

**Date: October 4, 2019**

**To/À: October 7, 2019 Conference Call Participants**

**From/De: Anthony Dale, Unifor Legal Department**

**Re/Ref: Canada Labour Code Part III**

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This memorandum describes and analyses recent changes to Part III of the *Canada Labour Code*. Many of these changes came into effect on September 1, 2019.

Part III of the Code is about labour standards. The Code applies only to employees in federally regulated businesses.

As of the date of this memo, it is difficult to locate a published version of the *Code* that incorporates all of these changes. Be sure to check the currency of any version of the Code that you are using.

The government will eventually make regulations that may modify or explain these new rules. Those regulations will not be made until 2020. In the meantime, the government has issued a number of interpretation and policy guidelines (IPGs) that can be found linked here in [English](#) and [French](#).

One of these IPGs also exempts certain kinds of employment from the application of some of the new rules.

### ***Background***

The background to these changes is a years-long process that has taken place under the broad heading of “modernization of the *Canada Labour Code*”. One of the main themes in the modernization project was improving work-life balance by enacting new measures about scheduling, and time away from work. Another of the main themes was the promotion of fair treatment and compensation for workers in non-standard or precarious work.

There were a number of statutory amendments beginning in 2017. They were part of much larger budget implementation bills and therefore were easily overlooked. Some of the changes have been in place for some time but not proclaimed in force right away. Some of the changes were amended before they even came into force. All of this has resulted in a confusing and overlapping set of amendments.

The following analysis is to make some sense of the changes that have now come into force or that will come into force in the near future. We have not attempted to describe all of the

changes, such as extensive and well-publicized changes to maternity and parental leave that are tied to Employment Insurance.

### **Part 1 – Collective Agreements and Part III**

Section 168 of the *Code* provides that Part III applies even where there is a contract, but the provisions of such a contract that are more favourable to the employee are not affected.

Section 168 also says that some of the divisions of Part III do not apply at all if they confer rights and benefits to an employee that are at least as favourable as each of those divisions. If the overall benefit in the collective agreement is more favourable, the collective agreement applies exclusively and the arbitration provisions in the collective agreement exclusively apply to any disagreements. The divisions affected by this rule are Division II (Minimum Wages), Division IV (Annual Vacations), Division V (General Holidays) and Division VIII (Bereavement Leave).

As a result, where benefits in any part of Part III have been improved, our collective agreements should be examined to see if the overall benefit in each subject area is at least as good as the labour standard.

In most cases as well, employees covered by a collective agreement will seek enforcement of the Part III labour standards by filing a grievance. Complaints to the Labour Program of the federal government will usually not be accepted if the matter could be enforced by way of a grievance (see section 251.05(1)(a)(iv) and (v), and IPG 700-10-IPG-701).

### **PART 2 – Changes in force on September 1, 2019**

#### **Flexible Work Arrangements**

**New section 177.1:** Employees with six consecutive months of continuous employment have a right to request a flexible work arrangement. The change may be the number of hours the employee is required to work, the work schedule or the work location. The request must be in writing and include certain things. Upon receiving such a request, the employer must decide whether to grant the request or refuse it. The employer must give written notice of the decision and reasons for refusing the request or any part of it. The legislation prohibits reprisals for making a flexible work arrangement request.

Section 177.1 says that a collective agreement cannot be modified in order to satisfy an employee's request unless the union agrees to the change in writing. This will require unions to consider whether to allow or block a change. The duty of fair representation may be engaged by this decision-making. Unions will also have to be alert to whether a request for a change by an employee is for reasons that are prohibited grounds of discrimination under the *Canadian Human Rights Act*. For example, a request for a change that is intended to address the employee's family responsibilities *may* trigger union obligations to cooperate in the accommodation of the employee's needs.

### **Work Schedules, Breaks and rest periods**

New rules are introduced that aim to make work schedules more predictable, and provide employees with a protected right to refuse work demands on short notice.

**New section 173.01:** An employer will be required to give an employee notice of their work schedule in writing at least 96 hours prior to the start of the employee's first work period or shift under that schedule. An employee can refuse to work if the employer has not given 96 hours' notice and cannot suffer any reprisal for refusing. Exceptions to this right of refusal are if it is necessary for them to work due to a threat to the life, health or safety of a person, a threat of damage or loss to property, or threat of serious interference with the ordinary working of the employer's industrial establishment. These exceptions only apply if they could not have been "reasonably foreseen" by the employer. An IPG provides guidance about what is or is not "reasonably foreseeable".

This new scheduling rule does not apply where a collective agreement provides a different time frame for providing schedules to employees, or where a collective agreement simply says that the section does not apply to those employees.

**New section 173.1:** If an employer changes a period or shift during which an employee is required to work, or adds another work period or shift to the employee's schedule, the employer must give at least 24 hours' notice. The same exceptions as in new section 173.01 apply.

**New section 169.1:** A new rule is introduced that requires employees to have an unpaid rest or meal break. The *Code* previously provided no such entitlement. The entitlement is an unpaid 30 minute break during every period of five consecutive hours of work. If employees are required by the employer to "be at their disposal" during the break, it must be paid. An employer can postpone or cancel a section 169.1 break in the case of the same circumstances that could not be "reasonably foreseen" as in section 173.01, above.

**New section 169.2:** Employees will also be entitled to a rest period of at least eight consecutive hours between work periods or shifts. This is also subject to the same qualification as in section 173.01.

**Important:** An IPG (#802-1-IPG-101) effectively exempts many classes of employees from some or all of these rules. These exemptions will exist until the government makes regulations but it is expected that the regulations will reflect the exemptions as expressed in the IPG. The exemptions and modifications are said to be made where the application of these new rules would be unduly prejudicial to the interests of certain classes of employees, or seriously detrimental to the operation of the industrial establishments.

IPG #802-1-IPG-101 includes a chart of occupations in various industrial sectors, and identifies which of these new rules applies or does not apply to those occupations.

### **Breaks for Medical Reasons or Nursing**

**New sections 181.1 and 181.2:** Employees will now be entitled to unpaid breaks during their working hours that are necessary for medical reasons. There is no maximum frequency or duration of such breaks, but an employer can request a medical certificate issued by a health care practitioner setting out the length and frequency of the breaks required by the employee. There is a new, very broad definition of “health care practitioner” in section 166 that replaces a definition of “qualified medical practitioner”.

A similar break entitlement is provided for employees to nurse or express breast milk. An employer cannot ask for medical evidence.

Regulations may modify these rules or exempt any class of employees.

### **Right to refuse overtime**

**New section 174.1:** Employees may refuse an overtime request in order to fulfil certain family responsibilities, with protection against reprisal when the employee refuses a request. The employee must first have taken reasonable steps to have those responsibilities fulfilled in other ways. The family responsibilities are the same ones listed in the new section 206.6(1) “Personal Leave” and are responsibilities related to the health or education of family members, or other urgent matters. An IPG (802-1-IPG-096) provides examples of qualifying family responsibilities.

### **Time Off in Lieu of Overtime Pay**

**New section 174:** The *Code* now specifically allows for employees to be paid for overtime worked at the rate of one and a half times their regular wages, or to be granted time off with

pay (at one and half hours for each overtime hour worked), subject to certain conditions. The time off must be taken within three months of the pay period during which overtime was worked (but can be extended if a longer period is set out by collective agreement, or extended to twelve months on agreement of the employer and a non-union employee). If banked time is not taken within the applicable period, or if the employee ceases to be employed, it must be paid out within 30 days.

This makes clear that a collective agreement may provide for earned time off instead of overtime pay. The cost to the employer will be the same but employees may see the time off as an additional inducement to work overtime.

### **Vacation**

**Revised Division IV (begins at section 183):** Vacation entitlements have been increased to:

- Two weeks after one year of service (paid at a minimum of four per cent of wages);
- Three weeks after five years of consecutive service (paid at a minimum of six per cent of wages); and
- Four weeks after 10 years of consecutive employment (paid at a minimum of eight per cent of wages).

The *Code* provides for vacation to be taken in one period, or at the employee's request and the employer's approval (both in writing), more than one period. Vacation can be interrupted for certain leaves.

### **General Holidays**

**Division V (begins at section 191):** The important amendment is a removal of the requirement that employees must be employed for at least 30 days to be entitled to a holiday with pay. This means that all employees will be entitled to have some payment of holiday pay, calculated based on the 20 days of earnings prior to the week in which the holiday occurs.

### **Bereavement Leave**

**Division VIII - Bereavement Leave (begins at section 210):** This leave is extended from three to five days. It may be taken in one or two periods, and may be taken during the time that begins on the day the death occurs and ending six weeks after the latest of the days on which any funeral, burial or memorial service of the immediate family member occurs. For employees with three consecutive months of continuous employment, the first three days of the leave must be paid. Any other days taken may be unpaid.

### **Other Leaves of Absence**

The Code now includes some new leaves of absence, and others have been modified, mainly by reducing the length of employment to qualify for the leave.

- **Personal Leave (new section 206.6):** An employee is entitled to a leave of absence for up to five days per calendar year for treating their own illness or injury, carrying out responsibilities related to health care of a family member, carrying out responsibilities related to the education of family members under the age of 18, addressing any urgent matter concerning themselves or a family member, or attending a citizenship ceremony. Responsibilities related to the health or education of family members, or other urgent matters. An IPG (802-1-IPG-096) provides examples of qualifying family responsibilities. Employees who have completed three consecutive months of continuous employment are entitled to the first three days of personal leave with pay. The employer may request documentation of the need for the leave and the employee must provide it, but only if it is “reasonably practicable” to do so. An IPG (802-1-IPG-098) provides guidance about what that means.
- **Leave for Victims of Family Violence (new section 206.7):** An employee who is the victim of family violence, or who is the parent of a child who is the victim of family violence, is entitled to a leave of up to 10 days per year to be used in periods of one day or more. The leave may be used to seek medical attention for the employee or their child, or to obtain services, counselling, legal or law enforcement assistance, or to relocate. Employees who have completed three consecutive months of continuous employment are entitled to the first five days of personal leave with pay. The employer may request documentation of the need for the leave and the employee must provide it, but only if it is “reasonably practicable” to do so.
- **Leave for Traditional Aboriginal Practices (new section 206.8):** Any employee who is an Aboriginal person (defined as Indian, Inuit or Métis), and who has completed three months of continuous employment is entitled to take five days per calendar year to engage in traditional Aboriginal practices including hunting fishing and harvesting. Other practices may be prescribed by regulation. The employer may request documentation that shows the employee is an Aboriginal person and the employee must provide it, but only if it is reasonably practicable” to do so.
- **Jury Duty (new section 206.9):** Employees may take a leave of absence for attending court in order to act as a witness or juror in a proceeding, or for jury selection. The length of the leave is not limited by the Code. No pay is required.

- **Medical Leave (new section 239):** Medical Leave replaces the former Sick Leave provisions of the Code. Employees remain entitled to up to 17 weeks of unpaid leave, which may now be used because of (a) personal illness or injury; (b) organ or tissue donation; or (c) medical appointments during work hours. The employee must give written notice of the leave (and its duration) four weeks prior to the first day of the leave, unless there is a valid reason why such notice cannot be given and otherwise as soon as possible. A medical certificate can be required if the leave is for three days or more. As with the previous Sick Leave provision, the new section provides for benefit continuation during this kind of leave, and requires the employer to continue to make contributions for those benefits.
- **Changes to Other Leaves:** In addition to the new and revised leaves described above, the September 1, 2019 changes remove qualifying periods for maternity leave, parental leave, critical illness leave and leave for death or disappearance of a child. The qualifying period for each of those was six months. Those leaves are now available to all employees regardless of the length of their employment. The military reservist leave in section 247.5 is now available after three months of employment instead of six months.

### **PART 3 – Changes Not Yet in Force (2020 or latter)**

#### **Equal pay for equal work (new sections 182.1 and 203.2)**

These important new rules are intended to provide pay equality without regard for employment status and status as a temporary help agency employee..

As a general rule, pay rate differentials based on “employment status” will be prohibited. The general rule will require equal pay regardless of employment status where employees work in the same industrial establishment, and work under similar working conditions, and perform substantially the same kind of work with the same skill, effort and responsibility. Employees will have a right to request a review of their pay rate for compliance with this section and the employer will have to provide a written response.

Despite the general rule, exceptions will still permit employers to establish distinct pay rates based on seniority or merit, or based on systems that measure the quantity or quality of each employee’s production, or any other prescribed factor.

Temporary help agency employees will also be entitled to the same pay rate as employees of the client in the same kind of circumstances described above. The exceptions described above also apply in the case of temporary agency employees. In addition, actions that deter or

prevent an employee from becoming an employee of a client of a temporary help agency will be expressly prohibited, including fees charged to the employee or the client for establishing an employment relationship.

### **Individual Termination (new section 230)**

The Code currently requires only two weeks notice of an individual termination of employment, or pay in lieu of that notice. There is no greater entitlement for employees with longer notice.

Under the new section 230, employees will be entitled to notice of individual termination that increases for each year of their employment to a maximum of eight weeks of notice:

<b>Length of Continuous Employment</b>	<b>Notice Period</b>
3 consecutive months	2 weeks
3 consecutive years	3 weeks
4 consecutive years	4 weeks
5 consecutive years	5 weeks
6 consecutive years	6 weeks
7 consecutive years	7 weeks
8 or more consecutive years	8 weeks

Unfortunately, there is no enhancement of the severance pay entitlement in the existing section 235 (which remains the greater of five days of pay or two days of pay per year of service).

### **Group Termination (new section 211)**

There will be extensive changes to the scheme for group terminations. The existing scheme requires sixteen weeks of notice to the Minister when fifty or more employees are terminated in a four-week period. The existing scheme then requires the establishment of a joint planning process. The existing scheme does not have any enhanced notice requirements that benefit individual employees. Employers often seek a waiver of the joint planning process requirements.

The new scheme will require that if fifty or more employees are dismissed from their employment simultaneously or within a four week period, the employer must provide 16 weeks of notice to the Minister. If no notice is given the employer must pay employees 16 weeks of pay. The employer must at the same time provide immediate notice to the union or to non-



unionized employees. Each employee dismissed during the 16-week group notice period will separately be entitled to eight weeks' of individual notice.

**Conclusion**

The above summary does not describe all of the changes to the Code that have or will result from the modernization project. Additional advice may follow.

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