KOSKIE MINSKY

JUSTICE MATTERS

# Employment Law

This is a summary of employment law matters of interest, from a litigator's point of view.

## Equal Pay Provisions of the ESA Now in Force

Effective April 1, 2018, the equal pay amendments to the *Employment Standards Act* ("*ESA*") flowing from the Bill 148 *Fair Workplaces, Better Jobs Act* officially came into force in Ontario.

These equal pay provisions prohibit any employer paying different rates of pay to employees because of a difference in employment status (eg. full-time, part-time and/or casual employee status) when:

1. they perform substantially the same kind of work in the same establishment;
2. their performance requires substantially the same skill, effort and responsibility; and
3. their work is performed under similar working conditions.

The amendments also prohibit temporary help agencies from paying an assignment employee a rate of pay less than the rate paid to an employee of the client in similar circumstances.

When complying with these equal pay obligations, it is important to note that an employer is not permitted to reduce the rate of pay of an employee in order to comply with its equal pay obligations or the equal pay obligations of a temporary agency. It is also important to note that the equal pay obligations now required by the *ESA* do not apply if the difference in pay is made on the basis of:

1. a seniority system;
2. a merit system;
3. a system that measures earnings by quantity or quality of production; or
4. any other factor other than sex or employment status.

If, however, a collective agreement is in effect on April 1, 2018 and that collective agreement contemplates differences in pay based on employment status, the collective agreement prevails until that collective

agreement expires or January 1, 2020, whichever is earlier.

Employers must be mindful of these new equal pay obligations and ensure compliance in order to avoid the prospect of being ordered to pay back wages and/or face fines imposed by the Ministry of Labour for non-compliance.

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# Recovery of Variable Compensation during the Notice Period

The issue of what a court will do when faced with a claim for variable compensation in the form of a Carried Interest Plan, much like a profit sharing plan, in which profit was recognized some 3-7 years following the initial investment, came before the Honourable Mr. Justice Monahan recently. In a decision released in February, Monahan J. held, much like bonus payments, this form of variable compensation, or the lost opportunity to earn this form of variable compensation, was payable for the duration of the notice period, in this case 18 months.

The employee had been employed as a Managing Director, Mezzanine Fund. The position entailed sourcing investment opportunities for the bank's capital in mezzanine debt, performing due diligence, strategic analysis and closing of transactions. A portion of the compensation for the role was tied to performance of those investments under a compensation plan called the Carried Interest Plan ("CIP"). After 13 years, the employer decided to move the mezzanine financing to a different branch of the organization and restructured. At issue, amongst other things, was the appropriate notice period, and whether there should be any compensation for the CIP for the notice period.

It was found that the CIP formed an 'integral' part of the employee's compensation, and it was the largest component of his compensation at over 50% of his income. While payments were not made annually, the entitlement accrued annually throughout the employee's 13 years of service.

In reviewing the terms of the CIP, Monahan J. found there to be no language to oust the common law presumption; namely there was nothing expressly excluding entitlement during the notice period, as set out in *Lin v. Ontario Teacher's Pension Plan Board.*

The fact that the employer terminated the CIP several months following the termination of the employee did not alter the analysis, as the CIP was in place as of the time of the employee's termination. The Court found that it would have likely amounted to a constructive dismissal to terminate the CIP while the employee was employed, and under that scenario damages for lost participation in the CIP would have also been awarded.

The Court awarded damages accordingly for this portion of the claim at just under $1 million.

Trial counsel was Nancy Shapiro for the employee. This decision is now under appeal. No hearing date is set.

*Manastersky v. Royal Bank of Canada* et al, 2018 ONSC 966 CanLII.

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# BILL 148 UPDATE: ONTARIO GOVERNMENT REVERTS BACK TO OLD PUBLIC HOLIDAY PAY FORMULA – FOR NOW!

On January 1, 2018, a number of amendments to the *Employment Standards Act*, 2000 ("ESA") came into effect under Bill 148. These amendments required substantial updates to employer practices, policies, and handbooks.

One of the amendments was to the public holiday pay formula in Part X of the ESA. However, the new rules and formula have been the source of most of the complaints under the ESA and need to be simplified. Accordingly, a review will take place in 2018.

However, until the rules and formula for public holiday pay can be fully reviewed, **Ontario Regulation 375/18** was filed on May 7, 2018, which reverts, on an interim basis, to the pre-Bill 148 public holiday formula for all employees, effective July 1, 2018 until December 31, 2019.

***What this Means for Employers and Employees***

- Employers are to continue to use the current formula under the ESA for calculating public holiday pay, including for the upcoming Victoria Day Holiday on May 21, 2018.
- **Effective July 1, 2018**, employers should revert back to the pre-Bill 148 formula, as follows:

  > **The employee's public holiday pay for a given public holiday shall be equal to the total amount of regular wages earned and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20.**

- Employers should ensure that all necessary changes to their payroll system are made in advance of the July 1, 2018 holiday.
- Employers should review and have their policies updated, if necessary.
- Employers should check for updates to the public holiday rules and formula in the coming months.

To make submissions on this issue, please email **exemptions.review@ontario.ca**

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# New Posting Requirements for Employers under the Smoke-Free Ontario Act, 2017, Effective July 1, 2018

The *Smoke-Free Ontario Act*, 2017**[1]** ("SFO") comes into force on July 1, 2018, repealing and replacing the *Electronic Cigarettes Act, 2015**[2]*** and the *Smoke-Free Ontario Act**[3]*** (collectively, the "Repealed Acts"). Most notably for employers, the SFO contains new posting requirements for signs and prohibitions regarding the use of medical cannabis.

The SFO expands on the prohibitions of use previously contained in the Repealed Acts. Section 12(1) of the SFO specifically provides that no person shall do any of the following in "prohibited places" (subject to limited prescribed exemptions):

1. Smoke or hold lighted tobacco.
2. Smoke or hold lighted medical cannabis (emphasis added).
3. Use an electronic cigarette.
4. Consume a prescribed product or substance, in a prescribed manner.

The definition of "prohibited places" has remained essentially unchanged, which continues to include an enclosed work place.

With respect to an enclosed workplace over which an employer exercises control, the requirements on employers remain as follows:

1. ensure employees comply with s. 12(1) above;
2. give notice to each employee in the enclosed workplace or other prohibited place;
3. post any prescribed signs with respect to the prohibitions under section 12(1) throughout the enclosed workplace, place or area, including washrooms;
4. ensure that no ashtrays or similar equipment remain in the enclosed workplace or place or area, other than a vehicle in which the manufacturer has installed an ashtray;
5. ensure that a person who refuses to comply with section 12(1) does not remain in the enclosed workplace or place or area; and
6. ensure compliance with any other prescribed obligations, which includes not taking disciplinary or penalizing action against an employee because they have acted in accordance with the SFO**[4]**

However, O. Reg. 268/18 now sets out detailed requirements for posting signs with respect to the prohibitions under s. 12(1). Employers must post **both** of the signs described in paragraphs 1 and 2 **or** the sign described in paragraph 3 "at each entrance and exit of the enclosed workplace, place or area in appropriate locations and in sufficient numbers to ensure that employees and the public are aware that

smoking and the use of electronic cigarettes is prohibited in the enclosed workplace, place or area"**[5]**

**Paragraph 1**: A sign that is,

i. at least 10 centimetres in height and at least 10 centimetres in width, and

ii. a copy of the sign entitled "Tobacco Sign for Employers", dated January 1, 2018 and accessible through a website of the Government of Ontario.

**Paragraph 2**: A sign that is,

i. at least 10 centimetres in height and at least 10 centimetres in width, and

ii. a copy of the sign entitled "Electronic Cigarette Sign for Employers", dated January 1, 2018 and accessible through a website of the Government of Ontario.

**Paragraph 3:** A sign that is,

i. at least 15 centimetres in height and at least 20 centimetres in width, and

ii. a copy of the sign entitled "Tobacco and Electronic Cigarette Sign for Employers", dated January 1, 2018 and accessible through a website of the Government of Ontario**[6]**

The prescribed signs are not yet available on the Government of Ontario website**[7]**

It is important for employers to be aware that failure to comply with the SFO, including the posting requirements, constitutes an offence and can result in fines being levied against the employer**[8]** We encourage employers to become familiar with the requirements under the SFO prior to its coming into force on July 1, 2018. Please contact your Koskie Minsky employment lawyer, should you have any questions.

**[1]** *Smoke-Free Ontario Act*, 2017, S.O. 2017, c. 26, Sched. 3 ("SFO").

**[2]** *Electronic Cigarettes Act, 2015*, S.O. 2015, c. 7, Sched. 3.

**[3]** *Smoke-Free Ontario Act*, S.O. 1994, c. 10.

**[4]** SFO, s. 14(1).

**[5]** SFO, O. Reg. 268/18 s. 15.

**[6]** SFO, O. Reg. 268/18 s. 15 (Note: there are specific requirements for retail, hotels, motels and inns).

**[7]** **https://www.ontario.ca/page/government-ontario**.

[8] SFO, s. 21(3).



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