

CDPA Employment Seminar: Navigating the *Employment Standards Act, 2000* Leaves of Absence and the Duty to Accommodate

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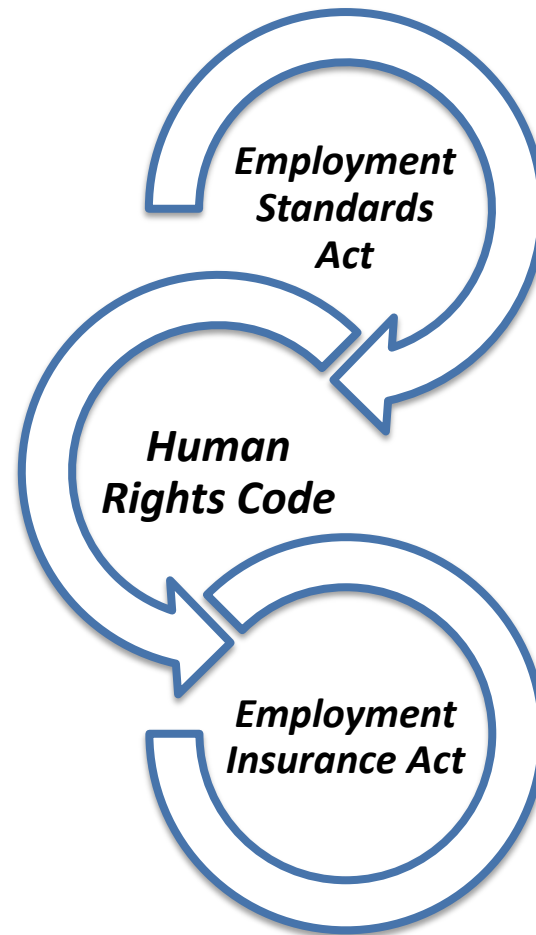
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Outline

- **Statutorily mandated leaves of absence:**
 - Pregnancy, Parental, Personal Emergency, and Family Medical
 - Practical Tips
- **Duty to accommodate ~~Code~~-related leaves:**
 - Overview of the duty to accommodate
 - Duties and Responsibilities of Employees & Employers
 - Practical Tips

Big Picture: Statutory Protection of Leaves of Absences



The Employment Standards Act

The Employment Standards Act (ESA): Leaves of Absences

- The *ESA*, is a law that sets minimum standards for workplaces in Ontario
- Who is covered?
- Complaint driven
- The Ministry of Labour enforces the *ESA* and its regulations, provides information, investigates potential violations and resolves complaints
- Will focus on the statutory mandates leaves

Pregnancy & Parental Leave

- Qualification: working at least 13 weeks before expected due date
- Pregnancy Leave: up to 17 weeks of job-protected, unpaid time off work
- Parental Leave: available to both biological parents and adoptive parents – birth mothers who took pregnancy leave are entitled to 35 weeks; those who did not, are entitled to 37 weeks

Personal Emergency Leave

- Up to 10 days per calendar year because of illness, injury, certain emergencies, other urgent matters
- To qualify, 50 or more employees
- This leave may be taken for personal illness, injury or medical emergency or for the death, illness, injury, medical emergency or urgent matter relating to:
 - a spouse, a parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparent, grandchild or step-grandchild of you or your spouse, brother or sister, a relative of the employee who is dependent on his or her care or assistance
- Notice to the employer

Family Medical Leave

- Job-protected time off work for up to 8 weeks to provide care or support to a family member with serious medical conditions with significant risk of death occurring within 26 weeks
- Applies in order to care for the following family members:
 - employee's spouse, a parent, step-parent or foster parent of the employee, and a child, step-child or foster child of the employee or the employee's spouse
- Medical condition and risk of death need confirmation via a certificate from qualified health practitioner

Obligations During and After...

- ***Benefits:*** During leave, employees continue to earn credit for length of employment, length of service, and seniority and benefits.
- ***Employee's Return:*** Employer is required to reinstate the employee to the position he or she held prior to the leave, or a comparable position if that position no longer exists.
- ***Terminating the Employee on Leave:*** If an employee is dismissed for reasons which are unrelated to the employee taking the leave, the employer does not have to reinstate the employee.

Human Rights & Duty to Accommodate

Duty to Accommodate: Overview

- Accommodation is considered a fundamental and integral part of the right to equal treatment in employment
- Obligation is to the point of undue hardship
- Objective is for the employee to continue to participate fully in work
- *Human Rights Code* focuses on:
 - Prevention and removal of barriers in the workplace
 - Appropriate accommodation that best ensures inclusiveness and equal opportunity
 - Respect for individual privacy, dignity and autonomy
 - Individual rather than formulaic approach

Legal Test: Accommodation & Undue Hardship

- Accommodation only required to the point of undue hardship
- Undue hardship includes:
 - Cost
 - Outside Sources of Funding
 - Health and Safety
 - There is no universal standard to determine when undue hardship exists
 - The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future

Grounds on which accommodation may be necessary

- Family Status (childcare responsibilities)
- Sex (pregnancy, breastfeeding, gender identity)
- Age
- Disability
- Creed/Religion

Example of Accommodation

- Modified working hours
- Modified working environment
- Modified duties
- New/updated equipment
- Ergonomic design
- Request for time off
- Keeping positions open while someone is on leave

Employee's Duties in the Accommodation Process

- Advise of disability (not necessarily what the disability is);
- Make needs known to the best of his/her ability, preferably in writing, to facilitate accommodation, and participate in discussions of possible accommodation solutions;
- Answer questions or provide information regarding relevant restrictions or limitations, including information from healthcare professionals, if needed;

Employee's Duties cont.

- Co-operate with any experts whose assistance is required to manage the accommodation process or when information is required that is unavailable to the person with a disability;
- Meet agreed-upon performance and job standards once accommodation provided;
- Work with the accommodation provided on an ongoing basis; and
- Discuss his or her disability only with persons who need to know.

Employer's Duties in the Accommodation Process

- Accept the employee's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise;
- Obtain expert opinion or advice where needed;
- Take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions;
- Keep a record of the accommodation request and action taken;

Employer's Duties cont.

- Limit requests for information to those reasonably related to the nature of the limitation or restriction so as to be able to respond to the accommodation request;
- Grant accommodation requests in a timely manner, to the point of undue hardship, even when the request for accommodation does not use any specific formal language; and
- Bear the cost of any required medical information or documentation - for example, doctors' notes and letters setting out accommodation needs, should be paid for by the employer

Key Information the Employer Needs for Accommodation

- The nature of the illness and how it manifests as a disability (which may include diagnosis, particularly in cases of mental illness);
- Whether the disability (if not the illness) is permanent or temporary, and the prognosis in that respect (i.e. the extent to which improvement is anticipated, and the time frame for same);
- The restrictions or limitations that flow from the disability (i.e. a detailed synopsis of what the employee can and cannot do in relation to the duties and responsibilities of her normal job duties, and possible alternative duties);

Key Information cont.

- The basis for the medical conclusions (i.e. nature of illness and disability, prognosis, restrictions), including the examinations or tests performed (but not necessarily the test results or clinical notes in that respect)
- The treatment, including medication (and possible side effects) which may impact on the employee's ability to perform her job, or interact with management, other employees, or "customers"

Is there a duty to accommodate?

- *An employer is unaware of an employee's drug addiction but perceives that a disability might exist. The employer sees that the employee is having difficulty performing, and is showing signs of distress.*
 - *Can the employer terminate?*
 - *Can the employer implement a performance improvement plan?*

Perceived Disability

What if there is no medical information or request for accommodation?

- Employers are not, as a rule, expected to accommodate disabilities of which they are unaware
- **HOWEVER** - the perception of a disability will engage the protection of the *Code*.

Perceived Disability: Employer Tips

What to do if you as an employer suspect a disability?

- Before disciplining or terminating for unacceptable behaviour – first consider whether the actions of the employee are caused by a disability
- Attempt to assist a person who is clearly unwell or perceived to have a disability, by offering assistance and accommodation
- Employers are not expected to diagnose illness or “second-guess” the health status of the employee

References

Christina Wallis (2013) Employee Leaves of Absence see:
<http://www.mondaq.com/canada/x/238508/employee+rights+labour+relations/EMPLOYEE+LEAVES+OF+ABSENCE>

Employment Standards Act, 2000 SO 2000, c 41 (see: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_00e41_e.htm#BK5)

Ministry of Labour (Ontario), *Leaves of Absence: Pregnancy, Parental, Personal Emergency, Medical & Reservist*, see:
http://www.labour.gov.on.ca/english/es/pubs/brochures/br_leaves.php

Ontario Human Rights Commission, (2008) *Ontario Human Rights Code at Work 2008*, see: <http://www.ohrc.on.ca/en/iv-human-rights-issues-all-stages-employment/8-meeting-accommodation-needs-employees-job>

Thank You

Questions?

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Disclosure

This presentation is intended to provide an overview of the law with respect to this topic and should not be construed as legal advice. For more information on the application of the law with respect to your situation, you are urged to contact a lawyer.