

Making Sense of Recent Developments in Employment and Labour Laws in Ontario: An Overview of the Implications for your Agency 2018 OARTY Conference – June 7, 2018

Presented by: Thomas A. Stefanik
Partner, Torkin Manes LLP
Email: tstefanik@torkinmanes.com
Phone: (416) 777-5430

Bill 148 - What we will cover

- How we got here:
 - Current regulatory/political climate.
 - *Changing Workplaces Review: An Agenda for Workplace Rights.*
 - Bill 148
- Some significant changes to employment standards under Bill 148:
 - Misclassification.
 - Scheduling.
 - Protecting Precarious Employees.
 - Increasing Mandatory Minimums.
 - Record Keeping.

Bill 148 - What we will cover

- Some significant changes to labour relations under Bill 148:
 - Facilitating Union Certification.
 - Consolidating Bargaining Units.
 - Employee Protections / Employer Penalties.
 - First Contract Mediation / Arbitration.
- Practical tips on compliance and managing these changes.
- Timeline and what's to come.

How we got here...

- Current Government has made numerous changes to labour & employment statutes.
- Trend is clear – workplace regulation increasing.
- To date these changes have had widespread political support.
- Changes are very rarely “employer friendly”.

How we got here...

- Government commissioned an expert panel
 - “Changing Workplaces Review” to modernize law and examine how the law addresses current realities in the workplace. Major concern was how to deal with precarious employment.
- July 2016 → interim report
- May 2017 → final report contained 173 recommendations.

How we got here...

- In response, the Provincial Government tabled Bill 148: *The Fair Workplaces, Better Jobs Act, 2017* on June 1, 2017.
 - Incorporates some of the recommendations made by the “Changing Workplaces Review”, but in some instances Bill 148 goes further (e.g. minimum wage).
 - Employers are (or should be) anxiously monitoring the progress of Bill 148 through the Legislative Assembly as these changes will bring additional operational costs.

How we got here...

- After Bill 148 passed through the First Reading it was referred to the Standing Committee on Finance and Economic Affairs for revisions.
 - PC members of the Committee tabled a motion for an economic impact analysis – however the committee majority voted against such an analysis.
 - However, the Committee did make some amendments to the Bill.
- A Second Reading of Bill 148 has been ordered.

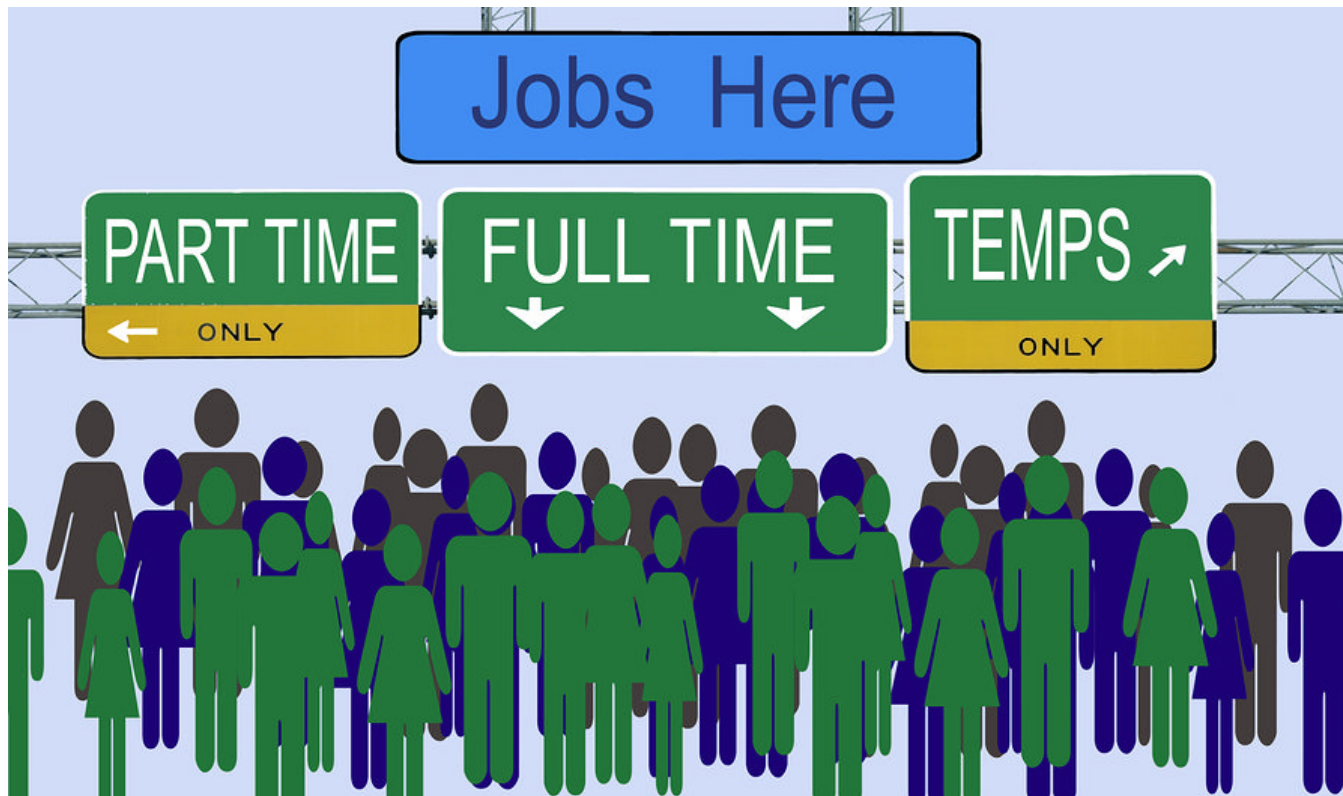
Misclassification



Misclassification

- Government extremely concerned about misclassification and attempts made to avoid minimum protections of ESA.
- New misclassification prohibition:
 - *“An employer shall not treat a person who is an employee of the employer as if the person were not an employee”.*
- Employers have the onus of proving that an individual is not an employee (i.e. an independent contractor).
- More litigation and enforcement action by MOL expected about the true “substance” of the relationship.

Enhanced protections for precarious employees (*ESA*)



Enhanced protections for precarious employees (*ESA*)

- Who is a precarious employee?
- PT/FT/Temps must be paid the same (no differential based on “employment status”) where:
 - Performing substantially the same work in the same establishment;
 - Performance requires substantially the same skill, effort and responsibility; and
 - Work performed under similar working conditions.
- Employers can still differentiate but have to prove the difference is based on:
 - seniority system (e.g. accumulation of hours) or merit system
 - system that measures earnings by quantity or quality of production
 - Other factors not related to employment status
- Rate reduction cannot be used to achieve compliance.

Enhanced protections for precarious employees (*ESA*)

- Employees have right to request a review of their wages where it is believed that wage disparity exists without justification.
 - Employer obligated to provide wage adjustment or written response explaining its disagreement with the employee's position.
 - No Reprisal.
- CAs will be grandfathered until renewal agreement negotiated (CA must be in effect as of April 1, 2018).
- Temp agencies must provide 1 week's notice or pay in lieu to temporary assignment employees where assignment terminates early.

Scheduling (*ESA*)

Work Schedule						
Mon	Tue	Wed	Thu	Fri	Sat	Sun
W	W	Off	Off	W	W	W
Off	Off	W	W	Off	Off	Off
W	W	Off	Off	W	W	W
Off	Off	W	W	Off	Off	Off

12 hour shifts – usually 7 a.m. until 7 p.m.

Scheduling (*ESA*)

- Example of CA concepts being applied to non-unionized workplaces and Government going beyond Panel recommendations.
- Creation of a right to refuse work (non-safety related)
 - Employee can refuse work assignment or on-call assignment if request is made within 96 hours of shift.
 - Narrow exemptions (e.g. emergency, reduce threat to public safety)
- Paying for cancelling shift:
 - 3 hours' wages at regular rate where scheduled work or on-call shift is cancelled without at least 48 hours notice.
 - Exemptions for situations out of the employer's control.

Scheduling (*ESA*)

- Call in Pay
 - Must pay 3 hours wages at regular rate to employees who work less than 3 hours or who are not called in at all.
- CA provisions are grandfathered until earlier of CA expiry or January 1, 2020 (CA must be in effect as of January 1, 2019).
- Bill 148 seeks to create more certainty for employees in scheduling. Impact is that employers lose flexibility to immediately respond to changing business conditions.

Scheduling (*ESA*)

- Employees with more than 3 months' service can make written request for schedule or work location changes.
- Employer obligation:
 - to *discuss* the request with the employee;
 - notify the employee of response/decision within a *reasonable amount of time*; and
 - to provide reasons where request (or part thereof) denied.
- If request granted → employee must be advised of date changes to take effect and duration.

Increasing minimum standards (*ESA*)



Increasing minimum standards (*ESA*)

- **Minimum Wage**
- Significant increase:
 - \$11.60 per hour on October 1, 2017 (already announced in March 2017)
 - \$14.00 per hour on January 1, 2018.
 - \$15.00 per hour on or after January 1, 2019.
 - Special minimum wage rates will not be eliminated – BUT same % increase will apply.
 - **Liquor servers:** \$10.10 per hour on October 1, 2017; \$12.20 per hour on January 1, 2018; and \$13.05 per hour on January 1, 2019.
 - **Students under 18 working part time (28 hours or less) during school year and on school breaks:** \$10.90 per hour on October 1, 2017; \$13.15 per hour on January 1, 2018; and \$14.10 per hour on January 1, 2019.
 - Reversion back to annual increases based on CPI.

Increasing minimum standards (*ESA*)

- **Minimum Wage**
- Financial Accountability Office Report - “Assessing the Economic Impact of Ontario’s Proposed Minimum Wage Increase”
 - \$50,000 net job losses (0.7% of total employment). Concentrated among teens/young adults
 - “However, there is evidence to suggest that the job losses could be larger than the FAO’s estimate. Ontario’s proposed minimum wage increase is both larger and more rapid than past experience, providing businesses with a greater incentive to reduce costs more aggressively”
 - Number of minimum wage earners will increase from 500,000 to 1.9 million
 - Only ¼ of the higher labour income would directly benefit low-income families.
 - “Since the income gains would not be concentrated on low-income families, raising the minimum wage would be an inefficient policy tool for reducing overall poverty.”
- http://www.fao-on.org/en/Blog/Publications/minimum_wage

Increasing minimum standards (*ESA*)

- **Calculation of O/T**

- No change to weekly thresholds or to exemptions (yet).
- However, removal of blended overtime rate. Calculation to be based on rate of pay for work performed at the time overtime accrued.

Increasing minimum standards (*ESA*)

- **Leaves of Absence**
- Pregnancy / Parental Leave
 - Parental leave increased from 35 weeks to 61 weeks for employees who take pregnancy leave and from 37 weeks to 63 weeks otherwise
 - Consistency with EI
- Personal Emergency Leave:
 - Removal of 50 employee threshold.
 - Two **paid** days (must take before unpaid days)
 - Employers no longer entitled to request medical note – BUT right to request reasonable evidence in the circumstances.

Increasing minimum standards (*ESA*)

- Leave for sexual or domestic violence (or threat thereof) experienced by employee or prescribed family member:
 - 13 consecutive weeks of employment threshold.
 - 15 weeks unpaid leave.
 - Employee access to other leaves not restricted.
- Family medical leave:
 - Length of entitlement to be increased from 8 weeks in 26 week period to 27 weeks in 52 week period (unpaid).
 - Consistent with amendments to *Employment Insurance Act*.

Increasing minimum standards (*ESA*)

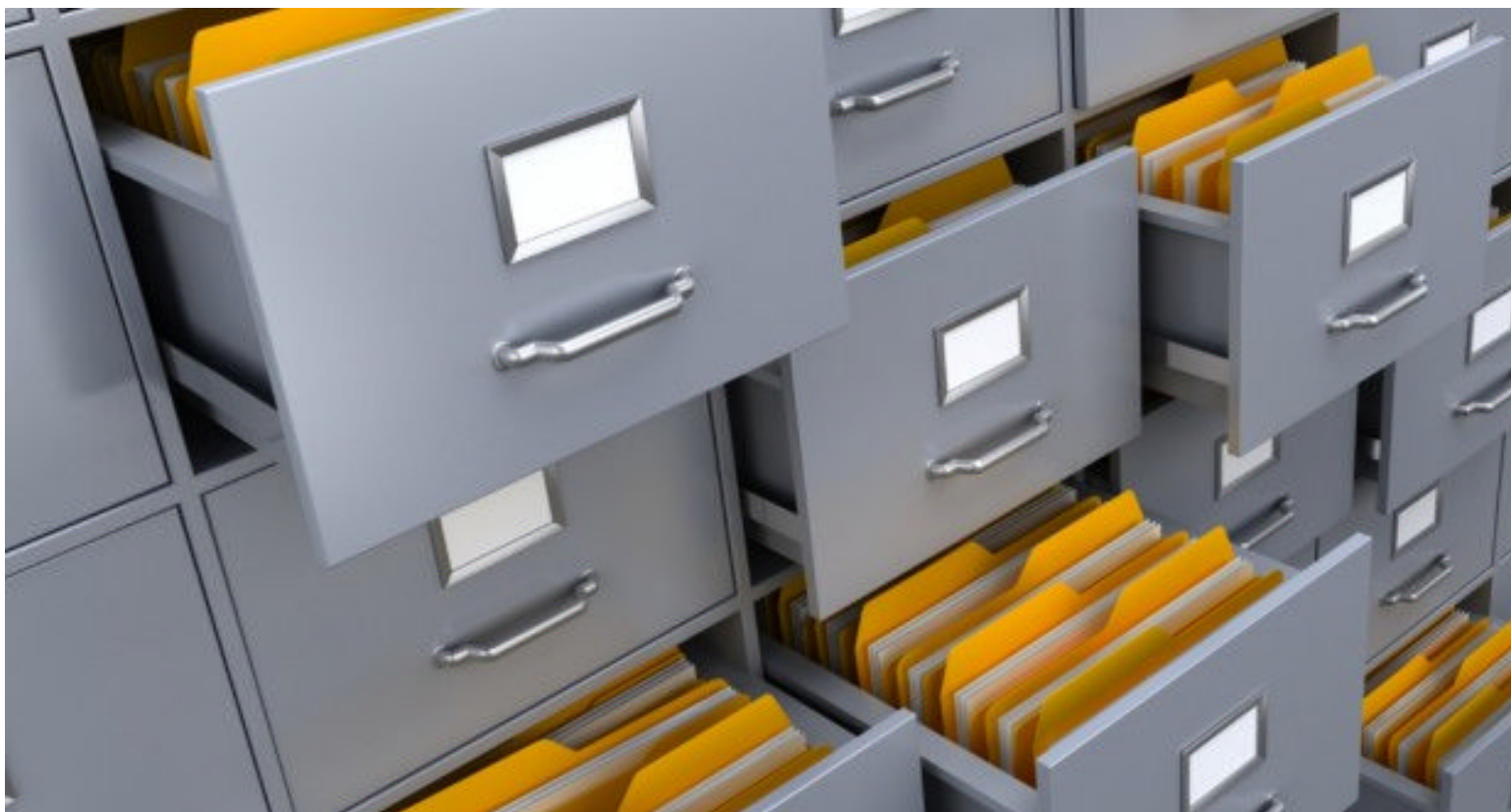
- **Vacation and Public Holidays**
- Minimum vacation increased to 3 weeks' vacation time and 6% vacation pay after 5 years' service.
- New formula for paid holidays:
 - Total amount of regular wages earned in pay period immediately preceding public holiday divided by the number of days actually worked.
 - Effectively, all employees get a full day's pay.
 - Written statement from employer detailing public holiday, date of substitute holiday, date on which statement provided to employee.
 - Effective July 1, 2018 and until December 31, 2019, Ontario Regulation 375/18 (made on May 7, 2018) reversed the manner of calculation for

Increasing minimum standards (*ESA*)

determining public holiday pay to the pre-Bill 148 formula – that is, the employee's public holiday pay for a given public holiday shall be equal to the total amount of regular wages earned in vacation pay payable to the employee in the 4 work weeks before the work week in which the public holiday occurred, divided by 20

- Written statement if substitute holiday given

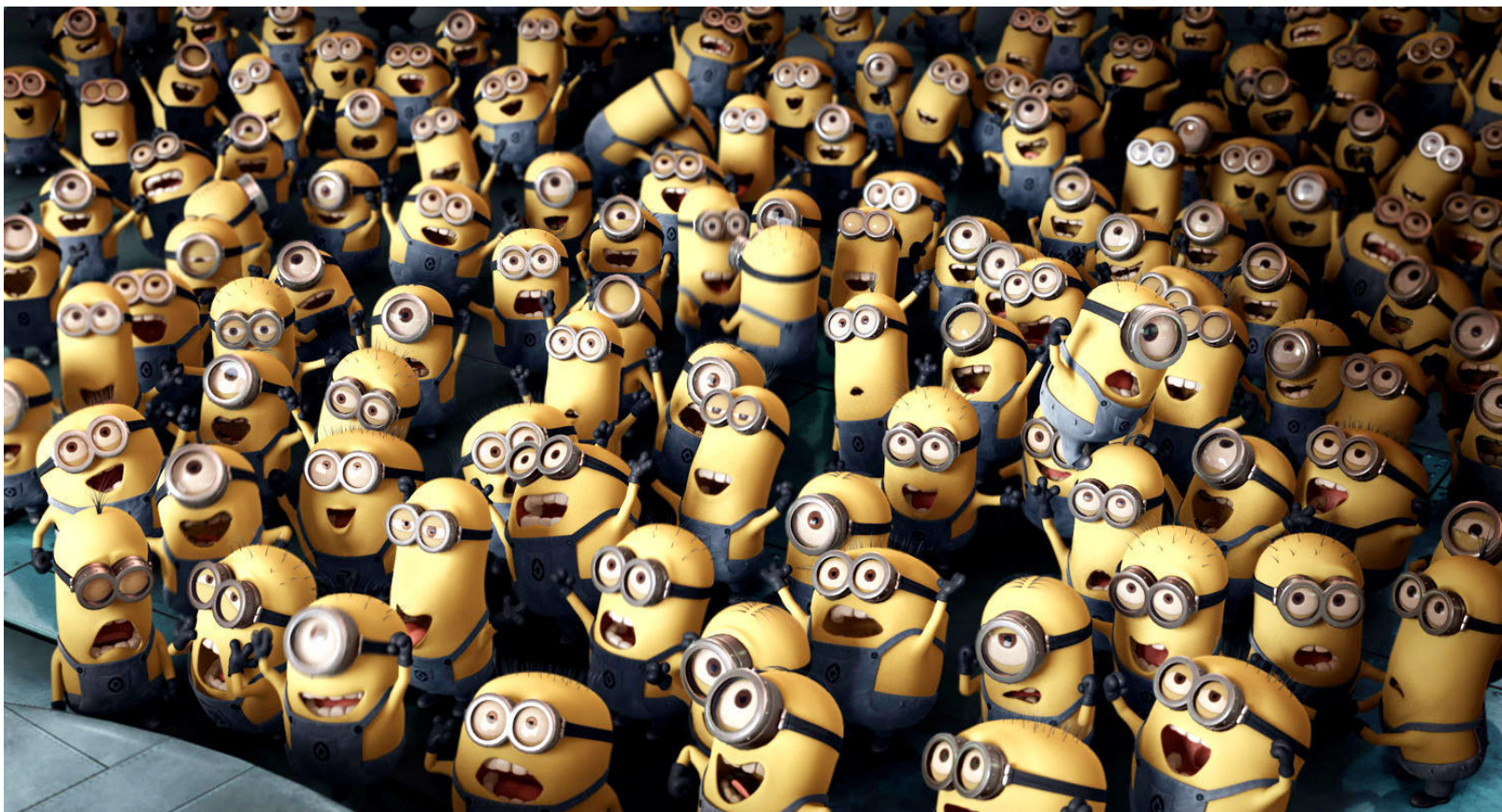
More and more record keeping (*ESA*)



More and more record keeping (*ESA*)

- Retention period for vacation records will increase from 3 years to 5 years.
- New record keeping requirements:
 - Dates and times employee scheduled to be on-call and any changes to on-call schedule.
 - Dates and times employee worked.
 - Where more than one rate of pay – dates and times employee worked above overtime threshold at particular rates of pay.
 - Dates and times of cancellations to any scheduled work day or on-call shift.
 - Written notice provided to employees re: substitute holidays.
 - Amount of vacation pay employee earned during vacation entitlement year and method of calculation + stub period where alternative vacation entitlement year used.
 - Documents related to employee taking leave of absence.
 - Temp agency to retain copy of written notice provided regarding termination of assignment.

Rules to facilitate union certification (*LRA*)



Rules that further facilitate union certification (LRA)

- No changes to certification rules in most industries.
- OLRB has power to order electronic voting.
- Card based certification for “specified industry employers”:
 - Building services.
 - Home care and community services industry (as defined in the Home Care and Community Services Act, 1994)
 - Temporary help agency.
 - Power granted to OLRB to determine whether a business operates in one of the above categories – avenue to expand card based certification.
- Successor rights provisions to apply to “building service providers” – changeover to be treated as a sale of business.

Rules that facilitate union certification (*LRA*)

- Disclosure obligation to union - provide the union with names and contact information of the employees in the union's proposed bargaining unit.
 - Includes phone numbers and personal email addresses in the possession of the employer.
- Union must demonstrate that it has at least 20% membership support in the proposed unit when applying to the OLRB for disclosure.
 - Employers must file a Notice of Disagreement within 2 days of the Application if it disagrees with the union's proposed bargaining unit or the estimate of employees in the bargaining unit.
- Provisions for protecting confidentiality of information.
- Does not apply to the construction industry

New authority to consolidate bargaining units (LRA)

- OLRB may consolidate bargaining units after certification.
- Conditions:
 - The application is made at the same time as the application for certification or within 3 months after the date of certification;
 - A collective agreement has not yet been entered into; and
 - Union seeking to consolidate another bargaining unit it already represents with same employer.
- Employer or union can make application.

Employee protections and employer penalties (LRA)

- Easier for the OLRB to automatically certify a union in the event of an employer committing an unfair labour practice.
- Just cause protection for employees if a union is certified and no CA in operation.
- Removal of 6 month time limit on employee right to request to return to work during strike/lockout – employer will be obligated to terminate or displace other employees hired to perform the work during the strike/lockout.

More steps before strike or lockout and emphasis on mediation/arbitration (*LRA*)

- First contract arbitration more readily available – must first go through the Board’s mediation process. No strike or lockout can take place for 45 days following mediator’s appointment.
- First agreement mediation and arbitration process must be completed prior to the OLRB making a determination regarding decertification or displacement applications.
- These changes create a safety net for the Union who may lose the support of bargaining unit members if bargaining is prolonged.
- These changes provide the Union with a significant tool to block decertification applications.

Practical tips on compliance and managing these changes

- Review and amend workplace policies (and potentially entitlements where employees are being provided with a greater right or benefit)
- Ensure that policies state that statutory entitlements are not in addition to current benefits provided by the employer.
- Minimum wage increases will place pressure on wages and payroll costs across the business.
 - Wage freezes, hiring freezes, downsizing, restructuring, elimination or reduction of incentive and/or merit based compensation.
 - Businesses will need to perform full costing and budget forecasts to understand and manage the impact of these added operational costs.
- Be ready for employee and union demands that seek a corresponding bump in pay for all employees but especially those near the minimum wage.

Practical tips on compliance and managing these changes

- Expect first collective agreements to be more intensely mediated and for unions to take advantage of arbitration.
- Consider if consolidation of bargaining units is advantageous.
- More time will need to be invested into scheduling to avoid shift cancellation costs and increased call-in pay obligations.
- Consider amending customer contracts to pass on increased scheduling and other costs.
- Misclassification offence means employers need to be much more careful in structuring work relationships. Only true ICs should be classified as such.
- Ensure contracts in place for ICs and seek an indemnity in contract with the IC or the staffing agency assigning the IC.

Practical tips on compliance and managing these changes

- Re-evaluate the use of part-time, casual and temporary labour as the cost will be going up.
- Review whether contracts with staffing providers and temp agencies need to be renegotiated.
- Review record retention practices and policies and ensure appropriate people in the organization are aware of new record keeping requirements.
- Perform due diligence review of compensation for employees with the same job or duties to confirm whether any wage variance exists as a result of employment status.
- Consider implementing pay systems that fall into statutory exceptions.

Practical tips on compliance and managing these changes

- Proceed with caution and seek legal advice during an organizing campaign to ensure the organization does not commit a ULP.
- Take union drives seriously from the very beginning given low threshold of support needed to obtain employee information.
- Update privacy policies and prepare a process in the event an employee list and information is ordered.
- Need to be mindful of new employee rights to request wage information and changes in schedule and work location as employees could claim reprisal if employee experiences adverse treatment.

Timeline and what's to come...

- The Bill may be returned to Committee after the Second Reading, so the employer community may have more opportunity to express its views.
- Second Reading is anticipated to occur this month.
- Bill 148 indicated that all changes to the *LRA* will come into force 6 months after the date on which the *Fair Workplaces, Better Jobs Act, 2017* receives Royal Assent.
- Changes to the *ESA* have varying enforcement dates:
 - Generally these changes will come into force January 1, 2018.
 - Date on which *Fair Workplaces, Better Jobs Act, 2017* receives Royal Assent (misclassification protections).
 - April 1, 2018 (scheduling, blending overtime rates, certain vacation entitlements).



Daniel Pugen

Partner, Employment & Labour

Phone 416-777-5194

Email dpugen@torkinmanes.com

Torkin Manes LLP

151 Yonge Street, Suite 1500
Toronto, ON M5C 2W7
www.torkinmanes.com

Torkin|Manes
Barristers & Solicitors