Ten Steps to Employment Standards Act Compliance

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For the human resources practitioner, the *Employment Standards Act* (the "*Act*"), which applies to the vast majority of Ontario workplaces, is arguably the most critical piece of employment legislation.

The *Act* sets out a number of non-negotiable minimum standards of employment such as hours of work, overtime, vacation entitlement and payment of wages. Written agreements, including employment contracts and collective agreements, must meet at least these standards. Failure to do so will render the agreement void even if parties to the agreement agreed to those terms.

An employer that does not comply with the *Act* may be subject to administrative and financial penalties under the *Act* ranging from $210 to $360. As well, employers that violate the *Act* may be subject to quasi-criminal prosecution. At one time, prosecutions for violations of the *Act* were considered a rare event. This is no longer the case: in 2006, 456 prosecutions were commenced against Ontario employers – up from 7 in 2001 and 318 in 2005. An employer that is convicted of an offence may be fined up to $100,000 for a first offence and up to $500,000 for a repeat offence. A director of the company may be fined up to $50,000 and/or sentenced to up to 12 months' imprisonment.

As a result, a review of your organization's compliance with the *Act* is now more critical than ever. What follows are ten key compliance strategies for implementation in your workplace.

1. **Know Your Posting Obligations**

   The *Act* requires all employers to display the Ministry of Labour's *What You Should Know About The Ontario Employment Standards Act* poster in a conspicuous location in the workplace. If the majority language in your workplace is not English, you are obligated to contact the Ministry in order to determine whether the poster has been published in that language. If it has been, you must also post the alternate poster.

2. **Know Your Record Keeping Obligations**

   Gone are the days where an employer can justify its lack of record keeping on the basis that it "doesn't do things in writing". The record keeping obligations set out in the *Act* are onerous and mandatory. Among the records that an employer is required to keep:

   - Each employee's name and address (must be retained for three years after employment ends).
   - The date on which each employee commenced employment (must be retained for three years after employment ends).

- An employee's date of birth, if he or she is under eighteen years of age (must be retained until the earlier of three years after the employee's eighteenth birthday, or three years after employment ends).
- The number of hours worked by an hourly paid employee in each day and each week (must be retained for three years after the day or week).
- The number of hours worked by a salaried employee in excess of their regular work day or week (must be retained for three years after the day or week).
- All documents relating to protected leaves under the *Act* (must be retained for three years after the day any such leave ended).
- Any agreement to work excess hours and/or to average overtime that is entered into with an employee (must be retained for three years after the last day on which work was performed under the agreement).
- Records of vacation time earned and taken by each employee, and records of the amount of vacation pay paid to each employee (must be retained for three years after they are made).

Proper record keeping is important for three reasons. First, it is mandatory to keep the records specified in the *Act*. Failing to do so may result in a penalty or prosecution. Second, the *Act* requires that records be available for inspection by an Employment Standards Officer. Obviously, it will not be possible to comply with this obligation if records are not kept. Third, written records will be critical to an employer's defence in the event that an employee alleges that his or her

rights under the *Act* have been violated. A failure to have written records to support an employer's defence will allow an adjudicator to "take the employee's word" that the *Act* has been violated, resulting in otherwise avoidable penalties.

3. Know When and How to Pay Overtime

If asked, most employers would correctly answer the question "when must overtime be paid?" The answer, of course, is that overtime must be paid after an employee has worked 44 hours in a week at the rate of one and a half times an employee's regular wage rate. Beyond that basic question, however, many employers are unclear about the *Act*'s requirements with respect to overtime. The following are some common traps, and how to avoid them:

- An employer cannot pay an employee a salary that is "inclusive of overtime". In fact, the Ministry of Labour has ordered unpaid overtime to be paid even where an employee has already agreed to be paid a salary that includes overtime pay. Such an order will result in an employer having to pay overtime to an employee twice: once as a result of the arrangement to pay the employee a salary that includes overtime and then again as a result of a Ministry of Labour order. Employers can avoid this situation by paying a base rate plus overtime, and by documenting the overtime pay and hours for which that pay was earned on the employee's pay stub. Not only will this avoid having to pay overtime twice – it is the law!

- An employer must pay overtime after 44 hours are worked in a week, even if the employee has agreed to work up to 48 hours or the employer has an approval from the Ministry of Labour that allows it to schedule employees in excess of forty eight hours in a week.
- Salaried employees are entitled to receive overtime pay.
- An employer may not have to pay overtime pay to all of its employees. The *Act* exempts a number of employees from the right to receive overtime pay. For example, supervisory and managerial employees may not be eligible to receive overtime pay. To avoid paying unnecessary overtime pay (or to avoid withholding overtime pay from employees who are entitled to receive it) employers should familiarize themselves with the overtime exemptions contained in the *Act*.

4. Know the Public Holiday Provisions

Ontario has nine public holidays: New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Christmas Day, and Boxing Day.

An employee who ordinarily works on the day that is a public holiday is entitled to the day off with public holiday pay. An employer cannot require the employee to work on the public holiday; the employee's consent in writing must be obtained. An employees who agrees to work on a public holiday must be paid his or her regular wage rate for all hours worked on the public holiday and must

receive a substitute day off with public holiday pay. Alternatively, if the employee agrees in writing, the employer may instead pay the employee public holiday pay plus one and a half times his or her regular wage rate for all hours worked on the public holiday.

If the public holiday falls on a day that is not ordinarily a work day for an employee, or is during an employee's vacation, the employee is entitled to either a substitute day off with public holiday pay or public holiday pay for the holiday but no substitute day off, if the employee agrees to this in writing.

In order to qualify for public holiday pay, an employee must work the entire last regularly scheduled shift before the public holiday and the entire first regularly scheduled shift after the public holiday, or must provide reasonable cause for not doing so. The scheduled shifts do not have to fall on the day immediately before and after the public holiday day; an employee who only works once a week would only have to attend the shift in the week before the public holiday and the shift after the public holiday to qualify for public holiday pay.

5. Know the Hours of Work Provisions

In general, an employer may not require or allow an employee to work in excess of eight hours in a day (or, for employees whose regular work day is more than eight hours, the number of hours in their regular work day) or 48 hours in a week.

An employer that wishes an employee to work in excess of the daily maximum number of hours of work must obtain the employee's written agreement that he or she will work up to a specified number of hours per day. The employee's number of hours of work per day may not exceed that specified in the agreement.

An employer that wishes an employee to work in excess of the weekly maximum must (i) obtain the employee's written agreement that he or she will work up to a specified number of hours per week and (ii) obtain an Approval from the Director of Employment Standards. As mentioned above, the hours of work provisions of the *Act* is separate from and in addition to the overtime provisions. Therefore, even if the Director of Employment Standards approved a maximum number of weekly hours of work in excess of 48, such approval does not relieve the employer of its obligation to give its employees overtime pay for all hours worked in excess of 44 hours.

6. Know the Personal Emergency Leave and the Family Medical Leave Provisions

The Personal Emergency Leave and Family Medical Leave provisions of the *Act* have some commonalities: the employee's length of employment is not interrupted as a result of having taken a leave; the employee may continue his or her benefit plan contributions and resulting entitlements during the leave; and the employee is entitled to return to the position he or she held at the conclusion of the leave. However, Personal Emergency Leave and Family Medical Leave are

not the same and failing to recognize the differences may result in a violation of the *Act*.

Personal Emergency Leave

The Personal Emergency Leave provisions of the *Act* provide an employee with an unpaid leave of absence of up to 10 days if (a) the employee suffers from a personal illness, injury or medical emergency or (b) a family member (as defined in the *Act*) dies, suffers from an injury or medical emergency, or experiences an urgent matter requiring the assistance of the employee.

Only employers that regularly employ 50 or more employees are required to grant their employees Personal Emergency Leave. Employers that do not regularly employ 50 or more people do not have to give an employee time away from work for personal matters, although they may choose to do so.

Unless a contract of employment or collective agreement provides a greater right or benefit, employers should be aware of the following with respect to Personal Emergency Leave:

- Personal Emergency Leave days are unpaid.
- Taking a partial day off work is treated as if an entire Personal Emergency Leave day has been taken.
- Personal Emergency Leave days cannot be carried over from year to year.

- An employer is allowed to ask for reasonable proof of the emergency giving rise to the leave.
- Because personal emergencies are by their nature unpredictable, the *Act* does not require that an employee request permission from the employer before taking a Personal Emergency Leave day. However, the employee must advise the employer as soon as possible that a Personal Emergency Leave day has been, or will be, taken. In other words, the employee must advise the employer that he or she will be taking a Personal Emergency Leave day in advance where possible, but cannot be penalized for failing to do so where circumstances prevent advance notice.

Family Medical Leave

Family Medical Leave is separate and distinct from Personal Emergency Leave. An employee is entitled to an unpaid leave of absence of up to eight weeks to provide care or support to an individual who stands in a familial or familial-like relationship with the employee if a qualified health practitioner issues a certificate stating that the individual has a serious medical condition with a significant risk of death occurring within 26 weeks.

By contrast to Personal Emergency Leave, Family Medical Leave is available to all employees, even if the employer does not regularly employ more than 50 employees.

Unless a contract of employment or collective agreement provides a greater right or benefit, employers should be aware of the following with respect to Family Medical Leave:

- There is no maximum number of Family Medical Leaves. If an employee has two different family members who meet the criteria, the employee will be entitled to two separate Family Medical Leaves.
- The leave ends on either the last day of the week that the family member dies or the last day of the 26-week period, whichever is earlier.
- If multiple family members work for the same employer, the employer can require all of the family members to share one eight-week leave (i.e., each family member does not get eight weeks off as a result of the medical certificate).
- Taking a partial week off work is treated as if an entire week of entitlement has been taken.

7. Know When and How Deductions Can be Made from an Employee's Paycheque

It is commonly assumed that an employer can make deductions from an employee's wages if, for example, the employee loses or damages merchandise, has a shortage in the cash till at the end of the day, or fails to return company property to the employer. This is an incorrect assumption and may be a violation of the *Act*.

In order to make a deduction from an employee's paycheque, an employer must either (i) be empowered or required by a statute or a court order to make the deduction; or (ii) have obtained the employee's written consent. The consent of the employee must be specific. It must refer to a specific amount of money or a formula by which that specific amount will be calculated. It is not sufficient that the authorization refers to "any shortages in the cash" or "any damage to merchandise".

In addition, the *Act* specifically prohibits withholding an employee's wages because of faulty work. Similarly, the *Act* prohibits withholding an employee's pay due to a cash shortage or lost or stolen property if an individual other than the employee has access to the cash or property.

8. Know What Constitutes a Layoff

Fluctuations in customer demand or availability of raw materials sometimes necessitates a temporary shutdown of an employer's operations and the lay-off of its employees. In the usual course the lay-off is temporary and the employee returns to work after its conclusion. In the unusual course, a lay-off becomes a termination which triggers an employer's termination and severance obligations. Employers wishing to avoid this latter situation should be aware of the following:

- The lay-off cannot last for more than 13 weeks in a 20 consecutive week period. If the lay-off does last for more than 13 weeks in a 20 consecutive week period, the employer will be deemed to have terminated the

employee and will have to provide notice of termination and severance pay, where applicable.

- Alternatively, the employer can lay-off an employee for up to 35 weeks in any 50 consecutive week period if the employer continues to make substantial payments to the employee, continues to make contributions to benefit and retirement plans during the lay-off, or has a supplemental employment insurance benefit plan that provides payment to employees during the lay-off.
- Although it was at one time a necessity, the employer no longer has to provide a definite day of recall to the employee. All that is required is that the employer comply with its obligation not to extend a period of lay-off beyond the limits set out in the *Act*.

9. Know What Breaks You Must (and Need Not!) Provide

An employee must receive a rest period of one half hour in every five consecutive hours of work. The rest period does not have to be paid. If the employee agrees, the employer may provide two 15-minute rest periods instead.

No other rest periods are required during the work day. An employee does not have a right to receive two 15-minute breaks and a lunch break during the work day. So long as an employee receives a half hour rest period for every five consecutive hours worked, the employer's obligations under the *Act* are met.

10. Know When to Ask For Help

It is clear from this brief summary that the *Act* imposes strict obligations on Ontario employers. Furthermore, as evidenced by the recent introduction of Family Medical Leave and the release of the updated poster entitled *What You Should Know About The Ontario Employment Standards Act*, these obligations are constantly changing. As a result, it is critical that employers audit their human resources policies and practices – both written and unwritten – in order to ensure that they do not violate the *Act*.

To ensure that it is compliant with the *Act*, it is advisable for an employer to engage the assistance of an experienced employment counsel to conduct an audit of its policies and procedures. Proactively engaging in internal audits and policy reviews will ensure that the *Act* is not unintentionally violated, avoid monetary penalties and quasi-criminal convictions, and remains sound human resources policy.

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