



INCLUDES RECENT AMENDMENTS TO THE *EMPLOYMENT STANDARDS ACT, 2000*

## Updated Guide to Sick Leave

Employers in Ontario, regardless of the number of employees, should have a policy for employees' sick leave. This guide sets out the minimum rights under the *Employment Standards Act, 2000*, to which employees are entitled, and provides direction on basic considerations and best practices for businesses' sick leave policies. It is important to know the obligations of employers to ensure employees are healthy and safe at

work and to operate a business with confidence minimizing liability.

This guide includes recent changes to the *Employment Standards Act, 2000* with respect to the addition of three (3) days of **paid** Infectious Disease Emergency Leave, which is set to end on March 31, 2023. Employers have until July 29, 2023 to be reimbursed by the Workplace Safety Insurance Board.

## UNDERSTANDING SICK LEAVE – WHAT ARE EMPLOYEES ENTITLED TO?

The Ontario *Employment Standards Act, 2000*, (“*ESA*”) sets out employees’ minimum entitlements to sick leave. While an employer can provide greater benefits than those set out in the *ESA*, they cannot provide less. Under the *ESA*, every employee in Ontario who has been employed by an employer for at least two (2) consecutive weeks – regardless of the size of the business they work for and whether they work full-time or part-time hours – is entitled to three (3) unpaid days of sick leave per calendar year. Sick leave can be taken due to the employee’s personal illness, injury or medical emergency. Sick leave is a job-protected leave, meaning that an employee cannot be terminated for taking the designated unpaid time away from work.



An employee is entitled to three (3) days of unpaid sick leave per calendar year regardless of when they began working (for example, an employee

who starts work in November is still entitled to three (3) days of unpaid sick leave prior to January 1 of the following year). Under the *ESA*, there is no entitlement to bank unused sick leave. The three (3) days of leave do not have to be taken consecutively. Employees can take the leave in part days, full days or in periods of more than one day.

An employee must inform their employer that they will be taking sick leave, and if the employee is unable to advise the employer prior to the sick leave they must inform their employer as soon as possible after beginning the leave. There is no requirement for an employee to inform their employer in writing that they are taking their sick leave, and an employee does not lose their right to sick leave if they fail to provide notice to their employer. If an employee takes any part of a day as a sick day, the employer may deem the employee to have taken one day of leave on that day. The employer must still pay an employee for any work performed on a partial sick day, however can deem the partial sick day to be a full day taken for the purpose of calculating the employee’s remaining entitlement to sick leave.

Whether or not an illness, injury or medical emergency is caused by an employee’s own actions inside or outside of the workplace, or is caused by circumstances beyond the employee’s control, is irrelevant to the employee’s entitlement to sick leave.

Where an employee is entitled to sick leave under the *ESA*, the employee (rather than the employer) decides whether to designate an absence as sick leave. An employee may be entitled to sick leave, however decide not to claim the absence as a sick leave day (perhaps instead taking a vacation day). In this case, the employee decides simply not to exercise their leave entitlement for that absence.

An employee continues to participate in an employer's benefits plans – such as pension plans, life insurance plans, accidental death plans, extended health plans, dental plans – while the employee is on sick leave, and during the employee's leave the employer is required to continue to make its designated contributions to any benefit plans.

Any time that an employee is on sick leave is counted for the purposes of calculating the employee's length of employment, service, or seniority, however will not be included in determining if the employee has completed a probationary period under an employment contract.

### **SICK LEAVE AND OTHER TIME OFF – HOW DOES SICK LEAVE IMPACT ON OTHER LEAVES OF ABSENCE OR VACATION TIME?**

Employees are entitled to other job-protected unpaid leaves under the *ESA* – for example, family responsibility leave, bereavement leave, or critical illness leave. One event may entitle an employee to more than one kind of leave – for example, if an employee and their child are both home sick with the flu, an employee may be entitled to both sick leave and family responsibility leave. While one event may entitle an employee to more than one type of leave, each leave is separate and the right to each leave is independent of any right an employee may have to the other leave(s). Each entitlement to leave applies separately from, and in addition to, every other entitlement to leave. This means that a single absence can only count against one statutory leave, even if the event that triggered it is a qualifying event under more than one leave. In the example above, if the employee stayed home for two (2) days and the employee deemed those two (2) days to be family responsibility leave, the employee would remain entitled to three (3) unpaid sick leave days.

An employee on sick leave can defer taking vacation time until after their sick leave expires. Alternatively, if the employee cannot defer vacation time under their employment contract and as a result would be required to either forfeit vacation time or take less than their full sick leave entitlement, the employer and employee can agree to a later date on which the employee will take their vacation time.

### **CONTRACTUAL ENTITLEMENT TO SICK LEAVE – ARE EMPLOYEES ENTITLED TO SOMETHING OTHER THAN *ESA* ENTITLEMENTS?**

The *ESA* sets out only an employee's *minimum* entitlements to sick leave. An employer can always provide an employee with greater benefits and entitlements than what is required by legislation, however the employer cannot provide an employee with less than their minimum entitlements under the *ESA*.



If an employment contract provides a greater right or benefit than the minimum three (3) days of unpaid sick leave under the *ESA*, then the terms of the contract apply instead of the minimum

standard. If the contract does not provide a greater right or benefit, or does not mention sick leave, then the sick leave standard in the *ESA* applies to the employee.

However, if an employment contract provides for something similar to sick leave (for example, paid “sick days”), and if the employee takes the leave under the employment contract, the employee is considered to have also taken sick leave under the *ESA*. For example, if an employee’s contract says that they are entitled to two (2) paid sick days per year and does not mention any other job-protected time off (for family emergencies, etc.), then the contract does not provide a greater benefit than the *ESA*. The employee is still entitled to three (3) days of job-protected sick leave per calendar year, however in keeping with the contract, two (2) of the three (3) days will be paid and one (1) will be unpaid. The paid sick leave days count against both the employment contract entitlements and the *ESA* sick leave entitlement. This is true whether the leave under the contract of employment is paid or unpaid.

#### **MEDICAL DOCUMENTATION AND SICK LEAVE – WHAT EVIDENCE ARE EMPLOYEES REQUIRED TO PROVIDE?**

An employer may require an employee who takes sick leave to provide “evidence reasonable in the circumstances” that the employee is entitled to the leave. This evidence could include a written doctor’s note, but the *ESA* does not go so far as to require that all employees returning from sick leave provide written evidence from a doctor or health care practitioner of the employee’s personal illness, injury or medical emergency. Determination of what evidence of personal illness, injury or medical emergency is “reasonable in the circumstances” will likely be determined on a case-by-case basis, and will include whether the employee visited a doctor or health care

practitioner or stayed home (which could likely be the case if an employee has the common cold or flu). An employer can ask for information on the expected duration of the absence, and the date(s) on which the employee was seen by a health care professional. An employer cannot ask for information about the employee’s diagnosis or treatment – however, this information may become relevant if an employee will require accommodation upon their return to work.

An employer may choose to discipline an employee who failed to give notice of sick leave when the employee was able to do so, but the employer must take care to ensure that the discipline is clearly linked to the failure to give notice (and is thus a breach of policy), and not a penalization for the employee taking sick leave.



#### **ILLNESS, APPOINTMENTS AND SURGERIES – WHAT QUALIFIES AN EMPLOYEE FOR SICK LEAVE?**

Time taken away from work to attend a doctor’s appointment due to illness or injury would qualify for sick leave.

Elective surgery would likely not be considered a personal illness, injury, or medical emergency, and therefore pre-planned elective surgery may

not qualify an employee to take sick leave – particularly cosmetic surgery for purely elective reasons. However, surgery required for an underlying medical condition (e.g. joint surgery for carpal tunnel syndrome or laser eye surgery), would likely qualify an employee for sick leave because the surgery relates to an illness or medical condition.

An employee cannot take sick leave to care for another family member who is ill; however, under the *ESA*, in some circumstances the employee will be entitled to family responsibility leave to care for a family member who is ill, injured, or experiencing a medical emergency.



### **SICK LEAVE POLICIES – WHAT SHOULD BE INCLUDED?**

Managing sick leave starts with proper workplace policies. A well-drafted Sick Leave Policy is key to properly managing employee expectations and adherence when it comes to time off for illness and medical emergencies. Employment contracts or employee handbooks are excellent places to set out entitlements and responsibilities for both employees and employers.

To prepare an effective sick leave policy, consider the following best practices:

1. Review the *ESA* and its regulations to ensure that minimum requirements and entitlements are reflected in your Sick Leave Policy;
2. Be clear and transparent with your employees about what qualifies for sick leave, and whether time off will be paid or unpaid;
3. Set out procedures and guidelines for requesting, reporting, and recording sick leave, including how, when and to whom to communicate requests for sick leave;
4. Determine and clarify an employee's entitlement to short-term and long-term disability benefits, if applicable; and
5. Include information and resources for employees returning to work from short or long term sick leaves.

### **EXTRAORDINARY CIRCUMSTANCES – WHAT ABOUT COVID-19?**

Currently, many employers and employees have questions about when and how an employee can take sick leave due to COVID-19. Employees remain entitled to three (3) unpaid sick leave days per calendar year, and in some cases employees will now be entitled to additional unpaid and paid job-protected time off in certain circumstances.

The *ESA* was amended on March 19, 2020 to allow for a job-protected **unpaid** leave for reasons related to “a designated infectious disease”. In the current circumstances, COVID-19 is considered a “designated infectious disease”, and the provisions may apply to other diseases in the future. Under these provisions, an employee is entitled to a job-protected leave of absence without pay for the following reasons:

- The employee is under medical investigation, supervision or treatment for COVID-19;

- The employee is acting in accordance with an order under certain sections of the *Health Protection and Promotion Act* that relates to the designated infectious disease;
- The employee is in isolation, quarantine, or is subject to a control measure (which may include, but is not limited to, self-isolation), implemented as a result of information or directions related to COVID-19 issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means;
- The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to COVID-19;
- The employee needs to provide care to a family member for a reason related to COVID-19 such as a school or day-care closure; or
- The employee is directly affected by travel restrictions related to COVID-19 and, under the circumstances, cannot reasonably be expected to travel back to Ontario.

An employee is entitled to take an unpaid leave due to COVID-19 for as long as 1) the employee is not performing the duties of their position for the reasons listed above, and 2) COVID-19 remains a designated infectious disease emergency.

Employees who take the unpaid leave will not be required to provide a medical note from a qualified health practitioner as evidence. An employer may require the employee to provide “evidence that is reasonable in the circumstances at a time that is reasonable” to support the employee’s entitlement to the leave.

### **PAID INFECTIOUS DISEASE EMERGENCY LEAVE – SET TO EXPIRE ON MARCH 31, 2023**

On April 29, 2021, the *ESA* was amended to require employers to provide eligible employees with three (3) **paid** days of an infectious disease emergency leave for reasons related to COVID-19. The leave was retroactive to April 19, 2021 and is set to expire on March 31, 2023. Employees are only eligible to three (3) paid days during the entire period from April 19, 2021 to March 31, 2023. Unlike the other “job-protected” leaves under the *ESA*, this is not an annual leave.



Under the *ESA*, employees are entitled to take the paid leave of absence only under the following circumstances:

- The employee is under medical investigation, supervision or treatment for COVID-19;
- The employee is acting in accordance with an order under certain sections of the *Health Protection and Promotion Act* that relates to the designated infectious disease;
- The employee is in isolation, quarantine, or is subject to a control measure (which may include, but is not limited to, self-isolation),

implemented as a result of information or directions related to COVID-19 issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means;

- The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to COVID-19; or
- The employee needs to provide care to a family member for a reason related to COVID-19 such as a school or day-care closure.

Employees are entitled to take the three (3) paid days of leave prior to taking their unpaid infectious emergency disease leave. For example, if an employee contracts COVID-19, and wishes to take five (5) days of leave, they can take three (3) paid days of leave, followed by two (2) days of unpaid leave. As outlined above, this is in addition to the three (3) days of sick leave that employees are entitled to each year.

Employees who take the paid leave will not be required to provide a medical note from a qualified health practitioner as evidence. An employer may require the employee to provide “evidence that is reasonable in the circumstances at a time that is reasonable” to support the employee’s entitlement to the leave.

If an employee is entitled to take a paid leave of absence under their contract of employment for any of the reasons outlined above, and as of April 19, 2021, the employee has some paid days remaining, then the employee’s entitlement

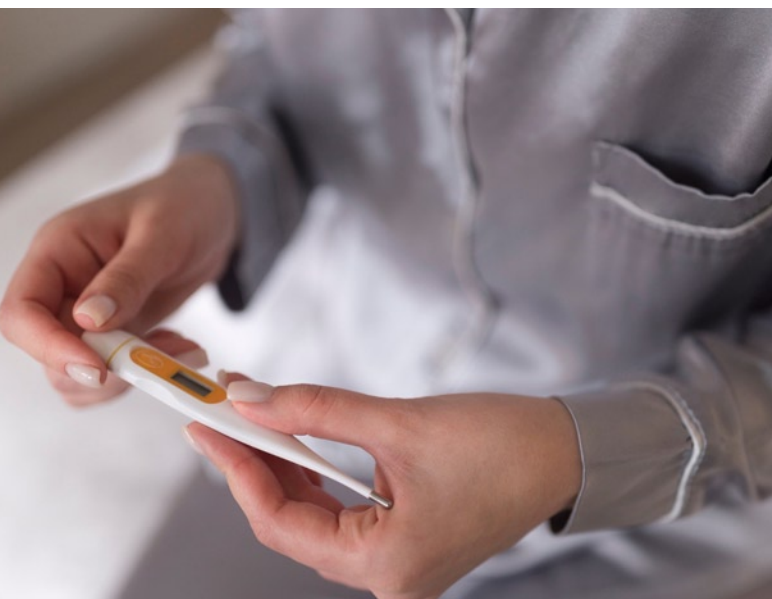
to paid infectious emergency disease leave is reduced by the number of paid days of leave remaining under their contract. For example, if an employee’s contract permits them to take two (2) paid days off for reasons related to COVID-19, and the employee did not take these two (2) paid days as of April 19, 2021, then the employee is only entitled to one (1) paid day under the *ESA*. However, if the employment contract imposes restrictions on taking the leave greater than those imposed by the *ESA*, for example, requiring an employee to provide a doctor’s note for their leave, then the employee will also be entitled to the *ESA* paid leave of absence.



Employees are entitled to be paid the lesser of either their actual wages for their time off, or \$200.00 for each day. For example, if an employee would normally be paid \$300.00 for each day, and took one (1) paid day of infectious emergency disease leave, the employee would only be entitled to \$200.00 for that day (as that is the maximum entitlement under the *ESA*). If an employee would normally be paid \$145.00 per day, and took one (1)

paid day of infectious emergency disease leave, the employee would only be entitled to \$145.00 (as it is less than \$200.00). The *ESA* prescribes different calculations for hourly, salaried and variable pay.

If an employee is scheduled to work overtime or work on a public holiday, and they take an infectious disease emergency leave, they are not entitled to overtime pay or premium pay, but rather, any pay will be calculated based on their regular wages.



Eligible employers are permitted to apply to be reimbursed for the three (3) paid days of infectious disease emergency leave through the Workplace Safety and Insurance Board, up to a maximum of \$200.00 per day, per employee. **Employers must apply for this reimbursement no later than 120 days after the employer paid the employee for the infectious disease emergency leave, or before July 29, 2023, whichever is earlier.** Employers are not eligible to be reimbursed if they paid the employees for their time off pursuant

to a contract of employment which provided the employee with paid time off for COVID-19.

As noted above, every entitlement to leave under the *ESA* applies separately from, and in addition to, every other entitlement to leave. This means that an employee does not have to use up their sick leave in order to qualify for unpaid and **paid** job-protected leave due to Covid-19 or a declared state of emergency. In other words, employers cannot require employees to take three (3) days of sick leave before beginning the unpaid and **paid** leave due to Covid-19. For example, if an employee had not used any sick leave as of March 31, 2023, and took their three (3) paid days of infectious disease emergency leave before March 31, 2023, the employee would remain entitled to three (3) unpaid days of sick leave for the remainder of 2023.

#### **EXPERT LEGAL ADVICE FOR CHALLENGES SPECIFIC TO MY WORKPLACE**

Minken Employment Lawyers is your source for expert advice and advocacy on today's employment law issues. If you have any questions or wish to have a Sick Leave Policy drafted or reviewed to help you effectively manage absences in the workplace and put your employees' minds at ease, or if you want to know more about your obligations as an employer under employment standards, human rights, occupational health and safety, workers compensation and privacy legislation, please contact us today at [contact@minken.com](mailto:contact@minken.com) or call us at 905 477-7011. Go to our website and sign up for our newsletter to receive up to date information, including new legislation and Court decisions impacting your workplace.

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