

PROPOSED CHANGES TO PERSONAL EMERGENCY LEAVE IN ONTARIO: COMMENT DEADLINE FAST APPROACHING

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Recently, the Special Advisors appointed by Ontario's Ministry of Labour released the [Changing Workplaces Review Interim Report](#) ("**Interim Report**"), which outlines various proposed changes to the *Employment Standards Act, 2000* ("**ESA**") and *Labour Relations Act, 1995*.

Comments on the proposed changes to the current provisions of the ESA pertaining to personal emergency leave ("**PEL**") must be submitted by **August 31, 2016** as the Special Advisors have been asked to make recommendations to the government on this issue in advance of the release of their final report. Stakeholders are encouraged to provide comments to the Special Advisors on all other proposed changes no later than **October 14, 2016**.

Current PEL Provisions

Currently, employees whose employer regularly employs 50 or more employees are entitled to 10 days of unpaid, job-protected PEL. Employers who regularly employ less than 50 employees are exempt from this provision (the "**Exemption**").

The ESA also provides that an employee may use PEL for a personal illness, injury or medical emergency or for the death, illness, injury or medical emergency or urgent matter concerning: 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 of the employee's spouse; the spouse of a child of the employee; the employee's brother or sister; or a relative of the employee who is dependent on the employee for care or assistance.

Employees must inform their employers about their plans to take the leave either before or as soon as possible after they have begun the leave.

Stakeholder Concerns

(a) Extending PEL to Small Businesses

As stated in the Interim Report, in 2014, only 5% of Ontario businesses employed more than 50 employees, while 95% of businesses employed 49 or less employees. More than half of those businesses (58%) employed less than five employees.

During consultations, some stakeholders made recommendations to remove the Exemption and extend PEL to employees working for smaller employers so that all employees could have access to this benefit.

While the Special Advisors did not hear from many small employers, they anticipated that they might well have vigorous opposition to the removal of the Exemption as such employers typically do not have the resources to employ human resources professionals and lack the expertise needed to deal with absenteeism issues. The Special Advisors also acknowledged a concern that small employers may not have the flexibility and the capacity to deal with PELs as currently framed in the legislation. Therefore, the extension of PEL provisions to smaller employers may have significant adverse impacts on their ability to provide service/product to their customer/consumer base.

(b) Concerns About Current PEL Provisions

Employers asserted that PEL should be assessed in the context of the other leaves that are provided in the ESA. Many employers noted the complexity in navigating the various ESA leaves.

Some employers with generous paid sick leave, bereavement leave, and other leave policies advised that some of their employees view PEL as being an entitlement that exists in addition to leaves already provided by the employer. Employers recommended separating PEL into separate leaves so that employers and employees can more easily assess whether the employer's policies provide employees with greater rights or benefits.

Employers also expressed concern about absenteeism and employees abusing the PEL provisions. Some employers pointed to high levels of absenteeism on Mondays and Fridays and on days abutting holidays as circumstantial evidence of abuse. They also asserted that although they are entitled to "require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave" that the circumstances triggering entitlement to such leaves are difficult if not impossible to monitor.

Employers also noted that PELs, although unpaid, often trigger additional costs to schedule overtime for others to fill in for the absent employee or even to staff at higher levels than necessary in order to retain the requisite staffing levels for their manufacturing operations. Sometimes, it requires the additional use of temporary and/or part time employees or of agency workers.

Proposed Changes to PEL Provisions

The options presented in the Interim Report are as follows:

1. Maintain the status quo.
2. Remove the 50 employee threshold.
3. Break down the 10-day entitlement into separate leave categories with separate entitlements for each category but with the aggregate still amounting to 10 days in each calendar year. For example, a specified number of days for each of personal illness/injury, bereavement, dependent illness/injury, or dependent emergency leave but the total days of leave still adding up to 10.
4. A combination of options 2 and 3 but maintaining different entitlements for different sized employers.

Submitting Comments

If you are interested in submitting comments to the Special Advisors on any changes proposed in the Interim Report, including changes to PEL, please do not hesitate to contact a member of McMillan LLP's Employment and Labour Relations Group for assistance.

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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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