

Employment standards and maximum hours of work

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A recent Ontario case is a reminder to employers of the province's controls on hours of work and the consequences of ignoring those controls. The case involved the attempt by Brian Wicke, a technician employed by Canadian Occidental Petroleum Ltd., to bring a class action against the company on behalf of 70 former employees placed on rotating 12-hour shifts. Wicke sought payment of overtime wages, as well as damages for breach of contract and punitive damages.

The company conceded that it had not obtained the proper approval from the Ministry of Labour for one group of employees but asserted that, for the rest, it had secured the required consent from the employees and the applicable provincial permit. Wicke disputed the validity of the consents.

The company argued that Wicke's action was barred under the legal doctrine of issue estoppel (described in ["Employee "misconduct" under U.I. Act not just cause for dismissal, Appeal Court rules"](#) on our Publications page) because the same claim had been rejected when he filed a complaint with an Employment Standards Officer. Wicke countered that he had not filed a complaint, but had merely sought information from the Ministry of Labour.

In a ruling issued on June 11, 1998, a judge of the Ontario Court, General Division, agreed with Wicke that the steps he had taken with the Ministry of Labour fell far short of a litigation of his claim on the merits, and ruled that his action could proceed. This decision indicates that a prudent employer should familiarize itself with the hours of work provisions in Part IV of the *Employment Standards Act*.

THE "8 AND 48" RULE

The basic rule in Part IV is that an employee's hours of work must not exceed eight in a day and 48 in a week, with the word "week" meaning seven consecutive days (s. 17). Eating periods described in s. 22 are not counted in determining the hours of work, but breaks other than recognized eating periods are. The "8 and 48" rule is mandatory but is subject to several exemptions and exceptions.

EXEMPTIONS

Not all employees are covered by the provisions of Part IV. For example, qualified persons who practise certain listed professions, such as "professional engineering", are exempted, as are those whose only work is supervisory or managerial in nature.

EXCEPTIONS

It is important to note that, in the case of the exceptions described below, unless conditions of

emergency or urgent work exist under s. 19, employees may not be forced to work additional hours without their consent or the consent of their agent (s. 20(3)). In unionized workplaces, the Ministry has taken the position that collective agreement language granting consent for the assignment of additional hours is equivalent to consent for the purposes of the Act. However, courts and tribunals may not always agree about the kind of language that is sufficient to constitute consent.

Emergencies and urgent work

The Act recognizes that circumstances may arise when observation of the basic rule is impossible. In the case of accidents, or where work is urgently required to be done to machinery or plant, the hours of work may be exceeded, but only so far as is necessary "to avoid serious interference with the ordinary working of the establishment". Because it removes an employee's right to refuse overtime work, the "work urgently required" component of the provision is viewed as a narrow exception, and does not apply to situations such as rush orders for a client or work required due to absenteeism (s. 19).

Variation permit

With the approval of the Director of Employment Standards, an employer may adopt a work day of up to 12 hours, as long as the work week does not exceed 48 hours. This approval is known as a "Gold Permit" (s. 18). Approval does not affect the employer's obligation to pay overtime rates after 44 hours in the work week (s. 24), or any greater benefit conferred under an employment contract.

Excess hours permits

The Director may also approve increases in hours worked in excess of those set out in s. 17 or approved under s. 18. For specified categories of employment, including full-time maintenance workers, employees engaged in shipping and receiving, delivery drivers and helpers, and some security personnel, or persons the Director believes are engaged in similar employment, up to 12 additional hours a week may be approved. For all others, 100 hours a year for each employee may be added. This is known as a "Blue Permit" (s. 20(1)).

Hours in excess of those obtained under a Blue Permit may also be authorized, but the employer must demonstrate that they are required due to the "work or the perishable nature of raw material being processed". Requests for these "Green Permits" are scrutinized more closely than those for Blue Permits, and the Ministry has developed a checklist of factors to determine whether excess hours are really necessary (s. 20(2)).

In Our View

While the consent of employees or their agents to working additional hours is not required for the emergency situations described in s. 19 of the Act, it is necessary in other circumstances. Moreover, it is Ministry policy to secure employee consent as a precondition for approval of variation of the work day under s. 18. Even if employees consent to work additional hours, with the exception of cases covered by s. 19, employers must obtain the proper approval from the Director

before assigning those hours. Failure to secure the appropriate permit could expose an employer to civil liability or quasi-criminal prosecution.

For further information, please contact [Colleen Dunlop](#) at (613) 563-7660, Extension 222.