

Employer Webinar

Preparing for a New Workplace Landscape

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Presenters:

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Agenda

- The focus of today's webinar is to confirm and address the amendments to the *Employment Standards Act* ("ESA") as a result of Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*
- Bill 148 received Royal Assent on November 27, 2017
- Bill 148 has and will cause significant reforms to both the ESA and the *Labour Relations Act* ("LRA")
- We will address the changes to the LRA in a webinar to take place in the New Year
- For the changes to the ESA, the majority will take effect on January 1, 2018; however, some changes took effect on December 3, 2017, and some will take effect on April 1, 2018 and January 1, 2019

Agenda

- Today's webinar will cover:
 - 1) Introduction
 - 2) Misclassifying Employees as Contractors
 - 3) Compensation Entitlements
 - 4) Shift Scheduling and Workplace Location
 - 5) Temporary Workers and Staffing Agencies
 - 6) Penalties under the ESA

1) Introduction

- How we arrived at today...
- In February 2015 the Ontario government announced that it would review issues and trends affecting workers and employers
- In general, this review was spurred on by concerns the provincial government expressed it had over ensuring workers are paid a living wage, to ensure that more workers are treated as permanent employees and, as a result, have more job security, and also to make it easier for workers to unionize
- This led to the Ontario Ministry of Labour appointing two Special Advisors who ultimately released the Changing Workplaces Review Interim Report on July 27, 2016
- On May 23, 2017, the government released the Changing Workplaces Review Final Report

1) Introduction

- Shortly thereafter, on June 1, 2017, the Ontario government introduced Bill 148
- After public consultations and some further amendments, Bill 148 received Royal Assent on November 27, 2017
- As mentioned, the majority of the changes will take effect on January 1, 2018; however, some changes took effect on December 3, 2017 and some will take effect on April 1, 2018 and January 1, 2019
- The Ministry is currently reviewing changes to be made to the regulations under the ESA

2) Misclassifying Employees

- In general, a contractor is a person who is in business for themselves, and is retained to provide certain defined services to your company
- In contrast, an employee is a full-time or part-time worker who is part of your company and has certain duties, as directed by your company
- Determining how a worker is to be categorized is dependent on a review of numerous factors relating to the worker and the work being performed
- Often, factors will exist which support both a finding that a worker could be considered a contractor as well as supporting a finding that the worker is in an employment relationship

2) Misclassifying Employees

- By the time the process which resulted in Bill 148 had commenced, it had become the position of the Ontario Ministry of Labour that a significant portion of workers who were being treated as independent contractors were, in fact, employees
- As such, it had been recommended that the ESA be extended to include the category of “dependent contractors”
- While this recommendation was not adopted, the amendments to the ESA do address the impact of mischaracterizing an employee as an independent contractor

2) Misclassifying Employees

- In particular, as a result of the amendments, the ESA now contains an express prohibition on an employer treating a worker who is an employee as a non-employee (e.g. a contractor)
- As such, penalties can now be levied against employers for misclassifying employees as contractors
- Also, it is important to note that in the course of an inspection or investigation or other proceeding (other than a prosecution) under the ESA, it is the employer who now bears the burden of proof in demonstrating that the worker is not an employee

2) Misclassifying Employees

- For companies who hire workers as contractors, it is important to attempt to ensure there are no facts which suggest the contractor is an employee
- Given these amendments, it is now even more important to have written agreements in place with the worker which confirm that the worker is a Contractor

3) Compensation

- The amendments to the ESA will increase the compensation package for all Ontario employees and, as a result, the wages that employers will be required to pay
- In particular, changes to the ESA have been enacted relating to:
 - a) minimum wage
 - b) vacation pay
 - c) holiday pay
 - d) minimum pay
 - e) overtime pay
 - f) equal pay
 - g) leaves

3)a) Compensation: Minimum Wage

- The general minimum wage was increased to \$11.60 per hour on October 1, 2017
- It should be noted that there are separate categories of minimum wage for those who serve liquor, students under 18, and others
- On January 1, 2018, the general minimum wage will further increase to \$14.00 per hour and, subsequently, on January 1, 2019, it will be further increased to \$15.00 per hour

3)a) Compensation: Minimum Wage

- Thereafter, minimum wage will be tied to inflation, with the new minimum wage being announced each April and taking effect in October
- These amendments will also have a flow through impact which will adversely impact many employers
- For instance, an increase to minimum wage not only impacts employers who pay minimum wage, but also employers who pay close to minimum wage to certain or all workers, as workers will expect the pay gap to be maintained

3)b) Compensation: Vacation Pay

- Effective January 1, 2018, the minimum entitlement to vacation pay will increase for employees with 5 years of service
- In particular, instead of being entitled to 2 weeks or 4% wages per year, all employees with 5 years of service will now be entitled to 3 weeks or 6% wages per year of service
- There is no obligation to allow the vacation time to be any longer than 1 week at a time
- In order to limit your company's vacation pay obligations, you may restrict your obligation to only paying the defined percentage based on wages earned, as opposed to giving out several weeks' pay when the employee is earning little to no wages

3)c) Compensation: Holiday Pay

- Public Holiday Pay is based on the employee's regular or average daily wage
- Prior to the Bill 148 amendments, non-salaried employees were paid an average of their daily wage, which was calculated by dividing their earnings during the past 4 weeks by 20
- As the calculation assumed a five day work week, part-time and irregular employees tended to be paid less than a day's pay for Public Holiday Pay
- Now, effective January 1, 2018, Public Holiday Pay will be calculated by dividing the employee's earnings during the last pay period by the number of days worked in the pay period

3)d) Compensation: Minimum Pay

- As of January 1, 2019, the amended ESA will have a 3 hour minimum pay rule, whereby an employee is entitled to a minimum of 3 hours' pay if they normally work more than 3 hours a day and are sent home after working less than 3 hours
- The 3 hour minimum pay rule does not apply if the employee is sent home because of weather, electrical issues, or other similar causes beyond the employer's control
- Further, the 3 hour minimum pay rule does not apply to employees providing essential public services

3)d) Compensation: Minimum Pay

- In addition, as of January 1, 2019, the amended ESA will also establish that on-call employees are paid the greater of: i) their hourly rate for each hour of on-call time worked; and ii) 3 hours of pay per 24 hours on-call
- As such, even if the worker is on-call for less than 3 hours or is never called in to work, they will be entitled to 3 hours of on-call pay
- The 3 hour on-call minimum pay rule does not apply to employees providing essential public services

3)d) Compensation: Minimum Pay

- There is no definition of “essential public services” in the ESA
- Companies involved in servicing or repairing in public services (e.g. road repair, emergency public clean ups, etc.) may be able to successfully argue that they are exempt from the 3 hour minimum pay rule and the 3 hour on-call minimum pay rule

3)d) Compensation: Minimum Pay

- Also, effective January 1, 2019, employees can refuse a request to be on-call, when the request is made with less than 96 hours notice
- In addition, as of January 1, 2019, the ESA will require employers to keep records of on-call scheduling and all changes to the on-call schedules
- In light of the upcoming changes, employers should be mindful not to trigger accidental/avoidable 3 hour minimum pay entitlements by overstaffing shifts or casually asking employees to be at the ready
- In addition, employers should properly document all on-call requests, schedules, and changes

3)e) Compensation: Overtime Pay

- Currently, for employees with two rates of pay, overtime pay is based on the employee's average wage
- Effective January 1, 2018, overtime pay will now need to be calculated based on the regular rate of pay for the work being performed after the overtime threshold is reached
- For employers who pay two rates of pay, you will need to be mindful of whether your labour costs can be reduced by scheduling the high rate work earlier in the week
- Employers will be happy to know that they are still able to enter into, with approval, overtime averaging agreements

3)f) Compensation: Equal Pay

- Currently, the ESA does not require an employer to compensate a part-time, casual, or fixed-term employee in the same matter as a full-time and indefinite employee
- As of April 1, 2018, an equal pay obligation will be established, whereby employees performing substantially the same work must be paid the same rate of pay, unless based on a seniority system, a merit system, and quantitative or quality of production system, or other objective and non-discriminatory system

3)f) Compensation: Equal Pay

- Under the forthcoming amendments to the ESA, employees will be entitled to inquire as to pay equity and employers will be obligated to provide a written response
- In addition, employers will be prohibited from retaliating against an employee who inquires about pay equity or speaks with others about their compensation further to confirming pay equity

3)f) Compensation: Equal Pay

- In preparation for wage parity, employers should take the time to identify wage disparity and either address the disparity or be prepared to provide objective justifications
- If not in place, wage grids can be a helpful way to ensure that all employees are consistently and properly compensated

3)g) Compensation: Leaves

- For parental leave, Bill 148 amended the ESA effective December 3rd, 2017, to increase leave entitlement from 35 weeks to 61 weeks (for employees who took a pregnancy leave), and from 37 to 63 weeks (for employees who did not take a pregnancy leave)
- Parental leave must be begin within 78 weeks of the employee becoming a parent
- For employees who became a parent before December 3rd, parental leave still must begin within 52 weeks of the employee becoming a parent
- These amendments match the changes to EI

3)g) Compensation: Leaves

- Currently, when a company has 50 or more employees, the employees are allowed a Personal Emergency Leave (“PEL”) of 10 unpaid days due to an illness, injury, or medical emergency or a death, illness, injury, or medical emergency of a prescribed family member (e.g. spouse, parent, child, etc.)
- As of January 1, 2018, the ESA will be amended to remove the 50 employees qualifier and the PEL will now be 2 paid days and 8 unpaid days per calendar year, after 1 week of employment

3)g) Compensation: Leaves

- As of January 1, 2018, the ESA will be amended to include a new entitlement for a domestic or sexual violence leave
- This leave was added to Bill 148 after its first reading
- The domestic or sexual violence leave will allow employees who have personally experienced or whose child has experienced harm as a result of domestic or sexual violence up to 10 days and up to 15 weeks of leave per calendar year, the first 5 days of which shall be paid
- In order to be entitled to this leave, the employee must have been employed for at least 13 consecutive weeks

3)g) Compensation: Leaves

- Previously, under the ESA employees were allowed up to 8 weeks of unpaid Family Medical Leave (“FML”) in a 26 week period to provide care and/or support to a prescribed family member who is at significant risk of death within that 26 week period
- As of December 3, 2017, the FML is extended to 28 weeks in a 52 week period, which is reflective of the new federal Employment Insurance regime

3)g) Compensation: Leaves

- Currently, employees with at least 6 months of service are allowed an unpaid leave with respect to a crime-related disappearance or death of an employee's child
- The length of the leave is 52 weeks if the child disappears and 104 weeks if the child dies
- As of January 1, 2018, the ESA will be amended to create two separate child leaves (one for crime-related disappearances and one for deaths), each of which will be capped at 104 unpaid weeks of leave
- If the employee is charged in regard to the disappearance or death, then the employee is ineligible for the leave

3)g) Compensation: Leaves

- When consenting to a requested leave, employers should be mindful that they also have an obligation to accommodate an employee's disability and family status under the *Human Rights Code*, up to the point of undue hardship
- As such, even if the employee is not entitled to a leave or a further leave under the ESA, the employer may still be required to consent to the leave pursuant to the Code

4) Shift Scheduling and Workplace Location

- As a result of Bill 148, as of January 1, 2019, the ESA will require that, after three months of employment, an employee may request in writing a dialogue with their employer about their schedule or work location
- The employer is then to discuss the request and provide a response within a reasonable time
- If the employer denies the request, the employer must provide an explanation for the denial

4) Shift Scheduling and Workplace Location

- When considering a schedule or work location request, employers should be mindful that they also have an obligation to accommodate based on certain grounds under the *Human Rights Code*, up to the point of undue hardship
- As such, if the shift change or location change request is made further to the Code (e.g. an earlier shift due to child care obligations or a different location due to elderly parent obligations), the employer may be required to agree to the request

5) Temporary Workers

- Many companies use assignment employees or temporary workers (i.e workers that are provided by temporary staffing agencies)
- Since 2009, the ESA has contained Part XVIII.1, a special section addressing temporary help agencies
- Effective April 1, 2018, the ESA will be amended to require that assignment employees immediately be paid a rate of pay equal to the rate paid to comparable employees of the temporary agency's client
- The ESA will also be amended to prohibit the agency's client from lowering its rate of pay to its employees, in order to reduce the amount to be paid to the assignment employees

5) Temporary Workers

- As with the equal pay provisions for employees, assignment employees will be entitled to inquire as to pay equity and employers will be obligated to provide a written response
- In addition, under the forthcoming amendment, assignment employees cannot be reprimed for inquiring about pay equity or speaking with others about pay to achieve equity

5) Temporary Workers

- Employers should be mindful that they may avoid pay equity obligations if temporary workers are only used for jobs which existing employees are not performing

5) Temporary Workers

- Further, as a result of Bill 148, effective January 1, 2018, assignment employees will be entitled under the ESA to 1 week's notice or pay in lieu of notice if an assignment was expected to last 3 months or more and ended before the estimated term
- This notice entitlement does not apply if the temporary help agency is able to find a new work assignment during the notice period which has a term of 1 week or more
- Further, this notice entitlement does not apply if the assignment employee engaged in wilful misconduct or wilful neglect of duty, if the assignment has become impossible or frustrated by unforeseeable event, or if the assignment is terminated because of a strike or lock-out

6) Penalties

- Under the ESA, employers can be subject to a Part I Ticket, a Part I Summons, or a Part III Summons
- The Part I Ticket and Summons are used for lesser offences, such as on one occasion failing to pay overtime pay
- In contrast, the Part III Summons are used for the more serious offences, such as failing to pay a group of workers their wages for a period of time

6) Penalties

- Currently, the set fines for a Part 1 Ticket is \$250/\$500/\$1000 and is expected to be increased under the regulation to \$350/\$700/\$1,500
- In regard to Part III Summons, individuals remain subject to a maximum fine of \$50,000 and/or up to 12 months imprisonment
- Corporations remain subject to a maximum fine of \$100,000 for a first offence, \$250,000 for a second offence and \$500,000 for a third or more offences
- As the Director of Employment Standards has effectively promised to double its current numbers of Employment Standards Officers, we can expect increasing compliance blitzes and tickets

6) Penalties

- As of January 1, 2018, the Director of Employment Standards will have the authority to publish online the details of contraventions and the penalties
- Employers should be particularly concerned as the CRA may use this shaming list as a way of identifying and targeting companies who have been found to have mislabelled their workers
- As such, employers should take the time to carefully review the terms, conditions and day-to-day realities of their contractor agreements to ensure there is no liability exposure

Questions?

Wilson Vukelich LLP can help ensure that your employment and contractor law matters are handled effectively and efficiently, and in a manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

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