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Bill 148 Undergoes Significant Amendment: *What Does It Mean for Employers?*

November 2017

Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*, passed Third Reading in the Ontario Legislature on Wednesday, November 22, 2017. The legislation introduces significant amendments to Ontario's *Employment Standards Acts* and *Labour Relations Act*, and limited amendments to the *Occupational Health and Safety Act*.

Most of the amendments come into force on January 1, 2018. It is therefore important employers prepare now (many Sherrard Kuzz LLP clients have already begun). For assistance, contact any member of our team.

Updated Executive Summary

When Bill 148 was first introduced in June 2017, Sherrard Kuzz LLP prepared a comprehensive Executive Summary including an analysis of the practical implications for Ontario workplaces. The Executive Summary was widely republished and used as a resource by industry associations, employer advocacy groups, and academia. It can be found on our website at Changing Workplaces Review – Final Report & Bill 148 – Executive Summary and Commentary – Sherrard Kuzz LLP – June 2017.

We are now in the process of updating our Executive Summary (including the detailed analysis) to reflect further changes to Bill 148 as it has moved through the Legislature (since June 2017). The updated Summary will soon be posted on the home page of our website.

In the interim, this briefing note summarizes all of the key amendments to the *Employment Standards Act, Labour Relations Act* and *Occupational Health and Safety Act*.

Employment Standards Act

- **Increased Minimum Wage.** The general minimum wage will increase to $14 per hour effective January 1, 2018 and $15 per hour effective January 1, 2019.

- **Equal Pay for Equal Work.** A part-time, casual employee or temporary employee will be entitled to the same rate of pay as a full-time employee performing substantially similar work. A distinction in rate of pay will be permitted only where based on (a) a seniority system, (b) a merit system, (c) quantity or quality of production or (d) some other objective factor. Additionally, an assignment employee sent to a client workplace by a temporary help agency will be entitled to the same rate of pay as an employee of the client performing substantially similar work, with a distinction in pay only permitted where based on a factor other than sex, employment or assignment employee status. **These amendments come into force April 1, 2018.**

- **Scheduling Restrictions.** Bill 148 introduces amendments to the *Employment Standards Act* aimed at reducing the ability of an employer to change the working hours of an employee on short notice. An employee will be entitled to at least three hours of regular pay where (a) the employee attends at work for a shift longer than three hours but works fewer than three hours, (b) the employee is on-call and is not called into work or is called in for fewer than three hours, and (c) the employee has an entire scheduled day of work cancelled within 48 hours of its intended start. An employee will also have the right to refuse a shift where the request to work is made fewer than 96 hours (4 days) prior to the start of the shift. Finally, after three months of employment, an employee will be entitled to request a change to his or her work schedule or location. **These amendments come into force January 1, 2019.**

- **Related Employer Liability.** Bill 148 amends the existing related employer provisions of the *Employment Standards Act*. Two employers may now be found to be "related employers" simply because they carry on *related businesses or activities*. **This amendment comes into force January 1, 2018.**

- **Employee Misclassification**. An employer will be in violation of the *Employment Standards Act* where it misclassifies an employee (*i.e.*, characterizes an employee as an independent contractor). In cases where an individual alleges he or she is an employee, the employer will bear the burden of proving the individual is not an employee. An employer may also be subject to a fine or penalty for any misclassification. **This amendment comes into force on Royal Assent.**

- **Vacation.** After five years of employment, an employee will be entitled to three weeks of vacation time and 6% vacation pay. **This amendment comes into force January 1, 2018.**

- **Public Holiday Pay**. Bill 148 amends the public holiday pay calculation formula entitling an employee to public holiday pay based on the wages paid to the employee in the pay period prior to the public holiday, divided by the **days worked** in that pay period. This may result in a significant public holiday pay windfall for a casual employee who may only work with an employer a few days a month. **This amendment comes into force January 1, 2018.**

- **Personal Emergency Leave**. Some of the most significant amendments in Bill 148 are with respect to Personal Emergency Leave ("PEL"). Bill 148 removes the 50-employee threshold for the application of PEL, meaning every employer (regardless of the number of employees) will be obligated to comply with the requirement to provide an employee up to ten days of PEL in each calendar year. The first two days of PEL are to be **with pay**. While an employer may require evidence to verify the need for the leave, Bill 148 expressly prohibits an employer from requesting a doctor's note. **This amendment comes into force January 1, 2018.**

- **Pregnancy Leave**. An employee will be able to take up to 12 weeks of pregnancy leave in the case of a stillbirth or miscarriage, an increase from the existing entitlement of 6 weeks. **This amendment comes into force January 1, 2018.**

- **Parental Leave**. An employee will be able to take up to 61 weeks of parental leave where a pregnancy leave is also taken by the employee, or 63 weeks if no pregnancy leave is taken. This is an increase from the existing entitlement of 35 weeks if pregnancy leave is taken or 37 weeks if no pregnancy leave is taken. **This amendment comes into force on the later of December 3, 2017 or Bill 148 receiving Royal Assent.**

- **Domestic Violence and Sexual Assault Leave**. A new leave introduced by Bill 148, an employee will be entitled to up to 10 days and 15 weeks of leave in each calendar year for prescribed reasons related to the domestic violence or sexual assault of the employee or the employee's child, or the threat of such violence. The first five days of this leave are to be **with pay**. An employee will need to have been employed for at least 13 weeks to be entitled to Domestic Violence and Sexual Assault Leave. **This amendment comes into force January 1, 2018.**

- **Critical Illness Leave**. A new leave introduced by Bill 148, this leave replaces the existing Critically Ill Child Care Leave. An employee will be entitled to a leave of up to 17 weeks to provide care and support to a critically ill adult family member and up to 37 weeks to provide care and support to a critically ill family member who is a child (under the age of 18). An employee will need to have been employed for at least 6 months to be entitled to Critical Illness Leave. **This amendment comes into force on the later of December 3, 2017 or Bill 148 receiving Royal Assent.**

- **Child Death Leave and Crime-Related Child Disappearance Leave.** These are two new, separate leaves under Bill 148 which replace the existing Crime-Related Child Death or Disappearance Leave. An employee will be entitled to up to 104 weeks of unpaid leave following the death of a child (regardless whether crime-related) or on the crime-related disappearance of a child. An employee will need to have been employed for at least 6 months to be entitled to either leave. **This amendment comes into force January 1, 2018.**

- **Family Medical Leave**. An employee will be entitled to a leave of up to 28 weeks in a 52 week period to provide care or support to a family member who has a serious medical condition with a significant risk of death within 26 weeks, an increase from the existing entitlement of 8 weeks. **This amendment comes into force January 1, 2018.**

Labour Relations Act

- **Every amendment to the *Labour Relations Act* will come into force on the later of January 1, 2018 or Bill 148 receives Royal Assent.** Earlier versions of Bill 148 had proposed these amendments not take effect until six months after Royal Assent. **Employers should therefore be aware these amendments will take effect sooner than initially anticipated**.

- **Card-Based Certification in Specified Industries.** While card-based certification currently applies to the construction industry, Bill 148 expands it to the temporary help agency industry, home care and community services industry and building services sector. The

significance of card-based certification is it allows a union to become certified **without a vote** where it can demonstrate it has the support of greater than 55% of the proposed bargaining unit. Where a union can meet this threshold, the Ontario Labour Relations Board (the "Board") can (and generally will) certify the union without the necessity of a secret ballot vote.

- **Access to Employee List**. A union will be able to apply to the Board for access to a list of employees in a proposed bargaining unit for the purpose of organizing the workplace. This is one of the most controversial amendments to the *Labour Relations Act.* To obtain access to the list, the union must demonstrate membership support from at least 20% of the proposed bargaining unit. The employee list is to contain each employee's name, phone number and personal email address (if the employer has this information). If equitable to do so, the Board may also order the employer provide additional employee information (such as job title) and any other means of contact the employee may have provided to the employer, except for the employee's home address.

- **Remedial Certification**. Under Section 11 of the *Labour Relations Act,* the Board may certify an employer where, as a result of an employer's actions (generally in the course of a union organizing campaign), the Board is satisfied (a) the true wishes of the employees in the bargaining unit are not likely to be reflected in a representation vote, or (b) the union was not able to obtain membership cards from at least 40 per cent of the individuals in the proposed bargaining unit at the time an application for certification is filed. Bill 148 dictates an employer must be certified where the Board finds a violation of Section 11. This will no longer be a discretionary remedy.

- **First Contract Mediation/Arbitration**. An employer or union will have access to mediation and mediation/arbitration in the context of a first collective agreement on request. Where the Board grants an application for mediation-arbitration, any concurrent displacement or decertification application is dismissed and the parties cannot commence or continue any strike or lockout.

- **Expanded Successor Rights.** Where a contract for building 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 *Labour Relations Act.* Accordingly, if a service provider is certified and bound to a collective agreement and loses a building service contract to a new service provider, that new service provider becomes bound to the collective agreement and any outstanding obligations incurred but not satisfied by the previous service provider.

- **Bargaining Unit Consolidation**. Following certification, a union (or employer) may apply to the Board have a newly-certified bargaining unit consolidated with an existing bargaining unit of the employer represented by the same union. Additionally, a union and employer may make joint application to the Board to modify an existing bargaining unit structure, which may include consolidating units, amending collective agreements to address a

consolidated unit and terminating a collective agreement in existence prior to any consolidation.

- **Return to Work Post-Strike.** An employer will be required to return an employee to work following a strike or lockout, regardless of how long the employee may have been out of the workplace.

- **Enhanced "Just Cause" Protection**. An employer will be required to prove "just cause" where it terminates or disciplines an employee following certification. An employer will also be required to prove "just cause" where it terminates or disciplines an employee following the commencement of a lawful strike/lockout. In both cases, this "just cause" protection ends only once the parties have reached a collective agreement or the union ceases to represent employees in the bargaining unit.

- **Interim Relief**. Bill 148 expands the Board's power to issue an interim order or decision. The Board will now have the power to (a) issue an interim decision or order in any application (including, for example, ordering the temporary reinstatement of a terminated employee), (b) put conditions on any interim decision or order, and (c) issue any interim order or decision without reasons.

Occupational Health and Safety Act

- **No mandatory heels in the workplace.** An employer will not be permitted to require a worker wear footwear with an elevated heel, unless required for safety. Exemptions will apply to a worker who is a performer in the entertainment or advertising industry.

Next Steps

It is expected Bill 148 will receive Royal Assent in the near future, and many of the proposed amendments are slated to take effect on **January 1, 2018**. 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.**