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November 19, 2013

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The Ontario Ministry of Labour (MOL) has completed its review of the draft "REGDOC-2.2.1, Managing Worker Fatigue and Hours of Work", from the perspective of the ministry's mandate and areas of responsibility. Thank you for providing us with the opportunity to provide comments.

As you know, in the late 1990's, the federal Canada Labour Code (CLC) was amended to provide regulation-making authority to exclude from the application of the CLC employment on or in connection with works or undertakings identified in regulation whose activities are regulated under the federal *Nuclear Safety and Control Act* (NSCA).

The federal government then made regulations under the CLC to exclude employees of Ontario Hydro (or, effectively, a successor) at prescribed nuclear facilities from Parts I-III of the CLC and to generally replace those parts of the CLC with the application of Ontario's, *Occupational Health and Safety Act* (OHSA), *Employment Standards Act, 2000* (ESA) and *Labour Relations Act, 1995* (LRA) (collectively, "the CLC Exclusion Regulations").

Although certain employees at certain Ontario nuclear facilities are therefore exempt from parts of the CLC in accordance with the CLC Exclusion Regulations, we appreciate that the NSCA continues to apply in respect of those employees, including requirements pertaining to employment related matters.

We understand that the proposed regulatory document (with requirements and guidance about hours of work and managing fatigue) applies to all workers who work on safety-related systems or who perform safety-related tasks with the potential for an immediate and direct effect on safety at a licensed nuclear facility.

Occupational Health and Safety

From an occupational health and safety perspective, the implementation of the proposed requirements and guidance about hours of work would not appear to have any adverse effect on the Ontario Ministry of Labour's enforcement of the OHSA and its regulations in workplaces, including nuclear facilities in respect of which the OHSA applies.

There are regulations under the OHSA which currently prescribe restrictions relating to hours of work when workers are exposed to specific hazards. Examples include:

- the Mining and Mine Plants Regulation, section 9 (the hazards of working underground and operating a hoist)
- the Construction Projects Regulation, section 386 (the hazard of working in compressed air environments)

The OHSA and its regulations do not contain any provisions that explicitly restrict hours of work to manage fatigue. However, the OHSA does contain a general duty clause (s. 25(2)(h)) that requires the employer to take every precaution reasonable in the circumstances for the protection of a worker. It is conceivable that, if put into effect, the proposed regulatory requirements and guidance could be considered by OHSA inspectors when determining whether an employer has met this duty.

Employment Standards

The ESA contains detailed provisions relating to hours of work in Part VII of the Act that need to be carefully considered.

With respect to hours of work, it appears that the requirements in the draft regulatory document could meet or exceed most of the minimum standards under the ESA. However, it is important to note that the general daily and weekly limits on hours of work under the ESA[1] can only be extended by written agreement between the parties.

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[1] Under the ESA, the maximum number of hours most employees can be required to work **in a day** is *eight* hours *or* the number of hours in an established regular workday, if it is longer than eight hours. The only way the daily maximum can be exceeded is by *written agreement*.

The maximum number of hours most employees can be required to work **in a week** is *48* hours. The weekly maximum can be exceeded by *written* agreement and approval of the Director of Employment Standards. However, the ESA provides a limited exception where an application for approval is pending.

Further to the requirement for written agreements, excess weekly hours also require an approval from the Director of Employment Standards. Whether the elements of the draft regulatory document concerning limits on hours of work would be consistent with the ESA may depend on whether such written agreements or approvals exist. In addition, certain standards in the ESA may not be altered by written agreement.

As such, there may be certain situations where the requirements in the proposed regulatory document do not provide a benefit to employees that is equal or greater than the benefit provided by the standard in the ESA. For example, the draft regulatory document provides that, on "rare occasions", an employee's work shift may extend up to 16 hours. However, as a general matter, the ESA provides that an employee must receive at least 11 consecutive hours off work each day (which would correlate to a potential 13 hour shift). That requirement cannot be altered by written agreement. Consequently, unless there are "exceptional circumstances", as defined in the ESA, employees subject to the ESA (which would include employees of nuclear facilities covered under the CLC Exclusion Regulations) cannot normally work a16 hour shift. Notably, the definition of 'exceptional circumstances" in the ESA[2] is not the same as the examples given for "rare occasions"[3] in the draft regulatory document. As such, there may be situations where an employer could be in compliance with the draft regulatory document relating to limits on hours of work but nevertheless be non-compliant with the ESA.

With respect to enforcement of the ESA, the means by which that is achieved generally depends on whether the employees at issue are represented by a union and subject to a collective agreement or not. Employees at the relevant nuclear facilities who are represented by a union generally do not file claims with the Ontario Ministry of Labour for enforcement of their rights under the ESA. The ESA provides that employees covered under a collective agreement are required (with limited exceptions) to seek enforcement of the ESA through the grievance procedures set out in their collective

[2] **Exceptional circumstances**

19. An employer may require an employee to work more than the maximum number of hours permitted under section 17 or to work during a period that is required to be free from performing work under section 18 only as follows, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations:

1. To deal with an emergency.
2. If something unforeseen occurs, to ensure the continued delivery of essential public services, regardless of who delivers those services.
3. If something unforeseen occurs, to ensure that continuous processes or seasonal operations are not interrupted.
4. To carry out urgent repair work to the employer's plant or equipment. 2000, c. 41, s. 19.

[3] E.g. to fill an unplanned minimum staff complement vacancy or complete an unplanned essential task

agreement. If the employees are not unionized, the ESA is enforced, at first instance, by employment standards officers appointed under the Act. In either case, whether the requirements of the ESA have been complied with requires a case by case assessment.

Finally, you should also note that the ESA provides that where the provisions of another Act or employment contract that directly relate to the same subject matter as an employment standard [in the ESA], provide a greater right or benefit to an employee than that employment standard, the provision in the employment contract or other Act apply and the standard in the ESA does not. This could mean that if the proposed requirements in the draft regulatory document could be properly considered to be "provisions of another Act [i.e. the NSCA] or part of an employment contract" then, to the extent that they provide a greater right or benefit, those requirements could potentially be enforced under the ESA in respect of the employees to whom the CLC Exclusion Regulations apply.