

October 7, 2019

URGENT

Honourable Harry Bains

Minister of Labour

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Honourable Carole James

Minister of Finance

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Mitzi Dean

Parliamentary Secretary for
Gender Equity

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Dear Ministers:

**Re: Consultation Submission on Proposed Pay Mandated for Leave taken
by Victims of Sexual and Domestic Violence**

On behalf of the Chartered Professionals Human Resources Association of British Columbia and Yukon ("CPHR BC & Yukon"), we write as requested to provide our feedback on the proposal to mandate employers to pay for some days of leave taken by victims of sexual and domestic violence ("VSDV"). Although Minister Bains is familiar with our organization, we will briefly introduce our organization for the benefit of Minister James and others who may read this document.

Background on CPHR BC

CPHR BC & Yukon represents over **6,200 human resource professionals and their service providers and advisors in BC and the Yukon**. Most of our members work every day on the front lines of labour/employee relations within the framework of the *Employment Standards Act* ("ESA") and applying it every day, whether as HR professionals or as advisors to employers. So our members are not only directly affected by any changes to the ESA but offer a wealth of practical experience on the topic of this consultation. We are thus uniquely positioned to provide insights into the

practical impact of proposed further ESA change to mandate some paid days for VSDVs. Our members, the **more than 2,650 organizations they work for**, and the employees of the organizations where our members work will be directly affected by the proposed change to the ESA.

The Background

We want to start by confirming that we supported and continue to support the creation of both types of job protected leave for VSDVs in the recently passed amendments to the ESA. They create explicit and flexible job protection for the most common needs for time off work attributable to sexual and domestic violence.

That being said, the current structure of personal leaves and compensation for those leaves in B.C. and, until relatively recently, most of the rest of Canada was two-fold:

- a) The right to take leave for a personal reasons from bereavement through maternity was protected by the ESA but with no requirement that any of the leave time be paid, even something as basic as sick time;
- b) Compensation for such leaves was dealt with through a combination of:
 - a. Employer provided or, in unionized workplaces, collectively bargained paid days off e.g. paid sick days; and
 - b. For employees with no employer sponsored pay for leaves, access to benefits under the Employment Insurance system. Currently, the expanded EI system offers 15 weeks of disability benefits, benefits during maternity and parental leaves and now care leave benefits.

Thus the proposal to require all employers to pay for between 2 and 5 days off for VSDVs annually is a huge new step in the evolution of leave rights for BC employers and their HR professionals. It imposes for the first time a statutory obligation to pay for a purely personal leave i.e. a leave which is not caused by or attributable to the employer.

While CPHR BC & Yukon did not have the time or resources to research data about current paid leave arrangements in B.C., from our members' experience, we can say the majority of B.C. employees already enjoy some paid days off for the most common after effects of sexual and domestic violence. Specifically, the most common impact of such violence is a period of mental and/or physical inability to work, which will likely be the most common ground for taking the leave. Roughly half of all employees in B.C. are able to access formal paid sick days for such absences with a difficult to measure additional number able to receive ad hoc pay for such sick time off from their employer. This employer sick pay would typically cover at least for the number of days for which ESA mandated pay is being proposed (3-5). For longer periods of absence where the victim is unable to work, all employees can all collect either private disability insurance benefits or EI disability. We also feel it is fair to say that many (but not all) employers provide pay for victims who need a few additional days for related activities such as those protected under the ESA leave which may not strictly speaking constitute "sick days" on an ad hoc discretionary basis.

So it is our assessment that the impact of mandating some paid days for VSDV will mainly consist of:

- A. Forcing some employers, mainly smaller private sector employers with no paid leave of any kind, to pay for some VSDV leave days; and
- B. Requiring employers which have already agreed to provide pay for some personal leaves to incur a modest amount of additional paid leave costs for VSDV leave takers. This will likely be a net additional cost to almost all such employers since, to our knowledge, very few policies or negotiated paid leave rights include paid leave for VSDV currently.

The bigger policy question is whether it makes sense to impose the first requirement under the ESA for all employers to pay for personal leave for VSDV leave takers or stick with the current structure under which pay for personal leaves is either employer provided (including union negotiated) or paid by the EI system. As noted above, we believe that there should be compensation for VSDV leave takers, but, on policy and consistency grounds, would suggest this compensation should come from the EI system

which effectively spreads the cost amongst all employees and employers in Canada rather than imposing the cost on the particular employer of the VSDV leave taker. Providing EI benefits would align with our current system under which other similarly deserving leave takers such as the disabled or women giving birth currently generally receive only EI benefits. We would add that there is no reason that EI benefits could not start from the first day of leave.

Members of our Board recently attended a presentation by the EI Commissioner in which she indicated the Commission is studying and preparing amendments to the Employment Insurance Act and its regulations to add an EI benefit for VSDV leave takers. Given the widespread support for VSDV across Canada, it would appear reasonable to anticipate the introduction of EI benefits for VSDV leave takers in the next 12 months. New EI benefits for care givers were tabled in March and implemented within months recently.

We acknowledge that for all leave takers EI benefits at 55% of wages (but capped at 55% of the Average Industrial Wage) will be considerably lower than their full pay, but as a society we seem to accept that when employees are off work for EI eligible personal reasons of any kind, this is a reasonable level of compensation which keeps the cost of providing these benefits, as well as the temptation to abuse the benefit, in check.

The HR Perspective

As HR Professionals, we see two further practical problems with mandating pay for VSDV leave takers.

Firstly, employers required to pay for days off for VSDV will have a much greater incentive to demand evidence of two highly sensitive related points:

- a) Proof and/or details of the actual sexual or domestic violence experienced by the employee or by the employee's "eligible family member"; and

- b) Proof and/or details that due to the violence the leave taker must undertake one of the protected leave activities (e.g. looking for new accommodation) during working hours.

We note the new ESA VSDV leave rights specifically allows employers to require such proof and we support that on general principle. Unfortunately, in the case of VSDV leave, the information employers will be demanding is, in most cases, excruciatingly personal and sensitive. Indeed, being asked to recount the events leading to the leave may, in some cases, retraumatize and embarrass the leave taker. We are concerned that employees will not be comfortable providing such evidence to their employer. In the majority of small and medium-size workplaces, there is no HR department so the information would be disclosed to the leave taker's manager or the business owner. Certainly, we believe HR professionals will be very uncomfortable collecting and safeguarding such personal and sensitive information. While in theory the same information can already be requested just to take the current unpaid ESA leave, we believe employers will, in practice, allow employees to take the leave without asking for more information but be more likely to actually request back up information and proof if they are obliged to pay for the time off.

By contrast, if an independent agency like the Employment Insurance Commission reviews evidence of the need for the leave, this potential privacy concern is avoided. We note the Commission is already adjudicating sensitive claims for critical care and disability leaves and is better placed to undertake this task and protect the data it collects on such sensitive topics.

Our second concern as HR Professionals is that in the many workplaces where no pay is available for equally deserving leaves such as disability or bereavement leave, other employees taking those leaves may not understand or resent the preferred treatment VSDV leave takers obtain in receiving ESA mandated pay for their leaves.

It is very difficult and invidious to compare the moral or economic merits of mandating pay for some important personal leaves but not others. Certainly it is possible to conceive of scenario where an employee suffers a relatively lower level of psychological harm which constitutes "sexual violence" thus giving rise to paid leaves rights, whereas

employees in those workplaces facing equally heartbreaking situations involved sickness, injury (including serious injury arising from a non-sexual assault) or bereavement would not be entitled to any pay from their employers. It will fall to our members to explain that what some employees may perceive as unequal paid leave rights is mandated by the ESA if paid leave for VSDV is introduced.

Finally, while our association has not sought a legal analysis, we would point out that introducing mandatory paid leave for one group of ESA leave takers leaves open the door to a potential Charter challenge under section 15 equality rights. Existing human rights case law holds that when administering pay and benefits during leaves, employers must act fairly and not discriminate against employees taking similar types of leaves. It is conceivable that a requirement to only pay for VSDV leave days could be found to discriminate relative to other deserving leave takers such as the injured or ill or, alternatively, based on sex based on the evidence that most VSDV leave takers will be female.

Conclusion

To summarize, CPHR BC & Yukon would recommend pay for VSDV leaves be introduced through expanded EI benefits which effectively and appropriately "socializes" the cost of what is ultimately a need for income during time off work for a personal reason. Providing pay through EI also avoids the need for employers to require highly sensitive, potentially embarrassment causing about the need for the leave from their employees.

In the alternative, in response to the other questions in the consultation on-line questionnaire, we would recommend any paid days be limited in number to 2 or 3 days per year, in line with several other provinces, and that the existing right of employers to require reasonable proof of the need for the leave to be maintained as currently drafted. In practice, most employers will not require it but employers should be entitled in appropriate cases to require proof of grounds for taking the leave if they are being required to provide pay. The current general wording of the employer right to require "reasonably sufficient proof" is appropriate given the myriad practical situations in which employees could request such leave given the broad definition of "domestic or

sexual violence” and the fact that the leave can be taken to support an “eligible family member” who is the actual victim.

In conclusion, we thank you for your consideration of these submissions and would be happy to answer any questions about this letter.

Chartered Professionals in Human Resources, B.C. & Yukon

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