

When is Unpaid Leave Too Much?



In Canada, employers have **specific legal responsibilities** when dealing with **unpaid leave requests**, and they must balance those obligations with operational needs. Below is a breakdown of what's required, what's discretionary, and how to handle multiple or extended requests, including when termination may be justified due to undue hardship.

1. Statutory (Legally Protected) Unpaid Leaves

Across all jurisdictions in Canada, employment standards legislation requires employers to grant certain **statutory unpaid leaves**. These include:

- Maternity and parental leave.
- Sick leave.
- Bereavement leave.
- Compassionate care leave.
- Family caregiver leave.
- Critical illness leave.
- Leave related to domestic violence.
- Reservist leave.

Employer's Legal Responsibilities:

- Accept the leave request if the employee qualifies.
- Maintain the employee's position or provide a comparable one upon return.
- Continue benefits coverage (e.g., health insurance) during the leave if the employee continues paying their portion.
- Not penalize or retaliate against the employee for taking or requesting leave.

Duration and Conditions:

Each type of leave has **specific eligibility rules and maximum durations**, which vary by province and federally.

Discretionary Unpaid Leave (Employer-Approved)

If an employee requests **unpaid leave for personal reasons** (e.g., extended travel, education, stress, or burnout) that is **not covered under employment standards**, the employer has **discretion** to approve or deny the leave.

Best Practices:

- Create a **written policy** for discretionary unpaid leaves to ensure fairness and consistency.
- Evaluate each request based on:
 - Operational impact.
 - Duration of the leave.
 - Reason for the leave.
 - Availability of coverage.

3. Managing Multiple Requests

When multiple employees request unpaid leave—statutory or discretionary—employers must:

- **Prioritize statutory leaves** (they are non-negotiable).
- Consider **staggering discretionary leave approvals** based on business needs.
- Use a **first-come, first-served** approach when feasible.
- Explore **alternative accommodations**, such as reduced schedules or part-time arrangements.

Employers should document their assessment process and communicate openly with employees.

4. What Constitutes Undue Hardship?

In cases where granting a leave—or a series of leaves—causes significant operational difficulty, an employer can argue **undue hardship**.

Legal Threshold for Undue Hardship:

- It must be more than inconvenience.
- There must be **evidence of significant financial or operational disruption**.
- Courts and tribunals look for:
 - **Costs** that are substantial and cannot be absorbed.
 - **Disruption to workflow** or inability to meet customer/client needs.
 - **Impact on other employees**, especially if their health or rights are affected by covering extended absences.

Important: The **bar for undue hardship is high**, especially in cases involving human rights (e.g., leaves tied to disability or family obligations). Employers must demonstrate that all options were considered before claiming hardship.

5. Termination and Legal Risk

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An employer **cannot terminate an employee on statutory leave or for requesting it**.

Doing so risks a wrongful dismissal and/or a human rights complaint.

In **discretionary leave** cases, termination may be legally justified if:

- The leave is unreasonably long.
- The leave significantly disrupts business operations.
- There's **documented evidence** that alternative accommodations were explored.
- The employer **communicated with the employee** and offered return options.

Case Example:

In *Naccarato v. Costco Wholesale Canada Ltd.* (2010), the Ontario Superior Court ruled that a long-service employee's absence (due to a non-work-related injury) caused undue hardship due to its indeterminate nature, and termination was upheld as legal.

6. Recommendations for Employers

- Have a **leave policy** that covers both statutory and discretionary requests.
- **Train managers** to understand statutory rights and how to evaluate discretionary requests.
- Keep detailed **records of all communications** and decisions.
- **Consult legal counsel** before denying leave or considering termination due to absence.

Summary Table: Employer Responsibilities by Leave Type

Leave Type	Statutory (Yes/No)	Can Be Denied?	Job Protection Required?	Can Employer Terminate?
Maternity/Parental	Yes	No	Yes	No
Sick Leave	Yes (varies by province)	No (if eligible)	Yes	No
Personal Unpaid Leave	No	Yes	No (unless promised)	Possibly, with due diligence.
Disability (HR Code)	Yes (under human rights)	No (if valid need)	Yes	Only with undue hardship.

Sample Unpaid Leave Policy for Canadian Employers

1. Purpose

This policy outlines the procedures and conditions under which employees may request unpaid leave, and how the company evaluates and manages such requests in compliance with applicable employment standards and human rights legislation across Canada.

2. Scope

This policy applies to all full-time and part-time employees of [Company Name] across all Canadian provinces and territories.

3. Types of Unpaid Leave

a) Statutory Unpaid Leave

Employees are entitled to statutory unpaid leaves under federal or provincial law, such as:

- Maternity and parental leave.
- Compassionate care leave.
- Sick leave.
- Critical illness leave.
- Domestic violence leave.
- Bereavement leave.
- Reservist leave.

b) Discretionary Unpaid Leave

Employees may request discretionary unpaid leave for:

- Personal matters (e.g., family obligations, education).
- Travel or sabbatical.
- Stress or burnout (not medically certified).

Approval of discretionary unpaid leave is at the employer's discretion and subject to operational needs.

4. Request Process

- Employees must submit a written request at least [X weeks] in advance (except in emergencies).
- The request must include:
- Reason for leave.
- Desired start and end dates.
- Any supporting documentation (where applicable).

5. Approval Criteria

- Whether the leave qualifies as statutory or discretionary.
- Impact on department operations and team workload.
- Availability of coverage for the role.
- History and frequency of leave requests.
- Reasonableness of the request duration.

6. Communication and Documentation

- All decisions (approval or denial) will be communicated in writing.
- Approved leaves will be documented in the employee's HR file.
- Managers and HR must respect confidentiality.

7. Benefits and Job Protection

- Statutory leaves guarantee job protection and continuation of benefits as required by law.
- Discretionary leaves may not include benefit continuation unless agreed upon in writing.

8. Return to Work

Employees must confirm their intention to return at least [X days] before their

scheduled return date. In certain cases, the company may require a fit-to-return certificate.

9. Termination and Undue Hardship

Where a discretionary leave causes significant operational disruption and alternatives have been exhausted, [Company Name] reserves the right to take appropriate action, which may include termination for cause due to undue hardship. Such decisions must be reviewed by senior HR and legal counsel.

Checklist for Evaluating Unpaid Leave Requests

Step 1: Identify the Nature of the Leave

- Is the leave request related to a statutory entitlement?
- If yes, identify applicable legislation.
- If no, classify it as discretionary leave.

Step 2: Review the Employee's Submission

- Has the request been submitted in writing?
- Are start and end dates clear?
- Is supporting documentation provided (if applicable)?

Step 3: Assess Operational Impact

- Will the employee's absence disrupt key operations?
- Can duties be reassigned or coverage arranged?
- Is the timing particularly sensitive (e.g., seasonal workload)?

Step 4: Evaluate Precedent and Fairness

- Have similar requests been granted or denied?
- Is the employee's leave history reasonable?
- Would approval create perceived or real inequity among staff?

Step 5: Consider Alternatives

- Can a shorter leave or part-time arrangement be offered?
- Can the leave be postponed to a more suitable time?

Step 6: Make a Decision

- Clearly document the rationale for approval or denial.
- Communicate decision in writing.
- Update employee records.

Step 7: Prepare for Re-Entry

- Confirm expected return date.
- Plan for reintegration (e.g., training, benefits restart).
- Conduct a return-to-work meeting if needed.