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VIA EMAIL

28 March 2019

URGENT AND CONFIDENTIAL (but subject to public disclosure requirements)

To: Minister of Labour, c/o Consultation Portal re Employment Standards Act Review

From: CPHR BC & Yukon

Re: CPHR BC & Yukon Submission on Employment Standards Act Review

On behalf of the Chartered Professionals in Human Resources Association of B.C. & Yukon ("CPHR BC"), we are pleased to make this submission to the Minister.

CPHR BC first formed a Public Policy Committee to address public policy topics affecting human resource professionals in July, 2018. We are proud to be making our second submission to government on reform to a keystone employment statute, having made a submission to the panel reviewing the Labour Relations Code and then to the Minister on the same topic last year.

By way of background, our Association represents over **6,100 human resource professionals and their service providers and advisors in B.C.** Our members work every day on the front lines applying and administering the Employment Standards Act ("ESA") or advising clients on the ESA. We are thus uniquely positioned to provide insights into the practical impact of proposed ESA reforms, as well as problem areas under the current ESA, which are not necessarily identified in the Consultation Paper. Our members, the organizations they work for and the employees our members serve within those organizations will be directly affected by any changes to the ESA. We attach as Appendix A a more complete summary of CPHR BC as an organization.

Our members, while typically employed by or consulting to an employer, play a unique mediating role, often serving as a trusted intermediary between individual employees and management. Our members are literally on the front line in the administration of the ESA, applying it every day. We are thus uniquely placed to comment on proposed areas for enhanced protections as well as anomalies in the application of the current ESA. This role is even more prominent in the non-union workplaces where the ESA and its enforcement have the most importance. We have tried to stay true to this unique balanced perspective in the submissions which follow.

Scope of Submission

The Government only announced its consultation February 28, 2019 with no publicity in traditional media and with a deadline of March 31 for response. While the BC Law Institute had initiated on its own a volunteer "review" of the ESA years ago, as it had no government mandate, many stakeholders, including CPHR BC, did not participate. Our Public Policy Committee has asked us to point out that expecting a key stakeholders like volunteer-based associations such as CPHR BC to review the consultation request, obtain feedback, engage members on it, formulate draft submissions and get their Board approval of those submissions within 31 days does not allow organizations to get the depth of member input or provide the depth and scope of insight and feedback we would have preferred and which the Government was presumably seeking. We would respectfully submit that, in future, all such consultations should provide at least 60 days notice and be publicized. We would also repeat our request that, as a primary stakeholder association in labour and employment matters, our organization receive formal notice of any such consultation rather than being left to discover it on the government consultation portal.

Given the tight timing for a volunteer organization to gather feedback, CPHR BC's Public Policy Committee decided to concentrate on making submissions on most but not all of the points raised under the 6 Themes in the Consultation Paper. In addition, we have brought forward areas for what we believe are "common sense" clarifications to the ESA to correct current interpretations of the ESA in the area of vacation and deductions from wages.

In the case of the 6 Themes in the Consultation Paper, it was not entirely clear on some points what changes the Government was contemplating. We have done our best to infer what reform initiatives the government is contemplating. As the ESA has not been updated for close to 20 years, we would urge the Government to review the entire Act and ensure that various anomalies in the current drafting, such as those discussed in our submission relating to vacation and deductions from wages, are corrected.

Format of Submission

We have formatted our submission in table format which we enclose as Appendix B. It was organized as follows:

A. First responding to the 6 Themes in the Consultation Paper: in this section, we addressed specific proposals where we had relevant knowledge and information and time to formulate a submission. We have also added additional suggestions for reform that relate the Themes in some sections e.g. hours of work and overtime;
B. The last section of the submission identifies two areas where, in our view, the ESA is sorely in need of amendment to bring its interpretation in line with actual workplace practise and expectations of both employers and employees: vacation rules and deductions from wages.

Where the factual or legal foundation for a suggested change is not obvious or is more complex, we have included a "rationale" for it.

Closing

In closing, CPHR BC and its Public Policy Committee are pleased to make this submission and hope the submissions above are helpful to the panel. Any questions should be directed to the Chair of the Public Policy Committee, J. Geoffrey Howard, ghoward@meplaw.ca 604-891-1184.

Sincerely,

J. Geoffrey Howard
CPHR BC Director and Chair, Public Policy Committee

Susan J. Ryan
Chair, CPHR BC Board of Directors

c.c. Anthony Ariganello, CEO, CPHR BC
Trevor Hughes, DM Labour

About CPHR BC & Yukon

Living in a substantively changed world where demographic shifts, technological advancements, and escalating globalization are redefining market needs and workplace expectations, the Chartered Professionals in Human Resources of British Columbia and Yukon (CPHR BC & Yukon) has become increasingly mindful of the role that it can serve in preserving public interest and in shaping the proficiency of the human resources management profession.

As the body representing more than 6,000 human resources practitioners in BC and Yukon, the Vancouver-based CPHR BC & Yukon represents an authentic professional body having the reach and influence to responsibly oversee and enforce a regime which preserves the interests of HR professionals, workers, employers, and the broader public. Importantly, CPHR BC & Yukon and its members are uniquely poised to respond to modern workplace challenges and to promote compliance with the complex rules and regulations that businesses today face; issues which are vastly different from a generation ago.

With increasing growth and complexity in the human resources sector, our organization recognizes the growing responsibilities of HR professionals. To that end, CPHR BC & Yukon grants the Chartered Professional in Human Resources (CPHR) designation in BC and the Yukon to 3,160 members. The CPHR designation is the highest standard of professional practice in human resources and is highly valued by organizations.

CPHR BC Proposed Submissions for ESA Reform (as proposed by Public Policy Committee and approved by Board and circulated to members for comment)			
Topic	**Government Position**	**CPHR Draft Position**	**Rationale (where applicable)**
1. Increasing Protection of Child Workers			
A)	Government: The BCLI Report recommended that children under 16 should be prohibited from working in industries or occupations that are likely to be harmful to their health, safety or morals, and that the special rules for child workers in recorded and live entertainment should not change. BC has few legal restrictions on the types of work that young workers may perform. The Ministry has heard from stakeholders that greater protections are required to keep young workers safe. They have also heard support for children working with parental consent in artistic endeavors, including recorded and live entertainment. BC's minimum age for employment is effectively 12 since a permit is only required for children under 12. Children aged 12 to 14 may work with consent of a parent/guardian, subject to some	CPHR: is generally supportive of the proposed additional protection for child workers but did not have time to gather relevant information to assess the proposed changes.	

	restrictions (for example, regulations that limit the number of hours young workers may work during the school year, and that require adult supervision of young workers).		
2. Transforming the Employment Standards Branch			
A)	Government: Eliminate the need for complainants to show they have requested the employer respond to their claim including through use of Self-Help Kit before allowing a claim to be filed.	CPHR: recommends retaining a flexible requirement for claimants to show they have tried to raise their claim first with the employer in writing, unless the employer is out of business	Our experience is that this requirement can avoid a large number of claims being filed and then taking up large amounts of ESB and employer and claimant time in that in some cases: • The employer may have made a mistake and will rectify it; • The employee may either not understand his/her rights or be mistaken on a material fact which the employer can correct e.g. has an incorrect recollection of vacation time taken. That being said, an intake officer could have discretion to waive it.
B)	Government: Possible amendment to allow ESOs to waive mandatory penalties for each section breached in some cases.	CPHR: we support this initiative, including in relation to breaches due to: • Lack of certainty in how to apply the ESA to a particular situation; • Honest mistake; • New or novel point of interpretation or law.	The current mandatory application of minimum penalties for each ESA section breached, while intended to incentivize settlement and avoid costly hearings, can be very arbitrary in the scenarios outlined. The solution would be to grant ESOs adjudicating the complaints the right to waive penalties on these and any similar grounds.

3. "Supporting Families" with Statutory Leaves			
A)	**New combined Family Responsibility and Sick Leave**	CPHR Proposal: Replace Family Responsibility Leave with 7 days of combined personal sick and Family Responsible Leave (but do not mandate pay), tentatively called "Personal Leave"	BC stands out for not having any mandated sick days off with the right to keep your job in the ESA, although in practise most employers formally or informally grant such leave. The ESA currently only provides for 5 days of Family Responsibility to care for family members' health and education needs. Given employees typically have a combination of sickness and family obligations requiring absences, with the line between them often blurred in practise, we support the BCLI recommendation of combined 7 day leave allowance of Personal Leave
B)	**Job Protection for Sick/Disability Leave**	CPHR Proposal: In addition provide job protection for injury and sickness leave to employees with at least 12 months service for up to 16 weeks in any 24 month period. Exceptions in some cases would need to be in laid out in the Regulations but include term hires, on call and other shorter term or non-indefinite term hires. Employers must be empowered under any such amendment to require reasonable medical or other corroborating information to confirm the validity of and manage such leaves under the Regulations.	The proposal strikes a balance between protecting employees and employer needs. It would not be available to short service employees, which is normal and fair. The duration of the leave is dove-tailed with EI disability benefit and most LTD waiting periods. Note this entitlement would not eliminate the need to consider whether, for sick/injury leaves exceeding the prescribed duration, the duty to accommodate under the Human Rights Code requires the employer to continue employment for longer. Prescribing minimum protected sick leave will provide guidance to less knowledgeable employers and employees unfamiliar with the "duty to accommodate" disability leaves under the Human Rights Code.

C)	**New Personal Leaves** Government: Suggest additional family or personal leaves be added.	CPHR: Does not support the creation or extension of any personal leaves given the recent expansion in number and duration of such leaves and that existing leaves cover most other personal leave needs e.g. victims of domestic violence would have sick leave rights if injured.	Government needs to understand that every new or expanded personal leave deprives the employer of the employee's service and can impose real hardship on the employer but also co-workers covering their work as well as customers and others served by the absent employee. For longer personal leaves, some employers are unable to hire a replacement so owners, managers and co-workers are forced to work overtime and handle heavy workloads. In almost every case, hiring a replacement worker to cover an employee on leave imposes hiring, training and reduced productivity costs which are then further increased when the returning employee needs to be retrained. No further expansion of such leaves, particularly after the significant extensions to maternity/parental and care giver leaves and creation of other lengthy personal leaves by the Government in 2018.
4. Strengthening ability to recover wages			
A)	**Increase limitations periods for ESA claims** Government: although the Consultation Paper is not clear, we understand the proposal to be to extend the period over which wages can be claimed to 12 months and extend the time to file claim to 12 months from termination or last breach.	CPHR: supports such amendments which are in line with other legislation (e.g. amended Human Rights Code) and the ESAs of other provinces.	

B)	**Require collective agreements to meet all ESA Standards** Government: require all collective agreements to meet ESA minimums on all ESA covered topics.	CPHR: does not support this but if introduced it would only be appropriate for this to take effect the next time a union and the employer conclude a new collective agreement.	The current ESA allows unions and employers to bargain for terms and benefits which can allow them to agree to provide less than ESA minimum terms on select ESA standards (e.g. overtime). In practise such bargained exceptions are very rare. Parties in collective bargaining should retain the flexibility to enter into such bargains where typically the union gains some other benefit in return to agreeing to this concession. At very least, such a change cannot be imposed in the middle of a collective agreement term when the parties have bargained for the terms and the union has gained some benefit for agreeing to the lower standard. They must have the opportunity at bargaining to review all terms and renegotiate past departures from the ESA. To do otherwise would result in unbargained for and potentially substantial pay gains for those employees mid-way through a collective agreement.
C)	**Tip Protection** Government: introduce wage protection for tips held by employers	CPHR: generally supports provided the amendments allow employers to protect tips, provided it also protects reasonable tip sharing, but was not able to gather information or feedback to comment further.	
5. Clarifying hours of work and overtime standards			
A)	**Rationalize overtime exemptions for "Professionals"**	CPHR Proposal: Amend to ensure that current list of regulated professionals (e.g. CPAs, lawyers, doctors) currently excluded from any rights under the ESA	The current complete exclusion of the list of regulated professionals seems unfair, leaving them with no statutory rights like vacation, mat leave etc. and does not correspond to actual practise since most employers of such professionals offer the same

		are covered by the ESA but not the hours of work and overtime section.	terms as other employees, including ESA entitlements. This is consistent with other provinces and BCLI recommendations.
B)		CPHR Proposal: For other non-manager professionals (e.g. non-registered engineers, non-CPA accountants, CPHRs!), create a new exemption from hours of work and overtime rules based in being professionals and earning at least 1.5 times the Average Industrial Wage used by EI to set benefits as base pay i.e. salary or hourly wages. Currently this would be **$79,650** (1.5 times $53,100)	There are many highly paid professionals not in the current list of those exempt from either the entire ESA or the hours of work and overtime provisions, where the mutual expectation of employees and employers is that hours of work and overtime rules will not apply. These employees generally have reasonable autonomy and often bargaining power, making an overtime exemption as appropriate as for the professions and occupations already exempt.
C)	**Consolidate other overtime exempt classes**	The ESA regulation currently contains a jumble of occupation exemptions that should be reviewed and rationalized	
D)	**Ad hoc Averaging**	CPHR Proposal: Allow employees to agree in writing to ad hoc averaging of hours pay: • In all cases where change in hours is employee requested; and • over up to 4 weeks at employer request, Both subject to limits e.g. maximum work day of 12 hours Eliminate any need to "renew" such averaging agreements but rather allow either party to terminate on written notice e.g. 4 weeks.	Current Averaging Agreements are very rigid and only work when a non-standard work week is fixed in advance. Ontario allows and the BCLI recommends allowing averaging on a more ad hoc basis which is more flexible and suitable to employers with occasional needs for overtime who can allow time off in lieu with say a 4 week period. This kind of arrangement is already informally in use between many employers and employees (e.g. employee asks to leave 2 hours early on Friday and agrees to make up the time by working 1 hour late Wednesday and Friday). It makes sense to make it legal.

E)	**Right of Majority of Employees to Require Others to Participate in a Fixed Averaging Hours**	CPHR Proposal: Allow employers to introduce non-standard fixed work weeks currently permitted under Averaging Agreements (e.g. 4 shifts of 10 hours) with the written support of 66% of affected employees Confer right of employees to terminate such arrangements on a similar show of support.	Formerly, a majority of employees could agree to average hours to avoid overtime and other affected employees were bound by this. Currently employers must get each participating employee's agreement. This is not practical for some situations where an entire team of employees (e.g. 3 shifts of workers) must agree to a non-standard work week for that to be offered. Under the current ESA, even if 90% of such a group of employees prefer a non-standard work week and are prepared to sign an Averaging Agreement to allow this to happen, they cannot require a "hold out" employee to agree so the employer may not be able to introduce the non-standard schedule if all the employees need to have the same schedule. The proposed change will enhance employee choice and reinstate a feature of the previous ESA regime on non-standard work weeks.
F)	**Advance notice of schedule change, right to refuse changes and minimum pay required if not respected**	CPHR Proposal: Require employers to give 48 hours' notice of schedule changes, with: • an employee right to refuse additional or materially different hours scheduled with less than 48 hours' notice without penalty or discipline; • where the late change in schedule reduces employee earnings from previously scheduled hours, require employer to pay some portion of the lost income But create a list of exceptions by regulation to both of these obligations and rights including:	With on-line scheduling and more employers doing last minute schedule changes, both increasing and decreasing hours worked and/or changing shift times, some protections are needed from abuse as it results in employees setting aside time for work and missing out both leisure and family time opportunities and other work opportunities only to learn shifts have been cancelled or changed.

		• For all employers, if there is an "emergency" i.e. the employer cannot fairly be held responsible for the last minute schedule change e.g. loss of power, fire, storm, internet outage etc.; • A broad category of "urgent response" workers (e.g. those like locksmiths etc.) who, by definition of are hired with the expectation that work schedules will depend on outside parties or events	
6. Improving Rights for Terminated Workers			
A)	**Termination notice or pay for employees with less than 3 months service** Government: apparently considering introducing termination notice or pay for employees with less than 3 months service.	CPHR: does not support this.	The current threshold for requiring ESA minimum notice of termination or pay in lieu starts at 3 months. That accords with the long established and universally used concept of "probation" where both employee and employer can terminate without notice during those 3 months. This is aligned both with employee and employer expectations and the law in almost every competing jurisdiction. If employers must pay termination pay with employees with less than 3 months service, they will be much more selective about hiring or convert employees to contractors with lesser rights, none of which is desirable.

B)	**Rights of employees who have given advance resignation notice** Government: clarify the severance obligations of employers who terminate workers during their period of resignation notice.	CPHR Proposal: As we understand it from the BCLI report and Consultation Paper, the issue is whether the ESA should clarify the ESA termination rights of an employee terminated without cause by an employer while working out notice of resignation. It has been argued that under the ESA the employer termination pay obligation should be the normal one even if the remaining period of resignation of notice is less. CPHR would support an amendment to confirm current ESB guidelines, which follow the basic contract law, that the employer terminating during resignation must provide the lesser of: 1. The contractual notice or pay in lieu due on any normal termination without cause; or 2. Pay in lieu of the balance of the resignation notice period. Benefits might also be included.	Current contractual law is clear that employees who give resignation notice greater than the notice the employer must give to terminate without cause are still subject to termination by the employer under its right to terminate without cause during the period of resignation notice. If the employer's required notice to terminate without cause is longer than the balance of resignation notice remaining, contract law currently only requires the employer terminating early to pay through the end of the resignation notice. We submit that the contract law is fair and the ESA should be amended to clarify the same rule applies to ESA termination notice given during resignation notice. It is worth noting that employers may have a variety of legitimate reasons to terminate employees working under resignation notice, including where the employee is no longer as motivated or where the employee is joining a competitor. In many such situations, the resigning employee actually prefers to receive compensation in lieu of working out the resignation notice. We note that, unlike some provinces, the BC ESA does not specify any statutory minimum notice of resignation and it is common for employees to fail to give any or "reasonable notice" as required by common law when resigning with no consequences.
Other Proposed Areas for ESA Reform from CPHR BC			
7. Vacation			

A)	**Total Vacation Pay Test** Explanatory Note: The ESA requires that the statutory minimum rate (4% rising to 6% after 5 years) of vacation pay be paid on "Total Wages" (the "Statutory Vacation Pay Amount"). "Wages" is defined in the ESA to include non-base pay, including almost all bonus or incentive pay (e.g. commission) ("Incentive Pay") and overtime and stat holiday premium pay (collectively "Non-Base Pay"). Many employers are not aware of the vacation pay accrual obligation on Non-Base Pay, particularly Incentive Pay or do not pay it. However, some of those same employers are paying more than the Statutory Vacation Pay Amount on Total Wages by offering more than the ESA minimum number of paid weeks off with base pay only. Under the Kenpo decision, employer can still be held liable for vacation pay on incentive pay when vacation pay accrued as time off with salary meets or exceeds the statutory requirement.	CPHR Proposal: Amend vacation pay section to make it clear that as long as total vacation pay accrued for the year meets the statutory minimum % on Total Wages then no additional vacation pay can be claimed. *Note: this **<u>is not</u>** suggesting any change to the basic ESA standard requiring vacation pay accrual on all "wages" including Non-Base Pay.*	Most of the numerous employers and employees who: • Provide employees with more than ESA minimum paid weeks off of vacation, but • are not calculating and paying separate vacation pay on Non-Base Pay (particularly Incentive Pay), are not aware of or complying with/asking for this liability. This will bring the ESA in line with common practise and common sense. Claims made under the Kenpo* decision are "windfalls" to the claimants and are not consistent with the overall vacation pay obligation under the ESA. **Under an arguably wrongly decided BC Supreme Court ESA judicial review decision, <u>Kenpo</u>, it was held that, even where the total vacation pay paid through offering "extra" (i.e. above ESA minimum) weeks of vacation with base pay exceeded the Statutory Vacation Pay Amount for the employee, employees could still claim the statutory vacation pay % on Non-Base Pay, in that case, commissions. In effect, the court refused to look at just the question of whether the total amount of vacation pay paid met the Statutory Vacation Pay Amount. Instead, it held the minimum statutory vacation pay had to be calculated and paid on each separate component of pay regardless of what was paid on base pay, although the ESA does not mandate this approach.)*
B)	**No Vacation Pay on Termination Pay and Vacation Pay**	CPHR Proposal: Eliminate vacation pay accrual on ESA termination pay and vacation pay itself.	Where an employee does not work out ESA notice, it makes no sense for vacation pay to accrue on it.

			Similarly, due to an error in drafting in the current ESA, vacation pay notionally accrues even on vacation pay, which is illogical and, taken to its ultimate conclusion, would mean a never-ending calculation of vacation pay on vacation pay. Other provinces quite properly exclude termination pay and vacation from the wages on which vacation pay must accrue. Many employers do not pay this given how illogical it is nor would most employees expect it.
C)	**No Vacation Pay or Time off Accrual on Longer Statutory Leaves**	CPHR Proposal: Clarify that during Statutory Leaves exceeding a low threshold (e.g. one month), no vacation time off or pay accrues. For clarity, time off on Statutory Leaves would still count as employment for other ESA purposes e.g. length of notice of termination, vacation entitlement increasing after 5 years of employment. Explanatory Note: Current EST case law holds that vacation time off must accrue during Statutory Leaves including longer ones like maternity leave. The ESB takes the position vacation pay may also accrue during leaves in some cases depending on the terms of the employee's vacation rights. However, a clear employer policy can eliminate liability for the vacation pay only.	As noted, accrual of any vacation time off or vacation pay on longer statutory leaves makes no sense since vacation is provided to working employees to recover from the effort of working whereas employees off on long Statutory Leaves are not working at all. Currently, the minimum requirement is accrual of vacation time off without pay required under ESA case law creates unnecessary and unattractive (to employees) unpaid vacation time off for employees taking such leaves. For employer accruing vacation pay on long leaves such as 12-18 month maternity leaves, the cost of the vacation pay can be very onerous. Furthermore, many employers are not providing vacation time off or pay accrual due to lack of knowledge and/or the fact such accrual does not accord with common sense and the purpose of vacation.
D)	**Confirm paying vacation pay during vacation acceptable**	CPHR Proposal: We support the BCLI proposal that an amendment confirm employers can pay vacation pay by simply paying the accrued pay on regular paydays during the vacation	Although almost all employers pay vacation this way, the ESA does not currently allow it, instead requiring vacation pay to be paid in a lump sum prior to the leave—an inconvenience. The BCLI also supported this "common sense" change.

8. Deductions from Wages			
A)		CPHR Proposal: Allow employer wage deductions without written employee consent where: a) Employer overpaid wages by mistake and is only recovering the overpayment; b) Employee has clearly agreed in writing to repay under a prior agreement to an amount e.g. amount paid to cover education expense with agreement to repay if employee quits/is fired for just cause before a defined period; or c) Employee has overtaken unearned vacation then resigned But such deductions should be limited to a threshold such as 25% of gross wages per pay except on payment of final wages on termination where full deduction is permitted given this is the employer's last chance to recover these amounts.	The current ESA section restricting deductions from wages has been interpreted in an unfairly rigid way that often means employees who clearly owe their employers money get off scot fee since the employer does not want to incur the cost and inconvenience of suing them in Small Claims Court. The 3 exceptions are common scenarios, make common sense and would be seen by employers and employees as fair.