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## **ESA Leave Consultation: Submission to the Employment, Labour and Corporate Policy Branch**



**Workers' Action Centre**

[ella@workersactioncentre.org](mailto:ella@workersactioncentre.org) \* 416-531-0778 \*

[workersactioncentre.org](http://workersactioncentre.org)



**Parkdale Community Legal Services**

[mary.e.gellatly@pcls.clcj.ca](mailto:mary.e.gellatly@pcls.clcj.ca) \* 416-531-2411 ext 246 \*

[parkdalelegal.org](http://parkdalelegal.org)

These submissions are made on behalf of the Workers' Action Centre (WAC) and Parkdale Community Legal Services (PCLS). Each year, our organizations support thousands of workers in low wage and precarious employment. Through case work, law reform initiatives, and movement building, it is our mission to support workers in their struggle for dignity and decent work in Ontario.

For workers in low-wage and precarious jobs, illness - including both mental and physical illness - too often leads to financial hardship. Through the experiences of our members and the workers we support, we see how the lives of workers can come crashing down around them when they experience long-term sickness or injury. We also know that many workers are forced to go to work sick because they do not have access to short-term job-protected paid sick leave, which in addition to undermining public health, can lead to worsening health conditions as workers forgo medical care.

It is our perspective that in legislating a personal long-term leave, the provincial government must prioritize adequacy and seamless accessibility, which are acknowledged principles for effective sick leave.<sup>1</sup> Neither of the proposed approaches in the Government's consultation paper meet this threshold for effectiveness.

When facing a health crisis or long-term sickness, workers are already dealing with many layers of stress; they should not also have to worry about losing their employment. It is critical that workers accessing Employment Insurance (EI) sickness benefits have access to job-protected leave under the ESA. A new job-protected leave must match or exceed the length of EI sickness benefits. This means:

- **Eligible employees should be entitled to at least 27 weeks of job-protected leave, which would cover the 26 weeks of financial assistance provided by EI sickness benefits, and the one-week waiting period.**

It is also critical that the scope and eligibility criteria for a new job-protected leave for illness or injury not create unnecessary barriers to access. The threshold for accessing EI sickness benefits is already restrictive. Many workers, particularly those working in precarious, part-time and contract work – who are disproportionately racialized, immigrant and women workers – are unable to accumulate the necessary insured hours to access EI.

The eligibility criteria and evidentiary requirements for a new job-protected leave for illness or injury must not exceed those for accessing EI sickness benefits. The leave should be available to any employee who is prevented from working due to illness, injury, quarantine, or any medical condition that prevents the person from working. This means:

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<sup>1</sup> *Before It's Too Late: How to close the paid sick days gap during COVID-19 and Beyond*, Decent Work and Health Network, July 2020:  
[https://d3n8a8pro7vhmx.cloudfront.net/dwhn/pages/135/attachments/original/1604082294/DWHN\\_BeforeItsTooLate.pdf?1604082294](https://d3n8a8pro7vhmx.cloudfront.net/dwhn/pages/135/attachments/original/1604082294/DWHN_BeforeItsTooLate.pdf?1604082294)

- **The proposed length of service requirement of 6 consecutive months must be removed; and**
- **Evidentiary requirements should not be more onerous than the requirements for obtaining EI sickness benefits.**

**Any approach to providing job-protected sick leave must also include 10 employer paid sick days.** Alongside longer-term leaves, employer paid sick days are critical to ensuring that workers have the financial security and job protection they need to attend to their health. This is the approach taken in the federal jurisdiction, where the *Canada Labour Code* was amended to create a 27 week job-protected Medical Leave that mirrors the scope and eligibility criteria for EI sickness benefits and includes an entitlement to 10 employer-paid sick days.<sup>2</sup> Together these measures ultimately lessen the burden on our healthcare system and reduce the spread of disease and illness in our communities, while ensuring that employees actually have the job protection they need to access EI sickness benefit and take care of their health. See below further details on three key recommendations for an effective personal long-term leave under the ESA:

**1. The eligibility criteria for a new long-term job-protected leave should not create additional barriers to access that exceed the criteria for EI sickness benefits**

Any new ESA job-protected leave provision should not thwart workers' entitlement to EI sick leave. The government should not introduce any additional barriers to accessing long-term job-protected leave beyond the eligibility criteria for EI sickness benefits. This would help ensure that any worker who is prevented from working due to illness, injury, quarantine, or any medical condition that prevents a person from working, would be eligible for a job-protected leave of up to 27 weeks.

The two approaches proposed in the government's consultation paper unnecessarily introduce new terms, which would create confusion for employers, employees and healthcare providers. Workers should not have to juggle different eligibility criteria while determining their leave entitlements. The first approach is overly restrictive, limiting access only to workers facing "critical illness". The second approach requires a worker to be unable to work due to "serious medical condition," which is not defined in the ESA, nor is it a term with a specific medical meaning. It is confusing, nebulous and likely to be interpreted differently by different healthcare providers.

Both eligibility thresholds proposed in the consultation paper are higher than the eligibility threshold for EI sickness benefits. This creates the conditions where a worker could qualify for EI sick benefits because their healthcare practitioner certifies they are unable to work, but that worker still does not qualify for job-protected leave. This approach will leave ill and injured workers vulnerable to termination, even when they qualify for EI sickness benefits.

Instead, to ensure seamless access and avoid unnecessary barriers, no new eligibility criteria should be introduced. As is the case for EI sickness benefits, workers should be eligible for this new long-term leave if they are unable to work due to medical reasons. This is consistent with the

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<sup>2</sup> *Canada Labour Code*, RSC 1985, c L-2, sections 239 – 239.01.

Ministry of Labour’s current policy not to “look behind” medical certificates when determining if an employee is rightfully entitled to take Critical Illness or similar leaves.<sup>3</sup> This approach appropriately recognizes that qualified health professionals – not employers, or the Ministry of Labour – have the expertise to assess their patient’s health needs. If in the medical opinion of a qualified health professional, a worker is unable to work for medical reasons, the *ESA* should enable that worker to follow their health practitioner’s recommendations for recovery.

## **2. Workers should not be required to work for 6 consecutive months to be eligible for job-protected medical leave**

No one can control the timing of a health crisis. If workers are seeking job-protected medical leave, it's because they badly need the time off. Restricting entitlement to longer-term sick leave to employees who have been employed for 6 months or longer creates an unnecessary and punitive barrier to access. Racialized, immigrant, women and low-wage workers in part-time and insecure employment would be most negatively impacted by this punitive restriction.

Currently, employees are entitled to three days of unpaid sick leave under the *ESA* after being employed for at least two consecutive weeks with an employer. Importantly, it is not necessary that the employee have been actively working for the two-week period, so long as they were an employee during this time. This same standard could apply for longer-term job-protected medical leaves. It is not necessary to introduce a new higher threshold for access to long-term sick leave, and doing so risks undermining access for those workers who need it most.

Evidence shows that workers do not abuse paid sick leave.<sup>4</sup> Workers are even less likely to abuse job-protected unpaid leaves, since they would generally prefer to earn their full income rather than take time off without pay. At best, employment insurance benefits provide a modicum of financial security to workers while they attend to their health or the health of a loved one. For all claimants, EI sickness benefits are capped \$668 per week, plus any family supplement for which the claimant is eligible.<sup>5</sup> Most workers, if they are even eligible for sickness benefits, will struggle to make ends meet while living off 55 percent of their insurable earnings.

Any concerns that the Ministry may have about employees abusing job-protected leaves are mitigated by the safeguards already built into the *ESA* and Employment Insurance system.

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<sup>3</sup> *Employment Standard Act Policy and Interpretation Manual*, Part XIV – Leaves of absence, <https://www.ontario.ca/document/employment-standard-act-policy-and-interpretation-manual/part-xiv-leaves-absence#section-7>.

<sup>4</sup> Drago R, Lovell V. “San Fran PSL Ordinance. San Francisco’s paid sick leave ordinance: Outcomes for employers and employees,” Institute for Women’s Policy Research, February 2011: [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://iwpr.org/wp-content/uploads/2021/02/A138\\_edited.pdf](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://iwpr.org/wp-content/uploads/2021/02/A138_edited.pdf); Applebaum E, Milkman R. “No big deal: The impact on New York city’s paid sick day laws on employers” <https://cepr.net/images/stories/reports/nyc-paid-sickdays-2016-09.pdf>. Page 4. Published September 6, 2016; “Implementation and Early Outcomes of the City of Seattle Paid Sick and Safe Time Ordinance” City of Seattle, April 2014: <http://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/PSSTOUWReportwAppendices.pdf>

<sup>5</sup> Benefits are normally clawed back on a dollar-for-dollar basis if the worker continues to receive any income during the claim, but exceptions are made in a few circumstances.

Specifically, employees must obtain a medical certificate from a licensed medical practitioner to obtain EI benefits, and therefore cannot access those benefits unless they have a bona fide medical condition that prevents them from working.

A minimum six-month employment requirement creates a higher threshold for access to sick leave than in any other Canadian jurisdiction. To fulfill the government's stated purpose of ensuring workers "have the peace of mind that their job will be waiting for them while they seek treatment",<sup>6</sup> workers should not have to earn the right to take care of their health through an excessive length of service requirement.

### **3. Evidentiary requirements should not be more onerous than the requirements for obtaining EI sickness benefits, and should safeguard the privacy of employees as much as possible**

This government has [recently recognized](#) the importance of lessening the administrative burdens placed on primary health providers. Yet under the two approaches proposed in the government's consultation paper, workers may need to ask their doctor to complete two different medical certificates: one to qualify their entitlement to EI sickness benefits, and another specifying the worker has a "critical illness" or "serious medical condition". Not only will this cost workers, who generally have to pay for the completion of these certificates, it will create further unnecessary drag on our healthcare system. By mirroring the eligibility criteria and evidentiary requirements for obtaining EI sickness benefits, Ontario could continue reducing the administrative burdens that providing sick notes places on primary healthcare providers.

Healthcare providers and advocates are clear that sick notes should not be necessary to stay home from work for short-term illnesses.<sup>7</sup> Federally regulated employers and employers in Manitoba, Prince Edward Island, New Brunswick, Nova Scotia, Newfoundland and Labrador, Quebec, and the Northwest Territories are prohibited from seeking sick notes for short-term absences.<sup>8</sup> Ontario has announced it will soon join several other Canadian jurisdictions in prohibiting employers from requiring sick notes for short-term illness or injury leaves.

For longer absences, if evidence is required to verify a worker's leave entitlement, the Ministry should safeguard the worker's medical privacy by maintaining the Program's current policy for Sick Leave (ESA, section 50) evidence, which prohibits employers from requiring information that reveals the workers' diagnosis and/or treatment of the medical condition of the employee that give rise to the sick leave entitlement. The Ministry should maintain the Labour Standards Program's current policy,<sup>9</sup> which holds that employers may reasonably request only the expected duration

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<sup>6</sup> "Ontario Taking Action to Support Injured Workers and Firefighters" November 8, 2023: <https://news.ontario.ca/en/release/1003785/ontario-taking-action-to-support-injured-workers-and-firefighters>

<sup>7</sup> *Supra* note 1; Ontario Medical Association, "Prescription for Ontario: Doctors' Solutions for Immediate Action": <https://www.oma.org/advocacy/prescription-for-ontario/prescription-for-ontario-doctors-solutions-for-immediate-action/>

<sup>8</sup> The number of consecutive days off that an employee can take before the employer may request a medical note varies by jurisdiction.

<sup>9</sup> *Supra* note 2.

of the absence and the date the employee was seen by a health care professional and whether the patient was examined in person by the health care professional issuing the certificate. Finally, where an employee is required to obtain a medical certificate, the employer should bear the cost of obtaining the note.

#### **4. The *Employment Standards Act* should include at least 10 employer paid sick days**

While Employment Insurance sickness benefits are designed to help workers weather medium and long-term illness or injury, the COVID-19 pandemic taught us that access to short-term paid sick days are an essential public health policy. In addition to preventing the spread of infectious disease, paid sick days support workers' ability to access preventive and primary care that avoids worsening health conditions that may force workers to access longer-term sick leave. That is why Ontario should join the four other Canadian jurisdictions that have introduced employer-paid sick leaves into law.<sup>10</sup>

Many workers, including those who are misclassified as independent contractors, or who are working with precarious immigration status, are not eligible for EI sickness benefits. Those who are must go without an income for at least the one-week waiting period. The ESA should offer at least 10 employer-paid sick days, and more during public health emergencies to mitigate the economic impacts and public health impacts of illness.

#### **Conclusion**

Access to paid job-protected sick leave is a crucial component of the decent work agenda that we have long been advocating for. Ontario should strive to create a comprehensive and practical approach to sick leave that works in tandem with federal benefit programs. In accordance with public health advice and the principles of equity, security, and human dignity that underpin decent work, sick leave should be widely accessible, provide sufficient financial support and job security, and be fairly and efficiently administered.<sup>11</sup> It is our respectful submissions that the government's current proposals will not achieve these ends unless the length, scope, and eligibility criteria for any new job-protected leave for illness and/or injury matches the eligibility criteria, and evidentiary requirements for Federal Employment Insurance (EI) sickness benefits and includes at least 10 employer-paid sick days.

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<sup>10</sup> Employer paid sick days have been implemented in the *Canada Labour Code* (s.239 – 239.01); British Columbia's *Employment Standards Act*, RSBC 1996 at s. 49.1; Prince Edward Island's *Employment Standards Act* RSPEI 1988 at s 22.2, and Quebec's *Loi sur les normes du travail* CQLR c N-1.1 at – s 79.6.1 à 81.17.

<sup>11</sup> Erick Tucker and Leah Vosko, "Designing Paid and Protected Employment Leaves for Short-Term Sickness and Caregiving" IRPP Insight October 21, No. 38 at p 14-15.