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Leaves of Absence under the Employment Standards Act, Ontario

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LEAVES OF ABSENCE UNDER THE EMPLOYMENT STANDARDS ACT, ONTARIO

Maternity Leave

1. Introduction:

This paper deals with various leaves granted to employees and the specific legislation that applies in these circumstances. It does not deal with other commercial relationships that Dentists may arrange with self employed or other individuals they work within the work place.

The question that needs to be determined at the outset is whether the individual is an employee or an independent contractor. This critical categorization, from a legal perspective depends on the facts that arise in each relationship. This categorization can be a complicated analysis and it is not the subject of this paper.

I will discuss each form of leave in a general way at the start of this paper. Thereafter, I will analyze the relevant sections of The *Employment Standards Act*, S.O. 2000, c. 41, (“ESA”) in point form on a section by section basis to provide the reader, should they wish, with a more in depth analysis of the relevant sections that apply when one considers employee leaves.

2. Maternity Leave, in short

ESA provides that a female employee who is the birth mother is entitled to “pregnancy leave” and “parental leave” of absence. All other parents are entitled to parental leave. Section 45 of the ESA defines parent to include adoptive parents and persons in a relationship of some permanence who intends to treat the child as his or her own. I will discuss the law relating to each type of leave separately.

3. Pregnancy Leave

An employee is entitled to at least 17 weeks of unpaid leave of absence for pregnancy, provided she is employed for at least 13 weeks prior to the due date.

An employee is required to give the employer 2 weeks advance written notice of the date the leave is to begin and a doctor’s certificate with the due date if it is requested. If the notice is silent it is assumed that the employee will take the maximum leave. The employee can change her return date to an earlier or later date assuming it is not beyond the maximum, by providing at least 4 weeks written notice before the earlier date of the date leave was previously scheduled to end.

An employee whose baby is stillborn or who has a miscarriage can qualify for pregnancy leave so long as it occurred no more than 17 weeks before the due date.

The employer must continue to pay pension, life, accidental death, extended health and dental plan coverage unless the employee provides written notice to the contrary. In most cases, employees must continue to pay their share of the premiums to continue in certain plans.

The key issues most employers stumble over:

- a) The employer must reinstate the employee to the same position she left, provided it does exist, or a comparable position if it does not. Her rate of pay must equal the rate she left with; and
- b) An employee cannot be penalized, disciplined laid off or terminated because she is entitled to or has applied for pregnancy leave.

An employee cannot schedule a new end date to her pregnancy leave that would result in her taking a longer leave than she is entitled to under the ESA without the employer's written agreement.

4. Parental Leave

Parental leave is similar to pregnancy leave; it applies to full and part-time people. The differences are that with respect to parental leave persons who have been employed for at least 13 weeks are entitled to unpaid leaves of absence of 35 weeks after pregnancy leave begins if the employee takes pregnancy leave (a total of 52 weeks, if so advised) and 37 weeks otherwise.

The employee also receives employment benefits, (UI) if she qualifies for the full periods described above, including the 2 week waiting period. The second parent if leave is taken must serve the 2 week (UI) waiting period, however. The Rules governing Pregnancy Leave and Parental Leave under the ESA are different from the Rules regarding payment of maternity benefits and parental benefits under the federal Employment Insurance Act. It is important that employees check their rights to EI in advance of scheduling leave under the ESA.

EI can be contacted at 1-800-206-7218 as the time periods differ.

Under the federal EI program employees can return to work and earn a certain amount of wages without having their EI benefits reduced. However under the ESA a return to work even on a part-time basis effectively ends the parental leave.

Both parents can take the respective parental leaves set out above whether they collect EI or not. The time period to take parental leave has been extended to no later than 52 weeks after the child is born or arrives into custody, care or control of the parent for the first time.

Certain female employees may also be entitled to disability benefits during the periods of leave. A careful review of the applicable insurance policy is recommended.

An employee who takes either parental or pregnancy leave can give 4 weeks written notice of termination if they wish to resign from employment either before the leave expires or when it expires.

Babies of parents who take both pregnancy and maternity leave, at separate times can have a parent at home for 89 consecutive weeks (17 + 35 + 37). Or both parents can take leave at the same time.

When complications arise, the birth mom can start her parental leave anytime within 52 weeks of the birth or the date the baby first came home from the hospital. All other parents must start as opposed to complete their parental leave no later than 52 weeks after:

- a) birth date; or
- b) the date the child first came into their care, custody and control.

Other Leaves of Absence

5. Leaves of Absence, the short version

Leaves of absence are also governed by statute; the ESA and probably to a greater degree, hopefully by common sense. The statute now names them; Family Medical Leave, section 49 and Personal Emergency Leave, section 50. I will set out this area of the legislation in a short version and then in point form in a more detailed version that follows.

This paper assumes that Dental offices, “regularly employs”, less than 50 people in most if not all instances and accordingly different more onerous considerations would apply if an employer, “regularly employs”, more than 50 employees under section 50 of the ESA.

The purpose of emergency leave is to enable an employee to take time off work to deal with an unforeseen event, which affects the employee or a family member while retaining his or her job security. Items include: personal illness, injury or medical emergency, death, illness, an urgent matter or medical emergency of him or herself or a select group set out at section 50(2) below: parents, children, spouse, same sex partners, brothers and sisters and relatives who are dependent for care on the employee. Incidentally “urgent matters” only relates to urgent matters of those listed in section 50(2) not the employee. The term “urgent matters” is not defined by the ESA.

Section 3 of Regulation 285 does exempt employees who work in various professions from emergency leave provisions where “the exercise of the entitlement would constitute an act of professional misconduct or dereliction of professional duty.” This includes persons employed as a registered practitioner of a health profession set out in schedule 1 of the Regulated Health Professions Act, 1991.

An employee who wishes these forms of leaves must advise the employer before beginning them and if unable, as soon thereafter as is possible. An employer may request back up documents

such as a doctor's note to establish that leave is necessary. The request for documents must be reasonable.

A portion of a day's leave may be deemed as a full day's leave by an employer. An employer must pay the salary the person earned when the leave was given on his or her return and if a raise is given to all persons of a similar standing, then it must also be paid to the reinstated employee.

During any leave an employer must continue each type of benefit plan it provides to its employees unless the employee directs otherwise in writing. Vacations may be deferred until after the leave has been completed or the employer and employee agree in writing. An employee can forgo his vacation pay if there is a conflict with the leave granted if same is confirmed in writing with the employer's agreement. In this circumstance the employer is required to pay the employee vacation pay unless it is deferred to another time with the employer's written agreement.

Parents, one of whom experiences a stillbirth or miscarriage are not entitled to parental leave.

Incidentally the ESA deems that any reference in the Act to any form of agreement is required to be in writing to be effective and any alteration from the standards an employee receives under the ESA must be in writing to be effective as well.

Leave is not included when calculating a probationary period but is when counting length of employment, service and seniority.

6. Bereavement Leaves

Employers grant leaves of absence to an employee for a death in the immediate family. It is customary to grant a 3 day paid leave either before or after the death to prepare and attend a funeral in these circumstances. Compassion dictates this but practicality and common sense should also speak to this as well.

7. Personal Leaves

Many employers grant employees a certain amount of leave to take care of urgent business or other personal issues. It is usually granted to persons with good employment records (valuable employees). Employers should be fair with all their employees and recognize that what one does for one may be being monitored by others. This form of leave is usually unpaid but it can be paid to reward valuable employees. An employer can consider suggesting that the employee use his or her vacation time for this purpose. The message delivered by this may not be the one intended.

If extended leave (longer than 1 month for instance) is requested the prudent employer is wise to commit the arrangement to writing. To avoid claims for wrongful dismissal or severance pay care should be taken to set out all the terms and conditions that will apply if the employee does not return within the agreed time. In order to be consistent a written policy developed in advance is appropriate with pre-prepared forms provided as attachments.

8. NOTICE PERIODS IN SHORT

Pregnancy Leave:

Service requirement before eligible for leave:	13 wks
Length of leave:	17 wks
Notice to employer	2 wks
Earliest start date before delivery	17 wks

Parental Leave:

Service requirement before eligible for leave	13 wks
Length of leave:	37 wks; 35 wks if took pregnancy.
leave;	
Notice to employer:	2 wks
When leave must be taken relative to birth/adoption:	commenced within 52 wks

Detailed Analysis available by contacting Robert Tighe at robert@rtighe.com, 416-863-9100