FTR Now

Changing Workplaces Review – Focus on Temporary Help Agencies and their Clients

Date: August 25, 2016

For the past month, we have reported extensively on the Interim Report issued on July 27, 2016 by the Special Advisors undertaking the Changing Workplaces Review. Previous issues of the *FTR Now* have reported on potential changes to Personal Emergency Leave, the Labour Relations Act, 1995 (LRA), and the Employment Standards Act, 2000 (ESA).

In this *FTR Now*, we will focus on proposals being considered in relation to Temporary Help Agencies (THAs) and the valuable services that they provide to their clients. This focus is warranted both because the Special Advisors have emphasized that their recommendations will focus primarily on what they see as "vulnerable workers engaged in precarious employment", which is defined to include employment through temporary help agencies, and because some of the proposed changes could fundamentally change the THA model that so many businesses have come to rely on.

Direct Regulation of Temporary Help Agencies and their Clients

One of the largest sections of the Interim Report relates to THAs and the assignment employees that they place with clients of the agency. The 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. 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.

As we described previously in our *FTR Now* focusing on proposals related to the ESA, the Interim Report outlines a number of options that the Special Advisors are considering that would directly impact the regulation of THAs and their clients:

- An expanded joint and several liability between the THAs and their clients for all substantive employment standards. Currently, the ESA makes THAs and their clients jointly and severally liable for unpaid regular wages, overtime pay, public holiday pay and premium pay for working on a public holiday. The Special Advisors are considering a recommendation to expand this to other unpaid amounts, such as vacation pay, termination pay and severance pay.
- Notwithstanding the 2009 Bill 139 amendments to the ESA that clarified that the THA is the employer of record for ESA purposes, the Special Advisors are considering a recommendation to make the client the employer of record for some or all employment standards.
- The Special Advisors are also considering an "equal wages for equal work" requirement which would require THAs to pay wages to assignment employees that are comparable to the wages paid to employees of the client who perform similar work.
- There is much discussion in the Interim Report about "mark-up" (i.e. the difference between what the THA charges the client for the services of an assignment employee and what the THA pays the assignment employee for those same services). The Special Advisors are considering several options related to "mark-up", including requiring it to be disclosed to assignment employees and placing limits on how large it can be. Unfortunately, the Interim Report neglects evidence that establishes that profit margins in the THA industry are quite low, and does not meaningfully address the varied legitimate purposes that are served by the mark-up THAs charge.
- Another option being considered is the reduction or elimination of fees chargeable by a THA if a client hires an assignment employee. Currently, a THA can charge a fee in this circumstance only if the assignment employee is

hired within six months of first being placed with a client.

Some of the more far-reaching options being considered would focus on the use of assignment employees by clients of THAs, and would seek to place limits directly on clients. These options include:

- Placing limits on the amount that any organization could use assignment employees – for example, by limiting the number of hours worked by assignment employees relative to the client's other employees, or by limiting the number of assignment employees relative to the client's overall employment complement.
- Placing limits on the length of an assignment.
- Deeming assignment employees to be permanent employees of the client after a specified time.
- Requiring clients to provide assignment employees with enhanced access to vacancies.

Yet other options being considered include:

- A possible recommendation to expand notice of termination and severance pay obligations to individual assignments, and not to the employment relationship itself. As with some of the earlier options, this would reverse the 2009 Bill 139 amendment which provides that assignment employees remain employees of the THA between assignments, subject to the ESA's temporary layoff rules.
- The introduction of a form of licensing or mandatory code of conduct for THAs.

Other Options of Note

Since THAs are employers of their assignment employees, they would be impacted by any of the other options for change being considered by the Special Advisors including, for example, options that would enhance substantive employment standards entitlements of employees more generally.

One key option that is being considered both with respect to the ESA and the LRA relates to an expanded notion of related or joint employment. Under this concept, a decision-maker such as the Ontario Labour Relations Board or a court can treat two or more employers as a single employer. In the labour relations context, this concept is typically applied where two or more employers under common control or direction are operated in such a way as to undermine a trade union's certification rights. In the employment standards context, a similar concept applies where the effect or intention is to defeat the intent or purpose of the ESA.

The Special Advisors are considering a variety of options with respect to joint employers, many of which would expand the concept considerably, including to situations where there was no actual common control and direction being exercised. On several occasions, the Interim Report references a recent decision of the National Labor Relations Board in the United States, in which a THA and its client were found to be joint employers in part because the client had the contractual right to control aspects of the employment relationship – a right that would be a common feature of almost any THA-client relationship. Such an expanded notion of joint employer could have significant ramifications for THAs and clients alike.

Next Steps

As we have outlined in our previous *FTR Nows*, the Special Advisors are seeking input on the options that they have identified in the Interim Report by **October 14, 2016.** Given the potential far-reaching consequences of the options being considered by the Special Advisors for THAs and their clients, all organizations should consider these proposals carefully, and should consider making submissions to the Special Advisors to ensure that your voice is heard in this process.

If you have any questions related to this *FTR Now* or would like to discuss making submissions to the Special Advisors, please feel free to contact Paul E. Broad at 519.931.5604, Craig S. Rix at 416.864.7284 or your regular Hicks Morley lawyer.

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