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Labour Bulletin

May 2004

Employment Law: Legislative Update

Both the federal and provincial governments have recently proposed or enacted legislation which will significantly affect employers in the province of Ontario. The following are brief summaries of the proposed or newly enacted laws.

Bill 63, the Employment Standards Amendment Act, 2004 (Hours of Work and Other Matters)

On April 26, 2004, the Government of Ontario introduced legislation which, if passed, will require employers to obtain approval from the Ministry of Labour before permitting employees to work in excess of 48 hours per week.

This proposed legislation is scheduled to come into force on January 1, 2005. Bill 63 follows through on the provincial government's promise to amend the hours of work provisions in the *Employment Standards Act, 2000* (ESA) and its promise to end the 60 hour work week.

The two main areas of the ESA that are affected by Bill 63 are excess hours of work agreements and overtime averaging agreements. Significantly, Bill 63 does not take away the ability of employers and employees to enter into these types of agreements.

Currently, an employer can require an employee to work more than 48 hours a week, up to a maximum of 60 hours, without applying to the Ministry of Labour, if it has the written agreement of the employee to do so. An employer is also currently able to average work hours over a period of up to four weeks with the written agreement of the employee. Without overtime averaging, an employee must be paid for overtime, in most circumstances, after he or she has worked over 44 hours in a week. If overtime is averaged over four weeks, an employee could work more than 44 hours in a week and not be paid overtime pay.

It is the government's view that some employees feel pressured to agree to work extra hours or to agree to average overtime hours. The government also believes that some employees are not fully aware of their rights under the ESA and do not freely choose to work extra hours or to average overtime hours.

Bill 63 would require employers to apply to the Director of Employment Standards and receive approval before permitting employees to work more than 48 hours in a week or to average overtime hours.

Some of the other key proposals set out in Bill 63 are:

- In all circumstances, employees would have to agree in writing to work hours over 48 in a week and to average overtime
- Director approval would not be required for agreements relating to excess hours of work in a day (over 8 hours)
- The Ministry of Labour may consider such things as the employer's employment standards compliance history and health and safety of workers in determining whether an approval should be given
- The Ministry of Labour may conduct spot checks at some workplaces to ensure that written agreements are in place, that employees have been given the required information sheet, and that employees have signed willingly
- A Ministry of Labour-produced information document must be shown to employees before entering into an hours of work agreement and an employee must also acknowledge that he or she has seen the document
- Employees can still have the right at any time to revoke their agreements to work extra hours after providing two weeks' written notice to their employers

- Employers can revoke agreements with reasonable notice
- Agreements must be kept for three years after the last day of work for the employee
- There are posting requirements in the workplace for applications, approvals, and refusals
- Parties that are convicted under the ESA will have their names published

The Ontario government has announced initiatives to increase awareness and knowledge of employment standards laws and has also stated that it will pursue enforcement of the ESA more aggressively, including random and targeted inspections of workplaces.

Bill 56, the Employment Standards Amendment Act, 2004 (Family Medical Leave)

On April 13, 2004, the Ontario government introduced draft legislation which, if enacted, would permit employees to have up to 8 weeks of job-protected, unpaid time off work in order to take care of a seriously ill family member who is at risk of dying within 26 weeks. The leave of absence would be available under the ESA and would be referred to as a "family medical leave".

The proposed legislation mirrors the recent changes made to the *Employment Insurance Act* which created a new entitlement to "compassionate care" benefits. Under the *Employment Insurance Act*, an employee can claim up to 6 weeks of benefits to care for a terminally ill family member. As with other benefits entitlements under the *Employment Insurance Act*, employees must generally serve a 2-week waiting period before collecting benefits.

Employees covered by the *Canada Labour Code*, such as bank or airline employees, are currently entitled to an 8-week leave of absence to care for or support a terminally ill relative. Bill 56 creates a corresponding 8-week leave of absence for provincially regulated employees.

In order to be entitled to family medical leave, an employee would be required (if requested by the employer) to provide a certificate from a qualified medical practitioner stipulating that the family member has a serious medical condition with a significant risk of death within 26 weeks from the day the certificate is issued.

An employee would only be able to take a leave in periods of entire weeks, as the proposed legislation does not permit partial week leaves. For the purposes of family medical leave, a "week" is defined as a calendar week.

The leave commences on the date the certificate is issued and ends on either the last day of the week when the family member dies, or when the 26-week period has expired, whichever occurs first.

The "family members" covered by the leave would include:

- the employee's spouse
- a parent, step-parent, or foster parent of the employee
- a child, step-child or foster child of the employee or the employee's spouse
- any individual prescribed by the regulation

Bill 56 also addresses the situation where a family member does not die during the 26 week period set out in the certificate. In this situation, an employee will be entitled to take another leave of absence of up to 8 weeks if a qualified health practitioner issues a new certificate stipulating that the family member has a serious medical condition with a significant risk of death within a period of 26 weeks. There is no limit on the number of leaves that can be taken under the ESA.

Unlike parental leaves, the family medical leave must be shared by employees. This means that, if two or more employees wish to take a leave of absence with respect to the same family member, the total combined leave cannot exceed 8 weeks during the 26-week period set out in the medical certificate.

Entitlement to family medical leave is separate and distinct from any entitlement to leave under the "emergency leave" provisions of the ESA. Emergency leave is available to an employee whose employer regularly employs 50 or more employees, and who requires a leave for personal medical reasons or to attend to a family member for medical reasons. Thus, employees may have access to both emergency leave and family medical leave.

As with emergency leave, an employee is required to provide advance written notice of his or her intention to take the family medical leave. When this is not possible, an employee must give written notice of the medical leave as soon as possible after it begins.

Once Bill 56 is enacted, we recommend that employers review their existing employment contracts, policies and procedures and their collective agreements to incorporate the availability of family medical leave.

Bill C-45, An Act to Amend the Criminal Code (Liability of Organizations)

On March 31, 2004, Bill C-45 came into effect. Bill C-45 amends the *Criminal Code* and imposes corporate criminal liability for corporations and officers in matters of health and safety. Bill C-45 establishes when, and under what circumstances, corporations and their officers or representatives can be charged with crimes involving negligence, recklessness or criminal intent.

Bill C-45 sets out rules that impose a positive legal obligation on "organizations", their "representatives" (including a director, partner, employee, member, agent or contractor) and "senior officers" (who have authority to direct how another person works) to ensure the safety of workers and the public.

Organizations and/or individuals can now be charged with criminal negligence where a representative or senior officer, with intent to benefit the organization and/or acting within the scope of their authority:

- commits an offence
- directs a representative to commit an offence
- fails to prevent a representative from committing an offence that the individual knew was about to occur
- demonstrates a lack of care

Before the passage of Bill C-45, officers and directors of a corporation could not be convicted of a crime for acts of the corporation solely because of their status as directors or officers. Bill C-45 expands corporate criminal liability by targeting "senior officers" who set company policies or manage important parts of an organization's activities. An individual's title is less important than the individual's functions. Directors, chief executive officers and chief financial officers are automatically considered "senior officers". As a result of the definition of senior officer, neither an individual nor a corporation charged with an offence can argue that the individuals occupying these positions had no actual role in setting policy or managing the organization.

Bill C-45 also expands the class of personnel to a company "representative", whose acts or omissions can lead to criminal charges. A "representative" includes virtually everyone who works for, or is affiliated with, a corporation – this includes directors, partners, employees, agents and even contractors. Further, in regard to workplace safety issues, the amended *Criminal Code* will now provide that those who are responsible for directing the work of others are under a legal duty to take reasonable steps to prevent bodily harm to any person arising from such work. This provision does not create a new criminal offence, but does make it easier for a charge of criminal negligence to be laid.

In addition to the stigma of criminal prosecution, the new *Criminal Code* provisions impose severe penalties against employers who fail to provide a safe workplace. The consequences for a conviction for a criminal act by a corporation are monetary fines up to $100,000 against an organization, in addition to any fine which may be levied under the applicable provincial health and safety legislation. Individuals can be fined and/or imprisoned for up to 25 years.

Bill 31, Health Information Protection Act, 2003 (Protection of Personal Health Information)

On December 17, 2003, the Minister of Health and Long Term Care has introduced comprehensive privacy legislation for the protection of health information of Ontario residents. If enacted, Bill 31 would establish privacy standards that would apply to most health care organizations.

Bill 31 applies to "health information custodians" such as health care practitioners, providers of long term care, hospitals, psychiatric facilities, health facilities, homes for the aged, nursing homes, care homes, pharmacies, laboratories, ambulance services, homes for special care, and any program for community health where the primary purpose is the provision of health care.

Bill 31 safeguards the privacy, confidentiality and security of personal health information. It sets out rules concerning consent to the collection, use or disclosure of personal health information. If passed, the Bill 31 would require that health information be kept confidential and secure, ensure that people know how their information will be used, and would provide individuals with rights to access their own personal health information and to request corrections of inaccurate information contained in their personal health records.

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Bill 31 is similar to the federal government's privacy legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) which regulates the collection, use and disclosure of personal information in the course of commercial activity.

Limitations Act, 2002

On January 1, 2004, the *Limitations Act, 2002* came into force in Ontario. This Act regulates how much time a person has to sue (make a claim) against someone else. The Act provides for a basic limitation period of two years, running from the day the "claim" is "discovered" within which an action has to be commenced, unless an exception in the Act applies.

The *Limitations Act, 2002* states that the two year limitation runs from the day on which a reasonable person ought to have known of the circumstances of the claim. Usually, in cases of dismissal both parties know that date that the dismissal occurred. The Act also provides that an individual is presumed to have known of the circumstances giving rise to a claim unless he or she can prove otherwise.

The *Limitations Act, 2002*, is important for employers because it means that a former employee may only file a wrongful dismissal lawsuit within two years of the date that the employee was given notice of his or her termination of employment. The previous *Limitations Act* permitted a wrongful dismissal lawsuit to be filed within six years of the date of dismissal. The change in the legislation will significantly reduce the length of time during which employers need to be concerned about potential liability arising from wrongful dismissal claims.

Employers should note that the *Limitations Act, 2002*, implements transition rules that apply to claims based on acts or omissions that take place before January 1, 2004, but which have not become the subject of formal legal proceedings before that date. If a claim for wrongful dismissal is based upon a termination of employment which occurred before January 1, 2004, it will be subject to the former six year limitation period.

Minimum Wage Increases

On February 1, 2004, the minimum wage in Ontario was increased from $6.85 to $7.15 per hour. There are some exceptions for students, liquor servers, homeworkers, and hunting and fishing guides. Minister of Labour for the province of Ontario, the Honourable Chris Bentley, unveiled a phased-in approach which will result in the minimum wage level reaching $8 per hour by February 1, 2007.

Labour & Employment News Update

Pallett Valo, LLP is pleased to present a 1/2 Day Labour & Employment Seminar, entitled "*Current Issues in Labour & Employment Law: Practical Strategies for Avoiding Pitfalls*", to be held in the Mississauga Area as follows:

- Tuesday, June 8, commencing at 8:30 am (The Mississauga Convention Centre, Salon B – 75 Derry Road West)
- For further seminar and invitation details please visit our website at www.pallettvalo.com

If you have any questions regarding recently proposed or enacted employment-related legislation, please do not hesitate to contact any member of the Labour and Employment Group at Pallett Valo, LLP.

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