

Critical Canada Update: What You Need to Know About Changes to Ontario's Labor and Employment Laws

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On November 22, 2017, the Ontario government passed the much anticipated [Bill 148, the Fair Workplaces, Better Jobs Act, 2017](#), which will result in significant changes to Ontario's labour and employment landscape. The Act received Royal Assent on November 27, 2017.

Highlights of the Act include a significant increase to Ontario's minimum wage; expansion of equal pay for equal work provisions beyond the criteria of gender; changes to leaves (including adding new leaves and mandatory paid days) protected under the Employment Standards Act, 2000 (ESA); strengthening protections against misclassification of employees; and numerous rules designed to help unions organize workers.

The Act was widely anticipated as a response to the [Changing Workplaces Review](#), a 419-page report that special advisers C. Michael Mitchell and John C. Murray prepared after extensive consultation with various stakeholders across the labour relations spectrum. The Review, commissioned with great fanfare by the Liberal government two years ago, made 173 recommendations with respect to Ontario's workplace legislation. The government responded to the Review by releasing [several drafts](#) of the Act and undertaking a series of consultations with various stakeholders to fine tune [the amendments](#) it intended.

The final version of the Act built upon these discussions and added several wrinkles to the legislation at the eleventh hour. Despite the concerns expressed by numerous management-side advocates, the Act remains employee-friendly and will present challenges for many employers in both union and non-union workplaces.

With the passage of the Act, the Ontario government has amended both the ESA and the Labour Relations Act, 1995 (LRA), seeking to increase protections and basic standards for Ontario workers, especially those who have been identified as being at greater risk, as well as easing the path for union certification. The Act also adds a new section to the *Occupational Health and Safety Act*.

Most of these changes will take place between January of 2018 and January of 2019, although some will take effect even sooner.

Employment Standards Changes

Minimum Wage Increases

The highest profile change in the Act involves a material increase to the general minimum wage from its current rate of \$11.40 per hour to \$14.00 per hour on January 1, 2018, and to \$15.00 per hour on January 1, 2019. This represents an unparalleled minimum wage increase for Ontario, particularly given the short time period in which it is taking place. Many employers will need to evaluate the impact of this change upon their labour costs. Even employers that currently pay more than the minimum wage rate may see a “knock-on” effect from employees expecting their wages to increase in proportion to the increase to the current minimum wage.

The Act will maintain lower rates for designated groups, such as students and liquor servers, but the rates for these groups will increase by roughly the same percentage as the general minimum wage rate in the same time frame.

Equal Pay Provisions

Effective April 1, 2018, employers will be required to pay all full-time, part-time, casual, temporary, and seasonal employees who perform substantially the same kind of work in the same workplace the same wage rates. What constitutes “substantially the same kind of work” remains an open question, as the definition of the phrase in the legislation is “substantially the same but not necessarily identical.”

This requirement will be subject to certain exceptions where the wage difference is based upon criteria such as seniority, merit, or productivity systems.

Employees who believe they are subject to a wage distinction will have the right to request a wage review of the employer. It is unclear at this time how such a review would be applied or enforced except that an employer will be required to provide written reasons for its disagreement as to the employee’s belief that he or she is being paid in violation of the rule.

Scheduling

The Act implements a number of measures with respect to scheduling hours of work. The changes include:

- guaranteed 3 hours’ pay at regular rates when a shift is cut shorter than scheduled as long as employees regularly work more than 3 hours per day or when a shift is cancelled less than 48 hours prior to the scheduled shift;
- guaranteed 3 hours’ pay at their regular rates for on-call employees who are not called into work;
- the ability to refuse additional shifts without consequences when given less than 96 hours of notice by the employer; and
- the right to request schedule or location changes without employer reprisal after having been employed for 3 months.

This requirement will come into force on January 1, 2019.

Misclassification

One of the key recommendations of the Review was to address concerns regarding employers misclassifying employees as independent contractors. The Act strengthens protections against employers that misclassify employees (and thereby deny these individuals the protections of the ESA).

Employers will now be prohibited from treating an employee as if he or she is a contractor rather than an employee. Moreover, the employer will have the burden of proof to prove that an individual is not an employee where the individual claims that he or she is and should be treated as such.

This change came into force on the day of Royal Assent and is now applicable.

Additional ESA Entitlements—Vacations, Overtime, and Holidays

The Act makes certain changes to additional existing ESA entitlements:

- Employees with five years of service with the same employer will be entitled to a minimum of three weeks of (paid) vacation, as opposed to the current two weeks.
- Where an employee works for the same employer in multiple positions, overtime pay will be paid at the rate of the position he or she was working during the overtime period.
- Holiday pay will now be calculated differently. Although it is still intended to provide a regular day's pay, this new calculation may increase entitlements for casual and part-time employees over the existing formula. Holiday pay will now be calculated as the total amount of wages earned in the pay period immediately preceding the public holiday divided by the number of days worked. An alternative method applies where the employee was not employed in the pay period immediately preceding the holiday.
- If an employer gives an employee a day off in lieu of permitting the employee to take off a public holiday, the employer must provide a written statement documenting the details of this substitution.

These changes will come into force on January 1, 2018.

ESA Protected Leaves

The Act will make a number of significant changes to ESA leaves:

- Personal emergency leave days will be available to all employees, not just those working for employers with more than 50 employees. Further, a minimum of 2 of these 10 personal emergency leave days will be paid (the requirement for paid days comes into effect after one week of employment). Employers will also be prohibited from requiring a medical note for use of personal emergency leave.
- The Act creates a new domestic or sexual violence leave entitlement of up to 15 weeks for an employee, or his or her child, who experiences domestic or sexual violence (including threats). Five days of this leave must be paid.
- The Act creates a new unpaid leave entitlement for employees experiencing the death of a child from any cause for a period of up to 104 weeks. The Act also increases the unpaid leave entitlement for crime-related child disappearances to a period of up to 104 weeks.
- The Act increases the amount of unpaid leave that is available under parental leave, family medical leave, and pregnancy leave where an employee suffers miscarriage or stillbirth.
- The Act extends the reach of critical illness leave to include situations where an employee needs to provide care to any critically ill family member, not just children.

These changes will come into force on January 1, 2018, with the exception of the changes to parental leave and critical illness leave, which will come into force on December 3, 2017.

Temporary Help Agencies

As noted above, employers utilizing workers from temporary help agencies will be prohibited from paying such workers less than they pay their own employees for doing the same work.

Additionally, temp agencies will have to provide assignment employees with one week's written notice or pay in lieu if an assignment that was estimated to last three months or more is terminated before the end of its estimated term, unless they offer a reasonable alternative assignment during the one-week period.

These changes will come into force on January 1, 2018.

Employment Standards Enforcement

The Act will make a number of changes to the processes relating to ESA claims, as well as the potential results of such claims.

A significant change that was recommended by the Review was a greater investment in the employment standards claim process. The Act has followed this recommendation on a number of fronts, including by authorizing the province to hire up to 175 more employment standards officers and launching a program to educate both employees and small- and medium-sized businesses about their rights and obligations under the ESA. This enhanced investment seeks to improve the turnaround time for ESA claims and resolutions as well as provide greater assistance to smaller employers that may struggle to understand the process.

Other changes include removing the requirement that an employee fulfil the "self-help" requirement before filing an ESA claim and providing that an employment standards officer can no longer refuse to investigate any such claim based on insufficient information from the claimant.

Consequences for employers found to be in violation of the ESA by such investigations will be increased. Maximum administrative monetary penalties for noncompliant employers will increase, ESA officers will have greater power to order direct payment to employees, and there will be more options for methods of payment. Officers will also be authorized to award interest on employees' unpaid wages or on fees that are found to be unlawfully charged to employees.

Additionally, the Director of Employment Standards will be authorized to publish the names of individuals who have been issued a penalty, a description of the contravention, the date of the contravention, and the amount of the penalty.

Finally, the law increases the government's power to collect unpaid wages. A collector authorized by the Director of Employment Standards will be empowered to issue warrants, place liens on real and personal property, and hold security while a payment plan is underway. Such agents will also be able to collect and share personal information in the course of collection.

These changes will come into force on January 1, 2018.

ESA Exclusions

The Act will eliminate or drastically reduce the scope of various exemptions from ESA minimum standards for groups such as:

- Crown employees (goes into force on January 1, 2018);
- individuals receiving training for work through their employer (goes into force on January 1, 2018);
- students who are employed and regularly work more than three hours per shift (such employees would be paid for at least three hours even if they worked less than three hours, goes into force on January 1, 2019); and
- employees working in a simulated job or working environment for their rehabilitation (goes into force on January 1, 2019).

Miscellaneous Employment Amendments

Additional changes to the ESA include the following (all of which will come into force on January 1, 2018):

- Removal of the provision that requires proof of "intent or effect" to defeat the purpose of the ESA when determining whether related businesses can be treated as one employer and held jointly and severally liable for payment owed under the ESA
- Altered rules allowing electronic agreements between employers and employees, such as agreements to work excess hours, to serve as agreements in writing
- Increased recordkeeping obligations imposed upon employers

Labour Relations Changes

Union Certification

As discussed above, the biggest mandate for the Ontario government in the context of labour relations, which was strongly supported by the recommendations of the Review, was facilitating the ability of employees to form unions. Private sector unionization rates have been shrinking province-wide for decades, and these reforms are intended to remove barriers to unionization.

The Act will make the following changes to certification rules and procedures:

- Card-based certification will be permitted for the temporary help agency industry, the building services sector, and the home care and community services industries.
- The Ontario Labour Relations Board (the "Board") will be permitted to conduct certification votes outside the workplace, including electronically and by telephone.
- Unions will be permitted to access employee lists and certain contact information, provided that they can demonstrate that they have the support of 20 percent of employees in their proposed bargaining unit.
- Certain conditions for remedial certification will be eliminated, allowing unions to get certified more easily when an employer engages in misconduct that contravenes the LRA.

The Board will be granted additional powers to regulate the voting process (ostensibly, in order to help assure the neutrality of the voting process) and make interim orders at its discretion in a wider array of circumstances.

The legislation will also require the Board to:

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- address first contract mediation-arbitration applications before dealing with displacement and decertification applications;
 - make access to first contract arbitration easier; and
 - add an intensive mediation component to the bargaining process.

The law enhances the Board's ability to apply successor rights for previously unionized workplaces. Building services contracts that were retendered will be subject to successor rights, as will other publicly funded contracted services that are retendered.

Finally, the Board will be granted additional discretionary powers to structure bargaining units. The legislation will allow the board to change the structure of bargaining units within a single employer if existing bargaining units are found to be no longer appropriate for bargaining, or to consolidate newly certified bargaining units with other existing bargaining units under a single employer if those units were represented by the same bargaining agent.

These changes will come into force on January 1, 2018. It is noteworthy that this effective date was one of the last amendments inserted into the final version of the Act. Until very recently, it was thought that many of the LRA amendments would not come into force until six months after passage of the Act.

Employee Protections

The Act also provides additional protections to unionized employees engaged in the process of enforcing their collective bargaining rights.

Specifically, the Act will protect employees from being disciplined or discharged without just cause by their employer in the period between certification and conclusion of a first contract, as well as between the date the employees were in a legal strike or lockout position and the new collective agreement.

Additionally, employers will be required to reinstate employees at the conclusion of a legal strike or lockout (subject to certain unspecified conditions), and to provide access to grievance arbitration for the enforcement of that obligation. The LRA at present gives employees the right, under certain conditions, to return to work within six months of the commencement of a lawful strike. The Act will remove this time limitation.

Finally, the Act will enhance penalties on employers found to be in violation of LRA protections. This legislation will increase maximum fines under the LRA to \$5,000 for individuals and \$100,000 for organizations (from the current \$2,000 and \$25,000, respectively).

These changes will come into force on January 1, 2018.

Occupational Health and Safety Changes

Acceptable Footwear

The Act will prohibit an employer from requiring a worker to wear footwear with an elevated heel unless it is required for the worker to perform his or her work safely.

An exception from this prohibition will be made for employers of performers in the entertainment and

advertising industries.

This change came into force on the day of Royal Assent and is now applicable.

Next Steps

Employers should act quickly to prepare for the coming changes. While many employers began this process in the months leading up to passage of the Act, all employers can nonetheless examine all applicable amendments and consider the full potential impact upon their businesses.

This analysis may involve:

- assembling documents, such as employment contracts and policies, that will need to be updated;
- reviewing existing practices that do not comply with new requirements; and
- considering any training that may be necessary to ensure that management and staff are fully prepared for the new landscape.

Summary Chart of Amendments and In Force Dates

Amendment	In Force Date
Misclassification of Employees Prohibition	Immediately
High Heeled Footwear Prohibition	Immediately
Parental Leave and Critical Illness Leave	December 3, 2017
Minimum Wage Increase – Phase 1	January 1, 2018
Increased Vacation Entitlement	January 1, 2018
Overtime/Holiday Pay Changes	January 1, 2018
Expansion of Personal Emergency Leave (Including Paid Days)	January 1, 2018
Introduction of Domestic or Sexual Violence Leave and Child Death Leave	January 1, 2018
Increases to Pregnancy Leave, Crime-Related Child Disappearance Leave, and Family Medical Leave	January 1, 2018
Termination Pay for Temp Workers	January 1, 2018
Elimination of Exemptions for Crown Employees and Workers Receiving Training	January 1, 2018
Related Employer Requirements	January 1, 2018
Electronic Agreements	January 1, 2018
Increased Recordkeeping Requirements	January 1, 2018
Enforcement Changes and Increased Penalties Under ESA and LRA	January 1, 2018
Increased Card-Based Certification	January 1, 2018
Employee List Requirement	January 1, 2018
Enhanced Ontario Labour Relations Board Powers	January 1, 2018
New Mediation-Arbitration Requirements	January 1, 2018
Heightened Employee Protections in the Collective Bargaining Process	January 1, 2018

Equal Pay Provisions	April 1, 2018
Minimum Wage Increase – Phase 2	January 1, 2019
Scheduling Requirements	January 1, 2019
Elimination of Exemptions for Employees Working in a Simulated Job and Certain Students	January 1, 2019

The full text of the Act is available [on the Ontario government's website](#).

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