

# Designing Paid and Protected Employment Leaves for Short-Term Sickness and Caregiving

Eric M. Tucker and Leah F. Vosko

## IN BRIEF

The COVID-19 pandemic has highlighted flaws in Canada's income-support programs and job-protection laws for sickness and caregiving leaves. Federal, provincial and territorial governments had to enact emergency measures to address serious gaps in the system. With these measures set to expire, policy-makers should take this opportunity to permanently reform Canada's sickness and caregiving leave regime. When workers decide that they cannot take time off because of inadequate benefits or job protection, the resulting costs are borne by both individuals and society. All persons engaged in paid work should be eligible for paid and protected leave to cover both sickness and caregiving needs.

## EN BREF

La pandémie a mis en évidence les failles des programmes de soutien du revenu et des lois sur la protection de l'emploi en cas de congés de maladie et pour proches aidants. C'est ainsi que les gouvernements fédéral, provinciaux et territoriaux ont dû adopter des mesures d'urgence pour remédier à leurs graves lacunes. Nos décideurs doivent profiter de la levée prochaine de ces mesures pour réformer durablement l'ensemble du système. Quand des travailleurs renoncent à prendre congé en raison d'une protection ou de prestations insuffisantes, ce sont non seulement ces individus mais aussi toute la société qui en assument les conséquences. Cette étude recommande que tout travailleur rémunéré soit admissible à des congés payés avec protection de l'emploi, aussi bien en cas de maladie qu'à titre de proche aidant.

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## WHY PAID AND PROTECTED LEAVES FOR WORKERS MATTER

The COVID-19 pandemic has stress tested Canada’s social policies and found many of them wanting. Among these are programs and laws governing paid and job-protected leaves for individuals who fall ill or have caregiving duties. In response to these shortcomings, federal, provincial and territorial governments enacted emergency measures to enhance job protections and income supports for workers during leave. Entitlements that had once seemed politically impossible to even consider were temporarily enacted into law.

Prior to COVID, less than half of workers had access to employer-provided paid and protected short-term sickness and caregiving leaves. The rest (roughly 6 out of 10 workers) depended on provincial and territorial laws for entitlements that are quite limited, especially with regard to employer-paid leaves. Although Canada’s Employment Insurance program provides income support to workers who take sickness or caregiving leaves, it is not well designed for those requiring short-term leave. For the few who do qualify, benefits cover only a fraction of lost wages. The lack of adequate leave provisions puts pressure on working-age women in particular, as they disproportionately bear caregiving responsibilities, and on workers in precarious jobs characterized by low pay and few, if any, employer-provided benefits.

When workers decide they cannot take time off because of inadequate benefits or leave rules, it can have significant socio-economic costs for both individuals and society. A large body of research documents the high cost of “presenteeism” – the phenomenon of sick people going to work and spreading infection among co-workers, resulting in long absences, more serious health problems and lower productivity.<sup>1</sup> Limited access to caregiving leave can contribute to worker burnout and result in unmet health care needs. Those affected may end up requiring more complex care, thereby increasing provincial and territorial health care spending. For these reasons, most countries provide short-term paid sickness leave. An international study found that Canada is a laggard in this regard.<sup>2</sup>

Although there are many deficiencies in Canada’s pre-pandemic leave regime, this paper focuses on short-term leaves – those that last up to 15 days.<sup>3</sup> This is the weak link in the broader leave and income-support regime, as was amply demonstrated during the pandemic.

<sup>1</sup> See V. Lovell, “No Time to be Sick: Why Everyone Suffers When Workers Don’t Have Paid Sick Leave,” Institute for Women’s Policy Research, June 2004; and S. Pichler and N. Ziebarth, “The Pros and Cons of Sick Pay Schemes: Testing for Contagious Presenteeism and Shirking Behavior,” Upjohn Institute for Employment Research, May 2015, <http://dx.doi.org/10.17848/wp15-239>.

<sup>2</sup> J. Heymann, H. Jin Rho, J. Schmitt and A. Earle, “Ensuring a Healthy And Productive Workforce: Comparing the Generosity of Paid Sick Day and Sick Leave Policies in 22 Countries,” *International Journal of Health Services* (2010); S. Kim, “Access to Employer-Provided Paid Leave and Eldercare Provision for Older Workers,” *Community, Work & Family* (2020), <https://www.tandfonline.com/doi/full/10.1080/13668803.2021.1885346>.

<sup>3</sup> It is beyond the scope of this paper to address the shortfalls in current medium- and long-term sickness and care leave and benefit regimes.

The emergency measures implemented during the pandemic demonstrate that better policies are attainable. Historically, temporary emergency measures to patch up long-standing shortcomings in social programs have led to lasting changes when social and political forces demanded reform.<sup>4</sup> Federal and provincial policy-makers should take this opportunity to re-invent Canada's sickness- and caregiving-leave regime, and permanently fill the gaps in income support and job protection laws.

We propose six principles – universality, sufficiency, fairness, security, flexibility and efficiency – to guide the development of legislative and policy reforms. We recommend that all persons engaged in paid work should be eligible for paid and protected leave under provincial/territorial and federal labour laws. Separate provisions are needed to include self-employed workers among eligible groups. A new regime should provide 15 days of leave – which workers could take in part-day or part-week increments – to cover both sickness and caregiving needs. Workers who earn less than the median wage should not incur income losses as a result of taking leave.

## PAID AND PROTECTED SICKNESS AND CAREGIVING LEAVES PRE-PANDEMIC

### Public provisions for sickness leaves

Canadian workers must either negotiate contractual leave rights or rely on legislation for both paid and unpaid sickness and caregiving leaves. Although common law precedent has found that workers have an implied contractual right to employer-paid sickness and caregiving leaves “on the grounds of common humanity,”<sup>5</sup> those judgments have been ignored for more than a century. This void has given way to the fragmented regime that exists in Canada today, whereby job-protected leave legislation is set for most workers by the provinces and territories, and public income-support benefits for unpaid leaves are provided by the federal government. Workers who take a protected leave are entitled to either the same job they had before the leave began, or a comparable job if their previous job no longer exists. Employers cannot threaten, fire or penalize in any way an employee who takes or plans on taking job-protected leave.

Employment Insurance sickness benefits provide income replacement when workers are unable to work due to injury, illness or quarantine. To be eligible, employees must have accumulated a minimum of 600 hours of insurable earnings in the 52 weeks preceding a claim. An eligible worker must provide a medical certificate to support the application, and there is a one-week waiting period, which means that workers do not receive sickness benefits for their first week of eligibility.

<sup>4</sup> Our current statutory collective bargaining regime, for example, was first created by an order in council during World War II, and every Canadian jurisdiction enacted a version of that model shortly after the war ended. See J. Fudge and E. Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Toronto: University of Toronto Press, 2001); P. McInnis, *Harnessing Labour Confrontation: Shaping the Postwar Settlement in Canada* (Toronto: University of Toronto Press, 2002).

<sup>5</sup> Supreme Court of Canada, *Dartmouth Ferry Commission v. Jane Marks*, 34 SCR 366 at 374 (1904).

For those who qualify, benefits are only available for the weeks in which earnings have decreased by more than 40 percent. A worker who was sick for 1 or 2 days in a 5-day work week, therefore, would not qualify for EI sickness benefits for that week. Eligible workers receive payment 28 days after they apply. Benefits last for a maximum of 15 weeks, but claimants must report in every 2 weeks to maintain eligibility. To be eligible for sickness benefits, self-employed workers must register and pay premiums for no fewer than 12 months before making a claim.<sup>6</sup> A self-employed claimant must meet a minimum earnings requirement; those qualified to claim benefits in 2021 had to have minimum net earnings of \$7,555 in 2020.

Benefits are set at 55 percent of a claimant's average insurable earnings (based on a formula that takes into account their best earning weeks and the level of unemployment in their region), up to the maximum insurable earnings (which was \$54,200 in 2020, for a maximum benefit of about \$573 per week).<sup>7</sup> Because benefit levels are based on employment earnings, they are lower for workers who earn less whether due to having relatively low hourly wages, fewer weekly hours worked or employment contracts of short duration.

The 55 percent wage replacement rate is especially punitive for part-time and temporary employees and those working in low-wage industries. For example, an employee working in Vancouver at the minimum wage (\$15.20 an hour) in a part-time job (25 hours a week) earning \$380 weekly during the qualifying period would be entitled to a sickness benefit of \$209 per week, 28 days after they applied.<sup>8</sup>

While income support falls under the EI program, the number of protected days off is determined primarily by the provinces under employment law and varies by jurisdiction. Due to the constitutional division of powers, the federal government has no authority over employment law other than in workplaces that fall under the federal jurisdiction. Roughly 10 percent of workers are employed in sectors such as banking, transportation, telecommunications and broadcasting, which are regulated by the federal government.<sup>9</sup>

Figure 1 shows the extent of paid and unpaid sickness leave protection provided by each jurisdiction. With few exceptions, jurisdictions provide a week or less of unpaid

<sup>6</sup> Self-employed workers must pay only the employee portion of EI premiums (\$1.58 on every \$100 of earnings in 2021), not the employer portion, which is 1.4 times the employee amount.

<sup>7</sup> For administrative purposes, EI sets different qualification criteria and benefit durations according to the geographic region where one resides. The boundaries of regions are set according to labour market conditions, with the aim of keeping them comparable to other administrative EI regions.

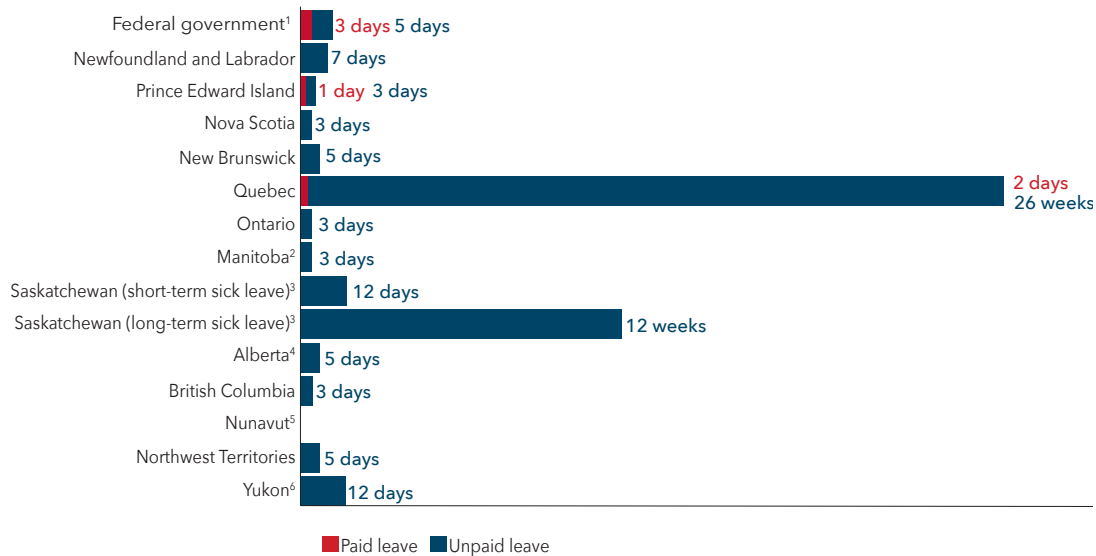
<sup>8</sup> As a partial response to the problems experienced by workers in low-income households, the federal government created a family income supplement, increasing the maximum benefit rate that a single individual in that household can receive from 55 percent to a maximum of 80 percent. However, the supplement is only available for workers in low-income families with dependent children. It is widely criticized for its assumption that resources are shared in households, and for the effect of this assumption on lower-income women and immigrant workers living in multigenerational households. The scheme also permits workers who are receiving sickness benefits and who can work part time to retain 50 percent of every dollar earned up to 90 percent of their weekly insurable earnings (*Employment Insurance Regulations*, SOR/96-332, s.34). For a detailed discussion and evaluation of the supplement, see L. Vosko, "The Challenge of Expanding EI Coverage: Charting Exclusions and Partial Exclusions on the Bases of Gender, Immigration Status, Age, and Place of Residence and Exploring Avenues for Inclusive Policy Redesign." (Toronto: Mowat Centre for Policy Innovation, 2011).

<sup>9</sup> See BCFED Health and Safety Centre, "Workplaces Covered under the Jurisdiction of the Federal Government in Canada," <https://www.healthandsafetybc.ca/workplaces-covered-jurisdiction-federal-government-canada/>.

protected leave. For example, the federal government provides 5 protected days, while Prince Edward Island, Nova Scotia, Ontario, Manitoba and British Columbia provide 3. At the other end of the spectrum, Quebec provides 26 weeks of unpaid protected leave, while Saskatchewan and Yukon provide 12 days. Most but not all jurisdictions (Quebec and the federal jurisdiction are the exceptions) require employees to have a minimum period of continuous employment with an employer before they qualify for protected leave, which ranges from 14 days in Ontario to 13 weeks in Saskatchewan (figure 2).

In most jurisdictions, there is a substantial discrepancy between eligibility and duration regarding EI sickness benefits and leave protection. EI is designed for medium- to long-term income disruptions, while protected leave provisions mostly cover very short-term absences. In all provinces (except in Quebec with its 26-week protected leave), eligible workers receive up to 15 weeks of EI sickness benefits after a one-week waiting period, even though their job protection ends well before that. Given the one-week waiting period for EI benefits to begin, workers in most provinces will likely have lost their leave protection before they collect EI sickness benefits. This means they could face serious financial repercussions for taking leave. Further, unpaid protected leaves may be available to workers who cannot collect EI benefits: those who take

**Figure 1. Paid and unpaid job-protected sick leave, by jurisdiction**



Sources: Authors’ calculations based on government documents. Note that the units of measurement for periods of leave are not standard in the legislation. They have been scaled for comparability across jurisdictions.

<sup>1</sup> All employees are eligible for 5 days of personal leave, which includes sickness and caregiving. For qualified employees, the first 3 days are paid by the employer.

<sup>2</sup> The 3 days unpaid sick leave are available under “family leave” in the Employment Standards Code.

<sup>3</sup> 12 days of unpaid sick leave are available for illness or injury that is not serious and 12 weeks for serious illness or injury.

<sup>4</sup> The 5 days unpaid sick leave are available under “personal and family responsibility leave” in the Employment Standards Code.

<sup>5</sup> Neither paid nor unpaid sickle leave is mentioned in the *Nunavut Labour Standards Act*.

<sup>6</sup> 1 day per month of tenure up to a maximum of 12 days.



protected leave for sickness but do not lose more than 40 percent of their weekly earnings do not qualify for EI.

These public policy and program discrepancies are problematic for most workers as less than half of them have access to employer-paid leave through a collective agreement or an employment contract. According to data from the 2016 Statistics Canada General Social Survey, about 42 percent of employees reported having employer-paid leave.<sup>10</sup> Moreover, access to paid leave varied significantly by industry, occupation, level of education and visible minority status.<sup>11</sup> The results of a 2019 survey of British Columbia workers were similar. Less than half had employer-paid sickness leave, and access varied according to their income, job type, unionization, immigration status and whether they were Indigenous, among other things.<sup>12</sup>

The shortfall in voluntary or negotiated employer-provided arrangements, combined with the limitations of the EI sickness benefit scheme, mean that many workers, particularly those who are most disadvantaged, lack access to sickness-leave regimes that provide both job protection and income support. While most jurisdictions mandate a few days of unpaid leave, only three (the federal jurisdiction, Prince Edward Island and Quebec) provide any paid sick days (figure 1). The federal jurisdiction is the most generous, with 3 days of leave (these are also available for caregiving), while Quebec provides 2 and PEI only 1. Moreover, in Quebec and under federal jurisdiction, an employee must have worked continuously for their current employer for the previous 3 months to qualify, while in PEI it takes 5 years of continuous employment to qualify for a single day of paid leave (figure 2).<sup>13</sup>

In sum, for most Canadian workers, access to paid and protected short-term sickness leave depends on whether it is provided through a collective agreement or an employment contract. Most jurisdictions do not require employers to provide any paid sick days, and the three that do require employers to provide them do so on a very limited basis. Finally, none of these benefits are available to workers who are self-employed. These workers do not have collective agreements and are not covered by employment standards legislation. They may purchase insurance for income support in case of illness, either privately or by opting into EI and paying premiums. There is no data on the proportion of self-employed workers who purchase private insurance or the terms of these plans. However, if these workers opt into EI, they will face the same disadvantages as other workers – namely, delays in receiving benefits that cover only a fraction of lost wages.

<sup>10</sup> It should also be noted that employees whose workplace provides employer-paid sickness leave are usually not eligible until they have worked continuously for that employer for a minimum period of time. As well, there might be a waiting period before benefits begin (Canada, Statistics Canada, "The General Social Survey," 2019).

<sup>11</sup> W. Chen and T. Medhi, "Assessing Job Quality in Canada: A Multidimensional Approach," Tables 2 & 3 (Ottawa: Statistics Canada, December 2018); and R. Casey, R. Brickner, J. Carlson, S. Rudrum and J. Munroe, "No Nova Scotian Should Have to Work Sick," Canadian Centre for Policy Alternatives (July 2021).

<sup>12</sup> I. Ivanova and K. Strauss, "Paid Sick Leave Finally on the Agenda: And Here's Why it Matters," *Policynote* (27 May 2020), <https://www.policynote.ca/paid-sick-leave/>.

<sup>13</sup> In Ontario, the previous Liberal government enacted 2 employer-paid sick days starting in January 2018, but the current Conservative government repealed this measure in November the same year, shortly after taking office.

**Figure 2. Qualifying period for paid and unpaid job-protected sick leave, by jurisdiction**



Sources: Authors' calculations based on government documents. Note that the units of measurement for periods of leave are not standard in the legislation. They have been scaled for comparability across jurisdictions.

<sup>1</sup> The employee must work for the same employer for 5 years.

<sup>2</sup> The qualifying period for the 3 days of unpaid sick leave is unspecified in the Nova Scotia Labour Standard Code.

<sup>3</sup> The qualifying period for the 26 weeks of unpaid sick leave is unspecified in Quebec's *Loi sur les Normes du Travail*.

<sup>4</sup> The qualifying period is 1 month for each day of unpaid sick leave, up to a maximum of 12 months.

## Public provisions for caregiving leaves

The caregiving benefits available under the EI system are designed for medium and long-term work disruptions, whether due to pregnancy, childbirth or adoption, care for an infant, or care for a terminally and critically ill family member. Workers – both employees and those who are self-employed – must meet the same hours-worked and employment eligibility criteria for these benefits as they do for EI sickness benefits. Similarly, workers must have lost more than 40 percent of their weekly income to qualify, and they face the same one-week waiting period before benefits are paid.

The major drawback of EI's caregiving benefits program is that it lacks the flexibility to deliver income support to those needing to periodically take a few days or hours off each week to care for a loved one suffering from a noncritical illness. One example of a common caregiving need is when a family member is undergoing cancer treatment and the caregiver needs to take only occasional days off.

As table 1 shows, few Canadian jurisdictions provide paid leave for short-term family caregiving. For example, for workers in the federal jurisdiction, the Canada Labour Code provides 5 days of personal leave (including sickness leave), 3 of which are paid if the employee has worked consecutively for 3 months for their current employer. The only other jurisdiction that provides paid leave for family caregiving is Quebec, which allows 2 days. Three provinces – Newfoundland, PEI and Quebec – provide 1 day of paid leave for bereavement. Recently, several jurisdictions introduced paid short-term

leaves related to domestic and sexual violence. Workers who have experienced violence (and/or those with a child who has experienced violence) may take up to 5 paid days off (depending on the jurisdiction), and may take longer unpaid leaves. With the exception of domestic and sexual violence leaves, unpaid caregiving leave protection rarely exceeds 5 days.

These short-term needs may be partially addressed by provisions in collective agreements or employment contracts, but data on these are sparse. One 2019 study found that employers paid 23 percent of family responsibility leaves and 38 percent of sickness or disability leaves in 2019 (compared with 72 percent of vacation leaves, for which there are more generous statutory entitlements). This means that most workers likely used paid vacation days to take sickness and caregiving leaves. Moreover, access to paid leaves is unequally distributed by income, job type, region and industry. For example, 74 percent of workers earning more than \$96,000 took paid leaves, compared with 14 percent of workers earning \$16,000 or less.<sup>14</sup>

The length of time an employee must work for the same employer to qualify for paid or unpaid caregiving leave varies from 30 to 90 days, according to the jurisdiction. Self-employed workers, who are not covered by employment laws, are not eligible.

Although we understand the urgent need to provide support for victims of domestic and sexual violence, we wonder why, in principle, this level of support is not also provided for other caregiving needs. Why, for instance, should a worker who has lost a grandchild be provided little leave time to grieve and to support their family? Arguably, attempting to fill the gaps in short-term caregiving leave by targeting specific circumstances that are deemed more deserving of support than others is an unprincipled and inadequate response, when what workers really need are more broadly defined workplace arrangements to accommodate their various caregiving responsibilities.

## TEMPORARY MEASURES IN RESPONSE TO THE COVID-19 CRISIS

The COVID-19 pandemic exposed the deficiencies in our sickness and caregiving leave regimes, and highlighted the limitations of our EI system. In response to this and the widespread work stoppages associated with public health restrictions, the federal government quickly introduced the Canada Emergency Response Benefit (CERB). The benefit was available to paid employees and self-employed workers (including noncitizens and permanent residents with a valid Social Insurance Number) who were at least 15 years old and had ceased to work for COVID-19-related reasons, or qualified for EI regular or sickness benefits, or who had exhausted their regular EI benefits between December 29, 2019, and October 3, 2020. Notably, “COVID-19-related reasons” included caregiving responsibilities such as taking time off work to care for a family member sick with the virus or to care for children due

<sup>14</sup> D. Macdonald, “COVID-19 and the Canadian Workforce” (Canadian Centre for Policy Alternatives, 2020) [https://www.policyalternatives.ca/sites/default/files/uploads/publications/2020/03/CCPA%20Report\\_COVID19%20and%20the%20Canadian%20Workforce.pdf](https://www.policyalternatives.ca/sites/default/files/uploads/publications/2020/03/CCPA%20Report_COVID19%20and%20the%20Canadian%20Workforce.pdf).

**Table 1. Provincial and territorial short-term caregiving leave, by jurisdiction**

Jurisdiction	Reason for leave	Unpaid/paid	Length of leave (time)	Qualifying period (consecutive time)
Federal <sup>1</sup>	Personal	Unpaid Paid	5 days 3 days	N/A 3 months
	Bereavement	Unpaid Paid	5 days 3 days	N/A 3 Months
	Domestic and sexual violence	Unpaid Paid	10 days 5 days	N/A 3 months
NL	Family care	Unpaid	7 days	30 days
	Bereavement	Unpaid Paid	2 days 1 day	30 days 30 days
	Domestic and sexual violence	Unpaid Paid	7 days 3 days	30 days 30 days
PEI <sup>2</sup>	Family care	Unpaid	3 days	6 months
	Bereavement	Unpaid Paid	2 days 1 day	N/A N/A
	Domestic and sexual violence	Unpaid Paid	7 days 3 days	3 months 3 months
NS <sup>3</sup>	Bereavement	Unpaid	5 days	N/A
	Domestic and sexual violence	Unpaid Paid	10 days to 16 weeks 3 days	3 months 3 months
NB <sup>4</sup>	Family care	Unpaid	3 days	N/A
	Bereavement	Unpaid	5 days	N/A
	Domestic and sexual violence	Unpaid Paid	10 days to 16 weeks 5 days	90 days 90 days
QC <sup>5</sup>	Family care	Unpaid Paid	10 days 2 days	N/A 3 months
	Bereavement	Unpaid Paid	2 days 1 day	N/A N/A
	Domestic and sexual violence	Unpaid	26 weeks	N/A
ON <sup>6</sup>	Family care	Unpaid	3 days	2 weeks
	Bereavement	Unpaid	2 days	2 weeks
	Domestic and sexual violence	Unpaid Paid	10 days to 15 weeks 5 days	13 weeks 13 weeks
MB <sup>7</sup>	Family care	Unpaid	3 days	30 days
	Bereavement	Unpaid	3 days	30 days
	Domestic and sexual violence	Unpaid Paid	10 days to 17 weeks 5 days	90 days 90 days
SK	Bereavement	Unpaid	5 days	13 weeks
	Domestic and sexual violence	Unpaid Paid	5 days 5 days	13 weeks 13 weeks
AB <sup>8</sup>	Family care	Unpaid	5 days	90 days
	Bereavement	Unpaid	3 days	90 days
	Domestic and sexual violence	Unpaid	10 days	90 days

Table 1 (cont.).

Jurisdiction	Reason for leave	Unpaid/paid	Length of leave (time)	Qualifying period (consecutive time)
BC <sup>9</sup>	Family care	Unpaid	5 days	N/A
	Bereavement	Unpaid	3 days	N/A
	Domestic and sexual violence	Unpaid Paid	10 days to 15 weeks 5 days	N/A N/A
NU <sup>10</sup>	N/A	N/A	N/A	N/A
NT <sup>11</sup>	Bereavement	Unpaid	3 to 7 days	N/A
	Domestic and sexual violence	Unpaid Paid	10 days to 15 weeks 5 days	1 month 3 months
YT <sup>12</sup>	Bereavement	Unpaid	7 days	N/A

Sources: Authors calculations based on documents from the various jurisdictions.

<sup>1</sup> Family leave is available under the same provision as sick leave under the Canada Labour Code. This means that all federal employees are eligible for 5 days of personal leave, which includes sickness and caregiving leave. All employees are entitled to 10 days of leave related to domestic and sexual violence, and the first 5 days are paid for qualified employees.

<sup>2</sup> Under the Prince Edward Island *Employment Standards Act*, the death of an immediate family member entitles an employee to 2 unpaid days and 1 paid day of leave, and the death of an extended family member entitles an employee to 3 unpaid days of leave. The qualifying period for all bereavement leave is unspecified.

<sup>3</sup> The qualifying period for the 5 days of unpaid bereavement leave is unspecified in the Nova Scotia Labour Standard Code. The domestic and sexual violence leave can be taken in periods of days or weeks, at the employees' discretion. An employee can take 10 days of leave, either continuously or intermittently, in addition to 16 consecutive weeks of leave. The employer must pay wages for 3 days of an employee's leave, and the rest is unpaid.

<sup>4</sup> The qualifying period for the unpaid family care leave and unpaid bereavement leave is unspecified in the New Brunswick *Employment Standards Act*. The domestic and sexual violence leave can be taken in periods of days or weeks, at the employees' discretion. An employee can take 10 days of leave, either continuously or intermittently, in addition to 16 consecutive weeks of leave. The employer must pay wages for 5 days of an employee's leave, and the rest is unpaid.

<sup>5</sup> The qualifying period for the 10 days of unpaid family care leave and all bereavement leave is unspecified in Quebec's *Loi sur les Normes du Travail*. All employees are entitled to days of unpaid leave to care for children, after 3 months of employment 2 of those days become paid. Two unpaid days and 1 paid day of leave are granted for the death of an immediate family member, and 1 day of unpaid leave is granted for the death of grandparents/grandchildren or an immediate family member of a spouse. The 26 weeks of unpaid domestic and sexual violence leave are legislated under the same provision as the sick, accident, organ donation and criminal offence leave.

<sup>6</sup> Under the Ontario *Employment Standards Act* the domestic and sexual violence leave can be taken in periods of days or weeks, at the employees' discretion. An employee can take 10 days of leave in addition to 15 weeks of leave, taken in periods of weeks. The employer must pay wages for 5 days of an employee's leave, and the rest is unpaid.

<sup>7</sup> The 3 days of unpaid sick leave and 3 days of unpaid family care leave are available under the "family leave" provision in the Manitoba *Employment Standards Code*. The domestic and sexual violence leave can be taken in periods of days or weeks, at the employees' discretion. An employee can take 10 days of leave, either continuously or intermittently, in addition to 17 consecutive weeks of leave. The employer must pay wages for 5 days of an employee's leave, and the rest is unpaid.

<sup>8</sup> The 5 days of unpaid sick leave and 5 days of unpaid family care leave are available under the "personal and family responsibility" provision in the Alberta *Employment Standards Code*.

<sup>9</sup> The qualifying period for the 5 days of unpaid family care leave and 3 days of unpaid bereavement leave is unspecified in the British Columbia *Employment Standards Act*. The domestic and sexual violence leave can be taken in periods of days or weeks, at the employees' discretion. An employee can take 10 days of leave in addition to 15 weeks of leave. The employer must pay wages for 5 days of an employee's leave, and the rest is unpaid.

<sup>10</sup> Bereavement, domestic and sexual violence, or family care leave are not mentioned in the *Nunavut Labour Standards Act*.

<sup>11</sup> The qualifying period for the 5 days of family care leave and 3 days of unpaid bereavement leave is unspecified in the Northwest Territories *Employment Standards Act*. An employee has 3 days of unpaid leave to attend the funeral of a family member if the funeral is in their community, and 7 days of unpaid leave if the funeral is out of their community. The domestic and sexual violence leave can be taken in periods of days or weeks at the employees' discretion. An employee can take 10 individual days of leave, either continuously or intermittently in addition to 15 weeks of leave. The employer must pay wages for 5 days of a qualified employee's leave, and the rest is unpaid.

<sup>12</sup> The qualifying period for the 7 days of unpaid bereavement leave is unspecified in the Yukon *Employment Standards Act*.

to school closures. These benefits remained in place during the spring and summer of 2020. CERB provided recipients with a taxable benefit of \$2,000 dollars a month (\$500 dollars a week) for a maximum duration of 28 weeks. No waiting period was required, so applicants received their first payment within 10 days of applying.

In September 2020, the federal government replaced CERB with a suite of different programs, including the Canada Recovery Benefit (CRB), the Canada Recovery Caregiving Benefit (CRCB) and the Canada Recovery Sickness Benefit (CRSB). These are slated to end in October 2021. The CRB is available to employees and self-employed workers who do not qualify for EI but saw their average weekly income reduced by 50 percent or more. A flat rate of \$1,000 (pre-tax) (reduced to \$600 pre-tax beginning July 17, 2021) was available per 2 week period up to a maximum of 54 weeks until October 23, 2021, and recipients could re-apply biweekly.<sup>15</sup> Reminiscent of EI rules, CRB claimants are required to seek work, not sever an employment relationship or commercial contract voluntarily, and to accept reasonable offers of employment.

The CRCB provides benefits to workers unable to perform at least 50 percent of their scheduled work per week due to childcare obligations tied to COVID-19, care obligations for someone sick with the virus, a self-isolation requirement, or a risk of serious illness if they were to contract COVID-19. Recipients may reapply bi-weekly. Unsurprisingly, women constituted a little more than three-fifths of applicants between October 2020 and April 2021.<sup>16</sup>

The federal government also offers the CRSB to workers unable to work at least 50 percent of their scheduled work week because they are required to self-isolate or are under advice to self-isolate as a result of an underlying medical condition. The benefit was initially available for two 1-week periods, but was extended to a maximum of 4 weeks in March 2021. A small majority of the applicants for this benefit has been men.<sup>17</sup>

Over this period, provinces amended their employment standards legislation to provide job-protected leaves during declared emergencies, including outbreaks of infectious disease. These laws provide employees with unpaid leave entitlements if they are unable to work due to emergencies declared under provincial emergency powers legislation or for reasons related to a designated infectious disease.<sup>18</sup>

<sup>15</sup> Those who apply for CRB benefits after July 17, 2021, will obtain a \$600 benefit (pre-tax) every 2 weeks.

<sup>16</sup> Canada Revenue Agency, "Table 4: Number of Canada Caregiving Benefit (CRCB) unique applicants, by province and territory, and gender," <https://www.canada.ca/content/dam/cra-arc/serv-info/tax/business/topics/crcb/statistics/crcb-tbl4-e.pdf>.

<sup>17</sup> Canada Revenue Agency, "Table 4: Number of Canada Recovery Sickness Benefit (CRSB) unique applications, by province and territory, and gender," <https://www.canada.ca/content/dam/cra-arc/serv-info/tax/business/topics/crsb/statistics/crsb-tbl4-e.pdf>.

<sup>18</sup> The leave can last for as long as the employee is not working for reasons such as being under medical investigation or treatment, acting pursuant to an order of a health authority, in quarantine pursuant to an order, or providing care or support to a family member. Employers cannot require workers to provide a medical certificate but can require them to provide reasonable evidence that they are entitled to the leave. See Ontario, *Employment Standards Act, 2000*, *supra* note 36, s 50.1, as amended by SO 2020, c 3; British Columbia, *Employment Standards Act*, RSBC 1996, c 113, s 52.12.

Several features of the pandemic income-support regime (CERB, CRB, CRCB, CRSB) enabled it to reach a much broader segment of the workforce than does regular EI. First, both employees and the self-employed were covered. Second, applicants were not required to work a minimum of hours for one employer. Third, there was no waiting period to access benefits. Fourth, rather than being tied to prior EI contributions, CERB provided a flat weekly entitlement (\$500), which, while lower than the then-maximum EI entitlement of \$573, was greater than the amount received by 84 percent of EI claimants laid off prior to the COVID-19 crisis.<sup>19</sup>

Despite improving access to benefits, the pandemic regime left some major elements of the pre-existing model intact. For example, there was still a labour force attachment criteria to qualify. The \$5,000 annual-earnings requirement had a disproportionate effect on the most precarious workers and those who had taken time away from paid work to fulfill caregiving responsibilities pre-COVID (mainly women). As well, workers needed to have lost at least 50 percent of their average weekly income to qualify (notably higher than the 40 percent reduction needed to qualify for EI sickness benefits). However, the most significant limitation was the fact that the benefits would cease once the infectious disease emergency ends. The pandemic regime presumed a return to the status quo.

The COVID-related paid and protected sickness- and caregiving-leave measures were broader and more generous than those previously available. New rules did not require self-employed persons to have previously enrolled and paid premiums into the EI program, and they reduced the qualification period to become eligible and eliminated waiting periods. For a large majority of workers, the benefits were greater than they would have been under EI. Finally, by expanding job-protected leave provisions, provincial and territorial governments allowed benefit recipients to enjoy a modicum of job security.

These sickness and caregiving benefits, however, were hardly a panacea. The average individual weekly earnings in February 2021 was \$1,140.<sup>20</sup> This means that a majority of Canadians who took sickness or caregiving leaves suffered a substantial loss of income. In addition, workers who took these benefits had to apply *after* incurring lost wages. Perhaps not surprisingly, a recent study found that as of March 28, 2021, less than one-sixth of the money allocated for the sickness leave program had been paid out.<sup>21</sup> The other major shortfall was that these benefits did not provide for sickness or caregiving leaves that are sporadic and short-term in nature, lasting days rather than weeks. The benefits were paid in weeks, and to qualify workers had to have lost at least

<sup>20</sup> D. Macdonald, "Which Unemployed Canadians Will Get Support?" *The Monitor*, Canadian Centre for Policy Alternatives (2020), <https://monitormag.ca/articles/which-unemployed-canadians-will-get-support/>.

<sup>21</sup> Statistics Canada, "Table 14-10-0223-01 Employment and Average Weekly Earnings (Including Overtime) for all Employees by Province and Territory, Monthly, Seasonally Adjusted" (Ottawa: Statistics Canada) <https://doi.org/10.25318/1410022301-eng>. The current median annual income is not available, but in 2019 it was about \$38,000 or a little under \$737 weekly. See Statistics Canada, "Table 11-10-0239-01 Income of Individuals by Age Group, Sex and Income Source, Canada, Provinces and Selected Census Metropolitan Areas" (Ottawa: Statistics Canada), <https://doi.org/10.25318/1110023901-eng>.

<sup>22</sup> P. Brethour, "Why Billions in Federal Sick-Leave Benefits Have Gone Untapped," *Globe and Mail*, April 9, 2021, <https://www.theglobeandmail.com/business/article-why-billions-in-federal-sick-leave-benefits-have-gone-untapped/>.

50 percent of their weekly income. Workers who needed to take less than 2 full days off in a week could not claim these benefits.

Belatedly, and under mounting political pressure, several provincial governments enacted temporary measures to provide workers with paid sick days. For example, at the end of April 2021, Ontario amended its *Employment Standards Act* to provide workers with 3 days of paid leave for COVID-related reasons, including medical treatment, vaccination, quarantine and providing support to a family member for specified COVID-related reasons. Under the new measures, the employer pays the employee's regular wages, up to a maximum of \$200 per day, but may apply for reimbursement from the Workplace Safety and Insurance Board, which in turn will be reimbursed by the government.<sup>22</sup> British Columbia enacted a similar measure in May 2021.<sup>23</sup> Thus far, BC is the only jurisdiction that has moved toward creating a more permanent short-term paid sickness-leave benefit, which is expected to come into force on January 1, 2022, although the number of paid days to be provided is currently undetermined.<sup>24</sup>

## PRINCIPLES TO GUIDE THE REDESIGN OF PAID SICKNESS AND CAREGIVING LEAVES

COVID-19 revealed fundamental flaws in sickness and caregiving leave coverage across the country. Governments responded with a patchwork of emergency measures, none of which permanently addressed those flaws, particularly in relation to short-term leaves. How should Canada's policy-makers redesign short-term protected and paid sickness and caregiving leaves? We believe the following six principles should inform and guide the development of a new regime. These principles are consistent with the concept of "decent work," which is advanced by the International Labour Organization in support of jobs that provide income and employment security, equity and human dignity.<sup>25</sup> While these principles do not align with Canada's pre-pandemic regime, they should underlie its reform.

### Universality

All workers engaged in work for remuneration are likely to require time off at some point to deal with temporary illness, injury or caregiving responsibilities. Short-term protected and paid sickness and caregiving leaves should be available to all workers, regardless of their status as employees or self-employed, or their status in Canada as citizens, permanent

<sup>23</sup> Ontario, *COVID-19 Putting Workers First Act*, 2021, S.O. 2021, c. 9.

<sup>24</sup> British Columbia, Bill 13 - 2021 *Employment Standards Amendment Act* (No. 2), 2021.

<sup>25</sup> In March 2020, the Yukon government created a paid sickness leave rebate for employers who offer their employees paid sick days to recover from an illness, which was set to expire on September 30, 2021. The rebate encourages employers to extend sick days by offering to reimburse them for the costs of up to 10 days of worker wages. It is not required under law for employers to offer these additional paid sick days, which is why we focus on the other provinces' emergency measures in this paper.

<sup>25</sup> International Labour Organization, "Decent Work and the Informal Economy" (Geneva: International Labour Office, 2002), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_policy/documents/publication/wcms\\_2,0442.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/documents/publication/wcms_2,0442.pdf).



residents or undocumented workers.<sup>26</sup> Universality also dictates that all workers be able to secure short-term paid sickness and caregiving leaves, regardless of the number of paid hours they have worked in the past or the duration of their contracts with their employers. Given that these needs are randomly occurring and are not related to job tenure, there should be a minimal or no threshold for qualification based on hours worked in the previous year. This principle has important implications for who bears the cost.

## Sufficiency

The principle of sufficiency requires that when workers need short-term leaves to attend to their own illnesses or to care for others, they should not face serious financial loss. This principle is particularly relevant for low-income earners who cannot afford any reduction in income. Public policy should not be built on the assumption that unpaid caregiving labour is freely and universally available.

## Fairness

The principle of fairness aims to protect workers from exploitation, while at the same time ensuring that employers are on a level playing field. In the case of workers, this principle is motivated by a need to address fundamental power imbalances that exist between workers and employers. Workers who are particularly affected are those who lack representation (e.g., through a union or professional association) or are engaged in the most precarious forms of employment – namely, jobs with low pay and of limited duration.

Regarding fairness for employers, because the obligation to provide short-term paid leaves currently depends mostly on collective bargaining agreements or contractual undertakings, and much less on employment standards, it places employers who do provide these leaves at a competitive disadvantage compared with those who do not. Fairness and universality in this context relate to employers' duty to provide pay for leave rather than workers' right to receive it.

## Security

The principle of security requires that workers should not lose their jobs as a result of taking short-term sickness or caregiving leaves. Applying this principle universally to various forms of employment may be complicated. For instance, providing job-protected leaves to self-employed persons, multiple job holders and those who are hired on temporary contracts may be difficult, because their absence could result in project delays and other costs that must be borne by other parties. Addressing these issues will require creative solutions and protections.

<sup>26</sup> Undocumented workers are entitled to the same labour rights as documented workers. If labour legislation were to provide for employer-paid sick days, undocumented workers would be entitled to them. The question of how well those rights can be enforced is a more complex question and is beyond the scope of this paper.

## Flexibility

This principle recognizes that workers need flexibility to make arrangements that are suitable to their individual situations. For example, while some short-term caregiving and sickness needs flow from one-off events, other needs may be periodic. The provision of short-term protected and paid sickness and caregiving leaves must therefore be sufficiently nimble and able to accommodate different needs.

## Efficiency

The principle of efficiency refers to the expedient use of time and resources to avoid unnecessary bureaucratic obstacles and requirements in accessing the regime in question. Programs that make the application process onerous and time consuming, or that result in avoidable delays in delivering benefits or refunds not only waste resources, but also discourage use by the intended beneficiaries. An efficient regime would support the principles of universality and fairness.

## DESIGNING A POST-PANDEMIC SHORT-TERM LEAVE REGIME

The global pandemic affords governments an opportunity to reinvent Canada's short-term sickness and caregiving leave regime, including who pays, the duration of benefits and the amounts received, who is eligible, and how to deal with the thorny issue of self-employed workers based on the proposed guiding principles.

## Eligibility and qualifying periods

The principle of universality requires that all persons engaged in paid work be eligible for paid and protected sickness and caregiving leaves (we consider self-employed workers in a later section). Under Canadian law a wide range of practices have been adopted in relation to qualifying periods for protected, unpaid leaves. In most cases, the law mandates that an employee must have a specified minimum job tenure with a current employer to qualify. Presumably, the argument for a job tenure requirement is based on the disruption and the inconvenience to an employer caused by a worker's absence, and the view that this burden, such as it is, should not be imposed until the employer has had an opportunity to profit from the worker's labour.<sup>27</sup> In our view, this narrow economic case for imposing a tenure requirement for unpaid leaves is weak. As well, it is far outweighed by the need to adhere to the principle of universality and ensure that all workers are able to take protected time off to care for themselves and others, as well as to protect public health.

Arguably, the case for tenure requirements for employer-paid protected leaves is stronger because the employer is bearing the cost. With few exceptions, Canadian

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<sup>27</sup> A. Schliwen, A. Earle, J. Hayes and S.J. Heymann, "The Administration and Financing of Paid Sick Leave," *International Labour Review* (June 2011): 43-62. International comparisons are complicated due to wide variations in paid leave regimes across countries and important differences between short-, medium- and long-term leave rules.

legislators have accepted this argument and imposed tenure requirements before employers are mandated to provide paid leaves, typically in the order of 3 months. In our view, the argument of fairness to employers imposes an unduly high burden on newly hired or short-term employees, who may not qualify for paid leave. As a result, a newly hired worker may neglect legitimate and vitally important needs, such as taking time to recover from illness or attend to the care of others. A tenure requirement also creates an incentive for employers to prefer short-term employment contracts over longer-term ones, undermining the fairness principle, which calls for a level playing field among employers.

## The number of paid sickness and caregiving leave days

Pre-pandemic, federal and provincial employment law provided very limited rights to short-term paid leaves. Only three provinces mandated paid sick days and only two jurisdictions mandated paid leave for caregiving. By international standards, Canada is a laggard. A 2011 study of 190 countries found that 154 provided paid sickness leave to employees through a variety of models. The most generous model, in terms of duration, consists of a two-stage system under which the initial period of leave is paid by the employer and the remainder is covered by social insurance. This model is used in 29 countries, mostly in Europe. About 85 percent of countries with this system provide a total of 26 weeks or more of paid sickness leave; the duration of the employer-provided portion in each country varies depending on when the social insurance portion begins. Twenty-seven countries have opted for a system in which employers are exclusively liable for paid leaves. In these countries, less than 5 percent provide for 10 or fewer days, about 32 percent provide for between 11 and 30 days, with the rest providing for 31 days or more.<sup>28</sup>

The key issue in the design of short-term leaves in Canada is that they must mesh seamlessly with medium- and long-term paid sickness and caregiving leaves and take into account the diversity of workers' needs. Workers who need to take multiple short-term leaves of less than a week over the course of a year will never use EI special benefits even if they qualify due to the one-week waiting period. To meet the various needs for both sickness and caregiving leaves, we recommend a total of 15 days of short-term paid leave. This would bring Canada more in line with its international peers. Further, most existing short-term paid leaves, and recommendations to extend them, apply only to sickness leave.<sup>29</sup> This overlooks the vital importance of caregiving, which should be accommodated in addition to, not in lieu of, sickness leave. We suggest combining the two categories of leave to allow workers flexibility in coping with the diversity of sickness and caregiving circumstances, which could arise more than once in a calendar year.

## The wage replacement rate

The principle of sufficiency requires replacing lost wages at a rate that, at a minimum, will not impoverish those taking leaves. Workers who must take a short-term leave

<sup>28</sup> Schliwen et al. "The Administration and Financing of Paid Sick Leave."

<sup>29</sup> The Liberal Party of Canada's 2021 election platform proposed instituting 10 days of paid sick leave for all federally regulated workers.

should receive income support for the duration of the leave. However, that still leaves open the question of the wage replacement rate.

A 2018 survey of OECD countries found that 19 of 34 countries had a wage replacement rate of at least 80 percent for personal illness, while 28 had a replacement rate of at least 60 percent. However, the study did not differentiate between short- and long-term leaves.<sup>30</sup> Another 2010 study that examined wage replacement rates for a 5-day illness found that 11 out of 22 countries provided median-wage workers with full pay.<sup>31</sup>

In our view, the principle of sufficiency dictates that short-term paid leaves should replace 100 percent of lost earnings for workers who make the median wage or less. While fairness dictates that a 100 percent replacement rate should be provided for all workers, regardless of their wage, we recognize that higher income workers are better able to negotiate with their employers to obtain short-term sickness and caregiving benefits above the statutory minimum than are low-paid workers. Also, the principle of sufficiency is not as compelling for workers earning more than the median wage, meaning that the wage replacement rate for this group could be less.

### Worker-centred flexible leave periods

Another important design issue to consider is whether workers ought to be required to take their leaves in full days or weeks – a requirement in some Canadian jurisdictions. For example, under Ontario’s domestic or sexual violence leave program, workers can take their leave in part days or part weeks, but if they do so the employer can count the time as a full day or week of leave. This means that in cases where the leave is unpaid, the employee can work and earn part of a day’s or week’s wages, but by doing so they use up the full days or weeks of leave available to them. We think these kinds of arrangements infringe on the principle of worker-centred flexibility.

We advocate counting the duration of the leave, paid or unpaid, not by the day or week but by hours of absence from work. If an employee on leave who works an average of eight hours per day 5 days a week is able to work 4 hours a day in a particular week, they should be permitted to use only half a week’s leave entitlement. Accommodating employees’ temporary need to reduce their work hours until they are fully recovered from an illness or while they are providing care for others may inconvenience employers. However, human rights law already recognizes the principle that employers have a duty to accommodate workers with disabilities to the point of undue hardship. In the context of short-term sickness and caregiving leaves, we do not see these accommodations approaching that threshold.<sup>32</sup>

<sup>30</sup> A. Raub et al., “Paid Leave for Personal Illness: A Detailed Look at Approaches Across OECD Countries,” Los Angeles: World Policy Analysis Center (2018), [https://www.worldpolicycenter.org/sites/default/files/WORLD%20Report%20-%20Personal%20Medical%20Leave%20OECD%20Country%20Approaches\\_0.pdf](https://www.worldpolicycenter.org/sites/default/files/WORLD%20Report%20-%20Personal%20Medical%20Leave%20OECD%20Country%20Approaches_0.pdf).

<sup>31</sup> Heymann et al., “Ensuring a Healthy and Productive Workforce: Comparing the Generosity of Paid Sick Day and Sick Leave Policies in 22 Countries.”

<sup>32</sup> The more complex design issues that arise in long-term leave programs – such as getting people back into paid employment – do not arise here. For a discussion of some of these design issues, see T. Leoni, “Sick But at Work: Graded Sick Leave in a Comparative Perspective,” *Social Policy Administration*, 55 no. 1 (2021) 65-81.

## Who is the payer of first instance?

A fundamental design issue is whether short-term leaves should initially be paid by the social insurance system or by employers. A review of the international literature confirms that the overwhelming majority of OECD countries require employers to provide short-term sickness pay.<sup>33</sup> The advantages of mandating employers to pay are greater efficiency and certainty that workers will continue to receive an income while on leave. When workers must apply for benefits through a social insurance program, there are inevitably delays associated with processing these claims and getting money into their hands. Furthermore, applications and reporting systems present a significant challenge for those who are unfamiliar with filing an online claim, who lack easy access to the internet, or who face other barriers. Workers in precarious jobs characterized by low pay, in particular, tend to be discouraged by such delays and hurdles.

For these and other reasons, we recommend an employer-based delivery platform for short-term leaves, as already exists in the three jurisdictions that provided them prior to the pandemic – the federal jurisdiction, PEI and Quebec. This has been adopted in Ontario and BC for the duration of the pandemic (perhaps beyond in BC). This would require that each jurisdiction enact a law to mandate short-term paid leaves. As a result, employer-paid leaves would most likely vary across the provinces in terms of duration, generosity and eligibility.

## Who bears the cost?

Although we recommend that short-term paid leaves be paid by the employer in the first instance, that still leaves open the possibility of shifting the cost to a social insurance fund. This is traditionally accomplished with a government-administered fund with compulsory contributions by employees or employers (or both), or by reimbursement out of general government revenues. In the context of the COVID-19 pandemic, both Ontario and BC opted to reimburse employers for the cost of short-term sickness leaves, funnelling the money through provincial workers' compensation plans. The question remains, should employers bear the cost of short-term leaves, or should the cost be shifted in whole or in part to the government or a social insurance fund?<sup>34</sup>

There are strong arguments for making the employer pay. Employers have been extracting a growing share of the value of economic activity since the mid-1970s. For example, between 1976 and 2014 median real hourly earnings grew by only

<sup>33</sup> A. Raub et al., "Paid Leave for Personal Illness: A Detailed Look at Approaches Across OECD Countries."

<sup>34</sup> An alternative way of arranging for employer reimbursement from the social security system within our current constitutional arrangements would be for the federal government to enact a short-term sickness and caregiving benefit plan, funded through EI, which provinces and territories could opt into provided their schemes meet specified standards. Thus, while each jurisdiction would need to mandate paid and protected short-term sickness and caregiving benefits, they would be encouraged to provide benefits according to national standards so that employers could apply for full or partial reimbursement from the federal social insurance fund. Alternatively, the EI system could offer employers a discount on their premiums if they provide paid short-term sickness and caregiving benefits that meet specified requirements, as is the case now for employers who provide their employees with a short-term disability plan. The problem with this option is that it depends on incentives rather than mandates and, depending on its design, will fall short of providing universal or near universal coverage. It might be considered for employers in provinces and territories that don't mandate such benefits.

0.09 percent per year, while labour productivity increased by 1.12 percent per year. Labour's share of gross domestic product (GDP) declined from about 77 percent in 1972 to about 65 percent in 2019.<sup>35</sup> These indicators could be viewed as evidence that the labour market has tilted unfairly against workers and that policies that have even a marginal redistributive effect, such as making employers pay short-term sickness and caregiving leaves, are not only justified but overdue.

Some economists might reject this premise and argue that introducing paid leaves will be offset by reductions in jobs, wages or other nonmandated benefits. However, empirical studies suggest that this might not be the case. For example, studies of mandated employer-paid sick pay in a number of US cities found that they neither impeded wage growth nor crowded out nonmandated benefits.<sup>36</sup> And no significant relation has been found between the duration or generosity of sickness leave and economic indicators such as per capita GDP, unemployment rates or national competitiveness.<sup>37</sup>

Regardless of one's view of the fairness or economics of making employers pay, there are other arguments in favour of cost shifting. First, it is important to recognize the benefits to all Canadians of providing workers with paid sickness and caregiving leaves. Paid sickness leave reduces the spread of communicable disease by enabling workers to stay home when they are ill, while caregiving serves a vitally important social function, especially when formal health supports or programs are lacking and unpaid caregiving can help reduce government health spending pressures. There is also a more pragmatic reason to consider shifting the cost to social insurance: Proposals to make the employer ultimately bear the cost of paid short-term leaves may face greater political opposition as employers mobilize to resist such a mandate. The experience of Canada is instructive. To date, few governments – the federal government, Quebec and PEI – including centre-left ones – have been willing to enact employer mandates, and where such mandates exist, they are quite limited.

Second, the employer-pay model is likely to make employers overzealous gatekeepers and monitors, and limit worker access to paid leaves. We know from workers' compensation systems that when employers face increased premiums as a result of their workers making claims for on-the-job injuries (experience-rated premiums), some employers can engage in intensive claims management that contributes to the under-claiming of compensable

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<sup>35</sup> J. Ugucconi, "Explaining the Gap between Productivity and Median Wage Growth in Canada, 1976-2014," *International Productivity Monitor*, Centre for the Study of Living Standards 31 (Fall 2016) 37-56; University of Groningen and University of California, Davis, "Share of Labour Compensation in GDP at Current National Prices for Canada," FRED, Federal Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/LABSHP-CAA156NRUG>, June 22, 2021.

<sup>36</sup> Pichler and N. R. Ziebarth, "Labor Market Effects of U.S. Sick Pay Mandates." *Journal of Human Resources* 55 no. 2 (2020).

<sup>37</sup> A. Schliwen et al. "The Administration and Financing of Paid Sick Leaves."

injuries and diseases.<sup>38</sup> Indeed, some countries have switched to an employer-paid model for the very purpose of incentivizing employers to police worker leave-taking.<sup>39</sup>

We are sympathetic to arguments in favour of making the employer bear the cost of short-term leaves. Most OECD countries have a shared-cost model, which requires the employer to bear the cost of short-term sick pay and the social insurance system the cost of long-term leaves. The number of weeks of employer-paid sickness leave varies considerably. Yet very few countries require the employer to pay less than the first two weeks, while eight require more.<sup>40</sup>

What to do? The primary goal is to provide all workers with easy access to generous paid leaves. In the absence of a federal-provincial agreement, the design of short-term paid leaves is going to be decided by each jurisdiction. During the pandemic, a Conservative government in Ontario and an NDP government in British Columbia both reimbursed employers for the cost of providing paid sick days. Hence, while we strongly favour the predominant OECD model of employers paying for the first weeks of sick leave, in some jurisdictions cost-sharing may become the political compromise.

### **Inclusion of self-employed and temporary workers**

Ensuring that self-employed workers qualify for sickness and caregiving leaves is part of a much broader challenge that is undermining the coverage and effectiveness of the social safety net for working-age adults in most OECD countries.<sup>41</sup> Ongoing technological innovation, digital platforms and the emergence of app-based companies are giving rise to a growing number of jobs that fall outside standard employment laws and key social programs. This type of nonstandard work is also often associated with job precarity, which is of great concern for policy-makers. Addressing this issue will entail more than tinkering with existing social programs, it may require redefining employer-employee relationships. Some jurisdictions, like the UK and California, have already undertaken this task by reviewing labour laws to better prevent workers from being improperly classified as self-employed contractors rather than as employees. This has implications in terms of ensuring a level playing field among employers. For instance, firms that hire self-employed workers do not have to remit payroll

<sup>38</sup> R. Saunders, J. O'Grady and S. Cardoso, "Nature and Extent of Claim Suppression in B.C.'s Workers' Compensation System," Institute for Work and Health, Issue Briefing, May 2021, <https://www.iwh.on.ca/summaries/issue-briefing/claim-suppression-in-bc-workers-compensation-system>; L. Mansfield, E. MacEachen, E. Tompa, C. Kalcevic, M. Endicott and N. Yeung, "A Critical Review of Literature on Experience Rating in Workers' Compensation Systems," *Policy and Practice in Health and Safety* 10, no 1 (2012).

<sup>39</sup> M. Palme and M. Persson, "Sick Pay Insurance and Sickness Absence: Some European Cross-Country Observations and a Review of Previous Research," *Journal of Economic Surveys* 34 (2020) 85-108; P. Hemmings and C. Prinz, "Sickness And Disability Systems: Comparing Outcomes and Policies in Norway With Those in Sweden, The Netherlands and Switzerland," OECD Economics Department Working Papers, No.1601 (2020).

<sup>40</sup> In the Netherlands, the employer is required to provide sick pay for the first 2 years that the employee is unable to work. As a result, employers purchase sick pay insurance. Special provisions are made to reduce the cost of insurance for small- and medium-sized business.

<sup>42</sup> A. Raub et al., "Paid Leave for Personal Illness: A Detailed Look at Approaches Across OECD Countries," World Policy Analysis Centre, Table 4 (2018), 15.

contributions for social programs (e.g., employment insurance, public pensions, etc.), whereas firms who hire employees are required by law to do so.

The complexities involved in providing paid sickness and caregiving leave to the self-employed extend well beyond the classification issue. Take job protection, for example. Employment legislation across Canada protects the jobs of leave-taking employees by requiring employers to permit them to return to work at the end of their leave and by prohibiting retaliation against employees who exercise their leave rights. However, job-protection laws do not apply to self-employed workers. Further complicating things is the type of activity many of these workers are involved in, as their participation in a project may be time sensitive and their absence could cause unacceptable project delays for other contracted parties. There is no simple solution.

With regard to providing paid leaves, self-employed workers currently have the option of enrolling in, and making contributions to, the EI special-benefits regime – including EI sickness and caregiving benefits. However, self-employed workers who choose to enroll in these benefit programs face the same struggles as other workers in accessing paltry benefits for a short-term leave.

We have argued that the principle of universality requires providing the same benefits to all paid workers within a jurisdiction. And fairness entails levelling the playing field, so that firms that hire self-employed workers do not gain an advantage over those that hire employees. In practice, this could mean that contributions to the EI special benefits regime should be made mandatory both for self-employed workers and for the entities that hire them. Although we recognize that there are other factors and options to consider, in our view the time has come for federal, provincial and territorial governments to work toward a revised combination of laws and income supports for self-employed workers that align with these principles.

## **MAKING PAID AND PROTECTED SICKNESS AND CAREGIVING LEAVES PERMANENT**

Sickness and caregiving leaves and income-support regimes need to be redesigned to address the daily reality faced by workers who may have to take time off work due to ill health or caregiving responsibilities. Provisions for sickness and caregiving pay and job-protected leaves in Canada have not kept pace with the higher rates of labour force participation of women. Indeed, workers are becoming more vocal about the growing challenges they face in balancing employment responsibilities and other life obligations. Often it takes a crisis before those challenges are recognized and acted upon. We are in such a moment.

The pre-pandemic sickness and caregiving leave regimes were inadequate. Too many workers lacked access to the job protections and income supports that would allow them to take a short work leave when they fell ill and enable them to meet the



caregiving needs of their loved ones. The pandemic policy response was, in many ways, an attempt to address the underlying deficiencies of these regimes – an implicit admission of their flaws. Once the emergency measures end, the pre-existing gaps in sickness and caregiving leave protections will once again prevail. It is essential, therefore, that we learn the lessons this crisis has taught us and reform these systems.

Federal, provincial and territorial governments should redesign their short-term protected sickness and caregiving leave regimes according to the principles of universality, sufficiency, fairness, security, flexibility and efficiency. Each principle contributes to the creation of a regime that is consistent with the concept of decent work. This would acknowledge the work-life challenges faced by workers, and greatly enhance Canadians' individual and collective well-being. Based on a survey of regimes outside Canada, as well as an in-depth examination of program and policy design issues within the Canadian federation, we have proposed a feasible plan to create a paid short-term sickness- and caregiving-leave regime that is available to all workers. Policy-makers must also find a way to ensure that self-employed workers have access to work leaves. Reforms that are based on the guiding principles we have outlined would redefine who is eligible for benefits, how the benefits are delivered, their duration, and the wage replacement rate. All workers need access to sickness and caregiving leaves without risking serious loss of income. These changes should be implemented swiftly.



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