Canadian Franchise Association™

August 31, 2016

Honourable John C. Murray and Mr. C. Michael Mitchell
Special Advisors

Changing Workplaces Review
ELCPB 400 University Ave.
12th Floor
Toronto, Ontario M7A 1T7

Via E-mail: CWR.SpecialAdvisors@ontario.ca

Dear Honourable John C. Murray and Mr. C. Michael Mitchell:

In response to the Changing Workplaces Review Special Advisors' Interim Report (the "Interim Report") the Canadian Franchise Association ("CFA") provides the following submissions with respect to the Personal Emergency Leave provisions ("PELs") under the Ontario *Employment Standards Act, 2000* ("*ESA*").

Background

In its 2016 budget, the Government of Ontario committed to addressing employer concerns with respect to PELs by seeking recommendations from the Ministry of Labour and Special Advisors. Employer concerns focused on the need for greater clarity with respect to how personal emergency leave days are reconciled with all other employer leaves in light of the greater right or benefit section of the *ESA*. Employer concerns did not focus on the potential for the removal of the 50 employee threshold.

CFA's Position

The background information provided in the Interim Report indicates,

- 971,000 employees – or 19% of the Ontario workforce is exempt from the PEL provisions, because they work in small firms;
- 95% of businesses employ 49 or less employees; and
- 58% of these businesses employ less than five employees.

The *ESA* already provides for:

- nine public holidays;
- two weeks of vacation;
- pregnancy leave;
- parental leave;
- family medical leave;
- organ donor leave;

- family caregiver leave;
- critically ill child care leave;
- crime-related child death or disappearance leave;

These leaves are in addition to any other leaves or sick days provided by an employer. By definition these leaves are unplanned and occur with little or no notice to the employer. Depending on the nature of the workplace, it is already burdensome for many employers to deal with the challenge of covering off absences; either work does not get done, or must be taken on by other employees to whom the employer often must pay overtime rates. In smaller businesses, it may be the employer him or herself that needs to cover off the absences.

As noted in the Interim Report, employers already required to provide PEL have raised concerns regarding increased absenteeism and the common abuse of these types of leaves as, notwithstanding the statutory right of employers to require reasonable proof of the reasons supporting the absence, actually obtaining such proof is not only challenging but also time consuming. This problem would clearly be magnified for smaller employers, who not only will have greater difficulty ensuring the work is covered during unplanned absences, but will also have greater challenges in enforcing the right to require proof of the basis for an absence due to lack of administrative resources. The CFA has significant concerns that this will effectively lead to an escalation of the cycle of abuse of these days, as employees use them and discover that small employers lack the administrative infrastructure to effectively monitor and police their use.

In addition, the CFA notes that many franchisees operate in business sectors where there is a need to be open long hours and, given other restrictions on hours of work in the ESA and the need to provide greater staffing during peak busy times, schedule multiple shifts to ensure full coverage. These are generally not work environments where either additional staff can be scheduled on a gratuitous basis, just in case of absences, or where work can be left undone to be covered by employees on subsequent shifts. The result of allowing a sanctioned system that will inevitably lead to a higher level of absenteeism is that many small employers may be forced to hire an even greater number of casual employees in order to ensure they are in a position to cover off the increased rate of absenteeism. This would seem to run counter to the stated objectives of this Review.

Maintain the current threshold

On behalf of the franchise industry that directly supports more than 700,000 jobs in this country through approximately 1,300 franchised brands and their 78,000 franchisees, we ask that you maintain the status quo and keep the 50 employee threshold. A significant portion of our membership would be negatively impacted by the elimination of the threshold.

Franchise operators are small businesses that do not have human resource departments. There is a clear separation between franchisor and franchisee with the responsibility for employees falling entirely to the franchisee. Moreover, many franchisors are themselves small businesses – only 10% of franchised brands in Canada have more than 100 units, while 60% have 15 or fewer. Many of these small businesses do not have the resources necessary to support the increased administrative burden, cost and competitiveness burden that would result from the elimination of the threshold. To extend this entitlement to smaller employers, including our franchisee members who may have only 5, 10 or 15 employees, would be a significant increase to the burdens they are already facing.

The PEL provision of the ESA is not the only statutory recognition of a 50 employee threshold. In fact, even within the ESA itself a 50 employee threshold triggers the requirement for payment of mass termination entitlements (the implication, of course, being that an employer with fewer than 50 employees can never meet that enhanced termination obligation).

Further, the implementation of the requirements of the *Accessibility for Ontarians with Disabilities Act* ("AODA") is based on the number of employees at a workplace, with 50 being a relevant trigger. The stated purposes of the AODA includes,

> "[r]ecognizing the history of discrimination against persons with disabilities in Ontario, the purpose of this Act is to benefit all Ontarians by...developing, implementing and enforcing accessibility standards in order to achieve accessibility for Ontarians with disabilities with respect to goods, services, facilities, accommodation, employment, buildings, structures and premises".

Even given the importance of the AODA's mandate, the Ontario Government still recognized that the ability of employers to comply is significantly impacted by their size, and therefore dictated different implementation requirements for employers with fewer employees.

The CFA therefore suggests that, while described by some as an 'arbitrary' cut off, the 50 employee threshold has repeatedly been recognized in the statutory employment context as a reasonable balancing point between the rights of employees and the reasonable capability of small employers to take on additional workplace obligations.

Alternatively, at a minimum, we ask you recommend a cost-benefit analysis be undertaken by the government of Ontario to understand the impact on jobs and the economy prior to any recommended change to this threshold.

Provide clarity on how the threshold is calculated

Currently, when determining whether the 50 employee threshold has been met, all employees (including part time and casual) of the employer are counted. In addition, when a single employer (i.e., a franchisee who owns multiple franchises) has multiple locations, all employees employed at each location in Ontario are counted.

Further, consistent with its position regarding any other ESA entitlements, the CFA submits that the concept of the 'employer' for purposes of calculating whether the 50 employee threshold has been met must not conflate franchisors and franchisees. As noted above, there is a clear demarcation between franchisors and franchisees when it comes to responsibility for employees. The CFA also notes that franchisors do not provide human resources support for franchisees. Further, they do not direct or control the employment of the employees of franchisees. As such, any model that retains a threshold (for which the CFA strongly advocates) must consider only the employees of one specific franchisee. Further, given that employees are generally hired to work at a single location and not interchangeable as between locations, even where multiple locations may be owned by the same franchisee, the definition should consider only employees employed at each of a franchisee's locations (if a franchisee operates more than one location).

In our view, the current calculation does not take into account the realities of a workplace and has a detrimental effect on many of our franchisee members causing further contribution to the administrative burden, cost and competitiveness burden as described above.

With respect to part time and casual employees, the CFA submits these employees should not be included for the purpose of calculating the 50 employee threshold. Alternatively, at minimum, the CFA submits that there be a proportionality consideration as between the number of part time and casual employees in the workplace as is seen in other employment legislation in Canada.

With respect to the multiple locations, the CFA submits that the threshold should be based on each single location. For example, a franchisee may own several franchises in Ontario. Each location will have its own employees with its own specific workplace issues and dynamics. There is often little or no integration between the multiple locations and treating the entire province as a 'single location' negatively impacts the franchise owner.

Conclusion

The existing administrative burden, cost and competitiveness burden on small employers in Ontario is already significant and challenging. If the government of Ontario is focused on the creation and maintenance of good jobs in Ontario we urge you to recommend research be undertaken prior to saddling yet another "leave" provision on small employers.

The statistics provided in the submission made to you by the Toronto Transit Commission ("TTC"), a large public transit system that employs approximately 13,000 employees, are educational, yet alarming. It notes the significant challenges to the TTC in its ability to effectively manage absenteeism and its own attendance management program. The TTC's submissions assert,

> *"These PEL totals continue to strain managers with the daunting task of ensuring the TTC can provide effective services to the public at a reasonable and fair cost."*

This acts as but one example of the challenges faced by employers with respect to the PELs. The challenge is even greater for small employers – including our franchisee members.

Respectfully, small employers do not have the resources to manage PEL days. Some still question their ability to manage the current maze of existing employee leave provisions. There is a thought that since the leave is without pay there is no financial impact to the employer. This is not the reality and the very real costs associated with replacing employees (e.g., overtime premiums, travel expenses, additional administration, etc.) are of concern. However, more critical is the inability of small employers to actually source skilled employees to replace their employees on little if any notice of such a need.

We look forward to continuing to work with you on the *Changing Workplaces Review* and hope this early feedback on PEL is helpful in outlining the perspective of our members on this important matter.

Respectfully,

Lorraine R. McLachlan
President and Chief Executive Officer