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CHAPTER 5

(Bill No. 2)

Employment Standards Amendment Act, 2009

Honourable Carolyn I. Bertram
Minister of Communities, Cultural Affairs and Labour

GOVERNMENT BILL

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CHAPTER 5

Employment Standards Amendment Act, 2009

(Assented to December 9, 2009)

BE IT ENACTED by the Lieutenant Governor and the Legislative Assembly of the Province of Prince Edward Island as follows:

1. This Act amends the *Employment Standards Act R.S.P.E.I. 1988, Cap. E-6.2.*

2. Section 1 of the Act is repealed and the following substituted:

- 1. In this Act** Definitions
- (a) “board” means the Employment Standards Board established under this Act; board
- (b) “contract of service” means a contract, whether or not in writing, in which an employer, either expressly or by implication, in return for the payment of pay to an employee, reserves the right of control and direction of the manner and method by which the employee carries out the duties to be performed under the contract; contract of service
- (c) “employee” means a person who performs any work for or supplies any services to an employer for pay, and includes employee
- (i) a person who is on leave from an employer,
- (ii) a person who is being trained by an employer to perform work for or supply services to the employer, or
- (iii) a person who was an employee;
- (d) “employer” means a person, firm or corporation, agent, manager, representative, contractor or sub-contractor having control or direction of or being responsible, directly or indirectly, for the employment of an employee and includes a person who was an employer; employer
- (e) “establishment” means a place or places at or in which all or any part of a business or undertaking of an employer is or has been carried on; establishment
- (f) “extended family” means the grandparent, grandchild, aunt, uncle, brother-in-law, sister-in-law, mother-in-law, father-in-law, son-in-law or daughter-in-law of an employee; extended family
- (g) “immediate family” means the spouse, child, parent, brother or sister of an employee; immediate family

inspector	(h) “inspector” means an inspector appointed under subsection 3(1);
layoff	(i) “layoff” means a temporary interruption of the employment relationship at the direction of the employer because of a lack of work;
minimum wage	(j) “minimum wage” means, in respect of an employee, the amount of wages fixed by order of the board pursuant to section 5 that applies to the employee;
Minister	(k) “Minister” means the Minister of Communities, Cultural Affairs and Labour;
overtime hour	(l) “overtime hour” means, with respect to an employee of an employer, an hour of work performed by the employee for the employer during a work week in excess of, <ul style="list-style-type: none"> (i) in the case where an order made under subsection 15(2) applies to the employer and employee, the number of hours of the prescribed standard work week set out in the order, or (ii) in any other case, the number of hours of the standard work week established under subsection 15(1);
pay	(m) “pay” means, unless the context indicates otherwise, all compensation due or paid to an employee for work done for or services supplied to an employer and includes vacation pay, pay in lieu of vacation, gratuities and benefits;
pay in lieu of vacation	(n) “pay in lieu of vacation” means any pay due or paid to an employee under section 11.1;
pay period	(o) “pay period” means the period of time established by the employer for the payment of pay to employees in accordance with subsection 5.2(3);
place of employment	(p) “place of employment” means any building, structure, premises, water, land or other place or thing in or upon which one or more persons are or have been employed for wages;
regular rate of wages	(q) “regular rate of wages” means the regular wage rate of an employee for an hour of work;
regulations	(r) “regulations” means the regulations made pursuant to section 41;
termination	(s) “termination” means the unilateral severance of the employment relationship at the direction of the employer;
vacation pay	(t) “vacation pay” means any pay due or paid to an employee under section 11;
wages	(u) “wages” includes salaries, commissions, and compensation in any form for work or service measured by time, piece or otherwise,

but does not include vacation pay, pay in lieu of vacation, gratuities or benefits;

(v) “week” means a period of seven consecutive days; week

(w) “work week” means work week

(i) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or

(ii) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.

3. The Act is amended by the addition of the following after section 1:

PURPOSES

1.1 The purposes of this Act are as follows: Purposes

(a) to ensure that employees receive at least basic conditions and benefits of employment;

(b) to promote positive relationships and open communications between employers and employees;

(c) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of Prince Edward Island;

(d) to contribute in assisting employees to meet work and family responsibilities;

(e) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.

4. (1) Subsection 2(1) of the Act is repealed and the following substituted:

2. (1) Except as otherwise expressly provided by this Act or the regulations, this Act and the regulations apply to all employers and employees. Application

(2) Subsection 2(4) of the Act is repealed and the following substituted:

(4) Notwithstanding subsection (1), only the following provisions of this Act apply to employees whose terms and conditions of work are established by a collective agreement pursuant to the *Labour Act* R.S.P.E.I. 1988, Cap. L-1: Employees with a collective agreement

(a) those provisions relating to maternity, parental, and adoption leave as contained in sections 18 to 22.02 and 23.3;

- (b) those provisions relating to leave for reservists as contained in section 23.1;
- (c) those provisions relating to sexual harassment as contained in sections 24 to 28;
- (d) those provisions relating to pay, protection of pay and payroll records as contained in sections 5.1 to 5.3, 5.6, subsection 30(1) and sections 31, 32 and 39.1;
- (e) those provisions relating to compassionate care leave as contained in sections 22.3 and 23.3;
- (f) those provisions relating to paid holidays as contained in sections 6 to 10;
- (g) those provisions relating to complaints as contained in sections 30, 35 and 36;
- (h) those provisions respecting the administration and enforcement of this Act and the regulations as contained in sections 3, 38 and 39.

(3) The Act is amended by the addition of the following after section 2:

Application of Act cannot be waived

2.1 (1) Subject to subsection (3), this Act applies notwithstanding any contract of service to the contrary between an employer and an employee.

Provisions of contract void if provide less favourable conditions or benefits

(2) A provision of a contract of service that confers upon an employee conditions or benefits less favourable than the conditions or benefits conferred upon the employee under a provision of this Act or the regulations is void and of no effect.

Provision of contract prevails if provides more favourable conditions or benefits

(3) A provision of a contract of service that confers upon an employee conditions or benefits more favourable than the conditions or benefits conferred upon the employee under a provision of this Act or the regulations prevails over the provision of this Act or the regulations.

5. The Act is amended by the addition of the following immediately after the heading “ADMINISTRATION” and before section 3:

Minister

2.2 (1) The Minister is responsible for the administration of this Act.

Delegation

(2) The Minister may, in writing, delegate to any person any of the Minister’s powers or duties under this Act, subject to the limitations or conditions set out in the delegation.

Residual powers

(3) The Minister may exercise a power or perform a duty under this Act even if the Minister has delegated it to a person under this section.

6. Section 3 of the Act is amended

(a) by the deletion of the words “officers to be known as inspectors of labour standards” and the substitution of the words “one or more inspectors for the purposes of this Act”;

(b) by renumbering it as subsection 3(1); and

(c) by the addition of the following after subsection (1):

(2) For the purpose of ensuring that the provisions of this Act and the regulations are complied with, an inspector may Powers of investigation and entry

(a) at any reasonable time, and without a warrant, enter into or upon lands or premises where a person is employed, may be employed, or has been employed for the purpose of conducting an inspection, investigation or examination of the conditions of employment;

(b) enter into any office or premises where an inspector has reason to believe employment records are kept or stored;

(c) inspect and examine all books, payrolls and other records of an employer that in any way relate to pay, hours of work or conditions of employment affecting any of the employer’s employees;

(d) take extracts from, or make copies of, with the employer’s consent, any entry in such books, payrolls and other records; and

(e) verify, in such manner as the inspector requires, the entries contained in such books, payrolls and other records.

(3) An inspector is not a competent or compellable witness in a civil proceeding respecting any information given or obtained, statements made or received, or books, payrolls, records or other things produced or received while exercising his or her powers or performing his or her duties under this Act. Inspector not compellable

(4) An inspector shall not be compelled in a civil proceeding to produce any statements, books, payrolls, records or other things he or she has obtained, made or received under this Act except for the purpose of carrying out his or her duties under this Act. Records

7. Section 4 of the Act is amended

(a) in subsection (7), by the deletion of the words “to advise the Lieutenant Governor in Council in accordance with section 5 and”;
and

(b) by the repeal of subsection (8) and the substitution of the following:

(8) Each member of the board shall, before acting as such, take an oath or affirmation of office, in the prescribed form, and file evidence in Oath and affirmation of office

writing of the taking of the oath or affirmation with the Minister in accordance with the regulations.

8. (1) Clause 5(1)(a) of the Act is amended by the addition of the words “or fix minimum wage rates for employees or classes of employees in different employments or different classes of employment” after the words “fix one minimum wage for all employees”.

(2) Subsection 5(2) of the Act is amended by the deletion of the words “the Minimum Wage Order” and the substitution of the words “any order made under subsection (1) that is in force”.

(3) Subsection 5(3) of the Act is amended

(a) in the words immediately before clause (a), by the deletion of the words “In advising the Lieutenant Governor in Council, the board shall take into account” and the substitution of the words “Before making an order under subsection (1), the board shall consider”; and

(b) in clause (b), by the deletion of the words “and the concept of reasonable return on private investment”.

(4) Section 5 of the Act is amended by the addition of the following after subsection (3):

Public consultation (3.1) The board shall, before making an order under subsection (1), consult with the public in respect of any existing and any proposed minimum wage.

(5) Subsection 5(4) of the Act is repealed.

9. The Act is amended by the addition of the following after section 5:

Collusion **5.1** No employee, by collusion with the employer of the employee or otherwise, shall work for less than the minimum wage to which the employee is entitled under this Act, or directly or indirectly return to the employer any part of the employee’s wage by reason of which action the wages actually received and retained by the employee are reduced to an amount less than the minimum wage to which the employee is entitled.

PAY AND PROTECTION OF PAY

Payment of pay **5.2** (1) An employer shall pay to an employee the pay to which an employee is entitled
 (a) in lawful currency of Canada;

(b) by cheque drawn upon a chartered bank, a credit union, trust company or other institution insured under the *Canada Deposit Insurance Corporation Act* R.S.C. 1985, c. C-3 and honoured and paid by such bank, credit union, trust company or other institution; or

(c) by direct deposit into an account of the employee in a chartered bank, credit union, trust company or other institution insured under the *Canada Deposit Insurance Corporation Act*.

(2) For the purpose of clause (1)(b), an employer who pays an employee by means of a cheque which, within six months from the date of issue, is determined to be valueless, shall be deemed to have failed to pay the employee.

Bad cheque -
deemed failure to
pay

(3) An employer shall

Time of payment

(a) pay the employee at such times that the interval between pays is not more than sixteen days; and

(b) when paying an employee, include all wages earned up to and including a day that is not more than five working days prior to the time fixed for payment.

(4) An employer is not required to comply with clause (3)(a) or (b) if the payments are otherwise made under the terms of a collective agreement or in accordance with an order of the board.

Exception

(5) An employee who is absent at the time fixed for payment of wages or who, for any other reason, is not paid at that time, is entitled to be paid on demand thereafter, during regular hours of work.

Payment to absent
employee

(6) Any pay to which an employee is entitled on the termination of his or her employment shall be paid by the employer to the employee not later than the last day of the next pay period after the termination of employment.

Payment on
termination of
employment

5.3 (1) Every employer shall give to every employee, at the time pay is being paid to the employee in accordance with subsection 5.2(3), a statement, in writing, showing

Pay statement

(a) the name and address of the employer and the name of the employee;

(b) the period of time or the work for which the wages are being paid;

(c) the regular rate of wages to which the employee is entitled and the number of hours worked;

(d) the gross amount of wages to which an employee is entitled;

(e) the gross amount of any vacation pay being paid to the employee;

- (f) the gross amount of any pay in lieu of notice of termination being paid to the employee;
- (g) the amount and purpose of each deduction;
- (h) any bonus, gratuity, living allowance, or other payment to which the employee is entitled; and
- (i) the net amount of money being paid to the employee.

Electronic pay statement

- (2) An employer may provide a pay statement to an employee electronically if the employer provides to the employee, through the employee's place of employment,
- (a) confidential access to the electronic pay statement; and
 - (b) a means of making a paper copy of the electronic pay statement.

Notice required before reducing wage rate

5.4 An employer shall give each employee of the employer notice of any reduction in the employee's regular rate of wages at least one pay period before the start of the employee's pay period in which the reduction is to take place.

Deductions from pay

5.5 (1) No employer shall, directly or indirectly, withhold or deduct all or part of an employee's pay, or require the employee to return all or part of his or her pay to the employer, unless the employer is authorized to do so under this section.

Authorizations

- (2) An employer may withhold, deduct or require the return of all or part of an employee's pay if the employer is required or authorized to do so under
- (a) any other Act of Prince Edward Island or Canada, or any regulations made under such an Act;
 - (b) a court order; or
 - (c) an order made under subsection 5(1).

Idem

- (3) An employer may withhold, deduct or require the return of an amount of all or part of an employee's pay if the withholding, deduction or required return
- (a) is related to a group benefit plan that the employee participates in;
 - (b) was requested by the employee as a contribution towards a savings plan; or
 - (c) is the result of a previous advance of pay to the employee.

Idem

(4) An employer may withhold, deduct or require the return of all or part of an employee's pay if the employer is authorized to do so in writing by the employee.

Faulty workmanship and damage

(5) Subsection (4) does not apply to authorize an employer to withhold, deduct or require the return of all or part of an employee's pay

because of any faulty work done, or any damage to the property of the employer, caused by the employee.

(6) Subsection (4) does not apply to authorize an employer to withhold, deduct or require the return of all or part of an employee's pay for the use by the employee of any uniform or footwear that

Use of uniform and footwear of employer

- (a) is supplied or required by the employer; and
- (b) is unique to the employer's business.

(7) For greater certainty, nothing in this section precludes an employer from requiring an employee to give the employer a deposit of up to 25 per cent of the cost of any uniform or footwear that the employer supplies for the use of the employee.

Deposit for uniform or footwear

(8) An employer shall reimburse any deposit given to the employer by an employee for the use of any uniform or footwear supplied by the employer where

Return of deposit

- (a) the employee's employment with the employer has ceased; and
- (b) the employee has returned the uniform or footwear to the employer.

(9) No employer shall require an employee to give the employer a deposit in excess of 25 per cent of the cost of any uniform or footwear that is supplied by the employer to the employee.

Deposit restriction

(10) Subsection (4) does not apply to authorize an employer to withhold, deduct or require the return of all or part of an employee's pay to cover a cash shortage of the employer if

Cash shortages

- (a) the cash shortage results from a customer of the employer leaving the place of employment of the employer without paying for any product or service provided there to the customer; or
- (b) the employee
 - (i) does not have sole control of the cash, and
 - (ii) was required to leave the cash unattended.

(11) Notwithstanding subsection (10), an employer may, in accordance with subsection (4), withhold, deduct or require the return of all or part of the employee's pay to cover a cash shortage of the employer if

Idem

- (a) the employer finds the cash shortage during or at the end of the employee's shift;
- (b) the employer
 - (i) advises the employee of the cash shortage at the end of the employee's shift or as soon as is reasonably possible thereafter,
 - (ii) permits the employee the opportunity to explain or find the cash shortage, and

- (iii) reports the cash shortage to an inspector; and
- (c) the inspector issues a decision to the employer and employee, before the end of the employee's pay period during which the cash shortage occurred, indicating that the inspector is satisfied that the employee is responsible for a cash shortage.

Payroll records

5.6 (1) Every employer shall, in respect of each employee of the employer, make and keep at the employer's principal place of business in the province, for a period of 36 months after the employee performs work for the employer, complete and accurate records of

- (a) the name, address and social insurance number of the employee;
- (b) the date of birth of the employee;
- (c) the wage rate and actual earnings of the employee;
- (d) the number of hours the employee works in each day and week;
- (e) the gross earnings of the employee per pay period;
- (f) the deductions from the employee's gross earnings and the nature of each deduction;
- (g) the date the employee started employment and the date the employee's employment terminated;
- (h) the type of work performed by the employee;
- (i) the period in which the employee received vacation with pay;
- (j) the amount of pay in lieu of vacation that has been paid to the employee; and
- (k) the number of overtime hours the employee has accumulated and used.

Exception *re* hours of work of salaried employees

(2) Clause (1)(d) does not apply in respect of the salaried employees of an employer where the employer establishes a work week and makes and keeps a record showing the number of hours worked by such employees in excess of the work week.

Employer to file information on request

(3) An employer shall, within seven days after receipt of a request from the board or an inspector, or within such other time as may be allowed by the board or an inspector, provide to the board or the inspector a statement setting forth the information required to be kept under subsection (1), together with a copy of any contract of service that the employer has with the employees of the employer in relation to wages, hours of work and any other term or condition of employment governed by this Act or the regulations, as may be required by the request.

Definitions

5.7 In this section,

director

(a) "director" means a director of a corporation;

corporation

(b) "corporation" includes a co-operative association.

(2) This section does not apply to directors of corporations that are carried on without the purpose of gain.

Non-application

(3) Subject to subsection (4), the directors of a corporation that is an employer are jointly and severally liable with the corporation to an employee of the corporation for pay owing from the corporation to the employee, up to a maximum amount equivalent to six month's pay, that becomes payable while they are directors if either

Directors' liability for pay

(a) the corporation is insolvent, the employee has filed a claim for unpaid pay with a receiver duly appointed in respect of the corporation or with the corporation's trustee in bankruptcy, and the claim has not been paid; or

(b) an inspector or the board has made an order pursuant to this Act requiring the corporation to pay an amount to the employee of the corporation on account of unpaid pay, and the corporation has failed to comply with the order within 30 days of the date the order was made.

(4) A director of a corporation is not liable for unpaid pay under this section where the director exercised the degree of care, diligence and skill to ensure that pay owing was paid that a reasonably prudent person would have exercised in comparable circumstances.

Exception where due diligence exercised

(5) A provision in a contract, or in the letters patent, articles, by-laws or in a resolution of a corporation which purports to relieve a director of the corporation from liability under this section is void and of no force and effect.

No relief by contract, etc.

(6) The provisions of this Act respecting the recovery of pay from an employer apply with necessary modifications to the recovery of pay from a director of a corporation.

Recovery

10. Subsection 6(1) of the Act is amended by the deletion of the words "and Christmas Day" and the substitution of the words "Christmas Day and any day prescribed as a paid holiday in the regulations".

11. Section 7 of the Act is repealed and the following substituted:

7. (1) Subsection 6(2) and sections 8 to 10 do not apply to an employee in respect of a paid holiday if the employee

Employees not entitled to paid holidays

(a) has been in the employ of his or her present employer for less than 30 calendar days prior to the paid holiday;

(b) has not received pay for at least 15 of the 30 calendar days immediately preceding the paid holiday;

- (c) fails, without reasonable cause, to work on both the employee's last scheduled work day before the paid holiday and the employee's first scheduled work day after the paid holiday;
- (d) has agreed to work on the paid holiday and has, without reasonable cause, failed to report for and perform work on the paid holiday; or
- (e) is employed under a contract of service under which the employee may elect to work or not when requested to do so.

Employees not directed to work

(2) Clause (1)(c) shall not apply to an employee if the employer of the employee has directed or permitted the employee not to report for work on one or both of the employee's scheduled work days referred to in that clause.

12. Subsections 11(1) and (2) of the Act are repealed and the following substituted:

Annual vacation with pay

11. (1) Where an employee works for an employer for a continuous twelve-month period, the employer shall,

- (a) not later than four months after the twelve-month period ends, give the employee
 - (i) an unbroken vacation of at least two weeks, if the employee has less than eight years of continuous employment with the employer, or
 - (ii) an unbroken vacation of at least three weeks, if the employee has at least eight years of continuous employment with the employer;
- (b) at least one week before the employee's vacation begins, notify the employee of the date the employee's vacation begins; and
- (c) at least one day before the employee's vacation begins, pay the employee
 - (i) an amount at least equal to four per cent of the employee's wages for the twelve-month period during which the employee established the right to a vacation, if the employee has less than eight years of continuous employment with the employer, or
 - (ii) an amount at least equal to six per cent of the employee's wages for the twelve-month period during which the employee established the right to a vacation, if the employee has at least eight years of continuous employment with the employer.

Vacation pay on termination of employment

(2) Where an employee's employment with an employer ceases, the employer shall, not later than the last day of the next regular pay period after the employee's employment ceases, pay to the employee

- (a) an amount equal to four per cent of the employee's wages for the period the employee has worked for the employer, if the employee has worked for the employer for a period of less than

twelve continuous months from the date the employment commenced;

(b) an amount equal to four per cent of the employee's wages for the period the employee has worked for the employer from the date the employee last became entitled, under subsection (1), to vacation with pay, if the employee has been employed continuously by the employer for a period of at least one year and less than eight years; or

(c) an amount equal to six per cent of the employee's wages for the period the employee has worked for the employer from the date the employee last became entitled, under subsection (1), to vacation with pay, if the employee has been employed continuously by the employer for a period of at least eight years.

13. The Act is amended by the addition of the following after section 11:

11.1 (1) Where an employee

(a) works for an employer for a continuous twelve-month period; and

(b) works less than 90 percent of the normal working hours of the employee during that period,

the employee may waive the employee's entitlement to vacation with pay under subsection 11(1) in return for the payment provided under subsection (2), by giving the employer written notice of the waiver prior to the end of the twelve-month period.

Waiver of
entitlement to
vacation with pay

(2) Where an employee gives an employer notice in accordance with subsection (1) of the employee's wish to waive his or her entitlement to a vacation with pay under subsection 11(1), the employer shall pay to the employee, not later than one month after the end of the twelve-month period during which the employee established the entitlement,

(a) an amount at least equal to four per cent of the employee's wages for the twelve-month period, if the employee has less than eight years of continuous employment with the employer; or

(b) an amount at least equal to six per cent of the employee's wages for the twelve-month period, if the employee has at least eight years of continuous employment with the employer.

Pay in lieu of
vacation

14. Section 12 of the Act is repealed and the following substituted:

12. Notwithstanding the provisions of any other Act, every employer shall be deemed to hold

(a) vacation pay accruing due to an employee in trust for the employee and for payment of the vacation pay to the employee in the manner and at the time provided under section 11; and

Vacation pay and
pay in lieu of
vacation, held in
trust

(b) pay in lieu of vacation accruing due to an employee in trust for the employee and for payment of the vacation pay to the employee in the manner and at the time provided under section 11.1, and any such pay deemed to be held in trust shall be a charge upon the assets of the employer or the employer's estate in the employer's hands or in the hands of a trustee, and shall have priority over all other claims including those of the Crown.

15. Subsection 13(1) of the Act is amended by the deletion of the words “calculating vacation pay or pay in lieu of vacation as provided in section 11” and the substitution of the words “calculating the amount of vacation pay payable to an employee under section 11, or the amount of pay in lieu of vacation payable to an employee under section 11.1.”

16. Section 14 of the Act is repealed.

17. (1) Subsections 15(1) and (2) of the Act are repealed and the following substituted:

Standard number of
hours of work

15. (1) The standard number of hours of work that an employer may require of an employee during a work week is 48 hours.

Exemptions

(2) The board may, by order,

- (a) prescribe standard work weeks, other than the one established in subsection (1), comprising the number of hours of work in excess of the number established in subsection (1) that the board considers appropriate;
- (b) prescribe
 - (i) the specific employers or classes of employers, and
 - (ii) the specific employees or classes of employees of such employers,
 to whom a standard work week prescribed under clause (a) applies; and
- (c) exempt the employers and employees, or any classes thereof, for whom a standard work week is prescribed in an order made under this subsection from the standard work week established in subsection (1).

(2) Subsection 15(3) of the Act is amended

(a) in the words preceding clause (a), by the deletion of the words “In granting any such exemption” and the substitution of the words “Before making an order under subsection (2),”; and

(b) in clause (d), by the deletion of the words “proposed by the employer or”.

(3) Subsection 15(4) of the Act is repealed.

18. The Act is amended by the addition of the following after section 15:

15.1 (1) An employer shall pay an employee at the rate of one and one-half times the employee's regular rate of pay for each overtime hour of work performed by the employee for the employer during a work week.

Overtime hours -
pay rate

(2) Where an employee of an employer performs one or more overtime hours of work for the employer during a work week, the employer may, instead of paying the employee for that work in accordance with subsection (1), give the employee one and one-half hours of paid time off work for each overtime hour worked, if

Overtime hours-
paid time off work

- (a) the employee requests such compensation in writing; and
- (b) the paid time off work is taken by the employee within three months of the work week in which the overtime was earned.

(3) Where the employment of an employee ends before any paid time off requested under subsection (2) has been taken by the employee, the employer shall pay the employee overtime pay in accordance with subsection (1) for any overtime hours that the employee worked and has not been compensated for.

Where employment
ends before paid
time off is taken

19. Section 16 of the Act is amended

(a) in subsection (1), by the deletion of the words "a rest period" and the substitution of the words "an unpaid rest period";

(b) in subsection (2), by the deletion of the words "a rest or eating period" wherever they occur and the substitution of the words "an unpaid rest or eating period"; and

(c) by the addition of the following after subsection (2):

(3) An employer shall not require an employee to remain at the employee's place of employment during an unpaid rest or eating period provided by the employer in accordance with subsection (2).

Remaining at place
of employment

20. Section 17 of the Act is repealed and the following substituted:

17. Each time an employee is required to report to work or for a work related activity, the employer shall pay the employee wages at the employee's regular rate of pay for not less than three hours.

Reporting pay

21. The Act is amended by the addition of the following after section 17:

TIPS OR GRATUITIES

Tips and gratuities	17.1 (1) Tips and gratuities are the property of the employee to whom or for whom they are given.
Restriction	(2) No employer shall <ul style="list-style-type: none"> (a) withhold tips or gratuities intended for an employee; or (b) treat tips or gratuities intended for an employee as the wages or partial wages of the employee, unless the employer and the employee have first agreed that the tips or gratuities of the employee are to be calculated as additional wages of the employee.
Billings	(3) Where the tips and gratuities of an employee are based on the billings of his or her employer in respect of banquets, bus tours, and other prescribed events, the employer shall pay the tips and gratuities to the employee within 60 days of the date of the event.
Exclusive to employee	(4) No employer of an employee shall require the employee to share a tip or a gratuity with the employer of the employee.
Employer surcharge	(5) Where an employer imposes a surcharge or other charge on a customer in lieu of the payment of tips or gratuities to an employee, all of the amounts collected in respect of the surcharge or other charge are the property of the employee for whom they are intended.
Restrictions	(6) Where an employer imposes a surcharge or other charge on a customer in lieu of the payment of tips or gratuities to an employee, the employer shall not <ul style="list-style-type: none"> (a) withhold the amounts collected in respect of the surcharge or other charge from the employee; or (b) treat the amounts collected in respect of the surcharge or other charge as the wages or partial wages of the employee, unless the employer and the employee have first agreed that the amounts collected in respect of the surcharge or other charge are to be calculated as additional wages of the employee.
Exclusive to employee	(7) Where an employer imposes a surcharge or other charge on a customer in lieu of the payment of tips or gratuities to an employee, the employer shall not require the employee to share any amount collected in respect of the surcharge or other charge with the employer of the employee.
Payment of amounts collected under surcharge	(8) Where an employer imposes a surcharge or other charge on a customer in lieu of the payment of tips or gratuities to an employee, the employer shall distribute all of the amounts collected in respect of the surcharge or other charge to the employee not later than the last day of the next pay period of the employee.

(9) An employer shall not pass on any administrative charges of the employer, including credit card or debit card charges, to an employee. Administrative charges

(10) An employer may adopt the practice of pooling tips and gratuities for the benefit of some or all of the employees, but such practice does not give the employer a proprietary interest in the tips and gratuities so pooled. Pooling

(11) An employer shall advise an employee, in writing, of any pooling policy in effect at the time the employee is hired. *Idem*

22. The heading immediately before section 18 of the Act is repealed and the following substituted:

MATERNITY, PARENTAL AND ADOPTION LEAVE

23. Section 19 of the Act is repealed and the following substituted:

19. (1) Where a pregnant employee of an employer Maternity leave

- (a) submits an application, in accordance with subsection (2), to the employer for maternity leave;
- (b) has been in the employment of the employer for a total of at least 20 weeks of the 52 weeks immediately preceding the commencement date for the maternity leave specified in the application; and
- (c) provides the employer with a certificate from a medical practitioner that states that the employee is pregnant and specifies the estimated date of birth,

the employer of the employee shall grant the employee maternity leave without pay from employment with the employer in accordance with section 20.

(2) An application by an employee to her employer for maternity leave shall Application

- (a) be made in writing;
- (b) specify the dates that the employee proposes to commence and terminate the leave; and
- (c) be given to the employer at least four weeks before the commencement date for the leave specified in the application.

24. Section 21 of the Act is repealed.

25. The heading “PARENTAL AND ADOPTION LEAVE” immediately before section 22 of the Act is repealed.

26. (1) Clause 22(1)(a) of the Act is amended by the deletion of the words “for a continuous period of twenty weeks or more” and the

substitution of the words “for a total of at least 20 weeks of the 52 weeks immediately preceding the day on which the requested leave is to commence”.

(2) Subsection 22(2.1) of the Act is amended by the deletion of the words “Notwithstanding any other provision of this section” **and the substitution of the words** “Subject to subsection 22.01(1)”.

(3) Subsection 22(3) of the Act is amended by the deletion of the words “Subject to subsection (6)” **and the substitution of the words** “Subject to subsections (6) and 22.01(1)”.

(4) Subsection 22(4) of the Act is repealed.

27. The Act is amended by the addition of the following after section 22:

Extended leave

22.01 (1) Where

- (a) an employee is on leave without pay granted under section 19 or 22;
- (b) the child, in respect of whom the employee is granted leave, has a physical, psychological or emotional condition requiring an additional period of parental care;
- (c) the employee, in accordance with subsection (2), submits an application to the employer for an extension of such leave; and
- (d) the employee, if requested to do so, provides the employer with a certificate from a medical practitioner that states that the child has, in the opinion of the medical practitioner, a physical, psychological or emotional condition requiring an additional period of parental care,

the employer shall grant the employee an extension of the leave of absence without pay of up to five consecutive weeks, beginning immediately after the end of the leave granted under section 19 or 22.

Application

(2) An application by an employee for an extension of leave under subsection (1) shall

- (a) be given, in writing, to the employer at least one week before the day on which the employee’s current leave under section 19 or section 22 ends; and
- (b) if required by the employer, be accompanied by a certificate of a medical practitioner that states that the child has, in the opinion of the medical practitioner, a physical, psychological or emotional condition requiring an additional period of parental care.

Reinstatement on expiration of leave

22.02 (1) An employer who has granted maternity, parental or adoption leave to an employee pursuant to section 19 or 22, as the case may be,

shall, on the expiry of that leave, permit the employee to resume work in the position held by the employee immediately before the leave began or, if that position no longer exists, in a comparable position with not less than the same wages and benefits that the employee would have received if the employee had not been granted the leave and, in either case, with no loss of any seniority or pension benefits that had accrued to the employee up to the commencement of the leave.

(2) For the avoidance of doubt, an employer is not obliged to pay pension benefits in respect of any period of maternity, parental or adoption leave granted to an employee. Pension benefits

28. Section 22.2 of the Act is amended by the addition of the following after subsection (3):

(4) Where an employee has been employed by the same employer for a continuous period of at least five years, the employer shall, at the request of the employee, grant the employee one day of paid sick leave during a twelve calendar-month period in addition to any unpaid leave that the employee is entitled to under subsection (1). Paid day of sick leave

(5) Where an employee is entitled to one day of paid sick leave pursuant to subsection (4), the employer shall pay the employee for the day of the leave at the employee's regular rate of pay for a day of work. *Idem*

29. (1) Subsection 22.3(1) of the Act is repealed and the following substituted:

22.3 (1) In this section,

Definitions

- (a) "family member" means, in respect of an employee,
- (i) a member of the immediate family of the employee,
 - (ii) a member of the extended family of the employee,
 - (iii) a niece, nephew, foster parent, ward or guardian of the employee,
 - (iv) any person who the employee considers to be like a person described in subclause (i), (ii) or (iii), and
 - (v) any other person who is a member of a class of persons that are prescribed to be family members by the regulations for the purposes of this section;

family member

- (b) "medical practitioner" means a person who is entitled to practice medicine under the laws of the jurisdiction or jurisdictions where the care or treatment of a family member is provided.

medical practitioner

(2) Subsection 22.3(2) of the Act is amended by the deletion of the word "qualified".

30. (1) Subsection 23(1) of the Act is repealed and the following substituted:

- Bereavement leave **23. (1)** On the death of a member of the immediate family or extended family of an employee, the employer of the employee shall grant to the employee a leave of absence
- (a) of one day of paid leave and up to two consecutive days of unpaid leave, if the deceased person was a member of the immediate family of the employee; or
 - (b) of up to three consecutive days of unpaid leave, if the deceased person was a member of the extended family of the employee.
- Paid day of leave (1.1) Where an employer's employee is entitled to one day of paid leave pursuant to clause (1)(a), the employer shall pay the employee for the day of the leave at the employee's regular rate of pay for a day of work.
- Vacation (1.2) Where an employee, during the period of a vacation, takes a paid day of leave under subsection (1), the employer shall extend the employee's vacation by one working day.
- (2) Subsection 23(2) of the Act is amended by the addition of the words "or the memorial service of the deceased person who was a member of the immediate family or extended family of the employee" after the words "not later than the day of the funeral".**
- (3) Subsection 23(3) of the Act is repealed.**

31. The Act is amended by the addition of the following after section 23.1:

COURT LEAVE

- Court leave **23.2** An employer shall grant an employee a leave of absence without pay for any period that the employee is absent from work as a result of being
- (a) summoned to serve on a jury;
 - (b) selected to serve on a jury; or
 - (c) served with a summons to attend at the hearing of an action, application or proceeding as a witness.

GENERAL PROVISIONS CONCERNING LEAVE

- Dismissal, suspension or layoff **23.3 (1)** An employer shall not dismiss, suspend or layoff an employee who has been granted a leave of absence under this Act for reasons arising from the leave alone.

(2) An employee who has been granted a leave of absence under this Act

Rights during leaves

- (a) retains seniority accrued up to the commencement of the leave; and
- (b) shall be deemed to have been continuously employed with the same employer during the leave of absence.

(3) For the period of any leave to which an employee is entitled under sections 19, 22 and 22.3, the employer

Continued participation in benefit plans

- (a) shall grant to the employee the option of maintaining any benefit plan in which the employee is participating prior to the start of the leave; and
- (b) shall notify the employee, in writing, of the option and the date beyond which the option may no longer be exercised at least ten days prior to the last day on which the option could be exercised to avoid an interruption in benefits.

(4) Subsection (3) applies with respect to life insurance plans, accidental death plans, extended health plans, dental plans and any specific benefit plans or class of benefit plans prescribed by the regulations for the purposes of this subsection.

Application of subsection (3)

(5) Where the employee chooses, in writing, to maintain any benefit plan to which subsection (3) applies, the employee shall enter into an arrangement with the employer to pay the cost required to maintain the benefit plan, including the employer's share thereof, and the employer shall process the documentation and payments as arranged.

Payment of cost of participation

32. The Act is amended by the addition of the following after section 28:

CONTINUITY OF EMPLOYMENT

28.1 (1) Where an employer sells a business or undertaking, or a part of a business or undertaking, and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act, and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment.

Sale of business or undertaking

(2) Subsection (1) does not apply if the day on which the purchaser hires the employee is more than 13 weeks after the earlier of his or her last day of employment with the seller and the day of the sale.

Application

(3) In this section, "sells" includes leases, transfers or disposes of in any other manner, and "sale" has a corresponding meaning.

sells and sale

33. (1) Subsections 29(1) and (2) of the Act are repealed and the following substituted:

Termination of
employment by
employer, notice
period

29. (1) Except where an employer has just cause to terminate an employee, and subject to subsection (2), an employer shall not terminate or lay off an employee who has been employed by the employer for a continuous period of six months or more without having given the employee at least

- (a) two weeks notice in writing, where the employee has been employed by the employer for a continuous period of six months or more but less than five years;
- (b) four weeks notice in writing, where the employee has been employed by the employer for a continuous period of five years or more but less than ten years;
- (c) six weeks notice in writing, where the employee has been employed by the employer for a continuous period of 10 years or more but less than 15 years; or
- (d) eight weeks notice in writing, where the employee has been employed by the employer for a continuous period of 15 years or more.

Exceptions,
termination without
notice

(2) Subsection (1) does not apply to

- (a) a person who is employed to perform a definite task for a period not exceeding twelve months;
- (b) a person who is laid off for a period not exceeding six consecutive days;
- (c) a person who has been offered reasonable other employment by his or her employer;
- (d) a person who is terminated or laid off for any reason beyond the control of the employer, including
 - (i) the complete or partial destruction of a plant,
 - (ii) the destruction or breakdown of machinery or equipment,
 - (iii) the inability to obtain supplies and materials, or
 - (iv) the cancellation or suspension of, or inability to obtain, orders for the products of the employer, if the employer has exercised due diligence to foresee and avoid the cause of termination or layoff; or
- (e) a person who is terminated or laid off because of labour disputes, weather conditions or actions of any governmental authority that affect directly the operations of the employer.

Additional notice
required where
employee continues
to work

(2.1) Where an employee is given a written notice of termination or layoff by the employer but continues to work for the employer for a period of one month or more beyond the end of the notice period, the notice is extinguished and the employer shall only terminate or lay off

the employee after giving a new notice in accordance with subsection (1).

(2) Section 29 is amended by the addition of the following after subsection (4):

(4.1) Where an employee has been employed continuously for longer than six months, the employee shall not terminate the employment without giving the employer, in writing, at least

Period of notice if employed for more than six months

- (a) one weeks notice where the employee has been employed by the employer for a continuous period of six months or more but less than five years; and
- (b) two weeks notice where the employee has been employed by the employer for a continuous period of five years or more.

34. The heading immediately before section 30 of the Act is repealed and the following substituted:

COMPLAINTS AND ENFORCEMENT

35. Section 30 of the Act is amended

- (a) by the repeal of subsections (1) to (5);
- (b) by renumbering subsections (6) and (7) as subsection (1) and (2) respectively;
- (c) in subsection (8),
 - (i) by the deletion of the words “subsection (7)” and the substitution of the words “subsection (2)”, and
 - (ii) by renumbering the subsection as subsection (3);
- (d) in subsection (9),
 - (i) in the wording preceding clause (a), by the deletion of the words “subsection (6) or (7)” and the substitution of the words “subsection (1) or (2)”,
 - (ii) in clause (b), by the deletion of the words “under subsection (6) or any benefits owing to the employee as determined under subsection (7)” and the substitution of the words “under subsection (1) or any benefits owing to the employee as determined under subsection (2)”, and
 - (iii) by renumbering the subsection as subsection (4);
- (e) in subsection (10),
 - (i) by the deletion of the words “(9)” wherever they occur and the substitution of the words “(4)”, and
 - (ii) by renumbering the subsection as subsection (5);

- (f) in subsection (11),
 - (i) by the deletion of the words “subsection (10)” and the substitution of the words “subsection (5)”, and
 - (ii) by renumbering the subsection as subsection (6);
- (g) by the repeal of subsection (12);
- (h) by renumbering subsections (13) to (16) as subsections (7) to (10) respectively;
- (i) in subsection (17),
 - (i) by the deletion of the words “subsection (6) or (7) or an appeal pursuant to subsection (15)” and the substitution of the words “subsection (1) or (2) or an appeal pursuant to subsection (9)”, and
 - (ii) by renumbering the subsection as subsection (11);
- (j) by renumbering subsections (18) and (19) as subsections (12) and (13) respectively;
- (k) in subsection (20),
 - (i) by the deletion of the words “subsection (17)” and the substitution of the words “subsection (11)”, and
 - (ii) by renumbering the subsection as subsection (14);
- (l) by renumbering subsections (21) and (22) as subsections (15) and (16) respectively;
- (m) in subsection (23),
 - (i) by the deletion of the words “subsection (24)” and the substitution of the words “subsection (18)”,
 - (ii) by the deletion of the words “subsection (21)” and the substitution of the words “subsection (15)”, and
 - (iii) by renumbering the subsection as subsection (17);
- (n) in subsection (24),
 - (i) by the deletion of the words “subsection (22)” and the substitution of the words “subsection (16)”, and
 - (ii) by renumbering the subsection as subsection (18);
- (o) in subsection (25),
 - (i) by the deletion of the words “subsection (22)” and the substitution of the words “subsection (16)”, and
 - (ii) by renumbering the subsection as subsection (19); and
- (p) by renumbering subsection (26) as subsection (20).

36. The heading immediately before section 33 and sections 33 and 34 of the Act are repealed.

37. The Act is amended by the addition of the heading “PROTECTION OF COMPLAINANTS” immediately before section 35.

38. Section 37 of the Act is repealed.

39. (1) The Act is amended by the addition of the heading “OFFENCES AND PENALTIES” immediately before section 38.

(2) Subsection 38(1) of the Act is amended by the deletion of the words “and not more than \$2,000” and the substitution of the words “and not more than \$10,000”.

40. The Act is amended by the deletion of the heading immediately before section 40 and the substitution of the heading “GENERAL”.

41. The Act is amended by the addition of the following immediately after the heading “GENERAL” and before section 40:

39.1 Every employer shall keep posted in a conspicuous place at any place of employment where the employees of the employer are engaged in their duties, copies of all orders under this Act relating to wages, hours of work or any other condition or term of employment governed by this Act and the regulations. Posting orders, etc

42. Section 41 of the Act is repealed and the following substituted:

41. (1) The Lieutenant Governor in Council may make such regulations as the Lieutenant Governor in Council considers are necessary for carrying out the purposes of this Act, and, without restricting the generality of the foregoing, may make regulations Regulations

- (a) exempting any class of employees or employers from the application of this Act or any section or other provision of it, including
 - (i) persons employed in specified occupations or professions,
 - (ii) persons employed in any specified class of work, and
 - (iii) persons employing employees referred to in subclauses (i) and (ii);
- (b) prescribing the form of the oath or affirmation of office that members of the board are required to take under subsection 4(8);
- (c) respecting the evidence, in writing, required under subsection 4(8) that a member of the board has taken the prescribed oath or

affirmation of office, including the form and manner of filing that evidence;

(d) prescribing the days that are paid holidays for the purposes of subsection 6(1);

(e) prescribing the events referred to in subsection 17.1(3) as being prescribed;

(f) prescribing the classes of persons that are family members of an employee for the purposes of subclause 22.3(1)(a)(v);

(g) prescribing the specific benefit plans or classes of benefit plans referred to in subsection 23.3(4) as being prescribed;

(h) prescribing any other thing that, by this Act, is to be prescribed or is to be determined or regulated by regulation; and

(i) defining any word or expression that is used but not defined in this Act.

Transitional
Regulations

(2) The Lieutenant Governor in Council may make regulations providing for any transitional matters the Lieutenant Governor in Council considers necessary or advisable in connection with the implementation of the amendments to the *Employment Standards Amendment Act, 2009*.

Idem

(3) A regulation under subsection (2) may provide that it applies despite this Act.

COMMENCEMENT

43. This Act comes into force on a date that may be fixed by proclamation of the Lieutenant Governor in Council.

CHAPTER 5

(Bill No. 2)

Employment Standards Amendment Act, 2009

<i>STAGE:</i>	<i>DATE:</i>
<i>1st Reading:</i>	November 18, 2009
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<i>Assent:</i>	December 9, 2009

SIGNATURES:

Honourable Barbara A. Hagerman, Lieutenant Governor

Honourable Kathleen M. Casey, Speaker

Clerk

Honourable Carolyn I. Bertram
Minister of Communities, Cultural Affairs and
Labour

GOVERNMENT BILL