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MANAGEMENT LABOUR & EMPLOYMENT LAWYERS

Bill 148 and Bill 47: Understanding the Changing Landscape of Labour and Employment Law in Ontario

Introduction

In 2015, the Government of Ontario announced that it would undertake a review of the Province's workplace legislation dubbed the "Changing Workplaces Review". The Final Report contained 173 recommendations to change both the *Employment Standards Act* and the *Labour Relations Act, 1995*. A week after its release in May 2017, the Ontario Liberals introduced the *Fair Workplaces, Better Jobs Act, 2017*, more commonly known as Bill 148 ("Bill 148"). The Act, which received Royal Assent on November 27, 2017, adopted many of the recommended changes made in the Review as they are, but to the surprise of many, went beyond the recommendations made in key areas at the expense of employers.

Bill 148 has been widely criticized by employers for the imposition of a number of costly provisions to Ontario's workplace laws, including: parity in pay between part-time and full-time employees, an increase in minimum vacation entitlements, paid emergency leave days, and easier certification for unions.

On October 23, 2018, the newly elected Ford government introduced Bill 47, the *Making Ontario Open for Business Act, 2018* ("Bill 47"). Bill 47, when passed, will repeal a substantial number of amendments made by Bill 148 – a move supported by employers province-wide, the Ontario Chamber of Commerce, and us here at CCPartners.

The legislation is also set to modernize Ontario's apprenticeship system, in part, by winding down the Ontario College of Trades.

The amendments to the *Employment Standards Act, 2000* are currently scheduled to come into force on the later of January 1, 2019 and the date of Royal Assent while the amendments to the *Labour Relations Act*, *1995* will take effect on the date of Royal Assent.

Employers must ensure that they remain compliant with the requirements of Bill 148 until Bill 47 comes into force.

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Part I: Amendments to the *Employment Standards Act, 2000* ("*ESA*")

Minimum Wage	
Pre-Bill 148	**General minimum wage** until September 30, 2017 - $11.40 **General minimum wage** as of October 1, 2017 - $11.60 **Student minimum wage** until September 30, 2017 - $10.70 **Student minimum wage** as of October 1, 2017 - $10.90 **Liquor Servers' minimum wage** until September 30, 2017 - $9.90 **Liquor Servers' minimum wage** as of October 1, 2017 - $10.10 **Homeworkers' minimum wage** until September 30, 2017 - $12.55 **Homeworkers' minimum wage** as of October 1, 2017 - $12.80
Bill 148 **Effective: January 1, 2018**	**General minimum wage** from January 1, 2018 to December 31, 2018 - $14.00 **General minimum wage** as of January 1, 2019 - $15.00 **Student minimum wage** from January 1, 2018 to December 31, 2018 - $13.15 **Student minimum wage** as of January 1, 2019 - $14.10 **Liquor Servers' minimum wage** from January 1, 2018 to December 31, 2018 - $12.20 **Liquor Servers' minimum wage** as of January 1, 2019 - $13.05 **Homeworkers' minimum wage** from January 1, 2018 to December 31, 2018 - $15.40 **Homeworkers' minimum wage** as of January 1, 2019 - $16.50 **Student minimum wage** – This rate applies to students under the age of 18 who work 28 hours a week or less when school is in session, or work during a school break or summer holidays. **Liquor Servers' minimum wage** – This hourly rate applies to employees who serve liquor directly to customers or guests in licensed premises as a regular part of their work. "Licensed premises" are businesses for which a license or permit has been issued under the *Liquor Licence Act*. If a server does not directly serve liquor to customers and regularly receives

	tips, they will be entitled to the general minimum wage. **Homeworkers' minimum wage** – Homeworkers are employees who do paid work in their own homes. For example, they may sew clothes for a clothing manufacturer, answer telephone calls for a call centre, or write software for a high-tech company. Students of any age, including those under the age of 18 years who are employed as homeworkers must be paid the homeworker's minimum wage. Regular wages is now defined as: wages other than overtime pay, public holiday pay, premium pay, vacation pay, domestic or sexual violence leave pay, personal emergency leave pay, termination pay, severance pay and termination of assignment pay and entitlements under a provision of an employee's contract of employment.
Bill 47	**General minimum wage** will freeze at $14 until 2020, at which point annual increases tied to inflation would restart. The scheduled increases for students, liquor servers, and homeworkers are similarly frozen until October 1, 2020.
Impact on Employers	The dramatic increase to the general minimum wage introduced by Bill 148 was a particular area of concern for Ontario employers. Faced with an overall increase of 32% in an 18 month period, businesses in Ontario were forced to either cut costs or pass along the increases to customers – a task that has proved difficult for many employers. Under Bill 47, employers are granted a welcome relief from the increase to $15.00 previously scheduled to come into effect as of January 1, 2019.

Equal Pay for Equal Work (Wage Parity between Part-Time and Full-Time Employees)	
Pre-Bill 148	The *ESA* did not previously provide any provisions on wage parity between contract, part-time, and full-time employees.
Bill 148 **Effective: April 1, 2018**	Where employees perform substantially the same kind of work in the same establishment, and their performance requires substantially the same skill, effort and responsibility, and their work is performed under similar working conditions, they shall all be paid the same, regardless of whether they are part-time, full-time, or contract employees. A difference in the rate of pay will only be allowed if pay is based on a seniority system or merit system, a system that measures earnings by quantity or quality of production, or any other factor other than sex or employment status. Bill 148 deletes the added definition of "seniority system" and no longer defines "seniority systems" to include those that base seniority on accumulated work hours. Further, the phrase "substantially the same" has been clarified to mean "substantially the same not necessarily identical". The proposed changes 'grand-father' wage rates that are contained in a collective agreement so long as it is in effect prior to April 1, 2018. Any new collective agreement that comes into effect after April 1, 2018 must comply with the parity in pay legislation. Bill 148 guarantees an employee the right to request about the wage rate paid to another employee and a review of their wages if the employee does not believe that wage parity has been achieved. The employer must provide either a wage adjustment or written reasons for declining the adjustment.
Bill 47	An employer will not be required to provide equal pay based on employment status to part-time, casual, and temporary employees.
Impact on Employers	Employers will be glad to see a return to the pre-Bill 148 language with respect to equal pay for equal work. While employers will still be required to provide equal pay on the basis of sex, Bill 47 removes the onerous requirement for employers to pay part-time, casual, and temporary employees at the same rate as full-time employees.

Scheduling and Short-Notice Schedule Changes	
Pre-Bill 148	The *ESA* does not currently regulate scheduling. There is no requirement for employers to post schedules in advance and there are no consequences for schedule changes that are done on short notice. The only protection that the *ESA* does provide in its current form is for an employee that typically works more than three hours being sent home after working less than three hours. In those cases, the employee must be paid at the minimum wage for three hours of work.
Bill 148	The language, "is required to present himself or herself" used in the current legislation stating that the rule is engaged where "an employee who regularly works more than 3 hours a day is required to present himself or herself for work but works less than three hours…." has been reinserted into the Bill. Where an employee that regularly works more than three hours per shift and is called in, but ultimately works less than three hours, despite being available to work longer, the employer shall pay the employee wages for three hours, equal to the greater of the following: • for three hours of work at their regular rate of pay; or, • the sum of (i) the amount that the employee earned for the time worked and (ii) wages equal to the employee's regular rate for the remainder of the time. Under this amendment, if an employee is entitled to some form of premium pay while actually working, the employee would remain entitled to that premium. If an employee's shift is cancelled within 48 hours of its start, the employee is entitled to payment of "wages for three hours", calculated as the greater of the same two amounts described above. If an employee is "on call" and is not called in, or is called in to work for less than three hours, the employee will be entitled to three hours of pay at their regular rate. The three hour rule calculation will require the payment of "wages for three hours", calculated as the greater of the same two amounts descried above. An employer is not required to pay an employee wages equal to the employee's regular rate for three hours of work if the employer cancels the employee's scheduled day of work or scheduled on call period within 48 hours before the time the employee was to commence work or commence being on call if:

- the employer is unable to provide work for the employee because of fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work;

- the nature of the employee's work is weather-dependent and the employer is unable to provide work for the employee for weather-related reasons; or

- the employer is unable to provide work for the employee for such other reasons as may be prescribed.

There is also a new exception to the minimum on-call pay rule, which will apply where a person is put on call for the purposes of ensuring the continued delivery of essential public services, and the person is not required to work.

An employee can refuse a request to work or be "on call" if the request is made less than 96 hours before the shift is supposed to start. As with the minimum on-call pay provisions, the new exception stated above applies here as well to ensure the continued delivery of essential public services, regardless of who delivers those services. This new exception adds to the other three exceptions in the Bill which include: to deal with an emergency, to remedy or reduce a threat to public safety, and other reasons as prescribed.

"Emergency" in this section now includes:

a) a situation or impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise; or

b) a situation in which a search and rescue operation takes place.

Bill 148 also adds several new record-keeping requirements for employers. Employers are required to keep a record of:

- The dates and times that the employee worked.

- If the employee has two or more regular rates of pay for work performed for the employer and, in a work week, the employee performed work for the employer in excess of the overtime threshold, the dates and times that the employee worked in excess of the overtime threshold at each rate of pay.

- The dates and times that the employee was scheduled to work or to be on call for work, and any changes made to

	the on call schedule. • Any cancellations of a scheduled day of work or scheduled on call period of the employee and the date and time of the cancellation.
Bill 47	Bill 47 repeals all of the scheduling provisions introduced by Bill 148. It addition, Bill 47 amends the "three hour rule" such that if an employee is regularly scheduled to work more than three hours a day, attends work, but works fewer than three hours, that employee will be entitled to the greater of: (1) the amount earned for the time worked plus the employee's regular rate for the remainder of the three hours, and (2) the employee's regular rate for three hours of work.
Impact on Employers	For businesses with unpredictable labour requirements, such as in the retail and hospitality industries, the scheduling requirements set to come into force under Bill 148 were a major cause for concern. The repeal of these requirements will allow Ontario employers to continue current scheduling practices and maintain the flexibility to respond to fluctuating staffing needs.
Personal Emergency Leave	
Pre-Bill 148	The legislation previously only entitled employees working in companies with 50 or more employees to 10 personal unpaid emergency leave days. These are job-protected leave days. The legislation also allowed employers to require medical notes to substantiate the need for a paid emergency leave day.
Bill 148 **Effective: January 1, 2018**	Bill 148 maintains the 10-day entitlement for personal emergency leave days, but now makes it mandatory for **2** of those days to be **paid.** The paid days must be used before the 8 unpaid days. This entitlement extends to all workplaces, not only those with 50 or more employees. However, an employee must have worked for an employer for one week before becoming entitled to the two paid days. Bill 148 further expands the scope of Personal Emergency Leave days to apply to time off work as a result of sexual or domestic violence experienced by the employee or a family member.

	If a paid day of leave falls on a day or at a time of day when overtime pay or shift premium would be payable by the employer, the employee is not entitled to overtime pay or shift premium for any leave taken under this section. Another critical blow to employers is that they can no longer require an employee to provide "sick notes" to substantiate any personal emergency leave days. Employers may still request notes, but employees can decline to provide them without fear of reprisal.
Bill 47	Bill 47 removes personal emergency leave in its entirety from the *ESA* and instead provides for three unpaid leaves. An employee with a minimum of two consecutive weeks of services will have the following leave entitlements under Bill 47: 1. *Sick Leave*: up to three days in each calendar year due to personal illness, injury, or medical emergency. 2. *Family Responsibility Leave*: up to three days in each calendar year due to the illness, injury, or medical emergency of selected family members. 3. *Bereavement Leave*: up to two days per calendar year due to the death of selected family members. Under Bill 47, employers may once again request that employees provide evidence reasonable in the circumstances to validate their entitlement to the leave. This may include requesting a medical note from a qualified health practitioner – a step that was impermissible with respect to personal emergency leave under Bill 148. Further, Bill 47 stipulates that if an employee takes leave, whether paid or unpaid, under the terms of their employment contract in circumstances for which the employee would also be entitled to take leave under the *ESA*, the employee is deemed to have taken their statutory leave. Bill 47 maintains the leave for domestic and sexual violence affecting an employee or an employee's child that were introduced by Bill 148. There are also no amendments with respect to parental leave, pregnancy leave, critical illness leave, family medical leave, child death leave, or crime-related child disappearance leave.
Impact on Employers	The introduction of personal emergency leave by Bill 148 has been an ongoing source of concern and confusion for Ontario employers. Bill 47 clarifies how statutory leave entitlements interact with an employee's contractual benefits to analogous leaves.

Temporary Help Agencies	
Pre-Bill 148	There is no corresponding provision under the previous legislation.
Bill 148 **Effective: January 1, 2018**	Under the equal pay for equal work provisions, Bill 148 would require assignment employees to be paid the same as employees of the agency's client. Equal pay is mandated for assignment employees where they: perform substantially the same work in the same establishment; utilize substantially the same skills and effort and have the same responsibilities; and the work is performed under similar conditions. If an assigned employee inquires about their rate of pay in comparison to non-assigned employees, the agency would have an obligation to reply and the employee cannot face reprisal for asking. Assignment employees may also request an adjustment to their pay without fear of reprisal. If the agency declines to adjust pay, they must provide written reasons for doing so. Bill 148 requires that a temporary help agency shall (a) record the number of hours worked by each assignment employee for each client of the agency in each day and each week; and (b) retain a copy of any written notice provided to an assignment employee. If Bill 148 is passed in its current state, as of January 1, 2018, an employee that is on an assignment that was scheduled to last 3 months or more must be given one week's written notice of termination or pay in lieu of notice. If working notice is provided, the agency may be able to offer one week of reasonable work during the notice period.
Bill 47	Bill 47 repeals the requirement for assignment employees to be paid the same as employees of the agency's client.
Impact on Employers	Once again, employers will benefit from a return to the pre-Bill 148 status quo.

Internships	
Pre-Bill 148	Under the *ESA*, unpaid interns are not classified as employees only if six stated conditions related to the receipt of training are met. These include: 1. The training is similar to that which is given in a vocational school. 2. The training is for the benefit of the individual 3. The person providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained. 4. The individual does not displace employees of the person providing the training. 5. The individual is not accorded a right to become an employee of the person providing the training. 6. The individual is advised that he or she will receive no remuneration for the time that he or she spends in training.
Bill 148 **Effective: January 1, 2018**	Bill 148 does not make any substantial changes to the existing legislation, but it provides some clarity as to when interns will be considered employees. Under Bill 148, if an intern receives training from an employer, and the training is for a skill that is used by the employees of the employer, then the intern will be considered an employee for the purposes of the ESA. An exemption exists where the intern performs the work under an approved program through an educational institution.
Bill 47	The amendments made under Bill 148 remain unchanged.
Impact on Employers	Employers will no longer be able to legally train interns outside of a formal process associated with an educational institution.
Recommendations	For employers that wish to continue on the practice of implementing interns in their workforce, it would be advised to

	connect with an educational institution to ensure that any such program is compliant with the ESA. Non-compliance with the amended legislation could result in having to pay wages for the time period in which an intern was with a company.
	Paid Vacations
Pre-Bill 148	Under the current legislation, there is no extra entitlement for employees that have been with an employer for five years or more. All employees are entitled to two weeks of vacation and vacation pay of 4%.
Bill 148 **Effective: January 1, 2018**	Bill 148 increases the mandatory vacation time for employee's that have been with the same employer for five years or more to three week's per year and vacation pay to 6%.
Bill 47	Bill 47 maintains the vacation entitlements implemented by Bill 148.
Impact on Employers	For most employers, this will have very little impact on their operations, as vacation for employees with five years of service or more will typically match or exceed the proposed change. However, for many small businesses that do not already offer these proposed entitlements, it will represent an increased overall cost, much like many other provisions of Bill 148.
Recommendations	For most employers, this provision will not have a significant impact on their operations. For those that it does affect, our recommendations are similar to the advice provided for wage increases, as ultimately this will result in an increased cost. Employers may want to look into whether any jobs can be done through automation. If it is possible, employers may look into reducing pension or benefit entitlements going forward in order to "claw-back" some of the increases that workers will be entitled to. In the restaurant industry, in order to maintain a competitive advantage, a "no-tipping" policy can be implemented.

	Finally, and perhaps inevitably, employers will be forced to either pass along the cost increases to customers or absorb the financial hit.
	Public Holiday Pay
Pre-Bill 148	The pre-Bill 148 method of calculating holiday pay was to take an employee's wages in the four weeks before the week of the holiday and dividing that number by 20. This takes into account how often an employee works when calculating holiday pay. Under the legislation, an employer can choose to pay an employee premium pay for working on a holiday, or they can pay the employee their regular wages for the day and substitute another paid day off.
Bill 148 **Effective: January 1, 2018**	Bill 148 introduces a new method for calculating public holiday pay. Under this new method, the pay required for holidays is calculated by taking an employee's total amount of regular wages earned in the previous pay period and dividing it by the number of days worked within that same period or if some other manner of calculation is prescribed, the amount determined using that manner of calculation Further, if employees agree to work on a public holiday and are entitled to a substitute holiday, the employer must provide the employee with a written statement which sets out the public holiday on which the employee will work, the public holiday that is being substituted, the date that is the substitute holiday and the date on which the statement was provided to the employee.
Bill 47	Bill 47 reverts to the public holiday pay formula in effect prior to Bill 148. (Note the Liberal Government had already reverted back to the previous calculation beginning with the Canada Day holiday with a view to further review of the provisions and impacts on employers).
Impact on Employers	For employers with part-time workers or workers that work irregularly, change introduced by Bill 148 initially resulted in higher costs; however, after realizing the new calculation method led to absurd results the Liberal government temporarily reverted back to the initial formula.

Overtime Pay	
Pre-Bill 148	Under the current legislations, an employer must pay an employee at one and one-half time his or her regular rate for work in excess of 44 hours per week or another prescribed threshold if applicable.
Bill 148 **Effective: January 1, 2018**	For employees with more than one role and paygrade with an employer, Bill 148 gets rid of the "blended rate" that is currently used for overtime pay and instead requires the overtime rate to be based on the rate of pay for the work being performed during the overtime hours.
Bill 47	The amendments made under Bill 148 remain unchanged.
Impact on Employers	While this impact is likely to be minor on employers, it is another restriction on scheduling flexibility that employers may want to take into account. To reduce costs, employers may want to structure a dual-rate employee's schedule in a way that entitles them to overtime pay at their lower rate rather than their higher rate.
Recommendations	If overtime is expected to be incurred, employers should structure an employee's schedule in a way that entitles the employee to overtime pay at their lower wage rate.
Electronic Agreements	
Pre-Bill 148	This is not covered by the current legislation, but is a practice that has already been adopted by the Ministry of Labour.
Bill 148 **Effective: January 1, 2018**	Bill 148 allows any written agreement required by the ESA to be accepted electronically. This simply codifies an existing practice.
Bill 47	The amendments made under Bill 148 remain unchanged.

Impact on Employers	Employers are now able to rely on an electronic ESA-related agreement.
Recommendations	Continue to increase use of technology to implement agreements and improve record-keeping.
	Crown Employees
Pre-Bill 148	Crown and Crown agency employees were not subject to the ESA provisions mentioned above.
Bill 148 **Effective: January 1, 2018**	Bill 148 eliminates the exemption of the ESA provisions that do not apply to Crown or Crown agency employees. Employees of these two groups will now be subject to the ESA provisions regarding: hours of work; minimum wage; overtime; vacation; and public holidays.
Bill 47	The amendments made under Bill 148 remain unchanged.
Impact on Employers	This will not have a significant impact on employers. While it may make it more attractive for talent to work for the Crown, this is unlikely. As Bill 148 is provincially proposed legislation, it can be presumed that the province will provide the funding to accommodate the added expenses to their own agencies.
Recommendations	None.
	Domestic or Sexual Violence Leave
Pre-Bill 148	The *ESA* previously did not provide for any provisions on domestic or sexual violence leave.
Bill 148 **Effective: January 1,**	Under this new section, an employee who has been employed for at least 13 consecutive weeks will be entitled to up to 10 days and up to 15 weeks of job-protected leave if the employee or a child of the employee experiences domestic or sexual violence or the threat of domestic or sexual violence.

2018	The first **5** days of this leave will be **paid**. The payment will generally be equal to the wages that the employee would have earned had they not taken the leave, although an alternate calculation is provided for employees who receive performance-related wages, such as commissions or a piece work rate. The domestic or sexual violence leave must be taken for one of the following purposes: • to seek medical attention for a physical or psychological injury or disability caused by the domestic or sexual violence; • to obtain services from a victim services organization; • to obtain psychological or other professional counselling; • to seek legal or law enforcement assistance; or, • any other prescribed purposes. Additionally, if a paid day of leave falls on a day or at a time of day when overtime pay, a shift premium, or both would be payable by the employer, a) the employee will not be entitled to more than his or her regular rate for any leave taken under this section; and, b) the employee will not be entitled to shift premium for any leave taken under this section. This leave also requires employers to establish mechanisms to ensure confidentiality of records related to a leave, and to specify a limited range of permitted disclosures.
Bill 47	The amendments made under Bill 148 remain unchanged.
Impact on Employers	The impact on employers would arise from the requirement of 5 paid days of leave, as this pushes further costs onto employers. The requirement on employer to have mechanisms in place to ensure confidentiality further increases the burden on employers to employ resources that protects confidentiality of employees that take this leave.

Recommendations	Amendments to current leave policies to include this new leave.
	Related Employer
Pre-Bill 148	Prior to Bill 148, the legislation required the entities in question to have some level of common control or ownership.
Bill 148 **Effective: January 1, 2018**	Bill 148 eliminates the "intent or effect" requirement for businesses to be considered common or related employers. For two entities to be considered related employers under the ESA, Bill 148 only requires them to carry on associated or related activities.
Bill 47	The amendments introduced by Bill 148 remain unchanged.
Impact on Employers	It remains to be seen how these changes will be interpreted by adjudicators. This may result in an overhaul of how related employer claims are treated, or it may have no measurable impact. For employers that may have gone bankrupt before paying out termination and severance to employees, this legislation is aimed at ending that practice.
Recommendations	Take a 'wait and see' approach. It remains to be seen what impact this change will have.
	"Self Help" Requirement
Pre-Bill 148	Current legislation requires employees to raise concerns about ESA violations with their employer first, before filing a complaint with the Ministry.
Bill 148 **Effective: January 1,**	Bill 148 removes the requirement for employees to raise an alleged contravention with their employer before filing a claim with the Ministry of Labour.

2018	
Bill 47	The amendments introduced by Bill 148 remain unchanged.
Impact on Employers	Rather than solving issues that may be unknown to the employer, employers and employees must now undergo a bureaucratic process involving that Ministry.
Recommendations	Employers should prepare for an increase in claims as a result of breaches of the ESA. Even if these breaches are unintentional or unknown to the employer, the formal process must now be adhered to.
	Independent Contractors
Pre-Bill 148	The legislation is similar, although employers do not currently bear the burden of proof in independent contractor/employee cases. Under the common law, if a worker is misclassified as an independent contractor, they will attract the same rights under the ESA as an employee.
Bill 148 **Effective: November 27, 2017**	Bill 148 prohibits an employer from treating a person as if they are not an employee when they are an employee. This is aimed at preventing employers from misclassifying workers as independent contractors rather than employees. During an inspection or investigation under the ESA, if an employer claims that a worker is not an employee, they bear the burden of proving their claim.
Bill 47	Under Bill 47, the employer will no longer bear the burden of proving the an individual is an independent contractor rather than an employee.
Impact on Employers	Employers that currently hire independent contractors would be prudent to seek legal advice to see if they are properly classifying the persons that do work for them.

Recommendations	Employers should consult a legal professional to ensure that they are in compliance with the legal standards.
Fines for Contravention	
Pre-Bill 148	Fines for contravention were originally set at $250 (first contravention), and $1000 (third contravention).
Bill 148	`Bill 148 raised the fines for contravention to $350 (first contravention), $700 (second contravention), and $1500 (third contravention).
Bill 47	Bill 47 reversed the amendments introduced by Bill 148.
Impact for Employers	Employers will welcome a reduction in fines.

Part II: Amendments to the *Labour Relations Act*

Scope and Coverage	
Current Legislation	Under the current legislative framework, certain groups of employees are exempt from the protections of the *Labour Relations Act* – individuals engaged in trapping or hunting, agriculture or horticulture workers, domestic worker employed in a private home, labour mediators and conciliators, and provincial court judges. Additionally, licenced professionals are not classified as employees under the LRA if they are employed in their professional capacity. This includes licenced members of the architectural, dental, land surveying, legal or medical profession entitled to practice in Ontario. Similarly, individuals who exercise a managerial function or are employed in a confidential capacity in matters relating to labour relations will not be considered employees for the purposes of the Act.
Bill 148	Bill 148 does not alter or remove the existing exemptions.
Bill 47	Bill 47 does not alter or remove the existing exemptions.
Impact on Employers	The Ministry of Labour has stated that it "will work with affected ministries to remove the exclusions under the *LRA* taking into account ongoing litigation." This statement suggests that while no alterations to the existing exemptions has yet occurred, these changes may still occur moving forward.
Recommendations	Employers should keep informed about continuing developments in this area.
Remedial Certification Requirements	
Pre-Bill 148	Previously, remedial certification (i.e. certification without a vote or despite the results of a vote) is only available as an

	"extraordinary" remedy where certain legal thresholds have been met (section 11).
Bill 148 **Effective: January 1, 2018**	Under Bill 148, remedial certification becomes the "presumptive remedy" where unfair labour practices have been committed and the Board finds that, as a result, the true wishes of the employees cannot be ascertained by a vote or the employer's actions prevented the union from achieving the forty (40) percent support required for a vote.
Bill 47	Bill 47 eliminates the amendments introduced by Bill 148 and restores the previous provisions with respect to remedial certification.
Impact on Employers	Remedial certification is once again an extraordinary remedy rather than a presumptive remedy for unfair labour practices during union organizing.
	Card-Based Certification
Pre-Bill 148	In 1995, Bill 7 eliminated card-based certification and introduced a mandatory voting model. In this model, certification occurs when the union receives the majority of votes. More recently in 2005, Bill 40 reintroduced the practice of card-based certification in the construction industry. Under this model, the Ontario Labour Relations Board will determine whether certification has occurred based on the evidence provided by the union and the employer's response to that evidence.
Bill 148 **Effective: January 1, 2018**	Bill 148 allows for a trade union to apply for card-based certification if the employer operates in the "business services industry", "home care and community services industry", or "temporary help agency." Bill 148 further extends to the government the power under the *Labour Relation Act* to determine whether employers are eligible for card-based certification. In doing so, the government may further define or clarify the meaning of "business services industry", "home care and community services industry", or "temporary help agency." This means that moving forward card-based certification may be extended to include a broader range of employers.

Bill 47	Bill 47 eliminates the card-based certification of the industries introduced by Bill 148. If an application for certification in these industries was filed before October 23, 2018, and is not determined by the date of Royal Assent, it will be determined according to the provisions of Bill1 48. However subsequent applications will be determined by secret ballot vote.
Impact on Employers	Under Bill 47, only construction industry employers are subject to card-based certification. It is generally the view of labour practioners that card-based certifications are undemocratic, open to abuse, and much harder to fight than vote based certifications. A return to vote-based certifications was welcomed by employers, however, CCP is disappointed that the government did not consider a return to vote-based certifications in the construction industry.
First Agreement Mediation and Arbitration	
Pre-Bill 148	Under the previous statutory framework, either the union or the employer may apply to the Ontario Labour Relations Board for first agreement arbitration. If a displacement application for certification by a competing union or an application for decertification is filed before the Board decides the application for first agreement arbitration, the new application stays the first agreement arbitration proceedings.
Bill 148 **Effective: January 1, 2018**	Bill 148 adopts the recommendation of the Changing Workplaces Review that first agreement mediation and arbitration must be completed prior to the determination of a new application for decertification or a displacement certification application. Additionally, where the union has given notice of intent to bargain or where there is a first agreement arbitration, amendments permit either party to request educational support in the practice of labour relations and collective bargaining and will require the Minister or first collective agreement mediator to make such supports available. Further, either the union or the employer may apply for the appointment of a first agreement mediator following the issuance of a no board report by the Minister. If such an application has been filed, the Minister is required to appoint a mediator. Once the appointment has been made, a 45-day mediation period will commence. During this period there can

	be no strike or lock-out. OLRB shall not deal with a decertification or displacement application until 45 days after the Minister appoints a mediator (increased from 20 days). At any time at least 45 days after the Minster has appointed a mediator, and if the parties have not accepted a collective agreement within this period, either party may apply for first agreement arbitration. Pending displacement certification applications or decertification applications will be held in abeyance until the first arbitration mediation and arbitration process has concluded.
Bill 47	Bill 47 repeals the amendments made by Bill 148 and returns to the previous statutory framework; however, there are transition provisions that may impact current first-agreement bargaining.
Impact on Employers	First contract arbitration is now restricted back to limited and specified circumstances.
Union Access to Employee Information	
Pre-Bill 148	Prior to Bill 148, there was no comparable disclosure requirement.
Bill 148 **Effective: January 1, 2018**	Bill 148 requires employers to provide, if requested, the union with the names and contact information of employees in the proposed bargaining unit in all applications for certification where the union can demonstrate that it has at least 20% membership support in that unit. This includes card-based certification. The contact information required includes the employee's telephone numbers and personal email addresses if the employer has access to such information. This disclosure is mandatory where the employee has provided the information to the employer. The Board may use its discretion and require that the list also include: • other information relating to the employee, including job title and business address; and, • any other means of contact that the employee has provided to the employer (except for a home address). Further, where an OLRB order directing an employer to provide the Union with an employee list is granted, the

confidentiality of the information is to be protected. Amendments required that:

- the employer must ensure that all reasonable steps are taken to protect the security and confidentiality of the list, including during its creation, compilation, storage, handling, transportation, transfer and transmission;
- the trade union must ensure that all reasonable steps are taken to protect the security and confidentiality of the list, and to prevent unauthorized access to the list; and,
- where the list is required to be destroyed, destruction of the list must be in a way that it cannot be reconstructed or retrieved.

This requirement does not apply in circumstances where a new union is seeking to displace the existing union in a workplace.

The Ontario Labour Relations Board will decide whether at least 20% of the employees in the bargaining unit appear to be union members. If this threshold is met, the Board will instruct the employer to supply the required information. If the threshold is not met the application will be dismissed.

There is no longer the requirement that the trade union must use the same proposed bargaining unit in a subsequent certification application that it used in its application to obtain the employee list. This would eliminate the need for the union or the employer to litigate the appropriateness of a potential bargaining unit at this preliminary stage.

The employer may file a notice of disagreement on the Board if it disagrees with either the union's proposed bargaining unit or the union's estimate of their support among the unit. This notice must be filed within two days of the application. The employer must indicate whether it believes the proposed bargaining unit is appropriate for the purposes of collective bargaining and provide an estimate of the number of employees in the proposed bargaining unit. If the employer has filed a notice of disagreement, the Board will first determine whether the union's proposed bargaining unit is appropriate. If the unit is found to be appropriate, the Board will proceed to consider whether the 20% threshold is met. Otherwise, the application will be dismissed.

The application for the disclosure of employee information does not apply to employers in the construction industry.

Additionally, it is important to note that unlike when an employer receives notice of a certification application, a request for employee information will not impose a statutory freeze.

Bill 47	Bill 47 repeals the disclosure requirements introduced by Bill 148. If a trade union has made an application for an employee list that has not been determined by the Labour Relations Board on the date of Royal Assent, the application will terminate. Further, any employee list provided under Bill 148 shall be destroyed by the trade union in a way that it cannot be reconstructed or retrieved.
Impact on Employers	This amendment addresses the privacy concerns raised by Bill 148.
	Consolidation of Bargaining Units
Current Legislation	Prior to the implementation of Bill 148, the Ontario Labour Relations Board does not have the power to consolidate bargaining units.
Bill 148 **Effective: January 1, 2018**	Bill 148 now allows an employer and trade union (or council of trade unions) that represents multiple bargaining units to jointly agree in writing to review the structure of the bargaining units. On a joint application of parties, the provisions would allow them to agree to the following changes, subject to the consent of the OLRB: • consolidating bargaining units; • amending descriptions of bargaining units; • making a collective agreement to apply to the consolidated units and terminating the existing collective agreements that applied to the pre-consolidated units; • amending collective agreements, including expiry dates and seniority provisions. ; • terminate the operation of a collective agreement that applied in respect of an existing bargaining unit before the consolidation; and,

	• permit a party to give notice to bargain collectively. Bill 148 gives additional powers to the Ontario Labour Relations Board to consolidate bargaining units in circumstances where an employer has multiple different units of employees. This power applies even where the different units within the workplace are represented by multiple unions. This change of structure may be made where the pre-existing bargaining units are found to be "no longer appropriate for collective bargaining." In the event that the Board chooses to consolidate units represented by different unions, it may decide which of the unions applies to the new unknit. This will accordingly terminate the bargaining rights of the surplus union. The Board will also have the power to determine if the collective agreement will apply to "with or without amendments" to the consolidated unit.
Bill 47	Bill 47 will remove the right of a party to seek to have a newly certified bargaining unit consolidated with an existing unit represented by the same trade union. The Labour Relations Board will be empowered to review the structure of bargaining units where existing units are no longer appropriate.
Impact on Employers	The review powers of the Labour Relations Board are now significantly limited with respect to the reorganization of bargaining units.
Extending Collective Bargaining Obligation: Building Services	
Pre-Bill 148	No corresponding provision under the previous legislation.
Bill 148 **Effective: January 1, 2018**	Bill 148 grants successor rights when building service contracts are retendered. This includes: building cleaning services, food services, and security services. The regulation also extends these rights to other publically funded contracted services.
Bill 47	The amendments made under Bill 148 remain unchanged. However, the authority to expand successor rights for publically-funded services is repealed.

Impact on Employers	Under the proposed legislation, following the end of a contract for building services if a new producer contracts to provide those services it will be deemed a sale of business. Accordingly, the new service provider will be bound by the existing collective agreement and will be responsible for any outstanding obligations of the previous provider.
Recommendations	Employers who engage in subcontracted work should be mindful that contracting to provide services in certain sectors may result in collective agreement obligations.
Extending Just Cause Requirement for Discipline and Discharge	
Pre-Bill 148	No corresponding provision under the existing legislation.
Bill 148 **Effective: January 1, 2018**	It is important to note that probationary employees are not excluded from this just cause protection. Bill 148 provides that if a trade union is certified as the bargaining agent of employees in a bargaining unit, the employer cannot discharge or discipline an employee in that bargaining unit without just cause during the period that begins on the date of certification and ends on the earlier of the date on which a first collective agreement is entered and the date on which the trade union no longer represents the employees in the bargaining unit.
Bill 47	The amendments made under Bill 148 remain unchanged.
Impact on Employers	The extension of just cause protections under Bill 148, and preserved under Bill 47, continue to significantly limit an employer's ability to discipline and discharge employees while the collective agreement process is ongoing. This will include the discharge of probationary employees, as there is no such qualification to the just cause protections in this section.
Recommendations	Training for supervisory staff on new rights and obligations. Adopt a progressive disciplinary approach which better meets the "just cause" standard.

Return to Work After Strike or Lock-Out	
Pre-Bill 148	Under the prior legislation, if an employee engaging in a lawful strike makes an application in writing to return to work within six months of the commencement of the strike, the employer must reinstate that employer to his or her former position.
Bill 148 **Effective: January 1, 2018**	Bill 148 eliminates the existing six-month cap on an employee's right to return to work during a strike.
Bill 47	Bill 47 eliminated the amendments introduced by Bill 148.
Impact on Employers	This will likely have a minimal impact on employers as in most cases issues surrounding return to work are agreed upon by the parties when establishing return to work protocols.
Recommendations	Ensure that those hired during a strike or lockout are informed of the temporary nature of the opportunity.
Ontario Labour Relations Board Expanded Power to Grant Interim Relief	
Pre-Bill 148	Prior to the implementation of Bill 148, the Ontario Labour Relations Board does not have the power to grant substantive interim relief, save for the power to order interim reinstatement in the face of an employee termination during an organizing campaign.
Bill 148 **Effective: January 1, 2018**	Bill 148 provides the Ontario Labour Relations Board with the unfettered power to make interim decisions and orders in any proceeding. Further, an interim decision or order need not be accompanied by reasons, written or otherwise.

Bill 47	The amendments made under Bill 148 remain unchanged.
Impact on Employers	May be used by Unions to stop employers from introducing significant workplace changes.
Recommendations	Ensure that all actions are well documented, based on business needs and, where possible, communicated in advance.
Fines for Contravention	
Pre-Bill 148	Maximum fines under the *LRA* were capped at $2000 for individuals and $25,000 for corporations.
Bill 148	Bill 148 increased maximum fines to $5000 for individuals and $100,000 for corporations.
Bill 47	The amendments made under Bill 148 will be revoked.
Impact on Employers	Employers will welcome a reduction in fines.