FTR Now

Changing Workplaces Review – Personal Emergency Leave

Date: July 28, 2016

On July 27, 2016, we circulated an *FTR Now* advising clients of the release of the Interim Report of the Special Advisors who are conducting the Changing Workplaces Review (Review). In this, our first follow-up *FTR Now*, we will focus on Personal Emergency Leave (PEL) under the *Employment Standards Act, 2000* (ESA) as that entitlement is being singled out for earlier consideration in the Review.

Background

Most employees in Ontario have an entitlement to Personal Emergency Leave – up to 10 days of job-protected leave for employees related to:

- their own personal illness, injury or medical emergency; or
- the death, illness, injury or medical emergency of a wide range of listed family members; or
- an urgent matter related to that same group of listed family members (though not for their own urgent matters).

Notably, this entitlement is available only to employees whose employers regularly employ 50 or more employees, which, the Interim Report identifies, leaves approximately 19% of all Ontario employees without access to PEL.

Employers have sought to find ways to balance their employees' statutory right to PEL with the legitimate needs of their operations, and the need to have employees attend at work regularly. Employers have also sought ways to integrate personal emergency leave into contractual entitlements that address similar, often overlapping, reasons for absence – bereavement leave, sick days, and the like.

In its 2016 Budget, the Ontario government made this commitment about PEL:

In the 2015 Ontario Economic Outlook and Fiscal Review, the government committed to enacting the following regulatory measures on an expedited basis:

- *Seeking advice, through the Ministry of Labour, from the Special Advisers on the Changing Workplaces Review to resolve concerns raised by business regarding the application of the emergency leave provisions of the Employment Standards Act. The advice is to be received in spring 2016, and the resolution is to be implemented later this year.*

This commitment is possibly the reason why the Special Advisors are seeking input on potential changes to the PEL provisions of the ESA on such a short turnaround.

Options Identified in the Interim Report

In the Interim Report, the Special Advisors review the submissions made by both employee groups and employers. It appears that the focus of employee groups was on expanding PEL to all Ontario employers, regardless of size, achieving a paid sick day entitlement and prohibiting employers from requiring doctors' notes to substantiate absences due to sickness. Employers identified the various difficulties that they encounter in trying to manage PEL without creating undue cost and lost productivity, including abuse of the existing PEL entitlement.

The Special Advisors noted that most jurisdictions in Canada have some form of PEL (Alberta excepted), but that it is more commonly offered as separate categories of leave – e.g. a certain number of days for illness, other days for bereavement, etc. They also noted that only Ontario has an employer-size eligibility threshold.

Against that background, the Special Advisors are considering the following options:

1. Maintain the status quo (i.e. no changes).
2. Remove the 50 employee threshold.
3. Break down the 10-day entitlement into separate leave categories with separate entitlements for each category.
4. Some form of a combination of options 2 and 3.

The Special Advisors have also stated that they are still open to other possibilities if any are identified.

While not, strictly speaking, part of the discussion of PEL in the Interim Report, employers should be aware that the Special Advisors are also considering whether a new entitlement to “paid sick leave” should be added to the ESA. While it appears that only PEI has such an entitlement within Canada, employee groups have been advocating for an approach that would allow employees to accrue 1 hour of sick leave per 35 hours of work, which works out to be approximately 7 days per year. Clearly, the introduction of this type of leave would have an impact on the PEL provisions of the ESA, at least as currently drafted. The Special Advisors are also considering options such as creating a set entitlement to a specified number of paid sick days per year, permitting a qualifying or waiting period before employees can access paid sick days and requiring employers to pay for doctors’ notes if they require them.

Next Steps

For small employers – those who regularly employ fewer than 50 employees – the potential expansion of the PEL entitlement to all employers within Ontario could have a significant impact on your operations. The Special Advisors themselves recognize this potential impact, given the more limited resources of smaller employers and the more limited capacity to address absenteeism, and they noted that they did not hear from many small employers during the consultations to date.

It is important, then, that small employers and industry groups with small employer members consider making submissions to the Special Advisors about the impacts such a change would have on your business. Ideally, such submissions would be backed up by objective evidence supporting your position.

For larger employers already subject to PEL, the Interim Report provides a further opportunity to make submissions to the Special Advisors about how PEL can be improved so that it is more manageable for employers while still achieving the purpose behind the leave, and about the potential impact on employers of the changes under consideration.

Submissions on the Personal Emergency Leave options canvassed in the Interim Report must be made by **August 31, 2016**. The government has provided the following contact information for this purpose:

Email:	CWR.SpecialAdvisors@ontario.ca
Mail:	Changing Workplaces Review
Fax:	416-326-7650

If you are considering making submissions, please note that because the Review is a public consultation process, all

submissions may be made available to the public or to other persons or parties participating in the process.

If you have any questions related to this *FTR Now* or would like to discuss making submissions to the Special Advisors, please contact your regular Hicks Morley lawyer.

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