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Making Ontario Open For Business Act
Executive Summary

October 2018

In 2017, Ontario's Liberal Government introduced and passed Bill 148, referred to as the "Fair Workplaces, Better Jobs Act, 2017" ("Bill 148"). Controversial on many fronts, Bill 148 made sweeping changes to Ontario's employment and labour landscape.

This week Ontario's Conservative Government under Premier Ford introduced Bill 47, the *Making Ontario Open For Business Act, 2018* ("Bill 47") which, when passed, will in large part return Ontario's employment and labour laws to their pre-Bill 148 status, with some exceptions. Changes are also proposed to the province's apprenticeship system and it appears the College of Trades will be wound down.

We expect to see Bill 47 move through the Legislature quickly. If passed in their present form, the amendments to the *Employment Standards Act, 2000* ("*ESA*") will take effect on the later of January 1, 2019 and the date of Royal Assent. The amendments to the *Labour Relations Act, 1995* ("*LRA*") will come into force on the date of Royal Assent.

We have prepared the following Executive Summary of key proposed amendments together with our commentary. By and large, the proposed amendments are welcome news for Ontario employers.

BRIEF BACKGROUND

In February 2015, the Ontario Government announced it would review issues and trends affecting workers and employers in the modern workplace. Two Special Advisors were appointed to lead public consultations.

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

One week later, Bill 148 was introduced which, in many respects, went far beyond the recommendations of the Special Advisors, signalling a clear intention on the part of the Government to focus on the demands of trade unions and employee advocates to the detriment of business and a strong economy.

Bill 148 (which by then also included amendments to the *Occupational Health and Safety Act*) received Royal Assent on November 27.

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

MAKING ONTARIO OPEN FOR BUSINESS ACT, 2018

Bill 47 passed First Reading on October 23, 2018. The proposed legislation, if enacted in its current form, will amend the *ESA* and *LRA* as follows:

Employment Standards Act

Minimum Wage

- Minimum wage will remain at $14 come January 1, 2019.
- Recent increases to the minimum wage will not be rolled back.
- There will be a 33-month pause in minimum wage increases with annual increases tied to inflation starting in 2020.

Commentary

Bill 148's abrupt increase to the general minimum wage was particularly troubling for employers given the direct impact this had and would continue to have on labour costs and competitiveness.

Early in its mandate the Ford Government signaled the minimum wage would not increase to $15 in January 1, 2019 as contemplated by Bill 148. However, there had been speculation whether the $15 increase would simply be pushed to 2020 or beyond. Bill 47 contains no provision at all for an increase to $15 at any defined future date. Cost of living increases in the minimum wage are also deferred until 2020 to give employers a period to adjust to the significant increase introduced in January 2018.

Scheduling

Bill 47 repeals all of the scheduling provisions that were to come into force on January 1, 2019. Specifically:

- The right to request a change to schedule or work location after an employee has been employed for at least three months.
- A minimum of three hours' pay for being on-call if the employee is available to work but is not called in to work, or works fewer than three hours.
- The right to refuse a request or demand to work or to be on-call on a day an employee is not scheduled to work or to be on-call with fewer than 96 hours' notice.
- The requirement to pay three hours' pay in the event of cancellation of a scheduled shift or an on-call shift within 48 hours before the shift was to begin.
- All of the record-keeping provisions introduced to address these new scheduling provisions.

Commentary

Bill 148 would have brought in blanket scheduling rules despite the Final Report expressly recognizing blanket scheduling rules made little business sense. The repeal of these provisions allows employers to maintain flexibility in scheduling practices. Specifically for a business with unpredictable workforce requirements such as in the retail, hospitality and homecare industries, the Bill 148 amendments were not realistic.

Three Hour Rule

Bill 47 introduces an amendment to the "three hour rule" similar to that which was included in Bill 148. Where an employee is regularly scheduled to work more than three hours a day attends work but works fewer than three hours, even if available to work longer, the employee will be entitled to the greater of (i) the amount earned for the time worked plus the employee's regular rate for the remainder of the three hours, and (ii) the employee's regular rate for three hours of work.

Personal Emergency Leave

One of more significant proposed amendments, Bill 47 repeals the controversial changes to the *ESA* Personal Emergency Leave ("PEL") provisions introduced by Bill 148. Specifically, Bill 47 removes PEL entirely from the legislation replacing it with three separate unpaid leaves designed to address the specific situations to which PEL applied prior to Bill 148. An employee with at least two consecutive weeks of employment will have the following entitlements:

- **Sick Leave**: up to three days per calendar year for the employee's illness, injury or medical emergency.
- **Family Responsibility Leave**: up to three days per calendar year for the illness, injury, medical emergency or urgent matter related to a prescribed family member.
- **Bereavement Leave:** up to two days per calendar year because of the death of a prescribed family member.

For each of these leaves, an employer may request an employee provide evidence reasonable in the circumstances to verify entitlement to the leave (including a medical note from a qualified health practitioner, reversing Bill 148's prohibition on requiring medical documentation to support a PEL leave). Bill 47 also expressly recognizes that, if an employee takes a paid or unpaid leave under an employment contract in circumstances that would otherwise entitle the employee to one of these *ESA* leaves, the employee is deemed to have taken leave under the *ESA* as well.

Commentary

Under the Bill 148 amendments, as of January 1, 2018, every employee in the province is entitled to two additional paid PEL days off per year and a further eight unpaid PEL days, for which no corroborating medical documentation can be requested. This was one of the most controversial amendments made by Bill 148.

Many employers have their own policies that provide for a variety of leaves, both paid and unpaid. Bill 47 addresses how these contractual benefits will intersect with an employee's entitlement to sick leave, family responsibility leave and bereavement leave, providing clarity to employers on an issue not addressed in Bill 148.

Other Expanded and Enhanced Leaves

The leave provisions for cases of domestic and sexual violence affecting an employee or an employee's child introduced by Bill 148 remain unchanged. This includes the entitlement to up to five paid days of leave under this section of the *ESA.*

Bill 47 also does not propose any amendments to the expanded and enhanced parental leave, pregnancy leave, critical illness leave, family medical leave, child death leave, or crime-related child disappearance leave provisions currently in force.

Related Employer

The amendments to the related employer sections of the *ESA* introduced by Bill 148 remain unchanged. Prior to the passage of Bill 148 two employers that were engaged in associated or related businesses could be declared one employer only if the intent or effect of their arrangement defeated the purpose of the *ESA*. Bill 148 removed the "intent or effect" condition.

Commentary

As we pointed out in our May 2018 Executive Summary of Bill 148, the related employer provision may be used to impose *ESA* obligations, such as severance pay, on two or more entities engaged in associated or related activities or businesses, when those obligations would not exist if the entities remained separate employers.

Vacation

Bill 47 makes no change to the vacation entitlements introduced by Bill 148. After five years of employment an employee remains entitled to three weeks of vacation time and 6% vacation pay.

Public Holiday Pay

Under Bill 47, public holiday pay is calculated based on the formula in effect pre-Bill 148. An employee's public holiday pay 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.

Commentary

Initially, the Bill 148 public holiday amendment was significant, particularly for an employer with casual employees. Under the Bill 148 formula, an employee who worked a single eight hour day in the pay period preceding the public holiday, and nothing more, was entitled to the same amount of

public holiday pay as an employee who worked five days per week at eight hours a day. Thankfully, the previous Government corrected this and, as of July 1, 2018, temporarily reverted back to the pre-Bill 148 formula. The current proposed amendment will permanently maintain the pre-Bill 148 formula.

Employee Misclassification

Bill 47 amends the employee misclassification section introduced by Bill 148. Where there is a dispute as to whether an individual has been misclassified as an independent contractor, the employer will no longer bear the burden of proving the individual is not an employee. Rather, the individual who claims to be an employee will have the onus to prove his/her employee status.

Equal Pay for Equal Work

Other than the requirement for equal pay on the basis of sex (which was included in the *ESA* prior to Bill 148), an employer will no longer be required to provide equal pay based on employment status (part-time, casual, and temporary). Bill 47 also repeals the requirement a temporary help agency pay an agency employee at the same rate of pay as an employee of the client performing substantially similar work.

Commentary

The Bill 148 amendments failed to recognize that many employers pay a part-time, casual or temporary employee at a different rate because he or she has less experience performing the work than a full-time counterpart or simply has less of a connection to the workplace. The Bill 148 amendments therefore significantly increased the cost to employers of hiring or keeping on part-time, casual and temporary employees. This ultimately hurt employees, particularly those who work in casual or temporary employment for the flexibility it provides.

Penalties for Contravention

Administrative penalties for contraventions of the *ESA* will return to $350/$700/$1500 for an individual and $250/$500/$1000 for a corporation.

Labour Relations Act

Card-Based Certification In Specified Industries

Bill 47 eliminates card-based certification for employers in specified industries (building services, home care and community services, and temporary help agency). If an application for card-based certification in these specified industries is filed before October 23, 2018, and is not determined by the date of Royal Assent, it will be determined in accordance with the card-based certification provisions enacted by Bill 148. However, any application for certification filed on or after October 23, 2018, and not determined by the date of Royal Assent, will be determined by secret ballot vote.

Commentary

Under the Bill 148 amendments, the broad definitions of the specified industries, together with the government's regulation making power allowing it to broaden the categories of employers, left open the possibility of extending card based certification to an employer other than in home care, building services or temporary help. Under the amendments introduced by Bill 47, only an employer in the construction industry remains subject to card-based certification.

Employee Lists

A trade union will no longer have the right to request the names of and contact information for employees in a proposed bargaining unit. Any application for an employee list made by a trade union that has not been determined by the OLRB on the date Bill 47 receives Royal Assent will terminate. Any employee list provided under Bill 148 shall be destroyed by the trade union in a way it cannot be reconstructed or retrieved.

Commentary

The ability of a trade union to request employee personal information raised significant privacy concerns.

Remedial Certification

Prior to Bill 148 if the OLRB determined an employer had committed certain violations of the *LRA* (generally in the course of a trade union organizing campaign) the OLRB had the discretion to order a variety of remedies, including the taking of a second vote. Bill 148 removed the OLRB's discretion and dictated that once a trade union established a violation of the *LRA*, such that true wishes of the employees were not likely reflected in the vote, the only available remedy appeared to be a remedial certification order.

Bill 47 reinstates the prior provisions of the *LRA*, permitting the OLRB to once again consider whether any remedy short of remedial certification, including a secret ballot vote, would remedy the violation of the *LRA.*

If an application for remedial certification is filed but not yet determined by the OLRB as of the date Bill 47 receives Royal Assent, the application will be decided under the new law.

Commentary

The remedial certification provision under Bill 148 removed any discretion from the OLRB to determine whether some form of remedial order other than certification is an appropriate remedy. Bill 47 restores the OLRB's discretion to award an alternative remedy that does not deprive employees of the right to a secret ballot vote, to determine whether they wish to be represented by a trade union.

Successor Rights

If a contract for building services (building cleaning services, food services and security services) comes to an end and a new provider contracts to provide those services, this change in service provider will be deemed to be a "sale of a business" for the purpose of the *LRA* (with the result that bargaining rights held by a trade union for the previous provider will transfer to the new provider). This provision, introduced by Bill 148, is maintained. However, the regulation-making authority to expand this provision to contract tendering for publicly-funded services, such as homecare, is repealed.

Structure of Bargaining Units

Bill 47 removes the right of a trade union (or employer) to seek to have a newly certified bargaining unit consolidated with an existing unit of the employer's employees represented by the same trade union. However, the OLRB may review the structure of bargaining units where existing units are no longer appropriate for collective bargaining.

Commentary

The ability for the OLRB to consolidate a newly-certified bargaining unit with a mature bargaining unit caused considerable concern for many in the employer community. When labour boards are given the power to alter the scope of existing bargaining units, employee choice can be compromised and smaller groups of employees that initially had a say whether to be unionized lose their voice as they are swallowed up by larger bargaining units.

It is also not insignificant that Bill 148 specifically directed the OLRB to consider whether consolidation would advance or 'contribute to the development of an effective collective bargaining relationship and contribute to the development of collective bargaining in the industry'.

While the OLRB retains the discretion under Bill 47 to review bargaining unit structures, the review may only occur if the OLRB is satisfied the existing units are no longer appropriate for collective bargaining. This is a far narrower evaluation than under Bill 148's criteria.

Return-to-Work Rights

Under Bill 47 an employee who has been on strike, or who has been locked out by his or her employer, has a right to be returned to work provided the request is made within six months from the commencement of the lawful strike or lockout. Bill 148 had removed any time limit on the employer's obligation to return an employee to work following a strike or lockout.

First Collective Agreement Mediation and Mediation-Arbitration

Bill 47 repeals the mediation-arbitration process introduced by Bill 148 and reverts to the first contract arbitration provisions in effect prior to January 1, 2018. Under Bill 47, first contract arbitration will only be ordered where it appears to the OLRB the process of collective bargaining has been unsuccessful 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 considers relevant.

If parties are engaged in mediation under the existing provisions of the *LRA* at the date Bill 47 receives Royal Assent, the mediation shall cease immediately. If parties have applied for first agreement mediation-arbitration but the OLRB has not yet made a determination as of the date of Royal Assent, the determination will be be made in accordance with Bill 47. Only where the OLRB has already directed settlement of the first agreement by mediation-arbitration as of the date Bill 47 receives Royal Assent will the parties proceed under the current (Bill 148) mediation-arbitration process.

Commentary

Under the Bill 148 amendments, first contract mediation and mediation/arbitration can be invoked when the parties do not reach a collective agreement, regardless of the reason. As such, a trade union that cannot not 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 without the need to have employees ratify that agreement (*i.e.*, the trade union need not take into account the wishes of the bargaining unit employees when negotiating a first agreement).That change under Bill 148 significantly enhanced the power of a trade union to secure demands in bargaining without regard to employees in the bargaining unit. As well, a trade union can unilaterally stop an otherwise timely termination or displacement application by simply making the request for the appointment of a first contract mediator. Under Bill 47, this is no longer the case.

Fines

Fines will return to a maximum of $2,000 for an individual and $25,000 for an organization.

Streamlining and Improving Processes

Bill 47 proposes changes to OLRB process including:

- Expanding and recognizing alternative means of communications (*e.g.*, facsimile, e-mail) for various types of documents, and deeming the time of the release or receipt of the document.
- Allowing the OLRB to make rules to expedite certain proceedings without the requirement of an order of the Lieutenant Governor in Council.
- Facilitating and requiring the publication of documents (collective agreements and arbitration awards) filed with the Minister, including publication on Government websites.

What's *Not* Included in Bill 47?

In addition to some of the notable Bill 148 provisions not repealed by Bill 47 (addressed above), there were a number of other amendments introduced by Bill 148 that remain in force. Specifically, Bill 47 does not propose any amendment to or repeal of:

- The inclusion of Crown employees and trainees under the *ESA*.
- The enhanced "just cause" provisions of the *LRA*.
- The amendments to the *Occupational Health and Safety Act* prohibiting an employer from requiring a worker to wear elevated heels in the workplace, unless required for health and safety reasons.

Bill 47 also does not restore the "self-help" requirement under the *ESA*.

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Ministry Of Training, Colleges and Universities

The Government has proposed sweeping changes to Ontario's apprenticeship system.

Journeyperson to Apprentice Ratio

Journeyperson to apprentice ratios will be set at one-to-one, to take effect the date Bill 47 receives Royal Assent.

Trade Classification and Reclassification

There will be a temporary moratorium on trade classifications and reclassifications to take effect the date Bill 47 receives Royal Assent. This will remain in effect until terminated by regulation.

Winding Down the Ontario College of Trades

The Government has indicated it intends to develop a replacement model for the regulation of the skilled trades and apprenticeship system in Ontario by early 2019. To this end, Bill 47 proposes a complete repeal of the *Ontario Colleges and Trades Apprenticeship Act, 2009*. If Bill 47 receives Royal Assent this provision will come into force on proclamation.

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We hope this Executive Summary is of assistance to our clients and readers. For more information or assistance, please contact the employment and labour law experts at Sherrard Kuzz LLP.