

Turning Over A New Leave: ESA Amendments Introduce New, Significant Categories Of Leaves



2014 saw the introduction of three new leaves protected under the **Employment Standards Act, 2000** (the “ESA”). These new leaves can result in significant absences from the workplace, which will create new human resources challenges for employers. Professionals engaged in workforce management and HR must be aware of these new obligations to employees in order to avoid accidental breaches of the ESA.

Family caregiver leave

The first of these new ESA leaves is family caregiver leave. The purpose of this leave is to provide an employee with time off work for the purposes of providing care or support to an immediate family member suffering from a serious medical condition. This new leave applies to all employees, regardless of their length of service.

The ESA provides little guidance as to what would be considered a serious medical condition. There is no definition in the legislation, but instead it provides that a serious medical condition may include a condition that is chronic or episodic.

The medical condition must be verified by a qualified health professional, which is broadly defined and includes a registered nurse or a psychologist. An employer may require the employee requesting the leave to provide a certificate from the medical professional indicating that the family member has a serious medical condition.

The authors have serious concerns about the lack of a clear definition for the term “serious”. There is no guidance provided to the medical professional completing the form (there is a form provided by the Ministry, though it is not mandatory that it be used). No reference is made to medical literature, regulations or professional standards or assessment guidelines. Equally worrisome, is the absence of a requirement that the ill person actually require care or support from the individual taking the leave (or from anyone for that matter) even if the condition could be considered objectively to be “serious”. We are greatly concerned that could lead to abuse of a leave that was fashioned for laudable reasons.

Under this new leave, an employee is entitled to an unpaid leave of absence of up to eight (8) weeks in order to provide “care or support” to the aforementioned family member. It should be noted that the allowable leave is eight (8) weeks per individual

affected. Therefore, if multiple family members are suffering from serious medical conditions, an individual may be entitled to multiple leaves over the course of a year. It is not difficult to think of scenarios, such as car accidents, in which multiple family members could suffer from serious medical conditions.

Family caregiver leave is similar to family medical leave, but is broader. More family members are encompassed by the family caregiver leave provisions, and the requirement for family medical leave that the ill individual suffer a “serious risk of death” is not present.

Critically ill child care leave

The purpose of the new critically ill child care leave is to provide an employee with a leave of absence to provide care or support for a critically ill child. Unlike family caregiver leave, an employee is not eligible for critically ill child care leave unless they have been employed for six consecutive months. In order to be entitled to the leave, the employee must provide a certificate from a qualified medical practitioner certifying that a child for which the employee is legally responsible is critically ill. Unlike family caregiver leave, this leave specifically requires that the certificate from the medical practitioner state that the child requires care or support of one or more parent.

For a child to be critically ill, their baseline state of health must have significantly changed, and their “life must be at risk” as a result of illness or injury.

This leave may last up to 37 weeks in a 52 week period. The ESA does specify how the leave must be taken, i.e. if it must be taken in one single period, in full weeks etc. In addition, the employee may be entitled to an additional leave if the child remains critically ill after the 52 week period has expired, provided that they have met all the eligibility criteria.

Crime related child death or disappearance leave

An employee may access crime related death or disappearance leave when there is “probable” cause to suggest that a child in their care has disappeared or has died because of a crime. The leave may last up to 52 weeks in the case of a disappearance or 104 weeks in the case of a death.

What employers should know

All of the new leaves are cumulative, including with leaves already in the ESA before these additions, meaning that an employee in particular circumstances may be entitled to very significant periods of absence.

Employers should note that the protections already in place in the ESA for protecting employees on leaves of absence also apply to these new leaves. This includes, for instance, the requirement to reinstate the employee to the position that they most recently held, or a comparable position if it no longer exists, protection against reprisals, and benefit continuation (subject to certain limited exceptions). In the case of long-leaves, third-party benefit providers may balk at the provision of benefits for inactive employees. Care should be taken to ensure that benefits can be continued through these leaves or employers risk violating the ESA and becoming effectively self-insured.

At the **2015 Ontario employment law conference**, employment lawyers Jeremy Schwartz and Frank Portman will provide you with an in depth look at these new ESA Leaves as

well as other recent ESA changes and how they will impact your workplace. The session includes tips on:

- The requirements under the new leaves of absence,
- Expanded compliance measures and potential liability for violations, and
- The risk of liability for employers that engage temporary agencies.

For this reason alone, attending the **16th annual Ontario Employment Law Conference**, presented by Stringer LLP and First Reference Inc., is more essential than ever. Need another reason?

The Ontario Employment Law Conference will take place at the Centre for Health & Safety Innovation in Mississauga on June 4, 2015. We look forward to seeing you and helping you apply the latest employment and labour law changes. **Come and learn the latest!**

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