

TIME TO BE FLEXIBLE: FEDERAL GOVERNMENT CURRENTLY IN CONSULTATION ON FLEXIBLE WORK ARRANGEMENTS

Posted on June 8, 2016

Categories: [Insights](#), [Publications](#)

Flexible work is a trending topic worldwide. France has recently introduced legislation giving employees the right to disconnect from business emails after work hours. Last year, the city of Gothenburg in Sweden announced a trial switch to a 6-hour work day for its public service institutions, such as retirement homes and hospitals. According to a [2015 survey](#) of 8000 employers and employees from small and medium-sized business, public sector organizations, and multinational companies in 10 countries, 75% of the organizations surveyed now have flexible working policies that allow employees to vary their hours and use technology to work from home. Of those companies, 83% see an increase in productivity, 61% report a boost in profits, and 58% say their company profile has been positively impacted.

In Canada, the federal government [pledged](#) to amend the *Canada Labour Code* to allow federally regulated workers to formally request flexible work arrangements (FWAs) from their employers. To that end, Employment and Social Development Canada has recently commenced a [public consultation](#) to explore how to implement the right to request FWAs.

What is an FWA

The federal government defines FWAs as "alternative arrangements to the traditional working week" and can take on many forms, both temporary or permanent. An FWA may allow an employee to alter (1) his or her work schedule, (2) the number of hours worked, (3) the location where work is done, (4) when he or she takes vacation, or (5) to take leaves to meet family or other personal obligations.

What is a Right to Request an FWA

The proposed right to request an FWA would be a statutory right that entitles an employee to formally request an FWA from his or her employer. When the employee submits a formal request, the employer would be required to consider and make a decision about the request within a certain period of time. If the employer denies the request, it must give reasons for the denial. The right would likely include protections for employees against dismissal or other forms of employer retaliation for exercising this right.

What will the Public Consultation Consider

To help craft this legislation, Canada is looking to the examples set by Australia, New Zealand, the U.K., and certain parts of the U.S. to get an idea of what mechanisms are required for the regime to work. For example, in the U.K., an employee's right to request is contingent on being employed for at least 6 months with the employer, and an employer must respond to the request within 3 months. In Australia, the period for employer response is 21 days. In New Zealand, each employee was initially limited to maximum one request per calendar year, but this has been changed to an unlimited number since 2015.

Other aspects of the statutory regime to consider include:

- what sort of information should the employee provide in the request;
- on what grounds may an employer decline a request;
- should an employee have a right of appeal or complaint if she or he thinks the employer unreasonably denied a request; and
- how should an employee be compensated or what penalties should be imposed on the employer if the complaint is well-founded.

Assuming the right to request an FWA is created, the federal government also wants to discuss how to promote employees' exercise of the right and monitor employers' responses to such requests, including penalizing non-compliant employers. Some proposed ideas include:

- awards for good workplace practices;
- an anonymous complaints process;
- employer self-audits;
- third-party complaint procedure, such as an ombudsperson;
- joint employer-employee committees for alternative dispute resolution; and
- monetary penalties and/or public disclosure of information of non-compliant employers or for employer retaliation against the exercise of such right.

What this Means for Employers

Accommodating an employee's request for an FWA will likely result in employers having to adapt or change their workplace structure and/or practices. Doing so may also impose additional costs on the employer, such as having to provide the necessary technology and cloud storage capacity for employees working remotely or hiring replacement staff or paying overtime to staff to cover employees who are working part-time or taking leaves. In addition, if an appeal or complaints process is imposed with these amendments, the lack of jurisprudence on this issue is also a cause for concern.

With these federal changes in the works, amendments to provincial and territorial labour and employment legislation may also be on the horizon. We will monitor and keep you informed on the progress of these proposed federal amendments.

Join the Discussion

The federal government has published a paper with a series of questions to generate discussion on the issue of right to request FWAs. You have until June 30, 2016 to participate through an online survey, email, telephone, Twitter via #flexiblework, or by mail.

by N. David McInnes and Linda G. Yang

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2016