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SENT VIA E-MAIL

C. Michael Mitchell and The Honourable John C. Murray
Special Advisors - Changing Workplaces Review
ELCPB 400 University Ave., 12th Floor
Toronto, Ontario M7A 1T7

Dear Special Advisors:

Re: Consultation submissions regarding personal emergency leave provisions

We are writing to provide you with additional information and feedback with respect to the proposed changes to the personal emergency leave ("PEL") provisions of the *Employment Standards Act, 2000*, SO 2000, c 41 (the "*ESA*"). These submissions are being made on behalf of one of our clients, an Ontario-based manufacturer with over 10,000 employees.

Employer policies may already provide greater rights or benefits than the PEL provisions

As suggested in oral submissions by a participant to an earlier stage of the Review, the PEL provisions may have "reached out to the wrong target audience". Large employers in the manufacturing sector generally provide their employees with generous leave benefits that are greater than those provided under the *ESA*. In spite of this, as the PEL provisions only apply to larger employers with a minimum of 50 employees, they have created confusion, additional administrative costs, and a decrease in productivity for these employers, without necessarily improving the condition of vulnerable employees who do not have access to extensive employment benefits.

Our client manages both unionized and non-unionized operations. Our client's leave and benefit policies already provide employees with greater rights and benefits than those provided by the PEL provisions, both in the unionized and non-unionized settings.

The rules regulating leave eligibility applicable to our client's unionized operations are set out in applicable collective agreements. Under these collective agreements, unionized employees are entitled to personal leave, medical leave, bereavement leave, leave for jury duty, pregnancy/parental leave, union

leave, education leave, partial leave days for medical appointments, as well as organ donor and military reservist leave. Jury duty, bereavement and partial leave for medical appointments are paid leaves. Unionized employees also have access to short-term disability ("STD") and long-term disability ("LTD") benefit plans.

Non-unionized operations also benefit from generous leave policies. For instance, our client's non-unionized employees are already provided with several types of paid leave that are more generous than the unpaid days pursuant to the PEL provisions (bereavement leave, STD and LTD), which cover the same situations for which PEL is available, as well as additional benefits (e.g. floating paid holidays). In addition, the employer's policy has the benefit of a clearly delineated call-in and reporting procedure.

The existence of the PEL provisions simply causes additional confusion for both employers and employees, as employees who are not entitled to both PEL and paid leave might at times think that they are in fact entitled to both. In fact, if an employee qualifies for a leave of absence that is either paid or that provides a level of income replacement (e.g. STD/LTD), any time off work on the paid leave of absence, that also meets the emergency leave criteria, would be automatically deducted from the available days of unpaid PEL. This creates an additional administrative burden for the employer without resulting in improved benefits for employees.

The current PEL provisions result in lost productivity and are prone to abuse

An internal analysis of our client's leave and absenteeism data has revealed the following trends:

- The total average number of PEL days taken per month was 3,548 in 2015.
- In 2015, approximately 42,619 days, or 340,953 hours, of production was lost due to PEL, at a cost of more than $8,000,000.00.
- Since the inception of PEL, it has cost our client approximately $130 million in lost days/hours, exclusive of lost production due to PEL-related manpower shortages, STD/LTD costs, lost production resulting from regular days off, overtime costs, and the costs of maintaining extra employees to help cover off unexpected absences due to PEL, and training costs for such extra employees.

The above-noted figures support the following general propositions regarding the challenges caused by the existing PEL provisions:

- Most employees who do take advantage of the PEL provisions appear to view PEL days as unqualified entitlements, rather than leave days available only in emergency situations involving themselves or specified family members.

- PEL days are difficult to monitor. While in some circumstances the employer is entitled to request additional information when reasonable (e.g. medical notes for PEL days tied to personal sickness or injury), other types of PEL days arguably do not (e.g. PEL days taken to deal with "urgent matters"). It is, however, relatively easy for employees to attribute a PEL day to a reason that may require them to provide less documentation, therefore potentially expanding the number of leave days available for sickness or other matters. As such, PEL is prone to abuse.

- PEL days are difficult to administer and integrate with existing employer leave provisions. As some PEL days overlap with leave benefits already provided by the employer, while others do not, it is often difficult for the employer to determine which PEL days should properly be granted (as there are no contractual provisions providing a greater right or benefit), and which leave days should not be granted. This also further hampers the employer's absenteeism management efforts, thereby negatively impacting productivity.

The current PEL provisions are confusing and difficult to administer

As noted above, PEL provisions currently overlap with contractual leave entitlements, as well as with other statutory leave entitlements set out in the *ESA*. The overlap between PEL and other statutory leaves is particularly problematic. The Ministry of Labour's website states as follows with respect to this topic:

> Personal emergency leave, family caregiver leave, family medical leave, critically ill child care leave, and crime-related child death or disappearance leave are different types of leaves. The purposes of the leaves, their length, the individuals with respect to whom they can be taken, and eligibility criteria vary.
>
> See the respective chapters of this Guide for more information on each leave.
>
> An employee may be entitled to more than one leave for the same event. Each leave is separate and the right to each leave is independent of any right an employee may have to the other leave(s).

The limited information provided by the Ministry and the ambiguity caused by the overlap between PEL and other *ESA*-protected leaves has remained a source of confusion for employers and employees alike.

In addition, under the current PEL provisions an employee may be eligible for PEL days because of an "urgent matter" concerning a specified family member. While the Ministry of Labour has indicated that an "urgent matter" is an event that is unplanned or out of the employee's control, and which raises the possibility of serious negative consequences (including emotional harm) if not responded to, there is no clear definition of what does or does not rise to the level of an "urgent matter" under the *ESA*. Not only does this ambiguity promote abuse of the PEL provisions, but it also creates practical challenges.

For instance, employers that are required to administer multiple leaves may find it difficult or practically impossible to determine whether their current leave coverage provides such a benefit. In turn, this ambiguity complicates the determination of whether the relevant PEL days should be granted in addition to other leaves already granted by the employer, or whether these would be subsumed on the basis that the contractual entitlements provide a greater right or benefit. This is a significant problem for a manufacturing employer that manages thousands of employees.

It is important to also note that the PEL provision of the *ESA* is not necessary to protect employees in many circumstances as a result of other protections contained in Ontario legislation. For example, the *Human Rights Code* ("*Code*") provides several protections to employees who may be absent due to disability or family status issues. When the PEL provision was introduced in the *ESA*, the *Code* was not interpreted as providing sufficient protection for employees who needed to be absent from work to deal with child care issues. Since that time period, the ground of family status under the *Code* has been interpreted to provide considerable protection with respect to work time missed due to child care and/or elder care issues. Further, the *Workplace Safety and Insurance Act, 1997* protects employees absent due to a workplace injury or illness. The overlapping legislative provisions cause further difficulty for employers and confusion among employees.

A more practical and balanced solution

In order to address the confusion resulting from the overlap between PEL days and other types of *ESA*-protected leaves, our client recommends breaking down the 10-day PEL into separate leave categories, with separate entitlements for each category but with the aggregate amount of leave days still amounting to 10 days in each calendar year.

This type of amendment to the *ESA*, which has already been suggested in the Interim Report, would allow for a specified number of unpaid leave days to be allocated to personal illness/injury, bereavement, dependent illness/injury and/or dependent emergency leave. Adopting this approach would

solve the confusion that has promoted abuse and added to employers' administrative burden, while maintaining the total number of days of leave unchanged. In addition, amending the *ESA* to remove the ambiguous concept of "urgent matter" may produce further clarity. If the concept of an "urgent matter" is retained at all, our client would respectfully request that, at the very least, the *ESA* be amended to provide a clear definition of what rises to the level of an "urgent matter".

Our client respectfully requests that any amendments to the existing PEL provisions of the *ESA* be made in further consultation with employers of all sizes. This would allow for the PEL provisions, which are of broad application to Ontario employers, to be amended in a way that is more likely to gain acceptance and, therefore, be correctly applied and implemented across the applicable Ontario workplaces.

Should you have any questions or concerns regarding our comments above, please do not hesitate to contact us.

Yours very truly,

Robert Bayne
cc Client