Bill 148: vacation, overtime and record keeping

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Introduction

Bill 148 introduced a host of new requirements for Ontario employers, many of which have received significant attention (eg, the changes to minimum wage and personal emergency leave). However, there are numerous other changes that have received only a passing mention, despite the fact that they create important – and enforceable – rights for Ontario employees.

This update covers three such changes, which should (but may not) be on the radar of Ontario payroll and HR information system administrators, namely:

- new vacation time and vacation pay requirements;
- changes to the calculation of overtime pay where employees have multiple rates of pay; and
- new record-keeping requirements.

New vacation time and vacation pay requirements

Bill 148 increased the vacation time and vacation pay entitlements to at least three weeks' time off and 6% of wages for employees with five or more years of service.

All periods of employment, whether active or inactive, continue to count towards an employee's length of service when determining vacation and vacation pay. Examples of inactive periods of employment include time spent on:

- pregnancy leave;
- parental leave;
- family medical leave;
- any other leaves of absence; and
- lay-off.

The increase in vacation pay entitlement also affects the amount payable to an employee under the Employment Standards Act 2000 on the termination of employment without cause. If an employer provides pay in lieu of notice of termination (or termination pay) to an employee with five or more years' service, vacation pay of at least 6% of the termination pay must also be provided. Vacation pay continues not to be accrued on severance pay required by the Employment Standards Act.

Employers with alternative vacation entitlement year

Some employers have a vacation entitlement year that is not based on an employee's hire date (eg, a vacation entitlement year that is based on the calendar year). This is referred to in the Employment Standards Act as an "alternative vacation entitlement year". In response to whether the vacation

entitlement of employees is pro-rated between the two different levels of entitlement for the year in which they reached five years' service, according to the Ministry of Labour, the answer is no.

The ministry's position is that employees earn three weeks' vacation time and vacation pay of 6% of wages for the entire vacation entitlement year in which they reached five years' service, provided that the vacation entitlement year ends on or after December 31 2017. That is, an employee earns the increased entitlements even for the portion of the vacation entitlement year before he or she reached five years' service.

To illustrate, consider the following example:

- An employer's vacation entitlement year runs from January 1 to December 31 for all of its employees.
- Amy was hired on July 1 2013. Amy reaches five years' service on July 1 2018. The question is when Amy starts earning the increased entitlements of three weeks' vacation time and vacation pay of 6% of wages.
- The Ministry of Labour's position(1) is that Amy starts earning the increased entitlements on January 1 2018 (ie, the start of the vacation entitlement year during which she reaches five years' service). There is no pro-ration of the entitlements, even though for half of that vacation entitlement year (ie, from January 1 2018 to June 30 2018) Amy does not have five years' service.

To comply with the Employment Standards Act, employers with an alternative vacation entitlement year should consider the following:

- Employers should adjust payroll records at the beginning of each vacation entitlement year in order to provide employees who will reach five years' service during the year with the correct number of vacation days and correct amount of vacation pay.
- Employers that pay employees their accrued vacation pay on each pay cheque should adjust the calculation of vacation pay and review (and revise, if appropriate) the written agreements with employees regarding the timing of providing vacation pay.
- Employers should put in place and communicate written policies regarding the recovery of overpayment of vacation pay in the event that an employee is paid vacation pay based on the increased entitlements for a portion of the vacation entitlement year but ceases to be employed before he or she reaches five years' service.

Overtime pay for employees with multiple rates of pay

Bill 148 also introduced new requirements for the calculation of overtime pay where an employer compensates employees based on different rates of pay depending on the work performed (eg, shift premiums or reduced rates for travel time). These new requirements came into effect on January 1 2018.

Previously, employees with multiple rates of pay were entitled to receive overtime pay (for hours worked in excess of the overtime threshold) at a blended rate. In other words, the overtime rate was calculated based on the proportion of non-overtime hours that the employee worked at each different rate in the relevant work week, multiplied by that rate.

Under the new provisions, overtime pay must be paid at the actual rate being earned at the time that the employee works the hours that are in excess of the applicable overtime threshold. For example, take an employee who is entitled to overtime after 44 hours of work per week, and works 48 hours in a week, comprising:

- the first 40 hours of the week in a role that regularly pays C$18 per hour; and
- the final eight hours in a role that regularly pays C$22 per hour.

Under the new requirements, the four hours of overtime pay to which the employee is entitled must be paid based on the regular rate that is payable when the overtime was actually worked:

- C$22 per hour x 1.5 = C$33 per hour for the four hours of overtime worked

The converse would also be true; if an employee worked at a higher rate for the majority of the week, but performed work that paid at a lower rate at the end of the week, including working overtime hours in that role, the overtime rate should be calculated at the lower rate. In other words, it is irrelevant that the employee's regular rate of pay for the non-overtime hours of work was different.

Unlike some of the new provisions introduced by Bill 148, there is no grace period or exemption for unionised employers, many of which have complex overtime calculation provisions in their collective agreements. Employers that pay shift premiums and provide multiple rates of pay should review their scheduling practices to assess any potential consequences.

New record keeping requirements

Bill 148 also introduced new record keeping requirements. Despite being one of the least publicised changes, the new requirements will significantly affect employers if they are required to respond to an audit from the Ministry of Labour or if they need to respond to a complaint by an employee. Without the required documentation, an employer may be unable to defend against a complaint of non-compliance with the Employment Standards Act.

Specifically, from January 1 2018 employers must keep records of:

- the dates and times that an employee worked;
- the dates and times that an employee performed overtime work and the applicable rate of pay if he or she worked overtime in a given week and has multiple regular rates of pay; and
- the amount of vacation pay that an employee earned and how it was calculated.

In addition, the retention period for vacation time and pay records increased from three to five years from the creation of the record.

There are also new records that must be kept in regard to employee schedules and changes made to those schedules, in accordance with the new employee scheduling entitlements that come into effect on January 1 2019 (for further details, please see "Bill 148: scheduling and the three-hour rule"). In brief, Bill 148 introduced employee entitlement to at least three hours' pay at the employee's regular rate if (subject to prescribed exceptions):

- the employer cancels the employee's shift with less than 48 hours' notice;
- the employee regularly works more than three hours and is required to attend work but works less than three hours (and is available to work for longer); or
- the employee is on call but is not called in or is called in for less than three hours.

Employees also have the new right to refuse requests or demands either to work or to be on call on a day that he or she is not scheduled to work, unless the employer gives at least 96 hours' (4 days') notice of the change, subject to some exceptions, including where the work comes within certain prescribed emergency situations.

As a result of these new restrictions on scheduling changes, from January 1 2019 employers must keep new records on the dates and times:

- of any cancellation of a scheduled work day or scheduled on-call work; and
- that an employee was scheduled to work or be on call and any changes to the on-call schedule.

These records must be kept for three years from the day or week to which the record relates.

Comment

Employers are encouraged to carefully review their current practices, in collaboration with their payroll staff and HR information system administrators to assess whether they require modification in light of these new requirements.

For further information on this topic please contact Bonny Mak or Jackie VanDerMeulen at Fasken

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Endnotes

(1) As set out on the Ministry of Labour website.
