Ministry of Labour Changing Workplaces Review
ORHMA Urges A Risk Based Enforcement Mode to Be Applied to the Employment Standards Act

The Ministry of Labour report known as the **"Interim" Changing Workplace Review** does not include specific recommendations for changes to the Employment Standards Act, 2000 (ESA). The review identifies areas for consideration and only offers options for recommendations. The Advisor's recommendations will be in their final published report in winter 2017 to the Minister of Labour. It will then be up to the provincial government to determine how they move forward with implementation of their recommendations. We are certain that it is no longer a question of if the provincial government will be making changes to the ESA but which recommendations they will adopt. An Interim Report has been released with a range of options to amend Ontario's Labour Relations Act, 1995, and Employment Standards Act, 2000 to better protect workers while supporting business in today's economy. The review's Special Advisors, Michael Mitchell and former Justice John Murray, are appointed by the government and are leading the recommendations. **Click here to view the Changing Workplaces Review Interim Report.**

Listed below is a summary of considered options included in the Changing Workplace Review Interim Report.

Employee definition issues:

- alleged misclassification of individuals as "independent contractors" instead of employed.
- Suggest increased awareness to all, enforcement and have employers support classification.
- whether the scope of "employee" should be broadened to include "dependent contractors".
- ESA recognize 'dependent contractor" as a category of worker who contracts services exclusive or near exclusive to one organization (results in a dependency relationship). LRA includes this feature and is recognized in courts for common law determinations.

If dependent contractors are to be considered as "employees" where most have control of many tasks including scheduling what rules would need to be considered?

- Consideration of expanding the definition of 'related employer" in broadening the "joint employer" meaning.
- Even in cases when common control and bearing is not covered.
- This is aimed at the franchisor and franchisee model.

Business structural changes:

- Employers responsible for ESA compliance with subcontractors.
- Franchisors liable for ESA violations of franchisees with or without limitations based on their involvement.

Exemptions:

- Finding that the ESA exemptions do not follow the "principle of universality" rule.
- Specific exemptions implemented in ESA since 2005 will be recommended to stay.

On the majority of exemptions a recommendation will be included to examine each one through a rigid process for maintaining or removing from the act.

Each exemption will not be dealt with in the upcoming report but through the recommended process except a list of exemptions the advisors have already made conclusions.

These include:

- Managers and supervisors on hours of work and overtime
- Minimum wage differentials for students and liquor servers
- Student exemption from the three hour rule

Overtime Pay: Interim report recognizes that Ontario has most rigorous standard than most provinces. Inclusion options of reducing some stringent rules such as:

- Need for director's approval for excess weekly hours (48 to 60).
- Eliminate employee agreements for excess hours and allow this if majority of employees agree.
- Considering lowering the overtime threshold from 44 hours per week to 40.
- Consider a cap on overtime averaging periods.

Work Schedule:

- Review the three hours rule when sending employees home earlier (as noted above with students)
- Job protected rights for schedule changes requests.
- Advance notice of posting schedules or changes to existing schedules.
- Offer part time employees preferences for extra hours.
- Options for sectoral regulation of scheduling.

Public Holidays:

- Options to change existing calculations of Holiday's
- Establish a premium of 3.7% prepaid to all employees for the year eliminating criteria rules which were designed to control any abuse

Vacation:

- Noted that Ontario has the least generous entitlements in Canada as all provinces are at three weeks and 6% vacation pay at some point (Saskatchewan subsequently increases it to four weeks and 8%).
- Options to increase vacation and at how many weeks and at what pay.

Paid Sick Days:

- Consideration in the interim report to add a paid sick leave entitlement to the ESA.
- *Employee groups are calling for* allow employees to accrue 1 hour of sick leave per 35 hours of work, which works out to be approximately 7 days per year. (Province of PEI has this)
- 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.

Leaves of absence:

- 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) Employer groups commented -Consider consolidating certain leaves due to complexity of addressing often overlapping leave entitlements.

Termination, severance and just cause:

- Ontario is consistent with other provinces in notice and exceed others in severance pay. Consideration is placed on 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.

- On severance pay, the key options being considered include expanding the scope by eliminating the current thresholds (i.e. 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.

- A significant option 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. (recently supported by a Supreme of Canada decision).

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:

- Employees employed directly by an employer, but on a fixed term or task basis such as part-time, temporary and casual employees tend to receive lower wages, fewer benefits and are less likely to be unionized.

- Similar wages are paid to full-time employees, unless there are objective grounds not to do so (e.g. qualifications, skills, seniority or experience).- several variations of this option presented.

- Potential limitation of the number or total duration of fixed term contracts an employer can enter into with an employee.

Temporary Help Agencies (THA):

- 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.

- Considering a wide range of options, too numerous to set out in detail here.

- 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;
- Introducing a form of licensing or a mandatory code of conduct.

Greater Right or Benefit:

- Expanded notion of a "greater benefit" that would apply to the entire employment contract, and not just individual employment standards.

Written Agreements:

- Currently 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.
- Options 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 tend to oppose the use of written agreements to vary standards.
- Employers cited the need to maintain and even enhance the flexibility that agreements provide
- 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 ,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 who are the authors of this Interim Report are considering a recommendation that an employer's pay period must align with its "work week".

Enforcement and Administration:

- A strong assumption that the province of Ontario has a serious problem with the enforcement of ESA provisions.
- Options with respect to attaining a culture of compliance with the ESA.
- 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.
- Making the investigation process more proactive and strategic by targeting sectors with vulnerable workers
- Focus on removing perceived barriers to the filing of ESA claims which 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).
- Concerns exist 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.
- Consider a greatly expanded scope of penalties that can be imposed on employers who violate the ESA. – 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.

Ontario's Personal Emergency Leave (PEL) -this entitlement has been considered for an earlier recommendation and an earlier government resolution due to a 2016 deadline included in the Provincial Budget. Most employees in Ontario have an entitlement to Personal Emergency Leave – up to 10 days of job-protected leave for employees related to:

- their own personal illness, injury or medical emergency; or
- the death, illness, injury or medical emergency of a wide range of listed family members; or
- an urgent matter related to that same group of listed family members (though not for their own urgent matters).
- Available only to employees whose employers regularly employ 50 or more employees-,leaves approximately 19% of all Ontario employees without access to PEL.

PEL Options Identified:
Options Identified

- Expanding PEL to all Ontario employers, regardless of size.
- Prohibiting employers from requiring doctors' notes to substantiate absences due to sickness.
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Most jurisdictions in Canada have some form of PEL (Alberta excepted), but that it is more commonly offered as separate categories of leave – e.g. a certain number of days for illness, other days for bereavement They also noted that only Ontario has an employer-size eligibility threshold.

Options considered:
1. Maintain the status quo (i.e. no changes).
2. Remove the 50 employee threshold.
3. Break down the 10-day entitlement into separate leave categories with separate entitlements for each category.
4. Some form of a combination of options 2 and 3.
5. Open to other identified possibilities.

Furthermore the "paid sick leave" and the "greater right or benefit" entitlements as listed above in this report consider options that will impact PEI.

Employer Comments Specific on Personal Emergency Leave:

Small employers – those who regularly employ fewer than 50 employees – the potential expansion of the PEL entitlement to all employers within Ontario will have a significant impact to their operations.
The Interim Report acknowledges the unique challenges of small business, "Such employers do not have the resources to employ human resources professionals and lack the expertise needed to deal with absenteeism issues. Secondly, there is a concern that they do not have the flexibility and the capacity to deal with PEL as currently framed in the legislation. Therefore, they may argue that the extension of PEL provisions to smaller employers will have significant adverse impact on their ability to provide service/product to their customer/consumer base." There is potential for economic hardship for small business and their employees hence the need to maintain the current 50 employee threshold.

All Employers- Employers have various difficulties that they encounter in trying to manage PEL without creating undue cost and lost productivity, including abuse of the existing PEL entitlement as it relates to doctor's notes. They find ways to balance their employees' statutory right to PEL with the legitimate needs of their operations, and the need to have employees attend at work regularly. Employers have also sought ways to integrate personal emergency leave into contractual entitlements that address similar, often overlapping, reasons for absence – bereavement leave, sick days, and the like. The Interim Report also discussed the Greater Right or Benefit provision in the ESA. The current intention of the ESA is such that if an employer offers a benefit to an employee that is more generous than the minimum standards defined in the ESA, then the ESA does not apply to that employee, in that particular circumstance. This is an important principle that must be maintained in the ESA yet more clarity is required. Clarity will allow employers the opportunity to ensure that their leave policies will provide a greater right or benefit and employees will be clear on their leave provisions. Clarity will also reduce

administrative costs and stream line processes that will benefit both the employer and employee. Clarity will provide more incentive for employers to provide leave provisions that are greater than the ESA.

Advisors recommending that the Greater Right or Benefit section of the ESA be amended to provide clarity on the employer entitlements (paid or unpaid) that provide a greater right or benefit. Prior to 2001, there were only two job-protected leaves, and between 2004 and 2014 seven new leaves were introduced. A move toward consolidation of all leave provisions would provide administrative relief and clarity to employers and employees.

Advisors recommending that the government move forward with a process involving employers and employees to consolidate the leave provisions in the ESA. In the absence of a signal toward broader consolidation, and PEL remains a standalone leave category, we recommend a further breakdown of PEL into separate categories with separate entitlements with the aggregate leave remaining at ten days.

Employer Comments Specific to the Employment Standard Act (Includes Key LRA Entitlements)
Education and Enforcement: A critical first step in improving workplaces for Ontarians is increased education and enforcement of Ontario's existing labour laws.

- We see these measures as an important area of common ground for government, employees, and employers. Human Resource development support should be considered.
- We do know that education is the best method for employers to understand the law and are to strive for compliance. Education and a Risk Based Inspection and Enforcement approach should be prioritized by the government. This approach strategically focuses resources where they will make the most difference.
- Furthermore we encourage the government to adopt an approach in training to the AGCO's "You and the Liquor Rules" educational campaign aimed at owners and managers of licensee establishments.

Scheduling Provisions: The provisions include potential options that will create rigid and universal requirements related to employers' posting of employee work schedules. A one-size-fits-all approach to scheduling fails to recognize the wide range of traffic demand in the hospitality industry that serves both employers and employees.

- **ORHMA does not support a one-size-fits-all approach to scheduling**.

Sectoral exemptions: These exemptions have potential that would allow for the abolishment of all sectoral exemptions.

- Doing so ignores the unique needs of important industries such as agriculture and information technology when it comes to flexible scheduling and compensation.

- **ORHMA does support the need for sector exemptions.**

Joint/common employers: This changes the current legal standard for determination of common employers.

- It represents a fundamental disruption to the current relationship between employees and employers.

- **ORHMA does oppose any changes to the current legal standard for determination of the joint/ common employers.**

Minimum Standards and Non-Standard Employment: The interim report includes an option to move away from this approach, potentially leaving both employers and employees uncertain of benefit entitlements. The interim includes options that will automatically move contract workers to full time employee status, further complicating employee-employer understandings of workplace relation. There are opportunities for contract work that can provide specialized skills required or needs that can help fill peak demand situations. Viewing this item through a single lens is a one-size-fits-all approach that will not work.

- **ORHMA believes in an industry with wide demand swings that there are benefits to utilizing contracted work and this standard must be examined from various views.**

Franchising: Any amendments to these acts that would deem franchisors to be joint or common employers with franchisees would change decades of business history and legal jurisprudence.

- Changes would fundamentally undermine the system of franchising in Ontario. Franchising has allowed thousands of Ontarians to go beyond the role of manager to become employers in a small business.

- **ORHMA does support greater clarity and certainty with respect to franchisors and franchisee's distinct employment and labour law liabilities. This clarity has the potential to have franchisors provide greater guidance and resources to their franchisees to assist in overall ESA and LRA education and compliance.**

Labour Certification Rules: These rules include options that would allow workers to unionize simply by signing a union card. The need for a secret ballot vote would be removed, marking a substantial change from the existing process. We believe this is diminishing of employees' rights and would prevent workers from having a real say about whether or not they wish to be part of a union. Intimidation and fear presence will lead to unintentional, unfair employee decisions.

- **ORHMA does support the right for a secret ballot vote to unionize.**

Sectoral bargaining: Sectoral bargaining includes options that would enable Sectoral Standards Agreements, which extend standards and contractual provisions throughout identified regional/ occupational/ industrial labour markets. These Agreements would expand collective bargaining among disjointed groups of employers and employees. This would have a devastating effect on the hospitality's business model. It will profoundly have a negative effect on small business with sustainment being an issue for many.

- **ORHMA does oppose sectoral bargaining.**

Conclusion: ORHMA recommends that the government does not make amendments to the legislation without statistical and economic data that would result in unintended consequences and negatively impact the ability of Ontario's businesses to create jobs and grow the economy. An economic impact study must be completed prior to any proposed amendments being released.

ORHMA Advocacy: We have participated in consultations with the government, meetings with the Minister of Labour, meetings with the Special Advisors, meetings with other key Ministers, MPPs and staff. We have also submitted comments throughout the review. We have asked and provided our members with communication products to outreach to their MPPs. We are also participating in an advocacy coalition with other like-minded associations and business – Keep Ontario Working. Please see link to Coalition website: http://keepontarioworking.ca/