

**Ontario Government To Review Exemptions Under the
*Employment Standards Act –
Employer Submissions Due by December 1, 2017***

October 26, 2017

On Wednesday, October 18, 2017, the Ontario Government announced it will fulfill its promise to engage in public consultation on the exemptions and special rules under the *Employment Standards Act* (the “ESA”), as well as the exclusion of domestic workers from the Ontario *Labour Relations Act* (“LRA”).

Employers and employer associations wishing to participate in the consultation process have no time to waste, as submissions are due by December 1, 2017.

The announcement came on the heels of Bill 148 passing Second Reading in the Ontario legislature. If enacted, Bill 148 will introduce significant amendments to both the ESA and LRA, most of which are expected to have a negative impact on employers in the province. See Sherrard Kuzz LLP’s [Changing Workplaces Review – Final Report & Bill 148 – Executive Summary and Commentary- June 2017](#), for a detailed review and analysis of this legislation.

Occupations Under Review

The consultation will focus on the exemptions and special rules which currently apply to:

- Architects
- Domestic workers (including their current exclusion under the LRA)
- Homemakers
- IT Professionals
- **Managerial and Supervisory Employees** (the “Managerial Exemption”)
- Pharmacists
- Residential Building Superintendents, Janitors and Caretakers
- Residential Care Workers

The Managerial Exemption

The Managerial Exemption impacts most Ontario employers. An employee who falls within this exemption is excluded from the ESA provisions relating to hours of work and overtime. Whether an employee falls within the exemption is based on an analysis of that employee’s job responsibilities. If the employee performs work that is supervisory or managerial in character **and** only performs non-managerial or non-supervisory work on an irregular or exceptional basis, the employee will be considered a manager or supervisor. For many employers, the difficulty is determining how the analysis applies to an employee (often salaried) who may have a role with a considerable degree of responsibility and accountability, but does not supervise or manage other employees. The analysis

also fails to adequately capture the “working manager” who may supervise employees while regularly performing the same type of work as the employees supervised.

The Changing Workplaces Review Final Report recommended a “salary plus duties” approach, such that an individual will qualify for the managerial exemption if the individual performs certain defined duties (similar to the duties required of an “executive” or “administrative employee” under the American *Fair Labor Standards Act*) and has an income in excess of 150% of the general minimum wage, based on a 44-hour work week.

If implemented, this test and associated clarity would be welcomed by many in the employer community. Unfortunately the amendment was not incorporated into Bill 148 and it remains to be seen whether this type of pragmatic approach will be adopted following the public consultation.

Next Steps

Any employer or employer group wishing to provide feedback on the Managerial Exemption should contact Exemptions.Review@ontario.ca. Include your name and contact information and request the Exemptions Toolkit for managers and supervisors. The Exemption Toolkit will include:

- Information about relevant provisions of the ESA, as well as proposed changes contained in Bill 148.
- An overview of the policy framework used by the Ministry of Labour to determine whether to grant an exemption.
- A list of questions from the Ministry of Labour designed to solicit information necessary to conduct its review.

A similar process exists for an employer or employer group wishing to provide feedback on any of the other exemptions. See the Ministry of Labour website at: https://www.labour.gov.on.ca/english/about/workplace/web_notice.php.

For more information or for assistance preparing a submission on behalf of your organization or association, contact any member of the team at Sherrard Kuzz LLP.

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