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EMPLOYMENT & LABOUR

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Changing Workplaces Review

Advisory Panel to Recommend Major Changes to Labour and Employment Laws

The Ontario Government has asked two special advisors (the "Advisors") to review and recommend legislative changes to the *Labour Relations Act*, 1995 ("LRA") and the *Employment Standards Act*, 2000 ("ESA"). In July 2016, the Advisors submitted their interim report. The report measures 312 pages.

The Policy Behind the Review

The interim report is part of the Advisors' "Changing Workplaces Review". It will very likely result in major changes to the LRA and ESA. The Advisors have been given a broad mandate by the Ontario Government to recommend changes while considering various "guiding principles". The two most notable "guiding principles" are modernizing the legislation to reflect the changing nature of the workplace/economy and protecting "vulnerable workers in precarious jobs". Fortunately, the Advisors have seen fit to acknowledge that the Changing Workplaces Review should support business as well. Of course, producing a final report that incorporates (or at least balances) both the concerns of labour and business will be extremely difficult.

The Potential Changes

Given the length of the interim report, this article does not summarize every single change being considered by the Advisors (only what this author considers the most material).

Labour Relations (LRA)

The following is a summary of some of the changes being considered to the LRA:

1. **Eliminating Exemptions from the LRA:** Certain employees (e.g. professionals and domestic workers) are currently exempt from the LRA. This means that these employees do not have access to the protections of the LRA and, most notably, the ability to unionize. The Advisors are considering whether these exemptions should be changed or eliminated with the goal of ensuring that more employees are covered by the LRA.
2. **Eliminating Voting to Unionize:** For non-construction employers, a union must

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prove (by providing written evidence to the Ontario Labour Relations Board ("OLRB")) it has 40% membership support. Then, the OLRB orders a vote of employees. If a majority of employees vote in favour of the union, then the union is certified. The Advisors are considering whether to eliminate the voting requirement. This would mean that employees could be unionized only by demonstrating membership support (referred to as "card based" certification). The Advisors are also looking at electronic membership evidence and alternative voting procedures such as the use of telephone or internet voting. All of this would make it easier to unionize.

3. **Union Access to Employee Lists During Organizing Drive:** The Advisors are considering permitting union access to employee lists during an organizing drive. This will make it easier for unions to contact employees to obtain the required membership support and then prior to any vote.

4. **Easier Access to Arbitration:** The Advisors are examining whether binding arbitration (in a first contract situation) should be more readily available and also whether alternative mediation structures should be in place prior to the parties being in a legal strike or lock-out position. The Advisors are also considering whether the OLRB should have the power to order interest arbitration in certain circumstances in renewal negotiations.

5. **Expanding the "Related Employer" Concept:** Currently, employers who are "related" may be considered as one employer by the OLRB. This means two different legal entities may be bound to a union certified with one entity so long as the two entities are "related". The Advisors are considering expanding the related employer concept to capture additional corporate structures, including the franchisee – franchisor relationship.

6. **Expanding Successor Rights to Certain Industries:** If a unionized vendor is sold to a non-unionized purchaser, the purchaser will inherit the union in most cases. This is referred to as successor rights. Many unions have argued that successor rights should apply more broadly and, specifically, to industries in which one service provider replaces another service provider (e.g. cleaning companies who have contracts with a building). The Advisors are considering whether successor rights should apply in this situation when all that has occurred is that one provider has lost a contract to another provider.

7. **Consolidating/Amending Bargaining Units:** Generally speaking, and subject to open periods for decertification, a bargaining unit does not change once certified. The Advisors are considering giving the OLRB the power to redefine, consolidate or amend bargaining units after certification. This would provide more flexibility to change (or add to) the composition of the bargaining unit over time.

8. **Replacement Workers**: During a strike, an employer is permitted to use replacement workers. Unions are obviously not in favour of this and have pressured the Advisors to recommend that the LRA prohibit the use of replacement workers.

9. **Reinstatement of Employees Following a Strike:** When a strike concludes, there is a general right of reinstatement for employees within six months from the date the strike commences. The Advisors are considering whether the six month time frame should be eliminated and what, if any, restrictions on reinstatement are appropriate.

10. **Remedies**: The Advisors are looking at broadening the remedies available to the OLRB and increasing penalties for non-compliance with the LRA.

Employment Standards (ESA)

The following is a summary of some of the changes being considered to the ESA:

1. **Misclassification Issues:** Many labour groups have commented that employers are misclassifying employees as independent contractors in order to avoid employment standards obligations (e.g. vacation pay, overtime pay, holiday pay, etc.). The Advisors are considering whether more resources should go into enforcement and/or whether the definition of employee in the ESA needs to be altered to put the onus on employers to prove independent contractors are not employees. The Advisors are also considering adding dependent contractors as being subject to certain parts of the ESA.
2. **Expanding Employer Liability**: In response to the submissions from labour about employers 'avoiding' liability, the Advisors are looking at expanding the situations in which an employer would be liable for ESA breaches. Suggestions include holding the employer responsible for the ESA breaches of contractors it retains, making it easier for the Ministry of Labour to find that corporate entities are "related", and imposing liability on franchisors for the ESA breaches of franchisees.
3. **Tightening Exemptions:** The ESA contains various exemptions. A common example is that managers/supervisors are generally excluded from the hours of work and overtime provisions. The Advisors are closely examining whether these exemptions should be changed or eliminated. For instance, one suggestion is to narrow the definition of manager such that a manager would only be exempt if he/she directly supervised a specified number of employees. Another suggestion is to impose a threshold compensation limit (e.g. $100,000/year) where anyone making less than the limit would be non-exempt.
4. **Revising Rules Around Excess Hours of Work and Overtime**: A large section of the interim report deals with this topic. Many options are on the table for the Advisors including lowering the overtime threshold, amending caps on daily and weekly hours of work, setting out when employees may refuse to work excess hours, and restricting averaging agreements.
5. **Vacation:** The Advisors are considering changing the minimum vacation entitlement from 2 to 3 weeks per year either at the start of the employment relationship or upon reaching a certain level of seniority.
6. **Leaves of Absence:** The Advisors have received submissions about personal emergency leave and paid sick leave. Some submissions have argued that the 50 employee threshold for 10 unpaid personal emergency leave days should be abolished. Some submissions have gone further and have argued that employees should have a right to paid sick leave under the ESA. One proposed formula is that employees would accrue 1 hour paid sick time for every 35 hours worked up to a cap. The Advisors have raised the possibility of having employers pay for doctor's notes required from employees.
7. **Protecting Part Time and Temporary Employees:** As noted above, a major reason for the Changing Workplaces Review is to assist "vulnerable workers in precarious jobs". The Advisors heard many submissions on this and are now considering a proposal whereby part-time, temporary and casual employees would be paid the same (or at least the same wage rate) as full-time employees if they do the same work and have the same skills. As many part time employees do not have access to benefits, the Advisors are looking at requiring employers to provide benefits to part time employees on a pro rata basis.

8. **Increased Termination/ Severance Pay Obligations:** Upon termination without cause, employers must provide notice of termination (or pay in lieu) equal to 0 – 8 weeks depending on service. Severance pay of 5 – 26 weeks is required where the employer has a payroll of $2.5 million annually and the employee dismissed has at least five years of service. The Advisors heard submissions on increasing the termination pay and severance pay obligations and reducing the thresholds for employees to obtain severance pay upon dismissal.

Next Steps for Employers

The Advisors are seeking comments on the interim report. The deadline is October 14, 2016. If you or your company wish to make submissions, you should contact the Advisors by e-mail at CWR.SpecialAdvisors@ontario.ca.

Employers can expect that some of the changes described above will be recommended by the Advisors and then enacted into law in the near future. The trend is clear. The Government wants to strengthen protections for vulnerable workers and to modernize labour and employment laws to reflect the current workplace realities. This mandate has been made clear to the Advisors and is very apparent from the interim report.

While all of the ultimate recommendations will not be enacted into law, it is reasonable to expect that the LRA will be amended to make unionizing a workforce easier. Also, the ESA will likely be amended to add protections for part-time employees and to tighten exemptions. These changes will likely result in increased costs and administration for many employers and an increased risk of union activity.

We will be monitoring the progress of the Changing Workplaces Review.

If you have any questions, please contact Daniel Pugen at dpugen@torkinmanes.com