Amendments to Employment Standards Act introduced by government

October 1, 2002

On September 25, 2002, the provincial government introduced Bill 179, the *Government Efficiency Act, 2002*. The Bill amends the *Workplace Safety and Insurance Act, 1997*, the *Labour Relations Act, 1995*, the *Crown Employees Collective Bargaining Act, 1993* and the *Ambulance Services Collective Bargaining Act, 2001*. However, the Bill's most notable amendments are to the *Employment Standards Act, 2000* (the Act), of which the following are among the principal features:

Vacation reporting requirements – ss. 12.1, 15.1, 41.1

Readers will recall that one of the changes the Act made was to allow employees and employers to agree on taking vacations in varying amounts of time, as opposed to blocks of one or two weeks. However, as the Act requires employers to provide vacation pay statements each time an employee takes a vacation, allowing the parties to agree on numerous "mini-vacations" had the unforeseen consequence of imposing a fairly onerous reporting requirement on employers.

To remedy this, the Bill proposes a procedure under which employers would be able to provide vacation pay reports to employees once a year, based on a vacation year selected by the employer. An employer could choose to base vacation entitlement either on the 12-month period commencing with the employee's hire date (the "standard vacation entitlement year") or on a 12-month period commencing on another date (the "alternative vacation entitlement year"). If the employer were to use an alternative vacation entitlement year, rules that address what the Bill refers to as the "stub period" – the period of time between the employee's start date and the beginning of the alternative vacation entitlement year – would apply.

The employer would be obliged to keep a record of the following information with respect to vacation entitlement:

- vacation time carried over from previous years;
- vacation time earned and taken in the vacation year;
- vacation time remaining available to the employee at the end of the vacation year; and
- vacation pay paid in the vacation year, the amount of wages on which the vacation pay was calculated and the period of time to which the wages relate.

With respect to any stub period, the employer would have to record

- vacation time earned and taken in the stub period;

- vacation time remaining available to the employee at the end of the stub period; and
- vacation pay paid in the stub period, the amount of wages on which the vacation pay was calculated and the period of time to which the wages relate.

On making a written request, the employee would be entitled to receive a statement with this information after the end of the vacation entitlement year or the end of the stub period, as the case may be. The employer would not be required to provide more than one statement for any vacation entitlement year or stub period. Employers who pay vacation pay that accrues during a pay period on the pay day for that period and who provide a statement setting out the amount of vacation pay being paid separately would not have to provide the annual statement or stub period statement. Termination pay statements would also have to include a statement setting out the gross vacation pay being paid to the employee and how it was calculated.

Vacation calculation – ss. 33, 35.1

Under the Act, if an employee does not work regular work weeks and does not take his or her vacation in complete weeks, the employer must base the employee's vacation entitlement on the average number of days the employee worked per week in the four months immediately preceding the first day on which vacation time for the 12 months of employment is taken.

Under the Bill, the calculation for these employees would be based on the most recently completed standard or alternative vacation entitlement year, rather than the preceding four months.

Public holiday agreements – ss. 27, 28, 30

The Act provides that an employer and employee may agree that the employee will work on a public holiday that falls on a work day and that, if such an agreement is made, the employer must provide the employee with another day off with pay or, if the parties agree, pay the employee at a premium for the work done on the public holiday.

This entitlement is subject to a number of restrictions if certain work is not performed. For example, the Act provides that, if an employee, with reasonable cause, performs none of the work he or she agreed to perform and then, without reasonable cause, fails to work on the day just before or just after the public holiday, the employee loses the entitlement to either the premium pay or a substitute holiday. Similarly, if the employee performs some of the work that he or she agreed to perform on the public holiday but fails, without reasonable cause, to perform all of it, the employer must give the employee premium pay for each hour worked on the public holiday but the employee has no other entitlement to a premium day or a substitute holiday.

The Bill provides that an employee who performs all the work agreed to on the public holiday but fails, without reasonable cause, to work either the day before or the day after the holiday, would receive premium pay but no other entitlement.

Public holiday on a non-work day – s. 29

The Act provides that, if a public holiday falls on a day that is not a working day or a vacation day, the employer must substitute another paid day off work for the employee.

The Bill provides that, for employees on pregnancy or parental leave or on lay-off, the entitlement would not be to another paid day off, but rather to public holiday pay for the holiday.

Definition of a week of lay-off – ss. 56(3), 63(2)

The definition of when an employee is considered to have been laid off for a week is important, because termination and severance entitlements are not triggered in respect of a laid off employee until the lay-off period exceeds a period referred to as a temporary lay-off, that is

- not more than 13 weeks in any period of 20 consecutive weeks, or
- more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks.

Currently, the Act does not distinguish between employees with regular work weeks and other employees in its definition of a week of lay-off.

The Bill provides that, for employees without regular work weeks, the lay-off would not be temporary if, for more than 13 weeks in any period of 20 consecutive weeks, the employee earns less than one-half the average amount the employee earned per week during the 12 consecutive weeks preceding the 20-week period. Weeks during which an employee misses a day of work because the employee is unable to work, unavailable for work, suspended from work or because of a strike or lockout are referred to as "excluded weeks". Such weeks would not be counted as part of the 13 weeks, but would be counted as part of the 20-week period. If the 12-week period preceding the 20-week period contains an excluded week, the average amount earned would be calculated based on the earnings in non-excluded weeks and the number of non-excluded weeks. Similar rules would apply to the second branch of the temporary lay-off threshold, described above.

Severance or termination pay

The Bill proposes to give Cabinet the power to make regulations requiring that certain amounts payable to an employee, such as pension, employment insurance, or workplace safety and insurance benefits, shall or shall not be taken into account in determining an employee's severance and termination pay.

CLARIFICATIONS

A number of the proposed amendments are clarifications of the intent of some of the Act's provisions. These are listed below

Overtime averaging agreement provision – ss. 22(2)

The Act provides that the employer and employee may agree to average the hours worked over a maximum four-week period for the purpose of calculating overtime entitlement.

The Bill would clarify that averaging is to occur over "separate, non-overlapping, contiguous periods of not more than four consecutive weeks each".

Rest periods – s. 18(1)

Currently, the Act provides that an employer must give an employee a period of at least 11 hours free from performing work in each day.

The Bill clarifies that the period is to be at least 11 *consecutive* hours free from work.

From "paid" to "earned"

In a number of places in the Act, calculations are based on wages "paid" or "received". For example, currently the Act provides that public holiday pay for a given public holiday shall be equal to "the total amount of regular wages and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20" (s. 24(1)(a)).

The Bill would amend this to "regular wages *earned*" to ensure that entitlement is not reduced if the employee has not been paid.

Severance and termination – s. 63(1)(a)

"Termination" is currently defined as occurring when the employer "dismisses the employee or otherwise refuses or is unable to continue employing him or her". However, "severance" is defined to include circumstances where the employer "dismisses the employee or refuses to continue employing the employee".

The Bill would remove this inconsistency by adding "or is unable to" to the definition of "severance".

For more information on the *Employment Standards Act, 2000*, see "Emergency leave and agreements under the *ESA 2000*: new variables in the workplace mix" and "Parental leave, overtime rules among major changes in new *Employment Standards Act*" on our Publications page.

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