FAIR WORKPLACES, BETTER JOBS ACT, 2017 BRINGS MAJOR CHANGES TO ONTARIO'S LABOUR AND EMPLOYMENT LAWS[1]

The Ontario legislature recently made wide-ranging changes to labour and employment laws by enacting the *Fair Workplaces, Better Jobs Act, 2017*, also known as "Bill 148". The *FWBJA* introduces numerous amendments to the *Labour Relations Act, 1995,* the *Employment Standards Act, 2000*, and the *Occupational Health and Safety Act*.

In this bulletin we discuss the key elements of the *FWBJA* as it affects trade unions and employees in Ontario.

The *FWBJA* arrived on the heels of the Changing Workplaces Review ("CWR"). In February 2015 the Government of Ontario commissioned the CWR report to recommend legislative reforms directed primarily at addressing the issues raised by the growing number of vulnerable workers faced with precarious or insecure employment in today's fragmented workplaces. Following a consultation process in which submissions were filed by most trade unions and advocacy organizations operating in Ontario, as well as by Ontario employers, the final report was released on May 23, 2017. Shortly after, the Government introduced and later further amended the *FWBJA* (Bill 148).

The *FWBJA* adopts some but not all of the CWR report's recommendations. In some cases it falls short of the recommendations, while in others it improves upon them. Overall, although neither the report nor the legislation adopted the more structural reforms sought by many worker-side advocates, the legislation introduces a series of incremental, but nevertheless significant, changes that will benefit workers in Ontario through improved minimum protections and enhanced access to unionization.

The final version of Bill 148 received Royal Assent on November 27, 2017 and many of its provisions are in force as of January 1, 2018.

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CHANGES TO THE *LABOUR RELATIONS ACT, 1995*

a) Effective Date of Changes

The changes to the Labour Relations Act, 1995 ("LRA") are in force as of January 1, 2018. Ontario Regulation 534/17 under the Labour Relations Act, 1995, titled "Transitional Matters" provides further details as to whether and how the new provisions apply to facts or matters existing as of January 1, 2018.

b) Union Right to Access Employee Lists During an Organizing Drive

Trade unions in most sectors are now entitled to apply for and receive a list of all employees in a proposed bargaining unit, before filing a certification application, if they can show 20% support in a proposed unit. The list is to include employee contact information. [LRA s.6.1]

The entitlement applies only if the employees do not have a certified bargaining agent and are not bound by a collective agreement. This means that the entitlement cannot be used for the purpose of raiding or seeking decertification [LRA s. 6.1(1)].

These new provisions do not apply to employers in the construction industry [LRA s. 6.1(17)].

This change will facilitate better communication in the course of organizing campaigns. It will also allow unions to identify in advance of filing a certification application whether they have met the membership threshold required to obtain a representation vote (or to obtain card-based certification in the sectors other than construction where that option is now available).[2]

- **Application process:** In order to apply for an employee list, a union must file an application at the OLRB setting out the following: a description of the proposed unit, an estimate of the number of people in the unit, the names of the union members in the unit, and evidence of those individuals' union membership (which is not disclosed to the employer) [LRA s. 6.1(1) and (3)]. At that point, the employer may object by filing a notice at the OLRB disputing the unit description and/or size. Any notice that disputes the unit size must include a statutory declaration setting out the number of individuals in the proposed unit [LRA s.

2 See section below: "d) Card-based Certification Expanded Into New Sectors"

6.1(4)-(5)].

- **OLRB determination:** Where the employer does not file an objection, the OLRB will order the employer to disclose the employee list if it determines that at least 20% of the people in the proposed unit were union members at the time of filing; otherwise it will dismiss the application. Where the employer does file an objection, the OLRB will order disclosure of the list if it determines that the proposed unit could be appropriate for collective bargaining and that at least 20% of the people in the unit were union members at the time of filing; otherwise it will dismiss the application. The OLRB can make these determinations based on the application and employer objection; it need not hold a hearing or consult with the parties [LRA s. 6.1(8)].

- **Content and security of the list:** If employers are ordered to provide a union with an employee list, they must include the telephone number and personal email address of each employee in the bargaining unit, provided they have this information in their possession. Additionally, the OLRB may order employers to include other employee information such as job title, business address, and any means of contact besides a home address [LRA ss. 6.1(9) and (10)]. Importantly, the employer and union must take all reasonable steps to protect the security and confidentiality of an employee list, and then destroy the list one year after it is ordered or earlier in some situations [LRA ss. 6.1(11), (12) and (13)].

c) Expanded Power to Order Remedial Certification

Bill 148 makes remedial certification more readily available in cases of employer misconduct.

The OLRB will now certify a trade union if it determines that, as a result of an employer's contravention of the LRA: (a) the true wishes of employees in the bargaining unit were not likely reflected in a representation vote, or (b) the union was not able to show that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union at the time the application was filed. [LRA s. 11(1) and 11(2)]

Previously, the OLRB could order a second vote instead of certifying the union, and could decide the remedy to order by considering the results of a previous vote and/or the adequacy of the union's membership support for the purposes of collective bargaining.

d) Card-based Certification Expanded into New Sectors

Card-based certification has been extended to three new sectors: building services, temporary help agencies, and home care and community services [LRA s. 15.2].

Trade unions organizing in these sectors can now choose between a card-based application and a standard application triggering a representation vote. The rules governing card-based applications in the above sectors are identical to the rules for such applications in the construction industry, requiring a demonstration of 55% support to obtain certification based on cards.

This reform has a limited reach and the government has retained the power to further limit its reach through regulations that restrict access to card-based applications in the above sectors by excluding certain classes of employees, excluding businesses or types of businesses, and further clarifying the scope of the sectors [LRA ss. 15.2(3), 125(i.1)-(i.4)].

It is unfortunate that, having affirmed the legitimacy of card-based certification, the government nevertheless elected not to provide access to card-based certification to all Ontario workers, including those working in the countless other sectors where it would facilitate access to unionization for precarious workers.

e) Additional Protections for Representation Votes

In vote-based applications for certification, the OLRB has new express administrative powers in relation to representation votes. The OLRB can now conduct votes outside of the workplace and also conduct them electronically or by telephone. In addition, the OLRB can issue directions governing the voting process and voting arrangements. [LRA s.111(2)(h) and (h.1)]

f) New Powers to Review and Consolidate Bargaining Units

Trade unions and employers can now ask the OLRB to review and consolidate bargaining units in limited circumstances. [LRA s.15.1]

This reform does not cover construction industry employees or school board employees who are not included in a teachers' bargaining unit [LRA ss. 15.1(9); *School Boards Collective Bargaining Act*, s. 7(2)].

- **Consolidation by application:** A union or an employer can seek the consolidation of certain bargaining units by requesting a review of bargaining unit structure at the time of a certification application, or within three months thereafter. In this process, the OLRB can only merge a newly certified bargaining

unit with an existing bargaining unit under the same employer, and it will only do so if both units are represented by the same union and there is no collective agreement in place for the new unit [LRA s. 15.1]. Importantly, the bargaining units can be at different employer locations.

When an application for review is filed, the OLRB must allow the parties to reach an agreement within a reasonable time and may make orders to implement any such agreement. However, if an agreement is not reached in a timely manner, or if the OLRB does not consider the agreement appropriate for collective bargaining, the OLRB will determine the issues at stake after considering all relevant factors, and may issue orders to do any of the following: consolidate the units; amend any certification order or bargaining unit description in a collective agreement; apply an existing collective agreement to the newly consolidated unit, with or without modifications; release the employer from an existing collective agreement; amend an existing collective agreement; and establish temporary terms and conditions of employment for any group of employees within the consolidated unit who would have been in a strike or lockout position [LRA s. 15.1(3)-(6)].

- **Consolidation by agreement and consent:** A trade union and an employer can merge bargaining units and make related changes at any time through mutual agreement and with the OLRB's consent. Once again, the units that are merged can be at different employer locations. Before the OLRB can provide consent, the union and the employer must review the structure of the units by written agreement and then jointly apply for the consolidation or related change. The related changes are limited to the following: applying an existing collective agreement to the consolidated unit, with or without modifications; amending any part of an existing collective agreement, including a bargaining unit description; terminating the operation of an existing collective agreement; permitting a party to give notice to bargain; and establishing temporary terms and conditions of employment for any group of employees in the consolidated unit who would have been in a strike or lockout position [LRA s. 15.1(8)].

These reforms should assist in promoting stable and effective collective bargaining and in extending access to bargaining to small groups of currently non-unionized employees. The ability to consolidate smaller units together or into a larger unit will allow unions to create units with the bargaining power necessary for longer term stability and success. Unions may therefore find it easier at the outset of organizing campaigns to attract and organize groups of employees outside an existing unit, particularly those who work at small locations under a multi-location employer. Employers will also benefit

from the minimized administrative costs and labour relations disruption associated with fewer units.

g) Right to First Contract Mediation and Expanded Access to First Contract Mediation-Arbitration

The Legislature has dramatically increased the protections available to trade unions and employees between certification and the ratification of a first collective agreement.

First contract mediation and arbitration provide significant defence against termination and displacement applications triggered by the difficulties commonly faced by unions, particularly in smaller, newly certified units, in achieving a first collective agreement and in providing new members with the benefits of unionization.

First contract mediation is now available to parties who cannot reach a first collective agreement. [LRA s.43]

In the event that mediation fails to produce an agreement, first contract arbitration is easier to access than it was in the past. For example, where remedial certification occurs and first contract mediation fails, the OLRB will order first contract arbitration in every case, unless the applicant union has bargained in bad faith or prevented successful bargaining by taking an uncompromising position without reasonable justification [LRA s.43.1]. Previously, by contrast, first contract arbitration was only available if the union could demonstrate that bargaining had failed for certain specific reasons, such as the refusal of an employer to recognize the union.

The new process operates as described below. However, we note that it is not available if any of the following circumstances apply: (i) the bargaining unit was consolidated under s. 15.1 (discussed under heading (f) above); (ii) the union applied for certification while a collective agreement was in place; (iii) one party is an employers' organization accredited as a bargaining agent for employers; or (iv) the pending collective agreement will be a province-wide agreement between bargaining agencies representing multiple employers and bargaining agents [LRA s.43(12)].

- **Stage 1 - First Contract Mediation:** Either party can apply to the Minister of Labour to appoint a mediator if they are unable to reach a first collective agreement and a "no board" notice has been released. The applicant must set out the issues in dispute and their position, and the other party must respond within 5 days by setting out their own disputed issues and position. A mediator will be appointed by the Minister within 7 days of the application and will meet the parties to assist with bargaining a first agreement. Strikes and lockouts are prohibited for 45 days after the mediator's appointment. [See LRA ss. 43(1)-(2),

43(4)-(6), 43(8)-(11)].

- **Stage 2 - Application for First Contract Mediation-arbitration:** If an agreement is not reached within the 45 days of the mediator's appointment, either party can apply to the OLRB for mediation-arbitration. The OLRB will grant the application, dismiss it, or order further mediation within 30 days. If remedial certification has taken place, the OLRB will always order mediation-arbitration unless the applicant has bargained in bad faith or has prevented successful bargaining by taking an uncompromising position without reasonable justification. If there was no remedial certification, the OLRB will order mediation-arbitration in every case unless the applicant has bargained in bad faith, or has prevented successful bargaining by taking an uncompromising position without reasonable justification, or the OLRB believes that further mediation would be appropriate. [See LRA ss. 43.1(1), 43.1(2), and 43.1(3)].

- **Stage 3a – Dismissal or Further Mediation:** If the application is dismissed or further mediation is ordered, the rules governing strikes and lockouts under s. 79 apply. Where the application is dismissed, the parties can make a joint request to the Minister for further mediation assistance or request further assistance from either the first collective agreement mediator or another mediator they have agreed upon. Where further mediation is ordered, the parties must either submit a joint request for mediation assistance from the Minister, or request assistance from the first collective agreement mediator or another mediator they have agreed upon. The OLRB may consider a second application for mediation-arbitration only if it is satisfied that, during the time since the original decision, the applicant has taken all reasonable steps to engage in good faith bargaining with the assistance of a mediator. [LRA s. 43.1(5)].

- **Stage 3b - First Contract Mediation-arbitration:** If the application is granted, the statutory “freeze” rules apply. The parties may jointly appoint a mediator-arbitrator within 7 days, or else a party may apply to the OLRB to appoint the chair or a vice-chair as the mediator-arbitrator. The mediator-arbitrator must hold the first hearing within 21 days of their appointment and issue a final decision within 45 days thereafter. The mediator-arbitrator will have the same powers as an arbitrator and will make orders with the same effect and immunity from judicial review. A first collective agreement reached under this process will be effective for 2 years. [See in particular LRA ss. 43.1(7), 43.1(9)-(10), 43.1(13)-(21)].

- **Extensions of time:** The time limits in the mediation-arbitration process (stages 2-3 above) can be extended by written agreement between the parties or by

order of the Minister, even if they have expired [LRA s. 43.1(22)].

- **Displacement and Decertification Applications ("DDAs"):** During any stage of the above process, the OLRB cannot deal with new or pre-existing DDAs except in limited circumstances. Where a party has *not* applied for mediation-arbitration, the OLRB can deal with DDAs if 45 days have passed since the appointment of the mediator. Where a party *does* apply for mediation-arbitration, the OLRB can deal with DDAs if the OLRB has dismissed the application for mediation-arbitration, or if 30 days have passed since the OLRB ordered the parties to engage in further mediation. Where the application for mediation-arbitration is granted, the OLRB will dismiss any outstanding DDAs and will not consider any new DDAs unless they are brought after the first collective agreement is settled. [LRA ss. 43(14)-(15) and 43.1(23)-(30).]

h) Just Cause Protection During First Contract Bargaining

In addition to access to first contract mediation, newly unionized employees now have immediate access to a key benefit of unionization following the certification of a bargaining agent.

Employers are now prohibited from discharging or disciplining an employee without just cause during first contract bargaining. This prohibition applies to the period between the date of certification and the date of a first collective agreement, or alternatively, the date that the union no longer represents the bargaining unit employees, whichever is earlier [LRA s. 12.1].

Bill 148 also extends just cause protection to employees following a strike or lockout, as discussed under heading (i) below.

i) New Protections Following Strike or Lock-out

Employees have several new rights in relation to strikes and lockouts. [LRA ss.80, 80.1]

First, striking employees have a right to reinstatement if they make an unqualified request to the employer at any time after the strike begins, whereas previously this right had expired 6 months after the commencement of the strike. The right remains subject to the availability of comparable work and the continuation of the employer's operations. [LRA s. 80(1).]

Second, once a lawful strike or lockout has ended, the striking or locked-out employees have a right to reinstatement on terms agreed upon by the employer and the union. This right can be enforced through the grievance and arbitration process applicable under

the new collective agreement. [LRA ss. 80(3)-(4)].

Third, striking or locked-out employees' have seniority rights with respect to reinstatement. They have bumping rights over others who performed their work during the strike or lockout. Moreover, if there is insufficient work for universal reinstatement, they have the right to be reinstated according to the seniority-based recall provisions in the collective agreement, or else according to their relative seniority at the time the strike or lockout began. The recall right does not apply during start-up operations if an employee is unable to perform the work required for the start-up [LRA ss. 80(5)-(7)].

Fourth, employees are protected from discipline and discharge absent just cause during the period between the date they entered a legal strike/lock-out position and the date of the first collective agreement, or alternatively, the date that the union no longer represents the bargaining unit employees, whichever is earlier. This right can be enforced through the grievance and arbitration process applicable under the new collective agreement [LRA s. 80.1].

j) Successor Rights between Specified Contract Service Providers

Successor rights are now provided for those in the building services sector in the event that building services are re-tendered to a new service provider. [LRA, s.69.1]

In other words, when eligible building services are re-tendered and the contract given to a new provider, unionized employees performing those services will retain the protection of their collective agreement and their union will keep its bargaining rights.

In addition, the legislation permits regulations that could extend successor rights protection to other types of service providers that "receive public funds directly or indirectly". [LRA s.69.2]

It will be of key importance going forward for unions operating in the public and quasi-public sector to actively push for these regulations. It should be noted, for example, that the CWR recommended that successor rights be extended to government-funded home care services, because of their vulnerability to a practice of re-tendering that serves to defeat collective bargaining.

The new provisions currently apply only to building services, defined as services that are provided by or to a building owner or manager, directly or indirectly, and that are related to servicing the premises, including cleaning, food and security services. The protections do not extend to building service employees who are in construction services, non-cleaning maintenance services, and food production services where the food is not produced and consumed on the premises [LRA s. 69.1(2)].

Where the provision applies it deems that a “sale of a business” has occurred if the following criteria are met: (i) employees perform eligible services at their principal place of work; (ii) the employer ceases (wholly or partly) to provide those services at the premises; and (iii) another employer later provides substantially similar services at the same premises [LRA s. 69.1]. If these conditions are satisfied, the union representing the affected employees can access the standard successor rights protections under section 69.

The new LRA provision adds to existing provisions in the Employment Standards Act that give building services providers an incentive to retain the employees of a former service provider by requiring the new provider to meet termination and severance pay obligations towards any employee of the former provider it did not continue to employ.

The limited reach of the new LRA provision leaves it falling very far short of the comprehensive reforms sought by many members of the labour movement to address the race to the bottom created by the contract-flipping now common in many sectors. However, the amendment represents an important step forward in its recognition that full successor rights are necessary for the protection of workers whose bargaining and bargained rights are defeated by repeated contract tenders for the same work.

k) Expanded Interim Relief Powers

The OLRB has been given a general power to make interim decisions or orders regarding any matter in any proceeding. When using this power, the OLRB does not need to issue reasons or comply with statutory tests. [LRA s. 98.]

We expect that this will have significant and wide-ranging effects on all proceedings at the OLRB.

Previously, the OLRB was limited to making interim orders for procedural matters and in relation to a limited number of substantive matters (primarily where a union supporter was terminated during an organizing campaign), and could only make substantive orders in compliance with a restrictive test that has now been removed from the legislation.

For a brief period between 1993 and 1998, the Board had similarly broad powers to grant interim relief. During those years, the Board formulated a two-step test which: (1) assessed whether a trade union could establish an arguable case that the Act was breached; and (2) assessed the relative harm to the employer and union. It will be important for trade unions to push for a return to this test in interim relief litigation and since this approach is shared with other labour boards holding similarly broad interim order powers it is probable that this will be the Board's approach.

l) Increased Fines for Offences

Parties who violate the LRA are exposed to liability for increased fines in the rare event that they are prosecuted for their conduct in court. As before, such prosecutions can occur only with the consent of the Board.

The maximum penalties for a contravention of the LRA have increased to $5,000 for an individual (up from $2000) and to $100,000 for an organization (up from $25,000) [LRA s. 104(1)].

CHANGES TO THE EMPLOYMENT STANDARDS ACT, 2000

Bill 148 makes a wide range of changes to the *Employment Standards Act, 2000* ("ESA").

These changes are of significance to trade unions and their members as well as non-unionized workers for a number of reasons.

First, unless the legislation specifically provides otherwise, if an employer contravenes any provision of the ESA, trade unions can enforce the provision against the employer as if it formed part of the collective agreement in force at the time of the contravention [ESA s. 99(1)]. By way of example only, the new minimum wage requirements described below apply to unionized and non-unionized employees alike.

Second, trade unions in bargaining will want to be aware of the provisions of the legislation in order to ensure that their agreements provide benefits to their members that are at least equal to or greater than the benefits provided by the ESA.

Third, unions need to be aware that the legislation contains some transitional provisions that allow collective agreement provisions to temporarily prevail over Bill 148 amendments that are otherwise coming into force for non-unionized workers in Ontario. These provisions should be of particular interest and concern to unions engaging in bargaining between now and the date that a collective agreement will have this effect. Provisions affected by the transitional rules for collective agreements are:

- new requirements for equal pay for equal work regardless of employment status (i.e. full-time, part-time, temporary or employed by a temporary help agency)[3];
- new provisions for minimum on call pay and the protections relating to scheduling

3 See details under the heading "f) Equal Pay for Equal Work"

changes made on short notice.[4]

Finally, trade unions should be aware that the newly expanded equal pay provisions of the legislation expressly provide that no trade union or other organization shall cause or attempt to cause an employer to contravene the equal pay provisions of the legislation.

a) Effective Dates

Most of the changes to the ESA are in effect as of January 1, 2018, but there are some exceptions as detailed below, including the following:

- The introduction of a bar on misrepresenting employees as independent contractors and of an onus on employers to prove non-employee status came into effect November 27 2017;

- The changes concerning equal pay for equal work will come into effect on April 1, 2018. However, transitional provisions will apply to preserve inequalities that are included in collective agreements that are in force as of April 1, 2018 until either the expiry date of the collective agreement or until January 1, 2020, whichever date comes first;

- New scheduling rights and call-in pay rights will come into effect on January 1, 2019. However, transitional provisions provide that collective agreements that do not provide those rights will prevail until the expiry of the collective agreement or January 1, 2020, whichever is earlier;

- The new Occupational Health and Safety Act prohibition on requiring the wearing of high heels came into effect on November 27, 2017.

In addition, we note that transitional matters arising from the implementation of Bill 148 may also be governed by further regulations [ESA ss. 141(2.0.3)-(2.0.4)]. To date no such regulation has been issued.

b) Improved Coverage: Trainees and Crown Employees

Trainees now have definitive status as employees, effective January 1, 2018. A trainee is an individual who is trained by an employer in a skill used by the employer's employees. [ESA ss. 1 (definition of employee) and 1(2)]. However, the ESA still excludes people who participate in educational work-experience programs through a secondary school, university, college of applied arts and technology, or private career college. [ESA s.3(5)]

4 See details under heading "h) Improved Scheduling Rights and Call In Pay Provisions"

Almost every provision of the ESA now covers Crown employees, while previously these employees were only covered by parts of the ESA. The Crown remains excepted from the application of the (now expanded) single or related employer provision, which deems an employer and separate persons to be one employer if they carry out associated or related activities or businesses. [See *ESA* s. 3.1, ESA s.4(4.1); previous s. 3(4) is repealed.]

c) Simplified Criteria for "Single Employer" Determinations

The legislation will treat one or more employers as a single employer if they carry on associated or related activities or businesses. It is no longer necessary for the activities or businesses to have the intent or effect of defeating the ESA's intent and purpose [ESA s. 4(1)].

Employers who are treated as one employer under this section are held jointly and severally liable for any contravention of this Act and to pay any amounts owing to an employee of any one of them. This provision will be of particular benefit to employees facing a bankrupt employer where associated or related businesses remain solvent.

The single employer provision also allows nominally separate employers to be treated as one for the purpose of determining whether the $2.5 million threshold entitling employees to severance pay is met.

d) Independent Contractors: New Rules on Misclassification

The Act now expressly prohibits employers from treating employees as if they were not employees.[ESA s. 5.1]

This change targets employers who try to evade their responsibility for vacation pay, public holiday pay, overtime pay, termination and severance pay and premiums for Employment Insurance and Canada Pension Plan by describing employees as "independent contractors."

If an employer claims that an individual is not an employee during an ESA investigation or proceeding (except a prosecution), the employer will be subject to a reverse onus requiring them to prove this claim [ESA s. 5.1)].

These changes came into effect on November 27, 2017.

The Government did not adopt the CWR's recommendations in this area, which included a recommendation that the legislation include an express confirmation of the status of a category of "dependent contractors" as employees, and it is yet to be seen how effective this amendment will be at meeting its objectives.

e) Increases to the Minimum Wage

As shown in the table below, the minimum wage in Ontario increased on January 1, 2018. The general minimum wage is now $14.00 per hour, up from $11.60. Going forwards, the minimum wage will increase again on January 1, 2019, and then increase annually in line with changes in the Consumer Price Index beginning on October 1, 2019. All of the increases take effect immediately and will not be deferred until the employee's subsequent pay period. [See ESA ss. 23.1 and 23.0.1].

	To Dec. 31, 2017	Jan. 1, 2018 to Dec. 31, 2018	Jan. 1, 2019 to Sept. 30, 2019
General	$11.60/hour	$14.00/hour	$15.00/hour
Liquor Servers	$10.10/hour	$12.20/hour	$13.05/hour
Homeworkers	$12.80/hour	$15.40/hour	$16.50/hour
Students under 18 years of age (whose weekly hours do not exceed 28 hours, or who are employed during a school holiday)	$10.90/hour	$13.15/hour	$14.10/hour
Hunting & Fishing Guides – A: if working less than five consecutive hours. – B: if working five or more hours, whether consecutive or non-consecutive.	A: $58/day B: $116.00/day	A: $70/day B: $140.00/day	A: $75/day B: $150.00/day

The minimum wage requirements apply to unionized and non-unionized employees alike. We note that the minimum wage rate for liquor servers applies only if the employee regularly receives tips or other gratuities from their work. Additionally, employees who qualify for both the student rate and the homeworker rate will receive the higher homeworker rate [ESA ss. 23.1 and 23.0.1].

Interestingly, the minimum wage rates are now set out in the ESA rather than in regulations under the ESA. This means that future changes to the minimum wage will require legislative reform, and that any future move to reduce the minimum wage cannot be easily implemented through a regulation.

f) Equal Pay for Equal Work

Among the more significant changes are several amendments that are intended to guarantee equal pay for equal work irrespective of sex or employment status. [ESA, ss. 42.1, 42, 42.1].

"Equal pay for equal work" means that an employee is entitled to the same pay rate as another employee who performs substantially the same kind of work in the same establishment, under similar working conditions, using substantially the same skill, effort and responsibility.

The amendments serve to add employment status to the existing protection of equal pay for equal work based on sex, and also set out new provisions regarding the application of these protections, as set out in the sections below.

- *Transitional Provisions regarding Collective Agreements*

These amendments are to come into effect on April 1, 2018. However, if there is a collective agreement in effect on April 1, 2018 that permits differences in pay based on employment status, the Act provides that the collective agreement will prevail until the collective agreement expires, or until January 1, 2020, whichever date comes first. [ESA ss. [ESA ss. 42.1 (7)-(8) and 42.2 (7)-(8)].

Trade unions in bargaining between now and April 1, 2018 need to take particular note of these transitional provisions and the effect they may have on their members.

- *Definition of "Equal Work" clarified*

The definition of "equal work" will be updated when the amendments come into force to clarify that "substantially the same kind of work" means work that is "substantially the same but not necessarily identical" [ESA s. 41.2].

- *Full-time, Part-time and Temporary or Casual Employees to be Paid at the Same Rate*

Employees will be entitled to equal pay for equal work regardless of a difference in their employment status. When this change takes effect, this entitlement will apply even if there is a difference between the employees' regular working hours (i.e. full-time part-time and casual employees must be paid at the same rate) or in their term of employment, including their status as permanent, temporary, seasonal or casual employees. However, employees will not benefit from the equal pay entitlement if they are found to be paid differently based on merit, seniority, the quantity or quality of their production, or another factor besides sex or employment status [ESA s. 42.1(1)-(2)].

- *Temporary Help Agency Employees entitled to pay equal to employees of the client performing equal work*

An employee of a temporary help agency who performs work for a client of the agency will be entitled to equal pay for equal work if they perform substantially the same work as an employee of that client. In other words, the ESA will prohibit a temporary help agency from assigning employees to a client and then paying those employees less than the client pays its own employees for performing substantially the same kind of work in the same establishment, under similar working conditions, and using substantially the same skill, effort and responsibility. However, the agency can still pay its employees at a different rate if the difference is based on *any* factor besides sex, employment status or assignment employee status. [See ESA ss. 42.2(1), 42.2(2).]

- *Employers cannot meet Equal Pay Obligations by Reducing Rates of Pay*

An employer will not be able to satisfy its equal pay obligations by reducing an employee's rate of pay. In the event that the above provisions are violated, the employer will have to increase the wage rate of the employee who is paid less in order to match the wage rate of the employee who is paid more [ESA ss. 42.1(3) and 42.2(3)].

- *Obligations of Trade Unions and Other Organizations*

No trade union or other organization is to cause or attempt to cause an employer to contravene any of the equal pay for equal work provisions of the ESA. [ESA, ss 42(4), 42.1(4), 42.2(4)].

- *Minister of Labour Review*

The Minister of Labour will initiate a review of these new equal pay entitlements before April 1, 2021 [ESA s. 42.3(1)].

- *Protections Against Reprisal*

Employees (including temporary help agency employees) will be protected against reprisal if they inquire about rates of pay, or disclose such information, for the purpose of determining or assisting in determining whether an employer is complying with its equal pay obligations [ESA ss. 74(1)(a)(v.1)-(v.2) and 74.12(1)(a)(v.1)-(v.3)]. Employees will be entitled to ask their employer to review their wage rate if they believe that it does not comply with equal pay requirements. In response, the employer must adjust the wage rate or provide a written explanation for its refusal to do so [ESA ss. 42.1(6) and 42.2(6)].

g) Overtime Pay

The legislation clarifies that employees with two or more wage rates are to receive overtime pay based on the wage rate applicable to the work they performed when earning the overtime pay [ESA s. 22(1.1)]. This change came into effect on January 1, 2018.

h) Improved Scheduling Rights and Call In Pay Provisions

The Act introduces significant new rights relating to scheduling and call-in pay, which are to come into effect for most Ontario employees on January 1, 2019 (subject to the transitional provisions regarding employees covered by a collective agreement as of that date, discussed below). [ESA, ss. 21.2 to 21.7]

First, employees will have a statutory right to request changes to their schedule or work location. The employer will have to discuss such requests with the employee and, within a reasonable time, either grant the request or provide reasons for denying it [ESA s. 21.2].

Second, employees who have their shifts cut short will benefit from an improved "three-hour rule." Employees who work less than 3 hours will be entitled to three hours' pay at their regular wage rate, provided they are available to work for longer and regularly work more than 3 hours a day. They will also be entitled to any additional income earned during the time worked, such as tips or commission [ESA s. 21.3(1)]. Under the current "three hour rule," an employee who works less than 3 hours, despite regularly working more than 3 hours in a day, must be paid the greater of (a) their regular wage for the time worked, or (b) 3 hours at the minimum wage [ESA Reg. 285/01, s. 5(7)].

Third, employees will receive minimum pay for being on call. Where an employee is placed on call and either (a) is not required to work or (b) works less than 3 hours despite being available to work longer, they will be entitled to three hours' pay at their regular wage rate, as well as any additional income earned during the time worked [ESA s. 21.4]. There will be two important limits on these rights: (1) The minimum payment of 3 hours' pay will be valid for a 24-hour period, even if an employee is on call multiple times during those 24 hours; and (2) Employees will not be entitled to the minimum payment if they are on call for the purpose of ensuring continued delivery of essential public services and are not in fact required to work [ESA s. 21.4 (2)-(3)].

Fourth, employees will benefit from new protections when their schedules are changed on short notice. They will be entitled to three hours' pay at their regular wage rate if their

workday or on-call period is cancelled on less than 48 hours' notice, except where the cancellation is caused by factors beyond the employer's control or other prescribed reasons [ESA s. 21.6]. Additionally, employees will be entitled to refuse requests or demands to work (or be on call) that are made on less than 96 hours' notice. This right of refusal will not apply if the request or demand is made for the purpose of ensuring continued delivery of essential public services; dealing with an emergency that could result in serious harm to persons or substantial damage to property; addressing a threat to public safety; or other prescribed reasons [ESA s. 21.5].

- *Transitional Provisions regarding Collective Agreements*

The third and fourth changes set out above (minimum pay for being on call, and protections for scheduling changes made on short notice) will not apply if they conflict with a provision of a collective agreement in force on January 1, 2019. In that situation, the collective agreement provision will prevail until the expiry of the collective agreement or January 1, 2020, whichever is earlier [ESA ss. 21.4(4)-(5), 21.5(4)-(5) and 21.6(4)-(5)].

i) Right to Notice of Termination for Temporary Help Agency Employees

Employees of temporary help agencies have new rights to notice of termination, effective January 1, 2018. Where an employee's assignment is estimated to last for three months or longer, but is terminated before the end of its estimated term, the agency must provide the employee with one of the following: (a) one week's written notice; (b) pay in lieu of such notice; or (c) an offer, within the notice period, of a new assignment that is reasonable in the circumstances and is estimated to last one week or longer. This obligation does not apply if the assignment is terminated based on uncondoned misconduct by the employee; a strike or lockout at the assignment location; or something "fortuitous or unforeseeable" that frustrates the assignment or renders it impossible to perform [ESA s. 74.10.1].

j) Public Holidays and Public Holiday Pay

The following changes regarding public holidays came into effect on January 1, 2018:

- Family Day is now a statutory public holiday [ESA s. 1(1) 1.1].

- Public holiday pay is now calculated by determining the employee's average daily wage for the days actually worked in the pay period preceding the public holiday [s. 24(1)]. This notably excludes vacation pay from the calculation. Previously, public holiday pay was an average daily wage calculated on the basis of wages earned and vacation pay during the four weeks preceding the public

holiday.

- Employees are now entitled to receive advance written notice of "lieu days." When an employee is scheduled to work on a public holiday, or when a public holiday will fall on a vacation day or other day that would not ordinarily be a working day, the employer must give the employee a written statement before the public holiday specifying which ordinary working day the employee will take off instead of the public holiday [ESA ss.27(2.1) , 28(2.1), 29(1.1) and 30(2.1)].

k) Vacations and Leaves of Absence

As described below, several vacation and leave entitlements have been improved and new grounds for leaves of absence have been introduced. All of the changes came into effect on January 1, 2018 except where noted.

- **Paid Vacation:** Employees with at least five years of service are now entitled to receive a minimum of three weeks' paid vacation after each vacation entitlement year they complete. The vacation pay must be at least 6% of the employee's gross wages (excluding vacation pay) earned during the preceding vacation entitlement year. [ESA ss. 33(1)(b), 34(3), 35.2(b).] Previously, such employees were only entitled to a minimum of two weeks' paid vacation, with vacation pay totaling at least 4% of the wages earned during the preceding vacation entitlement year.

  Once an employee qualifies for the new entitlement, the employer will schedule the vacation time in one of the following ways, unless they reach a written agreement to the contrary: three separate weeks, three weeks together, or two weeks together and a separate week. Note that employees with sufficient service can only access the new entitlement once they complete a vacation entitlement year on or after December 31, 2017. [See ESA ss. 35(3); and 33(4).]

- **Pregnancy leave:** Employees can now take a longer pregnancy leave if they are not entitled to take parental leave. The unpaid pregnancy leave will end on the later of the following dates: 17 weeks after the leave started, or 12 weeks after the birth, still-birth or miscarriage [ESA s. 47(1)(b)(ii)]. Previously the latter date was only 6 weeks. This new entitlement only applies if the pregnancy leave began on January 1, 2018 or later.

- **Parental leave:** The parental leave entitlement has increased from 35 weeks to 61 weeks for employees who take pregnancy leave, and from 37 weeks to 63 weeks otherwise. This unpaid leave must begin within 78 weeks after the child is

born or first comes into the employee's custody, care and control, rather than the previous limit of 52 weeks [ESA ss. s. 49(1) and 48(2)]. These changes only apply if the birth or custody date is later than December 3, 2017 [ESA ss. 48(2.1), 49(1.1), *FWBJA* Sch. 1, s. 72].

- **Personal Emergency Leave:** The entitlement to 10 days of personal emergency leave has been extended to all employees, where previously it only covered employees of employers who regularly employ 50 or more people [ESA s. 50(1)]. The grounds for taking this leave have not changed. Importantly, employees with at least one week of service must be paid for the first two days of their leave. Other employees must use their unpaid leave days until they become eligible for the paid days by accruing one week of service [ESA ss. 50 (5), (6) and (8)]. We note that employers can require reasonable evidence of entitlement to this leave, but they are not allowed to require a doctor's note where the leave is due to illness [ESA ss. 50(12)-(13)].

- **Family medical leave:** The unpaid family medical leave entitlement has increased from 8 weeks to 28 weeks, and has expanded to cover several additional family members as follows: a child under legal guardianship of the employee or a spouse; siblings and step-siblings; brothers and sisters in-law (step- and otherwise); sons and daughters in-law, including those of a spouse; grandparents and grandchildren (step- and otherwise) including those of a spouse; uncles, aunts, nieces and nephews, including those of a spouse; the spouse of a grandchild, uncle, aunt, nephew or niece; a person who considers the employee to be like a family member, subject to prescribed conditions, if any; and other prescribed individuals [ESA, s. 49.1(2)-(3)]. We note that this leave is only available where a medical practitioner has certified that a family member has a serious medical condition with a significant risk of death in the next 26 weeks.

- **Crime-related Child Disappearance Leave:** This unpaid leave has increased from 52 weeks to 104 weeks [ESA s. 49.6(2)]. In addition, where the child is found dead within 104 weeks after the disappearance, the employee is now entitled to begin a new 104-week leave under the provision for "Child Death Leave" [ESA s.49.6 (6)-(7)]. Previously, if the child was found dead within 52 weeks after the disappearance, the employee was entitled to an extended leave capped at 104 weeks after the date of the disappearance. We note that the new entitlements do not apply where the child's disappearance occurred before January 1, 2018. In those circumstances, the employee is only entitled to a leave under the rules in effect on December 31, 2017 [ESA ss. 49.5(12)].

- **Family Caregiver Leave:** This leave has been adjusted rather than improved. Now, if employees takes off any part of a week under this leave, the employer will deem them to have taken a full week of leave [ESA s. 49.3 (7.1)].

New Grounds for Leave

- **Critically Ill Family Member Leave:** Employees are now entitled to take up to 17 weeks of unpaid leave to provide care and support to any adult family member who is critically ill. The family members covered by the entitlement are the same individuals covered by the Family Medical Leave entitlement discussed above [ESA ss. 49.4 (1),(5)-(6)].

  The rules for this leave are similar to the rules that govern the existing Critically Ill Child Leave. For example, both leaves are only available to employees with at least six consecutive months of service, and both leaves provide a maximum number of weeks that may be taken by one or more employees in respect of the same critically ill person [ESA ss. 49.4 (11)-(12)]. However, the Critically Ill Child Leave permits up to 37 weeks of leave to provide care and support to a minor child in the employee's family who is critically ill [ESA ss. 49.4 (2)-(3)].

- **Child Death Leave:** Employees with at least six months' consecutive service are now entitled to take 104 weeks of unpaid leave if their child dies for *any* reason. Previously this leave was available only if it was probable that the child died as a result of a crime [ESA s. 49.5]. We note that the leave is subject to various rules. For example, the leave provides a maximum number of weeks that may be taken by one or more employees in respect of the same child. In addition, if an employee was already on leave under the previous "Crime-Related Child Death or Disappearance Leave" as of December 31, 2017, they must continue their leave under the rules in effect on that date [ESA ss. 49.5(12)].

- **Domestic or Sexual Violence Leave:** An employee with at least 13 weeks' consecutive service is entitled to take a total of 10 days and 15 weeks of leave, for specified purposes, if the employee or their child experiences domestic or sexual violence or the threat of domestic or sexual violence [ESA ss. 49.7(2) and (4)]. The 10-day entitlement is separate from the 15-week entitlement, such that an employee can elect to take leave from the day-based entitlement or the week-based entitlement. An employee who takes week/s of leave must provide a written notice to the employer [ESA s. 49.7(13)]. Importantly, the employee is entitled to be paid for the first five days of leave taken, regardless of whether the days are taken from the week- or day-based entitlements [ESA s. 49.7(5)].

This new entitlement is positive, but has some features which may be considered less than satisfactory. First, victims of domestic and sexual violence are only permitted to take leave for limited reasons, including to obtain counseling, seek medical attention, relocate, obtain services from victim services organizations, seek legal or law enforcement assistance, and other reasons as may be prescribed [ESA, s. 49.7(2)]. Second, all time that is taken off work is rounded up to a full day or week, as applicable, which means that the entitlements will deplete quickly if employees need only take short periods of time off for medical or other purposes [ESA ss.49.7(9) and (12)]. Third, employers are allowed to require evidence that the employee is entitled to take the leave, which could place vulnerable employees in the potentially dangerous position of needing to disclose private and highly sensitive personal information [ESA, s 49.7(15)]. Fourth, while employers are required to implement "mechanisms" to protect the confidentiality of records relating to this leave, the legislation provides no minimum requirements or standards for such mechanisms [ESA, s. 49.7(17)].

I) Improved Enforcement

A number of changes have been made effective January 1, 2018 for the purpose of improving the ESA's flawed system of enforcement. Below are some changes of interest.

- **Fewer Complaint Requirements**

  Employees are no longer required to inform their employer of a contravention before filing a claim under the ESA. [*FWBJA*, Sched. 1, ss. 46, 53].

- **Enhanced Powers for Establishing and Ordering Penalties**

  The Government can now make regulations that establish (or create methods for establishing) penalties or ranges of penalties for different types of contraventions [ESA ss. 141(1)16.1, and 141(3.1)]. Correspondingly, employment standards officers can now enforce such penalties by determining the amount of the penalty based on prescribed criteria, and by issuing a notice of contravention that specifies the amount of the penalty [ESA ss. 113 (1)-(1.2)]. The officers can also order employers to pay money directly to an employee when money is owed [ESA ss. 103(1)(a.1) and ESA s.104(3)(b); see also: ESA ss. 74.14(1)(a.1), 74.16(2)(b) and 74.17(2)(b)].

- **Expanded collection powers**

The Director now has the power to accept security for a payment; issue a warrant with the same force as a writ of execution; place a lien on the employer's real or personal property; and disclose information obtained under the ESA to a collector for the purpose of collecting moneys owed [ESA ss. 125.1, 125.2, , 125.3, and 127(6)-(7)].

- **Publication of contraventions**

  The Director can publish online or by other means the name of a person who receives a notice of contravention, a description of the deemed contravention, and the associated penalty [ESA ss. 113(6.2)-(6.4)].

CHANGE TO THE OCCUPATIONAL HEALTH AND SAFETY ACT

The new legislation makes only one change to the *Occupational Health and Safety Act.* The change relates to requirements for wearing high heels in the workplace and it came into effect on November 27, 2017.

Employers are now prohibited from requiring an employee to wear "footwear with an elevated heel," except where such footwear is necessary to perform the employee's work safely. The prohibition does not apply to employers of performers in the entertainment and advertising industry. That industry is defined to include the production of "any kind" of performance, including even a non-viewable audio performance. [OHSA s.25.1]