Overview of Amendments to the B.C. *Employment Standards Act and Regulations*

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This is a general overview of the subject matter and should not be relied upon as legal advice or opinion.
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CHANGES IN TWO PHASES.

1. Bill 48 *Employment Standards Amendment Act*. Some of the provisions of which were brought into force on May 30 clearly in response to legitimate employer concerns:

- Provision that collective agreement must meet or exceed provisions of the Act is removed and now, as long as the collective agreement contains any provision, those provisions apply and the Act does not. Further if the collective agreement is silent on those matters the provisions of the Act are deemed incorporated in the collective agreement. That means that, for unionized employees with some exceptions, the enforcement is under the collective agreement and not through the Branch.

- Reduction in minimum daily hours from 4 to 2.

- Reduction in time for employer record keeping from 5 to 2.

- Reduction of employer's liability for unpaid wages from 24 months to 6 months.

- And elimination of directors' and officers' personal liability in cases of bankruptcy and insolvency.

- The provision for the negotiation and enforcement of binding settlement agreements.

By Order in Council on November 21, 2002 the balance of the provisions in Bill 48 with the exception of child employment were brought into force as well as amended Regulations effective November 30, 2002. Thus, effective on that date the following provisions will be in effect:

- Averaging agreements;

- Changes to overtime rules with respect to the payment of double time;

- Simplification of statutory holiday provisions;

- Mandatory penalties for contravention of the Act.

- New appeal provisions as well as new regulations with respect to managers, commission sales employees, truck drivers, mining, fish farms, etc.

Materials an overview of the key changes.

In the time allotted cannot review all of those changes.

Focus for today on:

- Purpose of the amendments
- Impact of those amendments on the workplace and what changes you will have to make in order to ensure compliance.
- Finally, what further changes you can anticipate in this area.

PURPOSE OF THOSE CHANGES

The government's stated purpose in making the changes was:

- Protect vulnerable employees
- Promote greater flexibility by allowing employers and employees to negotiate mutually beneficial arrangements
- Revitalize the economy by recognizing the needs and realities of today's workplace
- Simplifying the rules and procedures and reducing government regulation (the government has committed to less intervention)

With respect to the last point it is clear that the amendments have resulted in some simplification. For example, removing the meet or exceed test for collective agreement provisions and allowing union and employers to negotiate provisions with respect to most of the matters covered by the Act and enforce those provisions through existing collective agreement grievance process does simplify the process.

On the other hand, recognizing the needs and realities of the modern workplace and focusing on specific industries is likely to result in more, not less, government regulation. Thus, for example the new regulations contain provisions with respect to employees who work on fish farms that produce fin fish; mining, commission sales employees to name a few in addition to the regulations which already existed and have been amended with respect to truck drivers, oil and gas field workers, high technology companies, silviculture and the like.

That is not to suggest that that is a bad thing but rather to suggest that there may be an inherent tension in the objectives set by the government.

WHAT CHANGES MUST YOUR ORGANIZATION MAKE TO TAKE ADVANTAGE OF THESE CHANGES?

A key component of that flexibility is contained in the changes to the hours of work and overtime provisions of the Act.

In B.C. the standard work day is still 8 and the standard work week is still 40. When these standards are exceeded overtime is generally payable.

Effective November 30, 2002 new averaging of hours of work provisions come into effect. (These are reviewed at pages 2 and 3 of the materials). These averaging agreement provisions replace the

flexible work schedule provisions of the pre-amendment Act. **Indeed, any flexible work schedule provisions in effect are cancelled as at the date the new provision comes into force.**

WHAT WAS THE OLD PROVISION

The flexible work schedule provisions allowed the employer to adopt a flexible work schedule but required:

- the employer to adopt a schedule prescribed in the regulation for a period of at least 26 weeks;
- required at least 65% of the employees affected by the schedule approve it; and
- a copy of the schedule had to be filed with the Director.

WHAT ARE THE NEW AVERAGING PROVISIONS?

The new averaging provisions remove some of the restrictions contained in the flexible work schedules.

- It allows an employer and an employee to now agree to average hours of work over a period of 1 to 4 weeks as long as certain conditions are met.
- Overtime is only payable if the hours of work are in excess of an average of forty hours a week over the period.
- Double time is payable after 12 hours a day.
- While 32 hour rest periods must be provided for each week of the averaging period they can be taken at different times or at the same time during the period.

This would appear to create much more flexibility given that there are no specified schedules to comply with, does not require 65% employee approval and there is no need to file with the Employment Standards Branch.

DOES NOT PERMIT THE EMPLOYER TO DO WHATEVER IT CHOOSES.

There are conditions that must be met and there is a cost to the flexibility.

The new provisions require that the following conditions be met.

- the agreement must be in writing;
- the agreement must be signed by the employer and the employee;
- it must specify a schedule for each day;
- it must specify the number of weeks covered;

- the number of times the schedule may be repeated;
- the start and expiry date of the period covered;
- in addition, the scheduled hours must not exceed an average of 40 hours per week over the period of the agreement; and
- a copy of the agreement must be given to the employee before the start date.

One of the benefits of the new legislation is that you will be able to negotiate individual terms with individual employees. One of the problems of this provision is that you will be able to negotiate individual terms with individual employees.

NEGOTIATION WITH INDIVIDUAL EMPLOYEES

That is, there must be an agreement in writing with each employee covered by a work averaging agreement.

- What if you have 150 employees on a flexible work schedule? Between now and November 30 you will have to sign 150 individual averaging agreements.
- What if some employees hold out and decide they don't want to work the schedule? Or decide that they want to attempt to negotiate slightly different terms to accommodate their individual circumstances.
- What if individual employees change their mind about working under this kind of work schedule? Can they later challenge the agreement by suggesting that they didn't understand the terms or they were signing it under duress?

BINDING NATURE OF AGREEMENT AND NO OPPORTUNITY FOR EMPLOYER TO AMEND

Another concern is that an averaging agreement entered into with an employee is binding until its expiry or a later date if the schedule is repeated.

It cannot be amended by the employer during its term.

There is a provision in the Act that allows an individual employee to request in writing a change to the daily work schedule provided that it does not change the total number of hours.

There is not, however, any provision for the employer to amend a daily work schedule. For example, it is not open to an employer to say to an employee working a four day, ten hour work schedule because of work loads rather than Monday to Thursday this week we would prefer to have you work Tuesday to Friday.

[Note: only high tech industries are permitted not to list daily work schedule.]

Section 31 of the Act which permitted an employer to provide 24 hour notice of a change in shift schedule has been deleted.

Variance is only with respect to the number of weeks.

This would, therefore, suggest that, at least initially, an employer may wish to enter into short term averaging agreements until satisfied these agreements are workable.

ALL OF THESE MATTERS WILL HAVE TO BE ADDRESSED AND DETERMINED BY NOVEMBER 30.

Effective November 30, if the employer has employees working a flexible work schedule and by that we mean non-traditional hours for example 4 – 10 hour days that employer may well find itself in violation of the overtime requirements of the Act unless individual averaging agreements are in place with the employees. In the absence of those agreements the employer may find itself liable for overtime on a daily basis. In addition, a failure to pay that overtime on a daily basis will be a contravention of the Act and may subject the employer to the mandatory penalties that have now been adopted.

STEPS TO TAKE IN ORGANIZATION

Thus, in anticipation of November 30 you will want to examine hours of work practices within your organization.

- Are there employees currently working non-traditional hours under a flexible work schedule that will require individual averaging agreements?

- Are there employees currently working standard schedules that you will want to negotiate averaging agreements with?

You will also want to address the following issues:

Standard Forms

- the preparation of standard form of averaging agreements which incorporate the basis requirements set out in the Act leaving room for customization in individual circumstances;

Negotiating Agreements

- consideration of how these agreements will be negotiated, in what circumstances and for what period of time;

Retention

- in addition, each of these agreements will have to be kept for two years after the employee's termination.

Thus, while clearly providing greater flexibility in terms of hours of work it does require the employer to comply with certain procedures and it will be necessary for each organization to understand those procedures in order to take full advantage of the flexibility and ensure compliance.

Similar issues arise with respect to other amendments in the Act, for example, the new definition of manager, the new definition of commission salespeople and new method of calculating overtime and statutory holiday pay, etc.

PROCESS AND PENALTIES

Even the process for dealing with the complaints will have an impact on your workplace.

Consistent with budget reduction in the Employment Standards Branch many issues now will be dealt with under collective agreement. With respect to non-union employees the emphasis of the Branch is now on self help and/or mediation and settlement of disputes rather than adjudication. If matters are not resolved and an employer is found in contravention the Act now contemplates mandatory penalties which escalate with the number of offences.

SELF-HELP

Individual complainants are provided with self-help kits as a first step. The employee is required to take self-help steps and seek to resolve the issue directly with the employer. That means the employer can anticipate that employees will be raising the issues directly with the employer in an attempt to resolve the complaint. However, to do so by the employee may jeopardize the complaint.

WORKPLACE DISPUTE RESOLUTION SYSTEM

Although the workplace dispute resolution systems have been common practice for employees working under a collective agreement, that is not necessarily the case for non-union employers.

As a result, employers should ensure that there is a mechanism in place for dealing with employee workplace complaints.

- There should be an individual well versed in the provisions of the Act
- that can receive these complaints,
- assess their legitimacy and
- make an effort to resolve these complaints prior to the issue proceeding to the complaint stage, potential adjudication, and penalties.
- Having one individual responsible will assist in ensuring consistency in dealing with these matters.

PENALTIES

- Penalties are no longer discretionary.

- The penalties escalate with the number of contraventions.

    - If there is no contravention of the same provision in the previous 3 years -- $500.00;

    - On the second contravention, i.e. there has been a contravention of the provision in the previous 3 years - $2,500.00;

    - And finally, $10,000.00 if the provision is contravened again within 3 years of the second contravention.

- By Location

The provision does look at contraventions by location rather than on a company-wide basis recognizing that most of these issues are dealt with by local management on a local level. Thus, a contravention by one location of the employer will not lead to increased penalties at another location of the employer. This is particularly important in cases of franchises.

This does not apply to employees dispatched from one location to another.

- Not Discretionary

What does it mean if the penalties are no longer discretionary? For example, in a case of termination where the issue is whether or not the employer had just cause for termination.

- Just Cause Cases

For example, an employer may take all reasonable steps in investigating and reaching its conclusion in finding that there is just cause.

An adjudicator may subsequently disagree with that assessment and order payment of termination pay to the employee.

Is this a contravention of the Act requiring the assessment of a penalty if there has been a prior contravention.

DUE DILIGENCE

Some have suggested that as long as the employer exercises "due diligence" there should be no penalty.

By due diligence, we mean that the employer took all possible steps to make the correct decision before acting. (What steps will the employer be required to take – legal opinions?)

Due diligence is a concept that has been applied by Employment Standards Tribunals in the past in determining whether or not to issue penalties. However, some tribunals have stated that the due diligence defence ties in with the requirement that the Director exercise its discretion reasonably in assessing penalties. Since there is no longer discretion there will no doubt be an argument that this defence no longer applies.

CLEAN SLATE

The penalty provisions of the Act apply to contraventions that occur after November 30, 2002. As a result, it would appear that all employers start with a clean slate.

WHAT IF NUMBER OF EMPLOYEES AFFECTED BY ONE CONTRAVENTION (I.E. IMPROPER CALCULATION OF OVERTIME)?

Unlike the old Act, the Regulations do not speak of multiplying the amount of the penalty by the number of employees affected. Nevertheless, it remains to be seen how a contravention of the Act which affects a number of employees and results in a number of complaints being filed will be dealt with in terms of penalties.

WHAT IF SAME EMPLOYEE NUMBER OF CONTRAVENTIONS (E.G. INCORRECT ABOUT MANAGER, FAILURE TO PAY OVERTIME AND STATUTORY HOLIDAY PAY)?

In addition, there may well be situations where the employer is alleged to have contravened a number of sections of the Act as a result of one set of facts. For example, if an employer is incorrect in its assessment of whether or not an individual is a manager, the employer may be in violation of both the overtime and statutory holiday provisions. Is this considered to be one or two contraventions for the purposes of subsequent conduct.

OFFICERS AND DIRECTORS

The monetary penalty provisions of the Act still provide that an employee, officer, director or agent of the corporation who authorizes permits or acquiesces in a contravention of the Act may be liable to the penalty. It remains to be seen how this will be interpreted.

PENALTIES UNDER COLLECTIVE AGREEMENTS?

Finally, it appears that employers operating under collective agreements may have escaped the penalty provisions of the Act. Having the collective agreement enforcement provisions apply it is unlikely that an arbitrator would adopt the penalty provisions.

CONCLUSION

As can be seen, there are significant and substantive changes made to employment standards in this province. In order to take full advantage of those changes an employer must consider their impact in the individual workplace and take the necessary steps to ensure compliance.

In addition, it is clear that the government is committed to ensuring that the realities of individual workplaces and industries are considered. We can anticipate that there will be further regulations with respect to some of those industries such as film once the issues have been properly addressed by the government.

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