Inter-office Communication
Note de service

To/A:	**National Representatives - Ontario**
From/De:	**Anthony Dale and Farah Baloo, Unifor Legal Department**
Date:	**January 29, 2018**
Subject/Objet:	**Legal Department Advisory – Employment Standards Act – Personal Emergency Leave**

This Legal Department Advisory is about how "Personal Emergency Leave" entitlements in the *Employment Standards Act, 2000* affect unionized employees who are covered by a collective agreement.

Bill 148 made Emergency Leave a statutory minimum entitlement for ALL employees from January 1, 2018. Many employers and unionized employees are considering for the first time how Emergency Leave operates alongside their collective agreements. Employers have a new incentive to avoid the obligations in the Act because two of the Emergency Leave days are now paid leave days.

This Advisory cannot deal with every possible circumstance. It provides a method for looking at collective agreement entitlements and the Emergency Leave entitlement in the ESA in order to determine whether one or both of them provide a benefit to an employee.

Personal Emergency Leave

The Personal Emergency Leave entitlement in section 50 of the ESA is now a minimum employment standard for all employees. Section 50 provides two paid days and eight more unpaid days off in each year for a wide range of illness, injury and urgent matters including bereavement affecting the employee and the employee's family members. Employees do not require the employer's consent to take a leave. They must notify the employer of the leave and may be required to provide evidence of their entitlement that is "reasonable in the circumstances" but an employer cannot require the employee to provide a doctor's note as evidence of an entitlement.

In the automobile and parts manufacturing sector, this benefit is modified by amendments to an existing regulation that makes special rules for that industry. Regulation 502/06 provides that employees in auto manufacturing, auto parts manufacturing, and auto warehousing and marshalling will have seven days instead of ten days of Emergency Leave available for all purposes other than bereavement, plus three days for each bereavement. The same Regulation

removes the requirement that two of the Emergency Leave days be paid if the employee is entitled to two paid vacation days or holidays above the employment standard for those subjects, or two paid days of leave for illness or medical appointments.

Interpretation of the Emergency Leave provisions of the ESA is usually not difficult. There might be disagreements about what is an urgent matter, or disagreements about what kind of evidence an employer may demand from an employee. But most issues can be solved by carefully reading section 50. Up-to-date links to the Act and Regulation 502/06 are at the end of this memo.

Much more difficulty occurs when the Emergency Leave entitlement is considered alongside a collective agreement or other employment contract.

Greater benefit analysis and Emergency Leave

The ESA exists to provide a set of minimum employment standards to employees.

Employers and employees generally cannot contract out of an employment standard. However, section 5(2) of the Act allows employers and employees to contract out of an employment standard if one or more provisions in an employment contract that directly relate to the same subject matter as the employment standard provide a "greater benefit" to an employee than the employment standard.[1]

This means that an employment standard does not apply if a collective agreement already provides a better benefit than an employment standard. The Employment Standards Act does not add extra benefits to a contract that is already better. For example, an employment standard of two weeks of paid vacation does not mean that an employee gets two weeks of additional paid vacation on top of what is provided in their collective agreement.

Questions about how to apply subsection 5(2) often arise in the context of the Emergency Leave entitlements. This is because the reasons that an employee may be entitled to Emergency Leave may also support a variety of collective agreement entitlements.

The following is a guide to the greater benefit analysis for purposes of the Emergency Leave employment standard where there is a collective agreement. It is based on the approach of various arbitrators, including Arbitrator Marilyn Nairn in a particularly well-written award, *IKO Industries* 2011 CanLII 98480 (ON LA) (ON LA).

[1] Subsection 5(2) of the ESA provides: "If one of more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or the Act apply and the employment standard does not apply."

Guide to managing Greater Benefit issues and Emergency Leave

The guide has three steps.

Step One: Identify all of the benefits in the collective agreement that directly relate to the PEL employment standard

The first step in considering how the Emergency Leave entitlement is to be applied where there is a collective agreement is to identify all of the benefits in the collective agreement that "directly relate" to the section 50 benefit. Arbitrators describe this as putting the comparable benefits in a "basket". This "basket" of comparable benefits is then weighed against the employment standard (see **Step Two** below).

The subject matter of the employment standard in section 50 is a right to a leave from work. It is a protection of the right to be absent from work for specified reasons with a right to return to work after the leave.

A collective agreement may have many provisions that directly relate to the same subject matter as section 50, or it may have few. The assessment of whether collective agreement benefits "directly relate" to the employment standard can be very difficult. This is where most disputes arise. Arbitrators consistently emphasize that at this stage we must compare "apples to apples" and not "apples to oranges". See for example the award in *Toronto Zoo*, (2001), 102 LAC (4th) 397 (Tacon).

For example, it is probably not appropriate to compare a "paid floating holiday" under the collective agreement with the Emergency Leave entitlements under section 50 of the ESA. A floating holiday generally would not be available to be taken without the employer's consent in an emergency or to deal with a family member's urgent matter.

Many employers will want to treat a paid sick day as comparable to PEL. This may be justified in some instances. It may be justified for example if the availability of the paid sick day is not discretionary, does not require prior notice in all circumstances or the evidence of illness required is not more than is required under the ESA. The features of the collective agreement sick day benefit must be considered in detail and compared to the section 50 leave entitlement in each specific case.

If the collective agreement benefit in question does not directly relate to the same subject matter as the Personal Emergency Leave employment standard, it is put aside and does not form part of the comparison exercise in **Step Two**. That collective agreement benefit is irrelevant to the issue about whether the collective agreement or section 50 provides the greater benefit.

The following are several awards in which an arbitrator decided that a collective agreement benefit was not comparable to section 50 of the ESA:

- *Abitibi-Consolidated Company of Canada* (2006), 151 L.A.C. (4th) 229 (Jesin) – floating holidays not comparable because not available for emergencies and clearly were intended as holidays.
- *Cargill Value Added Meats London* (2015) CanLii 27390 (ON LA) – floater days not intended to serve same purpose as emergency leave.

In the following awards, arbitrators found that the collective agreement benefit was comparable to section 50 of the ESA:

- *Sysco Food Services of Central Ontario*, 2015 CanLII 23833 (Randall) - sick days
- *IKO Industries Ltd,* 2011 CanLII 98480 (Nairn), upheld on judicial review: *IKO Industries*, 2012 ONSC 2276 – bereavement leave
- *Siemens VDO Automotive Inc*., 2005 CarswellOnt 5072 (Ont. Arb.) – paid personal allowance days.

Once all of the collective agreement benefits that directly relate to emergency leave are identified, go to Step Two.

Step Two: Determine whether it is the "basket of benefits" in the collective agreement or section 50 of the ESA that provides a greater benefit

This can be a difficult step. The totality of comparable benefits in the collective agreement is compared to the employment standard to see which provides the greater benefit to an employee.

Whether the totality of comparable collective agreement benefits is better than the employment standard in section 50 may not always be clear. It may be difficult to predict whether an arbitrator will find that it is the collective agreement or section 50 that provides the greater benefit.

The process of comparing the two involves a comparison of both the quantity of possible leave entitlements in the collective agreement compared to section 50, and also the quality of the entitlements (*IKO Industries* at para 34).

Some of the factors regularly considered by arbitrators when determining whether or not the totality of leave provisions in the collective agreement provide a "greater benefit" than section 50 are:

- What is the total number of days available under all of the leave entitlements?
- Are the collective agreement benefits subject to the employer's discretion or are the benefits available to employees "as of right" as in section 50?
- What events or circumstances are covered by the leave entitlement? Are they more or less available than the section 50 benefit? Do they cover the broad range of eligible family relationships in section 50? This may be the most relevant factor.
- Is the leave entitlement based on a calendar year or a year of employment?

- Is the leave paid or unpaid? (This factor is usually treated as neutral, since the benefit under section 50 is time off, not payment.)
- Is there a requirement to provide evidence to justify the leave and what proof is required?

If it is the collective agreement that provides a greater benefit, the Emergency Leave provisions of the ESA simply do not apply at all. That is because the Act provides a minimum standard. An employment standard does not apply to employees who have a greater benefit in their collective agreement. Employees are only entitled to Emergency Leave under section 50 if their collective agreement does not provide a greater benefit.

It is rarely the case that a collective agreement will be found to provide a greater benefit simply because the section 50 benefit covers such a wide range of absences, circumstances, and family members. In other words, in almost all cases we will go to **Step Three**.

The addition of two paid days to the section 50 employment standard makes it less likely that a collective agreement will be found to be a greater benefit.

Some employers will avoid the risk of making a wrong conclusion at Step Two by proceeding on the assumption that the totality of comparable collective agreement benefits is not better. In that case, whether a particular collective agreement benefit is comparable to section 50 will still need to be determined before going to **Step Three**.

Step Three – If section 50 of the Act provides a greater benefit, determine how the Act and the collective agreement operate together

If Step Two leads to the conclusion that section 50 of the Act provides the greater benefit, the minimum standard under section 50 of the ESA applies to the employee.

If this is the case, the collective agreement benefits and the employment standard both apply to the employee. In *IKO Industries*, the arbitrator said that the collective agreement benefits are "necessarily subsumed into the employment standard" (*IKO Industries Ltd,* 2011 CanLII 98480 (Nairn) at para. 37). Employees will have their contractual benefits "brought up to" the statutory minimum standard of ten emergency leave days. This means that the collective agreement benefits still apply to the employee but they will be topped up to meet the employment standard.

For example, if a collective agreement provides for six days of paid leave that are available to employees for the same purposes as section 50, and are subject to the same conditions as section 50, the six days of paid leave are comparable to the section 50 Emergency Leave. If there are no other comparable collective agreement benefits, the section 50 entitlement is a greater benefit because of the greater number of leave days. If an employee takes any of the six days of paid leave pursuant to the collective agreement, they will be counted against the employee's ten Emergency Leave days but the employee will be paid for those six days in accordance with the collective agreement.

It is important to note that it is only when an employee actually claims the benefit or benefits under the collective agreement that directly relate to the Personal Emergency Leave benefit that their entitlement is reduced. There is no automatic reduction in the number of Emergency Leave days that are available to the employee if the collective agreement benefit is not actually used at some point during the year.

Who decides whether an absence is an Emergency Leave day?

Whether an employer can unilaterally "deem" an employee to have taken a PEL day when they are absent depends on whether the employee obtains the benefit of a comparable benefit under the collective agreement.

In some cases, arbitrators have held that an employer cannot unilaterally treat an employee as having taken a leave if the employee has not expressed a wish to do so. For example the arbitrator in *U.N.I.T.E.-H.E.R.E. v. Pavaco Plastics*, 2007 CarswellOnt 3191, [2007] O.L.A.A. No. 71, 88 C.L.A.S. 153 (Reilly) relied on the words of section 50 as requiring that the employee must express a wish to take the leave. In this interpretation, taking a leave provides the employee with statutory protection but the employee is not required to accept that protection. In *Pavaco Plastics*, the employee was content to be treated as being on an unauthorized absence which the employer's attendance management plan treated as inconsequential. The employee wanted to save the Emergency Leave days for later, when absences might be more consequential.

The Policy and Interpretation Manual published by the Ministry of Labour (at section 18.7.6) provides that it is the employee who decides whether to designate an absence as an Emergency Leave day. However, it then says:

> Note that if an employer offers a benefit plan for sick days, bereavement days, etc., and the employee opts to claim benefits under the plan, it is Program policy that the employee *has in effect designated the absence* as a personal emergency leave day. The same approach applies with respect to workplace injuries. For example, if an absent employee claims WSIA benefits, the employee is, in effect, designating the absences as personal emergency leave.

Consistent with this qualification by the Ministry of Labour, where an employee accepts the benefit of a collective agreement leave provision that is comparable to section 50, it is likely that arbitrators will find that by claiming the collective agreement benefit, the employee has effectively elected to use an Emergency Leave day. In reaching this conclusion, one arbitrator referred to the main purpose of the section which is to protect employees against discipline for non-culpable absences, rather than to provide employees with a "bank of days to be stacked onto other consequence-free absences and to be used at their discretion…" (*Sysco Food Services* at p. 4).

Similarly in the *IKO Industries* case (above), when the employee took paid bereavement leave days under the collective agreement that were comparable to Emergency Leave days, they counted against the employee's section 50 entitlement.

Conclusion

The fact that some employers are dealing with Emergency Leave for the first time, and others are looking for ways to avoid the obligation to pay two additional paid days off, means that a multitude of Emergency Leave issues will turn up over the coming months.

We encourage National Representatives to consider the above guide with their local union committees in order to manage these issues.

Resources

The up-to-date text of the *Employment Standards Act, 2000* is here.

The up-to-date text of Ontario Regulation 502/06 which applies only to the automobile sector is here.

The Ontario Ministry of Labour's guide to Personal Emergency Leave is here.

AD:lmc/cope-343
cc: Jerry Dias, Bob Orr, Scott Doherty, Jenny Ahn, Deb Tveit, Katha Fortier, Shane Wark, Chris MacDonald