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Back to 2017: New Ontario government revokes pre-election employment law changes

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In this Update

- Bill 47, which repeals many of the employment and labour law changes that were introduced earlier this year, has passed
- A high-level summary of some of the key changes and effective dates
- What this means, and does not mean, for employers
- Update on the *Pay Transparency Act, 2018* and the *Police Record Checks Reform Act, 2015*

In 2017, the Liberal government introduced Bill 148, the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148), which made sweeping changes to employment and labour law in Ontario (a summary of which is set out in our November 2017 Osler Update). Many of those changes came into force in 2018, and employers were required to quickly adjust their policies and practices accordingly. Now, almost a year after Bill 148 came into force, the new Progressive Conservative government introduced Bill 47, the *Making Ontario Open for Business Act, 2018* (Bill 47), which rolls back many of the changes to the Ontario *Employment Standards Act, 2000* (the ESA) and the Ontario *Labour Relations Act, 1995* (the OLRA) that were introduced by Bill 148. On November 21, 2018, Bill 47 passed third reading and received royal assent.

The following is a high-level summary of some of the key changes resulting from Bill 47. The key amendments to the ESA will come into force on January 1, 2019, and those to the OLRA came into force on November 21, 2018.

Employment Standards Act

- **Minimum wage:** The minimum wage will remain $14, with no increases until the next inflationary adjustment scheduled for October 1, 2020.
- **Scheduling rules:** All but one of the proposed scheduling rules that would have taken effect January 1, 2019, have been repealed. Bill 47 does not repeal the "three-hour rule" implemented in Bill 148, whereby, effective January 1, 2019, employees who regularly work more than three hours a day and who are required to present themselves for work, but who work less than three hours, despite being available to work longer, are entitled to be paid three hours' wages.
- **Leaves of absence:** The existing personal emergency leave provisions will be replaced with three new *unpaid* leaves:

  - three days of sick leave for "personal illness, injury or medical emergency";
  - two days of bereavement leave for the death of prescribed family members; and
  - three days of family responsibility leave for illness, injury, medical emergency or other urgent matter relating to a prescribed family member.

Further, employers will no longer be prohibited from requesting a medical note to support an employee's request for such leaves.

- **Contractor misclassification**: While there remains a prohibition against treating a worker who is truly an employee for the purposes of the ESA as someone who is not an employee (generally, an independent contractor), the "reverse onus" has been removed. That is, the onus will shift back to workers, who will be required to prove that they are in fact an employee.
- **Equal pay for equal work**: The equal pay for equal work provisions regarding employment status/assignment employment status have been repealed. The longstanding equal pay for equal work provisions on the basis of sex will remain, but there will no longer be a right to request a wage review and receive a substantive written response.

Labour Relations Act

- **Card-based certification**: The new card-based certification rules for temporary help agencies, among other industries, have been repealed.
- **Employee lists**: The union will no longer be entitled to ask for a full employee list with contact information once it has the support of 20% of the proposed bargaining unit. Further, to the extent a union received such a list before Bill 47 came into force, it must be permanently destroyed.
- **Automatic remedial certification**: The new automatic certification provision has been repealed, reverting to the pre-Bill 148 rules providing the board with the discretion to make a variety of orders in the event of an unfair labour practice, which include automatic certification only if no other remedy would be sufficient to counter the effects of the contravention.
- **Structure of bargaining units**: The board will no longer have the explicit power to "subsume" newly certified bargaining units within existing bargaining units.

What this does not mean

To the extent an employer's policies and procedures have been updated to implement ESA changes introduced by Bill 148, the reversal of these changes does not mean that employers will be able to unilaterally reverse the changes to their policies and procedures without consequence. If an employer has already announced changes to the terms and conditions of employment to align its policies with Bill 148 changes that will now be revoked by Bill 47, the employer should assess the legal and other risks associated with revoking those policy changes. For example, if employers have implemented pay increases to reflect the proposed increase to the minimum wage, a reduction in light of the minimum wage freeze could cause complaints and discontent among employees and even lead to constructive dismissal claims. There is no prohibition against red circling those who did receive such increases in anticipation of a minimum wage increase that will now not occur as initially thought.

Other developments

Separately, the Ontario government has announced its intention to delay the implementation date of the *Pay Transparency Act, 2018* to a date to be determined by the cabinet. It appears that the government is seeking more time to engage in further public consultation prior to implementation. Therefore, the requirement contained in the act that employers include details of compensation ranges for posted or advertised jobs will not come into effect with the new year, as was previously expected.

The *Police Record Checks Reform Act, 2015* — which received royal assent almost three years ago — finally came into force on November 1, 2018. Most businesses that require some form of police check use a third-party service provider to administer those checks. That provider would largely be responsible for implementing the changes as part of their process. At a high level, the act standardizes the approach to employer requests for police records and provides that there are three types of checks that can be conducted — their appropriateness depends on the circumstances. Those checks are

- a criminal record check (i.e., criminal convictions);
- a criminal record and judicial matters check (i.e., criminal convictions plus discharges, warrants and outstanding charges); and
- a vulnerable sector check (i.e., the above plus findings of not criminally responsible due to mental disorder and record suspensions related to sexually based offences).

Otherwise, a key principle that comes out of the legislation is that the individual being checked must consent to the specific type of check being conducted and receive the results prior to the employer seeing them.

For more information about these or other workplace changes, please contact the authors or another member of the Osler Employment and Labour Team.