

BILL 148

Major Amendments to the ESA

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Presented by McDonald HR Law

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- ▶ Minimum wage
- ▶ Equal pay for equal work
- ▶ Scheduling
- ▶ Requests for changes to scheduling/work location
- ▶ Paid vacation
- ▶ Public holidays
- ▶ Personal emergency Leave
- ▶ Family medical Leave
- ▶ Parental leave
- ▶ Domestic or sexual violence leave

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- ▶ Temporary help employees
- ▶ Related employer liability
- ▶ Interns/trainees
- ▶ Independent contractors
- ▶ Record keeping
- ▶ Complaints
- ▶ Remedies
- ▶ Special Exemptions
- ▶ TO DO LIST

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Overview

- ▶ Employee centric
- ▶ ESA and Labour Relations Act
- ▶ This webinar - ESA only

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Minimum wage increase

- ▶ General minimum wage \$14.00 on Jan. 1 ,2018:
- ▶ \$15.00 on January 1, 2019
- ▶ Thereafter adjusted annually for inflation in October of each year
- ▶ Approximate 32% increase over 18 months
- ▶ Non-minimum wage employees may expect similar wage adjustments to reflect value and maintain relative wage difference
- ▶ Most likely going to hurt students

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Equal pay for Equal Work

- ▶ Currently full-time employees can be paid differently than part time or temporary employees
- ▶ Bill 148 - can't pay employees differently based on permanent or non-permanent wage status if:
 - ▶ Same work in same establishment
 - ▶ Performance requires same skill, effort and responsibility, and
 - ▶ Work performed under similar working conditions
- ▶ Doesn't have to be identical - only substantially the same

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When pay rates can be different

- ▶ When pay rates are based on:
 - ▶ Seniority *system* (which includes a system that provides for different pay based on the accumulated number of hours worked)
 - ▶ Merit system (not defined)
 - ▶ A system that measures earnings by quantity or quality of production, or
 - ▶ *Any other factor* other than sex or employment status

Temporary agency workers

- ▶ Equal pay/work applies to temporary workers
- ▶ Temp. agency employees can request an adjustment if he/she believes he/she is being paid less than the wages of a comparable employee. Agency must comply or issue written reasons for refusal
- ▶ No reprisal against temp. agency employee for requesting information about comparable rates
- ▶ Temporary reprieve for collective agreements that provide otherwise but must comply when renewed or made after April 1, 2018

Information and Review

- ▶ Employees can ask an employer or other employees for information about the wage rate paid to other employee for the purposes of determining compliance with equal pay/equal work
- ▶ Employees can request a review of their rate of pay under this section and the employer shall
 - ▶ Adjust the employee's pay accordingly (can't reduce full time pay), or
 - ▶ Provide a written response as to why the rate of pay won't be increased

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Comment; Equal Pay

- ▶ *“Any other factors:* Case law will be required to determine if employers have a legitimate reason for paying non-permanent employees at a lower rate
- ▶ Experience? Training?
- ▶ Employer’s may move to hours based on seniority system to factor in experience

Scheduling

Currently

- ▶ Not regulated
- ▶ No requirement to post schedules in advance
- ▶ No rules regarding consequences for changing or cancelling shifts
- ▶ Only current law - The “3-hour rule” pay the greater of 3 hours minimum wage or wage for actual time worked if employee typically scheduled for more than 3 hours but works less than 3 hours

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New - Scheduling

- ▶ 3-hour rule - pay 3 hours wages to employees who regularly work more than 3 hours, if they attend work and are sent home before 3 hours - does not apply if work is cancelled due to circumstances beyond employers control - such as storms and power outages
- ▶ Pay employees 3 hours regular rate if employer cancels schedule 48 hours before start - does not apply if work is cancelled due to circumstances beyond employers control
- ▶ Pay 3 hours regular wages to employees "on call" if not called in or called in for less than 3 hours
- ▶ Employee can refuse to be "on-call" if request is made at least 4 days before shift starts - Unless required to remedy or reduce a threat to public safety
- ▶ Collective Agreements with conflicting provisions can continue to apply until Jan. 1, 2020

Comment - Scheduling

- ▶ One size fits all
- ▶ Will be operational nightmare for some industries

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Requests for change of schedule or work location

Current

- ▶ No ESA rules
- ▶ No employee “right” to request unless covered by human rights - family status, disability, religion etc.

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New - Change Requests

- ▶ Employees with more than 3 months of service can request in writing:
 - ▶ An increase or decrease in hours
 - ▶ A more flexible work schedule
 - ▶ A change in work location
- ▶ Employer must discuss request
- ▶ If request denied, employers must provide written reasons for the denial
- ▶ Employee protected from reprisal

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Comment- Change Requests

- ▶ Final Report recommended “no appeal”
- ▶ ESA amendments silent on appeal
- ▶ Leaves question open as to opportunity to challenge
- ▶ Watch reprisals

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Paid Vacation

Current

- ▶ 2 weeks' vacation time after each 12-month period of employment
- ▶ 4 % vacation time for all wages earned in 12-month employment period
- ▶ No increases based on years of employment

New

- ▶ After employee is employed for 5 years or more, then
 - ▶ Increase to 3 weeks' vacation
 - ▶ Increase to 6% vacation pay

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Public Holidays

Current

- ▶ 9 paid public holidays
- ▶ Calculation - add up employee's regular wages in the 4 weeks before the public holiday and divide by 20
- ▶ Public holiday pay is an average of the employee's daily wage
- ▶ If employee works .6 FTE - employ will get 60% of a full day's wage for public holiday
- ▶ Example:
 - ▶ .6 FTE works 3 days, earns \$100 per day or \$300 per week
 - ▶ 4 Weeks = \$1200
 - ▶ \$1200 divided 20 days = \$60 public holiday pay

New- Public holiday pay

- ▶ Same number of public holidays
- ▶ Calculation of pay - take total amount of regular wages earned in the pay period immediately before the public holiday and divide it by the number of days worked by the employee in that pay period
- ▶ More public holiday pay
- ▶ Example:
 - ▶ .6 FTE works 3 days, earns \$100 per day or \$300 per week
 - ▶ Wages in 2 week pay period before public holiday = \$600
 - ▶ \$600 divided by 6 (number of days worked) = \$100 public holiday pay

Public holiday pay

Working the public holiday

Current

- ▶ Employer either:
 - ▶ Pays employee regular wage and substitutes another day off with public holiday pay, OR
 - ▶ Upon agreement with the employee, pays employee premium pay (1.5) for hours worked plus public holiday pay

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New - Working Public Holidays

- ▶ Where employee works and is given a substitute day off:
The employer must provide the employee with a written statement setting out:
 - 1) public holiday the employee will work,
 - 2) the date of the substitute holiday, and
 - 3) the date the statement was provided to the employee

ESA Leaves of Absences

- ▶ ESA provides minimum leave - employers can provide more generous leave
- ▶ No sick leave under ESA - only 10 Personal Emergency Leave
- ▶ Sick leave is an accommodation under the Ontario Human Rights Code
- ▶ Re-employment after the leave is protected
- ▶ No reprisals for taking the leave
- ▶ Benefits continue during the leave (except for reservist leave)

Personal Emergency Leave

Current

- ▶ Employers with 50 or more employees - 10 unpaid personal emergency leave - (“PEL”) days
- ▶ PEL days can be used for
 - ▶ personal illness,
 - ▶ injury,
 - ▶ medical emergency, or death, illness, injury, medical emergency or urgent matter concerning certain family members

Personal Emergency Leave

Current

- ▶ Family includes
 - ▶ spouse,
 - ▶ parent, step-parent, foster parent of employee or spouse
 - ▶ child, step-child, foster child of employee or spouse
 - ▶ Daughter or son-in law
 - ▶ Brother or sister
 - ▶ Relative of the employee who is dependent on the employee for care or assistance

New - Personal Emergency Leave

- ▶ ALL employers must provide 10 PEL days
- ▶ First two days must be paid
- ▶ Paid days available after the first week of employment
- ▶ If need leave during the first week, taken from the 8 unpaid PEL days
- ▶ PEL can also be used for leave required because of sexual or domestic violence or threat of such violence experienced by the employee or certain family members
- ▶ Employers can ask for evidence “reasonable in the circumstances” that the employee is entitled to the leave
- ▶ Employers are prohibited from requiring an employee to provide a medical note; can ask but not require

Comment – Personal Emergency Leave

- ▶ Every employee gets 10 days off, 2 days are paid with no medical documentation required.
- ▶ You will have to revisit your leave of absence provisions
- ▶ You have to include PEL days, 2 of which are paid
- ▶ You may reduce paid leave if provided for elsewhere

Family Medical Leave

Current

- ▶ Employee entitled to up to 8 weeks of unpaid leave in a 26 week period to provide support/care to certain family members who has a serious medical condition with a significant risk of death in 26 week period
- ▶ Employer can request a certificate from a qualified medical practitioner that states the individual has a serious medical condition with a significant risk of dying with in a period of 26 weeks

FML - Family Members

- ▶ Spouse
- ▶ Parent, step parent or foster parent of employee or employee's spouse
- ▶ Child, step child or foster child of employee or employee's spouse
- ▶ Child under legal guardianship of employee or employee's spouse
- ▶ Brother or sister, step-brother or step-sister
- ▶ Grandparent/step-grandparent, or grandchild/step-grandchild of employee or spouse
- ▶ Father-in-law, mother-in-law, brother or sister-in-law/step brother/sister-in-law
- ▶ Son or daughter-in-law of employee or spouse
- ▶ Uncle or aunt of employee or spouse
- ▶ Nephew or niece of employee or spouse
- ▶ Spouse of the employee's grandchild, uncle aunt, nephew or niece
- ▶ Foster parent of the employee's spouse
- ▶ A person who consider the employee to be like a family member

New - Family Medical Leave

- ▶ Leave increased from 8 weeks to 28 weeks

Critical Illness Leave

Currently - Critically Ill Childcare Leave

- ▶ Employees with a critically ill child are entitled to 37 weeks of leave in a 52 week period to provide care for the child under age 18
- ▶ This is being replaced with a Critical Illness Leave
 - ▶ Up to 37 weeks in 52 weeks to care for critically ill child
 - ▶ Up to 17 weeks in a 52 week period to care for critically ill adult who is a family member

Child Death and Crime Related Child Disappearance Leave

Current

- ▶ Up to 104 weeks of leave - crime related child death leave
- ▶ Up to 52 weeks leave - crime-related child disappearance leave

New child related leaves

- ▶ Crime-Related Child Disappearance Leave increased from 52 weeks to 104 weeks
- ▶ New Child Death Leave - up to 104 weeks - not dependent on death being crime related
- ▶ Available to employees after 6 months of employment
- ▶ Does not apply if child's death is believed to have arisen from child committing a crime or if parent is charged with a crime relating to the death

Pregnancy/Parental Leave

Current:

- ▶ Pregnancy leave - 6 week leave for employees who suffer a still-birth or miscarriage
- ▶ Parental leave - Extended a further 6 months
 - ▶ Where employee takes pregnancy leave, entitlement to parental leave is extended from 35 weeks to 61 weeks
 - ▶ If employee did not take pregnancy leave, entitlement to parental leave is extended from 35 to 63 weeks
 - ▶ 35 weeks if took pregnancy leave and 37 weeks if no pregnancy leave

New - Pregnancy/Parental Leave

- ▶ Leave for still-birth or miscarriage extended from 6 to 12 weeks
 - ▶ Available after January 1, 2018
- ▶ Parental leave increasing by 26 weeks:
 - ▶ From 35 weeks to 61 weeks (if employee took pregnancy leave)
 - ▶ From 37 to 63 weeks for employees who did not
 - ▶ Available if child is born on or after Dec. 3, 2017

Coordinates with new extension to 18 months EI benefits

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Domestic or Sexual Violence Leave

Current

- ▶ No such leave
- ▶ Bill 148 - can use PEL days including 2 paid days

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New Domestic or Sexual Violence Leave

- ▶ 15 weeks leave (in addition to the 10 PEL days)
- ▶ First 5 days are paid leave
- ▶ Where employee or employee's child experiences domestic/sexual violence or threat of sexual/domestic violence.
- ▶ The leave must be taken for the following purposes:
 - ▶ To seek medical attention for a physical or psychological injury or disability caused by the domestic or sexual violence
 - ▶ To obtain services from a victim services organization
 - ▶ To obtain psychological or other professional counselling
 - ▶ To relocate temporarily or permanently
 - ▶ To seek legal or law enforcement assistance or
 - ▶ Anything else the government prescribes (regulation)
- ▶ Employers can ask for "reasonable" evidence
- ▶ Available to employees after 13 weeks of employment

Related employer liability

Current

- ▶ Liability for ESA (overtime pay, termination etc.) rests with the entity that directly employs the employer
- ▶ Associated or related activities or businesses (that carry on common purposes) may be considered one employer (and therefore responsible for ESA liabilities)
- ▶ However, *only if the intent or effect of association has been to directly or indirectly defeat the purpose of the ESA*

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New- Related employer liability

- ▶ “intent and effect” criteria has been eliminated
- ▶ Two entities will be considered one employer if associated or related activities or businesses are carried on through an employer and one or more entities

Comment

- ▶ Could the FHT/FHO relationship be deemed related employers
- ▶ What would this mean in terms of liability for each others employees
- ▶ Would the MOL combine payroll numbers to determine the 2.5 Million threshold for severance pay
- ▶ Very important if FHO doesn't want responsibility to ensure no control over FHT employees

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Independent Contractors

Current

- ▶ Employers don't pay vacation pay, public holiday pay, overtime pay, termination/severance pay, EI or CPP premiums for independent contractors
- ▶ Independent contractors can claim deductions for their "business"
- ▶ It is not always obvious if a person is an employee and independent contractor

New - Indp. Contractors

- ▶ ESA has an express prohibition on misclassifying a person's status
- ▶ Could lead to penalties and claims for payment if violation est.
- ▶ The burden of prove is on the employer

Comment:

- ▶ Even where no complaint - if inspected, MOL may require you to prove someone is an independent contractor
- ▶ Inspections on the rise
- ▶ Review your arrangements

Interns

- ▶ Bill 148 clarifies that all interns are employees and entitled to ESA benefits “anyone who receives training from an employer if the skill in which the person is being trained is a skill used by the employer”
- ▶ Only exemption is college or university sanctioned coop programs

Comment

- ▶ Will reduce volunteering

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Record keeping

Current - Must keep records on:

- ▶ The employee's name and address
- ▶ The employee's date of birth, if the employee is a student and under 18 years of age
- ▶ The date on which the employee began his or her employment
- ▶ The number of hours the employee worked in each day and each week
- ▶ Wages, wages on termination and vacation pay

Additional record keeping

- ▶ Dates and times the employee worked - daily time records?
- ▶ If employee has 2 or more regular rates of pay for work performed for the employer and, in a work week, the employee worked more than 44 hours, dates and times of the overtime at each rate of pay
- ▶ Dates and times the employee was scheduled to work or to be on call for work and any changes made to the on call schedule
- ▶ Any cancellations of a scheduled day or work or on call period and the date and time of cancellation
- ▶ Written statements of public holiday substitutions

Record keeping Periods

- ▶ Current - 3 years
- ▶ New - 5 years

Complaints to MOL

Current

- ▶ Employees must first bring issue to employer

New

- ▶ Employees can go directly to MOL

Comment

- ▶ Reduced chance of correcting unintentional breaches
- ▶ Increased penalties

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Remedies

New

- ▶ Administrative penalties are expected to increase from \$250/\$500/\$1000 to \$350/\$700/\$1500 for first/second/third offences
- ▶ 170 new Employment Standards Officers are being hired, almost doubling the current number
- ▶ Where an employer has contravened the ESA, the Director of Employment Standards will publish online the name of the offender and a description of the contravention and penalty imposed.

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Review of Special Exemptions

- ▶ IT professionals, pharmacists, managers/supervisors exemptions are being reviewed
- ▶ This review finished beginning of Dec. 2017

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Effective Dates

- ▶ December 3, 2017
 - ▶ Parental leave (additional 35 or 37 weeks)
 - ▶ Critical Illness Leave
- ▶ April 1, 2018
 - ▶ Equal pay for equal work
- ▶ January 1, 2018
 - ▶ All other amendments

TO DO LIST

Prioritize Bill 148 amendments

- ▶ Minimum wage
- ▶ Equal pay for equal work
- ▶ Ensure vacation pay provisions are met - 3 weeks for all employees with 5 or more years of service
- ▶ Ensure payroll is aware of new rules for calculating holiday pay
- ▶ Record keeping - update the requirements
- ▶ Implement daily time record system

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TO DO LIST (2)

- ▶ Review leave of absence policies and adjust to account for:
 - ▶ 10 PEL days - first two of which are paid
 - ▶ Family Medical Leave
 - ▶ Pregnancy/Parental Leave
 - ▶ Critical Illness Leave
 - ▶ Domestic and Sexual Violence Leave
- ▶ Review independent contractor relationships
- ▶ Revise manuals and handbooks

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