WHAT CHANGES ARE COMING TO ONTARIO'S LABOUR AND EMPLOYMENT LAWS?

The *Changing Workplaces Review* and the *Fair Workplaces, Better Jobs Act, 2017*

On May 23, 2017, the final report of the *Changing Workplaces Review* ("*CWR*") was released to the public. Commissioned by the Government of Ontario, the report recommended that extensive changes be made to Ontario's employment and labour laws in order to better protect vulnerable workers.

On June 1, 2017 the Government introduced the *Fair Workplaces, Better Jobs Act, 2017* ("Bill 148"). If enacted, Bill 148 will amend both the *Employment Standards Act, 2000* and the *Labour Relations Act, 1995*.

Bill 148 reflects the Government's acceptance of many of the *CWR's* recommended changes. In a few instances, Bill 148 even goes beyond the *CWR* recommendations. However, Bill 148 does not adopt all of the *CWR's* recommendations, including in relation to a number of important labour and employment law issues, as discussed below.

Changes to Labour Relations: How would Bill 148 amend the *Labour Relations Act, 1995*?

The purpose clause:

Bill 148 would repeal the purpose section of the *Labour Relations Act, 1995* ("*LRA*") [repeal s. 2].[1] The *LRA's* purpose clause was not an issue addressed by the *CWR*, and the intention behind the repeal is unclear.

[1] Section numbers refer to the sections as amended in the *LRA*.

Employee List During Organizing Campaigns:

In order to facilitate effective workplace organizing, Bill 148 would give a union the right to a list of employee names, phone numbers and personal email addresses where it can show it has obtained membership evidence for 20% of employees in the bargaining unit it seeks to organize [new s. 6.1]. This new provision essentially adopts of one of the *CWR's* recommendations.

The process of obtaining a list of employee names would be similar to the process for filing a certification application. The union would file a membership list application with the Ontario Labour Relations Board (the "OLRB") that sets out a proposed bargaining unit description and an estimate of the number of employees in the unit, including membership evidence (the evidence is not disclosed to the employer). If the employer disputes either the unit description or size, it must file a response setting out its objection.

If the OLRB concludes that the unit is appropriate for collective bargaining and that the union has demonstrated that at least 20% of the estimated employees in the proposed bargaining unit are members, it will order the employer to provide the union with a list of employees. If those tests are not met, the application would be rejected. The OLRB would not be required to hold a hearing or consultation, but could determine the matter on the basis of the written materials alone.

Generally speaking, if a union files a certification application within one year of obtaining a membership list, it is required to seek certification of the same unit as that accepted by the OLRB in the membership list application [s. 6.1(12)].

The Government has not explained why the union's application for certification must exactly mirror its initial application for the list. This requirement may cause difficulties where, for legitimate reasons, a union seeks to depart from the bargaining unit description it initially provided.

Appropriately, given the purpose of facilitating workplace organizing and the difficulty of obtaining access to contact information for that purpose, the amendments would not authorize access to employee lists for individuals seeking to decertify a union. Similarly, a union could not apply for a list of employees already covered by a collective agreement or represented by a union. This would prevent the membership list provision from being used as a tool for raiding.

Certification:

While many in the labour movement had hoped for a return to a card-based certification system, the *CWR* ultimately recommended that certification by secret ballot be retained, provided that other changes were made, including improvements to the *LRA's* provisions concerning remedial certification and access to first contract arbitration.

Bill 148 appears to adopt most of the *CWR* recommendations.

Although the *CWR* did not recommend card-based certification, Bill 148 would extend card-based certification on a very limited basis to three sectors: temporary help agencies, building services, and home care and community services [new s. 15.3]. Card-based certification in these three sectors would be substantially the same as that in the *LRA's* construction industry certification provisions.

However, Bill 148 would permit this access to card-based certification be limited by regulations that prescribe classes of employees in respect of which the new certification provisions do not apply, or further define the meaning of "temporary help agency industry" and specify businesses or types of businesses that are or are not included in the temporary help agency industry for the purposes of the certification provisions [ss. 125(i.1)-(i.4)].

It is not at all clear what the justification is for limiting card-based certification to these three sectors, particularly if the goal is to support employee choice to engage in collective bargaining, especially for vulnerable workers or those in precarious employment (including employees in part-time, contract and contingent jobs, in the retail and service sectors, and in smaller workplaces).

Nor is it clear how extending card-based certification to temporary help agencies will have any meaningful impact. The *CWR* recommended that clients of temporary help agencies be deemed to be the employer of workers provided by an agency for *LRA* purposes – a recommendation the Government failed to adopt.

In all other sectors, the secret ballot based scheme will be retained. However, the OLRB will have the power to conduct votes outside of the workplace, including through electronic or telephone voting, and to give directions about the voting process and arrangements [new ss. 112(h.1) and (h.2)]. These reforms may modestly reduce the potential for undue employer influence or interference during a vote. However, the Government did not adopt the *CWR*'s recommendation that power to issue directions on

voting procedures and arrangements be granted to the Labour Relations Officers who supervise the votes. Rather, as noted, that power will lie with the OLRB.

Remedial Certification:

Bill 148 adopts the *CWR* recommendation that the *LRA's* remedial certification provisions must be simplified and made more effective. Currently, where a certification vote fails and the true wishes of employees cannot be ascertained due to employer misconduct, the OLRB *may* certify the union as the bargaining agent of the employees of the bargaining unit. However, it may also order a second vote, and must consider whether the trade union appears to have membership support adequate for the purposes of collective bargaining.

By contrast, under Bill 148, where it concludes that employer misconduct has made the true wishes of employees unascertainable, the Board will be required to grant remedial certification [s. 11(2)].

First Contract Arbitration Following Certification:

Currently, first contract arbitration following certification is available only in limited circumstances, such as where an employer refuses to recognize the union.

The *CWR* recommended that arbitration should automatically be available where remedial certification is ordered, *unless* the union bargained in bad faith or took an uncompromising position without reasonable justification. In first contract disputes not involving remedial certification, the *CWR* recommended an intensive mediation process similar to the one used in British Columbia.

Bill 148 largely adopts these recommendations, although a union would still be required to use the intensive mediation process before seeking arbitration, even where it was certified under the remedial certification provisions.

The process would work as follows [s. 43 and new s. 43.1]:

- If the parties are unable to effect a first collective agreement, either may apply to the Minister of Labour for the appointment of a mediator any time after the release of a "no board" report [s. 43(1)]. The application must include a list of issues in dispute [s. 43(2)];

- The other party must respond within **5 days** with their own issues list [s. 43(4)];

- The Minister must appoint a mediator within **7 days** of the initial application [s. 43(5)];

- The parties may not strike or lockout during the **20 days** following the appointment of the mediator [s. 43(8)-(11)];

- If no agreement has been reached after the 20 days have elapsed, either party may apply to the OLRB for mediation-arbitration [s. 43.1(1)];

- The OLRB must decide the application within **30 days** [s. 43.1(2)];

- The OLRB may make the following orders:

    - If the union was remedially certified the OLRB *must* order mediation-arbitration unless the union refused to bargain, bargained in bad faith, or took an uncompromising position without reasonable justification [s. 43.1(4)];

    - In all other first agreement situations, the OLRB may grant the request, dismiss the application, or order the parties to engage in further mediation [s. 43.1(2)]. There is a presumption in favour of granting mediation-arbitration except where there has been bad faith bargaining, unjustified uncompromising positions taken, or where the OLRB is of the opinion that "further mediation would be appropriate" [s. 43.1(3)];

- If mediation-arbitration is not ordered, the s. 79 strike/lockout rules apply [s. 43.1(5)(1)]. If mediation-arbitration is ordered, a statutory freeze continues in effect [s. 43.1(17)-(19)]. Where the OLRB orders mediation or dismisses an application, a party may reapply for mediation-arbitration. However, the OLRB may grant that application only if it is satisfied that the applicant has taken all reasonable steps to engage in good faith collective bargaining *with the assistance of a mediator* since the initial order [s. 43.1(5)(4)]

- If mediation-arbitration is ordered, the parties may agree to appoint a mediator-arbitrator, or if **7 days** have passed, either party may apply to the OLRB, which shall appoint a vice-chair to serve as mediator-arbitrator [s. 43.1(7), (9), (10)];

- The first hearing before the mediator-arbitrator must occur within **21 days** of his or her appointment, and the mediator-arbitrator must render a final decision within **45 days** thereafter [s. 43.1(15)-(16)];

- A collective agreement reached through arbitration shall be for a period of **2 years** [s. 43.1(21)].

All of the time limits described above may be extended by written agreement or order of the Minister [43.1(22)].

Displacement & Decertification Following Certification:

Bill 148 would give priority to mediation and arbitration proceeding over any displacement or decertification application, even if brought before the intensive mediation process was triggered [ss. 43(13)-(15), 43.1(23)-(30)].

Once the mediation process described above is triggered, the OLRB may not consider or continue to consider a displacement or decertification application, subject to the following rules:

- Where, after 20 days of mediation, neither party applies for mediation-arbitration, the OLRB may consider the displacement or decertification application;

- If a party applies for mediation-arbitration (whether at the expiry of the 20-day mediation period or thereafter), and

    - the OLRB dismisses an application for mediation-arbitration, the OLRB may consider the displacement or decertification application;

    - the OLRB orders further mediation, it may only consider a displacement or decertification application after the expiry of 30 days;

    - the OLRB orders mediation-arbitration, it shall dismiss any pending displacement or decertification applications, and may not entertain any further application until the open period.

Just Cause following Certification:

Bill 148 would extend just cause protection to employees against discharge or discipline during the period between certification and the first collective agreement [new s. 12.1]. This goes further than the *CWR*, which did not recommend such protections.

Return to Work Protections Following Strike:

Currently, a striking employee has a right to return to work if he or she makes an unqualified request to the employer within 6 months of the commencement of the strike. In line with the *CWR* recommendations, Bill 148 would eliminate the 6 month cut-off [s. 80(1)]. Employees would have a right - subject to an insufficient work exception and after startup operations - to return to work, and to bump others who may have worked during the strike, on the basis of the recall provisions contained in the collective agreement. Where no such collective agreement provisions exist, the right to return would be based on seniority at the time the strike began [new s. 80(2)-(7)].

Bill 148 would also protect employees from being disciplined or discharged without just cause in the period between being in a legal strike/lock-out position, and the conclusion of the new collective agreement [new s. 80.1].

Both rights – return to work, and not to be disciplined or discharged without just cause – would be enforceable through grievance arbitration [ss. 80(4), 80.1(2)].

Modification and Consolidation of Bargaining Units:

Bill 148 would give the OLRB two new powers to modify the size and structure of bargaining units.

The first power would permit the OLRB, upon application by either a union or the employer, to change the structure of units within a single employer, where the existing units are "no longer appropriate for collective bargaining" [new s. 15.2]. This is presumably intended to deal with fragmented single employer bargaining unit structures. The OLRB could consolidate, restructure, or reconfigure units, determine which union will be the bargaining agent of resulting units, and amend bargaining unit descriptions in any collective agreement as well as other terms of an agreement [s. 15.2(5)].

Like the *CWR*, the Government rejected calls to limit this new power to situations where all existing units are represented by the same union, and expressly provided that either a union or an employer may seek such an order.

While this power to consolidate bargaining units exists in other jurisdictions, included federally, and imposes a relatively high threshold that the existing bargaining units be "no longer appropriate for collective bargaining", there is a concern that it could be used by employers to reduce the free choice of employees in selecting and maintaining their bargaining agent and limit the diversity and representativeness of unions in the workplace. There is also a concern that it could lead to inter-union disputes.

The second new consolidation power allows the OLRB to consolidate existing units with newly certified units, and is aimed at redressing the imbalance in bargaining power for unions that represent employees of a single employer at multiple locations.

As the *CWR* special advisors explained:

> ….[A] single small unit of a large employer with multiple locations is likely to have almost no bargaining power and the chances of failure in achieving meaningful collective bargaining outcomes are very high. It is difficult to build support for unionization among employees where there is little likelihood of meaningful bargaining…
>
> Viable, effective and stable bargaining where some improvement in terms and conditions of employment can be achieved is likely only possible where there is a larger unit If units can be certified on a smaller basis and then varied or consolidated afterwards, this could make collective bargaining in those industries or sectors more viable. The probable reason why the law does not provide for the consolidation or varying of bargaining units, particularly with multiple smaller locations, is because in the 1940s, there were many single location enterprises. The traditional *Wagner Act* model, on which our current labour law is based, focuses on union organization at the enterprise level …
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> The current *LRA* was not designed for the current realities of the modern economy that has seen massive growth in the service sector, a significant increase of multiple small locations of a single, and often large, corporate employer and the development of large-scale franchising as a business The current *LRA* offers no effective or meaningful access to collective bargaining for thousands of workers in multiple location enterprises or

> franchise operations. In many sectors, these workers are vulnerable and perform precarious work. As Professor Slinn has said, "This Wagner Model orientation to determining representation may be effectively though not explicitly, excluding more vulnerable workers, including women, racialized and new immigrant workers from statutorily protected collective bargaining." There needs to be some change to give meaningful access to collective bargaining – a constitutional right – to vulnerable employees in some sectors of the economy…
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> Limiting bargaining units to a single location of the employer and/or the potential for having many small bargaining units at a single employer location, none of which have any real bargaining clout because there is no mechanism for consolidation except by consent of the parties, does reduce or limit the power of the employees and is a legislative deficiency, interfering with the objective of attaining meaningful access to collective bargaining.

Reflecting this rationale, Bill 148 would allow the OLRB to merge newly certified units with already existing units under a single employer, where the employer or union request a review of bargaining unit structure at the same time as, or within three months of a certification application and no collective agreement has been entered into. The same union must represent other units of employees, whether at the same location as the new unit or at a different location [new s. 15.1]. The OLRB is permitted to take into account any factor it considers relevant in deciding whether to consolidate the units, including the development of an effective collective bargaining relationship and the development of effective collective bargaining in the industry generally [s. 15.1(6)].

The OLRB would have the power to consolidate units, amend any bargaining unit description, require an existing collective agreement to apply to the new unit (with or without modifications), amend the terms of an existing collective agreement or declare that the employer is no longer bound to an existing collective agreement. The OLRB would also have the power to set terms and conditions of employment for employees in a newly consolidated unit who would otherwise be in a strike/lockout position.

These provisions would not apply to the construction industry [ss. 15.1(7), 15.2(9)].

It is not clear why Bill 148 would only permit bargaining unit consolidation at the time of certification, rather than permitting variance of existing bargaining units both before and after a collective agreement is in place, as the *CWR* had recommended.

Perhaps even more significantly, and as more fully set out below, notably absent from Bill 148 is any mention of the *CWR*'s recommended model for the consolidation of bargaining units involving franchisees. Nor does it reflect the *CWR's* suggestions concerning the need for broader-based or multi-employer bargaining structures.

Protecting Successor Rights in Re-Tendering Cases:

The *CWR* recognized that, in certain sectors, services provided by third parties are periodically re-tendered in order to defeat collective bargaining. These transactions are generally not treated as a "sale of business" under the *LRA*. Consequently, when contracted services are re-tendered and awarded to a new service provider, collective bargaining rights do not carry though, even if the new service provider hires the same workers to provide exactly the same services.

The *CWR* identified the building services industry – security, food services and cleaning – and government-funded home care services as two sectors particularly vulnerable to this practice. It recommended that successor rights should be extended to these sectors, similar to how the *LRA's* sale of business provisions operate. The *CWR* also recommended that the *LRA* be amended to permit regulations to be made extending successor right protections to other sectors in the future.

Disappointingly, Bill 148 would provide only a limited set of protections for successor rights.

While re-tendering would be deemed to constitute a sale of a business in the building services industry [s. 69.1], Bill 148 does not extend this protection to homecare services. While Bill 148 includes a regulation-making power that could result in this protection being extended to other service providers, it would only apply where an employer receives public funds, directly or indirectly [s. 69.2]. At the same time, regulations made under this section may also prescribe exceptions, further limiting the protections granted.

Interim Relief:

Currently, the OLRB has the power to make interim procedural orders. It may also make substantive interim orders related to reinstatement and terms and conditions of employment. However, its power to make such substantive interim orders is severely restricted by a number of conditions set out in the *LRA* which must be met before the power may be exercised.

The *CWR* noted that this approach is problematic, and is inconsistent with the powers exercised by many other administrative tribunals under s. 16.1 of the *Statutory Powers Procedure Act ("SPPA")*. It recommended giving the OLRB the general power to make interim orders – procedural or substantive – under the normal *SPPA* framework.

Bill 148 effectively implements this recommendation. It would give the OLRB a broad power to make any interim order without legislated tests or restrictions. The OLRB would not be required to issue reasons for an interim decision [s. 98].

Penalties for Violations:

Currently, violations of the *LRA* may be prosecuted by complainants before the Ontario Superior Court of Justice, but only with permission of the OLRB. The maximum penalties on conviction are $2000 for an individual, and $25,000 for an organization.

Bill 148 would increase these penalties to $5000 and $100,000 respectively [s. 104(1)]. It is questionable whether this change will have a meaningful impact given how infrequently the OLRB authorizes private prosecutions for violations of the *LRA*.

Commencement:

All of these amendments would come into force 6 months after Bill 148 receives Royal Assent.

However, Bill 148 also provides that Cabinet may make regulations "providing for any transitional matter that [it] considered necessary or advisable in connection with the implementation of the amendments made by [the Act]" [new ss. 125(2)-(3)]. This is an unusual provision to find in a statute, and its scope is unclear, though obviously broad. It could potentially be used to delay the coming into force of some or all of these amendments.

What's Missing from Bill 148's labour relations amendments?

While the scope of the Government's proposed reforms is wide, many of the *CWR's* recommendations are not reflected in Bill 148.

This may in part be explained by the fact that a number of the *CWR's* recommendations did not involve amending legislation. Others required action by an entity other than the Government. For example, the *CWR*'s recommendation that the OLRB modify its own rules to permit the submission of union membership evidence electronically is not something that the Government would directly implement.

However, there are several other omissions, which may indicate outright rejection of the *CWR* recommendations on these particular issues.

Exclusions from the LRA:

One significant *CWR* recommendation missing from Bill 148 is the extension of the *LRA* to domestic workers, hunters and trappers, agricultural and horticultural workers, and architects, dentists, land surveyors, doctors and lawyers. These groups will continue to be excluded from the *LRA*, and agricultural workers – who are some of the province's most vulnerable – will continue to operate under the grossly inadequate *Agricultural Employees Protection Act, 2002*.

The Government has explained that one reason for not getting rid of these exclusions is that they are being challenged in the courts. One would have thought that recognizing the constitutional rights of excluded workers to bargain would be a reason for removing the exclusions rather than waiting for a court to decide to do so. In any event, the Government has also indicated that the Ministry of Labour and other affected Ministries will consult on this topic.

Broader Based Bargaining, including Franchisees:

The Government has also failed to address any of the *CWR*'s recommendations on broader-based bargaining, which sought to address the problems of collective bargaining in a number of sectors where a traditional *Wagner Act* approach has proven inadequate. Many of the *CWR*'s recommendations called on the Government to engage in further study, such as with respect to issues affecting home care workers and artists, and rules for

mandatory accreditation of employer bargaining agencies, councils of unions, and mandatory certification of multiple employers.

Perhaps the Government will commence this work, but it is not mentioned in the Government's announcements or reflected in Bill 148. In the absence of any legislative changes related to broader based bargaining, it is somewhat difficult to take seriously the Government's professed commitment to extend meaningful access to collective bargaining in response to the growth in precarious work and other changes to the workplace that render the *Wagner Act's* single employer/single location model ineffective.

The *CWR* also made concrete recommendations with respect to franchises. It proposed that bargaining units of different franchisees of the same franchisor be allowed to bargain centrally with representatives of the franchisee employers. Collective agreements would be automatically extended to newly organized franchisees. The proposal would have built on the recommendation, accepted by the Government, that the OLRB be given greater powers to consolidate or modify bargaining units.

As the *CWR's* special advisors concluded:

> The policy reason behind recommending the ability to consolidate units at multiple locations of a single employer, namely, to create a structure that makes employee access to meaningful collective bargaining possible, applies equally to multiple locations of the same franchisor. Collective bargaining cannot be meaningful if it is limited to a single franchisee location. It is likely that no single bargaining unit for a single location of a franchisee has sufficient leverage to improve terms and conditions of employment when, in the same geographic area, there are many other locations selling the exact same product at the same or similar price. The only way to bargain effectively is to be able to bargain collectively with multiple locations involved with that brand in that geographic area. In circumstances where the franchisees are all operating virtually identical businesses and selling the same brand and product in the same labour market, there are compelling reasons to treat them like a single employer with multiple locations.

The Government's failure to adopt the recommendations with respect to franchises has not been explained.

Temporary Help Agency Reform:

As discussed in the next section, the Government accepted many of the *CWR's* recommendations related to employment standards reform for persons employed in temporary help agencies. However, it did not accept the *CWR*'s recommendations for *LRA* reforms in this area. The *CWR* recommended that clients of temporary help agencies would be deemed to be the employer of workers provided by an agency for *LRA* purposes. Such a rule would have eliminated the increasingly common and lengthy litigation over this issue before the OLRB, and would have provided meaningful protections for a particularly vulnerable group of workers by including them in workplace bargaining units.

Instead, as set out above, the Government extended card-based certification to temporary help agencies workers, despite the well-known impracticality of separately organizing these employees.

Power for Arbitrators to Extend Timelines:

The Government did not accept the recommendation that labour arbitrators be permitted to relieve against time limits in the arbitration procedure, where there are reasonable grounds for doing so and no prejudice to any party.

Elimination of Conciliation Boards:

The Government did not accept the *CWR's* recommendation to eliminate the use of conciliation boards, which have fallen into disuse.

Changes to Employment Standards
How would Bill 148 amend the *Employment Standards Act, 2000*?

Coverage:

While many people believe that the *Employment Standards Act, 2000* ("*ESA*") establishes universal minimum standards for all employees in Ontario, this is not the case. In fact, the *ESA* contains a complex patchwork of exemptions and special rules that apply to workers based on their industry, job classification, or employment status. According to the *CWR*, the *ESA* currently contains some 85 exemptions, with the result that only a minority of workers in Ontario receives its full benefit. The Government has committed to eliminating some identified exemptions, and to study whether to amend or eliminate others.

Effective January 1, 2018, Bill 148 would extend almost all *ESA* provisions to Crown employees [new s. 3.1]. [2]

People working in so-called "sheltered workshops", as well as others who receive on-the-job training, would receive *ESA* benefits starting in January 2019 [s. 1(1) "employee", clause (c)]. However, people involved in experiential education programs through a high school, university or college would *not* receive *ESA* protections.

Finally, the Ministry of Labour will begin reviewing other *ESA* exemptions, including those applicable to managers and supervisors. While the *CWR* made specific recommendations for amending the manager and supervisor exemption in the *ESA*, it largely limited itself to calling on the government to engage in broad consultation with employers, employees, community organizations and experts on the *ESA*'s exemptions. The Government has apparently committed to doing so, though whether or not it will follow the *CWR*'s proposed consultation model remains to be seen. These consultations are scheduled to begin this fall, and likely will continue for some time.

Misclassification of Employees as Contractors:

The *CWR* recognized the serious problem of employee misclassification – that is, the practice of employers labeling people "independent contractors" in order to avoid providing them with the minimum protections required for employees under the *ESA*.

[2] Note: Section numbers refer to the sections as amended in the *ESA*.

To remedy this, the *CWR* recommended a number of changes. These included expressly defining "dependent contractors" – a category of workers who are highly dependent on particular businesses for their work – as "employees" under the *ESA*.

Unfortunately, the Government rejected this recommendation on the purported basis that it could produce "unintended consequences".

Instead, the Government has made a general commitment to prohibiting the misclassification of employees as independent contractors, and to impose monetary penalties if an employer is convicted for this practice.

To this end, Bill 148 would amend the *ESA* to expressly prohibit employers from treating employees as if they were not employees, and establishing a reverse onus provision. In other words, where there is a dispute in any *ESA* investigation or proceeding (other than in a prosecution), the onus is the person claiming that an individual is *not* an employee to establish that fact [new s. 5.1].

However, it is not clear how this amendment would respond to the *CWR's* concerns respecting the changing nature of work and the workplace, including the growth in the "uber" or "gig" economy, and the need to extend the definition of "employee" to protect workers in precarious employment. Given the Government's professed commitment to improving precarious work, this omission is surprising.

Minimum Wage:

Bill 148 would make important changes to Ontario's wage rules [s. 23.1]. The most important change to low wage earners is a proposed change to the standard minimum wage to $15 per hour, up from the current $11.40. This increase would involve a three-step phase-in:

- October 1, 2017: $11.60/hour
- January 1, 2018: $14.00/hour
- January 1, 2019: $15.00/hour

Thereafter, the minimum wage would automatically increase based on changes to the Consumer Price Index.

The Government rejected the *CWR*'s recommendation that the lower minimum wages applicable to student employees under 18 and liquor servers be phased out. Instead, Bill 148 would increase these minimum wages by the same percentage increase of the standard minimum wage. The same percentage increase would apply to the special wage rates applicable to hunting and fishing guides and homeworkers.

Currently, *ESA* minimum wages are prescribed by regulation. Bill 148 would move minimum wage rates out of regulations and make them part of the *ESA* itself. This change would prevent Cabinet from reducing the minimum wages by adopting retroactive regulations. Any future changes to the minimum wage - aside from the automatic CPI increases - would require new legislation.

Overtime Pay:

Currently, where an employee holds more than one position with an employer, their overtime entitlement is based on a complicated blended rate. Bill 148 would simplify this rule by adopting the *CWR* proposal that overtime pay is to be based on the actual work performed during an overtime period [new s. 22(1.1)].

The *CWR* also recommended that limits be placed on an employer's right to "average" a worker's hours over a number of weeks in order to determine entitlement to overtime pay. The Government does not appear to have accepted this recommendation. As a result, employers may continue to make "agreements" with employees to average their hours over a number of weeks, whether or not this is done to meet legitimate business needs or employee interests.

Equal Pay for Equal Work:

The Government has proposed changes that would better ensure equal pay for equal work performed by casual, part-time and seasonal employees, as well as those employed through temporary help agencies [s. 1(1), ss. 42.1, 42.2].

Full-time, casual, temporary and seasonal employees would be entitled to the same rate of pay as regular employees when they perform substantially the same work, in the same establishment, under the same conditions, and require the same skill, effort and

responsibility. However, employers could justify differential pay on the basis of seniority, merit, quantity or quality of employee production or "other factors" [s. 42.1(1)-(2)].

A temporary help agency would be prevented from paying its employees a lower wage than that paid to its client's own employees performing the same work in the same establishment, under the same conditions, and requiring the same skill, effort and responsibility based solely on their status as a temp-agency employee [s. 42.2(1)]. However, the grounds to justify differential pay for these workers are *not* limited to the seniority, etc., grounds listed above. Any ground other than sex, status as a temporary help agency employee, or part time/temporary/casual/seasonal work for the client could justify differential pay [s. 42.2(2)]. This ability to rely on other undefined factors may prove troublesome in enforcing these protections.

The *CWR* recommended that equal pay for workers employed through a temporary help agency would only be triggered after six months of assignment to a given workplace. The Government's proposed changes do not include this limitation.

An employer cannot bring itself into compliance with these rules by reducing the pay of any employee [ss. 42.1, 42.2(3)]. In other words, where workplace wage rates violate these rules, the employer would be required to adjust the wages of lower paid employees upwards.

Employees, including temporary help agency employees, would be protected from reprisal where they make inquiries or disclose wage information for the purpose of determining an employer's compliance with equal pay rules [new ss. 74(1)(a)(v.1)-(v.2), 74.12(1)(a)(v.1)-(v.3)]. Employees who believe their pay does not comply with these rules would be able to request a review by their employer. The employer would be required to either adjust the rate of pay or give reasons for not doing so [42.1(6), 42.2(6)].

Unions would be expressly prohibited from attempting to cause employers to contravene these equal pay rules [ss. 42.1(4), 42.2(4)]. However, collective agreements that may violate these rules would be grandparented if they are in effect as of April 1, 2018. This grandparenting would continue after the agreement's expiry, but only until the conclusion of a new collective agreement. Any agreement renewed or entered into after April 1, 2018 would have to comply with the equal pay rules [ss. 42.1(7)-(9), 42.2(7)-(9)].

Vacation and Leave Entitlements:

Under the current *ESA*, employees are entitled to two weeks of paid vacation (or 4% vacation pay in lieu of vacation). Bill 148 would increase this entitlement to three weeks of paid vacation after five years of service with the same employer [ss. 33(1)(b), 34(3)]. Vacation pay would correspondingly increase from 4% to 6% of wages [s. 35.2]

On being entitled to three weeks of vacation, subject to a written agreement, an employee would be scheduled by the employer to take a three week vacation or three one-week vacations, or a two-week vacation and a one-week vacation [new s. 35(3)].

Bill 148 would also expand the entitlement to personal emergency leave [s. 50]. Currently, employers are only required to provide 10 days of unpaid personal emergency leave per calendar year if they employ 50 or more employees. The 50 employee threshold would be eliminated, extending the right to personal emergency leave to smaller workplaces.

Bill 148 also creates a new entitlement to emergency leave for employees experiencing domestic or sexual violence [new s. 50(1)(4)]. This is not currently covered by the *ESA's* emergency leave rules.

In some respects, Bill 148 goes beyond the *CWR*'s recommendations. The amendments would prohibit employers from requiring doctors' notes when an employee claims leave due to illness [ss. 50(11)-(12)]. The *CWR* only recommended that employers pay for such notes.

More significantly, Bill 148 would require an employer to pay for the first two days of personal emergency leave [ss. 50(5), (7)].

On the other hand, the Government rejected the *CWR*'s recommendation that entitlement to bereavement leave be expanded to 3 days per death. Instead, bereavement leave will continue to count against the current annual 10-day global limit. Conversely, the Government appears to have left the entitlement to leave at 10 days rather than the reduced seven recommended by the *CWR*.

Family medical leave would be extended from 8 weeks in a 26-week period to 27 weeks in a 52 week period [s. 49.1(2)].

Finally, two new leave entitlements would be introduced for tragedies involving an employee's children, replacing the existing leave for crime-related child death or disappearance.

Employees who have been employed for at least six months would be entitled to a single leave of up to 2 years following the death of their child, subject to certain conditions [new s. 49.5].

Bill 148 would also introduce a separate leave where an employee's child disappears as a probable result of a crime [new s. 49.6]. The conditions and terms of this leave are very similar to the existing child death leave, though the leave may be cut short if the child is found or if the grounds for thinking the disappearance is crime-related cease to exist [ss. 49.6(4)-(5)].

Although these leaves would be unpaid, in some cases workers might qualify for the *Federal Income Support for Parents of Murdered or Missing Children* grant.

Holidays & Holiday Pay:

Bill 148 makes Family Day a statutory public holiday [s. 1(1) clause 1.1].

Changes would also made to the method of calculating pay entitlements for individuals who do not work a regular shift due to it falling on a public holiday (public holiday pay), and the rules respecting employees who are required, or agree, to work on public holidays.

The method for calculating public holiday pay would be amended, so that it is based on the average daily wage from the employee's immediately prior pay period [s. 24(1)], rather than the average wage from the four weeks preceding the holiday.

Inexplicably, Bill 148 also removes statutory vacation pay from the calculation of public holiday pay [s. 24(1)(a)].

Bill 148's amendments would also remove the use of "lieu days" for individuals who agree or are required to work on a public holiday [ss. 27-28, 30]. Employers would be required to provide premium pay to these employees, which must result in a total payment that is at least one and one half times their regular rate. This requirement to pay premium pay would not apply if an employee were to take one of their two paid

emergency leave days on a public holiday on which they were scheduled to work [s. 50(9)].

Where a public holiday falls on an employee's non-working day, an employer is currently required to provide a lieu day within 3 months, or within 12 months with the agreement of the employee. Bill 148 would change this to require that the lieu day be the first ordinary working day either immediately before or after the public holiday [s. 29].

Additional Protections for Employees of Temporary Help Agencies:

In addition to the equal pay for equal work protections described above, Bill 148 would provide employees of temporary help agencies with protections analogous to (but weaker than) termination pay rights for permanent employees [new s. 74.10.1].

Under the proposed new rules, if a temporary help agency employee is put on an assignment estimated to last for three months or more, but is terminated early, the agency would be required to provide one week's notice or pay in lieu thereof. Alternatively, the agency may offer an assignment within the notice period that is reasonable in the circumstances, and has an estimated term of at least one week.

These protections do not apply if the early termination is caused by the employee's own misconduct, a strike or lockout at the location of the assignment, or *force majeure* [s. 74.10.1(4)].[3]

Scheduling Rights:

Currently, employers are not required to provide advance notice of shift schedules or last minute changes to existing schedules. The only protection is the "three hour rule". That rule provides, subject to certain exceptions, that an employee who regularly works more than 3-hour shifts, and reports to work only to be given less than 3 hours of work, must be paid 3 hours at the minimum wage, or the employee's regular wage for the time worked, whichever is greater.

Bill 148 would introduce several new protections with respect to scheduling [new Parts VII.1 and VII.2]:

[3] *Force majeure* refers to an extraordinary event, beyond the control of the parties that prevents one or both parties from fulfilling a contract.

- The three hour rule would be strengthened to require three hours pay at the employee's regular rate of pay, not at the minimum wage [new s. 21.3(1)];

- Where employees are on call (i.e. required to be available for work), but are not called into work, or are called into work for less than 3 hours, they must be paid three hours at their regular wage rate for each 24 hour on-call period [new s. 21.4];

- Employees would have a right to refuse a shift without repercussion, if offered the shift on less than 4 days' notice [new s. 21.5]; and

- Employers would have to pay 3 hours' wages where they cancel a scheduled shift on less than 48 hours' notice, unless the cancellation is owing to certain factors beyond an employer's control [new s. 21.6];

However, the rights related to notice of cancellation, refusal of work and to being on call would be subordinate to any conflicting provision in an applicable collective agreement [ss. 21.4(3), 21.5(3), 21.6(4)]. Thus, in organized workplaces, employers would be entitled to seek to have employees bargain away these protections. This is a serious departure from notion that employment standards are statutory minimum entitlements which cannot be contracted out of either individually or collectively.

Bill 148 would give employees a statutory right to request changes to their schedule or their location of work without fear of reprisal after 3 months of employment [new s. 21.2]. The *CWR* recommended that employees should have the right to do so annually, and that the employer be obligated to respond in writing to each request. Bill 148 does not contain any limit on the number of requests that can be made, but neither does it require the employer to respond in writing. However, the employer is required to meet and discuss requests with employees, and if they are refused, to provide reasons for refusal.

Enforcement:

A major theme of the *CWR* was that the Ministry of Labour should evolve towards a culture of enforcement, and to take on a role akin to a law enforcement agency in terms of ensuring compliance with the *ESA*. The Government appears to have accepted this imperative, and has made a number of non-legislative commitments in this area, including:

- Hiring 175 new employment standards officers by 2021;
- Launching new educational programs for both employers and employees;
- Resolving all *ESA* claims within 90 days;
- Inspecting 1 in 10 Ontario workplaces annually; and
- Focus enforcement activities on employers who "compete unfairly" by violating the *ESA*, thus levelling the playing field.

Only time will tell whether or not the Government lives up to these commitments.

Bill 148 would also enhance the *ESA's* enforcement provisions and make remedies for victims of *ESA* violations more available and effective. These changes, which would take effect in January 2018, include:

- Eliminating the requirement for employees to raise *ESA* concerns with their employer before filing a claim under the *ESA* [repeal of ss. 74.12.1, 96.1];
- Eliminating the ability of the Government to refuse to assign an officer to investigate an *ESA* claim due to insufficient information from the employee [ibid.];
- Introducing new powers for the Director of Employment Standards to collect unpaid wages and other debts, such as the power to take security for debts owing [new s. 125.1], issue warrants with the force of a writ of execution [new s. 125.2], to place liens on employer property [new s. 125.3], and to disclose information obtained under the *ESA* to enable a collector to collect a debt under the Act [new ss. 127(6)-(7)]
- Streamlining payments to employees by empowering employment standards officers to order employers to pay money directly to an employee when they or – in the case of a temporary help agency, their client – owes the employee money [ss. 74.14(1)(a.1), 74.16(2)(b), 74.17(2)(b), 103(1)(a.1), 104(3)(b)];
- Making it easier to treat related businesses as a single employer for the purposes of *ESA* liability by removing the need to show any intent or effect to defeat the *ESA* [new s. 4(1)];
- Increasing the flexibility around issuing notices of contravention to employers who violate provisions of the *ESA* by permitting different penalties, including ranges of penalties, to be prescribed by regulation and authorizing an employment

standards officer to determine the appropriate penalty within a range based on prescribed factors [ss. 113(1), 141(1)(16.1), 141(3.1)]; and

- Authorizing a 'name and shame' approach, in which persons who receive a notice of contravention for violating the *ESA* may have their identity and the details of their violations published online [new ss. 113(6.2)-(6.4)].

Other enforcement recommendations made by the *CWR* have not been taken up by the Government. The most significant change proposed by the *CWR* was to take the most serious prosecution for *ESA* violations out of the court system, and grant enhanced jurisdiction to the OLRB, including the power to impose penalties of up to $100,000. The Government also rejected companion reforms that would eliminate the requirement of employment standards officers to investigate all claims, and to permit employees to seek to enforce their *ESA* rights directly in proceedings before the OLRB.

Currently, the court-based prosecution system is rarely utilized, and mandatory investigation by employment standards officers can be slow (from 2011 to present, the average time for a level 1 ESO to be *assigned* to a complaint is 35.4 days). It remains to be seen whether the Ministry's new focus on enforcement will result in greater prosecutions in the Courts, and whether the hiring of new ESOs can make the investigation regime more efficient.

Written Agreements:

Where the *ESA* requires agreements to be made in writing, an electronic agreement is sufficient [new s. 1(3.1)]. This adopts a *CWR* recommendation that clarifies and simplifies agreement-making in the modern workplace.

Treatment of Tips:

Bill 148 would allow tips and gratuities to be treated as part of wages in prescribed circumstances [s. 1(1) "tips or other gratuities", "wages"].

Method of Paying Wages:

Bill 148 would create a regulation-making power to prescribe additional methods by which employers could pay wages [ss. 11(2)(d), 141(1)(1.1)].

Commencement:

All of the *ESA* amendments would come into force on January 1, 2018, with the following exceptions:

- Provisions respecting misclassification of employees - on Royal Assent
- Equal pay for equal work rules - April 1, 2018
- Expanded definition of employee to cover those receiving job training - January 1, 2019
- Scheduling protections - January 1, 2019

However, as with the proposed amendments to the *LRA*, the *ESA* amendments come into force subject to a broad regulation-making power that can provide for transitional matters in the same vague terms [ss. 141(2.0.3)-(2.0.4)].

What's Missing from the Employment Standards Changes?

The Government has not taken up various changes to the *ESA* proposed by the *CWR*.

The most notable rejection was the *CWR*'s recommendations directed at making enforcement of *ESA* violations more streamlined by:

- Removing the requirement for all complaints to be investigated by an employment standards officer;
- Providing a procedure for individuals to seek *ESA* relief before the OLRB;
- Creating satellite offices of the OLRB outside of the Toronto region to hear *ESA* complaints by workers; and
- Changing reviews of decisions of employment standards officers from a *de novo* standard to an appellate review.

The *CWR* also made a range of recommendations that would be implemented by changes to policies and procedures in the Employment Standards Branch. Because the

Government's proposals are directed at legislative reform, it is unclear whether or not these non-legislative recommendations will be accepted.

The Next Steps

Bill 148 was given first reading in the legislature on June 1, 2017. There was unanimous consent to refer it to committee before second reading so that consultations could take place over the summer while the Legislature is in recess. This is an unusual parliamentary procedure, but will provide for early input by stake holders and potentially a speedier passage through Queen's Park.

Committee sittings are currently scheduled to take place on June 22-23, July 10-14 and 17-21, and August 21-25, 2017. The government has indicated its desire to pass the legislation in the Fall.

In addition, the *CWR* recommended a series of further studies and consultations on matters ranging from multi-employer certification to sectoral *ESA* exemptions. The Government has committed to consultations on some matters already, but for others, it is unclear whether consultations will occur, and if so, when.