SHERRARD KUZZ LLP
Employment & Labour Lawyers

250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

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

May 2018

This Executive Summary provides an overview of Bill 148 - *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**", **and offers commentary from our firm.**

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-side 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.

Bill 148 passed First Reading on June 1, 2017. Thereafter, the Standing Committee on Finance and Economic Affairs carried out its review of the Bill, including consultation with trade unions, worker advocacy organizations, anti-poverty groups and some employer associations. Bill 148 was then amended based, it appears, principally on the representations from employee groups, with little weight given to the concerns expressed by employers in the manufacturing and service sectors.

The amended Bill, which also contains a provision amending the *Occupational Health and Safety Act* (*"OHSA")* prohibiting an employer from requiring a worker wear high heels, moved to third reading and was passed on November 22, 2017. It received Royal Assent on November 27.

WHEN BILL 148 BECOMES LAW

***ESA*:** Some of the amendments to the provisions in the *ESA* took effect **November 27, 2017** (Employee Misclassification) and **December 3, 2017** (Parental Leave and Critical Illness Leave). Most of the other amendments to the *ESA* came into force on **January 1, 2018**, although certain provisions took effect on **April 1, 2018** (Equal Pay Provisions). The remaining amendments come into force on **January 1, 2019** (Scheduling Provisions).

***LRA*:** All the amendments to the *LRA* were effective **January 1, 2018.**

***OHSA*:** The amendment to the *OHSA* came into force on **November 27, 2017**.

We will continue to monitor this Bill and its impact on Ontario workplaces, and update readers accordingly.

To learn more and for assistance preparing your workplace for Bill 148, contact Sherrard Kuzz LLP.

The **Final Report** as well as this **Executive Summary – May 2018** can also be found on the home page of our website at www.sherrardkuzz.com.

[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*)

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 increased 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 was not one of the changes contemplated by the Interim or Final Report.

Equal Pay for Equal Work **(in force April 1, 2018)**

Final Report

Prior to Bill 148, the *ESA* did 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 recommended 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 limited its recommendations to wage parity only. It did 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 (but not necessarily identical) kind of work in the same establishment,
- Their performance requires substantially the same (but not necessarily identical) skill, effort and responsibility, and
- Their work is performed under similar working conditions.

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. The term "difference in employment status" is defined in Bill 148 as "a difference in the number of hours regularly worked by employees; or a difference in their term of employment, including a difference in permanent, temporary, seasonal or casual status". An employer that hires a college or university student to work during the summer must therefore pay the student the same rate of pay paid to a regular, full-time permanent employee unless the summer student comes within one or more of the permitted exceptions to the equal pay requirement outlined above.

Regulations enacted in December, 2018 introduce an exemption from the equal pay for equal work provision for the following three categories of employees:

- A firefighter within the meaning of the *Fire Protection and Prevention Act, 1997.*
- A student under 18 who works not more than 28 hours a week or who works during a school holiday.
- A person employed in the recorded visual and audio-visual entertainment production industry.

Bill 148 temporarily "grand-fathers" wage rates contained in any collective agreement in effect as of April 1, 2018 up to the earlier of January 1, 2020 or the expiry of the collective agreement. Any new collective agreement made or renewed after April 1, 2018 must comply with the equal pay requirement.

Bill 148 goes beyond the recommendations in the Final Report, guaranteeing an employee the right to 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. As a result of the passage of Bill 148 employers may move to an hours-based seniority system to defend an experience-based pay differential within the workplace, or take other steps to establish a basis for coming within one or more of the exemptions.

Scheduling (in force January 1, 2019)

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 did not provide definitive recommendations to address scheduling concerns. However, it recognized a need for predictable scheduling in certain sectors. To address this, the Final Report recommended the *ESA* provide the Ministry of Labour authority to regulate scheduling by employers. It also recommended 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 provided no recommendation for on-call pay, but recommended 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 and expands this recommendation to provide:

- If an employee attends work but works fewer than three hours, despite being available to work longer, the employee is entitled to three hours of pay at his or her regular rate, or the amount the employee earned for the time worked plus the wages equal to his or her regular rate for the remainder of the time (whichever is greater).
- If an employee's scheduled day of work (or scheduled "on-call" period) is cancelled within 48 hours of its intended start, the employee is entitled to three hours of pay at his or her regular rate.
- If an employee is "on-call" and not called in to work, or is called in for work for fewer than three hours despite being available to work longer, the employee will be entitled to three hours of pay at his or her regular rate of pay, or the amount the employee earned for the time worked plus the wages equal to his or her regular rate for the remainder of the time (whichever is greater). This only applies to the first "on-call" shift in any 24 hour 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 or the "on-call" period commences.

Certain exemptions apply to these scheduling provisions:

- An employee has no right to refuse a shift where the request is due to an emergency situation, would result in threat to public safety, or is necessary to ensure the continued delivery of an essential public service (regardless of who delivers the service).
- An employee is exempt from being paid for an "on-call" shift where the employee is on call for the purpose of ensuring delivery of an essential public service (regardless of who delivers the service) and the employee is not actually called in to work.
- An employer is exempt from the 3 hour rule where the inability to provide work is due to extraordinary circumstances outside of the employer's control (fire, power failure, *etc.)*.
- An employee is exempt from the entitlement to pay for the cancellation of a scheduled day of work or "on-call" period if the cancellation was due to extraordinary circumstances outside of the employer's control (fire, power failure, *etc*.) or the nature of the work is weather-dependent and the employer cannot provide the work for weather-related reasons.

Bill 148 temporarily "grand-fathers" scheduling provisions contained in any collective agreement in effect as of January 1, 2019 up to the earlier of January 1, 2020 or the expiry of the collective agreement. Any new collective agreement made or renewed after January 1, 2019, must comply with the scheduling requirements.

Regulations enacted in December, 2018 provide an exemption to certain scheduling requirements for employees employed in the automobile manufacturing, automobile parts manufacturing, automobile parts warehousing, and automobile marshalling industries and an exemption to the scheduling requirements for employees employed in the recorded visual and audio visual entertainment production industry. Otherwise, Bill 148 does not expressly address sector-specific scheduling regulations, although the current *ESA* does provide that regulations may be

made "exempting any class of employees or employers from the application of this Act or any Part, section or other provision of it."

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. We also understand the government may create further regulation(s) to exempt certain sectors from these new scheduling amendments.

Requests for a Change to Schedule or Work Location (in force January 1, 2019)

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 made 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 recommended 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**' employment.

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 (in force January 1, 2018)

Final Report

Prior to Bill 148, an employee was 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* did not provide for an increase in these amounts based on length of employment.

The Final Report recommended 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 (in force January 1, 2018)

Final Report

The *ESA* provides for nine (9) public holidays for which most employees in Ontario are entitled to public holiday pay. Prior to Bill 148, public holiday pay was calculated by taking the regular wages earned and vacation pay payable to an employee in the four weeks prior to the week of the public holiday and dividing this number by 20. This calculation essentially provided 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) was paid proportionately to recognize the amount of time actually worked by an employee in the month.

The Final Report recommended the public holiday pay section of the *ESA* 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.

On May 7, 2018, the Ontario Government announced it will undertake a review of the public holiday provisions of the *ESA* and has invited feedback. The review will be conducted in 2018, and submissions can be sent to exemptions.review@ontario.ca.

As an interim measure, the Government has enacted Ontario Regulation 375/18 which reinstates the pre- Bill 148 formula for calculating public holiday pay, effective July 1, 2018. As such, as of July 1, 2018, an employee's public holiday pay for a public holiday is equal to the total amount of the regular wages earned and vacation pay payable to the employee in the four weeks before the work week in which the public holiday occurred, divided by 20. This regulation expires on December 31, 2019.

An employer wishing to grant an employee a substitute holiday in *lieu* of a public holiday will now need to provide the employee a written statement outlining the date being substituted for the public holiday.

Regulations enacted in December, 2018 provide a construction employee working in the construction industry will be exempt from the public holiday provisions of the ESA where the employee receives:

- At least 7.7% of his or her hourly wage for vacation pay or holiday pay, if the employee's period of employment is less than five years.
- At least 9.7% of his or her hourly wage for vacation pay or holiday pay, if the employee's period of employment is five years or more.

Commentary

The implication of the initial Bill 148 public holiday amendment was significant, particularly for an employer with casual employees. Under the amended formula, 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. Thankfully, as of July 1, 2018 an employer will be able to revert back to the pre-Bill 148 formula. It remains to be seen whether this will be a permanent amendment or whether the Ontario Government will pass an alternate public holiday calculation.

Overtime Pay (in force January 1, 2018)

Final Report

The Final Report contained a number of recommendations related to hours of work and overtime, most of which were not addressed in Bill 148. The Final Report recommended 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 (in force January 1, 2018)

Final Report

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

Bill 148

Bill 148 adopts this recommendation.

Commentary

This amendment 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 (in force January 1, 2018)

Final Report

Prior to Bill 148, the *ESA* required an employer that regularly employed 50 or more employees provide to each employee up to ten (10) unpaid personal emergency leave ("PEL") days to 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 recommended 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 recommended the *ESA* 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 recommended 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 includes 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 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**. An employee is entitled to those two days of paid leave after one week of employment. 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 note from a qualified health practitioner to substantiate the need for a PEL for medical reasons.

The PEL Regulation continues to apply to employees in the automotive sector. However, regulations enacted in December, 2018 amend the PEL Regulation to:

- Remove the 50 employee threshold, such that each employee employed in this sector will be entitled to PEL in accordance with the PEL Regulation.

- Clarify an employee will be entitled to up to three bereavement days in each circumstance of the death of a prescribed family member, as opposed to three bereavement leave days per calendar year.
- Entitle an employee to receive the first two PEL days off **with pay**. However, an employee will not be entitled to have these days paid where the terms and conditions of the employee's employment already provide him or her with two or more days off with pay for vacation or public holidays in excess of the ESA entitlements or for personal illness or medical appointments (*i.e.*, paid sick days).
- Align the PEL Regulation with the other PEL provisions by removing the right to request a note from a qualified health practitioner to verify the need for the PEL day.

Regulations enacted in December, 2018 also provide a construction employee working in the construction industry who receives at least 0.8% of his or her hourly wage for personal emergency pay will not be entitled to receive two paid PEL days. However, the employee will continue to be entitled to receive ten (10) unpaid PEL days.

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.

Domestic and Sexual Violence Leave (in force January 1, 2018)

Final Report

As mentioned above, the Final Report recommended the PEL provisions be amended to allow for leave to be taken if an employee or his or her minor child(ren) is the victim of domestic violence.

Bill 148

Initially, Bill 148 adopted the Final Report recommendation. Entering Second Reading, Bill 148 was amended to remove from PEL the reference to sexual or domestic violence (or the threat of such violence) and include a stand-alone Domestic and Sexual Violence Leave.

An employee with at least 13 weeks of employment will be entitled to an unpaid leave of absence of 10 calendar days in a year and 15 weeks in a calendar year for reasons related to the employee's (or the employee's child's) experience of domestic or sexual violence or the threat of such violence. Significantly, the first five days of this leave in each calendar year must be **paid**.

An employer may request evidence reasonable in the circumstances to support the need for the leave, and must protect the confidentiality of any records provided or produced related to the leave.

Commentary

While the "layering" of leave time in this provision is somewhat unique, it reflects the breadth of reasons why an employee might need to use the leave (*e.g.*, one day for a counselling session vs. two weeks for temporary or permanent relocation).

Critical Illness Leave (in force December 3, 2017)

Final Report

Prior to Bill 148, the ESA included Critically Ill Child Care Leave, entitling an employee to up to 37 weeks in a 52 week period to provide care or support to a critically ill child of the employee. The Final Report made no recommendations with respect to this leave entitlement.

Bill 148

Bill 148 replaces Critically Ill Child Care Leave with an expanded Critical Illness Leave. An employee with at least six months of employment is entitled to a leave of up to 17 weeks to provide care for and support to a critically ill adult family member and up to 37 weeks to provide care for and support to a critically ill family member who is a child.

Commentary

This amendment was expected by many in the employer community. It is consistent with amendments to the federal Employment Insurance regime entitling a claimant to up to 15 weeks of benefits to care for a critically ill adult family member, in addition to an entitlement of up to 35 weeks of benefits to care for a critically ill child.

Parental Leave (in force December 3, 2017)

Final Report

Prior to Bill 148, an employee with at least 13 weeks of employment was entitled to Parental Leave of up to 37 weeks, or 35 weeks if the employee had also taken a Pregnancy Leave. The Final Report made no recommendations with respect to this leave entitlement.

Bill 148

Bill 148 increases the Parental Leave entitlement to up to 63 weeks, or 61 weeks if the employee has also taken a pregnancy leave. This enhanced leave entitlement applies only where the child is born or comes into the employee's care and custody on or after December 3, 2017.

Commentary

This amendment was expected by many in the employer community, given amendments to the federal Employment Insurance regime entitling a parent to access parental benefits for a similar period of time if they do so at a lower benefit rate. We expect to see similar amendments made in other provincial employment standards legislation.

Pregnancy Leave (in force January 1, 2018)

Final Report

Prior to Bill 148, the ESA provided where an employee took a pregnancy leave but was not entitled to a parental leave, pregnancy leave ended on the later of (a) 17 weeks after the pregnancy leave began, and (b) six weeks after the birth, still-birth or miscarriage.

Bill 148

Bill 148 amends this provision to increase the six week pregnancy leave entitlement to twelve weeks following the birth, still-birth or miscarriage.

Commentary

This amendment was incorporated to provide an employee with a longer period of recovery following a still-birth or miscarriage occurring within 17 weeks from the anticipated date of delivery.

Family Medical Leave (in force January 1, 2018)

Final Report

Prior to Bill 148, the Family Medical Leave ("FML") provisions entitled 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 had a serious medical condition with a significant risk of death in the 26-week period.

The Final Report recommended increasing these thresholds to 26 weeks of FML in a 52-week period, bringing the FML provisions in line with changes to the federal Employment Insurance system which 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 28 weeks of leave within a 52-week period. The two additional weeks 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 (in force January 1, 2018)

Final Report

Prior to Bill 148, the *ESA* provided 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 recommended 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 sought to discourage the long-term use of temporary workers and encourage the hiring of temporary workers as permanent employees whenever possible. The Final Report recommended:

- 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 recommended 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. 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 be for two days.

Bill 148

Bill 148 departs considerably from these recommendations, making it considerably more 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, in force April 1, 2018**). Bill 148 entitles an assignment employee to be paid a rate of pay equal to the rate paid to an employee of the client when:

- They perform substantially the same (but not necessarily identical) kind of work in the same establishment,

- Their performance requires substantially the same (but not necessarily identical) skill, effort and responsibility, and
- Their work is performed under similar working conditions.

Unlike in the Final Report, Bill 148 requires **immediate** wage parity. A difference in the rate of pay is permitted only if based on any factor other than sex, employment status or assignment employment status.

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 temporary 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 an 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, the exemption only applies up to the earlier of the expiry of the collective agreement or January 1, 2020, whichever occurs first. 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. **This provision came in force on January 1, 2018**.

Commentary

As noted earlier, the final recommendations were 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, Bill 148 grossly overreaches 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 (in force January 1, 2018)

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 single 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 being treated as a "single" employer. However, the requirement of "intent or effect" is unique to Ontario.

The Final Report recommended 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.

The Special Advisors' principal reason for making this recommendation was 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.

Bill 148

Bill 148 adopts this recommendation providing two persons will be considered one employer for purposes of the *ESA* if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons without reference to the need they be under common direction and/or control.

Commentary

The existence of "intent or effect" required the two or more entities have some degree of common ownership or control. With the removal of "intent or effect", the only test for determining whether two or more entities are one employer for purposes of the *ESA* is whether they carry on "related activities or businesses". Once there has been a finding that an employer and one or more other persons carry on "related activities or businesses" the section provides "the employer and the other person or persons…shall all be treated as one employer…." for the purposes of all contraventions of the *ESA*.

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.

Making this amendment without further amendment to Section 4(1) of the *ESA* (which references "related activities or businesses"), may leave an employer vulnerable to an argument two entities which operate related businesses, but without common control or direction are captured by this provision and will be declared one employer for purposes of the *ESA*.

The current *LRA* single employer declaration still requires the demonstration that the two entities are under common direction or control and leaves the OLRB with discretionary powers. Unlike a comparable provision in the *LRA* the single employer designation under the *ESA* is not discretionary and no longer, at least on a plain reading, requires the presence of common direction or control.

This is not consistent with the current interpretation applied by the Ministry or the OLRB when considering whether "related" entities (*i.e.*, entities carrying on related activities or businesses) ought to be treated as one employer, nor has it been the intent of this type of legislative protection.

Employee Misclassification (in force November 27, 2017)

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 recommended 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 recommended 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.

An organization that retains independent contractors is well-advised to review these relationships to satisfy itself they are appropriately categorized. It is a common misconception that, if an independent contractor operates through an incorporated entity, this alone is sufficient to ensure the contractor is not considered an employee. However, the test is broader and more nuanced, often examining factors such as (1) whether the independent contractor bears a risk of profit or loss, (2) who controls and directs the work to be performed, and how it is performed, (3) who owns the tools and equipment used to perform the work, and (4) the ability of the contractor to subcontract out work and perform services for others.

"Self-Help" Requirement (in force January 1, 2018)

Final Report

Prior to Bill 148, an employee not covered by a collective agreement could 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* required the employee to first address the issue with the employer - referred to as a *self-help* requirement.

The Final Report recommended 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 (in force January 1, 2018)

Final Report

Prior to Bill 148, the following provisions of the *ESA* did 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 recommended 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 (in force January 1, 2018)

Final Report

Prior to Bill 148, the *ESA* provided a "trainee" was an "employee" for the purposes of the legislation, unless certain conditions were met to justify exclusion.

Employee advocates argued employers exploited this provision and benefited improperly from the free labour of trainees.

The Final Report recommended 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 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). The elimination of this opportunity for a student or other young person, together with the new equal pay provisions that prohibit a summer student and part time employee from receiving a lower rate of pay than a regular full time employee, may well result in significantly fewer employment opportunities for people with limited experience, trying to get their "first" or "entry level" job.

Remedies and Penalties

Final Report

Prior to Bill 148, enforcement mechanisms under the *ESA* included:

- 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 could 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 recommended 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 recommended 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 officer 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.

Regulations enacted in December, 2018 increase the administrative penalties for a non-compliant employer from $250/$500/$1000 to $350/$700/$1500.

Commentary

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 several sector and occupation based exemptions.

The Final Report expressed concern that, as a result of this "patchwork of exemptions", only 23% of minimum wage earners are fully covered by the *ESA*. The Final Report acknowledged 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 endorsed 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 recommended 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.

In November, 2017, the Ministry of Labour initiated a review of certain occupational exemptions under the *ESA*, including the managerial exemption, inviting members of the public to participate through written submissions. The review process is ongoing and we will update readers as developments occur.

Hours of Work

The Final Report made 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 recommended 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 encouraged 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 recognized additional funding would be 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 recommended 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 placed 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 recommended 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 recommended:

- 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 recommended 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 recommended, 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 recommended 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* was 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 asserted 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 was apparent a number of the recommendations affecting the *LRA* would have tipped that balance in ways that would 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

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 workers 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 recommended 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 was 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 recommended designated professionals be treated as employees under the *LRA*, the recommendations were 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 in Specified Industries

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 recommended 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. Moreover, the bargaining unit for which remedial certification may be granted need not be an appropriate bargaining unit but need only be a bargaining unit that "could be appropriate" for collective bargaining - a much lower test.

With respect to temporary help agencies, 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

Prior to Bill 148, where parties had not effected a first collective agreement and the Minister of Labour had appointed a conciliation officer, either party could apply to the OLRB for arbitration of a first collective agreement. Arbitration was only available on application by a party where the OLRB was satisfied the parties were unable to conclude an agreement because of:

a) The refusal of the employer to recognize the bargaining authority of the trade union;

b) The uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;

c) The failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or

d) Any other reason the OLRB considered relevant.

Based on these narrow factors, an employer could generally take a firm but reasonable position at bargaining, without fear of having to proceed to arbitration on a first agreement.

If an application for decertification of the union or a displacement application for certification by another union was filed before the OLRB issued its decision with respect to the request for arbitration, the decertification or displacement certification application operated as a stay of the request for first agreement arbitration.

The Final Report recommended 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 forty-five day period following the mediator's appointment no strike or lock-out can commence. If the parties have not reached a collective agreement within that 45 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. Where first agreement mediation-arbitration is ordered, neither party may commence a strike or lockout and any ongoing strike or lockout must terminate.

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 recommended 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 stated 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").

A union may file an application for a list of the employer's employees. If granted, the employer will be required to provide 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. The OLRB may also direct the employer include other information relating to the employee, including the employee's job title, business address and any other means of contact the employee provided to the employer, other than the employee's home address.

Where an employee list is provided, the employer and union must take all reasonable steps to protect its security and confidentiality, and the list is to be disclosed only to the appropriate officials of the union and used only for the purpose of a campaign to establish bargaining rights.

Bill 148 puts a time limit on how long a union may keep the list. The list is to be destroyed the earlier of: (a) the date the union's application for certification is dismissed or (b) one year after the OLRB's direction to provide the list. The list must be destroyed in a way it cannot be reconstructed or retrieved.

A union conducting a raid (where a union seeks to displace an incumbent union), is not entitled to apply for access to employee information.

If the employer disagrees with the proposed bargaining unit or the union's estimate contained in the application, 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 recommended 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

Although Bill 148 initially adopted 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, that provision was removed from the Bill during Second Reading.

Bill 148 permits the OLRB to review the structure of bargaining units of an employer represented by the same union when that union applies for certification for a new bargaining unit or within three months after it obtains certification, provided the union and employer have not entered into a collective agreement in respect of that recently certified unit. The OLRB may, as a result of that review, consolidate bargaining units, amend the bargaining unit description in an OLRB certificate or in the parties' collective agreement, order the existing collective agreement be applied to the newly certified bargaining unit or terminate a collective agreement.

Bill 148 also permits a union and employer to review the structure of their bargaining units at any time if they agree in writing to do so and, as a result of that review and their agreement, with the consent of the OLRB, to consolidate their existing bargaining units, amend bargaining unit descriptions and seniority lists, or terminate collective agreements.

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 during or after certification also includes the power to order the existing collective agreement apply "with or without modification" to the newly certified bargaining unit if it is consolidated with an existing 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.

Although Bill 148 directs the OLRB, when determining whether to consolidate bargaining units, to take into account "all factors that the [OLRB] considers relevant" it appears the OLRB will likely focus on the views of the union and employer, and not the employees. This is because Bill 148 specifically directs the OLRB to consider whether consolidation would "contribute to the development of an effective collective bargaining relationship; and contribute to the development of collective bargaining in the industry".

Extending Collective Bargaining Obligations

Franchise Industry

Final Report

The Final Report discussed 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 recommended 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 recommended 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 to have a probationary employee come within the just cause protection created by Bill 148 in the period after certification and before the first agreement is signed, and during a strike or lock-out. This statutory just cause protection ends when a new collective agreement is reached or when the union's bargaining rights have been terminated, whichever occurs first. The practical result of this provision is a probationary employee will often have a greater protection against dismissal *prior* to a collective agreement coming into effect than after the agreement is in force.

Return to Work After Strike or Lock-Out

Final Report

The Final Report recommended 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 displacing those employees who had worked during the strike or lock-out.

OLRB to Grant Interim Relief

Final Report

The Final Report recommended 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.

PART III
AMENDMENTS TO THE
OCCUPATIONAL HEALTH AND SAFETY ACT

Prohibiting Employers From Requiring Employees to Wear High Heels

Final Report

The Final Report made no recommendations regarding the *OHSA*.

Bill 148

Bill 148 amends the *OHSA* by adding a new section prohibiting an employer from requiring an employee "to wear footwear with an elevated heel unless it is required for the worker to perform his or her work safely". The section does not apply to an employee who works as a performer in the entertainment and advertising industry.

Commentary

The provision does not preclude an employee from wearing high heels at work if the employee chooses to do so. However, it prevents an employer from requiring an employee wear high heels as part of a uniform or dress code.

***

Sherrard Kuzz LLP will continue to closely monitor Bill 148 as it takes effect in Ontario workplaces.

For more information and for assistance complying with the law in your workplace, contact the employment and labour law experts at Sherrard Kuzz LLP.

***

Sherrard Kuzz LLP is one of Canada's leading employment and labour law firms, representing management. *Firm members can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting www.sherrardkuzz.com.*