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LABOUR AND EMPLOYMENT COMMUNIQUÉ

Everything New is Temporary: Employment Standards Amendment Act (Temporary Help Agencies), 2009 Comes into Force on November 6th

Adrienne Campbell
Toronto
Tel. 416.595.2661
acampbell@millerthomson.com

André Nowakowski
Toronto
Tel. 416.595.2986
anowakowski@millerthomson.com

As noted in previous communiqués (October 3, 2008 and December 18, 2008) the Ontario Government has taken steps to change the laws regarding the employment rights of individuals who are employed on a temporary basis, either by virtue of being elect to work employees who can choose to work when they wish, or by working for temporary help agencies and being assigned to work at clients of those agencies.

Note:

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lcassiani@millerthomson.com

Effective January 2, 2009, all "elect to work" employees became entitled to public holidays and public holiday pay.

The *Employment Standards Amendment Act (Temporary Help Agencies), 2009* will come into effect on November 6, 2009. Temporary help agency employees will now fall under the definition of "employee", and temporary help agencies who employ them will fall under the definition of "employer" for the purposes of many sections of the *Employment Standards Act, 2000* (the "ESA"). The main provisions of this act were outlined in our communiqué of December 18, 2008.

An agency's employees will now be covered under the ESA provisions that cover most other regular employees, and in particular the termination and temporary lay-off provisions. Certain information must now be provided in writing by the agency to its employees, including the agency's legal name and contact information, the hourly or other wage rate or commission and benefits associated with each assignment, the hours of work associated with each assignment, and the general description of the work to be performed on each assignment. In addition, the Ministry will be releasing a document that an agency must provide to each of its employees.

An agency will not be permitted to charge a fee to its employees in relation to the preparation of resumes or preparing for job interviews, nor will it be able to restrict those employees or its clients from entering into an employment relationship with each other. Clients who use agencies for temporary help will no longer be subject to fees after a six month period of temporary employment beginning on the day on which the employee first begins to perform temporary work for that client.

The temporary lay-off and notice of termination and severance pay provisions of the ESA will now apply to agency employees. If the employee is not assigned to perform work for a client for a week, the employee will be considered to be on lay-off for that week. The termination of an agency employee will be triggered after a lay-off of more than 13 weeks in any 20 consecutive weeks, or 35 weeks in any 52 consecutive week period. Where the employee is not given an assignment before the end of these periods, the employment is deemed terminated, and the notice and severance provisions of the ESA will be triggered. However, a week without work will not be considered a week

of layoff if the employee is not available to work, not able to work, refuses an offer of work that is not constructive dismissal, is subject to disciplinary suspension or not assigned due to a strike or lock-out.

In the event of a termination, the employee will be entitled to a minimum of one week notice or pay in lieu of notice (“termination pay”) equal to one week per year of service to a maximum of 8 weeks. Benefits have to be continued during this time. In addition, employees with 5 or more years of service with an agency whose payroll is greater than \$2.5 million per year will also be entitled to severance pay equal to 1 week per completed year of service to a maximum of 26 weeks.

The calculation of a week of termination pay in a lay-off situation will be based on the total amount of wages earned by the employee for work performed for clients during the 12 week period before the commencement of the lay-off period, divided by 12.

The calculation of a week of termination pay, other than in a lay-off situation, will be based on no less than the total amount of wages earned for work performed for any clients during the preceding 12 week period, ending on the last day on which the employee performed work for those clients, divided by 12.

As with any other employment relationship, agencies would be well advised to enter into a written employment contract with employees that limits the amount of notice due on termination to the employment standards minimums outlined above. We would be pleased to assist you in developing appropriate agreements.

A B O U T T H E A U T H O R :

Adrienne Campbell and André Nowakowski are members of our Labour and Employment Group in Toronto. They provide legal services and advice to a wide range of clients in the private and public sectors.

Our Labour and Employment Practice Group is dedicated to providing comprehensive and integrated legal services, and advises management in all aspects of labour relations and employment law. For more information about our Group, visit our website at www.millerthomson.com.

MILLER THOMSON'S OFFICES:

Vancouver: 604.687.2242

Kitchener-Waterloo: 519.579.3660

Toronto: 416.595.8500

Guelph: 519.822.4680

Calgary: 403.298.2400

Markham: 905.415.6700

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London: 519.931.3500

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