



## Questions from the Member Webinar - December 6, 2017

### MINIMUM WAGE / LIQUOR SERVER WAGE

Q: Is there a difference between the minimum wage and the wages for a tipped employee? How can businesses discern between them?

**A:** *All employees will need to be paid the general minimum wage unless they fall within one of the special minimum wage [categories](#), like liquor servers. A server will only be entitled to the liquor server minimum wage if the employee, as a regular part of employment, serves liquor directly to customers, guests, members or patrons in premises for which a licence or permit has been issued under the Liquor Licence Act and who regularly receives tips or other gratuities for this work.*

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Q: Can the wage rate change for an employee serving liquor during the course of their shift?

**A:** *The ESA does not require that employees be paid the general minimum wage rate when liquor is not being served and the liquor server rate when liquor is being served. Rather, the question to ask is whether an employee serves liquor directly to customers as a regular part of his or her employment. If so, that employee is entitled to be paid at the liquor servers' minimum wage for all hours worked. However, if the employee only occasionally serves liquor, the general minimum wage rate would apply.*

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Q: Do kitchen staff that get tipped out count as tipped employees?

**A:** *No.*

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Q: Would alcohol delivery staff (who do not serve directly) be counted as servers as well?

**A:** *No. An employee needs to serve liquor directly to a customer or guest in order to fall within the liquor server minimum wage.*

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Q: What is the current standard tip-out for back-of-house (BOH) employees? For example, can operators cover the rate of increase in wages (for the employee currently making a higher than minimum wage rate) by increasing the rate the BOH employee receives in tip-outs?

**A:** *If employers control tips in any way, including setting tip-out policy, then, according to Canada Revenue Agency (CRA) [rules](#), tips are considered payroll and subject to all source deductions. In order for tips to be considered direct, decisions on tip-sharing must be determined by employees.*

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Q: Do we have to implement a sliding wage scale with new minimum wage? I.E. – Does someone who is paid \$5 over minimum wage still receive that \$5 over the new minimum wage?

**A:** *No. You are only required to pay employees the minimum wage.*

## STUDENT WAGE

Q: If two employees do the same job but one employee is paid minimum wage and one is paid the student minimum wage, will the employee being paid student wage need to be paid regular minimum wage based on the equal pay changes?

**A:** *If a student is performing comparable work to an employee who is paid minimum wage, the student may be paid the student minimum wage rate. If the student is performing comparable work to an employee being paid more than minimum wage rate, the student may be entitled to the higher wage rate unless the wage differential can be justified based on a) a seniority system, (b) a merit system, (c) a system that measures earnings by quantity or quality of production or (d) any other factor other than sex or employment status.*

## EQUAL PAY FOR EQUAL WORK (not in force until April 1, 2018)

Q: For equal pay and equal work, does it only apply to wages? What about the tips in the restaurant?

**A:** *The equal pay provisions apply only to the employee's rate of pay, not to tips.*

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Q: How is "merit" defined? If we have two employees with the same job description and one is a better job performer, can we pay them at a different rate based on performance?

**A:** *A difference in the rate of pay is permitted if based on (a) a seniority system, (b) a merit system, (c) a system that measures earnings by quantity or quality of production or (d) any other factor other than sex or employment status. The term "merit system" is not defined. Paying two employees differently based on performance may be justifiable, however, an employer will need to be able to defend that decision if challenged by an employee. A defined merit system that entitles an employee to an increase based on achieving certain defined performance standards may a good way to do this.*

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Q: Can job descriptions be changed to accommodate the increases?

**A:** *An employer has a right to add job duties to an employee's role. However, if the amendments are so significant they constitute a unilateral change to the employee's fundamental terms and conditions of employment, this may result in an employee claiming constructive dismissal.*

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Q: Equal Pay - if you implement an incentive program, can you have a different incentive for full-time compared to part-time?

**A:** *The "equal pay" provisions require comparable employees be paid the same "rate of pay". This means an employer does not need to provide comparable employees the same benefit plans, etc. However, when it comes to types of payments provided to comparable employees (such as incentive payments) there is a risk these may also be considered part of an employee's rate of pay and therefore subject to the equal pay requirements.*

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Q: If a full-time staff member is assuming a position for another employee who's leaving for maternity leave, do I have to pay this employee the same salary I'm paying the staff member going on leave, or can I offer them a lower salary?

**A:** *A pay differential can be justified if it is based on (a) a seniority system, (b) a merit system, (c) a system that measures earnings by quantity or quality of production or (d) any other factor other than sex or employment status. If none of these exemptions*

**apply, the employee would be entitled to be paid the same rate of pay as the employee taking a leave of absence.**

## **SCHEDULING** (not in force until Jan 1, 2019)

- Q: If we have a snow storm, or another weather related event that will affect staffing as a result, and need to reduce the amount of employees for the day, do we have to pay the three hour minimum for the staff that we cancel?
- A: *The entitlement to be paid three hours where a shift is cancelled with less than 48 hours' notice does not apply if (a) 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 (b) 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.***
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- Q: If a planned special event is cancelled (i.e. the Maple Leafs lose a game and were out of the playoffs as a result) but were scheduled to play the following night if they won - would that be considered an exception to the scheduling rules or would we be required to pay the minimum three hours to everyone who was scheduled?
- A: *The rules laid out in Bill 148 remain murky for situations such as these. It is likely that this would fall within the exemptions.***
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- Q: Are restaurants with patios classified as weather dependent businesses?
- A: *Bill 148 does not specify which businesses may, or may not, be considered weather dependent.***
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- Q: If an employee leaves before their three hour shift ends, do we still have to pay them for the entire three hours?
- A: *The legislation says that if an employee attends work but works fewer than three hours, despite being available to work longer, the employee is entitled to three hours of pay at his or her regular rate. This means that you should not be obliged to pay him/her if he is not available.***
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- Q: Are there any exceptions for businesses in regard to the 96 hour window for schedules being posted for staff?
- A: *Not at this time. There may be exceptions through regulation.***
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- Q: What happens if there is no prescribed end time on an employee's schedule?
- A: *If the employee regularly works more than three hours per day, the "three hour rule" will apply, even if they don't have a prescribed end time on the schedule.***
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- Q: Does the three hour rule apply to shift workers who do not normally work longer than three hours?
- A: *If the employee regularly works more than three hours per day, the "three hour rule" will apply. For example, if the employee regularly works two, two-hour shifts per day, the employee will be considered to work three hours per day and accordingly will be***

**entitled to be paid for at least three hours for the day, even if they actually work less than that in the day.**

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Q: Does the 48 hour limit apply both ways? Meaning, if the employee was to skip/cancel their shift within 48 hours, would we be able to deduct three hours from their pay?

A: **No.**

## EMPLOYEE MISCLASSIFICATION

Q: Are employees such as delivery drivers, security guards, janitors, etc. considered employees or independent contractors?

A: ***There is no simple answer to this question. The test for determining whether someone is an employee will often examine issues such as (1) whether the contractor bears a risk of profit or loss, (2) who controls and directs the work and how it is performed, (3) who owns the tools and equipment to perform the work and (4) the ability of the contractor to subcontract the work and perform services for others.***

***The following are factors to consider when classifying employees according to the Canada Revenue Agency (CRA) website.***

<https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4110-employee-self-employed/employee-self-employed.html#factors>

## VACATION

Q: Is the maximum number of vacation pay still eight hours?

A: ***An employee is entitled to vacation pay equivalent to 4% of his or her wages in the vacation entitlement year, and 6% after five years of service. Generally, vacation pay is to be provided in a lump sum prior to the employee commencing vacation, although an employer and employee may agree in writing to an alternate form of providing vacation pay.***

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Q: Does the percentage of vacation pay accrued raise from the standard 4% for employees that have been working for more than five years?

A: ***Yes. Once an employee has five years of service, they are entitled to 6% vacation pay. This determination is based on their overall length of service with the employer, not just their length of service after January 1, 2018.***

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Q: Can you explain the vacation pay after five years? The vacation pay for part-time employees now is 4%. Will it increase to 6% January 1, 2018, or does it increase once employees complete five years with the employer?

A: ***Once they complete 5 years with the employer, an employee will be entitled to the 6% vacation pay amount.***

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Q: Is paid vacation plus 4% for employees over five years?

A: ***It is three weeks of vacation time and vacation pay of 6%.***

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Q: Is the five years vacation clause for full time employees only?

**A:** *Part-time employees are also entitled to three weeks' vacation time and 6% vacation pay after five years.*

## HOLIDAY PAY

**Q:** Does this public holiday pay begin Jan. 1, 2018?

**A:** **Yes.**

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**Q:** Can you explain how to calculate holiday pay in regard to days, shifts and hours worked starting in 2018?

**A:** *Public holiday pay is calculated by taking the total amount of regular wages earned by the employee in the pay period immediately preceding the public holiday and dividing it by the number of days worked by the employee in that period. If the employee works one eight hour shift in the pay period, that employee is entitled to the same amount as someone working five days a week for eight hours a day. The calculation is based on days worked, not shifts.*

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**Q:** In 2018, employers will be required to provide a written statement to the employee in regard to substitution days in lieu of public holidays. Are employees required to sign the acknowledgement?

**A:** *An employer wishing to grant an employee a substitute holiday in lieu of a public holiday will now need to provide the employee a written statement before the public holiday, setting out the public holiday the employee will work, the date being substituted for the holiday and the date the statement is provided to the employee. There is no requirement the employee sign it and there is no prescribed form to be used.*

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**Q:** If an employee works on a public holiday what are the requirements for pay? Does the foodservice and hospitality industry still fall under the "special circumstances" industry? Can employers still choose to give the employee a "paid day off" in lieu of paying public holiday pay, plus premium pay for the hours worked?

**A:** *If the public holiday falls on a day that is not ordinarily a working day for the employee, the employee is to be provided with a substitute public holiday.*

*An employee employed in a hotel, motel, tourist resort, restaurant or tavern may be required to work on a public holiday. Where an employee works on a public holiday, the employer may either pay the employee public holiday pay for the day plus premium pay for each hour worked OR pay the employee his or her regular wages for the day worked and give the employee a substitute public holiday.*

*Where a substitute holiday is provided, the employee must be provided the written statement discussed above.*

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**Q:** Does public holiday pay include vacation paid on each pay in addition to the regular wage?

**A:** **No. It is based on regular wages.**

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**Q:** For public holiday pay under Bill 148, will it apply to all part-time and full-time employees including students?

**A:** **Yes.**

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Q: When exactly is the pay period for public holiday calculation?

A: ***The legislation says the pay period immediately precedes the public holiday.***

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Q: Previously, there were rules about public holiday pay if you called in the day before or the day after the scheduled shift. Do those rules still exist?

A: ***These rules have not changed. The "before and after" rules are still in place.***

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Q: What happens when an employee takes a paid leave day on or prior to a stat holiday? How is it calculated?

A: ***Where an employee takes a PEL day before or after a public holiday, this is likely to be considered a "reasonable cause" for missing the shift. As such, it would not impact an employee's entitlement to public holiday pay.***

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Q: The public holiday pay provision seems ridiculous. Do you think it is an oversight?

A: ***No. It is part of a strategy to discourage part-time work.***

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Q: Is the holiday pay calculation applicable to just the foodservice industry, or is it a blanket adjustment across all sectors and industries in Ontario?

A: ***It is for all employers.***

## OVERTIME

Q: Does Bill 148 affect the overtime (OT) rate calculation?

A: ***Bill 148 repeals the blended rate, requiring instead the overtime rate be based on the rate of pay for the work being performed at the time overtime hours are accrued. However, Bill 148 has not amended the provisions that allow for the averaging of OT with Ministry approval.***

## PERSONAL EMERGENCY LEAVE

Q: For the personal emergency leave, do the two paid days apply on the first two days out of the 10 days, or the last two days out of the 10?

A: ***The first two days of PEL taken are to be paid. The pay will generally be calculated based on the wages earned had the employee worked the scheduled shift and not taken the leave.***

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Q: Q: What if an employee calls in sick and says they do not want it counted as a PEL day?

A: ***The current policy of the Director of Employment Standards is that, if an employee is not aware of the entitlement to take PEL, an employer should default to the position the absence ought to be counted as a PEL day. However, if the employee is aware of his or her right to PEL and expressly elects not to take a day as PEL, the employee can do so but the absence may be considered unauthorized and the employee would have no***

**protection against reprisal under the ESA if the employer issued discipline related to the absence.**

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Q: Do regularly scheduled appointments (hair, dentist, veterinarian) qualify as a PEL?

A: **The reasons a person emergency leave day can be taken are as follows:**

- **Personal illness, injury or medical emergency,**
- Or**
- **Death, illness, injury, medical emergency or urgent matter relating to the following family members:**
    - **A spouse (a married or unmarried couple of same or opposite sex)**
    - **A parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparent, 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.**
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Q: Since we can no longer ask for a doctor's note when an employee calls in sick, what kind of proof can we ask for?

A: **According to information provided by the ministry, an employer may require an employee to provide evidence reasonable in the circumstances that he or she is eligible for a personal emergency leave of absence. What will be reasonable in the circumstances will depend on all of 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. Where an employee calls in sick, it may be difficult to require proof given the restriction now placed on requesting a medical certificate.**

Q: Can an employer request a doctor's note after an employee exceeds the 10 PEL days?

A: **An employer can continue to request a medical note to verify the need for any time take after PEL has been exhausted. Medical documentation can also still be requested in the accommodation/return to work process.**

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Q: Can you explain the PEL rules if an employee is two hours late?

A: **PEL is calculated based on the wages the employee would have earned had they not taken the leave. If part of a day is taken as PEL by an employee due to lateness, the employee would be entitled to be paid for the period of time they were off that day (e.g. if they were off for three hours for PEL, they would be entitled to be paid for three hours).**

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Q: How do we calculate the pay for a PEL day?

A: **Paid PEL is generally be calculated based on the wages earned had the employee worked the scheduled shift and not taken the leave. If an employee takes PEL on a day that falls on a public holiday, the employee is not entitled to the premium pay the employee would have received had he or she worked that day.**

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Q: If our policy has two paid sick days for the employees right now, do we need to provide the employees with another two paid personal emergency leave?

**A: *It depends. If the employee takes two sick days at the beginning of the year, prior to taking any other PEL, the two sick days taken under the policy can be counted as the paid PEL days, although you may want to amend your sick leave policy to make it clear that, when an employee takes the two paid sick days under your policy, these also count against the employee's entitlement to personal emergency leave, including paid emergency leave, under the ESA.***

*However, if the employee first takes PEL for reasons that do not fall within the sick leave policy (e.g. child's illness, car broke down, etc.), the employee would be entitled to be paid for the first two PEL days taken in the year. They could then access the paid sick time under your policy later in the year, meaning they would get an entitlement to four paid days.*

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Q: I am planning to transition a majority of my full-time wage staff in to salaried employees. Does PEL still apply to salaried employees if sick days are not included in their contract? How does this new Act really affect salaried employees?

**A: *All employees, including salaried employees, will be entitled to PEL including the two paid PEL days.***

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Q: Do all employees immediately receive PEL days or do they have to be employed for a certain amount of time?

**A: *An employee is entitled to the two days of paid leave after one week of employment. Even if they have been employed for less than a week they will still be entitled to PEL (unpaid).***

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Q: If your business is seasonal, do staff still receive 10 emergency days? Or is it different for seasonal businesses?

**A: *All employees are entitled to ten PEL days in a calendar year, regardless of status.***

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## DOMESTIC VIOLENCE AND SEXUAL ASSAULT LEAVE

Q: Can you elaborate on the domestic violence leave?

**A: *An employee with at least 13 weeks of employment will be entitled to an unpaid leave of absence of 10 calendar days in a year and 15 days in a calendar year for reasons related to the employee's (or the employee's child's) experience of domestic or sexual violence or the threat of such violence. The first five days of this leave in each calendar year must be paid.***

***Domestic and Sexual Violence Leave may be taken:***

- 1. To seek medical attention for the employee or the child of the employee in respect of a physical or psychological injury or disability caused by the domestic or sexual violence.***
- 2. To obtain services from a victim services organization for the employee or the child of the employee.***
- 3. To obtain psychological or other professional counselling for the employee or the child of the employee.***

4. **To relocate temporarily or permanently.**
5. **To seek legal or law enforcement assistance, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the domestic or sexual violence.**
6. **Such other purposes as may be prescribed.**

*An employer may request evidence reasonable in the circumstances to support the need for the leave, and must protect the confidentiality of any records provided or produced related to the leave. The documentation requested may depend on the reason why the leave is being taken. For example, if the employee requires the leave to attend a counselling session, you may obtain a note confirming this from the counsellor. If the employee is attending a hearing, they may provide a copy of the hearing notice, etc.*

## IN FORCE/TIMING

Q: You said you are going over "proposed" changes, but Bill 148 is now law, so what's the difference?

A: ***Bill 148 has passed. However, there are regulations and rules that underpin the legislated changes and some of these are not developed/available yet.***

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Q: Which scheduling changes do not go into effect until January 2019?

A: ***Equal pay provisions go into effect on April 1, 2018, and scheduling provisions go into effect on January 1, 2019. The scheduling rules include the rules regarding three hour pay for cancelled or shortened shifts, payment for being on-call, and the right to refuse to work a shift on less than 96 hours' notice.***

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Q: Have there been any changes pertaining to rules or regulations in regard to tip pooling?

A: ***No changes at this point, but some changes could be coming.***

## EMPLOYEE LIST

Q: With respect to an employee list, would employees under the age of 18 be exempt, as they would naturally require their parents' consent?

A: ***No, requirements would apply to all employees regardless of age.***

## GENERAL

Q: Will Restaurants Canada be hosting a webinar for Alberta to cover Bill 17 legislation?

A: ***Yes. January 8, 2018.***

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Q: If there should be a change in provincial government, do you think there may be revisions to any of this?

A: ***Restaurants Canada is working hard to get commitments from opposition parties and you can help. If you haven't already, go to the portal SaveFoodservice (Username: Restaurants, Passcode savejobs). Find out who your MPP candidates are and contact them about your concerns.***

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Q: Are any tax breaks being proposed to offset these changes?

A: ***Restaurants Canada is lobbying the government for monetary offsets in the spring budget and the opposition parties for monetary benefits if they are elected.***

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Q: Is there another avenue to fight Bill 148 and the minimum wage increase?

A: ***Go to Savefoodservicejobs and send multiple letters to multiple MPPs. It is easy to do on this website portal with the postal code from each restaurant.***

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Q: My MPP is Patrick Brown. I have requested a meeting several times, sent letters and emails and never heard back from him. Any suggestions on how to get a reply?

A: ***Even if he hasn't responded, your message is getting through to him. In meetings with Restaurants Canada he has acknowledged hearing from a number of restaurant operators. Even if he doesn't get back to you personally, given that he is Leader of the Opposition, someone from his office should.***

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Q: How does the government support the business through corporate tax decreases?

A: ***In the Fall Economic Statement the government announced the following measures to help restaurant businesses.***

- ***Small business CIT rate from 4.5% to 3.5%, effective January 1, 2018.***
- ***Fund of \$124 million over three years to (should we indicate 'new hires') hire youth ages 15 to 29 years (a 25% take-up from our industry is expected)***  
***Small business employers (with less than 100 employees) receive \$1,000 to (should we indicate 'new hires') hire and \$1,000 to retain youth for six months beginning January 1, 2018. However, youth must be hired through Ontario's Youth Job Connection program.***
- ***A separate program for any size business that provides employers who hire youth facing employment barriers (again through the Youth Job Connection program) with retention payments of \$1,000 after three months, and a further \$1,000 payable after six months for each worker.***  
***Employers in a position to hire should contact their local employment service office for both of these programs.***
- ***"Cook" will be designated as one of five service-sector trades to be added to the eligibility list for the new Graduated Apprenticeship Grant for Employers.***  
***(<http://www.tcu.gov.on.ca/pepq/graduated-apprenticeship-grant.html>)***

***Because already-thin profit margins will be thinner following the implementation of Bill 148, corporate tax cuts provide very little in the way of an offset for Bill 148 for restaurant employers and hiring incentives are of little value to businesses that are struggling to retain their staff.***

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