Bill 148, *Fair Workplaces, Better Jobs Act, 2017*

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Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association (the "OBA") appreciates the opportunity to make this submission to the Standing Committee on Finance and Economic Affairs ("the Committee"), which is seeking input on Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*. The Bill will, if passed, make changes to the *Employment Standards Act, 2000* ("ESA") and the *Labour Relations Act, 199*5 ("LRA") which are designed to reflect the changing nature and trends of the modern workplace in today's economy.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 16,000 lawyers, judges, law professors and law students in Ontario. OBA members are on the frontlines of our justice system in every area of law and in every type of practice, and provide legal services to a broad range of clients in every region of the province. In addition to providing legal education for its members, the OBA is pleased to assist government with dozens of policy initiatives each year – in the interests of the public, the profession, and the administration of justice.

This submission was prepared by members of the OBA Labour and Employment Section, which is comprised of about 700 lawyers who serve as legal counsel to employers and employees in unionized and non-unionized environments, and have experience in a wide range of legal issues arising in the workplace that are dealt with through bargaining or come before the Ontario Labour Relations Board, arbitrators, courts, and human rights commissions/tribunals.

Overview

The amendments proposed in Bill 148 arise out of the Final Report of the Changing Workplaces Review, a process that was conducted by Special Advisors C. Michael Mitchell and John C. Murray over the course of two years. As acknowledged by the Special Advisors, the task undertaken through the Changing Workplaces Review was enormous, as it was the first independent review of the ESA and the LRA in more than a generation.

The OBA was pleased to provide submissions to the Ministry of Labour in 2015 and 2016 with respect to the Changing Workplaces Review. In light of the diverse range of interests represented by the OBA's membership, these earlier submissions reflected our support for fair and balanced approaches to areas of proposed reform in a way that ensures procedural fairness and access to justice for both employees and employers.

The OBA appreciates the current opportunity to provide comments with respect to the legislative proposals presented in Bill 148. The OBA has focused its feedback on the technical aspects of proposed amendments relating to scheduling, the calculation of public holiday pay, the calculation of vacation with pay, the rate of pay, and entitlements to leaves of absence under the ESA, as well as the rules around providing lists of employees under the LRA. The decision to focus comments on these areas reflects our efforts to provide assistance to the Committee by identifying areas where additional legislative clarity may be warranted, while focusing on those priority areas of consensus within our diverse membership, who act for both employers and employees.

Please note that unless indicated otherwise, all provision references are to the new or amended provisions of the ESA or LRA.

Comments on Schedule 1: ESA Amendments

Scheduling (Parts VII.1 and VII.2)

The new Parts VII.1 and VII.2 of the ESA will create new entitlements around scheduling, including minimum pay provisions for on call shifts. However, it is not clear from the language of the Bill whether the typical exemptions (i.e., for managers and supervisors) are intended to apply to the new entitlements.

Managers and supervisors are already exempt from ESA provisions regarding hours of work, break periods, and overtime by virtue of O. Reg. 285/09: Exemptions, Special Rules and Establishment of Minimum Wage. If the intent is to exempt these individuals from the new entitlements under Parts VII.1 and VII.2 to promote legislative consistency, we note that there would need to be a concurrent amendment to O. Reg. 285/09.

Public Holiday Pay (Part X)

The amended s. 24(1) and (1.2) of the ESA makes various references to the "the total amount of regular wages earned in the pay period immediately preceding the public holiday" in calculating an employee's public holiday pay. We assume that this is intended to mean wages earned in "the pay period immediately preceding *the pay period in which the public holiday falls*" [emphasis added]. An amendment to this effect would provided greater certainty in how an employee's public holiday pay is to be calculated.

In addition, the public holiday pay provisions generally require the employer to look to the employee's regular earnings in the pay period immediately preceding the public holiday in

calculating public holiday pay. The Bill describes two circumstances in which the employer must look to alternate pay periods for the public holiday pay calculation:

- The employee was on vacation or taking personal emergency leave, in which case the employer must look back to the pay period that preceded the leave or vacation and use that earlier pay period for the calculation (s. 24(1.1)).
- For new employees, if the holiday falls within their first pay period of work, in which case the employer must use the current pay period for the calculation (s. 24(1.1)).

It is unclear from these provisions what is to happen if the employee has no earnings in the preceding pay period for reasons unrelated to these circumstances – for example, he or she was not scheduled to work, took a different type of leave, and so on. Our interpretation is that the employee in such a case would have no entitlement to public holiday pay, though we would recommend that this be clarified in the Bill to avoid uncertainty for employers and employees.

Vacation With Pay (Part XI)

Amendments proposed under the Bill will operate alongside existing provisions in the ESA to provide for increased minimum vacation time (i.e., 3 weeks) and increased minimum vacation pay (i.e., 6% of wages) entitlements for employees who have been employed with an employer for five years – regardless of whether employment has been active or inactive during this period of time (see s. 33(1) and (2)). However, the amendments are ambiguous with respect to whether the "period of employment" used to calculate employees' amended vacation entitlements includes only the period of an employee's most recent *continuous* employment with the employer, or whether it contemplates including non-continuous or interrupted periods of employment.

This uncertainty is enhanced by other provisions of the current ESA that deal with the calculation of a "period of employment" (or similar language) in relation to other minimum entitlements, including the determination of severance pay and termination pay. For example, the current s. 65(2) of the ESA specifies that non-continuous employment is counted for the purpose of determining an employee's entitlement to severance pay under the ESA. Conversely, O. Reg. 288/01: Termination and Severance of Employment, confirms that the calculation of the "period of employment" for the purposes of calculating termination pay is based on the "period beginning on the day [the employee] most recently commenced employment". The approach to calculating vacation pay could reflect one or the other of these methods, and it is not clear from the Bill which is intended.

In addition, where similar provision for increased vacation time and vacation pay has been made under the employment standards legislation of other provinces – including British Columbia, Alberta, Manitoba, Prince Edward Island, and New Brunswick – those provisions have made express reference to employees receiving such increased entitlement following completion of five years' "consecutive" or "continuous" employment.

We recommend that the provisions of the Bill be amended to clarify whether "period of employment" used to calculate employees' amended vacation entitlements includes only the most recent *continuous* period of employment with the employer.

Rate of Pay (Part XII)

The current Part XII of the ESA, as well as proposed amendments to the Part under the Bill, make a number of references to the phrase "rate of pay" (the current s. 42 and the new ss. 42.1 and 42.2). Though the ESA contains definitions for the phrases "regular rate", "regular wages," and "wages," on a number of occasions, it does not define "rate of pay." We understand that the phrase "rate of pay" in the ESA and the Bill are referring to the "regular rate." However, an amendment in this respect would promote clarity through the use of consistent language.

Leaves of Absences (Part XIV)

The new s. 49.5 of the ESA broadens the current entitlement to an unpaid leave of absence if a child of the employee dies, so that it will apply in any case where the child dies (as opposed to only in the event of a crime-related death). However, per the new s. 49.5(3), the entitlement to leave will not apply if "…it is probable, considering the circumstances, that the child was a party to a crime in relation to his or her death."

We anticipate that this exception to the entitlement may cause practical administrative difficulties in its application for both employers and employees. It is not clear from the Bill on what basis a decision will be made that the child's involvement in his or her own death was "probable," nor what circumstances should be considered in making that decision. Where the leave commences on the date of the child's death, for example, reliable information regarding culpability may not be immediately available, making decisions around eligibility difficult to determine. Further clarity on this issue would enhance understanding and predictability in how this exception is to apply in practice.

Moreover, the policy basis for the exception in s. 49.5(3) is unclear. The Bill's expanded application of the leave entitlement to *all* child deaths, as opposed to only crime-related deaths, appears to reflect an understanding that a parent's grief following the loss of their child is profound no matter the cause of death. We would therefore request clarity

regarding the policy rationale in s. 49.5(3), which continues to disentitle some parents, where they experience the loss of a child in a particular set of circumstances, from the protected leave that is available to others.

In addition, the new s. 49.6 of the ESA retains the entitlement to crime-related child disappearance leave, but increases the maximum entitlement to 104 weeks from 52 weeks. However, per the new s. 49.6(4), the entitlement to leave will end if "the circumstances that made it probable that the child of the employee disappeared as a result of a crime change and it no longer seems probable that the child disappeared as a result of a crime." We raise the same concerns regarding the basis for a determination of "probability" in s. 49.6(4) as with s. 49.5(3), and we also request clarity in this respect.

Comments on Schedule 2: LRA Amendments

Section 6.1 (List of Employees)

The new s. 6.1 of the LRA provides that a trade union may, in certain circumstances, apply to the Ontario Labour Relations Board ("the Board") for an order directing an employer to provide the trade union with a list of employees of the employer. Where a trade union makes an application for certification and the application is dismissed less than one year after the Board makes a direction to the employer to provide the list of employees, the new s. 6.1(10)3 requires that the list be destroyed on or before the day the application for certification is dismissed.

The new 6.1(10)4., as it currently reads in the Bill, states that

> If the list is not destroyed in accordance with paragraph 3, it must be destroyed on or before the day that is one year after the Board's direction was made.

It appeared initially unclear to us that s. 6.1(10)4 is referring to the Board's direction to provide the list. As a result, we recommend that the provision be amended to read as follows [emphasis added]:

> If the list is not destroyed in accordance with paragraph 3, it must be destroyed on or before the day that is one year after the Board's direction <u>to provide the list</u> was made.

Conclusion

The OBA appreciates the opportunity to provide our input on Bill 148 and we hope that these comments will assist the Standing Committee in its review. The comments in this submission are made with a view to reflecting both employee and employer interests, and we hope that our feedback will be of assistance as the province moves forward with legislative change affecting Ontario workplaces.