MANAGEMENT
COUNSEL
Employment and Labour Law Update

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Just a Phone Call Away – Changes Coming to Minimum Pay for On-Call Work

Adam James
416.217.2248
ajames@sherrardkuzz.com

Unpredictable workflow can make scheduling a challenge. One common tool employers use to address this challenge is on-call staff: an employee remains available to be called in to work and must work if called.

The concept of on-call work is not itself problematic. Many jobs lend themselves to an on-call arrangement. Electricians, plumbers, IT professionals, doctors, and nurses are just a few examples. However, while holding oneself on standby may not be particularly onerous it is, as the Supreme Court of Canada recently noted "*a period of time during which the employer exercises a degree of control over the movements and activities of [an employee]. This exercise of control benefits the employer, who might otherwise have to employ [other employees] to work [after hours] to ensure a timely response to urgent [matters]*". To address this, Bill 148 will amend the Ontario *Employment Standards Act, 2000* ("*ESA*") to require compensation for an on-call employee even if the employee is not called in to work.

Under the Bill 148 amendments an on-call employee will be entitled to a minimum of three hours of pay at the employee's regular rate even if the employee isn't called to work.

At present, the *ESA* does not require an employer to compensate an employee for time spent on-call unless that employee is called to work. However, where an employee regularly works more than three hours but is called in and works fewer than three hours the employee is entitled to a minimum of three hours of pay at minimum wage or the employee's regular wage, whichever is greater (the "three hour rule").

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On **January 1, 2019**, the law will change bringing with it the potential to dramatically increase the cost of on-call work.

As of January 1, 2019, an employee will have the right to refuse a shift (or on-call period) where not previously scheduled and where the request is made fewer than 96 hours before the proposed start time. An employee will also be entitled to three hours of pay at the regular rate if an employee's entire scheduled day of work (or scheduled on-call period) is cancelled within 48 hours of its intended start.

Under the Bill 148 amendments an on-call employee will be entitled to a minimum of three hours of pay at the employee's regular rate even if the employee isn't called to work. That is, where an employee is on-call and is not required to work, or is called in but works for fewer than three hours despite being available to work longer, the employee is entitled to at least three hours of pay. This revised three hour rule will apply once in every 24-hour period the employee is on-call.

In addition, as of January 1, 2019, an employee will have the right to refuse a shift (or on-call period) where not previously scheduled and where the request is made fewer than 96 hours before the proposed start time. An employee will also be entitled to three hours of pay at the regular rate if an employee's entire scheduled day of work (or scheduled on-call period) is cancelled within 48 hours of its intended start.

Exemptions

These laws will not apply as follows:

- Where the employer is unable to provide work for an employee due to an extraordinary cause beyond the employer's control that results in a work stoppage (fire, storm, power failure, *etc.*), an employee will not be entitled to three hours' pay where the employee works less than three hours, or where the employee has the day of work (or on-call period) cancelled with less than 48 hours' notice.
- To an on-call shift where an employee is on-call to ensure the continued delivery of an essential public service and is not called into work.
- To a cancelled day of work (or on-call period) where the nature of the work is weather-dependent and the employer cannot provide the work for weather-related reasons. Note: It remains to be seen whether this exemption will be applied liberally to an employer whose business is only indirectly impacted by weather (for example, a warehousing operation where the product does not arrive due to a storm).

In addition, an employee will have no right to refuse to work or be on-call where the work deals with an emergency situation, remedies or reduces a threat to public safety, or is necessary to ensure the continued delivery of an essential public service (regardless of who delivers those services).

Finally, Bill 148 recognizes collective agreement provisions may conflict with the scheduling provisions under the new legislation. Accordingly, any provision of a collective agreement in force as of January 1, 2019 that conflicts with the on-call pay entitlement, the right to refuse a shift or the right to cancel a scheduled day of work (or on call period), is grandfathered to the earlier of the expiry of the collective agreement or January 1, 2020. After January 1, 2020, all collective agreements in Ontario must comply with the requirements under Bill 148.

It remains to be seen whether Ontario's new provincial government will seek to amend or repeal these scheduling changes. No mention was made during the election campaign, although rumours now swirl.

Tips for employers

Adapting to the scheduling changes under Bill 148 will require an honest look at your organization's current practices and some strategic thinking about your operational needs. Ask yourself:

- Is the work truly "on-call" or could it be scheduled inside regular business hours?
- How far in advance do you reasonably know about your organization's scheduling needs?
- How frequently is an on-call employee actually called in to work?
- When an employee is called in, does he/she work for at least three hours?
- If you transition from on-call to scheduled shifts and the work volume is lower than anticipated, are there useful tasks an employee can do for at least three hours?
- Would a voluntary call-in list work for your organization? In that case, an employee would not be *required* to hold him or herself available for work. If the employee is called and is not available to work, the employer would simply move to the next employee on the voluntary list.

It remains to be seen whether Ontario's new provincial government will seek to amend or repeal these scheduling changes. No mention was made during the election campaign, although rumours now swirl. Unless and until we hear definitively, now is the time to begin preparing for the new scheduling laws.

To learn more and for assistance, contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

The new Ontario government is rumoured to be considering a complete repeal of Bill 148 save and except the most recent increase to the general minimum wage to $14.00 per hour.

Equal Pay for Equal Work

What does this mean - and not mean - for employers?

Jeffrey Stewart
416.217.2228
jstewart@sherrardkuzz.com

One of the most significant changes Bill 148 made to Ontario's *Employment Standards Act, 2000* ("*ESA*") is to require "equal pay for equal work" among employees of different employment status (*e.g.,* part-time, temporary or full-time). While this may sound simple there is still considerable confusion about what "equal pay for equal work" means - and does not mean - for Ontario employers.

In a nutshell

As of April 1, 2018, an employer is prohibited from paying employees different rates of pay because the employees have a different employment status, where:

- the respective employees perform substantially the same kind of work in the same establishment
- performance requires substantially the same skill, effort and responsibility, and
- work is performed under similar working conditions

The equal pay for equal work requirement also applies to a temporary or contract employee. A temporary help agency must pay an assignment employee the rate of pay received by the client's direct employee if the above-noted factors are met.

The meaning of "employment status"

An employer is not required to pay all of its employees doing the same work the same rate of pay. The law only prohibits an employer from paying different rates of pay because of a difference in employment status.

The ESA defines a "difference in employment status" as a difference in:

- the number of hours regularly worked by the employees, or
- the term of their employment, including a difference in permanent, temporary, seasonal or casual status.

For example, an employer cannot pay a part-time or temporary employee less than a full-time employee solely because the former is part-time or temporary. An employer can pay two permanent full-time employees different rates of pay as there is no difference in their employment status.[1]

Exceptions

The equal pay for equal work provisions do not apply if the difference in pay is made on the basis of: (a) a seniority system; (b) a merit system; (c) a system measuring earnings by quantity or quality of production; or (d) any other factor other than sex or employment status.

Seniority system: Seniority refers to an employee's length of service with the employer. This will generally be calculated on a yearly or hourly basis.

Merit system: "Merit system" is not defined in the *ESA*. However, its definition will likely be consistent with the *ESA*'s requirements regarding equal pay for equal work based on sex. Therefore an employer will likely need to establish: (a) all affected employees are aware of the merit system plan; (b) objective appraisal criteria have been established; and (c) the system is applied equally to employees regardless of employment status.

A system measuring earnings by quantity or quality of production: This includes a piece work compensation plan.

Any other factor: The *ESA* does not define "any other factor". However, an example would be paying a full-time employee more than a casual employee performing similar work to recognize the full-time employee's greater experience. Similarly, an assignment employee can be paid less than a client's direct employee if the difference is based on any factor other than sex or employment status.

Rate of pay review

Under the new law, an employee has a right to a review of his or her rate of pay. Upon request from an employee, an employer is required to review the employee's rate of pay and either make an adjustment or provide written reasons why an adjustment is not required. An employer is not required to disclose pay information about other employees. One final note on this issue: the *ESA* protects an employee against reprisal. As such, an employee cannot be disciplined for requesting information about another employee's rate of pay or for requesting a review of his or her own rate of pay.

Impact on a collective agreement

It is common for a collective agreement to differentiate among the pay rates of full-time and part-time employees. To address this, Bill 148 provides a brief period of grandfathering for a collective agreement in effect on April 1, 2018, to the earlier of the expiry of the collective agreement or January 1, 2020. After January 1, 2020, all collective agreements in Ontario must comply with the requirements under Bill 148.

Next steps for employers

The *ESA* requires the Minister of Labour to commence a review of the equal pay provisions by April 1, 2021. At that time, employers and other stakeholders will have an opportunity to provide feedback and recommend changes. Until then, there are steps you as an employer can take to comply with the new law:

1. Evaluate your organization's pay structures to determine if employees of different employment status are paid differently and, if so, why.
2. Establish a formal and documented pay structure. This will help your organization efficiently and consistently respond to an employee's request for review, and provide documentation if audited.
3. If your organization uses temporary help, ensure the contract between your organization and temporary help agency includes a requirement the agency pay an assignment employee in accordance with the *ESA*, and indemnify your organization should this not happen and liability result.

[1] Unless the difference in the rate of pay is based on a protected ground such as the employee's sex.

For more information and assistance, contact the employment law experts at Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

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Seminar Series

Please join us at our next HReview Breakfast Seminar:

Beware Ye of Little Faith

An employer's duty to act in *good faith* during and at the end of the employment relationship -

Know your obligations and avoid unprecedented liability

Recent court decisions have amplified an employer's obligation to exercise **good faith** during and at the end of the employment agreement. Poor conduct by an executive, manager, supervisor or even an entry-level employee can lead to six figure liability and considerable reputational damage. Every employer needs to be aware of its legal obligations and warning signs of trouble.

Join us at this *HR*eview, as we identify landmines as well as best practices to minimize risk and liability:

1. **History and evolution of the employer's duty of good faith**
2. **Recent developments and shocking damage awards**
3. **Considerations prior to and during the employment relationship**
   - When negotiating a contract
   - During the employment relationship
4. **Considerations at the end of the employment relationship**
   - Justifying the decision to terminate
   - When to provide reasons
   - When silence is golden
   - Letters of reference
5. **What does the future hold?**

DATE: **Wednesday, September 26, 2018; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Hazelton Manor, 99 Peelar Road, Concord, ON L4K 1A3**

COST: Complimentary

REGISTER: **By Monday September 10, 2018 at www.sherrardkuzz.com/seminars.php**

Law Society of Ontario, CPD Hours: This seminar may be applied toward 1.5 general CPD hours.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar.*

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250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 HOUR 416.420.0738
www.sherrardkuzz.com
@SherrardKuzz

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