

THE EMPLOYERS' CHOICE

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Changes to the *Employment Standards Act* : What You Need to Know

The *Employment Standards Act* Overhauled for First Time in Twenty Years

In July 2000 the Ministry of Labour introduced a Consultation Paper setting out proposed changes to the current *Employment Standards Act*. The proposed changes were formalized into Bill 147 which passed third reading in the legislature on December 20, 2000. The new *Employment Standards Act, 2000* (the "Act") received Royal Assent on December 21, 2000. Although intended to "modernize" the existing legislation, the forthcoming changes may have far-reaching implications for you as an employer. We provide the following summary of the changes:

Hours of Work

The current permit system that requires employers in most industries to obtain permits allowing employees to work more than 8 hours in one day and/or 48 hours in one week will be eliminated. The permit system is viewed by many as cumbersome and ineffective. The new legislation would allow employees in most industries to work a maximum of 60 hours per week. Employee consent will still be required for any hours of work

over 48 in a week and this consent can be terminated by the employee on two weeks' written notice. In addition, the changes will allow employees and employers to agree to two eating periods that together total 30 minutes where the employee works more than five hours. Currently, employees are entitled to one, uninterrupted 30 minute meal break after five hours. The new Act also introduces weekly rest provisions requiring 24 consecutive hours rest in every 7 days or 48 consecutive hours rest in every 14 days. The changes also include a daily rest provision that, with the exception of on-call employees, requires an employee be given at least 11 hours away from the workplace each day.

Overtime

Overtime will still be paid after 44 hours at a premium of time-and-one-half. However, the changes will allow employers and employees to agree that an employee's hours of work can be averaged over a period of not more than four (4) weeks (i.e. over 176 hours worked) for the purpose of determining entitlement to overtime pay. In addition, employers and employees will be able to agree to time off in lieu of overtime pay. Time off would also be accumulated at a premium of time-and-one-half for overtime worked. Currently, although many employers allow employees to bank

overtime and take the time off in lieu of overtime pay, there are no statutory provisions allowing such a practice. Lieu time will have to be taken within three (3) months of the week in which the overtime was earned, although that period can be extended to twelve (12) months with the employee's agreement.

Public (Statutory) Holidays

Current legislation stipulates a number of qualifying provisions that employees must meet before they become entitled to statutory holiday pay. The general opinion of those consulted was that these qualifying provisions are administratively difficult to track and often very confusing to both employers and employees. The government's changes will eliminate the qualifying provisions with two exceptions. The first is that employees must work their scheduled shift before and after the statutory holiday in order to qualify for statutory holiday pay. Second, if employees agree to work the statutory holiday and then fail to report for work without reasonable cause, they are not entitled to statutory holiday pay. In addition, employees will be permitted to agree to work on the public holiday without the current requirement imposed on many employers to schedule a substitute day off. Employees and employers will be able to choose between either time-and-one-half pay for the statutory holiday plus a regular day's pay or to regular pay for the day and another day off with regular pay.

Vacation

The *Act* does not make any substantive changes to the vacation pay provisions except to allow employers to schedule vacation in daily increments at the written request of the employee. The current provisions require vacation to be taken in weekly or bi-weekly blocks. It is suggested that this legislative change simply seeks to reflect current workplace practices.

Emergency (Family) Leave

Perhaps the most publicized and controversial addition to the new *Act* is the introduction of family leave provisions. The *Act* mandates that in workplaces with 50 or more employees, each employee will be able to take up to 10 days of unpaid, job-protected leave each year to deal with a family crisis, personal or family illness and bereavement situations. This leave provision will apply to personal illness and to family crises, illness or death of the employee's spouse or same

sex partner, parent, step-parent, foster parent, child, step-child, foster-child, brother, sister, grandparent, step-grandparent, grandchild, step-grandchild, child's spouse or same-sex partner, father or mother of a spouse or same-sex partner, and any relative dependent on the employee for care or assistance.

There has been considerable publicity opposing this change, while others have questioned the wisdom of restricting this job-protected leave to workplaces with fifty or more employees. We note that a number of smaller employers already have more generous personal leave policies in place for their employees.

Pregnancy and Parental Leave

In an effort to provide consistency with the recent federal changes to the *Employment Insurance Act*, the new legislation will increase the length of job-protected parental leave from eighteen (18) weeks to thirty-five (35) weeks if the employee takes pregnancy leave and thirty-seven (37) weeks if the employee does not qualify for pregnancy leave (e.g. fathers and adoptive parents).

Employers will have to reinstate employees taking family, pregnancy or parental leave to the position held by the employee immediately prior to taking the leave if it exists or to a comparable position if it does not.

New Anti-Reprisal Protection

Although not as widely publicized as the family leave provisions, the new anti-reprisal protection offered to employees terminated, disciplined or otherwise penalized for allegedly exercising their rights under the *Act* could seriously impact on workplace practices in the future. The new *Act* gives Employment Standards Officers and Labour Relations Officers the power to reinstate and/or compensate employees who are terminated, disciplined or otherwise penalized for exercising their rights under the *Act* without the requirement of a hearing.

The government did not make substantial changes to these provisions but rather sought to clarify some confusion resulting from inconsistent

Termination and Severance Pay Provisions

adjudicative decisions. It specifically states that a temporary layoff within the parameters of the *Act* or the failure to provide a specific recall date is not a termination. It also makes clear that the period for which pay in lieu of notice is required is included for the purpose of determining an employers' severance pay liability.

Other Proposed Changes

- Allowing employers to directly deposit wages into employees' bank accounts without the consent of employees.
- Eliminating Director approval for some variations from standards such as reduced eating periods and the extension of temporary lay-offs.
- Requiring an employee's written authorization for the purpose of withholding wages which sets out the specific amount to be withheld or provides a formula from which a specific amount can be calculated.
- Escalating monetary penalties for violations of the *Act*.

What You as an Employer Should Be Doing Given the *Employment Standards Act* Changes

To ensure your organization is in compliance with the new *Act* and is taking full advantage of any opportunities available, you should:

5. Review current human resource policies/employee handbooks;
6. Examine employment contract/hiring letter precedents;
7. Amend current workplace practices such as scheduling and granting leaves of absence;
8. Consider the feasibility of continuing to provide supplementary income during pregnancy/parental leave, in light of the extended job-protected leave provisions

- and give adequate notice of any changes to your policies to employees;
9. Review any employee authorizations related to the withholding of wages; and,
10. Seek counsel on what steps may be taken to amend employment agreements to take advantage of the changes.

We also recommend that employers do the following:

11. Train supervisors/managers about the new provisions and, specifically, on the anti-reprisal obligations to avoid liability for the manager/employer;
12. Communicate with employees about the legislative changes and the impact of those changes on workplace practices/policies; and,
13. Prepare protocols for visits by representatives of government agencies including Employment Standards Officers.

Crawford Chondon & Andree LLP has the expertise and experience to provide assistance with any of the above to ensure your organization's compliance with the new *Employment Standards Act, 2000*. We would be pleased to assist you.

We are also pleased to offer the services of **The Employers' Choice Inc.**, an affiliated,

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full service human resources consulting company that provides value-added solutions together with “best practices” systems and training for the human resources component of your business.

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