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Bill 148: Fair Workplaces, Better Jobs Act

What the amendments of Bill 148 mean to business owners and employees

On November 22, 2017, after months of debate, the Ontario Legislature finally passed the third reading of Bill 148, which becomes law on January 1, 2018. While the intent of Bill 148, *Fair Workplaces, Better Jobs Act*, is laudable, the practicalities of its enforcement, owing to the sweeping number of changes to Ontario's employment and labour laws, continue to confound organizations across the province, particularly the small business sector. The amendments Bill 148 brings to the *Employment Standards Act*, 2000 ("the *Act*") will change a number of areas of the Act, mostly for the benefit of employees.

The most publicized change to the *Act* is, of course, the increase to minimum wage, which is to occur in two phases, 2018 and 2019. The first phase has the minimum wage for most employees in Ontario increasing from $11.60 to $14 by January 1, 2018. The second phase requires that the minimum wage increases again on January 1, 2019, to $15, and is subject to an annual inflation adjustment on October 1 of each year, beginning in October 2019.

Upon initial review, it appears that the amendments only seek to provide extensions of time to leaves, and increases to wages already contained in the *Act*, but Bill 148 will bring a myriad of other changes that will drastically affect management for small business owners, particularly those who offer shift work, contract work or temporary work relationships to their employees — as many dental-practice owners often do. Not only will these employers need to be aware of their obligations pursuant to the new amendments to the *Act*, but also the manner in which the worker is classified, especially if the worker is classified as an independent contractor with the desire to avoid the *Act* minimums.

The *Act* contains many amendments as a result of Bill 148, but for businesses where scheduling of workers is critical to the success of the business, employers must be particularly knowledgeable about the extended leave-of-absence provisions, scheduling provisions and the section requiring equal pay for equal work, now embedded in the *Act*.

1. Extended leave-of-absence provisions

The new amendments will extend the current leave-of-absence provisions for pregnancy, parental, family critical ill child leave, replacing it with critical illness leave.

However, the legislation has also created a new leave-of-absence provision including the provision of up to 10 days and up to 15 for employees encountering issues of domestic or sexual violence, including the provision of up to 15 weeks of leave, requiring the employer to pay the employee for the first five days of the leave in each calendar year.

Another amendment to the *Act* pertains to the personal emergency leave section, which allows employees to take up to 10 days unpaid emergency-leave days in order to take care of a personal illness, injury, medical emergency, death or other urgent matter. Now, the amendment requires that the employer must provide two of those 10 days as paid days to the employee.

Under both leaves, the employer is entitled to ask for evidence of why the employee is taking the leave, "reasonable to the circumstances." However, a doctor's note is not required, nor may it be requested. Therefore, it is clear that employees will be able to provide other types of evidence that would reasonably support a leave of the nature they are seeking.

2. Scheduling – New Part VII.2 – only comes into effect January 1, 2019

Of the Bill's many additions, however, one of the most critical for an "on-call workplace" are the new scheduling provisions, which only come into effect January 1, 2019. However, the introduction of what is referred to as the new "three-hour rule," will significantly affect the scheduling of workers if the organization wants to avoid paying for work not done.

In that regard, the new amendment requires that if an employee who regularly works more than three hours a

day is required to present for work, but works less than three hours, despite being available to work longer, the employer must pay for the full three hours.

The exception to this is if the employer is unable to provide work as a result of a natural phenomenon that has occurred beyond the employer's control — such as a power failure, a storm or fire — not something that would typically occur in a dental office.

Likewise, if an employee who is on call to work is not required to work, but does end up working less than three hours, even though the employee is available to work longer, the employer must still pay for the three hours. However, if the employee is on call multiple times during a 24-hour period, the employer is only expected to pay for the first three hours.

The exception to this is if the employee delivers essential public services, such as ambulance, police or public transit services, and the employee who was on call was not required to work, then the employer does not have to pay. Therefore, it appears that as long as the employee who was on call does not perform any work, the employer does not have to pay anything.

Additionally, an employee, employed for at least three months, may make a request, in writing, for a change in schedule or work location; the employer must discuss the request with the employee and, then, notify her or him of the decision within a reasonable time after receiving the request.

One of the reasons, however, that scheduling will become even more important is the employee's right to refuse work, and correspondingly, the employer's duty to ensure that if the employer does not need the employee to work, that the employee is notified at least two days in advance. In that regard, if the employer demands an employee be at work, or on call, on a day that they were not scheduled to do so, the employee has the right to refuse to do so if the demand is made less than 96 hours (four days) before the start of work.

Again, exceptions to this would occur if the employer's request is to deal with an emergency or remedy; to reduce a threat to public safety; to ensure that essential services to the public are delivered; or if the request is "made for such other reason as may be prescribed." The phrase "made for such other reason" may be an ability for the employer to put forward a legitimate, genuine reason for not being able to provide such notice, but only time will tell.

If an employer cancels the employee's scheduled day of work, or on-call period within 48 hours before the time the employee was to commence work or commence being on call, an employer, is required to pay an employee wages equal to the employee's regular rate for three hours of work. Exceptions outlined in this regard pertain to a natural disaster beyond the employer's control; the nature of the work being weather dependent, and the weather prevents the employer from providing work or if the "employer is unable to provide work for the employee for such other reasons as may be prescribed." Again, this last listed exception may provide an employer with some relief if the employer can provide a reason that is "reasonable."

In this regard, beginning January 1, 2019, an employer will therefore be required to pay an employee a minimum of three hours' pay for shifts under the following circumstances: if the employee works less than three hours; for being on call; and for cancelling with less than 48 hours' notice. Additionally, if employees are not already scheduled to be in, they may refuse to work unless notice is provided by their employer four days in advance.

As such, the practice of scheduling workers properly to carry out the requirements of your organization will become crucial to dentistry practices, if employers do not want to pay employees for work not done.

3. Equal pay for equal work – Part XII

The *Act* already requires that employers pay employees of the opposite sex the same pay for doing the same job. The new provision that has been added allows employees to receive equal pay from an employer regardless of a difference in employment status. The *Act* defines "difference in employment status" as either the difference in the number of hours regularly worked by the employees, or a difference in the term of their employment, including difference in permanent, temporary, seasonal or casual status workers.

Therefore, the *Act* makes clear that permanent, temporary, seasonal and casual employees must all be paid at the same rate as full-time employees if they are performing "substantially the same work." The definition "substantially the same" means "substantially the same but not necessarily identical."

The direct consequence of this amendment is that employers cannot pay an employee less than the rate paid to another employee of the employer because of a difference in employment status, if they are performing "substantially the same" kind of work in the same establishment; their performance requires substantially the same skill, effort and responsibility; and their work is performed under similar work conditions.

However, it is very important to note that this section will not apply when the difference in the rate of pay is made on the basis of a seniority system, merit system, a system that measures earnings by quantity or quality of production, or any other factor *other than* sex or employment status.

The *Act* also makes it clear that an employee may request a review of his or her wages if they believe there is an unwarranted disparity between their wage and that of a colleague. On receiving such a request, the employer must either adjust the pay, or provide a written reason for

disagreeing with the employee's argument. Employees who make inquiries about rates of pay or who disclose their rate of pay for the purpose of assisting in determining whether an employer is complying with the *Act* are strictly prohibited from reprisals.

Misclassification of worker as independent contractor

While many organizations have sought to classify their worker as an "independent contractor," if this is being done in order to avoid paying the worker the basic bare minimum protection, which is afforded to most employees under the *Act*, not only does Bill 148 seek to remedy that by imposing stiff penalties and fines ranging from $25,000 to $100,000, but so too, will a civil court, although the damages in that realm may be of a much more extraordinary nature. Therefore, classification of a worker is essential to any trier of fact, as employees are protected under the *Act*, while independent contractors are not.

Bill 148 aims to address cases and impose measures against employers who misclassify employees as independent contractors. In the event of any dispute, it is the employer who bears the responsibility for proving the individual worker is not an employee, not the other way around.

Due to the manner in which work has changed over the last several years, the notion of the hybrid employee has arisen in recent years, which has had a dramatic impact on the manner in which employers classify their workers, bridging the gap between independent contractor and employee, known as the dependent contractor.

The dependent-contractor concept is built around the idea of the worker's economic dependence on the organization, and the issue of its control over the worker. Control may be demonstrated in a variety of ways, amongst them ownership of tools, control over vacation, and any other factor that workers could use to prove that they were in an "employment" relationship, such as being in staff directories or other such evidence. Simply put, the more dependent a worker is on an organization, and the more control exercised over that worker, the more likely it is to have that employee classified as a dependent contractor and treated like an employee in an employment relationship. The case law clearly affirms that workers classified as "dependent contractors" are entitled to the same amount of reasonable notice of the termination of their employment, or compensation in lieu thereof, just as it would be received by an employee upon dismissal.

If either the Ministry of Labour or a court finds that a worker is economically dependent on an organization, and that organization exerts control over that worker, the more likely to find the worker either a dependent contractor or an employee, and thus afforded protections under the Act. Not only will this impact directly on the issue at hand, but it could also lead the Canada Revenue Agency to re-review tax records and find that the organization ought to have been paying taxes for the worker, resulting in the organization having to pay the back taxes. This could obviously lead to a significant amount of money in the end.

Therefore, the best manner in which to protect both the organization and the worker is through a well-articulated, clearly written contract, either of employment, or for an independent contractor. If the employment relationship is truly to be that of an independent contractor, ensure that your contract is drafted as such, by ensuring that the worker remits the HST themselves, and that the worker is not being provided with any of the perks provided to your employees. Likewise, the worker must not be economically dependent only on your organization, and must be free to contract with others.

In the end, it all comes down to the classification of the worker and scheduling practices, and in order to demonstrate a true independent contractor relationship, a written contract outlining the terms and conditions of the work relationship is an excellent way to start. Obviously, the same is true for your employees, given that this same contract will outline the expectations of both parties. It is equally important to review workplace policies and handbooks, while examining your work relationships, and contracts, if any, to ensure they properly reflect the terms and conditions you want to offer to your workers.

Do not wait until the Ministry of Labour, or worse still, civil courts, impose them upon you. OD

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