

Labour and Employment Law Bulletin

February 2008

First Family Day to be Observed in Ontario February 18, 2008

The first “Family Day” will be observed in Ontario on Monday, February 18, 2008. This public holiday was created by the Ontario Government in October of 2007, instituting the ninth public holiday under the *Employment Standards Act* of Ontario. In future years, it will be observed on the third Monday of February.

Generally speaking, employers who are regulated by the *Employment Standards Act* are required to allow their employees February 18, 2008 as a day off, with pay, to the same extent as they are required to provide a day off with pay for Labour Day or Victoria Day or any other public holiday. Federally regulated employers such as banks, airlines, and inter-provincial trucking companies are not regulated by the *Employment Standards Act*. Furthermore, the *Employment Standards Act* creates some exceptions. For example, there are special rules for employees who work in hospitals, hotels, motels, tourist resorts, restaurants, taverns or “continuous operations”. Those employers may require their employees to work on Family Day if it falls on a day that the employee is normally at work, provided that they either allow a substitute day off with pay, or pay the premium pay owed to the employee as required.

All employers who require an employee to work on Family Day will be required to pay the employee their regular rate of pay and one and one-half times their regular rate of pay for each hour worked on the day. Holiday pay is calculated based on the employee’s earnings in the previous four weeks of work. Employers are entitled to substitute a statutory holiday for another day by entering into a written agreement with the employee to substitute the holiday. An employee is not entitled to holiday pay if he or she fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before or after the public holiday.

Many employers already provide employees with more

than the minimum number of days off with pay. For example, some employers in Ontario provide their employees with a day off work with pay on the first Monday of August (“Civic Holiday”), or provide one or two floating days off work with pay. Some unionized employers have entered into a collective agreement that provides more paid holidays than the *Employment Standards Act* minimum. Those employers might be able to rely on section 5(2) of the *Employment Standards Act*, which provides as follows:

“If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.”

In a unionized environment, an employer might be able to more easily determine whether they are required to provide a day off work for employees on Family Day based on an analysis under this provision. An arbitrator would examine the entirety of the terms in the collective agreement respecting holidays and compare these benefits, in their entirety, with the benefits set out under the *Employment Standards Act*.

Non-unionized employers would be required to demonstrate that the total amount of benefits that they provide to the employee with respect to all paid holidays is superior to the benefits provided for under the

Employment Standards Act with respect to public holidays. The cases indicate that just because an employer has instituted one or two floating holidays, or provides for another non-statutory holiday such as the Civic Holiday, this may not mean that it is providing a greater right or benefit than the statutory provisions.

If you are in management, and you are trying to decide whether to provide your employees with the statutory benefit either this year or on an ongoing basis, or whether to rely on the “greater right or benefit” provisions of the *Employment Standards Act*, you may also wish to consider the human resource implications as to how employees will respond if Family Day is not recognized. Early indications from surveys performed

on behalf of Human Resources Professional Association of Ontario members are that a significant majority of employers are planning to provide their employees with Family Day off work, with pay. Depending on your current practices or your collective agreement, you should assess whether you need to change your holiday policy, and if so, how that change should be communicated to your employees.

Employers who would like any further information as to how the institution of Family Day in Ontario will apply in their workplace can contact either Andy Balaura or Pamela Yudcovitch in our Labour and Employment Department.

Pallett Valo LLP Labour & Employment Law Group

Representing your best interests in an efficient manner is what our lawyers do best. We have the legal expertise and rich experience to provide creative and pragmatic solutions for a wide variety of employment-related issues. Our approach is to provide advice that minimizes the time, costs and disruption associated with labour and employment disputes. We represent our clients before various provincial quasi-judicial tribunals, in court, and at conciliation, mediation and other proceedings.

We provide support to management in drafting employment contracts and company policies, collective bargaining, collective agreement administration and grievance arbitration. We work for a diverse range of employers in the private and public sectors, and have specialized expertise in the construction industry.

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