

# PROPOSED AMENDMENTS TO THE ESA – NEW LEAVES FOR ONTARIO EMPLOYEES?

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Proposed amendments to the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "ESA") could mean that employees in Ontario will soon be entitled to the following three new unpaid leaves of absence:

- Family Caregiver Leave;
- Critically Ill Child Care Leave; and
- Crime-Related Child Death or Disappearance Leave.

Each of the proposed leaves is described in more detail below.

## Family Caregiver Leave

Under the proposed Family Caregiver Leave, an employee would be allowed to take up to eight weeks of unpaid leave to provide care or support to any of the following relations who has a serious medical condition:

- The employee's spouse;
- A parent, step-parent or foster parent of the employee or the employee's spouse;
- A child, step-child or foster child of the employee or the employee's spouse;
- A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse;
- The spouse of a child of the employee;
- The employee's brother or sister;
- A relative of the employee who is dependent on the employee for care or assistance; and
- Any other individual prescribed as a family member going-forward.

An employee is entitled to the leave of absence if a qualified health practitioner issues a certificate stating that the employee's family member has a "serious medical condition". This term is not defined in the ESA or the proposed amendments, and therefore, the proposed Family Caregiver Leave could potentially apply to a fairly broad range of medical conditions.

There is no minimum service requirement for an employee to be eligible for this leave.

### **Critically Ill Child Care Leave**

The proposed Critically Ill Child Care Leave would require employers to grant an employee an unpaid leave of up to 37 weeks (or for the period set out in the medical certificate described below) to support the employee's "critically ill child". This term is defined as a child under the age of 18 whose baseline health has changed significantly and whose life is at risk due to illness or injury.

An employee is entitled to this leave of absence if: (i) the employee has been employed with the employer for at least six consecutive months; and (ii) a qualified health practitioner issues a medical certificate stating that the employee's child is a critically ill child who requires the care or support of one or more parents and setting out the period during which the child requires such care or support.

The proposed amendments to the ESA also set out certain circumstances where an employee may be entitled to further or additional unpaid leaves of absence, where the employee's child is critically ill.

### **Crime-Related Child Death or Disappearance Leave**

The Crime-Related Child Death or Disappearance Leave would allow an employee to take an unpaid leave of up to 104 weeks if it is probable that the employee's child died as a result of a crime, or up to 52 weeks if it is probable that the employee's child disappeared due to a crime. For the purposes of this leave, "child" includes the employee's child, step-child or foster child under the age of 18. To be eligible for this leave, the employee must have been employed for at least six consecutive months.

The employee is not entitled to the leave of absence if: (i) the employee is charged with the crime causing the death or disappearance of the child; or (ii) it is probable that the child was a party to the crime. Further, the employer can require that the employee provide evidence that is reasonable in the circumstances proving the employee's entitlement to this leave.

### **Employer Implications**

The Bill setting out these proposed leaves of absence (Bill 21) was introduced in March 2013 by Minister of Labour Yasir Naqvi, and is currently in second reading. If passed, these three unpaid leaves of absence would be in addition to the seven existing unpaid leaves under the ESA. The existing leaves are as follows:

- Pregnancy Leave;
- Parental Leave;
- Family Medical Leave;
- Organ Donor Leave;
- Personal Emergency Leave;

- Emergency Leave, Declared Emergencies; and
- Reservist Leave.

Furthermore, the leaves of absence under the ESA are in addition to every employer's duty to accommodate an employee's family status and marital status, up to the point of undue hardship, under the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19. Recent case law indicates that this duty includes allowing employees time-off and/or a flexible work schedule when necessary to care for elderly parents, children (especially special needs children), and/or a pregnant spouse. For more information on this topic, see McMillan's prior bulletin on family status discrimination: [an update on family status discrimination](#).

Since the circumstances where employees are entitled to take unpaid time-off work to address situations involving their family members continue to expand, employers would be well-advised to treat these situations with care, and seek legal counsel whenever they are unsure as to their legal obligations.

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#### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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