

Lorman – The Employment Standards Act

Leaves of Absence

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Managing Leaves of Absence Your Interests

- Maintaining 'production' – getting the work done
- Minimizing disruption of absence
- Minimizing costs of absence
- Controlling unauthorized absenteeism
- Maintaining healthy, happy employees
- Complying with legal obligations

Overview

- ESA leaves of absence
- Non-statutory leaves
- Frequently asked questions concerning leaves
- Best practices

ESA Leaves of Absence

- 7 categories
- Newest added in 2009
- Unpaid
- Job-protected
- All employees covered by the *Act* are entitled to leave

ESA Leaves of Absence

- Pregnancy
- Parental
- Family Medical
- Organ Donor
- Personal Emergency
- Declared Emergency
- Reservist

ESA Leaves – Key Elements

- Purpose
- Eligibility/qualifying conditions
- Duration
- Notice requirements
- Evidence of entitlement – documentation
- General provisions

Pregnancy Leave

- Eligibility/qualifying conditions
 - Employed 13 weeks before due date
 - Active employment not necessary
- Duration
 - 17 weeks
 - Must be taken all at once

Pregnancy Leave

- When leave begins
 - Earliest – 17 weeks before due date
 - Latest – day gives birth
- Notice to employer
 - 2 weeks before leave is to begin
 - Entitlement not lost if employee fails to give notice
 - Complications

Pregnancy Leave

- Documentation
 - Medical certificate, if requested

Parental Leave

- Eligibility/qualifying conditions
 - Same as pregnancy leave
- Duration
 - 35 weeks birth mother
 - 37 weeks other parent
 - Must be taken all at once
 - Both parents are eligible for parental leave

Parental Leave

- When leave begins
 - Birth mother – immediately after pregnancy leave
 - Parent – within 52 weeks after the child is born or comes into employee's custody, care and control
- Notice to employer
 - 2 weeks before leave is to begin
 - Entitlement not lost if employee fails to give notice

Pregnancy/Parental Leave

- 4-week notice requirement for
 - Ending leave early
 - Changing end date
 - Employee not returning
 - Exception – constructive dismissal

Family Medical Leave

- Eligibility/qualifying conditions
 - None, all employees covered by *Act*
- Purpose
 - Family member with “serious medical condition with significant risk of death occurring within a period of 26 weeks”
- Duration
 - 8 weeks, additional 8 weeks possible
 - Can be taken in 1 week blocks

Family Medical Leave

- Specified “family members”
 - “employee like a family member”
- Shared when caring for same family member
- Notice to employer
 - No specific working notice requirement
 - In writing before taking leave or if not possible ASAP after
- Entitlement is in addition to personal emergency leave

Family Medical Leave

- Documentation
 - Copy of certificate from qualified health practitioner (in Ontario, a doctor)
 - Compassionate Care Benefits Attestation Form
 - “employee like a family member”

Organ Donor Leave

- Eligibility/qualifying conditions
 - Employed for 13 weeks
- Purpose
 - Surgery to donate kidney, liver, lung, pancreas, small bowel
- Duration
 - 13 weeks
 - Extension possible, up to additional 13 weeks

Organ Donor Leave

- Notice to employer
 - In writing
 - 2 weeks before leave where possible
 - 2 weeks to end leave early or to extend leave
- When leave begins
 - Day of surgery or earlier if required
- Documentation
 - Medical certificate for initial leave and extended leave
- Entitlement is in addition to personal emergency leave

Personal Emergency Leave

- Eligibility/qualifying conditions
 - Employer regularly employs 50 or more employees in Ontario
- Purpose
 - Death, injury, illness, medical emergency or “urgent matter”
 - Specified individuals
 - Objective not subjective urgency
- Duration
 - 10 days per calendar year – no carryover, not prorated
 - May deem part days as entire days

Personal Emergency Leave

- Notice to employer
 - No specific working notice requirement
 - Before taking leave or if not possible ASAP after
 - Need not be in writing, oral notice is sufficient

Personal Emergency Leave

- Documentation
 - Employer can require “evidence reasonable in the circumstances”
- Depends on circumstances and reasons for leave
 - Duration
 - Pattern of absences/record of absenteeism
 - Available evidence and cost
 - Prior requests for leave on same date as “emergency” leave taken
 - Workplace policy

Declared Emergency Leave

- Eligibility/qualifying conditions
 - None, all employees covered by *Act*
- Purpose
 - Employee not performing duties due to declared emergency under *EMCPA* and
 - Order under that *Act*
 - Order under *Health Protection and Promotion Act*
 - Needed to provide care or assistance to specified individuals

Declared Emergency Leave

- Duration
 - Until emergency is terminated
- Notice to employer
 - No specific working notice requirement
 - Before taking leave or if not possible ASAP after
 - Need not be in writing, oral notice is sufficient

Declared Emergency Leave

- Documentation
 - Employer can require reasonable evidence at a reasonable time
- Entitlement is in addition to personal emergency leave

Reservist Leave

- Eligibility/qualifying conditions
 - 6 consecutive months of service
 - Active employment not necessary
- Purpose
 - Reservists deployed internationally or within Canada to assist in emergency and its aftermath
 - Includes pre and post-deployment obligations

Reservist Leave

- Duration
 - Time required to complete duties
- Notice to employer
 - Reasonable written notice before leave or ASAP after
- Documentation
 - Employer can require evidence of entitlement

Questions and Answers – Leave Entitlements

Can I ask for medical information?

- Contractual/collective agreement provisions
- Scope of medical information
 - Human rights considerations
 - Prognosis, not diagnosis
 - No treatment plan specifics
 - Information necessary in the circumstances
- Privacy concerns

What can I do if my employee fails to show up at work ?

- Investigate
 - Culpable/non-culpable absenteeism
 - Nature of leave (statutory/contractual/discretionary)
 - Legal obligations of employer/employee
 - Reason for failure to report absence/request leave

What if my employee takes an ESA leave without giving notice?

- “Reasonableness” of failure
- Failure to give notice does not end entitlement to leave
 - *Scott v. Roos Family Shoes*, 1985 CarswellOnt 883 (Ont. Div. Ct.)
 - Possible discipline for failure to provide notice, not for exercising right to leave
- No deemed termination
- Reprisal
- Consistency

Can I communicate with my employees while they are on leave?

- No general prohibition, BUT
 - Confidential information
 - Compliance with any medical restrictions
 - Employee vs. doctor
 - Harassment claims
- Employee's duty to participate in accommodation

Can I force my employee to take a leave?

- Pregnancy leaves
 - ESA: Cannot compel employee to take pregnancy leave
- Non-disciplinary suspension (administrative leave)
 - Explore accommodation
 - Employee's duty to participate
 - Attendance management?

What benefits do I have to provide to my employees while they are on leave?

- ESA leaves
 - Pension
 - Life and accidental death
 - Extended health
 - Dental
 - Other benefits provided to employees on other leaves (i.e. STD/LTD)
- Non-ESA
 - Governing Documents
 - Employment contract, policy, collective agreement
 - Insured benefits plan

Do I have to recognize the time off on leave?

- Length of employment, service and seniority accrue
- Benefits not impacted
- Exception – completion of probationary period

Is an employee entitled to take all accrued vacation upon returning from leave?

- Vacation pay and vacation time accrues
- Employee can defer vacation until leave ends
- Employee can forego time and receive pay
- Vacation pay expressed as a percentage of earnings – may be no entitlement to vacation pay
 - Greater right or benefit
 - Dependent on wording in employment contract, policy or collective agreement

Can I terminate my employee before the start of leave? During the leave? After?

- ESA leaves: For legitimate reasons unrelated to leave
- Lengthy LTD
- Persistent intermittent absenteeism
- Human rights considerations

I restructured my business while my employee was on leave. Do I have to reinstate her?

- Statutory duty to reinstate to same position, if it exists
 - IF NOT, to comparable position
- Factors for assessing comparable position:
 - Location of job
 - Hours of work
 - Quality of working environment
 - Degree of responsibility
 - Job security/possibility for advancement
 - Prestige and perks

I restructured my business while my employee was on leave. Do I have to reinstate her?

- Test: Would the employee's employment have been terminated if he/she had been at work?

- If no or a comparable position exists, duty to reinstate

When do I have to reinstate an employee returning from an ESA leave?

- Immediately after leave ends
- 1 exception – reservist leave
 - Can postpone reinstatement to later of 2 weeks or 1st pay period after leave ends

**My employee has asked for sick leave after giving birth.
Is she entitled to it? Can I ask for medical information?**

- “Six Week Rule”
- Discriminatory to deny before or after leave

**If I give my employees their ESA leaves, have
I done enough?**

- Individual contracts of employment
- Terms of collective agreement
- Policy
- STD/LTD plan
- Discretionary leaves
- Human rights legislation

If I give my employees their ESA leaves, have I done enough?

- Other Statutory Leaves
 - *Workplace Safety and Insurance Act, 1997*
 - *Canada Elections Act/Ontario Elections Act*
 - Time off to vote
 - *Ontario Juries Act*
 - Time off for jury duty

How can I facilitate a smooth and effective return to work for my employee?

- Communication plan
- Employee participation in the return to work
- Involvement of employee's doctor and other professionals where applicable
- Return to work policy or plan

What happens if I don't grant a statutory leave? If I terminate an employee where I shouldn't have?

- Reprisals
- Offences/penalties
- Reinstatement
- Notice of contravention
- Compliance order
- Compensation/damages
 - Loss of earnings; loss of employment; pain and suffering; severance pay; benefit entitlements; expenses in seeking new employment; all reasonable foreseeable damages

If I provide a greater leave entitlement do I also have to provide the ESA leave?

- Cannot contract out of the *Act*
- Greater right or benefit prevails
- Criteria used to determine greater right or benefit
- "Drawing down" ESA leave
 - i.e. personal emergency leave

How do I determine if we offer a greater right or benefit?

- Compare “apples to apples”
- Criteria to consider (personal emergency leave):
 - Qualifying events
 - Number of days of leave
 - Paid or unpaid
 - Reinstatement right
 - Negative consequences
 - Eligible relationships
 - Other minor criteria

Do I have to retain any records regarding ESA leaves taken by my employees? If so, for how long?

- Employer or “some other person” required to retain:
 - Notices
 - Certificates
 - Correspondence
 - Other documents related to an employee’s leave
- 3 years after the end of the leave
- Ensure readily available for inspection
- Best practice to retain documents for all types of leaves

Best Practices

- Know and understand your legal obligations and rights
 - Statutory
 - Documents governing employment relationship
- Know when to ask for help
 - Novel issue
 - Intersection of statutory and/or other leaves
- Consider the role of contracts and policies

Questions?