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# Regulations Amending the Canada Labour Standards Regulations (Number of Weeks): SOR/2020-191

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Her Excellency the Governor General in Council, on the recommendation of the Minister of Labour, pursuant to paragraph 239.01(13)(b) <sup>a</sup> of the *Canada Labour Code* <sup>b</sup>, makes the annexed *Regulations Amending the Canada Labour Standards Regulations (Number of Weeks)*.

## Regulations Amending the Canada Labour Standards Regulations (Number of Weeks)

### Amendment

**1 Section 33.1 of the *Canada Labour Standards Regulations* <sup>1</sup> is replaced by the following:**

**33.1** For the purpose of subsection 239.01(1) of the Act, the number of weeks of leave to which an employee is entitled is 28.

### Coming into Force

**2 These Regulations come into force on the day on which they are registered.**

## REGULATORY IMPACT ANALYSIS STATEMENT

*(This statement is not part of the Regulations.)*

## Issues

The *COVID-19 Emergency Response Act* amended Part III (Labour Standards) of the *Canada Labour Code* (the Code) to create a temporary new leave to allow employees in the federally regulated private sector to take unpaid job-protected leave if they are unable or unavailable to work for reasons related to COVID-19. The leave related to COVID-19 was designed to complement the Canada Emergency Response Benefit (CERB), with the CERB providing income support and the leave providing federally regulated employees with access to job-protected time away from work. The Code sets the maximum length of leave at 16 weeks, or another number of weeks prescribed by regulation. On June 26, 2020, the maximum number of weeks of income support payments under the CERB was increased from 16 to 24. On July 10, 2020, the *Canada Labour Standards Regulations* (CLSR) were amended to increase the maximum length of the leave related to COVID-19 to 24 weeks to align with the new maximum number of weeks of income support payments under the CERB.

On August 20, 2020, the Government announced its intention to increase the maximum number of weeks of income support payments an employee can receive under the CERB from 24 to 28 weeks. This change is now in force. Without corresponding changes to the job-protected leave, the maximum number of weeks of benefits of the CERB and the maximum length of the leave would fall out of alignment. This misalignment may cause confusion for federally regulated employees whose leave would expire after 24 weeks but who would continue to be eligible for an additional four weeks of benefits under the CERB. These employees may mistakenly believe that their continued eligibility for CERB payments entitles them to additional job-protected leave and could face disciplinary action from their employer, including loss of employment, if they choose to remain at home beyond their initial 24-week leave period.

If the maximum length of a leave related to COVID-19 is not extended to 28 weeks, an employee who began a leave and applied for the CERB on the first day it was available would no longer be entitled to the leave as of 00:01 on September 9, 2020, despite the fact that they would continue to be entitled to income support benefits under the CERB until September 27, 2020.

## Background

The COVID-19 acute respiratory disease is a condition in which affected individuals can develop fever, cough and/or difficulty breathing. COVID-19 has clearly demonstrated that it can cause severe, life-threatening respiratory disease. In more severe cases, infection can cause pneumonia, severe acute respiratory syndrome, kidney failure and death.

Canadians have been urged to maintain their vigilance and follow public health guidance as much as possible to contain the spread of the disease, and many workplaces continue to be closed. Beyond this, many employees whose workplaces remain open are unable to work due to contracting COVID-19, self-isolating, or caring for a child or family member who is sick or quarantined, or who is unable to return to their school or other care facility as a result of the disease. These employees are taking job-protected leave under the Code or provincial labour standards legislation.

## Objective

The objective of the *Regulations Amending the Canada Labour Standards Regulations (Number of Weeks)* [the Regulations] is to ensure that employees in the federally regulated sector that are unable or unavailable to work as a result of COVID-19 are able to continue to take job-protected leave without risking disciplinary action from their employer.

## **Description**

The regulatory amendment, made pursuant to paragraph 239.01(13)(b) of the Code, amends section 33.1 of the CLSR to extend the maximum allowable length of a leave related to COVID-19 from 24 weeks to 28 weeks. As a result, the maximum allowable length of a leave related to COVID-19 in accordance with subsection 239.01(1) of the Code will be 28 weeks. This extension will match the proposed extension to the maximum CERB eligibility period.

## **Regulatory development**

### ***Consultation***

The amendment to the CLSR will provide additional unpaid, job-protected leave to federally regulated employees to ensure eligible employees can take time off work without fear of losing their jobs, and avail themselves of the extended CERB, in direct response to the immediate and extraordinary public health situation posed by the outbreak of COVID-19. This measure needs to be in place expeditiously to be effective. Consequently, no consultation was undertaken.

Based on stakeholders' reactions following the introduction of the leave related to COVID-19, it is expected that employee and employer organizations would not oppose the extension of the leave.

### ***Instrument choice***

The maximum length of a leave related to COVID-19 may be fixed by regulation. There is no discretion in choice of instrument. If the amendment to the CLSR is not made, employees who are unable or unavailable to work for a reason related to COVID-19 and who continue to remain at home for longer than 24 weeks could face disciplinary action from their employer.

### ***Modern treaty obligations and Indigenous engagement and consultation***

There are no implications for modern treaty obligations or Indigenous engagement in the Regulations.

## **Regulatory analysis**

### ***Cost-benefit analysis***

The analytical requirements for cost-benefit analysis (CBA) have been adjusted as it relates to the response to COVID-19. The CBA compares the baseline with the regulatory scenario to provide a qualitative assessment of the incremental costs and benefits. The CBA concludes that the amendment to the CLSR may impose incremental costs on employers as employees prolong

the length of their leave related to COVID-19 beyond the pre-existing 24-week maximum, up to the new 28-week maximum. The Government will also incur some costs to implement the regulatory changes.

### **Baseline scenario**

While schools and other care and recreational facilities are slowly beginning to reopen, many will be operating at reduced capacity to respect public health measures. In addition, a second wave or significant outbreak could result in these facilities closing again. Further, the risk associated with exposure remains high for certain populations. As such, some employees who began a leave related to COVID-19 may require more time away from work when their 24-week leave ends. In the absence of regulatory amendments to extend the maximum length of leave, employees who need additional time off will have exhausted their entitlement to leave and either resign or fully return to work. Returning to work or resigning would disentitle them to the CERB and/or harm their ability to care for loved ones affected by COVID-19, or to recover from the disease themselves. An employee who does not report back to work following the expiration of his or her leave could face disciplinary action from the employer.

### **Incremental scenario**

There is no data available on the number of employees in the federally regulated private sector who have taken a leave related to COVID-19, nor any information that could help estimate the number of employees who will need to take more than 24 weeks of leave.

The amendment to the CLSR entitles employees to a leave of up to 28 weeks, rather than up to 24 weeks, if they are unable or unavailable to work for reasons related to COVID-19. The table below provides an overview of the results associated with the incremental scenario.

The amendment has no negative cost implications for employees. It will allow employees who are taking the leave related to COVID-19 to extend their leave to a maximum of 28 weeks if necessary. It will also help avoid employee confusion as to why the CERB has been extended to allow for payments in respect of 28 weeks, but the leave related to COVID-19 is still subject to a 24-week maximum.

The amendment may impose incremental costs on employers insofar as employees prolong the length of their leave related to COVID-19 beyond the pre-existing 24-week maximum, up to the new 28-week maximum. More employees may also become aware of the leave as a result of communications efforts, potentially increasing uptake. The cost of an incremental week of leave depends in large part on the way in which employers reallocate the work of an absent employee. An employer who has hired replacements to cover the work of employees on leave would face incremental costs associated with renewing those replacements (or acquiring new replacements if the previous replacements cannot be renewed) for any additional weeks of leave an employee takes as the result of the Regulations.

By contrast, employers who pay other employees overtime to complete the work of an employee who is on leave would face incremental costs if that employee extended his or her leave as a result of the Regulations. Based on the average weekly wage in the federally regulated private sector, this incremental cost is estimated at approximately \$600 per incremental week of absence per employee. This assumes that each hour that the employee who is on leave would

have worked is covered by assigning overtime to another employee making the same wage. However, this may not always be the case, as employers may have many employees working less than full-time hours to whom the work of the absent employees could be reassigned with no incremental overtime costs. In addition, employers may face additional minimal costs to implement any necessary changes to their workplace policies and procedures.

The amendment also benefits employers. Employees who have exhausted their 24-week leave may believe that they must choose between returning to work and resigning. If they resign, the employer will have permanently lost the services of a trained employee. If they return to work despite their ongoing caregiving responsibilities related to COVID-19, they may experience elevated levels of distraction and stress, leading to lower morale and productivity for the employer. In addition, in rare circumstances, an employee who began his or her leave to care for a loved one affected by COVID-19 may become exposed to the virus later in their leave (e.g. during the 23rd week). If this employee were forced to return to work, this could pose risks to the health and safety of the workplace. The Regulations address each of these scenarios.

The cost of implementation of the Regulations for the Government of Canada will be low and absorbed through existing operating resources. The resources will be used to update communication and outreach materials, training materials, and inform Labour Program (ESDC) inspectors of the changes.

**Table – Overview of the results for the incremental costs and benefits**

Stakeholder	Cost item and description	Benefit item and description
Employees	No costs to employees have been identified.	The amendment <ul style="list-style-type: none"> <li>• entitles employees to a leave of up to 28 weeks, rather than up to 24 weeks, if they are unable or unavailable to work for reasons related to COVID-19; and</li> <li>• allows employees who are taking the leave related to COVID-19 to extend their leave to a maximum of 28 weeks if necessary.</li> </ul>

Employers	<p>Employers who pay other employees overtime to complete the work of an employee who is on leave would face incremental costs if that employee extended his or her leave as a result of the Regulations. This incremental cost is estimated at approximately \$600 per additional week of absence, per employee. This assumes that each hour that the employee who is on leave would have worked is covered by assigning overtime to another employee making the same wage.</p> <p>Employers who hire replacements to cover an employee's leave may face minor incremental costs associated with retaining or hiring replacement workers for periods of leave in excess of 24 weeks.</p>	<p>Employees who have exhausted their 24-week leave may believe that they must choose between returning to work and resigning. If they resign, the employer will have permanently lost the services of a trained employee. If they return to work despite their ongoing caregiving responsibilities related to COVID-19, they may experience elevated levels of distraction and stress, leading to lower morale and productivity for the employer.</p> <p>In addition, in rare circumstances, an employee who began his or her leave to care for a loved one affected by COVID-19 may become exposed to the virus later in their leave (e.g. during the 23rd week). If this employee were forced to return to work, this could pose risks to the health and safety of the workplace. The Regulations address each of these scenarios.</p>
Government	<p>The Government will incur minor implementation costs to update communication and outreach materials, training materials, and inform Labour Program (ESDC) inspectors of the changes.</p>	

### ***Small business lens***

Small businesses represented approximately 95% of all employers in the federally regulated private sector but employed approximately 13% of all employees in 2019. These businesses are generally less well equipped to absorb long-term absences of employees as compared to larger businesses. This is due to their small workforce and their consequently limited ability to reassign the absent employee's work to other employees. The regulatory change may therefore result in small businesses needing to retain or hire replacement workers to complete the work of an employee who takes additional weeks of leave (in excess of 24 weeks) after the Regulations come into force. This could result in minor costs associated with retaining and/or onboarding replacement workers to cover for the employee's additional period of absence.

Additional flexibility for small businesses was not considered, as the Regulations respond to the COVID-19 pandemic and the incremental costs to small businesses are small and expected to be limited to the short term.

### ***One-for-one rule***

The one-for-one rule does not apply, as there is no incremental change in administrative burden on business.

## ***Regulatory cooperation and alignment***

Responsibility for the regulation of labour matters is constitutionally divided between the federal, provincial and territorial governments. The federal government has exclusive authority to legislate labour standards for the federally regulated private sector (e.g. banking, telecommunications, broadcasting and inter-provincial and international transportation), federal Crown corporations, as well as for certain activities on First Nations reserves. This includes about 955 000 employees (or approximately 6% of all Canadian employees) working for 17 700 employers.

Labour standards for other sectors — such as manufacturing, construction, primary industries, and wholesale and retail trade — fall within the exclusive jurisdiction of the provinces and territories.

The Labour Program has worked with its provincial and territorial counterparts to discuss leaves of absence related to COVID-19 and to share information. To date, 10 provinces and territories have introduced leaves of absence related to COVID-19, i.e. Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan and the Yukon. With the exception of Yukon, each of these jurisdictions provide for an indefinite leave of absence where an employee is unable to work for reasons related to COVID-19, including resultant caregiving activities.

## ***Strategic environmental assessment***

A preliminary environmental scan revealed no environmental impacts associated with the Regulations.

## ***Gender-based analysis plus (GBA+)***

No information is currently available on the number of federally regulated employees who have taken, or who continue to be on, a leave related to COVID-19. It is therefore difficult to extrapolate the gender impacts of this proposal. However, it is expected that the primary reason why an employee would need to take the leave related to COVID-19 for its maximum length is to provide care to children or family members affected by the disease itself or by the continued closure of daycares, schools and other care facilities. This suggests that women may benefit disproportionately from the Regulations, as women continue to shoulder a disproportionate percentage of childcare and caregiving responsibilities as compared to men. <sup>2</sup>

In addition, lower-income workers are less likely to have the ability to work from home than higher-income workers. <sup>3</sup> Workers with the ability to work from home are unlikely to need to take job-protected leave if they need to self-isolate in accordance with public health advice, or if they need to provide occasional care to a child or other family member as a result of the pandemic. By contrast, those without the ability to work from home would need to take job-protected leave in order to self-isolate or to provide even limited care to a child or other family member. Extending the leave related to COVID-19 is therefore expected to disproportionately benefit low-income workers in the federally regulated private sector, especially as these workers will continue to have access to the CERB during the extended period of this leave.

# Implementation, compliance and enforcement, and service standards

## *Implementation*

The Regulations come into force upon registration.

The Labour Program (ESDC) will prepare interpretation and guidance materials for employees and employers on their new rights and responsibilities, specifically to allow employers time to implement any necessary changes to their workplace policies and procedures. These materials will be available on the Canada.ca website.

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## Footnotes

- <sup>a</sup> S.C. 2020, c. 5, s. 42(1)
- <sup>b</sup> R.S., c. L-2
- <sup>1</sup> C.R.C., c. 986; SOR/2019-168, s. 1
- <sup>2</sup> Moyser, Melissa and Amanda Burlock. 2018. Time use: Total work burden, unpaid work, and leisure (<https://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/54931-eng.htm>). Women in Canada: A Gender-based Statistical Report, catalogue No. 89-503-X.
- <sup>3</sup> Messacar, Morissette and Deng. 2020. Inequality in the feasibility of working from home during and after COVID-19 (<https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00029-eng.htm>), catalogue No. 45-28-0001.