SHERRARD KUZZ LLP
Barristers & Solicitors

Management Counsel

Employment and Labour Law Update
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PROPOSED CHANGES TO HOURS OF WORK AND OVERTIME AVERAGING

On April 26, 2004, the Ontario Government introduced legislation that, if passed, will significantly change the way excess weekly work hours and overtime averaging agreements are regulated under the Ontario *Employment Standards Act* (the "*ESA*").

The legislation, Bill 63, the *Employment Standards Amendment Act (Hours of Work and Other Matters) 2004*, is scheduled to come into force on January 1, 2005. However, employers should begin now to review their practices to ensure they are in compliance when Bill 63 becomes law. Failure to do so may result in current agreements and approvals being unenforceable come January 1, 2005.

HOURS OF WORK

Under the current provisions of the *ESA*, an employee may work more than 48 hours in a week so long as the employee agrees in writing (and subject to the ESA's requirements to pay overtime). Approval is not required from the Director of Employment Standards (the "Director") unless the employee is to work more than 60 hours in a week.

Under Bill 63, the Director's approval must be obtained if the employee is to work more than 48 hours in a week (in addition to a written agreement between employer and employee).

AGREEMENTS AND APPROVALS

Prior to entering into an agreement with an employee the employer must provide to the employee a copy of a Ministry of Labour information document (which is expected to be prepared by the Ministry shortly) that sets out the employee's rights under the hours of work and overtime provisions of the *ESA*. The written agreement must then specifically state that the employee received the Ministry's information document. This documentation must also be given to any employee who has already entered into an agreement to work excess hours (in that case, the documentation must be provided to the employee prior to April 1, 2005).

> "Under Bill 63, approval of the Director of Employment Standards must be obtained if the employee is to work more than 48 hours in a week, in addition to a written agreement between employer and employee."

Under Bill 63 "agreements" and "approvals" are not grandparented equally. After January 1, 2005 "agreements" made prior to that date will remain valid. On the other hand any "approval" given by the Director prior to January 1, 2005 will become void as of January 1, 2005. Accordingly, an employer will have to obtain a new approval under the amended act.

When approval is sought the Director will consider a number of factors including an employer's record of compliance or contravention of the *ESA* as well as health and safety of employees. Employers can begin to apply for approvals under the amended act as of October 1, 2004.

Once obtained, approval for work hours between 48 and 60 will be valid for up to three years. Approval for more than 60 hours will be valid for only one year.

IF APPROVAL IS DELAYED

If an employer has applied for approval and has not received a response from the Director after 30 days of submitting the application, pending the Director's decision, the employee may work more than 48 hours in a week (but not more than 60 hours) so long as certain conditions have been met including: the employee agrees, no prior application for approval by the employer was refused or revoked and the current application for approval has been posted in the workplace (there are additional conditions).

OVERTIME AVERAGING

Under the current provisions of the *ESA*, an employer and employee can agree to average hours of work for overtime pay without approval from the Director if the averaging period does not exceed four (4) weeks. If it does exceed four (4) weeks, approval from the Director is required.

Under Bill 63, approval to average hours of work will be required in all cases.

Similar to the hours of work provision, if an employer has applied for averaging approval but not

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OVERTIME AVERAGING...

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received a response from the Director after 30 days of submitting the application, pending the Director's decision, averaging may take place but only over a maximum period of two consecutive weeks (subject to certain other conditions).

Also similar to the hours of work provisions, under Bill 63 "agreements" and "approvals" are not grandparented equally. After January 1, 2005 "agreements" made prior to that date will remain valid. On the other hand, any "approval" given by the Director prior to January 1, 2005 will become void as of January 1, 2005. Accordingly, employers will have to obtain new approvals under the amended act.

Finally, maximum time limits on averaging agreements remain unchanged under Bill 63: two (2) years for non-union employees and the term of the collective agreement for unionized employees.

COMPLIANCE AMENDMENTS

Under Bill 63 an employer is required to retain copies of excess hours and averaging agreements for three (3) years after the work was last performed under the agreement.

Bill 63 also proposes a new, tougher approach to breaches of the *ESA*. In addition to current penalties under the *ESA*, a person convicted of an offence may have published and posted, including on the Internet, their name, information about the offence, conviction and sentence.

The risk of embarrassment and damaged reputation is therefore enhanced considerably particularly in light of the Minister of Labour's recent announcement that target inspections will increase dramatically to capture employers violating the *ESA*. In the words of The Honourable Minister of Labour, Chris Bentley: "Last year, there were more than 15,000 claims against employers and only one prosecution was started. Starting today, enforcement is back in style."

WHAT TO DO

In order that your organization may be ready for January 1, 2005, a number of tasks can be undertaken now:

1. Review all existing Excess Hours and Averaging Agreements.
2. Prepare applications for the ESA Director's approval. Applications can be submitted as of October 1, 2004 to ensure they are in place when Bill 63 becomes law on January 1, 2005.
3. Obtain and prepare to distribute to any non-unionized employee who has entered or will enter into an Excess Hours Agreement the Ministry's information documentation (not yet available from the Ministry).
4. Ensure your organization is in compliance with all provisions of the *Employment Standards Act*.

If you or your organization would like assistance understanding or preparing to implement the proposed changes under the *ESA*, please contact any member of the skilled team at Sherrard Kuzz.

In addition, as Bill 63 has only recently been introduced, our law firm will continue to monitor the Bill's progress in the Legislature and will provides updates in future editions of *Management Counsel*.

Breakfast Seminar

Next in our series of employment and labour law update seminars:

TOPIC: UPDATE ON RECENT & CRITICAL EMPLOYMENT LAW DEVELOPMENTS

- o **Amendments to Ontario's *Employment Standards Act*:**
  - **Weekly Hours of Work**
  - **How to Seek the Director's Approval**
  - **Compassionate Leave**
  - **How to Obtain Valid Employee Agreements**
  - **Overtime Averaging**
- o **Pregnancy Leave**
- o **Release Forms - Essential Do's and Don'ts**
- o **Evolving Constructive Dismissal Principles**

DATE: Thursday, September 9, 2004 7:30 a.m. – 9:00 a.m.
(program to start at 8:00 a.m.; breakfast provided)

VENUE: Toronto Board of Trade Country Club
20 Lloyd Street , Woodbridge , ON 416.746.6811

HReview Seminar Series

Watch for your faxed invitation the week of July 26, 2004 or call 416.603.0700 to request an invitation.

MCGUINTY GOVERNMENT INTRODUCES FAMILY MEDICAL LEAVE LEGISLATION

In April 2004, the Provincial Liberal Government introduced legislation that would provide up to eight (8) weeks of job-protected, unpaid time off work for those workers taking care of a gravely ill family member at significant risk of dying within 26 weeks.

If passed, the *Employment Standards Amendment Act (Family Medical Leave), 2004* would create a family medical leave that applies to all workers covered by the *Employment Standards Act, 2000* - including part-time workers.

LEGISLATION RATIONALE

According to the Province the rationale behind the legislation is that

> "providing job-protected leave ... builds prosperity by creating a more positive, loyal and productive workforce for employers. Employees who are able to take leave to care for gravely ill family members tend to return to their workplaces better able to focus on their jobs and are likely to be more loyal to their employer. The direct cost of absenteeism due to high levels of caregiver stress has been estimated at just over $1 billion a year in Canada, with indirect cost of an additional $1 to $2 billion."

WHO IS ELIGIBLE

Under the proposed legislation "family member" is defined as a spouse (including same-sex spouse whether married or common law), child of the worker, child of the worker's spouse and parent (including "step" or "foster").

> "The ... *Act* would create a family medical leave that applies to all workers covered by the *Employment Standards Act, 2000* - including part-time workers."

QUALIFICATION PROCESS

A worker seeking leave must provide notice in advance (or as soon as possible after commencing leave if notice is not possible), and the proposed leave would be in addition to emergency leave under the *Employment Standards Act, 2000*, so that a worker would be eligible for both types of leave.

To qualify for family medical leave, a supporting medical certificate would be required. Then, if at the end of the 26 week period a second medical certificate is obtained an employee may be entitled to a further eight week leave. If more than one family member wishes to take the leave it may be shared.

A worker would not be required to have worked a specific length of time in order to quality for the leave, and would earn seniority and credit for length of service and length of employment while on leave just as if they had stayed at work. Similarly, during the period of leave the employer would have to continue to pay its share of the premiums to certain benefit plans

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DID YOU KNOW...?

On Monday, May 17, 2004, the Province's Bill 31, *Health Information Protection Act, 2004* ("*HIPA*") passed third reading. The new law **will come into effect on November 1, 2004**. To learn more about *HIPA*, see our Management Counsel Newsletter, February 2004, Vol. III, No. 1 at www.sherrardkuzz.com

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offered before the leave commenced (*i.e.* pension plans, life and extended health insurance plans, accidental death plans and dental plans).

Finally, a worker may also be eligible for Federal Employment Insurance compassionate care benefits and would quality for the Provincial benefits regardless whether the worker qualified for the Federal benefits.

We will continue to follow this proposed legislation and keep our readers informed.

If you would like to discuss how this legislation might impact your organization, please contact any member of our legal team at the numbers below.

DID YOU ALSO KNOW...?

Under the Federal *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*") the Government has passed a regulation allowing certain investigative bodies (such as private investigation firms, professional associations and law societies) to collect and disclose personal information about an individual without his or her consent?

Previously, a gap existed which permitted these bodies to collect personal information without consent, but not to disclose it (for instance, to the employer who engaged the services of the private investigator). That gap has now been filled, and there may be a free flow of information, provided that the engagement of the investigator is otherwise in accordance with privacy laws.

For more information on how privacy legislation may affect your business, contact any member of Sherrard Kuzz LLP.

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