July 4, 2016

Submission of the Canadian Association of Counsel to Employers to the Minister of Labour (Canada), the Honourable MaryAnn Mihychuk

Re: Proposed Right to Request Flexible Work Arrangements under the Canada Labour Code

Introduction: The CACE Perspective

CACE is an association of leading labour and employment lawyers who primarily advise employers across Canada. Our approximately 1,100 and growing members have broad knowledge and experience with employment standards rights such as Flexible Work Arrangements (FWAs) in Canadian, as well as foreign jurisdictions. CACE members are regularly called upon to provide advice to employers with regard to FWAs and are well versed in the law and policy considerations on this topic.

The Status Quo: Is there a problem?

1. The workforce affected by the proposed FWA legislation is the private sector subject to federal employment jurisdiction (the "Federal Sector"), which is a very small portion of the total Canadian workforce with unique characteristics. For the most part, Federal Sector workers work in large size businesses, with significant numbers employed by some of Canada's largest employers in banking, telecommunications and transportation. The Federal Sector has a relatively high level of unionization with unions that enjoy substantial bargaining power, which they have leveraged to achieve relatively favourable terms of employment. Many of these unions have already negotiated FWA rights of varying scope. Many of the large non-union employers, such as banks, already have FWA policies. Other Federal Sector employers presently consider common FWAs such as reduced or altered working hours on an ad hoc basis. Thus, like other stakeholder employer associations, CACE questions the need to legislate a right to request and potentially impose FWAs on employers. It is not aware of any evidence demonstrating that Federal Sector employees feel employers are not currently sufficiently flexible.

2. The most common and the most objectively meritorious reason employees request FWAs is to accommodate either family care obligations or a disability. Unlike the other major jurisdiction that has introduced broad FWA rights, the U.K., Canadian Federal Sector employees already enjoy substantial rights to "reasonable accommodation to the point of undue hardship" of family care obligations under our human rights legislation, the *Canadian Human Rights Act* (CHRA). They enjoy the same right to accommodation of disabilities, with comparatively lesser protection in the U.K. In particular, recent CHRA case law has dramatically expanded the employee right to the accommodation of family

care obligations. This means that the experience with and relevance of data on "the right to request" FWAs from other jurisdictions without such protections is of limited value. It also follows that any general FWA right will effectively only be needed and thus, primarily used by employees wanting lifestyle-based changes to their work. Given that fact, any proposed FWA rights should take into account the fact that employers already face considerable burdens in accommodating the family care and disability needs of employees. Requests for FWAs that are based on arguably less compelling interests than family care and disability needs should be given a lower priority in any legislative changes that are proposed.

3. It is also important to recall that in almost all such cases, an employee making an FWA request that the employer does not voluntarily accept amounts to a forced renegotiation of the terms of employment the employer had established with a view to maximizing productivity. The employee accepted these terms when hired or when they took their current position. Ironically, where an employer imposes a material negative change to terms of employment, such as major changes to the work schedule, this will, in most cases, constitute a "constructive dismissal", allowing the employee to quit and claim severance. Employers should not be forced to accept unreasonable changes to the terms of employment through FWAs imposed by third party adjudicators to accommodate employee lifestyle preferences when they are not permitted to impose the same changes on their employees to accommodate business needs.

4. That being said, employers also need more flexibility around hours of work, overtime pay and minimum pay requirements in the modern, more flexible workplace. The *Canada Labour Code*, Part III (the "CLC") offers them very little, particularly compared with provincial and US employment standards legislation applicable to other operations of Federal Sector employers and to their North American competitors. In particular, exempt classes of employees are very narrow under the CLC. Thus any rights to greater flexibility need to be available to both employees and employers. See the discussion at the end of this submission for further detail on this point.

<u>CACE Submission regarding the Scope of FWA Rights:</u>

5. While CACE therefore does not see a strong case for FWA amendments, CACE submits that should such amendments to the CLC nonetheless be made they should be done on the following terms:
    a. FWAs should only be available to employees who have completed one year of service—like the CLC unjust dismissal remedy. This ensures that potentially elaborate and costly FWAs are not implemented for employees with minimal attachment to the workplace. . Allowing FWA requests from the date of hire effectively amounts to a license to employees to reopen the negotiation of the terms of hire;
    b. FWA requests must be in writing outlining the scope or nature of the request, the reason for the request in general terms and any possible mitigating measures for the impacts on the employer and other employees. The second point need not entail full disclosure of health or other sensitive or private reasons for the request, but should provide a general idea of the reason. For employers trying to respond to a requesting employees' (potentially conflicting) needs or preferences, understanding the underlying reason can help persuade the employer to agree (e.g.. an FWA requested for reasons outside the employee's control may be accorded greater consideration than a mere preference to have Fridays off). Providing the underlying reason may also allow the employer to make alternative suggestions that address the underlying interests of the employee;
    c. Employers should be required to give reasonable consideration to an FWA request and provide a written response, which can include approval, rejection or acceptance with conditions or amendments. The written response should be required within a practical deadline given that many FWA requests, such as requests to work less (statistically the most common FWA request in the UK), require considerable planning by the employer. We suggest 30 days but with an employer right to extend the deadline for an additional 30 days. Setting a premature deadline will only end up leading employers to deny requests altogether if they lack time to consider the implications and measures to mitigate the impact on productivity, service levels, other employees and operations generally;
    d. Any FWA legislation must allow the employer to either reject or accept with conditions on a fair and broad list of grounds, including:

- the FWA will increase employer costs or decrease productivity or service levels by more than a trivial amount;
- the FWA would require reassignment of work which is not practical (e.g. the employee requests to work a 4 day week but the employer needs his services on the 5th day and cannot practically hire a qualified person for one day a week);
- the FWA entails additional work or effort on the part of other personnel which they are either unwilling to perform or it is not reasonable to expect of them;
- the FWA would negatively affect quality of service or production;
- the employee is not suitable for the FWA (e.g. working unsupervised from home) by reason of past performance or conduct;
- the FWA could result in the employer being unable to meet customer demand;
- the employer is planning changes to the workforce which are incompatible with the FWA;
- the FWA would result in the employer being in breach of any legal or contractual requirement (e.g. minimum staffing levels for an aircraft required by Transport Canada regulations; other obligations under a collective agreement); and
- the FWA would have an adverse effect on other employees or contractors, including teamwork and collaboration amongst co-workers and on employee morale.

e. While outside review of disputed employer responses to FWA requests is not necessary, if one is to be provided, such review should be done by specially trained Employment and Social Development Canada (ESDC) dispute resolution specialists who are knowledgeable about the employer's industry and trained in dispute resolution techniques such as mediation; (see discussion below re enforcement)

f. Assuming the amendments will provide for external review of denials of FWA requests, which, again, may not be necessary in our view, the standard of review should definitely <u>not</u> require employers to prove "undue hardship". This onerous standard is appropriate to fundamental human rights such as the accommodation of disability but not lifestyle/personal preference-based FWA requests.

Employers should not be required to incur substantial cost or impose burdens on other staff to accommodate these FWA requests. The appropriate test is to require the requesting employee to prove the employer had "no reasonable basis" for refusing the request under the permitted grounds given by the employer for the denial or conditions imposed on the request. Put another way, with FWA requests, the employer must only act reasonably. A third party with no economic stake in the business should not be empowered to effectively "manage" the employer's business by imposing potentially costly FWAs based on what the third party considers to be an "undue hardship". This approach ensures that the reviewing decision-maker will not impose unrealistic or unreasonable FWAs. For example, a telecommunication service technician who is paid $35/hour asks to work 4 shifts of 8 hours instead of 5 each week, but the employer requires a specific level of staffing at all times and it is not practical to hire a qualified technician for one day a week. The only possible "solution" is to incur overtime costs of over $140 per week or $7,280 a year and impose the burden of performing 8 hours of overtime every week on other technicians that they may not want to have to perform on an ongoing basis, all to facilitate this employee's lifestyle based request. In our submission, employers should be able to deny this sort of FWA request.

g. Limits should be placed on the scope and number of requests for FWAs that are permitted to be made in a year, with a limit of no more than 2 per year and the employer's right to disregard repetitive or abusive FWA requests should be expressly set out;

h. FWA requests should be limited to requests for changes of long to medium term duration, as distinct from one off requests (e.g. "I need to take my child to hockey camp at 3 pm on the following 3 Fridays; can I get off work early and make up the time") which would continue to be addressed under leave rights and/or duty to accommodate;

i. To the extent that an employee requests to work at home as an FWA, the employer should be exempt from any general Occupational Health and Safety obligations in respect of the home workplace including section 124 requirements. In fact, to reflect the much more limited responsibilities an employer should have for a home or other employee-selected workplace, an amendment should be made to the Regulations to ensure that an employer's workplace safety

obligations in respect of such employee-selected places of work is limited to equipment or procedures imposed or provided by the employer; and

j. Employers should have the right to modify or cancel an FWA every 12 months based on the same grounds as they can deny FWA requests and a right to modify or cancel a previously granted FWA at any time on 2 weeks' notice where there has been a change in circumstances making such a ground applicable.

Avoiding Duplicative Requests and Conflicting Results

6. The final critical issue is ensuring that any new FWA right does not duplicate existing rights of accommodation under the *Canadian Human Rights Act* or FWA-type rights under a collective agreement. In the case of the latter, negotiated FWA rights are the product of collective bargaining and therefore reflect compromises which must be respected. Furthermore, implementing FWAs will often conflict with seniority rights under the collective agreement (for example, many collective agreements offer flex work or favourable work schedules based on seniority). FWA requests by less senior employees cannot override the seniority principle. We suspect that this perspective on the primacy of negotiated FWA rights is shared by labour unions.

7. Similarly, any new FWA right should not duplicate existing rights to accommodation under the CHRA on grounds of family status, disability, religion etc. With respect to family care and disability-based FWAs, it is neither fair nor efficient that employees be able to apply for similar accommodation under two statutes for the same reason. This wastes employer and government resources; employers often have little choice but to invest significant management time and legal fees in defending such claims so the costs of duplicative procedures only doubles that burden. Allowing parallel FWA and CHRA accommodation requests can also facilitate tactical abuse of the two rights by employees and could lead to conflicting outcomes, neither of which is desirable. Thus, for the same reasons the unjust dismissal remedy is not available where a dismissal is alleged to be based on a CHRA protected ground of discrimination (see section 242(3.1)(b) and the interpretation of it in the case law), the FWA procedure or at least any dispute resolution procedure should not permit requests or complaints that are based on CHRA grounds.

8. We therefore propose that:
    a. any CLC "right to request" an FWA should not be available to a unionized employee. Unionized employees have the power to bargain for such rights and many have done so. Those who have not must be deemed satisfied with current employer policy and practice. Should that change, their union can bargain for FWA rights. This would parallel the unjust dismissal remedy, which is not available to unionized employees; and
    b. employees who wish to request an FWA based on a family care obligation or disability must elect to request accommodation under the CHRA or under the CLC general FWA provisions, but not both. Thus if an employee elects to make an FWA request, accommodation for the same reason cannot be later sought under the CHRA. This will require parallel amendments to the CLC and CHRA excluding requests which are substantially similar to prior CHRA accommodation or CLC FWA requests.

Compliance Programmes for CLC

9. The Consultation Paper also asks for feedback on measures to improve compliance with the CLC more generally. It is the view of CACE that overall there is a high level of compliance with the CLC in the Federal Sector. This may be due to the fact that most Federal Sector employers are larger and thus more knowledgeable about their obligations with the resources to comply.

10. CACE believes the existing legislative framework is adequate to ensure a high level of compliance. The current system is mainly complaint-driven but ESDC inspectors have authority to investigate based on reports of non-compliance or to initiate investigations of "high risk" employers or sectors. CACE strongly advises against allowing ESDC to investigate based on anonymous tips. Anonymous tips are far too easily abused, either through erroneous, uninformed complaints or complaints made in bad faith or for collateral motives (e.g. to get "revenge" on a manager or employer). Mandating investigation of anonymous complaints avoids any accountability for groundless or speculative complaints. CACE sees no evidence that legitimate incidents of violations of CLC employment standards are not being reported to ESDC. While third parties can

report breaches of the CLC today, they must identify themselves, which ensures a minimum level of accountability.

11. Existing wage and other employment standards investigation powers (section 249 of the CLC) and procedures available to ESDC staff are both adequate and appropriate.

12. Mediation is one of the most effective tools for resolving workplace disputes of all types, including CLC Part III breach claims, such as disputed FWAs. The CLC should be amended to specifically authorize the parties to agree or ESDC to, in suitable cases, require mediation before a complaint proceeds to formal adjudication.

13. ESDC should be given a new power to rule that some unjust dismissal complaints are without sufficient merit to proceed to a hearing i.e. a preliminary right to dismiss weak or abusive claims without forcing the employer to incur the legal expense and effort of preparing for and defending the claim on the merits at a formal hearing. Such early dismissal provisions exist in human rights legislation already and work well.

14. Existing legislation allows for ESDC to provide preventive training or information to assist employers in complying with the CLC, including in considering FWA requests etc. No amendment is needed here, although allocating resources to more communications with employers, managers and employees, including on how to mitigate the impact of FWA requests, may be helpful.

Enforcement of CLC

15. The Consultation Paper also asks for feedback on possible amendments to the enforcement remedies and mechanisms in cases where the CLC has been breached. It is fair to say the CLC is currently incomplete in this area. The primary enforcement focus should continue to be remedial, focusing on the payment of unpaid wages or other amounts due to employees arising from the breach of the CLC. In cases where wages or other monetary awards are made, they should be subject to a reasonable rate of interest such as prime plus 2% from the dates the amounts awarded should have been paid.

16. Highly punitive orders or awards are not appropriate given the informal investigation methods used to assess claims of CLC Part III breaches (other than unjust dismissal which already has a broad range of available remedies). To further encourage employer compliance and facilitate early settlement, the CLC could authorize ESDC decision-makers to award a **modest** administrative penalty (e.g. in BC, $500 per section breached) against repeat or intentional violators with escalating fines only in cases of severe repeat violations.

Other Flexible Work Force Reforms to CLC Part III

17. Following on the theme of the Consultation Paper, the CLC Part III needs to be reviewed and modernized to give employers more flexibility, including:
    a. broader, more realistic overtime and unjust dismissal exemptions for well paid professionals, including: high tech professionals and others not falling within current narrow exemptions, bringing them more in line with major provinces. Currently, many salaried high income earning professionals who may not have substantial decision making powers fail to qualify as overtime-exempt under strict existing case law defining "managers" and "persons exercising managerial authority". To further address this lack of flexibility, an income-based exemption for highly paid employees, such as found in Manitoba and US legislation, would be appropriate. For example, an employee earning total cash compensation equal to 1.5 times the EI maximum insurable earnings, which is based on the average industrial wage, should be exempt. Currently the EI maximum insurable wage is $50,800 so the income threshold would be approximately $75,000 under this proposal;
    b. exemption from the minimum "call out pay" of 3 hours for work done on a phone, smart phone, home computer or similar devices at a time and place of the employee's choosing (i.e. at home or wherever the employee happens to be based on the employee's own personal schedule) outside regular working hours i.e. only pay for the actual time worked with either no minimum "call out pay" when on a non-working day or a low minimum "call out pay" such as ½ or 1 hour. This is fair for the brief periods of email or telephone activity many employees need to perform on weekends or other non-working day. Such amendments will

increase employers' ability to offer flexible work as it will not entail possible disproportionate wage costs such as minimum call out pay of 3 hours;

c. a general reduction in the minimum "call out pay" (i.e. the minimum number of hours that must be paid if an employee starts work on a day not otherwise worked) from the current 3 hours to 1 hour to facilitate flexible work arrangements; and

d. legalize widespread ad hoc "time shifting" whereby employees are allowed to take time off then make it up on another day but will sometimes trigger overtime thresholds in doing so by creating a general exemption from overtime pay where triggered by "time shifting" that occurs with employee agreement.

18. To ensure an even-handed approach for both employees and employers, CACE respectfully suggests such long overdue amendments listed above, be included in one amending law along with changes with regard to FWA rights. This should only happen however, after a complete and less rushed consultation on all proposed changes. We recommend against introducing a broad range of changes in piecemeal amendments. Many of the reforms noted above are interlinked. For example, the need to create more flexibility with respect to minimum call out pay to allow for teleworking is a common FWA request. Consolidating all reforms on the Minister's agenda will have a more balanced impact on Federal Sector employers, and will allow for one round of training and policy amendment for HR departments.

Respectfully, the Canadian Association of Counsel to Employers

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