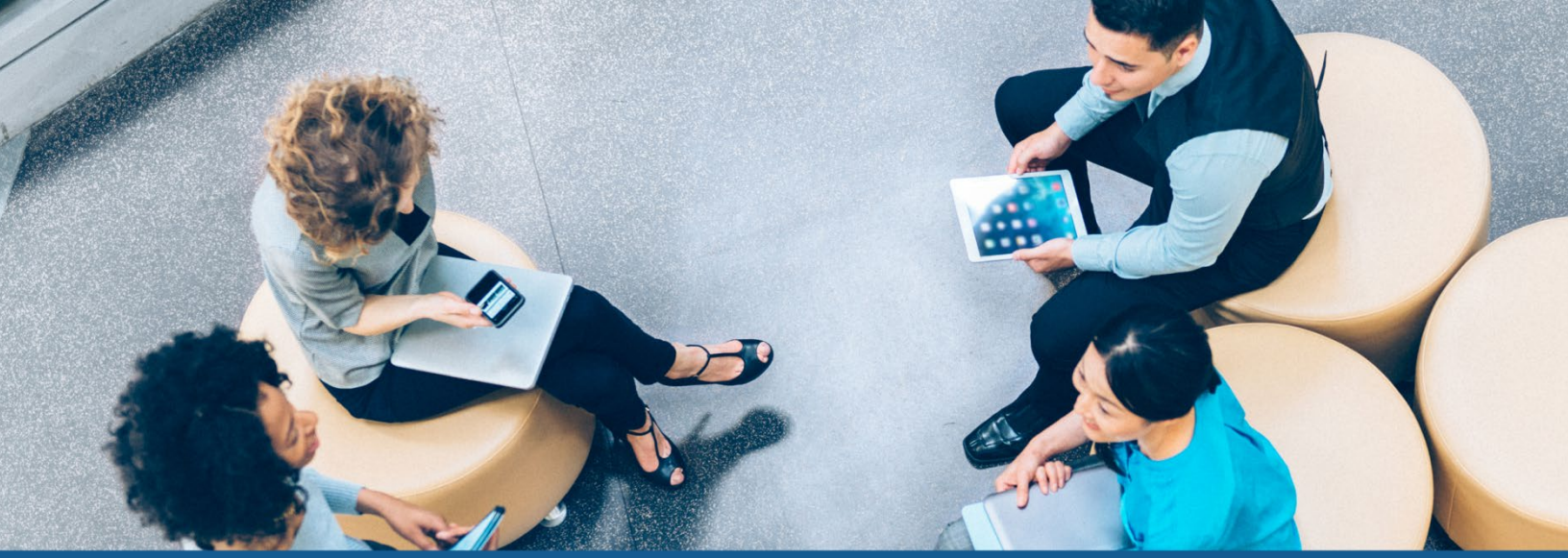

What's New in HR Law

Back to School September 2020: What Does it Have in Store for Employers?

August 27, 2020

Bottom Line

Since the onset of the COVID-19 pandemic, a significant issue for employers has been the struggle to balance maintaining business operations with accommodating employees' childcare obligations. In March, when schools and daycares closed, employers were faced with an onslaught of leave and accommodation requests from working parents. Many hoped that as childcare operations resumed, and as schools reopened in September, these requests would wane. However, reduced childcare availability along with the uncertainty surrounding school reopening in the fall has meant that employers are continuing to grapple with this issue.

Accommodation Requests from Working Parents Likely to Continue

As with many workplace issues that have been born out of the pandemic, there is uncertainty around what specific obligations an employer has when it comes to a an employee's childcare obligations, and at what point these obligations will be triggered.

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For employers, this uncertainty continues as we approach the start of the upcoming school year. In some jurisdictions in-person school attendance will be optional, giving families the choice to keep their children home and attend school remotely. In other jurisdictions, schools are reopening with staggered start dates and hybrid instructional models that will see children alternating between in-class and remote curriculum delivery. Furthermore, in all jurisdictions, the threat of COVID-19 outbreaks or a 'second wave' loom large and, along with it, the possibility of schools and daycares being closed anew.

Amidst the above, employers are – not surprisingly – facing both new and continued leave or accommodation requests from employees.

Requests based on Facility Closures and/or Medical Issues

In cases where these requests are based on actual facility closures, or legitimate health-related concerns, the approach is fairly straightforward.

Specifically, in most jurisdictions, leave entitlements for various reasons relating to the pandemic have been created. In Ontario, for instance, the *Employment Standards Act, 2000* was amended to include Infectious Disease Emergency Leave ("IDEL"). Employees may avail themselves of this unpaid job-protected leave where they are providing care or support to children or other applicable dependants "because of a matter related to a designated infectious disease".

Similarly, an employer's obligations under applicable human rights legislation are likely also to be triggered in these same circumstances on the ground of family status, and potentially also that of disability. Under applicable human rights legislation, employers may be required to authorize unpaid leaves of absence, or provide other forms of accommodation, which may include modifying work duties, providing flexible scheduled working hours, and/or permitting employees to work from home.

Requests based on Fear or Preference

Our experience amidst the pandemic thus far has shown that the above leniencies will likely be required in situations where schools or daycares are closed, or where there are *bona fide* medical reasons underlying an employee's request (*e.g.* the employee's child or another family member is at high risk because of an underlying medical condition). However, some families are choosing to keep their kids home even though in-school learning and childcare may be readily available. In situations where this decision is based on general fear or personal preference alone, the appropriate course of action is less clear.

In our pre-pandemic world, an employee's request for a leave of absence or other form of workplace accommodation could, in most cases, reasonably be rejected if it were based on preference or convenience alone. Similarly, mere preference would not entitle an employee to a statutory job-protected leave of absence. However, with the ongoing impacts of COVID-19, and lack of legislative or jurisprudential guidance to govern employee rights and employer

obligations, it is difficult to predict how adjudicators will assess such requests under these novel circumstances.

Some employers may wish to take the position that employees who refuse to work as a result of keeping their children home for reasons of personal preference have abandoned their employment and/or that their employment has been terminated for just cause. Such a position may find support in situations where schools and daycare programs are open, and public health authorities have deemed attendance to be safe.

However, given the lack of certainty as to how such a management decision would be perceived by decision-makers in the current circumstances, some employers may prefer to err on the side of caution, and extend temporary accommodations to employees who find themselves in this situation, where it is feasible to do so.

As this situation continues to evolve, we anticipate further guidance from courts, arbitrators, and provincial agencies. We will continue to provide updates as they become available.

Practical Guidance for Employers

Regardless of the course of action employers may ultimately choose to pursue in these circumstances, there are practical steps that every employer can take to meet their core legal obligations and limit liability. We outline these below.

1. **Take requests seriously.** There is both a substantive and a procedural component to the duty to accommodate. All requests for leaves of absence or other forms of accommodation should be taken seriously and thoroughly assessed. Automatic dismissal of requests can expose employers to liability.

2. **Engage in meaningful dialogue with employees.** When it comes to childcare-related requests, asking *why* the accommodation is required, *how old* the children in question are, and *what other means of care* may be available to the employee are among the questions that will be reasonable and appropriate to canvass with workers.

3. **Request appropriate substantiating documentation.** While most jurisdictions have imposed limitations on employers' ability to request a medical note to substantiate the need for a COVID-19 related leave, these limitations typically do not preclude employers from requesting appropriate documentation to facilitate return to work or accommodation processes.

4. **Document communications and offers of accommodation.** Keep detailed records of communications, feasibility assessments, and any options or alternatives that may be offered to employees as a means of meeting their childcare needs. Building an evidentiary record will be essential in establishing that an employer's procedural obligations have been met.

5. **Be fair, reasonable, and consistent.** As the most overused saying of 2020 goes: "these are unprecedented times". All workplace parties must demonstrate a certain degree of

tolerance and flexibility when it comes to navigating the various issues brought on by the pandemic. Employers are well-advised to approach decision-making with respect to childcare-related requests in a manner that is fair, reasonable, and consistent in order to avoid allegations of bad faith, favouritism, discrimination, or other such similar claims.

Need more information?

As with any accommodation request, each case may raise unique and nuanced considerations, and should be assessed on its own merits. For more information regarding workplace management and accommodation amidst the COVID-19 pandemic, contact Lucas Mapplebeck at 905-972-6875, Ashley Brown at 416-408-5563, or your regular lawyer at the firm.

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