What does the ESA now provide in Terms of Personal Emergency Leave?

Section 50 of the ESA provides that all employees in Ontario covered by the ESA (with the exception of employees who work in auto manufacturing, auto parts manufacturing, auto parts warehousing or auto marshalling, whose PEL entitlements are covered by a separate regulation) are entitled to ten (10) days of job protected PEL for the following purposes:

- personal illness, injury or medical emergency
  or
- death, illness, injury, medical emergency or urgent matter relating to the following family members:
  - spouse (includes both married and unmarried couples, of the same or opposite genders)
  - parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse
  - spouse of the employee's child
  - brother or sister of the employee
  - relative of the employee who is dependent on the employee for care or assistance
  - An urgent matter that concerns an individual described in 2 (a)-(g) above.

The employer is required to pay for the first two (2) days of leave for employees who have been employed with the employer for one (1) week or more. Employees who have been employed with an employer for less than one (1) week are not entitled to *paid* days. However, they can use unpaid PEL days until they accrue sufficient service to gain access to paid days.

WHAT IF A COLLECTIVE AGREEMENT PROVIDES FOR SICK LEAVE AND/OR BEREAVEMENT LEAVE? IS AN EMPLOYEE ENTITLED TO PAID PEL DAYS UNDER THE ESA AND ANY COLLECTIVE AGREEMENT ENTITLEMENT, OR DOES THE EMPLOYEE ONLY GET WHAT'S IN THEIR COLLECTIVE AGREEMENT?

Access to PEL days (paid or otherwise) under the ESA depends on whether or not the CBA (Collective Agreement) or employer policies under which an employee works provides something better than what is provides for under the PEL provisions of the ESA.

This is because the ESA says that "if one or more provisions of an employment contract that *directly relate to the same subject matter* as the employment standard, provides a greater right or benefit to an employee than the employment standard, the provisions of the contract apply, and the employment standard does not."

The Term "employment standard" means "a requirement or prohibition under the ESA that applies to an employer for the benefit of an employee."

As a result, in determining whether or not the PEL provisions of the ESA apply to an employee you will need to look to the provisions of the employees CBA and any relevant employer policies. Relevant provisions/policies include CBA articles relating to bereavement leave, sick leave and employer attendance management policies.

There isn't a single, definitive answer that applies in all circumstances to the question whether or not the collective agreements in Ontario provide a greater right or benefit then the PEL provisions of the ESA. Nor is it possible to say that because an employee gets two (2) paid bereavement days or sick leave days under the CBA the PEL provisions of the ESA don't apply. *Rather, whether or not the CBA provides a greater right or benefit than an employment standard depends on the specific language of the CBA and employer policies.* Depending on the language, some CBA agreements and employer policies may provide a greater right or benefit, others may not.

When comparing Collective Agreement/employer policy provisions, you can't compare "apples" and "oranges." In other words, you must only compare the CBA agreements and employer policies that directly relate to the same subject matter as the employment standard you are concerned with. For example, the fact that an employees has just cause protection under the CBA does not allow the employer to argue employees have no entitlement to PEL days, as the purpose of those two employee protections are distinct and different.

While you cannot compare "apples" and "oranges," you can compare "different varieties of apples." This means that when determining whether or not collective agreement/employer policies provide a greater right or benefit you can and should take into account the entire package of contractual provisions that relate to the same subject matter as the ESA, in his case PEL. That is why in determining whether or not employees are entitled to PEL days, it is relevant to look at all aspects of the employment contract with the employer, which includes both the CBA and employer policies.

In determining whether or not an employment contract provides a better deal than the ESA PEL provisions, the Ministry of Labour has outlines the following list of relevant criteria in their *ESA interpretation Manual,* from (in their view) most important to least important.

a. **Qualifying Events** – Does the contract cover all the different types of events that would entitle an employee to personal emergency leave under section 50? For example, if the contract allows the employee personal sick leave and bereavement leave but does not allow any leave for the illness of, or an urgent matter concerning, a dependant relative, this is a very strong (though not in itself conclusive) indication that the contract does not provide a greater right or benefit.

b. **Number or Days of Leave** – How many days does the contract provide for? Obviously, if the contract provides for something less than 10 days leave per calendar year, this weighs in on the side of concluding that it does not constitute a greater right or benefit. On the other hand, an unlimited leave entitlement, or an entitlement to more than the 10 days per calendar year that the ESA provides for, weights in on the side of concluding that there ***is*** a greater right or benefit.

c. **Paid or Unpaid** – How much of the leave under the contract is paid? Leave under the ESA is both paid (2) days and unpaid (8) so if he leave under the contract is all paid leave, this tends to point to the contract providing a greater right or benefit. But as with the other criteria, this criterion is not conclusive in itself; other criteria might tip the balance the other way.

d. **Reinstatement Right** – If the employee take leave under the contract, are they entitled to return to their original position (assuming it still exists), as they would if they took PEL days? If not, this would be a factor tending to suggest that a greater right or benefit is not being provided.

e. **Negative Consequences** – Even if the employee has a right to his or her original job, can the employee be adversely affected in any other way because they take leave under the contract e.g. the absence from work may cause him or her to be ineligible for a perfect attendance bonus, interrupt benefit coverage, deduction of leave time from seniority, reduction/forfeiture of contractual vacation entitlements, or the absence from work may be included in determining whether the employee has triggered an absence threshold that results in discipline or termination. Any such consequences points in the direction of the contract not providing a greater right or benefit.

f. **Eligible Relationships** – How does the contractual right compare with the PEL under the ESA in terms of the scope of coverage? Section 50 of the ESA provides an entitlement in relation to a fairly broad range of expressly designated relationships, including some that might be considered fairly remote. Moreover, the entitlement also extends to dependent relatives even if they do not fall into any named categories. If the contractual entitlement covers a narrower range of relationships this weighs in on the site of concluding that it does not constitute a greater right or benefit.

g. **Other Criteria** - A number of other criteria could conceivably have some impact on greater right or benefit determination. These criteria include what sort of evidence the employer requires to support the entitlement under the contract; whether the contractual right is based on the calendar year or on the individual's year of employment, and whether the employer can deduct a part day of the leave from the employee's entitlement as if it were the whole day (as the ESA allows employer to do under the PEL provisions.)

In addition to the criteria above identified by the Ministry, arbitrators have also looked at the amount of discretion the employer has in granting leave under the CBA. In other words, the more management discretion to deny the leave in light if operational needs/requirements, the less likely it is to be found to be a greater right or benefit to the absolute entitlement provides under the PEL provisions of the ESA.

If the CBA and employer policies do not provide a greater right or benefit, then the employee will be entitled to ***at least*** what is provided in the PEL provisions of the ESA.

This does not mean that an employees is entitled to the benefit of the PEL provisions of the ESA ***and*** their CBA entitlements – the two benefits are not added together. Rather, the purpose if the statutory entitlement is to bring the lesser CBA entitlement *up to* the minimum standard. This means that the first 10 days of leave taken under the CBA that meet the criteria for section 50 will be "counted" as emergency leave days for the purposes of entitlement under the ESA.

For example, if an employee is entitled to 4 days of paid bereavement leave under the CBA and takes that leave in February 2018 in order to deal with the death of the employee's mother, those 4 days of paid bereavement leave will count against the employee's 10 days of PEL entitlement (2 paid & 2 unpaid) under the ESA. As a result, when the employee returns to work after their bereavement leave, the employee will have 6 unpaid days of PEL left in the calendar year.

If, after utilizing their 10 PEL days, circumstances allow an employee to claim leave under the terms of the CBA, the employee will still be able to access the benefit of the CBA provision.

For example, imagine a CBA provides for 3 paid sick days and 3 paid bereavement leave days per year. However, doesn't contain a provision for job-protected time off (paid or unpaid) to tend a sick child or spouse, as does section 50 of the ESA. The CBA would arguably not provide a greater right or benefit (because it does not provide for all the types of leave provided for under section 50). As a result, an employee will have at least 10 PEL days (2 of which will be paid).

Now imagine the employee takes 10 PEL days in March (2 of which are paid, in accordance with section 50) to care for their sick child. In August the employee's family member dies. The employee would still have access to the paid bereavement leave days under the CBA because the employee has not taken any bereavement leave under the terms of the CBA and is still entitled to the benefit of the CBA provisions. However, if the employee's child got sick again in September of that same year, the employee would have no PEL days available to use to care for the child, as they would have exhausted their full PEL entitlement in March.