

Legal update

Wynne government intends to propose The Fair Workplaces, Better Jobs Act, 2017 in response to Changing Workplaces Review recommendations

May 2017

Employment and labour

Yesterday Ontario Premier Kathleen Wynne and Labour Minister Kevin Flynn unveiled the government's formal response to the Changing Workplaces Review Final Report, and the special advisors' 173 recommendations for change to the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act, 1995* (LRA). Although Premier Wynne's Liberal government has not embraced all of these recommendations, with the stated goals of creating more opportunity and security for workers, its blueprint for overhauling the province's current employment and labour laws represents a very sharp swing to the left.

Do not expect to see any actual legislation for several months. The announcement comes in the final week of the legislative session, just two days before MPPs rise for the summer break. Further, it appears there will be some opportunity for employer groups and others to have their voices heard before any legislation is passed. According to the [news release](#) from the Office of the Premier, Ontario is proposing a "broad consultation process" to gain feedback from a wide variety of stakeholders on the draft legislation it intends to introduce. Given that some of the proposals, if passed, would come into effect as early as January 1, 2018, we should expect a busy fall session.

Read the Ministry of Labour [backgrounder](#)

ESA proposals

Proposed changes to the ESA, if eventually enacted, would include the following.

Minimum Wage Increases

In the Changing Workplaces Review Final Report, the special advisors did not address the general minimum wage, although they did comment on the minimum wage differentials for liquor servers and students under age 18. Nonetheless, and absent any recommendation in the special advisors' 419-page final report, the Wynne government has tabled a proposal to increase the general minimum wage to \$14 per hour on January 1, 2018, and \$15 per hour on January 1, 2019, followed by annual increases at the rate of inflation.

The current special minimum wage rates for students under 18, liquor servers, hunting and fishing guides and homeworkers (employees doing paid work in their own homes for an employer) would remain in effect, with increases by the same percentage as the general minimum wage, as follows:

	September 30, 2017	January 1, 2018	January 1, 2019
Students under 18	\$11.60	\$13.15	\$14.10
Liquor servers	\$10.10	\$12.20	\$13.05
Hunting/Fishing Guides			
< 5 consecutive hrs in a day	\$58.00	\$70.00	\$75.00
5+ hrs in a day	\$116.00	\$140.00	\$150.00
Homeworkers	\$12.80	\$15.40	\$16.50

Equal Pay for Equal Work Provisions

Part-time, casual, temporary and seasonal employees doing the same job as full-time employees would be paid equally to full-time employees when performing the same job for the same employer. An exception to the equal wage requirement would apply where a wage difference is based on (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; or (d) other factors justifying the difference on objective grounds.

Temporary help agency employees doing the same job as permanent employees at the agencies' client companies would be paid equally to those permanent employees.

If passed, these equal pay proposals would come into force on April 1, 2018.

Scheduling

The proposed legislation, if passed, would establish new scheduling rules to come into force on January 1, 2019, including the following.

After having been employed for three months, employees would have the right to request schedule or location changes. All employees would be permitted to refuse shifts if asked to work with fewer than four days' notice. Employees "on-call" who are not called into work would be paid for three hours, at their regular rate, for each 24-hour period that they are on call. If a shift is cancelled within 48 hours of its start, affected employees would be entitled to three hours' pay at their regular rate.

Employee Misclassification

The proposed legislation would prohibit employers from misclassifying employees as "independent contractors." In the event of a dispute, the onus would be on the employer to prove that the individual is not an employee. Employers who misclassify employees could be subject to penalties including prosecution, public disclosure of a conviction and monetary penalties. If passed, these proposals would come into force on royal assent.

Notably, the government has confirmed that the definition of "employee" will not be broadened to include a "dependent contractor." Acknowledging that doing so would "create significant legal and potentially economic uncertainties" the Ministry of Labour backgrounder notes that a recent Law Commission of Ontario study specifically advised against a "dependent contractor" provision as its scope would be very difficult to define without inadvertently capturing independent contractors.

Joint Liability

The proposed legislation would remove the requirement for proof of "intent or effect" to defeat the purpose of the ESA when determining whether related businesses can be treated as one employer, and held jointly and severally liable for monies owed under the ESA. If passed, this proposal would come into effect on January 1, 2018.

Paid Vacation

The minimum paid vacation entitlement for employees with five or more years of service would increase from two to three weeks a year. If passed, this proposal would come into effect on January 1, 2018.

Personal Emergency Leave

The proposed legislation would eliminate the 50+ employee threshold for personal emergency leave (PEL), entitling all employees to 10 PEL days per year, including two paid PEL days. The reasons for taking PEL days would be expanded so that employees experiencing domestic or sexual violence, or the threat of such violence, could take the leave.

The proposed changes would also prohibit an employer from requesting a sick note from an employee taking PEL.

If passed, the PEL proposals would come into effect on January 1, 2018.

Leaves for the Death of a Child and for Crime-Related Disappearance

The proposed legislation would create a new, separate leave (presumably unpaid) for a period of up to 104 weeks in the event of a child's death from any cause. It would also establish a separate leave for a period of up to 104 weeks for the crime-related disappearance of a child. If passed, these proposals would come into force on January 1, 2018.

Exemptions and Special Industry Rules

At this time, there are no proposed changes to the current array of ESA exemptions and special industry rules. However, in fall 2017, in consultation with affected stakeholders, the ministry will conduct a review of the exemptions and special rules, including the exemptions currently in place for managers and supervisors.

Penalties for Non-Compliance

The government also intends to amend an ESA regulation to increase the maximum penalties for non-compliant employers from \$250/\$500/\$1,000 to \$350/\$700/\$1,500.

Further, proposed changes would allow the Director of Employment Standards to publish (including online) the names of individuals who have been issued a penalty, a description and the date of the contravention, and the amount of the penalty. If this proposal passes, it would come into force on January 1, 2018.

LRA proposals

Key proposals for reforming the LRA are clearly intended to make it easier for unions to obtain bargaining rights. If the proposed *Fair Workplaces, Better Jobs Act, 2017* is passed, all LRA proposals, including those summarized below, would come into effect six months after that act comes into force.

Union Certification

The proposed legislation would establish card-based certification for the temporary help agency industry, the building services industry and the home care and community services industry.

Proposals would also make several changes to the union certification process, including by:

- requiring the employer to disclose employee lists and certain contact information if the union demonstrates it has already achieved the support of 20% of the employees involved;

- allowing unions to certify more easily when an employer engages in misconduct that contravenes the LRA; and
- making first contract arbitration more accessible by adding an intensive mediation component to the process.

Successor Rights

Proposals include extending successor rights to the retendering of building services contracts and would also enable the government to apply successor rights, by regulation, to the retendering of other publicly funded contracted services.

Structure of Bargaining Units

Proposals would permit the Ontario Labour Relations Board (OLRB) to change the structure of bargaining units within a single employer, when the existing units are no longer appropriate for collective bargaining. The proposals would also permit the OLRB to consolidate newly certified bargaining units under a single employer, where those units are represented by the same bargaining agent.

Return to Work Rights

Currently, striking employees have a general right to return to work within six months of a lawful strike. Proposed changes would remove the six-month limitation. The proposed changes would also (subject to certain limitations) require employers to reinstate an employee at the conclusion of a lawful strike or lockout, and provide access to grievance arbitration to enforce that obligation.

Just Cause Protection

Proposals would protect employees from discipline or discharge without just cause in the period between certification and the conclusion of a first contract, as well as during the period between the date the parties are in legal strike/lockout position and the new collective agreement.

Fines

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. As the special advisors noted in the Changing Workplaces Review Final Report, these maximum amounts have not changed since 1990.

The proposed legislation, if passed, would increase these 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?

As indicated above, the Wynne government, which has been plagued with extremely low public approval ratings for some time now, will be proposing a broad consultation process to gain feedback from a wide variety of stakeholders on the draft legislation it intends to introduce.

There is no doubt that Premier Wynne's plan for reforming Ontario's employment and labour laws will be more popular with unions and employee advocacy groups than with the employer community. Indeed, the proposed reforms announced today are not surprising, given that the Wynne government mandated the special advisors who conducted the Changing Workplaces Review to focus on precarious work and decreased job security for employees. It remains to be seen, however, how the proposed reforms, if enacted, would help provide an environment supportive of business in the changing economy.

In fact, over the past several months employer groups have challenged whether radical reforms to Ontario's labour and employment laws are even necessary. In an interview with CBC News in February 2017, Ontario Chamber of Commerce Vice President Karl Baldauf cautioned against "putting businesses in a position where they will actually be less inclined to expand as a result of new, onerous regulations." The Chamber of Commerce has also urged the government not to make changes without clear evidence about the costs and benefits.

Speaking to members of the press yesterday, Premier Wynne admitted that she expects a backlash from business groups concerned about rising labour costs. As reported by the Toronto Star, the Premier expects, "There's going to be howling. The business community will be yelling at me."

She has likely got that right.

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