rubinthomlinson LLP

EMPLOYERS' ALERT • Issue 79 November 2017

On November 22, 2017, the Ontario government passed Bill 148, which includes amendments to the *Employment Standards Act* ("ESA"), the *Labour Relations Act* ("LRA") and the *Occupational Health and Safety Act* ("OHSA"). On November 27, 2017, Bill 148 received Royal Assent, which means that the Bill is now law. Amendments include significant changes to the ESA. The ESA now provides greater benefits and entitlements to employees and greater obligations on employers.

Ontario Passes Bill 148

The majority of the amendments come into effect on January 1, 2018. However, some amendments came into effect on the date of Royal Assent, while others do not come into effect until 2018 and 2019. For employers who currently have collective agreements in place, in some circumstances the provisions in the collective agreement will prevail until the earlier of the expiration date of the collective agreement, or, January 1, 2020. See the chart below for more detail.

In the chart below, we outline the current state of the ESA, Bill 148 amendments, and the resulting impact these changes may have on employers.

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Increased minimum wage	The general minimum wage is $11.60 per hour. The ESA also prescribes special minimum wages for certain occupations.	General minimum wage will increase to $14 per hour on **January 1, 2018** and $15 per hour on **January 1, 2019**. There will also be a proportional increase to special minimum wage rates.	The first increase to $14 per hour amounts to a 20.7% increase in the minimum wage rate. As a result, labour costs for businesses employing minimum wage earners will be substantially increased.
Misclassification of workers	No such provision.	Amendments now prohibit employers from treating, for the purposes of the ESA, a person who is their employee as if the person were not an employee under the ESA.	An employer who wrongfully classifies a worker as a non-employee (i.e. an independent contractor, or other non-employee) will now be in contravention of the ESA and subject to penalties.

e: info@rubinthomlinson.com t: 416.847.1814 f: 416.847.1815 20 Adelaide St. East • Suite 1104 • Toronto, Ontario • M5C 2T6

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Misclassification of workers *continued*		This provision addresses the concern of the misclassification of employees as "independent contractors". Breach of this provision is now a contravention of the ESA. **Effective Date: November 27, 2017.**	
Equal pay for equal work - No difference in pay rate because of employment status	Employers are not prohibited from paying part-time employees disproportionately lower wage rates than their full-time counterparts.	Employers will be prohibited from paying employees at different rates depending on whether they are full-time, part-time, seasonal, etc. There are however exceptions. The rule will not apply when the difference in pay rate is made on the basis of: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quality of production; or, any other factor other than sex or employment status.| **Effective Date: April 1, 2018.** **Unionized employers:** if a collective agreement ("CA") that is in effect on **April 1, 2018** contains a provision that permits differences in pay based on employment status, and there is a conflict between the provision of the CA and this rule, the provision of the CA prevails until the earlier of the date the CA expires and **January 1, 2020.**	Part-time employees generally commanded a disproportionally lower salary than full-time employees. As a result of the amendment, however, employers may want to avoid hiring part-time workers entirely. Exceptions still allow for different rates of pay so long as they are not discriminatory and are in line with ESA allowances.

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Equal pay for equal work for assignment employees	The ESA's Part XII currently covers equal pay provisions. Equal pay may not apply when the difference in the rate of pay is made on the basis of a number of factors – seniority is one of them.	This new change mandates equal pay for temporary help agency employees: • doing jobs that are substantially the same as employees at the agencies' client companies; • where performance requires substantially the same skill, effort and responsibility; and, • when work is performed under similar working conditions. There is however an exception: when the difference in the rate of pay is made on the basis of any other factor other than sex, employment status or assignment employee status. **Effective Date: April 1, 2018.** **Unionized employers:** if a collective agreement ("CA") that is in effect on **April 1, 2018** contains a provision that permits differences in pay between employees of a client and an assignment employee, and there is a conflict between the provision of the CA and this rule, the provision of the CA prevails until the earlier of the date the CA expires and **January 1, 2020.**	While temporary help agencies will no longer be permitted to pay their employees less than their client's employees, the exception does allow for the employer to justify pay differences in certain circumstances.

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Increased public holiday pay for part-time employees, and new public holiday pay formula.	Holiday pay is calculated as wages and vacation pay earned in the four work weeks prior to the week in which the holiday falls, divided by 20.	Holiday pay will be calculated as the average daily wages earned in the pay period leading up to the holiday. **Effective Date: January 1, 2018.**	Now part-time employees will receive higher holiday pay (i.e. someone working 8 hours per day and one day per week will earn the same holiday pay as someone working 8 hours per day and 5 days per week. Previously, that part-time worker would have earned 1/5th the holiday pay of the full-time worker because their holiday pay would have been calculated as four days' wages divided by 20). Similar to prohibiting pay rate differentiation, this will increase the costs of hiring part-time employees.
Substitute holidays	Where an employee works on a public holiday, the employee and employer can agree to either provide the employee with a substitute day off or pay the employee public holiday pay and premium pay.	The rule on substituted holidays remains but with the new imposition of written requirements for documenting substitutions. Under the new proposal, the employer would provide the employee with a written statement outlining: a) the public holiday; b) the substitution date; and, c) the date of the written statement. **Effective Date: January 1, 2018.**	While the option of substituting holidays remains the same, the procedure for engaging the option will be more onerous for employers. This will require planning and discussion with employees in advance of the specified holiday to ensure a written statement is properly executed.

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Vacation entitlement	Where an employee works for an employer for at least one year, the employee is entitled to a minimum of 2 weeks' vacation.	Amendments provide a minimum 3 week vacation entitlement to employees whose period of employment is five years or more. **Effective Date: January 1, 2018.**	Employers who only provide for the minimum 2 weeks' vacation for their longer tenure employees will have to plan ahead to account for the extra week of employee vacation. Employers who currently offer more than 3 or more weeks' vacation to employees with 5 years of service or more will not be affected.
Three hour minimum pay when shift is less than three hours, or, when on-call employee works less than three hours.	When an employee who regularly works more than three hour shifts reports to work but is sent home before the end of their shift, the employee receives the greater of their wages earned and three hours at the minimum wage.	The three hour rule will now be calculated at the employee's regular pay rate – not at the minimum wage. This amendment also includes a qualifying requirement for employees who benefit from the three hour rule: *In order to qualify, the employee must have been available to work for at least three hours at the time of the shift.* Exceptions: the rule does not apply if the employer is unable to provide work for the employee because of weather, fire, or other similar causes beyond the employer's control. The three-hour rule also does not apply if the employer required the employee to be on call for the purposes of ensuring the continued delivery of essential public services. **Effective Date: January 1, 2019.**	Employers will need to be more diligent in scheduling employee shifts to avoid the added expense. The new requirements, though useful in that they encourage employee availability, will do little to mitigate against the added expense. Additionally, the three hour pay rule now being calculated at the employee's regular rate rather than at minimum wage will result in greater financial burden on employers.

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Three hour minimum pay when shift is less than three hours, or, when on-call employee works less than three hours. *continued*		**Unionized employers:** if a collective agreement ("CA") that is in effect on **January 1, 2019** contains a provision that addresses payment for a less than three hour shift for regular and on-call employees, and there is a conflict between the provision of the CA and this rule, the provision of the CA prevails until the earlier of the date the CA expires and **January 1, 2020.**	
Three hour pay for cancellation of scheduled work or on-call shift with less than 48 hours' notice *Note: the minimum three-hour pay entitlements may not be grouped together if more than one entitlement arises in one particular instance. The entitlement is capped at three hours.	Employees are not entitled to pay for being on call or if an employer cancels their shift prior to them reporting to work.	Employees are entitled to a minimum of three hours' pay at their regular rate for being on call (even if they are not called into work) or if an employer cancels the employee's shift within 48 hours of the start of that shift. This amendment includes exemptions in circumstances: • Beyond the employer's control – such extreme weather, power failure, etc. • Where the work is weather dependent and the employer cannot provide work for weather dependent reasons. • Where the employer requires the employee	Having an employee be on call was a means to avoid idle time and reduce costs. However, as a result of the proposed amendment, the benefit of having on-call employees will be greatly reduced. The exemptions will at least relieve employers of this obligation in unforeseen circumstances.

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Three hour pay for cancellation of scheduled work or on-call shift with less than 48 hours' notice *continued*		to be on call for the purposes of ensuring the continued delivery of essential public services. **Effective Date: January 1, 2019.** **Unionized employers:** if a collective agreement ("CA") that is in effect on **January 1, 2019** contains a provision that addresses payment when the employer cancels the employee's scheduled work or on-call period, and there is a conflict between the provision of the CA and this rule, the provision of the CA prevails until the earlier of the date the CA expires and **January 1, 2020.**	
Right to refuse short notice request to work or to be on-call	No right to refuse.	An employee is now entitled to refuse without repercussion an employer's request to work or to be on call if the request is made less than 96 hours prior to the commencement of the shift. This amendment states that there is no employee right to refuse work where the work is to: a) deal with an emergency; b) to remedy or reduce a threat to public safety; c) ensure the continued delivery of essential public services; or	Employers will need to be more diligent in their shift scheduling by providing advance notice of shifts to employees. However they will not have to worry about short-notice in the event of emergencies and threats to public safety or other circumstances as may be prescribed.

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Right to refuse short notice request to work or to be on-call *continued*		d) for such other reasons as may be prescribed. **Effective Date: January 1, 2019.** **Unionized employers:** if a collective agreement ("CA") that is in effect on **January 1, 2019** contains a provision that addresses an employee's ability to refuse the employer's request or demand to perform work or be on call on a day the employee is not scheduled to work or be on-call, and there is a conflict between the provision of the CA and this rule, the provision of the CA prevails until the earlier of the date the CA expires and **January 1, 2020.**	
Right to request changes to schedule or work location	No such to request.	Amendments now provide the ability for employees **with at least three months' tenure** with their employer, to request changes to their schedule or work location. Employers who receive these requests must discuss them with the employee and either grant them or provide reasons for their denial. **Effective Date: January 1, 2019.**	While this amendment provides employees the right to request, it preserves an employer's ability to have the final say – provided reasons are offered for any denials to requests.
Overtime pay when employee has two or more rates of pay	Currently, employers are permitted to "blend" an employees various rates of pay for the purposes of overtime calculations.	If an employee has two or more regular rates for work performed for the same employer in a work week, the employee is	This provisions provides clarity with regards to multiple rates of pay and overtime. Employers must ensure they keep track of

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Overtime pay when employee has two or more rates of pay *continued*		entitled to be paid overtime pay for each hour of work performed in the week after the total number of hours performed for the employer reaches the overtime threshold. Additionally, the overtime pay for each hour is one and a half times the regular rate that applies to the work performed in that hour. **Effective Date: January 1, 2018.**	all employee hours worked to ensure they are properly calculating overtime and taking into account various rates of pay.
Termination of temporary agency assignment employees	No entitlement.	Temporary help agencies must now provide an assignment employee with one week's written notice or pay in lieu, if an assignment that was estimated to last for three months or more, is terminated before the end of its estimated term, unless another assignment lasting at least one week is offered to the employee. **Effective Date: January 1, 2018.**	This change will impose a burden on employers who may be unable to forecast the likelihood that an assignment will materialize as planned. It will likely result in scheduling and financial burden in instances where employers attempt to seek out alternative employment for the employee's notice period, or alternatively, provide pay in lieu of working notice.
Employer record-keeping requirements	There are currently a host of record-keeping requirements under the ESA which employers must currently abide by. Some of these record-keeping requirements include (but are not limited to): recording employee information, recording hours worked,	A larger list of record-keeping requirements has been imposed, which will be coming into force on varying dates. **Effective January 1, 2018:** - Dates and hours worked. - Where an employee has two or more regular rates of pay, the dates and times that the employee	While employers are already obligated to maintain detailed records, these provisions will make record-keeping more onerous. Increased record-keeping obligations open up the possibility of increased non-compliance fines and penalties for employers who fail to abide by these new requirements.

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Employer record-keeping requirements *continued*	providing pay stubs to employees, etc. Employers are currently required to retain records for 3 years after an employee ceases to be employed by the employer.	worked in excess of the overtime threshold at each rate of pay. - Records of substitute holidays (mentioned above). - Retention of documents for all leaves. - Record-keeping of vacation pay and vacation time. - Record retention for 5 years instead of 3. - temporary help agencies must: • record the number of hours worked by each assignment employee for each client of the agency in each day and each week; and, • retain a copy of any written notice provided to the employee upon termination of an assignment. **Effective January 1, 2019:** - Dates and times of work and on-call schedules, and any changes made to on-call scheduling. - Dates and times of cancellations of a scheduled day of work or scheduled on-call period.	
Paid personal emergency leave	Employees of employers with 50 or more employees are entitled to up to 10 unpaid days off for personal emergencies.	All employees will be entitled to 10 days off for personal emergencies, two of which must be paid. Employers are not permitted to require medical documentation to support the personal emergency leave, but can request "evidence reasonable in the circumstances".	The amendment not only entitles employees to two paid personal emergency days, but also significantly limits employers from managing the employee's attendance and ensuring the personal emergency leaves are taken appropriately.

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Paid personal emergency leave *continued*		There is however a qualifying period requirement: the employee must have worked for the employer for at least one week before reaching entitlement for the two paid days. Regardless of overtime pay or shift premiums, the employee will be paid regular wages. **Effective Date: January 1, 2018.**	The new requirements will put minor limits on eligibility and limit payment to regular wages.
Domestic or sexual violence leave	A leave for domestic or sexual violence leave would currently fall under s.50 (1) of the ESA – "personal emergency leave".	This new standalone leave will allow an employee, who has been employed by an employer for at least 13 consecutive weeks, to take a leave of absence if the employee or their child experiences sexual or domestic violence. The leave can be up to 10 days (taken individually), and up to 15 weeks (intermittently) to a maximum of 17 weeks total. The leave may be taken: to seek medical attention; to obtain services from a victim services organization; to obtain counselling; to relocate; or, to seek legal or law enforcement assistance. The first 5 days of the leave must be paid. **Effective Date: January 1, 2018.**	While domestic and sexual violence leave addresses a significant concern for survivors of violence, it does limit the employer's ability to gauge employee availability and monitor scheduling. The allowance of up to 15 weeks of leave can significantly impact the employer's ability to forecast and plan staffing. The five paid days will result in an employer's increased financial burden.
Pregnancy and parental leave	Currently, the length of pregnancy leave for employees who suffer miscarriage or stillbirth is 6 weeks' leave after the loss occurs.	Amendments will extend the leave for employees who suffer a stillbirth or miscarriage from 6 to 12 weeks. **Effective Date: January 1, 2018.**	The extension of pregnancy and parental leave does not change the rights and obligations imposed on employers currently in place

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Pregnancy and parental leave *continued*	Parental leave for employees who took a pregnancy leave is 35 weeks; employees who take parental leave and have not taken pregnancy leave may take a parental leave up to 37 weeks. An employee may commence parental leave no later than 52 weeks after the day the child is born or comes into the employee's care or custody for the first time.	The length of parental leave is extended from 35 to 61 weeks if the employee took a pregnancy leave and from 37 to 63 weeks for employees who did not. An employee may commence parental leave no later than 78 weeks (previously 52) after the day the child is born or comes into the employee's care or custody for the first time. **Effective Date: December 3, 2017.** Expansion of the definition of "legally qualified medical practitioner" to now include midwives, certain registered nurses, and other medical practitioners. **Effective Date: January 1, 2018.**	– such as, reinstating a returning employee, refraining from penalizing an employee on leave, continuing the employee's benefits, and maintaining the continuance of the employee accruing length of service and seniority. While these duties remain intact, the length of time that an employer must uphold these protections is greater.
Family medical leave	An employee is entitled to this leave for up to 8 weeks to provide care or support to a family member who has a serious medical condition with a significant risk of death occurring within a period of 26 weeks or shorter.	Increased leave from 8 to up to 28 weeks of leave. Expansion of the definition of "qualified health practitioner" to now include certain registered nurses or individuals with equivalent qualifications, and, in some circumstances a member of a prescribed class of health practitioners. **Effective Date: January 1, 2018.**	Employers will have a greater burden of managing workflows and schedules to ensure adequate coverage of employees on leave.
Critical illness leave	An employee may take up to 37 weeks of leave to provide care and support to their critically ill child.	In addition to current entitlements, this new leave also entitles an employee to take leave to provide care and support to any critically ill family member for up to 17 weeks. **Effective Date: December 3, 2017.**	Employers will have a greater burden of managing workflows and schedules to ensure adequate coverage of employees on leave.

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Child death leave	Current entitlement to leave applies only in the event of a crime-related child death for up to 104 weeks for an employee who has been employed by his or her employer for at least 6 consecutive months.	New leave now extends this entitlement (for up to 104 weeks of leave) if a child of the employee dies for any reason. **Effective Date: January 1, 2018.**	Employer obligations will remain the same.
Notice of contravention (of the ESA)	The regulations currently outline clear monetary penalties for employers who are in contravention of the ESA. No provision to publish information regarding the contravention.	Amendments provide that the penalties for employers in contravention of the Act shall be determined in accordance with the regulations, which permit the establishment of a penalty range that applies to individuals and corporations. Employment Standards Officers will have the discretion to determine penalties within the prescribed ranges. The Director of Employment Standards is now authorized to publish information related to a deemed contravention of the ESA following the issuance of a notice of contravention. **Effective Date: January 1, 2018.**	The regulation currently in place delineates the amount an employer must pay when in contravention of the ESA, and provides transparency as to how the penalty will be determined. The new penalty range established, coupled with Employment Standards Officers' discretion, may lead to uncertainty with regards to estimating fines. The Ministry will have the option of shaming employers by publishing information related to the contravention. While this may be mere embarrassment for some, the reputational harm could be damaging on the viability of an employer's business.
Collections	The ESA provides for the Ministry of Labour to demand payment from persons who are believed to owe money under the ESA. The Ministry also has the power to file an Order to Pay in court, which allows for enforcement of the Order in the court system including remedies such as: writs of seizure and sale, garnishments, and directions to enforce by sheriffs or bailiffs.	The Director of Employment Standards may now accept security for amount owing under the Act, issue warrants collecting money pursuant to an Order under the ESA, or registering a lien respecting money owed pursuant to an order under the ESA. **Effective Date: January 1, 2018.**	Employers in contravention of the ESA will now be subject to potential warrants and liens against their property pursuant to Orders. Employers will want to ensure they are in compliance with the Act and respond to Orders appropriately.

Amendment	Pre-Bill 148	Post-Bill 148	Resulting Impact
Footwear with elevated heel under the *Occupational Health and Safety Act* **("OHSA").**	No such provision.	A new section is added to the OHSA stating that an employer shall not require a worker to wear footwear with an elevated heel unless it is required for the worker to perform his or her work safely. An exception to this prohibition is made for employers or performers in the entertainment and advertising industry. **Effective Date: November 27, 2017.**	Employers in industries such as food and hospitality will no longer be permitted to require their employees to wear high heels on the job.

- In addition to amendments made to the ESA and OHSA, Bill 148 also amended various provisions of the *Labour Relations Act* ("LRA"). Please contact us for more information on LRA amendments. Also, please do not hesitate to contact any member of our employment law team in relation to any questions pertaining to these changes, or if you require assistance with implementation issues. Our employment law team can be contacted at (416) 847-1814.
- Written by Patrizia Piccolo, Partner and Employment Law Group Practice Lead, and Maria Luisa Vitti, Articling Student