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Changes to the *Employment Standards Act*:
What You Need to Know
June 10, 2015

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Welcome and Opening Remarks

Paul E. Broad

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Amendments to the Enforcement Provisions of the *Employment Standards Act*

Joseph Cohen-Lyons

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Enforcement Provisions

- Section 96 – A person alleging that the ESA has been or is being contravened may file a complaint with the Ministry
- 96 (3) – Two year limitation period on filing complaint
- Complaint assigned to Employment Standards Officer for investigation and enforcement

Enforcement Provisions

- Section 99 – Act is enforceable as if it were part of the collective agreement with respect to any contravention that occurs during the life of the collective agreement or any statutory freeze period

Enforcement Provisions

- Section 103 – Employment Standards Officer may make Order to Pay Wages owed under the ESA
- Time limits on Order to Pay Wages
 - Was 6 months (1 year for vacation pay or repeat contraventions)
 - Now 2 years for all wages

Enforcement Provisions

- Limits on amount of Order to Pay Wages
 - Was a \$10,000 limit
 - Now no limit on amount of Order to Pay Wages

Enforcement Provisions

- Common to see claims for termination and severance pay made with Ministry
- Employment Standards Officer has authority to enforce "greater right or benefit" in employment contract
- Superior Court has jurisdiction to enforce ESA provisions

Enforcement Provisions – Jurisdiction of Superior Court

- Superior Court can interpret, apply and award amounts under the ESA
 - *Boland v. APV Canada Inc.*, 2005 CanLII 3384 (ON SCDC)

Enforcement Provisions – Jurisdiction of the Superior Court

- No jurisdiction to award damages for reprisal under the ESA
 - *Bray v. Canadian College of Massage and Hydrotherapy*, 2015 CanLII 3452 (ON SCSM)
- Section 97 – removes right of employee who files a complaint to proceed with civil proceeding for same matter

Enforcement Provisions – Enforcement of Greater Right or Benefit by Ministry

- *Camis Inc. v. Hunt*, 2011 CanLII 6682 (ON LRB)
 - Employee filed complaint with Ministry for termination and severance pay
 - Employment contract provided for termination upon 3 weeks notice per completed year of service
 - On review, OLRB held that termination provision contained greater right or benefit that could be enforced via ESA complaint
 - Ordered to pay maximum of \$10,000

What is "Wages" Under the Act

Amanda J. Hunter

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Wages

“wages” means,

- (a) monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied,
- (b) any payment required to be made by an employer to an employee under this Act, and

Wages

(c) any allowances for room or board under an employment contract or prescribed allowances,

but does not include,

(d) tips and other gratuities,

(e) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency,

Wages

- (f) expenses and travelling allowances, or
- (g) subject to subsections 60 (3) or 62 (2), employer contributions to a benefit plan and payments to which an employee is entitled from a benefit plan;

Bonuses

Two parts to the exclusion:

- (1) dependent on the discretion of the employer;
and
- (2) that are not related to hours, production or efficiency.

Bonuses

- *Frederick Samuel White v. 2215515 Ontario Inc. (Swiss Chalet Rotisserie & Grill)*, 2012 CanLII 8116 (ON LRB)

What About?

- Profit sharing plans
- Stock options
- Restricted stock units or other long term incentive plans

What About?

- Sick leave
- STD/LTD
- SUB top ups
- Commission
- Car allowances
- Use of a company car?

Transition Provisions – Key Dates

- November 20, 2014
- February 20, 2015
- May 20, 2015
- October 1, 2015
- November 20, 2015
- February 20, 2017

November 20, 2014

- Date of Royal Assent
- Everything in force unless a different date identified
- Annual adjustment to minimum wage now part of the Act, no longer determined by regulation

February 20, 2015

- Wages due before this date continue to be subject to the \$10,000 cap
- Wages that become due to an employee on or after this date not subject to the \$10,000 cap

February 20, 2015

- Restriction on ESO ability to make wage orders changed to wages that became due 2 years before the date of the complaint or inspection
- However, if the wages that are subject to the complaint or inspection came due before February 20, 2015, then the 6 or 12 month limit (12 months for vacation pay and repeat contraventions) continues to apply.

February 20, 2015

- Employee files a claim for unpaid overtime in March 2016.
- Recovery will be limited to period from February 20, 2015 until the date of the claim
- Wages owing from March 2014 until February 29, 2015 are outside of the 6 or 12 months

May 20, 2015

- New poster requirements
- All new employees must receive a copy of the poster within 30 days of hire
- All existing employees must receive a copy of the poster within 30 days of May 20, 2015
- Self-audits

October 1, 2015

- Amendments to legislature's regulation-making power regarding minimum wage
- Establishing rules respecting the application of minimum wage
- Establishing minimum wage rates for different classes of employees
- General minimum wage \$11.25

November 20, 2015

- Changes to Temporary Help Agency provisions

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February 20, 2017

- Transition provisions repealed

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Compliance and Self-Audits

Kathryn L. Meehan

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May 20, 2015 Amendments

- Effective May 20, 2015, amendments to the ESA compliance obligations came into force. These include new poster requirements and new powers for employment standards officers to order employer “self-audits.”

ESA Poster

- Must provide each employee with a copy of the most recent ESA information poster
- This obligation applies in addition to the existing obligation to post the poster in a conspicuous place in the workplace.
- New employees must be given a copy of the poster within 30 days of their first day of work.
- Existing employees must be given a copy within 30 days of May 20, 2015 (June 19, 2015).

Do I Have to Hand Out a Paper Copy?

- **No**, may provide the poster as i) a printed copy; ii) an attachment in an email to the employee; or iii) a link to the document on an internet/intranet database, but only if the employer ensures the employee has reasonable access to that database (i.e. must ensure the employee has access to a computer and is able to access a working link to the document) **and** ensures the employee has access to a printer **and** that the employee knows how to use the computer and the printer.

Multilingual Workplace

- If the majority language in the workplace is something other than English and the Ministry has published a version in that language, the employer must post a translated version next to the English version.
- If an employee requests a translation of the poster into a language other than English, the employer is required to inquire as to whether the MOL has prepared a translation of the poster into that language, and if so, must provide the employee with a copy of the translation.

Where Do I Get it?

- Copies of the poster can be downloaded for free from:
<http://www.labour.gov.on.ca/english/es/pubs/poster.php>
- Copies can be obtained by mail for the cost of shipping and handling from ServiceOntario Publications, 1-800-668-9938.
- All multilingual material is available on the Ministry of Labour's website at: Ontario.ca/employmentrights

Employment Standards Poster Checklist

- There is a copy of the ESA poster posted in your workplace.
- It is the current version (visit [Ontario.ca/ESAposter](https://www.ontario.ca/ESAposter) to verify).
- It is posted where it will come to the attention of employees.
- If required, it has been posted in a second language.
- If the business has multiple locations, there is a copy posted in each one.
- Employees were provided with a copy of the current version of the poster within 30 days of being hired (visit [Ontario.ca/ESAposter](https://www.ontario.ca/ESAposter) to verify).
- Employees were provided with a translated version of the poster in addition to a copy in English if requested and the Ministry had a published version in that language.

Self-Audit

Self-audit

91.1 (1) An ESO may, by giving written notice, require an employer to conduct an examination of the employer's records, practices or both to determine whether the employer is in compliance with one or more provisions of this Act or the regulations.

Self-Audit

Examination and report

(2) If an employer is required to conduct an examination under subsection (1), the employer shall conduct the examination and report the results of the examination to the ESO in accordance with the notice and the requirements of this section.

Self-Audit

Notice

- (3) A notice given under subsection (1) **shall** specify,
- (a) the period to be covered by the examination;
 - (b) the provision or provisions of this Act or the regulations to be covered by the examination; and
 - (c) the date by which the employer must provide a report of the results of the examination to the ESO.

Self-Audit

Same

- (4) A notice given under subsection (1) **may** specify,
- (a) the method to be used in carrying out the examination;
 - (b) the format of the report; and
 - (c) such information to be included in the employer's report as the ESO considers appropriate.

Self-Audit

Same

(5) A notice given under subsection (1) **may**,

- (a) require the employer to include in the report to the ESO an assessment of whether the employer has complied with the ESA/Regs
- (b) require the employer to include in the report to the ESO an assessment of whether one or more employees are owed wages if, pursuant to clause (a), the employer has included an assessment that the employer has not complied;
- (c) require the employer to pay wages owed if, the employer assesses that one or more employees are owed wages.

Self-Audit

Report – Unpaid Wages

(6) If the employer's report includes an assessment that one or more employees are owed wages, the employer shall include the following in the report to the employment standards officer:

1. The name of every employee who is owed wages and the amount of wages owed to the employee.
2. An explanation of how the amount of wages owed to the employee was determined.
3. If the notice under subsection (1) requires payment, proof of payment of the amount owed to the employee

Self-Audit

Same – Other Non-Compliance

(7) If the employer's report includes an assessment that the employer has not complied with this Act or the regulations but no employees are owed wages as a result of the failure to comply, the employer shall include in the report a description of the measures that the employer has taken or will take to ensure that the ESA/Regs will be complied with.

Self-Audit

Orders

(8) If an employer's report includes an assessment that the employer owes wages to one or more employees, or that the employer has otherwise not complied with this Act or the regulations, and the employment standards officer determines that the employer's assessment is correct, the officer may issue an order under section 103 or 108, as the officer determines is appropriate.

Self-Audit

Inspection, investigation, enforcement not precluded

(9) Nothing precludes an ESO from conducting an investigation or inspection, and from taking such enforcement action under the ESA as the officer considers appropriate.

Self-Audit

Same

- (10) Without restricting the generality of (9), an ESO may,
- (a) conduct an investigation or inspection that covers a period or part of a period specified in the notice
 - (b) take such enforcement action as the ESO considers appropriate, including issuing an order under section 103 or 108, if, despite the employer's report indicating that the employer did comply, the officer determines that the employer did not comply with the ESA/Regs during a period or part of a period specified in the notice.

Self-Audit

False information

(11) No employer shall provide a report required under this section that contains information that the employer knows to be false or misleading.

How to Prepare for an Audit

- HM Checklist with a general overview of an employer's ESA compliance obligations, along with checklists to assist you in assessing your degree of compliance
- Tools on MOL website – hours of work and overtime tool, termination and severance calculator tool, the Employment Standards Workbook

Greater Benefit?

Greater contractual or statutory right

(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.

New Leaves, New Temporary Help Agency Rules and Consultation on Legislation Reform

Paul E. Broad

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Use of Temporary Agency Employees

- Bill 139 amendments from 2009
- Regulated the use of "assignment employees"
- Clarified that the agency is the employer for ESA purposes
- Permitted assignment employees to allege reprisals by the client of the agency
- Otherwise, agency responsible for ESA entitlements

Use of Temporary Agency Employees

- Bill 18 increases potential liability of clients of the agency
- Agency and client will be jointly and severally liable for:
 - Regular wages
 - Overtime pay
 - Public holiday pay
 - Premium pay

Use of Temporary Agency Employees

- Agency will remain primarily liable
- But, client can be held liable as if it was the employer of the assignment employees
- Into effect on **November 20, 2015**

Use of Temporary Agency Employees

- New record-keeping obligations – November 20
- Agency:
 - Hours of work for each day and each week for each assignment employee assigned to a client
- Client
 - Hours of work for each day and each week for each assignment employee it uses
- 3-year retention period

Use of Temporary Agency Employees

- Not the ESA, but...
- Government also gave itself regulation-making authority under WSIA
 - Potential to shift full cost of claims under the WSIA to the client of the agency
 - Could apply to clients subject to any of the 3 main experience rating systems – NEER, CAD-7, MAP
- Authority not yet proclaimed in force

Changing Workplaces Consultations

- Focus on changing workplaces and changing economy
- Considering amendments to the ESA and LRA

Changing Workplaces Consultations

- Government identified some areas of concern:
 - Non-standard working relationships, including temporary jobs, part-time work and self-employment
 - Service sector
 - Globalization and trade liberalization
 - Technological change
 - Diversity

Changing Workplaces Consultations

- Only excluded areas:
 - Construction industry provisions of the *LRA*
 - Minimum wage
 - Policy discussions subject to other independent processes

Changing Workplaces Consultations

- Government has published a Guide, which outlines how you may participate
- Submissions deadline – **September 18, 2015**
- Critical that government hears the voices of employers
 - Economic realities of modern workplace
 - How changes to employment are impacting businesses
 - Impact of government regulation – what currently works and what does not

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Leaves of Absence

- Three new leaves of absence came into effect on October 29, 2014
 - Critically ill child care leave
 - Crime-related child death or disappearance leave
 - Family caregiver leave

Leaves of Absence

- Critically ill child care leave
 - Up to 37 weeks' leave within a 52-week period
 - For children up to 18 years of age
 - May be entitlement to EI benefits
 - No explicit "whole week" requirement

Leaves of Absence

- Crime-related child death or disappearance leave
 - Up to 104 weeks if child's death is a result of crime
 - Up to 52 weeks for a child's disappearance
 - May be entitled to PMMC grant from federal government

Leaves of Absence

- Family caregiver leave
 - Applies where a listed family member has a "serious medical condition"
 - Up to eight weeks per calendar year
 - In addition to family medical leave, personal emergency leave and critically ill child care leave
 - No explicit "whole week" requirement

Panel Discussion & Questions

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Concluding Remarks

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