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## Community Legal Aid

October 14, 2016

### **Response and Recommendations to the Interim Report to the Changing Workplaces Review (CWR).**

Community Legal Aid (CLA) provides legal services to vulnerable members of the Windsor and Greater Essex County community. The writer is Review Counsel for the civil litigation practice of CLA. Our clinic represents clients in wrongful dismissal claims before the Small Claims Court. This review is based on observations made during the course of practice and primarily focuses on those recommendations that we have witnessed affecting our clients concerning the Employment Standards Act (ESA).

#### **EMPLOYMENT STANDARDS ACT**

##### **5.2.1 Definition of “Employee”**

The current definition has harmed various clients as a result of its misclassification by their employers. All too often, employees are misclassified as independent contractors in an effort to disenfranchise them of various rights under the Employment Standards Act (ESA).

##### **Recommendation:**

To pursue a combination of Options 3, 4 and 6. It is essential that active identification and documentation of misclassification is set out with the primary goal of enforcement. Furthermore, a system must be developed to record these violations, fine the violators and make this information publically accessible to prospective employees. The definition should be all inclusive, encompassing dependent contractors with the burden on the employer to disprove the presumption.

##### **5.2.2 Who is the Employer and Scope of Liability**

Currently Employers can thwart paying orders and the employee has to legal recourse to enforce this order against the assets of the employer.

##### **Recommendation:**

Option 6 should be invoked with the employee being able to attach their order to the employer's assets or to the assets of any closely related business.

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### **5.2.3 Exemptions, Special Rules, and General Process**

Current exemptions effectively segregate the most vulnerable members of the workplace. As an example students are often inexperienced in the workplace and unaware of their rights. Exemptions help establish distinguishing grounds for employment that may be misconstrued by new employee and subject them to future violations as a result of not understanding the distinctions set out in the exemptions.

#### **Recommendation:**

All exemptions should be reviewed and reassessed on a regular basis. Exemptions should not be utilized unless absolutely necessary and proven by current statistical analysis.

#### **5.2.4.1 Interns/Trainees**

Again, as stated in 5.2.3 exemptions should be very limited and used as a last means only after being substantiated by current statistical analysis deeming them necessary.

### **5.3.1 Hours of Work and Overtime Pay**

The current gap in the work week limits and overtime pay creates a grey area where violations for unpaid overtime often originate.

#### **Recommendation:**

Option 11 is the most viable way to address this issue. Requiring overtime pay at a 40 hour limit will help narrow this gap and leave little room for violations.

### **5.3.2 Scheduling**

Most of our student employees or part-time employees rely greatly on shift work. Employers often amend and reedit shift schedules making it more difficult for these employees to maintain a steady budget and gain financial stability.

#### **Recommendation:**

Employers should be mandated to provide at least 3 days' notice of final shift changes. Shift schedules should be provided well in advance with a minimum of at least two weeks' notice. Shifts should be no less than 4 hours and any cancellation after the notice period should result in the employee being paid ½ regular pay of that shift.

Most of these employees work around several jobs, school or family obligations (child care) as such there should be no limit on the number of times that an employee can request a shift change. Employers should be provided with proper notice of the shift change.

In accepting a job the employee needs to budget for their anticipated income. As such, employers should be mandated to present a minimum guaranteed number of shifts. This shall serve as the baseline from which an employee can arrange their other obligations with the goal of maintaining employment and financial security.

### **5.3.3.1 Holiday Pay**

Employees have expressed a concern on working holidays. There is, in many cases, a silent pressure on the employee to accept the work or suffer reprimand.

#### **Recommendation:**

The Ministry should take positive steps to enforce the public holiday requirements by stepping up inspections and issuing violations.

### **5.3.5 Paid Sick Days**

Sick employees attending work is counterproductive to the workplace. Employers benefit from a healthy work force and employees are more productive when they are healthy.

#### **Recommendation:**

There should be a minimum of 8 paid sick days. After those 8 days are exhausted an employee can begin to accumulate additional sick days at a rate of 1 day per 30 days worked to a maximum 5 additional days per year.

### **5.3.7 Part-Time and Temporary Work – Wages and Benefits**

Employees on contract often find themselves in long term employment relationships without the benefits designated to employees based on length of service.

#### **Recommendation:**

Option 3 is the proper approach to resolving this problem. Employers should be required to offer the same benefits to all employees carrying out the same type of work. This will lead to a more cohesive workforce.

Option 5 properly addresses the need to limit the number of term contracts and their duration. Consideration should be given to mandating that after a maximum number of term contracts or capped length continuity of employment will be applied to the employee's length of service despite the used of separate contracts. If the employer elects to terminate the employee after the maximum allotted number of contracts or length of term than proper notice and just cause should be applied to the entire duration of the employee's service irrespective of the number of contracts.

### **5.3.8.1 Termination, Severance, and Just Cause**

Our clients often elect pursuing their former employers under the common law in Small Claims Court because the damages awarded are often higher than those provided for in the ESA. The common law takes into consideration several factors that are live to the issues of the particular employee and current job market.

#### Recommendations:

Options 2, 3 and 4 can properly address these issues by doing away with the 3 month eligibility to receiving two weeks' notice and recognizing the employee's full length of employment.

### **5.3.8.2 Severance Pay**

When an employee is terminated the length of the service is indicative of their commitment to that former employer and at times is a hindrance to their reentry into the work force. Severance pay acknowledges this reality by providing the employee with compensation for their loyalty and commitment. The current legislation thresholds fail to equally acknowledge this commitment and loyalty but looking to the employers stature.

#### Recommendation:

Options 2-5 can address this issue by eliminating the payroll threshold, the five year condition for entitlement and a cap on the entitlements. The common law considers an employee's entire length of service without said cap and the legislation to mimic this stand

### **5.3.8.3 Just Cause**

The current status quo does not address the grave burden placed on temporary foreign workers in particular. It fails to acknowledge the reality of the pressures that these particular employees suffer including strict time constraints and terms of employment that affect their legal status in the country.

#### Recommendations:

Options 2 and 3 properly acknowledge the challenges faced by employees under the currency status quo and address the need to expedite the hearing of just cause cases to protect the right of temporary foreign workers to have their matter properly addressed before the courts bolstering their access to justice.

### **5.3.9 Temporary Help Agencies**

One of the causes of delay in having a violation or issue addressed is the constant shuffle that an employee at times endures in ascertaining whether the agency or the employer

client holds the liability or responsibility. This particular contractual relationship causes confusion to the employee which at times affects the enforcement of their legal rights.

Recommendation:

Option 2 best addresses this dilemma but should be expanded to encompass joint liability for all violations and clearly delineating the employer of record.

**5.4.1. Greater Right or Benefit**

Our clients repeatedly express a pressure to sign terms of employment without properly reviewing them. amongst these terms at times is an attempt to thwart the ESA requirements. This pressure increases as the job market becomes more precarious.

Option 1 is the only option that will protect against this pressure. Parties should not be able to contract out of the ESA. These are minimum standards that should be recognized by all parties. Any tampering with this requirement will dilute access to justice by creating a vast expanse of questionable events that require interpretation as to the will and understanding of the parties.

**5.4.3 Pay Periods**

Pay periods should be regular and align with work weeks so that they are easily understood and the employee can properly arrange their finances.

**5.5.2 Education and Awareness Programs**

All new corporations should be mandated to attend online course or seminars on the ESA prior to being licensed.

The ministry should enact education programs to be presented at high schools, and other upper year learning institutes. Particular emphasis should be given to temporary foreign workers.

**5.5.3 Creating a Culture of Compliance**

The unfortunate reality is that violations are not aggressively enforced so employers may consider them as a typical cost of business rather than attempt to comply with the ESA.

Recommendation:

The options presented do not address the need to publish violations and enforce strict compliance with the act. Law suits are addressed with more seriousness by employers because of the publication of the claim and the various options to enforce judgment. ESA violations must mimic this. Internal audits are prone to bias and difficult to standardize. Employees are exposed to a higher potential of reprisal in an internal system. The onus should remain on the ministry to ensure strict compliance with the act. The previous

recommendation made to maintain and publish records of violations is methods by which enforcement can be increased.

#### **5.5.4 Reducing Barrier to Making Claims**

Clients often do not appreciate the importance of properly documenting events and providing proper notices to employers about particular concerns. The work environment at times does not allow for the employee to freely express their concern.

##### **Recommendation:**

The ESA should allow for an employee to submit an anonymous complaint directly to the ministry with a reasonable explanation as to why the employer was not first approached. The complaint format should be simplified to ensure that those who lack the literacy and language skill can properly have their rights enforced. Options 2, 3 and 5 address these issues.

#### **5.5.4.2 Reprisals**

The environment of fear in the workforce must be done away with. These environments stem of intimidation by the employer in the form of the threat of reprisal or lack of education on the part of the employee.

##### **Recommendation:**

Option 2 addresses this live issue. Employees should be better educated by having access to decisions and employers can avoid such claims by reviewing decisions against reprisals.

#### **5.5.5.1 Inspections, Resources, and Implications of Changing Workplaces for Traditional Enforcement Approaches**

Inspections should be reflective of the current workplace environment. Advance notice of the inspections does away with this necessary aspect. The veracity of a complaint can be properly ascertained by acquiring firsthand current knowledge of the workplace. The seriousness of the violation can be reflected in the set amount of the fine and its enforcements.

##### **Recommendation:**

Options 2-4 address this issue. Misclassification should be included in inspections and the ministry should no longer provide advance notice of the inspection. Focus should be given to the most vulnerable employees being common areas of employment for temporary foreign workers, and young or first time employees. Violations should be met with strict fines that are easily enforced against the employer including the denial of the renewal of particular government issued licenses until all fines are paid.

### **5.5.5.2 Use of Settlements**

The individual financial situation of an employee can cause undue pressure on them to pursue a quick settlement although it may not be the proper one.

Options 2 and 3 address this issue. Employers should be mandated to provide a capped amount to employees to cover their legal fees to review a settlement prior to execution. Alternatively the ministry should provide legal support to employees reviewing settlements prior to execution. Again education on the minimum entitlements under the ESA will go a long way to assisting employees in ascertaining whether they are receiving a proper settlement.

### **5.5.5.3 Remedies and Penalties**

Remedies currently offered under the ESA and effectively unenforceable against certain employers. This reality numbs compliance to the Act and facilitates the recurrence of violations.

#### **Recommendations:**

Options 1 and 8 are rejected. The use of the remaining options will assist with the need to strengthen the deterrence of violations. Violations should be publically recorded; recurrent violators should have a graduated fine scale applied to their repeat violations. Enforcement should be conducted by Part III prosecutions and fines should be increased. Bad behavior should not be ignored or rewarded in the form of procurement contracts.

### **CONCLUSION**

This submission highlights the options presented by the Advisors that will best serve the most vulnerable employees disadvantaged by the status quo of certain aspects of the ESA. Primary focus should be on the enforcement of violations and strengthening compliance with the Act. If successful this will serve to strengthen a productive workforce and decrease the burden on the justice system and ministry in addressing the current recurring violations of the Act.

Yours truly,

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per: 

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