
Family Day added to list of public holidays in Ontario

On October 12, 2007, the re-elected government of Ontario filed a regulation adding the third Monday in February to the list of public holidays under the *Employment Standards Act, 2000* (ESA). The new holiday, Family Day, is the ninth such public holiday in Ontario and will be in effect next February. The question arises as to how employers will be affected.

First, it should be noted that the provisions of the ESA do not apply across the board to all Ontario employees. Most notable among those to whom the Act does not apply are employees whose workplaces are under federal jurisdiction, such as airlines, banks, the federal civil service, post offices, radio and television stations and most railways. As well, the public holiday provisions of the ESA do not apply to employees of the provincial government or provincial Crown agencies.

There are also some groups of employees who may be required to work on public holidays. These include employees working in:

- hotels, motels and tourist resorts
- restaurants and taverns
- hospitals and nursing homes, and
- continuous operations (operations or parts of operations that do not shut down or close down more than once a week, such as oil refineries or alarm monitoring companies).

These employees can be required to work on a public holiday without their agreement when the public holiday falls on a day they would normally work, and they are not on vacation.

AGREEMENT TO WORK ON PUBLIC HOLIDAY

Most employees have a right to refuse to work on a public holiday, and to take the day off with pay. However, if an employee, who qualifies, agrees in writing to work on the holiday, there are two options:

- the employee is entitled to wages at his or her regular rate for all hours worked on the public holiday plus another regular working day off with public holiday pay (this substitute day off must be scheduled for no later than three months after the public holiday or, if the employee has agreed in writing, up to 12 months after the public holiday), or
- if the employee agrees in writing, he or she is entitled to public holiday pay for the public holiday plus premium pay (1½ times the employee's regular rate) for all hours worked on the public holiday. In this case, the employee is not given a substitute day off.

GREATER BENEFIT PROVIDED UNDER CONTRACT

Further, the effect of section 5(2) of the Act must be considered. That provision reads as follows:

5(2) 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 provision would appear to mean that where an employment contract, including a collective agreement, provides more than nine paid holidays, the current number under the ESA, the employer may not have to recognize Family Day. Such an interpretation has been upheld in arbitration awards and in adjudications under the ESA.

In this connection, regard must be given to the employer's total public holiday package, not just to the number of holidays. For example, if the number of holidays provided is less than nine, but the rate of holiday pay is higher than that required under the ESA, the employment contract may still provide a greater benefit. Another issue to be considered when comparing contractual terms with the employment standard is whether there are qualifying conditions for entitlement to a paid holiday, such as length of service (there is no length of service requirement under the ESA) or the requirement to work the day before and the day after the public holiday (the entitlement under the ESA is lost if a worker fails to work on either of these days without reasonable cause).

However, even where the contract contains a greater benefit, the contract should be reviewed to determine whether there are other provisions, such as language obliging the employer to recognize any new public holiday, that would oblige the employer to add Family Day to its list of holiday entitlements. Those employers currently engaged in bargaining should consider whether, if the addition of the new holiday will surpass the level of comparable benefits they provide, or if contract language currently obliges them to recognize all public holidays, to propose alternatives should they determine it is in their interests to do so.

For example, some employers may find it preferable to provide a greater, but more flexible benefit than that provided by the addition of Family Day at a fixed time of the year. It is important to bear in mind when making such an offer that benefits which do not relate directly to holiday entitlements (e.g., vacation benefits) would likely not be seen as comparable to the statutory holiday entitlement, and could not be used as a means of contracting out of Family Day through the use of the greater right or benefit argument.

Another area requiring caution involves the use of float days as a benefit in place of public holidays. While some arbitrators have used such float days in making a comparison, others have not, noting conditions on the float days such as the requirement that they be mutually agreed to by the employee and employer, or that the entitlement is lost if not used by the end of the year.

Employers who determine that the current agreement does provide a greater holiday benefit even when Family Day is factored in, and who are not otherwise obliged to recognize the new holiday, will have to consider carefully whether to raise the issue during bargaining. Raising the matter would risk adding an unwanted item to the agenda. Remaining silent risks an adverse reaction from employees after bargaining is concluded and the employer has advised employees that they are not entitled to the new holiday. It may also lead to an arbitration which may be avoidable if the issue is addressed at negotiations. As a practical matter, it may prove difficult to resist pressure to recognize the new holiday, even for those employers not strictly bound to do so.

For further information, please contact [J.D. Sharp](#) or at (613) 940-2739 or [Vicky Satta](#) at (613) 940-2753.

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