



What's New in HR Law

Sweeping Changes Expected Following Ontario's *Changing Workplaces Review*

May 24, 2017

Sweeping changes to Ontario's employment and labour laws were recommended in the final report of the *Changing Workplaces Review* which was released yesterday by the Ontario Government. If adopted, the changes would be the most significant reforms in over 30 years.

The *Changing Workplaces Review* was conducted by two special advisers appointed by the Government in February 2015: C. Michael Mitchell, a veteran labour and employment lawyer, and John Murray, another well-known labour and employment lawyer who later became an Ontario Superior Court Justice.

We will have to see what the Government does with the recommendations, but early indications are that the Government intends to move ahead with significant reforms, perhaps in stages. We expect to know more by next week. We fully understand the significant impact these recommendations may have for our many clients across a variety of workplaces and workplace situations. We will keep you informed each step of the way.

The biggest changes proposed relate to increased protections for workers, with particular attention to precarious employment and enforcement mechanisms. There are some changes that would actually cut red tape and make things more straightforward for business. Of concern, the Report recommends consolidation of the *Employment Standards Act, 2000* ("ESA"), the *Labour Relations Act, 1995* ("LRA") and the *Occupational Health and Safety Act* ("OHSA")

into a “Workplace Rights Act”. Past history suggests that such a consolidation could have a multitude of unforeseen results.

Other key changes proposed by the Report include the following highlights:

Changes to the *Employment Standards Act, 2000*

- **Classification of Employees:**
 - Expand the definition of “employee” to include a **dependent contractor** as defined in the *LRA*.
 - Change the test for **managers** to a “salaries plus duties” test (i.e. to be exempt from hours of work and overtime protection, a manager would have to perform defined duties and have a salary of at least 150% of the general minimum wage).
- **Vacation with Pay:** Increase vacation entitlement to three weeks after five years of employment with the same employer, with corresponding increases to the vacation pay provisions (i.e. 6% vacation pay instead of 4% after 5 years).
- **Overtime and Hours of Work:**
 - Maintain the trigger for overtime at 44 hours per week and only permit overtime averaging where it would allow for a compressed workweek, continental shift or other flexibilities in employee scheduling desired by employees, or to provide for employer scheduling requirements where the total number of hours worked does not exceed the threshold for overtime over the averaging period.
 - Repeal the requirement for Ministry of Labour consent to work longer than 48 hours a week; only employee consent to work excess hours would be required.
 - Base overtime pay on the rate applicable to the work performed, not on a **blended rate** if an employee has more than one position.
 - Amend the “**Three Hour Rule**” to provide that, when an employee who regularly works more than three hours a day is required to report to work but works less than three hours, he or she must be paid three hours at his or her regular wage. Eliminate the student exemption.
- **Leaves:**
 - Eliminate the 50-employee threshold for eligibility for **personal emergency leave**, and reduce it to a total of seven days annually.
 - Remove **bereavement leave** from the personal emergency leave provisions and establish it as an independent entitlement of up to three unpaid days for each of the family members covered by the existing provisions. This would not be limited by an annual restriction and would be applicable to all employers.
 - Amend the *ESA* to provide that an employee can use personal emergency leave days if the employee or his/her minor children are victims of **domestic violence**.
 - Require an employer to pay for a doctor’s note for **sick days** if it requires one.
 - Increase **Family Medical Leave** (to care for dying relatives) from up to 8 weeks to up to 26 weeks (in a 52-week period).

- **Right to Request:** Amend the *ESA* to provide that after one year of service, an employee will have a right to request, in writing, that the employer: decrease or increase hours of work; give a more flexible schedule; or alter the location of work. The employer would be required to discuss the issue with the employee and provide reasons, in writing, if the request is refused.
- **Minimum Wage:** Eliminate the minimum wage rate for both students under age 18 and liquor servers, phased out over three years.
- **Equal Pay:** Amend the *ESA* to provide that no employee (e.g. part-time or casual) shall be paid a rate lower than a comparable full-time employee of the same employer.
- **Enforcement:**
 - Increase the fines, raise the penalties, and expand the OLRB's jurisdiction to impose penalties for violations of the *ESA*.
 - The Director of Employment Standards should be given a priority statutory charge against all of an employer's property to secure unpaid employee remuneration up to \$10,000 per employee, and be enabled to take security for the payment of employee remuneration, and be given direct rights of action to recover employee remuneration.
 - The existing provisions in the *ESA* and the *Ontario Business Corporations Act* should be amended to provide that up to six months' wages and up to 12 months' accrued vacation pay are the responsibility of the directors of a corporation where the employee has not been paid such sums by the corporation.
- **Temporary Help Agencies:**
 - Amend the *ESA* to provide that (with certain exceptions) assignment workers should **not receive less compensation** than a comparable employee of the client who performs similar work.
 - Provide for notice of termination and **termination pay** for assignment workers.

Changes to the *Labour Relations Act, 1995*

- **Inclusions:** Include and provide the same rights and protections as other employees to: agricultural and horticultural employees, and to members of the architectural, dental, land surveying, legal or medical profession practicing in Ontario and employed in a professional capacity.
- **Specific sectors:**
 - Permit the OLRB to require that certified, or voluntarily recognized, bargaining units of different **franchisees** of the same franchisor by the same union in the same geographic area, bargain together centrally with representatives of the franchisee employers in that area.
 - Conduct an expedited inquiry into whether and how sectoral bargaining could be established in the **publicly funded home care** sector.

- Conduct an inquiry and consultation to examine potential changes to the laws applicable to the **arts and entertainment** sectors.
 - Deem persons assigned by **temporary help agencies** to perform work for clients of the agency to be employees of the client for the purposes of the *LRA*.
 - Apply **successor rights** to the **building services industries** (security, food services, cleaning) and **home care** funded by the government.
- **Certification:** Empower the OLRB to order automatic certification if significant employer misconduct during union organizing campaigns and make first contract arbitration available in such circumstances.
- **Access to Information and Electronic Voting:**
 - Modify the **disclosure** requirements under the *LRA* such that, upon application by a union, if it appears to the OLRB that a union has the support of approximately 20% of the employees in a bargaining unit, the OLRB shall require the employer to disclose to the union the list of employees in the bargaining unit, together with the work location, address, phone number and personal email address of each employee.
 - Provide the OLRB with the explicit power to conduct **voting procedures** outside the workplace, including telephone and internet voting.
 - Give Labour Relations Officers the explicit authority to give binding directions and to make arrangements in the workplace that assure the neutrality of the voting process.
- **Bargaining Units:**
 - Amend the *LRA* to reflect that the OLRB can review the structure of a bargaining unit if it is satisfied that the bargaining unit or units are no longer appropriate for collective bargaining in the circumstances.
 - Amend the *LRA* to provide that, where the OLRB certifies a union (or council of unions) for a bargaining unit and the same union or council of unions is certified for a unit of employees in a separate location of the same employer (or for an additional unit at the same location), whether or not a collective agreement is in effect in the prior certified unit, the OLRB can consolidate or vary the bargaining unit description.
- Eliminate the six-month time period for striking employees to make an application to **return to work**.
 - Amend the *LRA* to provide for arbitration by the OLRB or by an arbitrator of the refusal to reinstate an employee at the conclusion of a strike or lock-out, any discipline of an employee by an employer during the course of a legal strike or lock-out, and any discipline of an employee by an employer after the expiry of a collective agreement.

For further information, please contact Jamie Knight, Rob Bayne, Alexa Sulzenko, Meaghen Russell, or any other lawyer you deal with at Filion Wakely Thorup Angeletti LLP, at 416-408-3221.

Reference – Summary Report

https://files.ontario.ca/changing_workplace_review_english_summary.pdf



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