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Employment

Going Full Circle

Significant Employment Legislative Reforms Clawed Back as of January 1, 2019

The condominium community in Ontario saw many hefty legislative reforms between November 2017 and April 2018. Those changes were effected primarily under the amended Condominium Act, 1998, the new Condominium Management Services Act, 2015 and the Fair Workplaces, Better Jobs Act, 2017 ("Bill 148"), though there were other statutory amendments impacting condominiums . And just as the industry was adjusting to the overabundance of legislative change, many of the employment law reforms were swiftly clawed back, effective January 1, 2019.

Specifically, on November 21, 2018, the provincial government passed Bill 47, the Making Ontario Open for Business Act, 2018. Bill 47 was the current government's reaction to the recent amendments to both the Employment Standards Act, 2000 ("ESA") and the Labour Relations Act ("LRA") introduced under Bill 148. This article only focuses on certain of the ESA changes.

Changes to the ESA

Bill 148 created a lot of buzz when introduced, primarily because of the robust increases in paid time, leave entitlements and scheduling rights it offered Ontario employees. Many employers in the condominium industry, including condominium management companies and condominium corporations, took considerable time and effort to ensure that their employment agreements and workplace policies complied with the new standards. Among other amendments, they adjusted pay rates to meet minimum wage requirements, eliminated pay gaps between employees on the basis of employment status (that is, whether the employee was a part-time, casual, or temporary), granted three paid weeks of vacation to employees with 5 or more years of service and made other necessary changes to workplace pay, benefits and standards.

Many employers also pro-actively developed policies in contemplation of the highly anticipated scheduling changes set to be introduced as of January 1, 2019. As a result of Bill 47, however, these scheduling standards never became law.

The following represents some of the most significant changes to the ESA under Bill 47, all of which will have some impact on employers within the condominium industry, and otherwise. The impact largely represents a decrease in labour costs and an increase in workplace flexibility.

Minimum Wage

Bill 148 provided for an increase to the minimum wage to $15 per hour effective January 1, 2019. Under Bill 47, the minimum wage will be maintained at $14 per hour until October 1, 2020. At that time, it will be subject to an annual inflation adjustment.

Equal Pay

The "equal pay for equal work" provisions under Bill 148 prohibited employers from paying different pay rates based on employment status (i.e., whether employees are part-time, casual, or temporary). For example, a relief superintendent had to be paid the same rate as a full-time superintendent, unless the pay discrepancy was based on something other than the superintendent's employment status. This provision has been repealed and employers can now pay different wage rates to full-time and other employees, though they remain prohibited from doing so on the basis of sex or any other ground set out in the Human Rights Code.

ILLUSTRATION BY JASON SCHNEIDER

Any employer who has already amended their employment agreements and workplace policies to reflect the Bill 148 changes will have to exercise prudence if they wish to rollback any of those new entitlements

Leaves of Absence

The former law gave employees two paid sick days and eight unpaid emergency leave days. Employers were not permitted to ask employees to provide a medical note to establish entitlement to the days. Under Bill 47, after two weeks of employment, an employee is entitled to the following unpaid leave days per year:

- three days off for personal illness, injury or a medical emergency;
- three days off for an illness, injury, medical emergency or another urgent matter involving certain family members;
- two days off as bereavement leave following the death of certain family members.

In addition, employers now have the right to request a doctor's note to establish entitlement to the unpaid leave.

Scheduling

The scheduling provisions under Bill 148 which were set to take effect on January 1, 2019 have been repealed. Employees will no longer have the right to request schedule or work location changes or to refuse last minute requests to work unscheduled shifts. Specifically, employees will not be entitled to:

- request schedule changes and/or workplace location changes after three months of employment, or otherwise. Under the Bill 148 changes, an employer could refuse this request, but it had to provide reasons for the refusal;
- refuse shift assignments if assigned with less than 96 hours' of notice to the employee;
- be paid three hours' wages upon reporting for work if the employee works less than three hours;
- - be paid 3 hours' pay if they are on call and not required to work fewer than three hours; or
- be paid three hours' regular wages if their work shift is cancelled with less than 48 hours of notice.

Misclassification of Employees as Independent Contractors.

Under Bill 148, there was a reverse-onus provision which required employers to establish that a worker was not an employee. Under Bill 47, the evidentiary burden has shifted back to the employee.

Penalties for Breach

Bill 47 has reverted back to the maximum administrative penalties which existed prior to Bill 148. This means a maximum fine of $250, $500 or $1000, depending on the nature of the particular contravention. The Bill 148 amounts were $350, $700 and $1500.

Key Takeaway

Subject to any employment contracts or collective bargaining agreements, the

Bill 47 changes mean employers have fewer financial and scheduling obligations to their employees. In addition, they face reduced penalties for any ESA breaches.

That noted, employers should proceed cautiously. Any employer who has already amended their employment agreements and workplace policies to reflect the Bill 148 changes will have to exercise prudence if they wish to rollback any of those new entitlements. For example, if a condominium corporation has already granted its concierge two paid personal emergency leave days, should it wish to reduce this entitlement, it will have to do so by providing reasonable notice of the change or, alternatively, fresh "consideration" (usually, money) which is accepted by the employee. Even in light of Bill 47, a unilateral reduction in an employee's pay or benefits could risk a constructive dismissal claim.

A Few Commonly Asked Questions

Are employees entitled to be paid for being on-call?

No. Subject to any employment or collective bargaining agreement, an employee is not entitled to compensation for merely being on-call if not ultimately called in to work.

Are employees entitled to be paid a minimum of three hours wages if they are called in to work and work less than three hours?

Yes. Bill 47 still requires that an employer pay a minimum of three hours' regular wages to an employee who regularly works more than three hours a day, is called in to work, and actually works less than three hours.

Are employees with five or more years of service still entitled to three weeks' vacation?

Yes. The Bill 148 amendments giving employees with five years' service no less than three weeks' of paid vacation time per year remains intact.

What about some of the new leave provisions under Bill 148?

Extended and new leaves of absence under Bill 148 are not impacted by Bill 47. Specifically, employees remain entitled to increased pregnancy leave (increased from 6 weeks to 12 weeks for employees who experience a stillbirth or miscarriage). In addition, they are entitled to extended parental leave (61 weeks or 63 weeks, depending on whether a pregnancy leave is taken), and expanded critical illness and family medical leave (up to 17 weeks to provide care and support for a critically ill adult family member or 37 weeks for a child, and 28 weeks to provide care or support to a family member who has a serious medical condition with a significant risk of death within 26 weeks, respectively).

The new domestic or sexual violence leave also remains intact. This leave allows employees with 13 weeks of employment to take a leave of absence if they or their child experiences domestic or sexual violence or the threat of domestic or sexual violence. The leave can be up to 10 days or 15 weeks (if taken as full weeks), and the first five days of the leave must be paid.

All leaves of absence are cumulative, and not concurrent, meaning an employee can take any applicable leaves consecutively, one after the other.