



Women's Legal
Education and
Action Fund

Fonds d'action et
d'éducation juridiques
pour les femmes

Charity Registration Number
10821 9916 RR0001
Numéro d'enregistrement

**Submission to the 2017 Workplace Legislation Review
on Behalf of LEAF and LEAF Edmonton**

April 18, 2017

Contact:

LEAF e-mail legaldirector@leaf.ca; tel. 1-888-824-5323

LEAF Edmonton e-mail edmonton@leaf.ca

I. Introduction

1. LEAF Edmonton is a branch of the Women's Legal Education and Action Fund (LEAF), a national non-profit organization dedicated to addressing discrimination against women through litigation, law reform, and public education under the *Charter of Rights and Freedoms* (the "*Charter*")¹ and applicable federal and provincial human rights codes.

2. LEAF and LEAF Edmonton make this submission² in support of recommendations for change to the *Employment Standards Code* ("*ESC*").³ Currently, the *ESC* is not in compliance with equality guarantees in Alberta's human rights legislation, the *Charter*, international conventions, or jurisprudence. LEAF recommends changes in the following areas to ensure working women in Alberta are treated in accordance with equality rights guarantees (for the full text of the recommendations, see below and Appendix 1):

- remove eligibility thresholds for family-related leaves
- remove employer authority to require a woman to start maternity leave
- provide for leave in circumstances of pregnancy termination
- provide for accrual of seniority, service, and benefits during family-related leaves
- provide for the right to request flexible work arrangements
- establish a task force to investigate solutions to the problem of work-family conflict.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

² LEAF acknowledges with gratitude the contributions of volunteers Jo-Ann Kolmes, Elizabeth Shilton, and Jennifer Tomaszewski.

³ *Employment Standards Code*, RSA 2000, c E-9.

LEAF's submissions are not an exhaustive review of the *ESC*; sections relevant to this brief can be found in Appendix 2.

II. LEAF Background

3. LEAF was founded in 1985 with the intention of ensuring that the promise of the *Charter*, and in particular the equality rights guaranteed by sections 15 and 28, would be fulfilled through the development of substantive equality for women in Canada. Substantive equality recognizes historically and socially based differences, challenges systemic and structural discrimination, and promotes an inclusive approach to human rights.

4. Since 1985 when section 15 of the *Charter* came into effect, LEAF has contributed to the development of the meaning of substantive equality and equality rights jurisprudence in Canada through test cases and interventions in numerous cases, including more than fifty in the Supreme Court of Canada. Many of these cases have dealt with workplace equality rights for women including *Brooks v Canada Safeway Ltd*⁴ ("Brooks") (exclusion of pregnancy from workplace benefit plan); *Janzen and Govereau v Platy Enterprises Ltd*⁵ (sexual harassment); *Schachter v Canada*⁶ (eligibility of fathers for parenting benefits under the *Employment Insurance Act*); *British Columbia (Public Service Employee Relations Commission) v BCGSEU*⁷ ("Meiorin") (adverse impact discrimination in job qualifications); and *Newfoundland (Treasury Board) v NAPE*⁸ (pay equity). In addition, in 2014, LEAF intervened in *Canada (Attorney General) v Johnstone*,⁹ ("Johnstone") the most recent appellate decision in Canada to address the meaning of discrimination on the basis of family status. Through this work, LEAF has

⁴ *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219.

⁵ *Janzen and Govereau v Platy Enterprises Ltd*, [1989] 1 SCR 1252.

⁶ *Schachter v Canada*, [1992] 2 SCR 679.

⁷ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3.

⁸ *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381.

⁹ *Canada (Attorney General) v Johnstone*, 2008 FCA 101.

developed considerable expertise in gender equality and the impact of family responsibilities on women workers. As one of LEAF's "biographers" has put it, "[LEAF's] imprint on constitutional principles of equality [is] clearly visible."¹⁰

5. LEAF Edmonton has been an active part of LEAF throughout its history. LEAF Edmonton engages in local fundraising for the national operation, education programs and advocacy. LEAF Edmonton has worked with LEAF in interventions arising locally, including *Kane v The Church of Jesus Christ Christian-Aryan Nations*,¹¹ *Vriend v Alberta*¹² ("Vriend") *R v Ewanchuk*,¹³ *Re Kane*,¹⁴ *Kane v Alberta Report*,¹⁵ *R v Shearing*,¹⁶ *R v Caron*,¹⁷ *Cunningham v Alberta*,¹⁸ *R v Barton*.¹⁹ In addition, LEAF Edmonton has made several submissions to the Government of Alberta. In 1993, LEAF Edmonton made submissions on revisions to the *Alberta Individual's Rights Protection Act* recommending that sexual orientation be included in the Act. Notably, in 2005 LEAF Edmonton made a submission to the Government of Alberta's Employment Standards Review relating to the eligibility threshold for maternity/parental leave in the *ESC*.²⁰ Then, as now, LEAF Edmonton submitted that the eligibility threshold for maternity/parental leave of 52 weeks of continuous employment with the same employer

¹⁰ Christopher Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2005) at 197.

¹¹ *Kane v The Church of Jesus Christ Christian-Aryan Nations* (1992), 18 CHRR D/268, [1992] AWLD No. 302 (Alta Bd of Inq).

¹² *Vriend v Alberta*, [1998] 1 SCR 493.

¹³ *R v Ewanchuk*, [1999] 1 SCR 330.

¹⁴ *Re Kane*, 2001 ABQB 570, 291 AR 71.

¹⁵ *Kane v Alberta Report* (2002), 43 CHRR D/112 (Alta. HRP); rev'd [2002] AJ No. 1539 (QB), 2002 ABQB 1081, 9 Alta. LR (4th) 184 (on natural justice grounds).

¹⁶ *R v Shearing*, 2002 SCC 58, [2002] 3 SCR 33.

¹⁷ *R v Caron*, [2011] 1 SCR 78.

¹⁸ *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011] 2 SCR 670.

¹⁹ *R v Barton*, 2015 ABQB 159 (LEAF intervened in the appeal; judgment is pending).

²⁰ Available upon request.

should be eliminated. LEAF Edmonton also contributed to LEAF's 2005 and 2009 submissions regarding the *Canada Labour Code*.²¹

III. Gender Disadvantage in the Workplace and the Role of Law

6. The workplace is a key site of gender inequality in Canada, including Alberta. Accordingly, LEAF submits that gender equality should be a fundamental guiding principle of this legislative review. Both existing provisions of the *ESC* and recommendations for change should be assessed against this guiding principle. In its 2017 Business Plan, the Ministry for the Status of Women identifies advancing gender equality as a critical priority for the Government of Alberta and includes women's economic security as one of the three policy areas in which the Ministry will work to achieve that end.²² To be consistent with these policy priorities, it is crucial to apply a gender lens to this review.

7. LEAF submits that the law can play an important role in rectifying gender disadvantage. Employment standards legislation is particularly important, since it is designed to establish minimum standards for those without bargaining power.

8. Recent statistics indicate that women in all sectors in Alberta earn less than men. On average, women's hourly wage is only 81.5 percent of men's. The difference is greater still in some sectors, such as professional, scientific and technical services, where women only earn 71.5 percent of the hourly wage earned by their male counterparts.²³ National comparisons of average annual earnings for full time workers reveal greater differences; according to a recent Statistics Canada report, “women aged 25 to 54 earned an

²¹ *Canada Labour Code*, RSC 1985, c L-2.

²² Alberta Ministry of Status of Women [2017] [Business Plan, Status of Women, 2017-2020](#).

²³ Alberta Ministry of Labour [2017]. [2016 Alberta Labour Force Profiles: Women](#).

average of \$52,500 in 2014, while their male counterparts earned an average of \$70,700.”²⁴

9. In addition, women are over-represented among vulnerable workers: in jobs often “characterized by low wages or insufficient hours of work, few or no benefits, little job security and minimal control over their work conditions.”²⁵ Although women now constitute 49 percent of the workforce in Alberta, they represent only 40.6 percent of the full-time workforce. Nationally, women hold almost 76 percent of permanent part-time positions, and 18.9 percent of employed women work part-time, compared to 5.5 percent of employed men (2015 figures).²⁶ Racialized women and women who are single parents are even more likely to hold precarious forms of employment.²⁷

10. Predictably, women with children and elderly women are at greater risk of poverty than men. Female-headed single parent families represent the poorest family type, with a poverty rate of almost 27 percent.²⁸ The Organisation for Economic Co-operation and Development (“OECD”) notes that while Canadian poverty rates remain quite low among OECD countries, poverty among the elderly grew in Canada between 2007 and 2010. The OECD observed that “[t]he biggest increase in old-age poverty occurred among elderly women, especially those who are divorced or separated. Higher poverty among older women reflects lower wages, more part-time work and careers gaps during women's working lives”²⁹

²⁴ Melissa Moyser, “Women in Paid Work” in Statistics Canada, *Women in Canada: A Gender-Based Statistical Report*, 7th ed. (Statistics Canada, 2017) at 26.

²⁵ Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: December 2012) at 7.

²⁶ Moyser, *supra* note 24 at 16.

²⁷ Andrea Noake, & Leah Vosko, “Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context”. Research Report: Law Commission of Ontario (2011) [“Noake & Vosko”] at 29-30.

²⁸ Statistics Canada, Summary Tables, [Persons in low income after tax \(in percent, 2007-2011\)](#).

²⁹ [Pensions at a Glance 2013](#) OECD and G20 Indicators: Canada.

11. The indicia of gender disadvantage in the workplace are linked closely to women's socially constructed roles in family care. Women still perform a disproportionate share of family care work, particularly the work of caring for young children, the elderly and family members with disabilities.³⁰ They suffer higher levels of work/family conflict, and are often required to accept part-time and precarious employment to ensure that family care needs are met, at a cost to their own wage levels, promotional opportunities and retirement incomes. As a report from the Law Commission of Ontario explained it:

The high numbers of women in precarious work are, in some measure, the result of their traditional social role as caregivers. Under the "gender contract" that typified the 1950s, middle class men were primarily responsible for financial support and women stayed home to care for the family. (Women in many working-class families have always worked outside the home, caring for other women's children, cleaning homes and working in factories and shops, for example.) Today, under current social and economic conditions, two incomes are often necessary to support a family and women's choices and involvement in many spheres of life have expanded. The majority of women have joined the workforce. The family unit is also more varied with increasing numbers of single parents. And yet women continue to bear primary responsibility for care-giving. In 2010, Canadian women spent an average total of 50 hours per week caring for household children, double that spent by men (24 hours). In 2008, just over 9 percent of women reported working part-time because of childcare responsibilities as compared to less than 1 percent of men.

³⁰ In 2010, Canadian women with children working full time spent an average of 49.8 hours/week on child care, compared to 27.2 hours/week for comparable men: [Women at a Glance in Canada: Statistical Highlights](#) (Status of Women Canada) at 7.

The report went on to observe that “the precarity of women’s jobs is partly influenced by public policy on maternity benefits and childcare.”³¹

12. In its *Policy and Guidelines on Discrimination because of Family Status*, the Ontario Human Rights Commission states:

Persons with caregiving responsibilities are disproportionately likely to find themselves in part-time, casual or other non-standard work. This is particularly true for women. Those in non-standard work are unlikely to have access to pensions and health-related benefits. This has long-term consequences for the economic security of caregivers and has the effect of disadvantaging persons identified by family status, particularly as it intersects with the ground of sex.³²

13. Furthermore, employer practices around scheduling may make it impossible or prohibitively expensive³³ to use established social services such as day care and respite care centres that are often open only during daytime hours, and do not accommodate users with atypical or unpredictable schedules.

14. Gender equality is a fundamental principle of Canadian law, and is further supported by Canada's commitments to international instruments. Equality for women in employment in the paid labour force is recognized in Alberta, across Canada, and internationally as a fundamental principle (see Appendix 3).

³¹ Law Commission of Ontario, *Vulnerable Workers and Precarious Work*, *supra* at 20.

³² Ontario Human Rights Commission, [*Policy and Guidelines on Discrimination because of Family Status*](#) (2007).

³³ Moyser, *supra* note 24 at 6-7; David Macdonald & Martha Friendly, “The Parent Trap: Child Care Fees in Canada’s Big Cities,” Canadian Centre for Policy Alternatives Report, November 2014 at 7.

15. The Supreme Court of Canada has long recognized the social reality that women bear a disproportionate share of the social and economic costs of both child-bearing and child rearing: *Symes v Canada*³⁴; *Brooks*.³⁵

16. In *Brooks*, Chief Justice Dickson made the following observations: "Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious."³⁶ In that case, the Court held that it is unlawfully discriminatory to exclude pregnant women from access to sick benefits under a workplace benefit plan.

17. The *Alberta Human Rights Act*,³⁷ ("AHRA") mandates terms and conditions of employment that do not discriminate on the basis of gender, family status and other protected grounds. LEAF submits that important sections of the *ESC* do not appear to conform to the *AHRA*, as the Alberta Human Rights Commission (the "Commission") itself has recognized,³⁸ particularly with respect to accepted standards in relation to pregnancy and parenting leave and workplace scheduling. Courts have recognized the quasi-constitutional nature of human rights legislation and the primacy of human rights guarantees over provisions of other legislation.³⁹ In addition, human rights codes must themselves conform to the *Charter*.⁴⁰ Accordingly, legislation such as the *ESC* must conform to both the *AHRA* and the *Charter*. We will have more to say about that issue below.

³⁴ *Symes v Canada*, [1993] 4 SCR 695.

³⁵ *Brooks*, *supra* note 4.

³⁶ *Brooks*, *supra* note 4 at 1243.

³⁷ *Alberta Human Rights Act*, RSA 2000, c A-25.5.

³⁸ Alberta Human Rights Commission, "[Rights and responsibilities related to pregnancy, childbirth and adoption: Interpretive Bulletin](#)".

³⁹ *Tranchemontagne v Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513, 2006 SCC 14 (CanLII), paras. 33-34.

⁴⁰ *Vriend*, *supra* note 12.

IV. Workplace Leave Provisions

18. Equality for women in the workplace requires guarantees of job protection and job-status protection in the context of pregnancy, motherhood, and family caregiving responsibilities. The *ESC* is currently non-compliant with these fundamental equality protections. LEAF provides the following recommendations to bring the *ESC* into equality compliance.

Recommendation 1: Remove eligibility thresholds for maternity leave, parental leave, and compassionate care leave. Do not include an eligibility threshold in any other family-related leave.

19. The eligibility threshold of 52 consecutive weeks of employment contained in each of the current family-related leave sections of the *ESC* (sections 45, 50(1) and 53.9(2)) exclude a significant number of women, and specifically the most vulnerable. For those excluded, the *ESC* fails to provide for basic job protection during pregnancy, maternity and parenthood. LEAF submits that this exclusion is inconsistent with the fundamental principles of gender equality articulated in the *Charter*, the *AHRA*, international commitments ratified by Canada and jurisprudence. LEAF recommends that the eligibility thresholds in the sections providing for maternity leave, parental leave and compassionate care leave should be removed. If other family-related leaves are added to the *ESC*, they should not include an eligibility threshold.

20. The eligibility thresholds exclude from job protection those women who have worked less than one year for the same employer. These women are vulnerable to losing their jobs because they become mothers. The most severe impact is on the most vulnerable women. Statistics Canada's Labour Force Survey indicates that in 2016 there were 108,300 women in temporary

jobs in Alberta: i.e. in seasonal jobs, term or contract jobs, or casual jobs.⁴¹ Studies have confirmed the presence of mainly women, Indigenous people, immigrants, and people of colour in the temporary work industry.⁴² "A growing body of Canadian studies suggests that the creation of flexible work arrangements has particularly disadvantaged racialized groups, especially racialized women. Racialized groups experience disproportionate access to sectors and occupations where non-standard forms of work are dominant."⁴³ The *ESC* now excludes from its protection those who are most in need of its protection.

21. The fact that other women are entitled to job protection guarantees under the *ESC* does not solve the problem for the women who are excluded. The maternity leave, parental leave, and compassionate care leave provisions are under-inclusive. They leave out a segment of women who are entitled to and in need of equality protection relating to their roles as mothers and caregivers. In determining whether discrimination exists, it does not matter whether all members of the vulnerable group are affected.⁴⁴

22. Lack of job protection in the context of maternity, parenthood and caregiving responsibilities places women in a socially and economically vulnerable position. The effects of such vulnerability can last a lifetime. Such vulnerability is inconsistent with Alberta's commitment to women's equality.

⁴¹ [Statistics Canada. Table 282-0080 - Labour force survey estimates \(LFS\), employees by job permanency, North American Industry Classification System \(NAICS\), sex and age group, annual \(persons\)](#), CANSIM (database), 2017-01-06.

⁴² Leah Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto: University of Toronto Press Inc, 2000) pages 190-195.

⁴³ G.E. Galabuzi, "Racializing the Division of Labour: Neoliberal Restructuring and the Economic Segregation of Canada's Racialized Groups" in J. Stanford and Leah F. Vosko, eds., *Challenging the Market: The Struggle to Regulate Work and Income* (Montreal: McGill-Queen's University Press, 2004), 176 at 183.

⁴⁴ *Janzen v Platy Enterprises Ltd*, *supra* note 5.

23. The eligibility thresholds exclude women who have had to rely on sequential short-term temporary jobs and women who have previously had a long-term commitment to the labour force followed by a brief lapse in employment for any number of reasons. Women who are employed for one full year are ineligible for job protection under the *ESC* if they start a new job during the year.⁴⁵ Even if a woman has worked for a full year, she could find herself in the situation where she qualifies for Employment Insurance maternity and parental benefits but has no job protection. The *ESC* eligibility thresholds may function as an incentive to employers to put women in more vulnerable, short-term jobs, so that they may avoid the requirements to provide family-related leaves under the *ESC*.

24. The eligibility thresholds for maternity leave and parental leave are non-compliant with Alberta's human rights legislation. The *ESC* is subject to the *AHRA*. The *AHRA* prohibition of discrimination in employment based on gender and family status (section 7) provides employment-related protection for women in the context of pregnancy, maternity, and family responsibilities. It applies over and above the eligibility threshold exclusions in the *ESC*.⁴⁶ The Commission has recognized that despite the exclusionary eligibility threshold in the *ESC*, pregnant women who have less than 52 weeks of work with the same employer have a right to a period of maternity leave.⁴⁷

25. While the Commission's publications accessible online set out the human rights protections that are over and above the eligibility thresholds in the *ESC*, such information is available only upon a query or a search. An

⁴⁵ J. Pulkingham and T. van der Gaag, "[Maternity/Parental Leave Provisions in Canada: We've Come a Long Way, But There's Further to Go](#)," *Canadian Woman Studies/Les Cahiers de la Femme*, Vol. 23, Numbers 3, 4, 116 - 125, at 118.

⁴⁶ *Supra*, note 37 at s. 1. Note the *ESC* does not declare that it operates notwithstanding the *AHRA*.

⁴⁷ Alberta Human Rights Commission, "Rights and responsibilities related to pregnancy, childbirth, and adoption," *supra* note 38. While LEAF is of the view that the length of leave set out in the Commission's publications for circumstances where the employee has not worked for the same employer for 52 weeks is insufficient, the Commission is clear that human rights obligations supersede the *ESC* eligibility thresholds.

employer or a pregnant woman who merely looks at the *ESC* will see that maternity and parental leave do not have to be provided to a woman who has worked fewer than 52 consecutive weeks for that employer. The language of the *ESC* is misleading, putting both employers and women in a position where equality rights are not recognized and women may lose their jobs.

26. Similarly, LEAF submits that the *ESC* eligibility threshold provisions appear to be non-compliant with the equality protection in s. 15 of the *Charter*.

27. As noted in the Alberta Labour Workplace Review comparison of jurisdictions, two provinces have no eligibility thresholds for maternity leave or parental leave in their employment standards legislation: British Columbia and New Brunswick.⁴⁸ They are in compliance with equality guarantees. The fact that there are provinces and territories with varying eligibility thresholds does not justify an eligibility threshold. Rather, it shows that those provinces and territories are not giving full, substantive recognition to women's equality. Those provinces with no eligibility thresholds show that an equality-compliant approach to maternity leave and parental leave is possible in Canada. Employers in Alberta should not build their economic position at the expense of women, particularly the most vulnerable women.

28. The equality principles noted above in relation to maternity leave and parental leave apply equally to compassionate care leave in Division 7.2 of the *ESC*, and to any family-related leave. There should be no eligibility thresholds denying women, particularly the most vulnerable women, access to job protection when they are experiencing family-related demands, responsibilities, or challenges.

⁴⁸ Alberta Labour. [Cross Jurisdictional Comparison](#).

Recommendation 2: Remove unilateral authority for an employer to require a woman to start maternity leave (repeal s. 49 of the ESC).

29. Section 49 of the *ESC* permits an employer unilaterally to require a pregnant employee to commence maternity leave at any time during the 12 weeks before the estimated date of delivery. There is no reference to the employer's duty to accommodate the employee by exploring (to the point of undue hardship) modification of duties or assignment to an alternative position. There is no reference to the obligations under the *AHRA*, which include duty to accommodate, and which, as discussed above, supersede the provisions of the *ESC*. It is submitted that section 49 of the *ESC* enables discrimination based on gender/sex, contrary to the *AHRA* and section 15 of the *Charter*, and should therefore be repealed.

30. An essential component of workplace equality and non-discrimination is an employer's duty to accommodate.⁴⁹ This is applicable in the context of an employee's pregnancy.⁵⁰ The Commission's interpretive bulletin on pregnancy and maternity again indicates that human rights obligations apply over and above a provision of the *ESC*. The interpretive bulletin states:

An employer is only able to apply section 49 of the *Employment Standards Code* ... after fulfilling their obligations under human rights law and accommodating the employee to the point of undue hardship.⁵¹

⁴⁹ *Meiorin*, *supra* note 7 at para. 54.

⁵⁰ *United Nurses of Alberta, Local 115 v Calgary Health Authority*, 2004 ABCA 7 (CanLII).

⁵¹ "Rights and responsibilities related to pregnancy, childbirth, and adoption," *supra* note 38.

31. Section 49 of the *ESC* fails to acknowledge an employer obligation to carry out the stringent requirements to the point of undue hardship of examining whether job duties may be modified and whether an alternative position or alternatives duties are available. It is submitted that this section in effect permits gender or sex discrimination, contrary to both section 7 of the *AHRA* and section 15 of the *Charter*.

32. Further, this section fails to provide for the pregnant employee's access to sick leave and associated benefits where there is such plan at the workplace. Section 46 of the *ESC* provides that maternity leave may start at any time during the 12 weeks immediately before the estimated date of delivery. This means that maternity leave could be commenced as late as just before the date of delivery. The Supreme Court of Canada in *Brooks* established that a pregnant woman cannot be denied access to sick leave benefits in relation to health-related reasons for absence from work. This was applied in Alberta by the Board of Inquiry and the Court of Queen's Bench in *Alberta Hospital Association v Parcels*⁵² ("*Parcels*"). The Commission's interpretive bulletin on pregnancy, childbirth, and adoption states:

An employer cannot decide which portion of a woman's absence from work because of her pregnancy is medical leave and which portion is maternity or parental leave as defined in the *Employment Standards Code*. This decision depends on the individual woman's pregnancy and birth experience as well as her personal choice.⁵³

33. Therefore, if there is a sick leave or disability plan at the workplace, the pregnant employee cannot be excluded from such plan in relation to health-related reasons for absence from work. If she cannot carry out the

⁵² *Parcels v Red Deer General & Auxiliary Hospital and Nursing Home Dist No 15* (1991), 15 CHRR D/257 (Alta Bd of Inq), var'd in part on other grounds (1992), 1 Alta LR (3d) 332 (QB) (*sub nom Alberta Hospital Assn v Parcels*).

⁵³ *Ibid.*

duties of her position because of pregnancy, and if there is no possible accommodation in relation to duties or alternative position into which she can be accommodated, then there would be a health-related reason for her absence from work. The employer cannot deny her access to such plan through unilaterally placing her on maternity leave. She should have access to such sick leave and benefits plan, with maternity leave under the *ESC* then commencing on her choice, up to the date of delivery.

34. If sick leave is introduced into the *ESC*, then the pregnant employee should have access to such leave for absence for health-related reasons associated with the pregnancy.

35. In comparing provisions in labour standards codes across Canada, it appears that almost all other jurisdictions give more recognition to an employer's duty to accommodate and to the employee's choice as to when to start maternity leave. Four jurisdictions contain no provision for employer authority to require a pregnant employee to commence pregnancy/maternity leave, and LEAF recommends that this is the approach that is most consistent with equality obligations. (For further comparisons, see Appendix 4.)

Recommendation 3: Add the right to a job-protected leave in circumstances of termination of pregnancy, including all the circumstances defined by the Alberta Human Rights Commission as relating to pregnancy.

36. The current wording in sections 45 – 48 of the *ESC* do not expressly address circumstances in which a pregnancy may terminate other than in live birth, such as miscarriage or still-birth. Legislated guarantee of a leave and job protection in such circumstances related to pregnancy is also important for women's equality in the workplace. The same equality

principles that require job-protected leave for women who give birth apply when the pregnancy has terminated in other circumstances. LEAF recommends that the right to a job-protected leave in circumstances of termination of pregnancy, including all the circumstances defined by the Commission as relating to pregnancy, be added to the *ESC*.

37. The Commission's interpretive bulletin on "Rights and responsibilities related to pregnancy, childbirth and adoption" states in its definition section that "pregnancy refers to pregnancy, childbirth, breastfeeding, miscarriage or stillbirth, abortion, and complications arising from any of these conditions."⁵⁴ The interpretive bulletin also notes that the protection from discrimination on the basis of gender includes protection from discrimination because of pregnancy, childbirth, breastfeeding, miscarriage or still-birth, abortion, and complications arising from any of the above.

38. Other jurisdictions in Canada do provide for leave in circumstances of termination of pregnancy such as miscarriage or still-birth (see Appendix 5).

V. Benefits and Benefit Accrual During Leaves

Recommendation 4: Add provisions for accrual of seniority, service, and the right to pension, health, disability and other benefits during family-related leave periods.

39. The *ESC* does not provide for accrual of seniority, service, pensionable service, or other benefits during family-related leave periods. Nor does it provide for continuation of payment of benefit premiums by the employer and/or the employee to ensure continuation of benefits.

⁵⁴ *Supra* note 38.

Section 53(7) of the *ESC*, pertaining to maternity leave and parental leave, and section 53.92(6) of the *ESC*, pertaining to compassionate care leave, provide only that the employee is reinstated in the position occupied when the leave started, or alternative work of a comparable nature, at not less than the earnings and other benefits accrued to the employee when the leave started. This codifies a structural, systemic discrimination whereby the woman loses economic and job status because of her role in childbearing or other family responsibility.⁵⁵ This loss will have effect over her lifetime.

40. Many other jurisdictions in Canada provide for accruals during pregnancy/maternity leave and other family-related leaves, and many jurisdictions provide for continuation of contributions to maintain participation in benefit plans.⁵⁶ There are important and useful examples of equality protective provisions in the employment standards legislation of the following jurisdictions, which the Alberta Government can consult in its workplace legislation review: *Canada Labour Code*, British Columbia, Saskatchewan, Ontario, Quebec (see Appendix 6).

VI. Work Scheduling

Recommendation 5: Amend the *ESC* to provide employees with the right to request flexible work arrangements, including flexible start and finish times and the ability to work from home.

Recommendation 6: Immediately establish a task force to investigate proactive measures for enabling employees to better deal with work-family conflict.

⁵⁵ Moyser, *supra* note 24 at 17-19.

⁵⁶ The obligation for an employer to continue payment of its share of benefit premiums during pregnancy/maternity leave in a manner comparable to other leaves was established in *Parcels*, *supra* note 52.

41. Another broad issue that undermines women's equality is lack of control over work scheduling. As noted in Section III of this submission, women are disproportionately impacted by workplace scheduling practices that do not permit them to organize their paid and unpaid working time and meet their family care responsibilities. Provisions of the *ESC* which give employers undue control over hours of work, permit the scheduling of mandatory overtime, and allow scheduling and schedule changes to take place on very short notice have a disparate impact on women, and increase their workplace and lifetime disadvantage.⁵⁷ Due to space limitations, LEAF refers the reader to the recommendations of the Alberta Federation of Labour ("AFL") regarding "employment standards fundamentals" in Issues 1-10 of the AFL brief.⁵⁸

42. In addition, women with family care obligations may require adjustments to existing work schedules on both a short-term and long-term basis, both to accommodate the scheduling of care arrangements and to deal with family emergencies.

43. The *AHRA* already imposes an obligation on employers not to discriminate on the basis of family status. Courts and tribunals have interpreted "family status" as including the obligations that come with family life, such as the care of children (*Johnstone*⁵⁹; *SMS Equipment Inc v. Communications Energy and Paperworkers Union, Local 707*⁶⁰) and the elderly

⁵⁷ Leila Morsy & Richard Rothstein, *Parents' NonStandard Work Schedules Make Adequate Childrearing Difficult: Reforming Labor Market Practices Can Improve Children's Cognitive and Behavioral Outcomes*, Economic Policy Institute, August 6th, 2015; Law Commission of Ontario, *Vulnerable Workers and Precarious Work*, *supra* note 25 ; Susan Bisom-Rapp & Malcolm Sargeant, *Lifetime Disadvantage, Discrimination and the Gendered Workforce* (Cambridge: Cambridge University Press, 2016).

⁵⁸ Alberta Federation of Labour, *The Canadian Mainstream and Beyond: Reforming Alberta's Employment Standards Code* (Submission to the 2017 Workplace Legislation Review, March 2017) at 4-12.

⁵⁹ *Johnstone*, *supra* note 9.

⁶⁰ *SMS Equipment Inc v Communications Energy and Paperworkers Union, Local 707*, 2015 ABQB 162.

(*Devaney v ZRV Holdings Limited*⁶¹). This means that when employer work rules clash with family care obligations, employers are required to review those practices to ensure that they are reasonably necessary for business purposes, and adjust them to accommodate reasonable employee requests for accommodation: *Meiorin*.⁶²

44. The Alberta Court of Queen's Bench has recently upheld the decision of an Alberta arbitrator finding that an employer discriminated against a single mother by requiring her to work rotating day and night shifts. The arbitrator ordered the employer to accommodate her request to work straight day shifts: *Communications Energy and Paperworkers Union, Local 707 v SMS Equipment Inc.*⁶³ The arbitrator specifically observed: "It is clear on the evidence that the additional burden of child care responsibilities has been a factor in the relatively low participation rate of mothers in the building trades" (para. 73).

45. While the legal obligation to accommodate child care obligation already exists in human rights legislation as part of the prohibition against discrimination based on family status, enforcement of that obligation requires expensive and time-consuming litigation, and forces employees to establish discrimination prior to triggering a duty to accommodate. Human rights codes are an important guarantee of equality rights, but they are no substitute for clear and specific rules set out in the *ESC* which tell employers what their obligations are in these matters, and advise employees of their rights.⁶⁴

⁶¹ *Devaney v ZRV Holdings Limited*, 2012 HRTO 1590.

⁶² *Supra* note 7.

⁶³ 2013 CanLII 71716 (AB GAA); *aff'd sub nom SMS Equipment Inc v Communications Energy and Paperworkers Union, Local 707*, *supra* note 60.

⁶⁴ Stephanie Bernstein, "Mitigating Precarious Employment in Quebec: The Role of Minimum Employment Standards Legislation" in Leah F. Vosko, ed. *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal and Kingston: McGill-Queens University Press, 2006) 221-40.

46. More specific measures are needed to assist employees in meshing work obligations with family care obligations. In its 2017 budget, the federal government announced its intention to amend the *Canada Labour Code* to provide employees in the federal sector with “the right to request flexible work arrangements for federally regulated employees, including flexible start and finish times and the ability to work from home, and new unpaid leaves to help manage family responsibilities.”⁶⁵ This was included among measures expressly designed to reduce the gender wage gap and encourage greater workforce participation among women. LEAF submits that as an interim measure, the Alberta Government should amend the *ESC* to include a similar “right to request” provision.

47. However, it is necessary to find more long-term solutions to the problem of work-family conflict. LEAF submits that the Alberta government should immediately establish a task force to investigate proactive measures for dealing with this problem. Such proactive measures might include a free-standing duty to accommodate requests for scheduling adjustments for family care reasons, and a requirement that employers conduct a review of workplace practices and procedures to determine whether they create barriers to worker performance of family care obligations, and whether they are reasonably necessary to meet business objectives.

VII. In Conclusion

48. Our review is not exhaustive. We have not addressed other issues of concern, including but not limited to issues surrounding domestic, temporary and part-time work. Additionally, we note that the AFL brief includes recommendations on ten other leaves:

- emergency leave and accumulation of emergency leave
- victims of domestic violence

⁶⁵ Government of Canada, [Budget 2017, Chapter 5](#).

- bereavement upon death of close family member
- sick leave
- jury duty
- leave in case of critically ill child
- death or disappearance of a child as a result of crime
- attendance at employee's citizenship ceremony
- organ donation
- running for political office

LEAF supports inclusion of these leaves in the *ESC*.

49. LEAF has been concerned with the fairness of the *ESC* family-leave provisions for some time, particularly the eligibility thresholds. As noted, we made a similar submission to a review of the *ESC* in 2005. We are encouraged by the Government of Alberta's stated commitment to advancing women's economic security and furthering the goal of women's equality. We submit that in order to meet those commitments, it is at a minimum necessary to ensure the *ESC* no longer codifies systemic discrimination on the basis of gender and family status.

APPENDIX 1 – LEAF'S RECOMMENDATIONS

Recommendation 1: Remove eligibility thresholds for maternity leave, parental leave, and compassionate care leave. Do not include an eligibility threshold in any other family-related leave.

Recommendation 2: Remove unilateral authority for an employer to require a woman to start maternity leave (repeal s. 49 of the *ESC*).

Recommendation 3: Add the right to a job-protected leave in circumstances of termination of pregnancy, including all the circumstances defined by the Alberta Human Rights Commission as relating to pregnancy.

Recommendation 4: Add provisions for accrual of seniority, service, and the right to pension, health, disability and other benefits during family-related leave periods.

Recommendation 5: Amend the *ESC* to provide employees with the right to request flexible work arrangements, including flexible start and finish times and the ability to work from home.

Recommendation 6: Immediately establish a task force to investigate proactive measures for enabling employees to better deal with work family conflict.

APPENDIX 2 – FAMILY-RELATED LEAVE PROVISIONS

EMPLOYMENT STANDARDS CODE

Division 7

Maternity Leave and Parental Leave

Entitlement to maternity leave

45 A pregnant employee who has been employed by an employer for at least 52 consecutive weeks is entitled to maternity leave without pay.

Length of maternity leave

46(1) The maternity leave to which a pregnant employee is entitled is a period of not more than 15 weeks starting at any time during the 12 weeks immediately before the estimated date of delivery.

(2) An employee who takes maternity leave must take a period of leave of at least 6 weeks immediately following the date of delivery, unless the employee and her employer agree to shorten the period by the employee's giving her employer a medical certificate indicating that resumption of work will not endanger her health.

Notice of maternity leave

47(1) A pregnant employee must give her employer at least 6 weeks' written notice of the date she will start her maternity leave, and if so requested by her employer, the pregnant employee must provide her employer with a medical certificate certifying that she is pregnant and giving the estimated date of delivery.

(2) A pregnant employee is entitled to start maternity leave on the date specified in the written notice given to her employer under subsection (1).

No notice of maternity leave

48 An employee who does not give her employer prior notice of maternity leave before starting it is still entitled to maternity leave if, within 2 weeks after she ceases to work, she provides her employer with a medical certificate

(a) indicating that she is not able to work because of a medical condition arising from her pregnancy, and

(b) giving the estimated or actual date of delivery.

Notice of employer to start maternity leave

49 If during the 12 weeks immediately before the estimated date of delivery the pregnancy of an employee interferes with the performance of her duties, an employer may give the employee written notice requiring her to start maternity leave.

Parental leave

50(1) Subject to subsection (2), an employer must grant parental leave to an employee as follows:

(a) in the case of an employee entitled to maternity leave under this Division, a period of not more than 37 consecutive weeks immediately following the last day of maternity leave;

(b) in the case of a parent who has been employed by the employer for at least 52 consecutive weeks, a period of not more than 37 consecutive weeks within 52 weeks after the child's birth;

(c) in the case of an adoptive parent who has been employed by the employer for at least 52 consecutive weeks, a period of not more than 37 consecutive weeks within 52 weeks after the child is placed with the adoptive parent for the purpose of adoption.

(2) If employees described in this section are parents of the same child, the parental leave granted under subsection (1) may

(a) be taken wholly by one of the employees, or

(b) be shared by the employees.

(3) If employees described in this section are parents of the same child and are employed by the same employer, the employer is not required to grant parental leave to more than one employee at a time.

Notice of parental leave

51(1) An employee must give the employer at least 6 weeks' written notice of the date the employee will start parental leave unless

(a) the medical condition of the birth mother or child makes it impossible to comply with this requirement;

(b) the date of the child's placement with the adoptive parent was not foreseeable.

(2) If the employee cannot comply with the written notice requirement for any of the reasons stated in subsection (1)(a) or (b), the employee must give the employer written notice at the earliest possible time of the date the employee will start or has started parental leave.

(3) An employee is entitled to start parental leave on the date specified in the written notice given to the employer under subsection (1) or (2).

(4) Written notice under section 47(1) is deemed to be notice of parental leave under this section unless the notice specifically provides that it is not notice of parental leave, in which case this section applies.

(5) Employees who intend to share parental leave must advise their respective employers of their intention to share parental leave.

Termination of employment prohibited during maternity leave and parental leave

52(1) No employer may terminate the employment of, or lay off, an employee who

(a) has started her maternity leave, or

(b) is entitled to or has started parental leave.

(2) Subsection (1) does not apply if an employer suspends or discontinues in whole or in part the business, undertaking or other activity in which the employee is employed, but the obligation of the employer to reinstate the employee or provide the employee with alternative work in accordance with section 53.1 continues to apply.

Resumption of employment

53(1) Subject to section 46(2), an employee must give the employer at least 4 weeks' written notice of the date on which the employee intends to resume work and in any event must give notice not later than 4 weeks before the end of the leave period to which the employee is entitled or 4 weeks before the date on which the employee has specified as the end of the employee's leave period, whichever is earlier.

(2) If an employee has given notice that she intends to resume work on a date that is before the end of the 6-week period referred to in section 46(2), the employee is entitled

without further notice to an additional period of leave sufficient to meet the requirements of section 46(2).

(3) The additional period of leave referred to in subsection (2) is to be charged first against any remaining maternity leave to which the employee is entitled and then against parental leave, and if it is charged against parental leave the amount of parental leave referred to in section 50 is reduced accordingly.

(4) An employee is not entitled to resume working until the date specified in the written notice referred to in subsection (1) or the end of the additional period referred to in subsection (2), as the case may be.

(5) An employee must resume work on the date specified in the written notice or immediately following the end of the additional period, as the case may be, and if the employee fails to return to work on that date the employee is not entitled to resume work subsequently unless the failure to return to work resulted from unforeseeable or unpreventable circumstances.

(6) If an employee fails to provide at least 4 weeks' notice before the end of the leave period to which the employee is entitled, the employee is not entitled to resume work unless the failure to provide the notice resulted from unforeseeable or unpreventable circumstances.

(7) Where an employee is entitled to resume work under this section, the employer must

(a) reinstate the employee in the position occupied when maternity or parental leave started, or

(b) provide the employee with alternative work of a comparable nature

at not less than the earnings and other benefits that had accrued to the employee when the maternity or parental leave started.

(8) An employee who does not wish to resume employment after maternity or parental leave must give the employer at least 4 weeks' written notice of intention to terminate employment.

Suspension of operations

53.1 If the business, undertaking or other activity of an employer is suspended or discontinued in whole or in part during an employee's maternity or parental leave and

the employer has not resumed operations when the employee's leave ends, the employer must, if the operation is subsequently resumed within 52 weeks following the end of the leave,

(a) reinstate the employee in the position occupied at the time the maternity or parental leave started, at not less than the earnings and other benefits that had accrued to the employee, or

(b) provide the employee with alternative work in accordance with an established seniority system or practice of the employer in force at the time the employee's maternity or parental leave started, with no loss of seniority or other benefits accrued to the employee.

...

Division 7.2

Compassionate Care Leave

Compassionate care leave

53.9 In this division,

(a) "common-law partner" means a person who at the relevant time cohabits in a conjugal relationship with the employee and has so cohabited with the employee for a continuous period of at least one year;

(b) "family member", in relation to an employee, means

(i) a spouse or common-law partner of the employee,

(ii) a child of the employee or a child of the employee's spouse or common-law partner,

(iii) a parent of the employee or a spouse or common-law partner of the parent, and

(iv) any other person who is a member of a class of persons designated in the regulations for the purpose of this definition;

(c) "physician" means a physician who provides care to a family member and who is entitled to practise medicine under the laws of the jurisdiction in which the care is provided;

(d) “primary caregiver” means an individual who has primary responsibility for providing care or support to a seriously ill family member for that family.

(2) Subject to subsections (3) to (7), an employee who has completed at least 52 consecutive weeks with an employer is entitled to compassionate care leave of up to 8 weeks to provide care or support to a seriously ill family member if the employee is the primary caregiver.

(3) For an employee to be eligible for leave, a physician must issue a certificate stating that

(a) a family member of the employee has a serious medical condition with a significant risk of death within 26 weeks from

(i) the day the certificate is issued, or

(ii) if the leave was begun before the certificate was issued, the day the leave began,

and

(b) the family member requires the care or support of one or more family members.

(4) An employee who wishes to take a leave under this section must give the employer notice of at least 2 weeks, unless circumstances necessitate a shorter period.

(5) Except in emergency situations, the employee must give the employer a copy of the physician’s certificate prior to commencing compassionate care leave.

(6) An employee may take up to 2 periods of compassionate care leave totalling no more than 8 weeks, but any second period of leave must end no later than 26 weeks after the first period of leave began.

(7) No period of leave may be less than one week’s duration.

Termination of employment

53.91(1) No employer may terminate the employment of, or lay off, an employee who has started compassionate care leave.

(2) Subsection (1) does not apply if an employer suspends or discontinues in whole or in part the business, undertaking or other activity in which the employee is employed, but the obligation of the employer to reinstate the employee or provide the employee with alternative work in accordance with section 53.93 continues to apply.

Resumption of employment

53.92(1) If an employee has been on compassionate care leave, he or she must provide 2 weeks' written notice of the date the employee intends to resume work.

(2) Notwithstanding subsection (1), nothing precludes an employer and an employee from agreeing in writing to a return to work date on less than 2 weeks' notice.

(3) If an employee fails to comply with subsection (1) or (2), the employer may postpone the employee's return to work for a period of up to 4 weeks after the day on which the employee notifies the employer of the employee's intention to resume work.

(4) If the employer informs the employee in writing that the employee's return to work is postponed, the employee is not entitled to return to work until the day that is indicated by the employer.

(5) During the period of postponement, the employee is deemed to continue to be on compassionate care leave.

(6) Where an employee is entitled to resume work under this section, the employer must

(a) reinstate the employee in the position occupied when the compassionate care leave started, or

(b) provide the employee with alternative work of a comparable nature

at not less than the earnings and other benefits that had accrued to the employee when the compassionate care leave started.

(7) An employee who does not wish to resume employment after compassionate care leave must give the employer at least 2 weeks' written notice of intention to terminate employment.

Suspension of operations

53.93 If the business, undertaking or other activity of an employer is suspended or discontinued in whole or in part during an employee's compassionate care leave and the employer has not resumed operations when the leave ends, the employer must, if the operation is subsequently resumed within 52 weeks following the end of the leave,

(a) reinstate the employee in the position occupied at the time the leave started at not less than the earnings and other benefits that had accrued to the employee, or

(b) provide the employee with alternative work in accordance with an established seniority system or practice of the employer in force at the time the employee's leave started, with no loss of seniority or other benefits accrued to the employee.

Leave and vacation conflict

53.94 Notwithstanding section 37(1), if an employee is on compassionate care leave on the day by which his or her vacation must be used, any unused part of the vacation must be used immediately after the leave expires or, if the employer and employee agree to a later date, by that later date.

APPENDIX 3 – EQUALITY LEGISLATION

1. *Alberta Human Rights Act, RSA 2000, c A-25.5*

1(1) Unless it is expressly declared by an Act of the Legislature that it operates notwithstanding this Act, every law of Alberta is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act.

...

Discrimination re employment practices

7(1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- (b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or any other person.

(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

2. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.*

Section 15(1)

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

...

Section 28

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

3. Convention on the Elimination of All Forms of Discrimination against Women, GA res. 34/180, 34 UN GAOR Supp. (No. 46), UN Doc A/34/46 (1981) [ratified by Canada 10 December 1981]

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural field, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

...

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, in a basis of equality of men and women, the same rights . . .

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, State Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; . .

APPENDIX 4 – COMPARISON OF EMPLOYMENT STANDARDS PROVISIONS RELATING TO DUTY TO ACCOMMODATE

The following jurisdictions contain no provision for employer authority to require the pregnant employee to commence maternity leave, and this is the approach that is most consistent with equality obligations:

- British Columbia, *Employment Standards Act*, RSBC 1996, c 113, see s. 50 and s. 54.
- Manitoba, *Employment Standards Code*, CCSM, cE110, see s. Division 9, ss. 52-57.1
- Ontario, *Employment Standards Act 2000*, SO 2000, c 41, see ss. 46, 47.
- Newfoundland and Labrador, *Labour Standards Act*, RSNL 1990, c L-2, see Part VII, ss. 39-42.

Quebec, *An Act Respecting Labour Standards*, CQLR, c N 1.1, s. 81.8 provides that from the sixth week preceding the expected date of delivery, the employer may require a medical certificate attesting that she is fit to work, and if she does not produce the certificate, only then can the employer require her to take maternity leave.

Express acknowledgement of the duty to accommodate is included in:

- *The Saskatchewan Employment Act*, SS 2013, c S-15.1, s. 2-49(5), and in the recognition that human rights legislation applies (s. 2-45)
- *The Canada Labour Code*, RSC 1985, c L-2, reassignment and job modification provisions in sections 204 and 205. Further, s. 208 provides:

Prohibition

208 (1) Subject to subsection (2), no employer shall require an employee to take a leave of absence from employment because the employee is pregnant.

Exception

(2) An employer may require a pregnant employee to take a leave of absence from employment if the employee is unable to perform an essential function of her job and no appropriate alternative job is available for that employee.

Length of leave

(3) A pregnant employee who is unable to perform an essential function of her job and for whom no appropriate alternative job is available may be required to take a leave of absence from employment only for such time as she is unable to perform that essential function.

Burden of proof

(4) The burden of proving that a pregnant employee is unable to perform an essential function of her job rests with the employer.

- New Brunswick's *Employment Standards Act*, SNB 1982, c E-7.2, s. 43(4) refers to "where no alternative employment is available."

While Nova Scotia's *Labour Standards Code*, RSNS 1989, c 246, s. 59A (1) provides that the employer may require a pregnant employee to "take an unpaid leave of absence while the duties of her position cannot reasonably be performed by a pregnant woman or the performance of the employee's work is materially affected," sub-section (2) provides:

(2) For greater certainty, nothing in subsection (1) affects any protection provided to a pregnant employee, regardless of the length of employment, by the Human Rights Act.

The following jurisdictions provide that labour standards officers must be involved in making the determination:

- Yukon *Employment Standards Act*, RSY 2002, c 72, s. 37: subsection (1) allows unilateral employer authority to require a pregnant employee to begin maternity leave within 6 weeks preceding the probable birth of the child, but subsection (2) requires the consent of the Director for the employer to require the pregnant employee to begin maternity leave at any earlier time

- Northwest Territories *Employment Standards Act*, SNWT 2013, c 13, s. 27(1) provides that an Employment Standards Officer makes the determination of whether the employee may be required to commence maternity leave.

- Nunavut *Labour Standards Act*, RSNWT (Nu) 1988, c L-1, s. 33, similarly provides that the Labour Standards Officer makes the determination.

PEI *Employment Standards Act*, RSPEI 1988, c E-6.2, provides in s. 19(3) for employer authority to require an employee to commence maternity leave, but s. 19(4) provides that in any prosecution relating to s. 19(3), the onus is on the employer to prove that the pregnancy would unreasonably interfere with the performance of the employee's duties.

APPENDIX 5 – COMPARISON OF EMPLOYMENT STANDARDS PROVISIONS RELATING TO LEAVE FOR PREGNANCY TERMINATION

British Columbia, *Employment Standards Act*, RSBC 1996, c 113 s. 50:

- is titled “Pregnancy leave”
- refers in s. 50(2) and (3) to “the date of the birth or of the termination of the pregnancy”
- provides for 6 consecutive weeks of unpaid leave and an additional 6 weeks if she is unable to return to work.

Ontario, *Employment Standards Act 2000*, SO 2000, c 41:

- S. 46 is titled “Pregnancy leave.”
- S. 46(3) sets out an exception as to when pregnancy leave may begin for “a pregnancy that ends with a still-birth or miscarriage.
- S. 46(6) provides that the requirement of notice (in sub-section (4)) does not apply if the employee stops working because of a complication caused by her pregnancy or because of a birth, still-birth or miscarriage that occurs earlier than the due date.”
- S. 47 provides for the end of pregnancy leave where the employee is not entitled to parental leave being the later of:
 - (i) 17 weeks after the pregnancy leave began, and
 - (ii) six weeks after the birth, still-birth or miscarriage.

Quebec, *An Act Respecting Labour Standards*, CQLR, c N 1.1:

Provides for these circumstances in s. 81.5.2 and 81.5.3.

81.5.2 Where there is termination of pregnancy before the beginning of the twentieth week preceding the expected date of delivery, the employee is entitled to a special maternity leave, without pay, for a period of no longer than three weeks, unless a medical certificate attests that the employee needs an extended leave.

If the termination of pregnancy occurs in or after the twentieth week, the employee is entitled to a maternity leave without pay of a maximum duration of 18 consecutive weeks beginning from the week of the event.

Newfoundland and Labrador, *Labour Standards Act*, RSNL 1990, c L-2:

Sections 41 and 42 contain provisions similar to Ontario's:

- S. 41 is titled "Special circumstances" and provides in subsection (1) that the notice requirements in s. 40(3) do not apply "in the case of an employee who stops working because of complications caused by her pregnancy or because of a birth, still-birth or miscarriage that happens earlier than the employee was expected to give birth. Subsection (2) provides for notice within 2 weeks of stopping work.

- S. 42(2) provides for the end of pregnancy leave where the employee is not entitled to parental leave being the later of 17 weeks after the pregnancy leave began, and six weeks after the birth, still-birth or miscarriage.

Yukon, *Employment Standards Act*, RSY 2002, c 72:

Section 36(4) provides for leave of 17 weeks (or any shorter period as the employee may request) if the employee gives birth, or the pregnancy is terminated, or the employee needs a leave of absence because of health problems caused by or associated with the pregnancy.

APPENDIX 6 – COMPARISON OF EMPLOYMENT STANDARDS PROVISIONS RELATING TO ACCRUALS

Canada Labour Code, RSC 1985, c L-2:

Right to benefits

209.2 (1) The pension, health and disability benefits and the seniority of any employee who takes or is required to take a leave of absence from employment under this Division shall accumulate during the entire period of the leave.

Contributions by employee

(2) Where contributions are required from an employee in order for the employee to be entitled to a benefit referred to in subsection (1), the employee is responsible for and must, within a reasonable time, pay those contributions for the period of any leave of absence under this Division unless, before taking leave or within a reasonable time thereafter, the employee notifies the employer of the employee's intention to discontinue contributions during that period.

Contributions by employer

(2.1) An employer who pays contributions in respect of a benefit referred to in subsection (1) shall continue to pay those contributions during an employee's leave of absence under this Division in at least the same proportion as if the employee were not on leave unless the employee does not pay the employee's contributions, if any, within a reasonable time.

Failure to pay contributions

(3) For the purposes of calculating the pension, health and disability benefits of an employee in respect of whom contributions have not been paid as required by subsections (2) and (2.1), the benefits shall not accumulate during the leave of absence and employment on the employee's return to work shall be deemed to be continuous with employment before the employee's absence.

Deemed continuous employment

(4) For the purposes of calculating benefits of an employee who takes or is required to take a leave of absence from employment under this Division, other than benefits

referred to in subsection (1), employment on the employee's return to work shall be deemed to be continuous with employment before the employee's absence.

...

Effect of leave

209.21 Notwithstanding the provisions of any income-replacement scheme or any insurance plan in force at the workplace, an employee who takes a leave of absence under this Division is entitled to benefits under the scheme or plan on the same terms as any employee who is absent from work for health-related reasons and is entitled to benefits under the scheme or plan.

British Columbia, *Employment Standards Act*, RSBC 1996, c 113

Employment deemed continuous while employee on leave or jury duty

56 (1) The services of an employee who is on leave under this Part or is attending court as a juror are deemed to be continuous for the purposes of

(a) calculating annual vacation entitlement and entitlement under sections 63 and 64, and

(b) any pension, medical or other plan beneficial to the employee.

(2) In the following circumstances, the employer must continue to make payments to a pension, medical or other plan beneficial to an employee as though the employee were not on leave or attending court as a juror:

(a) if the employer pays the total cost of the plan;

(b) if both the employer and the employee pay the cost of the plan and the employee chooses to continue to pay his or her share of the cost.

(3) The employee is entitled to all increases in wages and benefits the employee would have been entitled to had the leave not been taken or the attendance as a juror not been required.

(4) Subsection (1) does not apply if the employee has, without the employer's consent, taken a longer leave than is allowed under this Part.

(5) Subsection (2) does not apply to an employee on leave under section 52.2 [Reservists' leave].

Saskatchewan, *Saskatchewan Employment Act*, SS 2013, c S-15.1:

Length of service, rights of recall, benefits and reinstatement

2-48(1) An employee continues to accrue seniority, service for the purposes of subclause 2-23(a)(ii) or (b)(ii) and rights of recall while on an employment leave or a combination of employment leaves for the length of the employment leave or combination of employment leaves to a maximum of 52 weeks.

(2) Subject to subsection (3) and to the provisions of a prescribed benefit plan, an employee continues to be entitled to participate in the prescribed benefit plan while on an employment leave or combination of employment leaves, for the length of the leave or leaves, if the employee pays the contributions required by the prescribed benefit plan.

(3) The requirement in subsection (2) for the employee to pay the contributions required by the prescribed benefit plan does not apply to a bereavement leave or a citizenship ceremony leave.

(4) At the expiration of an employment leave and subject to subsection (5), an employer shall reinstate an employee to the same job the employee held before going on employment leave, without any loss of accrued seniority or benefits or reduction in rate of pay.

(5) An employer may reinstate an employee, without any loss of accrued seniority or benefits or reduction in rate of pay, to a job comparable to that held by the employee before going on employment leave:

- (a) if the employment leave was for more than 60 days; or
- (b) if prescribed circumstances exist.

Ontario, *Employment Standards Act 2000*, SO 2000, c 41:

Rights during leave

51. (1) During any leave under this Part, an employee continues to participate in each type of benefit plan described in subsection (2) that is related to his or her employment unless he or she elects in writing not to do so.

Benefit plans

(2) Subsection (1) applies with respect to pension plans, life insurance plans, accidental death plans, extended health plans, dental plans and any prescribed type of benefit plan.

Employer contributions

(3) During an employee's leave under this Part, the employer shall continue to make the employer's contributions for any plan described in subsection (2) unless the employee gives the employer a written notice that the employee does not intend to pay the employee's contributions, if any.

...

Length of employment

52. (1) The period of an employee's leave under this Part shall be included in calculating any of the following for the purpose of determining his or her rights under an employment contract:

1. The length of his or her employment, whether or not it is active employment.
2. The length of the employee's service whether or not that service is active.
3. The employee's seniority.

Exception

(2) The period of an employee's leave shall not be included in determining whether he or she has completed a probationary period under an employment contract.

...

Reinstatement

53. (1) Upon the conclusion of an employee's leave under this Part, the employer shall reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.

...

Wage rate

(3) The employer shall pay a reinstated employee at a rate that is equal to the greater of,

- (a) the rate that the employee most recently earned with the employer; and
- (b) the rate that the employee would be earning had he or she worked throughout the leave.

Quebec, *An Act Respecting Labour Standards*, CQLR, c N 1.1:

81.15. An employee's participation in the group insurance and pension plans recognized in the employee's place of employment shall not be affected by the absence from work, subject to regular payment of the contributions payable under those plans, the usual part of which is paid by the employer.

The Government shall determine, by regulation, the other advantages available to an employee during maternity, paternity or parental leave.

81.15.1. At the end of a maternity, paternity or parental leave, the employer shall reinstate the employee in the employee's former position with the same benefits, including the wages to which the employee would have been entitled had the employee remained at work.

If the position held by the employee no longer exists when the employee returns to work, the employer shall recognize all the rights and privileges to which the employee would have been entitled if the employee had been at work at the time the position ceased to exist.