

## EMPLOYEE & LABOUR RELATIONS BULLETIN

June 2005

### **“YOU PICKED A FINE TIME TO LEAVE ME, LUCILLE”: EMPLOYERS’ OBLIGATIONS AND STATUTORY LEAVES.**

It is the busiest time of the year for the company and your key sales associate Mary has informed you that she will be taking a pregnancy leave just as a new product is about to be launched. Or perhaps Fred, your warehouse manager, is on a family medical leave and you find that his replacement has the warehouse performing better than ever. You decide Fred is expendable. What obligations do you have to Mary and Fred?

Employees in both provincially and federally regulated businesses have statutory leave protection. In Ontario the majority of employees are covered by the *Employment Standards Act, 2000* (the “ESA”), which provides them the right to take statutory leaves of absences for express purposes; namely for the birth or adoption of a child (pregnancy and parental leaves), for the care of a seriously ill member of the employee’s family (family medical leave), or for the serious illness of either the employee or a family member (emergency leave). Because of their length pregnancy, parental and family medical leaves can cause logistical problems for employers and may occur at inopportune times.

When an employee takes an unpaid leave the employer has to arrange for coverage during the employee’s absence, possibly hire someone to take the employee’s place and reintegrate the employee into the workplace once the leave has concluded. A workplace can undergo substantial changes during the period when the employee is on leave and it may be that an employee’s position no longer exists, or has been substantially altered, when the employee returns. The employer may also find that the replacement worker performs better than the employee on leave, and now has two people for one position.

This bulletin focuses on the ESA and sets out the obligations an employer has to an employee on a statutory leave, including the obligation to reinstate the employee to the workplace once the leave has concluded.

#### **A. OBLIGATIONS DURING THE LEAVE**

While an employee is on a statutory leave the employer must maintain the employee on all benefit plans and continue to make all benefit contributions including pension, life insurance and health and welfare benefits. These obligations do not apply if the employee elects in writing to either discontinue benefit coverages or to not make his or her own benefit contributions (if required to do so under any applicable plans).

Employers should also be aware that employees on a leave will continue to accrue vacation time during the course of their leave. In addition, if rights or entitlements are earned on the basis of length of service, the employee will continue to accrue service during the period of the leave. For example if after six years of employment an employee is entitled to an extra week of vacation, the period an employee is on leave will be considered in determining whether the employee has reached the six-year mark. Under the ESA, an employee on leave is not entitled to accrue vacation pay (as contrasted with vacation time off) while on leave, unless the contract of employment provides otherwise.

## **B. OBLIGATIONS AFTER THE LEAVE**

Under the ESA an employee has the right to be reinstated to the position the employee most recently held before commencing a leave, if it still exists, or to a comparable position if the former position has been eliminated. However the right to reinstatement does not exist if the employee's employment was ended solely for reasons unrelated to the leave. As discussed below, this exception has been narrowly interpreted and will only apply in the clearest of cases.

The principal obligation of the employer is to reinstate the employee to the employee's previous position. The employee may be placed in a comparable position only if the previous position no longer exists. Cases have held that this requires the employer to show both (i) that the position no longer exists and (ii) that the work that the employee was performing is no longer being performed. This means that an employer cannot reassign the work to someone else or continue to employ a replacement and still claim that the returning employee's position no longer exists. It is no defence to a breach of this obligation to argue that it became apparent during the employee's leave that the employee was no longer necessary. If the same type of work is being performed, then the employee has a right to perform that work.

What constitutes a comparable position? An employer must do more than match the wages and benefits previously received by the employee. In order to determine whether the position is comparable, the following factors are considered: location of the job, hours of work, work environment, degree of responsibility, job security, possibility of advancement and prestige. Whether a position is comparable will be determined on an objective standard; the question is not whether the employee believes the position is comparable but whether a reasonable person would consider the position to be comparable.

As mentioned the ESA contains an exception to the obligation to reinstate. When the employee would otherwise have been dismissed for reasons completely unrelated to the leave, the employer is not required to create a position in order to accommodate the returning employee. In determining whether the exception should apply, the question to be asked is: would the employee still be employed in the same position but for the fact that the employee took a statutory leave? For example if a company undertakes a restructuring and as a result a portion of its business is either sold or discontinued, there is no obligation to create a new position for an employee whose employment would have been terminated as a result of the restructuring if the employee had not been on a statutory leave.

Employers should also be aware of section 74 of the ESA which prohibits an employer, or anyone acting on behalf of an employer, from intimidating, dismissing or penalizing an employee because the employee is eligible to take a statutory leave, intends to take a leave or takes a leave. The burden of proof under this section is on the employer, who must show that any action taken against an employee (such as demoting or dismissing the employee) was in no way motivated by the employee taking a statutory leave.

If an employee makes a claim under the ESA and the employer is found to have violated its obligations, there are a number of remedies used to enforce the leave protections of the ESA. These include an order to reinstate the employee, compensation for any lost wages and wages for the period of time the employee is out of work, as well as damages for the loss of continued employment. However the employee is under a duty to mitigate damages and the assessment will therefore consider the employee's efforts to find new employment. Nonetheless, employers should still be aware that there is the possibility of significant liability if the employer is found to have violated the obligation to reinstate.

If you have any questions about statutory leaves or your obligations to employees who take a statutory leave, please do not hesitate to contact any member of the Employee & Labour Relations group.

*Written by Dave McKechnie*

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*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

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