

In a Flash



November 22, 2017

Ontario Completes Overhaul of Workplace Laws (Bill 148)

Ontario's *Fair Workplaces, Better Jobs Act, 2017*, known colloquially as Bill 148, passed the Third Reading today and has been presented to the Lieutenant Governor for Royal Assent. The Bill is expected receive Royal Assent and become a law in the coming days.

One of the centrepieces and more controversial aspects of Bill 148 is the proposed increase in minimum wage from the current rate of \$11.60/hour to \$14.00/hr in January 2018, and eventually to \$15.00/hour by January 2019.

Bill 148 also contains a number of other extensive amendments to the *Employment Standards Act, 2000* ("ESA"), the *Labour Relations Act, 1995* ("LRA"), and the *Occupational Health and Safety Act* ("OHSA").

In the chart below, we outline some of the most noteworthy amendments to the ESA, LRA, and OHSA. These amendments will become effective as early as the date the Bill receives Royal Assent.

In the right-hand column of the charts below, we have included our analysis of how the forthcoming amendments to Ontario's workplace laws will affect both employers and employees.

If you have any questions regarding the impact of any upcoming changes to Ontario's workplace laws, or steps you can take to reduce their impact, please do not hesitate to contact a Mathews Dinsdale lawyer.

AMENDMENTS TO THE *EMPLOYMENT STANDARDS ACT, 2000* (ESA)

Requirement	Change	Comment
Overtime	<p>Previous: Employees who have more than one rate of pay receive overtime pay at a blended rate.</p> <p>Amendment: Calculation of overtime is now based on the actual rate being earned at the time the employee works hours in excess of the applicable overtime threshold.</p>	Calculating overtime entitlements for employees with multiple wage rates will require more diligent record-keeping, both in terms of hours worked as well as duties being performed at any given time.

<p>Minimum Wage</p>	<p>Previous: As of October 1, 2017, the general minimum wage in Ontario was set at \$11.60.</p> <p>Amendment: The general minimum wage will increase as follows:</p> <ul style="list-style-type: none"> • \$14.00 – January 1, 2018 • \$15.00 – January 1, 2019 <p>Minimum wage for students (under 18):</p> <ul style="list-style-type: none"> • \$13.15 – January 1, 2018 • \$14.00 – January 1, 2019 <p>Minimum wage for liquor servers:</p> <ul style="list-style-type: none"> • \$12.20 – January 1, 2018 • \$13.05 – January 1, 2019 <p>Similar changes will also take effect for hunting and fishing guides as well as homeworkers.</p> <p>After this minimum wage increase is phased-in, future increases will occur automatically based on changes to the Consumer Price Index.</p>	<p>These increases to minimum wage are significant, and are slated to take effect beginning in the New Year.</p> <p>Consideration will also need to be given to if and how the wage rates of other employees will also be affected, so that relatively wage rates remain consistent.</p>
<p>Classification of Workers as Independent Contractors</p>	<p>Previous: Workers classified as independent contractors were excluded from the protections of the <i>ESA</i>.</p> <p>Amendment: Employers are now prohibited from treating an employee as if they were not an employee, and bear the onus of establishing that a worker is not an employee.</p>	<p>By creating a reverse onus on employers, there is significantly more risk to employers who wish to treat workers as independent contractors.</p>
<p>Related Employers</p>	<p>Previous: Any party alleging that two or more businesses were a single employer was required to establish that the intent or effect of the arrangement was to defeat the purpose of the <i>ESA</i>.</p> <p>Amendment: Remove the requirement to show that the intent or effect of any arrangement was to defeat the <i>ESA</i>.</p>	<p>Removing this requirement makes it significantly less onerous to establish that two related businesses are a single employer.</p>

Record Keeping	<p>Previous: Employers are required to keep certain information for three (3) years after the employee ceases to be employed, including: name, address, start date, hours worked (daily and weekly) and certain other information.</p> <p>Amendment: Records must now be kept for five (5) years, and must now also include: duties and times of work, on-call schedules, changes made to scheduling (including cancelled shifts), dates and hours worked, dates and times that employee with more than one wage rate worked in excess of the overtime threshold at each rate of pay, substitute holidays, documents for all leaves, vacation pay and time.</p>	Employers are now faced with more onerous record-keeping obligations, significantly impacting informal working arrangements and schedule changes.
Shift Changes	<p>Previous: No requirement under <i>ESA</i> for employers to consider individual employee requests for changes to schedules or work locations.</p> <p>Amendment: Employees are now entitled to request changes to their shift schedules or working location. All requests must be discussed with the employee and either granted, or reasons must be provided for the denial.</p>	Employers are not required by the <i>ESA</i> to grant employees their requested or preferred shifts or shift locations, but must be more transparent about any request that is denied.
Public Holidays	<p>Previous: Employees working a statutory holiday are entitled either to a substitute day off or public holiday with additional premium pay.</p> <p>Amendment: Where an employee is given a substitute day off, the employer must provide a written statement to the employee setting out:</p> <ul style="list-style-type: none"> • the public holiday on which the employee will work; • the date of the day that is substituted for the public holiday; and • the date on which the statement is being provided to the employee. 	These more onerous record-keeping requirements will increase employer accountability to ensure that employees who are asked to work a public holiday actually receive the required substitute day.
Vacations	<p>Previous: All employees in Ontario were entitled to 2 weeks of paid vacation or 2 weeks of unpaid time off along with 4% vacation pay.</p> <p>Amendment: Paid vacation entitlements will now increase to 3 weeks and 6% after 5 years of service.</p>	In addition to increasing operating costs, employers will be required to revisit existing employment contracts and policies to ensure that employees with more than 5 years of service are receiving these increased entitlements.

<p>Scheduling</p>	<p>Previous: No requirement to provide advanced notice of shift changes, and any employee who is sent home after working less than their full shift is entitled to the greater of wages earned or 3 hours of minimum wage.</p> <p>Also no requirement to pay on-call employees whose shifts are cancelled, and no employee right to refuse a short notice request for the employee to work or be on call.</p> <p>Amendments:</p> <ul style="list-style-type: none"> • The 3-hour rule for cancelled shifts now requires 3 hours of pay at the employee’s regular rate of pay; • On-call employees who are not called in or are called in for less than 3 hours are also entitled to be paid 3 hours at their regular rate of pay; • Employees now have the right to refuse requests to work or be on call if made on less than 96 hours’ notice; and • Employees are entitled to 3 hours of wages where a shift is cancelled on less than 48 hours’ notice, unless the cancellation is due to factors beyond the employer’s control. 	<p>These amendments create significant financial disincentives to employers who wish to change or modify shifts on short notice, or want to make a “game time decision” about their staffing needs on any particular shift.</p>
<p>Equal Pay for Equal Work</p>	<p>Previous: Prohibition on providing different rates of pay based on an employee’s gender where the employee is performing substantially the same kind of work as other employees in the same establishment.</p> <p>Amendment: All employees, regardless of employment status (such as full time, casual, temporary and seasonal) are now entitled to the same rate of pay as regular employees when they are performing the substantially the same kind of work in the same establishment.</p> <p>Employees who believe they are being improperly paid at a lesser rate can request a review by their employer who must either adjust the employee’s rate or provide written reasons for why the request is being denied.</p> <p>Different rates of pay are still acceptable where an employee’s rate of pay is based on a seniority system, merit system, productivity system, or any other factor other than sex or employment status.</p>	<p>These amendments, particularly when considered in light of the amendments related to shift scheduling and cancellation, significantly impact the financial benefit of engaging a temporary, casual or part time work force on the basis that they are paid at a lesser rate than permanent workers performing the same functions.</p>

<p>Personal Emergency Leave</p>	<p>Previous: Most employees are entitled to 10 days of unpaid personal emergency leave per year, provided the employer employs at least 50 employees.</p> <p>Amendments:</p> <ul style="list-style-type: none"> • Elimination of 50-employee threshold as precondition to entitlement; • A minimum of 2 days of personal emergency leave must be <u>paid</u> as long as the employee has at least 1 week of service; and • Employers retain the right to require evidence to substantiate the reasons for the personal leave, but will be <u>prohibited</u> from requiring a medical certificate from a health practitioner. 	<p>Nearly all employees, regardless of the size of their employer, will now be entitled to 10 days of personal emergency leave, with the first 2 days being provided as paid leave.</p> <p>Employers will require more diligent monitoring and tracking of personal emergency leave days being taken in order to ensure that payment is being made, but also to minimize abuse by employees.</p> <p>It will also be necessary to balance the prohibition against requiring medical notes against the human rights duty to accommodate to the point of undue hardship.</p>
<p>Pregnancy Leave</p>	<p>Previous: Pregnancy leave for employees who suffer a miscarriage or stillbirth previously set at 6 weeks after loss occurs.</p> <p>Amendment: Increased to 12 weeks after loss.</p>	<p>The expansion of the existing leaves, and introduction of the new domestic or sexual violence leave, do not change the general obligations on employers to provide the requisite leaves (with or without pay, as appropriate), to reinstate employees following the end of any protected leave, and to refrain from penalizing the employee from taking a leave</p>
<p>Parental Leave</p>	<p>Previous: Parental leave previously set at 35 weeks for employees who took pregnancy leave, and 37 weeks for employees who did not, beginning no later than 52 weeks after the child is born or comes into the employee's custody.</p> <p>Amendment: Increased from 35 to 61 weeks and 37 to 63 weeks, respectively, and beginning no later than 78 weeks after the child is born or comes into the employee's custody.</p>	
<p>Family Medical Leave</p>	<p>Previous: Entitlement set at 8 weeks.</p> <p>Amendment: Increased to 28 weeks.</p>	

Critical Illness Leave	<p>Previous: Entitlement set at 37 weeks to provide care to critically ill child of the employee.</p> <p>Amendment: Expand leave to apply to all critically ill family members, not limited to providing care for minor child. Entitlement set at 37 weeks to provide care to critically ill child of the employee, and 17 weeks to provide care for critically ill adult related to the employee.</p>	
Crime-Related Death or Disappearance	<p>Previous: Entitlement set at 104 weeks where child of the employee dies and it is probable that the child died as a result of a crime.</p> <p>Amendment: Expand leave to include any death of a child of the employee.</p>	
Domestic or Sexual Violence Leave	<p>Previous: N/A</p> <p>Amendment: New leave provides for entitlement to up to 15 weeks of leave if the employee, or employee's child, experiences domestic or sexual violence (including threats) and the leave is needed to seek medical attention, obtain services from a victim services organization, obtain psychological or other professional counselling, relocate, or seek legal assistance.</p> <p>The first five days of domestic or sexual violence leave are required to be <u>paid</u>.</p>	
Temporary Help Agencies	<p>Previous: No requirement for temporary help agencies to provide notice of termination to workers on long-term assignment.</p> <p>Amendment: New requirement for temporary help agencies to provide assignment employees with 1 week's written notice or pay in lieu if an assignment estimated to last 3 months or more is terminated before its estimated term.</p>	When combined with the equal pay for equal work provisions, these new notice requirements will impose additional restrictions and flexibility on the use of workers engaged through temporary help agencies.

AMENDMENTS TO THE *LABOUR RELATIONS ACT, 1995* (“LRA”)

Requirement	Change	Comment
Employee Lists	<p>Previous: Employers not obliged to provide trade unions with a list of employees in the proposed bargaining unit during organizing campaigns.</p> <p>Amendment: Section 6.1 will be added to the Act. Under this new section, if it could be shown that a trade union has obtained membership evidence of 20 per cent of employees in the bargaining unit, it may apply for the Ontario Labour Relations Board (“Board”) for an order directing an employer to provide the trade union with a list of employees of the employer.</p> <p>Section 6.1 sets out the process for applying, obtaining and using such a list and establishes the rules to be followed by the Board in determining whether to make an order.</p>	<p>Having a list and contact information of the employees in the proposed bargaining unit will assist trade unions with their organizing efforts.</p>
Remedial Certification	<p>Previous: Section 11 of the Act provided that the Board “may” certify the trade union where employer misconduct during organizing campaigns has made the true wishes of employees unascertainable.</p> <p>Amendment: Section 11 of the Act will be amended to change the rules that govern when the Board will certify a trade union where there has been a contravention of the Act during the certification process, making it mandatory for the Board to issue a remedial certification where the employer engages in unfair labour practices during an organizing campaign, thereby making the true wishes of the employees unascertainable or preventing a trade union from demonstrating 40 per cent membership support for certification.</p>	<p>Finding of employer misconduct during organizing campaign will result in automatic certification of a trade union.</p>

<p>Modification or Consolidation of Bargaining Units</p>	<p>Previous: The Board had no authority to modify or consolidate bargaining units.</p> <p>Amendment: Section 15.1 will be added to the Act. Under that section, in certain circumstances, the Board may review the structure of bargaining units and make orders in respect of the structure of bargaining units. In particular, section 15.1 will give the Board powers to modify the size and structure of bargaining units, after certification but before the first collective agreement. The Board will also have the power to consolidate units, amend any bargaining unit description, require an existing collective agreement to apply to the new unit, amend the terms of an existing collective agreement or declare that the employer is no longer bound to an existing collective agreement.</p>	<p>It remains to be seen whether the Board will use this new power to streamline the certification process.</p>
<p>Card-Based Certification</p>	<p>Previous: Card-based certification only available in the construction industry, with a secret ballot based system in use for all other industries.</p> <p>Amendment: Section 15.3 will be added to the Act, which will provide for a card-based certification of trade unions as the bargaining agents of employees of employers in the building service, the home care service, and the temporary help agency industries. The card-based certification in these sectors would be similar to the current card-based certification in the construction industry. In all other sectors, the current secret ballot based system will remain in place.</p>	<p>The new card-based certification system for these three industries will make organizing campaigns substantially less cumbersome for trade unions operating in those industries.</p>
<p>Voting Procedure</p>	<p>Previous: Board not able to order that representation votes take place outside the workplace.</p> <p>Amendment: Section 111(2) of the Act will be amended to allow the Board to order the votes to take place outside the workplace or to conduct votes electronically or by telephone. The Board will also be able to give directions about voting process and arrangements.</p>	<p>The availability of new voting procedures will make voting more accessible to employees.</p>

<p>First Contract Mediation and Mediation-Arbitration</p>	<p>Previous: First agreement arbitration available only in limited circumstances where parties are unable to come to an agreement for a first collective agreement following certification.</p> <p>Amendment: Sections 43 of the Act will be amended and section 43.1 will be added, resulting in increased availability of first agreement mediation, as well as mediation-arbitration where first collective agreement mediation does not result in the parties entering into an agreement.</p> <p>A first collective agreement reached by mediation-arbitration will be effective for a period of two years from the date on which it is settled.</p>	<p>Both unions and employer are now required to use the intensive mediation process before seeking binding first-contract arbitration.</p>
<p>Successor Rights</p>	<p>Previous: Section 69 of the Act did not treat the re-tendering of services contracts as a sale of business transaction.</p> <p>Amendment: Sections 69.1 and 69.2 will be added to the Act, which will set out rules governing how section 69 (successor rights) apply in respect to building services contracts. In particular, subsection 69.1(3) of the Act will provide that for the purpose of section 69, the sale of business is deemed to have occurred if employees perform services at premises that are their principal place of work, their employer ceases, in whole or in part, to provide the services at those premises, and then substantially similar services are subsequently provided at the premises under the direction of another employer. In other words, re-tendering of services contracts will be deemed as a sale of business.</p>	<p>There will be a significant cost implications for the end users of building services, as there will be no incentive to re-tender services contracts to non-unionized service providers.</p>
<p>Reinstatement and Just Cause Protection</p>	<p>Previous: Time limit of 6 months for a striking worker to make a request to return to work after the commencement of the strike or lock-out.</p> <p>Amendment: New provisions will remove the 6 month time limit to return to work. They will also provide that employees have a right to bump others who may have worked during the strike, on the basis of the recall provisions contained in the collective agreement, or, if there are no such recall provisions, on the basis of length of service.</p> <p>Further, section 80.1 will be added to the Act. This section states that an employer may not discharge or discipline an employee in an affected bargaining unit without just cause during certain bargaining periods.</p>	<p>The right to return to work, and right not to be disciplined without just cause during certain bargaining periods will be enforceable through grievance arbitration.</p>

Interim Orders	<p>Previous: Board had the power to make interim procedural orders.</p> <p>Amendment: Section 98 of the Act, which governs the powers of the Board to make interim orders, will be amended to give the Board the general power to make both procedural and substantive interim orders. Further, the Board will not be required to issue any reasons for its interim decisions.</p>	The Board will be able to exercise the powers exercised by many other administrative tribunals under the <i>Statutory Powers Procedure Act</i> .
Prosecutorial Powers of OLRB	<p>Previous: Maximum penalties for contraventions of the Act or of orders made under the Act were \$2,000 (individual) and \$25,000 (organization).</p> <p>Amendment: Section 104(1) of the Act will be amended to increase the maximum penalties to \$5,000 and \$100,000 respectively.</p>	Both unions and employers are facing increased monetary penalties for contraventions of the Act.

AMENDMENTS TO THE OCCUPATIONAL HEALTH AND SAFETY ACT, 1990 (“OHSA”)

Requirement	Change	Comment
Footwear	<p>Previous: Duties of employers under the OHSA did not address duties with respect to footwear.</p> <p>Amendment: Section 25.1 added to the OHSA, which will prohibit employers from requiring a worker to wear footwear with an elevated heel unless it is required for the worker to perform his or her work safely.</p>	Employers, including employers in the hospitality industry, will no longer be able to require employees to wear high heels as part of a dress code.

If you have any questions regarding the impact of any upcoming changes to Ontario’s workplace laws, or steps you can take to reduce their impact, please do not hesitate to contact a [Mathews Dinsdale lawyer](#).

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