The Latest on the Employer’s Obligations

to Aging Workers and Care-givers: Employee Leaves

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Employer Obligations to Caregivers

I. Leaves of Absence

Increasingly, employees are starting families later in life, increasing the likelihood of having key personnel and managers, who have established careers, taking parental leaves. Also, many employees are becoming primary caregivers for aging parents. Both create personal obligations that can conflict with an employee’s employment obligations.

Our aging workforce presents numerous challenges for employers, the workplace and employees themselves. With the expected skill and labour shortages, employers can also expect to have to compete to attract workers, leading to more creative means of attracting and retaining talent.

As a result of these demographic pressures, employers can expect greater numbers of employees will have increasing obligations as caregivers, which in turn will have ramifications for the workplace. We will look at two areas in particular: extended leaves of absence and parental leaves. What can employers expect in the future and what steps can be taken to manage these obligations?
A. Extended Leaves of Absence

1. A Growing Trend

As the workforce ages, there is increasing demand for leaves of absence to attend to personal health issues and to support elderly dependents. A U.S. EAP/benefits services company, FamilyCare Inc., recently cited two reports predicting that long distance care for elders will replace child care as the single most important family issue for the Baby Boom generation: A May 2002 article in the Boston Globe and a National Council on Aging report. The latter estimates that between 7 million and 10 million adults are currently caring for their parents from a long distance and predicts the trend to more than double in 15 years. Notably, this does not account for those adults that care for parents in-home or close by.

Care giving issues, whether local or long distance, are affecting employees and have the potential for significant effects in the workplace. Resulting problems include increased stress and absenteeism, decreased productivity, increased use of leaves of absence, changes to part-time status, limiting career potential and employee turnover.

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Large employers, particularly unionized employers, have addressed care giving issues, for young and elderly dependents, in a number of ways, including leaves for: general family care, child rearing, illness or accidents involving family members, elder care, personal/dependent/family appointments and other household or family emergencies.

2. **Legislated Leaves**

In addition to individual employer leave policies, most workers in Canada have access to statutory leaves, including jury duty leave, maternity leave, parental leave, compassionate care leave and bereavement leave through federal or provincial legislation covering employment standards. It is unlawful for an employer to deny an employee leave to which she or he is entitled. Employers may not terminate employment or change a condition of employment as a result of an employee exercising her or his leave entitlement. Once the leave ends, the employer must place the employee in the same or a comparable position to that held before she took leave. Employment benefits must be maintained, provided the employee continues her or his premium contributions, and employment service is deemed continuous through the leave period. The federal employment standards, found in the *Canada Labour Code*, generally reflect the same basic entitlements and protections found in the provincial statutes. However, the federal legislation also has additional protections for ill and injured employees. For employees who have completed three months’ service, there is extended job protection for up to twelve weeks for absences...
related to illness or injury that is not work-related. For work-related illness and injury, employees’ jobs, benefits and service are protected in a similar manner to statutory leaves of absence such as parental leave.

Notably, there has been a recent trend of extending statutory leaves. Combined maternity and parental leaves have doubled and, last year, amendments were made to the Employment Insurance Act and the Canada Labour Code to provide paid compassionate care leave as of January 4, 2004. The amendments to the Canada Labour Code prohibit employers from dismissing, suspending, laying off, demoting or otherwise disciplining an employee for taking compassionate care leave. Also, the employee must be reinstated in his or her former position, or be given a comparable position in the same location and with the same wages and benefits once the leave ends.

Not all provinces have amended employment standards legislation to reflect these changes although, even in provinces that have not, some employers are already extending this leave to eligible employees.\(^2\) Compassionate care leave is an eight-week leave (a two week qualifying period followed by 6 weeks of EI benefits) available to employees to support and care for a family member who is gravely ill with a significant risk of death. Employees may work part-time while on leave and

\(^2\) For instance, in anticipation of compassionate care leave eventually being passed provincially, some unions have negotiated corresponding leave periods with employers to allow employees’ to use their current E.I. entitlement.
still receive partial benefits. Employees may also leave Canada to provide support and care to an eligible family member.

The leave is available to support and care for the following family members: an employee’s child or the child of a spouse or common-law partner, a wife/husband or common-law partner, a father or mother, a mother- or father-in-law, an employee’s father’s wife or mother’s husband and the common-law partner of a father or mother. Significant risk of death is established with a medical certificate confirming that the family member is in need of care or support and is at significant risk of dying within 26 weeks. Support and care include: providing psychological or emotional support, arranging for care by a third party or directly providing or participating in the care.

Employers should note there are different length of service qualifying times in different provinces.

British Columbia is alone among Western provinces in that it has a leave option for family care. British Columbia offers up to five days of unpaid leave annually to meet responsibilities related to the care, health or education of a child, or the care or health of an immediate family member.

3. The Case for Leaves of Absence as an Increasingly Popular Employee Benefit

The fastest growing, and soon to be largest, segment of the workforce is the 55-65 year-old employees. Human Resources Development Canada has estimated that by
2016, around 44% of the working population will be between the ages of 45 and 64, compared to 32% in 1996. As employers increasingly recruit and retrain older workers to meet the growing labour shortage, workplace policies and employee benefits are likely to be tailored to attract and retain this segment of the workforce. A key employee benefit that is predicted to be desirable for older workers is the availability of extended leaves of absence.

Many older workers who would make valuable employees may not need to work for a living and attracting and retaining them will require providing non-traditional benefits and accommodations. Some predicted benefits are long-term care insurance, deferred salary arrangements allowing for extended paid leaves, and paid family, compassionate and bereavement leaves.

With an aging workforce, illness, injury and disabilities will be more commonplace in the workforce. Beyond providing leaves as incentives, employers will increasingly be required to grant leaves as part of their duty to accommodate ill, injured or disabled workers.

4. **The Case for a Consistent Leave Policy**

As extended leaves of absence become more popular and more employers opt to provide such leaves and shorter-term leaves to employees, care will have to be taken to set out a consistent policy with clear objectives, terms and criteria. If employers

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3 Statistics Canada historical data. Projection from the Applied Research Branch, HRDC.
consider leave requests on an *ad hoc* basis, there is a danger that at some point a leave will be denied for an improper or inconsistent reason. Regardless of the employer’s motives, some employees are bound to draw the conclusion, mistakenly or not, that the denial of leave is related to a protected personal characteristic. In no time at all, the employer will be defending a human rights complaint. Implementing and observing a leave policy will help reduce the possibility that an employee will perceive a negative decision as discriminatory. Also, the policy will likely be of assistance to an employer trying to establish the *bona fides* of the decision to deny leave.

**B. Balancing the Duty to Accommodate with Extended Leaves of Absence**

5. **Revisiting the “Duty to Accommodate” and its Origins**

Provincial human rights legislation and the *Canadian Human Rights Act* prohibit an employer from “discriminating” in the employment, or any term or condition of employment, of a person on a number of enumerated grounds, including on the basis of a physical or mental disability. In certain circumstances, such discrimination may be legitimate if based on a *bona fide* occupational requirement.

The duty to accommodate originally was implied into human rights legislation by the Supreme Court of Canada. Since then, the duty has been codified in the *Canadian
Human Rights Act but it is still an implied duty in many provincial statutes including in British Columbia, Alberta, Saskatchewan and Manitoba.

In dealing with employees with disabilities, the duty to accommodate arises when:

- an employee has been (or may be) discriminated against, or treated adversely, by conduct or rules of the employer;

- the employee has a disability or is a constituent of a protected class;

- the discrimination arises because of, or is related to, this disability or constituency; and

- the disability or constituency affects the employee’s ability to perform a bona fide occupational requirement.

Essentially, what this means is that an employer may not discriminate against an employee with a disability – for example, by discipline, dismissal or alteration of any conditions of work – unless the employee’s disability prevents him or her from performing part of the job. If so, the employer still has to take reasonable steps to accommodate the employee by modifying or altering the terms of employment to the point of undue hardship.

For example, if an employee who works as a butcher develops severe arthritis in his hands, the employer may be able to terminate employment because the ability to use
his hands is a *bona fide* occupational requirement. This is so provided only that there are no practical or financially feasible adjustments which can be made to permit the employee to continue at work. This example is based on a physical disability, which usually, although not always, results in objective limitations which relate to the skills and abilities required for the position. More difficult to deal with are mental disabilities where the nature of the disability is vague and amorphous.

Not every condition, illness, injury or disease is a disability, especially if it is temporary or fleeting. For example, courts have determined that the flu or a broken leg do not constitute a disability, because neither condition has the elements of “severity, permanence and persistence”.

However, the legislation protects against discrimination both on the basis of actual and perceived disabilities. A perceived disability is where the employer believes that the employee has a disability, even if the employee does not. The employee is still protected by the human rights legislation because the employer’s conduct is motivated by the “disability” which is prohibited – regardless of whether the employee is actually disabled.

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6. **What is Involved in the Duty to Accommodate?**

The Supreme Court of Canada has made clear that there are two aspects to the duty to accommodate:⁵

- the procedure which is adopted to assess the issue of accommodation;
  
  and
  
- the substantive content of the accommodation.

The adequacy of the employer’s accommodation efforts will be assessed on the basis of both these elements.

The procedure refers to the investigative process used by the employer to assess the nature and degree of accommodation which is required. It includes such matters as the steps the employer takes to obtain information regarding the disability, the prognosis for recovery and the employee’s capability to perform work. The substantive content refers to the reasons of the employer to justify the accommodation which is offered or which the employer asserts would constitute undue hardship. The substantive content refers to the relationship between the decisions made by the employer and the information obtained in the investigation.

An employer has to ensure that both the procedural and substantive aspect of accommodation are properly considered. Recent case law indicates that if an

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⁵ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 66.
employer fails to carry out an adequate procedural investigation of accommodation, that failure constitutes a breach of the legislation.\textsuperscript{6} This violation may be found even if the employer can show that no accommodation could have been made in the circumstances. In other words, the employer’s actions will be reviewed for both the manner in which it approached the issue of accommodation, as well as the end result of the accommodation.

7. \textbf{What Factors must be Considered in Accommodation?}

In assessing whether accommodation is possible (to the “point of undue hardship”), the following factors are considered:

- the financial cost of accommodation, including the impact on efficiency, cost of renovations or adaptive technologies, and other costs;

- whether there will be any disruption to the terms of a collective agreement and the degree of such disruption;

- the impact upon the job functions of other employees and any morale problems which may result;

- interchangeability of work force and facilities;

- the size of the employer’s operation;

any safety concerns, including the likelihood of the risk, its magnitude, and who would bear the risk (i.e. whether it is the disabled employee, all employees or the public); and

whether the employee’s job itself exacerbates the disability.

8. **Absences Related to Illness or Disability**

If absence is related to an illness or disability, human rights legislation must be considered. Human rights law defines “disability” broadly and includes addiction, mental illness and physical ailments. Where a disability is responsible for the absenteeism, an employer is required to accommodate the employee’s disability to the point of undue hardship. This can mean accommodating an employee’s need for a prolonged sick leave or intermittent absences.

The employee has a duty to inform the employer of any condition and any associated, potential restrictions. In some cases, however, the employer must recognize the problem and investigate accommodations even if the employee has not raised the issue of disability. For example, some disabilities, such as mental illness, carry a social stigma and may be hidden from the employer. In others, such as addiction, denial may be part of the disease. Accordingly, where an employer has circumstantial or other indirect evidence of a disability, it must not ignore it. Liability may be incurred if it is later determined that the employer should have recognized signs of a problem.
Where the employee suffers from a mental disability which may impair his or her ability to make a reasoned judgment, the employer may also be expected to assume a proactive duty to exercise care on behalf of the employee. This duty may involve explaining the options available to an employee, explaining the consequences of the employee’s intended behaviour, or assessing whether a disabled employee has really meant to resign from his employment or make a decision that is detrimental to his interests. The employer cannot take advantage of an employee’s decision or conduct to end the employment relationship, when it knows or ought to know that the employee’s mental disability is likely impairing the employee’s ability to make a sound and reasoned judgment.

9. **Leaves of Absences as a Safety Measure**

An employer may place an employee on an indefinite leave of absence in order to deal with an employee’s bizarre or disturbing behavior or where there is clearly a mental medical issue that requires attention. The leave will end when the employee demonstrates to the employer, usually through a doctor’s opinion, that they are sufficiently healthy to return to the workforce without jeopardizing their own or other employees’ safety.

This issue may become more significant in the absence of mandatory retirement as older workers may be subject to various mental health issues.
In utilizing leaves of absence to accommodate employees with mental conditions, an employer may face a number of difficult issues. Is the condition work-related and, therefore, subject to a workers’ compensation claim, or is it non-work-related and subject to a STD or LTD claim? For such determinations, employers must rely on the assistance of medical professionals. However, what if an employee will not seek or accept help? Employers then face having an employee, who is not permitted to return to work, file a discrimination claim. Under health and safety laws, an employer does have to safeguard the workplace and the employee’s own safety and may have to stand firm on a decision to place an employee on leave. Such decisions should not be made without medical and legal consultation.
10. **The New Accommodation Frontier**

As mandatory retirement is phased out, there will be increasing pressure to extend human rights protections in employment to those workers above the age of 65. If human rights legislation in Canada is amended to extend protection to working seniors, employers’ duty to accommodate will be extended accordingly. This raises the possibility that employers will have to accommodate the infirmities of age, including diminishing performance and stamina, and increasing numbers and variations of mental and physical disabilities.

**C. Where does the Duty to Accommodate End?**

Despite the duty to accommodate, employers may not be able to accommodate disabled employees indefinitely. Where an employee is seriously injured or disabled and is likely never to return to work or to be able to perform any of the jobs within the workplace, employers will examine their legal options to end the employment relationship.

1. **Dismissing Employees on Medical Leave Without Cause (Non-Union Employees)**

Employers may want to dismiss employees who are absent due to long-term illnesses, for reasons unrelated to the absence or illness. This may arise in the case of a reorganization of the workplace, which results in the elimination of the employee’s position.
Also an employer may wish to dismiss an employee is if it is clear that the employee will not be able to return to work from an illness or injury.

Employment should not be terminated without first obtaining legal advice in order to ensure significant liabilities are not incurred and that pay in lieu of notice is appropriately calculated.

Under the common law, an employer may terminate an employee’s employment, without cause, by providing the employee with reasonable notice of the termination of employment or pay in lieu thereof. The notice period is intended to assist the employee find new employment while still employed or receiving income.

Many employers wait for an employee to return to work before making a decision to dismiss in an attempt to avoid an inference that the dismissal is related to the employee’s illness or injury and to comply with section 67 of the Employment Standards Act (B.C.), which provides that notice of termination is of no effect if given to an employee who is unavailable for work due to medical reasons or is on a leave. This does not preclude an employer from negotiating a separation with an employee who is still on leave, but caution must be taken to ensure such negotiations do not exacerbate the employee’s condition or result in a repudiation of the employment relationship. Despite the issues raised above, giving an employee notice while on leave may have some advantages:
notice, as opposed to immediate termination of employment (with or without pay in lieu of notice, may be preferable to the employee as he or she will continue to receive benefits during the notice period; the employee may make an unexpected recovery and return to work; and the employer may still choose to rely on the notice.

In providing notice or severance, employers should be aware of a 1997 Supreme Court of Canada’s decision which determined that an employee, in some cases, is not entitled to receive severance and disability pay concurrently. The Court found the employer should not have to pay severance where it had paid the disability insurance premiums (effectively providing the employee with double recovery). The Court did find that where the employee paid the premiums, the employee was eligible for both the severance and the disability pay. The Court also left open the possibility that in certain cases, where the employee indirectly bargained for fringe benefits such as disability insurance as part of the wage package and therefore had effectively “paid” for the insurance premiums, the employee could claim severance in addition to receipt of disability pay.

In McNamara the Ontario Court of Appeal considered a case where the employer fired a 25-year employee while he was on sick leave. Mr. McNamara received

disability benefits for about a year and a half and the employer argued that these
disability benefits should be deducted from the 24-month wrongful dismissal award.
As in the *Sylvester* case the employer paid the premiums for the long-term disability
insurance. The Ontario Court of Appeal also considered this issue in a case named
*Sills.*

Deciding factors in the cases were that the disability payments came from a insurer
as opposed to the employer and both of the employees gave evidence that they had
accepted a lower annual salary in return for a benefit package. On this basis, the
Court decided that the employees were, in effect, “self-insuring” against disability.
The Court was careful to state that the decisions do not create a “rule” entitling
employees to both damages for wrongful dismissal and disability benefits during a
reasonable notice period. However, courts will analyze the intentions of the parties,
particularly where a disability benefit is provided by a third-party carrier, to
determine whether disability benefits should mitigate the damages an employer must
pay an employee.

Therefore, employers may be able to reduce the chances of an employee obtaining
double recovery by using an express term in the benefit plan that provides that the
employer is entitled to deduct the value of disability pay received during the
reasonable notice period. To complement this step, additional evidence of the

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parties’ intentions on this issue should be documented such as including this term in the contract or offer at the time of hiring.

Waiting for an employee to return to work is not necessarily a safeguard. Employers can still be accused of discrimination relating to the employee’s illness or injury. In a recent case, an employer waited for a long-service employee to return from a sick leave for depression before terminating his employment due to an internal reorganization. The BC Human Rights Tribunal found the employee’s discrimination complaint was justified as the employer’s reasons for terminating his employment included, in part, performance-related reasons, which were found to be related to his depression. Therefore, employers must be able to establish bona fide reasons for the termination and satisfy a court or tribunal that there was no discriminatory taint. Special care must also be taken to prevent unintended consequences to benefit coverage or the employee’s recovery.

2. **Frustration of Contract (Non-Union Employees)**

In some dismissal cases, employers have successfully argued that the employment contract has been “frustrated” by the employee’s absence. Such an argument relies on a fundamental employment law tenet – that the employment relationship is a contractual exchange of labour and services for remuneration. Therefore, when an employee is unable to provide the labour and services, the employment relationship

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is frustrated. Frustration operates to end the contract without notice and without liability to the employer.

When considering whether employment has been frustrated, courts will look at the nature of the employee’s absence compared to the duration of the employment contract. Where the employment duration is indefinite, the courts will ask whether the employee’s circumstances effectively constitute a permanent incapacity which would lead to an end of the relationship? The courts will consider:

- the terms of the contract, including the existence of sick leave and short-term and long-term disability plans;
- the permanence of the employment relationship in the absence of illness or injury;
- the nature of the illness or injury, the length of absence and the likelihood of recovery;
- the nature of the employment; and
- the employee’s length of service.

In addition, courts will carefully scrutinize the evidence of disability and the prospects of recovery at the time of dismissal. Where the employee has been absent

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for a long time and the prospect of returning to work is small, courts may accept the employment contract has been frustrated. In many cases, courts have not accepted frustration of contract where the ill or injured employee has been absent for a year or less. In fact, successful claims of frustrated contract where illness or injury have been considered permanent have involved absences in excess of two years and an uncertain or poor prognosis for recovery. One difficulty for employers is concluding with some measure of certainty that the reasons or circumstances underlying absence are likely permanent.

One issue relating to the doctrine of frustration that has not been dealt with in British Columbia is the applicability of section 63 of the Employment Standards Act, which requires an employer to give notice of termination or pay severance pay commensurate with an employee’s length of service. As notice of termination is not effective while an employee is on a leave of absence, the wording of the Act suggests that an employer may still be liable for section 63 termination pay even if the contract has been frustrated.

3. **Termination of Unionized Employment**

Where a unionized employee has taken an indefinite, long-term absence, an employer may be entitled to terminate the employee’s employment, subject to the terms of the collective agreement. The employer has a contractual right to regular attendance by its employee. If the employer can establish that the employee’s absence is undue or excessive and that there is no reasonable prospect for the
employee’s return to work in the foreseeable future, it may be able to bring the employment relationship to an end. The termination of employment under such circumstances is non-culpable or administrative as opposed to termination for cause.

The employer, if challenged, may still be required to show that continuing to accommodate the employee’s poor absenteeism record would present an undue hardship.

A recent decision\(^\text{12}\) of the Supreme Court of Canada decided that the substantive rights and obligations of human rights legislation are incorporated into every collective agreement. In addition, the Court decided that arbitrators have jurisdiction to hear and decide human rights issues. The Court also found a number of policy reasons why arbitrators are the preferable adjudicators of human rights issues that arise in the unionized workplace. The Court noted that grievance arbitration has the advantage of both accessibility and expertise and said that it is logical that “the availability of an accessible and inexpensive forum for the resolution of human rights disputes will increase the ability of aggrieved employees to assert their right to equal treatment without discrimination, and that this, in turn, will encourage compliance with the Human Rights Code”. The Court noted that it was not concerned that the Human Rights Tribunals may currently have greater expertise than grievance arbitrators in the resolution of human rights violations as this would

\(^{12}\) Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324, 2003 SCC 42.
soon be remedied by arbitrators addressing human rights issues more frequently. This means that employers can expect more focus on human rights issues at arbitrations and an increasing influence of court- and tribunal-established human rights principles. As is discussed below, this has the potential for conflict between well-established labour arbitration jurisprudence and human rights jurisprudence.

4. The Potential Conflict Between Human Rights and Employment Principles

Courts and arbitrators in the labour and employment sphere have acknowledged and given effect to the principle that employment requires a concomitant contractual obligation to perform work even where a disability is present.

Recently, a decision of the Canadian Human Rights Tribunal has called the operation of this principle into question. In two separate cases involving disabled bus drivers who had been dismissed due to their long-term inability to attend work regularly, the Tribunal found that the employer had not exhausted its duty to accommodate.\textsuperscript{13} The Tribunal, on the evidence called in those cases, found that for a large employer, with a large pool of employees who are largely interchangeable, and a system of standby employees, there was no undue hardship in accommodating severe absenteeism.\textsuperscript{14}

\textsuperscript{13} Desormeaux v. Ottawa-Carleton Regional Transit, 2003 CHRT 2; and Parisien v. Ottawa-Carleton Regional Transit, 2003 CHRT 10.

\textsuperscript{14} It should be noted that the employer’s evidence was found to be anecdotal and the Tribunal found that no actual evidence of hardship was adduced.
The decisions in the above cases have supported the increasing concern among large and medium-sized employers that establishing undue hardship is a very difficult defence. The implications are that no matter how long an employee may be off work and regardless of the unlikelihood of his or her return to work, an employer may not be able to justify terminating the employment because the cost of carrying the absent employee will not amount to undue hardship. This raises the potential of lifetime employment, which may be somewhat unfounded but remains a concern.

It should be noted that the above decisions involved employees who had a high frequency of absences with varying durations. While not the same as being off work indefinitely, there is not much to distinguish between an employee who attends work two days out of three and an employee who is not there at all. In fact, it may be more inconvenient and expensive for an employer to accommodate the employee who may or may not report for work than it is to accommodate a long-term absence. Accordingly, it is difficult to reconcile the above decisions with common law and labour law principles and employers will have to approach such cases with care.

5. The Duty to Accommodate Does Not Extend to Childcare or Elder Care

Despite the increasing child and elder care burdens on today’s employees, employers’ duty to accommodate does not include accommodation of employee’s child or elder care responsibilities, even if the care is related to a disability.
In a recent BC case, an employer decided to change an employee’s shift for legitimate business reasons. Unfortunately, the change interfered with the employee’s child care responsibilities for her four children, including her 12 year-old son who suffered from severe Attention Deficit Hyperactivity Disorder and Tourette’s Syndrome. The employee initially tried the new shift times but found it created great difficulty and stress for her and she grieved, claiming the employer had a duty to accommodate her family status. The Arbitrator concluded that the definition of “family status” includes spouses and family members and, particularly, the parent-child relationship; however, he found that while “family status” refers to the status of being a parent *per se*, it does not include the specific circumstances that may arise for parents relating to daycare and child care needs. As such, the employer did not have a duty to accommodate the employee’s childcare needs. On this basis, an employer will not have a duty to accommodate elder care either.

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II. Issues Concerning Parental Leaves of Absence

1. Expanding Parental Leave

The objectives of parental leave policies are:\(^{16}\)

- to support family work and child rearing and to create an incentive for women to leave the labour force when children are very young; or

- to facilitate women's work outside the home and help reconcile work and family life by protecting and promoting the well-being of children while their parent(s) are in the labour force; or

- to permit women and parents to choose between the above options to suit their own preferences.

2. The Origins of Maternity/Parental Leaves

Maternity and parental leaves were originally adopted by various employers or countries as a health measure. Paid maternity leaves first appeared in Germany as part of the unique social insurance scheme created by Chancellor von Bismarck. Germany’s first national social insurance law was enacted in 1883, providing for health insurance, paid sick leave, and paid maternity leaves. This measure gained broad acceptance throughout developed countries through an international

convention on maternity protections by the International Labour Office Geneva Convention of 1919, which reconvened in 1953 and again, most recently, in 2000.  

Maternity leaves are predominantly health-based in most countries, but their expansion has involved unemployment, social security, other free-standing policy components, administration and financing. Unpaid maternity leaves are almost universal, but duration and forms of coverage range greatly and are country-specific.

3. The Trends in Maternity/Parental Leave

Increasingly, industrialized countries are extending leaves to fathers (paternity leave) or parents are being given the option of which parent can take leave (parental leave). At least four EU countries - Denmark, Italy, Norway and Sweden - have recently extended their paid parental leaves and have stipulated that at least one month of the extended leave is a “use it or lose it” entitlement for fathers. In Austria, three years of extended leave is offered on the condition that the father takes at least six months of the leave prior to the child turning three. Twenty-one countries provide a supplementary parental leave, including for adoptions. Thirteen of the 21 provide paid leave and, of those, seven countries extend the leave until the baby is 1 ½ - 3 years old.  

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In addition to increasing parental leaves, there is an emerging trend of offering such leaves on a full or part-time basis over an extended period of time, allowing either parent to remain at home or work part-time with job-protection and benefits. In addition, the parents have the option of taking the leave over an extended time period until the child is three, five or even eight. In Finland and Norway, parents receive a cash benefit that can be used, at their option, to supplement income or to purchase childcare.\(^\text{19}\)

4. Recent Maternity/Parental Leave Changes in Canada

In 2001, the Federal government amended its Employment Insurance legislation to extend parental leave provisions. The provinces followed by amending employment standards legislation to reflect this expanded benefit. Birth mothers became entitled to double their previous leave entitlement – from six months to one full year. Fathers became entitled to 37 weeks of leave. This development generated mixed feelings. Social advocates hailed the move as a positive measure for families and society. Employers worried that the move would increase hiring and retraining costs, and create retention challenges. Other concerns were the cost and inconvenience of amending policies and collective agreements.

Statistics Canada found that the average number of women receiving EI maternity benefits increased 8.5% from 49,700 per month in 2000 to 53,900 per month in 2002. However, at least half the increase occurred because of the reduction in the

\(^{19}\) Ibid.
number of hours of insurable employment required to qualify – from 700 to 600 hours. Fathers’ participation increased five-fold, a combination of the elimination of the two-week waiting period and the increase in leave time available.

For the year 2002, the EI maternity and parental programs paid out $223 million in benefits each month, a 119% increase over the $102 million per month in 2000.20

5. A Two-Year Maternity/Parental Leave in Canada?

There have been some suggestions that Canada should adopt a two-year parental leave. Although this is surprising by North American standards (the U.S. does not have paid maternity leave), the EU and other countries have better maternity and parental leave schemes: See table in Schedule A.

The idea of a two-year maternity/parental leave generates the same concerns (primarily cost-related) employers had three years ago when government formed the intention to extend maternity/parental leave to one year:

(a) employers are concerned about obtaining job coverage over two years;

(b) it is possible that an employer may have to hire and train more than one employee for the position during the two-year leave; and

after two years away from the workplace, employees will possibly require more retraining (increasing costs) due to the longer absence and the increased likelihood that technology and other job-related requirements will have changed during such a time-span.

Another viewpoint is that a two-year leave will encourage discrimination against young women, especially those with young children, by employers trying to avoid leave costs, which will reinforce the glass ceiling and would hurt women generally.21

6. The Pros and Cons of a Two-Year Leave
   (a) Job Coverage

An extended term may prove to be a mixed blessing for employers. It is unlikely that obtaining job coverage during a two-year absence will be much more of a burden to employers than the current requirement to obtain job coverage for one year, as finding replacement workers is something employers already have to do. In some respects, employers may have more success with job coverage as the pool of candidates for a two-year contract is likely to be greater than the pool of candidates for a one-year term. The longer term may well lead to an increase in the number and quality of applicants as prospective employees will view a two-year opportunity as

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more beneficial for developing experience, possibly obtaining a permanent position with the company, and obtaining new employment at the end of the term.

The potential pitfalls with having to obtain a two-year coverage are:

- potentially having to hire more than one replacement over the two-year period;
- potentially having multiple maternity leaves in respect of the same position;
- dealing with an unexpected early return-to-work; and
- a greater number of employees opting to take parental leave, particularly fathers.

(b) Training

A two-year term will not likely create significantly greater training burdens for the employer as the replacement employee has to be trained in any event. There may be greater requirements for retraining the returning parent due to the greater time away from the workplace. Nevertheless, retraining is already a current requirement in many cases and many employees would require some training during that period even if they were not on leave.
Some benefits may be:

- long-term retention;
- greater commitment and performance levels as employees will return to work healthier and under less stress; and
- higher employee morale.

The hypotheses, above, will also be influenced by the take-up rates. Will the two-year period result in a lesser or greater return-to-work ratio? Will the number of fathers taking parental leave increase and will their leave periods increase? Another significant influence will be the levels of income replacement provided by Employment Insurance (“E.I.”) over the two years. It may be that take-up rates will not increase and that the average leave period will not expand much if parents cannot afford to take their full entitlement. A 2002 survey result forecast that approximately 61% of women seeking a maternity/parental leave would choose to take the full duration.22 The reason for this is the expectation that many young, debt-laden parents will not be able to afford to take their full leave entitlement. On this point, it is noteworthy that despite the increase in the term of the leave entitlement, there has been an overall decrease in monthly benefit payments since 1996.23

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23 See Péрусse, Dominique, above.
It is also noteworthy that the extension of leave and benefits that occurred two years ago caused a 199% increase in EI maternity and parental benefits costs from approximately $1.2B during 2000 to almost $2.7B during 2002.\(^{24}\) This was not a significant problem for E.I. due to its healthy surplus. However, there will be further ramifications if rates are increased to provide greater EI benefits.

7. **Employer Experiences in the U.S.**

In 1993, the U.S. *Family and Medical Leave Act* ("FMLA") was introduced to protect the employment of workers requiring a leave of absence because of a serious illness or pregnancy. At the time, there was much hand-wringing by analysts and employers who felt that the legislation would be onerous and costly. Ten years later, however, studies show that most employers have found that FMLA has not resulted in the problems originally feared. The primary complaint has been abuse and difficulty administering the law.\(^{25}\) With maternity/parental leave, however, there is less opportunity for abuse.

A study, which reviewed Minnesota’s State unpaid maternity leave scheme, also concluded that employers’ anticipated concerns did not materialize.\(^{26}\) Generally speaking, the study found that employers reported that the leaves were beneficial for the workplace and the organization.

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\(^{24}\) Ibid.  
8. **Contractual requirements for employees on leave**

It is a good idea for employers to have a leave policy, even if the policy only adopts the employment standards. Key protections that an employer can build into the policy are notice requirements for returning from a parental leave in order to give an employer sufficient time to give notice of termination to the replacement employee. It is important to review applicable legislative provisions to ensure the contractual requirements are permissible.

9. **Contractual requirements for replacement employees**

A key contractual term for a replacement employee is the contract’s duration. First, an employer should decide whether the termination of the contract and the return-to-work date should overlap (for continuity or training reasons) or coincide (for cost reasons).

Either way, the replacement employee’s contract should clearly contain terms restricting the contract to a definite term. Despite being for a definite term, the contract should also contain notice provisions to account for unforeseen circumstances such as economic downturns, fit and performance issues, early returns-to-work, and reorganizations.

As the return of mothers to the workplace can be unpredictable, employers should ensure that the notices given to replacement workers and the contract end-dates are not ignored or waived. If an extension is required, employers must ensure that new
terms are in place that will protect the organization. If a one-year contract term comes and goes, even by one week, an employer may find itself with an indefinite term employee who is entitled to common law notice and a recently returned parent who has to be returned to their job or a comparable position.

10. **Pregnancy-Related Health and Benefit Issues**

The current state of the law concerning the overlap of pregnancy and related illness accepts that there is a health-related element to maternity leaves, the duration of which will depend on the particular circumstances in each case. When an employee can establish a health-related basis, she will have the right to choose whether to apply for maternity leave benefits or other employment benefits such as sick benefits.

The issue of when a normal pregnancy amounts to an illness arises because many employees’ sick leave benefits are better than the available EI maternity benefits (primarily with respect to income replacement). Thus, employees suffering from pregnancy-related complications or illness are generally better off taking sick leave, when possible, during their maternity leave. If an employee’s request for sick leave benefits while on maternity leave is denied, an employer may be liable for discrimination on the basis of sex in the event it denies a sick leave to an employee.
Unequal treatment relating to employment benefits has been considered by the Supreme Court of Canada.27 The Court ruled that a Canada Safeway disability plan discriminated against women on the basis of sex as it precluded payment of disability benefits for the ten weeks prior and six weeks after birth. The Court found this discriminated against pregnant women unable to work during this time due to related or unrelated illnesses and that pregnancy is a valid health reason for not working.

An Ontario human rights case also has considered whether an employee has the right to choose whether she will apply for maternity leave under the Employment Standards Act (Ontario) or apply for employment benefits including sick leave. It found that despite the wording of the statute, the employer’s decision to place the employee on maternity leave and deny her short-term disability benefits was discriminatory and that employers must treat the health-related portion of a maternity leave in the same manner as other health-related leaves.28 The Ontario Court of Appeal made the same finding in a 1998 case where an employer refused to allow a pregnant teacher to use her accumulated sick leave benefits, which were more generous than her EI benefits, for the period of time during and after the delivery of her child.29

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In another case, an Alberta Board of Inquiry found that the requirement that women on maternity leave pay 100% of their benefits premium was discriminatory in light of the fact employees on other leaves did not have to do so.30

11. Employer Obligations to the Parent During the Leave

Parental leave rules vary by province, particularly regarding the accrual of pension benefits. Job protection, the option of both parents taking leave, the benefits available and the continuation of disability coverage during leave may differ depending on the employee’s employment contract and the province they work in.

The employment standards legislation of British Columbia, Alberta, Saskatchewan and Manitoba all stipulate that an employee’s seniority must continue to accrue during maternity/parental leaves. Service for the purpose of pension and other benefits plans is also deemed to be uninterrupted. In respect of continuation of pension and other employment benefits, all the provinces require the employer to maintain its contributions unless, where contributions are shared, the employee opts not to continue payment.

See Schedule B for a detailed comparison of the legislation in the four Western provinces.

12. **Employer Obligations to the Returning Parent**

The employment standards of all the Western provinces require that an employer return returning parents to their former positions or to comparable positions with the same remuneration and benefits as they had before the leave.

Employment standards in British Columbia provide that employees on leave must receive all increases in pay and benefits that they would have been entitled to had they been at work instead of on leave.

The provincial legislation differs where the employer has downsized to the extent that the position no longer exists and no comparable work is available or where the employer wishes to terminate the employees’ employment.

British Columbia prohibits termination because of an employee’s pregnancy or her leave. Furthermore, an employer may not give notice of termination to an employee during a leave. This accords with the idea behind a notice period which is to give the employee time to seek other employment. Giving notice of termination to an employee while on maternity/parental leave undermines the purpose of the leave and the notice period. There is no such restriction on giving notice in the other three provinces; however, employers must carefully consider the potential of a human rights claim resulting from giving notice of termination to an employee who is on leave.
Alberta and Saskatchewan also prohibit termination where an employee takes a maternity/parental leave, but Alberta has an express exception if the employer discontinues its business in whole or in part. The Alberta legislation does, however, create a 52 week recall period in which an employer must return the employee to work if operations resume or if comparable work becomes available with no loss of seniority or benefits.

Manitoba, despite protecting employees’ rights to return to work from a leave, does not expressly protect employees with less than seven months’ service (the qualifying time periods for leave eligibility) from layoff or termination of employment. Alberta employees who do not have 52 weeks’ service also are not expressly protected. The Manitoba legislation only extends protection to employees who are eligible to take a leave and the Alberta legislation only extends protection to employees who have started their leave. The absence of express protection, however, is not definitive as human rights legislation does protect employees who do not qualify for leaves or who have not yet started their leave.
# Comparison of Maternity/Parental Leave Provisions in B.C., Alberta, Saskatchewan, and Manitoba

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<tr>
<th>Legislation</th>
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<th>Alberta</th>
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<tr>
<td>54(2): employer must not, because of pregnancy or leave, terminate employment or change a condition of employment without written consent.</td>
<td>53(7): when employee entitled to resume work under 53 (see below under “Employee’s notice”) employer must reinstate employee in position occupied when maternity or parental leave started or must provide employee with alternative work of comparable nature at not less than earnings and benefits accrued to employee at time leave commenced.</td>
<td>26(1): at expiration of leave, employer shall reinstate employee in position occupied at start of leave, or in comparable position, with no loss of accrued seniority and with no reduction in wages.</td>
<td>26(2): going on maternity leave does not constitute break in service for purposes of seniority and rights of recall, and seniority and rights of recall continue to accrue while employee on maternity leave.</td>
<td>60(2): employee wishing to resume employment after maternity or parental leave shall be reinstated to position occupied when leave began or to comparable position, with not less than wages or other benefits earned by employee prior to leave.</td>
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<td>54(3): as soon as leave ends, employer must place employee in position held before leave taken, or in a comparable position.</td>
<td>54(4): if employer’s operations suspended or discontinued when leave ends, employer must comply with (3) as soon as operations resume (subject to seniority provisions in 53.1: where suspension of employer’s business/undertaking/activity in whole or in part during maternity or parental leave, and employer has not resumed operations when employee’s leave ends, employer must, if operations recommence, reinstate employee to position occupied when leave commenced or provide comparable work with not less than wages and benefits accrued to employee at time leave commenced.)</td>
<td>27(3): remedies available where conviction under any</td>
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| collective agreement).  
56(3): employee entitled to all increases in wages and benefits as would be entitled to if leave had not been taken. | resume within 52 weeks of end of leave, reinstate employee in same position with same earnings and benefits, or provide employee with alternative work according to seniority system or practice in force at time leave started, with no loss of seniority or other benefits accrued to employee. | provision of this Part (e.g. judge may order reinstatement or retroactive wages etc.) | |

**Employer’s obligations re benefits**

| Employer’s obligations re benefits | 56(1)(b): services of employee deemed continuous for purposes of any pension, medical or other plan beneficial to the employee.  
56(2): if employer pays total cost of plan or if both employer and employee pay for plan and employee chooses to continue to pay his/her share, employer must continue to make payments to pension, | According to Alberta government website:  
“*The Employment Standards Code* does not require an employer to make any payments to the employee, or pay for any benefits, during maternity or parental leave. However, where an employer has benefit plans such as sick leave for employees, there may be obligations that arise under human rights legislation.” | 26(3): employee entitled to continue participation in benefit plan that is prescribed in regulations (see below) for purposes of this subsection while on maternity leave if employee pays contributions required by plan.  
*Labour Standards Regulations* L-1 Reg 5 r. 15: for purposes of 26(3), benefit plans | 60(3): for the purposes of pension and other benefits, employment of employee with same employer before and after maternity or parental leave deemed to be continuous. |

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| medical or other plan beneficial to employee as if employee were not on leave.  
56(3): employee entitled to all increases in wages and benefits as would be entitled to if leave had not been taken.  
56(4): (1) does not apply where employee has taken longer leave than allowed without employer’s consent. | | include medical, dental, disability or life insurance, registered retirement savings, pension, and accidental death or dismemberment plans, or any plan similar to those described. | |
| Employee’s notice requirements prior to leave | 50(4): request for pregnancy leave must be in writing and given to employer at least 4 weeks before employee proposes to commence leave, and if employer requires, be accompanied by medical certificate.  
51(1): request for parental leave must be in writing and given to employer | 47(1): pregnant employee must give employer at least 6 weeks’ written notice of start date of maternity leave and if requested, provide employer with medical certificate.  
48: employee who does not give prior notice of maternity leave before starting it is still entitled if she provides, within 2 weeks of ceasing work, medical | 23(1): employee who gives written application for leave at least 4 weeks’ before date specified as date she intends to commence leave and provides certificate certifying she is pregnant is entitled to maternity leave.  
23(2): despite (1), employee entitled to maternity leave if  |
| | | | 54(3): employee, as soon as practicable, must provide employer with medical certificate giving estimated “date of delivery” and give employer 4 weeks’ notice of intended date of start of maternity leave.  
55(1): employee who is eligible for maternity leave but does not give |
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<td>employer at least 4 weeks before employee proposes to begin leave, and if employer requires, be accompanied by medical certificate. (4-week notice does not appear to apply to adoptive parents.)</td>
<td>certificate indicating inability to work due to medical condition arising out of pregnancy and indicating estimated date of delivery. 51(1): employee must give employer at least 6 weeks’ notice of start of parental leave unless medical condition makes it impossible to comply or date of adoptive child’s placement unforeseeable. 51(2): if employee unable to comply with notice for any of the reasons in (1), employee must give notice of start date of parental leave at earliest possible time. 51(4): written notice under 47(1) deemed to be notice of parental leave unless notice specifically provides otherwise.</td>
<td>provides employer with certificate including estimated date of birth and specifying medical reasons why employee must cease work immediately, or certifying employee was pregnant but miscarriage or stillbirth ensued. 23(4), (5): where notice requirements not met. 29.1: 4 weeks’ notice for parental leave, but in case of employee taking maternity leave, 4 weeks’ notice before day on which employee scheduled to return from maternity leave. (see s. 29.1 for specific provisions/exceptions) 29.2: where employee to be primary caregiver of adopted child during leave, employee entitled to adoption leave on 4 weeks’ notice is entitled to leave if, within 2 weeks of ceasing work, she gives notice and provides medical certificate with estimated date of delivery and stating that employment duties could not be performed due to medical condition arising out of pregnancy. 56: employee not giving notice entitled to maternity leave for period not exceeding the time she would be entitled to under 54(1). 58(1)(b): employee intending to go on parental leave must give 4 weeks’ notice before day on which employee intends to start leave. 58(2): (effect of late notice)</td>
<td>4 weeks’ notice is entitled to leave if, within 2 weeks of ceasing work, she gives notice and provides medical certificate with estimated date of delivery and stating that employment duties could not be performed due to medical condition arising out of pregnancy.</td>
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<td><strong>Employee’s notice obligations while on leave</strong></td>
<td>50(5): request for a shorter period of leave under 1(b)(i) (i.e. under 6 weeks) must be given in writing to employer at least a week before date employee proposes to return to work, and if employer requires, be accompanied by medical certificate stating employee able to resume work.</td>
<td>46(2): where employer and employee agree, 6-week leave following birth may be shortened, upon employee submitting medical certificate that resumption within 6 weeks will not endanger her health.</td>
<td>23(7): where employee and employer agree that maternity leave should be less than 6 weeks, employer may permit employee to resume employment at expiration of period agreed to by both.</td>
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<td>53(1): subject to 46(2), employee must give employer at least 4 weeks’ written notice of date on which employee intends to return, and in any event must give notice not later than 4 weeks before end of leave period to which employee is entitled, or 4 weeks before end of date specified by employee as end of leave, whichever is earlier.</td>
<td>24: if unable to return for bona fide medical reasons at end of maternity leave, employee may request additional leave on submitting medical certificate stating that she is unable to return for medical reasons, and employer shall grant further leave not exceeding 6 weeks.</td>
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<td>53(2): if employee gives notice of shorter period under 46(2), employee entitled to additional period</td>
<td>59.1(2): employee may end parental leave earlier than time in 59.1(1) (generally 37 weeks unless shorter notice given) by giving employer at least 2 weeks’ notice or one pay period, whichever is longer, before day employee wishes to end leave.</td>
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<td>without notice to meet requirements of 46(2).</td>
<td>53(4): employee not entitled to resume work until date specified in written notice under (1) or end of additional period in (2).</td>
<td>prior to day she intends to resume work.</td>
<td>end leave.</td>
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<td>53(5): employee must resume work on specified dates or immediately following additional period, otherwise not entitled to resume work subsequently, unless failure results from unforeseeable or unpreventable circumstances.</td>
<td>53(6): if employee fails to provide at least 4 weeks’ notice, not entitled to resume work unless failure to provide notice resulted from unforeseeable or unpreventable circumstances.</td>
<td>28(2): employee not required to allow employee to resume employment until notice in (1) complied with.</td>
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<td>53(8): employee who does not wish to resume employment after leave must</td>
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<td><strong>Termination by employer while employee pregnant or on leave</strong></td>
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<td>54(2): employer must not, because of pregnancy or leave, terminate employment or change a condition of employment without written consent.</td>
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<td>52(1): employer may not terminate employment of employee who has started her maternity leave or is entitled to or has started parental leave.</td>
<td>27(1): employer not to dismiss, suspend or discriminate against employee by reason of pregnancy, temporary disability caused by pregnancy, or because employee has applied for maternity leave.</td>
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<td>67(1)(a): notice given under Part 8 has no effect if notice period coincides with period of leave.</td>
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<td>52(2): (1) does not apply where employer suspends or discontinues whole or part of business/undertaking/activity under which employee employed, but employer obligated to reinstate employee or provide employee with alternative work in accordance with 53.1 (see above under “Return to work”)</td>
<td>27(2): (where alleged violation of (1).)</td>
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<td>27(3): (where conviction under (1)).</td>
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