

Employers Pay the Price Sweeping Changes to Casual and Temporary Worker Legislation

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As of January 2, 2009, casual (“elect-to-work”) employees are no longer exempt from the public holiday provisions in the *Employment Standards Act* (ESA). And if the government passes proposed legislation, other significant changes will soon be on the horizon.

Temporary help agencies (“agencies”), users of agency workers (“users”), and employers with casual workers may soon face increased costs and administrative challenges as a result of proposed changes to the ESA and a recent amendment to one of its regulations.

Significant Changes

Agencies and employers with casual workers will be the first to feel the increased financial and administrative burdens brought on by the removal of the “elect-to-work” exception for public holiday pay. This is because, generally speaking, the agency remains the employer for purposes of the ESA and is solely responsible for complying with ESA public holiday obligations. Beginning with Family Day 2009, these two categories of employers will be required to provide public holiday entitlements to casual employees. However, agencies are likely to download to their increased costs to users.

If the Bill passes as presently worded, users’ potential liability in the areas of unpaid wages and reprisals would expand significantly. Users could find themselves on the hook for unpaid wages or subject to orders to pay and/or reinstate agency employees if they are found to have committed a reprisal against the agency employee. Currently those liabilities rest with agencies, not users.

It is not all bad news for users. If the Bill passes they would be guaranteed the right to enter into permanent employment relationships with agency employees. If they do so in the first six (6) months after the start of the temporary assignment agencies would be permitted to charge users a fee; if they do so after six (6) months agency fees would be prohibited.

The government has signalled that if the Bill should pass, it intends to remove the “elect-to-work” exemptions applicable to ESA termination and severance pay as well. Those changes could substantially increase costs for all three categories of employers.

How to Determine Public Holiday Entitlements After January 2, 2009

To determine public holiday entitlements, employers must determine employees’ qualifying days. To qualify for public holidays employees must work both their last regularly scheduled working day before, and first regularly scheduled working day after, the public holiday. This

will not always be straightforward for casual employees, because many of them do not work on a regular basis. Any day that a casual employee agrees to work would likely be interpreted as a “regularly scheduled working day” for that employee.

An employee may qualify for public holidays regardless of how much time passes between qualifying days. However, practically speaking, this amount could be nominal. This is because public holiday pay is calculated by dividing the wages an employee earns in the four (4) weeks prior to the public holiday by twenty (20). So, for example, \$0 divided by 20 = \$0.

Generally speaking, once employees qualify for a public holiday, their entitlement will be determined differently depending on whether they work on the public holiday or not. If employees do not work on the public holiday, then in most cases they would be entitled to public holiday pay for the day. If employees work on the public holiday, then they could be entitled to public holiday pay for the day, plus premium pay for the hours worked or to a substitute day off with public holiday pay. However, for traditional casual employees the prospect of receiving a substitute day off will hold little if any meaning.

Greater Right or Benefit

The ESA provides that where an employment contract (including a collective agreement) grants employees a greater right or benefit than the minimums prescribed in the ESA, the greater right or benefit prevails. There is a substantial and complicated body of caselaw dealing with this issue. Employers should seek legal advice to determine how these new public holiday entitlements for casual employees interact with their contractual obligations.

Final Word

Employers are strongly advised to seek legal advice if uncertain whether employees are casual employees, for assistance interpreting and applying the newly applicable provisions, and when determining whether an employment contract or collective agreement provides a greater right or benefit than the ESA.

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