

Federal Post

Changes to the *Canada Labour Code* and PIPEDA are Coming

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In this issue of our *Federal Post*, we discuss proposed amendments to the *Canada Labour Code* which will introduce new leaves as well as new obligations for federal employers regarding workplace harassment and violence, among other things. We also remind you about the incoming obligations regarding data breach under PIPEDA.

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Article One: Changes to the *Canada Labour Code* Are Coming

Bill C- 63 – Flexible Work Arrangements, New Leaves

The federal government has moved to implement a second round of changes to the *Canada Labour Code* (Code) that were set out in Budget 2017.

Bill C-63, [Budget Implementation Act, 2017, No. 2](#), introduced at first reading on October 27, 2017, is the second budget implementation bill relating to Budget 2017. Budget implementation bills are a means for the government to follow through with the legislative changes required to bring budget commitments into effect.

Among the changes proposed in Bill C-63 are a number of substantive changes to the Code, many of which were signalled in Budget 2017.

(a) Employee Requests for Flexible Work Arrangements

Bill C-63 would create a new Division under the Code, entitled “Flexible Work Arrangements.” This division would provide employees with at least six (6) months’ consecutive service with the right to formally request a change in working conditions. The conditions subject to the request would include:

- the number of hours that the employee is required to work;
- the employee’s work schedule;
- the employee’s location of work; and
- other terms and conditions that may be prescribed by regulation.

The request, which must be made in writing, would require a written response from the employer – no later than 30 days from the receipt of the employee’s request – granting the request, proposing an alternative change, or denying the request with reasons. The Division also specifies the following grounds for denial of an employee’s request:

- the requested change would result in additional costs that would be a burden on the employer;
- the requested change would have a detrimental impact on the quality or quantity of work within the employer’s industrial establishment, on the ability to meet customer demand or on any other aspect of performance within that industrial establishment;
- the employer is unable to reorganize work among existing employees or to recruit additional employees in order to manage the requested change;
- there would be insufficient work available for the employee if the requested change was granted; and
- other grounds that may be prescribed by regulation.

The Division would also prohibit an employer from dismissing, suspending, laying off, demoting or disciplining an employee because the employee has made a request for flexible work arrangements. It would also prohibit an employer from taking an employee’s request for flexible work arrangements into account in any decision to promote or train the employee.

(b) Notice of Shift Change

Bill C-63 would also introduce a new requirement for written notice of shift change or cancellation, at least 24 hours prior to the new or changing shift. Accordingly, if an employer wished to add an additional shift for an employee, or change the start time of a shift, such changes would need to be communicated in writing to the employee at least 24 hours in advance.

This new requirement would be subject to an exception where a situation could not be reasonably foreseen and that presents or could reasonably be expected to present an imminent or serious:

- threat to the life, health or safety of any person;
- threat of damage to or loss of property; or
- threat of serious interference with the ordinary working of the employer’s industrial establishment.

(c) Right to Refuse Overtime

A new right to refuse overtime is proposed where such overtime conflicts with a “family responsibility” under the Code. These responsibilities are defined as:

- the health or care of any of their family members; or

- the education of any of their family members who are less than 18 years of age.

This right would be subject to an employee first having taken reasonable steps to carry out their family responsibility by other means. Furthermore, the right to refuse overtime would also be subject to an exception where a situation could not be reasonably foreseen and that presents or could reasonably be expected to present an imminent or serious threat as in the case of the shift change provisions.

(d) Family Responsibility Leave

Bill C-63 would create a new, unpaid Family Responsibility Leave of up to three (3) days per calendar year in order to meet responsibilities concerning:

- the health or care of any of their family members; or
- the education of any of their family members who are less than 18 years of age.

This leave would be accessible to all employees with at least three (3) months' of consecutive service.

Although the employer would be permitted to request documentation to support the leave, the employee's obligation to provide such confirmation is subject to it being "reasonably practicable for them to obtain and provide it."

(e) Leave for Victims of Family Violence

Another new leave would apply in situations where an employee is a victim of family violence or is the parent of a child who is a victim of family violence. This unpaid leave of up to ten (10) days is tied to specific obligations, being the need to:

- seek medical attention for themselves or their child in respect of a physical or psychological injury or disability;
- obtain services from an organization which provides services to victims of family violence;
- obtain psychological or other professional counselling;
- relocate temporarily or permanently; or
- seek legal or law enforcement assistance or to prepare for or participate in any civil or criminal legal proceeding.

As with the Family Responsibility leave, the employer's right to documentation remains subject to it being "reasonably practicable" for an employee to provide it. However, there is no minimum service eligibility for this leave.

(f) Leave for Traditional Aboriginal Practices

A new leave for Traditional Aboriginal Practices would be created. This leave is restricted to employees who are Aboriginal persons (defined as Indian, Inuit or Métis) and who have completed at least three (3) months' of consecutive service. Such an employee would be entitled to take up to five (5) days' leave to "engage in traditional Aboriginal practices" which would include the following:

- hunting;
- fishing;
- harvesting; or
- other practices prescribed by regulation.

The employer's right to documentation is restricted to a request for documentation showing that the employee in question is an Aboriginal person, with the employee's obligation being subject to the information being "reasonably practicable for them to obtain and provide it."

(g) Extended Bereavement Leave

Currently, the Code provides for three (3) paid days as bereavement leave, where an employee has completed at least three (3) months' of consecutive service. Bill C-63 would extend bereavement leave by an additional two (2) unpaid days, resulting in a total of five (5) days, of which only three would be paid.

Additionally, the period in which bereavement leave can be taken is extended to account for a delay in the burial or memorial service, from three days after death of the immediate family member to six weeks after the latest of the days on which any funeral, burial or memorial service of that immediate family member occurs.

(h) Greater Flexibility Concerning Time Off

Bill C-63 would amend the Code to explicitly allow for time off in lieu of overtime. Where an employee and employer agree in writing, the employee can bank overtime at a rate of one and a half (1.5) times. This time must be used within a period of three (3) months, or a period of up to 12 months if agreed to in writing.

Additionally, the Code would be amended to explicitly allow an employee to take vacation in more than one period, if agreed to by the employer. A right for an employee to interrupt or postpone their vacation on account of another statutory leave under Divisions VII or VIII (i.e. maternity leave, parental leave, compassionate care leave, family responsibility leave, etc.) would also be enacted.

(i) Unpaid Internships

Additionally, Bill C-63 repeals amendments to the Code passed by the previous Conservative

government that had not yet been brought into force. These changes would have allowed for short-term internships, other than those administered through a college or university, in limited situations. Accordingly, unpaid internships would instead be restricted to students participating in a recognized post-secondary education program.

Bill C-65 – Workplace Harassment and Violence

On November 7, 2017, the federal government tabled Bill C-65, [*An Act to amend the Canada Labour Code \(harassment and violence\), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1*](#), which, if passed, will amend the Code with respect to the prevention of workplace harassment and violence, among other things.

(a) Amendments to Part II – Harassment and Violence in the Workplace

Amendments to Part II (Occupational Health and Safety) of the Code would, among other things, specifically recognize psychological injuries and illnesses in the preventative purpose of Part II.

Additionally, Bill C-65 would create a new specific duty for an employer to:

investigate, record and report, in accordance with the regulations, all occurrences of harassment or violence known to the employer; and
take prescribed measures to prevent and protect against harassment and violence in the workplace, to respond to such occurrences and to offer support to employees affected by workplace harassment and violence.

In meeting this new investigative duty, complaints of violence or harassment that are not resolved between the employee and supervisor can no longer be referred to the workplace committee, but instead must be referred directly to the Minister. The Minister would then be obligated to investigate the complaint unless the Minister is of the opinion that the complaint has been adequately dealt with and the matter is trivial, frivolous or vexatious.

The confidentiality of violence and harassment investigations appears to be an important focus of the proposed amendments. As drafted, Bill C-65 would not allow a policy committee, a workplace committee or a health and safety representative to participate in an investigation relating to an occurrence of harassment or violence in the workplace nor allow the Minister or an employer, without the person's consent, to provide the policy committee, a workplace committee or a health and safety representative with any information that would reveal the identity of a person involved in an occurrence of harassment or violence in the workplace, subject to certain exceptions.

(b) Removal of Exemption from Workplace Health and Safety Committee

Additionally, Bill C-65 would repeal the current provisions which allow an employer to request an

exemption from establishing a workplace health and safety committee where the work being done by employees at the work place is relatively free from risks to health and safety. A limited transitional provision would deal with outstanding exemption requests, and would limit their authorization to one (1) year.

(c) Application of Part II of Code to Parliamentary Employees

Bill C-65 proposes amendments to the *Parliamentary Employment and Staff Relations Act* (PESRA), which applies to Parliamentary employees such as employees of the House of Commons, the Senate, the Parliamentary Protective Service, the office of the Parliamentary Budget Officer and the Library of Parliament.

Additionally, the Minister would be required to publicly report back on any directions that have been issued under Part II of the Code and that were complied with by tabling the direction in the House of Commons and/or Senate. This same tabling obligation would apply to orders, decisions and directions of the Canada Industrial Relations Board that were not complied within the allotted time.

For Parliamentary employees, Bill C-65 indicates a legislative intention that these amended changes will finally come into force.

Article Two: Reminder on Incoming Data Breach Provisions under PIPEDA

Federally regulated employers and organizations that handle personal information as part of their commercial activity must be aware of recent amendments to the *Personal Information Protection and Electronic Documents Act* (PIPEDA). These amendments (passed, but not yet in force) create significant new compliance obligations, which will likely mean additional costs and increased litigation risk.

Where there has been a “loss of, unauthorized access to or unauthorized disclosure of personal information resulting from a breach of an organization’s security safeguards” which gives rise to a “real risk of significant harm to an individual”, organizations will be required to:

- (a) report the breach of security safeguards to the Office of the Privacy Commissioner of Canada
- (b) notify affected individuals of the breach of security safeguards (unless prohibited by law)
- (c) if notification to individuals is made, organizations must also notify other organizations if they believe those other organizations may be able to reduce the risk of harm or mitigate that harm

Whether a real risk of significant harm exists will be determined by factors including the sensitivity of the personal information involved and the probability that the personal information has been or will be misused, along with other factors prescribed in PIPEDA and its Regulations.

In addition, organizations must maintain a list of all breaches of security safeguards, even if they do not create a real risk of significant harm.

Organizations should take proactive steps to prepare for these new obligations. This should include ensuring that appropriate incident response protocols are in place, and that the organization is equipped to meet the new record keeping requirements. Such steps will be important in meeting statutory requirements, and preparing for regulatory matters and civil disputes which may arise.

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