

PREGNANCY, PARENTAL AND EMERGENCY LEAVE UNDER THE NEW ESA 2000

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LEAVE UNDER THE NEW THE ESA 2000

INTRODUCTION

The *Employment Standards Act* delineates the rights and responsibilities of employees and employers in Ontario workplaces. On December 20, 2000, the Ontario Legislature passed a new *Employment Standards Act* (ESA, 2000) that came into force on September 4, 2001. The amendments to the ESA 2000 are the first attempt at modernizing employment standards law in Ontario in two decades,¹ and are designed to ensure greater flexibility for employers and employees in creating work arrangements that accommodate their business, family, and health needs.

Significant amendments to the ESA 2000 include the extension of the pregnancy and parental leave provisions, and the enactment of the emergency leave provision. Prior to these new amendments, employees in Ontario had a statutory right to take leaves of absence from work without fear of losing job security or benefits only in the event of pregnancy or parental leave. As a result of the new amendments, the leave of absence provisions have been amended to extend the pregnancy and parental benefits from six months to one year (so as to correspond with the new EI entitlement in this regard). The emergency leave provision has expanded the right of employees to take leaves of absence in a variety of other circumstances set out in s. 50 of the ESA 2000.

¹ M. Layton, "Pregnancy, Parental & Emergency Leave" (Six-Minute Employment Lawyer, County of Carleton Association, 26 September 2001).

² *Ibid* at 2.

I PREGNANCY LEAVE

Eligibility

The pregnancy leave provisions are set out in ss. 46 and 47 of the ESA 2000. As with the old Act, the ESA 2000 stipulates that a pregnant employee is entitled to unpaid pregnancy leave if she began employment with her employer at least 13 weeks prior to her due date. An employee does not have to actively work during the 13 weeks to be eligible for pregnancy leave. She can be on layoff, vacation, sick leave, or have even started her pregnancy leave and still be entitled to take pregnancy leave because the entitlement to pregnancy leave is dependent on the employee's *expected* due date, and not on her *actual* birth date.

Commencement

The old Act stated that a woman could not begin her pregnancy leave any earlier than 17 weeks prior to her due date. However, the ESA 2000 is more lenient and allows pregnancy leave to commence either 17 weeks before a woman's due date *or* on the birth date, if the birth occurs earlier than the 17 weeks prior to the due date. Furthermore, if a woman's pregnancy ends in a stillbirth or miscarriage, her pregnancy leave may begin at that time, and that the 17 weeks requirement can be dispensed with.

It must be emphasized that an employee has sole discretion as to when her pregnancy leave will commence. It is against the law for an employer to force her to begin her leave early if she is sick, or her pregnancy restricts the type of work that she can do. If an employee cannot perform her regular duties, an employer must accommodate her by providing her with work that she is able to complete. Alternatively, she may choose to take sick leave until the baby is born and, under the ESA 2000, she has the absolute right to do so. Regardless of the situation, however, once an

employee has begun her pregnancy leave, she must take the leave all at once, and does not have the right to split it up.

Duration

The duration of pregnancy leave was not amended in the ESA 2000. An employee remains entitled to take up to 17 weeks of unpaid pregnancy leave. An exception is available to women who have taken the maximum entitlement of leave but has not yet given birth. In this situation, she has the right to stay on pregnancy leave until the baby is born. But as soon as the birth has occurred, the employee must start her parental leave.

Notice

Under the ESA 2000, the notice requirement also remains unchanged. An employee is required to give at least two weeks written notice of her intention to take pregnancy leave. The notice must include her expected due date and/or her intended date of leave. However, she has the right to leave either earlier or later than the date set out in the written notice, even after notice has been provided to her employer. The only requirement is that she provide her employer with a new written notice at least two weeks prior to the earlier date in which she wishes to commence her leave.

If a female employee is forced to stop work earlier than the date provided in the notice, due to complications caused by pregnancy, birth, stillbirth or miscarriage, she may be unable to give the requisite notice beforehand. Consequently, she is obligated to provide the employer with notice within two weeks after she stops working. However, if she fails to provide the requisite notice, she does not lose her right to pregnancy leave.

The content of the notice will vary depending on the circumstances. If an employee stopped work because of complications related to her pregnancy, the notice shall contain the start date of her pregnancy leave and, if the employer requests, a medical certificate from a legally qualified medical practitioner stating that she is unable to perform the duties of her position. Alternatively, if the employee stopped working for any other reason, the certificate must state the due date and the actual date of birth, stillbirth or miscarriage. The employer however, cannot force her to disclose any medical details respecting her condition, diagnoses, or treatment.

End of Pregnancy Leave

The end of an employee's pregnancy leave is determined, in part, by whether or not she is entitled to parental leave. If she is entitled to parental leave, her pregnancy leave will end 17 weeks after the pregnancy leave began. If she is not, then her pregnancy leave will end either 17 weeks after she began her pregnancy leave or six weeks after the birth, stillbirth, or miscarriage, whichever is *later*. An employee, however, may choose to end her pregnancy leave early. In order to do so, she must provide her employer with four weeks written notice prior to the date she wishes to end her leave. She may subsequently choose to change the end date, and has the right to do so, as long as she provides her employer with four weeks notice. Under no circumstances can her employer force her to return to work early. If it attempts to do so, the employee can file a complaint with the Ministry of Labour and the employer's conduct will be investigated.

The same notice requirements are applicable to an employee who wishes to terminate her employment before her pregnancy leave expires. The only exception to this provision is for women who are constructively dismissed while on leave. In these circumstances, the employee is not obligated to provide her employer with the four weeks written notice.

Benefits during Pregnancy Leave

An employee's rights pertaining to her benefits have not changed under ESA 2000. An employer is obligated to pay its contribution to the employee's benefit plan while she is on pregnancy leave. The plans include pension, life insurance, accidental death, extended health, dental, and any other prescribed plans. The employer is not obligated to make payments if the employee gives written notice that she no longer wishes to contribute to these plans.

In addition, the period of pregnancy leave is included in the determination of an employee's length of service, seniority, vacation, and the reasonable notice entitlements, however, it is *not* included in the determination of whether or not an employee has completed a probationary period.

II PARENTAL LEAVE

The parental leave provisions are set out in ss. 48 and 49 of ESA.2000. These provisions provide an additional leave of absence from work for birth mothers and parents. A parent is defined as any man or woman who is the birth parent, adoptive parent, or step-parent of a child, as well as any person who is in a long-lasting relationship with a parent of a child and intends to treat the child as his or her own. However, the length of the long-lasting relationship required is unknown.

Eligibility

Consistent with the old Act, employers who employ an employee for at least 13 weeks, are obligated to provide a leave of absence without pay following the birth of a-child or the coming of the child into his or her custody, care, and control for the first time. Therefore, parents of both newly born, and adopted children are entitled to unpaid parental leave.

Commencement

Under the old Act, parents wishing to take parental leave were required to do so no later than 35 weeks after the child was born or came in to custody, care, and control for the first time. The ESA 2000, on the other hand, provides some flexibility with respect to when parental leave may be taken. Thanks to the new amendments, parents are now permitted to begin parental leave no later than 52 weeks after the child is born or comes into custody, care, and control for the first time. This amendment originates in research showing that the amount of time parents spend with their newborns in the first year is important to the child's development. The amendment was altered to correspond with the new amendments to the duration of leave provisions in ESA 2000 (See section on Duration). Without this change, both parents would not be able to take the maximum leave provided under the pregnancy and parental leave provisions.

Duration

Under the old Act, an employee was entitled to 18 weeks of unpaid parental leave, regardless of whether or not he or she was entitled to pregnancy leave. The new amendments to the ESA 2000 have extended the duration of parental leave to up to 35 weeks of leave if the parent was *also* entitled to pregnancy leave, and up to 37 weeks of leave if they were not. Therefore, if parents of newborns elect to take the maximum allowable job-protected leave at separate times, the newborn could have a parent home for up to 89 weeks. This includes: 17 weeks of pregnancy leave (birth mother), 35 weeks of parental leave (birth mother), and 37 weeks of leave (other parent). Likewise, newly-adopted children can be cared for by their parents for up to 74 weeks.

Notice

If an employee wishes to take parental leave, he or she must provide their employer with two weeks written notice prior to the date that they wish to commence leave. The employee is also entitled to change the commencement date for parental leave upon written notice that must be provided two weeks prior to the earlier date that he or she wishes to leave.

End of Parental Leave

An employee has the right to end the parental leave early as long as he or she provides the employer with four weeks written notice prior to the date on which the parental leave will end. The employee also has the right to subsequently change the end date upon four weeks written notice. Any employer will be penalized if it attempts to force the employee to return to work earlier than he or she is entitled to.

Benefits During Parental Leave

As outlined in the pregnancy leave provisions, an employer is obligated to pay its contribution to the employee's benefit plan for the duration of the parental leave unless the employee gives written notice that he or she does not want to contribute themselves.

III EMERGENCY LEAVE

One of the most contentious changes to the Act has been the enactment of the emergency leave provisions set out in s. 50. The emergency leave provisions came into force on September 4, 2001, as a result of a *Blueprint* commitment introduced by the Harris government during its 1999 reelection campaign. This commitment promised a maximum of ten days of unpaid, job-protected

leave annually for recognized family and medical reasons to employees who are working for medium to large employers who each regularly employ 50 or more staff members.³

Eligibility

Pursuant to s. 50(1) of the ESA 2000, an employee is entitled to emergency leave without pay if their employer regularly employs 50 or more staff members, and if the reason for the leave is one of the following: a personal illness, an injury, a medical emergency or the death, illness, injury, medical emergency or other urgent matter concerning a close relative, 50(2) Close relatives are defined as:

1. The employee's spouse or same-sex partner;
2. A parent, step-parent or foster parent of the employee, the employee's spouse or the employee's same-sex partner;
3. A child, step-child or foster child of the employee, the employee's spouse or the employee's same-sex partner;
4. A grandparent, step-parent, grandchild or step-grandchild of the employee or of the employee's spouse or same-sex partner;
5. The spouse or same-sex partner of a child of the employee;
6. The employee's brother or sister;
7. Any other relative who is dependent on the employee for care or assistance.

Exclusions

Certain *professional employees* who meet the qualifying criteria are not entitled to take emergency leave if doing so would constitute an act of professional misconduct or a dereliction of professional duty. These employees include doctors, lawyers, architects, professional engineers, public accountants, teachers, pharmacists, physiotherapists, chiropractors, students in training for any of the listed occupations, or a person employed as a registered practitioner of a health profession set out in Schedule 1 of the Regulated Health Professions Act 1991.

³ P. Boniferro, M.C. Chambers, "Emergency Leave Under the *ESA, 2000*".

"Regularly" Employ Fifty or More Employees

Section 50 of the ESA 2000 requires, that an employer must regularly employ at least 50 employees for six or more months during the last calendar year in order to meet the 50-employee threshold.⁵ In this regard, it does not matter whether or not the months are consecutive, as long as the employer has employed at least 50 employees for a total of six months. It is the Ministry's policy to use the previous calendar year to determine whether or not the employee threshold has been met. However, the "Quirk" and the "Sea Change" principles are two exceptions to this approach.

The "Quirk" principle pertains to the Ministry's concern that an employer's previous calendar year was a quirk, and is not representative of its normal situation. The Ministry provides the example of an employer who employed 60 employees for more than half of the immediately preceding calendar year but employed only 35 employees in the three calendar years prior to the last calendar year. Furthermore, it is likely that it will not employ 50 or more employees for more than six months of the current calendar year. In this situation, the Ministry must conclude that the employer does not meet the 50-employee threshold and the emergency leave provision would not apply.

According to the Ministry, the "Quirk" principle also works in reverse. An example would be an employer who regularly employed 60 employees in the years preceding the last calendar year and during the current calendar year but employed only 30 employees for more than half of the last calendar year. In this situation, the Ministry would recognize this quirk and conclude that the employer met the 50-employee threshold even though it did not employ 50 or more employees during the last calendar year.

⁴ W. McNaughton, J.A. Brough. "Employment Standards Act, 2000: Emergency Leave" (Fifth Annual Six-Minute Employment Lawyer, Toronto: Continuing Legal Education, Law Society of Upper Canada, 2002).

⁵ "Emergency Leave" Ministry of Labour Information Bulletin No. 2, September 4, 2001.

The "Sea Change" principle is concerned with the possibility that something has occurred during the current year, or even the latter part of the previous calendar year, that represents *a. permanent* and significant increase or decrease in employee complement.⁶ Stated simply, an employer may have employed 50 or more employees for more than half of the previous calendar year, but something occurred in the current year, or the latter part of the previous calendar year, that has resulted in it permanently reducing its workforce to below 50 employees. An example provided by the Ministry is an employer who employs 60 employees for several consecutive calendar years, and continues to do so until the last three months of the last calendar year, wherein the number of employees drops to 35 employees due to the permanent loss of a significant client. In this situation, the Ministry must conclude that the employer does not meet the 50-employee threshold, even though it employed at least 50 employees for more than half of the preceding calendar year.

As a result of this designation by the Ministry, the employees will lose their entitlement to emergency leave if the terminations occur before July because the six-month requirement has not been satisfied. If the terminations occurred after July, no entitlement would be lost and employers are obligated to give the employees the necessary and maximum time off. Regardless of the outcome, an employer must wait until the end of the first half of the current calendar year before making any changes to the emergency leave benefit.

The "Sea Change" principle also works in reverse. In the event that an employer employs 30 employees for several years and then due to an increased market, was required to employ an additional 25 employees toward the end of the previous calendar year, the Ministry would conclude

that the employer met the 50-employer threshold despite the fact that it employed less than 50 employees for more than half of the immediately preceding calendar year.

Who is an Employee?

It is important for an employer to be aware that he or she is obligated to include all employees when determining whether or not they employ 50 or more employees. The term "employee" is broadly defined under the ESA 2000, and includes employees who are home-workers, part-time workers, probationary employees, employees employed under fixed-term contracts, employees on lay-off, strike or lock-out, casual employees and some trainees. Each part-time employee counts as one employee, regardless of the number of hours they work. Furthermore, if an employer has more than one business location, all employees regularly employed at each Ontario location must be included in the count. However, employees situated in business location that is out of Ontario cannot be included for the purposes of s. 50.

Personal Illness, Injury or Medical Emergency

Pursuant to the ESA 2000, an employee's reason for requesting time off must either be personal illness, injury, medical emergency, or the death, illness, injury, medical emergency or urgent matter of a close relative as defined in s. 50(2). The Ministry of Labour has also broadly defined what constitutes an illness, injury or medical emergency. An employer is therefore obligated to authorize leave for all illnesses, including elective or pre-planned surgeries if they are performed to address or prevent a medical condition, even if the illness, injury or emergency is caused by the employee's own actions. However, the Ministry has left open the possibility that some types of plastic surgery may not constitute an illness. The only consolation to employers is that any leave taken is unpaid.

⁶ *Ibid*, at 2.

Urgent Matter

As previously stated, employers are obligated to provide time off to employees who need to attend an urgent matter relating to certain relatives. Interestingly, an employee cannot take leave if the "urgent matter" is with respect to the employee personally. Rather, leave can only be taken if the "urgent matter" pertains to a "relative" listed in s. 50(2).

Unfortunately, the ESA 2000 does not define what constitutes an "urgent matter." As a result, it is foreseeable that the interpretation of the phrase will be heavily debated. However, the Ministry has provided some assistance until this matter can be resolved. According to the Ministry, an "urgent matter" is one that is unplanned or out of the employee's control, and involves the *possibility* of serious negative consequences, including emotional harm, if it is not attended to. The key question that an employer must ask is whether a reasonable person in the employee's circumstances would feel that the matter is an urgent one. Examples of what the Ministry regards as an "urgent matter" are situations in which an employee's babysitter calls in sick and there is no other caregiver available, or where an employee is asked to come and pick up their sick child at school. In these situations, the employer is obligated to allow the employee the requisite time off. Preventing or sanctioning the employee for taking time off, by refusing promotions or assigning fewer shifts, would violate the ESA 2000 and could result in an employer receiving a hefty fine.

Matters Concerning "Relatives"

Employers must also allow its employees to take unpaid leave to attend to the death, illness, injury, medical emergency or other urgent matter involving a "relative." A "relative" has been defined as a person related through blood, marriage, same-sex partnership or through a spousal relationship

between people of the opposite sex who are not married, regardless of how long the relationship has been in existence. An employer must also allow a leave of absence for an employee attending to non-relatives, who are dependent on the employee for financial support. The law, however, does not stipulate the level of dependency required by a non-relative to trigger the entitlement to leave. The Ministry has provided some guidance by indicating that partial dependency on the employee will be sufficient to trigger the leave entitlement and that the need for the emergency leave does not have to be a result of, or related to, the assistance that the employee provides.

Notice

As with the pregnancy and parental leave provisions, an employee who wishes to take emergency leave must provide his or her employer with either written or oral notice of their intention to do so. If circumstances arise in which the employee is forced to take emergency leave without providing the requisite notice, he or she must do so as soon as possible after the leave has begun.

An employee, however, does not lose his or her right to emergency leave if they fail to provide notice after their leave has begun. Their entitlement to a leave of absence arises because he or she qualifies under the ESA 2000 and there is nothing in the ES A 2000 suggesting that an employee will lose that right if they fail to provide the requisite notice.

Proof of Entitlement

Because an employer's business can be seriously disrupted by the absenteeism of an employee, an employer has the right to ask an employee for reasonable proof that he or she is entitled to the emergency leave.

Reasonable proof includes, but is not limited to, a doctor's certificate, death

⁷ *Ibid.* at 3.

certificates, notes from school or day-care facilities, and receipts. However, an employer is not entitled to information pertaining to the employee's medical history, diagnosis or treatment, including information regarding the medical condition that gave rise to the leave entitlement, unless the employee has consented.

Where an employee takes time off to attend to an illness, injury or medical emergency of a relative, the employer is prohibited from insisting on a medical certificate for the employee's relative since the relative is not an employee. It is only permitted to inquire about the relative's name, relationship to the employee, and the general reason why the leave was required.

Rights during Emergency Leave

The rights available during emergency leave are similar to the rights available during pregnancy and parental leave. An employer is obligated to provide a continuation of the same rights and benefits that the employee enjoyed while at work.

The 10-day Entitlement

As previously mentioned, an employee is permitted to take up to 10 unpaid days of leave annually. An employee, however, cannot insist on taking "part days" of leave.⁸ If an employee does take any part of a day as leave, an employer may deem the employee to have taken a full day's leave.

Furthermore, the 10-day leave entitlement cannot be carried forward from one calendar year to another and cannot be pro-rated. As of January 1st each year, an employee is entitled to the full 10

⁸ L. Shouldice. "The new emergency leave provisions on Ontario's Employment Standards Act, 2000" 2002, 11 E.L.L.R

days leave, regardless of how many days remain unused from the preceding year. In addition, an employer is compelled to authorize 10 days off for part-time employees and employees who are hired part way through the calendar year.

IV SANCTIONS FOR BREACH OF PREGNANCY, PARENTAL AND EMERGENCY LEAVE PROVISIONS

The cost to employers of failing to abide by the new provisions in the *Employment Standards Act* far outweighs the inconvenience of implementing them in the workplace.

Pregnancy and Parental Leave

Prior to the recent amendments to the ESA 2000, it was illegal in Canada to discriminate against an employee who was pregnant or intended to become pregnant, or who wanted to take parental leave. The ESA 2000 now provides employees with job protection for up to one year during pregnancy and parental leave.

Consequently, an employer cannot fire an employee for taking leave of this nature. In addition, at the conclusion of the pregnancy or parental leave, an employee has an absolute right to be reinstated to the position that he or she held prior to their departure. If the position no longer exists, an employee has the right to be reinstated into a "comparable" position. Furthermore, he or she cannot be forced into accepting a comparable position if his or her old position currently exists. The employee has a right to displace a successor who has been filling the position for the duration of their absence. Consequently, the employer cannot transfer the employee to an equivalent or senior position if it discovers during the leave of absence that the replacement is more competent, or better suited for the job.

Furthermore, an employer cannot attempt to circumvent its obligations by reinstating an employee to their former position, waiting a few months and then laying-off or transferring them once he or she has ceased to be a 'pregnant' or 'returning' employee. Arbitral decisions have held that such "after the fact" lay-offs or transfers are just as illegal where they occur a few months after an employee's return from maternity leave as when they occur on or before that date. The law also forbids an employer from reducing an employee's salary while he or she is on pregnancy or parental leave. Upon return, the employee must be paid the greater of: the most recent wage rate he or she earned with the employer or the rate that they would have earned if he or she worked throughout the leave. Therefore, if the wages corresponding to the employee's job have increased while the employee was on leave, the employer is obliged to pay the higher wage.

Unfortunately for employers, nothing will relieve an employer of its obligation to reinstate a returning employee except for closing the business. Prior to the new amendments in the ESA 2000, if the employer discontinued its operations and had not resumed them by the time the pregnancy or parental leave had ended, the employee was entitled to be reinstated when the employer, resumed its operations.⁹ This is no longer a requirement.

The current state of the law is unclear on whether or not the employer is obligated to create a comparable position for a returning employee if his or her position is eliminated as a result of a restructuring. On the one hand, both the old Act and the ESA 2000 require the employer to reinstate the returning employee to the job that he or she performed prior to their departure, if it existed, or to a comparable position if it did not. On the other hand, the ESA 2000 contains a new provision that provides an exemption to the employee's right to reinstatement if the employee is terminated solely

for reasons unrelated to the leave. If an employer can demonstrate that the termination was unrelated to the pregnancy or parental leave, it may not be obliged to create a comparable position for a returning employee. If, however, the employer cannot demonstrate that these two events were unrelated, it must lay off other employees to make room for a returning employee.

Similarly, an employer may not demote or transfer a female employee, in a manner that prejudices her career advancement, after she has announced her intention to bear children at some future date. A failure to meet this requirement may result in a breach of the Act. For example, a manager who is worried that the additional pressures of motherhood may impact on her ability to continue working long hours, and her attendance record following her return from pregnancy leave, will contravene the law if the manager transfers her to a less demanding or junior clerical position. To do so may now be construed as imposing a penalty, or partially suspending her duties, regardless of whether or not the employer had no intention of discriminating against the employee.

Even though it may be inconvenient or costly for an employer to honor its legal obligations under the ESA 2000, it must be aware that the price of disregarding these provisions could substantially exceed the financial consequences normally associated with wrongful dismissal claims. When an employer is found to have wrongfully dismissed an employee, without just cause, it is required either to give him or her reasonable notice or to pay the employee salary in lieu of notice. In the absence of a collective agreement, a non-unionized employer cannot be ordered to reinstate an employee, no matter how wrongful the dismissal and no matter how great the employee's seniority. However, where an employer breaches its statutory obligations to an employee under the Act, it may be obliged to reinstate the employee and to pay him or her a large financial settlement.

⁹ *Ibid.* at 3.

In practice, this financial settlement will be significantly greater than what an employer would have to pay in normal wrongful dismissal cases, particularly in the case. Earlier arbitration decisions have suggested that where the employer has breached its duty to a female employee regarding pregnancy and parental leave, it is obliged to indemnify her for the totality of the economic loss which she has actually suffered as a result of the illegal termination of her position. The following sums are habitually included in the indemnification that the employer must pay the employee if it breached these sections of the Act: a) all out-of-pocket expenses incurred by the employee in attempting to find a new job and suing her employer; b) financial compensation for the shock and emotional upheaval caused by the illegal termination of her employment; c) all wages lost from the date of termination to the date she finds an alternative position; d) where the employee is not to be reinstated, an additional lump sum payment, usually ranging from \$2,000 to \$10,000 for the loss of the job itself to compensate the employee, in part, for the loss of future earnings from her former position.

Emergency Leave

The introduction of the emergency leave provision a year ago has been controversial, and employers have expressed grave concerns about the impact of the provision on their current business practices.¹⁰ It is still premature to ascertain how employers *are* reacting to and treating employees as a result of this new entitlement; however, it is likely that the provision does not have a great impact on most Ontario employers. The initial concern amongst employers was that their employees would take advantage of the additional leave entitlement. While some employees have and will continue to abuse the emergency leave provision, it will likely be abused by only a few staff who

regularly abuse their leave entitlements, and not by all employees who are entitled to the leave. Moreover, the fact that emergency leave is without pay serves as a strong deterrent to misuse this entitlement and employees will likely take advantage of this provision only when it is necessary.¹¹

In addition, as the emergency leave is only available to employees who meet the 50-employee threshold, small employers do not have to concern themselves with the impact of this provision. Moreover, large employers whose employees are entitled to the benefits under this provision also need not be concerned because many large companies already provide a paid or unpaid leave of absence for reasons similar to those contained in the ESA 2000. Therefore, it has been suggested that the concerns surrounding the emergency leave provisions will be short-lived.¹²

However, it is still necessary for every employer to understand that under the ESA 2000, job protection is also guaranteed on an ongoing basis for employees who wish to take their maximum entitlement of emergency leave. Section 73(1) prohibits an employer, or a person acting on behalf of an employer, from intimidating, dismissing, or otherwise penalizing an employee, or threatening to do so, because he or she is eligible to take, or intends to take emergency leave. Violation of this provision may result in similar consequences to violations of other provisions under the Act.

Conclusion

It is obvious that the new ESA 2000 provisions have increased the responsibilities and obligations facing Ontario employers. To prevent significant negative financial repercussions, employers must

¹⁰ *Supra* note 4.

¹¹ N.C. MacDonald, "New Employment Standards Act, 2000" *The Employment Bulletin* 11:7 1 January 2002).

familiarize themselves with the changes to the employment legislation and determine whether or not their policies, practices and/or collective agreements comply with the new minimum standards legislation by providing at least a similar benefit. This means that employers may need to revamp their leave of absence and absenteeism policies to comply with this new emergency leave provision.

However, regardless of the situation, employers must bear in mind that the provisions under the ESA 2000 afford minimal protection of an employee's rights. Except in limited circumstances, an employer and employee are not permitted to contract out of these rights if the result is to afford a protection below what is provided for under the Act. Alternatively, they may have agreed to more extensive rights. Therefore it would be prudent for an employer to scrutinize the employment contract before taking any action involving an employee.

An employer who breaches the relevant provisions under the ESA 2000 therefore does so at its peril. Even in the case of a junior employee, who has only been with the employer for a short period of time, the indemnification package that it be ordered to pay can reach into the tens of thousands of dollars. Given the significant amounts of money involved, and the relative ease with which an employer may breach its legal obligations, it is well advised to obtain sound legal advice prior to restructuring its workforce in a manner which impacts on employees who are either returning from or intending to take pregnancy or parental leave.

¹² *Supra* note 4.