Manitoba Federation of Labour Submission to

Manitoba's Five Year Review of the Workplace Safety and Health Act

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Thank you for this opportunity to provide input into Manitoba's Five Year Review of the Workplace Safety and Health Act.

The Manitoba Federation of Labour (MFL) represents 95,000 unionized workers from 27 unions across the province. For decades, the MFL has been the leading voice for Manitoba workers in promoting safe and healthy workplaces. Workplace health and safety is the issue area about which our members are most passionate and active. To support this concern, the MFL:

- holds an annual Health and Safety Conference providing training workshops from a worker perspective;
- nominates labour representatives for the Minister's Advisory Council on Workplace Safety and Health, the Workers Compensation Board, and the WCB Appeals Commission;
- works closely with the MFL Occupational Health Centre and SAFE Workers of Tomorrow to promote awareness of workers' health and safety rights;
- has active committees where health and safety activists work together to promote safe and healthy workplaces and to promote workers' interests at the WCB; and
- lobbies the provincial government and WCB for stronger workplace safety and health measures.

The MFL offers the following recommendations to strengthen and improve the Workplace Safety and Health Act:

1. **The Act should require a mandatory, timely and prevention-oriented investigative process for fatalities and critical incidents**

When a workplace fatality or serious injury occurs, the Act should require a mandatory investigation to determine what happened, to identify how it could have been prevented, and to make recommendations to prevent similar fatalities/injuries in future.

This investigative process should be timely – timely in the sense of taking place as quickly as possible after the incident, and timely in the sense that it should aim to produce recommendations that could prevent future fatalities/injuries as soon as practicably possible.

This investigative process should be prevention-oriented in that its focus should be on understanding what happened and identifying ways to prevent similar incidents. To borrow a slogan used in the movement to reduce medical error in health care, this process should be about "learning, not blaming." To be sure, the enforcement arm of the WSH Division and police should be enforcing penalties, fines and criminal sanctions that may be warranted, but this prevention-oriented investigative process should be separate and complementary, focusing in on what can be learned to prevent repeat tragedies. A process that is truly structured around the principle of "learning, not blaming" would also reduce the involvement of lawyers, thereby improving the likelihood of a timely investigation in which all participants can be open and forthcoming about what transpired. The critical incident review process utilized in health care may provide lessons in this regard.

To ensure this investigative process is led by those with expertise in workplace safety and health, a list of available and qualified investigators could be maintained by the WSH Division, similar to the list of available and qualified arbitrators maintained for labour disputes.

This investigative process should also be structured to involve the families of victims of workplace tragedies. These families should have a right to participate in the process, to be kept abreast of its progress, and to have access to its final report and recommendations.

The reports and recommendations produced by this investigative process should be made public and submitted to the Minister's Advisory Council on Workplace Safety and Health:

- to prepare a plan, where appropriate, to disseminate the recommendations to workplaces across Manitoba; and
- where legislative or regulatory changes are required, to make recommendations about these changes.

2. Training provisions in the Act should be expanded and strengthened

When the Act was amended to provide health and safety committee members and representatives with a right to two days of paid educational leave annually (section 44(1), the intent was for this training to be taken by all committee members and representatives annually. However, the language in the provision is not strong enough and many health and safety committee members and representatives are not receiving the training contemplated when this provision was added. One of our largest affiliate unions tracks training days for committee members and reports that only 50% of committee members received two days of training in 2011. We recommend therefore that section 44(1) be amended to make paid educational leave a requirement and not simply a right.

The paid educational leave requirement states that such leave shall be allowed "for the number of hours the worker normally works during two normal working days, without loss of pay or other benefits." We commend the intent of this language – to ensure that workers do not see a loss in pay and/or benefits as a result of exercising their training rights. However, even with this language, our members have encountered situations where workers have experienced a loss in pay. For example, where a part-time worker receives two 8 hour days of training, they have sometimes only been compensated for a smaller number of hours because they normally work less than 8 hours per day. We therefore recommend that section 44(1) be amended to ensure workers do not experience a loss in pay/benefits when exercising their training rights by specifying that where a worker's normal working day is shorter than the number of paid educational leave hours received the worker be entitled to their normal pay and benefits for all of the training hours received.

While some health and safety committee members and representatives are not even receiving their two days of paid educational leave, many of our members find that even two days of paid educational leave is not sufficient to achieve the competencies they need to properly fulfil their committee/representative duties. The need for more training time arises from a variety of factors in today's workplaces:

- the drive to efficiency and productivity means work processes are changing very rapidly, often without regard to the impact on workers' health and safety;

- the continual introduction to the workplace of a dizzying array of new chemical and biological agents, as well as nanotechnologies, is placing growing and complex demands on joint committees; and
- workplace safety and health is a large and growing field of research, generating large amounts of potentially useful information for joint committees.

We therefore recommend that the number of paid education leave days required in section 44(1) be expanded from two to five.

Another challenge experienced by committee members who have received training is that the employer representatives on their committees have often not received training. This makes it difficult for joint committees to be effective. Joint committees work best when both worker and employer representatives are adequately trained to fulfil their responsibilities. We therefore recommend that the paid education leave be required for employer representatives to health and safety committees too.

Workers new to a job, including in particular, young workers, recent immigrants, and older workers re-entering the labour force, suffer from workplace injuries at a much higher rate than other workers. A recent study by Institute for Work and Health found that workers on the job for less than a month had four times as many injury claims as those who held their current job for more than a year. To address this elevated risk British Columbia enacted enhanced training requirements for young and new workers in 2007 (sections 3.22 to 3.25 of the Occupational Health and Safety Regulation). These regulatory requirements apply to workers who are new to a workplace, workers returning to a workplace where the hazards have changed during their absence, workers affected by a change in workplace hazards, workers relocated to a new workplace with different hazards, and workers under 25 years of age. The regulations prescribe specific training requirements for these workers. Because young and new workers in Manitoba face the same elevated risk levels, we recommend that Manitoba adopt enhanced training requirements for young and new workers similar to those in place in BC.

The duty imposed by Manitoba's WSH Act on employers to provide training to workers (section 4(4)) focuses on when workers need to be trained but is silent on the content of that training and on the employer's responsibility to ensure a worker has developed the competency to perform the work safely. Provisions in Saskatchewan are much stronger in this regard, prescribing the minimum elements to be included in training and prohibiting employers from permitting a worker to perform work unless the worker has

developed the competency to perform the work safely. We recommend that Manitoba strengthen section 4(4) by adopting the training responsibilities of employers found in section 19 of Saskatchewan's Occupational Health and Safety Regulations:

> 19(1) An employer shall ensure that a worker is trained in all matters that are necessary to protect the health and safety of the worker when the worker:
>
> (a) begins work at a place of employment; or
>
> (b) is moved from one work activity or worksite to another that differs with respect to hazards, facilities or procedures.
>
> (2) The training required by subsection (1) must include:
>
> (a) procedures to be taken in the event of a fire or other emergency;
>
> (b) the location of first aid facilities;
>
> (c) identification of prohibited or restricted areas;
>
> (d) precautions to be taken for the protection of the worker from physical, chemical or biological hazards;
>
> (e) any procedures, plans, policies and programs that the employer is required to develop pursuant to the Act or any regulations made pursuant to the Act that apply to the worker's work at the place of employment; and
>
> (f) any other matters that are necessary to ensure the health and safety of the worker while the worker is at work.
>
> (3) An employer shall ensure that the time spent by a worker in the training required by subsection (1) is credited to the worker as time at work, and that the worker does not lose pay or other benefits with respect to that time.
>
> (4) An employer shall ensure that no worker is permitted to perform work unless the worker:
>
> (a) has been trained, and has sufficient experience, to perform the work safely and in compliance with the Act and the regulations; or
>
> (b) is under close and competent supervision.

3. Workers' four fundamental workplace health and safety rights should be explicitly enshrined in the Act

A core component of workplace safety training focuses on the four fundamental workplace health and safety rights of workers:

- the right to know about hazards in the workplace;
- the right to participate in the identification, assessment and elimination/reduction of workplace hazards;
- the right to refuse unsafe work; and
- the right to be free from discrimination for exercising workplace health and safety rights.

Although these rights are featured prominently in government training materials and workshops, only the right to refuse and is clearly and explicitly stated in the Act. Section 5 clearly lays out the duties of workers, but not their rights. To reflect their fundamental

importance to our workplace safety and health system, we recommend that the Act be amended to explicitly recognize and affirm workers' four fundamental workplace health and safety rights.

4. Legal protection from discriminatory action should be strengthened

Section 42 of the Act aims to prohibit employers from taking discriminatory action against employees for exercising their health and safety rights. However, there is a misalignment between the definition of discriminatory action laid out in section 42(2) and the remedy for addressing discriminatory action laid out in section 42.1(2). On the one hand, the remedy in section 42.1(2) specifies that an order may be issued to stop the discriminatory action, to reinstate the worker on the same terms and conditions preceding the discriminatory action, to remove references to the matter from the worker's employment file, and to pay lost wages and benefits. On the other hand, the definition of discriminatory action in section 42(2) refers only to a loss of wages and benefits. We recommend that the definition of discriminatory action in section 42(2) be expanded to mirror the language in section 42.1(2), including changes to employment terms and conditions, and reprimands or other notes in a worker's employment file. We further note that section 42 prohibits "threatening" discriminatory action, but provides for no remedy to address such threats. We therefore recommend that violations of the prohibition on discriminatory action be subject to administrative penalties. This would underscore the seriousness of discriminatory action and provide for a remedy where discriminatory action is threatened but not taken.

5. Strengthen the right to refuse unsafe work

The right to refuse unsafe work is a fundamental health and safety right. However, the provisions that enact it need to be strengthened in several ways to ensure that the right is truly effective.

When an employer assigns work that has been refused as unsafe by one worker to another worker, the employers is required by section 43(6) to ensure the other worker is advised of the first worker's refusal and the reasons for it. This permits an employer to find another worker who can be pressured into performing unsafe work or who will voluntarily assume the risks based on information provided to them. Neither scenario is consistent with the intent and purposes of the Act – "to secure workers ... from risks to their safety, health and welfare arising out of, or in connection with, activities in their

workplaces." The work should not be reassigned until its safety has been reviewed by the supervisor, the worker committee co-chair or worker representative, and if the safety of the work remains in dispute, a Safety and Health Officer (SHO). We recommend that the Act be amended to prohibit employers from assigning work that has been refused as unsafe to any other workers until a determination has been made about the safety of the work in question

When a SHO is required to investigate a refusal of unsafe worker and determines that the refusal was valid, the Act requires the SHO to issue a written report of their findings. However, when the SHO determines the refused work is not dangerous, the Act does not require a written report. We believe a worker who has refused work as unsafe is entitled to written reasons if his/her concern has been rejected by a SHO. Given the seriousness of a concern that motivates exercising a worker's right to refuse, we also believe that a worker should have the right to appeal a decision by an SHO that work which has been refused as unsafe is not dangerous. We therefore recommend:

- that section 43.1(4) be amended to require the SHO to provide a written report to the worker explaining the decision that the work is not dangerous;
- that SHO decisions under section 43.1(4) be added to the list of decisions that may be appealed in section 37(1);
- that while an appeal of a decision under section 43.1(4) is pending, the worker who originally exercised their right to refuse should continue to have the right to refuse the work in question until the appeal is settled;
- that an employer should only be permitted to reassign work that has been refused as unsafe after a SHO has provided an opinion that refused work the work is not dangerous; and
- that an expedited appeal process should be developed to resolve appeals of right to refuse decisions in a timely manner

A final concern about the right to refuse unsafe work is that the right to be paid despite such a refusal only applies to the worker exercising the right (section 43.2). In practice, a worker's refusal may lead other workers to lose pay. For example, if a right to refuse situation has not been resolved when a shift changes, workers on the incoming shift may be prevented from starting the planned work. Section 43.2 does not protect these other workers from lost pay/benefits when such a situation prevents them from doing

planned work. We therefore recommend that section 43.2 be amended to extend the right to be paid to all workers affected by a refusal.

6. **Administrative penalties should be applied to a broader range of violations**

Administrative penalties were added to the Act a decade ago to improve compliance. This was a welcome addition, but we are concerned that the Act only permits such penalties to be applied for failures to comply with improvement orders. We believe there are other serious violations that should be addressed with administrative penalties. We recommend that section 53.1(1) be amended to expand the areas of non-compliance that can trigger administrative penalties to include:

- discriminatory action by an employer (section 42);
- violations of the regulations that provide a serious and immediate danger to workers, including failure to use fall protection, unshored excavations, exposure to asbestos, unsafe scaffolds/elevated work platforms, etc.

While we support extending the scope for administrative penalties to include a subset of listed serious violations, we would want not such an amendment to narrow the application of administrative penalties exclusively to those areas. We believe administrative penalties should continue to be levied for failures to comply with improvement orders in areas beyond that subset of violations.

7. **Programs that provide workers with incentives for not reporting injuries or for not missing work due to injuries should be banned**

There is a growing trend in Manitoba workplaces to provide cash or prize incentives to groups of workers that go a certain amount of hours or days without a lost time injury. While on the surface such incentive programs would appear to reward workers for preventing injuries, the reality is that such programs create a workplace climate of peer pressure to not report incidents/injuries or take needed time off. A worker reporting an injury or missing work due to an injury risks disqualifying them and their co-workers from receiving available incentives. A 2010 survey conducted by the MFL identified a broad range of workplaces where such programs had been introduced and confirmed that the incentives put real pressure on workers to not report incidents/injuries and to not miss work as a result of injuries. Such programs are a form of indirect WCB claims suppression. They also point blame for injuries solely at workers without considering why the workplace hazards were there in the first place. We therefore recommend that

the Act be amended to ban the provision of cash or prize incentives to workers for not reporting injuries or missing time from work as a result of injuries.

8. **There should be a legally mandated annual public report on the state of workplace safety and health in Manitoba**

There is currently no regular source of comprehensive information about the state of workplace health and safety in Manitoba. Various pieces of information can be found in the departmental and WCB annual reports, but even taken together, this information provides an incomplete picture. We commend the province for recently making additional enforcement information public, but Freedom of Information requests remain necessary for other key pieces of information. To present a more comprehensive picture, the Act should be amended to require a detailed, annual, public report on the state of workplace safety and health in Manitoba, including detailed enforcement and compliance indicators, prevention investments and outcomes, injury and fatality statistics, etc. To ensure a meaningful picture is presented, this data should not focus on WCB time loss injury statistics which are skewed by the incentive structure of the experience rating system.

9. **The Chief Prevention Officer position should be entrenched in the Act**

The newly created Chief Prevention Officer (CPO) position creates the potential to have a dedicated champion for workplace injury/illness prevention in Manitoba. To date, however, this position has not been clearly defined. To that end, we propose that the CPO position be defined and entrenched in the Act, with specific powers and responsibilities. Specifically, we recommend that the CPO be charged with responsibility for:

- monitoring workplace health and safety in Manitoba, including the maintenance of a database of key indicators and measures;
- writing the annual public WSH report recommended in this submission;
- evaluating workplace injury/illness prevention efforts in Manitoba; and
- making recommendations to the Minister on workplace injury/illness prevention.

We further recommend that the CPO:

- be appointed by the Minister on the basis of a joint recommendation from the Minister's Advisory Council on Workplace Safety and Health;

- have the power to independently initiate investigations where he/she identifies threats to workplace safety and health, and to produce reports on these investigations to the Minister and the Advisory Council on Workplace Safety and Health; and
- be a position located in the Department of Labour rather than the WCB.

10. Expand the range of decisions made under the Act that can be appealed

There are many provisions in the Act that require SHOs and the chief occupational medical officer to make judgment decisions with significant implications for workers. However, only a narrow range of these can be appealed under section 37. We have already recommended that a decision that refused work is not dangerous be subject to appeal. Given the seriousness of the safety issues at stake in many of these decisions, we further recommend that decisions under the following sections of the Act be subject to appeal under section 37:

- Sections 40(5) and 40(6) – more than one committee in a workplace, and committee for multiple workplaces:
  Discretionary decisions about the joint committees required for a workplace or group of workplaces are important decisions that can determine how effective workers' 'right to participate' will be.
- Section 50(1) - medical examinations and health surveillance:
  Currently, there is no way for workers to appeal a decision by the chief occupational medical officer against proceeding with medical examinations and/or health surveillance. Such a decision should be subject to appeal.

11. A worker's union should be listed as an "interested person" in section 37 appeals

When a worker from a unionized workplace appeals a decision under section 37 of the Act, his/her union typically supports their appeal and makes representations on their behalf. However, section 37 makes no mention of the worker's union. This omission can make it difficult for the union to provide effective representation. We recommend that section 37 be amended to specify that a worker's union is an "interested person" in the appeal process.

12. A worker's union should receive copies of stop work and improvement orders

Unions play a central role in advocating for health and safety in unionized workplaces. However, the union is not included in the list of parties that must be provided with copies of stop work and improvement orders. We recommend that sections 36.1 and 36.3 be amended to add a worker's union, where applicable, to the list of parties that must receive copies of stop work and improvement orders.

13. The Act's requirement for an employer response to committee recommendations should be clarified

Section 41.1(2) requires the employer to respond in writing within 30 days to any written recommendation from a health and safety committee or representative unless the recommendations are implemented. However, in situations where employer representatives have consistently voted down recommendations from worker representatives, there is no requirement for the employer to formally respond to the workers' concerns. If worker members of a committee have a safety concern and cannot secure support from management members of the committee on a proposed solution, we believe it is important that the employer be required to formally respond. We therefore recommend that section 41.1(2) be amended to require a written response from the employer to written recommendations forwarded by either co-chair of the committee. Ontario's Occupational Health and Safety Act includes this provision (section 19.1).

Section 41.1(2) is ambiguous on whether or not a written response is required when an employer has implemented all of the recommendations from a joint committee within 30 days of receiving them. It is open to the interpretation that no written response is required under these circumstances, leaving the committee without information about the disposition of their recommendations. We therefore recommend that section 41.1(2) be amended to clarify that a written response is required within 30 days where an employer has implemented the recommendations.

14. The requirement that workers are fully paid for carrying our committee duties needs to be clarified

Section 40(11) aims to ensure that workers who serve on joint committees can take time off from their regular work to carry out their committee responsibilities, and that they must be fully paid for all time spent carrying out these committee duties. However, ambiguity in the language of section 40(11) has been used by some employers to limit

pay for committee work to committee activity that occurs during regular work time. This is particularly problematic for shift workers or workers with irregular work patterns. We therefore recommend that section 40(11) be clarified to ensure that workers are paid for all time spent carrying out their joint committee duties, whether or not this time falls within regular working hours or not.

15. Enforcement of the Act needs to be strengthened

Earlier this year we raised concerns about the province's reluctance and general failure to apply administrative penalties. We urge the province to use the administrative penalty much more frequently to ensure compliance. The fact that so few administrative penalties are levied – zero penalties were levied in 2011-12 – sends a message to employers that there are no consequences for failing to comply with the Act. This is unacceptable. To ensure improved oversight over the enforcement process, we recommend that the Act be amended to require that enforcement reports are provided to the Minister's Advisory Council on Workplace Safety and Health every six months. These reports would provide an overview of penalties, fines, improvement orders, stop work orders and investigations, and would enable the Council to provide advice and recommendations to the Minister on effective enforcement.

We also reject the approach of always providing employers that have not complied with an improvement order with a warning letter before an administrative penalty is imposed. This approach in effect gives employers a "free pass" whereby they know they will not face a penalty for ignoring a first improvement order. Many improvement orders concern hazards that are too serious to allow free passes to employers. The "free pass" enforcement approach must change. There should be no automatic free pass. To facilitate a more active application of administrative penalties, we recommend that the authority to impose administrative penalties be reassigned to SHOs, eliminating the cumbersome process of presenting a report to the Deputy Minister for each penalty recommendation.

In addition to the reluctance to use the administrative penalty tool, there are specific areas of the Act and regulations that require more aggressive enforcement if they are to be effective in protecting the health and safety workers. Chief among these are the relatively new harassment/bullying regulations. When the regulations were adopted, we were advised by the WSH Division that enforcement would entail both ensuring employers adopt the required policies, and investigating whether or not employers are

following those policies when there are complaints of bullying or harassment. In practice, our members advise that enforcement has been limited to the former – to determining whether or not an employer has the required policy in place. If employers adopt a good policy but fail to follow it, there has been no enforcement. We reject this approach because a harassment/bullying policy that is not followed does not meaningfully protect workers from harassment/bullying. We urge the government to follow through on its original commitment to investigate failures to follow harassment/bullying policies in responding to workplace harassment/bullying complaints.

Another area where enforcement has been problematic is in the area of apprenticeship ratios. We understand that because these ratios do not fall under the Act, the WSH Division has been reluctant to enforce them. Because exceeding prescribed apprenticeship ratios can pose a serious risk to worker safety, we believe SHOs should be mandated to enforce apprenticeship ratios where workplace health and safety is threatened, and we recommend that the Act and any other related legislation be amended accordingly.

We understand the government is looking at measures to strengthen safety protections for workers required to work on roads and highways. We strongly support strengthening these protections by improving training requirements and by adopting more prescriptive requirements for signage, barriers, personal protective equipment, worker positioning, and speed limits. We are concerned though with how such new requirements may be enforced. If some provisions are left to the Highway Traffic Act and enforceable only by police officers, we are concerned that enforcement will not be driven by workplace health and safety priorities. We recommend that the SHOs be empowered to enforce all provisions related the safety of road/highway work.

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