

MODULE 4

Leaves of Absence



PERSONAL EMERGENCY LEAVE

An employee can take personal emergency leave for illnesses, injuries and medical emergencies for themselves or a specified family member listed below. It does not matter whether the illness, injury or medical emergency was caused by the employee or by external factors beyond their control.

Generally, employees are entitled to take the leave for pre-planned surgery if it is for an illness or injury, even though it is scheduled ahead of time and not a medical “emergency.”

However, employees **CANNOT** take the leave for cosmetic surgery that isn’t medically necessary or is unrelated to an illness or injury.

Urgent Matter

An employee can also take personal emergency leave because of an urgent matter concerning any of the family members listed below. An urgent matter is an event that is unplanned or out of the employee’s control, and can cause serious negative consequences, including emotional harm, if not responded to.

Examples of an urgent matter:

- Employee’s babysitter calls in sick;
- House of the employee’s elderly parent is broken into, and the parent needs help to deal with situation;
- Employee has an appointment to meet with their children’s school counsellor to discuss behavior problems and it can’t be scheduled outside of school hours.

Examples of events that are **NOT** an urgent matter:

- An employee wants to leave work early to watch their daughter’s soccer game;
- An employee wants the day off to attend her sister’s wedding as a bridesmaid.

Specified Family Members

1. Spouse (includes both married and unmarried couples, of the same or opposite gender);
2. Parent, grandchild or step-grandchild of the employee or employee’s spouse;
3. Spouse of the employee’s child;
4. Brother or sister of the employee; or
5. Relative of the employee who is dependent on the employee for care or assistance.

Paid Sick or Bereavement Leave

If an employer offers paid sick or bereavement leave, and it’s a greater right or benefit than the personal emergency leave (PEL) standard under the ESA, then the terms of the employment contract prevail.

Example: A contract only provides three paid personal sick days and three paid bereavement leave days per year. It does not include job-protected time off for any other reason. This contract does not provide a greater right or benefit than the personal emergency leave provisions. This means that the employee is entitled to 10 days of job protected personal emergency leave per calendar year.



MODULE 4

Leaves of Absence

There is nothing in the ESA that would prohibit an employer from subtracting any personal emergency leave (PEL) days that are taken from the paid days under the contract. For example, if the employee takes three days of PEL for personal illness in a calendar year, the ESA does not prohibit the employer from counting those days against both the employment contract entitlements and against the employee's PEL entitlement. While this is not prohibited under the ESA, an employment contract may address whether any PEL days count against any contractual leave entitlements.

On the other hand, if an employer offers a benefit plan for sick days, bereavement days, or for any other event that any leave under the ESA can be taken, and the employee chooses to claim benefits under the plan, the employee has in effect designated the absence as a day of statutory leave and it will reduce the employee's ESA entitlement. For example, if an employer offers three paid bereavement days under a benefits plan and the employee is absent three days because of the death of a parent and claims benefits under the plan, the employee is considered to have used three of their PEL days.

Length of Leave

Under the ESA, employees are entitled to two paid days, and eight unpaid days per calendar year. The first two days taken must be the paid days.

Employees are entitled to take personal emergency leave from their first day of working with a new employer. However, employees are not eligible to be paid for personal emergency leave until they have been employed for at least **1 WEEK**.

Use of Leave Days

Not all ten days need to be taken consecutively. An employee may take part of a day off, but an employer may count this as a whole day if they choose.

Calculating Paid Days

If the employee is a performance related wage earner, the employee is entitled to PEL pay at the greater of:

- Their hourly rate; or
- Minimum wage.

An employee is not entitled to overtime, shift premium or public holiday premium rates if a PEL day is taken.

Example: Employees paid by an hourly rate

PEL pay is the hourly rate multiplied by the number of hours the employee did not work because they took the leave.

Scenario 1: If they took leave for a full day

Jamie is paid \$16.00/hour and missed a full day of work to take personal emergency leave. He was scheduled to work nine hours. **PEL pay: $\$16.00 \times 9 = \144.00**

Scenario 2: If the employee took leave for part of the day

Oakley is paid \$17.50/hour and missed the first 2.5 hours of his shift to take personal emergency leave. He normally works eight hours in a day. **PEL pay: $\$17.50 \times 2.5 = \43.75** (in addition to regular earnings for the hours he worked during the rest of the day)



Example: Employees paid by salary

PEL pay is generally equal to salary continuance.

Scenario 1: If the employee took leave for a full day

PEL pay would be the employee's salary divided by the number of days in a pay period. Theresa is paid \$1,500.00 per bi-weekly pay period and works five days a week. **PEL for one day: $\$1,500.00 \div 10 = \150.00 .**

Scenario 2: If the employee took leave for part of the day

PEL pay would be the employee's hourly rate (salary divided by the number of hours the employee normally works in a pay period) multiplied by number of hours taken as personal emergency leave. Theresa is paid \$1,500.00 per bi-weekly pay period and works a 40-hour week. She takes four hours of leave. Hourly rate: $\$1,500.00 \div 80 = \$18.75/\text{hour}$. **Personal emergency leave: $\$18.75 \times 4 = \75.00 (in addition to any regular wages earned for the part of the day that she worked).**

Example: Performance-related wages

The calculation of PEL pay for employees who are paid fully or partly based on performance would use either the employee's hourly rate (if any) or the applicable minimum wage – whichever is greater.

Performance-related wages can include commission-only employees, employees who earn commission plus an hourly wage, an employee paid by piecework, or a flat-rate mechanic.

Scenario 1: Employee earns an hourly rate plus commission

Athan earns \$16.00/hour plus 2% commission on sales. Athan takes 6.5 hours of PEL. **PEL pay: $\$16.00 \times 6.5 = \104.00 (plus hourly wage for any hours worked + commission earned while the employee worked, if any)**

Scenario 2: Employee paid entirely by commission

Francesca earns 10% commission on all sales. Francesca is scheduled to work eight hours, makes sales of \$5,000 and takes three hours of personal emergency leave. **PEL pay: applicable minimum wage rate x 3 (in addition to the \$500.00 commission earned while the employee worked)**

Scenario 3: Employee is a homemaker paid by piecework

Yael earns \$3.50 per phone call answered. Yael is scheduled to work 8.5 hours, works two hours, answers nine phone calls and takes 6.5 hours of personal emergency leave. **PEL pay: applicable minimum wage x 6.5 (in addition to regular wages earned on the day based on piecework, which is $\$3.50 \times 9$)**

Scenario 4: Employee is a flat-rate mechanic

Matt is scheduled to work nine hours. Matt is paid a flat "book" rate of \$16.00/hour for tune ups (calculated to take two hours to complete). Employee completes two tune ups in three hours and takes the rest of the shift as personal emergency leave. **PEL pay: applicable minimum wage x 6 (in addition to regular wages earned on the day).**

Example: Employees scheduled to work overtime hours

If an employee is scheduled to work a shift that includes overtime hours, and they miss all or part of the shift to take paid personal emergency leave, the employee will be entitled to the regular hourly rate only for any leave taken, not the overtime rate.

Ramiro is paid \$15.00/hour and was scheduled to work a Saturday shift of eight hours. He had already worked 44 hours in the same week. He missed his entire shift to take paid personal emergency leave. **PEL pay: $\$15.00 \times 8 = \120.00**



MODULE 4

Leaves of Absence

Example: Employees scheduled to work hours when a shift premium is paid

If an employee is scheduled to work a shift that would attract a shift premium, and they miss all or part of the shift to take paid personal emergency leave, the employee will be entitled to the regular hourly rate only for any leave taken, not the shift premium.

Minh is paid \$16.00/hour and an additional \$2.50/hour for working night shifts. She is scheduled to work a night shift of nine hours and leaves after working two hours to take paid personal emergency leave. **PEL pay: \$16.00 x 7 = \$112.00 (plus regular wages and shift premium of [\$16.00 + \$2.50] x 2 for the hours that she worked)**

Example: Paid PEL is taken when an employee was scheduled to work on a public holiday

In some situations, employees can either be required to work on a public holiday because of the type of work that they do, or may agree to work on a public holiday.

Generally, the employee will be entitled to either:

- regular wages for the hours worked on the public holiday, plus a substitute day off with public holiday pay; or
- “premium pay” which is 1.5 times their regular rate for all hours worked on the public holiday, plus public holiday pay (and no substitute day off).

To receive this entitlement, the employee must work all the hours agreed to or required to on the public holiday – unless they had reasonable cause not to – and follow the “first and last” rule. That rule says that the employee must work all of the last scheduled shift before the public holiday and the first one after the holiday or have reasonable cause for failing to do so.

If an employee misses work because of one of the reasons personal emergency leave may be taken, this will also generally constitute “reasonable cause” for the purposes of public holiday entitlements.

If an employee agrees, or is required, to work on a public holiday and misses some or all of the shift to take paid personal emergency leave, PEL pay will not include the “premium pay” that the employee would have earned had they not taken the leave.

Tabitha works in a restaurant and is required to work on Victoria Day. She is paid the liquor server’s minimum wage. She is scheduled to work 10 hours on the public holiday, and the employer has decided to give her premium pay for all hours worked on that day, plus public holiday pay (but no substitute day off). Tabitha works six hours of the shift and takes the rest of as paid personal emergency leave.

Entitlements:

- Public holiday pay
- Premium pay for hours worked (liquor server’s minimum wage x 1.5 x 6 hours).

Note: the employee is not entitled to premium pay for any leave taken.

Notice Requirements

The employee must notify the employer that they are taking personal emergency leave as soon as possible, either before the leave is started or after the leave has begun. It does not need to be in writing.



Acceptable Evidence

An employer may require an employee to provide evidence “reasonable in the circumstances” that they are eligible for personal emergency leave. However, employers cannot require employees to provide a medical note from a physician, registered nurse or psychologist.

What will be reasonable in the circumstances will depend on all of the facts of the situation, such as the duration of the leave, whether there is a pattern of absences, etc.

The prohibition in the ESA against requiring a note from a physician only applies with respect to providing evidence that the employee is entitled to PEL. There may be some situations outside of the scope of personal emergency leave where an employer may need medical documentation in order to accommodate an employee to satisfy return to work obligations. The ESA does not prohibit employers from requiring a note for these sorts of other purposes.

NOTE: A professional employee may not take PEL where it would constitute an act of professional misconduct or a dereliction of professional duty.

Special Rule – Automotive Industry

An automobile manufacturing/parts/warehousing/marshalling employee may take:

- Up to seven days of leave within a calendar year for personal illness, injury or medical emergency, or the personal illness, injury, medical emergency or urgent matter of particular family matters; and
- Up to three days of leave for the death of a family member.

They are also not entitled to paid personal emergency leave if the employment contract provides two or more paid days for:

- Vacation;
- Holidays; or
- Personal illness or personal medical appointments.

The employee, however, is entitled to unpaid personal emergency leave.

Special Rule – Construction

A construction employee is not entitled to paid personal emergency leave if:

- The employee receives at least 0.8% of their regular wages or hourly rate as personal emergency pay; or
- The employee is still entitled to unpaid personal emergency leave.

NOTE: The employer can choose to follow the special rule or not. The employer may also not choose to apply the special rule to all employees.



MODULE 4

Leaves of Absence

Leaves of Absence and EI Benefits

Employees taking leaves of absence under some of the leaves outlined in this section may be eligible to receive EI benefits during the period of their leave. An employee eligible for these benefits will need to have his or her Record of Employment issued to them promptly in order to apply for these benefits.

Employee eligibility for EI benefits:

- Pregnancy/Parental Benefits;
- Family Caregiver Benefits (adult/child); and
- Compassionate Care Benefits.

PREGNANCY LEAVE

Pregnant employees have the right to take pregnancy leave up to 17 weeks unpaid time off work.

Who Qualifies?

Any full-time, part-time, permanent or term contract employee:

- Who is pregnant;
- Whose employer is covered by the ESA; and
- Who started her employment at least 13 weeks before the **expected** due date.

Example: Fatima began her employment 15 weeks before her due date. Soon after starting her new job, she was off sick for five weeks. Fatima is eligible for pregnancy leave because there are at least 13 weeks between the date her employment began and her due date. The fact that she did not actually work 13 weeks is irrelevant.

NOTE: When an employee is hired on a fixed-term contract and the term expires during her leave, the employment relationship generally comes to its natural conclusion with the expiry of the term. In such cases, the employer has no obligation to reinstate the employment after the leave.

Start Date – Pregnancy Leave

Earliest: 17 weeks before the employee's due date.

Exception: when an employee has a live birth more than 17 weeks before the due date, she will be able to begin pregnancy leave on the date of the birth.

Latest: Baby's due date.

Length of Pregnancy Leave

The maximum is usually 17 weeks. However, there is an exception if an employee has taken 17 weeks, but is still pregnant. Once the leave has started, it must be taken all at once.

An employee may decide to take a shorter leave if she wishes. If an employee returns to work for the employer from whom she took the leave, even if it is only part-time, under the ESA she gives up the right to take the rest of her leave.



Premature End to Pregnancy Leave

For miscarriages and stillbirths:

- If this occurs **more than** 17 weeks before her due date, the employee is **NOT** entitled to pregnancy leave
- If this occurs **within** 17 weeks of the due date, the employee is eligible for pregnancy leave, the latest date is date of miscarriage or stillbirth.
- Leave ends on the date that is the later of:
 - 17 weeks after the leave began; or
 - 12 weeks after the stillbirth or miscarriage.

Stillbirth example: Wai began her pregnancy leave 15 weeks before her baby was due. On her due date she had a stillbirth. The ESA provides that the pregnancy leave ends on the date that is the later of 17 weeks after the leave began or 12 weeks after the stillbirth. In this case, the later date is 12 weeks after the stillbirth. Wai can stay off work for up to 12 more weeks after the stillbirth, for a total of 27 weeks of pregnancy leave.

Miscarriage example: Hélène began her pregnancy leave 15 weeks before her baby was due. One week later (one week into her pregnancy leave) she had a miscarriage. The law indicates that her pregnancy leave ends on the date that is the later of either 17 weeks after the leave began or 12 weeks after the miscarriage. In Hélène's case, the later date is 17 weeks after the leave began. She will get a total of 17 weeks of pregnancy leave.

Notice Requirements

An employee must give her employer at least **two weeks'** written notice before beginning her pregnancy leave.

If the employer requests it, she must provide a certificate from a medical practitioner stating the baby's due date.

Retroactive Notice

Sometimes an employee has to stop working earlier than expected, for example because of complications caused by the pregnancy. In cases such as these, the employee has 2 weeks after she stops working to give the employer written notice of the day the pregnancy leave began or will begin.

An employee does not have to start her pregnancy leave at the time she stops working if she has stopped work due to illness or a complication caused by the pregnancy. She may choose instead to treat the time off as sick time and plan to commence the pregnancy leave later (but no later than the earlier of the birth date or due date). If requested, an employee has to provide a medical certificate issued by a doctor, midwife or nurse stating the baby's due date and stating that she was unable to perform the duties of her position because of the complication.

If an employee stops working earlier than expected because of a birth, stillbirth or miscarriage, she has two weeks after she stops working to give the employer **written notice** of the day the leave began. The pregnancy leave begins no later than the date of the birth, stillbirth or miscarriage. If the employer requests it, the employee has to provide a medical certificate issued by a medical doctor, a midwife or a nurse practitioner stating the due date and the date of birth, stillbirth or miscarriage



MODULE 4

Leaves of Absence

Changing Start Date of Leave

If an employee begins their pregnancy leave **earlier** than the original date, then they must provide the employer with two weeks' written notice before the new, earlier date.

If an employee begins their pregnancy leave **later** than the original date, then they must provide the employer with two weeks' written notice before the original date.

Example: Changing the start of a pregnancy leave to an earlier date

Barbara gave her employer written notice that she would begin her pregnancy leave on September 10. Now Barbara wants to start her leave on August 27. She must give her employer new written notice by August 13 (two weeks before August 27).

An employee can also change the date she will begin her leave to a later date than she originally told her employer. To do this, she must give her employer new written notice at least two weeks before the original date she said she would begin her leave.

Example: Changing the start of a pregnancy leave to a later date

Mairead gave her employer written notice that she would start her pregnancy leave on September 10. Now Mairead wants to start her leave on September 15. She must give her employer new written notice by August 27 (two weeks before September 10).

Ending Pregnancy Leave

An employee is not required to provide a return date, but may choose to do so. The employer may not require an employee on pregnancy leave to return from the leave early. If no date of return is provided, the employer is to assume that she will take her full 17 weeks of leave.

Changing End Date of Leave

If an employee is returning **earlier** than the original date, they must provide the employer with four weeks' written notice before the new, earlier date.

If an employee is returning **later** than the original date, they must provide the employer with four weeks' written notice before the original date.

Resignation on Pregnancy Leave

When an employee decides not to return to work while on pregnancy leave, they must give the employer **four weeks'** notice of resignation.

PARENTAL LEAVE

Any full-time, part-time, permanent or term contract employee who has recently become a parent, and is covered by the ESA, and who started employment at least 13 weeks prior is entitled to parental leave.

Who is a Parent?

A parent is either a birth parent, adoptive parent, or person in a relationship of some permanence with a parent of the child who intends to treat the child as their own.



Start Date – Parental Leave

Parental leave starts at the end of pregnancy leave, if taken. If no pregnancy leave is taken, a parent must begin parental leave no later than 78 weeks after:

- The date his or her baby is born; or
- The date his or her child first came into his or her care, custody and control.

Length of Parental Leave

Birth mothers who take pregnancy leave are entitled to receive **61 unpaid weeks'** leave. For any other parent who did not take pregnancy leave, are entitled to **63 unpaid weeks'** leave.

Parental leave must be taken all at once, but may decide to take a shorter leave if they wish.

NOTE: For miscarriages and stillbirths, spouses are not entitled to take parental leave.

Notice Requirements

An employee taking parental leave must provide his or her employer **two weeks'** written notice.

Retroactive Notice

If an employee has to go on parental leave before the scheduled start date, the employee must give his or her employer notice of the start date of his or her parental leave.

- Must be provided to the employer within **two weeks** of the employee's departure

Changing Start Date of Leave

If an employee changes the date of a parental leave to begin **earlier** than an original date, they must provide the employer with **two weeks'** written notice before the new, earlier date.

If an employee changes the date of parental leave to begin **later** than the original date, they must provide the employer with **two weeks'** written notice before the original date.

NOTE: If an employee wishes to take a shorter parental leave than 61 or 63 weeks, then the employee must either notify the employer what the return date will be before they start the leave, OR, the employee must give four weeks' written notice to the employer before the planned return date. Otherwise, the employer will assume the employee is taking the maximum period of leave, and is not under any obligation to immediately reinstate the employee.

Ending Parental Leave

The employee is not required to give an end date to his or her parental leave. The employer may not require an employee to return from her or his leave early. However, the employee may choose to give notice of return.

Changing End Date of Leave

If an employee changes the date of return **earlier** than the original date, they must provide the employer with **four weeks'** written notice before the new, earlier date.

If an employee changes the date of return **later** than the original date, they must provide the employer with **four weeks'** written notice before the original date.

Resigning on Parental Leave

When an employee decides not to return, they must provide the employer with **four weeks'** notice of resignation. This does not apply in the case of constructive dismissal.



MODULE 4

Leaves of Absence

FAMILY CAREGIVER LEAVE

Any employee, regardless of length of service is eligible for this leave. The purpose of which is to provide care or support to a family member for whom a health practitioner has issued a certificate stating that the family member has a serious medical condition.

Specified Family Members

1. Spouse (including same-sex spouse);
2. Parent, step-parent or foster parent of the employee or his/her spouse;
3. Child, step-child or foster child of the employee or his/her spouse;
4. Grandparent or step-grandparent of the employee or his/her spouse;
5. A grandchild or step-grand child of the employee or his/her spouse;
6. A spouse or a child of the employee;
7. A brother or sister of the employee; or
8. A relative of the employee who is dependent on them for care or assistance.

NOTE: The employer may request that the employee provide a copy of the document provided to an agency or department of the Government of Canada for the purpose of claiming benefits under the Employment Insurance Act in which it is stated that the employee is considered to be a family member.

Length of Leave

Up to **8 weeks'** in a calendar year may be taken. They can be taken consecutively or separately. However, a period of less than one week will be considered as a full week.

The employer cannot require the employee to take an entire week of leave if the employee only wants to take the leave for a single day, and cannot prevent the employee from working prior or after returning from taking a single day of leave during a work week.

Notice Requirements

The employee must give his or her employer written notice of his or her intention to take this leave as soon as possible, but does not have to be provided before starting the leave.

Notice is required before every leave if they are non-consecutive.

FAMILY MEDICAL LEAVE

Is unpaid, job-protected leave of up to 28 weeks in a 52-week period.

Family medical leave may be taken to provide care or support to certain family members and people who consider the employee to be like a family member in the case where a health practitioner has issued a certificate indicating that they have a serious medical condition with a significant risk of death occurring within a period of 26 weeks.

NOTE: Any employee is eligible, regardless of length of service.



Specified Family Members

1. The employee's spouse (including same-sex spouse);
2. A parent, step-parent or foster-parent of the employee or the employee's spouse;
3. A child, step-child or foster-child of the employee or the employee's spouse;
4. A brother, step-brother, sister, or step-sister of the employee;
5. A grandparent or step-grandparent of the employee or of the employee's spouse;
6. A grandchild or step-grandchild of the employee or of the employee's spouse;
7. A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee;
8. A son-in-law or daughter-in-law of the employee or of the employee's spouse;
9. An uncle or aunt of the employee or of the employee's spouse;
10. A nephew or niece of the employee or of the employee's spouse; or
11. The spouse of the employee's grandchild, uncle, aunt, nephew or niece.

NOTE: Family medical leave may also be taken for a person who consider the employee to be like a family member. People in this situation must provide their employer, if requested, with a completed copy of the compassionate care benefits attestation form, available from Employment and Social Development Canada, whether or not they are making an application for EI Compassionate Care Benefits or are required to complete the form to obtain such benefits.

Length of Leave

Up to 28 weeks within a 52 week period, the 52 week period starts on the first day of the week in which the 26-week period specified in the medical certificate begins.

Leave does not have to be taken consecutively, however, if an employee only takes part of a week off, it is counted as a full week of leave.

Leave Taken in Partial Weeks

Where an employee provides care or support for only part of a week:

- The employee's right to leave only begins on the first day he or she is providing care or support;
- The employee is entitled to leave for the rest of that week; and
- The employee may return to work only if the employer agrees.

Example: Felicia works weekdays. She provides care or support to her dying mother on Wednesday and takes family medical leave to do it. The first day of the week that she is entitled to be on family medical leave is Wednesday. She is also entitled to be on family medical leave on Thursday and Friday even though she is not providing care or support on those days. She is able to return to work on Thursday and Friday only if she wants to and her employer agrees to let her. Felicia is considered to have used up one of her 28 weeks of family medical leave even though she was on leave for only part of the week.

Sharing Family Medical Leave

The 28 weeks must be shared by any employee of the same employer who each take a leave to care for the same family member.

Example: If one spouse takes 18 weeks, the other spouse is only entitled to 10 weeks, the employees could take leave at the same time, or at different times.



MODULE 4

Leaves of Absence

Extending Family Medical Leave

If the family member lives longer than the projected 26 week period, the employee can remain on leave for up to **28 weeks** without a new certificate.

If the family member lives longer than 52 weeks and a new certificate is issued, the employee is entitled to another **28 weeks** of family medical leave.

Example: On Sunday, January 1, a qualified health practitioner issues a certificate stating that Jean's mother has a serious medical condition with a significant risk of death within a period of 26 weeks. Jean takes 26 weeks of leave (ending July 1). Jean's mother is still alive on July 1: Jean can take a further two weeks of leave before December 31 and will not have to get a second medical certificate to be entitled to take the full 28 weeks of leave.

If an employee has taken a family medical leave to care for a family member who has not passed away within the 52-week period starting on the first day of the week in the 26-week period specified in the medical certificate, and a health practitioner issues another certificate stating that the family member has a serious medical condition with a significant risk of death within 26 weeks, the employee would be entitled to an additional 28-weeks of family medical leave.

Additional Family Members

If an employee has more than one family member eligible for family medical leave, the employee is entitled to take up to **28 weeks** of family medical leave for each family member.

Start Date – Family Medical Leave

Earliest start date is the first day of the week in which the 26-week period begins.

NOTE: "Week" is defined for the purposes of family medical leave as a period of seven consecutive days, beginning on a Sunday and ending on a Saturday. If the date indicated on the surgery is a day other than Sunday, the 26 week period will begin on the preceding Sunday.

Example: On Wednesday, June 13, a qualified health practitioner issues a certificate stating that Mohammed's spouse has a serious medical condition with a significant risk of death within a period of 26 weeks. Because a week is defined as a period of 7 consecutive days beginning on Sunday and ending on Saturday under the family medical leave provisions, the 26-week period is considered to begin Sunday June 10. Assuming Mohammed wished to commence the leave on the day the certificate was issued, the first week of the leave would be considered to have begun on Sunday June 10.

End Date – Family Medical Leave

The latest day an employee can remain on leave is:

- The last day of the week in which the family member dies;
- The last day of the week in which the 52 week period expires; or
- The last day of the 28 weeks of family medical leave.

Whichever of the above is **earliest** will prevail.

Based on the definition of "week" for family medical leave, the last day an employee can be on leave will always be a Saturday.

Medical Certificate

The medical certificate supporting this leave:

- Must be issued by a qualified health practitioner (doctor or nurse practitioner);
- Does not have to be produced before leave starts;
- Employer is entitled to ask for a copy;
- Does not need to specify condition; and
- Employee is responsible for costs, if any.



Notice Requirements

The employee must give his or her employer written notice of his or her intention to take this leave as soon as possible.

NOTE: If the leave is not taken consecutively, the employee must provide notice before beginning each part of the leave

Example: Boris is going to take 14 weeks of leave from January 30 to May 6, and another 14 weeks from August 28 to December 2. Boris is required to provide written notice to his employer of both periods of leave. He can do this by providing a single written notice that sets out the start dates of both periods of leave, or he can provide two separate notices, at the same or different times.

An employee who does not give notice does not lose their right to a family medical leave.

While an employee is required to tell the employer in advance that they are taking a leave (or, if this is not possible, as soon as possible after starting the leave), the employee will not lose the right to take family medical leave if the employee fails to do so. An employer may discipline an employee who does not properly inform the employer, but only if the reason for the discipline is the failure to properly notify the employer and not in any way because the employee took the leave.

CRITICAL ILLNESS LEAVE

Is unpaid, job-protected leave for up to **37 weeks** for a minor, or **17 weeks** for an adult. The purpose of this leave is to provide care and support to an individual who is a specified family member.

Critical Illness leave is provided to any employee employed for at least **6 consecutive months**.

A qualified health practitioner must issue a certificate stating:

- The family member is critically ill;
- The family member requires care or support of family; and
- The period they require this care or support.

Definitions for Critical Illness Leave

Minor: child, step-child, foster-child, or child under legal guardianship and under 18 years of age.

Adult: 18 years of age or older.

Critically Ill: the person's baseline state of health has significantly changed and their life is at risk as a result of an illness or injury. (Not including chronic conditions if the chronic condition is the person's normal state of health.)

Specified Family Members

1. The employee's spouse (including same-sex spouse);
2. A parent, step-parent or foster-parent of the employee or the employee's spouse;
3. A child, step-child or foster-child of the employee or the employee's spouse;
4. A brother, step-brother, sister, or step-sister of the employee;
5. A grandparent or step-grandparent of the employee or of the employee's spouse;
6. A grandchild or step-grandchild of the employee or of the employee's spouse;
7. A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee;
8. A son-in-law or daughter-in-law of the employee or of the employee's spouse;
9. An uncle or aunt of the employee or of the employee's spouse;
10. A nephew or niece of the employee or of the employee's spouse; or
11. The spouse of the employee's grandchild, uncle, aunt, nephew or niece.



MODULE 4

Leaves of Absence

Medical Certificate

The employee does not have to have the medical certificate before they can start the leave, but must be obtained eventually.

An employer is entitled to ask for a copy of the certificate, and the employee must comply as soon as possible.

The medical certificate must:

- Name the minor child or adult;
- State that the minor child or adult is critically ill or has been critically injured;
- State that the minor child or adult requires the care or support of at least one family member; and
- Set out the period during which the minor child or adult requires the care or support.

Length of Leave

A critical illness leave taken to care for:

- **Minor:** up to 37 weeks in 52 week period
- **Adults:** up to 17 weeks in a 52 week period

The medical certificate issued will set out a period during which the person requires care or support, and the employee is only entitled to take a leave for the period set out in the certificate.

Weeks of leave do not need to be taken consecutively, they can also be taken separately and shared between employees if they are both family members of the person in need of care.

A “week” is defined as running from Sunday to Saturday.

Extending Critical Illness Leave

If the certificate specifies a leave of less than 37 or 17 weeks, the leave may be extended to a maximum of 37 or 17 weeks if another certificate is issued. A total leave cannot exceed the 17 or 37 set weeks in a 52 week period.

Example: Mark’s minor child Jason became critically ill on January 1. The certificate issued on January 1 stated that Jason requires the care or support of a family member for four weeks (until January 28). Jason is still critically ill on January 28. Another certificate is issued on January 29, stating that Jason will require care or support of a family member for another three weeks (until February 18). Mark is entitled to four weeks of leave during the period January 1 to January 28 and to a “further” leave of three weeks during the period January 29 to February 1, for a total of seven weeks of leave.

NOTE: The original leave and the extension(s) cannot be longer than 37 weeks in a 52-week period.

Example: Gail’s minor child Maggie became critically ill on January 1. The certificate issued on January 1 stated that Maggie requires the care or support of a family member for 30 weeks (until July 29). Maggie was still critically ill on July 29. Another certificate was issued on July 30 stating that Maggie will require care or support for another ten weeks (until October 6). Although Gail was entitled to take leave during the 30-week period from January 1 to July 29, and to take a “further” leave during the 10-week period from July 10 to October 6, the total amount of leave she is entitled to is 37 weeks during the 52-week period that began on January 1.

Example: Deljeet’s adult brother Balbir became critically ill on January 1. The certificate issued on January 1 stated that Balbir requires the care or support of a family member for 10 weeks (until March 11). Balbir is still critically ill on March 11. Another certificate was issued on March 12 stating that Balbir will require care or support for another 10 weeks (until May 20). Deljeet can take a further leave during the 10-week period between March 12 and May 20, but she can take no more than seven further weeks and her leave will end on April 29. The total amount of leave Deljeet is entitled to is 17 weeks within the 52-week



period running from January 1, the date of the first certificate. She may be eligible for an additional leave after that period is over: see “additional leaves”, below.

Additional leaves: If a minor child or adult remains critically ill after the 52-week period has expired, the employee is entitled to take another leave if the requirements for eligibility are met.

Example: A qualified health practitioner issued a certificate on January 1 2017, stating that Frank’s minor child Rooney is critically ill and requires the care or support of a family member for 52 weeks. Frank is entitled to up to 37 weeks of critical illness leave during that 52-week period. Rooney remains critically ill on December 31. Another certificate is issued on January 1 2018, stating that Rooney remains critically ill and requires the care or support of a family member for another 40 weeks. Frank is entitled to a new, “additional” leave of 37 weeks in the 52-week period starting January 1, 2018.

Notice Requirements

The employee must give his or her employer written notice of his or her intention to take this leave as soon as possible. Notice does not need to be provided before beginning the leave.

Change in Planned Leave

The employee may take this leave at a time other than indicated in the original plan where:

- The employer grants permission in writing; or
- The employee gives the employer reasonable advance of the change in writing.

There is no limit on the number of times the employee may change a planned leave.

ORGAN DONOR LEAVE

Is an unpaid, job-protected leave for up to 13 weeks. The purpose is to take time off to donate an organ.

The employee must be:

- Employed for at least 13 weeks; and
- Scheduled to undergo surgery to donate all or part of one or more of the following organs:
 - Kidney
 - Lung
 - Small bowel
 - Liver
 - Pancreas

Start Date – Organ Donor Leave

This leave may begin on the date of the surgery to remove the donor organ. It may also begin earlier where specified in a certificate issued by a qualified medical practitioner.

Length of Organ Donor Leave

An employee may take up to 13 weeks. It may be extended **once** if it’s stated as necessary in the medical certificate. The certificate must also specify a period of time and the extension cannot exceed 13 weeks.

NOTE: The maximum is 26 weeks total, with an extension.

Example: Gabriel began an organ donor leave on September 1, the day that he had surgery to donate part of his liver to his daughter. Upon the employer’s request, he provided a medical certificate from his doctor in advance of the surgery. After 13 weeks of organ donor leave, Gabriel was planning to return to work, but he had complications from the surgery that has hampered his recovery. His doctor recommended extending Gabriel’s organ donor leave for another six weeks. Gabriel provided his employer with a medical certificate from his doctor stating this and extended his leave for an additional period of six weeks.



MODULE 4

Leaves of Absence

Notice Requirements

The employee must give his or her employer written notice of his or her intention to take this leave. Where possible, the employee should give their employer **two weeks'** written notice before beginning or extending the leave. If that is not possible, written notice must be provided as soon as possible after beginning or extending the leave.

Medical Certificate

The employer may request a copy of the medical certificate, which must:

- Confirm the employee has undergone or will undergo surgery; and
- Identify when the employee is to begin the leave, if requested before the surgery, and/or to extend a leave for a period of time

RESERVIST LEAVE

Is an unpaid, job-protected leave of absence. The purpose is to serve while deployed in a Canadian Forces operation.

The employee must be a reservist in the Canadian Forces, who is either:

- Deployed to international or domestic operation; or
- Providing assistance in an emergency or its aftermath.

In order to be eligible for this leave, the employee must have been employed for **6 months**.

Generally, reservists must provide their employer with a reasonable written notice of the day on which they will begin and end the leave.

Employees on a reservist leave are entitled to be reinstated to the same position if it still exists or to a comparable position if it does not. Seniority and length of service credits continue to accumulate during the leave.

Unlike the case with other types of leave, an employer is entitled to postpone the employee's reinstatement for two weeks after the day on which the leave ends or one pay period, whichever is later. Also, the employer is not required to continue any benefit plans during the employee's leave. However, if the employer postpones the employee's reinstatement, the employer is required to pay the employer's share of premiums for certain benefit plans related to their employment and allow the employee to participate in such plans for the period the return date is postponed

CHILD DEATH LEAVE

The employee must have been employed for **6 consecutive months**, and be the parent of a child that has died.

Exceptions:

- Employee is charged with a crime related to the death; and/or
- The child was party to a crime in relation to death.



Length of Leave

A leave for the death of a child must be taken within the 105-week period that begins the week the child has died. The leave must be taken in a single period.

The total amount of child death leave that can be taken is 104 weeks. Leave can be shared between employees affected, and can be taken at the same time or different times, whether or not the employees work for the same employer.

Notice Requirements

The employee must give his or her employer written notice of his or her intention to take this leave. This notice must:

- Include a written plan, and
- Be provided to the employer as soon as possible.

NOTE: An employee who does not give notice does not lose their right to the leave.

Change in Planned Leave

If the employee changes the period of leave set out in his or her written plan:

- The employer must grant permission in writing, or
- The employee must provide **four weeks'** written notice of the change to the plan.

CRIME RELATED CHILD DISAPPEARANCE LEAVE

To be eligible for this leave, the employee must:

- Have been employed for **6 consecutive months**;
- Be the parent of a child that has disappeared; and
- It is probable that the employee's child disappeared as a result of a crime.

Exceptions:

- Employee is charged with the crime; and/or
- Child was a party to the crime.

"Child" means a child, step-child, or foster-child who is under 18 years of age.

An employer may require the employee to provide reasonable evidence of the employee's entitlement to the leave.

Timing and Length of Leave

A leave must be taken within the 105-week period that begins the week the child disappeared. It also must be taken in a single period.

Leave can be shared, and two employees can be on leave at the same time or at different times. This applies whether or not the employees work for the same employer.

Notice Requirements

The employee must give his or her employer written notice of his or her intention to take this leave. This notice must:

- Include a written plan; and
- Be provided to the employer as soon as possible.

NOTE: An employee who does not give notice does not lose their right to the leave.



MODULE 4

Leaves of Absence

Change in Planned Leave

If the employee changes the period of leave set out in his or her written plan, the employer must grant permission in writing, or, the employee must provide **four weeks'** written notice of the change to the plan.

Change in Circumstances

If there is a change in circumstance, there may be a change in the employee's entitlement to leave.

If the crime is no longer probable:

- Leave ends on day it is no longer probable.

If the child is found alive:

- 14 days of leave remains after the day the child is found.

If the child is found dead:

- The employee can remain on leave until the end of the week; and
- Employee becomes entitled to Child Death Leave.

DOMESTIC OR SEXUAL VIOLENCE LEAVE

To be eligible for this leave, the employee must have been employed for **13 consecutive weeks** and the employee or their child must have experienced or been threatened with domestic or sexual violence.

“**Child**” means a child, step-child, child under legal guardianship or foster-child who is under 18 years of age.

NOTE: The ESA does not include a definition of what domestic or sexual violence is for purposes of the ESA.

Purposes of Leave

An employee may take this leave for a variety of reasons:

- To seek medical attention for physical or psychological injury or disability;
- To access services from a victim services organization;
- To have psychological or other professional counselling;
- To move temporarily or permanently; and/or
- To seek legal or law enforcement assistance.

Length of Leave

An employee is entitled to up to **10 days** of domestic or sexual violence leave every calendar year, whether they are employed on a full-time or part-time basis.

There is no pro-rating of the 10-day leave. An employee who begins work partway through a calendar year is still entitled to 10 days.

Employees cannot carry over unused domestic or sexual violence leave.

The 10 days of leave do not have to be taken consecutively. They can take leave in part days, full days, or in periods of more than one day. If an employee takes only part of a day, the employer can count it as a full day of leave.

Employees are also entitled to **15 weeks** of domestic or sexual violence leave within a calendar year. They can be taken consecutively or separately.



The employee may take leave for periods less than a full week, but if they do, they are considered to have used up one week of their 15-week entitlement. If the employee is on leave for two or more periods within the same week (for example, on leave on Monday and Thursday of the same week), only one week of the 15-week entitlement is used up.

The employer cannot require the employee to take an entire week of leave if the employee only wants to take leave for a single day, and cannot prevent the employee from working prior to taking a single day of leave during a week, nor can they prevent the employee from returning to work after a single day of leave during the week.

NOTE: The first five days of domestic or sexual violence leave taken in a calendar year must be paid.

The rest are unpaid. The first five days are to be paid whether the employee takes leave from the 15-week entitlement, or the 10-day entitlement.

If an employee takes part of a day (for example, to attend a counselling session) it will count as an entire day, and if an employee takes part of a week (for example, to move into a shelter) this will count as entire week of leave under this section.

Calculating Pay

If an employee is a performance related wage earner and takes the first five days of this leave, the employee is paid the greater of:

- Their normal hourly rate; or
- Minimum wage.

The employee is not entitled to overtime, shift premium, or public holiday premium rates.

Employees who are paid by hourly rate

Domestic or sexual violence pay is calculated by the hourly rate multiplied by the number of hours the employee did not work because they took the leave.

Example 1: Naila is paid \$16.00/hour and missed a full day of work to take domestic or sexual violence leave. She was scheduled to work nine hours. Domestic or sexual violence leave pay: **\$16.00 x 9 = \$144.00**

Employees who are paid a salary

For an employee paid by salary, paying personal emergency leave pay is generally equal to salary continuance.

If the employee took leave for a full day: $\text{salary} \div \text{number of days in pay period}$

Example: Theresa is paid \$1500.00 per bi-weekly pay period and works a five day week. Domestic or sexual violence leave pay for one day = **\$1500.00 ÷ 10 = \$150.00.**

If the employee took leave for part of the day: $\text{hourly rate (salary} \div \text{number of hours the employee normally works in a pay period)} \times \text{number of hours taken as domestic or sexual violence leave.}$

Performance related wages

Domestic or sexual violence leave pay for an employee paid fully or partly based on their performance is the greater of the employee's "hourly rate, if any" and minimum wage for the time the employee took for paid domestic or sexual violence leave. "Performance-related wages" can include commission, commission plus an hourly wage, piece work, or a flat-rate.

Example 1: Employee earns an hourly rate + commission

Raquel earns \$16.00/hour plus two per cent commission on sales, Raquel takes 6.5 hours of domestic or sexual violence leave. Domestic or sexual violence leave pay: **\$16.00 x 6.5 = \$104.00 (plus hourly wage for any hours worked + commission earned while the employee worked, if any)**



MODULE 4

Leaves of Absence

Example 2: Employee paid entirely by commission

Francesca earns 10 per cent commission on all sales, plus expenses and a car allowance. Francesca is scheduled to work eight hours, makes sales of \$5000 and takes three hours of domestic or sexual violence leave. Domestic or sexual violence leave pay: applicable minimum wage rate x 3 (in addition to \$500.00 commission earned while the employee worked, if any)

Example 3: Employee is a homemaker paid by piece work

Paula earns \$3.50 per phone call answered. Paula is scheduled to work 8.5 hours, works two hours, answers nine phone calls, and takes 6.5 hours of domestic or sexual violence leave. Domestic or sexual violence leave pay: applicable minimum wage x 6.5 (in addition to regular wages earned on the day - \$3.50 x 9)

Employees who are scheduled to work overtime hours

If an employee is scheduled to work a shift which will include overtime hours, and they miss all or part of the shift to take paid domestic or sexual violence leave, the employee will be entitled to the regular hourly rate only, not the overtime rate.

Example: Pat is paid \$15.00/hour and was scheduled to work a Saturday shift of eight hours. She had already worked 44 hours in the same week. She missed her entire shift to take paid domestic or sexual violence leave.

Domestic or sexual violence leave pay: **\$15.00 x 8 = \$120.00**

Employees who are scheduled to work hours when a shift premium is paid

If an employee is scheduled to work a shift which will normally be paid at a higher rate due to a shift premium, and the employee misses all or part of the shift to take paid domestic or sexual violence leave, the employee will be entitled to the regular hourly rate only, not the regular hourly rate plus the shift premium.

Example: Minh is paid \$16.00/hour and is paid an additional \$2.50/hour for working weekend shifts. She is scheduled to work a Saturday shift of nine hours and leaves after working two hours to take paid domestic or sexual violence leave.

Domestic or sexual violence leave pay: **\$16.00 x 7 = \$112.00 (plus regular wages of \$16.00+\$2.50 x 2 for the hours that she worked).**

If an employee qualifies to take domestic or sexual violence leave, this will also generally constitute “reasonable cause” for the purposes of public holiday entitlements. See the public holiday chapter for more information.

If an employee agrees to work (or is required to work) on a public holiday and misses some or all of the shift to take paid domestic or sexual violence leave, domestic or sexual violence leave pay will not include “premium pay” if the employee would have earned it had they worked instead of taking the leave.

Example: Celina works in a restaurant and is required to work on Victoria Day. She is paid the liquor server’s minimum wage. She is scheduled to work 10 hours on the public holiday, and the employer has decided to give her premium pay for all hours worked on that day, plus public holiday pay (but no substitute day off in the future).

Celina works 6 hours of the shift and takes the rest off as paid domestic or sexual violence leave.

Entitlements

Public holiday pay + premium pay for hours worked (liquor server’s minimum wage x 1.5 x 6 hours)

Domestic or sexual violence leave pay: **\$0 because she is already receiving a full day’s pay (6 hours at 1.5 = 9 hours).**



Notice Requirements

10-day Periods

The employee must give his or her employer notice of his or her intention to take this leave in advance of going on leave or as soon as possible after beginning it.

15-week Period

The employee must give his or her employer written notice of his or her intention to take this leave in advance of going on leave or as soon as possible after beginning it.

NOTE: If leave is taken in non-consecutive days or weeks, employee must give the employer written notice each time.

Evidence

An employer may require an employee to provide evidence reasonable in the circumstance.

“Reasonable in the circumstances” depends on the situation, such as:

- The length of leave taken;
- Whether there is a pattern of absences;
- Whether any evidence is available; and/or
- The cost of any evidence.

DECLARED EMERGENCIES LEAVE

An employee is entitled to a leave of absence **without pay** under this section where the employee will not be performing the duties of his or her position because of an officially-declared emergency under the Emergency Management & Civil Protection Act. For more details regarding this leave, please refer to the ESA and its regulations.

REPRISALS

An employer **cannot** penalize or threaten to penalize an employee in any way for:

- Asking the employer to comply with the ESA and the regulations;
- Asking questions about rights under the ESA;
- Filing a complaint under the ESA;
- Exercising or trying to exercise a right under the ESA; and/or
- Giving information to an employment standards officer.

An employer **cannot** penalize or threaten to penalize any employee in any way for:

- Asking about the rate of pay paid to another employee to determine if an employer is providing equal pay for equal work; and/or
- Disclosing their rate of pay to another employee to determine if an employer is providing equal pay for equal work.

An employer **cannot** penalize or threaten to penalize an employee in any way for:

- Taking, planning on taking, being eligible or becoming eligible for any leave in the ESA; and/or
- Being subject to a garnishment order.



MODULE 4

Leaves of Absence

An employer **cannot** penalize or threaten to penalize an employee in any way for:

- Participating in a proceeding under the ESA; and/or
- Participating in a proceeding under section 4 of the Retail Business Holidays Act

If any employer penalizes an employee for those reasons, an Employment Standards Officer may order:

- Reinstatement of the employee; and/or
- Compensation of the employee for losses

