

FTR Now

Ontario Amends the ESA to Extend Employee Protections in Response to the COVID-19 Pandemic

Date: March 19, 2020

On March 19, 2020, the Ontario Legislature met in an emergency session to pass legislation to extend protections for employees in light of the COVID-19 pandemic. Bill 186, the [Employment Standards Amendment Act \(Infectious Disease Emergencies\), 2020](#) amends the leaves of absence provisions of the *Employment Standards Act, 2000* (ESA) to provide more leave entitlements to employees impacted by the pandemic and to prohibit employers from requesting medical notes in relation to the new leave. The government has previously stated that the amendments are retroactive to January 25, 2020.

Bill 186, *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*

In our *FTR Now* of March 17, 2020, [Ontario Declares Emergency in Light of COVID-19](#), we reviewed the impact of the declaration of a state of emergency in Ontario, and the triggering of the Declared Emergency Leave under the ESA.

Bill 186 has created a new leave of absence entitlement related to “infectious disease emergencies,” but it has done this by repealing many of the existing provisions related to Declared Emergency Leave, and then creating a new leave called: **Emergency Leave: Declared Emergencies and Infectious Disease Emergencies**. Of note for police boards, the government has given itself the authority to pass regulations that would apply the amended leave to police officers, along with various related provisions of the ESA.

The amended leave provision applies to two broad categories of reasons for an employee needing to be absent from work – Declared Emergencies and Infectious Disease Emergencies.

Declared Emergencies

Most of the prior provisions related to the Declared Emergency Leave have been re-enacted without substantial change in the new provision, and thus our March 17, 2020 *FTR Now* remains generally applicable and should be consulted for details.

In brief, employees will be entitled to an unpaid leave of absence where there has been an

emergency declared under the *Emergency Management and Civil Protection Act (EMCPA)*, and the employees are unable to work for one of the following reasons:

1. they are subject to an order under the EMCPA
2. they are subject to an order under the *Health Protection and Promotion Act (HPPA)*
3. they are needed to provide care or assistance to a specified individual, or
4. such other reasons as may be prescribed.

Of particular note, the group of “specified individuals” for the third category is significantly expanded under the amended leave provisions, and now includes:

1. The employee’s spouse.
2. A parent, step-parent or foster parent of the employee or the employee’s spouse.
3. A child, step-child or foster child of the employee or the employee’s spouse.
4. A child who is under legal guardianship of the employee or the employee’s spouse.
5. A brother, step-brother, sister or step-sister of the employee.
6. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee’s spouse.
7. A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee.
8. A son-in-law or daughter-in-law of the employee or the employee’s spouse.
9. An uncle or aunt of the employee or the employee’s spouse.
10. A nephew or niece of the employee or the employee’s spouse.
11. The spouse of the employee’s grandchild, uncle, aunt, nephew or niece.
12. A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met.
13. Any individual prescribed as a family member.

As before, this leave is unpaid, and will generally last until the declared emergency is terminated or disallowed.

As we note below in more detail, employers will still be able to request evidence “reasonable in the circumstances” (and at a time reasonable in the circumstances) to verify that the leave requested is to provide care or assistance to a specified individual.

Infectious Disease Emergencies

The amended leave provision includes a new leave (New Leave) which relates to “infectious disease emergencies” and applies where the government designates an infectious disease by regulation and an employee will not be performing work for one or more of the following reasons in relation to the “designated infectious disease”:

1. The employee is under individual medical investigation, supervision or treatment.

2. The employee is subject to an order of a medical officer of health or a court under the HPPA.
3. The employee is in quarantine or isolation or subject to a control measure, including self-isolation, that is undertaken because of information or directions issued by a public health official, qualified health practitioner, Telehealth Ontario, the government of Ontario or Canada, a municipal council or a board of health.
4. The employer directs the employee to stay at home because of concerns that the employee might expose other individuals in the workplace to the designated infectious disease.
5. The employee is providing care to any of the specified individuals listed above, including because of closures of schools and daycares.
6. The employee is directly affected by travel restrictions preventing the employee from returning to Ontario.
7. Any prescribed reason.

At the time of writing, a supporting regulation had not been published, but we can assume that the government will designate COVID-19 as a “designated infectious disease” for the purposes of the New Leave. Given the broad categories above, it is clear that the government intends the New Leave to protect a wide range of employees whose ability to attend at the workplace has been impacted by the current pandemic.

The New Leave is also unpaid. It is designed to last as long as COVID-19 remains designated by regulation and the employee is unable to work because of the reason engaged by their circumstances.

This last point means that the New Leave could apply for quite different periods of time. For example, an employee who self-isolates for 14 days, and is then able to return to the workplace, would be entitled to a leave for that period of self-isolation. A different employee who is unable to return to Ontario because of travel restrictions or a lengthy daycare closure, might be entitled to a much longer period of leave. Employees could also be entitled to the New Leave for more than one reason, suggesting that even if an employee is able to return to the workplace following self-isolation, for example, the employee could continue to remain on leave as a result of childcare obligations resulting from the closure of schools or daycares.

The Bill specifies that the designation may be retroactive, and the government has previously announced that it will be retroactive to January 25, 2020.

Of particular note, for both types of the leave, employers can require “evidence reasonable in the circumstances,” “at a time reasonable in the circumstances,” to verify the leave. Note the addition of the idea “at a time reasonable in the circumstances,” indicating that some flexibility is to be given to employees taking the leave to provide evidence to the employer.

More importantly, employers are prohibited from requiring employees to obtain medical notes (a

“certificate from a qualified health practitioner”) to justify the New Leave.

Final Observations

As with all leaves of absence under the ESA, employers may not take reprisals against employees for accessing the Declared Emergency and Infectious Disease Emergency Leave. The New Leave is also subject to all of the usual ESA protections granted to employees on leaves including, for example, continuation of certain benefits during the leave if the employee continues to pay their portion of the premiums.

The combined effect of the recent declaration of emergency in Ontario and the addition of a leave for infectious disease emergencies means that a broader mix of employees will be able to access the leave where their absence is due to any of the reasons discussed in this *FTR Now*.

We again remind employers who are contemplating temporary layoffs of their employees that consideration must be given to how the layoffs will interact with the employer’s obligations to provide statutory leaves under the ESA. Generally speaking, employees who are entitled to a leave of absence under the ESA cannot be laid off while they are entitled to the leave. This issue can be quite complex to address, and employers are encouraged to seek legal advice when determining how to proceed in a particular circumstance.

Hicks Morley continues to monitor developments related to COVID-19, and will endeavour to provide timely updates to our clients. For more information on how this New Leave may impact your workplace, please contact [Paul Broad](#) at 416.864.7286, [Nadine Zacks](#) at 416.864.7484, or [your regular Hicks Morley lawyer](#).