

## Bill 148 Update: Scheduling and the Three Hour Rule

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### ▼ Overview

#### Bill 148 Update

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MARCH 5, 2018

As most employers are now aware, *The Fair Workplaces, Better Jobs Act, 2017* ("Bill 148") is now in force. As we have reported previously, Bill 148 makes significant changes to the *Employment Standards Act, 2000* (the "ESA"). Included in the changes to the ESA are the introduction of new provisions regarding scheduling, including on call work, changes to scheduled shifts, and shift cancellation.

Although these changes are more delayed than some of the other changes that were made to the ESA and do not come into effect until January 1, 2019, it is important for employers to be aware of the changes so that they can ensure compliance in time.

We have summarized the important changes regarding scheduling below.

### ▼ Minimum Pay - The "Three Hour Rule"

Currently, Regulation 285/01 to the ESA provides that an employee is deemed to have worked for three hours if he or she regularly works more than three hours a day, is required to present him or herself for work and works less than three hours. Importantly, this "three hour rule" applies only to minimum wage rates. Therefore, employers are required to ensure that employees receive either their regular wages for time worked, or three hours of minimum wage, whichever is greater. The "three hour rule" does not apply if the employer is unable to provide work to an employee because of fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work.

The new "three hour rule" that will come into effect on January 1, 2019 changes this calculation. If an employee who regularly works more than three hours a day is required to present him or herself for work but works less than three hours, despite being available to work longer, the employer must pay the employee wages for three hours, equal to the greater of the following:

wages equal to the employee's *regular rate* for three hours of work; or

the sum of the amount the employee earned for the time worked, and wages equal to the employee's regular rate for the remainder of the time.

The first calculation is clear. The second calculation is a bit trickier. Under the second calculation, an employee would receive pay for time worked (at whatever rate is applicable to the time worked) plus pay for the remainder of the three hours at the employee's regular rate. So, for example, if an employee was scheduled to work three hours of overtime but worked for only 1.5 hours, the first 1.5 hours would be compensated at overtime rates, and the remaining 1.5 hours would be compensated at the employee's regular rate.

The three hour rule will not apply if the employer is unable to provide work for the employee because of fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work.

### ▼ On Call Work

Currently, the ESA does not provide for any payment to an employee if an employee is on call to work and is not called in or required to work. As of January 1, 2019, if an employee who is on call to work is not required to work or is required to work but works less than three hours, despite being available to work longer, the employer must pay the employee wages for three hours, equal to the greater of the following:

wages equal to the employee's regular rate for three hours of work; or

the sum of the amount the employee earned for time worked, and wages equal to the employee's regular rate for the remainder of the time

This will not apply if the employer required the employee to be on call for the purposes of ensuring the continued delivery of essential public services, regardless of who delivers those services; and the employee who was on call was not required to work.

The on call pay only applies once in each 24-hour period, beginning at the start of the first time during that period that the employee is on call. Therefore, even if an employee is on call multiple times during a 24-hour period, the employee could only trigger entitlement to be paid for three hours on one occasion during that 24-hour period.

## ▼ Right to Refuse Changes in Schedule or On Call Shifts

Beginning in 2019, an employee will have the right to refuse an employer's request or demand to work or be on call on a day that the employee was not scheduled to work or be on call if the request or demand is made less than 96 hours before the time the employee would commence work or commence being on call.

The right to refuse will not apply if the employer's request or demand to work or be on call is:

to deal with an emergency;

to remedy or reduce a threat to public safety; or

to ensure the continued delivery of essential public services, regardless of who delivers those services.

"Emergency" for this purpose is defined as a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise, or a situation in which a search and rescue operation takes place.

The Ministry of Labour could prescribe additional reasons in the future but these are currently the only exceptions set out in the *ESA*.

An employee who refuses an employer's request or demand to work or be on call will have to notify the employer of the refusal as soon as possible.

## ▼ Shift Cancellation

Beginning in 2019, an employer will also have to pay an employee wages equal to the employee's regular rate for three hours of work if the employer cancels the employee's scheduled day of work or scheduled on call period within 48 hours before the time the employee was to commence work or commence being on call.

Cancellation means that the entire scheduled day of work or scheduled on call period is cancelled, but does not include the shortening or extending of a shift.

The shift cancellation provisions will not apply if the employer is unable to provide work for the employee because of fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work; or if the nature of the employee's work is weather-dependent and the employer is unable to provide work for the employee for weather-related reasons.

## ▼ Collective Agreement Provisions

If a collective agreement that is in effect on January 1, 2019 contains a provision that conflicts with the new provisions of the *ESA* with respect to scheduling (i.e. payment for being on call, the ability to refuse to work on a scheduled day off, or shift cancellation), the collective agreement provision will prevail in the short term. The collective agreement provision will prevail until the earlier of the date the collective agreement expires and January 1, 2020.

## ▼ No Pyramiding of Entitlements

Some good news for employers though: an employee's entitlement in respect of one scheduled day of work or scheduled on call period will be limited to payment for three hours. An employee will not be able to trigger an entitlement to three hours of pay multiple times under the above provisions.

## ▼ Requests for Changes in Work Schedule or Location

And one final change in 2019. Once an employee has been employed for a period of three months or more, the employee will be able to submit a request to the employer requesting changes to the employee's schedule or work location.

An employer who receives this type of request must discuss the request with the employee and notify the employee of the employer's decision with respect to the request within a reasonable time after receiving the request. The *ESA* does not provide any guidance regarding what is considered a "reasonable time".

In the event the employer grants the employee's request, the notification advising the employee that the request has been granted must include the date that the changes will take effect and the duration of the changes. If the employer denies the request, the notification advising the employee that the request has been denied must include the reasons for the denial.

## ▼ Get Prepared Now

January 1, 2019 will be here before we know it. We therefore recommend that employers review their policies and pay practices to determine what, if any, changes need to be made. And if changes need to be made, for which employees?

Employers will also want to ensure managers are aware of the three-hour rule, the minimum on-call pay rule, and the cancellation of work or on-call assignment rule. Managers will also need to be aware of an employee's right to refuse work without 96 hours of advance notice.

Employers may also wish to develop a protocol to deal with employee requests for changes to their schedule or work location. Do policy documents need to be revised? What factors will be considered? What will the response look like? Can standardized forms be created?

Although employers are undoubtedly busy dealing with other changes required by Bill 148, there's time to get a jump start on the scheduling and hours of work changes.

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## ▼ Authors



Karen M. Sargeant  
**PARTNER**

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📍 Toronto, ON



Megan Beal  
**ASSOCIATE**

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📍 Toronto, ON