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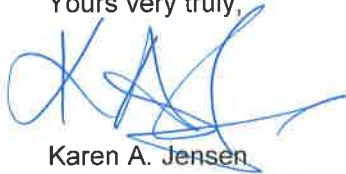
Standing Senate Committee on National Finance
The Senate of Canada
Ottawa ON K1A 0A4

Dear Madam/Sir:

Please find enclosed submissions of the Canadian Association Counsel to Employers (CACE) regarding the proposed amendments to the *Employment Insurance Act* and the *Canada Labour Code*.

We remain available to both testify either in English or French on this submission, and to answer questions directly. Geoff Howard, the project lead, would be pleased to answer any questions or to testify, should you find this helpful.

Yours very truly,



Karen A. Jensen
President, Advocacy Committee
Canadian Association of Counsel to Employers

c.c.: Jamie Knight, President, CACE; Mark Crestohl, Vice-Chair, CACE Advocacy Committee; Geoff Howard, Project Lead, member of CACE Advocacy Committee



**Submission of the Canadian Association of Counsel to Employers
to the Senate Finance Committee**

**Re: Proposed Amendments to the
*Employment Insurance Act and the Canada Labour Code***

Introduction: The CACE Perspective

The Canadian Association of Counsel to Employers, CACE, is a national not-for-profit association of management side labour and employment lawyers who are in private practice, or who work in-house for government or private-sector employers. Formed in 2004 as the only national organization of labour and employment lawyers representing the interests of employers in Canada, CACE now has over 1200 members working in every sector of the economy, including over 300 who work as in-house or government counsel. Our members have broad knowledge and experience with employment standards such as employee leave rights in Canada, as well as foreign jurisdictions. CACE members are regularly called upon to provide advice to employers with regard to employment legislation and are well versed in the law and policy considerations underlying such legislation, including the realities faced by employers and employees in workplaces across Canada, including those governed by federal employment legislation (the "Federal Private Sector" or "FPS").

The Federal Private Sector

The workforce affected by the legislation under review is the private sector subject to federal employment jurisdiction. While this sector comprises a small portion of the total Canadian workforce, it is a very significant component given its impact on the overall Canadian economy. Federal Private Sector workers mainly work in comparatively larger size businesses, with many employed by some of Canada's largest employers in banking, telecommunications and transportation. However, a substantial portion work for small to medium sized businesses, including small local airlines, bus companies, radio stations and air services. The Federal Private 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. Certainly, they have the bargaining power to seek increased leaves if that is a priority for their members. Many of the large, mostly non-union employers, such as banks, already have policies which allow for some extended leaves. Many other Federal Public Sector employers already consider requests for longer personal emergency or care need-based leaves of the type proposed, and grant them on an *ad hoc* basis. Given this background, we encourage the Senate to ensure Bill C-44 does not impose impractical broader and longer leave obligations where they are not needed, and where there will be, in our submission, significant unanticipated adverse consequences.

CACE also believes the Senate has an important role to play in reviewing these amendments as they were not the subject of any prior consultation with stakeholders to our knowledge.



Certainly CACE, which is regularly asked to provide inputs on such amendments by the government, was not asked for any in this case.

The Proposed Amendments

While, on their face, the amendments may appear to embody a natural progression of family-friendly legislation that has been embraced by many legislators across Canada, CACE wishes to ensure that the Senate has insight into the potential impacts of the Bill upon employers in Canada. While the thrust of our submissions relate to the Federal Private Sector, we wish to highlight that past changes to EI benefits for maternity, parental, critical illness and compassionate care have led to amendments to the applicable leaves of absence in provincial employment standards legislation. Accordingly, it is important for the Senate to consider the broader implications on the entire Canadian workforce (not just the FPS) when it is considering the impacts of Bill C-44.

While CACE has some concern regarding the overall cost to Canadian employers and employees of the enhanced EI benefits proposed in the Bill, we will focus our remarks on the changes to leaves proposed to the *Canada Labour Code* ("CLC") contained in, Bill C-44, the *Budget Implementation Act*. In CACE's view, the following proposed amendments warrant discussion:

Parental and Maternity Leave

1. CACE takes no issue with the proposed amendment to the CLC allowing maternity leave for birth mothers to start as early as 13 weeks prior to the delivery date rather than the current 11 weeks.
2. CACE's concern is with regard to the extended parental leave benefits proposed in Bill C-44. In the Federal Private Sector, both parents can currently take 37 weeks of parental leave to care for a new-born child or adopted child with EI benefits equal to 55% of the parent's weekly insurable earnings up to the average industrial wage, currently \$51,300. Bill C-44 would provide parents with the option to take the current parental leave duration with current EI benefit levels, or EI benefits for a period of 63 weeks, but at a lower benefit rate (i.e., 33%). Companion amendments to the CLC would allow parents to take the longer parental leave. This would mean that, in the most common situation currently, where the birth mother (i.e., a mother who delivers the child rather than an adoptive mother or a father) takes the maximum combined maternity and parental leave, she will be eligible for a protected leave of absence of up to a total of 18 months, and will be entitled to be reinstated to her old job (see discussion below re: amending the right of reinstatement). This represents a 50% increase in the leave duration from the current 12 months. This change will have a substantial impact on both the employer and the employee as discussed below.
3. Based on past extensions of maternity and parental benefits, CACE would expect the extended parental leave to be taken 90% by mothers¹ and we expect that a very significant number of those mothers will take the full 18 months, or, perhaps on average, something slightly less than maximum 18 months of leave, given the lower weekly benefit payable during the extended leave. However, even for non-birth mothers, the

¹ Outside of Quebec, only 11.9% of fathers claimed or intended to claim parental leave benefits. See Statistics Canada (2015) *Employment Insurance Coverage Survey 2013*. The Daily. November 16, 2016.



extension of the protected leave from 37 to 63 weeks amounts to a 70% increase in the duration of the leave. In CACE's submission, this extended leave will have a substantial impact on the employer, co-workers and the leave-taking employee, as discussed below. Further, parents taking the full extended parental leave do collect more EI than those who opt for the current level of parental leave at regular EI rates, which may further encourage the taking of an extended leave.

4. If the provinces amend their parental leaves to allow employees to use the extended parental benefits as has happened in the past, this will mean the parental extension will be available to all employees and thus impact all Canadian employers of all sizes.
5. On the assumption that a significant number of parents will take most or all of the extended leave, there will be another additional cost to the EI system and thus to both employers and employees who fund it. Therefore, the EI leave benefit extensions, will add to the cost of EI premiums for all employers and employees who finance the benefits on an approximately 50/50 basis.
6. The extended leave will be burdensome on employers, as well as co-workers and even the leave-taking employees. As noted above, based on past experience, it is likely that the extended parental leave will be taken almost exclusively by mothers who will end up being out of the workforce and out of touch with developments in their workplace for 18 months, rather than the current 12 months. Even under the current leave duration, employers struggle to integrate employees returning after 12 months of leave. The pace of change in most Canadian workplaces can be daunting to employees who are at work; it presents a dramatic challenge for employees absent for such an extended period of time to "catch up" on the changes to the employer's business, clients, processes and technology that are often introduced over the course of any given year.
7. Depending upon the size of the employer, the type of work performed by the leave-taking employee and the available labour pool within the geographic location, it can also be very challenging or even impossible for employers to find qualified temporary replacement workers in many cases (e.g. with pilots in smaller airlines). Even larger employers experience a significant loss of productivity during leaves taken by experienced, high productivity employees in cases where they are able to hire temporary replacements. For smaller employers or those in more remote communities, it is practically impossible to hire a productive replacement or, in many cases, anyone at all to replace the employee on leave. As a result, those employers may have to give up business and/or force other employees and the business owners to cover the tasks of the leave-taking employee.
8. Moreover, even in those circumstances where an employer is able to replace the leave-taking employee, the law currently provides employers hiring temporary employees for up to one year, greater flexibility in terms of ending the relationship. By potentially extending the replacement employee's employment beyond the current 12 month leave, employers will lose this flexibility. At the same time, employees who have worked for the company for as much as 18 months will have a greater connection with the company and have a greater expectation that they will be retained by the employer at the end of the leave.
9. Collectively, all of these additional costs of the extended maternity leave add up and amount to a significant burden and cost for employers and co-workers. For some



smaller employers who happen to employ several female employees who want to have families and take the current maximum leaves, the costs can threaten the viability of the business, which may survive on a modest profit margin.

The potential impact on the gender wage gap

10. CACE members and our clients are overall supportive of the government's agenda to narrow, and ultimately, eliminate the gender wage gap. CACE members also recognize that there are a myriad of factors at play that have perpetuated the gap. Many Canadian companies have implemented strategies to address the gap. CACE wishes to point out that since the proposed extended parental leave amendments do nothing to encourage increased usage of the leave by fathers, past experience tells us that the extended parental leave will be taken almost exclusively by mothers.
11. Various studies² show that the taking of longer maternity leaves correlates, unsurprisingly, with reduced career progression which in turn lowers the career earnings ladder of maternity leave-taking females. This makes obvious economic sense. Taking maternity leaves, particularly more than one, will inevitably reduce or, at best, defer, opportunities to take on higher paid jobs and result in knowledge, experience and skill deficits for leave-takers relative to non-leave taking peers in the fast-changing modern workplace. This translates into lower earnings in the long term.
12. While the Liberal party did promise to extend parental EI benefits in its platform, the Liberal government has also committed to reducing the remaining gender wage gap.³ The government has stated that it wants to reduce the gender wage gap by, amongst other things, encouraging greater and more diverse workforce participation of women. Ironically, the effect of the proposed extension of parental leave - a measure aiming to facilitate early child rearing and attachment of mothers - will almost certainly be to further aggravate the gender wage gap, both by leading to a lower overall female participation rate in the workforce, but more problematically, to a reversal in the long term trend towards a lower gender wage gap. Wage gap statistics that have been adjusted for hours worked and seniority demonstrate that leave-taking mothers may miss out on promotions and thus, wage increases. When they return to work they will have lost out in experience and tenure as compared to their colleagues, and they may also be less current, and thus, less productive, which may result in fewer promotions and hence, lower pay, and thus, a slower or stalled career progression.
13. This risk is well documented. In a 2013 OECD study⁴ examining the effect of leave entitlements on the gender earnings gap in 10 developed OECD countries, including Canada,⁵ between 1970 and 2010, the study concluded that the provision and gradual lengthening of paid leave contributed to a widening of the pay gap between male and female full-time employees.⁶ The study suggested that the reason behind the increase

² Ivona Hideg, "Longer maternity leave? Thanks, but no thanks", The Globe and Mail (18 April 2017), online: <www.theglobeandmail.com>.

³ Canada, Department of Finance, *2017 Budget Plan*, (Ottawa, 2017) at 223.

⁴ Oliver Thévenon & Anne Solaz, "Labour Market Effects of Parental Leave Benefits in OECD Countries" (2013) *OECD Social Employment and Migration Working Papers*.

⁵ Australia, Germany, Finland, France, Japan, Korea, Netherlands, Sweden, the United Kingdom, and the United States

⁶ Thévenon & Solaz, *supra* note 2 at para 82.



in the gap over time stemmed from women being the primary takers of parental leave, and the resulting slower career and earnings progression on return from leave.

14. Further, a United States (“US”) study⁷ comparing data from 1999 and 2009 from the International Social Survey Programme found that women in the US were more likely than their OECD counterparts⁸ to be managers, professionals, and employees in traditionally male-dominated professions. The study suggested the likely reason was because the US only mandates 12 weeks of maternity leave and that average leaves actually taken are far below Canadian levels, which encourages labour force commitment among women and reduces discrimination by employers.⁹
15. CACE acknowledges that there are many personal, social, and in some cases economic advantages for mothers who are able to take longer maternity leaves, including less stress for parents and the child(ren) during early childhood. CACE therefore, does not seek to characterize the negative impact on the gender wage gap as “worse” than these advantages, but merely points out that extending parental leave does come with social costs that conflict with the government’s agenda – which is widely supported by Canadian business - to narrow the wage gap.
16. CACE suggests that if the gender wage gap is to be reduced, which our members support, the government should focus instead on some or all of the following:
 - (a) Developing a national childcare strategy with appropriate funding. This is proven to increase female participation rates and earnings as seen in Quebec;
 - (b) Amending the Bill to require some parental benefits to be taken by fathers. This will partially equalize the risks of and burdens to employers of leave taking as between male and female employees in child rearing years. Experience in the Nordic countries has shown this helps lower the gender wage gap; and
 - (c) Working with the provinces to encourage women to try higher paying traditionally male jobs, while at the same time encouraging young men to get into well paid traditionally female jobs such as nursing or teaching.

Amending the right of reinstatement under the CLC

17. CACE has previously drawn the government’s attention to the unfair and impractical terms of the current *CLC* right of reinstatement for employees who take parental leave (the same applies to maternity leave, compassionate care leave, leave related to critical illness and leave related to death or disappearance of a child). CACE accepts and agrees that with regard to the current leaves under the *CLC*, the principle should be that the leave-taking employee should be no worse off in regard to job security than if they had not taken the leave. Unfortunately, the wording of the *CLC* goes further than that (and also goes further than most of the provincial statutes)¹⁰, which is particularly

⁷ Francine D. Blau & Lawrence M. Khan, “Why is the US Falling Behind,” (2013) *National Bureau of Economic Research Working Paper Series*.

⁸ Australia, Austria, Denmark, France, New Zealand, Norway, Portugal, Spain, Sweden, and Switzerland.

⁹ Blau & Khan, *supra* note 5 at 9.

¹⁰ In BC, section 54(2) of the *Employment Standards Act* requires an employer to place an employee in the position the employee held before the leave or in a comparable position. In Ontario, section 53(1) of



problematic with the proposed extension of the parental and critical illness leave in Bill C-44 (our comments on the latter proposal are set out further below). In particular, the wording of the reinstatement right provides that even if the employer can demonstrate a “valid reason” for why it cannot reinstate the employee in the position they occupied at the beginning of the leave, the employer is still required to reinstate the employee in a “comparable position”. Had the employee been at work throughout the leave in such a situation, they would likely have been laid off in the same way as their impacted colleagues.

18. Secondly, the right to reinstatement, particularly following an extensive leave, should be subject to the reasonable exception that an employee does not need to be reinstated where her/his position would have been eliminated or he/she would have been placed on lay-off if they were not on leave. Under the current wording of the *CLC*, it is arguable that an employer doing permanent restructuring or temporary lay-offs, which would have impacted the leave-taking employee, is required to reinstate the leave-taker to a comparable role, while co-workers who stayed at work can be terminated. In many cases, another employee who would otherwise have kept her/his job will have to be terminated to make room for the reinstated employee returning from leave. This is inefficient and unfair to co-workers.
19. The probability of a significant change to the employee’s position will increase significantly with the extension of the protected leave from 37 to 63 weeks. Moreover, the disruption that will be caused to the employer, co-workers, temporary employees, clients, suppliers, etc. by having to reinstate the employee to their position after such a lengthy absence will, in many cases, also cause significantly more hardship to all concerned.
20. Therefore, CACE recommends that employers have a modified reinstatement obligation with respect to employees taking a leave of more than 37 weeks. This could be an obligation to reinstate to the same or a comparable position when, and if, such a position is available and in priority to other internal or external candidates, provided the employee has the requisite qualifications.
21. While CACE believes a qualified right of reinstatement is appropriate for the entire FPS and in line with laws in other countries with long maternity and parental leave, in the alternative, such a qualified right of reinstatement should apply for smaller employers.
22. Making this amendment will go some way to showing the FPS employer community that the government is listening to its concerns and not just adding to its obligations.

Summary

23. To summarize this section, CACE recommends:
 - (a) Considering alternatives to extending parental leave that will not aggravate the gender wage gap and the career opportunities of mothers;

the *Employment Standards Act* provides that upon the conclusion of an employee’s leave, the employer shall reinstate the employee to the position the employee most recently held, if it still exists, or to a comparable position, if it does not.



- (b) Amending the right of reinstatement from all *CLC* leaves that exceed 37 weeks, to allow employers more flexibility to respond to changes to their business that will have occurred over the course of such extended leaves, including adding reasonable exceptions where the employee would have been temporarily laid off or lost their position due to reorganization, had they remained at work.

CACE Submission Regarding Changes to Critical Illness Leave

- 24. CACE supports, in principle, the protected leaves of absence in the circumstances that give rise to critical illness leave. CACE similarly supports the proposed extension of the leave in situations involving a critically ill adult. However, CACE submits that the proposal in Bill C-44 to extend the leave entitlement to “family members” of either a critically ill child or critically ill adult is presently drafted too broadly, giving rise to the potential for abuse by employees with the resulting burden being borne by employers and co-workers.
- 25. Critical illness leave under the *CLC* currently allows a parent, who has completed six consecutive months of employment, to take up to 37 weeks of unpaid (here used in the sense that there is no requirement for the employer to pay, but EI benefits may be available) leave to care for a critically ill child. Section 263 of Bill C-44 would amend section 206.4 of the *CLC* to extend the existing right to take leave to take care of a critically ill child to a yet-to-be-defined but likely much broader defined “family member” group, with the critical definition to follow in regulations under the *Employment Insurance Act* (the “*EIA*”) not yet disclosed in draft by the government. While it is readily understandable that a parent of a critically ill child will be needed to care for the child, the wording of Bill C-44 will allow an employee who falls in the “family member” group to take a protected leave, even if this individual is not needed to, nor does actually give, care to the child.
- 26. CACE wishes to raise the potential impact of the apparently intended, if not stated, wider definition of a “family member” in the regulations to follow. The proposed definition has an impact on both the identity of the person who can take the new longer leaves, and the number of family members for whom the care leave can be taken. CACE is also concerned about the expansion of the right to take the longest leave to care for an ill child to a wider family group. The combined effect with the expansion of EI benefits for the caregiving leave-takers will almost certainly be a very significant increase in utilisation of these leaves, probably mostly by older workers with ill baby boomer family members.
- 27. In addition, section 263 of Bill C-44 will grant employees in the FPS in the same “family member” group, the right for the first time to take an unpaid leave of up to 17 weeks or 4 months to care for a critically ill adult, with qualifying family members yet to be defined under regulations made pursuant to the *EIA*. CACE supports the creation of a leave of this nature having regard to societal changes that are impacting the “sandwich generation”; however, we are concerned about the impact of the leave on employers and co-workers, particularly in circumstances where the employee is not required to provide care.



Summary

28. CACE therefore recommends that the Senate amend the bill to only extend the leave to “family members” that are primary caregivers to the critically ill child or critically ill adult.
29. In particular, it is important to bear in mind that ultimately guaranteeing employees the right to take these increasingly longer leaves imposes significant burdens on employers and on co-workers forced to cover the leave-taking employee's work in many cases. This is difficult to manage, particularly for smaller FPS employers and is costly. Employers facing lengthy leaves of absence will have to assess how to cover the work of the employee, for example, by incurring and paying overtime, obtaining temporary employees, or, more commonly, with a combination of lost productivity and overtime worked by others to cover the leave-taker's duties.
30. As noted above, the federal government has not provided any specific information as to what the definition of “family member” will be under regulations to follow, but based on existing definitions in various modern Canadian employment statutes, it would appear likely to extend to grandparents, siblings and grandchildren, at a minimum. With a broader definition of “family member” there is the potential for abuse by certain employees who might repeatedly take leaves primarily for personal reasons without any requirement that the reason for the leave be to provide care or that the employee be needed to provide care to the critically ill family member. In practice and legally under the amendments, the employer has no right or means to verify that the leave taken nominally to care for the family member is actually used primarily for that purpose. The expansion of eligibility and duration of the leaves significantly increases the likelihood of such abuse, even if comparatively rare. More importantly, the employer (and co-workers forced to cover the leave-taker's work, particularly at smaller employers) will face an increasingly onerous burden of having to constantly accommodate such leaves with the costs and burdens on other workers, particularly managers and business owners, discussed above.

CACE Submission Regarding the Cumulative Impact of Planned Federal Labour Law Changes on the Federal Private Sector

31. CACE also wishes to bring to the attention of the Senate that, in addition to Bill C-44, the government is in the process of considering a multitude of other impactful changes to the *CLC* that, in the aggregate, are imposing a daunting compliance burden on employees in the Federal Private Sector. We ask the Senate to consider the cumulative impact of the full suite of changes that the government intends to introduce, taking into consideration, employers' ability to respond to a heavy increase in regulatory burdens. The Senate should also consider whether the reforms, taken as a whole, will achieve the goals of promoting job growth and equitable workplaces.
32. In some cases, such as the care and parental leave changes found in Bill C-44, the government has not engaged in any meaningful consultation with the FPS employer community, or at least with CACE, before passing major changes as part of an omnibus budget bill.
33. It is important for the Senate to understand that this agenda amounts to a radical and cumulatively massive rewrite of federal labour laws governing the FPS in the space of approximately two years. All of these new laws or amendments to the *CLC* impose



further burdens and obligations on employers without, to date, providing employers with the flexibility they need to manage and compete in the modern workforce.

34. A number of these initiatives, such as the more complex initiatives like Pay Equity and Proactive Disability Accommodation, will be very costly for FPS employers and require additional hiring of HR staff to implement and monitor compliance with these requirements. They will also require significant non-productive spending on outside consultants and lawyers. Such expense will be particularly burdensome for smaller employers for whom, so far, the government does not seem to be offering significant exemptions, but will negatively impact profitability and thus job growth of FPS employers.
35. Yet, CACE is not aware that the government recognizes that introducing such wide-ranging and onerous new requirements will be burdensome to employers, particularly smaller employers who will struggle to comply and simply cannot afford to hire expert consultants to help them comply.
36. We would also expect that foreign based competitors, and even provincially regulated businesses facing lower labour regulatory burden, will have a labour cost advantage, and thus, be able to undercut Canadian FPS employers.
37. Finally, if passed, the government will be required to budget for the huge increase in its Labour Programme enforcement and education staffing. Resources will be needed to assist employers to comply with the new amendments. Many of these initiatives will require the government to provide major education and compliance assistance to employers, particularly small and medium sized employers, at great cost, to ensure the legislation is understood by employers.
38. To summarize, CACE is concerned that, if implemented as currently planned over two years, the federal government will ultimately materially increase FPS employer costs, particularly during the next few years as businesses work to comply with so many complex new obligations in the short term and, in the long term, may materially reduce employment in the Federal Private Sector, ironically defeating the very purpose of this reform agenda, which is putatively to better protect FPS employees.

Conclusion

39. CACE therefore asks that the Senate consider our recommendations and concerns above:
 - (a) With respect to the extended parental leave, we ask the Senate to consider better alternatives to the childcare needs of Canadians, than the proposed option of extending parental leave in a manner that we expect to have negative consequences on the gender wage gap and the career trajectory of women.
 - (b) We further ask the Senate to recommend amendments to the reinstatement right in section 209.1 of the *CLC* for employees taking leaves longer than 37 weeks, to allow employers greater flexibility in managing the changes to their business during such lengthy leaves.



- (c) We further ask the Senate to recommend amendments to the proposed extension of critical illness leave such that the leave will only be available to those employees who fall within the new definition of “family member” but who are responsible for providing care to critically ill children or critically ill adults.
- (d) We ask the Senate to consider, when reviewing changes to federal labour and employment laws, asking the government to conduct an impact assessment of each such amendment, as well as the aggregate impact on employers in the Federal Private Sector, of the cumulative regulatory burden being added. This is consistent with the legitimate “sober second thought” role for the Senate, as recently exemplified with its review of Bill C-4 (card check unionization legislation).

We remain available to both testify on this submission and answer questions directly.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of June 2017.

The Canadian Association of Counsel to Employers (CACE)

