Cassels

Potential Changes on the Horizon for Ontario's Employment and Labour Laws: Final Report from the Ontario Government's Changing Workplaces Review

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After much anticipation, the Special Advisors appointed to lead the Ministry of Labour's Changing Workplaces Review (Review) released their final report (Report) this past Tuesday (May 22, 2017). The Report proposes a number of amendments to the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act, 1995* (LRA).

The Review was initiated by the Ontario Government in February of 2015 with a view to evaluating how Ontario's employment and labour law framework addresses broader issues and trends currently affecting Ontario's workplaces (such as globalization, technological advancement, and a shift from manufacturing to service sector jobs), with a particular emphasis on issues faced by vulnerable workers in precarious employment.[1] During the Review process, the Special Advisors consulted with and received submissions from public stakeholders, including workers, unions and businesses, as well as academics and experts.

The Report contains 173 recommendations which the Special Advisors describe as being aimed at "creating better workplaces in Ontario, where there are decent working conditions and widespread compliance with the law." It remains to be seen which of these recommendations will actually be implemented by the Ontario Government. Ontario's Minister of Labour, Kevin Flynn, released a statement on Tuesday indicating that they will be announcing a formal response within the next week.

Below we have provided an overview and discussion of some of the key recommendations of which employers in Ontario should be aware. We will continue to provide updates on the Government's response to the Report and any legislative changes as information becomes available.

Employment Standards

The Report includes a number of recommendations with respect to basic ESA standards that could have a significant impact on employers in Ontario.

Leaves of Absence - Despite early predictions, the Special Advisors did not recommend the introduction of paid sick time in Ontario, however they do recommend a number of amendments to the leave provisions which will provide for greater access to emergency leave and increased family medical leave entitlements,

as follows:

- Remove “bereavement” from the Personal Emergency Leave (PEL) provision and create an independent bereavement entitlement of up to three unpaid days of bereavement leave for each family member listed, with no annual limit.
- Reduce the PEL entitlement from ten days to seven days for all other reasons for PEL leave.
- Remove the 50-employee threshold for PEL such that employees in all workplaces are entitled to seven days of unpaid PEL.
- Expressly provide that an employee can use PEL if the employee is or their minor children are a victim of domestic violence.
- Provide that the “greater right or benefit” provisions of the ESA do not apply to PEL such that employers must comply with the minimum requirements, but can add to the entitlements at their option.
- 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.
- Expand the 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.
- Require employers to pay for a doctor’s note if the employer requires one before an employee is granted sick leave.

Equal Pay for Part-time, Casual, Temporary and Seasonal Employees – The Special Advisors recommend amending the ESA to create a rule that no employee be paid a rate lower than a comparable full-time employee of the same employer. This rule would apply to part-time, casual, temporary or seasonal employees, with the justification that it would be “unconscionable” to continue to allow differential treatment of these workers. The equal treatment rule would contain the following limitations:

- The rule will apply only to wages and will not require equal benefits and pensions, however the Report does recommend that the Government issue a study on how to provide a minimum standard of insured health benefits across all workplaces.
- The rule will not apply where the difference in treatment between employees is based on an objective ground such as seniority, merit or where earnings are measured by quantity or quality of production.

Hours of Work and Overtime – The Special Advisors are not recommending a change in the threshold for overtime pay in Ontario (currently 44 hours per week), however they do recommend the following amendments to the current overtime and hours of work provisions:

- Amend the current exemption for managers and supervisors to a “salaries plus duties” test, where, in order to be exempt from hours of work and overtime provisions, a manager would have to perform

certain defined duties and earn a salary of at least 150% of the minimum wage on the basis of a 44 hour work week (currently $750 per week).
- Remove the requirement that employers obtain Ministry consent for employees to work 48-60 hours per week, however maintaining the requirement for approval for weekly hours above 60.
- Add an option for obtaining group consent to work overtime through a secret ballot vote, if appropriate for the sector.
- Limit when employers may enter into overtime averaging agreements to situations that are desired by employees, for example, where it allows for a compressed work week, continental shift or other flexibilities in the employee's schedule. Where the overtime averaging is to provide for employer scheduling requirements, the Special Advisors recommend that approval be limited to circumstances where the total number of hours worked does not exceed the threshold for overtime over the averaging period.

Temporary Help Agencies – Consistent with the emphasis on vulnerable workers, the Special Advisors recommend the following changes to the ESA to provide for compensation equality and greater job permanency for "assignment" workers from temporary help agencies:

- Provide that, after six months, no assignment worker can receive less compensation than employees of the client performing comparable work.
- Create a positive obligation on clients to notify the worker of available job openings, to consider, in good faith, any assignment worker who applies for the position and to consider assignment workers for available positions with the client prior to terminating the assignment.
- Although not applicable to the ESA, the Special Advisors recommend that the client using the services of an assignment worker, and not the temporary help agency, be responsible for injuries incurred in the workplace.

Scheduling – The Special Advisors recommend providing the Ministry of Labour with the authority to regulate the scheduling of employees by employers, and to adopt a sector-specific approach to the regulation of scheduling, making the fast food and retail industries a priority. They also recommend that employees be given a "right to request" changes to their schedules on an annual basis, with an obligation on the employer to discuss the request with the employee and provide reasons in writing if the request is turned down. The reasons for the employer's decision will not be subject to review, however as a result of the proposed amendment, employees will be protected from reprisal for making scheduling requests.

Minimum Wage – The Special Advisors recommend phasing out the lower minimum wages for liquor servers (currently $9.90 per hour) and students under 18 (currently $10.70 per hour) such that both groups would be entitled to the higher general minimum wage (currently $11.40 per hour).

Increasing Vacation with Pay – To bring Ontario's vacation provisions in line with other provinces, the Special Advisors recommend increasing the vacation entitlement from two weeks per year to three weeks

per year after an employee has five consecutive years of employment with the same employer, and making a corresponding amendment to the vacation pay provisions (i.e., at least 6% vacation pay after five years of employment).

Public Holiday Pay – The Special Advisors did not recommend any specific changes to the public holiday pay provisions of the ESA however note that the provisions are complicated and difficult to enforce. The Special Advisors recommend the provisions be reviewed and replaced by provisions that are "simpler and easier" to understand.

Dependent and Independent Contractors – Despite early predictions, the Special Advisors did not recommend giving independent contractors access to the ESA standards, however they do recommend adding the term "dependent contractor" as defined in the LRA to the definition of employee under the ESA. Dependent contracts are a category of worker in which an individual contracts to perform services but those services are exclusively (or nearly exclusively) provided to a single organization, resulting in a relationship of dependency. The Special Advisors also recommend making worker misclassification (employee vs. independent contractor) a priority enforcement issue and, in the event of a dispute, creating a reverse onus requiring the employer to establish that the contractor is not an employee.

Consolidated Legislation and Increased Education, Enforcement and Administration

One of the themes of the Report is what the Special Advisors identify as a need to create a "culture of compliance" in Ontario workplaces. To this end, the Report makes a number of recommendations aimed at deterring non-compliance, increasing awareness among employers and employees of workplace rights and responsibilities, and ensuring that workplace laws are easy to access, understand and administer. These recommendations include the following:

- Consolidate the ESA, the LRA and the *Occupational Health and Safety Act* into one "Workplace Rights Act," and initiate a program of education on the legislation for both employees and employers.
- Move the Ministry of Labour toward becoming a more traditional law enforcement agency and less an agency involved in customer service, and allocate more resources to proactive enforcement initiatives, including spot checks, audits, inspections and campaigns to counter systemic non-compliance.
- Strategically increase the use of targeted inspections, particularly in sectors and jobs where there are large numbers of vulnerable workers in precarious employment, and focus enforcement strategies on the top of industry structures (such as the top of a supply chain or franchisor) where decisions are made that influence compliance by those lower in the structure.
- Increase penalties for non-compliance, including increasing fines for violations of the ESA from $295 to $1000, raising penalties for notices of contravention of the ESA from $250/$500/$1000 to $350/$700/$1500, and providing the Ontario Labour Relations Board (OLRB) with the authority to

order administrative penalties of up to $100,000 per contravention, and order employers to pay the costs of an investigation.

In addition, the Special Advisors recommend amending the ESA and the *Ontario Business Corporations Act* to remove the barriers currently in place for employees to recover wages and vacation pay directly from directors of a corporation, including the requirement in the ESA that formal insolvency proceedings be commenced before a remedy can be sought. The Special Advisors recommend that the legislation be amended to provide that up to six months' wages and up to 12 months' accrued vacation pay are the responsibility of the directors and to provide 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.

Labour Relations

Several of the Report's recommendations to amend the LRA could, if implemented, have a considerable impact on labour relations in Ontario.

Noting that the acquisition of union bargaining rights is a "controversial area of policy," the Report makes recommendations to address what the Special Advisors view are issues with the existing certification process under the LRA, stating that the "current provisions of the LRA are not sufficiently responsive to the adverse impact that employer misconduct has on the rights of employees to free and independent choice." While the Report recommends maintaining the current secret ballot vote process of certification, the recommendation is contingent on the adoption of the Report's proposed "package" of recommended amendments, including the following:

- In cases where the OLRB finds that the true wishes of employees are not likely to be ascertained in a vote due to employer misconduct, the OLRB should be required to certify the trade union (removing the option of a second vote) and to impose first contract arbitration.
- Provide the OLRB with the authority to require an employer to provide a union with contact information for the employees in the union's proposed bargaining unit, in cases where the union can demonstrate the appearance of the support of approximately 20% of employees in the bargaining unit.

Additional proposed amendments to the LRA include:

- Provide the following groups of employees (currently excluded) with access the collective bargaining regime under the LRA: domestic workers, hunters and trappers, members of the architectural, dental, land surveying, legal or medical profession employed in a professional capacity and agricultural and horticultural employees (with certain restrictions).
- The successor rights provisions of the LRA should be applied to the building services industries (security, food services, cleaning) and home care funded by the government (meaning that when

such work is contracted out and re-tendered, any existing bargaining rights and collective agreements would be binding on the new contractor).
- The OLRB should be provided with the power to modify bargaining unit structures, and to consolidate existing and/or newly certified bargaining units involving the same employer and the same union in sectors where "employees have been historically underrepresented by unions."

The Special Advisors' review of the LRA was informed in part by recent Supreme Court of Canada jurisprudence finding that the right to meaningful collective bargaining is an essential component of freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms*.

Implications for Franchising

The Report contains a number of references to the franchise business model. For a discussion of the Report's recommendations as they relate to the franchise business model, we recommend this article written by our colleague, Larry M. Weinberg, a partner in our franchise group.

[1] The Report defines these workers as those "whose employment: makes it difficult for them to earn a decent income; interferes with opportunities to enjoy decent working conditions; and/or puts them at risk in material ways."

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.