New Employment Standards Act, 2000 Amendments Expand School Boards' Obligations



In 2014, the Ontario *Employment Standards Act, 2000,* S.O. 2000 C. 41 (the "*ESA*"), which applies to most employees of all provincially-regulated employers in the province, including Ontario school boards, received some significant amendments. The most notable changes came in the form of three new leaves of absence, for which employees with specified length of service are eligible. Additionally, the most recent amendments include eliminating the current $10,000 cap on orders to pay wages, and applying a new two-year extended time limit on most wage claims that may be made under the *ESA*. As a whole, the amendments will serve to expand employees' statutory rights, necessitating school boards to quickly become informed with respect to the ways in which the new amendments may impact on their workplace, and take proactive steps to update policies and assess compliance in the context of applicable collective agreements.

The New Leaves of Absence

Effective October 29, 2014, school boards must make available to employees the following leaves of absence:

Family Caregiver Leave

All employees, regardless of length of service, will be entitled to up to eight (8) weeks of unpaid Family Caregiver Leave in each calendar year to care for an ill relative. The weeks of leave must be taken in full weeks, but do not have to be taken consecutively or in a single block. There is no minimum service requirement for eligibility to take Family Caregiver Leave, or pro-rating for part years.

An employee may take Family Caregiver Leave if caring for or supporting the following specified relatives:

- The employee's spouse.
- A parent of the employee or the employee's spouse.
- A child of the employee or the employee's spouse.
- A grandparent or grandchild of the employee or the employee's spouse.
- The spouse of a child of the employee.
- The employee's brother or sister.

- A relative of the employee who is dependent on the employee for care or assistance.

The scope of this leave also includes step-children, step-parents and foster children.

Employees are eligible for Family Caregiver Leave if they have a certificate from a "qualified health practitioner" stating that the specified relative has a "serious medical condition". The term "serious medical condition" is not defined in the *ESA,*except that it can be chronic or episodic.

The *ESA* defines "qualified health practitioner" as:

a person who is qualified to practise as a physician, a registered nurse or a psychologist under the laws of the jurisdiction in which care or treatment is provided.

This means an employee could provide a certificate obtained outside Ontario, which could present challenges for school boards in terms of verifying the certificate.

Employees who wish to take leave must advise the school board in writing that they wish to take Family Caregiver Leave. An employee may take the leave before providing notice, and then advise the employer "as soon as possible". Employees must provide a copy of the certificate "as soon as possible", upon request from the employer. As such, in practical terms, a school board may not deny or penalize an eligible employee for failing to provide it with notice or medical evidence prior to taking the leave.

Notably, Family Caregiver Leave is available *in addition* to Family Medical Leave, which employees were already entitled to under the *ESA.*The main difference between the two leaves is the types of relatives and nature of medical condition to which each is applicable. Under certain circumstances, an employee could qualify for both Family Medical Leave and Family Caregiver Leave, with respect to an ill relative.

Critically Ill Child Care Leave

Employees with at least six consecutive months of service may qualify for up to 37 weeks of unpaid Critically Ill Child Care Leave. Upon request from the employer, an employee must provide a copy of a certificate from a "qualified health practitioner" (defined in the same way as under Family Caregiver Leave) that states:

1. The child is critically ill and requires care or support of one or more parents and
2. The period during which the child requires care or support.

The child must be under 18 years of age. The *ESA*defines "critically ill" as "…a child whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury." The terms "baseline state of health" and "significantly changed" are not defined, and it remains to be seen how they will be applied in Ontario.

The employee notice requirements are similar to those for Family Caregiver Leave, i.e. providing the employer with notice and a copy of the certificate upon request "as soon as possible." Additionally, the employee must provide a "written plan" that indicates the weeks in which he or she will take the leave. As such, a school board may not deny or penalize an eligible employee for failing to provide it with notice or medical evidence prior to taking the leave.

Crime-Related Child Death or Disappearance Leave

Employees with at least six consecutive months of service may qualify for unpaid Crime-Related Child Death or Disappearance Leave. For the purposes of the leave, "crime" means an offence under the Canada *Criminal Code,* and "child" means under 18 years of age.

An employee can take up to 104 weeks in the event of a crime-related death of the employee's child, step-child or foster child. A "crime-related death" means the employee's child, step-child or foster child has died and it is "probable, considering the circumstances, that the child died as a result of a crime."

An employee can take up to 52 weeks in the event of a crime-related disappearance of the employee's child, step-child or foster child. A "crime-related disappearance" means the child has disappeared and it is "probable, considering the circumstances, that the child disappeared as a result of a crime."

The leave ends after 104/52 weeks, or the day on which it "no longer seems probable" that the child died or disappeared as the result of a crime.

An employee is not eligible for this type of leave if he or she is charged with a crime or if it is probable, considering the circumstances, that the child was a party to the crime.

Employees must advise the employer in writing that they wish to take the leave and provide a "written plan" that indicates the weeks in which he or she will take the leave. However, an employee may take the leave, and then advise the employer and provide the written plan "as soon as possible".

An employer may require an employee to provide "evidence reasonable in the circumstances" to entitlement to leave. It is not clear what evidence could be requested in these circumstances, and what would be considered "reasonable".

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Given the possibility that circumstances (and eligibility under the *ESA*) may change as police investigate the death or disappearance of the child, school boards may wish to periodically obtain information to confirm an employee's continued eligibility for the leave of absence.

Other Amendments

On November 20, 2014, Bill 18, the *Stronger Workplaces for a Stronger Economy Act, 2014* ("Bill 18") received Royal Assent. Bill 18 amends the *ESA* in the following significant ways[1]:

Removal of $10,000 "Cap" and New Two-Year Complaint Period

Currently, an employment standards officer can issue an order for an employer to pay an employee unpaid wages, up to a maximum of $10,000. Effective February 20, 2015 (and subject to transitional rules), the $10,000 "cap" is removed. Also, the current six-month limitation period for bringing forward a complaint to the Ministry of Labour for non-payment of wages will generally be extended to two years on a going-forward basis.

New Obligations Relating to Assignment Employees

Currently, employers can benefit from the assistance of employees working for temporary help agencies (assignment employees) without assuming statutory liability for unpaid wages. The new amendments brought on by Bill 18 change this situation. Effective November 2015, and subject to transitional rules, if the agency fails to pay an assignment employee for some or all of his/her wages, the temporary help agency's client (the respective employer) will be jointly and severally liable for certain unpaid wages
(i.e. regular wages, overtime pay, public holiday pay, and premium pay) of such assignment employees for the relevant pay period. There are also new record keeping requirements regarding assignment employees, including a requirement for clients of temporary help agencies to record the number of hours worked by each assignment employee in each day and each week, and to retain such records for three years.

Compelling Mandatory Self-Audits

Effective May 20, 2015, an employment standards officer will have the power to require an employer to conduct an examination/ self-audit of an employer's records, practices, or both, to determine whether the employer is in compliance with the *Employment Standards Act,2000* or its regulations. Such employers will be required to conduct the self-audit and report the results to the employment standards officer.

Provision of Informational Poster

Effective May 20, 2015, employers will be required to provide each employee with a copy of the most recent informational poster published by the Minister of Labour, and Ministry-prepared translations of such posters (if any), if requested by the employee.

Minimum Wage Adjustments

The minimum wage will also be adjusted in accordance with an equation that relies on the consumer price index. The Minister of Labour will, no later than April 1 of every year after 2014, publish the minimum wages that are to apply starting on October 1 of that year.

Preparing For The *ESA* Amendments

On the whole, the *ESA* amendments will expand school boards' employment-related obligations. This impact may best be mitigated by becoming informed in a timely manner regarding the ways in which the changes may impact the workplace, reviewing and updating affected policies, such as those with respect to leaves of absence in the context of applicable collective agreements, and performing a voluntary audit of compliance with employment standards well before the changes come into effect.

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