



## Ontario Employment Standards Act September 4, 2001 Amendments

### The Issue

**O**n September 4, 2001, the Ontario government introduced changes to the Employment Standards Act (ESA). A number of these changes have a direct impact on the operation of your group benefit plan, particularly in the disability area.

**Before September 4**, the ESA specifically permitted employers to terminate disability coverage (Short and Long Term) during any maternity or parental leave and to treat pregnancy differently from other causes of disability under disability plans. The original thinking was that as the purpose of disability coverage is to replace lost income, need did not exist where normal income is suspended – maternity and parental leaves are unpaid leaves. **Despite the logic**, the law did not consider, for example, a medical recovery from the delivery of a child as a legitimate reason to claim disability benefits. The ESA contained overt discrimination based on sex and pregnancy.

Many years ago, the Supreme Court of Canada ruled on a landmark case in Manitoba, “**Brooks versus Canada Safeway**”. While the provincial employment law prohibited discrimination on the basis of sex, it did not prohibit an employer from treating the issue of recovery from delivery differently from a broken leg. Ms. Brooks and the Supreme Court of Canada changed all that. The high court ruled that it was in fact discrimination on the basis of sex (only women have babies) and went further to state that it is both reasonable and necessary to ensure that the medical conditions related to pregnancy AND delivery are treated in the **same manner** as any other legitimate medical reason for being absent from work. The result was that private employers in Manitoba changed their disability plan practices and covered pregnancy related conditions, including the medical recovery period immediately following delivery the same as any other disability. This generally meant **topping up** Employment Insurance maternity benefits to the employee’s full short-term disability coverage entitlement.

Other cases, such as *Parcels versus Red Deer Regional Hospital* in Alberta followed and, recognizing the findings of the Supreme Court of Canada in the Brooks case, provinces such as Saskatchewan, Nova Scotia, British Columbia, Quebec, and the federal government **adopted policies** to match that of Manitoba.

**Why wasn’t Ontario in this list?** The situation was somewhat different. While the issue in the affected provinces was the generally followed policies of the employer (an inappropriate interpretation of the law), the source of discrimination in Ontario was the ESA law itself. Therefore to strike down the elements of discrimination would require someone to make a claim under the federal Charter of Rights and Freedoms that the Ontario law was discriminatory. This has not occurred.

**In 2001**, the federal government made **significant changes** to Employment Insurance, the major one being the extension of maternity and parental benefits. As has been the case historically, the federal EI and provincial ESA laws have not worked in tandem. This is no exception.



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## How This Could Effect You

- Effective from September 4, 2001, all employers operating in the province of Ontario should ensure that their disability plans and policies **recognize and cover** pregnancy related disabilities, including the medical recovery following delivery of a child, in the same manner as any other disability claim.
- Effective from September 4, 2001, all Ontario employers must extend all benefit coverage during a maternity/parental leave and maintain existing cost sharing arrangements during that period, **unless an employee declines the extension in writing**. However, the extension of STD and LTD benefits does not mean that the employee is entitled to payment during this period (other than pregnancy related claims such as the recovery from delivery described above). It does mean that disabilities starting or reoccurring during an approved leave are recognized; the waiting period starts counting from the date of disability but payments do not start until the **later of** the scheduled return-to-work date or the end of the elimination period.
- Employees who delivered a child on or after September 4 are entitled to **the difference** between their EI benefits and their STD/Salary Continuance entitlement for the health related portion or their leave period.
- Your insurance company will adopt its existing claim practices in this area (those that apply to Manitoba for example) to the management and payment of pregnancy related claims in Ontario. As an example, many insurers use general guidelines of **six weeks** for recovery from a normal delivery. These guidelines are just that and do not prohibit a claimant from submitting medical evidence that supports a longer payment period.
- Effective from September 4, 2001, corporate benefit extension policies for maternity, parental and emergency leaves **must be no different** from policies that apply to other forms of approved leave, such as sabbaticals and education leaves.



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## What You Need To Do

1. **Identify** all Ontario employees whose delivery and maternity leave started on or after September 4, 2001;
2. **Review and amend** (where required) your corporate policies regarding benefit extension and entitlement during leave to comply with the new regulatory guidelines;
3. If your Short and/or Long Term Disability plan is managed by a third party (an insurer), **obtain and review** their practices concerning the payment of pregnancy related claims.
4. If you operate an in-house Salary Continuance Plan, **amend** your policies where required to comply with the new regulations.
5. **Ensure the effective coordination** of payment between EI maternity benefits and your short term disability plan. You may only need to top up EI benefits to the person's short term disability entitlement. To take advantage of this cost effective manner to pay these claims, consider whether you need to develop an internal policy document outlining the related details.
6. **Determine** the claim and administrative requirements of this new change and communicate the issue to all employees.
7. If you are a national employer, ensure that your policies concerning the coverage of pregnancy related disabilities **meet the applicable provincial legislation**.

We are here to help get you through this legislative change with expert advice and communication services.

**Contact Team Krieger at**

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