Inter-office Communication
Note De Service

Date: December 1, 2022

To/À: **National Representatives**

From/De: **Unifor Legal Department**

Re/Ref: **Legal Department Advisory – Canada Labour Code – Paid Medical Leave (Section 239)**

This advisory provides information about the new paid medical leave entitlement under Section 239 of the *Canada Labour Code* (the "***Code***").

The *Code* only applies to federally-regulated employees. Section 239 forms part of Part III of the Code. Part III of the Code is about minimum labour standards.

This new entitlement was enacted in December 2021 but it will only now come into force on December 1, 2022.

Effective December 1, 2022, eligible employees in the federal sector will be entitled to 10 paid medical leave days per calendar year for medical leaves of absence ("**Paid Medical Leave**").

This advisory has two parts:

1. a review of the new Paid Medical Leave statutory provisions; and
2. a review of how the Paid Medical Leave entitlement will interact with collective agreement entitlements.

1. Paid Medical Leave

A medical leave of absence under Section 239 may be taken for the following reasons:

- personal illness or injury of the employee;
- organ or tissue donation;
- medical appointments for the employee during working hours; or
- quarantine of the employee.

Subsection 239(1) already provides that an employee is entitled to unpaid medical leave for up to 17 weeks. The unpaid leave entitlement remains unchanged. The federal government has said that the maximum length of unpaid leave under the *Code* will soon be raised to 27 weeks to align with the upcoming extension of EI sickness benefits beginning on December 18, 2022 (here and here).

Effective December 1, 2022, Section 239 of the *Code* is amended to entitle eligible employees to 10 paid days for medical leaves of absence.

The new Paid Medical Leave is an accruing benefit and will apply for any of the reasons an employee may take a medical leave of absence under Section 239 listed above.

a. Eligibility – Subsection 239(1.2)

All employees who complete 30 days of continuous service will earn three days of paid medical leave. After that, they will accrue one day of paid medical leave per month, to a maximum entitlement of 10 days per year.

The new benefit is not pro-rated for the year 2022. This means that employees employed on December 1, 2022, will accrue 3 paid days as of December 31, 2022. The fourth paid day will accrue on February 1, 2023. Employees hired after December 1, 2022 will accrue three paid days upon completion of 30 days of continuous employment, and one per month thereafter.

b. Maximum of 10 Days – Subsection 239(1.21)

An employee will be entitled to earn up to 10 days of Paid Medical Leave each year.

c. Rate of Pay – Subsection 239(1.3)

Each day of Paid Medical Leave must be paid at an employee's "regular rate of wages for their normal hours of work". Section 17 of the *Canada Labour Standards Regulations* clarifies that if an employee has hours of work that differ from day to day or is paid on a basis of other than time, "regular rate of wages" shall mean:

(a) the average of the employee's daily earnings, exclusive of overtime hours, for the 20 days the employee has worked immediately preceding the first day of the period of paid leave; or

(b) an amount calculated by a method agreed upon pursuant to a collective agreement.

d. Carry Forward – Subsection 239(1.4)

Employees will be able to carry over accrued but unused Paid Medical Leave days to the next year, but doing so will reduce the maximum number of paid days they accrue in that year by the number of days carried over. This means that an employee will not lose accrued entitlements at the end of a year if they have not used their Paid Medical Leave entitlement.

For example, if an employee has 6 unused Paid Medical Leave days at the end of a year, those days will carry over to the next year, but the employee will only be eligible to accrue 4 more Paid Medical Leave days in that year, to a total of 10 for the year.

e. Division of Leave with Pay – Subsection 239(1.5)

Paid Medical Leave may be taken in one or more periods, but an employer can require that each period be at least one day. In other words, an employer may prevent employees from using partial days.

f. Medical Notes – Subsection 239(2)

If an employee has taken a medical leave of absence with or without pay of at least five consecutive days, an employer is permitted to ask the employee to provide a medical note issued by a health care practitioner certifying that the employee was incapable of working for the period of their leave. An employer must make this request in writing and no later than 15 days after the employee's return to work.

g. Section 189 of the *Code* – Subsection 239(14)

Section 189 of the *Code* protects employees whose employment is transferred as the result of a sale of business, or due to a contract being awarded through a retendering process. Under this section, employment with the former employer is considered continuous employment with the subsequent employer.

If an employer changes because of a sale of business or a contract being awarded through a retendering process, employment is deemed to be continuous employment with the new employer for purposes of determining eligibility to Paid Medical Leave under Subsection 239(1.2).

h. Calendar Year vs. Date Used to Calculate Annual Vacation – Paid Medical Leave Regulations (Section 33.1)

Effective December 1, 2022, the Canada Labour Standards Regulations are amended to include rules applicable to the new Paid Medical Leave. Under Section 33.1 of the regulations, employers that use a year other than a "calendar year" to calculate annual vacation may use that same year to calculate paid medical leave entitlements.

This means an employer may choose to use the date it uses to calculate annual vacation for matters concerning Paid Medical Leave instead of the calendar year.

i. Business Size

The new Paid Medical Leave entitlement will apply to all eligible federal sector employees, regardless of the size of their employer.

j. Personal Leave under Section 206.6 of the *Code*

The amendments to the *Code* remove "personal illness or injury" from the reasons that Personal Leave may be taken under Section 206.6 of the *Code*. Following the amendments, Personal Leave may still be taken for up to five days per year for various reasons, including family responsibilities, urgent matters concerning employees or their

families, or employees attending their citizenship ceremonies, and three of the five days are paid if an employee has worked for an employer for three months or more.

2. Paid Medical Leave and Collective Agreements

a. ESDC Guidelines

Employment and Social Development Canada ("**ESDC**") has published two Interpretation, Policy and Guideline documents for the new Paid Medical Leave (Medical leave with pay – IPG-118 and Stacking – Medical Leave with Pay – IPG-119) (the "***Guidelines***"), effective December 1, 2022.

The *Guidelines* provide clarification about the scope of the new Paid Medical Leave where employees already have some entitlement to paid sick days under a collective agreement.

The *Guidelines* explain that employees will not be able to access both the new Paid Medical Leave days with existing paid sick leave entitlements if an employee's collective agreement already contains paid sick leave entitlements that are at least as favourable as the new Paid Medical Leave. The *Guidelines* should be reviewed carefully though they are not law. They are only an interpretation of the new provisions by ESDC.

b. Section 168 of the *Code*

The Paid Medical Leave entitlement applies to all employees Paid Medical Leave will apply to all employees, including those covered by a collective agreement. However, Section 168(1) specifies that the *Code* does not affect any rights or benefits under a collective agreement that are *more favourable* to an employee.

Section 168(1) ensures that parties cannot agree to reduce the protections of Part III of the *Code*. Grievance arbitrators have jurisdiction to determine whether an employer is complying with the statutory floor set by Part III.

Section 168(1) requires determining whether an employee will be entitled to the entitlements under their collective agreement *and* the entitlements under the *Code*, or if taking a paid sick day under a collective agreement will also count as a Paid Medical Leave day under the *Code*.

c. Comparing Collective Agreement and Statutory Entitlements

Section 168(1) requires a comparison between any paid sick leave entitlement under a collective agreement with the new Paid Medical Leave entitlement. This should be an "apples to apples" comparison. If an existing benefit is different in scope or purpose and not directly related to a leave for medical reasons in Section 239(1), then the benefit should be considered separate and will not reduce an employee's Paid Medical Leave entitlement. For instance, floater days or personal leave days that can be used for non-medical reasons, or medical leave days that can also be used for non-personal

medical reasons (e.g., injury or illness of a child or dependent), will not have the same scope and purpose as Paid Medical Leave.

If a collective agreement entitlement is for a different purpose than from Paid Medical Leave, the employee will have the right to access both entitlements separately.

If entitlement to paid sick leave under a collective agreement is of the same scope and purpose as the new Paid Medical Leave, then it must be determined which entitlement is more favourable. In determining which entitlement is more favourable, the relevant questions are:

- Do employees receive 10 days paid sick leave?
- Is the employee entitled to receive 100% of their regular rate of wages for their normal hours of work for any paid sick leave day?
- Can an employee take paid sick leave in one or more periods (i.e., can the employer require each period be of not less than one day)?
- Does the employer require the employee provide a medical note if absent for fewer than 5 day consecutive days?

If the *Code*'s entitlement is more favourable, the collective agreement entitlement to paid sick leave will be "brought up to" the *Code*'s entitlement. If the collective agreement is more favourable, each paid sick day taken under the collective agreement will count as a day of Paid Medical Leave for purposes of the *Code* (that is, entitlement to the statutory standard will be fully or partially reduced accordingly).

d. Paid sick leave under a collective agreement taken prior to December 1, 2022

Any paid sick leave taken before December 1, 2022 under the terms of a collective agreement will not reduce an employee's entitlement to Paid Medical Leave under the *Code* as of December 1, 2022.

As of December 31, 2022, current employees with at least 30 days continuous service will accrue their first three Paid Medical Leave days, regardless of whether they have used any paid sick days under a collective agreement at any time earlier in 2022.

Resources

- The ESDC's *Guidelines* are found here: Medical leave with pay – IPG-118 and Stacking – Medical Leave with Pay – IPG-119.
- The government's regulatory statement is found here.
- See the text of the legislation in **Appendix "A"** below.

- See the text of the relevant regulations in **Appendix "B"** below.

In solidarity,

Anthony Dale
Director, Unifor Legal Department

Blake Scott
Lawyer, Unifor Legal Department

ADBC/pc/cope343

cc. Front office
Reginal Directors
Senior Directors

Appendix "A"

Effective December 1, 2022, the text of the *Canada Labour Code* will read (changes underlined):

DIVISION XIII	**SECTION XIII**
Medical Leave	**Congé pour raisons médicales**
Entitlement to leave	**Droit à un congé**
239 (1) Every employee is entitled to and shall be granted a medical leave of absence from employment of up to 17 weeks as a result of (a) personal illness or injury; (b) organ or tissue donation; (c) medical appointments during working hours; or (d) quarantine.	**239** (1) L'employé a droit à un congé pour raisons médicales d'au plus dix-sept semaines en raison: (a) de sa maladie ou de sa blessure; (b) d'un don d'organe ou de tissu; (c) d'un rendez-vous médical pendant les heures de travail; (d) quarantaine.
Leave with pay	**Congé payé**
(1.2) Subject to subsection (1.21) and the regulations, an employee earns, as of the first day on which this subsection applies to the employee, (a) after completing 30 days of continuous employment with an employer, three days of medical leave of absence with pay; and (b) following the period of 30 days referred to in paragraph (a), at the beginning of each month after completing one month of continuous employment with the employer, one day of medical leave of absence with pay.	(1.2) Sous réserve du paragraphe (1.21) et des règlements, l'employé acquiert, dès le premier jour où le présent paragraphe s'applique à lui: (a) après trente jours de travail sans interruption pour l'employeur, trois jours de congé payé pour raisons médicales; (b) après l'expiration de cette période de trente jours, au début de chaque mois suivant un mois durant lequel il a travaillé sans interruption pour lui, un jour de congé payé pour raisons médicales.

Maximum of 10 days	**Maximum de dix jours**
(1.21) Subject to the regulations, an employee is entitled to earn up to 10 days of medical leave of absence with pay in a calendar year.	(1.21) Sous réserve des règlements, l'employé a droit d'acquérir jusqu'à dix jours de congé payé pour raisons médicales dans une année civile.
Rate of wages	**Taux de salaire**
(1.3) Each day of medical leave of absence with pay that an employee takes must be paid at their regular rate of wages for their normal hours of work, and that pay is for all purposes considered to be wages.	(1.3) Chaque jour de congé payé pour raisons médicales pris par l'employé est payé à son taux régulier de salaire pour une journée normale de travail; l'indemnité de congé qui est ainsi payée est assimilée à un salaire.
Annual carry forward	**Report annuel**
(1.4) Subject to the regulations, each day of medical leave of absence with pay that an employee does not take in a calendar year is to be carried forward to January 1 of the following calendar year and decreases, by one, the maximum number of days that can be earned in that calendar year under subsection (1.21).	(1.4) Sous réserve des règlements, les jours de congé payé pour raisons médicales non pris par l'employé dans l'année civile sont reportés au 1er janvier de l'année civile suivante et sont soustraits du nombre maximum de jours pouvant être acquis dans cette année au titre du paragraphe (1.21).
Division of leave with pay	**Division du congé payé**
(1.5) The medical leave of absence with pay may be taken in one or more periods. The employer may require that each period of leave be of not less than one day's duration.	(1.5) Le congé payé pour raisons médicales peut être pris en une ou plusieurs périodes; l'employeur peut toutefois exiger que chaque période de congé soit d'une durée minimale d'une journée
Certificate	**Certificat**
(2) The employer may, in writing and no later than 15 days after the return to work of an employee who has taken a medical leave of absence of at least five consecutive days, require the employee to provide a certificate issued by a health care practitioner certifying that the	(2) L'employeur peut, par écrit et au plus tard quinze jours après le retour au travail de l'employé qui a pris un congé pour raisons médicales d'au moins cinq jours consécutifs, exiger que celui-ci lui présente un certificate délivré par un professionnel de la santé attestant qu'il

employee was incapable of working for the period of their medical leave of absence.	était incapable de travailler pendant son congé.
Notice to employer (3) If an employee intends to take a medical leave of absence, they must give written notice to the employer of the day on which the leave is to begin and the expected duration of the leave at least four weeks before that day, unless there is a valid reason why that notice cannot be given, in which case the employee must provide the employer with written notice as soon as possible.	**Avis à l'employeur** (3) Si l'employé a l'intention de prendre un congé pour raisons médicales, il donne à l'employeur un préavis écrit d'au moins quatre semaines précisant la date et la durée prévues du congé. S'il existe un motif valable pour lequel il ne peut pas donner le préavis, il est tenu d'aviser l'em- ployeur par écrit dans les meilleurs délais.
Change — in length of leave (4) An employee must provide the employer with written notice of any change in the length of their medical leave of absence as soon as possible.	**Modification de la durée du congé** (4) L'employé donne à l'employeur un préavis écrit de toute modification de la durée prevue du congé pour raisons médicales dans les meilleurs délais.
Employment opportunities (5) An employee is entitled, on written request, to be informed in writing of every employment, promotion or training opportunity that arises during the period when the employee is on a medical leave of absence under this Division and for which the employee is qualified, and on receiving that request, the employer must provide the information to the employee.	**Possibilités d'emploi** (5) L'employé a droit, sur demande écrite, d'être informé par écrit de toutes les possibilités d'emploi, d'avancement et de formation qui surviennent pendant son congé pour raisons médicales pris sous le régime de la présente section et en rapport avec ses qualifications professionnelles, l'employeur étant tenu de fournir l'information.
Prohibition (6) Subject to subsection (7), an employer is prohibited from dismissing, suspending, laying off, demoting or disciplining an employee because the employee intends to take or has taken a medical leave of absence or taking such an intention or absence into account in	**Interdiction** (6) Sous réserve du paragraphe (7), il est interdit à l'employeur de congédier, de suspendre, de mettre à pied ou de rétrograder l'employé qui prend le congé pour raisons médicales, ou de prendre des mesures disciplinaires à son égard ou de tenir compte du fait que l'employé a pris un tel congé dans les décisions à prendre à son égard en

any decision to promote or train the employee.	matière d'avancement ou de formation. Cette interdiction vaut également dans le cas de l'employé qui a l'intention de prendre un congé pour raisons médicales.
Exception (7) An employer may assign to a different position, with different terms and conditions of employment, any employee who, after a medical leave of absence, is unable to perform the work performed by the employee prior to the absence.	**Exception** (7) L'employeur peut affecter à un poste différent, comportant des conditions d'emploi différentes, l'employé qui, à son retour d'un congé pour raisons médicales, n'est plus en mesure de remplir les fonctions qu'il occupait auparavant.
Benefits continue (8) The pension, health and disability benefits and the seniority of an employee who is absent from work due to medical leave under this Division accumulate during the entire period of the medical leave of absence.	**Avantages ininterrompus** (8) Les périodes pendant lesquelles l'employé s'absente de son travail en raison d'un congé pour raisons médi- cales pris sous le régime de la présente section sont prises en compte pour le calcul des prestations de re- traite, de maladie et d'invalidité et pour la determination de l'ancienneté.
Contributions by employee (9) If contributions are required from an employee in order for the employee to be entitled to a benefit referred to in subsection (8), the employee is responsible for and must, within a reasonable time, pay those contributions for the period of any medical leave of absence unless, at the commencement of the absence or within a reasonable time after, the employee notifies the employer of the employee's intention to discontinue contributions during that period.	**Versement des cotisations de l'employé** (9) Il incombe à l'employé, quand il est normalement responsable du versement des cotisations ouvrant droit à ces prestations, de les payer dans un délai raisonnable sauf si, au début du congé pour raisons médicales ou dans un délai raisonnable, il avise son employeur de son intention de cesser les versements pendant le congé.
Contributions by employer	**Versement des cotisations de l'employeur**

(10) An employer who pays contributions in respect of a benefit referred to in subsection (8) must continue to pay those contributions during an employee's medical leave of absence in at least the same proportion as if the employee were not absent, unless the employee does not pay the employee's contributions, if any, within a reasonable time.	(10) L'employeur qui verse des cotisations pour que l'employé ait droit aux prestations doit, pendant le congé pour raisons médicales, poursuivre ses versements dans au moins la même proportion que si l'employé n'était pas en congé, sauf si ce dernier ne verse pas dans un délai raisonnable les cotisations qui lui incombent.
Failure to pay contributions (11) 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 (9) and (10), the benefits do not accumulate during the medical leave of absence and employment on the employee's return to work is deemed to be continuous with employment before the employee's absence.	**Défaut de versement** (11) Pour le calcul des prestations, en cas de défaut de versement des cotisations visées aux paragraphes (9) et (10), la durée de l'emploi est réputée ne pas avoir été interrompue, la période du congé pour raisons médicales n'étant toutefois pas prise en compte.
Deemed continuous employment (12) For the purposes of calculating benefits, other than benefits referred to in subsection (8), of an employee who is absent from work due to medical leave under this Division, employment on the employee's return to work shall be deemed to be continuous with employment before the employee's absence.	**Présomption d'emploi ininterrompu** (12) Pour le calcul des avantages — autres que les prestations citées au paragraphe (8) — de l'employé qui s'absente en raison d'un congé pour raisons médicales pris sous le régime de la présente section, la durée de l'emploi est réputée ne pas avoir été interrompue, la période du congé n'étant toutefois pas prise en compte.
Regulations **(13)** The Governor in Council may make regulations (a) defining terms for the purposes of this Division, including "regular rate of wages" and "normal hours of work";	**Règlements** (13) Le gouverneur en conseil peut, par règlement: (a) définir tout terme pour l'application de la présente section, notamment « taux régulier de salaire » et « journée normale de travail »;

(b) modifying subsection (1.2), (1.21) or (1.4) if, in the opinion of the Governor in Council, employees or classes of employees will, despite the modification, earn periods of medical leave of absence with pay that are substantially equivalent to the period provided for in subsection (1.21); and (c) providing for employees or classes of employees to earn periods of medical leave of absence with pay other than in accordance with subsection (1.2) if, in the opinion of the Governor in Council, the periods of medical leave of absence with pay are substantially equivalent to the period provided for in subsection (1.21). **Application of section 189** (14) Section 189 applies for the purposes of this Division.	(b) adapter les paragraphes (1.2), (1.21) ou (1.4) s'il estime que des employés ou des catégories d'employés acquerront, malgré l'adaptation, des périodes de congé payé pour raisons médicales qui sont essentiellement équivalentes à celle prévue au paragraphe (1.21); (c) prévoir que des employés ou des catégories d'employés acquièrent des périodes de congé payé pour raisons médicales autrement qu'en conformité avec le paragraphe (1.2), s'il estime qu'ils acquerront des périodes qui sont essentiellement équivalentes à celle prévue au paragraphe (1.21). **Application de l'article 189** (14) L'article 189 s'applique dans le cadre de la présente section.

Appendix "B"

Effective December 1, 2022, the relevant regulations under the *Canada Labour Code* (Canada Labour Standards Regulations) will read (changes underlined) (found here):

Medical Leave with Pay **Modification – Subsection 239(1.21) of the Act** 33.1 (1) With respect to employers that base the calculation of the annual vacation of their employees on a year other than a calendar year, subsection 239(1.21) of the Act is modified as follows. **Maximum of 10 Days** (1.21) Subject to the regulations, an employee is entitled to earn up to 10 days of medical leave of absence with pay in a calendar year or in a year used by the employer to calculate the annual vacation of their employees. **Modification – Subsection 239(1.4) of the Act** (2) With respect to employers that base the calculation of the annual vacation of their employees on a year other than a calendar year and that use a year other than a calendar year to calculate the days of medical leave of absence with pay of their employees, subsection 239(1.4) of the Act is modified as follows: **Annual Carry Forward** (1.4) Subject to the regulations, each day of medical leave of absence with pay that an employee does not take in the year	**Congé Payé Pour Raisons Médicales** **Adaptation – Paragraphe 239(1.21) de la Loi** ***a.*** 33.1 (1) à l'égard de l'employeur qui base le calcul du congé annuel de ses employés sur une année autre que l'année civile, le paragraphe 239(1.21) de la Loi est adapté de la façon suivante: **Maximum de Dix Jours** (1.21) Sous réserve des règlements, l'employé a droit d'acquérir jusqu'à dix jours de congé payé pour raisons médicales dans une année civile ou dans une année servant au calcul par l'employeur du congé annuel de ses employés. **Adaptation – Paragraphe 239(1.4) de la Loi** ***b.*** (2) à l'égard de l'employeur qui base le calcul du congé annuel de ses employés et le calcul des jours de congé payé pour raisons médicales de ses employés sur une année autre que l'année civile, le paragraphe 239(1.4) de la Loi est adapté de la façon suivante: **Report Annuel** ***c.***

used by the employer to calculate the annual vacation of their employees is to be carried forward to the first day of the following year and decreases, by one, the maximum number of days that can be earned in that year under subsection (1.21), as modified by subsection 33.1(1) of the Canada Labour Standards Regulations.	(1.4) Sous réserve des règlements, les jours de congé payé pour raisons médicales non pris par l'employé dans l'année servant au calcul par l'employeur du congé annuel de ses employés sont reportés au premier jour de l'année suivante et sont soustraits du nombre maximum de jours pouvant être acquis dans cette année-là au titre du paragraphe (1.21), dans sa version adaptée par le paragraphe 33.1(1) du Règlement du Canada sur les normes du travail.