Insight

IN-DEPTH DISCUSSION

MAY 25, 2017

Canada: Ontario Special Advisors Make 173 Recommendations in their Final Report on the Changing Workplace

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In May 2015, the Ontario government appointed two Special Advisors (Michael Mitchell and The Honourable John C. Murray) to review the modern-day workplace and to consider whether the Ontario Labour Relations Act, 1995 ("OLRA") and the Ontario *Employment Standards Act*, 2000 ("ESA") require amendments to reflect workplaces as we know them today (the so-called "Changing Workplaces Review"). The Review was initiated to deal with the government's primary concerns with key workplace-related issues, including non-standard working relationships, the expanding service sector, workplace diversity, technological change and globalization, and trade liberalization. On July 27, 2016, the Special Advisors issued a lengthy Interim Report, which did not identify any specific recommendations, but confirmed the issues being considered, presented the range of options under scrutiny, and invited further input from stakeholders.

On May 23, 2017, the Special Advisors issued their Final Report (and a Summary Report) to the Ontario government containing their recommendations with respect to all of the issues considered under the OLRA and the ESA.

The Special Advisors noted that their review is the first independent review in Canada to consider specific legislative changes to both employment standards and labour relations in a single process. They state that their recommendations are aimed at creating better workplaces in Ontario where there are decent working conditions and widespread compliance with the law. The benefits that will flow from the changes they have recommended are described as follows:

> These changes would benefit workers directly, and employers and society in general. Employees will benefit from a better workplace and an enhanced ability

> to assert their basic rights. Employers will benefit from happier and more productive workplaces and from more robust enforcement. Better enforcement will help to ensure that employers that play by the rules do not experience unfair competition from those that do not. Responsible, law-abiding businesses, that represent a vast majority of employers, are entitled to compete on a level playing field. All parties will benefit from a better knowledge and understanding of basis rights and obligations.

The recommended changes are very significant for employers with Ontario employees. On an overall basis, the Special Advisors have recommended that:

- the ESA, OLRA and the *Occupational Health and Safety Act* should be consolidated under a single *Workplace Rights Act*;
- the government should initiate an education program for employers and employees with respect to their rights and obligations under that new Act;
- Ministry of Labour officials and inspectors should be required and authorized to report any violation of labour legislation that comes to their attention;
- the Ministry of Labour should allocate more resources to proactive enforcement including inspections, spot checks and audits;
- independent review of the new Workplace Rights Act should occur every five to seven years;
- an Ontario Workplace Forum (comprised of senior business and labour leaders, employee advocates and senior government officials, with an independent Chair facilitator) should be established and meet quarterly with a view to making recommendations to improve any changes implemented by the Ontario government as a result of the Changing Workplaces Review.

Recommendations for ESA Amendments

Key recommendations for amendments to the ESA include the following:

- The ESA should be amended to state that the Employment Standard Program not be required to investigate all ESA claims and priority should be given to investigation of alleged reprisal claims and complaints that would likely lead to an expanded investigation in the workplace.
- The Ontario Labour Relations Board ("OLRB") should be the forum for the adjudication of ESA complaints not investigated by the Ministry of Labour.
- The Ministry of Labour should target employers for self-audits, particularly in sectors where noncompliance is high or where there are many vulnerable employees.
- The Employment Standards Program should implement a policy for speedy investigation complaints by employees (including whistleblowers) alleging termination of employment based on exercising ESA rights or a failure to reinstate after a statutory leave of absence. Investigation of any such complaint should be commenced within five days of receipt of the complaint.
- A hotline should be established for anonymous ESA complaints.
- Safeguards should be implemented to keep the identity of a whistleblower or third-party complainant confidential.
- The OLRB should be given jurisdiction to impose administrative monetary penalties up to $100,000 per ESA infraction and to order an unsuccessful employer to pay the costs of the investigation.

- Directors are liable currently for up to six months' wages and up to twelve months' accrued vacation pay. The ESA should be amended to make it easier for an employee to recover from a Director should the corporation not meet its obligations to the employee.
- The current test for who is a "manager" should be changed to a "salaries plus duties" test. In order to be exempt from hours of work and overtime rules, a manager would have to perform certain duties (generally following U.S. tests for administrative and executive employees). The recommended salary figure is 150% of the general minimum wage (currently $11.40 per hour) converted to a weekly salary of $750 (based on a 44-hour workweek).
- No employee (including part-time, casual, temporary and seasonal employees) should be paid a lower rate than a full-time employee performing comparable work (although any consideration of pensions and benefits are excluded here). This would not apply where the difference in the rate arises as a result of seniority; a merit system; a system measuring earnings by quality or quantity of production; or another factor justifying the difference on objective grounds.
- The Ontario government should initiate an urgent study on how to provide at least a minimum standard of insured health benefits across workplaces, especially to part-time and full-time employees currently without coverage, and to self-employed individuals (including small employers).
- The Ministry of Labour should have the authority to regulate the scheduling of employees. The government should adopt a sector-specific approach to the regulation of scheduling, and regulation in certain sectors should be a priority (e.g. retail and fast food).
- "Right to request" – After one year of service, an employee should have a right to request an increase or decrease in hours of work, a more flexible schedule, or alteration of the work location. The employer should be required to discuss the issue and provide written reasons if the request is refused in whole or in part. There should be no appeal of the employer's decision on the merits. There should be a limit to one request per calendar year by an employee.
- With respect to temporary help agencies, assignment workers should not be paid less than a comparable employee of the client performing similar work (except during the first six months). The client should make best efforts to ensure assignment workers are aware of client job openings and should consider in good faith any assignment worker who applies.
- The requirement for obtaining consent by the Ministry of Labour for an employee to work between 48 to 60 hours a week should be repealed.
- The trigger for overtime should remain at 44 hours. Overtime averaging should only be permitted where it would allow for a continental shift, a compressed workweek or other flexibilities in scheduling desired by employees, or to address employer scheduling requirements where the total number of work hours does not exceed the overtime threshold over the averaging period.
- Personal emergency leave should be made available to all employees, not just employees of an employer with more than 50 employees. The ten unpaid days allotted to personal emergency leave should be reduced to seven days, while adding an independent entitlement of three unpaid days for the bereavement of family members. There should be no annual restriction on such bereavement leave.
- An employer should be obligated to pay for any doctor's note requested by the employer. (Notably, there is no recommendation for paid sick days.)
- Family medical leave of 8 weeks should be increased to a leave of up to 26 weeks in a 52-week period.

- Vacation entitlement should be increased from minimum of two weeks to a minimum of three weeks after five years of employment with the same employer, and minimum vacation pay should be increased from 4% to 6% after five years.
- The definition of "employee" should be expanded to include a "dependent contractor" and the same definition of that phrase should be adopted as already exists in the OLRA. If there is a dispute about whether an individual is an "employee", the entity receiving the individual's services should have the burden of proving that the person is not an employee and the obligation to produce all relevant evidence. The Ministry of Labour should make misclassification a priority enforcement issue.
- Any ESA exemption for interns/trainees should be removed.

Recommendations for OLRA Amendments

Key recommendations for amendments to the OLRA include the following:

- Domestic employees, professional employees (architects, dentists, land surveyors, legal and medical professionals) and agricultural and horticultural employees should have the same rights and protections as other employees re collective bargaining, etc.
- The secret-ballot process for certification should be preserved provided that the other recommendations of the Special Advisors are accepted.
- Where the true wishes of employees are not likely to be ascertained because of misconduct by an employer, remedial certification and first-contract arbitration should be granted. In the first-contract arbitration process, the parties should engage in an expedited and intense mediation/arbitration process. A union certified by remedial certification should only be entitled to first contract arbitration after engaging in that process.
- If a union has the support of 20% of employees in a bargaining unit, and upon application by the union, the OLRB should require the employer to provide the union with a list of employees in the bargaining unit, as well as the work location, phone number, address and personal email address of each employee. The same requirement applies if 20% of employees demonstrate that they no longer wish to be represented by a union. The same list should be provided to the employee representative. The union should not use the list for any purpose other than to seek support from employees in the unit. Any employee can ask the employer for the same list.
- The OLRB should modernize its rules with respect to permitting electronic membership evidence.
- The OLRB should have the power to conduct votes outside the workplace, including internet and telephone voting.
- The OLRB should be able to review the structure of bargaining units and consider the consolidation or amendment of bargaining units if it is satisfied that the bargaining unit is no longer appropriate for collective bargaining.
- If there are different bargaining units of different franchisees of the same franchisor by the same union in the same geographic area, the OLRB may require central bargaining subject to certain conditions.
- A person assigned by a temporary help agency to perform work for an agency client, or a person assigned by another supplier of labour to perform work for another person shall be deemed to be an employee of that client or that person. (There is no recommendation otherwise to change the existing law with respect to identifying the "true" employer or with respect to related or joint employers.)
- The current successor rights provision under the OLRA does not apply to contracting out and retendering contracts in the building services industry. The successor rights provision should be

extended to these industries (security, cleaning services and food services) and there should be regulation-making authority allowing for possible expansion of successor rights to other sectors or services.

- The six-month time period for striking employees to make an application to return to work should be eliminated.
- Arbitration by the OLRB or by an arbitrator should be required in the following situations (a) refusal to reinstate an employee after a strike or lockout; (b) an employee is disciplined during a legal strike or lockout; and (c) an employee is disciplined after expiry of a collective agreement.
- "Just cause" protection should not be extended to all employees in a bargaining unit from the date of certification to the date of the first collective agreement.
- An arbitrator should have the power to waive time limits under a collective agreement both in the arbitration procedure as well as the grievance procedure if the arbitrator is satisfied there are reasonable grounds for the extension and the opposite party will not be substantially prejudiced.
- If a corporation is convicted of an offence for violating the OLRA, it can now be fined up to $100,000 (increased from $25,000).

The Special Advisors confirmed that their mandate directed them to "be supportive of business in a changing economy". The Special Advisors were certainly cognizant of the need to take a balanced approach to change and assert that they endeavoured to strike this balance by taking the interests of all stakeholders into account in developing their recommendations. Whether the Special Advisors have achieved an appropriate balance will no doubt be vigorously debated going forward.

The Ontario government has stated that it intends to review all of the recommendations carefully and decide in short order which recommendations will lead to legislative amendments. A formal response to the Final Report is expected within the next week. In calling for the Changing Workplaces Review, the Ontario government's focus has been on enhancing protections for workers and support for business as part of its overall economic plan to build up Ontario by growing the economy and creating jobs. In light of that focus, and in light of the pending Ontario election in 2018, we expect that most, if not all, of the recommendations of the Special Advisors will find voice in the legislative agenda with important new obligations on many employers and the attendant costs of those obligations. Stay tuned.