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Ontario Consulting on ESA Exemptions

Date: October 20, 2017

On October 18, 2017, the Ontario government announced that it would be conducting consultations on a range of exemptions under the *Employment Standards Act, 2000*, including key exemptions that apply to managers and supervisors, as well as to IT professionals. Submissions are due by December 1st, and employers should consider whether to participate in this important undertaking that could significantly impact your operations.

Context for the Consultation

As readers will know, the Ontario government has been consulting extensively on changes to the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act, 1995* (LRA). The process began in 2015 with the launch of the Changing Workplaces Review, continued through the issuance of the Final Report of the Special Advisors on May 23, 2017, and continues to date as the government prepares to pass Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*.

The question of the ongoing validity of exemptions from the ESA's various employment standards was addressed to a significant extent in the Changing Workplaces Review Final Report. When the government announced the proposed Bill 148 amendments to the ESA, it announced that it would be conducting a review of ESA exemptions and special industry rules, including the exemptions for managerial and supervisory employees. This consultation has now begun.

Scope of the Consultation

At this time, the government will be consulting on the following ESA exemptions:

- Architects
- Domestic Workers, Homemakers and Residential Care Workers
- IT Professionals
- Managerial and Supervisory Employees
- Pharmacists
- Residential Building Superintendents, Janitors and Caretakers

The exclusion of domestic workers under the LRA is also being reviewed.

The range of the ESA exemptions varies as between the employee groups covered by the exemptions. For example, architects and pharmacists are exempt from a wide range of employment standards, including minimum wage, hours of work, overtime pay, vacation and public holidays. In contrast, managerial and supervisory employees are exempt from some

hours of work rules and overtime pay requirements.

Because of the key importance for most employers, we will briefly address the IT professional and managerial and supervisory exemptions.

IT Professionals

Currently, IT professionals are exempt from all hours of work and overtime pay employment standards. To fit within the exemption, the IT professional must work on IT systems that are based on computer or related technologies, and must use “specialized knowledge” and exercise “professional judgment”. Thus, the exemption does not apply to all IT workers.

In the Final Report of the Changing Workplaces Review, the Special Advisors stated that they had not been persuaded that the existing exemption was justifiable and seemed to be overbroad. Moreover, they could not determine whether there was a legitimate rationale supporting the exemption. However, they also noted that they did not have sufficient information to make specific recommendations, and therefore called for further consultation.

Managers and Supervisors

The exemptions for managerial and supervisory employees are similar to those that apply to IT professionals. They are exempt from overtime pay requirements, and are exempt from most of the hours of work standards (with the exception of eating periods). To fit within the exemption, employees must perform work that is “supervisory or managerial in character”, and may “perform non-supervisory or non-managerial tasks on an irregular or exceptional basis” only.

In the Final Report, the Special Advisors recommended that the existing managerial and supervisory exemptions be replaced by exemptions that would focus on a “salaries plus duties” test. This proposed test would require the individual to perform certain specified managerial duties and earn more than a specified salary in order for the exemptions to be triggered. The Special Advisors recommended that the minimum salary be set at 150% of minimum wage.

Participating in the Consultation

The government will be accepting submissions from interested stakeholders until **December 1, 2017**, and has created a website with more detailed information [here](#)

Of note, the government has prepared a toolkit for each category of exemption, which you will need to obtain in order to participate in the consultation process. The toolkits can be obtained by emailing exemptions.review@ontario.ca. Included in the toolkit will be:

- information about the ESA provisions and proposed Bill 148 amendments;
- an overview of the Ministry of Labour’s policy framework, which it has applied since 2005 to develop a range of occupational and sectoral ESA exemptions; and
- the questions that the government wants addressed as it analyses the exemptions in question.

Given the short time frame for participation, employers are encouraged to seek copies of the toolkits that the Ministry has prepared to better determine whether you should make submissions to the government. We would be pleased to assist employers with any submissions that you are considering.

Should you have any questions or require further information, please contact your regular Hicks Morley lawyer.

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