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Bill 148
Fair Workplaces, Better Jobs Act, 2017
Executive Summary

June 2017

INTRODUCTION

In February 2015, the Government of Ontario announced it would review issues and trends affecting workers and employers in the modern workplace. Two Special Advisors were appointed to lead public consultations: C. Michael Mitchell, formerly of Sack Goldblatt Mitchell LLP, and the Honourable John C. Murray, former justice of the Ontario Superior Court and prominent management labour lawyer.

Consultations began in May, 2015 focusing on how the *Employment Standards Act, 2000* ("*ESA*") and the *Labour Relations Act, 1995* ("*LRA*") could be amended to keep pace with the changing needs of workers and employers.

On July 27, 2016, the Special Advisors published an Interim Report (the "**Interim Report**") summarizing input they had received and seeking additional submissions.

On May 23, 2017, the Government of Ontario released "The Changing Workplaces Review: An Agenda for Workplace Rights Final Report" (the "**Final Report**"). At 419 pages, the Final Report contains 173 recommendations to amend the *ESA* and *LRA*.

One week later, the Government introduced ***An Act to amend the Employment Standards Act, 2000 and the Labour Relations Act, 1995 and to make related amendments to other Acts***, referred to as the "**Fair Workplaces, Better Jobs Act, 2017**" ("**Bill 148**").

What has caught the attention of the employer community is the degree to which many of the amendments in Bill 148 go far beyond the recommendations of the Special Advisors.

It is our view the amendments signal a clear intention on the part of the Government to focus on the demands of unions and employee advocates to the detriment of business and a strong economy. Small business[1], in particular, responsible for 28% of Ontario's gross domestic product and 66% of private-sector employment in Ontario, is likely to suffer most significantly.

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[1] Small business also represents 99% of Ontario's construction industry; 97% of Ontario's retail and healthcare industries; and 99% of Ontario's professional, scientific and technical services industries (*Statistics Canada, 2015*)

Bill 148 passed First Reading on June 1. A motion to dispense with Second Reading also passed and the Bill has been referred to the Standing Committee on Finance and Economic Affairs. The Standing Committee is scheduled to review the Bill throughout the summer.

Meanwhile, it is imperative employers and business organizations continue to engage with the Government to ensure it understands the negative impact Bill 148, in its current form, will have on job creation and economic prosperity in Ontario, both long and short-term.

This Executive Summary provides an overview of the Final Report and Bill 148, and offers Commentary from our firm.

The **Final Report** as well as this **Executive Summary** can also be found on the home page of our website at www.sherrardkuzz.com.

TABLE OF CONTENTS

PART I
AMENDMENTS TO THE *EMPLOYMENT STANDARDS ACT*

Increase to Minimum Wage

Final Report

The Final Report did not recommend an increase to the general minimum wage, though it did recommend phasing out (over three years) the student and liquor servers' minimum wage, and eliminating the current exemption of students from the "three hour rule" (the rule provides, where an employee who regularly works more than three hours a day is required to report to work but works for fewer than three hours, the employee must be paid for at least three hours at minimum wage or his or her actual wage for the time worked, whichever is greater).

Bill 148

A key component of Bill 148 is an increase to the general minimum wage. Effective January 1, 2018, minimum wage will increase from $11.60 to $14.00 per hour, with a further increase to $15.00 per hour effective January 1, 2019. Thereafter, minimum wage adjusts annually for inflation in October of each calendar year.

Bill 148 also increases the minimum wage for specific classifications of employees (students, hunting and fishing guides and homeworkers and liquor servers), proportionate to the increase in the general minimum wage. Liquor servers also receive the general minimum wage unless the server serves liquor directly to customers and regularly receives tips or gratuities.

Commentary

The increase to the general minimum wage is particularly troubling for employers given the direct impact this will have on labour costs and competitiveness. It is also very likely to curb the willingness of Ontario employers to hire students - necessary for a healthy and growing economy.

Equally troubling is that the business community was not provided any opportunity to consult on a proposed increase to the general minimum wage, as it was specifically excluded from the Special Advisors' terms of reference and as a result not one of the changes contemplated by the Interim or Final Report.

Equal Pay for Equal Work

Final Report

At present, the *ESA* does not require an employer to compensate a part-time, temporary, casual or limited term contract employee ("non-permanent employee") in the same manner as a full-time employee doing the same work.

The Final Report recommends the *ESA* be amended to provide that no employee be paid a rate lower than a comparable full-time employee of the same employer, unless the pay differential is the result of a:

- Seniority system
- Merit system
- System that measures earnings by quantity or quality of production
- Factor justifying the difference on objective grounds

Significantly, the Final Report limits its recommendations to wage parity only. It does not extend to benefits or pension plan entitlements.

Bill 148

Bill 148 adopts the recommendations on wage parity. It provides no employer shall pay an employee at a rate of pay less than the rate paid to another employee of the employer because of a difference in employment status when:

- They perform substantially the same kind of work in the same establishment,
- Their performance requires substantially the same skill, effort and responsibility, and
- Their work is performed under similar working conditions.

However, a difference in the rate of pay is permitted if based on a seniority or merit system, a system that measures earnings by quantity or quality of production or any other factor other than sex or employment status.

Bill 148 temporarily "grand-fathers" wage rates contained in a collective agreement in effect as of April 1, 2018. However, any new collective agreement made or renewed after April 1, 2018 must comply with the equal pay requirement.

Bill 148 then goes beyond the recommendations in the Final Report, guaranteeing an employee the right to request:

- Information about the wage rate paid to another employee (either from the employer or another employee).
- A review of his/her wages if the employee does not believe wage parity has been achieved; and the employer must either provide a wage adjustment or a written explanation why there will be no adjustment.

Finally, Bill 148 provides protection against reprisal where an employee seeks to enforce the right to information about wage rates or a review of his or her wage rate.

Commentary

These amendments fail to recognize that many employers pay a non-permanent employee at a different rate primarily because the non-permanent employee has less experience performing the work than the full-time counterpart. Should Bill 148 pass, many employers may move to an hours-based seniority system to defend an experience-based pay differential within the workplace.

Scheduling

Final Report

At present, the *ESA* does not contain a provision regulating the scheduling of work by employers. Nor is there a requirement for advance posting of a work schedule, or rules, pre-conditions or consequences for short notice changes to a schedule. There is a requirement for a minimum of three hours pay at minimum wage where an employee who typically is scheduled for more than three hours works less than three hours (the "three hour rule" referenced above).

The Final Report does not provide definitive recommendations to address scheduling concerns. However, it does recognize a need for predictable scheduling in certain sectors. To address this, the Final Report recommends the *ESA* provide the Ministry of Labour authority to regulate scheduling by employers. It also recommends a framework for designing scheduling provisions, as follows:

- Sector-specific scheduling regulations be established in certain sectors of the economy (as determined by the Ministry of Labour), with retail and fast food industries taking priority.
- Scheduling regulations be developed by sector committees (including representatives from industry to address employer concerns), with the Ministry of Labour providing a framework for the discussion and making available external resources, such as experts or academics, to facilitate the discussion and issues being considered.

The Final Report provides no recommendation for on-call pay, but recommends the "three hour rule" be amended to provide an employee who regularly works more than three hours per shift and who is called into work but ultimately works fewer than three hours be paid for **at least three hours of work at his/her regular rate of pay**. This represents an increase from the current requirement an employee be paid for three hours at **minimum wage or his/her actual wage for the time worked, whichever is greater**.

Bill 148

Bill 148 adopts the recommendation regarding the "three hour rule" but then goes beyond this recommendation to provide:

- If an employee's scheduled day of work is cancelled within 48 hours of its intended start, the employee is entitled to three hours of pay at his or her regular rate.
- If an employee is "on call" and not called in to work, or is called in for work for fewer than three hours, the employee will be entitled to three hours of pay at his or her regular rate of pay (per 24 hour on-call period).
- An employee is entitled to refuse a request to work or be "on call" without repercussion, where the request is made fewer than 96 hours (*i.e.*, four days) before the shift commences.

There are exemptions related to call-in pay and the right to refuse a shift where a collective agreement addresses these issues.

Bill 148 does not expressly address the idea of sector-specific scheduling regulations.

Commentary

Bill 148 legislates the foregoing blanket scheduling rules despite the Final Report expressly recognizing blanket scheduling makes little business sense:

> *Our experience and the approach taken in other jurisdictions reflect the fact that scheduling cannot be the same for all employees employed in all businesses. Scheduling can be a very complex and difficult subject. Trade unions and employers in collective bargaining often spend very significant amounts of time negotiating workable and fair scheduling arrangements. In sum, one size does not fit all.*

For a business with unpredictable workforce requirements, such as those in the retail and hospitality industries, these amendments are not realistic. In conjunction with the increase in minimum wage, the result may be fewer employees scheduled to work in order for an employer to control labour costs. This is not a positive development for business or employees.

It also remains to be seen whether the Government will move forward with the recommendation to develop sector-based committees to create further regulation around predictable work schedules.

Requests for a Change to Schedule or Work Location

Final Report

In its April 2017 budget, the Federal Government committed to amending the *Canada Labour Code* to provide an employee the right to request flexible work arrangements. The Final Report makes a similar recommendation including the right of an employee to request the employer increase or decrease the employee's hours, give the employee a more flexible work schedule, or alter the employee's work location, so long as the employee has completed at least one year of service.

The Final Report recommends the employer be required to give the employee an opportunity to discuss the request and, if denied in whole or in part, provide reasons, there being no right to appeal the employer's decision. An employee would also be protected against reprisal for requesting a change in work schedule or location.

Bill 148

Bill 148 adopts this recommendation in part, but then expands it by triggering this entitlement after only **three months**.

Commentary

Bill 148 is silent on the issue of a "right of appeal", and by omitting this important qualification, leaves open the question whether an employee will be able to challenge the employer's decision to deny a request for a change to schedule or work location.

Paid Vacation

Final Report

At present, under the *ESA* an employee is entitled to two (2) weeks' vacation time after each twelve (12) month vacation entitlement year, and a minimum vacation pay of four percent (4%) of wages earned in the twelve (12) month vacation entitlement year. The *ESA* does not provide for an increase in these amounts based on length of employment.

The Final Report recommends vacation time be increased to three (3) weeks' and vacation pay to six (6%) percent, after an employee has worked with the same employer for five years or more. This is in line with what employees currently receive in many other Canadian jurisdictions.

Bill 148

Bill 148 adopts these recommendations.

Commentary

While many employers, through policy, already meet these requirements, a legislated increase in vacation pay was expected by many in the employer community. Still, these amendments will increase overall labour costs for many employers particularly within the small business community.

Public Holiday

Final Report

At present, the *ESA* provides for nine (9) public holidays for which most employees in Ontario are entitled to public holiday pay. Public holiday pay is calculated by taking the regular wages paid to an employee in the four weeks prior to the week of the public holiday and dividing this number by 20. This calculation essentially provides an "average" of the employee's daily wage, meaning an employee who may only work a few days a week (even if full-time days) will be paid proportionately to recognize the amount of time actually worked by an employee in the month.

The Final Report recommends the public holiday pay section be reviewed and revised or replaced with provisions easier to understand and apply.

Bill 148

By seeking to "simplify" the method of calculating public holiday pay, Bill 148 is far more generous to an employee who works irregular hours than is the current *ESA*. Under Bill 148, public holiday pay is calculated by taking the total amount of regular wages earned by the employee in the pay period immediately preceding the public holiday and dividing it by the number of days **worked** by the employee in that period.

Another significant change not contemplated in the Final Report is the compensation to be provided to an employee who works a public holiday. At present, an employer will either: (1) pay the employee his or her regular wages and substitute another day off in the future as the public holiday with pay; OR (2) on agreement, pay the employee premium pay (*i.e.*, time-and-a-half) for the hours worked on the holiday, plus public holiday pay for the day. With option (2) the employee does not get a day off with pay, but does get a much larger amount of compensation for one day of work (essentially 2 ½ times the employee's regular earnings for a day of work).

Bill 148 removes the option to use a substitute public holiday to compensate an employee who works the holiday, and requires the employee be paid his or her public holiday pay plus premium pay for all hours worked.

Commentary

The implication of these amendments is significant, particularly for an employer with casual employees. An employee who works a single eight hour day in the pay period preceding the public holiday, and nothing more, will be entitled to the same amount of public holiday pay as an employee who works five days per week at eight hours a day.

As for removing the right to substitute another day off with pay, in many cases this is the preferred option for both employer and employee as it does not require premium pay for the hours worked, but does allow an employee to earn a day's pay plus receive a separate day off work.

Overtime Pay

Final Report

The Final Report contains a number of recommendations related to hours of work and overtime, most of which were not addressed in Bill 148. The Final Report recommends a repeal of the "blended" overtime rate where an employee works more than one position with an employer.

Bill 148

Bill 148 repeals the blended rate, requiring instead the overtime rate be based on the rate of pay for the work being performed at the time overtime hours are accrued.

Commentary

This change is likely to impact a small number of employers.

Electronic Agreements

Final Report

The Final Report recommends any written agreement required by the *ESA* be accepted electronically.

Bill 148

Bill 148 adopts this recommendation.

Commentary

This amendments legislates the existing policy position of the Ministry of Labour. An employer can now rely on an electronic agreement, without requiring an employee to physically sign an *ESA*-related agreement.

Personal Emergency Leave

Final Report

The *ESA* requires an employer that regularly employs 50 or more employees provide to each employee up to ten (10) unpaid personal emergency leave ("PEL") days which may be used for personal illness, injury or medical emergency, or the death, illness, injury or medical emergency or urgent matter concerning a prescribed family member.

In the late Fall of 2016, the Government enacted Regulation 307/16 which amended the PEL provisions of the *ESA* for the automobile manufacturing, automobile parts manufacturing, automobile parts warehousing, and automobile marshalling industries (the "PEL Regulation"). The PEL Regulation removed bereavement leave as a basis for PEL and added a separate bereavement leave entitlement to the *ESA*, providing an employee up to three (3) unpaid bereavement leave days in the event of the death of a prescribed family member. The total number of PEL days was reduced to seven (7) days to account for this bereavement leave.

The Final Report recommends the following amendments to the PEL provisions:

- **Remove the "50 employee" qualifying threshold**. This would mean all employees in Ontario would be eligible for PEL.
- **Remove bereavement leave from the PEL provisions and add a separate bereavement leave entitlement to the *ESA*.** The Final Report recommends the current provisions be amended to provide an employee with up to three (3) unpaid bereavement leave days in the event of the death of a prescribed family member. The total number of PEL days would then be reduced to seven (7) days to account for this bereavement leave. This would bring all employers in line with the PEL Regulation applied in the automotive industry, as described above.
- **Amend the PEL provision to allow for the leave to be taken if the employee or his or her minor child(ren) is the victim of domestic violence**.

- **Amend the PEL provision to provide that an employer must comply with the minimum requirements of this provision**.

Employee advocates also lobbied for paid sick days, though this was not recommended in the Final Report. Instead, the Final Report recommends that, if an employer requires an employee provide a doctor's note to substantiate the need for PEL, the employer bear the cost of the note.

Bill 148

Bill 148 proposes significant amendments to the PEL provisions. Some of these amendments reflect recommendations in the Final Report, while most do not.

Bill 148 removes the "50 employee" qualifying threshold, meaning the leave will be available to all employees in Ontario, regardless of the size of employer. Bill 148 also expands PEL to apply to leave required as a result of sexual or domestic violence (or the threat of such violence) experienced by the employee or a prescribed family member.

Bill 148 does not provide a separate bereavement leave and maintains the entitlement to PEL at ten (10) days per year, but significantly provides that the first two days of which must be **paid**. Again the government has gone farther in this area than even the Special Advisors recommended.

Although Bill 148 permits an employer to require an employee who takes a PEL "to provide evidence reasonable in the circumstances that the employee is entitled to the leave" it also prohibits an employer from requiring the employee provide a medical note to substantiate the need for a PEL for medical reasons.

Commentary

To the dismay of Ontario businesses, these changes, in concert with the removal of the 50-employee qualifying threshold, now entitle every employee in the province to two additional paid days off per year for which no corroborating medical documentation may be requested.

In addition, while the impetus for change in the PEL provisions was meant to simplify this area for all, this may not be the result. Many employers have their own policies that provide for a variety of leaves, both paid and unpaid. These amendments provide no clarity for an employer seeking to determine whether its leave policies provide a greater right or benefit than the legislated PEL provisions.

In addition, when considered in conjunction with the PEL Regulation, there is now an inconsistency in the PEL regime for the automotive sector as compared to the rest of the province.

Family Medical Leave

Final Report

The current Family Medical Leave ("FML") provisions entitle an employee to up to eight (8) weeks of unpaid leave in a 26-week period to provide care or support to a prescribed family member who has a serious medical condition with a significant risk of death in the 26-week period.

The Final Report recommends increasing these thresholds to 26 weeks of FML in a 52-week period. These amendments bring the FML provisions in line with recent changes to the federal Employment Insurance system which now allows an individual to claim compassionate care benefits (which have similar eligibility requirements) for 26 weeks in a 52-week period.

Bill 148

Bill 148 adopts this recommendation, increasing the entitlement to FML from eight to 27 weeks of leave within a 52-week period. The one additional week is likely to account for the one-week waiting period for Employment Insurance entitlement.

Commentary

This amendment was expected by many in the employer community, given amendments to the federal Employment Insurance regime. We expect to see similar amendments made in other provincial employment standards legislation.

Child Death Leave and Crime-Related Child Disappearance Leave

Final Report

At present, the *ESA* provides up to 104 weeks of leave for an employee with respect to a crime-related death of the employee's child, and up to 52 weeks of leave with respect to a crime-related disappearance of a child.

The Final Report recommends amending the *ESA* to allow for up to 104 weeks of leave with respect of the death of a child, the crime-related death of a child or the crime-related disappearance of a child.

Bill 148

Bill 148 adopts these recommendations, creating two separate leaves: Child Death Leave and Crime-Related Child Disappearance Leave. Each provides an employee who has achieved at least six months of employment with unpaid leave of up to 104 weeks. The Child Death Leave applies in the case of the death of an employee's child regardless whether related to a crime. The Crime-Related Child Disappearance Leave applies where the child disappears and it is probable this was the result of a crime. Neither leave applies where the employee is charged with the death or disappearance or it is probable the employee was a party to the crime.

Commentary

This amendment is unlikely to have a significant impact on the business community as many employers have had a practice of providing whatever leave is required by an employee who has lost a child due death or crime-related disappearance.

Temporary Help Agencies

Final Report

Throughout the consultations, the issue of temporary help agencies and assignment workers was debated frequently.

Employee advocates argued temporary employees are fundamentally vulnerable and experience:

- Lower pay
- Difficulty understanding and exercising employment rights
- Vulnerability in making complaints
- Increased risk of injury on the job-site
- Job instability
- Deterioration of health
- Unpredictable hours and income insecurity
- Barriers to permanent employment

Employer advocates and temporary help agencies rejected this and pointed to the *bona fide* need for temporary help in many sectors of the economy, specifically to respond to:

- Unexpected business growth
- Unexpected and long-term absences
- The need to bridge permanent replacements
- Special projects
- Seasonal and cyclical rushes and pre-selection of candidates

The Final Report seeks to discourage the long-term use of temporary workers and encourage the hiring of temporary workers as permanent employees whenever possible. The Final Report recommends:

- After an assignment worker has been working for a client for **six months or more**, he or she receive no less compensation than a comparable employee of the client performing similar work.
- A client should make "best efforts" to ensure any assignment worker is aware of available job openings and shall in good faith consider any assignment worker who applies for a position.
- A client should, prior to terminating the employment of an assignment worker, and in good faith, consider whether an assignment worker is suitable for an available position.

The Final Report also recommends giving an assignment worker notice, or pay in *lieu*, following the termination of an assignment of more than three months, where the assignment is terminated

by the agency or the client. While not entirely clear from the Final Report, it is anticipated the amount of notice would correspond to the amount of notice of termination an employee is entitled to under the *ESA*, with the length of service being based on the length of the assignment. If no working notice is provided, the agency would be obligated to provide the worker termination pay 13 weeks following the end of the assignment. The amount of the pay in *lieu* of notice would be reduced by the number of days of work assigned to the assignment worker by the agency during the 13 week window. For example, if an assignment worker is entitled to one week of notice, which translates to five days of pay, and the worker is provided three days of work during the 13 week period, the termination pay owed would is for two days.

Bill 148

Bill 148 departs considerably from these recommendations, proposing amendments which, if enacted, will make it difficult for most if not all temporary help agencies to survive.

The first amendment relates to equal pay (see also, **Equal Pay for Equal Work**). Bill 148 entitles an assignment employee to be paid a rate of pay equal to the rate paid to an employee of the client performing comparable work. However, unlike in the Final Report, Bill 148 requires **immediate** wage parity (subject to limited exceptions).

Bill 148 prohibits a client from lowering the rate of pay it pays to an employee to assist a temporary help agency comply with these requirements and prohibits a trade union or other organization from causing or attempting to cause a temporary help agency to contravene this requirement.

An assignment employee is also entitled to request an adjustment to pay where the employee believes his or her wage rate is lower than a comparable employee of the agency's client, and if the help agency disagrees, the agency must provide a written response setting out its reasons.

The reprisal provisions of the *ESA* are also expanded to provide protection to an assignment employee who requests information about comparable wage rates, or discloses information about comparable wage rates, for the purpose of determining whether wage parity is being achieved.

There is a temporary exemption to wage parity where a collective agreement, in effect as of April 1, 2018, permits for different wage rates between an assignment worker and employee of a client. However, any new collective agreement made or renewed after April 1, 2018 must comply with the equal pay requirement.

The second amendment relates to termination pay. Rejecting the Final Report's formula for calculating termination pay, Bill 148 entitles an assignment employee to **at least one week of notice of the early termination of an assignment where the assignment is scheduled to last at least three months**. If no working notice is provided, and the agency is not able to offer the assignment employee at least one week of reasonable work during the notice period, the employee is entitled to pay in *lieu* of the one week of notice.

Commentary

As noted earlier, these amendments are designed to discourage the long-term use of temporary employees and encourage the hiring of temporary workers as permanent employees whenever possible. However, we believe, the Final Report and Bill 148 grossly overreach to the detriment, possibly irretrievably, of the temporary help agency industry and the workers it serves.

But for rare circumstances, an employer that may otherwise avail itself of a temporary worker to address cyclical or seasonal demands or leaves will not be in a position to sustain the full cost of the temporary worker and the associated agency fee. This will also hurt many temporary workers who prefer the flexibility and variety offered by temporary work.

Related Employer Liability

Final Report

Historically, the *ESA* has placed workplace responsibility and liability on the entity that directly employs the employee. There is also recognition that associated or related business entities may be considered to be a common or related employer provided the "intent or effect" of the business relationship is to directly or indirectly defeat the purpose of the *ESA*.

The common law and employment standards legislation in other Canadian jurisdictions recognize the concept of a "common" or "related" employer. However, the requirement of "intent or effect" is unique to Ontario.

The Final Report recommends elimination of the "intent or effect" requirement on the basis of a concern that, by relying on that requirement, an employer may be able to escape liability for statutory payments.

Bill 148

Bill 148 adopts this recommendation providing two persons will be considered one employer if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons.

Commentary

The existence of "intent or effect" required the two entities have some degree of common ownership or control. With the removal of "intent or effect", the only test for determining whether two entities are one employer for purposes of the *ESA* is whether they carried on "related activities or businesses".

Historically, the *ESA* provisions, even with the "intent or effect" language, have been sufficient to capture circumstances in which a corporate structure may have otherwise been used for, or resulted in, an employee receiving less than their statutory entitlement, most notably in determining appropriate severance pay. Under section 4 of the *ESA*, as it currently exists, related

entities frequently have their payroll numbers combined to determine whether the "employer" meets the $2.5 million threshold entitling employees to severance pay under the legislation.

The Special Advisors' principal reason for making this recommendation is to capture the rare circumstance in which an employer goes bankrupt before satisfying termination or severance pay obligations owed to employees. Some decisions have held, where the principal of the bankrupt entity starts a new business, employees of the bankrupt entity cannot recover the outstanding amounts from the new business.

However, by making this amendment without further amendment to Section 4(1) of the *ESA* (which references "related activities or businesses"), it may leave an employer vulnerable to an argument two entities which operate related businesses (for example, two separately owned franchisees of the same franchisor), but without common control or direction are captured by this provision. This is not consistent with the current interpretation applied by the Ministry when considering whether entities are "related" for the purposes of the *ESA*, nor is it the intent of this type of legislative protection.

Independent Contractors

Final Report

According to the Final Report, 12% of Ontario's workforce of 5.25 million are reported as "own account self-employed". Yet the Ministry of Labour reports, relying primarily on anecdotal evidence, a significant portion of these "own account self-employed" workers are misclassified and ought to be classified as employees.

The Special Advisors point to a variety of reasons why an employer would prefer to classify an employee as an independent contractor, including that an employer is not obliged to pay a contractor vacation pay, public holiday pay, overtime pay, termination and severance pay and premiums for Employment Insurance and Canada Pension Plan.

While the *LRA* defines "employee" to include a "dependent contractor", the *ESA* does not include a similar definition. The common law acknowledges employer liability for an intermediate category, between employee and independent contractor, referred to as "dependent contractor".

The Final Report recommends the definition of "employee" be expanded to include a "dependent contractor", defined in the same manner as in the *LRA*. This would capture those individuals who, while described as a contractor or consultant, are in a position of economic dependence on the employer and where the relationship between the parties more closely resembles an employment relationship.

The Final Report also recommends that, where there is a dispute as to whether an individual is an employee, the person receiving the services (*i.e.*, the client or employer) bears the burden of proving the employee is not an employee for the purposes of the *ESA*.

Bill 148

While Bill 148 does not amend the definition of "employee" to include "dependent contractor" it does contain an express prohibition on an employer treating a person who is an employee as if he or she was not an employee for the purposes of the *ESA*. This is designed to prohibit the use of the independent contractor "title" where the individual more closely resembles an employee.

Bill 148 also requires that, in the course of an inspection or investigation or other proceeding (other than a prosecution) under the *ESA*, an employer claiming a person is not an employee bears the burden of proof.

Commentary

These recommendations are designed to reduce the use of independent contractor relationships, with little recognition of the fact many independent contractors prefer to be classified this way to trigger their own preferential tax treatment.

"Self-Help" Requirement

Final Report

At present, an employee not covered by a collective agreement can file a claim with the Ministry of Labour if the employee believes his or her employer has not complied with the *ESA*. However, before doing so, the *ESA* requires the employee first address the issue with the employer - referred to as a *self-help* requirement.

The Final Report recommends removing the self-help requirement on the basis it, and fear of reprisal, stifle complaints, the result of which is that most claims are filed by employees only after they have left employment.

By contrast, employers argue most non-compliance is innocent inadvertence or lack of understanding, and point to the positive impact on efficiency and workplace harmony when parties seek to identify and resolve matters directly.

Bill 148

Bill 148 adopts this recommendation so that an employee is no longer required to address an alleged contravention with the employer prior to filing a claim.

Commentary

It is expected the removal of the self-help requirement will increase the number of claims against employers even for inadvertent and unintentional breaches of the *ESA*, resulting in greater backlog and expense to all parties. Moreover, the parties will no longer have a legislated opportunity to address and resolve alleged non-compliance before a claim is filed.

Crown Employees

Final Report

At present, the following provisions of the *ESA* do not apply to employees of the Crown or a Crown agency:

- Hours of work
- Overtime pay
- Minimum wages
- Public holidays
- Vacation with pay

The Final Report recommends elimination of this exemption.

Bill 148

Bill 148 adopts this recommendation. Save for Section 4 of the *ESA* (the related employer provision) all provisions of the *ESA* will now apply to Crown employees.

Commentary

This amendment is not likely to impact the broader business community, given it applies only to Crown employees.

Interns/Trainees

Final Report

At present, the *ESA* provides a "trainee" is an "employee" for the purposes of the legislation, unless certain conditions are met to justify exclusion.

Employee advocates argue employers have exploited this provision and benefiting improperly from the free labour of trainees.

The Final Report recommends elimination of this exemption.

Bill 148

Bill 148 does not fully adopt this recommendation, but provides clarification as to when a person receiving training from an employer will (and will not) be considered an employee. Specifically, where a person receives training from an employer, and the skill for which training is being received is used by the employer's employees, the person is an employee.

The exemption *remains* where an individual performs work under a program approved by a college of applied arts and technology, university or private career college.

Commentary

In 2014 and 2015 the Ministry of Labour initiated a high-profile, proactive enforcement blitz with a focus on interns and trainees. Bill 148 signals the end of the use of interns, even in a limited circumstances, to the detriment of students (in particular) who no longer have the benefit of volunteering in a workplace to acquire on-the-job experience (outside of a formal co-op placement through an academic institution).

Remedies and Penalties

Final Report

At present, enforcement mechanisms under the *ESA* include:

- Voluntary Compliance
- Order to Pay Wages
- Order for Compensation
- Order for Reinstatement
- Director's Order to Pay Wages
- Compliance Order
- Notice of Contravention
- Provincial Offences Act prosecution – Part I
- Provincial Offences Act prosecution – Part III

An employer can also be required to post in its workplace any notice an employment standards officer considers appropriate or any report concerning the results of an investigation or inspection. The Ministry of Labour also publishes on its website the name of any person convicted under the *Provincial Offence Act* for a contravention of the *ESA*.

The Final Report recommends increased sanctions in the event of a violation, including:

- The penalty for Part I offences be increased from $295 to $1,000.
- The penalty for Notice of Contravention be increased from $250/$500/$1000 to $350/$700/$1,500.
- The Ontario Labour Relations Board ("OLRB") be given jurisdiction to impose an administrative penalty up to $**100,000 per infraction** and to order an unsuccessful respondent to pay the costs of an investigation (where it is in the public interest to do so - such as where the employer has engaged in a serious incident of reprisal or there are multiple, intentional and/or repeated violations of the *ESA).*
- The Ministry of Labour or Ministry of the Attorney General appoint a designated Crown prosecutor to determine when to initiate proceedings seeking an administrative penalty and to take carriage of a file as "applicant". This would replace the current Part III prosecution process.
- Any award be subject to an established rate of interest.

The Final Report also recommends use of an enforceable undertaking for unintentional and minor breaches, meaning an employer could agree to comply on a co-operative basis without

associated legal proceeding and sanction being imposed. However, if an undertaking is breached, enforcement proceedings could be initiated.

Bill 148

Bill 148 adopts some, but not all, of the recommendations.

Under Bill 148, penalties associated with a Notice of Contravention are established by regulation and an employment standards offer has discretion to determine the penalty, where there is a range of penalties for a particular infraction. As we understand it the Government has indicated a commitment to hire an additional 170 Employment Standards Officers, almost doubling current numbers, with the objective of increasing compliance with the *ESA*.

The Director of Employment Standards is also provided with the authority to determine appropriate rates of interest to apply where a provision of the *ESA* is violated.

Where a person has contravened the *ESA* after having received a Notice of Contravention, the Director of Employment Standards will publish on-line the name of an offender, as well as a description of the contravention and penalty imposed.

Commentary

In addition to what is already contained in Bill 148, the maximum administrative penalty for a non-compliant employer is expected to be increased from $250/$500/$1000 to $350/$700/$1,500, as recommended.

All told, the increase in fines, while disappointing, is not surprising. The publication of information on-line is consistent with the current practice of the Director of Employment Standards which publishes information in respect of an employer convicted of a Part I or Part III offence.

What's Not Included in Bill 148?

Some of the more significant recommendations from the Final Report not included in Bill 148 are the following:

Sector-Based Regulations and Exemptions

While the *ESA* broadly applies to all employees in the province, there are currently several sector and occupation based exemptions.

The Final Report expresses concern that, as a result of this "patchwork of exemptions", only 23% of minimum wage earners are fully covered by the *ESA*. That said, the Final Report acknowledges application of the *ESA* could be modified for certain sectors and jobs without sacrificing fairness or the legitimate interests of employees.

The Final Report therefore endorses a sector-specific approach, recommending the Government implement a committee process to evaluate current and future exemptions, with priority given to certain professions and positions: information technology professionals, pharmacy, residential building superintendent, and janitors and caretakers.

With respect to the managerial exemption (not a sector-specific exemption and therefore not requiring consideration by committee), the Final Report recommends a streamlined approach to determine whether a worker is a manager and therefore exempt from the *ESA*. If the individual meets certain established criteria (which the Special Advisors believe should mirror the duties of an employee considered an "executive" or "administrative employee" under the American *Fair Labour Standards Act*) and has an income in excess of 150% of the general minimum wage, based on a 44-hour work week, the worker falls within the managerial exemption.

If implemented, this test and associated clarity would be welcomed by many in the employer community.

While not expressly set out in Bill 148, the Ministry of Labour has indicated it will conduct a review of the current *ESA* exemptions, including the managerial exemption, commencing in the Fall of 2017. The Ministry of Labour has not expressed an intention to adopt the committee-based approach to exemption review, stating only that it will consult with affected stakeholders.

Hours of Work

The Final Report makes a number of recommendations related to hours of work and overtime, including:

- Repeal the requirement an employer obtain a permit from the Ministry of Labour to schedule an employee to work more than 48 hours per week. A permit would still be required where an employee works in excess of 60 hours per week.
- Permit overtime averaging only where: (i) it would allow for a compressed work week, continental shifts or other flexibilities in schedules desired by employees; or (ii) based on employer scheduling requirements, where the total number of hours worked does not exceed the threshold for overtime over the averaging period.
- Consider 'sector based' secret ballot voting to obtain group consent to an hours of work variance.

Though not included in Bill 148, the recommendation to remove the requirement for an excess hours of work permit for hours in excess of 48 hour per week would be a welcome change for the employer community.

$100,000 Administrative Penalty

As discussed earlier in this Executive Summary, the Special Advisors recommend granting the OLRB the discretion to impose a significant award of up to $100,000 as an administrative penalty for a serious infraction of the *ESA*. Whether or not this will be reviewed at a later date by the Ontario Government remains to be seen.

Enhanced Inspection and Enforcement

Under the *ESA*, an employment standards officer may proactively attend at an employer's place of business to ensure compliance with the *ESA*. However, given the Ministry of Labour's limited resources, proactive inspections cover less than 1% of Ontario workplaces.

The Final Report encourages the use of proactive enforcement measures, recommending a three-pronged approach:

1. Targeted inspections aimed at those sectors where data collected by the Ministry of Labour suggests there are large numbers of precariously employed or vulnerable workers.
2. Using the complaint process as a catalyst to expand workplace investigations where the information provided in a claim suggests the issue of non-compliance impacts more than the claimant alone or where an officer uncovers deliberate non-compliance.
3. "Top down" enforcement to encourage accountability at the highest levels of a business chain (supply chain, franchisor, *etc.*).

The Final Report recognizes additional funding is required to adopt a more proactive, targeted and research-based approach to enforcement, and we expect the Ministry of Labour will receive such funding if it intends to implement these recommendations. For example (as noted earlier), the Government has already announced its intention to hire up to 170 more Employment Standards Officers and launch a program aimed at educating small and medium sized businesses about the *ESA*. In addition, the Ministry of Labour has committed that by 2020-2021, the Employment Standards Program will resolve all claims filed within 90 days and inspect 1 in 10 workplaces.

A New Approach to the Adjudication of Employment Standards Claims

At present, a claim filed under the *ESA* is investigated and decided by an employment standards officer, following which, if a party is dissatisfied with the decision, the party may apply for a review of the decision by the OLRB.

The Final Report recommends expanding the role of the OLRB empowering it to adjudicate an employment standards claim even where no investigation is undertaken, in essence, making the OLRB a court of first instance for many employment standards claims. The OLRB's jurisdiction to hear *ESA* matters could be limited where the Director of Employment Standards does not approve that a complaint be heard by the OLRB or investigated, likely in circumstances where, even if the facts as alleged are true, there is no violation of the *ESA*.

There has been no indication from the Government of an intention to overhaul the current manner of claims adjudication. To the contrary, given the Government's commitment to resolve claims within 90 days by 2020-2021, it seems unlikely that within such a short period of time a complete overhaul is in the cards.

Education

The Final Report places considerable emphasis on the need to educate and inform parties, particularly vulnerable workers, of their workplace rights and obligations.

To this end, the Final Report recommends the *ESA*, *LRA* and *Occupational Health and Safety Act* be consolidated into a single *Workplace Rights Act* (mirroring the *Canada Labour Code*) to be comprised of three parts: Rights to Basic Terms and Conditions of Employment, Rights to Collective Bargaining, and Rights to a Safe and Healthy Workplace.

The Final Report also recommends:

- The Government initiate a program to educate employees and employers on all sections of the *Workplace Rights Act*.
- The Government consider including in the high school curriculum basic instruction on rights and entitlement under the *ESA*.
- The Ministry of Labour make its Policy and Interpretation Manual publicly available on line.
- The Ministry of Labour continue to collaborate with employee and employer groups to develop communication aimed at educating vulnerable employees and in sectors with high incidents of *ESA* non-compliance.
- The Ministry of Labour increase the use of employer-self-audits in sectors with a high proportion of vulnerable workers and incidence of non-compliance.

Finally, the Final Report recommends the Ministry of Labour encourage and support any employer that wishes to set up an "internal responsibility system" to identify and proactively address concerns prior to a claim being filed, much like a joint health and safety committee under the *Occupational Health and Safety Act*.

Aside from the commitment to increase education broadly for small and medium sized businesses, the Government has not signaled an intention to amalgamate workplace legislation or encourage the use of an "internal responsibility system".

Whistleblower Protection

The Final Report recommends, but Bill 148 does not include, express protection of a whistleblower by:

- Establishing a 'tips' hotline to report potential violations.
- Educating parties to encourage whistleblowing.
- Keeping confidential the identity of a whistleblower (including a third-party whistleblower) unless required to be disclosed by order of a court or tribunal. This includes not disclosing the identity of a whistleblower to the employment standards officer assigned to investigate the matter.

Application for Review

Generally speaking, a party wishing to challenge an order issued by an employment standards officer, or the refusal to issue an order, may apply to the OLRB which, in turn, is required to give the parties full opportunity to present evidence and make submissions. The proceeding before the OLRB is referred to as *de novo* meaning the hearing is fresh, regardless of whatever happened before an employment standards officer.

The Final Report recommends streamlining the review process by requiring the employment standards officer, when issuing a decision, to append all documents relied on, and changing the OLRB review from a hearing *de novo*, to more in the nature of an appeal; requiring the party applying for review to bear the burden of proving the decision should be overturned, modified or amended.

This recommendation is not addressed in Bill 148 or in any of the Government commentary to date.

PART II
AMENDMENTS TO THE *LABOUR RELATIONS ACT*

The approach taken by the Special Advisors to assess the *LRA* is based in large part on the constitutional protection afforded to freedom of association. According to the Special Advisors, the Supreme Court of Canada has "*made it clear that in the employment context, freedom of association guarantees the right of employees to 'meaningfully associate in the pursuit of collective workplace goals' and 'includes a right to collective bargaining*'."

The Special Advisors also assert they "considered the needs of business to remain competitive and for flexibility as very important objectives in making [their] recommendations" and purport to "recognize the need for balance". However, it is apparent a number of the recommendations affecting the *LRA* tip that balance in ways that will adversely affect many businesses.

The Final Report made several specific recommendations in three broad policy areas:

1. Scope and coverage of the *LRA.*
2. Facilitating access to the acquisition of bargaining rights by a trade union and collective bargaining.
3. Extending collective bargaining obligations to an entity that is not the employer of the employees a union represents but nevertheless has some power to affect the manner in which that employer carries on business, including the relationship with its employees.

Scope and Coverage of the *LRA*

Final Report

At present, the *LRA* does not apply to certain categories of worker (*e.g.*, a domestic working in a private home, a person engaged in hunting or trapping, a person employed in agriculture or horticulture, labour mediators and conciliators and provincial court judges) while other categories of worker are deemed not to be "employees" under the *LRA* (*e.g.*, licenced members of the architectural, dental, land surveying, legal and medical professions employed in their professional capacity). As well, the *LRA* does not apply to any person the OLRB finds exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

The Final Report recommends removing from the *LRA* the exclusions relating to domestics, persons engaged in hunting, trapping, agriculture and horticulture, and the deeming of those categories of professionals not to be employees under the *LRA*.

The recommendation with respect to designated professionals is coupled with a recommendation the OLRB determine whether work performed by a category of professional is an "essential service to a community". If so, where there is a strike by those professional employees, the OLRB is given the power to require mediation and some form of dispute resolution to impose a settlement. An essential service exists: "*where interruption of service would endanger the life,*

personal safety or health of the whole or part of the population or involved persons essential to the maintenance and administration of the rule of law".

Bill 148

Bill 148 does not remove the exemptions from the *LRA*. Rather the Ministry of Labour "*will work with affected ministries to consult with stakeholders to review the Special Advisors' recommendations to remove the exclusions under the LRA taking into account ongoing litigation*."

Commentary

Although the Final Report recommends designated professionals be treated as employees under the *LRA*, the recommendations are silent with respect to whether such professionals could constitute their own bargaining unit, as is the situation with professional engineers. Currently, a bargaining unit consisting solely of professional engineers is deemed by section 9(4) of the *LRA* to be an appropriate bargaining unit, but professional engineers may be included in a bargaining unit with other employees.

Acquisition of Bargaining Rights by a Trade Union and Collective Bargaining

Card Based Certification

Final Report

Having reviewed the history of card based certification in Ontario, a system that had been in place since the middle of the last century, subject to material changes in 1993, eclipsed by a mandatory vote based system in 1995, and reintroduced to the construction industry in 2005, the Final Report recommends the vote based system be maintained provided it is accompanied by:

- Effective remedial certification when employer contravention of the *LRA* affects the employees' ability to freely decide whether they wish to participate in collective bargaining.
- A robust first collective agreement mediation and arbitration process.

Bill 148

Bill 148 accepts the recommendations with respect to remedial certification, making access to first contract arbitration easier and "adding an intensive mediation component to the process". However, the Bill goes further by providing a trade union can apply for **card based certification** in respect of a "specified industry employer", defined as an employer that operates a business in the "building services industry", "home care and community services industry" or "temporary help agency industry".

Bill 148 also amends the government's regulation making power under the *LRA* allowing it to determine that certain employers are not subject to card based certification, and define or clarify the meaning of "building services industry", "home care and community services industry" and "temporary help agency industry".

The card based system appears similar to the current card based system used in the construction industry: the employer must file its response within two days of the date it receives the application and provide the names of employees it claims are in the union's proposed bargaining unit. If the employer proposes a different bargaining unit, it must include the names of the employees in its proposed unit. The OLRB then determines, as of the date the application was filed, the percentage of employees in the bargaining unit who are members of the union. Where the union has filed membership evidence on behalf of more than 55% of employees in the unit, the OLRB may certify the union or direct a representation vote. (Unless there are exceptional circumstances, the OLRB invariably certifies the union if more than 55% of the employees are union members as of the application date.) If the union files membership evidence on behalf of fewer than 40%, the application must be dismissed. If the membership evidence filed is on behalf of between 40% and 55% of employees, the OLRB must direct a representation vote.

Should an employer fail to file a timely response to the certification application, it is likely the OLRB will certify the union without a hearing if the union claims more than 55% of the employees in its proposed bargaining unit are members.

Finally, the remedial certification provision in the current *LRA* has been significantly changed where the employer commits an unfair labour practice (and as a result *the true wishes of the employees are not reflected in the results of the representation vote, or the union was unable to secure union membership from at least 40% of the employees in the bargaining unit*). In that case, the OLRB must certify a union "in the bargaining unit the [OLRB] determines could be appropriate for collective bargaining".

Commentary

The broad definitions of the three industries that come within the meaning of a "specified industry employer", taken together with the Government's regulation making power allowing it to broaden the categories of employers that come within those definitions, leaves open the possibility of the Government extending card based certification to an employer not currently captured by the Bill.

The OLRB need not hold a hearing to determine a card based certification application. The failure by an employer to file a response and list of employees within the two day time limit will likely result in a certificate being issued to the union. In the construction industry, a union may deliver the application to the employer up to two days after it files its application. It remains to be seen whether the card based application process will also enable a union to file its application a day or two before it delivers it to the employer. In those circumstances neither the employer nor the employees will know a certification application has been filed until the application date has passed, rendering meaningless any attempt to provide information to employees about consequences of becoming a union member.

The remedial certification provision also removes any discretion from the OLRB to determine whether some form of remedial order other than certification is an appropriate remedy if the employer has committed an unfair labour practice.

Temporary Help Agency Certification

Final Report

The Final Report recommends: "*Persons assigned by a temporary help agency to perform work for clients of the agency, or persons assigned by other suppliers of labour to perform work for a person, shall be deemed to be employees of the client or person, respectively, for purposes of the Labour Relations Act, 1995.*"

Bill 148

Bill 148 extends card based certification to the temporary help agency industry, and by doing so, treats a temporary help agency as the employer of the employees it dispatches to work for clients.

Commentary

The Government, by extending card based certification to the temporary help industry, intends to have the agency treated as the employer of the employees it assigns to work for its clients, contrary to the Final Report recommendation.

Treating a temporary help agency as the employer subject to card based certification raises many questions. Will the appropriate bargaining unit encompass all the employees dispatched by the agency out of one office, or will the bargaining unit be described in terms of employees working for a particular client? If a temporary help agency is certified, it does not appear there is anything in Bill 148 to preclude the agency's client from cancelling its arrangement with the agency and retaining another temporary help agency. To that end, the extension of successor rights (discussed below) does not encompass temporary help agencies.

First Agreement Mediation and Arbitration

Final Report

At present, where parties have not effected a first collective agreement and the Minister of Labour has appointed a conciliation officer, either party can apply to the OLRB for arbitration of a first collective agreement. If an application for decertification of the union or a displacement application for certification by another union is filed before the OLRB issues its decision with respect to the request for arbitration, the decertification or displacement certification application operates as a stay of the request for first agreement arbitration.

The Final Report recommends the first agreement mediation and arbitration must be completed before a decertification or displacement certification application is determined.

Bill 148

Bill 148 adopts and goes beyond this recommendation. The first agreement arbitration process under the current *LRA* has been buttressed by permitting either party to apply for the appointment of a first agreement mediator at any time after the Minister has issued a no board

report. After the application is filed the Minister must appoint a mediator. During the twenty day period following the mediator's appointment no strike or lock-out can take place. If the parties have not reached a collective agreement within that 20 day mediation period, either party may apply to the OLRB for first agreement arbitration. Upon receipt of that application the OLRB may either dismiss the application, order further mediation or direct first contract arbitration through mediation-arbitration. The OLRB must direct first contract mediation-arbitration when the union receives remedial certification.

Any pending displacement certification application or application to terminate bargaining rights, even it filed before an application for the appointment of a first agreement mediator, must be held in abeyance pending the completion of the first agreement mediation and arbitration process.

Commentary

First contract mediation and mediation arbitration can be invoked when the parties do not reach a collective agreement. As such, a trade union that cannot maintain support among the bargaining unit employees, including when there is genuine opposition from employees, can nevertheless secure a first agreement through the arbitration process and need not have the employees ratify that agreement (*i.e.*, the union need not take into account the wishes of the bargaining unit employees when negotiating a first agreement).

That change significantly enhances the power of a trade union to secure demands in bargaining without regard to employees in the bargaining unit. As well, a trade union could unilaterally stop an otherwise timely termination or displacement application by simply making the request for the appointment of a first contract mediator.

Employees in the bargaining unit are also no longer able to terminate the union's bargaining rights or try to bring in another trade union after that first agreement mediation and arbitration process is commenced unless the OLRB dismisses the application. If it is not dismissed, the employees must remain represented by that union until the final three months of that first collective agreement, an agreement that must have a minimum term of two years.

Union Access to Employee Information

Final Report

To enhance access to collective bargaining and facilitate union organizing the Final Report recommends requiring an employer provide to the union the names and contact information (including personal email address and phone number) of employees in a bargaining unit the union claims is appropriate, upon the union demonstrating it has not less than 20% membership support in that unit.

In making this recommendation the Final Report indicates access to employee information is an element of an entire package of proposals designed to enhance access to collective bargaining, **including maintaining the certification vote process**.

Bill 148

Bill 148 adopts this recommendation, but then, contrary to the Final Report, extends it by allowing access to employee information in all applications for certification, **including card-based certification in specified industries** (a business in the "building services industry", "home care and community services industry" or "temporary help agency industry").

If requested, the information an employer is required to provide is the name of each employee in the proposed bargaining unit and the employees' phone numbers and personal email addresses if they are in the employer's possession. This does not apply in the case of a raid (where a union seeks to displace an incumbent union).

If the employer disagrees with the proposed bargaining unit or the union's estimate, the employer must serve a notice of disagreement on the OLRB and union within two days of the application indicating whether it believes the union's proposed bargaining unit "could not be appropriate for collective bargaining". The employer must also serve its submissions and an estimate of the number of employees in the union's proposed unit.

If the employer does not file a notice of disagreement, the OLRB will determine whether at least 20% of the employees in the proposed unit "appear to be members" of the union and if so, direct the employer to provide the employee list and personal contact information. If the OLRB determines fewer than 20% of the employees appear to be union members, it must dismiss the application.

If the employer does file a notice of disagreement, the OLRB must determine whether the union's proposed bargaining unit could be appropriate. If the OLRB decides it could not be appropriate, it must dismiss the application. If the OLRB determines the unit could be appropriate, it must then determine whether there is an appearance of at least 20% membership support in the bargaining unit.

The determination the OLRB must make with respect to the level of support is based only on the information contained in the application and notice of disagreement, if any, filed by the employer.

Finally, the application for access to employee information "does not apply with respect to an employer as defined in section 126(1)" (an employer that operates a business in the construction industry).

Commentary

Bill 148 requires the OLRB to determine the level of membership support based on the materials filed by the union unless the employer files a notice of disagreement. Bill 148 does not contemplate the OLRB obtaining and considering information from the employer before making the determination, unless the employer files a notice of disagreement.

As we noted in our commentary on the Interim Report, two significant barriers to disclosure of employee personal information are the privacy rights of employees and the additional layer of

OLRB litigation that will likely ensue regarding whether a union can demonstrate sufficient support (*e.g.*, 20%).

Insofar as privacy is concerned, it is difficult to appreciate how Bill 148 rationalizes such a considerable intrusion into the rights of employees based solely on a minority of employees having signed a union card (*e.g.*, 20%). In terms of the impact on OLRB processes, adding another layer of potential litigation (should the employer file a notice of disagreement) will only delay and increase the costs associated with the entire certification process.

The exemption for an employer operating a business in the construction industry can be an important tool to resist an application for employee information particularly if the OLRB is consistent in its interpretation of the definition of a "construction industry employer". An employer can be a construction industry employer even when its principal business activities have nothing to do with the construction industry, so long as some employees carry out some construction work.

Finally, we note that Bill 148 does not contemplate a "statutory freeze" upon a union request for employee contact information. Under the current *LRA*, a freeze is triggered when an employer receives notice of a certification application. That said, we anticipate trade unions will put employer conduct under close scrutiny after filing an application for employee information given the potential consequence of remedial certification should an employer thereafter take steps found to be "anti-union".

Consolidation of Bargaining Units

Final Report

The Final Report recommends additional powers be given to the OLRB to consolidate bargaining units where an employer is dealing with several different units of employees, even where those units are represented by different unions.

Bill 148

Bill 148 adopts this recommendation, giving the OLRB authority to change the structure of bargaining units within a single employer "where the existing bargaining units are no longer appropriate for collective bargaining", even where the units are represented by different unions.

When the OLRB consolidates bargaining units represented by different trade unions it may declare which of the unions (and collective agreements) affected by the consolidation order represents (applies to) the employees in the newly consolidated unit. In doing so, the OLRB will also terminate the bargaining rights of the other union or unions that formerly represented employees at issue.

Commentary

While the consolidation of bargaining units may well streamline an employer's bargaining structure it may also raise a host of issues relating to, for example, the integration of seniority

lists, job classifications, wage rates and many others. The power to consolidate bargaining units after certification also includes the power to order the existing collective agreement apply "with or without modification" to the newly certified bargaining unit.

In our commentary on the Interim Report, we observed that where labour boards are given the power to alter the scope of existing bargaining units, employee choice can be compromised. Smaller groups of employees that initially had a say whether to be unionized, lose their voice as they are swallowed up by larger employee bargaining units. We had expressed the hope that if the power to consolidate bargaining units was recommended, the proposed legislation would include a provision ensuring smaller employer groups have a discrete voice in determining whether to be included in a larger bargaining unit.

Bill 148 directs the OLRB to focus on the views of the union and the employer when determining whether to consolidate bargaining units. The wishes of the employees do not appear to be a significant factor when deciding whether to order consolidation. Although the OLRB may order a representation vote when determining whether to consolidate bargaining units that are no longer appropriate, there is no power to order a representation vote in respect of a consolidation request following certification.

Extending Collective Bargaining Obligations

Franchise Industry

Final Report

The Final Report discusses broader-based bargaining at some length, including certain sectors of the economy where the franchising model has taken hold and in which sector-based collective bargaining might be established.

Bill 148

Bill 148 is silent on this issue.

Commentary

Our commentary on the Interim Report discussed ramifications of changes in the *LRA* that might negatively affect the myriad of franchise arrangements already in existence. Perhaps by saying nothing about franchise industry, the Government recognized that changing how the *LRA* applies to franchise arrangements is fraught with difficulties and pitfalls.

Building Services and Publicly Funded Home Care

Final Report

The Final Report recommends the successor rights provisions of the *LRA* be extended to include the building services industry (cleaning services, security services and food services), publicly

funded home care, and other industries in which retendering of contracts can result in a change of employer and displacement of employees.

Bill 148

Bill 148 extends successor rights to the retendering of building services contracts including building cleaning services, food services and security services, and, by regulation, to other publicly funded contracted services.

Commentary

Under Bill 148, where a contract for building services comes to an end and a new provider contracts to provide those services, that change in service provider is deemed to be a "sale of a business". In other words, if a service provider is bound by a collective agreement and loses the contract with the building to a new service provider, that new service provider becomes bound by that collective agreement and any outstanding obligations incurred but not satisfied by the previous service provider.

Through its regulation making power, the Government may also determine whether the successorship provisions will apply to any other "publicly funded contracted services". This may include not only contracted services the Government or one of its agencies has tendered, but hospitals, school boards, colleges, universities, municipalities or any other entity that receives "public money" and issues a tender to obtain services from a third party contractor.

In that case, if a service provider subcontracts work (not just building services, but any other kind of work or service they provide), and the subcontractor is or becomes bound by a collective agreement, if the service provider changes subcontractors, the new subcontractor will be subject to the existing collective agreement and union bargaining rights.

Miscellaneous Provisions

Extending Just Cause Requirement for Discipline and Discharge

Final Report

The Final Report recommends the extension of just cause protection to an employee during the period between the date a certification application is filed and the "conclusion of a first contract", and also during the period between the date a strike or lock-out is legal and the new collective agreement. The Final Report did not limit its recommendation to employees who had passed their probationary period.

Bill 148

Bill 148 adopts these recommendations.

Commentary

It is worrisome and unusual probationary employees are not excluded from the just cause protection created by Bill 148 after certification and before the first agreement is signed, or during a strike or lock-out. During the Bill 40 regime (1993-1995), when statutory just cause protection was introduced, the *LRA* provided for a "lesser standard" for probationary employees. It is also puzzling that the just cause protections only cease when a new collective agreement is reached, but not when the union's bargaining rights have been terminated.

Return to Work After Strike or Lock-Out

Final Report

The Final Report recommends the elimination of the six month limit on an employee's right to return to work during an ongoing strike.

Bill 148

Bill 148 adopts this recommendation. The employer must return bargaining unit employees and in doing so displace any person hired to perform the work of the employees while on strike or locked out.

Commentary

The obligation to return striking employees to work, and displace any person hired to do the work during the strike or lock-out, is generally dealt with by the parties in their agreed upon return to work protocols. The amendment will only impact an employer in the rare case where there has been a particularly long strike or lock-out and the only obstacle to settlement is whether employees who had been locked out or on strike can return to work.

OLRB to Grant Interim Relief

Final Report

The Final Report recommends repealing the limitations on the power of the OLRB to grant interim relief by giving it the same power to grant interim relief exercised by other administrative tribunals pursuant to the *Statutory Powers Procedure Act*.

Bill 148

Bill 148 adopts this recommendation.

Commentary

This amendment was expected by many in the employer community as it brings the OLRB in line with the interim relief power of other provincial administrative tribunals.

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Sherrard Kuzz LLP will continue to closely monitor Bill 148. Meanwhile, as stated at the outset, it is imperative employers and business organizations continue to engage with the Government to ensure it understands the negative impact Bill 148, in its current form, will have on job creation and economic prosperity in Ontario, both long and short-term.

For more information and for assistance, contact the employment and labour law experts at Sherrard Kuzz LLP.

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