

## Ontario's New Public Holiday: Family Day, February 18, 2008

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### What Employers Should Know

February 4, 2008

The Province of Ontario, following the lead taken by the provinces of Alberta and Manitoba, has passed legislation creating a provincial wide public holiday called Family Day, falling on the 3rd Monday of each February. Family Day, which is governed by Ontario's Employment Standards Act ("ESA"), increases Ontario's public holidays from 8 to 9, and in many respects is treated like other provincial public holidays.

### Is Family Day a Paid Day Off Work?

The statutory requirements are not fully and consistently applicable across the employment spectrum; an assessment of individual facts and circumstances is required to determine an employer's legal obligations and alternatives. In some cases, the Family Day Holiday might be a new holiday but not an extra holiday.

If an employee does "qualify", the employee is entitled to take public holidays off work and be paid "public holiday pay". If Family Day occurs while on scheduled vacation or not on an ordinary working day, the employee will be entitled to a substitute holiday with public holiday pay, or, public holiday pay for the public holiday with no substitute holiday.

Public Holiday Pay is calculated by adding the immediately preceding 4 weeks regular wages earned plus vacation pay and dividing by 20. A substitute day off must be scheduled for no later than 3 months after the public holiday or, if the employee agrees in writing, up to 12 months after the public holiday.

### Which Employees Are Eligible and Qualify?

Most employees in Ontario are eligible for these public holiday entitlements if their employment is governed by the provincial ESA. Employees who work in federally-regulated workplaces such as banks, telecommunications, and railways, or who are federal civil servants do not qualify.

Employees generally qualify for public holiday entitlements unless they fail without reasonable cause to work their entire shift on their regularly scheduled days of work before or after the public holiday (the "Last and First Rule"). Full-time, part-time, permanent or limited-term contract employees all qualify, no matter how recently hired nor how many days worked before the public holiday (though the amount of holiday pay may be affected).

Some employees may be required to work on a public holiday, either because they work in jobs that are not covered by the public holiday provisions of the ESA or they work in industries with special rules.

### Employees Who Are Exempt from the Holiday Provisions of the ESA

Employees in certain occupations and industries are exempt from the public holiday provisions of the ESA. They are not entitled to take Family Day off, and if their employer requires them to work on Family Day, they are not entitled to public holiday pay. These employees include seasonal workers, taxicab drivers, firefighters, construction workers receiving 7.7 per cent or more of wages for vacation pay or holiday pay, registered real estate salespersons, and

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professionals such as lawyers and doctors.

### **What About Qualifying Employees Who Can Be Required to Work Under Special Rules?**

Employees who work in the following businesses may be required to work on public holidays: Hotels, motels and tourist resorts; Restaurants and taverns; Hospitals and nursing homes, and Continuous Operations ( 24/7 operations or parts of operations that do not shut down or close down more than once a week such as utilities, refineries, and some manufacturing plants). The only time these employees can be required to work on a public holiday without their agreement is when the public holiday falls on a day they would normally work, and they are not on vacation.

### **Holiday Benefits Already Exceed Statutory Minimum**

If an employment agreement or a collective agreement provides a holiday benefit more generous to employees than the ESA minimum, the terms of the agreement apply and the ESA standard will not apply. Because the legislation refers to holiday benefits more generous than the ESA minimum, if an employer already provides 10 or more holidays per year, the employer is not required by ESA to provide the Family Day Holiday. An employer currently providing 9 or fewer holidays must provide the Family Day Holiday.

An employer can choose to grant the extra Holiday even if not statutorily required. Alternatively, employers that provide an equal or greater holiday benefit may designate a "floater" holiday as Family Day each year, compel employees to use a floater for Family Day, or provide a holiday on Family Day but discontinue another holiday that the employer is otherwise not required to provide. For example, Easter Monday, the August Civic Holiday, Remembrance Day, and extra days off in December are sometimes provided by employers even though not required by law, so the employer might transfer one of the non-statutory holidays to Family Day.

An assessment of which options are legally available to an employer must include a thorough review of all existing employment contracts, policies, and practices. The ESA provides a statutory minimum but does not over-ride greater contract benefits or other provisions which negotiated in collective or non-collective employment contracts.

### **What If the Employee Agrees to Work on Family Day?**

The employee can agree in writing to work on the holiday and be paid either: "public holiday pay" plus a "premium rate of pay" for the hours worked on the public holiday, or, the regular rate for hours worked on the holiday plus receive a substitute holiday with public holiday pay. Premium rate is at least 1.5 times the regular rate of pay.

### **Business Issues for Consideration**

Depriving employees of an additional holiday as so many believed they were getting could negatively impact employee morale, yet an employer legitimately must consider the loss of productivity, and integration not only with clients and suppliers, but as well with multi-jurisdictional operations. Whatever decisions are reached about implementation of policies to adhere to the statutory requirements, effective and clear communication with the employees as to the policy and the reasons behind the policy are well advised..

### **What If an Employer Does Not Follow the ESA?**

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The Ministry of Labour has investigative and enforcement capabilities and strategies, which include issuing Notices of Contravention and ticketing under the Provincial Offences Act. . In the case of prosecutions other than those commenced with a ticket, the maximum penalty, if an individual is convicted, is \$50,000 or imprisonment for a term of not more than 12 months or both. If a corporation is convicted, the maximum fine is \$100,000 for a first offence, \$250,000 if the corporation has one previous conviction and \$500,000 if the corporation has more than one previous conviction.

For more information, please contact your Miller Canfield lawyer in our Canadian office or call 519.977.1555.

*The information contained in this Employment Law Alert is general information only, and should not be relied upon as a substitute for legal advice or legal opinion. The legislation is more detailed than can be summarized in this brief Outline. You should consult a qualified lawyer in respect to particular facts and circumstances which are needed to assess legal obligations relating to the Ontario Family Day Holiday before proceeding with any course of action.*