

GETTING READY FOR ONTARIO'S FAMILY DAY

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On February 18, 2008, many Ontarians will enjoy the new public holiday introduced by the provincial government following last fall's election. Family Day is Ontario's ninth paid public holiday, to occur annually on the third Monday in February. This bulletin answers some of the questions employers may be grappling with as this new public holiday approaches.

Q: Who is eligible for Family Day?

A: Family Day will be treated no differently than the other public holidays recognized under the Ontario *Employment Standards Act, 2000* (the ESA). Eligibility for Family Day, like any other public holiday in Ontario, is not affected by whether an employee works full-time, part-time, is a permanent employee or employed on a fixed-term contract, nor is eligibility contingent on an employee's length of service with his or her employer. Both unionized and non-unionized employees are eligible for Family Day, subject to the terms of the applicable collective agreement. Accordingly, Ontario employees will generally be entitled to a February long weekend unless they fall within one of the following categories:

1. *Federal Undertakings:* Employees of federally-regulated workplaces such as banks, airlines, telecommunication companies, extra-provincial shipping companies and federal public servants are subject to the *Canada Labour Code*, not the ESA. Accordingly, these employees are not eligible for Family Day.
2. *Exempt Occupations and Industries:* Certain employees of provincially-regulated employers are exempt from the public holiday provisions of the ESA. Such employees include seasonal workers at hotels and tourist resorts and certain professionals such as accountants, doctors, engineers, lawyers, chiropractors and massage therapists. Employers are not obliged to provide these employees with a paid day off on Family Day.
3. *Exempt Operations:* Employees working in a hospital, a hotel or tourist resort, or a "continuous operation" (being a business that does not shut down or close more than once per week, for example, an alarm monitoring company) may be required to work on Family Day if it falls on a day that they would ordinarily work, and they are not on vacation. However, since these employees are not otherwise exempt from the public holiday provisions of the ESA, these employees are entitled to either (a) their regular wages on Family Day, together with a substitute day off with public holiday pay; or (b) public holiday pay on Family Day plus premium pay (at least time and a half) for each hour worked on Family Day.
4. *Last and First Rule:* Finally, an employee who is otherwise eligible for a paid day off on Family Day who fails, without reasonable cause, to work all of his or her last regularly scheduled day before or after Family Day, is not eligible for the paid holiday.

Q: We currently offer our employees greater holiday entitlements than prescribed by the ESA (e.g., Easter Monday, Civic Holiday, or “floating” holidays to be used at the employee’s discretion) – does this affect an employee’s entitlement to Family Day?

A: Maybe. The ESA prescribes the minimum standards that employers must adhere to with respect to their employees. However, where the current terms of employment (including a collective bargaining agreement in the unionized workplace) provide an employee with a greater benefit than the corresponding minimum standard, the greater benefit of the employment terms will apply, and the minimum standard does not.

Accordingly, where the terms of employment provide an employee with 10 or more paid holidays, the employer is not obliged to provide its employees with a paid holiday on Family Day. Since the employer is providing its employees with a greater benefit than the holiday provisions in the ESA (which provides employees with only 9 paid holidays), the employment terms with respect to holidays would apply instead of the holidays prescribed by the ESA.

It is important to note that for a term of employment to override the ESA holiday standards by providing a “greater benefit”, all aspects of the employer’s holiday provisions must be at least as favourable as those prescribed by the ESA. For example, if an employer provides its employees with 2 additional or “floating” holidays in addition to the public holidays prescribed by the ESA, but attaches qualifying conditions to these extra paid days off (e.g., a requirement that an employee be employed for at least 90 days before being eligible for the floating holidays), the additional holidays would not amount to a greater benefit since there are no such eligibility requirements attached to public holidays under the ESA. Similarly, employees must receive public holiday pay on a floating holiday to satisfy the greater benefit analysis. Public holiday pay is calculated by adding all payments made to the employee (i.e., base wages or salary, vacation pay, benefit contributions, bonus or incentive payments, but excluding any overtime pay) in the four weeks preceding the public holiday and dividing this sum by 20.

Q: We would prefer to give our employees a day off in the summertime, rather than Family Day in February – can we substitute Family Day for another date?

A: As with any other public holiday, Family Day can be substituted for another date provided that the employees agree, in writing, to work on Family Day. If such an agreement is reached, the employees will receive their regular wages for hours worked on Family Day and will be provided with a substitute holiday (for which they will receive public holiday pay) that must be scheduled no more than three months after Family Day, or, if the employee will agree in writing to the extended timing, up to 12 months after Family Day.

For more information with respect to compliance with your public holiday obligations, please contact:

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