Ius Laboris Canada Global HR Lawyers
MathewsDinsdale

Mathews, Dinsdale & Clark LLP
RBC Centre, Suite 3600
155 Wellington Street West
Toronto, ON M5V 3H1 Canada
O 416.862.8280 | F 416.862.8247

MEMORANDUM

TO: Tony Fanelli

CC: Stephen McArthur

FROM: Erich R. Schafer

DATE: November 26, 2018

Subject: Bill 47 - Application to non-construction employees

Please find below a summary of how Bill 47 has affected the amendments put in place by Bill 148. Bill 47 has now received Royal Assent. The changes to the *Employment Standards Act, 2000* (the "*ESA*") are not effective until January 1, 2019, but the changes to the *Labour Relations Act, 1995* ("*LRA*") took effect on the day that Bill 47 received Royal Assent (November 21, 2018).

AMENDMENTS TO THE *EMPLOYMENT STANDARDS ACT, 2000* (ESA)

Requirement	***Status of requirement following passage of Bill 148***	***Status of requirement under Bill 47***
Overtime	Prior to the passage of Bill 148, employees that had more than one rate of pay would receive overtime pay at a blended rate. Under Bill 148, the calculation of overtime was based on the actual rate being earned at the time the employee worked hours in excess of the applicable overtime threshold.	No change: The Bill 148 amendments with respect to this issue remain in place.
Minimum wage	The general minimum wage would have increased as follows under Bill 148: • $14.00 – January 1, 2018 • $15.00 – January 1, 2019 Minimum wage for students (under 18): • $13.15 – January 1, 2018 • $14.00 – January 1, 2019 After this minimum wage increase was phased-in, future increases would have occurred automatically based on changes to the Consumer Price Index, in accordance with amendments to the *ESA* passed in 2014.	The increase of minimum wage to $15.00 per hour will not take effect on January 1, 2019. The increases to minimum wage that took effect on January 1st, 2018 will not be rolled back. That is, the general minimum wage will remain at $14.00/hr, and the minimum wage for students will remain $13.15/hr. There will be a 33-month pause in minimum wage increases. Annual increases to the minimum wage, which will be tied to inflation, will start in October of 2020. To be clear, the

	If an employee received room and board, a new regulation under the *ESA* deemed certain amounts to be included for the purposes of determining whether minimum wage has been paid.	minimum wage will not necessarily rise to $15.00 in October of 2020. The change that takes place that month will be based on the inflation rate. The regulation concerning room and board has not been repealed.
Shift / location changes	Employees would have been entitled to request changes to their shift schedules or working location. All requests would have been discussed with the employee and either granted, or denied for reasons set out in writing.	Repealed. Under Bill 47, employees have no statutory right to request changes to their shift schedules or working location, and employers have no obligation to set out their reasons for the denial of such requests in writing.
Scheduling	• On-call employees who were not called in or were called in for less than three hours were also entitled to be paid three hours at their regular rate of pay; • Employees had the right to refuse requests to work or be on call if the request was made on less than 96 hours' notice; and • Employees were entitled to 3 hours of wages where a shift or on-call period was cancelled on less than 48 hours' notice, unless the cancellation was due to factors beyond the employer's control.	The scheduling provisions introduced by Bill 148 have been repealed. However, Bill 147 introduces a new rule known as the "three-hour rule". If an employee who regularly works more than three hours per day is required to attend at work, but works less than three hours, the employer is required to pay the employee for three hours of work at their regular rate. However, this requirement does not apply if the reduction in work is due to weather or similar factors beyond the employer's control. The new three-hour rule will apply to all employees, regardless of whether they are covered by a collective agreement.
Equal pay for equal work	All employees, regardless of employment status (such as full-time, assignment, casual, temporary, and seasonal) were entitled to the same rate of pay as regular employees when they were performing the substantially same kind of work in the same establishment. Employees who believed they were being improperly paid at a lesser rate could request a review by their employer who had to either adjust the employee's rate or provide written reasons for why the request was being denied. Different rates of pay were still acceptable where an employee's rate of pay was based on a seniority system, merit system, productivity system, or any other	Repealed. Bill 47 eliminates the prohibition against paying employees differently based on their employment status. Accordingly, employers are no longer required to respond in writing when an employee asserts they are being paid less on the basis of their employment status.

	factor other than sex or employment status.	
Personal emergency leave	Prior to the passage of Bill 148, most employees were entitled to ten days of unpaid personal emergency leave per year, provided the employer employed at least 50 employees. Bill 148 made the following changes to the personal emergency leave provisions: • Eliminated the 50-employee threshold as a precondition to entitlement; • A minimum of two days of personal emergency leave had to be paid as long as the employee had at least one week of service; and • Employers retained the right to require evidence to substantiate the reasons for the personal emergency leave, but were prohibited from requiring a medical certificate from a health practitioner.	Bill 47 eliminates paid personal emergency leave days, but also repeals the entire section related to personal emergency leave. That is, employees are no longer entitled to 10 "personal emergency leave" days each year. In place of the personal emergency leave provisions, Bill 47 contains provisions for "sick leave", "family responsibility leave", and "bereavement leave". These types of leave are described further below, but it is important to note they are all unpaid.
Sick leave / Family responsibility leave / Bereavement leave	Bill 148 did not contain provisions for "sick leave", "family responsibility leave", or "bereavement leave".	Employees who have been employed for at least two consecutive weeks are entitled to take: • Sick leave: Three days of unpaid leave in each calendar year for "personal illness, injury, or medical emergency". • Family responsibility leave: Three days of unpaid leave for an illness, injury, medical emergency, or "urgent matter" concerning certain a family member. • Bereavement leave: Two days of unpaid leave because of the death of certain family members. Employers are permitted to require "evidence reasonable in the circumstances" that an employee is

		entitled to take sick leave. Bill 148 prohibited employers from requiring medical certificates from a health practitioner, but that prohibition no longer exists. Notably, Bill 47 states that if an employee takes a leave of absence under an employment contract or collective agreement in circumstances for which he or she would also be entitled to take sick leave, family responsibility leave, or bereavement leave, the employee is deemed to have taken a day of leave under the *ESA*. This means that employees cannot "double-dip" by exhausting their entitlements under an employment contract or collective agreement before beginning to use their *ESA* leave.
Classification of Workers as Independent Contractors	Employers were prohibited from treating an employee as if they were not an employee, and bore the onus of establishing that a worker was not an employee.	Under Bill 47, there is still a prohibition against treating employees as if they were not employees. However, the onus no longer falls on the employer to prove that a worker is not an employee.
Related Employers	Prior to the passage of Bill 148, any party alleging that two or more businesses were a single employer for the purposes of the *ESA* was required to establish that the intent or effect of the arrangement was to defeat the purpose of the *ESA.* Bill 148 removed the requirement to show that the intent or effect of the arrangement was to defeat the purpose of the *ESA*.	No change: The Bill 148 amendments with respect to this issue remain in place.
Public Holidays	Where an employee was given a substitute day off in place of a public holiday, Bill 148 required the employer to provide a written statement to the employee setting out: • the public holiday on which the employee will work; • the date of the day that is substituted for the public holiday; and • the date on which the statement is	No change: The Bill 148 amendments with respect to this issue remain in place.

	being provided to the employee.	
Calculation of Holiday Pay	Prior to the passage of Bill 148, holiday was calculated by dividing the amount of regular pay and vacation pay that an employee received in the four work weeks before the work week in which the public holiday occurred, and dividing that number by 20. Under Bill 148, holiday pay was equal to the total amount of regular wages earned in the pay period immediately preceding the public holiday, divided by the number of days the employee worked in that period. Further, if an employee was on vacation or personal emergency leave during the pay period preceding the holiday, their holiday pay was calculated on the basis of the pay period preceding their vacation or leave. If an employee was not employed during the pay period immediately before the public holiday, their holiday pay was calculated using the pay period that included the public holiday. These changes increased the amount of holiday pay received by new hires, part-time employees, and employees that were on vacation or personal emergency leave prior to the holiday.	Bill 47 re-introduces the manner of calculating holiday pay that was in place prior to the passage of Bill 148.
Vacations	Bill 148 increased paid vacation entitlements to 3 weeks and 6% after 5 years of service.	No change: The Bill 148 amendments with respect to this issue remain in place.
Record-keeping	Prior to the passage of Bill 148, employers were required to keep certain information for three years after the employee ceased to be employed, including: name, address, start date, hours worked (daily and weekly), and certain other information. Bill 148 required that these records be kept for five years. Further, the records were to include: dates and times worked, on-call schedules, changes made to scheduling (including cancelled shifts), dates and hours worked, dates and times	Employers are no longer required to keep records of the dates and times that an employee was scheduled to work or be on call for work, or changes made to an on-call schedule. Bill 47 has also eliminated the requirement to keep records of cancellations of a scheduled day of work or a scheduled on call period. The other record-keeping requirements imposed by Bill 148 remain in place.

	that employees with more than one wage rate worked in excess of the overtime threshold at each rate of pay, substitute holidays, documents for all leaves, vacation pay, and time.	
Pregnancy Leave	Bill 148 increased unpaid pregnancy leave for employees who suffered a miscarriage or stillbirth from six weeks to twelve weeks after the loss occurred.	No change: The Bill 148 amendments with respect to this issue remain in place.
Parental Leave	Parental leave was increased from 35 to 61 weeks of unpaid leave for employees who took pregnancy leave. For employees that did not take parental leave, parental leave was increased from 37 to 63 weeks of unpaid leave. Prior to Bill 148, parental leave had to begin no later than 52 weeks after the child was born or came into the employee's custody. This was increased to 78 weeks.	No change: The Bill 148 amendments with respect to this issue remain in place.
Family Medical Leave	This was increased by Bill 148 from 8 to 28 weeks of unpaid leave.	No change: The Bill 148 amendments with respect to this issue remain in place.
Critical Illness Leave	Before Bill 148 was passed, employees could take up to 37 weeks to provide care to a critically ill child. Bill 148 expanded the leave to apply to all critically ill family members. The entitlement was set at 37 weeks for care of a critically ill child, and 17 weeks to provide care for a critically ill adult related to the employee. This form of leave is unpaid.	No change: The Bill 148 amendments with respect to this issue remain in place.
Death or Disappearance of Child	Prior to the passage of Bill 148, employees could take up to 104 weeks of unpaid leave where a child of the employee died and it was probable that the child died as a result of crime. Bill 148 expanded this leave to include any death of a child of the employee.	No change: The Bill 148 amendments with respect to this issue remain in place.
Domestic or Sexual Violence Leave	Bill 148 introduced this new type of leave, which provided up to 15 weeks of leave if the employee, or employee's child, experienced domestic or sexual violence (including threats) and the leave was needed to seek medical attention, obtain	No change: The Bill 148 amendments with respect to this issue remain in place.

	services from a victim services organization, obtain psychological or other professional counselling, relocate, or seek legal assistance. The first five days of domestic or sexual violence leave are paid.	

AMENDMENTS TO THE *LABOUR RELATIONS ACT, 1995*

Requirement	***Status of requirement following passage of Bill 148***	***Status of requirement under Bill 47***
Employee Lists	Under a new section 6.1 of the *Act*, if it could be shown that a trade union had obtained membership evidence of 20 per cent of employees in the bargaining unit, it could apply to the OLRB for an order directing the employer to provide the trade union with a list of employees of the employer. Section 6.1 set out the process for applying, obtaining, and using such a list and established the rules to be followed by the Board in determining whether to make an order.	Repealed: Section 6.1 has been repealed. Applications for employee lists that are ongoing as of January 1, 2019 shall be terminated, and unions that obtained employee lists under section 6.1 must destroy them.
Remedial Certification	Prior to Bill 148, section 11 of the Act provided that the Board "may" certify the trade union where employer misconduct during an organizing campaign had made the true wishes of employees unascertainable. Bill 148 made it mandatory for the Board to issue remedial certification where the employer engaged in unfair labour practices during an organizing campaign, thereby making the true wishes of the employees unascertainable or preventing a trade union from demonstrating 40 per cent membership support for certification.	Repealed: Bill 47 re-introduces the rules regarding remedial certification that were in place prior to Bill 148. That is, if the Board finds an employer engaged in unfair labour practices and made the true wishes of the employees unascertainable or prevented a trade union from demonstrating 40 per cent membership support for certification, the Board has discretion whether or not to certify the union. In deciding whether or not to certify the union due to an unfair labour practice, the Board can consider the results of a previous representation vote and whether the trade union appears to have enough membership support to engage in collective bargaining.
Modification or Consolidation of Bargaining Units	Bill 148 added section 15.1 to the Act. Under that section, in certain circumstances, the Labour Board could review the structure of bargaining units and make orders in respect of the structure of bargaining units. In particular, the Labour Board was provided with the power to modify the size and structure of bargaining units, after certification but before the first collective agreement. The Board also had the power to consolidate bargaining units, amend any bargaining	Repealed: The Labour Board no longer has the powers granted to it by section 15.1.

	unit description, require an existing collective agreement to apply to the new bargaining unit, amend the terms of an existing collective agreement or declare that the employer was no longer bound to an existing collective agreement.	
First Contract Mediation and Mediation-Arbitration	Before Bill 148, first agreement arbitration was available only in limited circumstances where the parties were unable to come to an agreement for a first collective agreement following certification. Bill 148 provided increased access to first agreement mediation, as well as mediation-arbitration where first collective agreement mediation did not result in the parties entering into a collective agreement. A first collective agreement reached by mediation-arbitration would be effective for a period of two years from the date on which it was settled.	Repealed: Bill 47 repeals the rules regarding first contract mediation and mediation-arbitration that were introduced by Bill 148. The provisions regarding first agreement arbitration that were in place prior to Bill 148 have been restored.
Successor Rights	Bill 148 contained new provisions that set out how the successor rights provisions of the Act would apply to building services providers. In particular, Bill 148 stated that the re-tendering of services contracts would be deemed a sale of business.	No change: The Bill 148 amendments with respect to this issue remain in place.
Reinstatement and Just Cause Protection	Prior the passage of Bill 148, there was a time limit of six months for a striking worker to make a request to return to work after the commencement of a strike or lock-out. Bill 148 removed the six-month time limit to return to work. It also provided that employees have a right to bump others who may have worked during the strike, on the basis of the recall provisions contained in the collective agreement, or, if there were no such recall provisions, on the basis of length of service. Further, Bill 148 stated that an employer could not discharge or discipline an employee in an affected bargaining unit	Bill 47 restores the six-month time limit for striking workers to return to work. Workers returning from a strike no longer have the right to bump others that worked during the strike. Workers still have just cause protection during a lawful strike or lock-out.

	during a lawful strike or lock-out.	
Prosecutorial Powers of the OLRB	Bill 148 increased the maximum penalties for contraventions of the Act or of orders made under the Act from $2,000 to $5,000 for individuals, and from $25,000 to $100,000 for organizations.	Repealed: Bill 47 restores the maximum penalties that were in place prior to Bill 148.
Form of Notice	n/a – Bill 148 did not contain any provisions respecting acceptable methods of notice for the purposes of the Act.	Bill 47 states that notices or communications sent for the purposes of the Act may be sent by mail, courier, fax, or e-mail.
Voting Procedure	Bill 148 allowed the Labour Board to order representation votes outside of the workplace or votes conducted electronically or by phone.	No change: The Bill 148 amendments with respect to this issue remain in place.