

# LORMAN – THE EMPLOYMENT STANDARDS ACT

July 13, 2010

## LEAVES OF ABSENCE

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(The author would like to acknowledge the assistance of  
Neil Dzuba and Paula Campbell in the preparation of this paper.)

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Ontario's *Employment Standards Act, 2000* (the "*Act*" and/or the *ESA*) establishes numerous unpaid job-protected leaves of absence that employees may be entitled to take. The types of leaves enumerated in the legislation have changed over the years in accordance with changes to societal views and expectations. For example, family medical leave is a provision that was added to the *Act* in 2004; the introduction of this leave was not only a recognition of a progressively aging population, but also a recognition of the demands that are placed on families to assist in the care of fellow family members. More recently, the Government of Ontario has added organ donor leave to the *Act*, influenced in part by campaigns throughout the province to raise awareness of the need for organ donors. The *Act* currently provides for seven types of unpaid leaves of absence.

The purpose of the following discussion is to review the job-protected leaves of absence primarily found within section XIV of the *Act*. The leaves discussed in this paper are unpaid leaves. Although unpaid, the leaves do carry significant obligations on employers to reinstate employees when the leave ends, as well as to continue certain benefits for the duration of the leave. As many employers are aware, employees who exercise their rights to unpaid leaves can result in significant financial and operational burden for employers.

The first section provides a general overview of the structure of the *Act* related to the protected leaves and discusses some of the main characteristics of the protected leaves that are available to qualifying employees: what, if any, qualifying conditions; the duration of the leaves; and types of evidence required to substantiate the leave. The second section reviews the general provisions of the *Act* concerning leaves: an employer's reinstatement

obligations after the leave has ended; employer obligations related to continuing benefits during a leave; and accrual of length of service and seniority. It must be stressed that all employees are entitled to the protected leaves discussed herein, which includes full-time, part-time, permanent, probationary<sup>1</sup>, and contract employees. As well, there are certain principles of the *Act* that employers should be aware of as they have an impact on protected leaves.

## **OVERVIEW OF THE ESA JOB-PROTECTED LEAVES**

The following section reviews the job-protected leaves of absence under the *Act*, and discusses how an employee may qualify for the particular leave. While the focus will be on the most utilized leaves, the more recently-added leaves, including organ donor leave and reservist leave, will also be reviewed.

### **Pregnancy Leave (Section 46)**

Pregnancy leave under the *Act* provides for 17 weeks of unpaid leave. An employee must have been hired at least 13 weeks before the due date of the child in order to be eligible for the leave. However the employee does not need to be actively working during the 13 week qualification period.

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<sup>1</sup> Some leaves have qualifying conditions based on length of employment, for example pregnancy, parental and reservist leave which are discussed later.

The earliest that pregnancy leave can begin is 17 weeks before the child's due date, unless an employee has a live birth that takes place more than 17 weeks before the due date, in which case the leave will start on the date that the baby is born. Conversely, the latest that the pregnancy leave can start is the earlier of the due date or the birth date. It is up to the employee to decide when the pregnancy leave will begin; an employer cannot make the decision for the employee.

An employee whose pregnancy ends in a miscarriage or stillbirth more than 17 weeks before her due date is not entitled to take pregnancy leave. Where a pregnancy ends due to a miscarriage or stillbirth within the 17-week period before her due date, an employee is entitled to pregnancy leave. The latest date for commencing the leave is the date of the miscarriage or stillbirth and the leave ends on the date that is the later of 17 weeks after the leave began or six weeks after the stillbirth or miscarriage.

An employee is required to provide at least two weeks written notice both of her intent to take pregnancy leave and of the date the leave is to begin. An employee may change the start of her leave to an earlier or later date by providing her employer with two weeks written notice.<sup>2</sup> An employee who fails to give the required notice does not however lose her entitlement to take pregnancy leave.

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<sup>2</sup> In the case of an earlier date, an employee must give her employer new written notice at least two weeks before the new, earlier date. In the case of a later date, the notice must be provided to an employer at least two weeks before the date that was set out in the original notice.

An employer is entitled to request a medical certificate that indicates the due date of the child. There are situations, such as when complications with the pregnancy arise, where an employee will not be able to provide the requisite two weeks notice. If an employee stops work, she has two weeks from the stop date to provide written notice to the employer. If the employee stops work on account of complications arising from the pregnancy, she does not have to take pregnancy leave right away; the time away from work can be considered sick leave, if the employee is entitled to such leave.

Once an employee has started pregnancy leave, it must be taken all at once. Unlike some of the other leaves, it cannot be split into parcels of time that add up to 17 weeks. If an employee returns to work before the end of the 17 weeks, the employee loses her entitlement under the *Act* to the remaining portion of the leave. The employee decides whether she wants to take the entire length of the pregnancy leave. An employee who wishes to return to work earlier must provide the employer with four weeks written notice before the new earlier date.

An employee who decides to resign, either before the end of her pregnancy leave or at the end of the leave, must provide the employer with at least four weeks written notice of her resignation. However, the four-week notice requirement does not apply if the employer constructively dismisses the employee.

## **Parental Leave (Section 48)**

Similar to pregnancy leave, the criteria for qualifying for parental leave includes working for an employer for a period of 13 weeks prior to the leave. The employee does not have to actively work during the 13 weeks. Each parent is entitled to take parental leave for a period of up to 35 to 37 weeks. Birth mothers who take pregnancy leave are entitled to 35 weeks of leave; all other parents are entitled to 37 weeks of leave. Parental leave may be taken concurrently. For the birth mother, parental leave must begin immediately after the pregnancy leave period ends. For other parents, parental leave must begin no later than 52 weeks after the child is born or first comes into their custody, care and control.

The definition of “parent” is broad, and includes a birth parent, an adoptive parent (whether or not the adoption has been legally finalized), and an individual who is in a relationship of some permanence with the child and intends to treat the child as his or her own.<sup>3</sup> As with pregnancy leave, once it is started, parental leave must be taken all at once. The same notice requirements exist for parental leave as pregnancy leave with respect to advising of the intent to take leave, changing the start or end date of the leave or providing the employer with notice of resignation.

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<sup>3</sup> *Employment Standards Act, 2000*, S.O. 2000, c.41, s. 45.

### **Family Medical Leave (Section 49.1)**

All employees covered by the *Act* are entitled to family medical leave for up to eight weeks in order to provide care or support to specified family members who are terminally ill provided that:

- a qualified health practitioner issues a certificate<sup>4</sup>; and
- the certificate states that the family member has a serious medical condition with a significant risk of death occurring within a period of 26 weeks or such shorter period as may be prescribed.

Employers are entitled to ask for the certificate and the employee must provide as soon as possible after the request is made. An employee does not need to provide a certificate before the leave is taken. However, if the employee does not provide the certificate the employee is not entitled to the job protections that family medical leave affords.

Unlike pregnancy and parental leave, there is no requirement that an employee be employed for a specified period of time in order to be entitled to family medical leave.

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<sup>4</sup> A qualified medical practitioner is defined in the *Act* as a person who is qualified to practice medicine under the laws of the jurisdiction where the ill family member is being cared for or treated or in the prescribed circumstances, a prescribed class of health practitioners. To date there are no prescribed classes of health practitioners. In Ontario, only medical doctors can issue a certificate.

An employee seeking family medical leave must meet a number of conditions. In addition to the requirement for a certificate from a qualified health practitioner, there are specific guidelines concerning who is considered a specified family member. The specified family members for whom leave may be taken are found in section 49.1 (3) of the *Act* and in the Regulations (O. Reg. 476/06), and are as follows:

- the employee's spouse, including a same-sex spouse;
- a parent, step-parent or foster parent of the employee;
- a child, step-child, or foster child of the employee or the employee's spouse;
- a brother, sister, step-brother, or step-sister of the employee;
- a grandparent or step-grandparent of the employee or the employee's spouse;
- a grandchild or step-grandchild of the employee or the employee's spouse;
- the father-in-law, step-father-in-law, mother-in-law or step-mother-in law of the employee;
- a brother-in-law, step-brother-in-law, sister-in-law, step-sister-in-law of the employee;
- a son-in-law or daughter-in-law of the employee or employee's spouse
- an uncle or aunt of the employee or the employee's spouse;
- a nephew or niece of the employee or the employee's spouse;
- the spouse of the employee's grandchild, uncle, aunt, nephew, or niece;
- a foster parent of the employee's spouse.

In addition to the family members listed above, an employee may take leave for an individual who considers the employee to be like a family member. Upon request, the employee must provide the employer with a “Compassionate Care Benefits Attestation” form.<sup>5</sup> The form must be signed by the gravely ill person or representative confirming the employee is like a family member.

Family medical leave “attaches” to a family member, so if an employee has more than one family member who qualifies under the *Act*, the employee will have a separate eight week entitlement to leave for each family member.

Unlike some of the other leaves, the eight weeks of family medical leave does not have to be taken in consecutive weeks. Employees are entitled to take a week off at a time (or more than one week at a time). If the employee takes any number of days off that amount to less than seven days, it will still be counted as an entire week. For the purpose of family medical leave, a week is defined as seven consecutive days beginning on a Sunday, and ending on the subsequent Saturday.

An employee must take the leave within the 26 weeks as stipulated in the medical certificate. The last day of the family medical leave is either the day the family members dies, the last day of the 26 week period, or the last day of the eight-week entitlement. If the family member does not die within the 26 weeks as provided in the medical certificate, an

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<sup>5</sup> This form is available from Human Resources and Skills Development Canada  
<http://www.servicecanada.gc.ca/cgi-bin/search/eforms/index.cgi?app=prfl&frm=ins5223&ln=eng>

employee can obtain another medical certificate and be entitled to another eight weeks of leave.

If family medical leave is taken under the *Act*, the eight weeks of leave must be shared by all employees in Ontario who take a similar leave under the *Act*, and are providing care for the same family member. For example, if an employee takes three weeks to care for a family member, his or her spouse will only be entitled to take the remaining five weeks of the eight weeks of permitted leave. Spouses can take leave at the same time, but they do not have to. This provision applies whether individuals requesting the leave work for the same or different employers in Ontario.

Unlike the pregnancy and parental leave provisions, the *Act* does not contain a working notice requirement other than requiring an employee to notify the employer in writing that he or she will be taking a family medical leave. Where an employee must begin leave before advising the employer, he or she must inform the employer in writing as soon as possible after starting the leave. However, an employee who does not give notice does not lose his or her right to a family medical leave.

Family medical leave is in addition to any entitlement an employee may have to personal emergency leave discussed below.

### **Organ Donor Leave (Section 49.2)**

Organ donor leave is a relatively new provision; it was introduced to the *Act* on June 26, 2009 and provides up to 13 weeks of unpaid job-protected leave to an employee for the purpose of undergoing surgery to donate all or parts of the following organs:

- kidney;
- liver;
- lung;
- pancreas; and
- small bowel.

To qualify for the leave, an employee must have been employed with the employer for a period of at least 13 weeks. Similar to the pregnancy and parental leave qualifying period, an employee does not have to be actively employed during the 13-week period.

An employee is to provide at least two weeks written notice of his/her desire to take organ donor leave, if possible. If the notice is not possible, the employee must provide written notice as soon as possible upon the commencement of the leave. Even if notice is not provided before the leave, the employee will be entitled to the leave provided he/she meets the conditions discussed above. Employers are entitled to request that employees who take organ donor leave provide a medical certificate. Where an employer requests a medical certificate, the employee is required to provide one to the employer as soon as possible.

Organ donor leave begins on the date of the surgery, although it may start on an earlier date if a certified medical practitioner provides a medical certificate indicating an earlier date.

Once the 13 week period has been completed, the employee may also be entitled to take up to an additional 13 weeks off for medical reasons. Therefore, an employee has the potential to obtain a total of 26 weeks of organ donor leave. To qualify for the extended leave, an employee must provide a certificate from a qualified medical practitioner indicating:

- the employee is unable to perform the duties of his/her position on account of the organ donation; and
- the employee will not be able to work for a specific period of time.

The organ donor leave entitlement is in addition to the entitlement to personal emergency leave.

### **Personal Emergency Leave (Section 50)**

Personal emergency leave was introduced into the *Act* to provide employees with up to 10 unpaid, job-protected leave days for personal emergencies during the course of a calendar year. This leave applies to workplaces that *regularly* employ 50 or more employees. According to the Ministry of Labour this requirement will be met, for example, if the employer employed at least 50 employees for at least half of the time in the previous

calendar year, subject to changes of some permanence in the number of employees in the current calendar year.<sup>6</sup>

When determining 50 or more employees, all of the employees of the employer are to be counted (including full-time, part-time, casual, employees who are laid off). Where a single employer has more than one location in Ontario, all of its employees are included in the count.

An employee is entitled to take personal emergency leave for a personal illness, injury or medical emergency, or for a death, illness, injury, medical emergency, or urgent matter for:

- a spouse (which includes a same-sex spouse);
- a parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse;
- the spouse of the employee's child (which includes a same-sex spouse);
- a brother or a sister of an employee;
- any relative<sup>7</sup> of the employee who is dependent<sup>8</sup> on the employee for care or assistance.

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<sup>6</sup> *Employment Standards Act Policy and Interpretation Manual* (Toronto: Carswell, 2009) at 18.7.1 II. iii

<sup>7</sup> "Relative" is not defined in the Act. It is Ministry of Labour policy that to be a relative of an employee, the individual should be related through blood, marriage, adoption or common law relationships between people of the same or opposite sex who are not married. [*Employment Standards Act Policy and Interpretation Manual* (Toronto: Carswell, 2009) at 18.7.1 II. iii]

<sup>8</sup> Likewise the Act does not define "dependent". It is Ministry of Labour policy that a relative is considered "dependent" if the relative relies on the employee for some degree of care or assistance in meeting their daily

There is no requirement that an employee be employed for a specific period of time in order to be eligible for personal emergency leave.

The intent of this provision is to provide leave for employees where an urgent matter arises. The provision is not intended for employees who simply want a day off of work. Certain professional employees and regulated health professionals are not permitted to take personal emergency leave if taking the leave would constitute an act of professional misconduct or a dereliction of professional duty.<sup>9</sup>

While the *ESA* and its Regulations do not define urgent matters, the Ministry of Labour has stated that an “urgent matter” is one that is unplanned or out of the employee’s control, and involves the possibility of serious negative consequences, including emotional harm, if it is not responded to. The Ministry of Labour has provided the following as examples of urgent matters:

- an employee’s babysitter calls in sick;
- the house of the employee’s elderly parents is broken into, and the parent is very upset and needs the employee’s help to deal with the situation; and

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needs. As well, the reason for emergency leave does not have to be connected with the type of dependence between the relative and the employee. [*Employment Standards Act Policy and Interpretation Manual* (Toronto: Carswell, 2009) at 18.7.1 II. iii]

<sup>9</sup> O. Reg. 285/01, s. 3 Special Rule re Emergency Leave.

- the employee has an appointment to meet with his or her child’s counsellor to discuss behavioural problems at school, and the appointment could not be scheduled outside the employee’s working hours.<sup>10</sup>

The test is an objective one – would a reasonable employee in the employee’s circumstances feel that the matter is an urgent one? Recently, the Ontario Labour Relations Board found that an employee was entitled to emergency leave when she was terminated for leaving her shift after advising her employer that she would have to leave work before the end of her shift as she did not have child care.<sup>11</sup>

Employees are required to advise their employers that they will be taking an emergency leave either before they commence their leave, or if unable to do so, as soon as possible after beginning the leave. The *Act* allows employers to deem a partial day absence as a full day of personal emergency leave. Furthermore, employers may ask employees to provide evidence that is “reasonable in the circumstances” to establish their entitlement to emergency leave. What is “reasonable in the circumstances” will depend on all of the circumstances of a particular situation, however the following factors may be considered:

- the duration of the leave;
- whether there is a pattern of absences or a record of absenteeism;
- whether any evidence is available;

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<sup>10</sup> *Employment Standards Act Policy and Interpretation Manual* (Toronto: Carswell, 2009) at 18.7.1 II. ii.

<sup>11</sup> *JB's Mongolian Grill v. Schram*, 2007 CanLII 8452.

- how difficult it would be for the employee to obtain the evidence;
- the cost of the evidence;
- whether there is a reasonable workplace policy in place regarding circumstances under which employees have to provide proof of the reason for their absence.

The type of evidence required will ultimately depend on the reason why the leave was taken: the evidence required to substantiate a personal illness will be different from the evidence required to substantiate an urgent non-medical matter.

### **Emergency Leave, Declared Emergencies (Section 50.1)**

Employees may be entitled to an unpaid leave when an emergency is declared by the Government of Ontario under the *Emergency Management and Civil Protection Act* (“*EMCPA*”). An employee is entitled to the leave if the employee will not be performing his or her duties because of the emergency, and one of the following occurs:

- an order has been issued that applies to the employee under the *Emergency Management and Civil Protection Act*<sup>12</sup> or the *Health Protection and Promotion Act* (“*HPPA*”)<sup>13</sup>;

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<sup>12</sup> The *EMCPA* allows the Lieutenant Governor in Council or the Premier to declare an emergency if a situation exists that requires immediate action to prevent, reduce or mitigate a danger of major proportions that could result in serious harm to persons or substantial damage to property provided certain criteria are met. Orders can be made in a variety of areas including for example: regulating or prohibiting travel within a specified area, evacuating individuals, closing any place, whether public or private including any business, office.

- the employee is required to provide care or assistance to the following specified individuals:
  - employee’s spouse;
  - a parent, including step or foster parent, of the employee or employee’s spouse;
  - a child, including step or foster child, of the employee or employee’s spouse;
  - a grandparent or grandchild, including step-grandparent or step-grandchild, of the employee or employee’s spouse;
  - the spouse of a child (which includes a same-sex spouse) of the employee;
  - the employee’s brother or sister;
  - a relative of the employee who is dependent on the employee for care or assistance.
- other reasons that may be prescribed.

The emergency must arise as a result of danger caused by a natural disaster, an accident, acts of terrorism, disease or other risks to health (as defined under the *EMCPA*).

To take the leave, an employee is required to advise the employer that he or she is taking the leave on account of a declared emergency. An employer can “request evidence reasonable in the circumstances at a time that is reasonable in the circumstances” that the

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<sup>13</sup> The *HPPA* provides broad powers to a medical officer of health to order individuals to take or refrain any action specified, for example closure of premises or quarantining individuals due to communicable disease outbreak.

employee is entitled to the leave. The leave lasts for the duration of the declared emergency and is in addition to personal emergency leave. A declared emergency lasts 14 days following its declaration, unless the declared emergency is terminated earlier or extended.<sup>14</sup> Unlike personal emergency leave there is no requirement that the employer regularly employ 50 or more employees.

### **Reservist Leave (Section 50.2)**

Reservist leave was added to the *Act* in December 2007, when the *ESA* was amended by the *Fairness for Military Families Act (Employment Standards and Health Insurance), 2007*. To be eligible for this leave, employees must have been working with their current employer for at least six consecutive months. Similar to the other leaves with a service qualifying condition, it is not necessary that an employee be actively working for this six-month period. The employee is required to provide reasonable notice in writing of the date upon which the leave will commence and end. If the employee is unable to provide advance notice to the employer, notice can be provided as soon as possible after beginning the leave.

Reservist leave allows reservists who are deployed internationally, or domestically to assist in dealing with an emergency<sup>15</sup> or its aftermath, to take unpaid leave under the *Act* for the

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<sup>14</sup> *Emergency Management and Civil Protection Act* R.S.O. 1990, c. E.9, s. 7.0.7.

<sup>15</sup> “Emergency” is defined to mean a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused

period of time required to complete their duties as required by the operation. For operations outside of Canada, the employee is also entitled to leave for the pre and post-deployment obligations that arise out of the operation. An employee may be required to provide proof of entitlement to reservist leave if requested by the employer.

### **Assessing a Greater Right or Benefit**

The standards, including the leaves of absence, found in the *Act* are minimum standards from which employers and employees cannot contract out of. While an employer is entitled to provide only the minimum standards set out in the *Act* (or greater benefits than those established in the statute), it cannot provide a benefit that is lower than the standard found in the *Act*. Section 5 (2) of the *Act* states the following:

*If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.*

Essentially, this means that where an employer provides an employee with a benefit that is greater than what is found in the *Act*, the greater right or benefit prevails. Greater rights or benefits may be found in contracts of employment, employment policies, or collective agreements.

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by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise or a situation in which a search and rescue operation takes place.

To determine a greater right or benefit, one must determine whether contracted standards are reasonably comparable to the standards found in the *Act* (i.e. comparing “apples to apples”). The approach to determine a greater right or benefit involves taking into account all of the provisions in a contract that relate to a specific employment standard found in the *Act*. If the right or benefit provided in the contract is determined to be a higher standard than the legislated entitlement, it prevails.

When taking into account the specific condition of employment related to the specific legislated benefit, not every condition of employment in the package needs to be superior to the legislated minimum. In fact, some of the provisions of the benefit may fall below legislated standards. Therefore if, on the whole, the condition of employment related to the specific standard in the *Act* provides a greater right or benefit, it prevails. However, the greater right or benefit cannot be used as a justification to provide an employee with a lesser statutory entitlement under a different employment standard. For example, a greater entitlement to days off for public holidays cannot be used to justify a lower standard for, as an example, emergency leave under the *Act*. One Labour Standards Referee has stated:

*The use of the words “an employment standard” conveys the meaning that for an employer's terms or conditions of employment to prevail, they must confer a greater benefit in respect to a particular employment standard and would only prevail in respect to that standard. In other words, the employer could not rely on a greater benefit in respect to one standard to offset a lesser benefit in respect to another standard.*<sup>16</sup>

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<sup>16</sup> *C. Fasano Food Market* (1976), CarswellOnt 743 (para. 12).

Determining whether an employment contract or collective agreement provides a greater right or benefit than the personal emergency leave provisions is more complicated than in the case of other leaves given the numerous circumstances for which personal emergency leave may be utilized (illness, injury, medical emergency, urgent matter). The Ministry of Labour has developed the following criteria to assist in determining whether an employment contract, policy or collective agreement provides for a greater right or benefit than personal emergency leave under the *Act*:

- Qualifying Events – Does the contract cover all the different types of events that would entitle an employee to personal emergency leave?
- Number of Days of Leave
- Paid or Unpaid
- Reinstatement Right
- Negative Consequences – Is the employee adversely affected because leave was taken (i.e. demotion, loss of seniority, denial of bonus, pay increase, etc)?
- Eligible Relationships – How does the contract compare with the *Act* in terms of scope of coverage? Does it cover a narrower range of relationships?
- Other Minor Criteria – evidence required to support the leave, whether employer can deduct a part day of leave from the employee’s entitlement as if it were a whole day<sup>17</sup>

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<sup>17</sup> *Employment Standards Act Policy and Interpretation Manual* (Toronto: Carswell, 2009) at 18.1.6

Where there is a greater right or benefit than what is found in the *Act*, there is the potential for a benefit “draw down”. The drawn down practice is most commonly applied to personal emergency leave entitlement under the *Act*. In one example<sup>18</sup>, an arbitrator considered the effect of a greater right or benefit in a collective agreement compared to the *Act*. The collective agreement provided for paid bereavement days, whereas under s. 50 of the *Act*, an employee in certain circumstances is entitled to 10 unpaid emergency days (including leave on account of the death of certain relatives). The employer allowed the employees to take the paid bereavement days, and deducted the corresponding number of days from the entitlement under the *Act*’s emergency leave days.

In allowing the employer to deduct from the *Act*’s emergency leave days, the arbitrator first noted that the bereavement days in the collective agreement and the purpose behind the emergency leave days in the *Act* were similar. The collective agreement provided a greater right or benefit than the *Act* with respect to the bereavement leave (paid days off versus non-paid days off). As such, the employer was entitled to determine that the bereavement leave days taken under the collective agreement also counted towards the *Act*’s emergency leave days. Provided the contracted benefit is directly comparable to and provides a greater benefit than the *ESA* standard, the draw down practice is acceptable.

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<sup>18</sup> *Sobeys Inc. v. C.A.W., Local 1090 (McNair Grievance)*, [2008] O.L.A.A. No. 48 (Reilly).

## GENERAL PROVISIONS AND RIGHTS DURING LEAVE

### **Benefit Continuation** (Section 51)

If an employee participates in benefits plans, the employee will have the right to continue to participate in the following benefit plans enumerated in the *Act* during the length of a protected leave unless he or she elects in writing not to do so:

- pension plans;
- life insurance plans;
- accidental death plans;
- extended health plans;
- dental plans; and
- any prescribed type of benefit plan

An employer is only obligated to provide the above-noted benefits if it does so already. An employer is obligated to continue to pay its contributions for any of the benefit plans noted above unless the employee specifically states in writing that the employee will not be paying his or her contributions, if any. However, an employer is not required to pay its share of certain benefits premiums for employees who take reservist leave, unless the employer has postponed the return to work, in which case the employer must pay the premiums for the period of the postponed return. Employees on leave may also continue to participate in other benefit plans not specifically enumerated in the *Act* if employees who

are on non-ESA types of leave are able to continue to participate in those plans<sup>19</sup>, for example short-term and long-term disability benefits. It should be noted however that denial of access to disability benefits to an employee who is on a pregnancy or parental leave has been found to be discriminatory under human rights legislation.<sup>20</sup>

### **Leave and Vacation Conflict (Section 51.1)**

Vacation pay and vacation time continue to accrue while an employee is on an unpaid leave of absence. The *Act* allows an employee to defer taking accrued vacation time until after the leave expires or at a later date where the employer and employee agree in writing. This provision of the Act addresses the restrictions on when vacation can be taken under the ESA<sup>21</sup> as well as employment contracts, policies or collective agreement provisions that may restrict an employee from deferring to take vacation that would otherwise be forfeited. The *Act* also allows employees to forego taking vacation time and receive only vacation pay.<sup>22</sup>

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<sup>19</sup> O. Reg. 286/01, s. 10.

<sup>20</sup> *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

<sup>21</sup> *Employment Standards Act*, 2000, S.O. 2000, c.41, s. 35 and 35.1. S. 35 requires employees to take their ESA vacation no later than 10 months following the vacation entitlement year.

<sup>22</sup> Vacation pay under the *Act* is expressed as a percentage of earnings (4%). An employee who does not have any earnings while on leave would not have any vacation pay entitlement. The same may apply where a greater right or benefit contained in an employment contract, policy or collective agreement expresses vacation as a percentage of earnings. However, this determination is dependent on the wording of the provision in question.

### **Length of Employment – Service and Seniority Accrual (Section 52)**

Length of employment, length of service and seniority continue to accrue during the period of all of the leaves discussed herein. Therefore, any benefits that are dependent upon length of employment, service or seniority are not impacted by an employee taking a protected leave. However, the period of the leave does not count toward the completion of an employee's probationary period.

### **Reinstatement Obligations (Section 53)**

An employee who has completed any of the leaves of absence discussed above has the right to be reinstated to the position he or she most recently held prior to taking the leave, should the position still exist. If the position no longer exists, the employee has the right to be placed in a comparable position. Reinstatement is to occur immediately after the conclusion of the leave. However with respect to reservist leave, an employer is entitled to postpone the employee's reinstatement until a prescribed day or if no date is prescribed for two weeks after the day on which the leave ends or the first pay day after the day on which the leave ends, whichever is later.

An employer may not offer a comparable position to an employee unless the pre-leave position no longer exists. There are several factors to consider when determining a comparable position. The obligation of an employer to place an employee in a comparable position involves more than offering a position with a similar rate of pay and benefits.

Specifically, the employee is entitled to a position that is substantive and qualitatively the same as the one held prior to the leave. Some of the considerations to determine a comparable position include:

- location of the job;
- hours of work (including time of day, length of the working day, shift or weekend work);
- degree of responsibility (including degree of independence and supervision);
- job security and possibilities for advancement;
- quality of the working environment; and
- prestige and perquisites.<sup>23</sup>

The importance of each factor listed above will vary depending on the position, and no one factor will necessarily be weighed more than the others. While the new position may not seem as attractive, if all of the factors above are comparable in their totality, the position will be deemed to be comparable. The test is based on what a reasonable employee in the same circumstances would consider comparable.

When an employee returns to work from a leave, the *Act* requires that the employee be paid his or her most recent wage rate or the rate that would have been earned had the employee worked throughout the leave. For example, if all other employees received a cost-of-living increase, the employee returning from leave is also entitled to the increase. Similarly, if an

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<sup>23</sup> *American Can Canada*, 1983 CarswellOnt 890, E.S.C. 1464.

employee would have progressed on a wage/pay grid because of length of service while on leave, the employee is to be placed at the requisite step on the grid upon returning from leave.

### **Exception to the Reinstatement Obligation**

While there are significant obligations placed upon an employer, the *Act* does not create an absolute right of reinstatement and specifically notes that an employer is not required to reinstate an employee if the reason for the termination is completely unrelated to the employee taking the leave. In determining whether the termination is legitimate – unrelated to the leave – the test is would the employee’s employment have been terminated if he/she had been at work? For example, if the employer goes through a *bona fide* downsizing of its organization, there would be no obligation to reinstate if the employee would have lost his or her job regardless of whether or not he or she had taken a leave. In *Commercial Spring and Tool Company Ltd. v. Parwinder K. Kalsi*<sup>24</sup>, the Ontario Labour Relations Board looked at a situation whereby an employee alleged that she was terminated on account of a pregnancy. The employer restructured its operations, and argued that 80-85% of the employee’s duties no longer existed. In ruling that the employee was not terminated because of being pregnant, or for the entitlement to take pregnancy leave, the Board focused on the fact that after taking away the employee’s main duties, there were only a few menial tasks left in her position. Prior to the leave, the employee spent 7.5 hours a day working on compliance certificates, which were no longer being issued as it was too costly

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<sup>24</sup> (2004) CanLII 49772 (OLRB).

for the employer. Based on this decision, an employer will have to demonstrate that the position essentially no longer exists to justify not hiring an employee who sought to return from leave. In addition, the employer will also have to demonstrate pressing and substantial factors forced the employer to restructure its workplace, which resulted in the elimination of positions and/or jobs.

The burden placed upon an employer is high especially where an employee is terminated within a short time after returning from leave. Such a termination will be subject to intense scrutiny, particularly in respect to a pregnancy or parental leave. The closer the termination is to reinstatement the more likely an employment standards officer would consider it a “sham reinstatement”.

Employees do bear the initial burden of proof in reinstatement cases. However, it is fairly easy for employees to meet this onus. An employee must establish that a leave of absence was taken and that he or she was not reinstated. Once an employee meets this burden of proof, the onus will shift to the employer. It is up to the employer to prove that the employee’s termination/non-reinstatement following the leave was unrelated to the leave.

In cases where an employer allows an employee to take extra time off after the expiry of a protected leave, the employee may not be able take advantage of the reinstatement obligations under the *Act*. For example, an employer may allow an employee to take parental leave for a period beyond the time period prescribed in the *Act*; the “extra time”

then becomes a non-statutory leave. While reinstatement obligations would arise up to the point where the statutory leave ends, it may not apply when the non-statutory benefit ends.

Employment standards officers have significant remedial powers in the event they find there is a breach of the reinstatement obligation, including compensation for any losses and/or reinstatement. For example, in *Delores James v. Craiglee Nursing Home*<sup>25</sup> the Ontario Labour Relations Board upheld the ruling of an employment standards officer to reinstate an employee who was not reinstated after taking pregnancy and parental leave. Few reasons were provided for the non-reinstatement, and there had been no complaints about the employee's work performance. In addition to the reinstatement, the employer was ordered to compensate the employee for all lost wages.

### **Reprisal Under the ESA**

An employer is not allowed to penalize an employee for exercising a right under the *Act*. Specifically, under section 74 of the *ESA*, an employer, or someone acting for an employer, cannot "... intimidate, dismiss or otherwise penalize an employee or threaten to do so ..." for taking various actions related to the rights under the *Act*. The reprisal provisions include action, or threatened action, against an employee who is or will become eligible to take a leave, or who intends or takes a leave under Part XIV of the *Act*. If there is an alleged reprisal, the employer bears the onus to prove that there was no reprisal. Employment standards officers have the authority to order reinstatement and/or compensation that can be

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<sup>25</sup> (2004) CanLII 30948 (OLRB).

significant when it is determined that an employer retaliated against an employee for exercising a right under the *Act*.

### **Record Keeping**

An employer is required to retain, or arrange for another person to retain, all notices, certificates, correspondence and other documents related to an employee taking any of the leaves of absence discussed above for a period of three years after the end of leave.<sup>26</sup> An employer must also ensure that these records are readily available for inspection as required by an employment standards officer.<sup>27</sup> For example, in the case of an employee who has taken parental leave, an employer's record may contain any of the following documents:

- written notice to take parental leave
- written notice to change parental leave start date
- written notice provided after commencing parental leave
- written notice to end parental leave early
- written notice to change parental leave end date
- written notice to resign from employment on or before end of parental leave<sup>28</sup>

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<sup>26</sup> *Employment Standards Act, 2000*, S.O. 2000, c.41, 15 (7).

<sup>27</sup> *Employment Standards Act, 2000*, S.O. 2000, c.41, s. 16.

<sup>28</sup> *Employment Standards Act Policy and Interpretation Manual* (Toronto: Carswell, 2009) at 10.3.7.

## **Conclusion**

Ontario's *Employment Standards Act* provides various job-protected leaves for employees that create significant obligations for employers. If an employee qualifies, he or she is entitled to take an unpaid leave and to be placed in his or her position, or a comparable position, upon return to the workplace. Employers need to be aware of the conditions to qualify for each of the leaves, in addition to the reinstatement and benefits continuance obligations imposed by the *ESA*. Finally, violations of the *Act* could result in compensation owed to employees and, in certain cases, an order to reinstate an employee.