

Emergency leave and agreements under the *ESA 2000*: new variables in the workplace mix

Two of the features of the *Employment Standards Act, 2000* (see "[Parental leave, overtime rules among major changes in new *Employment Standards Act*](#)") which have attracted considerable attention are the emergency leave provisions and the provisions under which employers and employees may enter into agreements to vary the employment standards provided in the Act. In this article, we take a closer look at these two new aspects of employment law in Ontario.

AGREEMENTS TO VARY: GENERAL CONSIDERATIONS

Unless otherwise provided, agreements between employers and employees must be in writing. This rule applies to most agreements contemplated under the Act but not, most notably, to the employment contract itself, other than a collective agreement. When a union representing the employee enters into an agreement with the employer to vary an employment standard, that agreement is binding on the employee. The Ministry of Labour (MOL) has noted that the "in writing" requirement can be satisfied by electronic agreements, but the employee must have done something positive to demonstrate assent to the agreement for it to be valid.

The MOL has also indicated that a number of factors are relevant to whether an agreement can be considered enforceable. These include whether

- the agreement purports to be retroactive. Generally, agreements should cover only future events. However, in limited circumstances, some retroactivity may be permissible;
- the parties have signed the agreement;
- the terms of the agreement are clear and specific;
- the employee understood the consequences of entering into the agreement; and
- the employee was coerced into making the agreement.

A number of the concerns arising from the foregoing list of factors can best be dealt with by including in each agreement the following elements:

- the names of the parties;
- the date the agreement was made;
- the date the agreement takes effect;
- the date the agreement expires;
- an accurate description of the employment standard being varied and what is replacing it; and
- the parties' signatures.

TYPES OF AGREEMENTS PERMITTED

The Act provides for numerous types of agreements, including agreements to

- exceed daily and weekly hours of work to a maximum of 60 hours per week (or more than 60 hours, with the Director's approval);
- provide less than eight hours free from work between shifts;
- provide two eating periods totalling 30 minutes per five-hour work period, instead of one 30 minute period (this agreement does not have to be in writing);
- average the hours worked over a maximum four-week period for the purpose of calculating overtime entitlement (or, over more than a four-week period, with the Director's approval);
- compensate an employee with time off in lieu of overtime pay, within three months of the date the overtime was earned, or, by further agreement, within 12 months;
- provide that an employee who is not required to work on a public holiday, work on the holiday and that the employer (a) pay the employee his or her regular wages and give the employee a subsequent paid day off within three months or, if the parties agree, 12 months, or (b) if the parties agree, pay the employee holiday pay plus premium pay for each hour worked on the public holiday;
- provide vacation time in increments of less than one week (note: this agreement must be initiated by an request in writing from the employee);
- pay vacation pay as it accrues or at a time agreed upon;
- have the employee forego taking a vacation, with the Director's approval; and
- pay severance owing to employees in installments, over a period not to exceed three years.

EMERGENCY LEAVE

The emergency leave provision allows employees in workplaces that regularly employ 50 or more employees to take up to 10 days of unpaid leave per year to deal with

- a personal illness, injury or medical emergency;
- the death, illness, injury or medical emergency of specified individuals; or
- an urgent matter that concerns specified individuals.

"Specified individuals" is defined to include persons such as the employee's spouse, same-sex partner, or a close or dependent relative.

At the conclusion of emergency leave, the employee is entitled to be reinstated to the position that he or she most recently held, if it still exists, and otherwise to a comparable position.

The MOL has provided guidelines for how it will interpret some of the terms used in the emergency leave provisions:

"Regularly employs 50 or more employees"

As this qualifier is one of the preconditions to an employee being eligible for the leave, it is important to understand how it will be interpreted. According to the MOL, this requirement will be met if the employer employed "at least 50 employees for at least half of the time in the most recent calendar year, subject to changes of some permanence in the number of employees in the current calendar year".

Therefore, if, in a given year, an employer permanently reduces its work force to under 50 employees, the entitlement to emergency leave in that year may depend on when during the year the reduction takes place. If it takes place early in the year, employees may well lose their entitlement in that year as of the time the reduction occurred. If it occurs late in the year, employees would remain entitled, because more than 50 employees had been employed for six months during the year.

Who is an "employee"?

All employees are to be counted for the purpose of the 50-employee threshold, including homeworkers, casuals, probationary employees, and employees who are laid off, on strike or locked out. Part-time employees each count as one employee, and if an employer has more than one location in Ontario, all of its employees are included in the count.

"Illness, injury or medical emergency"

"Illness" includes pre-planned or elective surgery, if performed to address or prevent a medical condition. As well, if the condition is brought on by the employee's own actions, the employee will still be entitled to leave.

"Urgent matter"

This term refers to a matter 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 test is whether a reasonable person in the employee's circumstances would feel that the matter is an urgent one". [emphasis in original]

"Relative of the employee who is dependent on the employee for care or assistance"

"Relative" in this context is defined broadly, and includes a person whose relationship with the employee arises "through a same-sex or spousal partnership once there is a conjugal relationship, regardless of how long the relationship has been in existence".

A relative is considered "dependent" if the relative relies on the employee *to some degree* for care or assistance in meeting daily needs. As well, the reason for emergency leave does not have to be connected with the type of dependence between the relative and the employee.

In Our View

Mention should also be made of the interaction between emergency leave and contractual leave provisions. When contractual provisions provide a greater leave right than those in the Act, the contractual provisions prevail. In some cases, it is clear which confers the greater right - for example where the contract or collective agreement provides 10 days of *paid* leave days for all the situations covered by the emergency leave provisions in the Act.

However, the MOL also indicates that, if an employee is entitled to only 10 paid *sick* days, and uses them, that employee will not be entitled to access the emergency leave provisions for other purposes, such as bereavement. This is because, even though the paid sick leave does not cover all of the contingencies of the emergency leave, by actually taking 10 paid days, the employee has received a greater benefit than that available under the Act - 10 paid days off for personal sickness, as opposed to 10 unpaid days for circumstances that include personal sickness. (See also ["Amendments to Employment Standards Act introduced by government"](#)).

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