

EMPLOYMENT & LABOUR RELATIONS BULLETIN

January 2008

FAMILY FUN IN FEBRUARY?

As most employers are aware, “Family Day” has come to Ontario. In October 2007, the provincial government amended the *Employment Standards Act, 2000* (the “ESA”) to give employees an additional day off from work on the third Monday of every February. This amendment brings the number of public holidays in Ontario up to nine.

With Ontario’s first Family Day fast approaching (February 18, 2008), many employers have begun to consider whether they can meet their obligations to employees without sacrificing company productivity or compromising the equilibrium of carefully structured multi-jurisdictional holiday policies.

The obligations of employers whose contracts and policies simply mirrored the eight statutory holidays that were required in 2007 are clear; such employers must now grant employees an additional paid holiday on Family Day.

However many employers provide their employees with greater holiday entitlements than those required by statute. For instance many employers provide one or more “floater” holidays or extra time off work in December around Christmas. The obligations of such employers are less clear. Although it may not be possible to determine, with certainty, what the Ministry of Labour will require of such employers, some general guiding principles are set out below.

A Greater Benefit

The ESA sets out minimum employment standards. However if an employment agreement or a collective agreement provides a greater benefit to employees, then the terms of the agreement apply and the statutory standard does not apply. Therefore employers that give employees a greater holiday benefit than the benefits required by statute may not be required to give employees a holiday on Family Day.

However before an employer decides not to grant a holiday on Family Day, it is important to ensure that employees really receive a greater benefit. This will depend on the particular circumstances of each case. Some points to keep in mind are as follows:

- Employees are entitled to a holiday on Family Day unless they receive a greater benefit, not an equal benefit. Therefore if an employer provides 10 (or more) holidays per year, it may not have to provide an extra holiday for Family Day. However employers that provide nine holidays must comply with the ESA.
- When determining if a benefit is greater, employers cannot “compare apples to oranges”. Employers cannot fail to provide a holiday on Family Day, on the basis that employees receive other benefits that exceed statutory requirements. For instance, employees cannot be denied a public holiday because they receive more vacation time than the ESA requires.
- All aspects of the holidays provided by an employer will be examined to determine if they are of greater benefit than the public holidays under the ESA. For instance the holiday benefits provided by an employer may not be greater if the employer imposes more stringent qualifying conditions than those set out in the ESA (e.g. floater holidays that are earned based upon length of service).

What Can Employers Do?

Employers that grant a greater holiday benefit may be entitled to choose not to give employees a holiday on Family Day. Further employers that provide an equal or greater holiday benefit may have the following options:

1. Designate a “floater” holiday as Family Day each year or compel employees to use a floater for Family Day;
2. Provide a holiday on Family Day, but discontinue another holiday that the employer is not required to provide under the ESA (e.g. the August Civic Holiday, Easter Monday, or extra days off in December); or
3. Provide Family Day as an extra holiday.

However an employer must remember that the ESA is not the only source of its obligations to employees. An employer may have contractual obligations (express or implied) which limit its authority to implement some of the options described above.

Unionized Employees

As with any question involving unionized employees, employers must carefully review the relevant collective agreement(s) to determine their obligations. Although Ontario collective agreements are not likely to contain express reference to Family Day, that does not mean the language of such agreements could not be interpreted to require that the employer provide all statutory holidays as well as any additional holidays required by the collective agreement. Further an employer’s authority to designate a floater holiday as Family Day may be limited by consultation obligations or other requirements set out in the collective agreement.

Non-Union Employees

For non-union employees, contractual holiday entitlements should be determined with reference to individual employment agreements, as well as employee handbooks, employment policies and the employer’s past practices.

Practical Tips

In many cases employers choose to exceed their legal obligations for practical or business reasons. Most employees are aware that the provincial government has created a new statutory holiday in Ontario and they are looking forward to an extra holiday in February. Therefore although some employers may not be legally required to grant an extra holiday, failure to do so could negatively impact employee morale. This potential impact should be given serious consideration when employers decide how to integrate Family Day into their existing holiday policies and practices.

At a minimum, employers should ensure that they adopt an effective communication strategy with employees and bargaining agents. This should include:

- Clear advance notice of how employees’ existing holiday entitlements will be affected by Family Day. For instance employees should be promptly notified if: (a) they will not be given a day off from work on Family Day because they already receive a greater contractual benefit; (b) they will be required to use a “floater” for Family Day; or (c) the employer intends to eliminate a non-statutory holiday that was provided in previous years.
- Emphasis on the generosity of existing holiday policies and the fact that employees already receive greater holiday entitlements than the ESA requires. Some employers may also wish to point out other benefits employees receive that exceed statutory requirements.
- Where appropriate, an explanation of the reasons for the employer’s decision. For instance a lost day of productivity may have negative business consequences for some employers, while other employers may require a consistent holiday policy across multiple provinces.

One Last Note

Although this bulletin summarizes some general principles respecting Family Day, employers' legal obligations are highly dependant on factual circumstances. For instance, there are special rules respecting public holidays for certain industries (e.g. hospitals and continuous operations) and for certain types of employees (e.g. seasonal workers and some types of professionals). In addition federally regulated businesses in Ontario are not subject to the ESA, but rather, are governed by the *Canada Labour Code* which does not provide for a Family Day public holiday.

Any member of our Employment and Labour Relations Group would be pleased to discuss your Family Day obligations.

Written by Lyndsay Wasser

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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