FTR Now

Changing Workplaces Review Final Report – Focus on Employment Standards

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In this, our third update related to the Changing Workplaces Review Final Report (Final Report), we focus our discussion on the recommendations related to the *Employment Standards Act, 2000*. While many of the recommendations relate to proposed changes to specific standards, the Final Report contains a strong emphasis on compliance measures, comprised of both education and enforcement initiatives, to better achieve a "culture of decency and compliance" within Ontario.

A Focus on Employment Standards

The mandate of the Special Advisors in undertaking the Changing Workplaces Review was wide-ranging, with a focus on two primary statutes – the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act, 1995* (LRA). Within that mandate, there was a primary emphasis on vulnerable workers engaged in precarious employment, which is reflected throughout the Final Report. This emphasis likely accounts for the significant attention that is paid to the ESA in the Final Report: of the 173 specific recommendations made by the Special Advisors, approximately 140 relate to the ESA and compliance with minimum standards. Given the sheer number of recommendations and depth of discussion, our review is necessarily limited to what we believe are key recommendations for employers to consider.

We remind readers that, despite the media coverage leading up to the release of the Final Report regarding a potential $15.00 minimum wage, changes to minimum wage were not within the mandate of the Review and are not addressed in the Final Report.

Recommendations Related to Specific Standards

In this first section of the *FTR Now*, we will highlight various recommendations related to specific standards that have been made by the Special Advisors. While many of the recommendations would enhance employee entitlements, some would favour employer interests and should be noted.

Equal pay for part-time, casual, temporary and seasonal employees

One key recommendation is that the ESA should be amended to provide for a general rule that no employee should be paid less than what is paid to full-time employees of the same employer who perform comparable work. The Special Advisors would apply this principle equally to part-time, casual, temporary or seasonal employees, as a matter of fundamental equity. However, there are two key limitations on the recommendation:

- First, the general rule would not apply where there were objective reasons to justify a differential wage rate, including systems that are based on seniority, merit or where earnings are measured by quantity or quality.
- Second, the general rule would be limited to wages only, and the Special Advisors did not recommend extending it to benefits or pension plan coverage. Rather, the Special Advisors urged the government to study how a minimum level of insured benefits could be provided more broadly across workplaces.

Scheduling and related issues

The Final Report contains a significant discussion of scheduling and related issues. The Special Advisors recommend that the ESA provide the government with the authority to address scheduling on a sectoral basis, and further recommend that the government prioritize developing regulations for certain sectors, including retail and fast food. There is also a recommendation that employees be given a "right to request" changes to their schedules on an annual basis, with a corresponding obligation on the employer to discuss the request with the employee and provide reasons in writing (upon request) if the employee's request is turned down.

Hours of work and overtime pay

There were few recommendations related to the hours of work and overtime pay provisions of the ESA. In terms of employee consent to work excess hours, the Special Advisors recommend that the ESA clearly provide that an electronic consent is acceptable, and they also recommend that the government consider developing sectoral regulations allowing for a majority of employees in a non-union facility to agree to work excess hours and thereby bind the entire group of employees. They did not recommend a change to the "11 hour rule" which requires employers to provide 11 consecutive hours off work each day.

On a positive note for employers, the Special Advisors have recommended that the Ministry eliminate the need to obtain the approval of the Director of Employment Standards for excess hours between 48 and 60 in a week. Moreover, they did not recommend any changes to the general overtime pay threshold of 44 hours in a week.

The main recommendation with respect to overtime pay is that there be stricter limitations placed on when employers may enter into overtime averaging agreements with their employees. The recommendation is that overtime averaging primarily be permitted where it would allow for a compressed work week, continental shifts or other flexible work schedules wanted by employees. Where the overtime averaging is to provide for employer scheduling requirements, the Special Advisors recommend that approval be limited to circumstances where the total number of hours worked does not exceed the threshold for overtime over the averaging period**.**

Personal emergency leave

The Special Advisors are recommending changes to personal emergency leave similar to the pilot project implemented previously in the automotive sector (discussed in detail in our December 20, 2016 *FTR Now* Ontario Launches Personal Emergency Leave Pilot Project). Under the recommendation, personal emergency leave would consist of a two-fold entitlement:

- seven personal emergency days each calendar year, and
- three bereavement days per death of a listed family member, with no yearly limit imposed.

In addition, the Special Advisors recommend eliminating the 50-employee threshold, which would mean that personal emergency leave would be available to employees in all workplaces within Ontario. Moreover, there is a recommendation to explicitly allow the leave to be claimed in instances of domestic violence.

Notwithstanding considering the issue in the Interim Report, the Advisors did not recommend that the ESA be amended to provide for paid sick days.

Of likely concern to employers, the Special Advisors have also recommended that the “greater right or benefit” provision of the ESA not apply to personal emergency leave to ensure that all employees have access to the basic leave entitlements. The Special Advisors do not comment on whether paid leaves such as sick leave can be offset against an employee’s personal emergency leave entitlement.

Other leaves of absence

In terms of other leaves of absence, the Special Advisors have recommended that family medical leave (available where there is a significant risk of death to certain family members) be extended to allow for leave of up to 26 weeks in a period of 52 weeks, mirroring changes implemented by the federal government to compassionate care benefits under the *Employment Insurance Act*. The current leave is for up to 8 weeks of leave in a period of 26 weeks.

There is also a recommendation to extend the existing crime-related child death or disappearance leave to any death of a child.

Vacation and public holidays

Perhaps not surprisingly, there is a recommendation to increase vacation entitlement to 3 weeks of vacation time and 6% vacation pay following 5 years of employment. In this regard, Ontario and the Yukon are the only jurisdictions in Canada that limit vacation to 2 weeks and 4% regardless of length of service.

In terms of public holidays, the Special Advisors reviewed a number of possible ways to simplify the public holiday provisions of the ESA, which are notoriously complex. In the end, they recommend that the government conduct a further review of these provisions with a view to replacing them with a simpler set of rules.

Application of the ESA

The Final Report contains numerous provisions relating to the application of the ESA, including who is an “employee”, which employees should be excluded from the ESA, and how to address the many exemptions found in the statute and regulations. We note some key recommendations.

Dependent contractors

The Special Advisors have recommended that the ESA be amended to include “dependent contractors” within its scope of application. A “dependent contractor” is 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. There is no recommendation to have special rules for dependent contractors.

Independent contractors

The Advisors did not recommend that independent contractors be covered by the ESA. However, they do recommend that the government make misclassification of persons as independent contractors an enforcement priority, and they recommend a reverse onus requiring employers to establish that the contractor is not an employee.

Interns and Crown employees

The Special Advisors have recommended that the exclusion of interns from the ESA be eliminated. Similarly, they recommend that the exclusion of Crown employees from certain parts of the ESA also be eliminated.

Exemptions

As was made clear in the Interim Report, the Special Advisors determined that a complete review of all of the ESA's many exemptions was not feasible within the context of their mandate. The Final Report reiterates their call for a review of all ESA exemptions, and they propose a framework within which such a review should occur. We will not review that in detail, except to note that the framework would apply on a sectoral basis under the auspices of special sectoral committees, and would entail a transparent process allowing for the participation of all interested parties.

In terms of specific exemptions, the Special Advisors have recommended that the existing managerial and supervisory exemption be replaced by an exemption that would focus on a "salaries plus duties" test. This would require the individual to perform certain specified managerial duties and earn more than a specified salary (recommended to be set at 150% of minimum wage).

The Advisors also recommend that the special minimum wage rates for students under 18 and for liquor servers be phased out over a 3-year period.

Temporary Help Agencies

A key focus in the Interim Report was temporary help agencies and the use of assignment employees by clients of the agencies. The Final Report contains several recommendations specific to this sector. In yesterday's *FTR Now* focusing on the LRA, we noted that the Special Advisors are recommending that for the purposes of the LRA, clients who use the services of assignment employees be deemed to be their employers. This is notwithstanding that the agency is employer of record for ESA purposes.

In addition, the Special Advisors have recommended several changes to the ESA, including:

- a requirement that assignment employees receive the same wages as employees of the client performing comparable work, though only after an assignment has lasted for 6 months (and subject to certain limitations designed to prevent misuse of the rule)
- an obligation on clients to inform assignment workers of job openings and to consider applications in good faith
- an obligation on clients to consider assignment workers earning less than 2.5 times the minimum wage for available positions prior to terminating the assignment
- an obligation on the agency to provide working notice of an assignment end or to pay termination pay where working notice is not provided (this would be a separate obligation from notice of termination).

Notwithstanding that the Changing Workplaces Review did not include the *Workplace Safety and Insurance Act, 1997* (WSIA) within its scope, the Special Advisors recommended that the WSIA be amended to make clients responsible for injuries incurred in the client's workplace by an assignment worker.

Compliance

As noted at the outset, the Final Report contains a strong emphasis on compliance measures, including a range of recommendations related to enforcement of the ESA and to education initiatives. The objectives of these recommendations are to increase protection for employees who exercise their rights and to achieve strategic and consistent enforcement of the ESA.

Enforcement activities

The Special Advisors recommend proactive enforcement initiatives, such as targeted inspections, spot checks and audits, as well as a policy for the quick investigation of complaints by whistleblowers and employees alleging reprisals. There are

recommendations relating to facilitating complaints, including anonymous complaints through a hotline, by telephone or over the internet.

The Special Advisors have also recommended a wholesale rethinking of how the Ministry of Labour handles complaints that are filed, with a key recommendation that the Ministry only investigate high priority complaints. For complaints that would not be investigated, the Advisors recommend utilizing the Ontario Labour Relations Board (OLRB) as a forum to provide access to individual complainants to an expedited dispute resolution process. In order to facilitate access to justice, the OLRB would be required to appoint vice-chairs throughout the province to conduct hearings locally, and would be required to prepare self-help materials for unrepresented litigants.

Sanctions

The Final Report also recommends the creation of stronger sanctions for employers who are not compliant with the ESA as the Special Advisors consider the current sanctions to be insufficient to deter future non-compliance. They recommend giving the OLRB a broader jurisdiction to impose significant monetary penalties and increasing the administrative penalties up to $100,000 per infraction. The decision to seek an administrative monetary penalty would be the responsibility of a new Director of Enforcement. Similarly, the Advisors recommend increasing the amount of Notices of Contravention and tickets issued under the *Provincial Offences Act*.

Internal responsibility systems

The Interim Report considered the implementation of an internal responsibility system (IRS), similar to the IRS established by the *Occupational Health and Safety Ac*t through joint health and safety committees. The Final Report recommends that the Ministry of Labour encourage the establishment of an IRS by employers, but does not recommend that they be made mandatory.

Education

There are a wide variety of recommendations that are meant to increase education and awareness amongst employees and employers of their rights and obligations, including strategic and targeted communications aimed at sectors with a high incidence of non-compliance and many vulnerable employees. Several of the recommendations are aimed at increasing awareness of the ESA's anti-reprisal provisions, including faster, stronger enforcement of those provisions and publication of penalties imposed on employers who commit reprisals in violation of the ESA.

Conclusion

As we reminded readers in our prior update, the Final Report contains the recommendations of the Special Advisors that have been made to the Minister of Labour. It will now be up to the government to consider the recommendations that have been made and to determine which recommendations, if any, it will adopt and pass into law. This review process may take some time to fully run its course, and we may well see some recommendations being adopted more quickly than others (particularly with respect to those recommendations that may require more complex legislation or regulations to implement). Hicks Morley will continue to monitor the progress of this file and will be seeking to ensure that employer voices are being heard and considered by the government throughout this process.

Should you have any questions or require further information, please contact your regular Hicks Morley lawyer.
