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HAVE “MATERNITY LEAVE” BENEFITS CHANGED IN BC FROM 12 TO 18 MONTHS?

By: Nicole Mangan

Expanded parental leave was announced as part of the 2017-2018 federal budget and news agencies are widely reporting on the changes. So, employers and employees in BC need to know – what is the law and what has changed?

The Law on Pregnancy and Parental Leave in BC

Pregnancy and parental leaves for provincially regulated employees in British Columbia are governed by the British Columbia *Employment Standards Act* (“ESA”). Some employers are federally regulated and, in that case, are instead subject to the provisions of the *Canada Labour Code* (the “Code”). Examples of federally regulated employers are: banks; telecommunications and broadcasting companies; companies providing inter-provincial transportation including air, rail or marine transportation; pipelines; Crown corporations and uranium mining.

The ESA provides two different leaves that can be combined to create what people sometimes consider to be “one year” of “maternity leave”. The Code has previously contained fairly similar provisions.

“Pregnancy leave” is one ESA provision that allows for up to 17 consecutive weeks of unpaid leave to an employee giving birth to a child. This leave must start no more than 11 weeks before the expected birth date and cannot start any later than the actual birth date of the child. Under the ESA, an employee is expected to provide a request in writing to their employer for this leave and that request should be made at least 4 weeks prior to the beginning of the proposed leave. Leave cannot, however, be denied simply because a written request was not made. Employers may also choose to request a certificate, from a medical practitioner or a nurse practitioner, documenting the expected or actual birth date.

“Parental leave” is a second ESA provision which allows for leaves of different durations depending on parents’ circumstances and whether “pregnancy leave” has been used in relation to the birth of the same child. A birth mother can take up to 35 weeks of parental leave if she has used the “pregnancy leave”. If she hasn’t, the available parental leave is 37 weeks. Birth fathers and adoptive parents may also take 37 weeks of parental leave that must commence within 52 weeks of the child’s birth or placement.



While each of these leaves is unpaid under the ESA, a person can apply for Employment Insurance (“EI”) benefits during the leaves. Entitlement to EI is governed by the *Employment Insurance Act* and its criteria are not necessarily the same as the leave periods provided under the ESA. It is, for example, EI legislation that allows for the payment of, and potential splitting of, EI benefits to caregiving parents for a child up to what was a combined maximum of 35 weeks of parental leave. Payments during a pregnancy leave are also provided for. Full, unpaid ESA leaves are actually available to both parents, however, few parents are in a position to each take 35 or 37 week unpaid leaves when only a combined total of 35 weeks of leave were eligible for EI benefits. It is the EI provisions that sometimes result in parental leave being described as being “split” between parents if both wish to take a period of leave and receive benefits. The fact EI may only provide benefits for the equivalent of one total period of parental leave should not be confused with each parent’s entitlement to this unpaid leave under the ESA.

What’s Changed?

Effective December 3, 2017, new parents beginning a parental leave will be able to obtain 18 months of EI benefits instead of 12 but at a lower rate – 33% of average weekly earnings instead of 55%. In essence, a similar value of EI benefits are available but they can be taken in 12 months or spread over a longer period. What is important to understand is that the leaves available under the ESA have not changed – only the Code has been amended to correspondingly permit longer leaves. The Code now provides for 63 weeks of parental leave instead of 37 resulting in a combined available pregnancy and parental leave for federally regulated employees of 78 weeks instead of 52. While estimates vary, most numbers indicate that federally regulated employees comprise less than 10% of workers while over 90% of workers are subject to provincial regulation.

Impact of the Changes

A provincially governed employer could voluntarily agree to extend the leave permitted by the ESA and the employee could then apply for the longer period of reduced EI benefits, however, the law does not currently require provincially regulated employers to provide for 18 months’ total pregnancy and parental leave. Any voluntary agreements for extended leave, and any federally regulated employers and employees, should consider the following potential issues arising from the longer leave: the effect on any agreement to provide top-up pay during the leave, possible impacts on vacation accrual, and the employer and employee obligations to maintain their share of any benefit payments during the leave.

Future changes may occur that impact provincially regulated employers but, for now, the landscape of legal obligations remains the same for the majority of employers and employees dealing with pregnancy and





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700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA

TELEPHONE
604 682 3664

FAX
604 688 3830

RBS.CA