CANADIAN Lawyer

New rights for the precariously employed

Ontario's Bill 148 contains controversial provisions viewed as negative for many employers.

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Ontario's labour laws are undergoing their biggest changes since the 1990s. The overhaul is intended to benefit workers by raising the minimum wage in two stages to $15 an hour by 2019, ensuring equal pay for part-time employees, increasing vacation entitlements and making it easier to unionize in certain sectors where employment is precarious.

Ontario Labour Minister Kevin Flynn has introduced Bill 148, the Fair Workplaces, Better Jobs Act, 2017. The legislation includes many of the amendments to the province's Employment Standards Act and Labour Relations Act that were proposed in the "Changing Workplaces Review Final Report," released May 23. The government has sent the bill to committee for consultations around the province.

"Most of the changes are intended to protect lower-level workers by increasing minimum wage, sick days and vacation," says Stuart Rudner, partner at Rudner MacDonald LLP. "But they look like they will have an impact on small businesses, maybe not mid-sized businesses.

“If you’re a small business with a significant part of your workforce earning minimum wage, your labour costs are going to increase dramatically over the next few years.”

Casual, part-time, temporary and seasonal employees will have to receive pay equal to full-time employees for doing equal work. (There would be exceptions based on seniority and a merit system.) “A lot of businesses have evolved their practices so that they use non-traditional labour — part-time, fixed term, contractors — in an effort to cut their labour costs,” says Rudner. “So a lot of these changes are designed to prevent that.”

A number of manufacturing employers could be potentially affected by it, says Greg McGinnis, partner at Mathews Dinsdale & Clark LLP in Toronto.

“The issue of having to pay temps and regular employees the same is potentially a major issue, because temps are a significant feature in manufacturing, but it has also become common to have different terms of employment such as contract versus permanent and there have been different rates of pay between those different groups,” says McGinnis. “It’s a potentially significant and costly requirement. For many small companies, this is a huge deal.”

Companies may also choose to take a harder look at the jobs they have because they will have to clamp down on labour costs. Long term it may be relatively less expense to automate certain jobs.

Not all 173 of the experts’ recommendations were accepted by the government.

“We were hoping to see the government convert to legislation with some clarity around the managerial and supervisory hours of work and overtime exemptions,” says Erin Kuzz, partner at Sherrard Kuzz LLP. The exemption currently applies to managers but not to those who routinely do some of the same work as the staff they manage.

But in many organizations, the culture is for the managers to work alongside the staff that report to them. The final report had proposed taking into account their salary and their general job duties. “That would have brought some clarity about how managers are defined, but there was no mention of it in the legislation,” says Kuzz.

The legislation provides for pay parity between temp agency workers and full-time employees in the same workplace from the temp’s first day on the job (versus after six months proposed in the final report).

“Careful of the law of unintended consequences,” warns Kuzz. “What you’ll see is employers dramatically reducing or eliminating their use of temporary workers but not balancing that by hiring the same number of full-time workers. If an employer is going to be paying that much more [to the temps], that will outweigh the value of the flexibility [they provide]. This could have potentially devastating consequences to the whole temporary work industry.”

Lara Speirs, executive vice president and general counsel, legal and public affairs at temp agency Randstad Canada, declines to speculate on the impact, but she says her company already operates in one of the most highly regulated jurisdictions for the industry. “Now there are to be even more sweeping changes, many of which were not recommended in the final report. We’re concerned for ourselves, our industry and our clients.”

McGinnis agrees, pointing out that Ontario operates in a competitive economy and competes with less regulated jurisdictions.

He says companies now face considerable compliance-related activity as a result of the new rules and the justifications seem “anti-business.”

Bill 148 contains controversial provisions applicable to shift work. Employers must pay three hours of wages if they cancel a shift with fewer than 48 hours notice. Employees can refuse shifts without repercussion if the employer gives them less than four days notice. Employees will also have the right to request changes to their schedule after working somewhere for three months (though the employer does not have to fulfil the request).

There’s also the question of whether the province can realistically enforce all the micro-rules being put in place such as around shift notices.

“By micro-managing the relationship too much you run the risk of not being able to enforce it at all,” he says.

“It’s all very well to have rules, but it’s more important for people to have jobs,” he says. “If I had to pick between two things, I would regulate health and safety more than how much notice someone gets of a weekend shift.”

Temp agency workers must be given at least one week’s notice when a job that was supposed to last longer than three months ends early. If that notice is not given, the temp must be paid the difference.

“For some industries, where work days are not standard, the changes will really limit the employer’s flexibility when it comes to scheduling,” says Rudner. The 48-hour notice rule “will either change practices or end up adding to labour costs.”

Kuzz adds: “It affects hotels as well as restaurants, but also health-care industries. In in-home health care, the client has the absolute right to cancel a visit. There may just be no work to perform.”

Employers that misclassify workers as “independent contractors” instead of employees in order to avoid Employment Standards Act obligations would be subject to fines. There’s good reason for the penalties, says Rudner. “There’s been a massive misuse of the contractor label. The last five or 10 years, we’ve seen almost an epidemic of contractors who are really employees in all but name. For employers, it may be a way to cut labour costs. They don’t have to pay EI premiums and CPP premiums, but for employees, they lose the protections of the ESA as well as common-law rights.”

Once an employee has been with a company for five years, they will be entitled to three weeks of paid vacation. Kuzz says many small businesses don't provide three weeks, or if they do, they make it over 10 years, to act as a retention incentive.

Personal emergency days would no longer be limited to workers at companies with 50 or more employees. All workers will receive 10 days annually, two of them paid. Under the bill, employers will not be allowed to request a sick note from an employee taking personal emergency leave.

"If the employee just calls in one morning and says he's too sick to come into work, the employer has no right to say, 'We're going to need you to bring in a doctor's note,'" says Kuzz. "Imagine how frequently we're going to see spikes in absenteeism on Fridays and Mondays. Only two of those days are paid, but many employees are happy to take unpaid days off."

The amendments to the Labour Relations Act are also significant. They are intended to make it easier to unionize for home care and community services workers, workers in the building services sector and those who work through temp agencies to unionize. Speirs says that these provisions were included in Bill 148 without consultation or recommendation by the review panel. Under the bill, if a certain proportion of workers (in those sectors) sign a union card, there does not have to be a certification vote. "If you have card-based certification," says Tim Lawson, partner at McCarthy Tétrault LLP, "there's a higher probability that a union that applies for certification is actually going to become certified, because there is no vote, no opportunity for an employer to tell its side of the story and counter-balance what the union is saying to employees."

He also points to the bill's provision empowering the Ontario Labour Relations Board to consolidate a certified bargaining unit with an existing bargaining unit of the employer represented by the same union. "You can see the ripple effect and the momentum that a union can get once they successfully certify a few different locations of the same employer," says Lawson. "That power will have a dramatic impact on the ability of unions to organize franchise locations."

The mandate of the expert advisers was two-fold: to consider ways to decrease precarious work and improve the lot of precarious workers, but also to improve flexibility and efficiency for employers. "There's none of the flexibility part in any of the recommendations or the proposed changes in Bill 148," says Lawson.

The bill boosts fines for employers who violate labour laws. The maximum fine for ESA violators will be increased to $350, $700 and $1,500 from $250, $500 and $1,000 for various violations. The government will publish the names of those who are fined. The maximum fines under the Labour Relations Act would increase to $5,000 from $2,000 for individuals and to $100,000 from $25,000 for organizations.

Lawson says that, with the bill's emphasis on increased fines for ESA violations and the hiring of more inspectors, "the Ministry of Labour really becomes a prosecutorial body like you'd see in some U.S. states, rather than a body intended to assist employers and employees in upholding the law and mediating and resolving cases. That's really going to be a big change."

"There's not any good news here for employers," says Kuzz. "Where employers will have an impact on modifying the bill is going to be a very industry-specific issue. At the end of the day, it's great to do wonderful things for employees, but none of this matters if there aren't employers around to employ them."