

The Ontario Health Premium — who pays?

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(DCN SPECIAL)

One of the most hotly contested issues of the day is whether the employer is required to pay the new Ontario Health Premium (OHP) on behalf of its bargaining unit employees.

To date, there are arbitral decisions coming down on both sides of this issue.

History

In 1969, the Health Services Insurance Act, 1968-1969 (Ont.) came into effect. This act established the Ontario Health Services Insurance Plan which later became known as the Ontario Health Insurance Plan (OHIP). Under the OHIP employees were liable for the payment of health premiums, and large employers were required to make payroll deductions from employees' salaries.

Effective January 1990, the Employer Health Tax (EHT) came into force, which provides generally for

the payment of a health tax by an employer based upon its payroll costs. Accordingly, since January 1990 employees have not been personally liable to pay premiums for health care.

The OHP was introduced as part of the 2004 Ontario Budget as a means to supplement funding of health care in Ontario. It is a personal levy placed on individuals based upon their total taxable income. It has not replaced, but is in addition to, the EHT.

Despite the abolition of the OHIP premiums and their replacement with the EHT, many collective agreements continue to contain language that requires the employer to pay all, or part, of the "OHIP premiums." The question before arbitrators is whether that existing language can be extended to include an employer's obligation to pay the new OHP.

OHP—tax or premium?

A number of related argu-

ments have been advanced to support the proposition that the OHP should be borne by the employee.

□ Despite being called a "premium" the OHP is properly characterized as a "tax." Section 2.2 of the Tax Act states: "Every individual shall pay a tax, called the Ontario Health Premium, for a taxation year ending after December 31, 2003, if the individual is resident in Ontario on the last day of the taxation year."

□ Unlike the EHT, the responsibility to pay the tax is that of the individual, not the employer and not the employee.

□ The amount is based on the individual's taxable income—not an employer's payroll and not an individual's employment income from a particular employer (T4 earnings). If the employer is required to pay the OHP this would require the employer to obtain—and the employee to disclose—complete information about the employee's worldwide taxable income—from any and every source—not just employment income and not just from that employer.

□ The amount collected goes into general government revenue (i.e. the legislation does not stipulate that government must spend the funds money on health care).

□ Non-payment is dealt with as a failure to pay income tax (i.e. the government can withhold GST refunds or future income tax refunds for failure to pay).

□ Unlike a true "premium,"

Unions have argued the OHP is a 'premium' not a 'tax'

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the amount of OHP collected varies with an individual's taxable income and bears no specific correlation to the services provided.

□ The OHP need not be paid for an individual to receive health services (unlike a true "premium" where payment is a precondition to receiving service).

In their effort to ensure that employers are required to pay the OHP on behalf of employees, unions have argued that:

□ The OHP is properly characterized as a "premium." The amount collected is a flat rate (graduated), is earmarked for health care and is not a general tax.

□ The OHP funds, in part, the same services funded by the OHIP (that is, the OHP, like OHIP, is part of the universal medical insurance program in Ontario).

□ The purpose of the OHP is to augment funds raised through the EHT. As such the OHP is really a part of the EHT and should be borne by the employer.

The arbitral decisions

There are few decisions on this issue. To date, one arbitrator has held that the OHP should be borne by the employer. However, three arbitrators have disagreed.

In Lapointe Fisher Nursing Home and United Food and Commercial Workers Union, Local 175/633 (Barrett, September 15, 2004), the collective agreement contained a clause requiring the

employer to pay OHIP premiums on behalf of its employees. That clause had remained in the collective agreement long after January 1990 and the introduction of the EHT. The arbitrator found that the bargain that had been reached between the employer and union—and reaffirmed with each successive agreement—was that the employer would fund the "plan of (medical) insurance" in Ontario. Accordingly, regardless of its characterization as a "premium" or "tax" the net result was the same—the employer had agreed to pay.

As for the difficulty in calculating the amount of OHP on the basis of global income, the arbitrator acknowledged the employer's concern, but held that the difficulty could not and should not determine the issue of whether the employer had an obligation to pay. (NB: This decision is under review.)

In Jazz Air Inc. and Air Line Pilots Association, International (Teplitsky, September 27, 2004), heard two days after Lapointe but decided several days before, the arbitrator once again focused on the bargain to which the parties had agreed in the collective agreement. The arbitrator concluded that the "reference to premiums in the collective agreement does not include this new tax" because the EHT had replaced the premiums previously paid by individuals (OHIP) and the parties did not contemplate the OHP when negotiating the current

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Similarly, in College Compensation and Appointments Council and Ontario Public Service Employees' Union (Shime, October 2004), the arbitrator focused on the bargain originally reached by the parties, in particular the clause that read: "If the government, at any time in the future, reverts to an individually paid premium for health insurance, the . . . (employer) will resume pay (sic) 100 per cent of the billed premium for employees."

The arbitrator found that the OHP was not a "reversion" to the old OHIP premiums, but rather

something entirely different. He also found that at the time the bargain was made the parties could not have anticipated the OHP. As such, it could not reasonably be read into the collective agreement.

In Goodyear Canada Inc. Collingwood Plant and United Steelworkers of America, Local 834L (Tims, November 1, 2004), the collective agreement required the employer to pay the monthly premium so that the employee qualified for benefits provided by the OHIP. The arbitrator concluded that the OHP did not result in the employee qualifying for benefits under OHIP. Thus the employer was not required to pay the OHP.

Sherrard Kuzz LLP will continue to monitor this important issue, and advocate vigorously that the OHP ought not to be borne by

employers.

In the meantime, we encourage all employers to:

1) Review the health benefit premium language of your collective agreement to determine exposure, if any, to an increase in premium/tax payments.

2) Review all collective agreement language to identify redundant, inapplicable or vague provisions.

3) Renegotiate the removal or clarification of collective agreement language that is redundant, inapplicable or vague. This will go a long way to avoid the imposition of obligations which were either never intended by the parties or long ago expired.

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