

SIGNIFICANT CHANGES TO BRITISH COLUMBIA *EMPLOYMENT STANDARDS ACT* ARE NOW IN FORCE

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Significant amendments to the BC *Employment Standards Act* (the “*ESA*”) are now in force as a result of the *Employment Standards Amendment Act, 2019* receiving Royal Assent on May 30, 2019.

The *ESA* has not been significantly updated for 15 years. The amendments to the *ESA* incorporate recommendations made by the Employment Standards Act Reform Project Committee.

The purpose of this bulletin is to provide a summary of the more significant amendments to the *ESA*. More detailed information can be obtained from any member of McMillan LLP’s Vancouver Employment and Labour Relations Group.

Director and Officer Liability

Previously, directors or officers were exempt from personal liability for unpaid wages where a corporation was in receivership or subject to insolvency proceedings. This exemption for unpaid wages has now been eliminated. However, directors and officers continue to be exempt from personal liability for unpaid termination pay under the *ESA* if the corporation is in receivership or is subject to insolvency proceedings.

Sale of a Business

Where a business or part of a business is sold, the employment of an employee of the business is deemed, for the purposes of the *ESA*, to be continuous and uninterrupted. This deeming provision has now been expanded to include the circumstances where the business continues to operate under a receiver or a receiver-manager.

New Statutory Leave Provisions

In addition to the existing *ESA* unpaid statutory leaves, specifically pregnancy, parental, family responsibility, compassionate care, reservists, bereavement, and disappearance or death of a child leaves, two new unpaid leaves have been introduced.

Critical Illness or Injury Leave:

Employees are now eligible for up to 36 weeks of unpaid leave to provide care or support for a family member under 19 years of age and up to 16 weeks for family members 19 years old or older. Such leave may be extended if the life of the family member remains at risk.

Domestic or Sexual Violence Leave:

Domestic or sexual violence leave provides victims of domestic or sexual violence with up to 10 non-consecutive days of unpaid leave, as well as an option that could provide an additional 15 weeks of consecutive unpaid leave.

Informing Employees of Their Rights Under the ESA

Employers are now required to make available or provide to each employee information about the rights of the employee under the *ESA* in a form prescribed by the Director of Employment Standards.

Credit Obligations

The *ESA* previously provided that an employer could honour an employee's written assignment of wages to meet a credit obligation. The meaning of credit obligation has now been clarified as follows: (a) an advance of wages to the employee from the employer, including vacation pay; (b) an outstanding balance in respect of the purchase of goods or services from the employer by the employee; and (c) an outstanding balance in respect of the personal use of real and personal property of the employer by the employee.

Gratuities

A definition of "gratuity" has been added to the *ESA*. Employers are now explicitly prohibited from withholding gratuities from an employee, making a deduction from an employee's gratuities, or requiring an employee to return or give the employee's gratuities to the employer, except for the purposes of redistributing gratuities (tip pooling). Generally, an employer, director, or shareholder cannot share in the tip pool. However, a sole proprietor or partner in a partnership who regularly performs, or a director or shareholder who performs to a substantial degree the same work performed by (a) some or all of the employees who share in the tip pool, or (b) employees of other employers in the same industry who commonly receive or share in tips, may share in the tip pool.

Employee Resignation

A new requirement now applies in respect of employees who have been employed for at least three months and who give notice of resignation of their employment. Where the employer decides to terminate the employee during the resignation notice period provided by the employee, the employer must pay to the employee the lesser of the amount the employer is liable to pay on termination or the amount of money the

employee would have earned during the resignation notice period.

Application of the *ESA* to Collective Agreements

Previously where a collective agreement contained any provision pertaining to hours of work and overtime, statutory holidays, annual vacation or vacation pay, seniority retention, recall, termination of employment or layoff, the *ESA* did not apply to the employees covered under the collective agreement in respect of those provisions and entitlements. Now, all such collective agreement provisions must at least meet or exceed *ESA* requirements. Going forward, employers must evaluate the terms of their collective agreements to ensure that they either meet or exceed the minimum requirements set out in the *ESA*.

In order to give employers time to prepare and consider any required collective agreement changes, the implementation of this amendment is subject to a transition period. This change does not apply to collective agreements in effect when the amendments came into effect, but will apply once these agreements expire and a new or renewed agreement comes into effect.

Additional notable changes

- extension of the period for an employee to recover owed wages from 6 to 12 months;
- ability for the Director of Employment Standards to conduct an investigation to ensure compliance with the *ESA* at any time and for any reason (comes in force by regulation);
- deemed employer status with regard to each employee who performs work on the employers behalf if a company retains the services of an unlicensed employment agency (comes in force by regulation);
- elimination of the requirement for an employee to use the self-help kit as a first step in collecting owed wages;
- increased age at which a child may work from 12 to 16, subject to certain exemptions for “light work” that may be performed by 14 and 15 year olds (comes in force by regulation); and
- requirement to retain payroll records for 4 years after the date on which they were created.

Employers should familiarize themselves with the changes that are now in effect and take this opportunity to revisit their employment agreements, policies and procedures, which may now require updating.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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The logo for mcmillan, featuring the word "mcmillan" in a lowercase, sans-serif font. The "m" and "c" are in a dark red color, while the "m", "i", "l", "l", "a", and "n" are in a light blue color. The logo is positioned in the upper left corner of the page.

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