

FASKEN

The Passage of Bill 47: Making Ontario Open for Business Act, 2018

A Brief Overview

Amendments to the Ontario *Employment Standards Act, 2000*

Effective on January 1, 2019	
Employee vs Independent Contractor	<ul style="list-style-type: none"> • MAINTAINED - Employers are prohibited to treat a person who is an employee as if he or she is an independent contractor. • REPEALED - The provision putting the onus on the employer to establish, in case of dispute, that an individual is an independent contractor and not an employee.
Minimum Wage	<ul style="list-style-type: none"> • REPEALED - The increase in minimum wage to \$15/hour that was supposed to occur on January 1, 2019 as well as the provision providing that increases would subsequently be tied to the Consumer Price Index each year (starting October 2019). This also applies to all special minimum wages increases planned for January 1, 2019 and, potentially, October 2019 (students under 18 years of age, employees who serve liquor, hunting and fishing guides and homeworkers). • NEW - The minimum wage will remain at \$14/hour until 2020, at which time it will be tied to rise with the Consumer Price Index in October each year (starting October 2020). The “freeze” until 2020 also applies to all special minimum wages (students under 18 years of age, employees who serve liquor, hunting and fishing guides and homeworkers).
Records	<ul style="list-style-type: none"> • MAINTAINED - Record retention requirements for vacation related records is increased from three (3) years to five (5) years. • MAINTAINED - For vacation records, the requirements, as they read immediately before January 1, 2018, continue to apply with respect to vacation entitlement years and stub periods that began before January 1, 2018. • MAINTAINED - New record keeping requirements concerning: <ul style="list-style-type: none"> • the dates and times employees worked • where two or more regular rates of pay apply, the dates and times that the employee worked in excess of the overtime threshold at each rate of pay • vacation pay earned during a vacation entitlement year and how it was calculated • where an alternative vacation entitlement year is established, the amount of vacation pay that an employee earned during the stub period and how it was calculated. • REPEALED - New record keeping requirements concerning: <ul style="list-style-type: none"> • the date and times of on-call schedules (was supposed to come into force on January 1, 2019) • the dates and times for cancelled shifts or on-call periods (was supposed to come into force on January 1, 2019) • any changes made to on-call schedules (was supposed to come into force on January 1, 2019).
	<p>Temporary Help Agencies</p> <ul style="list-style-type: none"> • MAINTAINED - In addition to general record keeping requirements applicable to employers, temporary help agencies must also retain records concerning written notice provided to an assignment employee relating to the termination of an assignment.

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Overtime	<ul style="list-style-type: none"> • MAINTAINED - Employees with multiple regular rates of pay with the same employer for work performed in a work week shall be paid overtime at 1.5 times the regular rate of pay that applies to the work performed for the hours that exceed the overtime threshold.
Public Holidays	<ul style="list-style-type: none"> • REVERT BACK TO THE PREVIOUS FORMULA ON A PERMANENT BASIS - Public holiday pay will be calculated as: total amount of regular wages earned and vacation pay payable in the four weeks before the work week in which the public holiday occurred, divided by 20. (Bill 148 had introduced a new formula, but the previous government had, by regulation issued in the spring of 2018, suspended its coming into force pending revision). • MAINTAINED - Where an employee works on a public holiday and is given a substitute day off, an employer must provide a written statement including: <ul style="list-style-type: none"> • the public holiday on which the employee will work or that is being substituted (if the public holiday falls on a day that is not ordinarily a working day or when an employee is on vacation); • the date of the substitute day off; and • the date on which the statement is provided to the employee.
Vacation	<ul style="list-style-type: none"> • MAINTAINED - Increased vacation time from two (2) to three (3) weeks and vacation pay from 4% to 6% for employees with five (5) or more years of service. • MAINTAINED - Clarification on employees who do not take vacation in complete weeks: in such circumstances, the employer shall base the number of days of vacation that the employee is entitled to: (a) on the number of days of vacation that the employee is entitled to; (b) if the employee does not have a regular work week, on the average number of days the employee worked per week during the most recently completed vacation entitlement year.
Pregnancy Leave	<ul style="list-style-type: none"> • MAINTAINED - For an employee whose child is not yet born at the end of the 17 weeks of pregnancy leave, who has a stillbirth or miscarriage, or whose child dies during the pregnancy leave, the pregnancy leave will end on a date that is the later of : (i) 17 weeks after the pregnancy leave began; and (ii) twelve (12) weeks (increased from six (6) weeks) after the birth, still-birth or miscarriage of a child. • MAINTAINED - The new definition of a “legally qualified medical practitioner” for purposes of pregnancy leave, as follows: <ul style="list-style-type: none"> ○ a person who is qualified to practice as a physician; ○ a person who is qualified to practice as a midwife; ○ a registered nurse who holds an extended certificate of registration under the <i>Nursing Act, 1991</i>; or ○ in the prescribed circumstances, a member of a prescribed class of medical practitioners.
Parental Leave	<ul style="list-style-type: none"> • MAINTAINED - The increase to parental leave from 35 weeks to 61 weeks if the employee took a pregnancy leave; and from 37 weeks to 63 weeks if the individual did not take pregnancy leave. • MAINTAINED - The requirement that parental leave begins no later than 78 weeks after the child is born or comes into the employee’s custody, care and control for the first time.
Family Medical Leave	<ul style="list-style-type: none"> • MAINTAINED - The increase in duration of this unpaid leave to provide care or support to a family member from eight (8) weeks to 28 weeks in a 52-week period. • MAINTAINED - The expansion of the definition of a “qualified health practitioner” to include, for the purposes of this leave : <ul style="list-style-type: none"> ○ a person who is qualified to practice as a physician under the laws of the

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	<p>jurisdiction in which care or treatment is provided to the individual described in the next bullet;</p> <ul style="list-style-type: none"> ○ a registered nurse who holds an extended certificate of registration under the <i>Nursing Act, 1991</i> or an individual who has an equivalent qualification under the laws of the jurisdiction in which care or treatment is provided to the individual described in the next bullet; or ○ in the prescribed circumstances, a member of a prescribed class of health practitioners. <ul style="list-style-type: none"> ● MAINTAINED - The more expansive definition of family members covered under this leave: <ul style="list-style-type: none"> ○ an employee’s spouse; ○ a parent, step-parent or foster parent of the employee or the employee’s spouse; ○ a child, step-child or foster child of the employee or the employee’s spouse; ○ a child who is under legal guardianship of the employee or the employee’s spouse; ○ a brother, step-brother, sister or step-sister of the employee; ○ a grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee’s spouse; ○ a brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee; ○ a son-in-law or daughter-in-law of the employee or the employee’s spouse; ○ an uncle or aunt of the employee or the employee’s spouse; ○ a nephew or niece of the employee or the employee’s spouse ; ○ the spouse of the employee’s grandchild, uncle, aunt, nephew or niece; or ○ a person who considers the employee to be like a family member.
<p style="text-align: center;">Critical Illness Leave</p>	<ul style="list-style-type: none"> ● MAINTAINED - The expansion of the Critically Ill Care Leave to include adult family members, such as: <ul style="list-style-type: none"> ○ an employee’s spouse; ○ a parent, step-parent or foster parent of the employee or the employee’s spouse; ○ a child, step-child or foster child of the employee or the employee’s spouse; ○ a child who is under legal guardianship of the employee or the employee’s spouse; ○ a brother, step-brother, sister or step-sister of the employee; ○ a grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee’s spouse; ○ a brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee; ○ a son-in-law or daughter-in-law of the employee or the employee’s spouse; ○ an uncle or aunt of the employee or the employee’s spouse; ○ a nephew or niece of the employee or the employee’s spouse; ○ the spouse of the employee’s grandchild, uncle, aunt, nephew or niece; ○ a person who considers the employee to be like a family member; and ○ any individual prescribed as a family member for the purpose of this definition.
<p style="text-align: center;">Child Death Leave and Crime-Related Child Disappearance</p>	<ul style="list-style-type: none"> ● MAINTAINED - The conversion of the unpaid <i>crime-related</i> child death leave to an unpaid child death leave of up to 104 weeks of leave if a child of the employee dies <u>for any reason</u>. ● MAINTAINED - The increase in duration of the unpaid crime-related child disappearance leave from up to 52 weeks to up to 104 weeks.

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Leave	
Domestic or Sexual Violence Leave	<ul style="list-style-type: none"> • MAINTAINED - An employee's entitlement to a leave of absence if the employee, or a child of the employee, experiences domestic or sexual violence, or the threat of domestic or sexual violence. <ul style="list-style-type: none"> ○ The leave of absence may be taken for any of the following purposes: <ul style="list-style-type: none"> ▪ to seek medical attention for the employee or the child of the employee in respect of a physical or psychological injury or disability caused by the domestic or sexual violence; ▪ to obtain services from a victim services organization for the employee or the child of the employee; ▪ to obtain psychological or other professional counselling for the employee or the child of the employee; ▪ to relocate temporarily or permanently; ▪ to seek legal or law enforcement assistance, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the domestic or sexual violence; and ▪ such other purposes as may be prescribed. ○ Each calendar year, an employee will continue to be entitled to: <ul style="list-style-type: none"> ▪ up to 10 days of leave, and ▪ up to 15 weeks' of leave. ○ The first five days shall be paid in each calendar year.
Sick, Family Responsibility and Bereavement Leave	<ul style="list-style-type: none"> • REPEALED AND REPLACED - Personal emergency leave is repealed (including the two (2) paid days) and three (3) new unpaid leaves are introduced for employees who have been employed for at least two (2) consecutive weeks: <ul style="list-style-type: none"> ○ <u>Sick Leave</u>: employees are entitled to three (3) unpaid days per year due to personal illness, injury or medical emergency; ○ <u>Family Responsibility Leave</u>: employees are entitled to three (3) unpaid days per year due to the illness, injury or medical emergency of a family member or due to an urgent matter concerning a family member; ○ <u>Bereavement Leave</u>: employees are entitled to two (2) unpaid days per year due to the death of a family member. • REPEALED - The prohibition against requesting a doctor's note. Employers can now ask for documents from a qualified medical practitioner in order to substantiate an absence for these leaves. • MAINTAINED - For the purposes of the new leaves, a family member is defined as follows: <ul style="list-style-type: none"> ○ the employee's spouse; ○ a parent, step-parent or foster parent of the employee or the employee's spouse; ○ a child, step-child or foster child of the employee or the employee's spouse; ○ a grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse; ○ the spouse of a child of the employee; ○ the employee's brother or sister; ○ a relative of the employee who is dependent on the employee for care or assistance. • NEW - Specific recognition that paid or unpaid days taken under an employee's contract of employment that would also count as a sick leave, a family responsibility leave or a bereavement leave under the Act will automatically count towards an employee's

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	entitlement under these provisions.
Temporary Help Agencies	<ul style="list-style-type: none"> • MAINTAINED - The requirement for temporary help agencies to provide one week's written notice or pay in lieu of notice of termination of an assignment employee who is assigned to a client for an estimated term of three (3) months or more and the assignment ends earlier than expected. <ul style="list-style-type: none"> • This section does not apply where the assignment is terminated before the end of the estimated term and the employee is offered another assignment of one (1) week or longer during the notice period.
Equal pay for equal work	<ul style="list-style-type: none"> • REPEALED - Amendments to the equal pay provisions that came into effect on April 1, 2018 to provide for an entitlement to equal pay regardless of employment status (e.g. part-time, temporary, seasonal or casual). • REPEALED - An employee's right to request a wage review based on the equal pay provisions and the obligation imposed on employers to either adjust the employee's rate of pay or provide a written explanation for the wage differential. • AMENDED - Employees are protected from reprisal if they have sought to enforce their rights to information on wage rates under the equal pay for equal work provisions now repealed.
	<ul style="list-style-type: none"> • REPEALED - The prohibition imposed on temporary help agencies to pay their employees assigned to perform work for a client at a rate less than the rate paid to the employees of the client when the temporary help agency employee is: <ul style="list-style-type: none"> ○ Performing substantially the same kind of work ○ Required to have the same skill, effort and responsibility ○ Working under similar working conditions.
Scheduling	<ul style="list-style-type: none"> • REPEALED - The provision allowing an employee who has been employed for at least three (3) months to request changes to his or her work schedule or work location and the corresponding provision imposing on the employer the obligation to discuss the request with the employee and either grand it or provide reasons for the denial (was supposed to come into force on January 1, 2019).
	<ul style="list-style-type: none"> • MAINTAINED - Employers shall pay an employee wages for at least three (3) hours* of work if the employee: <ul style="list-style-type: none"> ○ regularly works more than three (3) hours per day; ○ is required to attend work; and ○ works less than three (3) hours, despite being available to work longer (came into force on January 1, 2019). • MAINTAINED - The above does not apply if the employer is unable to provide work for the employee because of fire, lightning, power failure, storms or similar causes the employer's control that result in the stopping of work (came into force on January 1, 2019). • REPEALED - The provision providing that employers shall pay an employee for at least three (3) hours if the employee is on-call and: <ul style="list-style-type: none"> ○ is not required to work, or ○ is required to work but works less than (3) three hours, despite being available to work longer (was supposed to come into force on January 1, 2019). <p style="color: red; font-weight: bold;">* Wages for three (3) hours to be calculated as the greater of: (a) the sum of (i) the amount the employee earned for the time worked, and (ii) wages equal to the employee's regular rate for the remainder of the time.</p>

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REPEALED - The employee's right to refuse a request to work a shift or be on-call if the request is made with less than 96 hours' notice.

REPEALED - An employee's entitlement to three (3) hours of pay if an employer cancels the employee's shift with less than 48 hours' notice.

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A Brief Overview

Amendments to the Ontario *Labour Relations Act, 1995*

Effective on November 21, 2018 (date of Royal Assent)	
Union Access to Employee Lists	<ul style="list-style-type: none"> • REPEALED - If a union can demonstrate, through membership, that it has the support of 20% of employees in an appropriate bargaining unit, then the union can apply to the Ontario Labour Relations Board (“OLRB”) for an order directing the employer to give the union a list of all employees in the proposed bargaining unit. • REPEALED - An employee list shall include employees’ personal phone numbers and email addresses (if employees have provided that information to the employer), and in certain circumstances other information relating to the employees (e.g. job title, other means of contact). • TRANSITIONAL RULE - Any application made pursuant to the now repealed provisions that had not been determined as of November 21, 2018 was terminated on that day. • TRANSITIONAL RULE - Unions who obtained employee lists pursuant to the now repealed provisions must immediately destroy the lists in a manner that they cannot be reconstructed or retrieved.
Automatic Certification	<ul style="list-style-type: none"> • REPEALED - If the OLRB is satisfied that: <ul style="list-style-type: none"> • an employer has contravened the <i>Labour Relations Act</i> (the “LRA”); and • as a result, the union was not able to obtain 40% support or the true wishes of the employees were not likely reflected in a representation vote then the OLRB shall automatically certify the union as the bargaining agent without a vote. • RETURN TO PRE-BILL 148 RULES - The remedial rules that existed prior to Bill 148 are reinstated (e.g. a representation vote - or another representation vote - may be ordered, automatic certification being available as a remedy only if no other remedy would be sufficient to counter the effects of the contravention). • TRANSITIONAL RULE - Any application made pursuant to the now repealed provisions that had not been determined as of the day Bill 47 came into force will be determined in accordance with the post- Bill 47 remedial rules (i.e. the pre-Bill 148 rules).
No Discharge or Discipline Following Certification	<ul style="list-style-type: none"> • MAINTAINED - If a trade union is certified, an employer shall not terminate or discipline an employee without just cause during the period between the date of certification and the earlier of: <ul style="list-style-type: none"> • the date of the first collective agreement, and • the date the trade union no longer represents the employees.
Structure of Bargaining Units	<ul style="list-style-type: none"> • REPEALED - Under certain circumstances, after certification, the OLRB has the authority to make orders in respect of the structure of bargaining units (e.g. consolidate, amend the description or certification order, etc.), or the parties, at any time, may by agreement and with the consent of the OLRB make changes to the structure of bargaining units.

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Certification without a Vote	<ul style="list-style-type: none"> • REPEALED - For specified industries (building services, home care and community services, and the temporary help agency industry), a trade union may apply for certification without a representation vote where it is established that more than 55% of the employees in the bargaining unit are members of the union. • TRANSITIONAL RULE - An application made under the now repealed provisions that was filed with the OLRB before Bill 47 received first reading (October 23rd, 2018) will be determined in accordance with the pre-Bill 47 provisions. If an application was filed on or after October 23rd, 2018, the application will be determined in accordance with section 8 of the LRA (i.e. in accordance with the pre-Bill 148 provisions).
Request for Educational Support	<ul style="list-style-type: none"> • REPEALED - Employers may request educational support in the practice of labour relations and collective bargaining, to be made available by the Minister, where: <ul style="list-style-type: none"> • a union is certified or voluntarily recognized; • a first collective agreement mediation occurs.
First Collective Mediation/Arbitration	<ul style="list-style-type: none"> • REPEALED - First contract mediation is available if a newly certified union and employer are unable to reach a first collective agreement. • REPEALED - Where a mediator has been appointed during first collective agreement mediation, no employee shall strike and no person or trade union shall call or authorize or threaten to call or authorize a strike for 45 days after the appointment. • REPEALED - If the parties cannot reach agreement during the 45-day mediation period, either party may apply to the OLRB for the appointment of a mediator-arbitrator. • RETURN TO PRE-BILL 148 RULES - The pre-Bill 148 provisions for OLRB involvement in first collective agreement arbitration have been re-instated with minimal changes. • TRANSITIONAL RULE - If a first collective agreement by mediation-arbitration was directed by the OLRB before Bill 47 came into force, then the now repealed provisions continue to apply until the parties have entered into a first collective agreement. If parties are in first collective agreement mediation on the date Bill 47 came into force, the mediation shall cease on or immediately after that date. If an application for first collective agreement mediation-arbitration has been filed but not yet determined by the OLRB before Bill 47 came into force, the application shall proceed pursuant to the post-Bill 47 provisions.
Successor Rights, Building Services	<ul style="list-style-type: none"> • MAINTAINED - The extension of “successor rights” to the retendering of building services contracts. In other words, a sale of business is deemed to have occurred if: <ul style="list-style-type: none"> • employees perform services at a premises (principal place of work), • the employer ceases to provide those services, and • substantially similar services are subsequently provided by another employer at those premises.
Strike or Lockout When no Collective Agreement is in Force	<ul style="list-style-type: none"> • AMENDED - The waiting period before the parties may strike or lockout has been increased from: <ul style="list-style-type: none"> • 7 to 9 days where the Minister is deemed, pursuant to section 122(2) LRA, to have released to the parties the report of a conciliation board or mediator; and • 14 to 16 days where the Minister is deemed, pursuant to section 122(2) LRA, to have released to the parties a notice that he/she does not consider it

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	advisable to appoint a conciliation board.
Reinstatement of Employees'	<ul style="list-style-type: none"> • RETURN TO PRE-BILL 148 RULES - The pre-Bill 148 six-month limit during which a lawfully striking employee could request to return to work has been reinstated. Employees must make such a request within six (6) months from the commencement of a lawful strike/lockout on the terms and conditions agreed upon between the employer and the union. • TRANSITIONAL RULE - The Bill 148 amendments to the LRA will continue to apply to applications made before November 21, 2018 (meaning that the six-month period will not apply in these cases).
Board's Power to Make Interim Orders	<ul style="list-style-type: none"> • MAINTAINED - The broad power of the OLRB to make interim decisions and orders in any proceeding.
Fines	<ul style="list-style-type: none"> • RETURN TO PRE-BILL 148 RULES - Maximum fines have been reinstated to their previous level: <ul style="list-style-type: none"> • \$2,000 for individuals (down from \$5,000), and • \$25,000 for organizations (down from \$100,000).
Voting	<ul style="list-style-type: none"> • MAINTAINED - The expanded power to conduct votes outside the workplace, electronically or by telephone .