

The Ontario Government's Repeal of Portions of Bill 148

Less than a year after the legislation took effect on January 1, 2018, the new provincial government made good on its promises on October 23 to repeal certain parts of *Bill 148: Fair Workplaces, Better Jobs Act, 2017*. Bill 148 was passed by the Liberal government in late November 2017, making controversial and significant changes to several labour and employment laws, including under the *Employment Standards Act, 2000* and the *Labour Relations Act, 1995*.

The *Making Ontario Open for Business Act, 2018* will rollback some of the changes implemented or planned to be implemented by Bill 148. While many of the changes are being applauded by many employers, others are frustrated with the additional efforts Bill 47 will now require to reverse the changes that have been made. In announcing the changes, the government stated that it “is acting to bring jobs and investment back to our province by lightening the burden on business and making sure that hard work is rewarded”. In addition, while many criticized Bill 148 as too far-sweeping and harmful to employers and the economy, many are criticizing the reforms proposed by Bill 47 for failing to pay heed to the protections for vulnerable workers Bill 148 was intended to offer.

Reports also indicate that the Ministry of Labour is halting proactive inspections regarding wage theft and employment standards violations altering the previous government's plans to hire 175 new inspectors on Ontario workplaces.

A few things to bear in mind: while Bill 47 is expected to pass, you may wish to hold off on making changes to your workplace until the provisions are finalized. You may also consider which provisions you wish to change. While you must always comply with the law, employers are allowed to provide a greater right or benefit than what is under the Act and if you feel that it is easier or more beneficial to keep things as you are, you can consider doing so. There may also be an argument that employers who granted rights in accordance with Bill 148 may constructively dismiss employees if they take away these new benefits and, accordingly, employers should take care in how they rollback benefits that may have already been granted. In addition, unionized employers who bargained new collective agreements in 2018 to incorporate changes required by Bill 148, will be forced to operate under the terms of the agreement at least until the next round of bargaining, if not beyond that time if they're unable to negotiate the resulting changes out of the next collective agreement.

Employment Standards Act, 2000

Minimum wage

- keeping the minimum wage at \$14 on January 1, 2019 rather than increasing it to \$15 as planned
- tying minimum wage increases to inflation and pausing any increases until 2020

The minimum wage hike had been very controversial and many business groups pushed to have it frozen given the substantial increase in labour costs, although some reports have indicated that it was having a positive impact on the economy.

Scheduling

- the following scheduling provisions that were set to come into force on January 1, 2019 will be repealed:
 - the right to request changes to schedule or work location after an employee has been employed for at least three months
 - 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 less than three hours
 - the right to refuse requests or demands to work or to be on-call on a day that an employee is not scheduled to work or to be on-call with less than 96 hours' notice
 - the record-keeping requirements associated with these scheduling provisions

The scheduling provisions were introduced largely in an effort to assist vulnerable workers, but created considerable difficulty to some employers who require changes to staffing on short notice to operate a viable business.

Three-hour rule

- the rule regarding 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, which was scheduled to come into force on January 1, 2019 is being repealed
- however, the rule that where an employee who regularly works more than three hours a day is required to report to work, but works less than three hours, the employee would be entitled to three hours' pay is being maintained

Personal emergency leave

- replacing the personal emergency leave provisions with the following:
 - up to three unpaid days for personal illness
 - two unpaid days for bereavement leave
 - three unpaid days for family responsibilities

The proposed changes would repeal any paid emergency leave, which has already cost some employers tens of thousands of dollars in its inaugural, and perhaps, only year.

However, the proposed changes to the personal emergency leave provisions may be less impactful than they might seem at first glance given that employers have a duty to accommodate under the *Human Rights Code* and may be required to authorize time off work to employees in certain circumstances, that would exceed the personal leave days.

Doctor's notes

- repealing the provision that prohibits employers from requiring an employee to provide a medical note from a qualified health practitioner

Many employers were frustrated by the inability to request doctor's notes, a fundamental part of any attendance management program. This will be a welcome change.

Public holiday pay

- repealing the averaging public holiday pay formula prescribed by Bill 148 and returning to the previous prorated public holiday pay formula

Misclassification

- repealing the reverse onus on the employer to prove that an individual is not an employee where the employee's status as an employee is challenged
- the same test will still apply to determine whether an individual is an employee or independent contractor but the default will not be an employment relationship; however, in many circumstances when these relationships are reviewed, they are determined to be employment relationships and care should still be taken in establishing these relationships

Equal pay for equal work

- repealing equal pay for equal work on the basis of employment status (part-time, casual, and temporary) and assignment employee status (temporary help agency status)
- the longstanding requirement for equal pay on the basis of sex will remain

Sheltered workshops

- delaying the January 1, 2019 repeal of the exclusion from the ESA of individuals who perform work in a simulated job or working environment if the primary purpose is the individual's rehabilitation to have it come into force on proclamation

Penalties for Contravention

- reverting to the previous administrative penalties for contraventions of the ESA by reducing the maximum penalties from \$350/\$700/\$1500 to \$250/\$500/\$1000
- this ultimately may not make a tremendous difference given that the fines were relatively low to begin with

Vacation & leave for domestic and sexual violence

- employees will still be entitled to three weeks' vacation after five years of continuous employment, which is consistent with other jurisdictions in Canada
- as well as leave related to domestic and sexual violence will remain in force

Labour Relations Act

Overall, the proposed changes repeal the provisions that made it easier for unions to certify and reach a first collective agreement. They also pull back on the authority the changes under Bill 148 afforded the Ontario Labour Relations Board to merge new and existing bargaining units.

Card-based certification

- repealing the changes that forced card-based certification on the workers in home care, building services, and temporary help agencies in favour a vote through a secret ballot

Employee lists

- repealing the rules that required an employer to provide employees' personal information to a union, even if only 20% of the workers showed interest in joining a union
- this was a controversial provision as many people argued that it violated individuals' rights to privacy by forcing the release of their personal information

Remedial certification

- reinstating the pre-Bill 148 test and preconditions for the OLRB to certify a union as remedy for employer misconduct
- requiring the OLRB to determine whether a vote or new vote would be a sufficient remedy, or whether the only sufficient remedy would be to certify the union

Successor rights

- repealing the regulation-making authority to expand successor rights to contract tendering for publicly-funded services such as homecare

Structure of bargaining units

- repealing the power of the OLRB to review and consolidate newly certified bargaining units with existing bargaining units
- empowering the OLRB to review the structure of bargaining units where the existing bargaining units are no longer appropriate for collective bargaining

Return-to-work rights

- returning to the six-month limitation on an employee's right to reinstatement following the start of a strike or lock-out

First collective agreement mediation and mediation-arbitration

- repealing first collective agreement mediation and mediation-arbitration provisions and provisions for educational support
- reinstating pre-Bill 148 conditions for access to first agreement arbitration (i.e., where it appears to the OLRB that collective bargaining has been unsuccessful for specified reasons)

Fines

- as with the changes to the ESA, returning to the previous maximum fines for offences under the LRA by decreasing the fines from \$5,000 to \$2,000 for individuals and from \$100,000 to \$25,000 for organizations

Streamlining and improving processes

- expanding and recognizing alternative means of communications under the Act (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

- facilitating and requiring the publication of documents (collective agreements and arbitration awards) filed with the Minister, including publication on the government website

With a short window until the end of the year, the bill is expected to pass soon. Check back with us for an update.