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FEDERAL LEGISLATIVE UPDATE 2019

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Appendix 1: Canada Industrial Relations Board Information Circular: No. 15-Adjudication of Unjust Dismissal Complaints

Appendix 2: Canada Industrial Relations Board Information Circular: No. 14-Section 246.1 Reprisal Complaints

Appendix 3: The Labour Program's Interpretations, Policies and Guideline 101-Scope of Application and associated Schedule



Federal Legislative Update 2019

There were a number of significant changes to the *Canada Labour Code* (the “Code”) in 2019 Applicable to federally regulated employees. The changes are reflected in the following enactments:

- Bill C-44, the *Budget Implementation Act, 2017, No. 1* (“Bill C-44”);
- Bill C-63, the *Budget Implementation Act, 2017, No. 1* (“Bill C-63”);
- Bill C-65, an Act to amend the Canada Labour Code (harassment and violence), the *Parliamentary Employment and Staff Relations Act* and the *Budget Implementation Act, 2017, No.1* (“Bill C-65”);
- Bill C-86, the *Budget Implementation Act, 2018, No. 2* (“Bill C-86”).

This paper outlines the *Code* changes according to when the laws came into force.¹ It also outlines a number of enacted changes to the *Code* which have yet to come into force.² The appendices provide additional reference material in relation to these enactments.

Code Changes in Force April 1, 2019

The following significant changes pursuant to Bill C-44 were made to Part III of the Code and came into force on April 1, 2019.

Recovery of Wages (Division XVI)

The limitation period for all unpaid wages, in Section 251.1(1.1) has been extended from 12 to 24 months.

General (Division XVI)

A new Section 251.131(2) has been added requiring the application of an administrative fee to orders to pay equal to the greater of \$200.00 and 15% of the amounts ordered to pay.

¹ The *Accessible Canada Act* came into force July 11, 2019 seeks to identify, remove and prevent barriers to disabled persons in respect of Federal enterprises and organizations, including federally regulated employers.

² A new federal *Pay Equity Act* has not yet come into force; regulatory amendments to the *Employment Equity Act* have also not yet come into force.

Code Changes in Force July 10, 2019

The Canada Occupational Health and Safety Regulations were amended to reflect up to date standards for safety equipment.³ Updates were made to the systems, procedures, clothing and safety material under Part XII of the Regulation relating to Protective Equipment and Other Preventive Measures. The updates include changes to:

- protective headwear
- protective footwear
- eye and face protection
- respiratory protection
- skin protection
- fall-protection systems
- protection against drowning (personal flotation devices)
- protection against moving vehicles
- records
- instructions and training
- defective protection equipment

Code Changes in Force July 29, 2019

Bill C-44 implemented a number of changes to the way in which disputes are adjudicated under Parts II and III of the Code.

Unjust Dismissal Complaints

Unjust dismissal complaints are no longer referred to an adjudicator. Sections 242 (1) and (2) mandating reference to an adjudicator and the adjudicator's powers have been repealed. Pursuant to the amended s. 241 (3) a complaint to the Head of Compliance and Enforcement, which cannot be settled, is now referred directly to the Canada Industrial Relations Board ("CIRB") for adjudication.

The CIRB has published an Information Circular regarding the adjudication process and it is attached to this paper as **Appendix 1**.

Appeal Officers

Similarly, the CIRB will now handle all appeals in relation to wage recovery orders. Section 251.12 dealing with the appointment of and powers of a referee have been replaced by provisions assigning the CIRB with exclusive responsibility to handle appeals and issue orders. Specifically, Part III, Division XVI, Section 251.11(1) now assigns jurisdiction over Part III appeals to the CIRB.

³ Canada Gazette, Part II, Volume 153, Number 14

Appeals previously filed with the Occupational Health and Safety Tribunal Canada will now be handled by the CIRB under Part II, Section 145.1 of the Code.

External Adjudicators

A new section 12.001 has been added to Part III of the Code permitting the CIRB to appoint an external adjudicator to determine any matter that arises under Parts II and III of the Code. Adjudicators may also be appointed to address matters under the yet to be enacted Part IV dealing with Administrative Monetary Penalties. Such adjudicators would have all of the powers of the CIRB.

Reprisal Protections

The Code has been amended to add Division XIV.1 after the unjust dismissal provisions.

Section 246 of the Code permits employees to make reprisal complaints against employers in relation to adverse employer actions in relation to employee complaints under the Code, requests for information about Code related rights or participating in a Code related proceeding as a witness. Reprisals may include dismissal, suspension, lay-off, demotion and disciplinary action.

Reprisal complaints must be made within 90 days of the alleged reprisal (246.1(2)). The Code imposes a reverse onus on the employer to disprove the reprisal allegation (246.1(4)). The Code also establishes, under s. 246.3, a number of control mechanisms to dismissal complaints that are frivolous and vexatious. Section 246.1(2) prohibits concurrent unjust dismissal complaints.

The Board may exercise any number of remedial options under Section 246.4 including cease and desist orders, reinstatement of employment, compensation and any other equitable remedy appropriate in the circumstances.

The CIRB's Information Circular in relation to Reprisal Complaints is attached to this paper as **Appendix 2.**

Code Changes in Force September 1, 2019

Bill C-63 and Bill C-86 effected a number of significant amendments to Part III of the Code in relation to Standard Hours, Wages, Vacation and Holidays.



Hours of Work and Overtime (Divisions I, II.1)

a) Breaks (169.1) and Rest Periods (169.2)

With the changes effected by Bill C-86, every employee is entitled to an unpaid break of at least 30 minutes during every period of five consecutive hours of work. If the employee is required to be at the “disposal” of their employer, the employee must be paid for the break.

Breaks may be postponed or cancelled in order to address situations that present an imminent or serious threat to a person or property or would constitute serious interference with the employer’s operation.

Every employee is entitled to a rest period of at least eight (8) consecutive hours between work periods or shifts, subject to the same exceptions that apply to break periods.

Sections 181.1 – 181.3 entitle employees to unpaid breaks necessary for medical reasons and must provide a certificate setting out the length and frequency of the breaks. The section may evolve in the future as regulations are added. Employees are also now entitled to breaks for the purpose of nursing or to express breast milk.

b) Scheduling Notice (s. 173.01)

Effective September 1st, employers must provide employees with their schedule at least 96 hours prior to the start of the first shift.

The employee is entitled to refuse work in the absence of the employer’s compliance with the rule. However, the refusal is not permitted in situations related to imminent or serious risk to life or property or a threat of serious interference with the employer’s operation.

c) Shift Changes or Additions (s. 173.1)

In the event of a shift change, employers must provide at least 24 hours’ notice of any shift changes. If the required change is an earlier start, the notice must be given 24 hours prior to the earlier start. If a later start is required, the required notice is 24 hours prior to the original shift start. Where a shift is added, 24 hours’ notice must be given prior to the start of the added shift.

The employee is entitled to refuse work in the absence of the employer’s compliance with the rule. However, the refusal is not permitted in situations related to imminent or serious risk to life or property or a threat of serious interference with the employer’s operation.

d) Overtime (s. 174)

The Code now permits overtime compensation in the form of a premium equal to 1.5 times the employee's regular rate, or time off with pay equal to 1.5 hours of time off for each hour of overtime worked.

Employees are entitled to request an agreement in writing for taking time off instead of overtime pay. The Code establishes a three (3) month limitation period within which the time off must be taken. Alternatively, the employee and employer may agree to allow the employee to take the time off not more than twelve (12) months after the end of the pay period in which the overtime was worked.

The Employer must compensate the employee with the overtime premium in the event that time off is not taken in accordance with the three (3) month limit or the parties' agreement. The premium must be paid within 30 days of the date that this limitation period expires.

Under a new s. 174.1, employees may refuse overtime in order to carry out family responsibilities.

However, the refusal is subject to the employee taking reasonable steps to manage their family responsibility in order to work the overtime.

Refusals are not permitted where the overtime is necessary to address a situation that could not have been reasonably foreseen or presents imminent or serious threat to a person, property or the employer's operations.

Flexible Work Arrangements (Division I.1)

A new Division I.1 and section 177.1 has been added to the Code entitled "Flexible Work Arrangements".

Employees who have completed six (6) months of continuous employment with an employer may request changes to the following terms and conditions of employment:

- Number of hours
- Work schedule
- Location of Work
- Any prescribed terms and conditions.

The employee's request must be in writing and must contain information that reflects enumerated criteria in s. 177.1(2), including, *inter alia*, the employee's opinion about how the change may affect the employer's operation and the manner in which the employer could manage those consequences.

The employer must make a decision on the request within 30 days. Section 177.1(3) outlines a number of bases for refusal including, excess cost, detriments to work product, efficiency or customer demand, inability to reorganize work and depletion of work for other employees.

Where a collective agreement is in place, Section 177.1(6) provides that a change must be agreed to by the trade union.

Section 177.1(9) clarifies that an employer's obligations to consider and grant scheduling requests does not limit an employer's duty to accommodate "under any other Act of Parliament".

Annual Vacations (Division IV)

Prior to September 1st, employees with up to six (6) years of service were entitled to at least two (2) weeks of vacation with pay. After six (6) years of service, employees were entitled to three (3) weeks' vacation with pay.

After September 1st, vacation with pay under Section 184, Division IV is more generous, as follows:

- Two (2) weeks after one (1) year of employment;
- Three (3) weeks after five (5) consecutive years of employment; and
- Four (4) weeks after ten (10) consecutive years of employment.

Continuity of Employment (Division IV)

Section 189 of the Code has always contained provisions deeming employment to be continuous in the event of a transfer, sale of merger from one federally regulated employer to another.

The provision has now been amended to apply to provincial undertakings that become a federal work, undertaking or business as a result of the transfer of business.

Holiday Pay (Division V)

Bill C-86 repeals Section 196(3) of the Code which excluded employees from holiday pay if the holiday occurred in the first 30 days of employment. All employees, regardless of length of service, are now entitled to Holiday Pay.

Leaves of Absence (Divisions VII, VIII, XIII, XV.2)

a) Maternity and Parental Leave (Division VII, ss. 206(1), 206.1(1))

Under Bill C-86, employees are no longer required to complete six (6) months of consecutive continuous employment in order to be entitled to maternity or parental leave.

b) Critical Illness Leave (Division VII, s. 206.4)

Under Bill C-86, employees are no longer required to complete six (6) months of consecutive continuous employment in order to be entitled to Critical Illness Leave in relation to a critically ill child or adult family member.

c) Leave Related to Death or Disappearance (Division VII, s. 206.5)

Under Bill C-86, employees are no longer required to complete six (6) months of consecutive continuous employment in order to be entitled to this leave. The leave of absence is for 104 weeks and applies where a child of a parent has died and it is probable that the child died as a result of a crime.

d) Personal Leave (Division VII, s. 206.6)

Every employee will be entitled to a leave of absence of up five (5) days in respect of:

- a) A personal illness
- b) Responsibilities in relation to the health or care of any family member
- c) Responsibilities in relation to the education of family members less than 18 years of age
- d) An urgent matter concerning themselves or family members
- e) Attendance at a citizenship ceremony
- f) Reasons prescribed by regulation.

After three (3) consecutive months of employment, employees are entitled to the first three (3) days of the leave with pay at their regular rate for normal hours of work.

The employer is entitled to documentation supporting the leave that is “reasonably practicable”.

e) Leave for victims of family violence (Division VII, s. 206.7)

Every employee who is a victim of family violence or the parent of a child who is a victim of family violence will be entitled to ten (10) days’ leave of absence each calendar year for the following purposes:



- Seeking medical attention for physical or psychological injury or disability
- Obtaining services intended for victims of family violence
- Obtaining psychological or professional counselling
- Relocating
- Seeking legal or law enforcement assistance with respect to civil or criminal proceedings
- Any measures prescribed by regulation

Employees who have completed three (3) consecutive months of continuous employment will be entitled to take the first five (5) days as paid leave.

Documentation that is “reasonably practicable” to obtain and provide may be required by the employer no later than fifteen (15) days after an employee’s return to work.

f) Leave for Indigenous Practices (Division VII, s. 206.8)

Every employee who is an Aboriginal person and has completed three (3) consecutive months of continuous employment will be entitled to up to five (5) days of leave each calendar year for the purpose of engaging in the following traditional Aboriginal practices:

- a) hunting
- b) fishing
- c) harvesting
- d) any practice prescribed by regulation

The employer is entitled to request documentation showing that an employee is an Aboriginal person, 15 days after the employee has returned to work from the leave of absence.

g) Leave for Court or Jury Duty (Division VII, s. 206.9)

Every employee is entitled to a leave absence to attend court to act as a witness, juror or to participate in a jury selection process.

h) Bereavement Leave (Division VIII, s. 210)

Prior to September 1st, the Code entitled employees to three (3) days of bereavement immediately following the day of death of an immediate family member.

The Code now entitles every employee to a leave of absence of five (5) days at any point beginning on the day of death and ending six weeks after the latest of the days on which the funeral, burial or memorial service occurred.

i) Medical Leave (Division XIII, s. 239)

Prior to September 1st, the Code prohibited employer reprisals against employees who took a leave of absence due to illness or injury. The three preconditions to the prohibition were: (a) the employee must have completed three (3) consecutive months of continuous employment; (b) the absence did not exceed 17 weeks; and (c) the employee provided written certification of incapacity due to illness or injury.

Section 239 has been expanded in a number of key ways after September 1st.

Every employee, regardless of service, is now entitled to a leave of absence of up to 17 weeks due to personal injury or illness, organ or tissue donation or medical appointments during working hours. The employer may require a medical certificate in respect of the absence only if the absence is three (3) days or longer.

Another notable change is that the Code now requires employers, on request, to inform employees on medical leave of every employment, promotion or training opportunity that arises during the medical leave of absence, in writing. However, the opportunity must be one for which the employees is qualified.

j) Leave of Absence for Members of Reserve Force (Division XV.2, s.247.5(1))

Entitlement to leave has been reduced from 6 months to 3 months.

Interpretations, Policies and Guidelines (“IPG”)

The Labour Program has published a number of IPGs in relation to the new labour standards. These include the following:

- **Situations that the Employer could not have reasonably foreseen—Exceptions
IPG-091**

**Imminent or serious threat—Exceptions
IPG-092**

**Threat of damage to or loss of property—Exceptions
IPG-093**

**Serious interference with the operation of the establishment—Exceptions
IPG-094**

Applicable to new provisions relating to breaks, rest periods, notice of schedule, work shift changes and overtime refusals (ss. 169.1, 169.2, 173.01, 173.1, 174.1)

- **Reasonable steps**
IPG-095

Applicable with respect to the an employee’s rights to refuse overtime after taking reasonable steps to fulfill a family responsibility (s. 174.1)

Family responsibilities
IPG-096

Family member
IPG-097

Applicable with respect to an employee’s right to refuse overtime in respect of family responsibilities (s. 174.1) and personal leave (s. 206.6)

- **Reasonably Practicable**
IPG-098

Defines “reasonably practicable” for the purpose of determining an employee’s obligation to their employer. For example, in respect of providing documentation to justify a leave of absence. Applicable to personal leave, leave for victims of family violence and leave for Traditional Aboriginal Practices (ss. 206.6, 206.7, 206.8)

- **Stacking**
IPG-099

Applicable to personal leave (s. 206.6) where a collective agreement also provides for personal leave entitlement.

- **30 minute breaks**
IPG-100

Interprets and provides guidance in respect of the new break periods in section 169.1.

- **Scope of application**
IPG-101

Defines the scope of application with respect to breaks, rest periods, notice of hours of work and shift changes (sections 169.1, 169.2, 173.01 and 173.1) until related regulations come into force. Until then, employers may carry on business as usual with respect to specific job titles and industrial sectors.

IPG-101 and the associated schedule is attached hereto as **Appendix 3**.

Changes Not Yet in Force⁴

I. Part III Changes

Application of Part III and Internships

Expected to be in force: 2020 or later

Under Bill C-63 a number of key changes that would affect unpaid internships were enacted.

Section 167.1 will prohibit employers from treating employees as if they were not their employee in order to avoid their obligations or deprive employees of their rights. Section 167(1.1) will extend the application of the Code to persons “acquiring knowledge or experience”, except to the extent provided for in the regulations and unless the activity performed is part of a qualified educational program.

The federal government has published regulations entitled *Standards for Work-Integrated Learning Activities Regulations*, which are not yet in force. These regulations outline the process for determining whether a student placement can be unpaid, the applicable labour standard protections and any administrative requirements like record keeping.

Unpaid student internships would still be entitled to certain labour standards. All other individuals undertaking internships would be treated as employees and covered by all labour standards, including the right to be paid at least the minimum wage.

On June 8, 2019, a Regulatory Impact Analysis Statement was published in the Canada Gazette together with the regulations.

Minimum Age of Employment (Division II)

Expected to be in force: 2020 or later

Section 179 of the Code would prohibit the employment of persons under the age of 18, except as prescribed.

Equal Treatment (Division III)

Expected to be in force: 2020 or later

⁴ Expected in force dates from *Labour Program: Current and future legislative and regulatory changes*
<https://www.canada.ca/en/employment-social-development/programs/laws-regulations/labour/current-future-legislative.html>

Under Sections 182.1 to 182.4, an employer would be prohibited from paying wages that are less than the rate paid to another employee where:

- they work in the same establishment
- they perform substantially the same kind of work
- the work performed requires substantially the same skill, effort and responsibility
- their work is performed under similar working conditions
- any other prescribed factor.

The prohibition does not apply where the difference in rate is due a system of seniority, merit, quantity or quality of production or other prescribed criteria.

Employees will be entitled to request a review of their rate of wages and the employer must respond with a written report within 90 days of the request. Where the request is successful, a retroactive payment of wages to the date of the request is required.

Employers who notify employees of employment or promotion opportunities will be required to inform all employees regardless of employment status.

Temporary Agency Employees (Division VI.1)

Expected to be in force: 2020 or later

Sections 203.01 – 203.5 of the Code would prohibit employers from:

- Charging fees to employees in connection with establishing an employment relationship or assigning the employee to work for a client.
- Charging fees to clients in relation to the client's hiring of an assignment employee. The prohibition would only apply if the employee's assignment with the client began more than six (6) months before the start of the client's employment relationship with the employee.
- Preventing or attempting to prevent an employee from establishing an employment relationship with a client.
- Paying employees less than that which the client pays its employees, subject to the same conditions and exceptions that apply to the Equal Treatment section in section 182.1. Clients would be prohibited under the Code from reducing employee wages to allow an agency employer to comply with the prohibition.

Employees will be entitled to request a review of their rate of wages and the employer must respond with a written report within 90 days of the request. Where the request is successful, a retroactive payment of wages to the date of the request is required.

Termination of Employment (Divisions IX, X)

a) Group Termination of Employment (Division IX, ss. 211-229)

Expected to be in force: 2020 or later

The group termination provisions of the Code apply where a federally regulated employer terminates 50 or more employees within a four (4) week period. At present, the employer must provide at least 16 weeks' notice of termination to the Minister, plus any individual notice of termination under s. 230 and severance pay pursuant to s. 235.

Under the new group termination provisions, Section 212 would require an employer to provide notice of termination to the Head of Compliance and Enforcement ("Head") at least 16 weeks prior to the first termination.

A new Section 212 (1.1) would permit the employer to provide 50 or more employees, whose employment is terminated on the same day, with at least 16 weeks' wages in lieu of notice to the employees. In those circumstances, the group notice period would be deemed to begin on the day of termination and the employer may provide at least 48 hours' notice of termination to the Head. The notice must also be provided to affected employees and posted in a conspicuous place in the workplace.

The new section does not stipulate that individual notice of termination under section 230 is to be given in addition to the group notice.

However, a new Section 212.1 will require employers to provide to each redundant employee at least eight (8) weeks' notice of termination on a date which cannot precede the date specified in the group notice of termination. This section will supplant the obligation to provide individual notice of termination in Section 230. The employer may provide payment in lieu of notice or a combination of notice and payment in lieu of notice.

Unchanged are provisions requiring the establishment of a joint planning committee to determine if termination of employment can be avoided or to minimize the impact of termination on redundant employees.

Severance obligations are unchanged.



b) Individual Terminations of Employment (Division X, ss. 229.1-234)

Expected to be in force: 2020 or later

Section 230 of the Code now requires notice of termination, or in lieu thereof, equivalent to two (2) weeks for all employees.

The Code will be amended to replace that obligation with a graduated notice obligation as follows:

Length of Employment	Notice Period
Three months to three years	Two weeks
Three to four years	Three weeks
Four to five years	Four weeks
Five to six years	Five weeks
Six to seven years	Six weeks
Seven to eight years	Seven weeks
Eight years +	Eight weeks

Reimbursement of Work-Related Expenses (Division XII.1)

Expected to be in force: 2020 or later

Section 238.1 of the Code would mandate an entitlement to be reimbursed for reasonable work related expenses unless the expense is ineligible under the Code, represents union related dues (or similar monetary obligations) or is allocated to the employee as part of a written agreement.

The Code has not yet specified a timeframe for the reimbursement of expenses.

II. Workplace Harassment and Violence

Expected to be in force: 2020

Bill C-65 is intended to repeal a patchwork of existing laws and policies with respect to violence and harassment and establish a comprehensive scheme to address harassment and violence in the federal sector. The new framework would focus on the following three areas:

- a) Preventing harassment and violence
- b) Responding effectively to incidents of harassment and violence
- c) Supporting victims, survivors and employer.

These comprehensive protections would apply both to the *Canada Labour Code* and the *Parliamentary Employment and Staff Relations Act*.

Bill C-65 received Royal Assent on October 25, 2018. Its coming into force will require regulations in respect of investigation procedures, recording keeping and possibly sanctions.

III. New Part IV, Administrative Monetary Penalties

*Expected to be in force: 2020, once regulatory amendment approved*⁵

Bill C-44 includes a new Part IV to the Code entitled Administrative Monetary Penalties. The Part would constitute a comprehensive enforcement regime for both Parts II and III of the Code. The new part would address the following matters:

1. Designation of violations under the Part II and III;
2. Determination of fines, or “administrative monetary penalty” (“AMP”) according to the severity and category of violation;
3. Timeframes for the payment of AMPs
4. Service of notices of violation and procedures for review.
5. Publication of the names of employees who receive an AMP in order to deter non-compliance
6. Determination of wages to be paid to employees summoned to appear before the CIRB for an appeal, in accordance with section 288 of the Code.

Regulations, not yet adopted, are required to bring the changes into force. Proposed regulations were published in the *Canada Gazette* on August 24, 2019. Interested persons may make representations regarding the proposed regulations within 90 days of this date.

⁵ Canada Gazette, Part I, Volume 153, Number 34: Administrative Monetary Penalties Regulations
<http://www.gazette.gc.ca/rp-pr/p1/2019/2019-08-24/html/reg1-eng.html>