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FAMILY DAY: AN ADDITIONAL PAID HOLIDAY – OR IS IT?

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[Editor's Note: The following article discusses laws related to Family Day in Ontario. For detailed information regarding Family Day in other jurisdictions, please consult the relevant Ministry or legal counsel.]

Shortly after the October 11, 2007 election, the Provincial Government added Family Day to the list of Public Holidays recognized by the *Employment Standards Act, 2000* ("ESA"). In 2008, Family Day will fall on February 18.

Recently, there have been conflicting reports in the media regarding an employer's obligation to give its employees this additional day off with pay. Getting the answer right is important to every employer. If an employer grants the paid holiday but is not legally required to do so, it has needlessly incurred potentially significant costs in terms of lost productivity or the payment of extra wages to employees working on Family Day. On the other hand, if an employer elects to deny the additional paid holiday and that decision is successfully challenged by an employee or a union, the employer may face the payment of sizeable damages.

This briefing note provides general information to assist you to determine what your obligations are as an employer.

Factors To Consider

Whether an employer is obliged to give its employees Family Day as a paid day off depends on a number of factors including: whether the employer is federally or provincially regulated, its employees' current public holiday entitlement, and, in the case of a unionized workplace, the provisions of the applicable collective agreement.

Inside

Is the Employer Federally or Provincially Regulated?

Family Day is a Public Holiday under the ESA. This Act applies only to provincially regulated employers. A federally regulated employer (such as a bank or airline) is not required to comply with the provisions of the ESA. Therefore, a federally regulated employer is not required to give its employees Family Day off with pay.

Provincially Regulated Employers

The “default” rule is that a provincially regulated employer is obliged to give its employees a paid day off on every Public Holiday. This applies regardless of whether the workplace is subject to a collective agreement. There is an important exception: under the ESA, if an employer already provides to its employees a “greater right or benefit” than what is required by the ESA, the employer is not required to provide (in this case) the additional paid holiday.

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What is “a greater right or benefit”?

Arbitration decisions and decisions under the ESA provide insight as to what constitutes a “greater right or benefit”. It is important to appreciate that the answer is not reached merely by adding up the number of paid holidays to which an employee is entitled under his/her employment contract (including a collective agreement) and comparing it to the number provided for under the ESA. The analysis is more complex than that. Courts and arbitrators consider all of the following factors as a whole, no single factor being determinative:

- The number of paid holidays already provided by the employer.
- The qualifying conditions for public holiday pay.
- Whether an employee could be required to work on a Public Holiday.
- The rate of premium pay for working on a Public Holiday.

In addition, consideration will be paid to the *purpose* of the Public Holiday, and whether or not the term or condition of employment which the employer argues constitutes a “greater right or benefit” satisfies that purpose. The Government’s stated purpose for adding Family Day as a Public Holiday is to provide Ontario families with a common day off so that they may spend time together.

It is consideration of all of these factors which makes a “greater right or benefit” determination more complex than just counting the number of holidays an employer already provides.

For example, where an employer provides employees with Remembrance Day and the Civic Holiday off with pay, the employer may assume it has satisfied the test and need not grant Family Day as an additional paid holiday. However, although the employer is providing a greater *number* of paid holidays, it has not provided one which satisfies the stated purpose of Family Day; that is to provide a common day off for Ontario families. On these facts, there is a strong argument that the employer is still required to observe Family Day.

That said, where terms and conditions in a workplace exceed the ESA minimum number of paid holidays, and there is some flexibility as to when an employee may choose to take the excess day(s) off (for instance, “float days” that can be used at an employee’s request), there is a stronger argument that the employer has met the “greater right or benefit” test.

Finally, employers must ensure that the days provided in excess of the ESA minimum do not have restrictions or

qualifiers that make them less favourable than the ESA Public Holidays. For instance, if an employee must be employed for a minimum of a year to be eligible to take a “floater day”, it is unlikely that that floater day will be found to be a replacement for Family Day for an employee with less than a year’s service.

As you can see, the analysis [is] complex, and the stakes are high. There are a number of factors that must be taken into account, and it all starts with a clear review of the current terms and conditions of employment in your workplace. To make sure that you and your organization make the right call we recommend that you seek legal advice.

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