LET RIGHT PREVAIL

Law Society of Ontario | Barreau de l'Ontario

TAB 17

THE SIX-MINUTE Labour Lawyer 2018

Towards a More Flexible Workplace for Employees: Recent Changes to the *Canada Labour Code*

Written and presented by:
Bonny Mak, *Fasken Martineau DuMoulin LLP*

Co-written by:
Rachel Devon, *Fasken Martineau DuMoulin LLP*

June 21, 2018

cpd Continuing Professional Development

Towards a More Flexible Workplace for Employees:

Recent Changes to the *Canada Labour Code*

Bonny Mak & Rachel Devon

FASKEN

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents
333 Bay Street, Suite 2400
P.O. Box 20
Toronto, ON M5H 2T6
Telephone: +1 416 366 8381
Facsimile: +1 416 364 7813
www.fasken.com

TABLE OF CONTENTS

I. INTRODUCTION 1
II. CONTEXT: CANADA'S CHANGING WORKPLACE AND THE ARTHURS REPORT 2
III. OVERVIEW OF BILL C-63 3
Right to Request Flexible Work Arrangements 4
24 hours' Written Notice of a Change in Shift 6
Expanded Bereavement Leave 7
New Leaves of Absences 8
(i) Family Responsibility Leave 8
(ii) Leave for Victims of Family Violence 8
(iii) Leave for Traditional Aboriginal Practices 9
Changes to Overtime 10
(i) Right to refuse overtime for family responsibilities 10
(ii) Paid time off in lieu of overtime pay 11
Additional Amendments Under Bill C-63 12
IV. OTHER RECENT CHANGES TO THE *CANADA LABOUR CODE* 13
Changes to Leaves of Absence under Bill C-44 13
Additional Amendments under Bill C-44 - Expanded Powers of the CIRB and Inspectors 14
Prohibitions Relating to Genetic Testing 16
Prevention of and Protection Against Harassment and Violence 18
Certification And Decertification of a Bargaining Unit 19
V. CONCLUSION 20

I. INTRODUCTION

The world of work is changing rapidly. Today, more and more Canadians are struggling to find an appropriate balance between their work and personal obligations. According to the Canadian Mental Health Association, 58% of Canadians experience "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.[1] These increasing pressures can be attributed to a number of significant socioeconomic and demographic changes in Canada, including higher participation rates of women in the workforce, the rise of dual earner and single parent families, and increasing demands for informal caregiving as the population ages.[2] Studies suggest that millennials – the fastest growing segment of Canada's workforce – highly value work-life balance, and are seeking flexible workplace arrangements as a result.[3] Further, Canadian courts have held that family status protections under human rights law extend to a person's family caregiving responsibilities.[4] Within this context, employers must strive to adapt their workplace policies and employment practices in order to accommodate the needs of their employees and to retain them.

In 2017, the Canadian Government made a number of changes to the *Canada Labour Code*[5] (the "***Code***") that attempt to address the need for increased flexibility in the workplace. Bill C-63, *Budget Implementation Act, 2017, No. 2*,[6] received royal assent on December 14, 2017. However, many of its changes have not yet come into force. This Bill introduces a number of important changes to the *Code* pertaining to flexibility in the workplace, including new employee leaves, a right to refuse to overtime if it interferes with family responsibilities under the *Code*, and perhaps most significantly, a formal right of employees to request flexible workplace

---

[1] Canada, Employment and Social Development Canada, *Flexible Work Arrangements: A Discussion Paper* (Ottawa: May 2016) at 1 [Discussion Paper].

[2] *Ibid*.

[3] *Ibid*.

[4] *Canada (Attorney General) v. Johnstone*, 2014 FCA 110.

[5] *Canada Labour Code*, RSC 1985, c L-2 [*Canada Labour Code*].

[6] Bill C-63, *A second Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures,* 1st Sess, 42nd Parl, Canada (assented to 14 December 2017) [Bill C-63].

arrangements in relation to the number of hours they are required to work, their work schedule, and their location of work. These amendments are the culmination of numerous consultations, reports, and discussions that have taken place over the years regarding the changing workplace environment and the resulting need for flexible workplace arrangements.

This paper will provide an overview of the changes to the *Canada Labour Code* made under Bill C-63. The first section of this paper will provide background information regarding the reports and research that serve as the foundation for these legislative changes. The second section of this paper will provide an overview of the amendments to the *Code* enacted under Bill C-63. The final section of this paper will describe additional and related amendments to the *Code* introduced in 2017, including new and expanded leaves of absence, prohibitions against mandatory genetic testing, changes to union certification and de-certification processes, expanded powers of the Canada Industrial Relations Board, and new protections and employer obligations related to the prevention of and protection against harassment in the workplace.

II. CONTEXT: CANADA'S CHANGING WORKPLACE AND THE ARTHURS REPORT

The changes to the *Code* under Bill C-63 are the result of numerous policy discussions, reports, and consultations that have occurred since the early 2000s surrounding labour standards and the concept of flexible work. In fact, many of the changes to the *Code* under Bill C-63 were explicitly recommended in a 2006 report titled, *Fairness At Work: Federal Labour Standards for the 21st Century* (the "**Arthurs Report**").[7] In October 2004, Harry Arthurs, former dean of Osgoode Hall Law School, was appointed by the Minister of Labour to review Part III of the *Code*, which establishes labour standards for workers employed in federally regulated enterprises.[8] At the time of the Arthurs Report, Part III of the *Code* had not been significantly updated since it was enacted in 1965. Given the rapidly changing technological, political, and economic environment, a legislative review of the *Code* was overdue. The Arthurs Commission released its 324 page report in the fall of 2006, which included numerous recommendations for revisions to

---

[7] Harry W Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century (*Gatineau, QC: Human Resources and Skills Development Canada, 2006) [Arthurs Report].

[8] *Ibid* at ix.

the *Code* aimed at enhancing the rights of employees. To date, the Arthurs Report remains the most comprehensive review of Part III of the *Code*.

The Arthurs Report focused on the need for flexibility in workplace arrangements. The Report specifically states, "workers need more control over their time at work and after work in order to fulfill their responsibilities as family and community members, and employers need more flexible working time arrangements in order to compete in a highly volatile global marketplace."[9] In keeping with this theme, many of the recommendations in the Arthurs Report were aimed at promoting flexible workplace arrangements. Key recommendations of the Arthurs Report included increased flexibility in the provisions governing maternity, parental and compassionate care leave,[10] paid time off in lieu of overtime pay,[11] a ten day unpaid family responsibility leave,[12] expansion of bereavement leave,[13] a right of employees to request in writing, that their employer decrease or increase their hours of work, give them a more flexible schedule or alter the location of their work,[14] a limited right to refuse overtime to meet family obligations,[15] and a right to receive notice of shift changes at least 24 hours in advance.[16] These recommendations were not immediately implemented through legislative reform. However, as will be discussed below, many of the changes recommended in the Arthurs Report have since been incorporated to the *Code* through Bill C-63.

III. OVERVIEW OF BILL C-63

Bill C-63 received royal assent on December 14, 2017. However, the changes to the *Code* under Bill C-63 have not yet come into force, and will come into force on a day to be fixed by order of the Governor in Council, upon Proclamation.[17] This Bill makes a number of significant

---

[9] *Ibid* at xiii.
[10] *Ibid* at xiv.
[11] *Ibid* at 147.
[12] *Ibid* at 154.
[13] *Ibid* at 154-55.
[14] *Ibid* at 150.
[15] *Ibid* at xiv.
[16] *Ibid* at 152.
[17] Bill C-63, *supra* note 6 at cl. 216.

changes to the *Code*. Consistent with many of the recommendations in the Arthurs Report, these amendments are primarily aimed at ensuring more flexible workplace arrangements that allow employees to balance their personal and family obligations with their responsibilities at work. While these amendments enable employees to have greater control over their schedules, they also create potential operational challenges for employers. The following section provides an overview of the key changes made to the *Code* under Bill C-63.

Right to Request Flexible Work Arrangements

One of the most notable amendments to the *Code* under Bill C-63 is the creation of a formal right of employees to request flexible work arrangements from their employers relating to their hours of work, schedule, and location of work. Employees who have completed six months of continuous employment may request, in writing, a change to the number of hours that the employee is required to work, the employee's work schedule, the employee's location of work, and any terms and conditions that apply to the employee prescribed by regulation.[18] The employer must provide written notice to the employee of their decision within 30 days of receiving the request.[19] Requests may be refused if (i) the requested change would result in additional costs that would be a burden on the employer, (ii) 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, (iii) the employer is unable to reorganize work among existing employees or to recruit additional employees in order to manage the requested change, or (iv) there would be insufficient work available for the employee if the requested change was granted.[20]

The idea of a statutory right to request flexible workplace arrangements is not a new concept. In fact, the Arthurs Report expressly recommended that employees should have a

---

[18] *Canada Labour Code*, *supra* note 5, s. 177.1 (1) [as amended by Bill C-63].
[19] *Ibid*, s. 177.1 (4).
[20] *Ibid*, s. 177.1 (3).

formal right to request flexible work arrangements.[21] However, to limit potential administrative burdens on employers, the Arthurs Report further recommended that the employer's obligation to respond to an employee's request should be limited to one request per calendar year, per employee, and employees should not be allowed to invoke these provisions until completing one year of service with the employer.[22]

In November 2015, Prime Minister Trudeau mandated the Minister of Employment, Workforce Development and Labour, the Honourable MaryAnn Mihychuk, to bring forward legislation to amend the *Code* to allow workers to formally request flexible work arrangements from their employers. The Government carried out broad public and stakeholder discussions to 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.[23] A report summarizing these consultations was published in September 2016.[24] Unsurprisingly, views on whether employees should have a legal right under the *Code* to make a request for flex work were polarized. Employers and employer associations argued that such a right is not necessary, while labour organizations, advocacy groups, and academics argued that it should not be left up to the discretion of employers to grant employees the flexibility they require.[25] Over 70 percent of survey respondents indicated that they would be "very likely" to use the right to request flexible work arrangements if they had it.[26] Consistent with the Arthurs Report recommendations, employer organizations maintained that employees should be entitled to make a request only after one year of continuous service with the same employer and that there should be limits on the number of requests that can be made per calendar year.[27] However, the *Code* does not go this far in the restrictions imposed on

---

[21] Arthurs Report, *supra* note 7 at 150.

[22] *Ibid*.

[23] Discussion Paper, *supra* note 1 at 8.

[24] Canada, Employment and Social Development Canada, *Flexible Work Arrangements: What Was Heard* (Ottawa: September 2016).

[25] *Ibid* at 11.

[26] *Ibid* at 12.

[27] *Ibid* at 13.

requests for flexible work. Rather, under the *Code*, requests can be made by employees with only six months of continuous employment, rather than one year.[28] Further, while the *Code* provides that the Governor in Council may make regulations limiting the number of requests that an employee may make in a calendar year, no such regulations have been made as of yet.[29] Thus, it remains unclear how the right to request flexible work arrangements will be implemented in practice, and whether this new statutory right could create significant scheduling difficulties and/or increased costs for employers.

24 hours' Written Notice of a Change in Shift

Bill C-63 amends the *Code* to provide that if an employer makes any changes to an employee's shifts or adds another or shift to the employee's schedule, the employer must give the employee written notice at least 24 hours in advance.[30] This amendment was an explicit recommendation of the Arthurs Report.[31] In describing the importance of sufficient notice of shift changes, the Arthurs Report commented:

> Improving the work-life balance of employees depends not only on controlling the duration of their working days and weeks, and ensuring their access to leaves and vacations – it also depends on making work schedules more predictable. Employees with family, personal, educational or second-job commitments often make elaborate arrangements to honour these commitments, proceeding on the assumption that they will be at work at certain times and will not be there at others. If their working hours are changed, especially on short notice, their lives can be thrown into disarray. This is especially true for workers who work irregular shift schedules, and who – studies show – suffer elevated levels of job strain, psychological distress and health problems as a result.[32]

This particular amendment to the *Code* attempts to create more flexibility in workplace schedules so that employees can meet their personal commitments outside of work. At the same time, it

---

[28] *Canada Labour Code*, *supra* note 5, s. 177.1 (1) [as amended by Bill C-63].

[29] *Ibid*, s. 177.1 (8).

[30] *Ibid*, s. 173.1 (1).

[31] Arthurs Report, *supra* note 7 at 152.

[32] *Ibid* at 151.

creates less flexibility for employers by limiting their ability to manage and direct the workplace as required.

Expanded Bereavement Leave

Bill C-63 extends the current paid bereavement leave by an additional two unpaid days, and expands the time period in which bereavement leave can be taken. Under the former provisions of the *Code*, employees with three continuous months of employment were entitled to three paid days of bereavement leave. These days had to be taken in the three days immediately following the day of the death.[33] Under the new provisions of the *Code*, employees will be entitled to five days of bereavement leave, two of which are unpaid. These days must be taken within six weeks after the latest of the days on which any funeral, burial, or memorial service of that immediate family member occurs.[34] Further, at the request of the employee, the employer may extend the period during which the leave of absence from employment may be taken.[35] The Arthurs Report made similar recommendations to expand the period of bereavement leave. The Report made the following comments regarding the former provisions of the *Code*:

> The relatively brief duration of bereavement leave is not sufficient for many bereaved immigrant or aboriginal workers to travel to and return from a funeral at their family's home in distant countries, or in remote Canadian communities, nor is it sufficient to permit participation in protracted rites associated with some religions, communities and cultures.
>
> Moreover, bereavement leave must be taken immediately after the death of the family member, even though a funeral may not be scheduled within the three days following the relative's death. Nor can it be used to attend a memorial held some time after a person's death, as is the custom in certain Aboriginal and other cultures.[36]

[33] *Canada Labour Code*, *supra* note 5, s. 210 as it appeared on 9 May 2018.

[34] *Ibid*, s. 210 (1) [as amended by Bill C-63].

[35] *Ibid*, s. 210 (1.1).

[36] Arthurs Report, *supra* note 7 at 154.

However, the amendments to the *Code* do not actually go as far the recommendations in the Arthurs Report, which provided that employees should be entitled to take up to seven consecutive working days of bereavement leave, starting on any day.[37]

New Leaves of Absences

(i) Family Responsibility Leave

Pursuant to Bill C-63, the *Code* will provide for three days of unpaid leave to fulfil family responsibilities. This new leave is available for every employee who has completed three consecutive months of continuous employment, and is intended to enable the employee to carry out his or her responsibilities related to (a) the health or care of any family member, or (b) the education of any family member who are less than 18 years of age.[38] The leave may be taken in periods of one day or more. An employer may request the employee to provide documentation to support the reasons for the leave within 15 days of the employee returning to work following the leave.[39] This amendment does not go as far as the Arthurs Report's recommendation, which stated that employees should be entitled to take up to ten days of family responsibility leave without pay per calendar year to meet responsibilities regarding the education of a child or the care and health of a family member.[40]

(ii) Leave for Victims of Family Violence

Bill C-63 amends the *Code* to provide for a ten day unpaid leave for an employee who is a victim of family violence, or for a parent of a child who is a victim of family violence. The leave is permitted for the following purposes:

(a) to seek medical attention for the employee or his/her child in respect of a physical or psychological injury or disability;

---

[37] *Ibid* at 155.

[38] *Canada Labour Code*, *supra* note 5, s. 206.6(1) [as amended by Bill C-63].

[39] *Ibid*, ss. 206.6 (2), 206.6(3).

[40] Arthurs Report, *supra* note 7 at 154.

(b) to obtain services from an organization which provides services to victims of family violence;

(c) to obtain psychological or other professional counselling;

(d) to relocate temporarily or permanently;

(e) to seek legal or law enforcement assistance or to prepare for or participate in any civil or criminal legal proceeding; or

(f) to take any measures prescribed by regulation.[41]

As with the new family responsibility leave, an employer may request the employee to provide documentation to support the reasons for the leave within 15 days of the employee returning to work following the leave, and the leave of absence may be taken in one or more periods.[42]

(iii) Leave for Traditional Aboriginal Practices

As amended by Bill C-63, the *Cod*e will provide that every employee who is an Aboriginal person and who has completed three consecutive months of continuous employment is entitled to take five days of unpaid leave per calendar year to engage in traditional Aboriginal practices, including hunting, fishing, and harvesting. The leave of absence may be taken in periods of one day or more. An employer may request the employee to provide documentation that shows the employee is an Aboriginal person within 15 days of the employee returning to work following the leave.[43]

---

[41] *Canada Labour Code*, *supra* note 5, s. 206.7 (2) [as amended by Bill C-63].

[42] *Ibid*, ss. 206.7 (4), 206.7 (5).

[43] *Ibid*, s. 206.8.

Changes to Overtime

Bill C-63 amends the *Code* provisions relating to overtime to provide for a (i) a right of employees to refuse overtime work in order to meet their family responsibilities and (ii) the option of paid time off in lieu of overtime pay upon agreement.

(i) Right to refuse overtime for family responsibilities

Under the Bill C-63 amendments, the *Code* will provide that employees may refuse to work overtime requested by an employer in order to fulfil any family responsibility set out in subsection 206.6 (1) (which includes family responsibilities related to the health or care of any family member or the education of family members under age 18).[44] However, in order to refuse to work overtime under this provision, an employee must first take reasonable steps to carry out their family responsibility by other means.[45] An employee's ability to refuse to work overtime on this basis is subject to certain exceptions. More specifically, an employee may not refuse to work overtime if it is necessary for them to work overtime to deal with a situation that the employer could not have reasonably foreseen and that presents or could reasonably be expected to present an imminent or serious (a) threat to the life, health or safety of any person; (b) threat of damage to or loss of property; or (c) threat of serious interference with the ordinary working of the employer's industrial establishment.[46] Further, an employee may not be dismissed or disciplined for refusing to work overtime under this provision.[47] The right to refuse overtime in order to fulfil family obligations was an express recommendation of the Arthurs Report.[48] Again, this amendment ensures that employees have more control over their work schedule in order to meet family obligations; however, it could pose scheduling difficulties for employers.

---

[44] *Ibid*, s. 174.1 (1).
[45] *Ibid*, s. 174.1 (2).
[46] *Ibid*, s. 174.1 (3).
[47] *Ibid*, s. 174.1 (4).
[48] Arthurs Report, *supra* note 7 at 146.

(ii) Paid time off in lieu of overtime pay

The former provisions of the *Code* provided that where an employee works overtime, the employee must be paid at a rate of not less than one and one-half times his or her regular rate of wages.[49] The new provisions of the *Code* explicitly allow for employees to be either paid for overtime worked at the rate of one and one-half times their regular wages, or to be granted time off with pay at the rate of one and one-half hours for each overtime hour worked, subject to certain conditions.[50] In order to receive paid time off in lieu of overtime pay, there must be an agreement in writing for such arrangements between the employee and the employer. Further, the time off must be taken within a period of three months after the end of the pay period in which the overtime was worked or within a period of up to 12 months, if agreed to in writing.[51] This amendment is consistent with the Arthurs Report, which recommended that the *Code* should permit an employee and his or her employer to agree that overtime hours will be compensated by time off with pay, at the rate of one and one half hours for every hour worked as overtime, to be taken at a time mutually agreeable to the employer and employee.[52]

This amendment reflects what many federal employers have already been doing in practice. In fact, the practice of granting paid time off in lieu of overtime pay where agreed to by employers and employees has been permitted by adjudicators in the past, notwithstanding that the practice was not explicitly permitted under the *Code*. For example, in the case of *Lac La Ronge Indian Band and Bird, Re*, [2001] C.L.A.D. No. 491, the employer had a practice of providing time off in lieu of overtime pay; if an employee worked one hour of overtime, the employee could take one and one-half hours off and be paid as though they were present at work.[53] Arbitrator Hood took no issue with the employer's practice, concluding that "overtime hours have been fully compensated for by time off in lieu."[54] Similarly, in *RSB Logistic Inc. v. Hale*, [1999] C.L.A.D.

[49] *Canada Labour Code*, *supra* note 5, s. 174 as it appeared on 9 May 2018.

[50] *Ibid,* s. 174(1) [as amended by Bill C-63].

[51] *Ibid*, s. 174 (2).

[52] Arthurs Report, *supra* note 7 at 146-47.

[53] *Lac La Ronge Indian Band and Bird, Re*, [2001] C.L.A.D. No. 491 at paras 8-9.

[54] *Ibid* at para 18.

No. 548, the Referee commented that "some employers and employees in some workplaces agree to adjust for overtime hours by permitting employees to take time off in lieu of the overtime hours. There is nothing wrong with this practice."[55] However, an employer cannot require employees to take time off in lieu of overtime where no express agreement has been made to that effect.[56]

Not only have labour adjudicators permitted this practice, but a number of provinces already permit paid time off in lieu of overtime pay in their provincial employment standards legislation. At the time the Arthurs Report was published, this practice was already lawful in seven Canadian jurisdictions.[57] As of May 2018, 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. The legislation in Ontario, for instance, is nearly identical to the new provisions under the *Code*; in Ontario, both the employer and the employee must agree to the time off in lieu of paid overtime, and the employee must take the time off within three months of the week in which overtime was earned. This period can be extended up to a maximum of 12 months with the consent of both parties.[58] Thus, the amendment under the *Code* regarding paid time off in lieu of overtime pay brings Canada's federal labour legislation in line with current practices of federal employers and with provincial employment standards legislation across the country.

Additional Amendments Under Bill C-63

Bill C-63 also amends the provisions relating to vacation entitlements to allow an employee to take vacation in more than one period, if agreed to by the employer.[59] Under Bill C-

---

[55] *RSB Logistic Inc. v. Hale*, [1999] C.L.A.D. No. 548 at para 35.
[56] *Ibid*.
[57] Arthurs Report, *supra* note 7 at 147.
[58] *Employment Standards Act, 2000*, SO 2000, c 41, s. 22 (7).
[59] *Canada Labour Code*, *supra* note 5, s. 184.1 [as amended by Bill C-63].

63, the *Code* will provide a right for an employee to interrupt or postpone their vacation on account of another statutory leave under Divisions VII or VIII.[60] Finally, 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.[61]

IV. OTHER RECENT CHANGES TO THE *CANADA LABOUR CODE*

Bill C-63 is one of many bills amending the *Code* in 2017. While many of the recent amendments are intended to create flexibility in the workplace, others are unrelated to flexibility, but are nonetheless significant for employers in the federal sector. The following section will provide an overview of significant changes to the *Code* introduced in the year 2017 in order to contextualize the Bill C-63 amendments.

Changes to Leaves of Absence under Bill C-44

Bill C-44, *the Budget Implementation Act, 2017, No. 1*,[62] introduced significant changes to leaves of absence under the *Code*. Division 11 of Bill C-44 expands the availability of such absences as well as the time period in which they can be taken. The following changes regarding leaves of absence under Bill C-44 came into force on December 3, 2017:

- A pregnant employee may begin her maternity leave up to 13 weeks prior to her due date (increased from 11 weeks) provided she has completed six consecutive months of continuous employment.[63]

- Employees will be provided with an unpaid parental leave of absence of up to 63 weeks to care for a new-born child or a child who is adopted by the worker, reflecting the new

---

[60] *Ibid*, s. 187.1(1).

[61] Judy Gallagher et al, “Changes to the Canada Labour Code and PIPEDA are Coming” (27 November 2017), *Hicks Morley*, online: <hicksmorley.com/2017/11/27/federal-post-changes-to-the-canada-labour-code-and-pipeda-are-coming/>.

[62] Bill C-44, *An Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures,* 1st Sess, 42nd Parl, Canada (assented to 22 June 2017) [Bill C-44].

[63] *Canada Labour Code*, *supra* note 5, s. 206 (1).

benefits under the *Employment Insurance Act*. Previously, the maximum period of leave was 37 weeks.[64]

- Those eligible to take a leave of absence to care for a critically ill child has been expanded beyond a parent to a family member of a critically ill child.[65]

- The *Code* now provides for an unpaid leave of absence to care for a critically ill adult family member. An employee who has completed six months of continuous employment and who is a family member of a critically ill adult will be eligible to take up to 17 weeks of unpaid leave in order to care for or support that adult.[66]

Additional Amendments under Bill C-44 - Expanded Powers of the CIRB and Inspectors

In addition to new and expanded leaves of absence, Division 17 of Part 4 under Bill C-44 makes a number of other significant changes to the *Cod*e, particularly relating to the powers of the Canada Industrial Relations Board (the "**CIRB**" or "**Board**") and Inspectors designated by the Minister under s. 249. The amendments under Division 17 are not yet in force and will come into force by order of the Governor in Council. Those additional key changes under Division 17 are as follows:

- **Appointment of external adjudicators by the Board:** The Chair of the Board may appoint an external adjudicator to determine any matter that comes before the Board under Part II (Occupational Health and Safety) or Part III (Standard Hours, Wages, Vacations and Holidays). These external adjudicators will have all the powers, duties and functions of the Board with respect to any matter for which they have been appointed.[67]

- **Changes to the powers of the Canada Industrial Relations Board:** Bill C-44 will amend the *Code* to make significant changes to the powers of the Board. Among other things,

[64] *Ibid*, s. 206.1 (1).
[65] *Ibid*, s. 206.4 (2).
[66] *Ibid*, s. 206.4 (2.1).
[67] *Canada Labour Code*, *supra* note 5, ss. 12.001 (1), 12.001 (2) [as amended by Bill C-44].

Bill C-44 transfers to the Board the powers, duties and functions of appeals officers under Part II of the *Code* and of referees and adjudicators under Part III.[68]

- **Expanded powers of an Inspector:** The *Code* has been amended to clarify that an inspector appointed under s. 249 has the power to make a finding that an employee was dismissed for just cause for the purposes of s. 230 (notice or wages in lieu of notice) or s. 235 (severance pay).[69] The amendments expand the authority of inspectors to issue compliance orders; in particular, inspectors may order an employer to cease the contravention of a provision of Part III (Standard Hours, Wages, Vacations and Holidays).[70]

- **Internal audit orders:** The Minister of Labour can order an employer to determine, following an internal audit, whether it is in compliance with a provision of Part III and to provide the Minister with a corresponding report.[71]

- **Establishment of a complaint mechanism under Part III for employer reprisals**: Division XIV.1, "Complaints Relating to Reprisals" has been added to the *Code.* It provides that employees may make a complaint in writing to the Board if they believe that their employers have taken reprisals against them. However, dismissed employees cannot make a complaint.[72]

- **Administrative fees for review of payments orders**: Employers who seek a review of a payment order will now have to pay an administrative fee specified in the payment order in addition to the amount of the order.[73]

- **Introduction of administrative monetary penalties to promote compliance:** Bill C-44 adds a new Part (Part IV) to the *Code* which establishes a penalty system to promote

[68] Summary of Bill C-44, online: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-44/royal-assent>.

[69] *Canada Labour Code*, *supra* note 5, s. 246.7 (1.1) [as amended by Bill C-44].

[70] Summary of Bill C-44, online: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-44/royal-assent>.

[71] *Canada Labour Code*, *supra* note 5, s. 251.001 (1) [as amended by Bill C-44].

[72] *Ibid*, s. 246.1.

[73] *Ibid*, s. 251.101 (2).

compliance with Parts II and III. Part IV sets out a comprehensive framework for establishing the contraventions that constitute violations, the penalties, the review process, and the appeal process related to violations. The specific contraventions and penalties will be identified by regulations. Notably, the *Code* will limit the availability of certain defences to a person or department named in a notice of violation. Specifically, it is no defence that the person or department exercised due diligence to prevent the violation, or that they reasonably and honestly believed in the existence of facts that, if true, would exonerate the person or department.[74]

Prohibitions Relating to Genetic Testing

On May 4, 2017, Bill S-201 *An Act to prohibit and prevent genetic discrimination* ("***Genetic Non-Discrimination Act***")[75] came into force. This Act amended the *Canadian Human Rights Act* to prohibit discrimination on the basis of genetic characteristics. This Act also amended the *Code* by adding specific prohibitions against genetic testing in employment. Prior to the passing of the *Genetic Non-Discrimination Act*, Canada was the only country in the G7 without legislation to protect individuals from discrimination based on their genetics.[76]

Pursuant to the amendments under the *Genetic Non-Discrimination Act*, the *Code* provides that employees cannot be forced to undergo a genetic test.[77] If an employee chooses to undergo a genetic test, that employee is entitled not to disclose the results.[78] Employers cannot impose any disciplinary measures if an employee refuses to undergo or to disclose the results of a genetic test, and no person is permitted to disclose to an employer that an employee has undergone a genetic test or disclose to an employer the results of the test without the written

[74] *Ibid*, s. 277 (1).

[75] Bill S-201, *An Act to prohibit and prevent genetic discrimination,* 2nd Sess, 41st Parl, Canada (assented to 4 May 2017) [*Genetic Non-Discrimination Act*].

[76] Kerry Gold, "How genetic testing can be used against you – and how Bill S-201 could change that" *The Globe and Mail* (3 April 2016), online: <www.theglobeandmail.com/life/health-and-fitness/health/bill-s-201-aims-to-end-genetic-discrimination-in-canada/article29494782/)/>.

[77] *Canada Labour Code*, *supra* note 5, s. 247.98 (2).

[78] *Ibid*, s. 247.98 (3).

consent of the employee.[79] Similarly, no employer can collect or use the results of a genetic test without the written consent of the employee.[80]

The *Code* also provides for a complaint mechanism to an inspector where an employer has taken disciplinary action against an employee in contravention of s. 247.98 (4). Where the inspector is unable to settle the complaint, on the written request of the complainant, the inspector must report to the Minister of Labour.[81] In turn, the Minister may appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint. The adjudicator may order the retraction of a disciplinary measure, the reinstatement of the employee, or impose any other remedy that it deems appropriate.[82]

Notably, the *Genetic Non Discrimination Act* is currently subject to constitutional challenge. The Quebec government has requested a reference from the Quebec Court of Appeal regarding the legislation's constitutionality (and in particular, whether it infringes on provincial jurisdiction by attempting to regulate the insurance industry). The constitutionality of the legislation is being fiercely debated by academics; we can expect Canadian courts to rule on this issue in the near future.[83] In fact, before the Act received royal assent, the federal Liberal Government indicated that it intends to take the unusual step of referring the *Genetic Non-Discrimination Act* to the Supreme Court of Canada for an opinion on its constitutionality.[84]

These amendments relating to genetic testing are especially significant as there is currently no provincial legislation prohibiting genetic testing in employment. Ontario is the only province that has introduced legislation which would its *Human Rights Code* to add "genetic

---

[79] *Ibid*, ss. 247.98 (4), 247.98 (5).

[80] *Ibid*, s. 247.98 (6).

[81] *Ibid*, s. 247.99 (5).

[82] *Ibid*, ss. 247.99 (4) - (8).

[83] Devon Kapoor, "The Genetic Non-Discrimination Act: A Valid Exercise of the Federal Criminal Law Power? (Part 1)" *TheCourt.ca* (3 October 2017), online: <www.thecourt.ca/genetic-non-discrimination-act-valid-exercise-federal-criminal-law-power-part-1/>. The reference to the Quebec Court of Appeal is available here: http://courdappelduquebec.ca/fileadmin/Fichiers_client/Actualites/SANS_SIGNATURE_-_Press_release_-_Reference_-_Genetic_Non-Dis.pdf

[84] Peter Menyasz, "Canadian Genetic Testing Law to Face Constitutional Review" *Bloomberg* (9 May 2017), online: <www.bna.com/canadian-genetic-testing-n73014450650/>.

characteristics" as a prohibited ground of discrimination.[85] Thus, the Federal Government is leading the charge with respect to legislative prohibitions against genetic discrimination and genetic testing in employment.

Prevention of and Protection Against Harassment and Violence

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,[86] passed Third Reading in the House of Commons on May 7, 2018. The Bill serves to clarify the obligations of federally-regulated employers to prevent and protect against workplace harassment and violence, and is designed to strengthen obligations and protections with respect to violence and harassment, including sexual harassment, in the workplace.

The *Code* currently obligates employers to take prescribed steps to prevent and protect against violence in the workplace.[87] However, Bill C-65 expands this obligation to include harassment and requires employers to follow the *Code*'s investigation requirements for all allegations that may meet the definition of harassment. More specifically, Bill C-65 proposes to recognize "psychological injuries and illnesses," including those incurred through workplace harassment and violence, as threats to occupational health and safety. In particular, the Bill adds the prevention of "physical or psychological injuries and illnesses" as an express purpose of Part II of the *Code*.[88] Bill C-65 also imposes a duty on employers to investigate, record, and report all

---

[85] Bill 30, the *Human Rights Code Amendment Act (Genetic Characteristics), 2016*, was introduced into the Ontario Legislature and received first reading on September 29, 2016. On November 3, 2016, Bill 30 passed Second Reading and was sent to the Standing Committee on Justice Policy. If passed, the provisions would amend the Ontario *Human Rights Code* to include genetic characteristics as a prohibited ground of discrimination and harassment. In addition, Private Member's Bill 164, *Human Rights Code Amendment Act, 2017*, was introduced into the Ontario Legislature on October 4, 2017. The Bill passed Second Reading and was ordered to the Standing Committee on Regulations and Private Bills on October 26, 2017. If passed, Bill 164 would amend the Ontario *Human Rights Code* to include genetic characteristics (along with immigration status, police records, and social condition) as prohibited grounds of discrimination.

[86] 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,* 1st Sess, 42nd Parl, Canada (as passed by the House of Commons 7 May 2018) [Bill C-65].

[87] *Canada Labour Code*, *supra* note 5, s. 125.1 (z.16).

[88] *Ibid*, s. 122.1 [as amended by Bill C-65].

occurrences of harassment or violence in accordance with the regulations.[89] Finally, Bill C-65 imposes a duty on employers to take the prescribed measures with respect to harassment and violence in the workplace, to respond to occurrences of harassment and violence in the workplace, and to offer support to employees affected by harassment and violence.[90]

Certification And Decertification of a Bargaining Unit

Bill C-4 came into force on June 19, 2017.[91] The amendments under this Bill reversed the changes to certification and de-certification processes made by the Conservative Government under Bill C-525. Bill C-525 required that the certification and decertification of a union as a bargaining agent be achieved by a mandatory secret ballot vote-based majority. [92] Under the Bill C-4 amendments, the mandatory secret ballot representation vote has been eliminated. The new amendments provide the Board with the discretion to certify a trade union on the basis of the membership evidence submitted with an application for certification if it is satisfied that a majority of the employees in the unit wish to be represented by the applicant union, without the requirement to hold a representation vote in every case. Now, pursuant to s. 28, the CIRB must certify a trade union as a bargaining agent for a unit if it (a) has received an application for certification; (b) has determined that the unit is an appropriate unit for collective bargaining; and (c) is satisfied that a majority of the employees in the unit wish to be represented by the trade union as their bargaining agent.[93]

Section 29 (1) of the *Code* allows the Board to order a representation vote for the purpose of verifying whether employees in a unit wish to have a particular trade union as their bargaining agent. This representation vote is not mandatory. Under s. 29 (2), a mandatory vote regarding

---

[89] *Ibid*, s. 125 (1) (c).

[90] *Ibid*, s. 125 (1) (z. 16).

[91] Bill C-4, An *Act to amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act, the Public Service Labour Relations Act and the Income Tax Act,* 1st Sess, 42nd Parl, Canada (assented to 19 June 2017) [Bill C-4].

[92] Legislative Summary of Bill C-4: *An Act to amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act, the Public Service Labour Relations Act and the Income Tax Act*, online: <lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=c4&Parl=42&Ses=1&source=library_prb. See also the Annual Statute: http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2017_9/page-5.html#h-15>.

[93] *Canada Labour Code*, *supra* note 5, s. 28.

certification is required in cases where the Board is satisfied that between 35% and 50% of the employees in the unit are members of the trade union.

Further, the procedure for revocation of certification that existed prior to the coming into force of Bill C-525 has now been reinstated. Pursuant to s. 38 (1), an application for revocation may be made by an employee who claims to represent a majority of the employees in a unit (Bill C-525 reduced this threshold to 40% of the employees). Under s. 38 (3), if a collective agreement applicable to a bargaining unit is in force but the bargaining agent that is a party to the collective agreement has not been certified by the Board, any employee who claims to represent a majority of the employees in the bargaining unit may apply to the Board for an order declaring that the bargaining agent is not entitled to represent the employees in the bargaining unit.[94]

V. CONCLUSION

The changes to the *Code* introduced in 2017 will likely have a profound impact on employers and employees in the federal sector. From new and expanded leaves of absence, prohibitions against mandatory genetic testing, changes to union certification and de-certification processes, expanded powers of the Canada Industrial Relations Board, and finally, new protections and employer obligations related to harassment in the workplace – the changes to the *Code* introduced this year are far-reaching. The amendments under Bill C-63 – including new leaves of absence, a formal right to request flexible work accommodations, a right to refuse overtime to fulfil families responsibilities, and time off in lieu of overtime pay – signal a commitment by the Canadian Government to increasing flexibility in the workplace for employees. While these new amendments will help employees to balance their personal and work commitments, employers must find ways to adjust their practices and policies in order to provide the level of flexibility required by the legislation and to ensure employee retention. Given the increased participation of women in the workforce, the rise of dual and single parent families,

[94] For more information on the amendments to the Board's certification procedures, see Canada Industrial Relations Board, "Certification: New Rules of Procedure Respecting Applications for Certification in Effect Beginning June 22, 2017" (22 June 2017), online: <www.cirb-ccri.gc.ca/eic/site/047.nsf/eng/h_00092.html>.

and increasing demands for informal caregiving as the population ages, the emphasis on flexible workplace arrangements will likely only grow stronger in the future.