

Law Society of Upper Canada
Employment Law Summit

October 19, 2017

Revised: December 3, 2017

CHANGING WORKPLACES REVIEW

**by Arleen Huggins, Partner and Erin Epp, Associate, Koskie Minsky LLP,
and Daniel Pugen, Partner, Torkin Manes LLP**

CHANGING WORKPLACES REVIEW
by Arleen Huggins, Partner and Erin Epp, Associate, Koskie Minsky LLP
and Daniel Pugen, Partner, Torkin Manes LLP

Note: This paper was originally prepared in October, 2017, prior to final amendments which were made before the passage of the *Fair Workplaces, Better Jobs Act, 2017* on November 22, 2017 and it receiving Royal Assent on November 27, 2017. As such, we have included an Addendum outlining the further changes made between the writing of this paper and the passing of the final Act.

INTRODUCTION

In May of 2017 the Ministry of Labour released the *Changing Workplaces Review: An Agenda for Workplace Rights* (the "*Review*"), prepared by special advisors C. Michael Mitchell and John C. Murray, proposing changes to the *Employment Standards Act, 2000* ("*ESA*") and the *Labour Relations Act* ("*LRA*").¹ The mandate of the *Review* was, in part, to "consider the broader issues affecting the workplace and assess how the current labour and employment law framework addresses these trends and issues with a focus on the *LRA* and the *ESA*."²

In June of 2017 the Minister of Labour, Kevin Flynn, introduced Bill 148, *Fair Workplaces, Better Jobs Act, 2017*, announcing major changes to the *ESA* and *LRA* based on some of the recommendations from the *Review*. To labour advocates, Bill 148 is an important step in offering further protections for certain vulnerable workers. For the business community, concerns have been raised as to the added costs of these changes, and, in particular, the minimum wage.

This paper will outline some of the anticipated impacts of the upcoming changes to the *ESA*, from both an employee and employer perspective, and discuss whether the changes address the mandate of the Changing Workplaces Review.

1. The Changing Nature of Work and the *ESA*

i. Changes to the ESA in the context of the rise of precarious work

The *ESA* constitutes the basic floor of rights for workers in Ontario, one upon which individuals are increasingly reliant as rates of unionization (in the private sector) decrease.

A key component of the mandate of the *Review* was to recommend changes to the *ESA* while considering "the needs of vulnerable workers in precarious work".³

¹ Special Advisors C. Michael Murray and John C. Murray, *The Changing Workplaces Review: An Agenda for Workplace Rights, Final Report*, May, 2017, available online: <https://files.ontario.ca/books/mol_changing_workplace_report_eng_2_0.pdf> [Changing Workplaces Review].

² Changing Workplaces Review, *supra* at p. 18.

³ Changing Workplaces Review, *supra* at p. 6.

It is generally accepted that the nature of work is changing and that there has been a rise of precarious work. Indeed, this was the motivation for the *Review* itself. In their paper *Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context*, Leah Vosko and Andrea Noack state:

"Many current labour regulations and policies are premised on the norm of a standard employment relationship (SER) defined by a full-time continuous employment relationship where the worker has one employer, works on the employer's premises and has access to extensive social benefits and statutory entitlements from that employer. Research shows, however, that this employment model, and particularly its associated securities, is waning."⁴

Similarly, the *Review* asserts "that the growth of non-standard work has put many workers in more precarious circumstances."⁵

As standard employment relationships change, many have argued that precarious work has been on the rise. An academic characterization is as follows: "forms of work for remuneration which have one or more dimensions of labour market insecurity that make them substantially different from the "functions" of the SER [standard employment relationship] – specifically its association with access to training, regulatory protections, and social benefits, decent wages and a social wage."⁶ They argue that there are four key measures of precarious work: low wages, no pension, no union coverage, and small firm size. Where workers experience three out of those four elements, they are likely in a precarious work situation.⁷ The *Review* also cites Leah Vosko in defining precarious work as "work for remuneration characterized by uncertainty, low income, and limited social benefits and statutory entitlements,"⁸ and broadly states that low wages are a necessary condition for precarious work.⁹

The *Review* goes on to define "vulnerable workers" as follows:

"Vulnerable workers" describes people, not work or jobs. It is used in many contexts to denote social groups who are defined by their "social location," that is, by their ethnicity, race, sex, ability, age and/or immigration status. In other contexts, however, the term "vulnerable workers" denote groups of workers who have greater exposure to certain risks than other groups, regardless of their social location. In the latter context, the term "vulnerable" describes all those (regardless of the social group(s) to which they belong) whose conditions of employment make it difficult to earn a decent income and thereby

⁴ Andrea M. Noack and Leah F. Vosko, "Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context", commission by the Law Commission of Ontario for its report on Vulnerable Workers and Precarious Work, November, 2011, at p. 1 [Noack and Vosko].

⁵ *Review* at p. 42.

⁶ Noack and Vosko, *supra* at p. 3.

⁷ Noack and Vosko, *supra* at p. 7.

⁸ *Review* at p. 41, citing Leah Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (New York: Oxford University Press, 2010), 2.

⁹ *Review* at p. 41.

puts them at risk in material ways including all the undesirable aspects of life that go hand-in-hand with insecurity, poverty and lower incomes."¹⁰

Many have argued that employment standards legislation has yet to catch up to the changing nature of work (including the issue of precarious employment). Bill 148 is an effort by the Ontario government to support precarious workers. While many of the proposed changes seek to stabilize work and assist precarious workers, from an employee's perspective, some argue that there are many gaps which remain and many key underlying issues that the legislation does not address. From an employer's perspective, some argue that these changes tip the balance that employment standards legislation seeks to strike between the interests of labour and business and that increased costs (with potential job loss) are possible. While one of the principles guiding the *Review* was to ensure businesses remain competitive and flexible, many employer advocates have pointed out that Bill 148 does not include any of the measures set out in the *Review* that were considered more "favourable" to business.¹¹

This paper will examine some anticipated changes and their impact below.

Please note that Bill 148 has not been passed. Accordingly, what follows may change.

2. Overview of Changes in Bill 148

The *Review* made 173 recommendations; 129 of which related to provisions in the *ESA*. Only 18 changes would be addressed by the current iteration of Bill 148, which are:

1. **Minimum wage** – section 23.1(1) of the *ESA* is amended to increase the minimum wage to \$14.00 for most employees on January 1, 2018 and to \$15.00 for most employees on January 1, 2019, and is subject to an annual inflation adjustment on October 1 of every year, starting in October of 2019;¹²
2. **Independent Contractors** – The new section 5.1 prohibits employers from treating a person who is their employee as if the person were not an employee, targeting independent contractor relationships. Further, the new section 5.1(2) places the onus on the employer to prove that a person is not an employee;
3. **Requests for Changes to Schedule or Work Location** – the new Part VII.1 allows employees to request changes to their schedule or work location, and employers must discuss the changes with the employee and either grant them or provide reasons for the denial;
4. **Scheduling** – the new Part VII.2 (Scheduling) requires employers to provide a minimum three hours' pay for shifts that are under three hours, and three hours pay

¹⁰ *Review* at p. 42.

¹¹ For example, the *Review*, at page 221, recommended the elimination of the requirement that the Ministry of Labour approve excess hours of work agreements. The *Review* also recommended simplifying the public holiday section of the *ESA* at page 255

¹² Note that the new s. 23.1(1) of the *ESA* will keep differential wage rates for different classes of employees, such as students under 18 years of age, employees who serve liquor, and for homeworkers – see Bill 148 at s. 14(1).

if the employer cancels their shift within 48 hours of its start time. Employers must also pay three hours to employees for being on call, if they are not called in to work while on call. Employees have a right to refuse requests or demands to work made within four days of the request;

5. **Temporary Help Agencies** – temporary help agencies are required to provide an assignment employee with one week's written notice or pay in lieu if an assignment that was estimated to last for three months or more is terminated before the end of its estimated term unless another assignment lasting at least one week is offered to the employee;
6. **Equal Pay for Equal Work** – Part XII is amended to add provisions 42.1 and 42.2. Subject to certain exceptions (e.g. pay differential based on seniority), these provisions entitle employees to equal pay from an employer regardless of employment status. Amendments are also proposed to the reprisal provisions to prohibit reprisals against employees who make inquiries about rates of pay, or who disclose their rate of pay to determine whether the employer is complying with this part;
7. **Enhanced Pregnancy and Parental Leave** - under the amended section 47(1)(b)(ii), employees who give birth are entitled to start parental leave 12 weeks after birth, an increase from six weeks. Further, employees who experience still-birth or miscarriage are entitled to 12 weeks leave, up from six. Under the amended section 48(2), employees are entitled to commence parental leave up to 78 weeks after the child is born, an increase from 52 weeks. Finally, parental leave is extended from 35 weeks to 61 weeks, or 63 weeks if the employee also took pregnancy leave (up from 37 weeks);
8. **Personal Emergency Leave** – all employees are entitled to 10 days' personal emergency leave, not just those at an employer with 50 employees or greater, as was previously the case. Further, if the employee has been employed by the employer for one week or longer, two days of the leave are required to be paid days. Employers have a right to request evidence of entitlement to these days, but do not have the right to request a certificate from a health practitioner;
9. **Domestic or Sexual Violence Leave** – the new section 49.7 allows an employee employed by an employer for at least 13 consecutive weeks to take up to 10 days and up to 15 weeks leave, all without pay, if the employee or child of the employee experiences domestic or sexual violence, or the threat thereof, and the leave is taken for one of the enumerated purposes, which include seeking medical attention relating to the violence, obtaining services from a victim services organization, obtaining counselling, to relocate, or to seek legal or law enforcement assistance. The amount of the leave (10 days and 15 weeks) is ambiguously worded, but seems to indicate that employees have the flexibility of taking up to 10 days on an *ad hoc* basis, or longer portions of leave as needed;¹³

¹³ See Ministry of Labour Backgrounder, "Ontario's Proposed Domestic or Sexual Violence Workplace Leave (October 5, 2017), available online: < <https://news.ontario.ca/mol/en/2017/10/ontarios-proposed-domestic-or-sexual-violence-workplace-leave.html>>

10. **Family Leaves** – Part XIV is amended to provide increased leaves. Family medical leave is increased from eight to 28 weeks (section 49.1). The new section 49.5 entitles employees to 104 weeks of unpaid leave if their child dies for any reason. New section 49.6 retains entitlement to crime-related child disappearance leave but increases the leave from up to 52 weeks to up to 104 weeks;
11. **Overtime Pay** – Part VIII is amended such that employees who have two or more regular rates performed for the same employer will no longer have rates blended for overtime calculation purposes;
12. **Public Holidays** – section 24 is amended to be based on the number of days actually worked in the pay period immediately preceding the public holiday. Further, while employers are still required to provide a day off in lieu if the employee is required to work on the public holiday, new subsections in sections 27 to 30 require the employer to provide a dated written statement setting out the public holiday the employee is required to work, and the substitute day;
13. **Vacation with Pay** – the new sections 33 to 35 entitle employees whose period of employment is 5 years or more to a minimum of three weeks of vacation;
14. **Interest** – section 88(5) is amended to allow the Director to calculate rates of interest for amounts owing under the *ESA*, and allows money to be held by the Director in trust;
15. **Steps required before complaint assigned** – the requirement in section 96.1 for an employee to take certain steps specified by the Director before the Director assigns a complaint for investigation is repealed;
16. **Order to pay wages** – section 103(1) is amended to allow employment standards officers to order employers to pay wages directly to employees. Under the current section 103(1), employment standards officers may only "arrange" with the employer that they pay wages directly to the employee, or order the employer to pay wages to the Director in trust. Sections 104(3) and 105(1) are also amended and provide the terms required for an employment standards officer order, as well as requirements should an employer be unable to locate an employee to whom wages are owed;
17. **Notice of Contravention** – the amended section 113(1) allows an employment standards officer to issue a notice to a person they believe to have contravened a provision of the *ESA*. Further, the new subsection 113(6.2) allows the Director to publish the name of a person who has been found to have contravened the *ESA* and received a notice under section 113(1), as well as a description of the contravention, the date of the deemed contravention, and the penalty for same. This would be available publically;
18. **Collection** – new provisions are added to Part XXIV strengthening enforcement of orders under the *ESA*. Section 125.1 allows the Director to accept security for amounts owing under the *ESA*; section 125.2 allows the Director to issue warrants

to enforce payment; and section 125.3 allows the Director to claim a lien on real or personal property;¹⁴ and

19. **Binding the Crown** – The new section 3.1 provides that the *ESA* will bind the Crown, subject to an exception in section 4 of the *ESA*, which allows separate persons to be treated as one employer under the *ESA* in certain circumstances.

Most provisions will come into force on January 1, 2018. The new section 5.1 which disallows employers from claiming employees are not employees comes into force on the date of Royal Assent. The Equal Pay provisions will come into force April 1, 2018. The scheduling provisions will come into force January 1, 2019. Enhanced parental leave provisions come into force on a date to be named by proclamation.¹⁵

While this paper does not offer a detailed analysis of all of the above provisions, it will discuss the expected/potential impacts of the changes for employees and employers in respect to some of the more controversial or key changes

3. Impact of Changes of Bill 148

i. Minimum Wage

The minimum wage increases in Bill 148 are among the most controversial of the proposed changes.

As stated in the *Review*, and cited above, the most reliable marker of precarious work is earning a low wage. Especially in Toronto, where the cost of living is significantly higher than elsewhere in Ontario, earning a minimum wage of \$11.40 per hour is simply not enough for people to live on. In 2015, the Canadian Centre for Policy Alternatives published a report finding that a living wage in Toronto at that time for a family of four with two working parents was a minimum of \$18.52 per hour, for each parent.¹⁶ The Daily Bread Food Bank publishes an annual report based on a survey of their users called *Who's Hungry: A Profile of Hunger in Toronto*. In the 2017 report, they note the rise of the "working poor" – food bank users who are employed, yet cannot afford to pay rent and buy food.¹⁷

Worker advocates are supportive of the upcoming raise to the minimum wage to \$14.00 per hour, as an incremental step towards low-wage employees earning a more livable wage.

The dramatic increase in the minimum wage (30%) surprised the business community as it was not part of the *Review's* mandate. Further, the Government's own minimum wage advisory panel did not recommend dramatic increases but instead recommended that the minimum wage

¹⁴ Bill 148, *Fair Workplaces, Better Jobs Act, 2017*, Explanatory Note, available online: <http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4963>

¹⁵ *Fair Workplaces, Better Jobs Act, 2017* at s. 61.

¹⁶ Kaylie Tiessen, Canadian Centre for Policy Alternatives, "Making Ends Meet: Toronto's 2015 Living Wage", April 10, 2015, available online: <<https://www.policyalternatives.ca/publications/reports/making-ends-meet>>

¹⁷ Daily Bread Food Bank, *Who's Hungry: 2017 Profile of hunger in Toronto*" at p. 25, available online: <<http://www.dailybread.ca/wp-content/uploads/2017/09/Whos-Hungry-2017.pdf>>.

be adjusted upward with inflation. This was adopted by the Government in 2014 and provided the certainty and predictability on labour costs that are key for business.

Of course, the minimum wage will have a dramatic increase on employer payroll costs. Besides a wage increase for those currently below \$14 per hour, other employees are likely to exert pressure on employers for a corresponding increase in pay. These increased costs are likely to be passed off to consumers if employers cannot seek internal efficiencies.

ii. Temporary Help Agencies

Improving terms of employment for temporary workers is a goal of Bill 148. The Toronto Star recently reported that there has been a 20% increase in temporary agencies in Ontario over the past decade; with most of the growth focused in Toronto.¹⁸ As the Law Commission of Ontario found in their 2012 report, *Vulnerable Workers and Precarious Work*, temporary workers are often the most precariously employed and most vulnerable:

"Similarly, temporary workers are more likely to be in precarious work than permanent workers. This is significant because, at present, temporary employees may not fully benefit from Ontario employment standards provisions requiring a minimum length of tenure (such as vacation, termination notice and severance pay). Furthermore, once a worker accepts a temporary job, it becomes more difficult to advance and the worker is likely to earn reduced income for many years. The uncertainty associated with temporary employment makes these jobs precarious by definition."¹⁹

There are two key amendments in Bill 148 aimed at improving standards for temporary workers. First, to ensure more predictability for temporary workers in scheduling, Bill 148 would amend the *ESA* to require temporary help agencies to provide an employee with one week's written notice or pay in lieu thereof if an assignment that was estimated to last three months or more is terminated before the end of its estimated term, unless another assignment lasting one week is offered to the employee. Second, the "equal pay for equal work" provisions would apply to temporary workers, such that clients of temporary help agencies could not pay temporary workers less for performing substantially the same work as they pay their own employees (subject to certain exceptions).

These are welcome changes from the perspective of temporary workers, as they add some stability in terms of notice requirements and pay equity. The anti-reprisal provisions, prohibiting an employer from retaliating against a temporary worker who enquires about rates of pay in order to enforce the equal pay provisions, should also offer some protection to them.

However, for many labour advocates, these provisions do not address many of the underlying problems with temporary work.

¹⁸ Sarah Mojtehdzadeh, "Temp agencies on rise as province seeks to protect vulnerable workers", *Toronto Star*, July 15, 2017, available online: <<https://www.thestar.com/news/gta/2017/07/15/temp-agencies-on-rise-as-province-seeks-to-protect-vulnerable-workers.html>>

¹⁹ LCO Report at p. 16. For a recent in-depth article on temporary work, see Sarah Mojtehdzadeh and Brendan Kennedy, "Undercover in Temp Nation", *Toronto Star*, September 8, 2017, available online: <<http://projects.thestar.com/temp-employment-agencies/>> [Undercover in Temp Nation].

For example, if a temporary worker is injured while working, the temporary help agency, not the client who controls the workplace where they were injured, is liable to the Workplace Safety and Insurance Board. This is an incentive for employers to use temporary help agencies rather than hiring employees, especially in sectors such as manufacturing and healthcare, where there is a higher risk of injury compared to other industries.

Despite its goal, it is arguable whether Bill 148 has created sufficient disincentives to employers using temporary help agencies.

From an employer's perspective, many businesses rely on temporary agencies to supply "as needed" and flexible labour. Employers benefit from the payroll costs and administration being handled by the temporary agency. The business community also points to the flexibility temporary work can provide certain types of workers. Bill 148 will likely dissuade employers from using temporary agencies as the cost will increase due to the equal pay provision. Employers will have to re-evaluate staffing needs as well as their commercial agreements with agencies.

iii. Part-time v. Full-time work

As the Law Commission of Ontario found in their report *Vulnerable Workers and Precarious Work*, full-time employees are less likely to be precariously employed than part-time employees. 33% of part-time workers, as compared to 9% of full-time workers, have low wages are not unionized, and have no access to a pension.²⁰ Further, while some workers certainly choose to be employed part-time for many reasons, including family obligations, in 2012 36.6% of part-time workers aged 25-44 were working part-time only because of market conditions and inability to find full-time work.²¹

As such, Bill 148 seeks to support part-time workers requiring employers to pay part-time employees at the same rate as full-time employees for the same work. For reference, the proposed provision states:

"Difference in employment status

42.1 (1) No employer shall pay an employee at a rate of pay less than the rate paid to another employee of the employer because of a difference 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."

A key issue with the provision however will be enforcement. The equal pay for equal work provision is almost identical in wording to s. 42(1) of the *ESA*, which prohibits differential pay based on sex. However, s. 42(1) of the *ESA* has rarely been applied, and has been interpreted

²⁰ LCO report, *supra* at p. 16.

²¹ LCO Report, *supra* at p. 16.

narrowly by decision-makers.²² The Equal Pay Coalition has argued that the requirement that men and women "perform substantially the same kind of work" allows employers to "create or maintain minor differences between women's and men's jobs in order to maintain pay differences."²³ As such, if the same loopholes are used, there is a risk that the proposed language will not actually have an impact on pay rates for part-time workers.

From an employer's perspective, forcing employers to pay workers the same pay is a significant intrusion into management's rights to decide pay structures. Similar to how an employer cannot differentiate pay based on prohibited grounds of discrimination under human rights legislation, an employer will be unable to differentiate pay based on part-time as compared to full-time status. However, employers have been somewhat comforted by the inclusion of certain exemptions in Bill 148, which permit differentiation on objective grounds. Notably, an employer can continue to pay different amounts if the pay differential is based on seniority (including hours worked). This is an important exemption for employers as many employers use seniority, and other objective means, in creating compensation structures which lead to employees being paid at different rates. Employers are keenly interested in maintaining the flexibility to pay employees of different experience levels different pay rates. Currently, Bill 148 permits this to continue.

iv. Scheduling Changes

For many precarious workers, uncertainty around scheduling has a negative impact in many areas. Income levels are dependent on how many shifts they are scheduled for, and if shifts are reduced or cancelled, that can have a significant effect on their pay. Further, for those with family obligations, having no control over their shift location or last minute requests to work can impact their personal lives in a significant way. The Bill 148 changes will allow workers more predictability in their schedule, as well as compensation for cancelled shifts and being on call, which are significant gains.

A significant gain for workers in Bill 148 is the language around scheduling, including:

- The right to refuse a request to work if the request is made within 4 days of the shift;
- The right to be paid for 3 hours' work if a shift is less than 3 hours long, if the worker is on call but is not called in to work, and if the employer cancels the shift within 48 hours of its start time; and
- The right to request a schedule or location change without fear of reprisal if the employee has been employed with the employer for a minimum of three months.

The shift scheduling changes arguably provide the most substantive improvement for workers out of the changes we have discussed. The anti-reprisal provisions are especially helpful in supporting employees. However, some have argued that a gap in Bill 148 is the lack of a requirement to provide a schedule in the first place.

²² WAC Report, *supra* at p. 5.

²³ Ontario Equal Pay Coalition, "Building Employment Standards and Labour Relations Protection to Close the Gender Pay Gap: Equal Pay Coalition Submissions to the Standing Committee on Finance and Economic Affairs," July 21, 2017, at p. 14. Available online: <<http://equalpaycoalition.org/wp-content/uploads/2017/07/EPC-Bill-148-submissions-FINAL-CORRECTED.pdf>>

From an employer's perspective, the scheduling and shift cancellation provisions will provide a disincentive to change schedules and will force employers in industries where fixed hours are not always possible (for example, in the restaurant industry) to invest more time in determining scheduling and to determine ways to avoid the increased costs of these changes. For example, in order to avoid the call-in pay provisions, employers may eliminate "on call" classifications and/or provide for longer daily hours of work. Interestingly, the *Review* noted that scheduling was workplace-specific and that the Government should avoid overarching scheduling regulations.²⁴ Unfortunately for employer advocates, Bill 148 disregarded this recommendation in an effort to provide more certainty to employees with unpredictable work schedules. Finally, the additional reprisal rights can be subject to abuse or frivolous litigation by employees.

v. Independent Contractors

Under new provisions of the *ESA*, it will be a violation to misclassify an employee as an independent contractor. Further, under the new section 5.1, if, during the course of an employment standards officer's investigation the employer claims that a person is not an employee, the employer bears the burden of proof to demonstrate same.

For precarious workers this is a significant gain. For example, in the cleaning industry, many employees are wrongfully classified as independent contractors, meaning they lose protections under the *ESA*, though they are arguably among those who could most benefit from such protections. Significantly, the Law Commission of Ontario found in their report *Vulnerable Workers and Precarious Work* that misclassification has disproportionate negative impacts on women and immigrants.²⁵ The Law Commission noted the following difficulties with misclassifying workers as self-employed:

"Some advocates are concerned with what is referred to as "creative classification" by employers. Practices of misclassification have been identified in industries such as cleaning and trucking. In our consultations, we heard about examples of some pizza delivery persons and workers in the catering industry being misclassified as independent contractors and their employers not acknowledging their employment standards obligations. In responding to the Interim Report, the Chinese Interagency Network of Greater Toronto indicated that they had encountered workers, most prevalently among sewing machine operators in factories and general help in grocery stores, "forced to be self-employed by the employers in order to be hired". Sewing machine operators earned their wages through piece-work creating an "atmosphere of competition among workers as well as to minimize workers' cohesiveness in addressing any kinds of work issues."²⁶

The new section 5.1 means that it would be considered an offence under the *ESA* to misclassify employees as independent contractors, and would allow the Ministry of Labour to prosecute employers who have, until this point, been able to abuse their power to misclassify employees.²⁷

²⁴ *Review* at p. 192.

²⁵ LCO Report, *supra* at p. 92.

²⁶ LCO Report, *supra* at p. 92.

²⁷ Section 132 of the *ESA* provides that a person who contravenes the Act or Regulations or fails to comply with an order is guilty of an offence and liable to pay fines, and if the employer is an individual, to imprisonment for up to 12 months.

However, how diligently the Ministry of Labour prosecutes employers for violations of section 5.1 remains to be seen. In other jurisdictions, prosecutorial and investigatory powers have been a tool used to eliminate incentives to misclassify. For example, the *Review* notes that in the United States, a 2015 Department of Labour investigation into misclassification of employees as self-employed resulted in more than \$74 million in back wages for more than 102,000 workers in industries where employees are most likely to be precariously employed, such as food service, day care, hospitality, garment, and janitorial sectors.²⁸

From an employer's perspective, as Bill 148 essentially creates an offence for misclassification, employers will have to be more conscientious of how they classify workers. Not only will the penalties be increased for non-compliance, the reversal of the legal burden of proof will make it more difficult for an employer to be successful in litigation if an individual's status as a contractor is challenged by the Ministry of Labour. Unfortunately, this new offence may have some unintended consequences. For example, many employees who want to be independent contractors (for example, for tax reasons) will find that many employers are less receptive to classifying them as such. This could result in fewer opportunities for these individuals in the job market. For those employers who are receptive, such employers may insist on full contractual provisions for the employer's protection, which can include indemnity provisions in the event of a misclassification. Additionally, employers may be more willing to use agencies to supply independent contractors instead of contracting with individuals directly.

vi. Enhanced Pregnancy and Parental Leave

Pregnancy and parental leave provisions under the *ESA* would be increased by Bill 148 to be in line with the new Employment Insurance leave provisions. In some cases, these are significant increases. For example, while under the current *ESA* parents are entitled to 35 weeks of parental leave, or 37 weeks if they also took pregnancy leave, those numbers are nearly doubled to 61 and 63 weeks, respectively.

From the employee perspective, this is a positive development that would allow parents greater flexibility in returning to work, and would allow them more time with young children. This is especially crucial given the inflated costs of daycare; allowing families to stay home with their children for longer could reduce overall daycare costs for parents.

Many employers understand the societal need for strong pregnancy and parental leave provisions. However, there is a disruption to the business when employees are on prolonged leaves of absence. Dramatically increasing the pregnancy/parental leave will magnify these business disruptions and will make it more difficult to re-integrate individuals back into the workforce following their leave.

vii. Personal Emergency Leave

The new leave provisions include applying personal emergency leave to all workplaces and mandating 2 personal emergency leave days with pay. Personal emergency leave allows employees to take 10 days job-protected leave for personal illness or injury, or the death, illness, injury, or medical emergency concerning their family. Under the current provisions, employees who work for employers who employ 50 people or fewer are not provided *any*

²⁸ *Review* at p. 264-265.

personal emergency leave. The Workers' Action Centre estimates that under the current provision, 1.7 million workers are excluded from personal emergency leave provisions.²⁹

Employees who are in low-wage positions may go into work while ill because their personal emergency leave days are unpaid, and they simply cannot afford to take a day off. This can have public health consequences. Requiring two days of paid personal emergency leave provides some relief for low-wage employees.

From an employer's perspective, the introduction of paid sick leave and broadening personal emergency leave to all workplaces is a significant alteration of the status quo. It was also a surprising inclusion in Bill 148 as paid sick leave was not recommended by the *Review*. While many larger workplaces provide some form of banked sick time, many small businesses will have great difficulty providing this benefit to employees. Many business advocates have argued that allowing two paid sick days, along with increases to the minimum wage, increased vacation entitlements, and new call-in pay and shift cancellation costs, will result in a dramatic increase in costs that could lead to job losses, especially for small businesses.

Additionally, Bill 148 prohibits an employer from asking for a doctor's note to support an individual's personal emergency leave. The *ESA* will continue to allow an employer to request reasonable evidence in the circumstance. However, in the absence of medical documentation, many employers are at a loss to determine what evidence they may practically seek and are worried about potential abuses of employee personal emergency leave.

viii. Domestic and Sexual Violence Leave

The new Domestic or Sexual Violence Leave, which provides 10 days, *ad hoc*, or up to 15 weeks, both unpaid, is also a crucial addition to the *ESA*, as it will support women in particular who experience domestic or sexual violence. Notably, Bill 148 goes beyond the recommendation in the *Review*, which was to amend the Personal Emergency Leave provisions to include domestic violence as a reason for taking the leave.³⁰ The addition of section 49.7 providing a new leave may be in part the result of Bill 26, introduced by NDP MP Peggy Sattler, which would provide 10 **paid** days of leave for employees who have experienced domestic or sexual violence.³¹

Domestic violence is an issue that directly relates to the workplace for a few reasons. First, it is common for abusers to stalk, threaten, or harass their partners at work. Second, as domestic violence disproportionately affects women, it is a gendered issue in the workplace and impacts women's ability to earn an income. Further, while risk of domestic violence is the same regardless of education or income level, poverty or risk of job loss is a significant barrier to women leaving abusive relationships.³²

²⁹ WAC Report, *supra* at p. 3.

³⁰ *Review* at p. 243.

³¹ See Bill 26, available online:
<http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4174>.

³² See Ontario Ministry of the Status of Women, "Statistics: Domestic Violence", available online:
<http://www.women.gov.on.ca/owd/english/ending-violence/domestic_violence.shtml>; some provinces have online resources for addressing domestic violence as it affects the workplace, see

For these reasons, the new Domestic and Sexual Violence leave is a welcome addition to the *ESA*. It remains to be seen whether Bill 26 will pass, which would result in 10 **paid** days of leave for victims, but this would certainly be a supportive measure for women who experience gender-based violence as it would protect their ability to earn income in a particularly vulnerable time of their lives.

4. Conclusion: What's Next?

There are significant changes in Bill 148 that seek to offer support to vulnerable workers in Ontario by raising their basic floor of rights under the *ESA*. In particular, we anticipate that scheduling changes and "equal pay for equal work" provisions will have a major workplace impact. A key issue however with the *ESA* is that it still relies mainly on impacted employees to assert their rights in order to enforce the legislation. Therefore enforcement of the changes will be a concern going forward.

Employers will have to carefully evaluate their staffing needs and payroll costs. Bill 148 provides disincentives to use part-time and temporary labour. It also mandates premiums an employer must pay if shifts are cancelled within certain timelines. This, along with the increased minimum wage (and pressure from other employees for a corresponding increase in pay), increased vacation time, and paid sick days, will mean that employers will have to seek efficiencies in operations. Some have argued that this could have unintended consequences on the very people Bill 148 seeks to protect.

From a practitioner's perspective, Bill 148 is likely to create additional workplace disputes as the new provisions get tested before the Ministry of Labour and the Courts. In particular, the new reprisal provisions and the equal pay provisions are likely to be litigated by employees and trade unions alike.

ADDENDUM

In the final version of Bill 148, the following changes were included which were not part of the Bill at the time of the writing of this paper in October, 2017.

1. **Equal Pay for Equal Work** – a definition of "substantially the same" has been added, for the purposes of the equal pay provisions, as meaning "substantially the same but not necessarily identical" (s. 41.2);
2. **Minister review of equal pay provisions** – the new section 42.3 requires the Minister to cause a review to be commenced of the equal pay provisions prior to April 1, 2021;
3. **Domestic or Sexual Violence Leave** – the new Domestic or Sexual Violence Leave provides that the employee's first five days of leave are paid (s. 49.7);
4. **Family Medical Leave** – section 49.1(3) significantly expands the family relationships that qualify for family medical leave beyond simply what would traditionally be thought of as immediate family. The following relationships will qualify the employee for leave:
 - a. The employee's spouse.
 - b. A parent, step-parent or foster parent of the employee or the employee's spouse.
 - c. A child, step-child or foster child of the employee or the employee's spouse.
 - d. A child who is under legal guardianship of the employee or the employee's spouse.
 - e. A brother, step-brother, sister or step-sister of the employee.
 - f. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse.
 - g. A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee.
 - h. A son-in-law or daughter-in-law of the employee or the employee's spouse.
 - i. An uncle or aunt of the employee or the employee's spouse.
 - j. A nephew or niece of the employee or the employee's spouse.\
 - k. The spouse of the employee's grandchild, uncle, aunt, nephew or niece.
 - l. A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met.
 - m. Any individual prescribed as a family member for the purposes of this section.
5. **Critical Illness Leave** – was what previously known as "critically ill child care leave" will be called "critical illness leave", and allow an employee to take a leave to care for the family members listed above, under Family Medical Leave. If the leave is taken in

relation to a minor child, the leave entitlement is up to 37 weeks, and if the leave is taken in relation to an adult family member, the leave entitlement is up to 17 weeks (s. 49.4);

6. **"On Call" provisions** – a minimum of three hours of pay continues to be required for employees who are on call but are not required to work (or who are required to work less than the three hour minimum). However, a new exception has been added: the provision does not apply to employees required to be on call to ensure the "continued delivery of essential public services", if they were not actually called in to work (s. 21.4).

Coming into Force

The *Fair Workplaces and Better Jobs Act* received Royal Assent as of November 27, 2017. Most provisions come into force January 1, 2018, except the following key provisions:

1. **Currently in force:** The new section 5.1, prohibiting employers from treating employees as independent contractors, came into force upon Royal Assent;
2. **In force December 3, 2017:** the lengthened parental leave provisions (amendments to ss. 48(2) and 49(1)) and the new critical illness leave (new s. 49.4);
3. **In force April 1, 2018:** the equal pay for equal work provisions (ss. 41.1, 42.1, and 42.2);
4. **In force January 1, 2018:** the scheduling provisions (new part VII.1 and VII.2).