mccarthy tetrault

Bill 148 IS NOW THE LAW, WHAT NEXT? A Timeline of Implementation

The *Fair Workplaces, Better Jobs Act, 2017* will require employers to make significant changes to their policies and practices. This paper describes the changes and the timeline when they apply.

Overview

On Wednesday, November 22, 2017, the Government of Ontario passed Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*. Introduced on June 1, 2017 as a response to the Final Report of the Changing Workplaces Review, Bill 148 makes significant amendments to Ontario's *Employment Standards Act, 2000* ("ESA"), *Labour Relations Act, 1995* ("LRA") and the *Occupational Health and Safety Act* ("OHSA").

Over the past two years, on our McCarthy Tétrault Ontario Employer Advisor Blog, we reported regularly on the progress of the Changing Workplaces Review. Announced in February 2015, the Changing Workplaces Review was part of the Government of Ontario's broader mandate to "modernize" employment and labour laws in an effort to strengthen protections for "vulnerable and precarious" workers and, as we were constantly reminded, support businesses in today's evolving economy. Specifically, the review sought input on changes to Ontario's ESA and LRA. The Government of Ontario expressly excluded a review of the Minimum Wage from the mandate of the Changing Workplaces Review, presumably because it had already been studied extensively through a Government review in 2014.

As many will recall, the Changing Workplaces Review was led by two special advisors, the Honourable John C. Murray, a former Ontario Superior Court Justice and management-side labour lawyer and C. Michael Mitchell, a former senior partner at a union-side labour law firm. As part of the review, the special advisors sought input from numerous stakeholders across the province by way of two extensive rounds of in person and written public consultation.

The Final Report of the Changing Workplaces Review was released on May 23, 2017. It was over 400 pages in length and contained 173 recommendations. The Changing Workplaces Review was given the specific mandate: to address the prevalence of vulnerable workers and precarious employment. Many of the 173 recommendations in Final Report were therefore a reflection of that agenda, including recommendations that could have potential to increase rates of unionization in sectors where unions have traditionally had low representation.

THE GOVERNMENT ADDED SEVERAL CHANGES TO THE BILL THAT WERE NOT […] IN THE FINAL REPORT

One week after the Final Report was released, the Government of Ontario presented its response by introducing Bill 148. The Government added several changes to the Bill that were either not among the recommendations in the Final Report or that substantially diverged from the Final Report. Most notably added was the highly publicized increase to the Minimum Wage, as well as the introduction of paid leaves and the return to card-based certification.

Bill 148 underwent public consultation throughout the summer of 2017. While the employer-community provided thoughtful and well-researched submissions, the Bill changed very little from First to Third Reading.

What follows is a summary of the final Bill that was passed yesterday.

In Force Immediately

Occupational Health and Safety Act

#1: No High-Heeled Shoes

Employers can no longer require workers to wear high-heeled shoes. Exceptions are made for workers in the "entertainment and advertising industry", which includes the production of a live or broadcast performance or visual, audio or audio-visual recordings of performances.

This change was a last-minute addition to Bill 148 and follows similar measures taken in British Columbia to ban mandatory high-heels in the workplace.

Employment Standards Act

#1: Explicit Ban on Mislabelling "independent contractors"

While this was always prohibited by law, there is now an explicit ban on treating employees as independent contractors for the purposes of the ESA. Employers will face a reverse onus in demonstrating that any independent contractors they engage are not in fact employees under the ESA.

[THE BAN ON HIGH-HEELED SHOES] WAS A LAST-MINUTE ADDITION […] AND FOLLOWS SIMILAR MEASURES TAKEN IN BRITISH COLUMBIA

December 3, 2017

Employment Standards Act

#1: Extended Parental Leave

In an effort to bring the ESA into line with the recent changes to the *Employment Insurance Act*, the length of parental leave will now increase by a total of 26 weeks. The entitlement to parental leave will increase from 35 weeks to 61 weeks for employees who take pregnancy leave, and from 37 weeks to 63 weeks for employees who did not. Employees are only entitled to this extended parental leave if the child is born or comes into their custody, care and control after December 3, 2017. As a result, employees currently on parental leave will not have the benefit of this extended leave

#2: Introducing the New Critical Illness Leave

Currently, employees who have been employed for at least six months are entitled to a 37 week "Critically Ill Child Care Leave" to provide care or support to a critically ill child. Employees eligible for this leave were entitled to Employment Insurance ("EI") benefits for Parents of Critically Ill Children.

"Critically Ill Child Care Leave" will be replaced with a new "Critical Illness Leave", which consists of the following:

- A leave of up to 37 weeks (in a 52 week period) to provide care for a critically ill child under the age of 18; and
- A leave of up to 17 weeks to provide care or support to a critically ill family member (over the age of 18).

This additional leave corresponds with the new EI entitlement to Family Caregiver Benefit for Adults. To be eligible for Critical Illness Leave, employees must be employed for at least six months. For the purposes of this leave, the definition of "family member" is quite broad and even includes people who consider the employee "to be like a family member".

January 1, 2018

Employment Standards Act

#1: $14 Minimum Wage

Minimum Wage in Ontario will rise to $14/hour on January 1, 2018. Below is a table demonstrating the expected increases to the Minimum Wage. Following January 1, 2019, the Minimum Wage will be subject to an annual inflation adjustment on October 1 of each year. In addition, the Ministry of Labour has committed to review the Minimum Wage and the process of adjusting it by October 1, 2024.

Affected Workers	Oct. 1, 2016 Wage Rate	Oct. 1, 2017 Wage Rate	Jan. 1, 2018 Wage Rate	Jan. 1, 2019 Wage Rate
General Minimum Wage	$11.40	$11.60	$14.00	$15.00
Students	$10.70	$10.90	$13.15	$14.10
Liquor Servers	$9.90	$10.10	$12.20	$13.05
Homeworkers	$12.55	$12.80	$15.40	$16.50

#2: Paid Personal Emergency Leave

Personal Emergency Leave will become available to all employees, not just employees of employers who regularly employ 50 or more employees. In addition, two days of Personal Emergency Leave will be paid, provided that the employee has been employed by the employer for more than one week. The paid days will have to be taken before any unpaid days of Personal Emergency Leave in a calendar year. Employers retain the right to require evidence of entitlement to these days but they will not be permitted to require a certificate from a qualified health practitioner.

TWO DAYS OF PERSONAL EMERGENCY LEAVE WILL BE PAID […AND EMPLOYERS…] WILL NOT BE PERMITTED TO REQUIRE A [MEDICAL] CERTIFICATE.

#3: Domestic or Sexual Violence Leave

An employee who has been employed by an employer for at least 13 consecutive weeks will be entitled to a leave of absence without pay if the employee or a child of the employee experiences domestic or sexual violence, or the threat of domestic or sexual violence. This leave of absence may be taken for one of the following purposes:

1. To seek medical attention in respect of a physical or psychological injury or disability caused by the domestic or sexual violence.
2. To obtain services from a victim services organization.
3. To obtain psychological or other professional counselling.
4. To relocate temporarily or permanently.
5. To seek legal or law enforcement assistance, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the domestic or sexual violence.

The leave is structured as a dual entitlement, such that an employee may take up to 10 days of leave as well 15 weeks of leave, recognizing that an employee may require a degree of flexibility to respond to the circumstances necessitating the leave. The first five days of this leave must be paid. In addition, Employers may make a reasonable request for evidence of the necessity of the leave, however, they must also establish mechanisms to protect the confidentiality of such information and only disclose it in limited circumstances.

#4: Extended Pregnancy Leave

Pregnancy leave for employees who suffer a still-birth or miscarriage will be extended from 6 weeks to 12 weeks after the pregnancy loss occurs. This only applies to leaves that commence after January 1, 2018. Employees will be able to satisfy their entitlement to this leave by providing a medical certificate from a physician, nurse practitioner or midwife.

#5: Family Medical Leave

The entitlement to Family Medical Leave, which allows employees to provide care or support to a family member with a serious medical condition, will be extended from an eight week leave in a 26 week period to a 28 week leave in a 52 week period. Entitlement to this leave may be certified by physicians, nurse practitioners or another prescribed class of health practitioners.

#6: Child Death Leave

The new Child Death Leave, which will provide employees with an entitlement to up to 104 weeks of unpaid leave if a child of an employee dies for any reason, expands upon the entitlement of the former Crime-Related Child Death Leave. Additionally, the entitlement to Crime-Related Child Disappearance Leave will increase from 52 weeks to up to 104 weeks.

#7: Vacation

Currently, ESA vacation is set at 2 weeks per year for all employees. Now, employees with five years of service, as of January 1, 2018, will be entitled to 3 weeks of vacation time and 6% vacation pay. In addition, employers will be required to retain records related to vacation for a period of five years (as opposed to three).

#8: Public Holiday Pay

A new formula for the calculation of public holiday pay will be introduced. The new calculation divides the wages earned in the pay period immediately preceding the public holiday by the number of days actually worked. The effect of this change is significant, particularly for those that are casual or irregular workers. For example, an employee that works three, eight-hour shifts in a preceding pay period will receive eight hours of public holiday pay. Under the previous formula, that employee would have received 4.8 hours' pay.

In addition, employers who provide a substitute holiday to an employee will be required to provide written confirmation of that substitution.

[THE] NEW FORMULA FOR THE CALCULATION OF PUBLIC HOLIDAY PAY WILL BE …SIGNIFICANT, PARTICULARLY FOR THOSE THAT ARE CASUAL OR IRREGULAR WORKERS.

#9: Expansion of the Employer-Employee Doctrine

The "intent or effect" requirement of the related employer test will be removed. As a result, many business models that are not currently considered "related" for the purposes of the ESA, such as franchising arrangements or parent-subsidiary relationships, may be subjected to increased scrutiny from the Ministry of Labour or complaints from employees they do not even employ.

#10: Other Changes

Several other changes will also come into force January 1, 2018, including:

- the requirement to provide pay in lieu of reasonable notice for temporary assignment employees whose assignment ends early;
- the removal of the exemption for crown employees; and
- an increase in penalties for non-compliance, coupled with expanded wage collection powers.

Labour Relations Act

#1: Union Access to Employee Information

To enhance access to collective bargaining and facilitate union organizing, when a union can demonstrate that it has not less than 20% support in a proposed bargaining unit, employers will now be required to provide the union with employee names and contact information (including personal email address and phone number) in the proposed bargaining unit. In addition, the Ontario Labour Relations Board ("OLRB"), may further require the employer to provide other information relating to employees including, job titles, business addresses and any other means of contact for the employee. These changes do not call for disclosure of employee home addresses.

#2: Remedial Certification

The new remedial certification provision removes the discretion from the OLRB to determine whether some form of remedial order other than automatic certification is an appropriate remedy if the employer has committed an unfair labour practice. As a result, the OLRB will be required to certify a union as the bargaining agent of employees if it has found that an employer has contravened the LRA.

#3: Structure of Bargaining Units

Following certification, but prior to the parties entering into a collective agreement, an employer or trade union will be permitted to unilaterally apply to the OLRB to review the structure of the bargaining unit and consolidate it with another certified bargaining unit represented by the same union. This will allow unions to establish bigger bargaining units, with more negotiating power, among employers who have multiple locations (such as those in the retail or food services industry).

Employers and unions will also be permitted to mutually agree to review and amend the structure of bargaining units at any time, including by consolidating existing units, amending bargaining unit descriptions, amending collective agreements and otherwise applying collective agreements to consolidated bargaining units.

#4: Card Based Certification

Card-based certification will replace the existing vote-based certification process in the building services industry, the home care and community services industry and the temporary help agency industry. Under this process, where the union can demonstrate it has support of 55% of employees in the proposed unit, the bargaining unit may be certified, without a vote. If the union has support of 40% the employees, but less than 55% a representation vote will be ordered.

#5: Just Cause Protection Following Certification

Despite the Final Report recommending against the introduction of a just cause standard for the period between the date of certification to the date of the first collective agreement, just cause protection will apply. Additionally, employers will not be able to discharge or discipline an employee in a bargaining unit without just cause during the period between the date a strike or lock-out became lawful and the date in which a new collective agreement is entered into.

#6: Successor Rights

Successor rights of unions will be extended to building services providers. What that means is that where a unionized company that provides cleaning services, food services or security loses a contract, the new company providing that work will be subject to the collective agreement of the displaced provider.

#7: Other

Several other changes will also come into force January 1, 2018, including the expanded use of first collective agreement arbitration and mediation as well as an increase in fines for violations of the LRA will increase for individuals from $2,000 to $5,000 ad from $25,000 to $100,000 for organizations.

April 1, 2018

Employment Standards Act

#1: Equal Pay for Equal Work

As of April 1, 2018, employers will be required to pay casual, part-time, temporary or seasonal employees at the same rate as full-time employees if those employees perform substantially the same (but not necessarily identical) kind of work, in the same establishment. This requirement will extend to temporary help agencies, such that workers of temporary help agencies must be paid at the same rate of pay as employees of the client company they are assigned to, provided they perform substantially the same (though not necessarily identical) kind of work.

Differences in pay between employees of different status (or temporary help agency workers) will only be permitted where the difference in pay is made on the basis of: seniority, merit, earnings by quantity or quality of production, or any other factor other than sex or employment status. It is important to note that “seniority” does not include the amount of hours an employee works, despite that being a common distinguishing factor in workplaces and collective agreements.

Employees and temporary help agency workers who believe they are not being paid equally, will be permitted to request a review of their rate of pay with their respective employer. Employers who receive such a request, and disagree with it, will be required to provide a written response setting out the reasons for the disagreement. Further, employers will be expressly prohibited from committing reprisals against employees (or temporary help agency workers) who make such a request and must permit or discuss or disclose their rate of pay to other employees.

It is important to note that collective agreements which permit differences in pay that conflict with the requirement of equal pay for equal work will prevail until January 1, 2020 or the expiry of the agreement, whichever is earlier. This means that employers may be required to renegotiate the pay provisions during the currency of their collective agreement, or have them overridden by the ESA’s new rules.

The Ministry of Labour intends to review the equal pay for equal work provisions prior to April 1, 2021.

January 1, 2019

Employment Standards Act

#1: $15 Minimum Wage

As mentioned above, the general Minimum Wage rate will increase to $15/hour on January 1, 2019.

#2: Right to Request Scheduling Changes

Employees with three months' service will be permitted to submit a written request to their employer for a change in work schedule or work location. Once an employer receives the request they must:

(i) Discuss the request with the employee; and

(ii) Notify the employee of their decision within a reasonable time.

If the employer grants the request, they must specify the date the change takes place and the duration. If the employer denies the request, they must provide reasons for the denial.

#3: Scheduling: *Three Hour Rule*

Previously, the ESA did not contain any provisions regulating the scheduling of work by employers. The only requirement was the so-called "three-hour rule". Under that rule, an employee who regularly works more than three hours per day and is required to report to work but works less than three hours, that employee must be paid either the higher of three hours at minimum wage or the employee's regular wage for the time worked.

PREVIOUSLY, THE ESA DID NOT CONTAIN ANY PROVISIONS REGULATING THE SCHEDULING OF WORK BY EMPLOYERS.

The "three-hour rule" will change and the effect will be to entitle employees to more pay guarantees. Under the new rule, an employee who regularly works three hours a day and is required to present himself for work, but works less than three hours, despite being available to work longer, will be paid for three hours of work, equal to the greater of:

(i) Three hours of pay at the employee's regular rate; or

(ii) The sum of:

a. The pay for the time worked; and

b. Wages equal to the employee's regular rate for the remainder of the three hours.

Under this calculation, employees who receive overtime pay (or some form of premium) for the time worked, will be entitled to that premium. This is best illustrated through an example:

> An employee's regular rate of pay is $20/hour. If an employee works two hours of overtime, and is then sent home, that employee would be entitled to:
>
> (2 hours x $30) + (1 hour x $20) = $80
>
> This $80 is equivalent to four hours at the employee's regular rate.

#4: Scheduling: *On Call Pay*

If an employee is "on call", available to work, and not called in to work (or is called in for work for fewer than three hours), the employer will be required to pay the employee for three hours of work, equal to the greater of:

(i) Three hours of pay at the employee's regular rate; or

(ii) The sum of:

a. The pay for the time worked; and

b. Wages equal to the employee's regular rate for the remainder of the three hours.

Employers will only be required to pay an employee a minimum of three hours in a twenty-four hour period beginning at the start of the first time during that period that the employee is on the call. In addition, the requirement to provide "on call pay" will not apply to employees on call for the purposes of ensuring the continued delivery of essential public services.

Where a collective agreement is in effect on January 1, 2019, the scheduling provisions of the collective agreement will prevail until January 1, 2020 or the expiry of the agreement, whichever is earlier.

#5: Scheduling: *Right to Refuse Shifts*

An employee will be entitled to refuse a request to work or be "on call" without repercussion where the request is made fewer than 96 hours before the shift commences. Employers are exempt from this provision if the employer's request is to deal with an emergency, to remedy or reduce a threat to public safety, ensure delivery of essential public services or for other reasons prescribed by regulation.

Under this exception, "emergency" is defined to include:

(i) a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise, or

(ii) a situation in which a search and rescue operation takes place.

The exception for employers with collective agreements in place will also apply, such that the collective agreement will prevail until the earlier of expiry and January 1, 2020.

#6: Scheduling: *Cancellation of Shifts within 48 hours*

Under this change, if an employee's scheduled day of work (or on call period) is cancelled within 48 hours of its intended start, the employee is entitled to three hours of pay at his or her regular rate. It is important to note that this change only applies to cancellations and not if schedules are shortened or extended.

This requirement will not apply to cancellations beyond the employer's control, such as weather, fire, power failure or other reasons prescribed by regulation. Similar to above, the collective agreement exemption will apply.

#7: Removal of the Work Hardening Exemption

The ESA currently exempts individuals who perform work in a simulated job or working environment for the purposes of returning the employee to productive work after an injury, illness or disability (also known as "work hardening"). The removal of this exemption will effectively limit the use of those programs and make accommodation efforts more difficult.

About McCarthy Tétrault

McCarthy Tétrault LLP provides a broad range of legal services, advising on large and complex assignments for Canadian and international interests. The firm has substantial presence in Canada's major commercial centres and in London, UK.

Built on an integrated approach to the practice of law and delivery of innovative client services, the firm brings its legal talent, industry insight and practice experience to help clients achieve the results that are important to them.

Our Labour & Employment Practice

Lawyers in our Labour & Employment Group bring a reputation for strategic, practical and expert advice in advising clients across Canada in both the public and private sectors, and with both unionized and non-unionized workplaces. Our expertise includes crafting effective solutions to labour issues essential to the success of corporate mergers, acquisitions, insolvencies and reorganizations. Central to the effectiveness of our practice is our ability and experience advising on the full range of labour and employment matters, including labour relations, labour board hearings, grievance arbitration, collective bargaining, recruitment and hiring, dismissals, employment contracts and policies, occupational health and safety, workplace safety and insurance, immigration, human rights, accessibility, privacy, and legislative compliance. Our Labour & Employment lawyers regularly appear before courts, arbitrators and tribunals and, where necessary, provide advice on labour dispute preparation and act as counsel on applications for injunctive relief and judicial review.

For more information, please contact:

Tim Lawson
Partner, National Practice Group Leader, Labour and Employment
tlawson@mccarthy.ca
416-601-8172
Full Profile ≫

Matthew Demeo
Associate, Labour and Employment
mdemeo@mccarthy.ca
416-601-8120
Full Profile ≫