FTR Now

Changing Workplaces Review – Focus on the *Employment Standards Act, 2000*

Date: August 4, 2016

This is our fourth client update related to the Interim Report of the Special Advisors under Ontario's Changing Workplaces Review (Review). In this *FTR Now*, we will focus on the options identified by the Special Advisors as potential changes to the *Employment Standards Act, 2000* (ESA).

We remind you that Personal Emergency Leave was addressed in our *FTR Now* of July 28, 2016, Changing Workplaces Review – Personal Emergency Leave. We also refer you to our *FTR Now* of August 3, 2016, Changing Workplaces Review – Focus on the Labour Relations Act, 1995.

There is an overlap in issues identified in the *Labour Relations Act, 1995* (LRA) sections of the Interim Report (LRA Interim Report) and those identified in the ESA sections of the Interim Report (ESA Interim Report), and we will identify some of those below.

The ESA Interim Report

Much like the LRA Interim Report, the ESA Interim Report does not identify specific recommendations for amending the ESA. Rather, it identifies those areas of the ESA that are being considered in the review, and identifies options for recommendations that the Special Advisors are considering and on which they now seek further input. The one exception to this general principle is the section dealing with exemptions from the ESA, where the Special Advisors have described (in general terms) what some of their recommendations will be.

The potential options being canvassed by the Special Advisors are wide-ranging, and address not only the scope of ESA application, but also consider virtually all substantive standards. If adopted, even in part, they could result in a significant restructuring of the application of the ESA to employers. This is reflected in the broad range of options being considered to further regulate temporary help agencies (notwithstanding that Ontario has far more regulation already than any jurisdiction in Canada), and the sweeping options being considered for redefining the employer-employee relationship. Many of the options being considered by the Special Advisors relate to employees in non-standard employment relationships, which the Advisors see as including employment on a part-time basis, contract work, employment through temporary help agencies, and self-employment.

Given the wide range of issues being considered, we cannot review all of the options in detail. In some cases, we will simply note that a particular area of the ESA is under review, while in others we will provide a more comprehensive description of the options being considered by the Special Advisors.

Scope and Coverage of the ESA

The Special Advisors have considered a number of issues under the general heading of "Scope and Coverage of the ESA". Several of these merit closer attention.

(a) Who is an Employee

The ESA Interim Report identifies two main issues related to the identification of employees – (1) the alleged misclassification of individuals as "independent contractors" instead of employees; and (2) whether the scope of "employee" should be

broadened to include “dependent contractors”.

With respect to the first issue, Special Advisors report that 12% of Ontario’s workforce is reported as being “self-employed without paid employees”. The ESA Interim Report seems to accept as given that some, perhaps a significant portion, of these workers are misclassified, whether intentionally or not. With respect to options, the Special Advisors have identified increased education for employers and workers, proactive enforcement and creating a reverse onus on employers to prove that the classification is appropriate.

With respect to the definition of “employee”, the primary discussion focuses on whether the ESA should expressly recognize the concept of a “dependent contractor” – a category of worker between “employee” and “independent contractor” in which an individual contracts to perform services for an organization, but those services are exclusively (or nearly exclusively) provided to a single organization, resulting in a relationship of dependency. This concept is a feature of the LRA definition of “employee”, and has been recognized by Ontario courts for common law purposes.

If the definition of “employee” were to be expanded to include dependent contractors, the Special Advisors are seeking input on whether special rules would need to be considered for dependent contractors, many of whom would have significant levels of control over the scheduling of their own hours of work, for example.

(b) Who is an Employer and Scope of Liability

As we described in our review of the LRA Interim Report, the Special Advisors are considering a range of options that would greatly expand the notions of “related employer” and would recognize a broader category of “joint employer”, even where common control and direction is not shared in practice.

The Special Advisors are considering similar options for the ESA, and have been provided with numerous submissions by employee advocacy groups and trade unions about the impact of a “fissured” workplace (i.e. one where production and services are performed by a variety of employers, often in the service of another organization). The submissions took special aim at franchise relationships.

Many of the options being considered by the Special Advisors would have a significant impact on how employers structure their businesses. Some examples of options being considered include:

- requiring employers and contractors to ensure ESA compliance by subcontractors;
- creating an expanded “joint employer” test;
- making franchisors liable for ESA violations of franchisees, either without limitation or in more limited circumstances where the franchisor has more direct involvement; or
- eliminating the ESA’s requirement that a related employer finding can only be made where the “intent or effect” of the relationship is to defeat the intent or purpose of the ESA.

Other options include a modified “oppression” remedy, based on provisions of the *Ontario Business Corporations Act*, and having the Ministry of Labour impose liens on goods produced in violation of the ESA.

(c) Exemptions

One of the largest areas of discussion in the ESA Interim Report relates to the many and varied exemptions and special rules established in the ESA and its regulations, which the Special Advisors describe as being “prima facie…inconsistent with the principle of universality.”

Certain industry-wide exemptions have been established since 2005 under a Ministry of Labour process for the development of “Special Industry Rules”. The Special Advisors have indicated that they will not be recommending that these exemptions be reviewed.

For the significant majority of the ESA's exemptions, the Special Advisors have signalled that they will be recommending that the Ministry establish a formal, neutral review process to determine whether any of the exemptions are justified on the basis of objective criteria (an exercise that will require more time than available in the current review). There is a detailed discussion of how such a future review process should be structured.

For a small, but important, group of exemptions, the Special Advisors have indicated that they have sufficient information from the current Review to make recommendations to the government. While the options identified inevitably contain the possibility of maintaining the "status quo", the import of the discussion in each case is that the exemption is either entirely unjustified or is too expansive in its current form and should be narrowed. This group consists of the following exemptions:

- information technology professionals (hours of work and overtime);
- managers and supervisors (most hours of work and overtime);
- pharmacists (a wide range of exemptions);
- residential care workers (hours of work and overtime, various special rules);
- residential building superintendents, janitors and caretakers (some hours of work, overtime, minimum wage and public holidays);
- minimum wage differentials for certain students and liquor servers; and
- the student exemption from the 3-hour rule.

Employers who rely on any of these exemptions to any significant degree should carefully review these sections of the ESA Interim Report.

(d) Exclusions

The ESA Interim Report also considers two exclusions from the ESA – interns/trainees and Crown employees (excluded from parts of the ESA). With respect to the exclusion for interns and trainees, the Special Advisors identify recent concerns related to unpaid internships, and note concerns raised about their potential abuse. The Special Advisors are seeking input on whether the exclusion should be maintained or eliminated, and if maintained, whether any further controls over an employer's reliance on the exclusion should be created (e.g. a requirement for Director approval).

Standards

Given the open-ended nature of the consultations undertaken by the Special Advisors, it is perhaps not surprising that submissions were made on virtually all of the standards in the ESA (with the exception of minimum wage rules, which are outside the scope of the Review). We identify some of the highlights, below.

(a) Hours of Work and Overtime Pay

The ESA Interim Report contains a discussion of most aspects of the current hours of work rules and restrictions, and correctly recognizes that Ontario has more stringent restrictions than most other provinces.

A number of the hours of work options being considered could be seen as reducing some of the restrictions – e.g. eliminating the need for a Director's approval for excess weekly hours between 48 and 60 – while others would modify existing rules to make them more workable in practice – e.g. rather than requiring agreements from each non-union employee, allowing employers to set up excess hours arrangements if a defined majority of affected employees agree. Similarly, the Special Advisors are considering a number of options to lessen restrictions on daily hours, such as removing the requirement to have an excess daily hours agreement.

As this is one of the few areas in the Review which is considering relaxing some of the ESA's rules in a manner that might benefit employers, clients should consider adding their voice in support of some of these potential changes.

With respect to overtime pay, the Advisors are considering whether to recommend lowering the threshold from 44 hours per week to 40, and whether there should be a cap on overtime averaging periods.

The issue that had the greatest discussion was scheduling of work by employers – i.e. the process by which employers establish employee work schedules, and implement changes to established schedules. Outside of the 3-hour rule (which requires employers to compensate certain employees who report for work but are sent home less than 3 hours after reporting), the ESA contains few rules on the establishment and communication of work schedules.

A variety of options are being considered, including increased reporting pay obligations, granting employees a job-protected right to request schedule changes, and requiring advance notice of the implementation of an employee's schedule or changes to an existing schedule. Some of the options focus on changes that would grant part-time employees preference for extra hours. One option outlines a detailed proposal for "sectoral regulation of scheduling", under the oversight of the Minister and an appointed advisory committee.

(b) Vacations and Public Holidays

It appears that there were few submissions on public holidays, but those that were made tended to focus on the complexity around calculating public holiday pay. The Special Advisors are considering several options, including a recommendation to revert to the former ESA's calculation, at least for some employees. One option of note is to establish a premium of 3.7% for all employees, pre-paid on wages throughout the year, and to eliminate all of the rules around qualifying criteria. While this last option would have the value of simplicity, it could lead to the employee abuse of holidays that the qualifying criteria were designed to control.

With respect to vacation, the Special Advisors note that Ontario has the least generous vacation entitlements in Canada, as all other jurisdictions increase vacation entitlement to 3 weeks' vacation time and 6% vacation pay at some point. (Saskatchewan is unique in starting vacation at 3 weeks and 6%, and subsequently increasing it to 4 weeks and 8%.) Perhaps not surprisingly, the options under consideration focus on whether the vacation entitlement should be increased, and by how much.

(c) Paid Sick Days

As we described in our previous *FTR Now* on Personal Emergency Leave (PEL), the Special Advisors are considering whether to recommend the addition of a paid sick leave entitlement in Ontario:

While not, strictly speaking, part of the discussion of PEL in the Interim Report, employers should be aware that the Special Advisors are also considering whether a new entitlement to "paid sick leave" should be added to the ESA. While it appears that only PEI has such an entitlement within Canada, employee groups have been advocating for an approach that would allow employees to accrue 1 hour of sick leave per 35 hours of work, which works out to be approximately 7 days per year. Clearly, the introduction of this type of leave would have an impact on the PEL provisions of the ESA, at least as currently drafted. The Special Advisors are also considering options such as creating a set entitlement to a specified number of paid sick days per year, permitting a qualifying or waiting period before employees can access paid sick days and requiring employers to pay for doctors' notes if they require them.

(d) Leaves of Absence

With respect to leaves of absence, the Special Advisors are considering submissions for adding new leaves of absence – a leave for victims of domestic abuse or sexual violence (paid or unpaid), and a leave for the death of child (the current leave only applies where the death of the child is crime-related). One option that the Advisors are considering is whether any of the existing leaves can be consolidated – a request by employers who have commented on the administrative complexity of addressing numerous, often overlapping leave entitlements.

(e) Termination, Severance and Just Cause

As with some of the other substantive standards, few submissions were received in relation to notice of termination or severance pay, perhaps reflecting that Ontario's requirements are either consistent with other jurisdictions (notice), or greatly exceed all others (severance pay). Nevertheless, the Special Advisors have identified several options that they are considering, including adjustments to the 8-week cap on notice of termination, elimination of the 3-month waiting period, and requiring notice of termination to be based on a cumulative period of employment as is the case with severance pay.

In terms of severance pay, the key options being considered include expanding its scope by eliminating the current thresholds – 5 years of service, and an employer with a $2.5 million annual payroll or who has terminated 50 or more employees within a 6-month period as a result of a full or partial discontinuance of its operations. Another option under consideration is to eliminate the 26-week cap.

One of the more significant options being considered by the Special Advisors is the introduction of "just cause" protection for non-union employees. This is being considered for all employees, and for Temporary Foreign Workers on an expedited basis. Given the recent Supreme Court of Canada decision in *Wilson v. Atomic Energy Canada Limited* on "unjust dismissals" under the *Canada Labour Code*, summarized in our July 14, 2016 *FTR Now* Supreme Court of Canada Majority Rules "Unjust Dismissal" Provisions of Canada Labour Code Prohibit Without Cause Dismissals of Non-Unionized Employees, this option may have some momentum.

Currently, for provincially regulated employees in Ontario both the ESA and the common law permit employers to terminate their non-union employees as long as the employer provides the appropriate notice. Under the ESA, the notice is determined based on years of service. Under the common law, "reasonable notice" is required. Parties are free to negotiate provisions related to termination, provided that such contractual provisions are consistent with the minimum standards of the ESA. As long as the reason for termination is not illegal (e.g. in violation of the *Human Rights Code* or a reprisal for filing an ESA complaint), neither the common law nor the ESA require an employer to have cause for dismissal. The introduction of a "just cause" standard would, therefore, fundamentally alter the employment landscape in Ontario, and would require all employers to revisit their employment and termination practices.

Part-time Employees and Temporary Employees

The Special Advisors devote a significant portion of the ESA Interim Report to the situation of part-time employees and temporary employees (i.e. employees employed directly by an employer, but on a fixed term or task basis). The Special Advisors report that such employees tend to receive lower wages, fewer benefits and are less likely to be unionized.

The primary option being explored by the Special Advisors is a requirement to pay part-time, temporary and casual employees the same wages as are paid to full-time employees, unless there are objective grounds not to do so (e.g. qualifications, skills, seniority or experience). There are several variations of this option presented.

Another option of note is the potential limitation of the number or total duration of fixed term contracts an employer can enter into with an employee.

Temporary Help Agencies

One of the largest sections of the ESA Interim Report applies to a consideration of Temporary Help Agencies (THAs) and the assignment employees that they place with clients of the agency. The ESA Interim Report clearly evidences a concern with the growth of the temporary help agency model of business, and paints a picture that largely focuses on perceived shortcomings in the business model.

The Special Advisors are considering a wide range of options, too numerous to set out in detail here. Since Ontario has the strictest regulation of THAs in Canada, the Special Advisors have researched the use of THAs in the United States, the

European Union and Australia, and several of the options being considered are derived from practices in those jurisdictions.

Some of the options under consideration are:

- expanding joint and several liability between the THA and their clients for all employment standards (currently this is limited to regular wages, overtime pay, public holiday pay and premium pay for working on a public holiday);
- making the client the employer of record for some or all employment standards (currently, only the THA is considered the employer for ESA purposes);
- creating an “equal wages for equal work” requirement;
- requiring disclosure of “mark-up” (i.e. the difference between what the THA charges the client and pays the assignment employee);
- reduction or elimination of fees chargeable if a client hires an assignment employee;
- limits on client use of assignment workers – e.g. limits on hours worked or numbers of assignment employees relative to the overall operations;
- facilitating permanent employment by limiting the length of assignments, deeming assignment employees to be permanent employees of the client after a set time, or providing enhanced access to vacancies at the client;
- expanding notice of termination and severance pay obligations to the assignments; and
- introducing a form of licensing or a mandatory code of conduct.

Greater Right or Benefit

There is limited discussion of the “greater right or benefit” in the ESA, and the Special Advisors are currently considering only one option in addition to the *status quo*, which would be an expanded notion of a “greater benefit” that would apply to the entire employment contract, and not just individual employment standards.

Written Agreements

The ESA contains a number of opportunities for employers and employees (or their agents) to make written agreements to vary specific standards within limited parameters. The Special Advisors identify twenty contexts in which such agreements can be used. Examples include excess hours agreements, overtime averaging agreements, agreements to forego a “substitute day” when a public holiday occurs on an employee’s day off, and agreements regarding when to pay vacation pay.

Employee advocacy groups tended to oppose the use of written agreements to vary standards, while employers cited the need to maintain and even enhance the flexibility that agreements provide. The options being considered reflect this range of views.

Pay Periods

The Ministry of Labour appears to have made submissions on the issue of pay periods and whether they align with the “work week” chosen by employers for the purpose of scheduling hours of work and calculating overtime. Based on the Ministry’s submissions, the Special Advisors are considering a recommendation that an employer’s pay period must align with its “work week”.

The Special Advisors are also considering the expansion of special rules related to commissioned automobile salespersons to a wider range of commissioned salespersons. These rules focus on the length of pay periods, reconciliation periods, and rules related to the reconciliation of employee draws against commissions earned.

Enforcement and Administration

Just as with the LRA Interim Report, the Special Advisors dedicated significant attention to the enforcement of the ESA and made it clear that they believe that Ontario has a serious problem with the enforcement of ESA provisions. Employers should be aware that the Special Advisors are considering a wide array of options with respect to attaining a culture of compliance with the ESA.

One key option would entail the requirement that employers implement an internal responsibility system, such as an expansion of the Joint Health and Safety Committee/Health and Safety Representative model in non-unionized workplaces, to include an audit of ESA compliance. In an enhanced version of this proposed model, the Committee/Representative would have ongoing obligations to promote awareness of, and compliance with, the ESA.

An additional option under consideration in relation to enforcement includes making the investigation process more proactive and strategic by targeting sectors with vulnerable workers, as that term is used by the Special Advisors, or where the misclassification of employees is high.

Yet another option would focus on removing perceived barriers to the filing of ESA claims. This latter option includes potentially permitting anonymous claims, subject to a requirement that employers be provided sufficient information to respond (which is already an issue for employers under the current enforcement models). The discussion on enforcement also notes concerns with how settlements of ESA claims are made, and whether there need to be restrictions on settlements, or whether legal support should be made more readily available to employees who are considering settling a claim.

Another key option being considered is a greatly expanded scope of penalties that can be imposed on employers who violate the ESA. This is most strikingly exemplified by the proposal to give the Ontario Labour Relations Board the authority to impose significant administrative monetary penalties in a process that could entail the creation of a Director of Enforcement position to oversee such a system.

Other options in relation to penalties including increasing offences under the *Provincial Offences Act*, increasing the dollar value of the Notice of Contravention, and increasing the administrative fee payable when a restitution order is made.

Summary and Next Steps

As we have advised in our previous updates, employers have a unique opportunity to participate in the Changing Workplaces Review. This *FTR Now* should have demonstrated that the potential ESA changes are wide-ranging and could have a significant impact on your business. While it is not clear whether the Special Advisors will make recommendations on all of the options being considered, they may interpret employer silence as being a form of acceptance, or at least a lack of opposition to a proposal. The Special Advisors specifically note the absence of employer submissions on several subjects throughout the Interim Report.

Submissions on the *Employment Standards Act, 2000* options canvassed in the Interim Report must be made by **October 14, 2016**. The government has provided the following contact information for this purpose:

Email: CWR.SpecialAdvisors@ontario.ca

Mail: Changing Workplaces Review

ELCPB 400 University Ave., 12th Floor

Toronto, Ontario M7A 1T7

Fax: 416-326-7650

If you are considering making submissions, please note that because the Review is a public consultation process, all

submissions may be made available to the public or to other persons or parties participating in the process. To alleviate some of these concerns, employers may want to consider utilizing trade or industry associations to make submissions on behalf of their members.

If you have any questions related to this *FTR Now* or would like to discuss making submissions to the Special Advisors, please contact your regular Hicks Morley lawyer.

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