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Family Day - A New Statutory Holiday with a Catch

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Family Day is Ontario's newest public holiday and will take effect in February 2008. The holiday will occur on the third Monday of the month.

Now this is exciting stuff for employees, what an unexpected gift to the people of Ontario! A new holiday in February that will provide the opportunity for all Ontario families to spend some extra quality time together.

On its surface, the intent and meaning of Family Day seems very touching and I sincerely do appreciate my family; however, I am a bit cynical by the addition of this "politically motivated" holiday. Family time is truly important; however, this recent amendment to the Ontario's *Employment Standards Act (ESA)* is fraught with implications that may lead to costly, confusing, frustrating and aggravating predicaments for Ontario's employers and employees alike. The implications are not so "family-oriented" and seem to have been overlooked before October 11th, 2007, the day that Family Day was announced.

Section 5 (2) of *ESA* formalizes the enactment of Family Day and 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 nine paid holidays or more (please note that the Civic Holiday in August, although respected as a public holiday by many Ontario employers, is <u>not</u> an official public holiday required by the *ESA*), 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*.

Consideration 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).

Despite the above, even in circumstances 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 ultimately require the employer to add Family Day to its list of holiday entitlements. Those employers currently engaged in bargaining should consider whether the addition of the new holiday will surpass the level of comparable benefits they currently provide, or whether their contract language currently obliges them to recognize all public holidays. These latter considerations will provide employers with basis upon which to effectively negotiate the holiday provisions with their employees or unions, while respecting the statutory obligations under the ESA.

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. In precluding the use of float days, these arbitrators made the distinction between public holidays and float days by noting conditions on the float days such as: (i) the requirement that they be mutually agreed to by the employer and the employee; and/or (ii) the loss of entitlement to the float day if not used within a specific period of time or by a certain date.

In short, employers should carefully examine the public holiday package they provide to employees and make an educated decision based on the aforementioned considerations before adding Family Day to their list of public holiday provisions.