NORTON ROSE FULBRIGHT

Legal update

Ontario Changing Workplaces Review: Final Report recommends sweeping reforms to employment and labour statutes

May 2017
Employment and labour

In 2015, the Ontario government initiated the Changing Workplaces Review (Review) with a view to identifying potential reforms to the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act, 1995* (LRA) to ensure that the province's employment standards and labour relations laws continue to reflect modern realities. The government appointed C. Michael Mitchell and the Honourable John C. Murray as special advisors to lead the Review, with a mandate to consider the broader issues affecting the workplace and assess how the province's current employment and labour law framework addresses those issues. In particular, the special advisors were asked to determine what changes, if any, should be made to the ESA and LRA, particularly in light of relevant trends and factors including globalization, trade liberalization, technological change, the growth of the service sector, and changes in the prevalence and characteristics of standard employment relationships. This is the first independent review in Canada to consider specific legislative changes to both employment standards and labour relations in a single process.

The special advisors issued their much anticipated Final Report on May 23, 2017. Their sweeping recommendations for changing the ESA and the LRA, if adopted, would usher in a new array of workplace rights in the province.

The 420-page Final Report includes over 170 recommendations on a wide range of issues, including consolidating the ESA, LRA and the *Occupational Health and Safety Act* under a single *Workplace Rights Act,* to be subject to a process of independent review every five to seven years. The *Workplace Rights Act* would be comprised of three parts, entitled Rights to Basic Terms and Conditions of Employment, Rights to Collective Bargaining, and Rights to a Safe and Healthy Workplace.

The special advisors were mandated to consider the need for reform through the lens of changes in the workplace and the economy that have been occurring over a lengthy period of time, while being supportive of business in a changing economy. In the Final Report, they state that, during hearings held across Ontario as part of the Review, they found many legitimate social and economic concerns affecting vulnerable employees in precarious employment, characterized by job instability, low wages and lack of benefits. Accordingly, they have aimed their specific recommendations at creating better workplaces in Ontario with decent working conditions and widespread compliance with the law.

View the Final Report

The following summarizes a number of key issues identified by the special advisors, along with their related recommendations.

Employment standards

Definition of employee

The special advisors identify the misclassification of employees – whether intentional or unintentional – as independent contractors not covered by the ESA as a significant issue. Accordingly, a key recommendation in the Final Report is for the Ministry to make misclassification a priority enforcement issue. Other recommendations include expanding the statutory definition of employee in the ESA to include dependent contractors, as currently defined in the LRA 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."

ESA exclusions and exemptions

In addition to stating that the government should make a review of the existing ESA exemptions a priority, the special advisors recommend eliminating, over a three-year time frame, the special minimum wage rates for liquor servers and students under 18.

Perhaps more significantly, recommendations include changing the current test for managers to a "salaries plus duties" test, where in order to be exempt from hours of work and overtime protection, a manager would have to perform defined duties, which would generally follow tests which are, in broad strokes, compatible with the Ontario Labour Relations Board (OLRB) criteria. The special advisors also recommend that the salary figure be 150% of the general minimum wage (currently $11.40), converted to a weekly salary of $750 per week on the basis of a 44-hour work week – i.e. the threshold triggering overtime pay.

Equal pay with comparable full-time employees

The special advisors recommend amending the ESA to provide that no employee shall be paid a rate lower than a comparable full-time employee of the same employer. This rule would not apply, however, where there is a difference in treatment between employees on the basis of: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; or (d) another factor justifying the difference on objective grounds.

Pension and benefits plan coverage

For practical reasons, and out of a concern that there could be significant unintended impacts on full-time employees, the special advisors do not go so far as to recommend equal treatment in the provision of benefits and pensions for part-time, temporary, contract, casual and seasonal employees. Instead, they recommend that the government initiate an urgent study on how to provide at least a minimum standard of insured health benefits across workplaces, especially to those full-time and part-time employees currently without coverage, and to the self-employed, including small employers.

Scheduling and the right to request

There are currently no provisions in the ESA that regulate scheduling of work by employers or require employers to provide advance notice of shift schedules or of last minute changes to existing schedules. Noting that workers often have very little ability to make changes to their work schedules when needed to accommodate family and other responsibilities, and that scheduling – a complex and difficult subject – cannot be the same for all employees employed in all businesses, the special advisors recommend revising the ESA to give the Ministry the authority to regulate scheduling. Recognizing the need for predictable schedules for employees in certain sectors and the variability of scheduling requirements, they also recommend that the government adopt a sector-specific approach to the regulation of scheduling, making regulation in some sectors, such as fast food and retail, a priority.

A further recommendation would give employees with one year of service a right to request, in writing, that the employer decrease or increase his or her work hours, provide a more flexible schedule, or alter his or her work location. The employer's obligation to respond to an employee's request would be limited to one request per calendar year, per employee.

Temporary help agencies

The Final Report notes that "the triangular nature of the relationship between the employee, the agency and the client, and the temporary nature of the employment, results in some temporary help agency employees being among the most vulnerable and precariously employed of all workers."[1] The special advisors accept the general proposition that these workers should be paid the same as others performing the same work in the same establishment. Among the other recommendations related to temporary help agency employees is that prior to terminating the employment relationship with an assignment worker, the client should consider, in good faith, whether the assignment worker is suitable for an available position with the client.

Hours of work and overtime

Recommendations with respect to hours of work include an option for obtaining group consent to work overtime or to other hours of work rules, by way of a secret ballot vote on a sectoral basis.

The special advisors recommend overtime averaging only be permitted where it would allow for a compressed work week, 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. Overtime averaging should not be permitted for other purposes, unless a specific case can be made by an industry or sector for averaging on a sectoral basis.

Of note, the special advisors also recommend leaving the overtime threshold at 44 hours in a week and repealing the requirement to obtain Ministry consent to work 48 to 60 hours a week.

Personal emergency leave

Submissions by employee advocates with respect to the ESA's personal emergency leave (PEL) provisions were keen to entitle all employees to PEL and so recommended that the 50+ employee threshold for entitlement be removed. Conversely, employer submissions were more focused on the cumbersome and conflated nature of the provisions, stating that it was difficult to navigate the various PEL categories and to establish that their generous paid sick leave and bereavement policies provided greater rights than the ESA.

The special advisors' recommendations pay credence to both employee and employer concerns. First, they recommend removing the 50 employee minimum, requiring employers of all sizes to provide PEL entitlements. Second, they recommend that PEL be broken down into separate leave categories, so that employees are entitled to seven days' unpaid leave for personal illness, injury and family emergencies and to three days' unpaid leave for bereavement. Notably, the total number of days of leave that an employee is entitled to – 10 days in total – does not change under these recommendations.

The Final Report also recommends adding a new classification of emergency leave to cover an employee if the employee is, or the employee's minor children are, a victim of domestic violence. The special advisors suggest that all information related to an employee's request for leave under this category be kept confidential.

Absent from the recommendations is any requirement to provide paid sick days. However, the Final Report does recommend that employers be required to pay for any medical notes they require from employees to substantiate a leave.

Termination, severance and just cause

The special advisors' Interim Report, released in July 2016, suggested that sweeping changes to the ESA termination and severance provisions might be anticipated. Indeed, the options considered by the special advisors at that time included the removal of the eight-week cap on notice of termination, eliminating the three-month eligibility requirement

for notice of termination, increasing the 26-week cap on severance pay, and precluding employers from dismissing employees for anything but just cause.

Interestingly, the Final Report provides no commentary – much less any recommendations – with respect to the ESA provisions on termination, severance or just cause.

Vacation

Compared to other Canadian provinces, Ontario has the least generous provisions with respect to paid vacation. Accordingly, the special advisors recommend increasing vacation entitlement to three weeks after five years of employment, with a corresponding increase in vacation pay to at least 6%.

Remedies and Penalties

As part of an effective compliance strategy, the special advisors favour enforcement mechanisms that encourage compliance, deter non-compliance and provide appropriate restitution to employees whose ESA rights have been violated. Their recommendations include increasing the amount of tickets from $295 to $1,000, and doubling the penalties for Notices of Contraventions.

They further recommend adding a new provision that would allow the OLRB to issue administrative monetary penalties of up to $100,000 per contravention, give the OLRB the authority to order employers to pay the costs of an investigation and to pay employees interest on their unpaid monetary entitlements, and permit employers and the Ministry to enter into undertakings on a voluntary basis, enforceable by the OLRB.

Director liability for employee remuneration

The special advisors recommend amending the existing provisions of the ESA and the *Ontario Business Corporations Act* to make directors of a corporation liable for up to six months' wages and up to 12 months' accrued vacation pay if the employee has not been paid these sums by the corporation.

Labour relations

Scope and coverage of the LRA

The special advisors' review of the current exclusions from collective bargaining is informed by Supreme Court of Canada jurisprudence finding that the right to meaningful collective bargaining is an essential component of the right to freedom of association under section 2(d) of the *Charter of Rights and Freedoms*. Accordingly, they recommend amending the LRA so that the following groups, currently excluded from the Act, are covered:

- Domestic workers employed in a private home. The special advisors note that there is no valid policy reason to deny this group of workers their constitutional right to freedom of association, even though "the promise to engage in collective bargaining will be in most cases, illusory"[2] since many domestic workers are the only person employed in a private home by a homeowner.

- Persons employed in hunting or trapping. The special advisors note that no other Canadian jurisdiction excludes this group from coverage under the applicable provincial labour legislation.

- Agricultural employees. The special advisors add that the government should consider whether protection for the family farm is a pressing and substantial objective warranting the exclusion of some or all persons employed on a family farm from the LRA. Of note, although the special advisors acknowledge that agricultural workers are currently covered under the Ontario *Agricultural Employees Protection Act* (AEPA), they state that "viewed through a policy lens (which must be informed by and take into account Charter principles), and as a practical matter, in our view, the AEPA is defective … as it contains barriers to the realization by agricultural employees of their ability to advance their interests and to protect themselves."[3] They go on to enumerate, over several pages what, in their view, are defects in the AEPA – a discussion that is arguably well outside their mandate.

Horticultural employees. The special advisors note that no other Canadian jurisdiction excludes this group from coverage under the applicable provincial labour legislation, and they find no valid policy reason to exclude horticultural employees from coverage. They acknowledge, however, that strikes by horticultural workers could have a significant impact on planting, growing, harvesting and caring for plants and trees.

Certification procedure

Although the special advisors state they do not believe that there is a single "correct" certification procedure, they nonetheless recommend that the secret ballot process for certification be preserved, provided additional recommendations are also accepted, the key points of which are summarized below.

Where the true wishes of employees are unlikely to be ascertained because of employer misconduct, remedial certification and first contract arbitration should follow, unless the union bargains in bad faith or otherwise disqualifies itself from first contract arbitration.

An intensive mediation process should be integrated into the first contract arbitration process. A union certified by remedial certification would be entitled to first contract arbitration only after undergoing the intensive mediation process.

Decertification or displacement applications should be prohibited while the intensive mediation and first contract process is ongoing.

Provided the OLRB is satisfied that the union has the support of approximately 20% of the employees in a proposed bargaining unit, the union should be permitted to obtain employee lists and contact information. The special advisors emphasize that a "fair and democratic voting process requires a list of eligible voters and contact information to be made available so that employees can be informed participants in the election process."[4]

Consolidation and amending of bargaining units

Ontario is one of very few Canadian jurisdictions that does not give its labour board the general authority to consolidate and amend bargaining units. The special advisors recommend giving the OLRB the power to modify bargaining unit structures if it satisfied that the bargaining unit or units are no longer appropriate for collective bargaining. They further recommend that, in sectors or industries where employees have been historically underrepresented by unions, the OLRB be given the power to consolidate existing and/or newly certified bargaining units involving the same employer and the same union in order to contribute to the development of effective collective bargaining relationships.

Broader-based bargaining for franchisees

The Final Report identifies and discusses a number of existing or proposed models of broader-based bargaining, illustrating the alternatives that could be considered. However, the special advisors recommend proceeding with only one model of broader-based bargaining to be applied to franchisees, whereby the OLRB could require certified or voluntarily recognized bargaining units of different franchisees of the same franchisor to bargain together centrally if they are represented by the same union in the same geographic area. They justify the reasonableness of a franchisee central bargaining model, given that franchisees operate their businesses in a way that is materially the same, under the same contracts and policies of the same franchisor. Further, staffing, labour costs and methods of operation are either the same or so similar that any differences are manageable.

Related and joint employers

The special advisors describe LRA issues regarding the identification of the "true" employer and the complex relationship among related or joint employers as being among the most difficult areas addressed in the Review. They have generally not recommended changes to the existing law or otherwise attempted to regulate genuine subcontracting relationships.

However the special advisors have included one specific recommendation in relation to temporary help agencies, whereby temporary help agency workers assigned to perform work for clients of the agency, or persons assigned by other suppliers of labour to perform work for a person, would be deemed to be employees of the client or of the person, as the case may be, for the purposes of the LRA.

Successor rights

The current successor rights provision protects union and bargaining unit employee rights when there is a sale of a business, providing that bargaining rights and collective obligations of the "seller" flow through to the "purchaser". However, this protection does not currently apply to contracting out and re-tendering contracts in the building services industries. In order to protect vulnerable workers in this situation, the special advisors recommend extending the successor rights provision to the building services industries (specifically, security, food services and cleaning services), and further revising the LRA to include a regulation-making authority allowing for the possible expansion of successor rights to other services or sectors in the future.

Prosecutions and penalties

Currently, on conviction for an offence for a violation of the LRA, individuals can be fined up to $5,000 and corporations, employers' organizations, unions and trade union councils can be fined up to $25,000. Each day that a contravention continues may constitute a separate offence. The special advisors note that these maximum amounts have not changed since 1990. Accordingly, they recommend increasing the maximum amounts to make individuals liable to a fine of up to $5,000, and corporations, employers' organizations, unions and trade union councils liable to a fine of up to $100,000.

What's next? Stay tuned for the government's formal response

In a relatively short statement announcing the release of the Final Report, Minister of Labour Kevin Flynn stated that the government has reviewed the recommendations and will be announcing its formal response within the next week.

John Mastoras
Rhonda Shirreff

The authors wish to thank Kaley Dodds for her help in preparing this legal update.

Footnotes

[1] Final Report at page 198.

[2] Final Report at page 286.

[3] Final Report at page 298.

[4] Final Report at page 339.

For further information, please contact one of the following lawyers:

> Rhonda Shirreff	Toronto	+1 416.203.4444	rhonda.shirreff@nortonrosefulbright.com
> John Mastoras	Toronto	+1 416.216.3905	john.mastoras@nortonrosefulbright.com

Norton Rose Fulbright Canada LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright South Africa Inc and Norton Rose Fulbright US LLP are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

References to "Norton Rose Fulbright", "the law firm", and "legal practice" are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together "Norton Rose Fulbright entity/entities"). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a "partner") accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.

© Norton Rose Fulbright Canada LLP 2017