

Ryerson University Equity, Diversity and Inclusion Submission on Personal Emergency Leave

Draft Response to the Changing Workplaces Review Special Advisors' Interim Report

August 25, 2016

Introduction

Thank you for the opportunity to provide further input into changes to the Ontario *Employment Standards Act (ESA)* concerning **Personal Emergency Leave (PEL)**.

Ryerson University's Equity, Diversity and Inclusion division supports the Special Advisors' focus on vulnerable workers in precarious jobs. Precarious work has many negative consequences for society, as indicated in the research we included in our initial submission and the research from our Centre for Labour Management Relations. As stated in our original submission, work is more likely to be precarious when the:

- pay is low;
- employment is temporary, casual and/or part time;
- workplace is non-unionized;
- work is with smaller employers (e.g. 50 or less employees); and/or
- employer or employee is exempted from *ESA* provisions.

Research indicates that workers in precarious jobs are often from equity seeking groups such as, women, racialized people, new Canadians, Aboriginal peoples, persons with disabilities and LGBTQ people. The Ontario Human Rights Commission submission makes a similar point. Therefore, **decisions on changes to the *ESA* must be mindful of the important role the legislation can play in promoting equity and inclusion for employees from groups that have been underrepresented in the workforce and face systemic barriers in the workplace.**

The *ESA* establishes minimum employee rights and employer obligations. In the absence of specific legislated rights, non-union employees must rely on their employers' discretion to provide them with the terms and conditions of employment they seek. Many employers, such as Ryerson University, provide pay, benefits and other terms and conditions of employment for

most of their permanent and temporary full time employees, and some part time employees, that are above the minimum requirements. The changes proposed to the PEL provisions will not have a substantial impact on employers like Ryerson or the employees who work for them. As an educational institution with a diverse student population, however, the university has an interest in promoting equity, diversity and inclusion in the broader community.

Our proposed changes will have the most impact on employers who only provide the minimum requirements per the *ESA*. While these employers may think that their interests and that of their employees diverge in terms of unpaid leaves, such as Personal Emergency Leave, there is a growing body of evidence that suggests that leaves of absence and other benefits can profit employers by promoting better engagement, quality of work and productivity of their employees. **Employers can only be flexible and adapt at “lightning speed” to changes in the “new, highly competitive and dynamic changing economy,” as the interim report indicates, through the efforts of their employees.**

What we recommended concerning Personal Emergency Leave

In our first submission, we recommended changes to existing leave provisions, including changes to PEL to include care of dependents who are not relatives.

The purpose of that suggestion was not to limit the modification of the legislation to the proposed change, but to stimulate thought and discussion about the diversity of personal circumstances that can necessitate such a leave.

Employer Concerns and Evidence from Research

Before making more detailed recommendations in this submission, Ryerson’s Equity, Diversity and Inclusion division would like to comment on some of the employer issues and concerns mentioned in the interim report concerning PEL and provide some evidence that speaks to these issues.

A concern expressed by some employers, which was noted in the interim report, is that employees abuse the PEL provisions. However, there is no research based evidence to suggest there is a widespread problem with employees taking unpaid leave when the circumstances do not support such a leave, e.g. taking sick leave when not sick. In fact, there are studies that have found that employees who are not paid for sick leave are less likely to be absent from work when they are sick.

One 2005 UK study (based on a 2004 Labour Force survey) found that only about 5% of absences are long term, but that they account for a third of days lost. Ryerson, which has generous paid short term leave benefits and other paid leave provisions for family and emergency circumstances for most employees, has found that a small number of employees with lengthy absences can cause average days absent to be double that of the median days absent. Put another way, the vast majority of employees take very few of the leave days

available to them in a given year at the university. The UK study also found that contrary to the common perception, absences were not higher on Mondays and Fridays.

Canada has also conducted Labour Force Surveys that report on absences due to illness/injury and family or personal responsibilities. Various reports and data produced by Statistics Canada over the years from this survey have indicated:

- Women tend to have more days absent than men.
- Presence of pre-school children increases personal and family leave absences.
- Older workers tend to have more days absent than younger workers.
- Unionized employees tend to have more days absent than non- unionized employees.
- Employees in permanent positions have more days absent than employees in temporary jobs.
- Employees in health occupations, where they are more exposed to illness, have more days absent than employees in other occupations.
- Public sector workers have more days absent than private sector workers – largely because they have more employees with the above noted characteristics.
- Ontario is one of the provinces, and Toronto one of the cities, in Canada with the least days absent.
- **Data available through Statistics Canada for the period between 2005 and 2015 indicate that in Ontario days lost due to illness and family/personal responsibilities have gone down from 8.7 to 7.7 per year.**

All of the above information points to the utility of paid and unpaid leaves to provide time off and, for paid leaves, income protection for employees who are sick and/or have family and personal responsibilities that require absence from work. Employees who need to take time off and feel secure in their ability to do so, avail themselves of these leaves. There is nothing in the above information to suggest that conferring rights leads to abuse of leave provisions.

Another employer concern mentioned in the interim report is the cost of such leaves. The focus is on the cost of absenteeism due to decreased productivity and cost of additional or temporary workers to fill in for employees who take the leaves. However, there is a large and growing body of research about the cost of “presenteeism.” For example, if an employee stays home for a day or two when they have the flu and returns to work in a condition where they can perform their work at their optimal level, productivity and quality of work is often higher than if they had come to work sick. When employees come to work sick their productivity is often lower for the extended period it takes to recover from the illness. Furthermore, they are also likely to cause others in the workplace to become ill leading to further productivity decline.

In a 2015 review of the literature on presenteeism, published in *The Business Management Review*, it was estimated that presenteeism has an economic cost to Canada of \$15-25 billion per year. The article indicates that a review of the research suggests that the cost is much higher than for absenteeism. From a cost perspective, it appears as though employers, and governments, should be more concerned about employees coming to work sick than about absences from work due to illness. The research also suggests that employees are more likely to come to work when sick if the leave is unpaid.

Recommendations

Ryerson University's Equity, Diversity and Inclusion division makes the following recommendations based on the information presented in the interim report and the above evidence-based discussion. Focusing on vulnerable workers in precarious jobs and employers who apply the minimum requirements of the *ESA*, we recommend:

1. **Remove the 50 employee threshold for PEL.** Regardless of the size of an employer, employees need to have the right to take time off when sick and when family or personal circumstances require such absences. Whether or not there is a legal entitlement under the *ESA* for these absences when working for a smaller employer, employees who, for example, are hospitalized or whose children are ill and have no other viable childcare options, have been and will be absent from work. Therefore, smaller employers currently do and will continue to have to deal with these circumstances. Employees who work for smaller employers will continue to be at risk of losing their jobs or other reprisals in these circumstances, unless the legislation is changed.

As the interim report notes on page 211, "Indeed the very nature of such leaves, being related to emergencies precludes much notice being given in most circumstances." Not only does the nature of such leaves preclude much notice, it also often precludes any choice in whether or not to be absent from work. This is not something that should be left to the discretion of employers, particularly employers who only apply the minimum requirements of the *ESA*.

2. **Eliminate exemptions that do not permit employees – largely professionals – to take PEL if doing so would constitute professional misconduct or dereliction of duty.** Most other jurisdictions in Canada that provide leaves similar to PEL do not have similar exemptions. As indicated in #1 above, employees do not generally have a choice in being absent from work in the circumstances this leave anticipates. In addition, professionals who are covered by collective agreements often do not have this exemption to their access to similar provisions in those agreements, e.g. sick leave. Employers should have contingency plans so that they can provide professional services and carry out duties in such circumstances, rather than leading some employers to unrealistically rely on the *ESA* exemption to try to prevent an employee from being absent in urgent situations.

3. **Separating the leaves could result in employees running out of one type of leave while other leaves are unused. Therefore, we recommend leaving the entitlement combined, with the associated flexibility.** From an EDI perspective it makes sense to keep the different types of leave (sick, bereavement, personal emergency) under an overarching PEL provision because it allows the most flexibility for employees to take the type of leave they need more often. For example, an employee who is a parent with a young child in daycare may use PEL more often to care for their child when sick (daycares do not generally permit attendance of sick children), whereas an employee with a chronic health condition may use PEL more often for sick leave, and an employee who generally doesn't take any sick or personal leave, may find they need to use much of the days off available in a year due to the death of close family member, perhaps in another country.
4. Ryerson University's Equity, Diversity and Inclusion division also recommends the following changes to PEL provisions in the *ESA*:
 - a. **Provide three days paid PEL per calendar year within the first 5 years of employment with an employer; four days paid PEL per year from 5-10 years of employment; five days paid PEL per year for employees with over 10 years of employment with an employer; and an additional 5 days of unpaid PEL per year on top of any paid PEL entitlement.** This provides a type of "earned" paid PEL that would not be overly onerous for employers to administer and the total number of both paid and unpaid days for employees with less than 5 years of employment with an employer roughly aligns with the average number of employee sick/personal/family days absent in Ontario in a year. Having additional paid PEL days with more years of service also helps to address the issue of more sick days taken by older employees. The evidence concerning sick leave in particular, which we are recommending continues to be part of PEL, indicates that employees are more likely to come to work when sick if the leave is unpaid. *The unpaid PEL provisions have limited benefit for employees in precarious jobs, primarily because any loss of pay likely creates significant financial hardship, such as not being able to pay rent, buy food, pay for utilities or pay for childcare.*
 - b. **A qualification period is not recommended, as employees should not be penalized because of unexpected circumstances that arise early on in their employment.**
 - c. **There should be language to indicate that PEL pay takes into account variable hours and part time work, which could mean that the actual pay during a leave would be based on hours worked within the last four weeks prior to taking the leave, similar to the public holiday pay calculation. Alternatively, the pay could be based on the scheduled hours that were missed.**

- d. Per section 50.(2) of the legislation, the paid PEL should apply to matters concerning the employee's spouse, etc. as indicated, but with the **last item (50.(2)7.) changed to, "a relative or individual who is dependent on the employee for care or assistance."** In some cultures, individuals other than relatives may be dependent on an employee for care or assistance.

- e. **Section 50.(7) should be removed.** This change doesn't prevent employers from making reasonable requests for evidence of eligibility for the leave. It does, however, remove a cue that may suggest to employers that their policies and processes should require evidence of eligibility each time a leave is requested or taken, as many do. In the Paid Sick Days section the interim report notes that the OMA encourages "employers to not require sick notes as doing so only encourages the spread of germs in the doctor's office waiting room." In addition, the interim report notes, "...many people have questioned the utility of medical notes which very often can only repeat what the physician is told by the patient, are costly, and which are of very little value to the employer and have little probative value in any legal proceeding." This type of request can set up an adversarial relationship between the employer and the employee and should only be made when there is a strong indication of abuse of the leave. Let's encourage employers to trust their employees more; evidence indicates that this can pay off in terms of employee engagement and performance.

Contact

If you would like more information on the research referenced in this submission, or would like to discuss this submission further, please contact Tamar Myers, Director, Strategic Planning, Assessment and Special Projects, Office of Equity, Diversity and Inclusion, Ryerson University, tmyers@ryerson.ca or by phone at 416-979-5000 ext. 7974.