BLG PUBLICATION

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Proof and Personal Emergency Leave: Determining what Evidence is “Reasonable in the Circumstances"

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The Ontario *Employment Standards Act, 2000* ("ESA") saw another significant set of amendments come into force on January 1, 2018 as a result of Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*. As we have previously in our November 2017 bulletin, these amendments range from the introduction of a higher general minimum wage to the creation of new and/or expanded leaves of absence for an array of specific circumstances.

Change in Personal Emergency Leave Entitlements

One of the more significant amendments is the change to Personal Emergency Leave ("PEL"). All employees in Ontario are now entitled to 10 PEL days in a calendar year, the first two of which are paid. The pay is equal to the wages the employee would have earned had they not taken the PEL day (or part-day, as the case may be). Prior to Bill 148, only employees in workplaces with more than 50 employees were entitled to PEL, and PEL days were unpaid. The entitlement criteria for PEL have not changed: personal illness, injury or medical emergency; the death, illness, injury or medical emergency of specified family members; or an urgent matter that concerns specified family members.

Subsection 50(12) of the ESA requires that employees provide evidence to the employer that is “reasonable in the circumstances” to prove PEL entitlement. However, the Bill 148 amendments added a prohibition in subsection 50(13): an employer can no longer *require* an employee to provide a certificate from a “qualified health practitioner” as evidence of entitlement to PEL. A “qualified health practitioner” is currently defined for the purpose of PEL as a physician, registered nurse, or psychologist. This amendment has been widely reported in the media as permitting employees to take PEL for personal illness without the requirement to produce a doctor’s note. There may be an increase in PEL days now that the first two PEL days are also paid.

The Evidentiary Threshold

So what qualifies as evidence which is “reasonable in the circumstances” for the purposes of PEL? Case law on this discrete issue is sparse. However, the pre-Bill 148 requirement to provide evidence “reasonable in the circumstances” has been considered by Ontario labour arbitrators. In one award, Arbitrator Chauvin characterizes the obligation in the following way:

“Determining what is “reasonable in the circumstances” requires a balancing of the rights and the interests of both the employee and the employer. The employee has a statutory right to the emergency leave. The employer has the right to operate its business in a productive manner. Both the employee and the employer must comply with the [ESA], and have an interest in working together harmoniously to ensure that the emergency leave provisions are used properly and productively. Ideally, employees and employers will work cooperatively to ensure that this goal is achieved. Achieving this goal is optimized when the employee provides the best evidence that is reasonably available to establish that he is entitled to a personal emergency leave.”[1]

Ministry of Labour Guidance

Further guidance on determining if evidence is "reasonable in the circumstances" can be found in the Ministry of Labour's online publication entitled: Your Guide to the *Employment Standards Act*. While this guidance is non-binding on adjudicators, the Minister of Labour explains that there may be circumstances where the prohibition on a certificate from a qualified health practitioner does not apply:

"The prohibition in the ESA against requiring a note from a physician, registered nurse or psychologist applies only with respect to providing evidence that the employee is entitled to personal emergency leave. There may be some situations outside of the scope of personal emergency leave where an employer may need medical documentation in order to, for example, accommodate an employee, satisfy return to work obligations. The ESA does not prohibit employers from requiring a note for these sorts of other purposes."

Most employers prefer a doctor's note as reasonable evidence of illness. However, if such notes are generally no longer permitted in the context of proving PEL entitlement, could there be other evidence that would be "reasonable in the circumstances"? Some examples which appear in the case law include a note from a pharmacist and a receipt for over-the-counter migraine medication (in lieu of a doctor's note that the employee suffered a migraine) or copies of parking receipts for proof that an employee was at a hospital visiting their ailing mother. The Ministry of Labour guidance publication also explains that if it is reasonable in the circumstances for the employer to require the employee who took PEL to provide a note from an individual who is not a physician, registered nurse or psychologist, the employer can only ask for the following information:

- the duration or expected duration of the absence;
- the date the employee was seen by a health care professional; and
- whether the patient was examined in person by the health care professional issuing the note.

The Ministry of Labour guidance publication goes on to explain that for the purposes of proving PEL entitlement, employers cannot ask for information about the diagnosis or treatment of the employee's medical condition. In addition to being prohibited from requiring the employee to provide a medical note with respect to PEL, the employer cannot require the employee to give details of the relative's medical condition. The employer may only require the employee to disclose the name of the relative, and their relationship to the employee, and a statement that the absence was required because of the relative's injury, illness or medical emergency. This approach would be consistent with Arbitrator Chauvin's comments in the above award, which held that in certain circumstances there may actually be no other better and available evidence than an employee's own statement or an employee's attestation on an employer-created form.

In the context of bereavement under the PEL provisions, a published obituary would likely be considered reasonable evidence, alongside an employee's explanation of the relative's identity to ensure that they fall within the class of specified family members under the PEL provisions. It is unclear though what evidence will be required when determining PEL entitlement for "urgent matters" under the ESA. The Ministry of Labour explains in its guidance publication that an urgent matter is "an event that is unplanned or out of the employee's control, and can cause serious negative consequences, including emotional harm, if not responded to." One example provided by the Ministry of Labour is if an employee's babysitter calls in sick. Example of non-urgent events would be if an employee wants to leave work early to watch his daughter's soccer game or for an employee to attend a sibling's wedding as a bridesmaid. While this is a non-exhaustive list provided by the

Ministry of Labour, it goes to show that the level of evidence required will need to be considered based on the unique facts of each case.

ESA or Employment Contract?

Finally, employers should be aware that pursuant to subsection 5(2) of the ESA, if the provisions of an employment contract directly relate to the same subject matter as an employment standard (*i.e.* PEL), andprovide a "greater benefit" to an employee than the employment standard, the provisions of the employment contract will apply in lieu of the employment standard. While an employer cannot contract out of the minimum standards established by the ESA, where an employer provides a greater PEL benefit within the meaning of subsection 5(2), the new Bill 148 amendments will not otherwise displace any proof of eligibility requirements that an employer may have, including the requirement to provide a doctor's note.

Conclusion

We continue to monitor the Ministry of Labour's interpretation of PEL, as well as emerging case law, now that Bill 148 amendments are in effect. In the meantime, employers should ensure that their policies and procedures on doctor's note requirements, and other proof of eligibility to take a PEL day, comply with the ESA. Should you require further information or guidance, please contact your BLG lawyer or a member of our Labour and Employment Group.

[1] *Access Alliance Multicultural Community v Health, Office, Professional Employees and Education Division of UFCW, Local 175,* 2012 CanLII 95768 (ON LA).

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