

# Make it a functional Family Day

January 1, 2008

*The simple addition of one public holiday may be anything but simple for some employers.*

In just a few weeks' time, on Monday February 18, 2008, many Ontario employees will be enjoying a day off on Family Day, the ninth and newest statutory holiday under Ontario's *Employment Standards Act, 2000* (the ESA).

This additional holiday, on the third Monday in February each year, was added by regulation last October. Because the ESA sets the minimum required public holiday entitlement for employees, Ontario-regulated employers who currently offer the minimum entitlement will be adding Family Day to the list of holidays that their employees currently enjoy.

Other employers may have more complex decisions to make. Some employers are federally regulated, and aren't governed by the ESA. Others already offer greater public holiday benefits than the minimum required under the ESA, and may not be legally required to add Family Day as a paid holiday. Still others have employment contracts or collective agreements that specifically address public holidays.

If your organization falls into any of the above categories, here's an overview of the issues that could impact your decisions about the new Family Day holiday.

## **Situation #1: You are a federally-regulated employer**

The new Family Day regulation only applies to employers governed by the ESA. This excludes federally-regulated employers such as banks, airlines and railways, broadcasters and many others.

These employers are not required by the ESA to add Family Day as a holiday, although many of them will voluntarily do so. However, Federally-regulated employers must still abide by the terms of any employment contract or collective agreement that covers its employees. If those contracts reference provincial public holidays in any way, the terms should be reviewed carefully to determine whether the new Family Day regulation requires any changes to the employer's holiday schedule.

## **Situation #2: You offer a greater public holiday benefit than the ESA**

Section 5(2) of the ESA allows an employer to substitute contract terms that provide a greater benefit for the minimum required terms under the ESA. Specifically, Section 5(2) states that:

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.

This means that if your employment contract or collective agreement provides a greater benefit than the ESA in terms of a statutory holiday package, you may not have to provide an additional paid holiday on Family Day.

The tricky issue with this provision is defining what a “greater benefit” is. If you simply take the number of public holidays that you offer employees, you will need to provide 10 or more in order to provide a greater benefit than the new provisions of the ESA. These 10 days must be in addition to any vacation entitlement that employees may have. And if any of the days have conditions attached to them, such as a “use it or lose it” condition that might apply to floater days, these may not qualify as part of the greater benefit test.

Of course, the number of holidays is not the only way that you may be providing a greater benefit. For example, you might be providing a higher rate of pay for public holidays than that specified under the ESA. Because of these different variables, it's your organization's total public holiday package not just number of days that you should be factoring in when determining if you provide a greater benefit than the ESA.

### **Situation #3: Your employees work under an employment contract or agreement**

Before you make any decision about Ontario's new Family Day within your organization, you should carefully review the terms of any employment contract or collective agreement that applies to your employees. There may be language in the contract or agreement that either directly or indirectly relates to public holidays and could impact the decision you make about Family Day. Employers must be cautious about applying terms of a contract or making changes without proper notice to employees, or risk potential claims for constructive dismissal.

While the direction on this new public holiday will be clear for many organizations, there will be significant grey areas for others, and litigation in some situations will be inevitable. For this reason, make sure you get the professional advice you need to make the decisions about this new holiday that are the right ones for your organization.

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