

Employment and Labour

APRIL, 2001

The New Ontario Employment Standards Act

Summary of Additions and Revisions

In November, 2000, the Ontario government introduced the *Employment Standards Act, 2000* (the "New Act") which included significant revisions and additions to the minimum terms and conditions of employment currently found in the *Employment Standards Act* (the "Old Act"). Although the New Act has not yet been proclaimed in force, employers should be aware of the enhanced and additional obligations which are imposed by the New Act in order to ensure that their policies and procedures will comply with the New Act once it is fully in force and effect. Many of the changes included in the New Act are intended to provide employees and employers with the flexibility to arrange their work schedules to address specific business and personal needs. Efforts have also been made to clarify obligations relating to hours of work, overtime, vacations and public holidays and to recognize practices which are already in place in many employment relationships.

Provisions of the Old Act which have not changed relate to employers' obligations on termination, including group termination and severance payments, equal pay for equal work, directors' and officers' liability for certain employment related payments and non-discrimination in the provision of benefit plans. As with the Old Act, the New Act does not apply to employees who are in positions which are managerial or supervisory in nature. There continue to be excluded categories of employees and professions to whom the New Act will not apply. As with the Old Act, any attempt by a party to "contract out" of the New Act will be ineffective.

This bulletin will summarize the major changes introduced by the New Act with reference to the obligations of the Old Act, followed by a review of the new obligations added in the New Act.

Revised Minimum Standards Under The New Act

Pregnancy and Parental Leave

Although the New Act was not in force as of December 31, 2000, transition provisions allow for extended parental leave for parents of children born or adopted on or after that date in order to comply with changes to the federal employment insurance benefits. The reinstatement obligations of employers to employees who take pregnancy and/or parental leave remain unchanged.

Pregnancy leave can now begin on the earlier of 17 weeks before the estimated due date or the actual birth of the child. The Old Act states that the earliest date for beginning a pregnancy leave is 17 weeks before the estimated due date. Pregnancy leave is still a maximum of 17 weeks.

Under the New Act, maximum parental leave is increased from 18 to 35 weeks for employees who also take pregnancy leave, in which case parental leave must begin immediately after pregnancy leave ends. Parental leave for employees not taking pregnancy leave is increased to a maximum of 37 weeks, in which case the parental leave must begin within 52 weeks after the child is born or comes into the employee's custody.

The New Act will therefore allow a natural mother 52 weeks of combined leave after which time the reinstatement obligations of an employer must be met. The New Act will also allow the natural mother's partner a further 37 weeks of parental leave, beginning at the end of the child's first year, with the same job protection entitlement.

Revisions to employees' notice obligations at the start of their pregnancy leave (only on the request of the employer) and in the event that the employee does not intend to return to work after their leave (4 weeks notice of intention not to return) are included in the New Act.

Payment of Wages

Under the Old Act, wages must be paid by cash or cheque, and the employer was required to provide a written statement of wages and vacation pay. Under certain conditions, the New Act allows for wages to be paid by direct deposit, without first obtaining an employee's agreement and for the statement of wages to be provided by e-mail. The priority of employee wage claims over any other unsecured claims of the employer has increased from \$2,000 to \$10,000 per employee.

Overtime

The Old Act required overtime to be paid for hours worked in excess of 44 per week. The New Act continues the 44 hour threshold, but allows for employers and employees to reach agreements regarding averaging employees' pay over 4 week periods for the purpose of determining overtime entitlement and taking time off in lieu of overtime pay.

Hours of Work

Previously, approval from the Ministry of Labour was required before employees could be asked to work more than 8 hours per day or 48 hours per week. Under the New Act, while the maximum of 8 hours per day and 48 hours per week remain, an employer and employee can agree to a maximum work week of 60 hours without approval or a permit from the Ministry. These agreements can be revoked by either party. New requirements regarding rest periods between shifts (outlined below) were introduced to ensure that employees receive minimum periods of time free from work, even in the event of longer work days and weeks. The New Act also allows the mandatory 30 minute eating period every 5 hours to be split into 2 breaks that total 30 minutes every 5 hours, upon the agreement of the employer and the employee.

Public Holidays

Although the public holidays under the New Act are unchanged, the obligations relating to payment or time off in respect of public holidays have been simplified.

Any employee (including part-time employees) who has earned regular wages in the 4 weeks prior to the week in which the public holiday falls will be entitled to public holiday pay if they work the last regularly scheduled work day before and the first regularly scheduled work day after the public holiday. Under the New Act, an employee who has to work on the public holiday has a choice of either regular pay plus premium pay for the hours worked or regular pay and a substitute day off in lieu of the public holiday.

Vacation Pay

The New Act does not change the minimum required period of paid vacation (2 weeks after 12 months' service) or the minimum amount of vacation pay (4% of wages earned in the previous 12 months). However, it does allow that vacations may be taken in increments of less than 1 week, if the employee so requests in writing and the employer agrees. Employers and employees can also agree to have vacation pay paid out as it is accrued during each pay period, rather than in a lump sum prior to the paid vacation period.

Record Keeping

The Old Act requires an employer to make and keep some employee records for 24 months after the work is performed. Other records have to be kept for 5 years. The New Act imposes a uniform record keeping obligation of 36 months for all information including personal data, wages, gross earnings and deductions, pregnancy leave-related documents, notices, certificates and correspondence relating to employees. The New Act allows these records to be kept outside of Ontario without the Ministry's approval.

Obligations on Dismissal - Pay in lieu of Notice and Temporary Lay-off

Under the New Act, if an employer is dismissing an employee without notice (and without cause), the employer must make a lump sum payment of pay in lieu of notice, rather than continuing their wages for the statutory notice period, as allowed by the Old Act. Benefits must still be continued for the statutory notice period to which the employee would have been entitled, if their employment had not been terminated without notice. The New Act no longer requires an employer to specify a recall date in the event of a temporary lay-off. Previously, this failure would have resulted in the automatic termination of employment.

**New Minimum Standards
Introduced By The New Act****Emergency Leave**

10 days per year of unpaid, job-protected leave for emergencies must be given by employers who regularly employ 50 or more employees. Such leave must be given because of the illness, injury or medical emergency of the employee or their family or because of an urgent matter concerning the employee or a member of their family. As the entitlement to take such leave has been left somewhat undefined, the New Act allows an employer to require an employee to provide reasonable evidence of the need for such leave. During such periods of leave an employee's benefits must be continued, seniority continues to accrue and the employee has the same reinstatement entitlements due to an employee returning from pregnancy and/or parental leave.

**Hours Free From Work
and Hours Between Shifts**

While increasing the number of hours which may be worked without notice to the Ministry, the New Act includes minimum periods which must be free from work and minimum periods between shifts. Employees (other than those on call) are entitled to a period of at least 11 hours free from performing active duties each day (which effectively removes the previous prohibition against working more than 12 hours in a day so long as the minimum work-free period is provided). Employees are also entitled to a period of at least 8 hours free from work between shifts, unless they agree otherwise, or the total hours worked on successive shifts does not exceed 13. Employees are also entitled to at least 24 consecutive hours free from performing work in each week, or at least 48 consecutive hours free from performing work in each period of 2 consecutive weeks.

Posting of Information

The New Act requires employers to post material prepared by the Ministry of Labour describing the rights of employees and the obligations of employers under the legislation. This information must be posted in a conspicuous place and, if the majority language in the workplace is not English, in translated versions provided by the Ministry.

Anti-Reprisal Provisions

The New Act includes new offences for the intimidation, dismissal or threatening of employees who ask employers to comply with the legislation, make enquiries about their rights, file complaints or otherwise try to exercise their rights under the New Act.

As the New Act was introduced quickly in order to ensure compliance with the new federal pregnancy and parental leave entitlements, the actual application and effect of many of the new and revised obligations is uncertain. As a result, more information regarding the application of the New Act as well as actions required to ensure compliance with or strategies for responding to the legislation's new terms and conditions can be obtained by contacting any of Goodmans lawyers practicing in this area including:

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