

# MANAGEMENT COUNSEL

Employment and Labour Law Update



“Human Resources professionals need to be at the forefront of pandemic crisis preparedness ... it has been estimated that organizations should expect employee absenteeism rates approaching 30% during a pandemic.”

...see inside



## Compassionate Care Benefits Expanded Under New Legislation

### COMPASSIONATE CARE LEAVE

All Canadian jurisdictions, with the exceptions of Alberta and the Northwest Territories, have enacted legislation entitling an eligible employee to an unpaid job protected leave of absence to provide care or support to certain classes of persons with (i) a serious medical condition and (ii) a significant risk of death within 26 weeks. This leave is commonly referred to as Compassionate Care Leave.

### EMPLOYMENT INSURANCE BENEFITS

In 2004 the *Employment Insurance Act* (the "EIA") was amended to permit an employee who was on a Compassionate Care Leave to claim employment insurance benefits ("EI Benefits") for up to six weeks. The classes of individuals for whom the employee could provide care and claim EI Benefits were limited to:

- The employee's spouse or common-law partner<sup>1</sup>
- A child of the employee or of the employee's spouse or common-law partner
- The employee's parent; and
- The spouse or common-law partner of the employee's parent

Recent amendments to the *EIA*, which came into effect on June 15, 2006, have more than tripled the number of classes of eligible individuals so that they now include a more expanded version of the employee's immediate family and numerous members of the employee's extended family. For example: aunt, uncle, anyone the individual considers to be in a "close relationship" and current or former foster relationships, guardians, wards and tutors.

### JOB PROTECTION

In jurisdictions which have enacted Compassionate Care Leave, an employer is obligated to grant the Compassionate Care Leave if it is requested by an eligible employee who is able to support a request with the appropriate medical documentation. During the Compassionate Care Leave, employment is considered continuous so that annual vacation and benefit entitlements continue. An employee who takes a Compassionate Care Leave is also entitled to the same increases in wages and benefits he would have enjoyed had the leave not been taken. Overall the benefits and job protection available to an employee on Compassionate Care Leave is substantially similar to that afforded an employee on maternity or parental leave.

In Saskatchewan and Quebec the Compassionate Care Leave is up to 12 weeks of unpaid job protected leave, while in all other jurisdictions it is up to eight weeks<sup>2</sup> of unpaid job protected leave.

<sup>1</sup>Common-law partner means a person who has been living in a conjugal relationship with that person for at least a year.

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In each of these jurisdictions, the list of individuals for whom an employee may take a Compassionate Care Leave to provide care and support essentially mirrors the list originally prescribed in the *EIA*. That is, the list of eligible relationships is generally restricted to a narrow definition of "immediate family member".<sup>3</sup>

By contrast, in Alberta and the Northwest Territories, an employee may otherwise be eligible to claim EI Benefits, but an employer is not obligated to grant the employee unpaid, job protected leave. That is, while the EI Benefits will be available to an employee who is permitted to take a temporary leave of absence, there is no legislative requirement for an employer in Alberta or the Northwest Territories to grant such leave.

#### WHAT DOES THIS MEAN FOR EMPLOYERS?

To date, no Canadian province or territory has similarly expanded the scope of relationships covered by the respective Compassionate Care Leave provisions. As a result, although an employee may be eligible to claim EI Benefits when providing care and support to a member of the expanded list, an employee will not be entitled to take Compassionate Care Leave. The list of eligible relationships for which Compassionate Care Leave may be taken in each jurisdiction continues to be governed by the relevant employment standards legislation and remains much more restrictive than the list for which an employee may rely upon to claim EI Benefits.

An employer is not required to provide unpaid, job protected Compassionate Care Leave to an employee merely because the employee is otherwise eligible to claim EI Benefits. The obligation to grant an employee such protections can only be created through amendments to the applicable legislation in the respective jurisdictions - changes to the *EIA* are irrelevant for the employer's purposes.

Until or unless the relevant employment standards legislation is amended, nothing changes for an employer when managing an employee's request for leave to provide care and support to another individual.

Sherrard Kuzz LLP will keep its readers and clients apprised of any developments in this area.

<sup>2</sup>In British Columbia and Ontario a further leave is possible if the family member survives past the 26 week period specified in the medical certificate, provided the employee furnishes the employer with another medical certificate. In some jurisdictions there are also other forms of "family responsibility" or "emergency" leaves available to eligible employees in addition to the Compassionate Care Leave.

<sup>3</sup>In New Brunswick the definition is somewhat broader to include any person in a "close family relationship", which includes the individuals typically identified as "immediate family members" as well as "a relationship between persons who, though not married to one another and whether or not a blood relationship exists, demonstrate an intention to extend to one another the mutual affection and support normally associated with those relationships first mentioned."

## DID YOU KNOW?

The *Occupational Health and Safety Act (Ontario)* requires every employer that regularly employs five or more employees to have a written health and safety policy and program, updated annually.

## New Leave Entitlement in Circumstances of Declared Emergency

Bill 56, *An Act to amend the Emergency Management Act, the Employment Standards Act, 2000, and the Workplace Safety and Insurance Act, 1997*, became law on June 20, 2006.

The new legislation, which was the subject of a Sherrard Kuzz LLP Newsblast in June 2006 (see [sherrardkuzz.com/newsblasts.php](http://sherrardkuzz.com/newsblasts.php)), gives Ontario's Premier and/or Cabinet the statutory authority to declare an "emergency", defined as "a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise". An example of this would be a pandemic.

Of particular significance to employers are the amendments that Bill 56 makes to the *Employment Standards Act, 2000*. Bill 56 provides that an employee, in certain situations, will be entitled to a leave of absence without pay ("personal emergency leave") in circumstances in which the employee will not be performing the duties of his or her position because of a declared emergency. The length of such leave would be for as long as the employee is not performing his or her duties because of the declared emergency. The entitlement to this leave ends on the day the emergency terminates or is disallowed.

Any individual or corporation who fails to comply with an order made pursuant to Bill 56, or interferes with or obstructs any person in the exercise of a power or the performance of a duty under Bill 56, is vulnerable to conviction and hefty fines, and in the case of an individual, to imprisonment.

For more information on Bill 56, and how it may affect your workplace, please contact any of our lawyers at 416.603.0700 or 416.420.0738 (24 Hour).

# The Importance of People-Focused Pandemic Planning

As Avian flu, and the threat of a global pandemic, receive increasing attention around the world, organizations are considering how best to prepare for the looming crisis. Human Resource professionals need to be at the forefront of crisis preparedness and planning, as it will be human capital that will be most affected if a pandemic does develop.

## WHAT IS A "PANDEMIC"?

Pandemic refers to the spread of an illness or disease across a wide, geographic area. Recent concerns expressed in the media and in academic circles about a potential pandemic relate to a relatively new strain of the influenza virus, commonly referred to as the "avian flu". To date, this flu has shown a tendency to be easily transmissible between birds, and between birds and humans. It is feared that avian flu may mutate to become transmissible through human-to-human contact, and spread quickly around the world. The World Health Organization has warned of a significant possibility of such an eventuality within the foreseeable future.

## HOW WOULD A PANDEMIC AFFECT MY ORGANIZATION?

It has been estimated that between 1/3 and a 1/2 of a given human population will become sick at some point during a pandemic. This includes your employees. Even if an employee does not become ill directly as a result of a flu virus, the employee may nevertheless be absent from work out of fear, in order to care for others or because infrastructure breaks down and effectively prevents business and transportation systems from operating. Accordingly, employee absenteeism is anticipated to be a significant problem for all employers. Indeed, it has been estimated that organizations should expect employee absenteeism rates of approximately 30% during a pandemic.

In addition to employee absenteeism within your own organization, each organization must consider the impact that similar absenteeism rates may have on suppliers and customers. For example, even if your organization is able to maintain a sufficient staffing level, a pandemic might result in a decrease in the supply of goods and services required by your organization, or in customers' ability to receive your products or services.

## WHY MUST HUMAN RESOURCES BE INVOLVED IN CRISIS PREPAREDNESS AND PLANNING?

Experience has shown that in the face of crisis, business continuity planners and crisis responders tend to focus on the rescue and restoration of hard services, infrastructure, IT, security and business operations. In other words, getting the business up and running is emphasized at the expense of people issues.

Yet the most important asset of an organization is its human capital. Human resources professionals will therefore need to develop an effective people strategy as a component of an organization's business continuity plan. They are often the most adept at understanding an organization's demographics, culture, effective modes of communication, and in anticipating employees' motivations and needs in the face of a crisis, and the adjustment

and recovery that will inevitably follow. Moreover, human resources professionals are attuned to workplace laws that may affect an employer's response to people-related aspects of business continuity planning.

## WHY SHOULD MY ORGANIZATION PREPARE NOW?

Although no one can be certain that a pandemic will strike in the near future, planning for that eventuality may make all the difference in your organization's ability to respond effectively to influenza-related employee absences.

## SOME PLANNING CONSIDERATIONS FOR ORGANIZATIONS

A business pandemic plan should encompass all areas of operations. Planning for labour shortages and determining how to manage employees during a crisis, are vital components of any plan. The following is an overview of a people-focused pandemic planning checklist:

1. **How prepared is your organization currently?** Each business must evaluate its current situation to determine readiness in the event of a pandemic. How will a pandemic be identified by your organization (if not by provincial declaration)? Do employees know what to do in the event of a pandemic? Is there an early warning system to alert management of the transmission of illness in the workplace? Do you even have a plan?
2. **How might a pandemic impact your workplace?** How is work performed in your organization? What vulnerabilities exist? How will labour shortages affect operations? How might a pandemic impact your supply chain (locally and internationally) and your ability to serve your customers? How flexible is your workforce, and are there any factors that may limit flexibility (e.g. collective agreements)?
3. **What types of preventative measures can you take?** Each organization should take steps now to prevent or reduce the likelihood of influenza gaining a foothold in the workplace. This includes employee vaccinations (if sufficient vaccine for the influenza is available), organizing work differently to limit employee interaction, and training employees in basic, preventative measures to reduce the likelihood of transmission between individuals.
4. **If a pandemic arrives, how can you mitigate its impact on the organization and its people?** This is the heart of any human resource pandemic plan. How will you communicate effectively with employees, both at the workplace and at home? Can business operations be reorganized so as to continue even in the face of a pandemic? What is the minimum number of employees necessary to keep the organization functioning? In which capacities? Are employees trained to assume other roles within the organization if this becomes necessary? Are employees able to work from home or in alternative locations?
5. **What is the legal environment within which human resources will be managed in the event of a pandemic?** The recent enactment of Bill 56, *An Act to amend the Emergency Management Act, the Employment Standards Act, 2000 and the Workplace Safety and Insurance Act 1997*, means that if an emergency is declared, such as in response to a pandemic, employees will be eligible for extended leaves of unpaid absence from work so long as the reason for the absence is related to the

*Pandemic Planning continued from p.3*

emergency itself. The provincial government may also order the temporary closure of a business and that employees remain in their homes.

6. **Is your organization a party to a collective agreement?** If so, what effect, if any, will the agreement have on your organization's ability to effectively respond to a pandemic?
7. **Implementation.** Commitment, training and communication. Is senior management committed to preparing a continuity plan that can be implemented in the event of a crisis? Has your

organization's continuity plan been communicated and have employees been trained to respond to a pandemic?

On September 21, 2006, Sherrard Kuzz LLP will host a half day seminar on **Pandemic Planning**. We have invited distinguished speakers from the medical, government and business communities. We will delve more deeply into a range of issues related to pandemic planning, and hope that you will join us. Details of the Seminar are set out below.

**MORNING SEMINAR**

Next in our series of employment and labour law updates:

**TOPIC:** PLANNING FOR THE NEXT PANDEMIC:  
A PROACTIVE APPROACH FOR EMPLOYERS

**Guest Speakers:**

Dr. John Millman; MD, CCFP, CCBOM, Medical Director, WellServe Health Care Management  
Mr. Geary W. Sikich; Principal, Logical Management Systems Corp.  
Allison Stuart; Director, Emergency Management Unit, Government of Ontario

- What is a pandemic, and what threats does it pose for employers and employees in Ontario?
- Update on Avian Influenza
- What are governments doing to prepare for an influenza pandemic?
- Lessons learned from the SARS outbreak in 2003, and other disruptive events
- What should employers be doing, as a component of business continuity planning (BCP), to prepare for a pandemic?
- What are employers'/employees' workplace rights and obligations in the event that a pandemic spreads to Canada?

**DATE:** Thursday, September 21, 2006, 7:30 a.m. – 11:30 a.m. Program to start at 8:00 a.m., breakfast provided. Please note this is a 1/2 day seminar.

**VENUE:** The Toronto Board of Trade, Airport Centre, 830 Airport Rd., Toronto, ON

**RSVP:** 416.603.0700 (Tel.), 416.603.6035 (Fax) or [mrhoden@sherrardkuzz.com](mailto:mrhoden@sherrardkuzz.com) by Friday, September 8th.

**HReview**  
Seminar Series



155 University Avenue, Suite 1500  
Toronto, Ontario, Canada M5H 3B7  
Tel 416.603.0700  
Fax 416.603.6035  
24 Hour 416.420.0738  
[www.sherrardkuzz.com](http://www.sherrardkuzz.com)

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