

Parental leave, overtime rules among major changes in new *Employment Standards Act*

On December 20, 2000, Bill 147, the *Employment Standards Act, 2000* received third reading from the Ontario Legislature. The Act, most of whose provisions are expected to become law sometime in 2001, represents a major change in Ontario's employment legislation. The government states that the new Act provides "more flexibility to make work hour arrangements directly with employees to suit business needs, without government interference and red tape".

HOURS OF WORK, TIME OFF WORK, OVERTIME

Some of the red tape mentioned above presumably refers to the elimination of the Ministry of Labour's permit system for employees working excess hours. Perhaps the most controversial provision of the new Act is the implementation of the 60-hour maximum work week. Previously, the Act capped the work week at 48 hours, with certain exceptions. As well, the work day was limited to eight hours. Employers wishing to exceed these limits required the approval or permission of the Director of Employment Standards, but employees in any case were not obliged to work more than 48 hours in a week.

Under the new Act, the maximum workday is eight hours, "or, if the employer establishes a regular work day of more than eight hours for the employee", the number of hours in the employee's regular work day. With respect to the work week, an employer may, with the employee's agreement, require the employee to work up to 60 hours, or such other number of hours as are set out in regulations. No permit or approval is required for either the lengthened work day or the 60-hour week, although this may not be the case with respect to hours extended under future regulations. The agreement to work excess hours may be revoked by the employee on giving two weeks' written notice.

The employer is required to give the employee a period of at least 11 hours free from performing work in each day, except when the employee is on-call. Employees must be given a break of at least eight hours between shifts unless the total time worked on successive shifts does not exceed 13 hours, or unless the employee agrees to a shorter break. At least 24 consecutive hours off must be provided each week, or at least 48 hours off in every period of two consecutive weeks.

These provisions may be varied by the employer "but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations" in the following circumstances:

- to deal with an emergency;
- if something unforeseen occurs, to ensure the continued delivery of essential public services, regardless of who delivers those services;

- if something unforeseen occurs, to ensure that continuous processes or seasonal operations are not interrupted;
- to carry out urgent repair work to the employer's plant or equipment.

It should be noted that, previously, this override applied only in cases of an accident or where work was urgently required for the employer's machinery or plant.

As before, and subject to regulations, overtime pay commences after 44 hours of work per week and is at the rate of time and one half. Now, however, an employee may agree to average his or her hours of work over a period of not more than four weeks "for the purpose of determining the employee's entitlement, if any, to overtime pay". Such agreements must provide an expiry date and, for non-unionized employees, cannot exceed two years in duration, although they may be renewed. An averaging agreement is irrevocable, unless both parties agree to its revocation.

As well, the Act permits the parties to agree to the employee taking time off in lieu of overtime at the rate of one and one half hours off for each hour of overtime, provided that the time off is taken within three months of the week in which the overtime was earned or, where the employee agrees, within 12 months.

PUBLIC HOLIDAYS AND VACATIONS

Under the old Act, employers were required to schedule vacations in periods of one or two weeks. Now, if the employee requests and the employer agrees, vacation may be scheduled in shorter periods. Further, if the employee and employer agree, the employee may, with the Director's approval, be allowed to forego taking vacation.

The new Act extends entitlement to paid time off on public holidays to employees who have worked for less than three months. Previously, this group was excluded, as were those who had not worked on at least 12 days during the four work weeks before the holiday. However, under the old Act, where an employee agreed to work on a public holiday, that employee was paid at time and one half plus his or her regular wages for each hour worked. Now, if the employee agrees to work on a public holiday, he or she will receive the regular pay rate for the holiday and another day off with pay instead of the public holiday, or, if the parties agree, the premium pay rate for working on the public holiday plus his or her regular wages.

EMERGENCY LEAVE

A new provision allows employees in workplaces with 50 or more employees to take up to 10 days of unpaid leave per year to deal with

- a personal illness, injury or medical emergency;
- the death, illness, injury or medical emergency of specified individuals; or
- an urgent matter that concerns specified individuals.

The specified individuals include

- the employee's spouse or same-sex partner;
- a parent, step-parent or foster parent of the employee, the employee's spouse or the employee's same-sex partner;

- a child, step-child or foster child of the employee, the employee's spouse or the employee's same-sex partner;
- a grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse or same-sex partner;
- the spouse or same-sex partner of a child of the employee;
- the employee's brother or sister;
- a relative of the employee who is dependent on the employee for care or assistance.

The employer may require that the employee provide evidence that he or she is entitled to the leave. At the conclusion of emergency leave, the employee is entitled to be reinstated to the position that he or she most recently held, if it still exists, and otherwise to a comparable position.

PREGNANCY AND PARENTAL LEAVE

Previously, employees were entitled to 17 weeks of unpaid pregnancy leave and 18 weeks of unpaid parental leave for a maximum of 35 weeks. As of December 31, 2000, employees are entitled to 35 weeks parental leave if they have also taken pregnancy leave, while employees who did not take pregnancy leave (*i.e.* fathers or adoptive parents) are entitled to 37 weeks of parental leave. In other words, birth mothers may now take 52 weeks of combined leave. These changes were implemented to correspond with the federal government's recent changes to the *Employment Insurance Act*, which extend combined pregnancy and parental leave for the birth mother to 50 weeks from 30 weeks.

The new Act provides more flexibility regarding the commencement of parental leave. Previously, an employee had to commence parental leave no later than 35 weeks after the birth date. This is now extended to 52 weeks. However, as before, where the employee is the birth mother, parental leave will, in most cases, have to begin when the employee's pregnancy leave ends.

With respect to pregnancy leave, previously, this could start no earlier than 17 weeks before the due date. Now, it may commence at the time of a live birth even if more than 17 weeks before the due date.

As in the case of emergency leave, at the conclusion of pregnancy or parental leave, the employee is entitled to be reinstated to the position that she or he most recently held, if it still exists, and otherwise to a comparable position. A new provision states that the employee is not entitled to reinstatement if the employee is terminated solely for reasons unrelated to the leave. The old Act had provided that, where the employer's operations were discontinued and not resumed before the leave's conclusion, the employee was entitled to reinstatement on the resumption of operations, subject to any seniority system. The absence of an equivalent provision, combined with the new restriction on reinstatement rights where the termination is for a reason unconnected with the leave, raises questions as to whether such employees will retain the right to be reinstated following a resumption of operations.

ENFORCEMENT

Under the old Act, every person found guilty of contravening the Act was liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than six months, or both. Now, the fine remains the same, but the prison term has been doubled to 12 months. Under

the new Act, corporations will be subject to a fine of up to \$100,000 for a first offence, up to \$250,000 for a second offence, and up to \$500,000 for additional offences.

A significant aspect of the new provisions relates to the enforcement and remedial powers granted to Employment Standards Officers. Under the old Act, if an employer took a reprisal against an employee for attempting to assert a right under the Act, the matter was dealt with by way of prosecution in the provincial courts. Now, an Employment Standards Officer may order that employee reinstated, compensated, or both.

Employment Standards Officers are given the same power with respect to violations of the provisions respecting parental, pregnancy and emergency leave, lie detector tests, and retail business establishments. Under the previous Act, officers had this power only with respect to contravention of the pregnancy and parental leave provisions.

Significantly, there appears to be no requirement that an officer hold a hearing before making an order under this provision. Applications for review of the officer's decision by the Ontario Labour Relations Board must be filed within 30 days. This is a reduction of 15 days from the period provided under the old Act.

Where the employee involved is not represented by a union, an Employment Standards Officer may issue a notice of contravention where an officer believes that a person has contravened a provision of the Act. The notice must contain or be accompanied by information setting out the nature of the contravention and the prescribed penalty. The employer has 30 days to apply to the OLRB for a review of the notice, failing which it will be deemed to have committed the contravention.

If an Employment Standards Officer is prevented, or likely will be prevented from entering the employer's premises for an inspection, the officer may apply to a justice of the peace for a warrant. Where a warrant has been issued, the Employment Standards Officer may call upon a police officer for assistance in executing it. As under the previous Act, it is forbidden to obstruct the inspection of an Employment Standards Officer, but there is also now a positive obligation to produce a record when asked, and to provide any assistance reasonably necessary to interpret a record or to reproduce it in readable form.

As before, an officer may, after receiving a complaint against an employer and on 15 days' notice, require the employer to attend a fact-finding meeting and to produce documents. Now, attendance at a meeting may also be required if the officer, after inspecting the employer's premises, has reasonable grounds for belief that the employer has contravened the Act or regulations.

OTHER CHANGES

Priority of claims

Previously, wages had priority over the claims of all other unsecured creditors of an employer, to the extent of \$2,000 per employee, except for distributions made under the federal *Bankruptcy and Insolvency Act*. That figure has been raised to \$10,000.

Direct deposit of wages

Under the old Act, an employer was required to pay employee wages by cash or by cheque. Now, an employer may pay an employee's wages by direct deposit, subject to several

conditions, including that the financial institution be located within a reasonable distance from the location where the employee works.

Temporary lay-off not termination

Previously, those administering the Act considered that, when a recall date was not issued to a laid-off employee, the lay-off was not temporary, and the employee was therefore terminated and entitled to notice or pay in lieu of notice. Now, the Act stipulates that a lay-off that does not specify a recall date is not a termination unless the duration of the lay-off exceeds that of a temporary lay-off, a term defined in the Act.

In Our View

While the new Act does away with the permit system for overtime and provides increased flexibility in terms of arriving at mutually acceptable working arrangements, employers will have to consider the impact of the extended leave provisions on their financial resources, workplace policies, and employment contracts. Definitional issues concerning the grounds for emergency leave (what constitutes a "personal illness" or an "urgent matter") may also arise.

The Act provides a skeletal structure to which future regulations will be added. These will provide exemptions and special rules and, hopefully, will clarify certain provisions of the Act. The government will be consulting stakeholders about the regulations in the next few months.

This article provides only a summary of the changes made to the Act. (See also "[Employment Standards Act Amendments - Bill 147](#)" and "[Amendments to Employment Standards Act introduced by government](#)" and "[ESA 2000, GEA 2001 now in force](#)" and "[Emergency leave and agreements under the ESA 2000: new variables in the workplace mix](#)".) Please do not hesitate to contact us should you require further clarification about how the new law will affect your workplace.

For further information, please contact [Jacques A. Emond](#) at (613) 563-7660, Extension 224.

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