



The “new” *ESA* – what does it mean for municipalities?

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The *Fair Workplaces, Better Jobs Act, 2017*

- What have they done to the *ESA*?
 - Some brand new provisions (scheduling, equal pay for equal work).
 - Some tweaking (personal emergency leave, public holiday pay).
 - Some provisions left alone (termination and severance pay).

- Royal Assent on November 27, 2017, but staged implementation:
 - Nov. 27, 2017
 - Dec. 3, 2017
 - Jan. 1, 2018
 - Apr. 1, 2018
 - Jan. 1, 2019

Independent Contractors – Nov. 27/17

- Addition of section 5.1
 - “An employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act”.

Independent Contractors

- Definition of employee:

“employee” includes,

(a) a person, including an officer of a corporation, who performs work for an employer for wages,

(b) a person who supplies services to an employer for wages,

(c) a person who receives training from a person who is an employer, as set out in subsection (2), or

(d) a person who is a homemaker, and includes a person who was an employee.

Independent Contractors

Two Key Changes:

1. Provides independent contractors a route to challenge their classification, retroactively, and seek protection and benefits of the *ESA*, notwithstanding the terms of any contract or past practice.
2. Onus of proof shifted to the employer to prove that the person is not an employee.

How to Address

- Review immediately all individuals employed as independent contractors within your municipality.
- Consider the terms of their contractual relationship – are they really independent?
 - Is the position they hold typically an employment position or contractor role?
 - What work do they perform (how similar to work performed by other employees)?
 - How long have they been under contract (greater than 2 years)?
 - How many times has their contract been renewed (more than twice)?
 - How do they get paid – fixed price or hourly?
 - Who supplies the tools/office/equipment to perform the work?

How to Address

- Does the contractor employ anyone else?
- Who sets the hours of work?
- Does anyone tell them how to do their work?
- Does the contractor “report” to someone in the municipality?
- Does the contractor have the same contact information as the municipality?
- Was the contractor a former employee?
- Does the contractor perform work for other businesses?
- Is the contract of limited duration?
- Is there a chance of profit or risk of loss?

Options

- Review contracts and maintain only those who are independent contractors.
- Phase out those contracts that would fail under the new requirements.
- Put in place procedures for the review and turnover/contract renewal of independent contractors.
- Consider converting contractors to employees with offers of employment and appropriate termination clauses.

Pregnancy and Parental leave – Dec. 3/17

- Changes made so that pregnancy and parental leave can now total 18 months.
- Matches changes to the *EI Act* so that 12 months of the EI benefits can now be received over 18 months.
- May need to address top up provisions in policy or collective agreements.

Critical Illness Leave – Dec. 3/17

- Replaces Critically Ill Child Care leave.
- Care or support provided to a critically ill **minor child** family member for up to 37 weeks in a 52 week period.
- Care or support provided to a critically ill **adult** family member for up to 17 weeks in a 52 week period.

Minimum wage increase – Jan. 1/18

- \$14/hour Jan. 1/18, \$15/hour Jan. 1/19.
- Aside from cost consequences, produces compression issues.
- May be more human resources consequences than legal issues - employee perception of internal equity will be affected.
- May also affect pay equity schemes/plans - suggests those be reviewed.
- May also affect ability to attract and retain employees.

Vacation – Jan. 1/18

- Addition of third week of vacation (and 2% vacation pay) after 5 years' service.

Personal Emergency Leave – Jan 1/18

- All Ontario employers must provide emergency leave (not just large employers that regularly employ 50 or more employees).
- Leave must relate to a personal illness, injury or medical emergency or a listed family member's death, illness, injury or medical emergency or an "urgent matter" that concerns such a family member.
- Two (2) paid days (of the total of 10) to be provided by employers.
 - Paid days must be taken first
 - Employee has to have been employed for at least one week



Personal Emergency Leave

- Employers can require evidence of entitlement, but can no longer require a doctor's note.
- Be creative regarding what evidence you require.
- Integration with sick leave and other policy/collective agreement entitlements.
- Important to have a culture of accountability for absence from work.
 - personal discussions – no text or voicemail.
 - supervisor training.

Family Medical Leave – Jan. 1/18

- Purpose of leave is to permit employee to attend to a critically ill relative at risk of death in the next 26 weeks (can now be extended to 52 weeks).
- Used to be 8 weeks – now 28 weeks.
- Medical certificate required to justify leave.

Other leaves – Jan. 1/18

- Child death leave.
- Child disappearance leave.
- Domestic or sexual violence leave.

Common or Related Employers – Jan. 1/18

- Amendment to section 4(1) of the *ESA*
 - “Subsection (2) applies if associated or related activities or business are or were carried on by or through an employer and one or more other persons”.

Common or Related Employers

Key change

- Deletion of the provision requiring the “intent and effect” of the business structure to defeat the intent and purpose of the *ESA*
- Requirement would be limited to showing common ownership or common control
- Relevant to size of payroll for severance pay (\$2.5M)

Public Holiday Pay – Jan. 1/18

- To be based on average daily pay from the pay period before the holiday (changed from four week average)
- Substitute holidays to be in writing in advance to employees

Equal pay for Equal Work– Apr. 1/18

- Non-union – as of Apr. 1/18.
- Transition for unionized employees until Jan. 1/20.
- No employer shall pay an employee at a rate of pay less than the rate paid to another employee of the employer because of a difference in employment status.
- Employment Status
 - Part-time, temporary, casual and seasonal employees

Equal Pay for Equal Work

Conditions

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

Equal Pay for Equal Work

Few exceptions

- Seniority system
- Merit system
- Based on quantity and quality of production
- Any other objective factor other than gender or employment status

Equal Pay for Equal Work

- Pay to be equal as of time of hire – no delay based on probationary period or other transition period.
- Contravention can include retroactive payment of prior wage differential.
- Firefighters exempted.

Equal Pay for Equal Work

How to Prepare

- Review Employer's current structure of part-time, casual and seasonal allocation of work and positions.
- Implement seniority-based system for pay and pay increases.

Equal Pay for Equal Work

How to Prepare

- Consider other objective pay systems as applicable.
 - Objective merit review.
 - Objective production system (but likely cannot distinguish within classification).
 - Objective classification review (education, licensing requirement).

Scheduling – Jan. 1/19

5 areas

1. Request for change in schedule or work location.
2. Minimum call-in – 3 hours pay at regular rate.
3. On-call – minimum 3 hours pay at regular rate (firefighters exempted).
4. 3 hours pay if shift or on-call cancelled within 48 hours of shift/call-in.
5. Right to refuse on-call assignment if given with less than 4 days' notice.



Scheduling – Jan. 1/19

Exceptions

- an emergency, to reduce a public threat, or to ensure continued delivery of essential public services.

Termination and Severance

No changes to:

- Termination notice/pay (maximum 8 weeks), and
- Severance pay entitlements (maximum 26 weeks but employee needs 5 years of service and employer needs to have a \$2.5M annual payroll).

***Labour Relations Act* amendments**

1. Union with 20% support in the proposed bargaining unit may apply to the OLRB for an order directing the employer to produce contact information for the employees.

- Name, address and email (if provided by employee).
- Employer has two days to respond.
- No hearing required.

***Labour Relations Act* amendments**

2. Remedial certification without a vote.
 - Employer has contravened the *Act*, and
 - Contravention has prevented the true wishes of the employees from being reflected in a representation vote.

***Labour Relations Act* amendments**

3. Interim orders

- Used to be restricted to procedural matters.
- Now without restriction.

4. Votes

- Can now be conducted by internet or phone.

***Labour Relations Act* amendments**

5. Just cause protection
 - Now from date of certification.

6. First Contracts
 - First contract mediation (after conciliation).
 - Then first contract mediation-arbitration.

7. OLRB jurisdiction to review bargaining units increased.

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