



FIR Labour Relations Ltd

ADVISORY LETTER

BY E-MAIL

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TO: ALL FIR ACCREDITED MEMBERS

Gentlemen and Mesdames:

ESA Paid Sick Days—Now That the Legislation Has Been Changed

This Advisory Letter is being provided to assist FIR accredited member companies navigate the recent amendments to the Employment Standards Act (ESA) legislation. As you may be aware, the provincial government announced changes to the sick leave provisions which included the removal of the “meets or exceeds” provision that had applied to paid personal illness or injury leave under collective agreements and amended the language to change “employment year” to “calendar year”. This change now forces all employers with collective agreements to provide *ESA* paid sick days¹, there are no longer any exceptions for employers as it relates to the ESA. These changes took effect on March 31, 2022, and are not retroactive.

The Association is providing these suggested guidelines; however, we recommend you seek legal advice should you require more determinative answers.

These guidelines include legal interpretations and practical recommendations and are intended to assist member companies in the administration of complex legislation. **It is considered solicitor client privileged; these should not be shared outside of FIR Accredited Member Companies and cannot be used in any other forum than it was intended.**

¹ The ESA uses “personal illness or injury leave” language. Commonly, this is referred to as sick days or paid sick days, which is used in this document.

Sick Days Overview

The *ESA*, section 49.1, provides 5 paid sick days and 3 unpaid sick days per calendar year to employees in the forest industry (note that our collective agreements provide for the potential for more unpaid sick leave, subject to a medical certificate - Leave of Absence provisions). Employees (full time, part time and casual) are eligible for sick days after 90 consecutive days of employment with an employer. Under the Act, the paid sick days are calculated using an “average day’s pay”: divide the amount paid (excluding overtime) by the number of days worked in the previous 30 calendar days. We provide practical guidance on the following pages.

If an employee states that they need to miss a day of work, or partial day of work, due to personal illness or injury, they will be presumptively entitled to access their paid sick days or unpaid sick days. Employers can request, and employees are required to provide, “reasonably sufficient proof” of personal illness or injury to confirm their entitlement to paid sick days or unpaid sick days.

Paid or Unpaid Sick Days – Employee’s Choice

The *ESA* Guide (the “Guide”)², which is not binding law, but may be considered by adjudicators, states that whether a sick day is paid or unpaid is employee-initiated: it is up to the employee to decide whether they are requesting paid or unpaid sick days.

While the Guide recommends paying employees for a sick day if the employer is in doubt, employers cannot “claw back” an employee’s wages if sick day is paid in error.

However, there is a potential argument that if a sick day was paid by the employer, without the clear request of the employee, it should still count as one of the 5 paid sick days used for the year. Therefore, it is preferable that the employer either clarify in advance whether the employee is taking a paid sick day, or alternatively, not pay the sick day until the employee makes a clear request.

² <https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/esa-part-6-section-49-1?keyword=49.1>

Partial Paid Sick Days

The *ESA* does not contemplate partial paid sick days or partial unpaid sick days. Section 49.1(3) specifies that an employee is to be paid an “average day’s pay”, and the *ESA* provides a formula for this calculation. The *ESA* does not appear to provide a mechanism for proration of sick days, paid or unpaid. Therefore, if an employee leaves work early due to personal illness or injury, and claims a paid sick day, there is an argument to be made that they are entitled to pay for the hours they worked, an “average day’s pay”, and that day counts as one of the 5 paid sick days.

However, this opens up a potential for abuse if an employee were to work 7.5 hours of an 8 hour shift, and then go home sick, and claim a paid sick day and expect to be paid 8 more hours of sick pay, in addition to pay for the 7.5 hours worked. We do not believe this was the intent of the legislation.

Recommendation: FIR and the other provincial employers’ associations suggest a practical approach to someone who goes home sick during the day. This may include a discussion with the employee before they leave, asking them if they want the hours remaining to be one of their 5 paid sick days and therefore the remaining hours of the shift paid, or if they would like it to be unpaid and therefore not count against one of their 5 paid sick days. In addition, a request for reasonable proof is a tool available for employers to respond to suspected abuse or questionable patterns.

Grievances for the period Jan 1,2022 to March 31,2022

Some FIR employers had grievances filed for Sick Days denied because the “Meets or Exceeds” provision applied to Sick Days during the above period of time and the collective agreement provisions did exceed the legislated provisions. (This is why the USW and other unions pressured the provincial government to change the legislation.)

If an employer wants to resolve these grievances by paying out for Sick Days taken during that period, we recommend that the employer obtain a written statement from the Union acknowledging that these sick days count toward the 5 Sick Days legislated now for the period forward from March 31,2022.

Note that The Guide clarifies that if an employee has taken any paid sick days in 2022, those will count towards their total paid sick days for the calendar year. The Guide further states that if an employee has already taken 5 paid sick days, they are not entitled to any further paid sick days until 2023.

Calculation of an “Average Day’s Pay”

The *ESA* provides the formula an employer is to use to calculate an “average day’s pay”: amount paid/days worked in the prior 30 calendar days.

The calculation uses a 30 calendar day period and divides the amount paid (excluding overtime) by the number of days worked. For example, an employee who works 20 days in a 30-day period and earns \$4,000 (excluding overtime), would have an average day’s pay of \$200, less statutory deductions.

In the case of workers who regularly work more than 8 hours per days at straight time (e.g. regular 10 hour and 12 hour shifts), the calculation on “average day’s pay” provides a better end result for workers on these shifts, as they get 5 days x 10 hours or 5 days x 12 hours.

If the employee worked all 8 hour shifts in the previous 30 days, then was scheduled for a 4 hour shift and calls in sick, the average day’s pay would be based on 8 hours, regardless of the fact the employee was only scheduled to work 4 hours. This could also be abused. A request for reasonably sufficient proof is a tool available for employers to respond.

If an employee works no hours in the 30 day period, then their “average day’s pay” is \$0. However, if employees can pick which sick days they want paid or unpaid, it is unlikely they would request a paid sick day if the pay was \$0.

Recommendation: We believe that based on our job posting and pay systems, companies are meeting the intent of the law and will reduce administrative issues, by administering the pay for the leave on the basis of the hourly rate of the job the employee was doing just prior to the time of the leave or if the employee had multiple jobs that day, the employee's posted rate of pay. This should be paid at their regularly scheduled straight time number of hours (i.e. not paid on any regularly scheduled overtime hours).

Weekly indemnity

As part of the Health and Welfare Plan (the "Plan"), employees are entitled to a maximum of 26 weeks of the EI weekly rate (currently, 55% of an employee's insurable weekly earnings) plus \$100. There is a 5-day waiting period for normal illness leaves under the Plan, which does not present any overlap with the requirements under the *ESA*. However, in the case of injury leave under the Plan, the benefits are immediately payable (no waiting period). In this case, the employer should only top up the weekly indemnity plan amount (prorated daily amount) to the daily calculated sick days amount (see above recommendation), for any days the employee wishes to use as paid sick days.

With respect to whether the employer can require an employee to apply for weekly indemnity benefits, the collective agreement does not require employees to use the weekly indemnity benefit, and in fact, an employee must qualify for weekly indemnity benefits before they will receive them. Accordingly, based on the existing language, applying for weekly indemnity benefits will be the employee's choice.

Call-in Shifts

Is an employee who is called-in, and responds they cannot because they are sick, entitled to a paid sick day? The *ESA* and the Guide do not expressly state whether the employee is required to be scheduled for a shift before requesting paid sick day. This is something that may develop in the case law, but at present, there is a good argument that in order to claim paid sick day "leave", the employee must actually be scheduled to work on that day. Otherwise, there is nothing to take "leave" from. An employee could potentially abuse the entitlement by accepting the on-call shift, then shortly after being scheduled or starting the shift, claim personal illness or injury. Again, a request for reasonably sufficient proof is a tool available for employers to respond to suspected abuse or questionable patterns.

Recommendation: Only provide paid sick days to an employee who was scheduled for work and informs the employer that they are not medically fit for duty. Do not provide paid sick days for employees who are called into work and are not able to accept the call in due to sickness.

Reasonably Sufficient Proof

The employer can request “reasonably sufficient proof” within a reasonable time frame from the employee taking a sick day (paid or unpaid), recognizing that the nature of the personal illness or injury may make immediate proof of personal illness or injury impracticable. The Guide clarifies that there must be a connection between the employee’s leave and a “personal injury or illness.” If an employee is using the sick day to attend an appointment, treatment or procedure, there must be a sufficient connection between the treatment, procedure or appointment and the employee’s personal illness or injury.

Reasonably sufficient proof of illness or injury isn’t limited to a note from a treating physician or health care provider. For example, a hospital bracelet may suffice or, if verbal confirmation from the employee may be sufficient in certain circumstances (e.g. flu, cold). The details of what is “reasonably sufficient proof” will vary depending on the circumstances. Suspected abuse or questionable patterns should warrant a higher threshold of reasonably sufficient proof. See the ESA Guide for additional examples (page 2 end note).

Overpayments

The *ESA* does not permit employers to require an employee to pay back the employer for any inadvertent overpayment of paid sick days. However, as noted above, there is an argument that if a sick day was paid by the employer, without the clear request of the employee, it should count as one of the 5 paid sick days for the year. Additionally, where it is an error, like other payroll errors, an employer grievance can be used to seek an order to deduct the overpayment from future wages.

Paid Sick Days for Mental Health

The Guide clarifies that paid sick days can be used for mental or physical illness. The employee must, however, be able to provide “reasonably sufficient proof” of illness as described above.

“Personal” Illness or Injury

“Personal illness or injury” is undefined in the *ESA*, and there is no case law to assist with the definition at this time. However, given that the legislation specifically refers to personal_illness or injury, and the requirement for employees to go through WorkSafe BC for all occupational illnesses and diseases remains in place, there is a good argument personal illness or injury refers to non-occupational illness or injury. If it is unclear whether the employees leave is covered by *ESA* or WorkSafe BC.

Recommendation: Do not provide a paid sick day until it is confirmed WorkSafe BC does not apply.

Paid Sick Days and Statutory Holiday Pay

The Guide provides that if an employee is scheduled to work on a statutory holiday, but is sick and claims a paid sick day, they are entitled to an “average day’s pay” for the paid sick days, and that counts towards their 5 paid sick days.

Recommendation: We believe that based on our job posting and pay systems, companies are meeting the intent of the law and will reduce administrative issues, by administering the pay for the leave on the basis of the hourly rate of the job the employee was doing just prior to the time of the leave or if the employee had multiple jobs that day, the employee’s posted rate of pay. This should be paid at their regularly scheduled straight time number of hours (i.e. not paid on any regularly scheduled overtime hours).

Part-time, Casual, and Re-hired Employees

Employees are entitled to 5 paid sick days per calendar year, regardless of whether they are full or part time, or are casual employees. This means that employees with more than one employer will be eligible for 5 paid sick days per employer. Similarly, if an employee uses any of their paid sick days with their employer and then the employment relationship ends, the employee’s entitlement to 5 paid sick days will “refresh” if that employee is rehired by the same employer and has worked 90 calendar days. If the employment relationship is maintained during a break of service and return to work in the same calendar year, then there should not be a refresh of paid sick days.

Recommendation: Where entitled, provide for paid sick days, but only where they are clearly scheduled in advance and then call in sick.

Unpaid Sick Days

The *ESA* provides 3 unpaid sick days that are protected. Beyond that, there is no *ESA* protection for additional unpaid sick days. Instead, human rights, collective agreement protections, and/or contract case law provide additional

protections and rules around what are excessive sick days and steps employers can take in response.

Recommendation: Follow the Leave of Absence provisions under your FIR-USW collective agreement and your company's past and current practices for additional unpaid sick days.

This is complex and new legislation, which is still developing. As such, we will try to keep you updated.

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