

The Institute Review

Central Ontario Industrial Relations Institute

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Employment Standards CONFUSION – Part 2

In Part 1 of this article (last month), we explained that, contrary to earlier reports from many sources, Ontario's new EMPLOYMENT STANDARDS ACT, 2000, has yet to be proclaimed into force — but for one section that provides for an extension to the length of a parental leave of absence. In the meantime, the current (old) legislation continues to apply. This month we continue our look at some of the changes that will become law . . . sometime.

Last month we examined some of the changes that Bill 147 will bring to the administration of hours of work, overtime, meal breaks and time off from work. In this edition, we look at family-related leaves of absence, vacations, public holidays and termination.

FAMILY-RELATED LEAVES OF ABSENCE

By now, most readers will be familiar with the idea that the length of parental leave possible under the legislation has been significantly increased. These changes mirror the changes made at the federal level, to the *Employment Insurance Act*, extending the duration of parental leave EI benefits.

Employees who also take a pregnancy leave of absence now qualify for up to 35 weeks of parental leave. Employees who do not take a pregnancy leave (usually, but not exclusively, fathers) qualify for up to 37 weeks of parental leave.

Although the language surrounding pregnancy and parental leave has changed, the basic intent and application of the statute continues more or less as it is under the current ESA.

One notable change, however, has to do with an employer's obligation to reinstate an employee following the end of his or her leave of absence. As many members are aware, the prevailing trend in the case law interpreting the current provisions holds that employers face an *absolute* obligation to reinstate — that is, the employee must be reinstated into the pre-leave job, if it still exists and, if it does not, into a comparable job. Under this absolute viewpoint, if no comparable job exists, an employer is obliged to *create* one, merely to satisfy the obligation to reinstate.

While the case law has taken a rather unyielding view of the employer's obligation to reinstate, the Ministry of Labour's (MOL) policy has been marginally more flexible. The MOL policy has long recognized that there may be situations where an employee would have been laid off in any event, whether or not a leave of absence was taken. In those narrow circumstances, the MOL has allowed for the possibility that a failure to reinstate may not amount to a violation of the law.

Bill 147 essentially codifies the MOL's policy viewpoint. The new section 53(2) states that the obligation to reinstate does not apply where the employment of the affected employee ends "solely for reasons unrelated to the leave". Presumably this will be a high standard to meet but, as a practical matter, where an employer can demonstrate that a lay-off would have occurred despite the LOA, there is at least the possibility of demonstrating how and why the failure to re-employ does not amount to a violation of the legislation.

Another significant change under Bill 147 is the addition of "Emergency Leave". These provisions will only apply to those employers who regularly employ 50 or more people. Under these new provisions, employees will be entitled to a leave without pay in the event of a personal illness, injury or medical emergency; the death, illness, injury or medical emergency involving certain family members; or any "urgent matter that concerns" those family members identified. The list of family members is fairly broad and includes, for example, the same-sex partner of a child of an employee.

A total of 10 days leave is available under these provisions. Employers will be allowed to require employees to provide reasonable evidence that they are entitled to the leave. Are we being cynical or will these new emergency leave provisions lead to much creativity (and litigation)?

VACATIONS WITH PAY

Already one of the most confusing portions of the current legislation, members may be interested to know whether the new Bill simplifies the rules regarding vacation and vacation pay.

The answer is . . . maybe. At long last it will be legal in Ontario to grant vacation time off in increments of less than one week, *i.e.*, it will be permissible for an employee to take a single vacation day off. However, this will only be allowed where the employee makes his or her request in writing. We're not sure whether this truly represents a step forward or not, inasmuch as most of the litigation over this issue occurs when an employee who uses a single vacation day to cover a sick day (or other spontaneous need for time off) later turns around and claims a full vacation entitlement.

EMPLOYMENT FAQs

(Frequently Asked Questions)



The Institute issued a Special Bulletin a few years ago advising members that, unless a recall date was given, a temporary layoff would be deemed to be a termination. Will that policy change under the new Employment Standards Act, 2000?



In February 1999, the Ministry of Labour did change its policy such that officers would no longer view as temporary any lay-off where affected employees did not receive a recall date. Bill 147 makes absolutely clear that a recall date will NOT be required in order for a lay-off to be viewed as “temporary”. This is good news for any employer that uses temporary lay-offs.

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VACATIONS WITH PAY (continued)

Unless the employer has (and retains) the request in writing, it appears that the situation under the revised Act is really no different than under the current legislation — the employer may still be liable for the full vacation entitlement despite having earlier granted one or more days off thinking it was “vacation”.

Furthermore, the new statute appears to add new complications in terms of the form and timing of vacation pay payments. Vacation pay must be paid in a lump sum before the employee starts his or her vacation, unless certain criteria are met. Furthermore, the new Act makes the payment of vacation pay during a strike mandatory if the employee has already scheduled the vacation time off — even if the employer subsequently “cancels” the vacation request.

PUBLIC HOLIDAYS

Another extremely confusing part of the current ESA, it may be questionable as to whether or not the new statute represents an improvement over the current system for administering public holidays.

First of all, a new method for calculating public holiday pay is explicitly included. The formula requires the employer to take into account both wages and vacation pay payable to the employee during the 4 week period leading up to the holiday — and divide that amount by 20. Simple, no?

The qualifying conditions for becoming entitled to the public holiday benefit have been simplified, but whether or not that represents an improvement in the view of employers is doubtful — for example, the requirement that an employee must have worked for 3 months prior to the holiday has been removed, as has the requirement to work on at least 12 days during the 4 weeks leading up to the holiday (the condition under which many part-time employees currently become disentitled). The only qualifier retained is the requirement to work the last day before, and first day following, the stat holiday.

Essentially all employees, regardless of whether they are new hires or part-timers, will qualify for the public holiday benefit provided they don't attempt to unreasonably “stretch” the long weekend by taking an extra day off, either before or after the holiday day in ques-

tion. Simpler, maybe, but with more employees qualifying, this may be more expensive for employers.

While much of the underlying system appears to remain much the same, it is couched in so much new language that, on first review, we predict that the public holiday provisions will continue to be a thorn in the side of employers — and anyone else who has the misfortune to try and make sense of them!

TERMINATION

No major changes but, again, enough new language that things that used to be second nature may now require a second, more careful review.

The term “termination” is given an explicit, three-part definition and includes a constructive dismissal where the employee resigns within a “reasonable period”. Based on current case law, presumably that means within 3 months, give or take. Unfortunately, the term “severance” (as in “severance” of employment) is also defined, thereby accentuating the already confusing dichotomy between “termination” for the purposes of notice versus “severance” for the purposes of severance pay.

The new legislation provides an explicit formula for determining whether an employer has an annual payroll of \$2.5 million or more, for the purpose of determining whether severance is payable. It also makes clear that any and all broken periods of service must be taken into account in terms of determining severance entitlements (implicit in the current ESA).

Notice periods remain unchanged, with only a slight revision in the language used. Notable, however, is the explicit treatment given to “split” notice periods; that is, where some working notice is given and the remainder paid as ‘termination pay’. While allowable under MOL policy, the new legislation confirms that this practice will not be considered as a violation.

The treatment given to temporary lay-offs is also largely unchanged, preserving the 13 week and 35 week lay-off system. Surprisingly, however, the new Bill fails to address the administrative problem that arises under the current legislation where, at the expiry of a 13-week lay-off, the employee is deemed terminated under the legislation even though, under most collective agreements, the employee retains seniority and recall rights and is not “terminated”.