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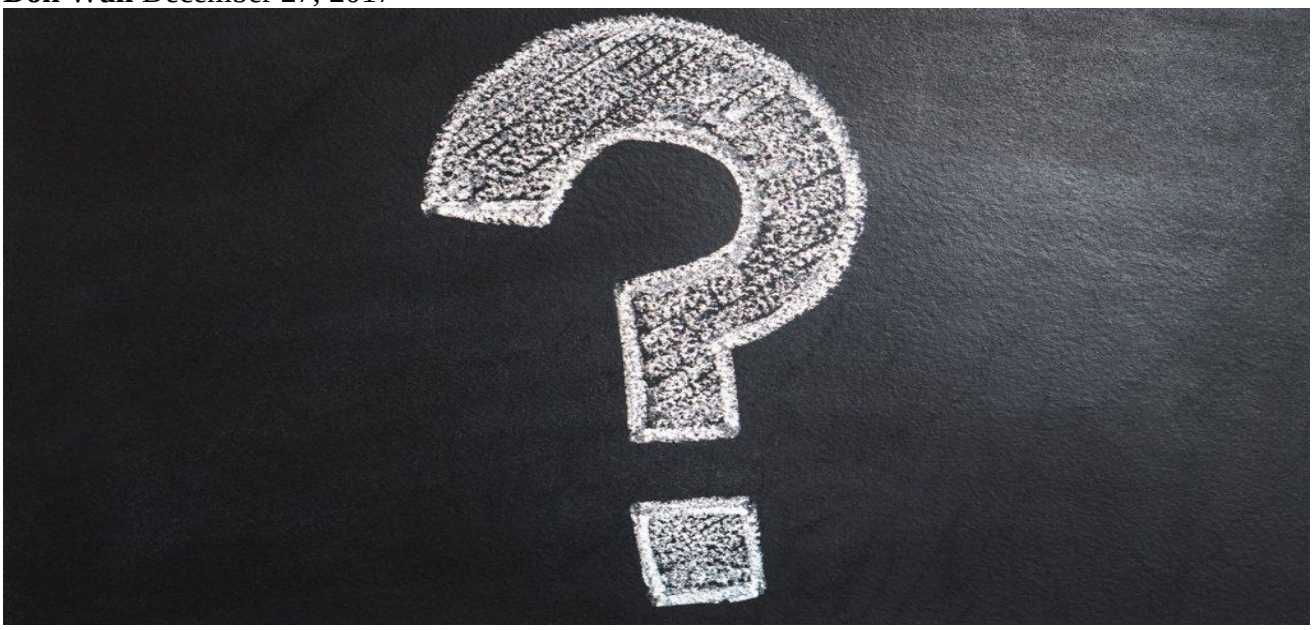
Employers should examine Bill 148 carefully: lawyer

Don Wall December 27, 2017



Construction employers thinking Ontario's new Bill 148 reforming the Employment Standards Act (ESA) and the Ontario Labour Relations Act (OLRA) does not affect them should think again.

That's the view of labour lawyer Michael Sherrard of Toronto firm Sherrard Kuzz and Andrew Pariser, vice-president of the Residential Construction Council of Ontario.

The bill from the Ministry of Labour, proclaimed into law in November, will raise Ontario's minimum wage to $15 per hour in stages, extends paid vacations, broadens employees' rights on work scheduling, introduces limitations on workers being categorized as independent contractors and gives workers more rights to leaves of absence.

Construction employers were told during consultations on the bill that their special workplace circumstances would be protected. An October article published in the Daily Commercial News quoted one labour lawyer who suggested the reforms were drafted "meticulously" to exempt the construction sector.

But Pariser said construction employers need to educate themselves on how the bill could in fact affect them in unintended ways. Sherrard identified four issues that construction employers

should be aware of, and suggested further clarification is needed and exemptions may still be forthcoming as ministry officials "operationalize" Bill 148.

"Because of all the attention the 15 dollars got, a lot of other things were overlooked, and that just makes me nervous, because now that we are going live, and it is being rolled out, you are going to have some unintended consequences," Pariser said.

Sherrard said construction employers should take note of new provisions on shift scheduling, personal emergency leave (PEL) days, vacation and holiday pay and independent contractors.

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— Michael Sherrard

Sherrard Kuzz

The scheduling provisions come into force Jan. 1, 2019. Employees will be entitled to three hours of wages even if they work for less than three hours, if shifts are cancelled with less than 48 hours' notice or if they are asked to be on call. Construction employees often work unpredictable shifts, said Sherrard, with factors such as bad weather and availability of supplies making shift scheduling difficult.

Complicating matters are three-year collective agreements that unionized construction trades have with employers, said Sherrard. Those contracts will expire in April 2019.

Sherrard said as it stands now, contractors with unionized workforces are "in a good place" on the scheduling issue, because their collective agreements remain in effect until the expiry date.

That is not the case with contractors who work with non-unionized trades.

"If you are non-unionized, you want to pay attention to what the ministry says between now and Jan. 1 of 2019," said Sherrard.

If there is no exemption issued to construction employers before Jan. 1, 2019, he said, the scheduling reforms "will be a complicating factor in terms of figuring out how we schedule short notice and cancellation of shifts, creation of shifts and the on-call provision."

Contractors might want to seek counsel to determine whether a late insertion into the amendments regarding matters beyond a contractor's control, such as weather, applies to the construction sector, said Sherrard.

The Bill 148 reforms expand PEL to 10 days for all firms large and small, with a minimum of at least two paid days per year for all workers.

Sherrard said, just as he was preparing to be interviewed about the new legislation, that he received an email with notice of a proposed construction-sector exemption to some elements of the PEL reforms.

The PEL and vacation pay reforms take effect Jan. 1, 2018. Under the new provisions, workers are now entitled at least three weeks' vacation after five years with a company.

Sherrard said construction employers should ensure collective agreements are compliant in reflecting the new requirements given that many construction agreements calculate PEL, vacation and holiday pay as a percentage of earnings.

The new independent contractor provisions came into force upon royal assent. Sherrard said as the law is written there are many ways workers in trades who do piecework, such as flooring, bricklaying, framing and others, could be caught by the ESA reforms. Construction employers should consult counsel to discuss compliance and liability, Sherrard said.

But he thinks construction sector exemptions could be forthcoming in this area as well.

"We are quite worried about unintended consequences," Sherrard said. "Remember, this whole bill was intended to help vulnerable workers, and respectfully I don't think the government looked at construction as fitting into that definition."

Pariser commented, "We need to respect the collective bargaining relationship between employers and unions…I think it is a dangerous principle to get away from. I think on construction, everybody knows we pay relatively higher wages than in other sectors but you get paid when you work. So anything that deviates from that is really going to cause unintended consequences."

The bill also included changes to the rights of unions to become certified. Sherrard referred to one set of provisions, regarding remedial certification, as noteworthy for the construction sector.