

# Final Report of Changing Workplaces Review Recommends Sweeping Changes to Ontario's Employment and Labour Law

Thursday, May 25, 2017

On May 23, 2017, the Ministry of Labour (the "Ministry") released the [Changing Workplaces Review Final Report and Summary](#), which contains 173 recommendations for changing Ontario's current employment and labour laws (the "Report") based on the "changing nature of the workforce, the workplace, and the economy itself."

The 419-page Report contains recommendations ranging from specific changes to employment standards to general considerations, such as consolidating the *Employment Standards Act, 2000* ("ESA"), *Labour Relations Act, 1995* ("LRA") and the *Occupational Health and Safety Act* ("OHSA") under a single "*Workplace Rights Act*". The recommendations in the Report have no legal effect unless and until Ontario's Provincial Government takes formal steps to implement them by amending legislation and/or by making policy changes. In a press release dated May 23, 2017, the Minister of Labour stated that the government had reviewed the recommendations, and would be announcing a "formal response" within the next week.<sup>1</sup> Also on May 23, 2017, Premier Kathleen Wynne was quoted by the media as saying the government would be acting "very soon" and to "(s)tay tuned. It will be moving forward very quickly."<sup>2</sup>

We have consolidated the Report into the Top 10 Recommended Amendments to the ESA and the LRA. We have also included a discussion of the themes and broader proposals contained in the Report. As noted above, the government has not yet enacted any legislation or otherwise implemented any of the recommendations in the Report.

## Top 10 Recommended Amendments to the ESA

### 1. Leaves of Absence :

- a. Remove the 50-employee threshold for Personal Emergency Leave.
- b. Reduce Personal Emergency Leave from ten days to seven days, and remove bereavement from the Personal Emergency Leave provisions.
- c. Create independent leave entitlement for bereavement, composing up to three unpaid days for each of the family members listed in the Personal Emergency Leave provision, without any annual restriction.
- d. Amend Personal Emergency Leave to allow an employee to use days in circumstances related to domestic violence.
- e. Require employers who request a doctor's note to pay for the note.
- f. Revise the public holiday pay provisions so they are simpler and easier to understand.
- g. Increase annual minimum vacation time to three weeks and minimum vacation pay to 6% after five years of employment with the same employer.

2. **Part-time Work:** Prohibit paying part-time employees at a rate lower than a "comparable full-time employee" of the same employer, except where difference based on (a) seniority; (b) merit; (c) earnings measured by quantity or quality; or (d) another factor justifying the difference.
3. **"Right to Request":** Permit employees with more than one year of service with the right to, once per year, to request a decrease or increase in hours of work, flexible schedule or to alter their location of work. The employer would be required to give the employee an opportunity to discuss the issue and provide reasons in writing if the request is refused. There would be no appeal of an employer's decision.
4. **Overtime:** Maintain overtime threshold in the ESA at 44 hours per week, but restrict overtime averaging to only 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 total hours do not exceed overtime threshold.
5. **Hours of Work:** Repeal the requirement to obtain Ministry of Labour consent to work 48-60 hours a week.
6. **Definition of Employer:** Change the definition of related employer under section 4 of the ESA to remove the current requirement that there be intent or effect to defeat the ESA.
7. **Definition of Employee:** Update exemptions and scope of definition of "employee" to remove exemptions for "persons receiving training" and designated Crown employers, and to include "dependent contractor".
8. **Manager Exemption:** Change the test for managerial exemption to a "salaries plus duties" test, whereby a manager would have to perform defined duties to be exempt from hours of work and overtime standards, with the salary to be 150% of minimum wage.
9. **Classification of Employee:** Amend the ESA to provide that where there is a dispute about whether or not a person is an employee, the employer bears the burden of proof and must adduce all relevant evidence.
10. **Temporary Help Agencies :**
  0. Assignment workers would not receive less compensation than a comparable employee of a client performing similar work, except for the first six months of an assignment.
  1. Clients must make "best efforts" to ensure assignment workers are aware of job openings with the client and should consider any application for a position in good faith.
  2. Prior to terminating an assignment, clients must consider whether the assignment worker is suitable for an available position with the client **except** where the position is at or above a cap of 2.5 times minimum wage (converted to a weekly or annualized salary at 40 hours per week).
  3. Clients, not agencies, are to be held responsible for workplace injuries incurred by assignment employees.

### **Top 10 Recommended Amendments to the LRA**

1. **Collective Bargaining Exclusions:** Remove exclusions for domestic workers, agricultural and horticultural employees, and members of architectural, dental, land surveying, legal or medical professions.
2. **Remedial Certification:** Revise the remedial certification provision in section 11 of the LRA to require the Ontario Labour Relations Board ("OLRB") to certify a trade union as the bargaining unit, rather than having certification a discretionary remedy the Board may order.
3. **First Contract Arbitration:** Provide for first contract arbitration under section 43 of the LRA where the OLRB orders remedial certification under section 11, unless the union has bargained in bad faith or is uncompromising without reasonable justification.
4. **Intensive Mediation:** Include an "intensive mediation" approach similar to that in place in British Columbia.
5. **List of Employees:** Require an employer to disclose the list of employees, including the work location, address, phone number and personal email address of each employee, where a union makes an application and where the OLRB determines that a union has support of 20% of employees in a bargaining unit.
6. **Electronic Evidence:** Modernize OLRB rules to permit electronic membership evidence and include tools to ensure authenticity of such evidence.
7. **Voting Procedures:** Conduct OLRB voting procedures by telephone and by internet, and develop an electronic voting system.
8. **Bargaining Units:** Provide new powers for the OLRB to modify or consolidate existing bargaining units.
9. **Franchisees/Franchisors:** Implement a model where certified bargaining units of different franchisees of the same franchisor by the same union in the same geographic area could bargain together centrally. An employer bargaining agency would represent franchisee employers.
10. **Temporary Help Agencies:** Deem assignment employees to be employees of the client for the purposes of the LRA.

### Discussion of Themes and Broader Proposals in the Report

The Report also discusses several themes and issues more broadly without providing concrete recommendations for amendments to the ESA or LRA. Notably, the Report places an emphasis on re-imagining and emphasizing the manner in which the ESA is currently enforced. It also recommends that certain areas of review be conducted on a sector or industry-specific basis.

The Report suggests there is a need for more proactive enforcement initiatives, including spot checks, audits, and inspections, in particular, in sectors and jobs where there are large numbers of "vulnerable employees". The Report proposes that, where a complaint is filed with the Ministry, an employment standards officer may expand his or her investigation if he or she determines there is likely widespread non-compliance in the workplace and may include investigate the "top of industry structures", such as franchisors or common employers, to determine how decisions are made regarding personnel policies. This provides greater investigative powers to employment standards officers.

In conjunction with increased enforcement initiatives, the Report recommends an improved access to justice model and an accessible process for workers to have some complaints adjudicated by Vice-Chairs at the OLRB, rather than investigated by employment standards

officers. The Report also recommends an expanded role for the Office of the Worker Advisor to help employees with claims under the ESA and other resources to assist employee complainants. If adopted, these recommended amendments would facilitate the complaint process and likely result in an increase in litigation for employers.

The Report provides few specific recommendations related to exemptions under the ESA. Rather, it recommends the government establish a committee process that may be utilized when existing exemptions under the legislation are being reviewed, when new exemptions are being considered, and when sector-specific regulations are contemplated. The Report only recommends the government make the review of existing exemptions under the ESA a "priority" and that the committees should be divided into sectors and sub-sectors with employee representatives and representatives from both small and large employers.

Along with exemptions under the ESA, the Report recommends the following further inquiries and investigations to be carried out by government:

- Monitor the use of fixed-term contracts before engaging in intervention;
- Gather data and statistics to identify sectors most in need of regulation with regards to scheduling; and
- Conduct an inquiry into sectoral bargaining in certain industries, such as home care and arts and entertainment.

We will continue to monitor and report on further developments, including more updates from BLG on sector-specific developments. We will also be hosting an L&E Breakfast Club in our Toronto office on September 20, 2017 to update clients on the Report, its implementation and other legislative developments. As stated by the Premier, "stay tuned".

<sup>1</sup> Ministry of Labour, News Release, "[Statement from Minister Flynn on the Release of the Changing Workplaces Review Final Report](#)" (May 23, 2017)

<sup>2</sup> Robert Benzie, "[Labour report calls for expanding protection for workers in Ontario](#)", *The Toronto Star* (May 23, 2017)

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