

Final Report Issued by Ontario's Changing Workplaces Review - Good and Bad News for Franchising

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The anticipated Changing Workplaces Review Final Report of the Special Advisors for the Ontario Government, which proposes revisions to the *Labour Relations Act, 1995* (LRA) and the *Employment Standards Act, 2000* (ESA), was released on May 23, 2017. The Final Report delivers a combination of good and bad news for franchisors and franchisees, and will likely generate strong commentary from the Canadian franchise community.

While the Final Report explicitly rejects the implementation of a new joint employer status for franchisors, it strongly promotes the need for more regimented unionization and collective bargaining for employees of Ontario franchisees operating under the same brand.

The July 2016 Interim Report discussed the need to review whether the franchisor and franchisee are common or related employers. Helpfully, the Final Report does not propose an amendment to Section 1(4) of the LRA, which is used frequently to determine whether franchisors and franchisees are related employers. While the Special Advisors consider the appeal of adopting a new legal test, they ultimately conclude that a new legislative test would be controversial and unclear in its application. The Special Advisors suggest that the issue should, as is the case today, be determined on a factual basis using the existing and longstanding test. In some cases, and as was always the case, franchisors could be found on the existing law to be related employers with a franchisee. However most franchisors need not worry as they now structure their franchise systems to avoid such a finding.

While the joint employer issue may be a victory for franchisors, the Special Advisors note concerns with structural weaknesses in the current labour relations legislation as it pertains to collective bargaining. This applies to franchisors and franchisees because employees in a franchise operation are now restricted to bargaining in each franchise location separately.

Elaborating on Section 4.6 of the Interim Report with regards to “broader-based” bargaining systems, the Special Advisors advocate for a need to provide a remedy for the vulnerable and low-paid workers who do not have access to meaningful collective bargaining. The Final Report advocates for a new system to be put in place whereby independent unrelated franchisees of one brand in a geographical area could be required to collectively bargain with employees of those multiple franchisees towards one union contract. Apart from longstanding practices in the construction industry, this would be unprecedented as labour relations has historically relied on there being a single employer. In fact, the Final Report clarifies that it rejects the notion

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of multiple employers having to come together in this way ***except when they are franchisees (or franchisor owned corporate units) of a single brand***. In its October 2016 response to the Interim Report, the Canadian Franchise Association noted the unfairness of this proposal and argued that each franchisee runs their business differently. As such, for all franchisees of the same franchisor in a single geographical area to collectively bargain is unreasonable since it could impede their ability to operate their businesses properly, profitably and in accordance with their franchise agreements.

According to the Final Report, the Special Advisors state it is good policy to treat franchisees of a common franchisor as a single large employer with multiple locations. This is because, the Final Report argues, franchisees of a single franchisor promote the same brand, sell the same products and operate in the same market, under the same contracts of the exact same franchisor. While franchisors and franchisees would likely disagree with these sweeping generalizations in the Final Report, the Special Advisors believe there are compelling reasons to treat franchisees like a single employer with multiple locations. An “employer bargaining agency” comprised of representatives of the franchisee employers, would represent the franchisees at the bargaining table with the union. The franchisor would not have a seat at the bargaining table, unless he/she is also an employer in the affected geographic area. Additionally, the Ontario Labour Relations Board would be granted the power to require an employer bargaining agency.

Other notable recommendations include the elimination of the current lower minimum wage for restaurant servers and for government agencies to use heightened vigilance in addressing “misclassification” of employees as independent contractors. This has been an issue in some franchises, such as those in the cleaning industry. However, the Final Report rejects the suggestion that independent contractors should be entitled to the benefits or the protections of the ESA. Independent contractors are not economically dependent on one employer and are performing business on their own accord.

Additionally, the Final Report advocates in favour of “top down” enforcement, a process where an employer with multiple sites would be committed to investigating wide-scale violations in the workplace. From a franchise business model perspective, this means that a franchisor would be responsible for ensuring that franchisees are complying with employment standards law. The Final Report emphasizes that these “top down” compliance strategies are not based on concepts of joint liability, but rather that top industry players (the franchisors) have a stake in protecting the name of the brand. For example, in Australia, the National Franchise Program works with franchisors aiming to improve the employment standards compliance performance of their franchisees. According to the Special Advisors, a well-developed “top down” strategy is about protecting brand presence, as opposed to making a franchisor liable for a franchisee’s non-compliance. Therefore, a proper “top down” strategy can minimize risk to the franchisor’s brand if franchisees are non-compliant.

As it currently stands, the Ontario government has indicated they will soon reveal which of the over 170 policy recommendations in the Final Report they wish to move forward on. Therefore, it remains to be seen if these recommendations affecting the franchise business model will become law. Accordingly, those who

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want to protect the current way in which the franchise business model operates are encouraged to immediately make their concerns known to the Ontario Minister of Labour and their individual Members of the Provincial Parliament.

[You can read the Full Report here.](#)

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