

FRANCHISE AND DISTRIBUTION

PROPOSED CHANGES TO ONTARIO EMPLOYMENT AND LABOUR LAWS

by Edward (Ned) Levitt, Andrae Marrocco and Kathy Le

On May 23, 2017, the Government of Ontario's Special Advisors released their Final Report from the Changing Workplaces Review (the **Final Report**) which outlines 173 recommendations to amend the *Employment Standards Act* (Ontario) (the **ESA**) and the *Labour Relations Act* (Ontario) (the **LRA**). In response to the Final Report, on June 1, 2017, the Government introduced Bill 148 – *Fair Workplaces, Better Jobs Act, 2017* (**Bill 148**) which proposes certain amendments to the ESA and LRA.

While Bill 148 does not specifically target franchise systems (contrary to recommendations set out in the Final Report), franchisors and franchisees should be aware of the proposed changes that will generally apply to many employers in Ontario.

Employment Law Proposals

Proposed changes to the ESA include the following:

Minimum Wage Increases – The general minimum wage will be increased to \$14 per hour on January 1, 2018, and then to \$15 per hour on January 1, 2019. The special minimum wage rates for liquor servers, students under 18, hunting and fishing guides, and homeworkers would be maintained, and would increase by the same percentage as the general minimum wage.

Paid Vacation – Employees with at least five years of service will be entitled to three weeks paid vacation, an increase from two weeks under the current ESA. This would take effect January 1, 2018.

Paid Personal Emergency Leave – Under the current ESA, workplaces with 50 or more employees are required to provide personal emergency leave (PEL). Bill 148 proposes that all employers provide 10 days of PEL per year, two of which would be paid. Further, Bill 148 prohibits employers from requesting a doctor's sick note from an employee taking PEL and expands the reasons for employees being entitled to take PEL. This would take effect January 1, 2018.

Overtime Pay – Employees who hold more than one position with an employer must be paid at the rate for the position they are working during any overtime period.

Equal Pay for Equal Work – Employers will be required to pay casual, part-time, temporary and seasonal employees the full-time employee rate when performing the same job for the same employer. Exceptions include where a wage difference is based on a seniority system, a merit system, systems that determine pay by quantity or quality of production, or other factors (however, sex and employment status do not qualify as exceptions). Employees will be entitled to request a review of their wages and the employer will be required to respond.

Similarly, temporary help agency (**THA**) employees (assignment workers) will be paid at the same rate as permanent employees of the THA client when performing the same job and such assignment workers would be entitled to request a review of their wages.

These changes would come into effect April 1, 2018.

THAs will be required to provide assignment workers with at least one week's notice when an assignment scheduled to last longer than three months will be terminated early. If less than one week's notice is given, the assignment work must be paid for the difference, unless the assignment employee is offered at least one week's worth of reasonable work during the notice period.

Scheduling – Bill 148 proposes the following changes with respect to scheduling:

- Employees will be entitled to request schedule or location changes after having been employed for three months.
- Employees who regularly work more than three hours per day, but upon reporting to work are given less than three hours, must be paid three hours at their regular rate of pay.
- Employees can refuse to accept shifts if their employer asks them to work with less than four days' notice.
- If an employer cancels a shift within 48 hours of its start, employees must be paid three hours at their regular rate of pay.
- When employees are "on-call" and not called in to work, the employer must pay them three hours at their regular rate of pay. This would be required for each 24-hour period that employees are on-call.
- These changes would take effect January 1, 2019.

Employee Misclassification – Employers that misclassify their employees could be subject to penalties including prosecution, public disclosure of convictions and monetary penalties. Such measures are intended to address cases where employers improperly classify their employees as independent contractors and thus preclude them from being entitled to the protections under the ESA. In the event of a dispute, the employer will have the burden of proving that the individual is not an employee. These provisions would take effect when Bill 148 becomes law.

Joint Liability – Bill 148 proposes to remove proof of "intent or effect" to defeat the purpose of the ESA when determining whether related businesses can be treated as one employer and held jointly and severally liable for monies owing under the ESA. These provisions would take effect January 1, 2018.

Other proposed amendments to the ESA would impact family medical leave, leave for the death or disappearance of a child, payments to

employees, employee contact when a complaint has been filed under the ESA, interest on unpaid wages, collections, and penalties for non-compliance of the ESA.

Labour Law Proposals

Proposed changes to the LRA will affect union certification rules in order to more easily facilitate unionization and will enable the Ontario Labour Relations Board (the OLRB) to change existing bargaining units.

Union Certification – Bill 148 proposes the following in respect of union certification:

- establishing card-based union certification for the THA industry, the building services industry and home care and community services industry;
- allowing unions to access employee lists and certain contact information, provided the union can demonstrate that it has already achieved the support of 20% of employees involved;
- empowering the OLRB to conduct votes outside the workplace, including electronically and by telephone;
- eliminating certain conditions for remedial union certification, allowing unions to more easily certify when an employer engages in misconduct that contravenes the LRA;
- making access to first contract arbitration easier, and also add an intensive mediation component to the process before dealing with displacement and decertification applications; and
- empowering the OLRB to authorize Labour Relations Officers to give directions relating to the voting process and voting arrangements in order to help assure the neutrality of the voting process.

These changes would come into effect six months after Bill 148 becomes law.

Structure of Bargaining Units – Bill 148 allows the OLRB to change the structure of bargaining units within a single employer, where the existing bargaining units are no longer appropriate for collective bargaining, and to consolidate newly certified bargaining units with other existing bargaining units under a single employer, where those units are represented by the same union. Importantly, this proposal could impact multi-unit franchisees and franchisors with multiple corporate stores in close geographic proximity.

Additional amendments to the LRA would impact return-to-work rights and procedures, just cause protection in the period between certification and conclusion of a first contract, and during the period between the date the employees are in a legal strike or lock-out position and the new collective agreement, and fines and penalties under the LRA.

All proposals to the LRA would come into effect six months after Bill 148 becomes law.

The proposed amendments to the ESA and LRA would translate to increased operational and compliance costs for employers and more easily facilitate certification of unions.

Should you have any questions about how the proposed amendments could affect your franchise system, please contact any of the following individuals from our Franchise & Distribution Group in Dickinson Wright's Toronto office

This client alert is published by Dickinson Wright LLP to inform our clients and friends of important developments in the field of franchise and distribution law. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered in here.

FOR MORE INFORMATION CONTACT:



Ned Levitt is a Partner in Dickinson Wright's Toronto office. He can be reached at 416.646.3842 or nlevitt@dickinsonwright.com



Andrae Marrocco is a Partner in Dickinson Wright's Toronto office. He can be reached at 416.777.4046 or amarrocco@dickinsonwright.com



Kathy Le is an Associate in Dickinson Wright's Toronto office. She can be reached at 416.777.2392 or kle@dickinsonwright.com