Employment and Social Development Canada
Emploi et Développement social Canada

Labour Program: fair, safe and productive workplaces

Flexible Work Arrangements

A Discussion Paper

May 2016

Canada

Minister of
Employment, Workforce Development and Labour

Ministre de
l'Emploi, du Développement de la main-d'œuvre
et du Travail

Ottawa, Canada K1A 0J9

With the nature of work and society evolving, more and more Canadians are challenged in finding the right balance between their work and personal life.

The Government has pledged to give workers in federally regulated sectors the right to formally request flexible work arrangements from their employers and consultations are an important step in making that a reality. The ability to make these requests without fear of reprisal will support economic security for middle class Canadian families and those working hard to join them. I will also work with provinces and territories to encourage similar changes for provincially regulated sectors.

This discussion paper sets the stage for engagement on this issue with workers, employers, labour and employer organizations, academics, other experts, and other organizations concerned about work-life balance.

I invite you to review the paper and submit your comments online, via email or by mail.

Your input will contribute to the development of evidence-based policy that can help Canadians balance their work and personal responsibilities.

I look forward to hearing your views.

The Honourable MaryAnn Mihychuk, P.C., M.P.

Canada

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I Introduction

Today, more and more Canadians are struggling to find the right balance between their work, family and personal responsibilities. Developments in the world of work, driven by globalization, technological advances, evolving work processes and the need to constantly upgrade skills, have made workplaces more complex and challenging for workers and employers alike. At the same time, higher participation rates for women in the labour force, the rise of dual earner and single parent families, growing demands for informal caregiving as the population ages, and other factors are creating added family and personal responsibilities, especially for middle class Canadians and those working hard to join them.

"The way Canadians work is changing. The way Canadians live is changing. It's about recognizing that we can increase the productivity for Canadians and protect their quality of life in a way that will grow the economy."

Excerpts from a speech given by the Leader of the Liberal Party of Canada, Justin Trudeau, on August 19, 2016, during the 42nd general election campaign.

Achieving balance amongst these often competing responsibilities can be difficult. In fact, according to the Canadian Mental Health Association, **58% of Canadians report "overload"** due to the pressures associated with the many different roles they now play at work and home, with family and friends and as volunteers in their communities.

The amount of stress Canadians experience trying to balance their work, family and personal responsibilities can have significant negative impacts: for their physical and mental health, their job satisfaction and the quality of life of their families; for employers in terms of absenteeism, retention rates and lost productivity; and for demand on healthcare and social services across Canada.

In addition, those born between 1980 and 2000 – often known as "millennials" – have different expectations about their employment experiences. As a number of **recent studies** suggest, many are seeking more flexibility in when, how and where they work because they highly value work-life balance. Millennials are the fastest growing segment of Canada's workforce and have now become the **largest generation in the Canadian workforce**. As a result, employers are increasingly striving to adapt their employment practices to better accommodate their needs and thereby improve employee recruitment, engagement and retention.

Employers are also adapting their workplaces to a Canadian workforce that is becoming increasingly diverse and multicultural. For example, between 2006 and 2031, the foreign-born population is expected to **grow four times faster** than the rest of the population. Furthermore, almost **400,000 Indigenous youth** will be of age to enter the labour market in the coming decade. Employers are therefore increasingly seeking to create inclusive and supportive work environments that are flexible enough to support, accommodate and engage employees from various cultural backgrounds.

In recognition of these important issues, in November 2015, the Prime Minister, the Right Honourable Justin Trudeau, mandated the Minister of Employment, Workforce Development and Labour, the Honourable MaryAnn Mihychuk, to bring forward legislation to amend the ***Canada Labour Code*** (Code) to allow workers in federally regulated sectors to formally request flexible work arrangements from their employers. Federally regulated sectors include about 883,000 employees (or 6% of all Canadian employees) working for 11,450 employers in industries such as banking, telecommunications, broadcasting and inter-provincial and international transportation (including air, rail, maritime, and trucking), as well as federal Crown corporations and certain activities on First Nations reserves. The Minister has also been asked to consult with the provinces and territories on the implementation of similar changes in provincially regulated sectors.

Introducing a right to request flexible work arrangements under the Code provides an important opportunity to consider other potential legislative and non-legislative approaches for enhancing flexibility in work arrangements for Canadians.

Purpose of the Discussion Paper

The Government of Canada recognizes that, in order to reform federal labour policy and deliver real results to Canadians, meaningful engagement must be an integral part of the policy developmental process. This discussion paper is intended to help gather the views and perspectives of workers, unions, employers, employer organizations, advocacy groups, academics and other experts, the provinces and territories and the Canadian public on flexible work arrangements. It also invites feedback on what tools and methods should be used to ensure that a right to request flexible work arrangements, and any related initiatives, are effectively implemented.

The discussion paper will serve to support a variety of engagement activities that will be carried out across Canada over the coming weeks. For further information about these activities, including opportunities to participate, please consult

http://www.esdc.gc.ca/en/consultations/labour/flexible_work_arrangements/index.page

Written comments on the discussion paper are encouraged and can be provided directly to the Labour Program of Employment and Social Development Canada by June 30, 2016. Comments can be submitted online

http://www.esdc.gc.ca/en/consultations/labour/flexible_work_arrangements/index.page

or via email at the following address:

NC-TRAVAIL_FLEXIBLE-FLEXIBLE_WORK-GD@HRSDC-RHDCC.GC.CA

They can also be mailed to:

Strategic Policy and Legislative Reform Division
Labour Program
Employment and Social Development Canada
Place du Portage, Phase II
165 Hôtel-de-Ville
Mail Box L910
Gatineau, Quebec
K1A 0J2

Prior to submitting written comments by mail or electronically, please make sure to review the Privacy Notice Statement (PNS) on page 25 of this discussion paper. By submitting your comments, you are consenting to participation in this consultation. You are also consenting to, and acknowledging that, you have read, understood, and agree to the PNS; and that your submission, or portions thereof, may be published on Canada.ca, included in publicly available reports on the consultation, and compiled with other responses to the consultation in an open-data submission on **Open.Canada.ca**.

II

Flexible Work Arrangements

What are Flexible Work Arrangements?

Flexible work arrangements are alternative arrangements to the traditional working week. Many of these arrangements began to take shape from the 1960s through the early 1980s, as employers and governments sought new employment practices to address emerging issues such as growing traffic congestion, the increasing labour market participation of women with family responsibilities, the expansion of manufacturing plant work hours, high unemployment rates and the need to reduce costs.

Since the early 1980s, and in a context of growing awareness about the importance of work-life balance, flexible work arrangements have been increasingly adopted by employers as family-friendly workplace policies to help employees balance the demands of their work with family and personal responsibilities, such as caring for a child, parent or friend, pursuing education, participating in traditional Indigenous practices (e.g. hunting, fishing and harvesting), recovering from an injury or illness, or transitioning into retirement.

Flexible work arrangements are now regularly provided by many employers as part of human resource policies and informal practices within their organizations, included in collective agreements between employers and unions, or made available to employees through employment or labour standards laws.

There are many types of flexible work arrangements. The most common forms allow an individual employee to alter, on a temporary or permanent basis, his or her work schedule, the number of hours worked or the location where work is done, or to take time off to meet specific responsibilities.

According to a 2015 survey conducted with 8,000 employers and employees in 10 countries, 75% of organizations now have flexible working policies to enable employees to vary their hours and use technology to work from home.

Vodafone (2016), ***Flexible: Friend or Foe?***

Flexible Work Schedules

Flexible work schedules are arrangements that allow employees to better manage family and other personal responsibilities (e.g. picking up a child at daycare, providing informal care) that conflict with the traditional Monday-to-Friday, nine-to-five work week, for instance by being able to commute to and from work outside of rush hour. Common forms of these arrangements include:

- **Flextime:** Working a set number of hours with flexible start and finish times agreed upon within specific limits;
- **Compressed work weeks:** Working for longer periods of time per day or shift over a defined period of time in exchange for a day off;
- **Time swaps:** An employee requests time off for personal reasons and offers to make it up by working longer than usual hours on another day;
- **Split shifts:** Working two or more periods during a defined period of time (e.g. 12 hours) in a day;
- **Time off in lieu:** Overtime can be compensated by time off with pay at the rate of 1.5 hours per overtime hour worked;
- **Right to refuse overtime:** An employee can refuse to work overtime; and
- **Notice of shift change:** Employers are required to notify employees in writing at least 24 hours in advance of a shift change.

In 2012, about 36% of Canadian employees with caregiving responsibilities had flextime.

Statistics Canada (2012), *General Social Survey.*

Amongst collective agreements covering at least 200 employees in sectors under federal jurisdiction, 36% provide the option of compressed work weeks and 55% the option of time off in lieu of overtime pay.

Labour Program, Negotech.

Flexibility in the Number of Hours Worked

Arrangements that provide flexibility in the number of hours worked allow employees to reduce (or increase to a certain limit) the amount of time they spend at work. These arrangements are particularly useful to support employees with intensive caregiving responsibilities, older workers transitioning out of the workplace, employees coming back into the workforce after a career break (e.g. a parent), or employees with a health problem or disability. Examples include:

- **Reduced hours/Part-time:** Working fewer hours than the traditional work week;
- **Job sharing:** Allowing two employees to jointly fill one full-time job, with responsibilities and working time shared or divided between them;
- **Partial leave:** Working a reduced time schedule for a temporary period of time; and
- **Gradual retirement:** Reducing working hours over a period of time to support older workers transitioning out of the workplace.

About 37% of Canadian employees with caregiving responsibilities had the option to choose to work part-time in 2012.

Statistics Canada (2012), *General Social Survey.*

In 2015, about 16% of women (compared to 3% of men) worked part-time because they were caring for a child or children, or because they had personal and family responsibilities.

Statistics Canada (2015), *Labour Force Survey.*

Flexible Location of Work

Telecommuting or teleworking is an arrangement that allows an employee to work from home, or a remote location outside of the traditional workplace, on either a temporary or permanent basis. The arrangement can benefit employees by allowing them to schedule their work day around their family and other personal responsibilities, while at the same time effectively meeting work requirements. It can also accommodate employees who have certain disabilities and are unable to leave their home.

While working from home or remotely is not a new phenomenon, new technologies such as 4G data services, instant messaging, web conferencing and cloud storage are making it more and more feasible.

According to a 2012 Rogers Communications and Harris/Decima survey:

- **44% of full-time employed Canadians are able to work remotely; and**
- **70% of full-time workers aged 18–29 (millennials) would be more satisfied in their jobs if they could work remotely using cloud software.**

Rogers Communication Inc. (2013),
Rogers Innovation Report: Connected Workplace

Flexible Leaves

Leaves are arrangements that permit employees to take time off from work to meet family and other personal obligations without the loss of employment rights. They can be paid or unpaid. The duration of a leave can vary from a few hours (e.g. taking a dependent family member to a medical appointment) to a few days (e.g. attending a funeral), or last weeks or months (e.g. recovering from a serious illness or injury). Leaves include:

- **Short-term family responsibility leave:** Leave to attend short-term family obligations (e.g. caring for a sick child);
- **Long-term family responsibility leave:** Long-term leave to care for a seriously ill family member;
- **Short-term sick leave:** Leave to recover from a short-term illness or injury;
- **Bereavement leave:** Leave that provides adequate time and flexibility to attend a funeral, memorial service or burial;
- **Buyable leave/Leave with income averaging:** An employee exchanges an agreed reduction in salary for extra periods of leave over a specified period;
- **Leave for victims of domestic violence:** Leave to cope with domestic violence;
- **Educational leave:** Leave to undertake part- or full-time study or to engage in related activities (e.g. complete assignments or study for examinations);
- **Court leave:** Short-term leave to serve on a jury or to appear in court as a witness; and
- **Hunting, fishing, or harvesting leave:** Leave to participate in traditional Indigenous practices such as hunting, fishing or harvesting.

In 2012, the large majority of Canadian employees with caregiving responsibilities reported working for an employer that provided the ability to take a leave (paid or unpaid) to take care of a child (75%) or a family member (74%), or to take an extended leave without pay for personal reasons (74%).

Statistics Canada (2012), *General Social Survey.*

Amongst collective agreements covering at least 200 employees in sectors under federal jurisdiction, 17% provide the option to take a leave of absence to care for a child or a family member.

Labour Program, Negotech.

Flexibility in Rest Periods

Rest periods (e.g. meal breaks, minimum rest periods, vacation leave and holidays) are important components of work-life balance as they help employees to restore their health and well-being. There are many arrangements that provide flexibility in the time that employees allocate for these periods. Examples include:

- **General holiday substituted with any other day:** An employee substitutes another day off for a general holiday;
- **Postpone or interrupt vacation leave if eligible for and take another leave:** An employee who experiences an event (e.g. becoming ill, dealing with the death of a family member) can postpone or interrupt his or her vacation and take the leave associated with the circumstance (e.g. sick leave, bereavement leave); and
- **Division of vacation leave:** Annual vacation can be divided into two or more periods (including in one-day increments).

In recent years, some states in the United States have amended their labour legislation to provide workplace protections for victims of domestic violence. In Canada, the Government of Manitoba has recently amended the *Employment Standards Code* to provide victims of domestic violence with a short-term leave (up to 10 days, including 5 paid days) and an unpaid long-term leave (up to 17 weeks).

Some collective agreements covering employees working in Canada's territories and northern regions of the provinces allow employees to take a leave of absence in order to participate in traditional Indigenous practices such as hunting, fishing or harvesting. The leave may be paid or unpaid and may vary with respect to its duration and the notice period required.

Labour Program, Negotech.

Potential Impacts

Studies exploring the benefits of flexible work arrangements for employees reveal that such arrangements are likely to improve their overall work-life balance, reduce workplace stress and health-related symptoms, reduce absenteeism, increase job satisfaction and organizational commitment, and maintain their attachment to the labour market (Possenriede et al., 2014; Hughes and Parkes, 2007; and Halpern, 2005). Employers can also benefit from flexible work arrangements as these arrangements help them to enhance recruitment and retention, reduce costs (e.g. absenteeism, turnover, overtime), increase productivity and improve morale, collaboration and overall commitment (Eurofound, 2012; Corporate Voices for Working Families, 2011; McNall et al., 2010; and Shepard et al., 1996).

Accommodating an employee's request for flexible work arrangements may require an employer to adapt his or her workplace practices. For example, while telecommuting is often associated with increased productivity, implementing such an arrangement may require changing how the employee is supervised and appraised, or involve certain costs (e.g. computer, 4G network service plans, cloud storage services) (Richard, 2012). Other arrangements, such as part-time work and leaves, may necessitate reorganizing work amongst existing staff, hiring a replacement or paying overtime (Guerin et al., 2015; Smith, 2011; Fagan et al., 2014).

Flexible Work Arrangements in Canadian Labour Legislation

Federal Jurisdiction

Part III of the *Canada Labour Code* (Code) regulates labour standards such as hours of work, minimum wages, statutory holidays and annual vacations, as well as various types of statutory leave. These labour standards are mainly intended to provide a basic floor of rights for all workers and prevent unfair competition by providing a level playing field for employers.

Part III of the Code is relatively prescriptive regarding certain labour standards (e.g. hours of work, annual vacations, general holidays). In these cases, employers and individual employees are limited in their ability to devise flexible work arrangements that are tailored to their specific needs. However, Part III does provide a number of leaves of absence for employees. These include maternity leave, parental leave, compassionate care leave, leave related to critical illness of a child, leave related to the death or disappearance of a child, leave of absence for members of the reserve force, work-related illness and injury leave, sick leave and bereavement leave.

Provincial and Territorial Jurisdictions

There are examples in provincial and territorial labour laws of labour standards that provide a certain degree of flexibility to either or both employers and employees. For example, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island and Quebec do not set a maximum number of hours per day during which an employee may work. Instead, they stipulate a number of standard hours that can be worked per week (e.g. 40 hours in a week), providing certain flexibility in terms of daily hours of work.

In addition, labour legislation in ten Canadian jurisdictions (Alberta, British Columbia, Manitoba, Newfoundland and Labrador, the Northwest Territories, Ontario, Prince Edward Island, Quebec, Saskatchewan and Yukon) provides that overtime hours can either be paid or taken as paid time off work at a rate of one and one-half hour for each overtime hour worked.

In Ontario, both the employer and the employee must agree to the "time off in lieu" of overtime paid and the employee must take it within three months of the week in which overtime was earned. This period can be extended up to a maximum of 12 months upon consent of both parties.

Similarly, Alberta, Newfoundland and Labrador, Ontario, Prince Edward Island, Quebec, the Northwest Territories, Nunavut and Yukon allow an employee who works on a statutory holiday to be paid a premium rate or receive a paid day off.

To limit the number of overtime hours that an employee may be required to do, Alberta, Ontario, Nunavut and Northwest Territories set maximum hours, either on a daily or weekly basis. Other jurisdictions (Manitoba, Quebec, Saskatchewan and Yukon) provide employees with the right to refuse overtime in defined circumstances. In Yukon, for example, employees may refuse to work overtime for "just cause," if the reasons are specified to the employer in writing. In Quebec, employees may refuse to work more than a specified number of hours, subject to exceptions (e.g. in the event of unforeseen circumstances or emergency situations). Quebec's labour legislation also allows employees to refuse to work beyond their regular hours in order to fulfill family obligations, if they have taken reasonable steps to deal with these obligations through other means.

British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan provide a leave for short-term family responsibilities. The leaves vary with respect to their maximum duration (3 to 12 days per year), scope (the circumstances in which they may be taken) and eligibility requirements. In Ontario, for instance, employees who work for employers with at least 50 employees are eligible for a personal emergency leave. With this leave, employees can take up to 10 days of unpaid job-protected leave per calendar year for a number of personal and family issues ranging from bereavement to a medical emergency.

Ontario, Quebec and Saskatchewan also provide long-term family responsibility leaves. In Ontario, an employee is entitled to up to 8 weeks of unpaid family caregiver leave to provide support or care to an immediate family member. Similarly, in Quebec and Saskatchewan, there are leave provisions that allow employees to take up to 12 weeks of unpaid leave per year to care for a seriously ill or injured family member.

Questions for Discussion

1. What types of flexible work arrangements are currently being provided in your workplace? Are they made available through informal practices, human resource policies, a collective agreement, or employment or labour standards laws? What good practices have been identified?
2. What kinds of flexible work arrangements would help employees better balance work, family and other personal responsibilities? Why?
3. From an employer standpoint, what benefits do flexible work arrangements provide? Have any unintended consequences resulted from providing employees with greater flexibility?
4. How can flexible work arrangements help employees and employers to better recognize and respect cultural diversity, including Indigenous practices?
5. Are there any key barriers to enhancing flexibility in work arrangements? For employees? For employers? If there are, how can they be addressed?

III

Right to Request Flexible Work Arrangements

What is a Right to Request Flexible Work Arrangements?

A right to request flexible work arrangements is a statutory right that entitles employees to formally request that their employers alter, on a temporary or permanent basis, their work schedule, the number of hours worked and/or the location where their work gets done. The right usually includes protections for employees against dismissal or other forms of retaliation (e.g. discriminatory practices in training and promotion opportunities) for exercising the right.

A right to request flexible work arrangements also normally requires that employers give due consideration to such requests and respond within a set deadline. The employer may only decline a request on reasonable business grounds. In addition, if the employer rejects a request, he or she must provide evidence to support the grounds for refusal.

Since the early 2000s, **Australia**, **New Zealand** and the **United Kingdom** and a number of jurisdictions in the United States (e.g. **Vermont**, **San Francisco**) have introduced legislation that is focused on encouraging individual employees and their employers to develop flexible arrangements that suit their respective needs and establishes a right to request flexible work arrangements. In New Zealand, the right to request flexible work arrangements was initially available to employees with caregiving responsibilities and with six months of continuous employment with the same employer, and a maximum of one request could be made per calendar year. Since 2015, the right has been available to all employees from their first day of employment and employees can make as many requests as they wish.

While the laws in these jurisdictions generally reflect similar principles about the kinds of flexible work arrangements that can be requested and the duty for the employer to consider these requests, they vary in some regards. For instance:

- **Entitlement:** An employee's right may or may not be contingent on having been employed for a defined period of time (e.g. six months in the U.K);
- **Restriction:** An employee may be permitted to make multiple requests per calendar year, or the right may be limited to a single request per employee, per calendar year;
- **Information requirements:** When requests must be made in writing, employees could be obliged to provide certain information for the employer, including:
  - i) the type of working arrangement requested and whether the change is permanent or temporary;
  - ii) date on which the employee proposes that the variation take effect and, if the variation is for a period of time, the date on which the variation is to end;
  - iii) the reason for the request (e.g. caregiving); and/or
  - iv) the expected impact of the change on the employer;

- **Considering requests:** The process followed by an employer to give due consideration to a request varies. For example, differences exist regarding:
  i) the period required to respond to a request (e.g. 21 days in Australia, 3 months in the United Kingdom);
  ii) guidelines about how to handle requests (e.g. United Kingdom **Code of Practice**); and
  iii) whether a response is required in writing or not;
- **Employer right of refusal:** The business grounds for which an employer may refuse an employee's request for flexible work arrangements vary and include: the burden of additional costs; inability to reorganise work amongst existing staff; detrimental effects on their ability to meet customer demand; inability to recruit additional staff; detrimental impacts on quality; detrimental impacts on performance; insufficiency of work during the periods the employee proposes to work; and planned structural changes;

Surveys conducted in the United Kingdom showed that between 79% and 91% of requests for flexible work arrangements made by parents or caregivers were accepted in 2013.

Department for Business, Innovation & Skills (2014), ***The Fourth Work-Life Balance Employer Survey: Main Findings***.

According to a 2014 Australian survey:

- **28% of employees made a request for flexible working arrangements; and**
- **41% of entreprises received a request, with larger entreprises (72%) more likely to receive a request than smaller ones (38%).**

FairWork Commission (2015), ***Australian Workplace Relations Study First Findings Report***.

- **Appeals/recourse:** If a request for flexible work arrangements is turned down by an employer, and the employee believes that the employer has not complied with the legislation, different processes allow the employee to seek the assistance of a labour inspector, access mediation or file a complaint to an employment tribunal;
- **Burden of proof:** At an employment tribunal, an employer must generally demonstrate that they have not unreasonably refused the request;
- **Remedies:** If a complaint is well-founded, an employer may be required to reconsider the request and/or compensate the employee; and
- **Employees subject to a collective agreement:** Employees bound by collective agreements may or may not be entitled to a right to request flexible work arrangements.

Provincial and Territorial Jurisdictions

No provincial or territorial labour laws currently provide employees with a right to request flexible work arrangements.

According to a 2013 survey conducted in the United Kindom, fewer than 1% of employers reported that an employee made a complaint to an employment tribunal related to the right to request flexible work arrangements over the preceeding 12 months, or that an employee was considering a complaint.

Department for Business, Innovation & Skills (2014), ***The Fourth Work-Life Balance Employer Survey: Main Findings***.

Potential Impacts

A right to request flexible work arrangements provides employees with a formal avenue to request an adjustment to their work arrangements. It also encourages employees and employers to negotiate arrangements that suit their respective needs in terms of flexibility, rather than imposing a "one size fits all" solution.

Providing a right to request flexible work arrangements also aligns with recent court decisions, which have determined that family status protections under human rights law – such as the *Canadian Human Rights Act* – extend to a person's family caregiving responsibilities.[1] This means that, when an employee demonstrates that he or she has substantive childcare obligations that cannot be reconciled with an employer's existing rules or policies to the extent that the employer's rules or policies interfere with that employee's ability to meet that substantial obligation in any realistic way, an employer has the duty to accommodate this employee to the extent that it would not cause undue hardship to his organization.

However, a right to request flexible work arrangements may have a negative impact on the operations of small businesses due to their generally more limited resources to deal with additional administrative burdens. In addition, employers may have concerns about how complaints or appeals will be handled, particularly if it is a statutory right and given a lack of jurisprudence.

In New Zealand, where there is a right to request flexible work arrangements, 70% of employers report having some or all of their employees working flexibly and 87% say that flexible work arrangements have had a positive impact.

New Zealand Department of Labour (2011), ***Review of Flexible Working Arrangements in New Zealand Workplaces***.

Questions for Discussion

1. What process should apply to making requests for flexible work arrangements (e.g. entitlement, frequency, format, information requirements)?
2. What process should employers be required to use to respond to requests for flexible work arrangements (e.g. time period for reply and other considerations, business grounds for refusing a request)?
3. If an employee's request for flexible work arrangements is not properly dealt with or denied, what recourse should be available?

[1] Canada (Attorney General) v Johnstone, 2014 FCA 110; Canadian National Railway v. Seeley, 2014 FCA 111.

IV

Implementing Flexible Work Arrangements

Minister Mihychuk and all other ministers have been asked by the Prime Minister not only to deliver on specific priorities, but to deliver on them in new ways. This includes ensuring that desired outcomes for Canadians are clearly defined. It also includes ensuring that the successful implementation of new initiatives is considered as an integral part of the policy making process, and that progress toward achieving outcomes is monitored so that adjustments can be made if necessary.

Desired Outcome

The fundamental purpose of introducing a right to request flexible work arrangements, and potentially other complementary measures, is to provide employees with more flexibility to structure their work lives and to provide employers with more flexibility to accommodate these needs. Ultimately, the desired outcome is two-fold: employees who are better able to balance their work, family and other personal responsibilities; and employers who are able to benefit from reduced absenteeism, increased productivity and improved recruitment, engagement and retention.

"It is my expectation that we will deliver real results and professional government to Canadians. To ensure that we have a strong focus on results, I will expect Cabinet committees and individual ministers to: track and report on the progress of our commitments; assess the effectiveness of our work; and align our resources with priorities, in order to get the results we want and Canadians deserve."

The Right Honourable Justin Trudeau,
Mandate Letter to the Minister of Employment, Workforce Development and Labour.

Achieving and measuring this outcome will be challenging. A key issue to consider is what tools and methods should be used to ensure that a right to request flexible work arrangements, and any related initiatives, are effectively implemented and that the results are carefully monitored.

Effective Implementation

Successful implementation depends on having effective compliance and enforcement mechanisms in place. These mechanisms are focussed on ensuring that rights and related responsibilities are known and understood, that they are respected by both employees and employers, that disagreements can be raised and addressed fairly and without reprisal, and that mechanisms are in place to uphold legislative requirements and, when violations are found, to provide appropriate remedies.

The *Canada Labour Code* (Code) contains a variety of long-standing compliance and enforcement tools for dealing with matters relating to labour standards (**Part III** of the Code) and occupational health and safety (**Part II** of the Code). They include powers to assist parties in settling complaints, to examine records, to conduct inspections and investigations and, where there is found to be non-compliance, to issue payment orders to recover unpaid wages and directions for occupational health and safety violations. There are also provisions in the Code specifically aimed at adjudicating unjust dismissal complaints. These tools, combined with proactive outreach and awareness building, are often effective at achieving voluntary compliance and resolving complaints.

Over 86% of labour standards complaints filed with the Labour Program under Part III of the Code over the past five years were filed by individuals whose employment had already been terminated. This suggests that many employees do not seek recourse following violations, possibly for fear of facing negative repercussions in the workplace or because they are unaware of their rights or how to enforce them.

Labour Program, ESDC.

However, the Code's enforcement provisions are not always adequate for dealing with employers who knowingly, and repeatedly, contravene legislative and regulatory requirements. In addition, although the Code provides for prosecuting offenders, this is a burdensome, expensive and time consuming process that is typically reserved for the most serious labour standards and occupational health and safety violations.

More generally, achieving compliance with labour legislation has become more **challenging** over the past two or so decades, especially in light of the changes that have taken place in the workplace and the rise of precarious work. Studies show that the rate of compliance is affected by many factors, such as the level of awareness that employees and employers have about their respective rights and responsibilities, whether the penalty system creates appropriate incentives to comply or a formal enforcement strategy is in place, firm size, business practices, an employer's compliance history, union presence in the workplace and the attitudes of workers and employers.

In this context, it is important to consider the degree to which the existing framework for compliance and enforcement that is embedded in the Code is well-suited to effectively implementing a right to request flexible work arrangements and any related measures to enhance flexibility. For instance, the introduction of a right to request could change the behaviours of employees and/or employers (e.g. in terms of the volume of requests generated and needing to be considered) in such a way that adjustments are necessary in the tools that are currently available under the Code for ensuring compliance and enforcement.

In addition, many other jurisdictions in Canada and internationally have taken steps to modernize the instruments that they use to foster compliance and enforcement with labour laws and regulations. More up-to-date approaches for improving compliance and enforcement have also been examined by researchers, think tanks, international organizations and others. Some of these more modern tools could potentially offer support – either as is or as adapted – for effectively implementing a right to request flexible work arrangements under the Code and related initiatives.

Statistics from the 2008 Federal Jurisdiction Workplace Survey revealed that a significant number of employers were not complying with or at least not aware of certain provisions of the *Canada Labour Code.* For example, about 25% of employers said that they did not provide three weeks of paid annual vacation after six years of continuous employment, 60% said that they did not provide bereavement leave in the event of the death of an immediate family member, and approximately 80% said that they did not have a sexual harassment prevention policy.

Labour Program, ESDC.

Enhanced Education and Outreach

The provinces and territories and other countries are more and more relying on enhanced education and outreach activities to promote voluntary compliance and encourage specific desired behaviours. These include:

- **Targeted campaigns:** Have targeted messages (e.g. about specific rights and obligations where non-compliance is more frequent), or messages that are targeted to particular audiences that are considered to be more vulnerable or less likely to comply voluntarily (e.g. youth, new immigrants and new employers), and are delivered through traditional channels and social media.
- **Interactive websites:** Provide accessible, more customized information to workers and employers (e.g. about legal rights and obligations and penalties) and allow information to be submitted electronically (e.g. complaints).

Positive Incentives

Positive incentives, such as praise, awards and prizes, are now more frequently used in many countries, including Canada, to encourage and enable improved compliance. Examples include:

- **Capacity building:** Initiatives to promote the sharing and publicizing of good workplace practices in order to boost the capacity of others to comply (e.g. **Canadian Centre for Occupational Health and Safety youth video contest**).
- **Awards and recognition:** Programs offered by enforcement bodies, sometimes in collaboration with employers, unions and other organizations, to formally recognize good workplace practices and those who develop and adopt them (e.g. **Work Safe Alberta Awards program**).

Complaints Process

Steps have been taken in other Canadian jurisdictions and internationally to modernize the complaint-based systems that have traditionally underpinned labour legislation. Examples include:

- **Processing times:** Call centres, self-help kits and mediation, especially for small claims, that are aimed at **reducing processing times**, and on-line forms that further speed processing and also ensure more consistency and improved accuracy in the information provided to support complaints.
- **Anonymous complaints:** Allegations of labour law violations can be filed by a complainant anonymously, as in Saskatchewan and some U.S. states (e.g. Colorado, Illinois and New York).
- **Protections against employer retaliation:** Stronger protections against employer retaliation for workers who exercise their rights under labour legislation, such as giving inspectors specific powers (e.g. orders to cease and desist and/or to reinstate or compensate an employee).
- **Statutory presumption of employer retaliation:** Where a complainant has been fired or faced other forms of retaliation, the employer bears the burden of proof that the measures taken were not retaliatory.

In Saskatchewan, complaints can be made anonymously if an individual believes that the *Saskatchewan Employment Act* is not being followed and they would like the situation corrected but do not wish to make a formal complaint. The anonymous complaint could involve monetary issues, such as wages, overtime, vacation pay, not being paid, or not being paid correctly. It could also involve non-monetary issues, such as not receiving a work schedule or a pay stub, or not being paid on time. Problems are usually corrected on a "go-forward" basis, to ensure that from this point on the provisions of the Act will be followed in the workplace.

Government of Saskatchewan, Employment Standards Division, ***Anonymous Complaint Form***.

Enhanced Enforcement Strategies

In the provinces and territories and countries such as the United States and the United Kingdom, a variety of tools have been adopted to strengthen enforcement. Some of the more common ones are:

- **Risk-based enforcement:** Improved identification of high-risk sectors and random audits, combined with communication activities to publicize that this is being done.
- **Targeted enforcement:** Inspection blitzes targeted at high-risk firms and/or sectors, as well as enforcement strategies that take into account the particular characteristics of smaller firms, for instance by allowing **training to be substituted for fines**.
- **Strengthened training:** Ongoing **training programs**, especially for new inspectors or when new compliance and enforcement tools are introduced, that raise awareness and ensure that the tools that are available to enforcement officials are consistently applied.

Penalties

In recent years, significant attention has been paid to the importance of diversifying and strengthening the **penalty system** and increasing the real and perceived costs of non-compliance in order to deter violations. Examples include:

- **Fines:** More effective fines that are better aligned with the relative seriousness of the offence, fully remedy the losses caused by a violation and can be imposed more efficiently (e.g. tickets and administrative monetary penalties).
- **Other financial incentives:** Administrative surcharges (e.g. on wage payment orders) and payment by violators of interest charges and the **administrative costs** related to inspections and other enforcement activities.
- **Regulatory disclosure:** As is the case in Alberta, Ontario, Connecticut and Oregon, **information about serious offenders** is, or can be, disclosed in the workplace and/or to the public.

An administrative monetary penalty (AMP) is a fine that can be imposed by designated government officials against a person or organization that has contravened a legal requirement. AMPs are generally considered to be less punitive than criminal sanctions and can be more expeditiously imposed in response to a particular case of non-compliance. Seven provinces – British Columbia, Alberta, Manitoba, Ontario, Quebec, Nova Scotia and Yukon – now have AMP regimes in place under their occupational health and safety or labour standards legislation.

Multi-Agency Enforcement

Multi-agency enforcement is generally designed to improve compliance by reducing red-tape and administrative burden and to improve enforcement by creating efficiencies. It is often rooted in the idea that non-compliance in one area increases the likelihood of non-compliance in another. Examples include:

- **Information sharing:** Information and intelligence about non-compliant employers are shared between different bodies responsible for enforcing labour and employment legislation, to the extent permitted by privacy laws, in order to strengthen their ability to target enforcement activities, as happens in the **United Kingdom**.
- **Coordination:** Mechanisms such as the **UK Pay and Work Rights Helpline**, which provides workers, employers and others with single window access to the five bodies responsible for the enforcement of labour and employment legislation and has operators who are cross-trained and able to refer cases to the relevant body (or bodies).
- **Delegation or deputization:** Inspectors from one enforcement agency are authorized to enforce labour laws and regulations overseen by another.

Enhanced Roles for Third-Parties

The role of third-parties in improving compliance and enforcement of labour legislation by enhancing individual and collective voice has received considerable attention in the past few years. Approaches that have been examined in other jurisdictions or adopted include:

- **Third-party complaints:** Allow complaints from any party who wishes to bring forward an alleged violation, as can be done in Australia through the **Fair Work Ombudsman**.
- **Third-party monitoring:** Combines government enforcement with monitoring by an impartial third-party.
- **Partnerships or participatory enforcement:** Give government, employers, workers and community groups an **ongoing role in enforcement**, including documenting violations and helping employees seek redress.

Self-Regulation

Similarly, there has been a proliferation of non-governmental forms of enforcement. Key examples include:

- **Self-monitoring:** Firms assess and monitor themselves for non-compliance and take corrective action as required or, as is now the case under the *Ontario Employment Standards Act,* can be ordered to conduct **self-audits** and report the results.
- **Codes:** Sector- and firm-level codes of conduct, or codes of voluntary compliance, which include reporting requirements.
- **Joint committees:** Joint employer-employee committees that can oversee alternative dispute resolution on matters of disagreement, or develop and approve firm-level plans to achieve regulatory objectives.

Effective Monitoring

In addition to effective implementation, delivering a right to request flexible work arrangements, and potentially other flexibility-enhancing measures, requires ensuring effective monitoring. Monitoring depends on having timely, reliable and relevant data. It also depends on being able to use the data, whether quantitative or qualitative, to assess where progress is being made in achieving the desired outcomes for employees and employers and where adjustments may be required.

The current labour standards compliance regime, because it is largely based on complaints, does not provide an adequate basis for monitoring the impact of the introduction of new provisions aimed at encouraging flexibility. This raises the question of whether it may be necessary to include some basic reporting requirements that will allow adequate monitoring and follow-up, without creating excessive burden on employers and employees.

Finally, effective monitoring will necessitate developing ways to assess whether the outcome being sought – that employees in federally regulated enterprises experience an improvement in their ability to achieve work-life balance, thereby reducing stress and other undesirable impacts and that their employers benefit from reduced absenteeism, increased productivity and being better able to attract and retain employees – is actually being realized. To this end, it may be useful to develop tailored survey methods to track and report on progress.

Questions for Discussion

1. Is the desired outcome appropriately defined?
2. What are likely to be the key challenges – for employees, employers and the Labour Program – in ensuring effective compliance and enforcement with a right to request more flexible work arrangements and any related initiatives for enhancing flexibility?
3. What specific compliance and enforcement tools are best suited for implementing a right to request flexible work arrangements and any related measures?
4. If any new enforcement tools should be added to the *Canada Labour Code* to ensure compliance with a right to request flexible work arrangements and any related measures, should they also apply with respect to enforcing other labour standards under Part III of the Code, or occupational health and safety provisions under Part II? Which ones? Why?
5. What kinds of data and methodologies are presently available to help assess and monitor progress in implementing a right to request flexible work arrangements and any related measures? Are there gaps and, if so, how can they be addressed?
6. Besides effective compliance and enforcement and effective monitoring, are there other key factors for successfully implementing a right to request flexible work arrangements and any related measures that should be considered? For example, are there non-legislative measures that would be helpful?

Notice to Participants

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