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The Changing Workplaces Review

Expert Panel Recommends Major Changes to Labour and Employment Laws

As set out in our previous article, the Ontario Government commissioned an expert report on the state of Ontario's labour and employment laws led by John C. Murray and Michael Mitchell (the "Advisors"). The Advisors were tasked with recommending changes to the *Employment Standards Act, 2000* ("ESA") and the *Labour Relations Act, 1995* ("LRA"). The final report – 2 years in the making - was released on May 23, 2017 and titled "*The Changing Workplaces Review: An Agenda for Workplace Rights*". The report measures 420 pages long and contains 173 recommendations. It is likely that a substantial number of these recommendations will become law soon.

It is beyond the scope of this article to review all 173 recommendations in detail. Instead, we have briefly summarized some key recommendations which are likely to be adopted by the Ontario Government.

Guiding Principles and Mandate

The Advisors were tasked with an ambitious mandate:

> "…to determine what changes, if any, should be made to the legislation in light of the changing nature of the workforce, the workplace, and the economy itself, particularly in light of relevant trends and factors operating on our society, including globalization, trade liberalization, technological change, the growth of the service sector, and changes in the prevalence and characteristics of standard employment relationships." (page 18)

In pursuing this mandate, the Government asked the Advisors to consider various "guiding principles", including addressing precarious employment, protecting vulnerable workers, achieving respect for the law, meaningful enforcement, access to justice and collective bargaining.

Fortunately for Ontario employers, the Advisors also noted that ensuring business competitiveness and flexibility is an important objective

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to consider along with ensuring that the law does not undergo "rapid pendulum swings". The Advisors sought to "craft recommendations" that are "balanced" and capable of being "sustained by subsequent governments".

The Recommendations

1. Enforcement / Compliance

A large part of the final report focused on the Ministry of Labour ("MOL") having the necessary tools to enforce the law. Besides additional funding and hiring more inspectors, the Advisors recommended:

- more powers to employment standards officers and the Ontario Labour Relations Board ("OLRB");
- stiffer fines for non-compliance;
- more proactive inspections that target certain industries;
- increased use of the employer self-audit provision of the ESA;
- making it easier to recover unpaid wages against directors of a corporation;
- creating a statutory lien in favour of the MOL against an employer's property to secure unpaid wages up to $10,000 per employee; and
- prioritizing reprisal complaints for inspection.

The Advisors also recommended the use of an employee hotline for anonymous complaints and ensuring that whistleblowers receive protection from reprisals for reporting - in good faith - violations of the ESA.

2. Sectoral Regulation

The Advisors are in favour of setting up committees of representatives from various sectors of the economy (e.g. fast food and retail) who would then have statutory authority to make recommendations to the Government on exclusions/exemptions from the ESA as well as employee scheduling. The Advisors are clear that these sectoral committees would also have authority to develop "sector-specific scheduling regulations".

3. Who is a Manager?

Most employers understand that a manager is exempt from the hours of work and overtime provisions of the ESA. However, the test for determining whether an employee works in a managerial capacity was subject to extensive commentary and study by the Advisors.

In the end, the Advisors decided to adopt the approach taken in the United States whereby an individual would only be a manager (and therefore exempt) if they performed specific managerial duties **and** earned a specific salary for doing so. The Advisors refer to this as the "salaries plus duties test". The threshold salary figure would be 150% of the minimum wage. That would mean that unless an employee made at least $750 per week (150% of the $11.40 minimum wage) that employee would not be a manager regardless of the duties he/she performed.

4. Equal Pay for Part Time Employees and Temporary Employees

One of the guiding principles of the final report was to ensure the protection of vulnerable and precarious workers, many of whom work in part-time roles. The Advisors recommended that part-time employees should have terms and conditions of employment that more equally resemble those of full-time employees. Specifically, the Advisors recommended that "no employee shall be paid a rate lower than a comparable full-time employee of the same employer". This would mean that comparable part-time and full-time employees would need to be paid the same. The Advisors did create some exceptions in that this rule would not apply where employees are treated differently based on seniority, merit or the quantity or quality of production.

The Advisors decided **not** to mandate that part-time employees receive minimum standards of benefits and pension, but recommended that the Government further study the issue.

With respect to assignment workers (i.e. employees assigned from a temporary agency to work with a client of the agency), the Advisors recommended that these workers should not receive less compensation than a comparable employee of the client performing similar work (except that this would not apply in the first six months of the assignment).

5. Good Faith Consideration of Assignment Employees

In an effort to improve the permanent job prospects of an assignment employee, the Advisors recommended that employers should

have to consider any assignment worker who applies for a position and must also, before termination, consider whether the assignment worker is suitable for an available position. The employer must act in good faith in doing so.

6. Employee Right to Request Scheduling Changes

Consistent with the Advisors' goal of ensuring more certainty and control over scheduling for employees, the Advisors recommended that employees have a statutory right under the ESA after one year of service to request in writing (once a year) that the employer adjust their hours of work or work location. The employer would be required to discuss the issue with the employee and provide reasons in writing if the request is refused. An employee would have no recourse to appeal the employer's decision.

7. Call-In Pay

The Advisors recommended that the current call-in rule should be simplified such that if an employee is required to report to work and then works less than three hours, the employee must be paid three hours at his/her regular wage. This would replace the old three hour rule which mandated that employers pay the greater of minimum wage or the number of hours worked at the employee's regular rate.

8. Removing MOL Consent to Work Excess Hours

In an effort to simplify the current rules, the Advisors recommended that the current requirement in which employers must seek MOL consent to have employees work 48 – 60 hours/week should be repealed.

9. Overtime

Although there was pressure on the Advisors from employee and union organizations to move the overtime threshold to 40 hours/week, the Advisors decided to keep the status quo (i.e. 44 hours/week). The Advisors cited the state of the economy and the impact that some of the recommendations would have on certain employers and concluded that:

> "we should be cautious in recommending broad changes which might directly affect the bottom line of those same employers." (page 223)

10. Personal Emergency Leave and Bereavement Leave

The Advisors recommended that all employees should have access to the personal emergency leave days provided for in the ESA. Currently, only employees of larger employers (those with over 50 employees) can take advantage of this leave of absence.

However, and interestingly, the Advisors recommended that bereavement leave should be removed from the personal emergency leave section of the ESA and be made an "independent entitlement of up to three unpaid days". The result would be that employees would have 7 personal emergency leave days and 3 bereavement leave days (instead of the current practice of 10 personal emergency leave days).

11. Sick Days

Despite pressure from medical organizations and union/employee groups, the Advisors did not recommend that employers provide for paid sick days. The Advisors noted that requiring paid sick leave is very uncommon in North America. The Advisors were, however, more comfortable eliminating the 50 employee threshold on personal emergency leave as noted above.

The Advisors also recommended that employers should be required to pay for a doctor's note if the employer requires one.

12. Vacation

As was expected, the Advisors recommended that the statutory minimum vacation time of 2 weeks and vacation pay of 4% should be increased to 3 weeks and 6% upon an employee reaching 5 years of service. This would bring Ontario in line with other Provinces.

13. Definition of "Employee"

The Advisors heard numerous submissions on the issue of ensuring that employees were not misclassified as independent contractors. The Advisors were clear that most workers should be entitled to the ESA's minimum standards and that misclassification should become a "priority enforcement issue". Accordingly, the Advisors recommended that the definition of employee should be expanded to

include a "dependent contractor", defined as:

> "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 dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent 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." (recommendation 125).

The practical impact of this definition is that contractors who only provide services to one company would most likely be categorized as "dependent contractors", thus entitling them to the ESA's minimum standards (e.g. holiday pay, vacation pay, notice of termination, etc.).

The Advisors also recommended that in any misclassification dispute, the employer would have the legal burden of proof to show that the person is not an employee.

14. Related Employers

The Advisors were concerned that if a business is operated through different corporate entities, employees should not be limited in recovering unpaid wages from only their direct employer. The result is that the Advisors recommended that it should be easier to find that two entities are "related employers" – meaning that the two entities would both be responsible for ESA breaches.

Practically speaking, this will make it easier for employees and unions to seek recovery of unpaid wages against multiple corporate entities as long as those entities are carrying on "associated or related activities or businesses" (regardless of whether the intent or effect of the relationship between the entities was to avoid the ESA).

15. Acquiring Bargaining Rights

The Advisors were lobbied by labour organizations to revert back to 'card' based certification in which employees would only have to sign a certain threshold level of membership cards with the union (and not have a secret ballot vote) in order to become unionized. As expected, employers were opposed to this. The Advisors ultimately decided that a secret ballot vote should be maintained.

However, there is a catch. The recommendation that a secret ballot vote should remain is part of a "package" of recommendations that includes:

- making it easier for a union to be automatically certified in the event of an unfair labour practice by an employer;
- easier access to "intensive mediation" and first contract arbitration; and
- requiring an employer to provide an employee list to a union if a union can establish 20% support in a proposed bargaining unit.

While the recommendations maintain the status quo for certification, the "package" was deemed necessary by the Advisors to preserve the integrity of the vote. As stated by the Advisors:

> "In the current circumstances, the policy we favour is a secret ballot voting system that includes effective remedies of certification and access to first collective agreement arbitration where there is employer misconduct undermining the integrity of the vote" (page 324).

The Advisors also noted that the requirement to provide employee lists is necessary in order for employees to exercise their freedom of association and to ensure an "informed, free and accessible electorate of employees."

16. Electronic Membership Evidence and Voting

The Advisors recommended that the OLRB update its rules to allow for electronic submission of union membership evidence and to also permit voting via telephone and the internet. This would make the unionization process more accessible and modern.

17. Consolidation / Amendment of Bargaining Units

The Advisors recommended that the OLRB should have the power to review and modify existing bargaining unit structures if the status quo is no longer appropriate for collective bargaining. This would provide

unions with an opportunity to revisit (and potentially expand) its bargaining unit by applying to the OLRB. This is similar to the rules for federally regulated employers under s. 18.1 of the *Canada Labour Code*.

The Advisors also recommended broader OLRB powers in sectors "where employees have been historically underrepresented". Such powers would include the ability to apply the terms of an existing collective agreement to a newly constituted bargaining unit. This would mean that a union could insist that one collective agreement should apply to another worksite or group of employees without the parties potentially going through collective bargaining. The Advisors have noted that in exercising this power, the OLRB would consider the following:

> "whether the proposed new unit and/or terms of the agreement contribute to the development of an effective collective bargaining relationship and serve the development of collective bargaining in the sector/industry." (recommendation 156)

18. Franchisee Bargaining

The Advisors considered the franchisor-franchisee relationship and recommended a number of measures, including that the OLRB should have the power to order centralized collective bargaining. As an illustration, if three franchisees of the same franchisor are organized by the same union and in the same geographic area, representatives of those franchisees would bargain centrally with the union on terms that would apply to all three workplaces. Another recommendation is that the OLRB would have the power to order that a collective agreement applicable to one franchisee could be applied to a newly certified bargaining unit involving the same union and a different franchisee of the same franchisor.

19. Client Employs Agency Workers

The Advisors recommended clarifying that assignment workers would be considered employees of the client under the LRA. This would result in agency workers counting as employees for the purposes of any union organizing drive. For employers that are already unionized, this would likely result in agency workers enjoying the benefits of any collective agreement.

20. Expanded Successor Rights

In order to expand bargaining rights in the building services sector for vulnerable workers, the Advisors recommended that when a building services provider (e.g. cleaning, food services, security) replaces a unionized provider, successor rights would apply. This would mean that the new non-unionized provider would inherit the union in the same way as if the new provider purchased the business of the old provider. As stated by the Advisors:

> The law currently protects the bargaining rights of unions and the terms and conditions of employment of employees when businesses are sold. In the building service sector, contracting out and re-tendering is the equivalent of a sale and should be treated in the same way. Accordingly, we recommend – in the interests of protecting negotiated gains, stability and security for employees – that successor rights should be applied to the building services industry. (pages 411-412)

In addition to building services, the Advisors would apply successor rights to home care employees funded by the Government as employment in this area is, according to the Advisors, "precarious".

Next Steps

As is evident, the recommendations noted above are far reaching and will impact the workplace significantly. While we cannot predict which recommendations will be enacted into law, we are confident that many of the recommendations covered in this article will be carefully examined by the Government with the ultimate goal of adopting them in full or in part into the ESA and LRA.

We recommend that employers and industry associations should consider making representations to the Government, and particularly during committee meetings once the Government drafts legislation. The presentations made by employer groups during the Advisor's consultations were taken into account and afforded weight in producing the final report, especially in regards to hours of work and overtime. We

believe that the Government will, likewise, also afford considerable weight to the views of business.

We will keep you updated on the progress of the recommendations and the Government's legislative response. To this end, we are planning a breakfast seminar, once the Government's legislation has been drafted.