



Evans, Philp LLP
Barristers and Solicitors

Breakfast Series:
**Employment
Standards Act, 2000 –
An Update**
Unravelling The Mysteries

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Employment Standards Act, 2000 – An Update

Unravelling The Mysteries

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Introduction

- the *ESA* is extensive, covering many topics including sale of business, related businesses, payment of wages, vacation, various leaves, hours of work, statutory holidays, breaks, overtime, termination, etc.
- this seminar provides an overview of only some of its provisions

Introduction, cont'd

- the *ESA* establishes minimum employment standards that most employers in Ontario must follow
- the *ESA* is complex, with wording that often is difficult to follow or lacking in clarity

When Does *ESA* Not Apply?

s.3(2) - the *ESA* does not apply to employers and employees in Ontario whose employment relationship falls within the federal jurisdiction, such as:

- banks
- inter-provincial or international trucking co's

s. 5(2) - the *ESA* may not apply if employment contract provides a greater right or benefit

Unpaid Leaves Under The *ESA*

- s. 46,47 - Pregnancy leave
- s. 48,49 - Parental leave
- s. 49.1 - Family Medical Leave
- s. 50 - Personal Emergency Leave
- s. 50.1 - Emergency Leave, Declared Emergency
- s. 50.2 - Reservist Leave

Pregnancy Leave – s.46,47

- no entitlement if employee's due date **not** at least 13 weeks after her date of hire
- leave for up to 17 weeks, unless no parental leave entitlement, in which case leave ends on the date that is the later of 17 weeks after leave began and 6 weeks after the birth, still-birth or miscarriage
- may commence **no earlier than** the earlier of the day that is 17 weeks before the due date and the day of the birth
- may commence **no later than** the earlier of the due date and the day of the birth

Pregnancy Leave, cont'd

- employee generally must provide at least 2 weeks written notice of commencement of leave
- employer may request doctor's note stating due date

Parental Leave, s.48,49

- employee must have at least 13 weeks service with the employer and must be the “parent” of a child
- “parent” includes:
 - a person with whom a child is placed for adoption
 - a person who is in a “*relationship of some permanence with a parent of a child and who intends to treat the child as his or her own*”

Parental Leave, cont'd

- employee who stops work early due to complication or early birth, still-birth or miscarriage must provide written notice within 2 weeks and employer may request doctor's note indicating:
 - where there is a complication, that employee unable to work due to the complication and stating the due date
 - in any other case, the due date and the actual date of the birth, still-birth or miscarriage

Parental Leave, cont'd

- employee may begin parental leave no later than 52 weeks after day the child is born or comes into employee's custody, care and control for first time
- person who has taken pregnancy leave must begin parental leave upon end of pregnancy leave unless child has not yet come into her custody, care and control

Parental Leave, cont'd

- parental leave ends 35 weeks after it began, if the employee also took pregnancy leave; otherwise, it is 37 weeks
- employee may end leave earlier if he/she provides 4 weeks written notice

Family Medical Leave, s.49.1

- an employee is entitled to up to 8 weeks unpaid leave to provide “*care or support*” to spouse, etc. (see below) if a qualified health practitioner issues certificate indicating individual has “*serious medical condition with a significant risk of death occurring within 26 weeks*”

Family Medical Leave, cont'd

- An employee may take a leave in regard to his/her spouse, parent, step-parent, foster parent, child, step-child, foster child, sibling, grandparent, nephew, niece, uncle, aunt, etc.
- “spouse” includes person to whom employee is married or a person with whom the employee lives in a conjugal relationship outside of marriage

Family Medical Leave, cont'd

- if two or more employees take a leave in regard to the same person, the total of their combined leaves may not exceed 8 weeks where only one doctor's certificate is issued
- if the person does not die, employee may take a second leave and employer may require a second doctor's certificate
- leaves must be taken in full week periods

Family Medical Leave, cont'd

- if employee must begin leave before advising employer, employee shall advise employer in writing as soon as possible after beginning of leave
- if requested , employee shall provide doctor's certificate as soon as possible

Personal Emergency Leave, s. 50

- applicable only to employers who regularly employ 50 or more employees
- leave is provided for:
 - personal illness, injury or medical emergency of the employee or of specified persons (see below)
 - an “*urgent matter*” that concerns persons specified (see below)

Personal Emergency Leave, cont'd

- the persons specified under the *Act* are:
 - employee's spouse
 - parent, step-parent or foster parent of employee or spouse
 - child, step-child or foster child of employee or spouse
 - grandparent, step-grandparent, grandchild or step-grandchild of employee or spouse
 - spouse of employee's child
 - employee's sibling
 - a relative of the employee who is dependent on the employee for care or assistance

Personal Emergency Leave, cont'd

- employee shall advise employer of the leave in advance unless he/she must begin the leave before advising employer, in which case employee shall advise employer as soon as possible thereafter
- an employer may require employee who takes a leave to provide evidence “*reasonable in the circumstances*” that he/she is entitled to the leave

Personal Emergency Leave, cont'd

- entitlement to a total of 10 days' leave per calendar year
- if employee takes any part of a day as a leave, employer may deem it to be a full day's leave

Personal Emergency Leave, cont'd

“...the legislature did not intend to make the failure to provide notice grounds to disqualify the employee from taking the leave....as [the employee] had an absolute right to the emergency leave without...authorization from the company, [the employee] could not have been terminated...for being absent without such authorization.”

Ryding-Regency Meat Packers (Crjlenica)

Personal Emergency Leave, cont'd

“..no ‘magic words’ need be uttered to invoke [this] entitlement...On the facts of this case, where the [employee] placed herself in the hands of the employer and specifically pleaded the requirements of the [Act]...it does not lie with the Employer to argue that the provisions have not been invoked...”

Temiskaming Lodge (Randall)

Emergency Leave, Declared Emergencies s.50.1

- applies **only** where emergency declared under the *Emergency Management and Civil Protection Act* (“EMCPA”)
- employee must be prevented from performing job duties due to order issued under *EMCPA* or *Health Protection and Promotion Act* or because he/she is needed to provide care or assistance to specified persons (see below)

Emergency Leave, Declared Emergencies

Specified persons are:

- employee's spouse
- parent, step-parent or foster parent of the employee or spouse
- child, step-child or foster child of the employee or spouse
- grandparent, step-grandparent, grandchild or step-grandchild of the employee or spouse
- spouse of a child of the employee
- employee's brother or sister
- a relative of the employee who is dependent on the employee for care or assistance

Reservist Leave, s.50.2

- an employee is entitled to a leave of absence if he/she is a reservist and will not be performing the duties of his/her position because,
 - (a) he/she is deployed to a Canadian Forces operation outside Canada;
 - (b) he/she is deployed to a Canadian Forces operation inside Canada that is or will be providing assistance in dealing with an emergency or with its aftermath

Reservist Leave, cont'd

- employee must have at least 6 months continuous service with the employer
- the leave may last as long as the deployment

Rights During Leaves, s 51 -53

- employee continues to participate in benefits plan unless he/she elects in writing not to do so
- employee may defer taking vacation until leave expires
- period of any leave shall be included in calculating service and seniority

Reinstatement Following A Leave

- s. 53 (1) at end of leave, employer **shall** reinstate employee to his/her position if it still exists or to comparable position if it does not
- s. 53 (2) no obligation to re-employ if employee terminated **solely** for reasons unrelated to the leave

Reinstatement Following A Leave

“...jobs may be compared by reference to the following:

- 1. location of the job;*
- 2. hours of work, including time and duration*
- 3. quality of the working environment;*
- 4. degree of responsibility, including amount of independence and supervision...;*
- 5. job security and possibility of advancement;*
- 6. prestige and perquisites*

Bronson Bakery Ltd. (Fraser)

Reinstatement Following A Leave

“...[the pregnancy leave provisions are] meant to limit the economic consequences of childbirth and adoption by creating a mandatory right to a leave and then reinstatement to the former position. The scheme does not create an absolute right to a job for everyone who has taken a leave...”

Ontario Blue Cross (Muir)

Reinstatement Following A Leave

“...for how long must the Employer reinstate – a day, a week, a month? Absent any language in the Act indicating the contrary...upon the completion of the leave and reinstatement an employer can deal with the employee as it would any other employee ...so long as the employer’s conduct is made in good faith...the Act [does not have] anything more to say about the matter

Ontario Blue Cross (Muir)

No Reprisals

s. 74 (1) - no employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so because the employee is or will become eligible to take a leave, intends to take a leave or takes a leave

s. 74 (2) –the employer has the burden of proving that it did not contravene s 74 (1)

No Reprisals, cont'd

“...I do not mean to suggest that an employer may never take action in relation to a pregnant employee which is prejudicial towards her. A pregnant employee is no better off than any other employee merely on account of her pregnancy. The purpose of section 44 of the Act is to ensure that she is in ***no worse*** position.”

Whitmell (Albertyn)

No Reprisals, cont'd

“...I interpret section [74] to involve a taint test - if the unwanted intimidation, discipline, suspension, layoff, dismissal or penalty of an employee known to be pregnant is tainted by consideration of her pregnancy, then the section has been violated, but this does not mean that any and every intimidation, discipline, suspension, layoff, dismissal or penalty of a pregnant employee is *ipso facto* a violation of section [74].”

Whitmell (Albertyn)

Termination of Employment

s. 57 - notice or pay in lieu thereof at the rate of one week per year of service to a maximum of 8 weeks

s. 60 - all benefits must be maintained during this statutory period

- although lay-off for not > 13 weeks ≠ a termination under *ESA*, it may still be a termination at common law
- termination due to disability (frustration of contract) triggers employee's entitlement

Severance of Employment

s. 64(1) - applicable only to employees with 5 years service or more who work for employer having annual payroll of \$2.5 million or more

- essentially one week's pay per year of service to max. of 26 weeks
- termination due to disability (frustration of contract) triggers employee's entitlement

Future Breakfast Seminar – Please Join Us

- Mark your calendar...

Tuesday, May 27, 2008

Thank you for coming!