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PAYROLL AND THE H1N1 INFLUENZA PANDEMIC

By: Theo Anne Opie, LL.B. © CCH Canadian Limited.

H1N1 influenza ("H1N1") has been raising international concern since April 2009. On June 11, 2009, the World Health Organization ("WHO") raised the pandemic alert from Phase 5 to 6 as the pandemic has spread to at least two countries in one WHO region and at least one other country in another WHO region. The world is now officially in the 2009 influenza pandemic.

As of July 7, 2009, 120 countries have reported laboratory confirmed cases to WHO. While the WHO has reported that some countries are coming to a steady state, i.e., Mexico, with sporadic cases and small outbreaks that could indicate that it is coming out of wave 1, the WHO is also cautioning that the pandemic is spreading very rapidly and that a second wave is to be expected. In North America, that second wave is likely to coincide with the fall return to schools and universities and employees returning to work following traditional summer vacations.

As well, the WHO has issued cautionary statements with respect to how H1N1 will most likely pick up again during the northern hemisphere's winter months and regular influenza season. This may be highly significant given that the H1N1 vaccine is not expected to be readily available until late 2009 or early 2010.

Managing Absenteeism – Employee Leaves of Absence and Payroll's Role

The H1N1 pandemic could require organizations to deal with day-to-day operations in a different manner with some of the major issues being work flow, staffing and absenteeism. Organizations are

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being advised to have a pandemic/emergency plan in place that would, amongst other things, determine who replaces key employees should they get sick, make provision for continuity of the supply chain, ensure that sick employees stay home from work; provide employees with the needed technology and opportunity to work from home; arrange for necessary daycare and set out how vacations and short-term disability benefits can be used to help both employees and the organization.

While the overall responsibility for these issues would fall to senior management and/or a crisis management team formed for such a purpose, payroll would have responsibility for advising management of employee leave rights under employment standards or government declared public health or emergency leave and for proper payroll practices related to such leaves.

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Employment Standards Leaves of Absence

To begin with it is important for payroll to know what types of leave are available in which provinces and which provinces do not provide specific types of leave. Alberta does not provide for any of the following: sick leave, family responsibility leave, compassionate care leave or bereavement leave. British Columbia and Nunavut do not provide sick leave. The Northwest Territories, Nunavut, the Yukon and the federal jurisdiction do not provide family responsibility leave.

Secondly, payroll needs to know to whom the leave applies. For example, in Ontario an employer who employees 50 or more employees must grant employees 10 days unpaid "personal emergency" leave. That leave applies to an employee's personal illness and with respect to the illness, injury, medical emergency or death of a family member.

Finally, it is extremely important for payroll to know whether the leave is paid or unpaid. While almost all leaves of absence are unpaid, some jurisdictions provide for a mix of paid and unpaid leave. For example, in Newfoundland and Labrador, employees are entitled to two days unpaid bereavement leave and where employed for a month or more, one additional paid day of leave.

The chart on the following page summarizes the various personal, family responsibility, compassionate care and bereavement leaves across the country. For specific details regarding qualifying requirements, the definition of family members, etc. for each jurisdiction and whether the leave is paid or unpaid, see the Employment Standards section of PAYSOURCE at ¶6700 *et seq*.

Sick/Family Responsibility/Compassionate Care and Bereavement Leave Chart

Jurisdiction	Sick Leave	Family Responsibility Leave	Compassionate Care Leave	Bereavement Leave
Federal	up to 12 weeks	not provided for	8 weeks	3 days
Alberta	not provided for	not provided for	not provided for	not provided for
British Columbia	not provided for	5 days	8 weeks	3 days
Manitoba	3 days	3 days	8 weeks	3 days
New Brunswick	5 days	3 days	8 weeks	5 days
Newfoundland and Labrador	7 days	7 days	8 weeks	up to 3 days
Northwest Territories	up to 7 days	not provided for	8 weeks	up to 7 days
Nova Scotia	3 days	3 days	8 weeks	up to 4 days
Nunavut	not provided for	not provided for	8 weeks	not provided for
Ontario	up to 10 days	up to 10 days	8 weeks	up to 10 days
Prince Edward Island	3 days	3 days	8 weeks	up to 3 days
Quebec	up to 26 weeks	10 days	12 weeks	up to 5 days
Saskatchewan	12 days	up to 12 weeks	up to 16 weeks	up to 5 days
Yukon	up to 12 days	not provided for	8 weeks	up to 1 week

Government Declared Public Health or Emergency Leave

In addition to leaves under employment standards legislation, Alberta and Ontario have passed public health/emergency leave legislation to address situations such as pandemics, and in response to previous Ontario situations such as SARS and the 2003 power blackout. Payroll departments and senior management should monitor news releases for any declared emergencies in Alberta and Ontario and should be aware that other provinces could also pass similar legislation.

In Alberta, the *Public Health Act*, provides that where, on the advice of the Chief Medical Officer, the Lieutenant Governor in Council is satisfied that a public health emergency exists or may exist, or there is a significant likelihood of pandemic influenza, the Lieutenant Governor in Council may make an order declaring a state of public health emergency relating to all or any part of Alberta. Where the order is in regard to pandemic influenza, the Chief Medical Officer may, during the state of public health emergency and subject to any terms and conditions the Chief Medical Officer may impose, authorize the absence from employment of any persons who are ill with pandemic influenza, or who are caring for a family member ill with pandemic influenza. In the case of a pandemic, an employer shall not terminate, restrict or in any way discriminate against an employee for such an authorized absence from employment.

In Ontario, an employee is entitled to an unpaid leave of absence from work if the employee will not be performing his or her employment duties as a result of an emergency declared under the *Emergency Management and Civil Protection Act*, where the employee is either the subject of an order under the Act, or under the *Health Protection and Promotion Act*, or is needed to provide assistance to a family member. Entitlement to the unpaid emergency leave during a declared emergency is in additions to the 10 days' unpaid personal emergency leave currently provided under the *Employment Standards Act, 2000*.

Hot News Items

British Columbia Provincial Sales Tax (PST) To Become Harmonized Sales Tax (HST)

British Columbia intends to harmonize its provincial sales tax with the federal Goods and Services Tax effective July 1, 2010, to boost new business investment, improve productivity, enhance economic growth and create jobs, Premier Gordon Campbell and Finance Minister Colin Hansen recently announced.

B.C. will have the lowest Harmonized Sales Tax (HST) in Canada, by combining the seven per cent B.C. Provincial Sales Tax (PST) with the five per cent federal Goods and Services Tax (GST), for a single sales tax rate of 12 per cent. All other provinces with an HST, and the one proposed by Ontario, have a rate of 13 per cent.

It's estimated the HST will remove over $2 billion in costs for B.C. businesses. That includes an estimated $1.9 billion of sales tax removed from business inputs, which enhances competitiveness, increases investment and productivity and, ultimately, increases prosperity. For example, some savings would include about $880 million for the construction industry, $140 million for manufacturing, $210 million for the transportation industry, $140 million for the forestry sector, and $80 million for mining and oil and gas. In addition, B.C. businesses will also save an estimated $150 million annually in compliance costs.

Similar to PST exemptions, the B.C. HST will provide consumers with point-of-sale rebates on a number of products including gasoline and diesel fuel for motor vehicles, books, children's-sized clothing and footwear, children's car seats and car booster seats, diapers and feminine hygiene products.

"The PST is an outdated, inefficient and costly tax, some of which is hidden in the price of goods and services and passed on to and paid by consumers," said Minister of Finance Colin Hansen. "Evidence from the Atlantic provinces showed that the hidden tax is removed very quickly, with the majority of the savings passed through to consumers in the first year".

The proposed HST will include:

- Unlike any other province, B.C. will provide an automatic point-of-sale rebate so consumers do not have to pay the provincial portion of the HST at the pump for purchases of gasoline and diesel fuel for motor vehicles, including any biofuel components.
- A partial rebate of the provincial portion of the single sales tax for new housing to ensure that new homes up to $400,000 will bear no more tax than under the current PST system, while homes above $400,000 will receive a flat rebate of about $20,000.
- A refundable B.C. HST Credit paid quarterly with the GST and carbon tax credit to offset the impact of the tax on those with low incomes.
- A temporary delay in the provision of input tax credits for certain purchases by businesses with taxable sales in excess of $10 million.

The federal government will provide British Columbia with $1.6 billion in transitional funding in recognition of the improvement this change will make to business competitiveness in Canada. The full cost of administration will be borne by the federal government, saving the Province an estimated $30 million annually in administration costs. With this decision, the Province can now move forward and work with industry to implement the new HST.

More than 130 countries, including 29 of the 30 OECD countries, along with four Canadian provinces, have adopted taxes similar to the HST, called value-added taxes, which reimburse most businesses for the tax they pay on their inputs. Ontario will also move to a single, value-added sales tax on July 1, 2010. With B.C., six of Canada's 10 provinces will have a similar sales tax by July 1, 2010. Implementation of a single sales tax in B.C. would immediately reduce costs and enhance the competitiveness of B.C. manufacturers and exporters both nationally and internationally and bring B.C. into line with what is viewed as the most efficient form of sales taxation in the world.

Once fully implemented, the single sales tax will make B.C. one of the most competitive jurisdictions in the industrialized world for new investments. The proposed changes are subject to approval by the parliaments of Canada and British Columbia.

For further information contact: Jamie Edwardson, Communications Manager, Ministry of Finance, 250 356-9872 and Dale Steeves, Communications Director, Office of the Premier, 250 361-7783

Need To Know

Canada Labour Standards Regulations Provide Seniority Benefits for Reservists on Leave

Previously, reservists who took a leave of absence from employment to participate in Reserve Force operations pursuant to the new reservist leave provisions of the *Canada Labour Code*, did not benefit from the same continuity of employment provisions applicable to other leaves under the Code. The continuity of employment provisions ensure that the accumulation of other leave and benefit entitlements under the Code, including maternity leave, bereavement leave, sick leave severance pay, and vacation, continue while an employee is on a leave of absence.

Recent amendments to the Canada Labour Standards Regulations (SOR/2009-194) ensure that the Code's continuity of employment provisions also apply to employees taking reservist leave.

In addition, the amendments require employers to keep a record of information pertaining to the reservists' leaves consistent with the record-keeping requirements of other types of leave under the Code.

The new federal Reservists leave seniority benefits are located in the "Employment Standards" section of PAYSOURCE at ¶6730. As well the new record keeping requirements for federal Reservists leave are located at ¶8305.

Saskatchewan Introduces New Minimum Age of Employment

Changes to The Minimum Wage Regulations will establish age 16 as the general minimum age of Employment in Saskatchewan. An "absolute" minimum age of 14 has also been established, provided those 14 and 15 year old workers fulfill certain requirements. This regulatory change will come into effect 14 days after being published in the Saskatchewan Gazette.

This change also removes the sector-based application of minimum age provisions so that all sectors of the economy must comply with the minimum age of employment. The amended regulation also establishes that 14 and 15 year olds can work if certain restrictions are met and provides for exceptions in special circumstances.

There are four restrictions to the employment of young people 14 and 15 years of age. Under these restrictions, young people age 14 and 15 who wish to work must:

- obtain the consent of their parent or guardian;
- complete a certificate focusing on occupational health and safety and employment standards;
- not work after 10 p.m. on a day preceding a school day or before the time that school starts on any school day; and
- work no more than a maximum of 16 hours of work during a school week.

Prior to this, only five sectors had a minimum age of employment: hotels, restaurants, educational institutions, hospitals and nursing homes. That restriction was reviewed in May 2009, following a consultation process which began in January.

Current legislation continues to restrict the employment of young people: in casinos and in the sale, handling or service of alcohol; during school hours; and in certain high-risk occupations. See the "Minimum Age" section of PAYSOURCE at ¶5160.

For more information, contact: Lisa Danyluk, AEEL, Regina, Phone: 306-787-7791, Email: lisa.danyluk@gov.sk.ca.

Subscribers will be notified when the new regulation becomes law.

Recent Cases and Rulings

Employer Failed To Provide Minimum Notice Required by Statute; Reasonable Notice Awarded

• • • **Ontario** • • • Dwyer was employed as a vice-president of Advanis. After two years with the company, he was promoted to a marketing position. Dwyer suffered a heart attack and was off work for a period of time. Advanis paid the cost of medication not covered by the employee drug plan and continued his full salary, even though it did not maintain any short-term disability benefits. Dwyer returned to work after four weeks, but felt excluded from management decisions. He was subsequently informed that he would be terminated as a result of a poor year by the company. He then suffered further heart problems. Dwyer brought a wrongful dismissal claim, asking for damages in lieu of reasonable notice of termina-

tion, as well as punitive damages for the manner of his dismissal.

The claim was allowed. The original contract of employment contained a termination provision, but it was no longer relevant once Dwyer accepted the new marketing position that was specifically tailored to his skills. The contract also limited notice to that provided by the *Employment Standards Act*, but Dwyer was not even provided with the four weeks' notice of termination and benefits as required by the Act. Therefore, the written employment contract did not operate to limit the common law requirement of reasonable notice. In determining reasonable notice in this situation, the Court took into account the specialized nature of the business, and the limited opportunities for similar employment; Dwyer's health situation was not considered. In light of these circumstances, Dwyer was awarded twelve months' reasonable notice. There was no award of punitive or compensatory damages. His heart condition had nothing to do with the decision to terminate Dwyer, but was a direct result of the financial difficulties experienced by the company.

Dwyer v. Advanis Inc., (Ont. S.C.J.), 2009 CLLC ¶210-029.

Unfavourable Employment Reference Given by Former Employer Did Not Breach Employee's Privacy Rights

• • • **Alberta** • • • An Alberta woman was working as a temporary employee for Burnswest. When she applied for a full-time position, Burnswest contacted her former employer, George Byma Real Estate, for a reference. Burnswest asked a number of questions about the employee's skill level, quality of work, punctuality, former position with Byma, and her relationship with co-workers. Byma informed Burnswest that the employee had done a good job at the start, but had made some mistakes and had wasted company time. Byma indicated that it would not hire the employee again. A few days later, the employee called Byma, and talked to the person who had given the reference. During the conversation there was a discussion about the fact that the former employee had been married "two or three times", and had been in a number of jobs over the past few years. The employee brought a complaint before the Information and Privacy Commissioner, alleging that Byma had disclosed her personal information to Burnswest.

The complaint was dismissed. The Commissioner found that the reference check discussion involved the employee's work history, habits and skills, but not anything about her personal life. The information discussed between Byma and Burnswest qualified as personal employee information reasonably required by a prospective employer to establish an employment relationship. Therefore, Byma was allowed to disclose it, and Burnswest was allowed to collect it under the *Personal Information Protection Act*.

Byma, Operating as George Byma Real Estate Team v. Burnswest Corporation, (Alberta Information and Privacy Commissioner) 2009 CLLC ¶210-026.

Wrongful Dismissal Action of Long-Serving Employee Summarily Dismissed

• • • **Alberta** • • • Poliquin was employed by Devon for 26 years, and was 50 years old when he was dismissed. At the time of his dismissal, Poliquin held a senior supervisory position. He was responsible for supervising a number of employees, including other supervisors. Following his dismissal, Poliquin brought a wrongful dismissal claim. Devon's position was that Poliquin was dismissed for cause for accepting free landscaping services at his personal residence from Devon suppliers without paying for the services and using company computers to view and transmit pornographic and racist materials. Devon brought a motion for summary dismissal. The summary judgment application was dismissed by the chambers judge. Devon appealed.

The appeal was allowed, and the wrongful dismissal action was summarily dismissed. Poliquin's actions were serious. As senior supervisor, he was responsible for issuing contracts for Devon, and signing all invoices related to his areas of responsibility, including those from the very suppliers that provided work at his house. In addition, the company code of conduct made clear that Devon employees were required to avoid behaviour that created a conflict between their work duties and personal interests. His solicitation and receipt of free landscaping services was a clear violation of this code of conduct, and a clear violation of an essential provision of his employment contract. In addition, the code of conduct expressly prohibited employees from using company computers to send pornographic, obscene or inappropriate messages by email. As a senior supervisor, it was his responsibility to attempt to stop others from sending him pornographic and racist emails. He did not stop the emails from being sent, and in a few circumstances, he forwarded them on to other employees. In addition, he had been warned in the past about accessing pornographic sites. Therefore, there was no genuine issue of material fact requiring trial and, therefore, the wrongful dismissal action could not succeed.

Poliquin v. Devon Canada Corporation, (Alta. C.A.), 2009 CLLC ¶210-030.

Deferred Profit Sharing Plan – Withdrawal or Transfer While Remaining an Employee

It is the view of the CRA that the terms of a deferred profit sharing plan (DPSP) may allow its participants to withdraw all or a portion of the funds vested under the DPSP even if the participants are still employed by their employer. This would be allowed under s. 147(2)(*k*)(i) of the Act. The participants are also allowed to transfer funds from their DPSP directly to another DPSP, registered pension plan (RPP) or registered retirement savings plan (RRSP) if they meet certain conditions (see s. 147(19) of the Act). The conditions to be met are as follows: the transfer must be direct; it must be made for the account of an individual; the transferred amount cannot be part of a series of periodic payments; and it would be included in the individual's income under s. 147(10) of the Act if it would be paid directly to the individual. A transfer can only be considered made for the account of an individual in two situations: (1) the individual was a current or former employee of an employer having participated to the DPSP for the account of that employee; or (2) the individual was, at the time of death of the employee or former employee, his/her spouse or common-law partner who was entitled to receive the amount as a consequence of his/her death. For additional information on this topic, refer to paragraphs 1 and 2 of IT-528 or Information Circular 77-1R5.

Technical Interpretation, Financial Sector and Exempt Entities Division, April 27, 2009, Document No. 2008-0304761E5.

Directors' Liability

The CRA was asked whether former directors of a corporation may be assessed for income tax under the Act after the corporation has been dissolved for over two years. Subsection 227.1(4) provides that directors cannot be assessed more than two years after they ceased to hold office. The jurisprudence provides that a director does not continue to be a director during the period of dissolution and revival of the corporation will not reinstate the directors unless this is specifically provided for in the Revival Order. However, s. 242(1)(*c*) of the *Ontario Business Corporations Act* (OBCA) provides that if the corporation had property that would have been available to satisfy a judgment or order had the corporation not been dissolved, that property remains available for the purposes of satisfying those debts. In this case, the corporation had debts that were certified prior to dissolution. As such, the CRA stated that the only way that the directors may be assessed for income tax under the Act is if an application is made to revive the corporation under the OBCA and the terms of the application provide that the corporation be reinstated retroactive to the date of its dissolution and that the directors be considered to have continued to hold office since the time prior to the dissolution.

Income Tax Rulings Directorate, May 12, 2009, Document No. 2009-032099117

Stock Option Benefits to Non-Resident

The CRA was asked whether a stock option benefit of a non-resident individual employed in Canada is subject to Canadian tax, and whether employer withholding was required.

The taxpayer was a U.S. resident who was employed in Canada as a director of a Canadian public corporation. The taxpayer received compensation in the form of retainer fees and stock options. The taxpayer provided his employment services to the corporation and not to any other other person and none of his services were performed outside Canada. The fees paid to the taxpayer exceed $10,000 annually.

The CRA stated that, where the taxpayer exercised an option to acquire shares of the company, the taxpayer would be required to include in his income, by virtue of s. 7 and s. 115(1)(*a*)(i) of the Act, an amount equal to the difference between the fair market value of the shares at the time acquired less the total amount paid by the taxpayer to acquire the option and the amount paid to acquire the share. Where the taxpayer's services are performed in Canada, the entire benefit will be sourced to Canada based on the allocation method set out in Annex B to the 5th Protocol to the Canada–U.S. Income Tax Convention.

Further, the taxpayer may be entitled to a 50 per cent deduction of the amount of the benefit under s. 110(1)(*d*) provided that,

- the taxpayer was dealing at arm's length with the corporation,
- the amount paid by the taxpayer upon exercise of the stock options was not less than the amount by which the FMV of the shares at the time of the option agreement was made exceeds the amount paid by the taxpayer to acquire the options, and
- the shares are "prescribed shares" pursuant to s. 6204 of the Income Tax Regulations.

Remuneration paid to a non-resident employee would be subject to the same withholding, remitting and reporting obligations as for Canadian resident employees pursuant to s. 153(1)(*a*) of the Act and s. 102 of the Income

Tax Regulations. The CRA's response raises the issue of the occasionally-overlooked issue of whether a corporate director is an employee under the Act. Under s. 248(1), "employee" includes an "officer", and an "officer" means a person holding an "office", and an "office"includes the position of a corporation director. Accordingly, since directors are employees, the remuneration paid to such persons is taxable as income from an office or employment under, *inter alia*, ss. 5, 6 and 7 of the Act.

Income Tax Rulings Directorate, International and Trusts Division, May 7, 2009, Document No. 2008-0276181E5

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