



**Government of the Northwest Territories Response to Committee Report
12-19(2): Report on the Review of Bill 20: An Act to Amend the *Employment Standards Act***

Background

The Standing Committee on Social Development (Committee) presented Committee Report 12-19(2): “Report on the Review of Bill 20: *An Act to Amend the Employment Standards Act*” (Report) on March 10, 2021.

The proposed legislation provides an entitlement to unpaid emergency leave for employees who are unable to perform their duties because of an emergency and provides an exception to the periods of notice required for group terminations that applies in the case of an unforeseeable event or circumstance beyond an employer’s control.

Committee’s report contains two recommendations for the Department of Education, Culture and Employment (ECE), on the subject of public engagement during the development of regulations and a review of financial resources available to support paid emergency leave.

On March 12, 2021, the Report was considered in Committee of the Whole and both recommendations were adopted.

Recommendation 1

Standing Committee on Social Development recommends the Department of Education, Culture and Employment undertake public consultation to develop prescribed emergency provisions, including those that have already been defined in relevant sections of Bill 20.

GNWT Response

Although ECE recognizes the importance of consultation with the public and stakeholders in developing or amending legislation and regulations under regular circumstances, Bill 20 and the corresponding amendments to the Employment Standards Regulations (the Regulations) that will follow, are required in order to respond to a specific and ongoing public health emergency; that is, the COVID-19 public health emergency.

The Cabinet Operational Guidelines for Publishing Proposed Regulations, which outline the process by which the GNWT should engage members of the public on the development or amendment of GNWT regulations, states that proposed regulations do not need to be published if they are:

- Proposed regulations made in response to an emergency
- Proposed regulations made to respond to a specific event or activity.

Based on these guidelines, ECE does not believe public consultation is appropriate, as COVID-19 is both a specific event and an emergency and the amendments are required without further delay to

encourage workers in the Northwest Territories (NWT) to follow self-isolation protocols without fear of losing their employment.

Bill 20 allows ECE to amend the Employment Standards Regulations to prescribe:

- a circumstance that constitutes an emergency, in order to specify that employees will be entitled to emergency leave with regard to the circumstance;
- to prescribe reasons that will (or will not) entitle employees to emergency leave with regard to a prescribed emergency; and
- to make entitlement to emergency leave retroactive with regard to a prescribed emergency.

These regulatory amendments will give ECE the ability to ensure the proposed emergency leave provisions in Bill 20 meet the needs of workers and employers in respect of each particular emergency. They will also allow ECE to react quickly in future emergencies. Should any unforeseen situations related to a prescribed emergency arise that are not addressed by the proposed emergency leave provisions in Bill 20, ECE will have the ability to address them in the Regulations in a timely manner. Furthermore, once there is no longer a need for emergency leave with regard to a specific prescribed emergency, ECE will be able to repeal the provisions related to the prescribed emergency from the Regulations. Accordingly, the changes to the Regulations, in response to a specific emergent situation, will be temporary.

At this point in time, the sole prescribed emergency to be included in the amended Regulations is the COVID-19 public health emergency, which has officially been designated an emergency. With respect to requests for public consultation on other potential emergencies that could be considered prescribed emergencies within the Regulations, ECE believes such engagement would be premature and run contrary to the definition of an emergency, which is a specific circumstance requiring a reactive and mitigative response, rather than a proactive one.

Most jurisdictions in Canada amended their employment standards legislation to include similar unpaid emergency leave entitlements in the immediate months that followed their declared public health emergencies related to COVID-19, while others already had provisions in their legislation that sufficiently addressed the circumstances. The Government of the Northwest Territories (GNWT) is required to establish job protected sick leave legislation or regulation to allow their residents to access the temporary income support programs established by the Government of Canada, under the Safe Restart Agreement. ECE will use the Regulations to clarify reasons that will entitle an employee to emergency leave in line with the income support programs established by the Government of Canada, as required.

There are currently no job-protected leave provisions in the *Employment Standards Act* (the *Act*) that allow employees in the NWT to self-isolate for reasons related to COVID-19.

As such, ECE does not believe this is an appropriate opportunity to pursue engagement with the public and plans to continue moving forward with developing amendments to the Employment Standards Regulations as outlined above.

Recommendation 2

To address undue financial hardship as a result of mandated emergency leave requirements, the Standing Committee on Social Development recommends the Department of Education Culture and Employment undertake a review of territorial government programs and policies to allow financial resources to be made available while an employee is required to take unpaid emergency leave.

GNWT Response

The *Employment Standards Act* sets out the minimum employment standards for the NWT and includes several job-protected leaves that allow employees to take time away from work without pay for certain personal reasons without the fear of losing their jobs or other reprisals. Setting a requirement for unpaid leave under the *Act*, such as emergency leave, does not prevent employers from compensating employees during periods of leave. Employers can and do negotiate benefits above the *Act* to attract and retain the best workforce possible.

Because the duration of emergency leave is undefined in the *Act*, ECE believes it would be unreasonable to legislate emergency leave as paid leave under the *Act*, which would require employers to compensate employees taking emergency leave. An employee can access emergency leave as long as the emergency continues and prevents the employee from performing the duties of their employment. For example, an employee who has an underlying health condition that puts them at greater risk of getting COVID-19 could be deemed to be on emergency leave for several months. This would be an excessive financial burden to impose on some employers who are potentially already struggling as a result of an emergency.

In regards to Committee's recommendation, ECE is unclear on whether Committee is recommending financial resources be made available for employees who are unable to work as a result of our current COVID-19 public health emergency, or whether the recommendation is intended to apply to all emergency leave taken under potential future emergencies.

Given the COVID-19 public health emergency has been in effect for over a year in the NWT, ECE believes implementing a benefit that employees could access retroactively for periods deemed as emergency leave related to COVID-19 would be overly complex to effectively cost and administer.

Additionally, many employees who were unable to work for reasons related to COVID-19 may have already received benefits from the Government of Canada through the Canada Emergency Response Benefit (CERB), Employment Insurance, and/or the Canada Recovery Benefits. If the GNWT were to introduce financial resources that employees could access for self-isolation periods retroactively deemed as emergency leave over the course of the pandemic, it could result in employees receiving both federal and territorial benefits for the same periods of leave.

Alternatively, if Committee is recommending that ECE undertake a review of territorial government programs and policies to allow financial resources to be made available while an employee is required to take unpaid emergency leave during future emergencies, ECE and the Department of Finance will be implementing the Government Renewal Initiative to formally review and evaluate

ECE programs and services in terms of efficiency and effectiveness in April 2021. This process will provide ECE with the evidence required to make informed resource allocation decisions on programs and services. Such decisions would also need to take into consideration the broad suite of identified GNWT funding priorities.