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PaySource®

August 2008
Number 158

FEDERAL WAGE EARNER PROTECTION PROGRAM IN FORCE

Certain sections of Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, were proclaimed in force on July 7, 2008. Relevant sections now in force are summarized below.

Section 1 enacts the *Wage Earner Protection Program Act*, which establishes the Wage Earner Protection Program ("WEPP"). Where an employer is bankrupt or goes into receivership, employees who have been terminated and had been working for the employer for more than three months can pursue unpaid wages (including salaries, commissions, compensation for services rendered and vacation pay, but not severance or termination pay) through the WEPP. Wages recoverable are those earned in the last six months before the bankruptcy, less any applicable provincial or federal deductions, to a maximum of the greater of $3,000 and four times the maximum weekly insurable earnings under the *Employment Insurance Act*. Payments authorized under the WEPP may be made from the Consolidated Revenue Fund. If such a payment is made to an individual in respect of unpaid wages, the Crown is, to the extent of the amount of the payment, subrogated to any rights the individual may have in respect of those unpaid wages against the bankrupt or insolvent employer. Employees who were employed in managerial positions, as officers or directors of the employer, or had a controlling interest in the employer's business, are not eligible for the WEPP.

Section 57 amends the *Bankruptcy and Insolvency Act* to protect property in registered retirement savings plans, registered retirement income funds, and other similar financial products from seizure in bankruptcy if those products do not already benefit from such a protection. This protection is subject to a clawback of any property contributed within 12 months of the date of bankruptcy.

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Sections 67 and 88 amend the *Bankruptcy and Insolvency Act* with respect to priorities in bankruptcy. Section 67 creates a wage and pension priority in the event that an employer becomes bankrupt or subject to a receivership. Any employee who does not qualify for payment under the WEPP will be able to pursue his or her wage claim through the regular bankruptcy process and has a claim against the property of a bankrupt for services rendered during the six months before the bankruptcy for a maximum of $2,000. Travelling salespeople will also have a claim for valid disbursements not exceeding $1,000. Section 88 amends the scheme of distribution to provide a preferred claim for creditors whose security is negatively affected by the new wage priority.

The Wage Earner Protection Program Regulations, which also came into force on July 7, 2008, establish procedural details in various subject areas under the Act, including the definitions of "wages" and "termination of employment" for the purposes of the WEPP, and the fees payable to insolvency professionals for the performance of their duties under the *Wage Earner Protection Program Act*.

Bill C-55 received first reading in the House of Commons on June 3, 2005, second reading on October 5, and third reading on November 21. It received first and second readings in the Senate on November 22, 2005, and third reading and Royal Assent on November 25, 2005. Readers will be informed when the remaining sections of the Bill are proclaimed in force.

PAYSOURCE

Published monthly as the newsletter complement to PAYSOURCE, by CCH Canadian Limited. For subscription information, see your CCH Account Manager or call 1-800-268-4522 or (416) 224-2248 (Toronto).

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Need To Know

Report by Expert Panel on Older Workers

In late July 2008, the Expert Panel on Older Workers released the Report entitled *Supporting and Engaging Older Workers in the New Economy*. The Panel was established by the Minister of Human Resources and Social Development Canada on January 23, 2007, in response to two divergent pressures that threatened the high standard of living enjoyed by Canadians: the aging population and providing for older workers who are displaced as the economy adapts. The Panel conducted consultations and released a Discussion Paper as part of its examination of the current situation and future prospects of older workers.

In its Report, the Panel made 13 recommendations, including: (1) the elimination of mandatory retirement in the federal jurisdiction; (2) changes to federal and provincial tax and pension systems that would eliminate the work cessation clause in the Canada Pension Plan, allow eligible individuals to work and receive benefits while still contributing to a pension plan, minimize work disincentive effects associated with the Guaranteed Income Supplement clawback provisions, and continue to promote phased retirement; and (3) reforms to the *Employment Insurance Act*: long-tenured workers who have not been EI recipients on a regular basis be eligible to receive benefits for longer; the extended duration of benefits and mobility assistance for these long-tenured employees not depend on the unemployment rate in the region, as is the case for special benefits such as maternity, parental, compassionate and sickness benefits, and a strong recommendation that the federal government engage in a fundamental review of the *Employment Insurance Act*.

For further information, see: www.hrsdc.gc.ca/en/corporate/whats_new/index.shtml.

Nunavut Minimum Wage Increase Reminder

On September 4, 2008, the Nunavut minimum wage will increase to $10.00 per hour, up from the previous rate of $8.50 per hour.

The new minimum wage rate is located in the "Employment Standards" section of PAYSOURCE at ¶5505 and ¶5544.

Reservist Leave Summary Chart

The following chart provides an update on Canadian jurisdictions that have added a job-protected reservist leave to their employment standards schemes.

Jurisdiction	Reservist Leave	Minimum Notice	Service Eligibility	Certificate	Benefit Continuation	Protection of Seniority
Federal	Yes.	4 weeks' written notice (or as soon as possible).	6 consecutive months.	If requested, within 3 weeks after the leave starts (unless valid reason).	No.	Yes.
Alberta	No. (*In January 2008, the Alberta Minister of Employment indicated Alberta will look at creating this protection.)	N/A.	N/A.	N/A.	N/A.	N/A.
British Columbia	Yes.	4 weeks' written notice of the date the leave will begin and end (or as much notice as practicable).	N/A.	Employers may require the employee to provide further information respecting the leave.	No.	Not specified.
Manitoba	Yes.	As much notice as reasonable and practicable in the circumstances.	7 consecutive months.	Employer may request a certificate.	Not specified.	Not specified.
New Brunswick	Yes.	Notice that is reasonable under the circumstances.	6 months. (For a second or subsequent leave, 12 months must elapse.)	Employer may require.	Not specified.	Yes.
Newfoundland and Labrador	Yes.	At least 60 days' notice in writing (reasonable notice where compliance is not possible).	6 consecutive months. (For a second or subsequent leave, 12 months must elapse.)	Employer may require.	No (unless otherwise agreed).	Not specified.
Northwest Territories	No.	N/A.	N/A.	N/A.	N/A.	N/A.

Jurisdiction	Reservist Leave	Minimum Notice	Service Eligibility	Certificate	Benefit Continuation	Protection of Seniority
Nova Scotia	Yes.	90 days' notice or what is reasonably practical where there is an emergency.	1 year.	Employer may require.	Yes/No. *The reservist has the option to pay/continue benefit plans.	Yes.
Nunavut	No.	N/A.	N/A.	N/A.	N/A.	N/A.
Ontario	Yes.	Reasonable notice in writing.	6 consecutive months.	Employer may require.	No.	Yes.
Prince Edward Island	Yes.	As much as reasonable and practical.	6 consecutive months.	Employer may require	No.	Yes.
Quebec	No. (*Bill 98, *An Act to amend the Act respecting labour standards* mainly regarding reservists was introduced in June 2008.)	N/A.	N/A.	N/A.	N/A.	N/A.
Saskatchewan	Yes.	At least 6 weeks and reasonable notice for emergencies.	N/A.	The employer can ask the employee for a certificate.	Not specified.	Yes.
Yukon	No.	N/A.	N/A.	N/A.	N/A.	N/A.

Recent Cases and Rulings

Dismissal for surfing pornographic Web sites at work justified

• • • **New Brunswick** • • • Backman worked for Maritime Paper for 14 years as a Structural Design Supervisor. Audits of his computer activity revealed that he was surfing inappropriate and pornographic Web sites for substantial periods of time. Backman had received prior warnings about not accessing such Web sites, and had been warned that further incidents would result in termination. When Backman was terminated, he brought a wrongful dismissal claim. While he acknowledged that he viewed pornography at work, he saw it as a harmless diversion when work permitted. The employer viewed it as offensive and an obscene misuse of its computer resources.

The action was dismissed. Employers are entitled to establish appropriate rules about the conduct or self-expression of their employees at work. Looking at pornography for sexual gratification was sexual conduct or a sexually oriented practice, and if such conduct or practice occurred at work and undermined the sense of personal dignity of another person at work, then it would be a form of illegal sexual harassment. In this case, Backman's viewing of pornography was offensive to the manager of Information Services, who was required as part of her job to observe the pornographic images that Backman had been looking at on his computer. Backman had argued that the employer was estopped from dismissing him for viewing pornography, since his salary was raised after a prior incident when he was caught viewing pornography, but any condonation by the employer of such misconduct would not defeat the statutory obligation of the employer to prevent sexual harassment at the workplace. Also, the written warnings were still relevant, even though they were given several years prior to Backman's dismissal, since the actions involved were so serious. Therefore, the repeated viewing of pornography at work was a serious matter which destroyed the employer's trust in Backman as a supervisor, and the employer was justified in terminating him.

Backman v. Maritime Paper Products Limited, (N.B.Q.B.), 2008 CLLC ¶210-029.

Employee who retracted resignation was wrongfully dismissed

• • • **Alberta** • • • Robinson had worked as Cooperheat's branch manager since 1997. In August 2004, Cooperheat was acquired by Team Industrial Services. In

January 2005, the safety manager for Cooperheat complained to her supervisor that Robinson had yelled at her and spoken to her rudely. At a meeting to discuss the issue held on February 1, 2005, management believed that Robinson had resigned. The next day, Robinson met with his supervisor and asked to retract his resignation, but the request was declined. Robinson was informed by memo that his resignation had been accepted. His last day of work was to be February 25, 2005, but he was asked to leave on February 11 and paid out up to February 25. Robinson brought a claim for wrongful dismissal.

The claim was allowed. The test of whether an employee has resigned is whether a reasonable person would have understood by the employee's statement that he has just resigned. The resignation must be clear and unequivocal, and must objectively reflect an intention to resign or involve conduct demonstrating such an intention. In this case, the statements made by Robinson during the meeting did not state that he resigned – at most, they indicated the potential that he may resign in the future. The circumstances of the meeting also made it appear to be an emotional outburst by Robinson, rather than a clear and unequivocal resignation. In addition, even if an employee does resign, he or she may retract the resignation unless the employer has acted to its detriment in relying on it, and Robinson retracted his resignation before the employer had even sent out the memo accepting his resignation. Robinson was entitled to 18 months' reasonable notice, with no special or bad faith damages awarded. Due to Robinson's failure to mitigate his damages, his award was reduced by six months.

Robinson v. Team Cooperheat-MQS Canada Inc., (Alta. Q.B.), 2008 CLLC ¶210-031.

Travel expenses paid by employer an employment benefit

The taxpayer was employed as a helicopter pilot. His contract of employment required him to routinely fly for periods of 28 days in Alberta, followed by holidays of 14 days. The taxpayer maintained a residence in Quebec and returned to Quebec by air every 28 days to spend his 14-day holidays there. The taxpayer's employer paid for the taxpayer's travel expenses between Alberta and Quebec. In assessing the taxpayer for 2006, the Minister included in his income, as a benefit for tax purposes, the amounts paid by his employer. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was dismissed. The taxpayer chose to reside at all material times in Quebec. Therefore, his costs of travelling between Quebec and Alberta were personal in nature, and the payment by his employer of those costs constituted a benefit to be included in his income.

Léonard, (Tax Court of Canada), 2008 DTC 4193.

Pastoral agents entitled to deduct clergy residence expenses from employment income

The taxpayers were pastoral agents ("agents de pastorale") of the Roman Catholic Church (the "Church"). In assessing the taxpayers for various years from 2003 to 2005, the Minister denied them the clergy residence deductions claimed. The Minister's position was that none of the taxpayers was a "member of the clergy, or of a religious order or a regular minister of a religious denomination" as required by subparagraph 8(1)(*c*)(i) of the Act. On their appeal to the Tax Court of Canada, the taxpayers argued, in part, that they were not ordained but were regular ministers of a religious denomination, i.e., the Church, and were thus entitled under subparagraph 8(1)(*c*) to the deductions claimed.

The appeals of seven of the taxpayers were allowed, and the appeals of the remaining two taxpayers were dismissed. For persons to qualify as a "regular minister of a religious denomination", the jurisprudence requires that they be appointed by a legitimate authority of the denomination to exercise a spiritual function in accordance with its beliefs by ministering to its members. Under the Church's organizational structure in this case, pastoral agents are regular ministers of the Church acting under a pastoral mandate conferred upon them by an ordained bishop of the Church. Their duties are integrated with the regular pastoral duties of ordained members of the Church, and without these pastoral agents, who are, in essence, lay clerics, the work of the Church could not go on. Applying the foregoing findings, the seven taxpayers who were pastoral agents fell within the purview of paragraph 8(1)(*c*) and were entitled to the deductions claimed. The two taxpayers who were not pastoral agents did not have the status of regular ministers of the Church. They, therefore, fell outside paragraph 8(1)(*c*) and were not entitled to the deductions claimed. The Minister was ordered to reassess the seven taxpayers who were pastoral agents accordingly. The assessments of the other two taxpayers were affirmed.

Lefebvre et al., (Tax Court of Canada), 2008 DTC 4272.

Director Liability for Unremitted Source Deductions

The taxpayer became a director of a corporation incorporated, in September 1996, by his brother (the "Corporation"). He was never an active director involved in the day-to-day affairs of the Corporation. In a letter dated October 30, 1996 addressed to the Corporation, he purported to resign as a director, but he did not tell the Minister about his resignation until May 2006. The Minister assessed the taxpayer vicariously for the Corporation's unremitted source deductions. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was dismissed. Under subsection 119(2) of the Ontario *Business Corporations Act*, until the first meeting of shareholders, the resignation of a corporate director named in the articles is not effective until a successor has been named. In this case, there was no evidence of any first shareholder's meeting or of any successor having been appointed to replace the taxpayer as a director. His purported letter of resignation, therefore, was legally ineffective and he was liable as assessed, since he failed to meet the onus of establishing that the Minister's assessment was incorrect.

Shepherd, (Tax Court of Canada), 2008 DTC 4284.

Automobile Allowance – After-Hour Service Calls

The situation the CRA was asked to comment on involved employees who received an allowance for the use of their automobile when they are on-call at home after completing their regular shift and must return to a particular work site. This allowance was paid by the employer under the collective bargaining agreement and computed by reference to the cost of a taxi that would have to be taken by the employee to return to work. The CRA was asked if the employee would have to include the allowance in his income and, if the answer was yes, if he would be able to claim a deduction from that allowance. The CRA confirmed that, in this particular case, the travel expenses incurred by an employee to answer a call after the end of his regular shift were personal. The related travel was between the employee's personal residence and his place of employment, and enabled him to perform his employment duties once he had reached the particular work site. The travel in question was not between two different work sites nor accomplished in the course of performing employment duties. Unless the expenses are incurred to travel between work sites or in the course of performing employment duties, the related allowance cannot qualify for the exemption listed in subparagraph 6(1)(*b*)(vii.1) of the Act. The allowance would be included in the employee's income under paragraph 6(1)(*b*) of the Act and could not be reduced by a deduction. Employers providing free transportation to their employees to take them to a work site because they could not use their car or the public transportation would not have to include a taxable benefit in their income for that service. However, there is no indication in this case that such restrictions are applicable to the employees returning to the work site. For additional information on this topic, see also paragraphs 14 and 49 of IT-522R.

Technical Interpretation, Business and Partnerships Division, June 13, 2008, No. 2008-00270721E5.

Automobile Operating Cost Benefit – Payments to Third Party

In *Window on Canadian Tax* ¶3741, we reported that operating expenses with respect to an automobile provided in connection with an individual's employment that are paid by the employee to a third party could not be deducted in determining the benefit included in the individual's income under paragraph 6(1)(*k*). Prior to the introduction of paragraph 6(1)(*k*), the operating expense benefit with respect to an automobile was included in income under subparagraph 6(1)(*a*)(iii), which the CRA interpreted as providing for a reduction for payments to third parties.

It is now the CRA's view that "it is administratively acceptable to consider payments to third parties as amounts eligible to reduce the operating expense benefit" under paragraph 6(1)(*k*).

Technical Interpretation, Business and Partnerships Division, May 26, 2008, No. 2008-027407117.

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