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MANAGING WORKPLACE CHANGE

Bill 148

What It Means for Ontario's Small Businesses & Non-Profit Employers

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There are many components to Bill 148 that will, or have the potential to, significantly impact small businesses and non-profit organizations in Ontario.

The purpose of this article is to highlight the five amendments to Ontario's *Employment Standards Act, 2000* (ESA) with the greatest potential to impact how small businesses and non-profit organizations operate.

1. Increase to Minimum Wage —in force January 1, 2018

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 under 18, hunting and fishing guides, homeworkers, liquor servers), proportionate to the increase in the general minimum wage. For instance, the minimum wage for students under 18

increased to \$13.15 per hour effective January 1, 2018, and will increase to \$14.10 per hour effective January 1, 2019.

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 the Ontario small business community to hire students—necessary for a healthy and growing economy.

2. Scheduling —in force January 1, 2019

Bill 148 introduces a number of provisions to regulate the scheduling of work and minimum pay required where a shift is cancelled or cut short. Specifically:

- 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 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 "on-call" period commences.

Certain exemptions apply to these scheduling provisions and are of particular note for small businesses and non-profit organizations:

- An employer is exempt from the three-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 "grandfathers" 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.

Commentary

For a small business or non-profit organization with unpredictable workforce requirements, these amendments are not realistic. A small business or non-profit employer may need to look at scheduling fewer employees in order to control labour costs.

3. Holiday Pay

—in force January 1, 2018

The ESA provides for nine public holidays for which most employees in Ontario are entitled to public holiday pay.

Bill 148 introduces a new formula for calculating holiday pay, which is particularly important for any business open on holidays that has historically relied on casual and part-time employees to staff those holidays.

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.

As well, 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.

Commentary

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

A small business or non-profit employer with a number of casual employees may want to reduce the number of part-time and casual employees it staffs in the pay period preceding a public holiday in order to minimize its public holiday pay exposure.

4. Equal Pay

—in force April 1, 2018

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

Bill 148 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 substan-

tially 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 who is 18 or older 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.

Recent regulations enacted have expressly included an exemption to the equal pay requirements for a student under 18 who works not more than 28 hours a week or who works during a school holiday.

Bill 148 temporarily "grandfathers" 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 also guarantees an employee the right to a review of his or her wages if the employee does not believe wage parity has been achieved; and the

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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. To address this issue, small business and non-profit employers may elect to 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.

5. Personal Emergency Leave —in force January 1, 2018

Some of the most significant amendments in Bill 148 for small business are with respect to Personal Emergency Leave (PEL).

Bill 148 removes the “50 employee” qualifying threshold previously in place for PEL, meaning each employee in Ontario will be entitled to 10 PEL days per year, with the first two days being paid. An employee is entitled to those two days of paid leave after one week of employment.

Although Bill 148 permits an employer to require that an employee who takes a PEL provide evidence to verify eligibility for the leave, it expressly prohibits an employer from requiring the employee provide a medical note to substantiate the need for a PEL.

Commentary

In addition to the significant impact of providing all employees with two paid days of PEL per year, these amendments may also impact a small business or non-profit employer’s existing workplace policies. Many employers have their own policies that provide for a variety of leaves, both paid and unpaid. If the workplace policies collectively provide a “greater right or benefit” than the legislated PEL provisions, an employee will not have an entitlement to PEL in addition to the policy entitlements. A small business or non-profit employer may wish to evaluate and, if necessary, amend any existing workplace policies to minimize the potential of having to provide for paid leave under policy in addition to paid PEL. □

To further discuss the impact of Bill 148, and for assistance in preparing your workplace, contact the employment and labour law experts at Sherrard Kuzz LLP.

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