Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers

Emond Harnden LLP

BREAKFAST SEMINAR SERIES

IMPORTANT CHANGES TO WORKPLACE LEGISLATION

Recent Amendments to the *Employment Standards Act 2000* and the *Labour Relations Act 1995*

Raquel Chisholm

Steven Williams

April 14, 2005

www.emond-harnden.com

ONTARIO *EMPLOYMENT STANDARDS ACT* AMENDMENTS

Raquel Chisholm

April 14, 2005

www.emond-harnden.com

Overview

- Employment standards amendments regarding excess hours of work, overtime averaging, various housekeeping amendments, increased enforcement measures
- Proposed amendments to the *Labour Relations Act, 1995*

Employment Standards Act Amendments

- Bill 63 *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004*
  - Passed December 9, 2004
  - Amendments effective March 1, 2005
- Enhanced enforcement measures
  - Ticketing, effective July 1, 2004
  - *Provincial Offences Act*, Regulation 950

Employment Standards Act
The basics

- Maximum hours of work
  - 8 hours a day, or the number of hours in a regular work day if it is more than 8
  - 48 hours a week
- Overtime
  - Payable after 44 hours of work each week
  - At the rate of 1½ times the regular rate of pay

Excess Hours of Work/Overtime
Averaging

- As of March 1st
- Director of Employment Standards must approve
  - Agreements to work in excess of 48 hours per week; and
  - Agreements to average hours of work for the purpose of determining entitlement to overtime

Historical Overview
Excess hours of work

- **Pre-2000 Amendments**
  - Employers, with employees' consent, could apply to Ministry of Labour for a permit
  - Gold, Blue, Green and Specific Industry permits
- **2000 Amendments (ESA 2000)**
  - Removed permit requirement
  - Only employees' consent required for excess hours to a maximum of 60 hours per week
  - Work in excess of 60 hours per week required Ministry approval (O. Reg. 285/01)
- **2005 Bill 63**
  - Reinstatement of Ministry approval for employer/employee agreements

Provisions Which Remain Unchanged Under Amended Act

- Maximum daily and weekly hours of work
- Rest periods
  - Hours free from work
  - Free from work between shifts
  - Weekly/bi-weekly free time requirements
- Exceptional circumstances
- Meal periods
- Exclusions and exceptions

An Overview of the Steps

- Step 1 – Employer/Employee Agreements
- Step 2 – The Application Process
- Step 3 – Pending Approval
- Step 4 – Receipt of Approval or Notice of Refusal

Excess Daily Hours
March 1, 2005

- Employer and employee can agree to a work day in excess of 8 hours
- Ministry approval is not required where 48 hours per week is not exceeded

Excess Weekly Hours
March 1, 2005

- Employee's hours of work may exceed 48 hours per week where:
  - Employer and each employee enters into a written agreement indicating employee's consent to work excess hours
  - Employer has applied for and received approval from the Director of Employment Standards
  - Employee's hours of work do not exceed the lesser of the number of hours specified in the agreement or the number of hours specified in the approval

Excess Daily/Weekly Hours
Agreement only valid where

- Employer provides non-union employees with the Ministry's publication "*Information for Employees About Hours of Work and Overtime Pay*" (http://www.gov.on.ca/LAB/english/es/hours/info_hours.html)
- Written agreement between employer and employee must contain a statement that the employee acknowledges that he or she has received this document

Excess Daily/Weekly Hours
Agreement only valid where

- For unionized workplaces, the agreement must be between the employer and the bargaining agent
- Arbitrator's have said that the agreement from the bargaining agent must be clear, unambiguous and unequivocal

Existing Agreements in Place Prior to March 1, 2005

Excess Daily Hours Agreements

- Continue to be valid agreements
- Employer must provide the employee (non-unionized) with the Information Sheet no later than June 1, 2005

Excess Weekly Hours Agreements

- Continue to be valid agreements
- Employer must provide the employee (non-unionized) with the Information Sheet no later than June 1, 2005
- As of March 1st, must obtain new approval from the Director
- Approvals granted prior to March 1, 2005 ceased to have effect on March 1st

How to Obtain Approval
The application process

- Employer must obtain and fill out the Hours of Work and Averaging of Hours application
- Employer's Guide to the Application Process on MOL
- www.gov.on.ca/LAB/english/es/hours/index.html
- You can ask for approval of one or more individual employees, an entire occupational group or all of the employees at the workplace

Posting Requirements
Excess hours of work

Application

- Posted on the date of service in every workplace where the affected employees work
- Remain posted until the employer receives either approval or notice of refusal of the application from the Director

Approval

- Post while excess hours agreement is in place

Notice of Refusal

- Post for 60 days

Deciding to Grant Approval
Director may consider

- Any factors Director considers relevant including:
  - Current or past contraventions of the Act or the Regulations by the employer;
  - The health and safety of the employees; and
  - Any other factors prescribed by regulation

Director's Approval

- Director may:
  - Impose conditions on an approval
  - Revoke an approval on giving the employer notice that the Director considers reasonable
- Based on any factors Director considers relevant, including, but not limited to those listed on slide 16

Excess Hours of Work Pending Approval

- Employees may begin to work up to a maximum of 60 hours per week, pending approval from the Director, if all of the following nine conditions have been met

Excess Hours of Work Pending Approval

Conditions to be met

1. The employer and employee have entered into valid, written agreement to work excess weekly hours
2. The employer has served the application on the Director
3. The application applies to the individual employee or occupational group, which includes the individual employee
4. 30 calendar days have passed since the application was served on the Director

Excess Hours of Work Pending Approval

Conditions to be met

5. The employer has not received a notice that the Application was refused
6. The employer's most recent previous application, if any, was not refused
7. The employer's most recent approval, if any, was not revoked
8. The employer has posted and kept posted a copy of the application in at least one conspicuous place in the workplace
9. The employee does not work more than the lesser of the following:
   - -the hours of work specified in the application;
   - -the number of hours the employee agreed to work; or
   - -60 hours

How Long Will Approval Last?

- Excess hours of work (48 to 60 hours)
  - Three years
- Excess hours of work (over 60 hours)
  - Maximum one year

Historical Overview
Overtime averaging

- **Pre-2000**
  - No averaging provisions
  - Hours in excess of 44 hours per week paid at 1 ½
- **2000 Amendments (ESA 2000)**
  - Employer and employees could agree to average hours of work over a period of up to four weeks without approval
  - Regulation 285/01 allowed agreements for averaging over periods greater then four weeks with Ministry approval
- **Bill 63**
  - Averaging provisions continue with two notable amendments:
  - Four week threshold removed – over two or more weeks
  - Employer/employee agreements now require Ministry approval

Overtime Averaging
March 1, 2005

- Employer may average an employee's hours of work over two or more consecutive weeks where:
  - Employer/employee have a written agreement
  - Employer has applied for and received approval from the Director of Employment Standards
  - Averaging does not exceed the lesser of the number of weeks specified in the agreement or the number of weeks specified in the approval

Existing Agreements in Place Prior to March 1, 2005

Overtime Averaging Agreements

- Agreements that have not expired or have not been revoked continue to be valid agreements
  - As of March 1st, employer required to obtain approval from the Director
- Approvals granted prior to March 1, 2005 for averaging agreements of four weeks or longer terminated on February 28, 2005.
  - New approval is required

Averaging Overtime Pending Approval

- Must meet eight similar conditions as excess hours of work (see slides 20 & 21)
- With the exception that there is no requirement to post application in the workplace
- Averaging period pending approval is limited to two consecutive weeks

Overtime Averaging

Posting requirements

- Approval to be posted in every workplace where affected employees work
- Approval to remain posted until approval expires or is revoked

Deciding to Grant Approval
Director may consider

- Same factors as hours of work application
  - Any factors Ministry considers relevant including,
    - Current or past contraventions of the Act or the regulations by the employer
    - The health and safety of the employees
    - Any other factors prescribed by regulation

How Long Will Approval Last?

- Overtime averaging
  - Non-unionized employees - up to two years
  - Unionized employees – employer and union can agree to any expiry date

Common Requirements for Agreements

- Must be in writing
- Must include names of the parties to the agreement
- Must be some clear indication that the employer and employee have in fact agreed
- Ideally, indicate any additional terms or conditions negotiated by the employer and employee relevant to working excess hours or overtime averaging
- State when the agreement will come into effect and when it will end
- Agreement would ideally demonstrate informed consent

Specific Requirements for Excess Hours of Work Agreements

- Must specify the maximum number of excess hours in a day or in a week that the employee will agree to work
- Must contain a statement that the employee acknowledges he or she received MOL Information Sheet
- Inform employee of entitlement to cancel the agreement on two week's written notice to the employer

Specific Requirements for Overtime Averaging Agreements

- Must indicate employee's agreement to have his or her hours of work averaged over periods of specified number of weeks
- Must provide an expiry date (non-unionized - cannot be more than two years)
- Inform it cannot be cancelled before the agreement expires unless BOTH the employer and employee agree

Agreements are Revocable

Excess Hours of Work

- Employee
  - Two weeks' written notice
- Employer
  - Reasonable notice

Overtime Averaging

- Cannot be cancelled before agreement expires, unless both parties agree

Housekeeping Amendments

- New poster to be posted in the workplace
  - www.gov.on.ca.LAB/english/es/poster.html
- Records readily available for inspection to include vacation time and vacation pay
- Retention of excess hours agreements and overtime averaging agreements – three years after last day on which work was performed under agreement
- Emergency leave – s. 50(5) “each year” changed to “each calendar year”
- Publication of convictions

New Enforcement Measures
Ticketing

- Employment standards officers who have been appointed as provincial offences officers may issue tickets under the *Provincial Offences Act* for certain ESA violations
- Set fines of $300.00 with a victim fine surcharge added to each set fine

Ticketable Offences

Three categories:

1. Administrative and enforcement offences (ie. Failure to retain records)
2. Contraventions of wage-based employment standards (ie. Failure to pay overtime pay)
3. Contraventions of non-wage based employment standards (ie. Requiring employees to work hours in excess of daily or weekly limits)

ONTARIO *LABOUR RELATIONS ACT* AMENDMENTS

Steven Williams

April 14, 2005

www.emond-harnden.com

Labour Relations Statute Law Amendment Act, 2004

- Bill 144 received first reading November 3, 2004
  - Second reading debated April 5th
- Government's stated objectives
  - Promote workplace stability
  - Restore balance and fairness to labour relations
- Restoring powers to OLRB
- Specific amendments in the construction industry

Return of Automatic Certification

- Bill 144 restores OLRB's power to order automatic certification as a remedy for an employer's unfair labour practice during an organizing drive
- Power was removed by the Conservative government in 1998 following OLRB certification order in respect of a Wal-Mart store
- Under LRA 1995, OLRB's remedial power is currently limited to ordering another representation vote

The Wal-Mart Decision

- Subtle but effective threat to close store led Board to automatically certify the union
- Board - three violations of the LRA:
  - Failure of company to distance itself from remarks of anti-union associate and its “silencing” of pro-union employees “has a chilling effect on the union’s organizing drive”
  - Four managers circulating among staff to solicit questions about the unionization drive – “an extremely effective tactic of intimidation or undue influence”, as well as designed to identify union supporters
  - Conduct that most concerned the Board was Wal-Mart’s refusal to respond to questions about a possible store closure. This was a key employee concern

The Wal-Mart Decision

- "If you adopt the approach of constantly soliciting questions in [this environment], you have to answer them…. By not reassuring people that the store would not close the managers knew what conclusions the associates would come to. Manipulating the circumstances in this fashion allowed the seed to be planted and grow in the minds of the associates that if they supported the union they might lose their jobs."

Employer Actions Which Have Resulted in Automatic Certification

- Surveillance, interrogation, monitoring of union organizers
- Intimidation and harassment
- Captive audience meetings
- Threats to economic/job security
- Termination of union organizers
- Lay-offs not motivated by legitimate business reasons

Canac Kitchens Ltd.
[1994] OLRB Rep. August 972

- Board declined to certify – found true wishes of the employee could be ascertained by way of a vote
- Board considered a number of factors:
  - The absence of any direct threats to employees about job security, or about the involvement of the union
  - The fact that the interference with the union organizers was not substantial and was kept quite private
  - The fact that no dismissals or even serious discipline of union organizers or supporters were carried out

Canac Kitchens Ltd.
[1994] OLRB Rep. August 972

- Most importantly, Board considered the availability of other remedial responses to redress the unfair labour practices and to restore an environment conducive to a free expression of wishes by way of a vote
  - Size of the workforce was one factor assessed

Employer Unfair Labour Practice
Test to be met

- As a result of employer's contravention of the Act:
  - Employees' true wishes not reflected in a representation vote; or
  - Union unable to obtain necessary 40% support

Employer Unfair Labour Practice
Board powers

- Order a representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees
- Order a second representation vote; or
- Automatic certification
  - Granted where no other remedy sufficient to counter effects of employer contravention

Employer Unfair Labour Practice

- In deciding an application, Board may consider:
  - The results of previous representation vote; and
  - Whether union appears to have adequate membership support for the purposes of collective bargaining

Union Unfair Labour Practice

- New parallel provision provides for remedies for unfair labour practices by unions
- Current legislation allows OLRB to order a second representation vote where union contravenes the Act and interferes with employees' true wishes

Union Unfair Labour Practice

- Under Bill 144, Board would also have the power to dismiss union's application for certification if no other remedy would sufficiently counter the violation

Union Unfair Labour Practice

- Before making an order, Board may consider
  - Results of a previous representation vote, and
  - Whether union appears to have adequate support among employees

Where Board Dismisses Union's Application for Certification

- Union barred from reapplying for one year
- LRA 1995, currently bars <u>any</u> union from reapplying for one year
- However, board may consider an application if:
  1. An employee has changed positions
  2. New application is for a different bargaining unit which includes the employee's new position but does not include the employees original position

Reintroducing OLRB's Power to Issue Interim Orders

- 1992, NDP amendments to LRA gave OLRB power to make interim orders, including reinstatement
- 1998, Conservative government amended the LRA – Board power to make interim orders on procedural matters only
- Current act precludes OLRB from reinstating employees

Bill 144 – Interim Orders

- Restores OLRB's power to issue interim orders in the following instances:
  - Procedural matters on such terms as the Board considers appropriate
  - Requiring employer to reinstate an employee on such terms as the Board considers appropriate
  - Respecting terms and conditions of employment of an employee that have been altered or who has been subject to reprisal, penalty or discipline by the employer during an organizing campaign
- Burden of proof is on the applicant (union)

Issuing Interim Orders
Conditions to be met

- Employer's action occurred during an organizing campaign;
- There is a "serious issue to be decided";
- The interim relief is necessary to prevent "irreparable harm" or to achieve "other significant labour relations objectives"; and
- The "balance of harm" favours granting the interim relief pending a decision on the merits

No Interim Order Where

- Board determines that the alteration of terms and conditions, dismissal, reprisal, penalty or discipline by the employer was not related to the employee's exercise of his or her rights under the Act

Restoring Card-Based Certification in the Construction Industry

- Manner in which applications for certification are processed
- Union will have option of having its application processed under current vote-based system or card-based system similar to what had been in place prior to 1998

Restoring Card-Based Certification in the Construction Industry

- More than 55% - Board may either certify the union or direct a representation vote
- Between 40 and 55% - Board must direct a representation vote
- Less than 40% - Board shall dismiss the application

Other Amendments

- Ends mandatory posting of decertification information
- Eliminates union salary disclosure
- Makes permanent a dispute resolution regime in the residential sector of the construction industry in Toronto and surrounding area
- Interest arbitrators in the ambulance sector
  - Bill 144 requires Minister to appoint an interest arbitrator who is "qualified" in the opinion of the Minister
  - No requirement under current Act for Minister to consider the individual's experience in making the appointment