

Ontario's Changing Workplaces Review Special Advisors Interim Report Complexity and Inconsistency Adversely Affect Compliance

EXECUTIVE SUMMARY

The Canadian Payroll Association (CPA) is pleased to provide feedback to the Ministry of Labour on the *Changing Workplaces Review Special Advisors Interim Report* as this supports our goal of increasing the efficiency and effectiveness of payroll-related legislation, regulations and administration for all stakeholders: employers, employees and the government. The Association actively participates in Ontario's Ministry of Labour and Ministry of Finance Employer Stakeholder events and congratulates the government on initiating these consultations.

Complexities and inconsistencies in employment standards legislation, and those of other government departments, adversely affect employers' understanding and compliance of their regulatory requirements. Last year, our Payroll Infoline answered 5,000 inquiries related to employment/labour standards in Ontario (of 40,000 inquiries nationally). Employers are key stakeholders that annually contribute \$4.5 billion in Workplace Safety and Insurance Board premiums and \$5.6 billion in Employer Health Tax premiums.

Ontario's Employment Standards legislation and administration review should contain the following revisions to reduce regulatory complexity and inconsistencies, and promote greater employer compliance:

- Sufficient implementation time for any changes to legislation or administration
- Consistency with the Canada Revenue Agency's definition of "employee"
- Eliminating Ministry approval for excess hours and overtime averaging
- Eliminating a blended overtime rate
- Public holiday pay simplification
- Severance pay threshold should be based on Ontario payroll only
- No changes to pay period definition
- Developing an online interpretation guide for employers

Addendum 1 includes the CPA's original submission from last September which included the following recommendations and comments:

- Increased regulatory harmonization with other provinces/territories
- Accepted use of electronic documents and record-keeping should be clearly addressed
- Working agreements and vacation waivers should not require Ministry approval
- Clarity regarding placement agency workers
- Clear definition of "supervisor" and "manager"
- Proactive employer education rather than reactive punitive approach
- More examples within the online Employment Standards Guide and related webpages

IMPLEMENTATION TIME

The CPA consulted with the major payroll software providers and software developers, who provide payroll and time and attendance solutions for employers with a payroll in Ontario. Any changes to the determination, calculation and payment of hours worked, public holiday, vacation entitlement — or any other systems generated calculations will require between six and eighteen months to analyse, implement, test and communicate to employers and employees.

The CPA's payroll and systems experts are available for consultation on proposed changes to employment standards and can provide detailed analysis to the Ministry of system and implementation time requirements.

Employment Standards should be aligned with CRA Definition of "Employee"

Section 5.2.1 / 5.2.2 / 5.3.9: Definition of Employee/Who is the Employer and Scope of Liability/
Temporary Help Agencies

It is imperative that Employment Standards use the same criteria for defining an employee versus a self-employed worker as those established in the Canada Revenue Agency's (CRA's) [RC4110 Employee or Self-Employed Guide](#) based on the *Income Tax Act*. **An employer must be in the position of being compliant with the CRA requirements and Ontario Employment Standards.** The CPA also has *Employee or Self-Employed Payroll Best Practices Guidelines*, along with an interactive quiz to test employers on their knowledge.

As previously stated in the CPA's September 11, 2015 submission on the Changing Workplaces Review (see Addendum 1),

The client's responsibility is to remunerate the temporary agency for services rendered; the agency's responsibility is to pay their employees. The client should not be held responsible for both paying the agency under their contract for services, and to the worker if their employer did not satisfy the employment contract. This is the equivalent of making patrons of a restaurant jointly responsible for unpaid wages of the wait staff, cook, etc.

ELIMINATING MINISTRY APPROVAL FOR EXCESS HOURS AND OVERTIME AVERAGING

5.3.1 Hours of Work and Overtime Pay

The CPA recommends eliminating the requirement for Ministry approval for excess hours and overtime averaging since an employee written agreement is sufficient. This would decrease administrative burden on both the employer and the Ministry. Electronic employee agreements should be accepted in all cases.

BROAD DEFINITION OF WAGES

Ontario's broad definition of "wages" has unnecessarily complicated overtime, public holiday pay, and severance, as explained below.

5.3.1 HOURS OF WORK AND OVERTIME PAY

A more streamlined treatment should be obtained while still upholding employees' rights to 1.5 x their hourly rate (without the need for a blended overtime rate), uninterrupted earnings during vacations, and a regular day's pay for public holidays. (Ontario is the only province that requires a blended overtime rate when an employee has two different positions and rates of pay with the same employer. In other jurisdictions, the employee is entitled to overtime pay based on the rate of pay earned during the overtime period, regardless of any other rates earned within a different period.)

5.3.3.1 PUBLIC HOLIDAYS

Public holiday pay is equal to the total amount of regular wages earned and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20. The proper calculation of public holiday pay is a common problem for employers. It is often pointed to as an example of unnecessary complexity in the Act.

Before 2001, if an employee's work hours did not vary, the employee was paid a regular day's pay for the public holiday. There was a requirement to calculate public holiday pay only for employees whose daily hours of work varied. Since 2001, employers are required to perform public holiday pay calculations for every employee, even those whose work hours do not vary.

To return to the original purpose of the public holiday's standard, employees whose work week does not vary should be entitled to a regular day's pay. Other eligible employees should be entitled to holiday pay equal to an average day's wages paid (not earned) in the month prior to the holiday, calculated according to the employee's pay period. For example, a bi-weekly employee would be entitled to wages paid in the two previous pay periods divided by the number of days paid.

Alternatively, a straight payment of 3.7% of wages, as set out in Public Holiday Option 4 of the Interim Report, could provide a simplified option for employers, provided it remained optional.

The Guide should also clarify that an employee is not entitled to public holiday pay for a holiday that falls during a maternity leave since she would have not yet satisfied having worked the first scheduled day following the leave. A clear example in the Guide would save hundreds of inquiries received each year by the CPA's Payroll Infoline, and Employment Standards Branch.

5.3.8.2 SEVERANCE PAY

The Ministry should clarify that only Ontario payroll be included in the calculation of the \$2.5 million threshold.

5.4.3 PAY PERIODS

The Ministry should maintain the status quo that enables employers to establish a recurring pay period and pay date. Any changes to the structure of a pay period could create unnecessary administrative burdens such as the production of Records of Employment.

Online Interpretation Manual

The CPA recommends the Employment Standards Interpretation Manual be available online to enable employers to access explanations, clarifications and examples on how to be compliant with Ontario's Employment Standards.

About the Canadian Payroll Association

The CPA has been representing employers' payroll interests since 1978, through its core purpose of Payroll Compliance through Education and Advocacy and its values of Community, Professionalism and Authoritative Compliance Knowledge.

As the authoritative source of Canadian payroll compliance knowledge, the CPA influences the operational, compliance and technology policies and processes of 500,000 organizational payrolls through payroll service and software providers, hundreds of thousands of small, medium and large employers, as well as federal and provincial tax authorities. The CPA advocates on behalf of employers to federal and provincial governments, proactively influencing payroll-related legislation to enable all stakeholders to administer them in an efficient and effective manner.

Professional payroll administration is mission-critical because of the magnitude of the remuneration by employers and the breadth of the legislative compliance requirements.

Canada's 1.5 million employers count on payroll professionals to annually pay \$901 billion in wages and taxable benefits, \$305 billion in provincial and federal statutory remittances, and \$169 billion in health and retirement benefits, as well as produce 26 million T4s, 9 million T4As, and 7 million RL-1s - all while complying with over 200 regulatory requirements.

Addendum 1: September 11, 2015 Canadian Payroll Submission

Changing Workplaces Review

The Canadian Payroll Association congratulates the Ontario government for initiating consultations on the current *Labour Relations Act, 1995* and *Employment Standards Act, 2000*, (ESA) as this supports our goal of increasing the efficiency and effectiveness of payroll-related legislation, regulations and administration for all stakeholders: employers, employees and the government.

The Association actively participates in Ontario's Ministry of Labour Employer Stakeholder events and thanks the Ministry for accepting our most recent recommendation that employers be enabled to distribute the employment standards poster to employees electronically or in paper format. This decision not only reduces paper burden and costs for the Ministry of Labour, it also decreases administrative burden for employers and government. In today's changing workforce dynamics, it is less complex to send a copy of the poster to employees electronically.

When complexity decreases--compliance increases

In recommending changes to the two central pieces of legislation governing workplaces in Ontario, the goals of decreased complexity and increased compliance should be the guiding principle for Special Advisors coordinating this public consultation and providing the Minister of Labour with a final written report with recommendations. The objective should be more efficient and effective regulatory requirements for employers, employees and government.

With this objective in mind, we have prepared the following recommendations and comments to the consultation questions for the Changing Workplaces Review that impact employers and their payroll systems:

- Ontario should increase regulatory harmonization with other provinces/territories
- The accepted use of electronic documents and record-keeping should be clearly addressed
- Working agreements and vacation waivers should not require approval from the Director of Employment Standards
- Clarity must be given regarding placement agency workers
- The terms "supervisor" and "manager" require definition
- Minimum standards enforcement should be achieved by proactive employer education rather than the current reactive punitive approach
- Employers need to understand their compliance requirements
- More examples are required within the online Employment Standards Guide and related webpages

How has work changed for you?

Technology has enabled organizations to expand their activities across Canada and globally. This requires employer policies and payroll systems to address multi-jurisdictional requirements. Non-consistent payroll requirements across jurisdictions increase complexity for employers, payroll services providers and software developers.

Are changes needed to support employers in the modern economy?

Yes, changes are needed to support employers in the modern economy by harmonizing minimum standards and government should support more online electronic documentation.

- Greater harmonization of minimum standards with other provinces and territories is needed. Ontario's Ministry of Labour should take the lead on a Canada-wide initiative to identify the most efficient and effective legislation, regulations and administrative policies with a goal to harmonize a minimum of two standards per year. The Canadian Payroll Association has subject matter experts in all jurisdictions and is available to illustrate inconsistencies and identify areas that should be harmonized; for example, the calculation of public holiday pay. The complexity of the calculation of public holiday pay varies by jurisdiction, making it challenging for employers who operate in multiple jurisdictions. The long-term benefits of this initiative include more efficient and effective administration and implementation of regulatory requirements across Canada, and greater employer understanding and compliance.
- The accepted use of electronic documents and record-keeping in today's modern economy should be clearly addressed in the ESA and on the Ministry of Labour website for employment standards.

How could the ESA be simplified while remaining fair and comprehensive? Are there standards in the ESA that are too complex? If so, what are they and how could they be simplified?

Requiring approval from the Director of Employment Standards for workplace agreements increases complexity and red tape burden for employers, government and employees. The MOL should adopt the same administrative efficiencies that exist for mutual agreements between the employee and employer to substitute a public holiday, which do not require approval from the Director, for the following four types of agreements:

- working more than the maximum hours
- averaging hours
- compressed workweeks
- waiving of legislated vacation time (while keeping legislated vacation pay mandatory)

Are there specific employment relationships (e.g., agencies) that may require special attention in the ESA?

- It is still unclear how clients are jointly responsible for unpaid wages of placement agency workers, especially when workers do not report unpaid wages to the organization they are providing services for.

The client's responsibility is to remunerate the temporary agency for services rendered; the agency's responsibility is to pay their employees. The client should not be held responsible for both paying the agency under their contract for services, and to the worker if their employer did not satisfy the employment contract. This is the equivalent of making patrons of a restaurant jointly responsible for unpaid wages of the wait staff, cook, etc.

- The terms "supervisor" and "manager" require definition and clarity throughout the ESA and supporting MOL web pages.
- The MOL should provide guidance on how to differentiate between an employee and a contractor, similar to

Do the current enforcement provisions of the ESA work well? What problems, if any, exist with the current system? What changes, if any, should be made?

Minimum standards enforcement should be achieved by proactive employer education rather than the current reactive punitive approach. The Ministry of Labour should work more proactively with employers and key stakeholders, such as the Canadian Payroll Association and other industry/professional associations, rather than spending additional resources on audit blitzes.

The federal government's Underground Economy Reduction model, which utilizes associations to bring awareness and education to members, should be adopted rather than a strict punitive approach.

A more consistent approach from MOL auditors and inspectors is needed. For example, some auditors agree that an indication of pay period frequency and end date on the pay statement satisfies the requirement of illustrating the pay period for which the wages are being paid. Other auditors have issued the employer a non-compliance ticket even though the pay period start date can undeniably be determined with the pay frequency and end date.

Improved clarity within the Act, regulations and Employment Standards Guideline and website should reduce misinterpretation by auditors, inspectors and MOL staff responding to employer queries.

What changes could increase compliance?

Employers need to understand their regulatory requirements to be compliant. Confusion, however, often develops from conflicting court decisions. In *Paquette c. Quadraspec Inc.*, 2014 ONCS 2431, the Ontario Superior Court decided that previous court decisions to only recognize an employer's Ontario payroll, when determining whether they have a payroll of \$2.5 million or more, were incorrect. This suggests that employers may have to include their global payroll; however, this has not been clarified by Employment Standards.

The following require increased clarity within legislation, regulations and administrative policies:

- Clearly state if the \$2.5 million threshold for severance consideration includes an employer's payroll outside of Ontario.

- Clarify pay statement requirements regarding the pay period for which the wages are being paid.
- Define Termination Pay and Severance Pay in section 1 of the ESA to avoid confusion between the two.
- Clearly indicate, within the Act, when certain types of employees are exempt (for example, certain professionals may be exempt from overtime rules).
- Clarify when bonus or incentive payments form part of the public holiday calculation.
- Clearly illustrate how to calculate public holiday pay when the employee's shift straddles two calendar days.
- Create a Just Cause fact sheet, similar to one create by British Columbia's Employment Standards: <https://www.labour.gov.bc.ca/esb/facshts/justcaus.htm>.
- To avoid current confusion that this refers to the Canada Pension Plan, the following underlined clarifications should be added in the ESA guide under exemptions from severance pay: "...has his or her employment severed and retires on a full company registered pension plan recognizing all years of services."
- Clarity for Orders to Pay (whether the amount sent to the Director of Employment Standards is subject to Canada Pension Plan, Employment Insurance and income tax deductions, and if the amount is to be reported on the employee's T4).

Should all Ontario employees be provided with a number of job-protected sick days and personal emergency leave, and are there are other types of leaves that should be addressed?

If job-protected sick days or any additional job-protected leaves are legislated, these should be unpaid to keep both direct and indirect employer costs down. (Indirect costs would include payroll system implementation to track paid days off, carry-over provisions, etc.)

Are there any other issues related to this topic and changes that need to be addressed?

More examples are required within the online Employment Standards Guide and related webpages. For example, the public holiday pay examples provided in the Carswell Interpretation Manual provide much needed clarity; however, not all employers have access to this manual.

Last year, our Payroll Infoline answered over 40,000 inquiries from employers requiring clarification on legislation across Canada (10,500 related to employment/labour standards and half pertaining to Ontario). Payroll compliance through education and advocacy is our mission statement and the Canadian Payroll Association is pleased to continue working with Ontario's Ministry of Labour to ensure that any amendments to legislation, regulation or administrative policies are introduced with the greatest possible administrative efficiencies. Our subject matter experts are available to offer feedback on any proposed amendments to legislation, regulations, administrative policies, as well as the Employment Standards Guide, online calculators, website, or any other employer resource tools.