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My Review of Bill 148 Employment Standards Reforms

The new Bill 148 amendments to the Ontario *Employment Standards Act* are far ranging and important. The real test, as always, will be how and whether the new laws effect changes in the behaviour of the parties. We will need to wait and see how the case law fleshes out some of the uncertainties and also how well the government is able to ensure compliance, which is always a big challenge in employment regulation. Here is my quick summary of the key changes to the ESA and OHSA, with occasional commentary. I posted a commentary on the changes to the *Labour Relations Act* on my blog a while back, but I intend to write up a summary like this one so I have a unified summary.

Repeal of the Ridiculous Pre-Conditions Needed Before a Complaint Can Be Filed

Let's start with the repeal of one of the stupidest employment laws I've ever come across (and there have been a lot of stupid ones in my days!). Bill 148 repeals Section 96.1 of the *ESA,* which discouraged employees (and ex-employees) from filing complaints by setting up a system that required them to first confront the employer with the allegation that the employer is breaking the law and then wait for a response from the employer. The employee then had to demonstrate the Director of employment standards that the steps were taken, otherwise the Director would not assign a complaint to an employment standards officer.

I criticized this law way back in 2010 when it was first enacted in this post fittingly entitled "When Did Discouraging Workers from Filing ESA Complaints Become Public Policy in Ontario?". The Liberals argued that the law would encourage settlement of complaints before they became complaints. The cynic in me argued that the real purpose was to reduce the number of new complaints coming in order to address the large backlog of cases. Anyways, kudos to the Liberals for recognizing that a law they passed was bad policy and for doing away with it in Bill 148.

Simplifying of Related Employer Provision [Section 4(1))

The ESA permits the tribunal to treat two or more businesses or persons who are engaged in associated business activities as one entity that is jointly liable for obligations owed employees. In the past, applicants for a common employer declaration needed to show that (1) there were two or more businesses involved, (2) that the applicant was employed by one of them; (3) that the businesses were engaged in associated or related activities, and (4) that the intent or effect of these related or associated activities was to defeat the intent and purpose of the Act. Bill 148 repeals requirement (4). These subtle change *could* have dramatic effects, depending on how the change is interpreted and applied.

This is because requirement (4) has been interpreted in the past as imposing an obligation on the applicant to show some sort of arrangement or to use the language that sometimes appears in cases, at least "something more" than just related or associated activities (see e.g. *Cybernet Communications v. Francis* and the great subcontracting case *Lian v. J. Crew Group*] Now it

appears that it will be enough to demonstrate associated activities alone in order to obtain a common or related employer declaration. This requires demonstration of facts such as common ownership, common management, common financial control, common logo or company name, employee intermingling, asset transfer, and common market and customers.

The intriguing question is whether the new trimmed down definition of a common employer is sufficient to catch the relationship between franchisors and franchisees, for example. You might recall that the two wise men who wrote the Changing Workplaces Review spent considerable time on the challenge of regulating working conditions in franchising that arise because the power, resources, and control often reside up the franchising chain rather than at the micro-level of the franchisee. We will need to watch how this change to Section 4(1) impacts the development of the common employer jurisprudence, if at all.

Topics Related to Chapter 2 of *The Law of Work*: The Law of What? Employment, Self-Employment, and Everything in Between

Reverse Burden on employment status [new Section 5.1]

A new section 5.1 makes it unlawful for an employer to misclassify an employee as a non-employee. Until Bill 148, an employer who misclassified an employee as an independent contractor—and this happened a lot—would be ordered to pay any statutory entitlements owing to the employee. Now the act of misclassification is an offence in itself giving rise to potential fines and penalties in addition to any back wages or other entitlements owed the employee.

The purpose of this change is to alter employer thinking. The new law creates an incentive for businesses to *presume* that workers are their employees unless they have a strong case for arguing that they are independent contractors. To strengthen this incentive even more, Bill 148 also introduces a form of reverse onus when an "employer or alleged employer" claims that a worker is not its employee. The concept of an "alleged employer" is similar to the Australian concept of an "apparent employer" found in fair work legislation there. It is a useful concept because it permits a worker to identify the entity he/she believes is the employer and then the burden shifts to that entity to establish that it is *not* the employer of the person. This addition presumably does not alter the test that the labour board will apply in assessing whether a worker is an independent contractor or an employee, but it does require the employer to go first and explain to the board how the worker fails to meet the definition of employee.

"Unpaid Interns" and Workers in Training

The much-maligned exception from the legislation for "persons receiving training" found in the old Section 1(2) is repealed. This exception excluded from ESA coverage workers receiving training from a non-educational institution when six factors were present. Section 1(2) and the six conditions are discussed in Chapter 2 (Box 2.3] of *The Law of Work*, and so I will need to revise

that material! Under Bill 148, a person receiving training *is an "employee",* unless the training is in accordance with an approved public or private college or university program.

Section 1(2) was the law that in theory permitted "unpaid interns" outside of university and college training programs. It was widely abused by employers looking for free labour. I (and many others) argued for years that Section 1(2) should be repealed and that only 'internships' for which students receive credit towards their degree and that are part of a regulated and monitored educational program should be permitted. I also argued for a law requiring educational institutions to prepare a Code of Conduct setting out the conditions under which students can be asked to perform work that would be distributed to the students and businesses and approved by the state.

Topics Related to Chapter 21 of *The Law of Work*: Regulation of Wages and Pay Equity

Minimum Wage Increase [new section 23.1]

This change has attracted the most attention. The minimum wage will increase to $14 on January 1, 2018 and $15 on January 1 2019. Predictably, the business lobby has argued that thousands of jobs will evaporate because employers will start laying off workers to pay for the wage increase. My favorite response to this age-old argument was presented by economist Jim Stanford, who bet his fellow economists $500 that job levels would *increase* in the year after the minimum wage is introduced. When last I checked with Jim, no economist had taken him up on the bet. Jim's point was that job levels are determined by many factors of which the minimum wage is just one, and that no serious economist actually believes that the job levels will go down in Ontario because of the minimum wage, although many pseudo economists, business lobbyists, and non-expert media pundits try to persuade the public this will happen.

Call-In Pay, Cancellation of Shifts, and Right to Refuse a New Work Schedule Assignment [new Section 21.4. 21.5]

An employee "on call" who is not required to work or who works less than 3 hours is entitled to be paid for three hours. I confess to being a bit slow on this language (maybe someone can help me). The new law says the payment is payable to an "employee who is on call work [but] is not required to work". But then there is an exception saying that the payment is *not* required if "the employee who was on call was not required to work". Those two provisions seem to be contradictory, but I am probably missing something?

A new Section 21.6 entitles an employee to 3 hours' pay if an employer completely cancels a scheduled shift less than 48 hours before the shift is scheduled to commence, except if the cancellation is due to a force of nature or power failure (see conditions in Section 21.6(3)). Section 21.5 permits an employee to refuse to accept a "demand to work" or to be on call that they were not originally assigned to work if the request or demand is made within 96 hours (i.e.

4 days). Exceptions include when the request is to deal with an "emergency", threat to public safety, or ensure an essential public service is delivered.

Equal Pay for Equal Work (Gender) [new section 41.2, 42(6)]

The provisions requiring equal pay for work that is "substantially the same" have been amended to clarify to that "substantially the same" does not necessarily mean "identical". This same definition applies to the new equal pay provisions based on employment status (see below). I presume that the purpose of the clarification is to address a concern that adjudicators might be interpreting "substantially the same" too narrowly. It remains to be seen whether it will make any difference in practice.

A new section 42(6) is also added that permits an employee who believes the equal pay provision is not being complied with to request a review by the employer. The Liberals are still clinging to this belief that the law can facilitate dialogue between an individual non-union employee and the employer that will produce useful employment-related outcomes. If an employee makes a request, the employer must then either adjust the employee's pay or provide reasons why the equal pay provisions are not being violated. I'm not clear on whether an employer who admits under this new section that they were not in compliance with the equal pay provisions can then be fined or ordered to pay back wages, or whether the adjustment just starts from the point that the employer makes the change. Isn't an agreement to raise the pay an admission that the employer was in contravention of the law requiring equal pay?

Equal Pay for Equal Work (Employment Status and Temp Employees) [New section 42.1, 42.2]

This is potentially an important new law that comes into effect in April 2018. Bill 148 attempts to address discriminatory pay practices based on "differences in employment status", including differences in the number of hours worked and the term of employment (full-time, part-time, temporary, seasonal). The new provision essentially mirrors the equal pay for equal work provisions relating to gender (discussed above) in requiring equal pay between employees with differences in "employment status" when:

> (a) they perform substantially the same kind of work in the same establishment;
> (b) their performance requires substantially the same skill, effort and responsibility; and
> (c) their work is performed under similar working conditions.

As with the gender equality provisions, a big question is how the exceptions will be applied. Those exceptions permit pay differentials based on seniority, merit systems, pay systems based quality or quantity of production, and the catch-all "*factors other than sex and employment status*".

In the case of workers assigned to a company by a temporary placement agency, the only exception allowed is for differences based on factors "other than sex, employment status, and

assignment employee status". "*Difference in employment status*" is defined as a difference in hours regularly worked or a difference in term including permanent, temporary, seasonal or casual status. Think about this difference. What is the effect, intended or otherwise, of removing from the equal pay law relating to employees assigned by a temp agency the exceptions based on seniority, merit pay systems, and pay systems based on quantity and quality of production?

Reprisals for Asking About Pay Rates For the Purposes of Equal Pay Provisions

There are two new sections added to the 'no reprisals' section of the ESA (Section 74(1)(a)). Bill 148 makes it unlawful for an employer to penalize an employee for asking coworkers what they are paid or telling another employee what they are paid "for the purpose of determining or assisting another person in determining whether an employer is complying with the equal pay provisions in Part XII of the Act. Parallel provisions are added in relation to disclosure of rates of pay at workplaces where temp workers are assigned (Section 74.12(1)(a)).

This is a weird one. The obvious question to me is why an employer should *ever* be entitled to penalize an employee for discussing their pay. Shouldn't the anti-reprisal law more generally prohibit reprisals against *any* employee for discussing their pay rate with anyone else? The more information available about pay rates, the better functioning the labour market will be. That's what labour economists say, anyways, and we all know how much politicians like to listen to economists. And information about pay rates also shines a light on discriminatory or unfair pay practices. It's hard to think of a good public policy argument to support employers penalizing employees for discussing their pay rates with coworkers. Can you think of any?

Topics Related to Chapter 22 of *The Law of Work*: Regulation of Working Time

Vacation Entitlements and Vacation Pay [new Section 33 and 35]

The current ESA (s. 33) entitles employees to 2 weeks' vacation per year worked. Bill 148 retains 2 weeks' vacation time for employees with less than 5 years' service, but increases vacation time to 3 weeks' after 5 years' service. Vacation pay continues to be calculated based on 4% of the employees' earnings for the year for which the vacation is given for employees with less than 5 years' service, but that amount increases to 6% for employees with more than 5 years' service. This law clearly rewards service beyond 5 years. Anytime an entitlement increases at a defined moment in the employees' service length, a concern arises whether the law will create a perverse incentive for employers to terminate the employee before the entitlement kicks in. Do you think employers may be incentivized to terminate employees before 5 years in order to avoid the additional vacation week?

Calculation of Holiday Pay [new Section 24(1)]

Bill 148 changes the way that Holiday Pay is calculated, making it I think an easier to understand formula. The amount of holiday pay is now calculated by taking the amount of regular wages

earned over the previous pay period and dividing that by the number of days worked in that period.

Hours of Work and Scheduling Changes [new Section 21.2]

A new section 21.2 introduces a requirement for employers to "discuss" with an employee who has at least 3 months' service a request put in writing by the employee for a change in their work schedule or work location. The employer must then notify the employee of their decision with reasons within a reasonable amount of time. This is more of that Liberal "if-we-can-just-get-the parties-to-talk-to-each-other-lots-of-problems-will-be-solved" theology. In my humble opinion, this law will have no impact whatsoever, and I don't even understand why the government bothered with it. An employee who feels comfortable asking for such changes will already make the request, and an employee who does not feel comfortable will not suddenly be emboldened by this new law, presuming they even know of its existence.

Three Hour Rule [New Section 21.3]

Bill 148 requires employers to pay at least 3 hours' wages to an employee who reports for work and is sent home before 3 hours, provided that the employee regularly works longer than 3 hour shifts and was available to work longer. There are exceptions when the reason the employee is sent home have to do with circumstances beyond the employee's control, such as fire, electrical failure, lighting (but presumably not due to a lack of available work)

Personal Emergency Leaves

A surprising proportion of Bill 148 is devoted to changes to various leave provisions. Here is a summary of the changes:

- Unpaid *Pregnancy leave* in the case of a woman not entitled to parental leave (still birth or miscarriage) is extended from 6 to 12 weeks (Section 47(1)).
- Unpaid *Parental leave* can now be taken no later than 78 weeks after the child is born (or adopted) (increased from 52 weeks (section 48)), and the length of parental leave entitlement increases from 35 weeks to 61 weeks if the employee also took pregnancy leave, and from 37 to 63 weeks if the employee did not take pregnancy leave.
- The list of individuals for whom an employee can take unpaid *family medical leave* to care for is increased in Bill 148, essentially from immediate family to extended family (Section 49.1), and the amount of time that can be taken increases from 8 weeks to 28 weeks.
- A new *critical illness leave* is introduced (Section 49.4) that extends to both critically ill children and critically ill family members and is available only to employees with at least 6 months' service. The leave is up to 37 weeks to care for a child and 17 weeks to care for an adult. The employee must present to the employer a certificate from a qualified health practitioner.

- The *child death and crime-related disappearance leaves* have been redrafted so that an employee with at least 6 month's service whose child dies or disappears under circumstances in which it is probable that a crime was committed is entitled to up to 104 weeks' unpaid leave (Sections 49.5, 49.6).
- There is a new *domestic or sexual violence leave* provision that entitles employees with at least 13 weeks' service to take a leave of up to 10 days and 15 weeks of leave with the first 5 days in a year being paid leave and the rest unpaid (Section 49.7). The leave applies if an employee or child of employee experiences domestic or sexual violence or "the threat" of such violence and the leave is needed for a list of identified purposes.
- The *personal emergency leave* entitlement in Section 50 was amended to eliminate the requirement that the employer have 50 or more employees. This leave is available to employees who suffer a personal injury or illness or there is an urgent matter or illness to certain designated family members. The maximum amount of leave is 10 days in a year and the first 2 days are now paid (provided the employee has been employed at least one week).

Topics Related to Chapter 23 of *The Law of Work*: Regulation of the End of Employment Contracts

Notice of Termination to Temp Worker Whose Assignment Ends Prior to 3 Months

Bill 148 adds a requirement for temp agencies to give one week's notice or pay in lieu to an assignment employee who is assigned to job expected to be 3 months or more but which is cut short, unless the employee engages in wilful misconduct, the assignment was "frustrated", or the assignment was terminated due to a work stoppage (Section 74.10.1]. This creates a form of exception to the general rule that employees with less than 3 months' service are not entitled to statutory notice.

Changes to Ontario Occupational Health and Safety Act

A new Section 25.1 is added to the "duties of the employer" part of the OHSA, which prohibits 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 job safely." Hhhm, anyone think of a job that is only safe if done with high heels? There may be some, I presume, but none come to mind. An exception is created for a performer in the entertainment and advertising industry.