

**Breakfast Seminar Series**

**Navigating Leaves of Absence**  
*Tips for Managers*

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**Your Interests**

- Maintaining 'production' – getting the work done
- Minimizing disruption of absence
- Minimizing costs of absence
- Controlling unauthorized absenteeism
- Maintaining healthy, happy employees
- Complying with legal obligations

## Overview

- Statutory leaves – eligibility and obligations
- Non-statutory leaves
- Frequently asked questions concerning leaves
- Best practices

## Statutory Leaves of Absence *Employment Standards Act, 2000*

- Pregnancy
- Parental
- Family Medical
- Personal Emergency
- Declared Emergency
- Reservist
- Organ Donor (Proposed)

## Pregnancy/Parental Leave

- Eligibility: **13 weeks employment**
- Pregnancy: **17 weeks**
- Parental: **35 or 37 weeks**
  - » both parents

## Personal Emergency Leave

- Entitlement:
  - Employer regularly employs **50 or more employees** in Ontario
  - Death, injury, illness, medical emergency or “urgent matter”
    - Objective not subjective urgency
    - Prescribed individuals
- Duration:
  - **10 days** per calendar year

## Family Medical Leave

- Entitlement: **All Employees**
- Family member with:
  - “Serious medical condition with significant risk of death occurring within a period of 26 weeks”
- Duration: **8 weeks**
  - Must be taken in full week periods

## Other *ESA* Leaves

- Declared Emergency Leave
- Reservist leave
- Organ Donor Leave (*Bill 154*)

## Statutory Leaves of Absence *Canada Labour Code, Part III*

- Maternity
- Parental
- Compassionate Care
- Bereavement
- Sick Leave
- Work-Related Illness and Injury
- Reservist

## If I give my employees their ESA/CLC leaves, have I done enough?

- Other Statutory Leaves
  - *Workplace Safety and Insurance Act, 1997*
  - *Canada Elections Act/Ontario Elections Act*
  - *Ontario Juries Act*

## **If I give my employees their ESA/CLC leaves, have I done enough?**

- Individual contracts of employment
- Terms of Collective Agreement
- Policy
- STD/LTD Plan
- Discretionary leaves
- Human rights legislation

## **What can I do if my employee fails to show up at work ?**

- Investigate
  - Culpable/non culpable absenteeism
  - Nature of leave (Statutory/Contractual/Discretionary)
  - Legal obligations of employer/employee
  - Reason for failure to report absence/request leave

## What if my employee takes an *ESA/CLC* leave without giving notice?

- “Reasonableness” of failure
- Failure to give notice does not end entitlement to leave
  - Possible discipline for failure to provide notice, not for exercising right to leave
- No deemed termination
  - *Ryding-Regency Meat Packers* (2006), 155 L.A.C. (4th) 382
- Reprisal
- Consistency

## Can I ask for proof that my employee is entitled to take an *ESA/CLC* leave?

- *ESA*: Pregnancy leave/*CLC* Maternity Leave
  - Certificate of due date/pregnancy
- *ESA*: Family Medical Leave/*CLC* Compassionate Care
  - Medical certificate
- All other *ESA* leaves:
  - Evidence/“reasonable in the circumstances”

## What is “reasonable in the circumstances”?

- Factors:
  - Duration of leave
  - Pattern of absences/record of absenteeism
  - Availability of evidence
  - Cost of evidence
  - Prior requests for leave on same date as “emergency” leave taken
- *Tilbury Assembly* (2004), 124 L.A.C. (4th) 375
  - Responsive to individual circumstances
- *FAG Bearings*, [2005] O.L.R.B. Rep 785
  - reasonable in time

## Can I ask for medical information?

- Contractual/Collective Agreement provisions
- Scope of medical information
  - Human rights considerations
  - Prognosis, not diagnosis
  - No treatment plan specifics
  - Information necessary in the circumstances
- Privacy concerns



## Can I communicate with my employees while they are on leave?

- Purpose of communication and consider reason for leave
- No general prohibition, BUT
  - Confidential information
  - Compliance with any medical restrictions
  - Employee vs. doctor
  - Harassment claims
- Employee's duty to participate in accommodation

## Can I force my employee to take a leave?

- Administrative leave
- Explore accommodation
  - Employee's duty to participate
- Attendance management
- Health and safety obligations (to employee, to co-workers)
- Pregnancy leaves
  - *ESA*: Cannot compel employee to take pregnancy leave
  - Under *CLC*: where "unable to perform essential functions of the job" and "no appropriate alternative job" available

## What benefits do I have to provide to my employees while they are on leave?

- **ESA leaves**
  - Pension
  - Life and Accidental Death
  - Extended Health
  - Dental
  - *CLC*: Pension, Health, Disability
- **Non-ESA**
  - Governing Documents
    - Employment Contract, Policy, Collective Agreement
  - Insured benefits plan
  - *Orillia Soldiers* (1999), 42 O.R. (3d) 692

## My employee has asked for sick leave after giving birth. Is she entitled to it? Can I ask for medical information?

- "Six Week Rule"
- *Essex County Board of Education* (1998), 164 D.L.R. (4th) 455
- *Peel Board of Education* (2000), 92 L.A.C. (4th) 289

## Is my employee entitled to vacation time in respect of time spent on leave? Vacation pay?

- **ESA:**
  - vacation leave vs. vacation pay
  - vacation pay calculated on "*wages the employee earned during the period for which vacation is taken*".
  - BUT: service and seniority must accrue during leave
  
- **CLC:** Broadly similar
  
- **Collective Agreement - Greater right or benefit**
  - Vacation with pay
  - Vacation pay calculated on service or seniority with the employer

## Can I terminate my employee before the start of leave? During the leave? After?

- **ESA:** For legitimate reasons unrelated to leave
  - **CLC:** specific anti-reprisal provision
  
- Lengthy LTD
  
- Persistent intermittent absenteeism
  
- Human rights considerations

## **I restructured my business while my employee was on leave. Do I have to reinstate her?**

- Statutory duty to reinstate to same position, if it exists
  - IF NOT, to comparable position
- Factors for assessing comparable position:
  - Location of job
  - Hours of work
  - Quality of working environment
  - Degree of responsibility
  - Job security/possibility for advancement
  - Prestige and perks

## **I restructured my business while my employee was on leave. Do I have to reinstate her?**

- Test: Would the employee's employment have been terminated if he/she had been at work?
- If no, or a comparable position exists, duty to reinstate

## **How can I facilitate a smooth and effective return to work for my employee?**

- Communication plan
- Employee participation in the return to work
- Involvement of employee's doctor and other professionals where applicable
- Return to Work Policy or Plan

## **What happens if I don't grant a statutory leave? If I terminate an employee where I shouldn't have?**

- Reprisals
- Offences/Penalties
- Reinstatement
- Notice of Contravention
- Compliance Order
- Compensation/Damages
  - Loss of earnings; loss of employment; pain and suffering; severance pay; benefit entitlements; expenses in seeking new employment; all reasonable foreseeable damages

## Best Practices

- Designate individual(s) in your organization responsible for leaves administration
  - Provide training
  - Know and understand your legal obligations and rights
  - Monitor legislative changes to existing leaves and introduction of new leaves
- Implement comprehensive leave policies. Ensure consistently applied
- Know how leaves affect other entitlements

## Questions?