

THE EMPLOYERS' CHOICE

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EMERGENCY LEAVE AND THE COLLECTIVE AGREEMENT

As most employers are aware, the Ontario *Employment Standards Act, 2000* (the "ESA") was proclaimed in force on September 4, 2001. One of the more confusing changes, especially for unionized employers bound by collective agreements, is the addition of emergency leave entitlement for employees who work for employers regularly employing more than 50 employees in Ontario.

Interpretation guidelines recently released by the Ministry of Labour (the "Ministry") suggest that, in some instances, employees covered by collective agreements may be entitled to combine protected leave under the collective agreement with emergency leave under the ESA. Additionally, the interpretation guidelines indicate that some employees will be able to claim more time off than others depending on when particular leaves are taken.

The Employment Standards Act, 2000

Under the ESA, eligible employees are now entitled to up to 10 unpaid days off per year for specified emergencies. Emergency situations are defined as the employee's own illness, injury or medical emergency and/or the death, illness, injury, medical emergency or other urgent matter of or related to prescribed family members.

Most collective agreements already provide some form of leave for employees. Common examples include sick leave, personal leave, floating holidays, bereavement leave, and witness/jury leave.

Of primary importance to the analysis of the interplay between emergency leave and other leaves conferred by collective agreements, is section 5 of the ESA. This section essentially provides that, while employers may not contract out of the ESA, provisions in a collective agreement that confer a greater right or benefit on employees will prevail over the ESA standard.

If a collective agreement provides 10 or more paid or unpaid personal leave days that may be taken for any purpose, that provision will comply with and may prevail over the ESA emergency leave provisions. However, what if a collective agreement provides for different annual leave entitlements, for example 7 paid personal sick days and 3 paid personal days to be used for other purposes? Does the fact that the employee has an entitlement to a total of 10 paid days off per year oust the application of the emergency leave provisions? Perhaps not, according to interpretation guidelines released by the Ministry.

Ministry of Labour Guidelines

The Ministry's interpretation guidelines suggest that the leave taken must be credited against both the specific collective agreement entitlement(s) and the emergency leave entitlement if both are applicable, or only one if it is not applicable to both. This can result in inequity among employees in

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similar circumstances and may result in some employees being entitled to more than 10 days of protected annual leave.

Using the above hypothetical collective agreement entitlements, a couple of examples will illustrate how the Ministry's interpretation guidelines work:

Employee A uses his 7 paid personal sick days early in the year. These days are counted against his ESA emergency leave entitlement, leaving a balance of 3 days. He then uses his 3 paid personal days to care for his sick child. These are also counted against the ESA emergency leave entitlement and, according to the Ministry, he has now exhausted both his collective agreement and ESA leave entitlement of 10 days.

Employee B in contrast starts the year by taking 3 paid personal days to move into a new home. She now has no personal days remaining, but according to the Ministry she still has 10 ESA emergency leave days. Her child then gets sick for 5 days. The Ministry position is that she is entitled to take 5 emergency leave days to cover the period of sickness. These days are unpaid. She now has 5 emergency leave days remaining, but is still entitled to 7 paid personal sick days under the collective agreement. If she takes the 7 paid personal sick days later in the year, she will then have had a total of 15 days' leave in the current year before she has exhausted her collective agreement and ESA leave entitlements.

The Ministry's interpretation guidelines are confusing and potentially unfair to both employers and individual employees. What remains to be seen is if arbitrators under collective agreements will accept the Ministry's guidelines when grievances concerning the interplay between the statutory and collective agreement leave entitlements are ultimately adjudicated. We will advise you as we become aware of such decisions.

Practical Advice For Employers

Assuming the Ministry's interpretation is ultimately followed by arbitrators, we recommend that employers consider proposing the replacement of specific leave entitlements in their collective agreements with general emergency leave provisions when their contracts are being renegotiated. For example, employers may propose a general emergency leave provision of

10 or more days leave per year (whether paid, unpaid or a combination of paid and unpaid), to be granted for reasons which mirror the ESA emergency leave provisions, in exchange for the deletion of specific sick, bereavement and personal leave provisions.

The successful negotiation of such changes to collective agreements would remove any uncertainty over the total number of leave days to which an employee may be entitled to take in any given year. It would also prevent the potential for discontent amongst employees that will inevitably occur when some employees are entitled to more leave than others depending on when particular leaves are taken.

One note of caution, however, is the potential for increased costs if the leave provisions being negotiated are paid leaves. For example, with a set of specific paid leave provisions an employee could not use a bereavement leave day to cover a sick day or vice versa. Under a general paid leave provision the two types of leave would be interchangeable. Therefore, an employer considering a general leave provision should consider the potential additional cost when determining the number of paid leave days to propose.

Editor's Note: The Ministry's interpretation guidelines also apply to non-union employers with leave policies that form part of the contract of employment.

Employer Obligations Under Private Sector Privacy Legislation

The federal government recently enacted privacy legislation to regulate organizations in the private sector. Effective January 1, 2001, the *Personal Information Protection and Electronic Documents Act* (the "PIPEDA" or the "Act") applies to federally regulated organizations to which the public sector *Privacy Act* does not apply, and governs how federal employers handle the personal information of their employees. Provincially regulated organizations should note that effective January 2004, the PIPEDA will apply to private sector organizations in Ontario unless the provincial government enacts similar legislation. The Ontario government has

announced its commitment to pass its own private sector privacy legislation sometime in 2003.

A common misperception is that privacy law strictly relates to the regulation of electronic commerce transactions on the internet. In fact, the application of privacy legislation involves requiring organizations to protect personal information in their possession by placing restrictions on the collection, use and disclosure of individuals' personal information in all forms. In the workplace context, privacy law regulates an employer's use of employee personal information, which means information about an identifiable individual excluding the person's name, title, business address and telephone number.

Employers constantly encounter privacy issues in the workplace through the consistent acquisition, retention and dissemination of personal information about their employees from various sources. Such sources include initial interviews, pre-employment checks and aptitude tests, medical information, drug and alcohol tests, performance reviews, employer investigations and surveillance including video, telephone and computer-usage monitoring.

The PIPEDA imposes significant restrictions on federal employers' collection, use and disclosure of employee information. The Act is based on and incorporates the principles of the *Canadian Standards Association Model Code*, which provides guidelines that an organization must follow to maintain and promote the confidentiality of personal information. Essentially, compliance with the PIPEDA obliges federal employers to implement measures, which include:

- Designating an individual to be accountable for ensuring compliance with the Act.
- Identifying the purposes for the collection of employee personal information before or at the time the information is collected.
- Ensuring that employees know about and consent to the collection, use and disclosure of his or her personal information, except where not appropriate.
- Ensuring that personal information is collected by fair and lawful means, and that collection, use and disclosure of the information is limited to and consistent with the purposes identified.
- Ensuring that all personal information is secure and accurate, and is retained only as long as necessary to fulfill the identified purposes,

except as required by law (such as retention requirements under the *Employment Standards Act*).

- Allowing employees access to their personal information that the employer possesses. Under the Act, access to personal information requested by an employee can only be denied in extremely limited circumstances.
- Developing policies and procedures that describe the employer's personal information handling practices, and that include instructions on how employees can obtain access to their personal information.

Where to Begin?

Employers who have concerns about whether their organization is in compliance with the Act should begin by conducting an internal audit of all personal information within the organization's control. Such an audit should involve identifying and documenting when, how and what personal information is collected. The employer must also determine where employee personal information is stored, why it's collected, whether the employee consented to the collection, use or disclosure, how the organization manages employee information and whether there are any policies and practices currently in place which contravene the Act.

After this audit process, employers must develop privacy policies that provide guidelines for collection, use and disclosure, and also establish mechanisms for employee access to his or her personal information.

It is critical to ensure compliance with the PIPEDA as the Federal Privacy Commissioner has been conferred extensive authority to enforce the Act. An employee can file a written complaint against his or her employer with the Privacy Commissioner, who has broad powers of investigation, audit and inquiry. The Privacy Commissioner may issue a report with respect to his findings, which could include that an organization has contravened its obligations under PIPEDA. An employee dissatisfied with the Commissioner's report and recommendations can apply to the Federal Court for review. The Court can find that an organization has not complied with its obligations under the Act, and may award

damages to the employee, including damages for any humiliation that the employee has suffered as a result of the employer's contravention.

Given the extensive enforcement provisions under PIPEDA, organizations should ensure that they have implemented personal information handling practices that comply with the requirements of the Act. If you are a federal employer faced with ensuring that your current practices meet the requirements of PIPEDA, or a provincial employer wishing to prepare for compliance with the anticipated Ontario privacy legislation, we would be pleased to assist you in addressing your specific workplace privacy concerns.

THE COSTS OF DEFAMATION

Defamation generally consists of any "published" words that tend to lower a person in the estimation of others or harm the person's reputation. However, such words are justifiable if they are truthful. Words are "published" if they are conveyed to a third party by way of words (slander) or through written means (libel). While defamation is usually associated with newspaper and magazine stories, it is also a concept of which employers should be aware. Employees who have been defamed by their employers may be awarded damages for the defamation itself. They may also be awarded an increased notice period in a wrongful dismissal action due to bad faith. Finally and of more concern, defamed employees may be compensated by way of aggravated or punitive damages. Such damages are costly and cast a negative light on employers.

Aggravated damages are intended to compensate a person for aggravated (increased) injury. In wrongful dismissal actions, employees often claim aggravated damages for mental distress caused by the employer's actions towards them. Punitive damages, on the other hand, are not compensatory. They are awarded to punish the employer for its "harsh, vindictive, reprehensible and malicious" conduct towards the employee.

Aggravated and punitive damages are not often awarded in wrongful dismissal cases except where the conduct upon which they are based constitutes a separate actionable wrong such as defamation. This scenario occurred in a recent Ontario wrongful dismissal case.

Mr. Chahal served as Khalsa Community School's principal for less than one year before he was dismissed without notice. A committee of individuals from a local Sikh community oversaw the school's affairs. At a committee meeting one of its members - Mr. Sekhon - alleged that Mr. Chahal had misbehaved towards the school's teachers and caused some of them to cry. Mr. Sekhon repeated this allegation to a local Punjabi newspaper and indicated that this was why Mr. Chahal was terminated. The story was published.

The Court found Mr. Sekhon's accusations to be false and unfounded. Mr. Sekhon and two other committee members were found personally liable for defamation and conspiracy. More importantly, the Court also found that Mr. Sekhon was acting as a school representative when he made these false allegations. Because the allegations constituted defamation and because they were "harsh, brutal and reprehensible", the Court awarded Mr. Chahal \$25,000.00 in punitive damages. This amount was in addition to the \$60,000.00 that Mr. Chahal received for reasonable notice damages.

Our last newsletter discussed the dangers of including false and negative statements in employee performance reviews. Employers should also refrain from making false and negative statements about their employees to third parties. However, there are some occasions when employers must tell third parties true but negative things about former employees. Giving false *positive* references for former employees expose employers to negligent misrepresentation claims if employees can not live up to the accolades. In the end, employers should always ensure that any positive or negative comments are supported by verifiable facts.

Please Note: This newsletter is prepared as an informational service for our clients and other interested parties. It is not intended to constitute legal advice, a complete statement of the law or an opinion on any subject. Although we endeavour to ensure the accuracy of the content, no one should act upon the information provided without a thorough examination of the law after the facts of a specific situation are fully considered.