

Ontario businesses need to prepare for major changes to employment and labour legislation

NOVEMBER 29, 2017 12 MIN READ

Related Expertise

- [Employment and Labour](#)

Authors: [Melanie Simon](#), Jason Hanson

In this Update

- Businesses in Ontario need to plan now to address the budgeting, scheduling and operational impact of significant changes to the *Employment Standards Act, 2000* (the ESA) and the *Labour Relations Act, 1995* (the LRA)
- [Bill 148](#) [PDF], which amends the ESA and the LRA, received Royal Assent on Monday, November 27
- Although different changes in Bill 148 have different effective dates, many will be effective on January 1, 2018
- Bill 148 also adds a new rule regarding high-heeled footwear to the *Occupational Health and Safety Act* (the OHSA)

In this Update, we highlight some of the more important changes set forward in Bill 148. The Bill contains many provisions dealing with various details, such as exemptions, qualifications and even methods of calculating wages, which, in the interest of brevity, we do not address. For more information, please feel free to contact any of the authors or another member of Osler's [Employment and Labour Group](#).

Date	Change highlight
Now	Independent contractor/employee distinction: Reverse onus and criminalization
	OHSA change: no mandatory high heels (except entertainment industry)
December 3, 2017	Extensions to the unpaid parental and critical illness leaves of absence
January 1, 2018	Increased minimum wage, increased vacation for employees with more than five years of service, and new and extended leaves of absence
	LRA changes
April 1, 2018	Equal pay for equal work provisions: Casual, part-time, temporary and seasonal employees; temporary help agency employees
January 1, 2019	New scheduling rules

Changes to the ESA

Independent contractor/employee distinction: Reverse onus and

criminalization

Effective: November 27, 2017

New rules dealing with the distinction between independent contractors and employees are effective now that Bill 148 has received Royal Assent. The Bill does not clarify the distinction but it does provide that:

- if there is a question about whether someone is an employee or independent contractor, a 'reverse onus' is triggered, meaning that the burden is on the employer to prove that the person is an independent contractor (and therefore excluded from ESA coverage) and not an employee.
- if a person is misclassified, meaning that the employer treats a person as an independent contractor but he or she is really an employee, the Ministry of Labour may commence a prosecution against the employer (the reverse onus provision does not to apply in a prosecution).

Action: Employers should therefore examine their relationship with individuals they presently do not treat as employees, such as independent contractors, and consider whether such individuals are properly classified as such for the purpose of ESA compliance.

Extensions to the unpaid parental and critical illness leaves of absence

Effective: December 3, 2017

- **Parental leave:** The length of parental leave is extended from 35 weeks to 61 weeks for employees who have taken a pregnancy leave, and from 37 weeks to 63 weeks for employees who have not. The extension brings the leave provisions in line with recent changes to the *Employment Insurance Act*, which will allow employees to spread their parental benefits over a longer period of time.
- **Critical Illness Leave:** This leave replaces the former "Critically Ill Child Care Leave" and is available to employees with at least six months' service. The leave provides for the following:
 - an unpaid leave of up to 37 weeks to care for a critically ill minor child (i.e. who is under 18 years of age and a family member)
 - an unpaid leave of up to 17 weeks to care for a critically ill adult who is a family member. "Family members" is broadly defined.

Action: Leave policies should be reviewed and updated according to the new law. In particular, employers with a policy of topping-up EI parental benefits to 100% of the employee's regular salary must consider how this will work now that employees can extend their parental leave over a longer period (and receive less EI each week from the government).

Increased minimum wage, increased vacation for employees with more than five years of service, and new and extended leaves of absence

Effective: January 1, 2018

- **Minimum wage:** The minimum wage will increase according to the following schedule:
 - January 1, 2018: \$14 per hour for most employees

- January 1, 2019: \$15 per hour **for most employees**
- Annually, thereafter: adjusted for inflation

The special minimum wages applicable to students employed part-time or during school holidays, employees who regularly serve alcohol, homeworkers, and hunting and fishing guides are also to be increased on the same timeline.

- **Vacation:** Currently, the ESA mandates two weeks' paid vacation for all employees. Bill 148 provides that employers must provide at least three weeks' paid vacation to employees with at least five years' service.
- **Leaves of absence:**
 - **Personal emergency leave:** All employers will be required to provide the personal emergency leave (PEL) effective January 1, 2018 (currently this leave is only required at workplaces with 50 or more employees). Further, Bill 148 requires that employers pay regular wages for the first two days of the leave. Additionally, the amendments prohibit employers from requiring a doctor's sick note from an employee taking PEL (although they may require other evidence reasonable in the circumstances).
 - **Family medical leave:** Family medical leave is extended from eight weeks to 28 weeks if a "qualified health practitioner" issues a certificate stating that a family member has a serious medical condition with a significant risk of death occurring in 26 weeks or less. The definition of a "qualified health practitioner" is expanded to include a broader range of health practitioners.
 - **Domestic or sexual violence leave:** Bill 148 creates a new leave for employees who have been employed for at least 13 consecutive weeks and if they or their child experience domestic or sexual violence, or the threat of domestic or sexual violence, and the leave is taken for prescribed purposes (which relate to seeking medical attention, victim services, counselling, and legal assistance). In each calendar year, an employee may take up to 10 days of leave and may take up to 15 weeks of leave as well. The first five days of leave in each calendar year under this entitlement are paid. The two-leave approach likely reflects the legislature's belief that in the circumstances of this type of leave, two separate leaves may be required.
 - **Child death leave:** Bill 148 replaces the former "Crime Related Child Death or Disappearance Leave" with two distinct leaves: "Child Death Leave" and "Crime-Related Child Disappearance Leave." Each provides an employee with at least six months' service with unpaid leave of up to 104 weeks.
 - **Pregnancy leave:** Prior to Bill 148, where an employee is not entitled to parental leave, their pregnancy leave would end on the later of (a) 17 weeks after it began, and (b) six weeks after the birth, still-birth or miscarriage. Bill 148 increases the six-week period to 12 weeks.

Action: Employers should budget for increased costs with respect to minimum wage, vacation, and leaves of absence. Employers should revise policies and procedures to address these changes.

Equal pay for equal work provisions: Casual, part-time, temporary and seasonal employees; temporary help agency employees

Effective: April 1, 2018

Bill 148 requires employers to pay:

i. casual, part-time, temporary and seasonal employees at a rate of pay that is not less than the rate of pay for full-time employees, and

ii. temporary help agency employees at a rate of pay that is not less than the rate of pay for permanent employees of the agency's client,

if (a) the employees are performing substantially the same kind of work in the same establishment; (b) the work requires substantially the same skill, effort and responsibility; and (c) the work is performed under similar working conditions. Exceptions to these equal pay rules will exist where the difference in pay is based on factors other than sex or employment status, or based on the provisions of a collective agreement in force on April 1, 2018. Examples of permitted factors likely include a merit system or seniority.

An employee may request a review of his or her rate of pay, and the employer must either adjust the employee's pay accordingly or provide written reasons for not doing so. Employers are prohibited from reducing an employee's rate of pay in order to comply with the Equal Pay for Equal Work provisions.

Action: Employers should consider their employees' respective rates of pay and ensure that the basis for any differences do not contravene the amended ESA; they should also consult with any temporary help agencies for the same reason. Employers should train supervisors that any request for a review of a rate of pay needs to be immediately reported to a designated person who will handle the response, which is a legally sensitive document.

New scheduling rules represent major changes in how businesses operate and therefore businesses have over a year to prepare

Effective: January 1, 2019

- **Reporting pay — Three-hour minimum pay:** Employees who regularly work more than three hours per day, but upon reporting to work are given less than three hours, must be paid three hours pay. This rule does not apply if circumstances beyond the employer's control result in the stopping of work.
- **On-call pay — Three-hour minimum pay:** Employees who are "on-call" and not called into work, or who are called into work but work less than three hours, must be paid three hours pay. Only one three-hour minimum applies to all on-call scenarios which may occur during a 24-hour period. On-call pay is not required if the on-call is for purposes of ensuring the continued delivery of essential public services and the employee was not required to work.
- **Shift cancellation — Three-hour minimum pay:** If an employer cancels a shift within 48 hours of its start, employees must be paid three hours pay (with an exception for cancellations due to circumstances beyond the employer's control and other prescribed reasons).

- **Request for changes to schedule or work location:** Employees with at least three months' service have the right to request a change to their work schedule or location of work. The employer is required to discuss the change with the employee, provide a response within a reasonable time, and provide reasons if the request is denied.
- **Right to refuse:** Employees can refuse to accept shifts if their employer asks them to work with less than 96 hours' notice (with an exception for employees ensuring the continued delivery of essential public services, to deal with an emergency, to remedy or reduce a threat to public safety, or for such other reasons as prescribed).

Action: Employers should turn their minds to the day-to-day operation of their business, including the scheduling of employees, so as to be prepared for the pending financial cost of planned, but not necessarily performed, labour.

Bill 148 also amends the ESA with respect to a wide variety of other matters, including penalties for non-compliance, expanded no reprisal provisions, transitional provisions, calculation of pay for time not worked, enforcement mechanisms, exemptions and students. In connection with these legislative changes, the province has announced that it plans to hire up to 175 more employment standards officers, signalling that the Ontario Ministry of Labour will be placing a renewed emphasis on ESA compliance.

Changes to the LRA

Bill 148 will also have a significant impact on Ontario's labour law regime through amendments to the LRA. Collectively, most of these changes are designed to make it easier for unions to obtain collective bargaining certificates in the private sector. Although these changes were originally scheduled to come into force six months after Bill 148 received Royal Assent, they will now come into force on January 1, 2018. Significant changes to the LRA include:

- **Employee lists:** Trade unions will now be able to apply to the Labour Board for a list of employees and their contact information in non-unionized workplaces prior to applying for certification. The Labour Board will grant this application if at least 20% of the employees in the proposed bargaining unit appear to be members of the trade union.
- **Mandatory remedial certification:** The Labour Board will now be required to certify a trade union where the employer contravenes the LRA and as a result the trade union was not able to demonstrate the 40% support needed for a representation vote or the representation vote was unsuccessful. Under the current rules, the Board can only order certification without a vote if it is satisfied that no other remedy, such as a new secret ballot vote under terms imposed by the Board, would be sufficient to counter the effects of the contravention.
- **First agreement mediation:** Parties to collective bargaining who are unable to reach a first collective agreement will now be able to apply to the Minister to appoint a first collective agreement mediator. The union and employer will not be permitted to call a strike or lock-out during the 45 days following the mediator's appointment. If the mediator is not able to achieve an agreement within 45 days, either the employer or the union could then apply to the Labour Board to appoint a mediator-arbitrator to effect the settlement of the first collective agreement.

- **Card-based certification:** Trade unions seeking to certify employees in the building services industry, the home care and community services industry, and the temporary help agency industry will now have the option to apply for certification without a vote. Under this alternate procedure, the Labour Board may certify a bargaining unit where it is satisfied that more than 55% of the employees in the bargaining unit are members of the trade union.
- **Electronic and telephone voting:** The Labour Board will now have the express power to conduct a vote outside the workplace, including electronically or by telephone.
- **Successor rights:** Bill 148 also impacts the contract tendering process in the building services sector (such as building security, food and cleaning services). Successor rights will now extend to building services, meaning that any applicable collective agreements will carry over when a new building services provider is engaged to provide substantially similar services to the building.
- **Consolidating and restructuring bargaining units:** Historically, after the Ontario Labour Board issued a certificate, the Labour Board had no more to say in the configuration of the bargaining unit. That will change. The Labour Board will now have the power to consolidate a newly-certified bargaining unit into an existing unit of the same employer represented by the same trade union, and to order that the existing unit's collective agreement applies to the newly certified employees. Employers and trade unions with multiple bargaining units will also have the power to review the structure of their bargaining units at any time and, with the consent of the Labour Board, consolidate bargaining units, amend the description of bargaining units, and/or amend existing collective agreements.

Changes to the OHSA

Effective as of Monday, November 27, the OHSA has been amended to prohibit employers from requiring that employees wear footwear with an elevated heel. Exceptions to this prohibition are made where an elevated heel is required for safety reasons or where the worker is employed as a performer in the entertainment and advertising industry.

To learn more about how Bill 148 affects employers, please contact the authors or any member of Osler's [Employment and Labour Group](#).

The authors acknowledge the technical and presentation assistance provided by Katherine Germatenko, Orla Donohoe, Rod Perry, and Jeff Razon.