

Employment Law

February 14, 2005

Reminder - Changes To Hours Of Work And Overtime Averaging Requirements Under The Ontario *Employment Standards Act*

As of March 1, 2005, changes to the Ontario *Employment Standards Act* ("ESA") require employers to receive approval from the Director of Employment Standards (the "Director") if:

- an employee is permitted to work more than forty-eight (48) hours per week;
- an employer averages an employee's hours of work over a period of more than one (1) week for the purposes of calculating overtime pay.

An employer cannot rely upon an existing agreement that is not approved by the Director.

This update provides employers with practical information regarding the application process and what the Director will consider, the process while approvals are pending, and the new requirements for written agreements with employees.

It is not too late to submit an application for approval to the Director and have employees sign written agreements. An application may be submitted to the Director before or after March 1, 2005. If an approval is

required, it is imperative that an application be completed as soon as possible.

If you must apply or are awaiting approval, we recommend that you contact us so that we can determine your eligibility to allow employees to work in excess of the weekly limit or overtime threshold while your application is pending.

Application to the Director for Approval

To obtain an approval an employer must complete an application to approve *existing* or *new* written agreements with employees. The application form can be obtained through the Ministry of Labour's website at: <http://www.gov.on.ca/lab/english/es/hours/index.html>

An employer is not required to provide copies of written agreements with employees when submitting the application, but written agreements must be maintained within employees' employment files.

The same application form is used to apply for both an approval to exceed the forty-eight (48) hour work week and an approval to average hours for the purposes of calculating overtime pay. One application form can be submitted to obtain both approvals. Note, however, that the Director may take into account whether another approval is being sought when granting an approval.

An application can be submitted on-line or printed off the Ministry's website in PDF or HTML format and completed and served on the Director using a variety of acceptable methods (in person, by verifiable mail, or by facsimile).

In addition to detailed information regarding an employer's business operations and the employees affected by the application, an employer is required to summarize the reasons for applying for excess weekly hours and/or averaging hours of work for specifically named occupational groups. Accordingly, we encourage clients to contact us with any questions regarding the application process, including how to properly complete the applica-

tion, serve the application on the Director and determine the date of service to calculate the earliest date that an employer may rely upon a signed agreement while an approval is pending. This latter process is discussed below in the section entitled “Employer Rights Pending Director’s Approval of an Application”.

Director’s Considerations

The Director may consider any factor that he or she considers relevant to decide whether to issue an approval. However, the new changes to the ESA specifically include two factors that the Director may consider:

- An employer’s current or past contraventions of the ESA or its regulations, if any; and
- The health and safety of the employees.

Other factors that the Director may consider for excess hour approvals include:

- Whether the employer has examined other avenues to complete work (including whether employees on layoff could be recalled to perform work; how many shifts are operating; whether it is feasible to add another shift; or whether the employer can hire new employees instead of having current employees work excess hours);
- The number of excess hours being requested;
- The requested duration of the approval and what necessary measures are being adopted to avoid or reduce excess weekly hours in the future;
- The reason for the employer requesting the approval;
- The implications for the employer and/or employees if approval is not granted; and
- Whether the employer has also served an application for an approval to average hours for the purposes of calculating overtime pay.

Other factors that the Director may consider for overtime averaging approvals include:

- Whether the information provided with regard to scheduling indicates non-compliance with the hours of work or rest period provisions; and
- Whether the employer has also served an application for an approval for excess weekly hours of work.

Posting Requirements

An employer who has applied for an approval for excess weekly hours or overtime pay averaging must post a copy of the application in at least one conspicuous place, in every workplace of the employer, where it is likely to come to the attention of the employees. The application should be posted on the same day that it is served on the Director.

If the application is approved, the employer must post the approval in place of the application, and leave the approval posted until it expires. If the application is refused, the employer must post the refusal notice for a sixty (60) day period in place of the application form.

Duration of Approval

The Director’s approval to exceed hours of work can be for a maximum of three (3) years, with a one (1) year maximum if the hours in the agreement exceed sixty (60) hours per week.

An agreement to average hours for the purposes of calculating overtime pay cannot be for a term greater than two (2) years.

Approval Not Required if Only Work Day Exceeds Eight Hours

Note that as long as the total amount of hours per week does exceed forty-eight (48), an employer can permit or require an employee to work in excess of eight (8) hours a day by forming a written agreement with that employee (or union) and providing that employee with an Information Sheet, which is discussed below. A Director’s approval is not necessary if the daily eight (8) hours are exceeded so long as the work week is less than forty-eight (48) hours.

Overtime Threshold is Forty-Four Hours

Note that even if the Director approves an agreement to exceed the forty-eight (48) hour work week or approves an agreement to average hours for overtime pay purposes, employees must still be compensated with overtime pay for hours worked in excess of forty-four (44) hours per week.

Employer Rights Pending Director’s Approval Of An Application

If an employer does not receive an approval or refusal from the Director within thirty (30) days after serving an

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application to exceed work hours or average hours, and certain criteria are met:

- Employees who have signed an agreement can work in excess of forty-eight (48) hours, provided that they do not work more than sixty (60) hours per week, despite the number of hours set out in the application; and/or
- The employer may average an employee's hours over no more than a two (2) week period, despite the period of averaging set out in the application.

Review Of The New Requirements For Excess Hours Of Work And Averaging Hours Agreements

A. Hours of Work

In addition to a Director's approval, employers who permit or require employees to work more than forty-eight (48) hours in a work week must now:

- form a written agreement with affected employees (or unions) to exceed the ESA's standard hours of work;
- provide all affected non-union employees with a new Information Sheet, which is available at: http://www.gov.on.ca/LAB/english/es/hours/info_hours.html

What Must Be Included in a Written Agreement

An agreement to exceed hours of work must:

- be in writing;
- specify the maximum number of excess hours in a week (or day) that the employee agrees to work;
- demonstrate the employee's informed consent that the ESA's standard limits are being exceeded;
- acknowledge that the employee has received the Information Sheet if the agreement is entered into after March 1, 2005 (if the agreement is entered into before March 1, 2005, the employee must be provided with the Information Sheet before June 1, 2005);
- inform the employee of their right to cancel the agreement on two (2) week's notice to the employer;
- indicate any additional terms relevant to working excess hours;
- state when the agreement comes into effect and when it ends;

- include the names of the parties; and
- clearly indicate that the employer and employee have in fact agreed (which can be evidenced by signatures).

Keep in mind that employees must be provided with a sufficient amount of time to consider the agreement before entering into it, which varies depending on the circumstances and type of agreement.

Providing the Information Sheet to an Employee

When an employer must provide the Information Sheet to an employee depends on when the written agreement is formed.

- Agreement formed before March 1, 2005 - Information Sheet must be provided before June 1, 2005.
- Agreement formed after March 1, 2005 - Information sheet must be provided before forming the agreement and the fact that the Information Sheet has been provided should be reflected in the agreement.

B. Averaging Hours

In addition to a Director's approval, employers who average an employee's hours of work over a period of more than one (1) week for the purposes of calculating overtime pay must:

- form written agreements with affected employees (or unions).

An employer is not required to provide non-unionized employees with a copy of the Information Sheet.

What Must Be Included in a Written Agreement

An agreement entered into after March 1, 2005 must:

- be in writing;
- indicate the employee's agreement to have his or her hours of work averaged over period of specified number of weeks;
- demonstrate the employee's informed consent that the ESA entitles the employee to receive overtime pay for hours worked in excess of forty-four (44) hours per week;
- provide an expiry date for the agreement, which cannot be more than two (2) years after the agreement's effective date for non-unionized employees;

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- inform the employee that the agreement cannot be cancelled before the agreement expires unless BOTH the employer and employee agree;
- indicate any additional terms relevant to averaging hours of work for the purposes of determining entitlement to overtime pay;
- state when the agreement comes into effect;
- include the names of the parties; and
- clearly indicate that the employer and employee have in fact agreed (which can be evidenced by signatures).

Again, keep in mind that employees must be provided with a sufficient amount of time to consider the agreement before entering into it, which varies depending on the circumstances and type of agreement.

If you have any questions concerning how these changes operate and how they might impact upon your workplace, our lawyers would be pleased to assist you. Please feel free to contact **Joe Conforti** at 416.597.4177, **Joe Morrison** at 416.597.4203 or **Alexa Abiscott** at 416.849.6005 with your questions.

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