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Labour and Employment Communiqué

Government Efficiency Act

Amendments to the *Employment Standards Act, 2000*

A number of amendments were made to the *Employment Standards Act, 2000 (ESA)* near the end of 2002 when the *Government Efficiency Act, 2002* came into force. The amendments affect various provisions of the *ESA*. Some of the highlights are outlined below.

Vacation Pay

The *ESA* now contains new definitions affecting vacation time and pay. The main addition is “alternative vacation entitlement year”. This refers to a 12-month recurring period which an employer has chosen for vacation purposes which begins on day that is different from the first day on which an employee began employment. Also relevant is the “stub period” which is the period of time between the first day of employment and the beginning of the alternative vacation entitlement year.

In a nutshell, the new definitions and provisions on this topic allow an employer to have the same vacation year for all employees. Where the start date of an employee is different from the beginning of the vacation year of the employer, the stub period in between the two dates is to be pro-rated for the employee’s vacation entitlement. As a result, an employee still gets vacation credit for the stub period.

The requirement that employers provide employees with information about vacation on each pay statement has been removed from the *ESA*. However, employers are still required to keep records relating to vacation. An employer must still provide the employee with specified vacation information when vacation is paid out to the employee. As well, an employer is obliged to provide an employee with specified vacation information upon written request. The employer is only obliged to respond to such a request once a year.

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To discuss the implications of this communiqué, please contact:

André Nowakowski
416.595.2986
anowakowski@millerthomson.ca

Employees enforcing a claim for vacation pay under the *ESA* are now allowed to recover vacation pay owing for the 12 months preceding the claim, rather than the normal 6 month restriction for other claims under the *ESA*.

Hours Free From Work

The *ESA* now states that an employee is to receive 11 “**consecutive**” hours of rest in each day. Previously, the *ESA* did not contain the word “consecutive”. The *ESA* does not contain a definition of “day”. However, the Ministry of Labour has an information bulletin on its website relating to hours of work which defines a “day” as starting at the beginning of an employee’s shift and ending 24 hours later.

Lay-off

The definition of what constitutes a week of lay-off has been slightly altered. This impacts the termination and severance provisions of the *ESA*. Now included in the *ESA* is an “excluded week”. This is a week in which an employee is unable to work, is not available for work, is absent from work on a disciplinary suspension, or is not provided work due to a strike or lock-out on at least one day of that week.

An excluded week is not considered to be a week in which an employee has been temporarily laid off. However, the week is still to be considered in calculating the total period for which an employee was temporarily laid off. For example, an employee is laid off temporarily for 13 weeks in a 20 week period. In that 20 week period, in addition to the 13 weeks of lay-off, an employee also missed a week of work, for example, due to a disciplinary suspension. This is an excluded week and thus is not considered in determining whether an employee was temporarily laid off (13 weeks) or terminated (more than 13 weeks) in the 20 week period. However, the excluded week is still part of the 20 week period – it does not interrupt or otherwise affect the period.

The excluded work week also affects the calculation of a regular work week’s wages for an employee who does not have a regular work week.

Overtime Averaging Agreements

The *ESA* now clarifies that the four week period over which hours may be averaged for the purposes of overtime pay is not a rolling four week period.

For further information on the Labour and Employment Group contact:

Miller Thomson LLP
2500 – 20 Queen Street West
Toronto, ON M5H 3S1

416.595.8500
416.595.8695 (fax)

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Public Holidays

Provisions have been added to this portion of the *ESA* which clarify an employee's entitlement to premium pay for work performed on a public holiday. Specifically, where an employee agrees to work on a public holiday and performs all of the work but fails without reasonable cause to work the last shift before or first shift after the public holiday, the employee is only entitled to premium pay for the hours worked on the public holiday.

Employees who are on a leave of absence under the *ESA* or on lay-off are only entitled to public holiday pay and not a substitute day off in place of the public holiday.

About the author:

André Nowakowski is a member of our Labour and Employment Group. He provides legal services and advice to clients in the private and public sectors.

For further information on the Labour and Employment Group contact:

*Miller Thomson LLP
2500 – 20 Queen Street West
Toronto, ON M5H 3S1*

*416.595.8500
416.595.8695 (fax)*

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