

**EMPLOYMENT LAW  
BILL 147**

**A New Employment Standards Act for 2001**

**NOTES OF SEMINAR PRESENTED TO GEORGIAN COLLEGE  
ON FRIDAY, FEBRUARY 2<sup>ND</sup>, 2001**

**BY**

**GEOFFREY T. MULLIN  
MULLIN THWAITES WARD, LLP  
Barristers & Solicitors  
235 Broadway  
Orangeville, Ontario  
L9W 2Z5  
Telephone: (519) 941-4559  
Fax: (519) 941-4806**

**Background:**

The *Employment Standards Act, 2000* (Bill 147) was given third reading on December 19<sup>th</sup>, 2000 but only one section was proclaimed effective December 30<sup>th</sup>, 2000, the section dealing with pregnancy and parental leave. None of the other sections of the Bill had been proclaimed as of February 15<sup>th</sup>, 2001 nor are they expected to be in effect until the months of June or July, 2001 notwithstanding the Ministry's stated intention to have the Act implemented by early 2001.

I propose, therefore, with the limited time available on Friday, February 2<sup>nd</sup>, 2001 to survey the more practical sections of the Act with a view to making you familiar with the language and the scheme of the Act by referring and discussing specific sections and definitions and attempting to demonstrate the various sections that will eventually apply.

### **How This Act Applies - Part (iii)**

Any civil remedy that an employee otherwise has is not affected by the adoption of this Act.

8. (1) *Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act.*

Nor can an employer and an employee contract out of the provisions of this Act and any attempt to do so is void.

5. (1) *Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.*

### **Standards Relating to Termination or Severance are Minimal Standards .**

#### **Part xv**

The provisions governing termination of employment are minimal standards only and do not disentitle an employee from pursuing longer termination notice and greater severance pay within the civil courts.

I have illustrated the minimal requirements of the *Employment Standards Act* by referring to three cases decided in 1998.

In *Taylor v. Bank of Nova Scotia* the employee was a senior accounting clerk, 51 years of age and had been an employee for 20 years. She had conducted two transactions against clearly stated bank policies and procedures. The bank fired the employee for cause but the Ontario Court held that cause had not been established and that 12 months notice was appropriate.

In *Blackburn v. Victory Credit Union Limited* involved an employee of 32 years service who was terminated for cause after a number of financial irregularities (none substantial) were discovered. The Nova Scotia Court of Appeal held that 24 months notice was appropriate.

*Frank v. Federated Co-operatives Limited* involved an employee of 22 years who was fired for attempting to obtain personal benefit from his employer's suppliers contrary to the stated procedures of the employer. The employee was awarded 20 months for notice and damages.

I am referring to these cases at this point to demonstrate that the notice and severance requirements of the Act bear no relationship to the amounts awarded in these Court decisions.

All employees who have been employed for three months or more are entitled to written notice of termination or a payment of a lump sum equal to the wage entitlement during the notice period.

The notice of termination is essentially one week for every year of employment to a limit of eight weeks for eight years or more service. (*See Section 53*)

In calculating the length of employment you include the periods off for pregnancy and parental leave or any other inactive employment

*59. (1) Time spent by an employee on leave or other inactive employment is included in determining his or her period of employment.*

and during the notice period the employee is entitled to the benefits of all benefit plans she was otherwise entitled to.

Severance pay is obligatory when an employee has worked more than five years, the employer has more than 50 employees and a payroll of \$2.5 Million Dollars or more. In any event, severance pay is limited to 26 weeks and is calculated pursuant to Section 65.

65. (1) *Severance pay under this section shall be calculated by multiplying the employee's regular wages for a regular work week by the sum of,*
- (a) *the number of years of employment the employee has completed; and*
  - (b) *the number of months of employment not included in clause (a) that the employee has completed, divided by 12.*

It is readily apparent that a combination of termination notice and severance pay does not approach the damages awarded in the three examples cited above.

### **Limits of Hours of Work and the Provision of Eating Periods**

#### **Part vii**

This part reveals a number of new and important compliance requirements when dealing with agreements to obviate certain statutory requirements. Example:

17. (1) *Subject to subsection (2), no employer shall require or permit an employee to work more than,*
- (a) *eight hours in a day, or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day; or*
  - (b) *48 hours in a work week.*

But the Act provides an exception

17. (2) *An employer may permit an employee to work up to a specified number of hours in excess of an amount set out in subsection (1) if,*
- (a) *the employee agrees to work these hours; and*
  - (b) *the employee will not work more than 60 hours or such other number of hours as are prescribed in a work week.*

The exception may be invoked if there is an agreement between the employee and the employer.

*Question: May the agreement be verbal or is writing required?*

The answer to this question is clearly stated in 1(3) of the Definitions Section -

*1. (3) Unless otherwise provided, a reference in this Act to an agreement between an employer and an employee or to an employer and an employee agreeing to something shall be deemed to be a reference to an agreement in writing or to their agreeing in writing to do something.*

All agreements should be in writing, unless specifically stated otherwise, and those agreements must be retained in the employee's file.

Be aware that agreements between employees and employers can be revoked by the employee upon written notice. (See Section 17(3))

*17. (3) An employee may revoke an agreement under subsection (2) two weeks after giving written notice to the employer.*

An employer shall give employees a period of at least 11 hours free from work each day and at least 8 hours between shifts. There are exceptions of these mandatory requirements under certain exceptional circumstances. (See Section 19)

There shall be eating periods of at least 30 minutes at the end of 5 hours of consecutive work.

### **Overtime Pay - Part viii**

Every hour of work over 44 hours per week is payable at one and one-half times regular rate. However if there is an agreement (in writing) the hours of work may be averaged over a period of four weeks to determine entitlement to overtime. Such an agreement must have an expiry date and it cannot be longer than two years from the effective date of the agreement. Remember, however, that an employee cannot unilaterally revoke the averaging agreement before the expiry date. *(See Section 22 (6))*

*22. (6) No averaging agreement referred to in this section may be revoked before it expires unless the employer and the employee agree to revoke it.*

An employee may be compensated for overtime hours by receiving an equivalent of one and one-half of paid time off for each hour worked if there is an agreement (in writing) and if the paid time off work is within three months of the work week in which the overtime was earned.

### **Public Holidays - Part x**

An employer and an employee may agree in writing that the employee is to work on the public holiday, and if so, the employee may elect to accept another day off in exchange for holiday pay. Or she may elect to work and receive her regular pay plus premium pay (one and a half times her regular pay rate)

### **Vacation Pay - Part xi**

An employee is entitled to two weeks vacation after each 12 month the employee is employed and non-active employment is to be included in determining the 12 month period. *(See Section 33)*

*33. (1) An employer shall give an employee a vacation of at least two weeks after each 12 months the employee is employed.*

The vacation period can be taken in two weeks or one week or two one week periods or in less than one week periods if the employee requests in writing and the employer agrees.

Vacation pay is at least 4% of the wages earned during the 12 month period for which vacation is given.

Also if the employer direct deposits wages to an account or if the employee does not take her holidays in complete weeks, the employer may pay on the pay day for the period in which the vacation falls rather than paying a lump sum before the employee's vacation begins.

Vacation pay due to an employee is deemed to be held in trust for that employee. *(See Section 40)*

*40. (1) Every employer shall be deemed to hold vacation pay accruing due to the employee in trust for the employee whether or not the employer has kept the amount for it separate and apart.*

#### **Leaves of Absence - Part xiv**

A pregnant employee is entitled to pregnancy leave without pay unless her due date falls fewer than 13 weeks after she started employment. *(See Section 46)*

*46. (1) A pregnant employee is entitled to a leave of absence without pay unless her due date falls fewer than 13 weeks after she commenced employment.*

Example: her due date must be at least April 1<sup>st</sup>, 2001 if she started her employment on January 1<sup>st</sup>, 2001.

She must begin her pregnancy leave no earlier than the earliest of the birth date or 17 weeks before the due date. The employee must give notice in writing of pregnancy leave two weeks prior to the date it is to begin.

Pregnancy leave ends 17 weeks after it started if she is entitled to parental leave. If she is not entitled to parental leave, pregnancy leave ends the day that is the latest, either 17 weeks after pregnancy leave started or 6 weeks after birth.

A parent who has been employed for at least 13 weeks is entitled to parental leave of 35 weeks following the birth of a child or a child coming into custody, care and control for the first time. (*See Section 48*)

*48. (1) An employee who has been employed by his or her employer for at least 13 weeks and who is the parent of a child is entitled to a leave of absence without pay following the birth of the child or the coming of the child into the employee's custody, care and control for the first time.*

It is important to remember that both parents are entitled to this leave and the definition of parent is quite broad for it includes a person who is in a relationship of some permanence with the mother and who intends to treat the child as his own. A relationship of some permanence is not the equivalent, as suggested by the Ministry of Labour, to a long standing relationship. It can be a relationship as brief as one to nine months combined with a declared intent to treat the child as his own. (*See Section 45*)

*45. In this Part,*

*“parent includes a person with whom a child is placed for adoption and a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own”*

The parent must begin parental leave no later than 52 weeks after the child is born or comes into the employee's custody, care and control for the first time. A parent of a child who has been awarded custody of that child for the first time would qualify for parental leave. Parental leave for a parent who has had pregnancy leave is a maximum of 35 weeks and parental leave for a

parent who has not had pregnancy leave is 37 weeks. Parental leave by both parents can be taken at the same time or at different times. It would be possible to extend pregnancy and parental leave by both parents to a maximum period of 89 weeks.

8.	Pregnancy Leave	17 Weeks
9.	Parental Leave for Mother	35 Weeks
10.	Parental Leave for Parent who has not Exercised Pregnancy Leave	<u>37 Weeks</u>
		89 Weeks

The greatest discussion at the Seminar of February 2<sup>nd</sup>, 2001 was Emergency Leave. The general perception being that Emergency Leave was potentially the most disruptive to an employer and the most susceptible to abuse.

It should be noted, however, that Emergency Leave is only available from an employer who regularly employs 50 or more employees. *(See Section 50)*

*50. (1) An employee whose employer regularly employs 50 or more employees is entitled to a leave of absence without pay because of any of the following:*

1. A personal illness, injury or medical emergency.
2. The death, illness, injury or medical emergency of an individual described in subsection (2).
3. An urgent matter that concerns an individual described in subsection (2).

Unfortunately “urgent matter” is not defined and it obviously could be subject to abuse. The act does provide the employer the ability to challenge the reasonableness of the request for Emergency Leave. *(See Section 50)*

*50. (7) An employer may require an employee who takes leave under this Section to provide evidence reasonable in the circumstances that the employee is entitled to leave.*

Given that the employee is entitled to take a total of ten days leave under this section each year (two weeks) it is perhaps not unexpected that employers may have legitimate concerns particularly when one considers Part xviii.

### **Reprisal - Part xviii**

No employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so, who exercises or attempts to exercise a right under this Act, including Emergency Leave.

The onus to prove that an employer did not contravene this provision lies upon the employer and not the employee. *(See Section 74)*

*74. (2) Subject to subsection 122 (4), in any proceeding under this Act, the burden of proof that an employer did not contravene a provision set out in this section lies upon the employer.*