FAQ: Bill 148 – Employment & Labour Law changes

It is important to try and incorporate as many of the *Labour Relations Act (LRA)* and *Employment Standards Act (ESA)* changes into our CAs as possible. This is motivated by two reasons. First, laws are not written in stone. In 1993 Ontario's labour legislation changed dramatically, however the government changed two years later and all the positive gains were reversed in 1995. Changes in both government and prerogatives can happen at any time, and we should not count on these provisions staying in the Acts. Second, we tend to enforce what is in the CA and not always notice what is in the ESA. By incorporating the ESA changes in the ESA into our CA, we will insure that our members will receive these changes and they are not overlooked.

It is also important not to sign any document from the employer which states that provisions in the CA 'provide a greater right or benefit' than the ESA.

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Q: Is the employer required to update various provisions in the CA when bargaining so they are consistent with the law?

A: No, the employer is not required to write the changes into the CA. Whether any of these provisions end up written or in a Memorandum of Understanding (MOA) in the CA, they apply regardless. Employers are legally obligated to comply with these changes.

By analogy, the Human Rights Code says you cannot discriminate against someone on the basis of their race. If this provision was not in the CA, it still operates. It is the same with the ESA (or other employment related statutes.)

If the employer is attempting to bargaining a provision in a CA that offends the ESA (or any other statute) to impasse; that would be an illegal proposal. Remember that no one can bargain an illegal proposal to impasse.

Q: What parts of the legislation are currently in effect versus later?

A: Almost everything that was passed in Bill 148 is now in effect (as of January 1st, 2018) and applies to your members whether they have it in their CA or not. The two main exceptions are the changes around 1) scheduling 2) equal pay. See below for more information. An additional exception to the ESA regarding workers receiving compensation in a simulated work environment (e.g. sheltered workshops) will be repealed January 1st, 2019.

Q: Scheduling and Equal pay commencement and bargaining ideas?

A: Everything except scheduling and equal pay provisions already apply.

Equal Pay – If the CA in effect on April 1st, 2018 has an inferior equal pay provision, the employer can keep that provision until January 1st, 2020, or the expiry of the CA, whichever comes first. After that, they can still maintain differential pay if they can qualify for one of the exceptions.

Scheduling – Except for the three-hour rule, if the CA in effect on January 1st, 2019 has an inferior scheduling provision the employer can keep that provision until January 1st, 2020, or the expiry of the CA, whichever comes first.

If you are currently in bargaining, you should try to table a proposal or a late proposal to reflect the new enhanced ESA provisions.

If that is not possible, there is no one 'best practice'. It must be assessed on a case by case basis; depending on how the workers are scheduled, what kind of work they do, what is in the collective agreement now, is there a "better right or benefit" situation, and what other statutes may say about hours of work in that kind of workplace. (Some employees have limits on how they can be scheduled.)

It may make sense to try to get the shortest possible term (one year) for the inferior CA which will be in effect April 1st, 2018. This way the new rules would apply sooner than January 1st, 2020.

Alternatively, depending on other issues at the table, it may still make sense to get a longer agreement, and wait for these provisions to automatically apply on January 1st, 2020, even if the CA expires after that.

Q: If the minimum wage (current or expected) is better than the CA, and it automatically applies, why should I bargain language to include it in the CA?

A: The minimum wage applies to everyone. There is a general minimum wage rate which applies to most of the kinds of workers CUPE represents, and four other minimum wages for specific classes of employees, like those who get tips for example. Whether it is in your collective agreement or not, however the general minimum wage rate is now $14.00/hour. (Effective January 1st, 2018).

It has not yet reached $15. That increase will take effect on January 1st, 2019. Before that date there is a provincial election, where the Conservative party is campaigning on slowing down the scheduled minimum wage increase. It is important that you are bargaining in language that says your members will get $15 as a minimum January 1st, 2019. This way you cover your members if there is a change in government and/or policy.

Note that in the future (if not changed by a subsequent government), minimum wage will automatically increase every October 1st (starting in 2019) by the Consumer Price Index amount. Or:

Previous wage x (**Index A** [CPI last calendar yr]/**Index B** [CPI two calendar yrs before])
= adjusted wage amount.

Q: Is the minimum wage calculated on a base rate or total compensation?

A: The minimum wage is calculated on 'regular wages' based on a pay period. This does not include overtime, stat pay, premium pay, vacation pay, domestic and sexual violence leave pay, PEL pay, termination pay, severance pay, termination of assignment pay, and entitlements under an employment contract.

Q: What if the minimum wage changes during a pay period?

A: If the minimum wage rate changes during a pay period, the pay period will be treated as if it were two separate pay periods and the employee will be entitled to at least the minimum wage that applies in each of those periods.

Example:

Pay Period	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Week 1	26	27	28	29	30	31	1
Week 2	2	3	4	5	6	7	8

Minimum wage rates increase on the 1st of the month in this example. Here is a pay period which straddles that date.

Assume that the workers are making $13.95 before the increase. On the 1st, anyone not making the new minimum age rate automatically starts getting $14.00. Any hours worked in week one on the first six days of the pay period can be paid at the lower rate, any hours worked after 12:01 am on the 1st (the other 8 days of the pay period) must get paid at the higher minimum rate.

Q: Does the minimum wage apply to travel time?

A: It depends. Travel time, time spent on mandatory training (for existing employees) and, in certain uncommon circumstances, commuting time are considered to be hours of work for minimum wage purposes. Employers can establish different rates for different types of work as long as they are still complying with the minimum wage and overtime pay provisions. Best approach is to negotiate clear provisions about travel time in the CA.

Q: What if our member current is at $14.60 and was due for an increase of 1.5% January 1st, 2019. Do they get the new $15 minimum wage first and then 1.5% on top?

A: Our position is that they are entitled to both, so yes, they get the $15 first then the 1.5% on top of that. It appears there will be disagreements about this arising from the January 2018 increase to $14.00, and there may be grievances over this.

Q: How does the "better right or benefit" doctrine apply under Bill 148?

A: The same way it does for the rest of the ESA. The ESA states in section 5 (2): *"Greater contractual or statutory right (2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.*

As always, a case by case assessment is needed if one (or more) provisions of the CA are inferior to the ESA, but that overall provision in the CA is better than the ESA provision. (The best way to avoid having to do this analysis is to always have all your provisions of the CA superior to the ESA.)

If you think you have a better right or benefit question/conflict, please talk to your servicing representative.

As always, your best bet is to not rely on the ESA and instead incorporate the ESA provision (or better) expressly into your CA.

Q: How many Personal Emergency Leave (PEL) days are there?

A: There are still ten days a year, and they are now available to employees of any employer, not just ones who regularly employ 50 or more employees.
The other change is that now 2 of the 10 days are paid. The paid days must be the first 2 taken in a year. (So, the employer cannot hold back the two paid days until the employee has already taken 8 PEL days.)

Q: How does Personal Emergency Leave (PEL) interact with sick days or bereavement leave or other leaves in CA?

A: There is no single best practice in determining how a CA will work with PEL as each case is specific.

The CUPE default is not to allow the employer to double count against CA and PEL allowances.

However, there is information on the Ministry of Labour website telling the community that double counting is <u>not prohibited</u> by the amended ESA. (Just the way taking away paid breaks from minimum wage workers who got a raise on January 1st, 2018 is not prohibited.) Remember, there is a difference between "not prohibited" and "required".

Generally, if a CA provides a greater right or benefit than the PEL standard under the ESA, then the terms of the CA apply instead of the minimum standard. If the provision in the CA does not provide a greater right or benefit, then the PEL standard in the ESA applies to the employee.

This may require a careful assessment, because PEL days can be used for different reasons, but the CA may have specific leaves for specific things.

If the "sick day" provisions contained in the CA are a greater right or benefit **<u>after all</u>** <u>its features have been compared with the PEL provisions in the Act</u>, then the terms of the CA will apply. (See sick note question below.)

PEL is a leave that may be taken by employees for up to 10 days each calendar year due to personal illness, injury or medical emergency or death, illness, injury, medical emergency or urgent matter relating to certain family members.

It cannot be denied, and a worker cannot be fired for being absent without leave if they take the day. The Employer is entitled (with one exception – no sick notes, see below) to "evidence" that the employee needed the day off. The ESA does not define "evidence".

The following qualifying conditions must be met:

- Illness, injury, or medical emergency of employee.
- Illness, injury, medical emergency, death or urgent matter of certain employee family members

Applicable family members:

- A spouse
- A parent, step-parent, foster parents, child, stepchild, foster child, grandparent, step-grandparent, grandchild or step-grandchild or step-grandchild of the employee or the employee's spouse
- The spouse of the employee's child
- A brother or sister of the employee
- A relative of the employee who is dependent on the employee for care or assistance.

Example – <u>N.B. these examples come from the ministry's website and do not necessarily reflect the views of CUPE</u>:

A CA only provides three paid personal sick days and three paid bereavement leave days per year. It does not include job-protected time off for any other reasons. This contract <u>does not</u> provide a greater right or benefit than the PEL provisions. This means that the employee is entitled to 10 days of job protected PEL per calendar year.

There is nothing in the ESA that would prohibit an employer from subtracting any PEL days that are taken from the paid days under the contract. For example, if the employee takes three days of PEL for personal illness in a calendar year, the ESA does not prohibit the employer from counting those days against both the provisions in the CA and against the employee's PEL entitlement. While this is not

prohibited under the ESA, it is also not mandated. A CA may address whether any PEL days count against any contractual leave entitlements.

On the other hand, if an employer offers a benefit plan for sick days, bereavement days, or for any other event that any leave under the ESA can be taken, and the employee chooses to claim benefits under the plan, the employee has in effect designated the absence as a day of statutory leave and it will reduce the employee's ESA entitlement. For example, if an employer offers three paid bereavement days under a benefits plan and the employee is absent three days because of the death of a parent and claims benefits under the plan, the employee is considered to have used three of their PEL days.

Q: Can an employee take PEL for pre-planned surgery (e.g. Lasik)?

A: Generally, the answer is yes. However, they cannot take it for cosmetic surgery for the purposes of improving their looks unless that was caused by a medical emergency. Similarly, you cannot take it for an annual check up (e.g. dentist), unless it is the result of an illness, injury or medical emergency. However, there may a be a specific provision for leave in the CA for these circumstances.

Even if it is not covered by the CA or the ESA, Bill 148 does not mean an employee cannot ask for a leave day without pay, or to use a vacation or other banked day as they have been able to in the past. The Employer is not limited only to what is in the ESA or the CA.

Q: How do sick notes interact with the ESA and a CA?

A: If an employee is taking sick days out of their 10 day PEL allotment, the ESA says that the employer cannot require a sick note.

If an employer is double counting PEL and sick days, CUPE will argue they cannot use a CA provision or a policy to require a sick note, and still count the day (covered by a note) as a PEL day.

NOTE: PEL only covers two paid days. So, if an employee has already used their two paid PEL days for something else, or is sick longer than 2 days, the arithmetic will be specific to their situation needs, what has been used and their CA.

It is up to the employee to determine whether they wish to use a benefit under the CA or the ESA, and then inform the employer. If the sick days are only being counted against entitlements in the CA, then whatever the CA specifies about sick notes applies. If the sick days are only being counted against PEL leaves then no sick notes are required. In some circumstances, we know employers will attempt to double count a sick day against both the CA and ESA provisions.

This is neither prohibited or proscribed under the act. If the sick days are being counted against both the CA and PEL, the Ministry of Labour believes that sick notes can be required, however CUPE does not agree with this interpretation. This will have to be litigated. Success will depend on the right CA language.

We have reports that doctors saying they do not have to write sick notes anymore, because of Bill 148. This is true if the sick leave is being covered by PEL days. If the sick day entitlement is coming out of the CA, and the CA has a sick note requirement or the employee is on an attendance management program, sick notes will still be required.

Q: How does PEL work with other leave entitlements?

A: PEL, family caregiver leave, family medical leave, domestic or sexual violence leave, critical illness leave, child death leave and crime-related child disappearance leave are different types of leaves. The purposes of the leaves, their length and eligibility criteria are different.

An employee may be entitled to more than one leave for the same event. Each leave is separate and the right to each leave is independent of any right an employee may have to the other leave(s). This means that a single absence can only count against one statutory leave, even if the event that triggered it is a qualifying event under more than one leave.

If you are preparing proposals, look at the specific ESA provisions to establish or improve your CA language. Remember the employer is not required to put these leaves in the CA. But qualifying employees are entitled to these leaves, even if the CA does not provide for them.

Q: PEL usage and applicability (e.g. part-timers, etc.)?

A: Employees are entitled to up to 10 full days of job protected PEL every **calendar** year, whether they are employed on a full or part-time basis.

There is no pro-rating of the 10-day entitlement. An employee who begins work partway through a calendar year is still entitled to 10 days of leave for the rest of that year.

Employees cannot carry over unused PEL days to the next calendar year. The 10 days of leave do not have to be taken consecutively. Employees can take the leave in part days, full days or in periods of more than one day. If an employee takes only part of a day as PEL, the employer can count it as a full day of leave.

Example: Part-day PEL

Kevin's daughter is sick, and her doctor has scheduled some tests at the hospital. Kevin tells his employer that he must be away from work in the morning to take his daughter for tests.

Kevin has the right to be on PEL for the half-day needed to take his daughter for the tests. His employer does not have to count the absence as a full day of leave, but can if they want to, under the ESA.

A CA provision may only require Kevin to count the hours actually taken. Kevin does not have the right to take the entire day off as leave under the ESA – even if his employer counts it that way because he only needs half the day for the leave. Since the leave is not for Kevin's illness, but for his daughter, the employer is entitled to evidence (not a sick note for Kevin) that the leave was needed.

The employer is only allowed to count the half-day absence as a full day of leave when determining if Kevin's 10-day entitlement has been used up. The employer, for example, still must pay Kevin for the half day that he worked and has to include the hours worked to determine whether he worked overtime, or reached his daily or weekly limit on hours of work.

Q: Can an employer, who pays PT staff a percentage in lieu of benefits and sick days, deduct any PEL time claimed for sickness, from their lieu amount?

A: No, PEL days cannot be deducted from the percentage in lieu. Percentage in lieu is not a greater right or benefit, so they cannot deduct it or count against it.

Q: What rights will an employer have when asking for proof (evidence) of domestic and sexual violence leaves?

A: Under the ESA, an employer can require an employee to provide evidence reasonable in the circumstances that they are eligible to take domestic or sexual violence leave. What will be reasonable in the circumstances will depend on all the facts of any given situation, such as the duration of the leave, whether there is a pattern of absences, whether any evidence is available, and the cost of the evidence. The employer may have policies about granting leaves under these circumstances, or if the CA already has language, what is required may already be defined. In all these cases, the key word is "reasonable".

Employees who take domestic or sexual violence leave are entitled to the same rights as employees who take pregnancy or parental leave. For example, an employer cannot threaten, fire or penalize in any other way an employee for taking, planning on taking, being eligible or being in a position to become eligible to take a domestic or sexual violence leave.

Q: Do Equal Pay for Equal work provisions apply if there are two different CAs – one for FT and another for PT?

A: In Ontario, it was illegal for many decades for part-time workers and full-time workers to be in the same bargaining unit. As a result, there are still many work places where the two kinds of employees are still in the same union and even local, but different bargaining units.

The question is: Do they have the same employer, or "establishment" is the word used in the ESA? (Usually the employer and establishment will be the same.)

If the employees are working in the same "establishment, then yes equal pay provisions apply (subject to the exceptions above). The same establishment means a location where the employer carries on business. Two or more locations are considered a single establishment if:

- they are in the same municipality; **or**

- there are common “bumping rights” for at least one employee across municipal borders.

Also, are they doing work which requires the same skill, effort and responsibility. Also, the work must be substantially the same. To be paid equally, the employees must be doing work that is “substantially the same”. Substantially the same is not necessarily identical.

The way the ESA is drafted, there are some other loop holes. The ESA also says that it is permissible to have different rates of pay for substantially the same work if it is due to a system of seniority, merit, production rates (e.g. piece work or production quotas) “or any other factor other than sex or employment status”.

Finally, remember that if the CA that is in effect on April 1st, 2018 permits differences in pay, and conflicts with the ESA, that CA language operates until January 1st, 2020 or when the CA expires – whichever comes first.

Q: What has changed with regards to Family Day?

A: Family Day has moved over from regulation to legislation, otherwise there was no substantive change. A greater right or benefit analysis applies here and whatever way your CA agreement was dealing with this before will continue.

Q: Are sewer and water members exempted from the 10 PEL days because under Bill 148 they are considered an essential service?

A: Sewer and water are not exempted from PEL days.

Q: Is an employer who states that stand-by and call-in are the same thing correct?

A: Under the ESA it is not the same thing, and under normal CAs it is not either, but check your specific CA.

The three-hour rule applies to when an employee gets paid if they must report for duty outside of the regularly scheduled hours (even if they work less than three hours).

Stand-by pay applies to being on call when an employee must maintain a state of fitness for work and potentially be close enough geographically to the work place to get there if needed but may never have to go it.

Whether the ESA or the CA is better will depend on the CA. This may be an instance where there is a question of a greater right or benefit. These sections are not in force until January 1st, 2019.

Minimum pay for being on call also has other exemptions. First, the implementation is delayed if there is an inferior CA that is in place January 1st, 2020 or the expiry of the CA.

Secondly, minimum pay for being on call only applies to employees who are not on call for the purposes of ensuring the continued delivery of essential public services if the employee was actually called into work. The changes to the ESA indicate that stand-by pay is voluntary unless except due to the continued delivery of essential public services.

Q: How does the new minimum wage effect Pay Equity/JJEC – in particular the Bands?

A: No, they cannot use pay equity money to top themselves up to the minimum wage. They can only use pay equity money for pay equity adjustments. Money from funders for other purposes (e.g. child care funding) can be used to fund minimum wage rates.

Q: I understand the student minimum wage (under 18) is based on the number of hours worked in a week. My CA has students under 18 (Library Pages).

A: The definition of students has not changed. For employees who are students under 18 years of age, if the student's weekly hours do not exceed 28 hours or if the student is employed during a school holiday, $13.15 per hour. (See: s.23.1 (1)1.i.)

Q: Are CUPE members who work as Residential Care Workers covered by the ESA?

A: There are certain categories of workers that are exempted from all or part of the ESA in various ways. There are special rules for Residential Care Workers. The

argument we have made to the government is that the current exemption requires residency by a worker in a family-type home. The ESA defines a residential care worker as: a person who is employed to supervise and care for children or developmentally handicapped persons in a family-type residential dwelling or cottage and who resides in the dwelling or cottage during work periods but does not include a foster parent. Our members who work in group homes are not residents and, are therefore, not exempted from the ESA.

Also, if an employee is a "student homeworker" (see s. 23.1(1)) then they get the minimum wage for a homeworker, which is higher than the minimum rate for a student.

Q: What should we do if the CA is closed?

A: While these changes will apply whether they are in the CA or not, the government could change at any point, so it is important that these additional provisions are specified in our CAs. Bargain MOAs to reflect these changes. It is also a good idea, to state that when there is a difference between what is in the CA and the legislation, "the superior provision" will prevail. That way you are covered if the legislation is eroded by the government later.

NOTE: this document contains discussion of many of the changes contained in Bill 148, but not all. This document was designed to respond to frequently asked questions.

March 1st, 2018 ver.

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