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EMPLOYMENT LAW – WINTER 2008

A new era in provincial enforcement

By Carole McAfee Wallace

Goodbye regulatory silos. Inspectors from different ministries can now share their observations and findings about your organization with each other

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On January 17, 2008, the *Regulatory Modernization Act, 2007* (the "Act") came into effect. While the name of the Act may sound innocuous, its impact could have far-reaching implications for many Ontario employers.

Ministries working together

The Act provides an integrated approach to enforcing provincial laws and regulations across Ontario government Ministries that carry out enforcement activities. Here are the key provisions of the Act that could have an impact on your organization if it is subject to provincial inspections, audits, or investigations.

Information sharing between ministries

An inspector who collects information about your organization in the course of their duties under one provincial law or regulation can now make observations that are "likely to be relevant" to enforcement or administration under another law or regulation. These observations can then be shared with other ministries or enforcement branches.

In addition, some inspectors may be specifically authorized to collect information on behalf of two or more ministries. For example, the Ministry of Labour may authorize Ministry of the Environment inspectors to collect certain workplace safety information during the course of an *Environmental Protection Act* inspection.

Public information disclosure

The Act contains specific provisions for publicly disclosing information about an organization and its level of compliance with provincial legislation. This includes information

in the possession of provincial officials before the Act took effect on January 17, 2008. This potential for public disclosure is designed to act as an added deterrent to non-compliance.

Previous convictions a factor in sentencing

If you are convicted under the provisions of a provincial law, any previous convictions you may have under other provincial laws – even those that occurred before January 17, 2008 – can be factored into sentencing. In fact, if a prosecutor introduces a previous conviction under another provincial law during sentencing submissions, the court must either impose a more severe penalty or give reasons as to why a more severe penalty isn't justified.

How you can prepare

The *Regulatory Modernization Act*, 2006 expands the potential scope of inspection your organization may be subject to, increases the chance that you'll face a full or partial inspection you are not prepared for, and increases the potential penalties you could face if you are subject to multiple convictions under provincial laws.

With the Act now in force, here are a few steps you can take to manage any negative impact that it may have on your organization.

- **Reinforce a culture of compliance:** This is an excellent time to review the legislation your organization is subject to and the steps needed to ensure compliance on an ongoing basis. Workplaces that have a good track record of compliance and show a willingness to maintain a culture of compliance are less likely to face extensive monitoring by provincial regulators.
- **Treat all inspections as multi-ministry**. When an inspection does take place, assume that the inspector may be examining any number of potential areas for compliance, not just their particular area of expertise. Such an assumption may prompt you to examine and correct potential areas of non-compliance in advance of the inspection occurring.
- **Consider a single point of contact for regulatory issues.** If you haven't already designated an individual, you may want to assign a single point of contact for all provincial regulatory issues. This can simplify communication between your organization and the government and ensure that one person has an integrated view of the compliance landscape.

Make it a functional Family Day

The simple addition of one public holiday may be anything but simple for some employers

By Peter Biro

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In just a few weeks' time, on Monday February 18, 2008, many Ontario employees will be enjoying a day off on Family Day, the ninth and newest statutory holiday under Ontario's *Employment Standards Act, 2000* (the ESA).

This additional holiday, on the third Monday in February each year, was added by regulation last October. Because the ESA sets the minimum required public holiday entitlement for employees, Ontario-regulated employers who currently offer the minimum entitlement will be adding Family Day to the list of holidays that their employees currently enjoy.

Other employers may have more complex decisions to make. Some employers are federally regulated, and aren't governed by the ESA. Others already offer greater public holiday benefits than the minimum required under the ESA, and may not be legally required to add Family Day as a paid holiday. Still others have employment contracts or collective agreements that specifically address public holidays.

If your organization falls into any of the above categories, here's an overview of the issues that could impact your decisions about the new Family Day holiday.

Situation #1: You are a federally-regulated employer

The new Family Day regulation only applies to employers governed by the ESA. This excludes federally-regulated employers such as banks, airlines and railways, broadcasters and many others.

These employers are not required by the ESA to add Family Day as a holiday, although many of them will voluntarily do so. However, Federally-regulated employers must still abide by the terms of any employment contract or collective agreement that covers its employees. If those contracts reference provincial public holidays in any way, the terms should be reviewed carefully to determine whether the new Family Day regulation requires any changes to the employer's holiday schedule.

Situation #2: You offer a greater public holiday benefit than the ESA

Section 5(2) of the ESA allows an employer to substitute contract terms that provide a greater benefit for the minimum required terms under the ESA. Specifically, Section 5(2) states that:

> 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.

This means that if your employment contract or collective agreement provides a greater benefit than the ESA in terms of a statutory holiday package, you may not have to provide an additional paid holiday on Family Day.

The tricky issue with this provision is defining what a "greater benefit" is. If you simply take the number of public holidays that you offer employees, you will need to provide 10 or more in order to provide a greater benefit than the new provisions of the ESA. These 10 days must be in addition to any vacation entitlement that employees may have. And if any of the days have conditions attached to them, such as a "use it or lose it" condition that might apply to floater days, these may not qualify as part of the greater benefit test.

Of course, the number of holidays is not the only way that you may be providing a greater benefit. For example, you might be providing a higher rate of pay for public holidays than that specified under the ESA. Because of these different variables, it's your organization's total public holiday package – not just number of days – that you should be factoring in when determining if you provide a greater benefit that the ESA.

Situation #3: Your employees work under an employment contract or agreement

Before you make any decision about Ontario's new Family Day within your organization, you should carefully review the terms of any employment contract or collective agreement that applies to your employees. There may be language in the contract or agreement that either directly or indirectly relates to public holidays and could impact the decision you make about Family Day. Employers must be cautious about applying terms of a contract or making changes without proper notice to employees, or risk potential claims for constructive dismissal.

While the direction on this new public holiday will be clear for many organizations, there will be significant grey areas for others, and litigation in some situations will be inevitable. For this reason, make sure you get the professional advice you need to make the decisions about this new holiday that are the right ones for your organization.

Employment settlements that stick

A few careful steps can help ensure the employment termination settlements you provide are beyond any future legal challenge

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The structuring of a termination agreement is the central and most critical task an employer undertakes during the process of terminating an employee. It can also be the most challenging. No two termination situations are identical, and getting from termination offer to termination settlement can try even the most patient of human resources professionals.

There are many benefits to getting an employee's fast and efficient sign off on a settlement agreement. It lessens disruptions to remaining staff who may have a connection to the departed employee; it avoids the uncertainty of future legal proceedings; and minimizes your time commitment.

But in getting the deal done, it's important to ensure that any actions you take don't leave your settlement agreement exposed to a legal challenge down the road. One of the ways employees have challenged agreements is by claiming that the circumstances in which the agreement was signed and accepted were unconscionable and that any release of the employer should be set aside.

Fortunately for employers, a recent Ontario Court of Appeal decision, *Titus v. William F Cooke Enterprises Inc.*, has confirmed the test for unconscionability and given some clear direction on when an agreement will be set aside for this reason.

Four part test

In *Titus*, the employee held the position of corporate counsel for 18 months before being terminated without cause. He was offered statutory termination pay of two weeks plus a lump sum payment equal to his salary for two and a half months.

The employer prepared a termination agreement that contained the offer and a release from all claims that the employee may have against the employer. The employer suggested that the employee take the offer home consider it over the weekend. However, the employee insisted on signing the release that day in exchange for a cheque for the full amount of the termination pay.

Several months later, the employee began an action for wrongful dismissal, requesting that the release be set aside as unconscionable. Among other things, the employee claimed that the employer took advantage of his vulnerable situation due to the recent death of his father and his difficult financial situation caused by a high debt load. At trial, the employee succeeded at having the release set aside. The employer appealed.

The Ontario Court of Appeal applied the test for unconscionability set out in 2005 by the Alberta Court of Appeal in *Cain v. Clarica Life Insurance Company*. There are four elements that are necessary for an agreement to be found unconscionable:

1. A grossly unfair and improvident transaction; and
2. The victim's lack of independent legal advice or other suitable advice; and
3. An overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. The other party's knowingly taking advantage of this vulnerability.

The Court of Appeal concluded that none of the elements of this test were present in *Titus*, due mostly to the fact that the employee was a lawyer with employment law experience and was not rushed to sign the release in difficult circumstances. He was, in fact, encouraged by the employer to take time to review and consider the release.

Based on the wording of the test adopted in *Titus*, it appears that it may be difficult for employees to have a termination agreement or release overturned on the basis of unconscionability. Nevertheless, it is important for employers to craft their termination agreements in such a way that they will not be set aside for this reason.

Steps to protect your agreement

Here are three steps you can take to help ensure any termination settlements you prepare are beyond legal rebuke:

Ensure employee gets independent legal advice

This is the most critical step to ensuring that a settlement agreement goes unchallenged. Give departing employees adequate time to get the legal advice they need. Then, be sure to include an acknowledgement that they received this advice in the release. In some cases, you may want to request that the lawyer giving independent advice sign a certificate acknowledging that this advice was given and understood.

Provide employee with adequate notice of termination

The *Employment Standards Act, 2000* mandates minimum periods of notice of termination, depending on how long the terminated employee has worked for the employer. You must provide the departing employee with the minimum statutory notice of termination. However, it is best to offer to pay some amount in addition to the statutory minimum so that it cannot be said that there was no consideration for the release.

Avoid linking letter of reference with signing of releases

The Ontario Court of Appeal in Titus found that any link between providing a letter of reference in exchange for a signed release was "potentially problematic" and could "provide valuable support for an employee's subsequent claim that a release was unconscionable…". While employers have no obligation to provide a letter of reference, your decision on whether or not to provide a letter of reference must be made independently of any settlement offer.

If you have questions about issues raised in this newsletter, or any other labour or employment law concerns, please contact a member of the Employment Law group at WeirFoulds LLP. Contact information and a full list of team members can be found at www.weirfoulds.com.

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