



# What's New in HR Law

## Arbitrator: Flexible Paid Time Off Is Different than Personal Emergency Leave

July 13, 2018

### **BOTTOM LINE**

The new Personal Emergency Leave entitlements under the *Employment Standards Act, 2000* (“*ESA*”) are distinct and in addition to an employee’s floater days under a collective agreement.

### **Facts: Employer denied employees’ request for paid Personal Emergency Leave days**

When Bill 148 came into effect on January 1, 2018, it amended the *ESA* to allow for two paid, and eight unpaid, Personal Emergency Leave days for any of the following circumstances:

- A personal illness, injury or medical emergency
- The death, illness, injury or medical emergency of a family member
- An urgent matter that concerns a family member.

At the time that the *ESA* was amended in January 2018, the employer was providing employees with three paid “floater” days under the terms of the collective agreement. Employees were able to take these floater days within a twelve-month period that ran from July to June. These

days were flexible in that they could be used as a holiday or for an unexpected absence from work.

When two employees attempted to take their paid Personal Emergency Leave days under the amended *ESA*, the employer denied the request saying that the employees had already used their three paid floater days. The employer argued that the three floater days counted as the employees' Personal Emergency Leave days.

The employer relied on section 5 of the *ESA*, which states that if a provision in an employment contract provides a greater right or benefit to an employee than an employment standard, the provision in the contract applies and the *ESA* standard does not.

### **Greater Right or Benefit: Did the employer provide a greater benefit with three floater days?**

The arbitrator determined that the new entitlement under the *ESA* to two paid Personal Emergency Leave days was in addition to the floater days already provided for under the collective agreement.

The arbitrator explained that section 5 of the *ESA* requires a comparison of "apples to apples." In other words, in order for the greater benefit provision to apply, the two benefits being compared must have the same purpose.

The fact that the floater days could be used as holidays made their purpose different from the new paid Personal Emergency Leave days under the *ESA*. The arbitrator also stated that it would be inconsistent with the terms of the collective agreement to require employees to save two of their floater days for potential Personal Emergency Leave days.

Moreover, the arbitrator found that the twelve-month, July to June period in which employees could use the floater days was different from the Personal Emergency Leave days which followed a standard twelve-month calendar year. This was problematic because if employees were to use more than one of their floater days before the turn of the calendar year, they would not have access to the required two paid Personal Emergency Leave days in the next calendar year.

### **Check the Box**

Following the enactment of Bill 14, employers need to ensure they are complying with the *ESA*:

- A "floater" day under a collective agreement cannot be substituted for a Personal Emergency Leave day.
- Employers cannot reduce the terms of a collective agreement to meet *ESA* requirements in the wake of Bill 148.
- A "greater right or benefit" analysis requires the employer to consider both the purpose and time frame of the provision in question.

**Date:** May 25, 2018  
**Forum:** Ontario Labour Arbitration  
**Citation:** *Carillion Services Inc. and LIUNA, Local 183 (Williams), Re*, 2018 CarswellOnt 8854

### Need more information?

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