

CHANGING WORKPLACES REVIEW RECOMMENDS SIGNIFICANT CHANGES TO ONTARIO'S LABOUR AND EMPLOYMENT LAWS

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On May 23, 2017, Ontario's Ministry of Labour released the long-awaited [Changing Workplaces Review Final Report](#), which contains a total of 173 recommendations, proposing numerous amendments to the Labour Relations Act, 1995 ("**LRA**") and the Employment Standards Act, 2000 ("**ESA**").

Below is an overview of some of the noteworthy changes that would, if enacted into law, have a significant impact on Ontario workplaces and the way some employers do business in the province.

I. Proposed Amendments to the ESA

Contractors

The special advisors recommend that the ESA be expanded to include dependant contractors which would be defined as follows (using the same definition found in the LRA):

a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material or any other thing owned by the dependant contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependant contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor (Emphasis added).

The special advisors also recommend that the Ministry make the misclassification of employees a priority enforcement issue. Should there be a dispute about whether or not a worker is an employee, the person receiving the worker's services has the burden of proving that the person is not an employee covered by the ESA.

Casual, Part-time, and Temporary Employees

The special advisors strongly recommend that the ESA be amended to prohibit employers from providing part-time, casual, temporary, contract or seasonal employees with a lower rate of pay than comparable full-time

employees of the same employer. The rule would not apply where there is a difference in treatment between employees on the basis of: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; or (d) another factor justifying the difference on objective grounds.

Temporary Help Agencies

The special advisors also recommend that the ESA be amended to provide that, after the first six months of an assignment, no assignment worker can receive less compensation than a comparable employee of the client performing similar work. The client receiving the services of the assignment worker would also have a positive obligation to notify the worker of available openings with the client and an obligation to consider, in good faith, any assignment worker who applies for an open position.

Hours of Work and Overtime

While the special advisors recommend that the trigger for overtime remain at 44 hours per week, they do recommended the following changes to the hours of work and overtime provisions of the ESA:

- The current test for managers be changed to a “salaries plus duties” test (as in Manitoba) so that in order to be exempt from hours of work and overtime rules, a manager would have to perform defined duties and earn a salary of at least 150% of the general minimum wage on the basis of a 44-hour work week (currently \$750.00/week).
- The requirement for obtaining Ministry consent to work 48-60 hours a week be repealed (while maintaining Ministry approval for weekly hours above 60).
- The introduction of an option for obtaining group consent to work overtime, or for other hours of work rules, through secret ballot vote, if appropriate for the sector.
- Overtime averaging be permissible only where it would allow for flexibilities like a compressed work week, continental shifts or other flexibilities in scheduling desired by employees, or to provide for employer scheduling requirements where the total number of hours worked does not exceed the threshold for overtime over the averaging period.

Leaves of Absence

The special advisors are not recommending the introduction of paid sick time in Ontario – an item many predicted based on their interim report. However, they are recommending the following amendments to the leave provisions of the ESA:

- **Personal Emergency Leave.** The elimination of the 50-employee threshold so that all employees in Ontario are entitled to seven days of personal emergency leave for all of the reasons currently covered by the provisions, except bereavement.

- **Bereavement Leave.** A standalone bereavement leave be added to the ESA and be made up of three unpaid days for the death of each of the family members covered by the existing personal emergency leave provisions with no annual limit on the number of bereavement leave days an employee can take.
- **Doctor's Notes.** An employer obligation to pay for a doctor's note if the employer requires one before an employee is granted sick leave.
Family Medical Leave. Increase the current family medical leave provisions from 8 weeks in a 26 week period to 26 weeks in a 52 week period to mirror the recent federal Employment Insurance Act amendments.
- **Additional Child-Related Leaves.** Expand Crime-Related Child Death or Disappearance Leave to include the death of a child (non-crime related), recognizing that the death of a child (whether crime related or not) and the disappearance of a child (whether crime related or not) are equally disabling to a parent.

Increased Vacations with Pay

The special advisors are recommending that annual vacation entitlements be increased to three weeks after five years of employment with the same employer, and making a corresponding amendment to the vacation pay provisions (i.e. at least 6% vacation pay). This change would bring Ontario's vacation pay provisions in line with other provinces.

Director Liability for Employee Remuneration

The special advisors recommend that the ESA and the Ontario Business Corporations Act be amended to provide that up to six months' wages and up to 12 months' accrued vacation pay are the responsibility of the directors of the corporation. Further, they recommend that the only condition that must be met in order for an employee to receive these amounts is that the employee has not been paid them by the corporation. This involves a material change to the current enforcement procedures.

II. Proposed Amendments to the LRA

Elimination of Exclusions

The special advisors recommend that several of the exclusions from the LRA be removed so that domestic employees, hunters and trappers, agricultural and horticultural employees as well as members of the architectural, dental, land surveying, legal and medical profession be given the same rights and protections under the LRA as other employees.

Consolidating Units and Amending Bargaining Rights

The special advisors recommend that the Ontario Labour Relations Board be given the power to modify

bargaining unit structures, if satisfied that bargaining unit or units are no longer appropriate for collective bargaining. Further, the special advisors recommend that in the Board have the power in sectors or industries where employees have been historically underrepresented by unions to consolidate existing and/or newly certified bargaining units involving the same employer and the same union. The stated goal of these amendments is to contribute to the development of effective collective bargaining relationships in these sectors and industries.

Broader Based Bargaining

The special advisors recommend a model wherein certified or voluntarily recognized bargaining units of different franchisees of the same franchisor by the same union in the same geographic area could be required by the Board to bargain together centrally. Any such bargaining would be conducted with representatives of the franchisee employers in that area. There are a number of potential implications to this approach, which run counter to how the Board has historically dealt with franchise relationships.

Temporary Help Agencies

The special advisors recommend that persons assigned by temporary help agencies to perform work for clients of the agency, or persons assigned by other persons assigned by other suppliers of labour to perform work for a person, be deemed to be employees of the client or of the person, respectively, for the purposes of the LRA.

Summary

The Final Report from the special advisors is very much “hot off the press”. As a result, there has yet to be any formal comment from the Ontario government about next steps. We expect, however, that a large number of the recommendations will be accepted, and the ESA and LRA will be amended. We will continue to publish updates on specific topics covered by the report, and will provide further news about the government’s response and implementation. In the meantime, please do not hesitate to contact any member of McMillan’s Employment and Labour Relations group if you have any questions regarding the Final Report.

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A Cautionary Note

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

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