

ONTARIO PROPOSES MAJOR CHANGES TO THE *EMPLOYMENT STANDARDS ACT, 2000*

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On October 23, 2018, the Government of Ontario has put forward legislation, titled the *Making Ontario Open for Business Act, 2018* (Bill 47), through which it intends to repeal several of the major changes made to the *Employment Standards Act, 2000* ("ESA") by the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148).

McMillan and McMillan Vantage published a [summary of the new legislation's key provisions](#) shortly after the province announced the new legislation. Changes proposed to the ESA, specifically, are set out in greater detail below:

Minimum wage

The province's standard minimum wage will remain at \$14 per hour, rather than increasing to \$15 per hour on January 1, 2019. The minimum wage will remain at \$14 per hour until 2020, when it will once again be indexed to inflation, as it was prior to Bill 148.

Scheduling

The new legislation proposes to reverse several Bill 148 scheduling obligations that were due to take effect on January 1, 2019. These include:

- **Scheduling requests** – Under Bill 148, Ontario employees with greater than three months' service would have been permitted to request that their employer decrease or increase their work hours, provide a more flexible schedule, or alter their work location. Employers would have, in turn, been required to discuss any such requests and provide written reasons justifying any denial.

Under the new legislation, employers will not face the obligation to justify a scheduling decision, in writing, after receiving an employee complaint. However, employers should remain mindful of the possible obligation to accommodate scheduling and work location requests where such an accommodation request is made in connection with a ground protected by the *Human Rights Code* (such as family status or religion). Employers should also consider whether their current policies address such requests and how they will be handled when they are made.

- **On-call pay** – In addition, as of January 1, 2019, Bill 148 would have required employers to pay employees for 3 hours of on-call time, whether or not the employee was called into work, for every 24 hour period that the employee was on call. This change will no longer proceed. Employers will still be obligated to compensate employees for a minimum of 3 hours' work time when the employee was called into work, but there will not be an on-call pay requirement if the employee is not called in or remaining at a place of employment ready to work.
- **Cancelled shifts** – Bill 148 would also have obligated employers who cancel a shift or scheduled on-call period within 48 hours of the shift's start time to compensate employees for at least 3 hours of work. Under the new legislation, employers will be able to cancel shifts and on-call periods without facing the minimum payment requirement, unless the employee has already attended his or her regular shift and the employer cancels the shift.
- **Notice of extra work** – The new legislation will remove the requirement to provide employees with at least 96 hours' notice of a scheduled shift. Under Bill 148, employees would have been permitted to refuse a scheduling request without penalty if their employer did not provide 96 hours' notice.
- **Record-keeping** – Ontario is also doing away with Bill 148's record-keeping requirements in respect of the above provisions.

The new legislation is adding a requirement (under a new Part VII.1 of the ESA) that, with exceptions for certain causes beyond an employer's control, an employee who regularly works more than 3 hours per day and who reports to work but works for less than 3 hours, despite being available to work longer, shall be paid the greater of either:

- The sum of (1) the amount earned for time actually work, and (2) wages equal to the employee's regular rate for the remainder of the 3-hour period, or
 - Wages equal to the employee's regular rate for 3 hours' work.
- This is an increase from the pre-Bill 148 legislation, which only required the calculation to be done based on the minimum wage. While it is an increase, most employers won't see any impact as the practice is generally to pay the three hours at the employee's regular rate.

Three leaves of absence to replace personal emergency leave

The Ontario government has elected to replace (paid and unpaid) personal emergency leave under the ESA with three separate leaves without pay for all employees with at least two weeks' service:

- **Sick leave:** 3 days per calendar year, to be taken because of a personal illness, injury or medical emergency;
- **Family responsibility leave:** 3 days per calendar year, to be taken because of a family

illness/injury/medical emergency or another urgent family matter; and

- **Bereavement leave:** 2 days per calendar year, to be taken because of the death of a prescribed individual.

Previously, and as a result of Bill 148, Ontario employees were entitled 10 personal emergency leave days per year, the first two of which had to be paid. Employers are reminded that employees continue to be entitled to personal emergency leave until the new legislation takes effect.

In addition, employers will be permitted to request “evidence reasonable in the circumstances” in support of a leave request. This may include a doctor’s note.

Lastly, in a change that will be helpful to employers that provide for sick or personal leave in their employment contracts, the new legislation provides that where an employee takes paid or unpaid leave under an employment contract in circumstances for which the employee would have been entitled to sick, family responsibility or bereavement under the ESA, the employee will be deemed to have taken his/her statutory sick leave.

These changes will cause consternation for employers who already have adjusted their time off programs to meet the 10 emergency leave days that were provided to employees. Employers will have to carefully consider whether moving to the new legislation will cause employee relations issues as both the reduction in the number of days as well as segregating them for different purposes will challenge employees who have become used to the previous entitlement.

Pay equity

Bill 148 amended the ESA to require, as of April 2018, employers to provide equal pay to workers performing “substantially the same” type of work, where that work required substantially the same skill, effort and responsibility and where the work was performed under similar working conditions. The new legislation will permit employers to compensate employees of various statuses, as well as assignment employees, at different rates.

In addition, employers will no longer be required to either adjust an employee’s pay or provide a written response setting out reasons for disagreement with a pay equity request, even where that request is based on alleged different pay because of the employee’s sex.

Employers’ obligations respecting pay equity on the basis of sex or gender will remain in place.

Public holiday pay

The ESA will revert to the pre-Bill 148 formula for calculating public holiday pay, with pay calculated based on

the total amount of regular wages and vacation pay payable to the employee in the 4-week period prior to the week in which the holiday occurred, divided by 20.

Penalties for contravention

Ontario will revert to the administrative monetary penalty levels for ESA contraventions that were in place prior to Bill 148, with maximum penalties for failure to display the required ESA poster or for several record-keeping violations decreasing from \$350 (first offence), \$700 (second offence), and \$1500 (third offence) to \$250, \$500, and \$1000.

What is staying:

Several notable changes to the ESA made through Bill 148 will remain in place, including:

- The standard minimum wage increase to \$14 per hour;
- The availability of domestic and sexual violence leaves of absence, the first five days of which must be paid;
- Vacation time and pay for employees with more than 5 years' service will remain at 3 weeks per year and 6% of wages, respectively.

Considerations for employers

Bill 47 (the *Making Ontario Open for Business Act, 2018*) has, thus far, only passed first reading in the provincial legislature. While the legislation is all but certain to pass, there could still be changes to some of the Bill's specifics since specific changes to a Bill's initial provisions are often made at the committee stage between second and third reading.

We will keep you updated on any new changes made.

Though the legislation is set to take effect on the day it receives Royal Assent, we remind employers that until that time the ESA remains in effect in its present form. Employers must continue to comply with all amendments made through Bill 148 that have already taken effect until such time as they are legally repealed.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.