock-out. Bill 47 would reinstate the six (6) month period. While the extension of successor rights to the retendering of building services contracts (i.e., contracts for food services, building/cleaning services and security services) would remain, Bill 47 would repeal the extension, by regulation, of successor rights to the retendering of publicly funded contracted services, such as homecare.

If passed into law, Bill 47 would also reinstate the previous maximum fines available under the

LRA, which would mean a reduction in the maximum exposure to fines for contraventions of the LRA from \$5,000 to \$2,000 for individuals and \$100,000 to \$25,000 for organizations.

Bill 148 Amendments not Impacted by Bill 47

The Bill 148 amendment that provides employees with protection from being disciplined or discharged without just cause during the following two periods would remain:

- 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.

In our view

Assuming that Bill 47 becomes law with only minor modifications, many of the more onerous provisions of Bill 148 will soon be repealed. The proposed amendments to the ESA are scheduled to come into force the later of January 1, 2019 and the day Bill 47 receives Royal Assent. The proposed amendments to the LRA are scheduled to come into force when Bill 47 receives Royal Assent. Employers may find it useful to revisit their existing policies, employment contracts, and collective agreements (if applicable) with a view to revising these in light of the anticipated, less stringent Bill 47 requirements.

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