



FREQUENTLY ASKED QUESTIONS

Bill 148: Fair Workplaces, Better Jobs Act 2017

Updated: January 19, 2018

This document provides members of the Ontario Restaurant Hotel & Motel Association with general information on Bill 148 and should not be relied on as legal advice or opinion. Should you require further assistance, please contact the ORHMA office.

MINIMUM WAGE

QUESTION: I work as a server on rotating shifts such that sometimes I work during the morning, but also work the lunch and dinner hours. While I generally never serve liquor on the morning shift my duties do involve serving liquor when I work the lunch and dinner periods. Does my wage rate change depending on what shift I'm working?

ANSWER: Part of your regular employment duties includes serving liquor, even though you do not do so every shift; therefore the liquor server wage rate would apply to you. The liquor server wage rate applies to your whole employment relationship and does not change from shift to shift. For more information: <https://www.ontario.ca/page/minimum-wage-increase#servers>

HIGH HEELS

QUESTION: What is the definition of high heels?

ANSWER: Please note, the legislation uses the term elevated heel, this would include various types of footwear including high heels. The footwear amendment to the OHS Act does not define "elevated heel". Guidance material will be developed to assist employers in understanding footwear requirements and corresponding guidance will be provided to occupational health and safety inspectors with respect to enforcement of this legislation.

QUESTION: How many inches can a heel be to be in compliance?

ANSWER: As above, elevated heel is not specifically defined nor does the legislation reference specific measurements or dimensions.

QUESTION: If heels are not a mandatory policy at a restaurant but an employee chooses to wear heels and then later files a health and safety grievance – who is to blame the employer or the employee?

ANSWER: The prohibition is not intended to prevent workers from choosing to wear an elevated heel at work, subject to existing footwear personal protective equipment requirements in regulations made under the OHS Act. Employers retain the right to establish, based on the environment and work performed, health and safety policies that address safe, suitable footwear. With respect to your concern regarding a grievance or dispute, the matter would be dealt with subject to a collective agreement where one exists. In the absence of a collective agreement the matter would be addressed under the employers existing human resource policies. In lieu of grievance, if your question is with respect to the filing of a claim with the Workplace Safety and Insurance Board (WSIB) any claim would be subject to independent adjudication by the WSIB taking into consideration a variety of factors which could include whether the employer has established policies and practices intended to prevent injury or illness as related to the claim.

EQUAL PAY FOR EQUAL WORK

QUESTION: Scenario: A front of house till cashier who is working doing front. Question: If you have someone over 18 making the minimum \$14 and someone under 18 is doing the exact job, can they ask for equal pay?

ANSWER: The ESA 2000 currently prohibits employers from paying an employee less than another employee who does substantially the same job if the difference in rate of pay is based on gender.

As of April 1, 2018, employers will also be prohibited from paying casual, part-time, temporary and seasonal employees less than full-time employees who do substantially the same job if the difference in the rate of pay is due to a difference in employment status.

The ESA does not prohibit employers from paying all full-time employees different rates of pay for doing the same job. There may be legitimate reasons for the varying rate, e.g. seniority, merit, etc. In order for a difference in rate of pay to be prohibited by the ESA, the difference must be based on a difference in gender or employment status (as of April 1, 2018).

The ESA provides for varying minimum wages.

The general minimum wage rate of \$14 an hour applies to most employees. The student minimum wage rate of \$13.15 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.

Therefore a cashier who is under 18 years of age, can be paid the lower student minimum wage subject to the conditions noted above and this would not be violation of the Equal Pay for Equal Work provisions as long as the difference in rate of pay is based on something other than employment status or sex.

SCHEDULING

QUESTION: Bill 148 "on call" minimum pay of 3 hour if you do not cancel 48 hour notice. Do you know if there is a provision that if the staff member and operator mutually agree to cancel the on call last minute for example: the restaurant does not require the on call staff and the staff agreed that he/she do not need to come to work....That the owner would not need to pay the minimum 3 hour wage?

ANSWER:

- Section 21.4 provides that where an employee is on call and is not called in to work, or is called in to work but works less than three hours despite being available to work longer, the employee is entitled to be paid at least their regular rate for three hours of work.
- Section 21.6 provides that where an employer cancels an employee's scheduled day of work or scheduled on call period within 48 hours of its start, the employee must be paid for three hours of work at the employee's regular rate.
- Both sections 21.4 and 21.6 contain some exceptions to these general rules and also allow for collective agreements in place on January 1, 2019 that conflict with the provisions to prevail over the language in the ESA until the earlier of the date the collective agreement expires and January 1, 2020.

This specific question is whether an employee and employer can agree that these rules will not apply to them in a given situation. Unless expressly provided for in the Act, employees and employers cannot agree that certain provisions of the

ESA will not apply to them. The ESA does not provide for employees and employers to agree that sections 21.4 or 21.6 do not apply. Section 5(1) of the ESA prohibits an employer and an employee from contracting out of, or waiving, an employment standard. Any such contracting out or waiver is void.

PUBLIC HOLIDAY PAY

QUESTION: What is the new methodology for public holiday pay calculations that take effect January 1, 2018?

ANSWER: This depends on how the employee is paid for the work on the public holiday (i.e. Hourly, salary, commission), and whether the employee takes a full or part day off.. If they are paid premium pay for the hours worked on the public holiday, those hours are not included in the calculation for overtime pay. You can find this on MOL website at:

<https://www.ontario.ca/document/your-guide-employment-standards-act/public-holidays#section-11>

Please note: this section of the *Employment Standards Act, 2000* was not affected by Bill 148.

DOMESTIC VIOLENCE

QUESTION: As an employer, do I have the ability to validate the domestic abuse claim? If so, how can I do so in a way that is acceptable?

ANSWER: Employers can require an employee who takes personal emergency leave to provide evidence reasonable in the circumstances that the employee was entitled to the leave. However, employers cannot require employees to provide a note from a physician, registered nurse or psychologist.

QUESTION: Are there restrictions on how many times an employee can take this leave?

ANSWER: For employees that have been employed for at least 13 consecutive weeks, the new legislation provides up to 10 individual days of leave and up to 15 weeks of job protected leave when an employee or their child has experienced or is threatened with domestic or sexual violence. The first five days of leave each calendar year would be paid, the rest would be unpaid.

The new legislation also requires employers to put mechanisms in place to protect the confidentiality of records they receive or produce in relation to an employee taking domestic or sexual violence leave. These leave provision comes into force on January 1, 2018.

Visit the Ministry of Labour website regarding domestic and sexual violence leave:

https://www.ontario.ca/page/plan-fair-workplaces-and-better-jobs-bill-148?_ga=2.257808907.1476022550.1515098327-1143775006.1454512394

COLLECTIVE AGREEMENTS

QUESTION: Can a provision in a collective agreement override amendments to the Employment Standards Act, 2000 (ESA) as brought about by Bill 148, the Fair Workplaces, Better Jobs Act 2017?

ANSWER: There are certain new sections of the ESA (not yet in effect) that may allow for a provision in a collective agreement that addresses the same topic as the standard under the ESA to prevail over that new standard for a limited period of time, if there is a conflict.

For example, the Bill creates a new section 21.4 of the ESA that will come into force on January 1, 2019. Section 21.4 requires a minimum amount of pay for an employee who is on call but is either not required to work or who works for less than three hours, despite being available to work longer. Subsection (3) of s. 21.4 states that if a collective agreement that is in effect on January 1, 2019 contains a provision that addresses payment for being on call and there is a conflict between the provision in the collective agreement and section 21.4, that the collective agreement's provision prevails. Subsection (4) of s. 21.4 sets out that the collective agreement only prevails until the earlier of the date the collective agreement expires and January 1, 2020.

Other sections introduced by Bill 148 that may allow for a provision in a collective agreement to prevail over the standard for a limited period of time are: s. 21.5, s. 21.6, s. 42.1, and s. 42.2. Each section must be read individually to understand how it applies.

If a particular section in the ESA does not specifically set out that a provision in a collective agreement may prevail over the ESA standard, then the ESA minimums apply.

For example, Bill 148 amends the minimum wage provisions of the ESA. Section 23.1, which comes into force on January 1, 2018, sets out (among other things) new minimum wage rates that will take effect on January 1, 2018. There is nothing in the Bill establishing that wage rates set out in a collective agreement may prevail over the new rates in section 23.1. In other words, regardless of what is written in a collective agreement, it would be a contravention of the ESA for an employee who is entitled to the minimum wage to earn less than the relevant rate.

Please note, however, that where a contract of employment (which includes a collective agreement), provides an employee with a greater right or benefit than an employment standard under the ESA, such greater rights will apply instead of the minimum standards established by the ESA (see subsection 5(2) of the ESA). Greater rights can include, for example, a higher hourly rate than the minimum wage required by the ESA, longer vacations than the minimum vacation time required by the ESA, etc. A greater right or benefit may be enforceable under the ESA.

QUESTION: If I have a union agreement, does the act over ride this... do I increase to minimum wage now or at end of the union agreement?

ANSWER: We have been advised by Ministry of Labour wage rates must conform with the minimum rates as of January 1, 2018 even if a collective agreement is in place and offers lower wages. Employers must meet minimum standards.

INDEPENDENT CONTRACTORS

For information on Independent Contractors, please visit: https://www.ontario.ca/page/difference-between-employee-and-independent-contractor?_ga=2.120696010.336778134.1512482535-35577041.1507836681

QUESTION: Should the employer ask/demand Independent Contractors to change their status to become an employee with all tax deductions?

ANSWER: The *Employment Standards Act, 2000* (ESA) applies only to employees. It does not apply to independent contractors or any other type of non-employee. However, the fact that a person is called an independent contractor does not determine whether or not the person is an “employee” who has rights under the ESA. During an ESA investigation or inspection, an employment standards officer would look at all of the facts and make a decision about whether or not the person is an “employee” under the ESA. Pursuant to section 5.1(2) that will take effect on January 1, 2018, if, at the end of an investigation or inspection the alleged employer has not convinced the officer on a balance of probabilities that the individual is self-employed, then the officer will rule that the individual is an employee.

QUESTION: Does the employer have to increase the rate of pay to absorb the taxes that the employee will now have to pay? What are the consequence (including tax liabilities) to the Employer if the person refuses to switch over to an employee? What are the consequences (including tax liabilities) to the Independent Contractor if the person refuses to do so? Under the new law, does the Employer has any tax liabilities for all the prior years of service when this person as an Independent Contractor? What is the best course of action for this Employer?

ANSWER: Please note that the Canada Revenue Agency (CRA) administers tax laws and, as such, any issues related to tax liabilities should be directed to that organization.

EMPLOYMENT STANDARDS ACT (ESA) POSTER

QUESTION: As an employer to I have to provide a poster to my employees?

ANSWER: Yes. On January 2, 2018, a new version of the Ministry of Labour’s Employment Standards Poster will be published (version 7.0). This replaces version 6.0.

The poster describes important rights and requirements under the Employment Standards Act, 2000 (ESA) and must be posted in the workplace where it is likely that employees will see it. Employers are also required to provide employees with a copy of the poster in either print or electronic format.

If the majority language in the workplace is something other than English and the ministry has published a version in that language, the employer must post a translated version next to the English version.

QUESTION: How can I get copies of the new poster?

ANSWER: As of January 2, 2018, version 7.0 will be available to be downloaded and/or printed off the Ministry of Labour website at Ontario.ca/ESAposter.



MINISTRY OF LABOUR CUSTOMER SERVICE – HELP LINE

QUESTION: Do you know what the hours are for the MOL Customer Service help line 1-800-531-5551?

ANSWER: The Employment Standards Information Centre is open from Monday to Friday, 8:30 a.m. to 5:30 p.m.

QUESTION: Do you know if the government is adding more customer service representatives?

ANSWER: The capacity of the call centre has been increased and they are able to accommodate more incoming calls before clients receive a busy signal, however they are still experiencing a higher than normal call volume as a result of Bill 148.

Clients who call the information centre and receive an automated message indicating that they are experiencing a higher than normal call volume due to Bill 148 are now able to press 1 if they have Bill 148-specific questions and 2 for other questions related to the ESA. Each option has its own separate queue. Six new customer service representatives have been trained on Bill 148 and are strictly handling the Bill 148 queue.

QUESTION: Who provides the customer help line – is this a third party?

ANSWER: The Employment Standards Information Centre is operated by Service Ontario.

QUESTION: Is it possible to have an automated call back number arranged for those who get a busy signal?

ANSWER: As mentioned above, clients who call the information centre and receive an automated message indicating that they are experiencing a higher than normal call volume due to Bill 148 are now able to press 1 if they have Bill 148-specific questions and 2 for other questions related to the ESA.

QUESTION: Do you have dates set for regional MOL understanding Bill 148 across Ontario?

ANSWER: The Ministry of Labour is working with Small Business Enterprise Centres (SBECs) to have their officers deliver ESA overview presentations at various locations across Ontario. A number of these sessions have been scheduled already and we are working with our Communications and Marketing Branch to post a schedule on their website that we can share with our members. Once the schedule is up, you will be able to refer your members to the schedule so that they may contact the SBECs directly to sign up for any sessions that may be taking place in their area.

QUESTION: Will the Ministry of Labour be providing more webinars beyond PEL?

ANSWER: At this time the ministry does not have additional webinars planned. If additional webinars are scheduled MOL will promote them to their stakeholders, including ORHMA.

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