Back to School 2020: How Employers Can Address the Expected Surge in Requests for Accommodation on the Grounds of Family Status

Date : August 28, 2020

Recently, the Ontario government announced its COVID-19: Reopening Schools plan for the fall of 2020. For elementary schools (Kindergarten to Grade 8), the plan anticipates full-time in-person learning for students of all school boards. For secondary schools (Grades 9 to 12), the plan differentiates between "designated school boards," which will offer a combination of part-time in-person learning and part-time remote learning, and "non-designated school boards," which will be permitted to offer full-time in-person learning. However, the plan also provides that in-person learning will be optional for all students whose parents choose to enroll them in full-time remote learning for the duration of the 2020-2021 academic year. This means that not only will some parents be required to keep their children home at least on a part-time basis to engage in remote learning, but all parents can elect to keep their children home on a full-time basis throughout the coming school year.

With many parents having already expressed a significant interest in the remote learning option, it is expected that many will seek accommodation from their employers to monitor and/or assist their school-aged children throughout the day. In the normal course, this may require employees to first consider other available childcare options before seeking accommodation from their employer. But, in the world of the ongoing COVID-19 pandemic, alternative childcare options will be limited. At the same time, the government has made additional statutory protections and entitlements available to certain eligible employees. So, how can employers best handle requests for accommodation to tend to family matters this fall?

Accommodation on What Grounds?

Under the Ontario *Human Rights Code*, "family status" means the status of being in a parent and child relationship. That status is conferred special statutory protections in employment. It is most likely that parents seeking accommodation from their employer while their children engage in remote learning would do so under this protected ground. However, it is also possible that such a request might be partially based on the intersection of family status with other protected grounds including, for example, the protected ground of disability (e.g., the employee themselves and/or their children who might be at increased risk due to a disability). Employers should be mindful to consider all the grounds on which a request for accommodation has been made to ensure that they can respond in an appropriate and fulsome manner to the employee's needs.

Addressing A Request for Accommodation

Employers in receipt of a request for accommodation related to the reopening of schools are permitted, as they are in the usual course, to scrutinize the request. That said, all requests for accommodation should be handled with sensitivity on public policy, as well as gender-related grounds (i.e., the disproportionate impact on women of addressing childcare needs).

Not every circumstance related to family status will necessarily give rise to a duty to accommodate. Rather, it is only when workplace rules, requirements, standards, or factors have a discriminatory effect on employees with caregiving (or other responsibilities related to their family status) that the duty will be triggered. Further, employees seeking accommodation must be able to demonstrate that there is a genuine need for accommodation; personal preference is generally not sufficient for the duty to be triggered. This means that accommodation may not be required in the case of a parent who simply prefers for their child to engage in remote learning, whereas accommodation may be required in the case of a parent who, for example, has been advised by a medical professional to keep their immunocompromised child at home for their health and safety. However, as the back to school process has only just begun in the province, it remains to be seen how exactly the Ontario Human Rights Tribunal will address and adjudicate any accommodation-related disputes arising in the context of the reopening of schools during a pandemic.

Where the duty to accommodate is triggered, employers have a positive obligation to explore the existence of any childcare obligations with their employees; employees too have a positive obligation to participate and cooperate in the accommodation process. Under normal circumstances, this might include seeking out familial assistance or altering/switching shifts between parents or guardians. In the context of COVID-19, however, with public health guidance suggesting the need to limit social contacts and protect older family members who may be at higher risk, it is still not entirely clear what will be considered sufficient to satisfy the employee's obligation in this regard. It will be left to employers to use their best judgment in making that assessment.

Determining Accommodation Requests

In the event that the outcome of the above process results in the determination that no safe childcare alternative is available, the employer will have to accommodate employees to the point of undue hardship. The determination of whether an accommodation will cause undue hardship must be assessed in light of its cost, outside sources of funding (if any), and health and safety requirements (if any), and must be based on real, direct, and objective evidence.

Where workplace or work-from-home accommodation is not possible without undue hardship, employees may instead be eligible to take statutory job-protected infectious disease leave (or "IDEL") under the *Employment Standards Act, 2000* ("ESA"). IDEL is an unpaid leave of absence that is available to employees who will not be performing the duties of their position because of one or more of the following reasons related to a designated infectious disease – in this case, COVID-19:

- The employee is under individual medical investigation, supervision or treatment related to COVID-19;
- The employee is acting in accordance with an order under section 22 or 35 of the *Health Protection and Promotion Act* that relates to COVID-19;
- The employee is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to COVID-19 issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means;
- The employee is under a direction given by their employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease;
- The employee is providing care or support to a defined class of individuals because of a matter related to COVID-19 that concerns the individual, including, but not limited to, school or day care closures;
- The employee is directly affected by travel restrictions related to COVID-19 and, under the circumstances, cannot reasonably be expected to travel back to Ontario; or
- Such other reasons as may be prescribed.

Although the existing IDEL provisions do not presently address the specific situation of an employee who chooses to keep their child home from school and cannot otherwise be accommodated, the employee may nonetheless qualify under one of the other avenues for eligibility for IDEL and thus benefit from a temporary unpaid leave of absence, as well as the Canada Emergency Response Benefit (or "CERB"). Even where accommodation is simply not required, the employee may – in certain circumstances – still be eligible for IDEL under its broad eligibility criteria.

Briefly, for those on IDEL who are eligible, the CERB remains available to claimants for up to 28 weeks. However, as of September 27, 2020, most claimants who qualify will be transitioned to a newly expanded and simplified Employment Insurance ("EI") program. The Federal government has also announced that it intends to introduce legislation supporting the creation and implementation of three new proposed temporary recovery benefits for claimants who still do not qualify for EI once their entitlement to CERB comes to an end. These proposed new recovery

benefits would become available as of September 27, 2020, and remain available for a period of one year:

1. The Canada Recovery Benefit (CRB), which would provide $400/week for up to 26 weeks to workers who are self-employed or are not eligible for EI and who still require income support and who are available and looking for work;
2. The Canada Recovery Sickness Benefit (CRSB), which would provide $500/week for up to two weeks to workers who are sick or must self-isolate for reasons related to COVID-19; and
3. The Canada Recovery Caregiving Benefit (CRCB), which would provide $500/week for up to 26 weeks per household to eligible Canadians who cannot work because they must care for one or more specified individuals, for example:

- A child under the age of 12 because their school or daycare is closed or operates under an alternative schedule due to COVID-19;
- A family member with a disability or a dependant because their day program or care facility is closed or operates under an alternative schedule due to COVID-19; or
- A child, a family member with a disability, or a dependant who is not attending school, daycare, or other facilities under the advice of a medical professional due to being at high-risk if they contract COVID-19.

For more details on the changes to the EI program and the new proposed recovery benefits see our Focus Alert – Federal Government Announces Details of Winding Down of the CERB Program.

Beyond IDEL, employees may also be eligible for other job-protected leaves of absence, depending on the language of the applicable statute, employment contract, or collective agreement. For example, the ESA also provides for family caregiver leave (up to 8 weeks per year for each specified individual) and family responsibility leave (up to 3 days per year), both of which could also be accessed in certain circumstances.

Possible Accommodation

Though employers are most likely to see requests from employees to work remotely to accommodate their childcare obligations, this is not the only option available to address this unique situation. Employers may wish, for example, to explore temporarily modifying employees' schedules and/or duties so they can share in their childcare obligations with another parent or guardian.

Although it is not yet known how the courts may or may not temper their usual positions on various employment and/or labour law related issues in the context of the COVID-19 pandemic, employers

in non-unionized environments that explore such options should remain aware of the potential risk of constructive dismissal claims. Employers in unionized environments will be required to first review their collective agreements regarding modifying schedules and/or duties to see what, if any, actions may be permitted in that regard. In all cases, employers should obtain appropriate legal advice before acting.

Accommodation in the Context of Confirmed or Possible Exposure to COVID-19

Beyond the initial return to school in the fall, employers should prepare for the possibility that one or more of their employees will have to self-isolate for a period of time if their children (and by extension, they) are exposed to or diagnosed with COVID-19 as a result of the child's attendance at in-person learning. In such cases, employees who are either not ill, or not too ill to work, may also request accommodation.

In the event of a confirmed or possible exposure to COVID-19, different considerations will apply to the accommodation process, including any applicable local public health guidance or directives, which may impact (1) what (if any) accommodation is possible and (2) whether the accommodation (if any) will create undue hardship. However, employers will otherwise be required to go through the same process as they would with any other request for accommodation based on the grounds of family status, disability, or a combination thereof.

Additionally, in cases of self-isolation arising as a result of a confirmed or possible exposure to COVID-19, employees continue to be temporarily eligible for IDEL and are thus able to benefit from temporary statutory job protection, as well as the CERB, EI, or one of the other proposed monetary benefits related to COVID-19, as applicable, depending on the = timing of the claim. Further, employees may also be eligible for other job-protected leaves of absence, depending on the language of the applicable statute, employment contract, or collective agreement. As a result, in the event that accommodation is simply not possible, employees will not be left without options.

In Our View

Employers facing not only the return to school process and the continued gradual return to work process are bound to see an increase in requests for accommodation in a variety of contexts. Although this article was intended to focus specifically on the context of the parent-child relationship, other situations – such as that of the employee who is a caregiver for an elderly or infirm family member – may equally trigger a duty to accommodate in the coming months.

As a complement to this Focus Alert, **see our FAQ** covering many common scenarios employers

can expect to face when receiving and evaluating requests for accommodation based on family status. For more information or tailored advice on your rights and obligations as an employer dealing with COVID-19 or other issues, please contact Porter Heffernan at 613-940-2764, Colleen Dunlop at 613-940-2734 and Larissa Volinets Schieven at 613-563-7660 #230.