ONTARIO HOSPITAL ASSOCIATION

200 Front Street West, Ste. 2800
Toronto, ON M5V 3L1
Tel: 416 205 1300
Fax: 416 205 1301
www.oha.com

Ontario Hospital Association

Response to the Changing Workplaces Review Interim Report

Changing Workplaces Review, Employment Labour & Corporate Policy Branch
Ministry of Labour
400 University Ave., 12th Floor Toronto,
ON, M7A 1T7
Fax: 416-326-7650

October 14, 2016

ONTARIO HOSPITAL ASSOCIATION

The Ontario Hospital Association (OHA), on behalf of its members, welcomes the opportunity to provide additional comments in response to the Changing Workplaces Review Interim Report. The OHA continues to advocate for the recommendations it made in its initial submission in September 2015 and wish to acknowledge the inclusion of two of those recommendations in the Interim Report. First, the OHA recommended a mechanism to consolidate bargaining units, which is found in section 4.3.4 of the Interim Report. Second, the OHA recommended changes to the greater right or benefit provision of the *Employment Standards Act, 2000*, which is found in section 5.4.1 of the Interim Report.

The OHA wishes to reiterate two comments made in its initial submission. These comments guided the OHA's initial recommendations to the Changing Workplaces Review and its response to the Interim Report.

First, Ontario hospitals are driven to provide competitive total compensation packages for all employees that far exceed what is provided in the *Employment Standards Act, 2000*. Employee compensation is tied to the recognition of the vital work of hospital employees, and the fact that hospital employees have skills and qualifications that are in demand in the labour market generally.

Second, Ontario hospitals have significant union density, at approximately 69%. Union coverage is not concentrated amongst particular employee groups. Rather it extends throughout the entirety of each hospital's organization. The centerpieces of hospital labour relations are the six central collective agreements between the Participating Hospitals and ONA, OPSEU, SEIU, CUPE, Unifor, and PIPSC. While there are over 1000 collective agreements in force across Ontario hospitals, these six collective agreements tend to provide the benchmark for terms and conditions of employment for both unionized and non-unionized employees.

Below are the OHA's recommendations in response to the recommendations in the Interim Report. We will organize our recommendations using the same numbering as found as the Interim Report.

ONTARIO HOSPITAL ASSOCIATION

Labour Relations Act, 1995

4.3.1.1. Card-based Certification

Interim Report Options:

1. Maintain the status quo.
2. Return to the card-based system in place from 1950 to 1993, possibly adjusting thresholds (e.g., to 65% from 55%).
3. Return to the Bill 40 and current construction industry model.
4. Permit some form of electronic membership evidence.

OHA Recommendations:

Maintain the status quo. Or, in the alternative, if card-based certification is introduced, then safeguards must be in place to ensure that employees who signed cards still support the union

The Interim Report notes that vote-based certification methods "are associated with statistically significant reduction in certification application activity, including success rate". The OHA notes that certification activity continues in Ontario hospitals and we are aware that certification applications at Ontario hospitals are generally successful. In the last 4.5 years there have been 31 successful certification drives at Ontario hospitals. These drives have occurred across the province, from the smallest to the largest hospitals. This represented about a 4% increase in the number of bargaining units in Ontario hospitals. This is a significant rate of growth considering that approximately 69% of all Ontario hospital employees, including those excluded from the *Labour Relations Act*, are unionized.

Even though Ontario hospitals are large organizations, which can be spread out over multiple sites, it is not clear that the present vote based certification method poses particular difficulties for unions wishing to represent hospital employees. The experience in the hospital sector suggests that card based certification is unnecessary to achieve bargaining rights, and therefore the OHA recommends that the status quo be maintained.

In the alternative, If a card-based certification model is introduced, then it must be accompanied by a method that ensures that an employee who signed a card is still in support of certification once a certification application is filed. The "Terminal Date" approach discussed in the Interim Report is appropriate. Or, alternatively, a simple review of cards signed prior to a particular date could occur in order to ensure that the employee remains in support of the union.

ONTARIO HOSPITAL ASSOCIATION

4.3.1.3. Access to Employee Lists

Interim Report Options:

1. Maintain the status quo.
2. Subject to certain thresholds or triggers, provide a union with access to employee lists with or without contact information (the use of the lists could be subject to rules, conditions and limitations. A right to access employee lists could also be provided with respect to applications for decertification.

OHA Recommendations:
Maintain the status quo.

Similar to card-based certification, unions have argued that a lack of access to employee lists prior to filing an application for certification inhibits unionization efforts. This is also acknowledged in the Interim Report. The Interim Report noted that this is a particular problem in large organizations, which are geographically spread out, with staggered shifts.

Introducing new rules which would mandate that employers are to give unions employee lists prior to filing an application for certification, and that the lists would include contact information, would be a significant departure from the norm in Canada. In fact, giving unions employee contact information prior to filing the application for certification would appear to be unique in all jurisdictions with *Wagner*-based labour relations regimes.

The OHA submits that there must be a demonstrated pressing need to alter the current regime regarding the provision of employee information. Further, this pressing need must outweigh the detriments to such a proposed plan.

While unions argued that they are facing difficulties in certifying large organizations without employee lists, this is not apparent in the hospital sector in Ontario. As noted above, some of Ontario's hospitals are large, and in some cases are spread out over large geographic areas. Also, given the fact that they are 24/7 operations, staggered shifts are the norm rather than the exception. Despite these facts, union density is significant across the sector, with no obvious disparity between large and small hospitals, or between multi-site and single site hospitals. The experience in the hospital sector does not speak to a pressing need for changes to the rules regarding the provision of employee lists.

More importantly, the OHA is concerned that the provision of an employee list at some point before it is absolutely necessary would be a significant intrusion into employee privacy, specifically if the lists included employee contact information.

The current regime provides the appropriate balance between the desire for an effective certification process and individual privacy interests. Until a union becomes the legal representative of an employee, we would suggest that the provision of personal information about individual employees is inappropriate.

4.3.1.4 – Off-site, Telephone, and Internet Voting

Interim Report Options:

1. Maintain the status quo.
2. Explicitly provide for alternative voting procedures outside the workplace and/or greater use of off-site, telephone and internet voting

OHA Recommendations:

With regards to off-site voting, maintain the status quo. Or, in the alternative, unions must demonstrate a real concern with voting on the employer's premises

With regards to telephone and internet voting, no recommendations are made.

While the OHA is sensitive to the administrative difficulties in arranging a vote, we believe that the implementation of off-site voting would only serve to create additional challenges. For example, some hospitals are multi-site, across a significant geographic area. For these hospitals, off-site voting would mean securing a number of voting locations, with a potential cost attached to each one. If there are concerns about voting on the employer's premises, this can be dealt with through an assessment of voting locations on the premises. If the advisors determine that off-site voting is necessary, then off-site voting should only occur when the union can demonstrate a real concern with voting on the employer's premises.

The OHA has no issues with the recommendations regarding telephone and internet voting.

ONTARIO HOSPITAL ASSOCIATION

4.3.4 – Consolidation of Bargaining Units

Interim Report Options:

1. Maintain the status quo.
2. Reintroduce a consolidation provision from the previous LRA where only one union is involved.
3. Introduce a consolidation provision with a narrow test (e.g., allowing it only in cases where the existing bargaining unit structure has been demonstrated to be no longer appropriate).
4. Introduce a consolidation provision with a test that is less restrictive than proving that the existing bargaining unit is no longer appropriate. This provision could be broad enough to allow for the federal labour relations board's previous practice under the Canada Labour Code, as it was prior to the incorporation of the amendments recommended by the Sims Task Force in Chapter 6 of "Seeking a Balance: Canada Labour Code, Part I" with respect to bargaining unit reviews.
5. Amend section 114 of the LRA to provide the OLRB with the explicit general power to alter a bargaining unit in a certificate or in a collective agreement.

OHA Recommendations:
Introduce a consolidation provision with a narrow test (e.g. allowing it only in cases where the existing bargaining unit structure has been demonstrated to be no longer appropriate).

In the OHA's initial submission we recommended that a process be created which would allow for change to the composition of bargaining units absent any particular trigger event. This process would be used in circumstances where it is demonstrated that bargaining unit structures do not reflect current workplace realities, impedes operational flexibility and innovation, and/or has a significant detrimental effect on labour relations. To be clear, this should include instances where the affected bargaining units are represented by different unions. The OHA recognizes the concerns over employee choice but we believe that safeguards can be built into the process to ensure that those concerns are outweighed by the demonstrated labour relations difficulties.

A concrete example of the difficulties which can occur due to outdated bargaining unit structures is the current separation of Registered Nurses (RNs) and Registered Practical Nurses (RPNs) into separate bargaining units in most hospitals. As mentioned in the OHA's initial submission, changes in the regulatory regime governing health care providers has led to increasing overlap between RNs and RPNs. The ultimate goal is that these professionals work collaboratively as part of an inter-professional team.

However, because RNs and RPNs are generally represented by different unions, attempts to move to the collaborative team model have been met with significant resistance by unions who are concerned about bargaining unit integrity. The OHA believes that concerns over bargaining unit integrity should not trump innovations in health care delivery designed to improve patient outcomes.

The transfer of work between RNs and RPNs, pursuant to the regulatory regime governing those professionals, has been a very contentious part of collective bargaining with the Ontario Nurses Association ("ONA") which represents RNs but not, as a general rule, RPNs. It was one of ONA's key priorities in the most recent round of collective bargaining. This is evident in communications sent out by ONA during the collective bargaining process.

For example, in its update dated March 31, 2016, which was after the interest arbitration hearing to settle the renewal central collective agreement, the bargaining committee chair for ONA wrote: "Job security was the most contentious of the issues addressed at the hearing. We argued that the recent raft of RN layoffs, which has seen RPNs parachuted into our jobs, was sufficient "demonstrated need" for contract language that would protect our jobs and stop the bleeding of the RN workforce and the drop in quality patient care. We referred to language in nursing contracts in Alberta and Saskatchewan that maintain current RN staffing levels. We must have the same type of language in Ontario" [emphasis added]. From the OHA's perspective, ONA was not willing to accept any deal that did not include protections against the movement of work from RNs to RPNs. In other words, the current bargaining unit structures have led directly to significant difficulties in achieving negotiated settlements with ONA.

This point was recognized in the interest arbitration award between the Participating Hospitals and ONA dated September 7, 2016. In the award the chair of the board, Christopher Albertyn, wrote the following:

"The Union is faced with a historical circumstance that is not to its advantage. Following the Report of the Johnson [sic] Hospital Inquiry Commission in 1974, the current structure of hospital bargaining units was established. At that time the role of nursing assistants was very different from the role now played by RPNs within the health care system. The scope of practice of RPNs has expanded significantly over the years since the 1970s and they now have considerable community of interest with RNs. The problem, though, is that they are in separate bargaining units from the RNs. This reality appears to be creating labour relations problems for some hospitals, for ONA, and for the unions representing RPNs. There is no easy solution, so the Union has understandably reacted to it by seeking greater enforcement of the protections it has to its bargaining unit work, and by seeking to extend and improve these protections" [emphasis added].

4.6.1. Broader-based Bargaining Structures

Interim Report options:

1. Maintain the status quo.
2. Adopt a model that allows for certain standards to be negotiated and is then extended to all workplaces within a sector and within a particular geographic region, etc. This could be some form of the ISA model or variations on this approach that have been proposed in a very detailed way (as discussed above).
3. Adopt a model that would allow for certification of a unit or units of franchise operations of a single parent franchisor with accompanying franchisees; units could be initially single sites with accretions so that subsequent sites could be brought under the initial agreement automatically, or by some other mechanism.
4. Adopt a model that would allow for certification at a sectoral level, defined by industry and geography, and for the negotiation of a single multi-employer master agreement, allowing newly organized sites to attach to the sectoral agreement so that, over time, collective bargaining could expand within the sector, along the lines of the model proposed in British Columbia.
5. Adopt a model that would allow for multi-employer certification and bargaining in an entire appropriate sector and geographic area, as defined by the OLRB (e.g., all hotels in Windsor or all fast-food restaurants in North Bay). The model would be a master collective agreement that applied to each employer's separate place of business, like the British Columbia proposal, but organizing, voting, and bargaining would take place on a sectoral, multi-employer basis. Like the British Columbia proposal, this might perhaps apply only in industries where unionization has been historically difficult, for whatever reason, or where there are a large number of locations or a large number of small employers, and, perhaps only with the consent of the OLRB.
6. Create an accreditation model that would allow for employer bargaining agencies in sectors and geographic areas defined by the OLRB (e.g., in industries like hospitals, grocery stores, hotels, or nursing homes), either province-wide, if appropriate, or in smaller geographic areas. This model is intended for industries where unionization is now more widespread, but bargaining is fragmented. Employers could compel a union to bargain a master collective agreement on a sectoral basis through an employers' organization, and be certified by an accreditation-type of model, similar to the construction industry accreditation model. This might be desirable for employers in industries where unions decline to bargain on a sectoral basis, and where the union could otherwise take advantage of its size, vis-à-vis smaller or fragmented employers, to "whipsaw" and "leapfrog."

7. Create specific and unique models of bargaining for specific industries where the Wagner Act model is unlikely to be effective or appropriate because of the structure or history of the industry, (e.g., home care, domestic, agriculture, or horticulture workers, if these industries were included in the LRA).
8. Create a model of bargaining for freelancers, and/or dependent contractors, and/or artists based on the Status of the Artist Act model.
9. Apply the provisions of the LRA to the media industry as special provisions affecting artists and performers.

OHA Recommendations:

The OHA does not support any of the above options. The OHA recommends a legislative mechanism which would create trade union councils within the current framework of central collective bargaining in the Ontario hospital sector.

The OHA notes that the Interim Report appears to address two overarching issues within its recommendations regarding the creation of broader-based bargaining structures. The first is to counter the supposed lack of union representation by creating a model of collective bargaining that makes organizing small, individual parts of a larger organization or sector more effective. The second issue is to rationalize bargaining within a sector to avoid distortions and inefficiencies caused one employer/one union bargaining. Much of the discussion in the Interim Report is directed towards the first issue, while the OHA's priority is addressing the latter. As noted above, union representation amongst Ontario hospitals is already significant and continues to grow. The difficulty therefore is rationalizing the collective bargaining in the province when similarly situated employees are represented by numerous bargaining agents. This ultimately results in an inefficient bargaining process.

We do not believe that any of the proposed options noted above address the concerns described by the OHA in its initial submission. While option 6 speaks to issues of fragmented bargaining, its focus is on bringing employers together into accredited employer bargaining agencies and not the creation of trade union councils. The fragmentation problem in the hospital sector is not the same as the noted issues in the construction sector, as the fragmentation exists on the union side in the hospital sector.

Generally, in the hospital sector, there are a number of unions who hold representation rights of employee groups at a small number of hospitals, such as Teamsters or United Steelworkers. While these bargaining units are akin to the bargaining units which participate in central bargaining, there are not enough bargaining units to justify central bargaining.

The OHA recommends legislative changes which would allow the creation of trade union councils which would bring these unions together with the larger hospital unions to negotiate central collective agreements. These collective agreements would apply to all unionized hospital employees within a particular group, i.e. nurses, service, paramedical. This model has been implemented in the hospital sector in Nova Scotia.

Further, while the *School Board Collective Bargaining Act* envisions central collective bargaining between an employer bargaining agency and a single union, it does give the Minister the power to designate a council of trade unions as an employee bargaining agency at central bargaining.[1] The OHA is aware that several trade union councils were established in the last round of collective bargaining.

The creation of trade union councils within the Ontario hospital sector is not a new idea. This was one of the recommendations of the Johnston Commission in 1974, which was struck to examine wages, salaries, and other benefits of hospital employees in Ontario. The Commission recommended that unions be allowed a period of time to voluntarily form trade union councils, but that if they failed to do so then the councils should be legislated into existence. As the unions have not yet moved to voluntarily form trade union councils, the OHA believes that a legislative framework to accomplish this goal is necessary.

Employment Standards Act, 2000

5.2.2 Who is the Employer and Scope of Liability

Interim Report options:

1. Maintain the status quo.
2. Hold employers and/or contractors responsible for compliance with employment standards legislation of their contractors or subcontractors, requiring them to insert contractual clauses requiring compliance. This could apply in all industries or in certain industries only, such as industries where vulnerable employees and precarious work are commonplace.
3. Create a joint employer test akin to the policy developed by the DOL in the US as outlined above.
4. Make franchisors liable for the employment standards violations of their franchisees:
    1. in all circumstances;
    2. where the franchisor takes an active role;
    3. in certain industries; or

[1] Subsection 20(3)

4. in no circumstances.

5. Repeal the "intent or effect" requirement in section 4 (the "related employer" provision).
6. Enact a remedy similar in principle to the oppression remedy set out in the OBCA, but make it applicable to employment standards violations. It would apply when companies are insolvent or when assets are unavailable from one company to satisfy penalties and orders made under the Act, and the principal or related persons set up a second company or business, or have transferred assets to a third or related person. (Section 248(2) of the OBCA defines oppression as an act or omission which effects or threatens to effect a result which is oppressive, unfairly prejudicial or unfairly disregards the interests of, among others, a creditor or security holder of a corporation. Bad faith could or could not be an element of the activity complained of. Under the OBCA a court has broad remedial authority to take action it seems fit when it finds an action is oppressive, or unfairly prejudicial or unfairly disregards the interests of a creditor. This remedy could be sought in court or before the OLRB).
7. Introduce a provision that would allow the Ministry of Labour to place a lien on goods that were produced in contravention of the ESA.
8. Encourage best practices for ensuring compliance by subordinate employers through government leading by example.

OHA Recommendations:

With regards to options related to joint liability, maintain status quo. In the alternative joint and vicarious liability will only exist in industries where vulnerable employees and precarious work are commonplace.

With regards to other options, no recommendations are made.

Hospitals have looked to contract out vital, but peripheral, services that can be fulfilled by specialized organizations at a lower cost. For example, hospitals have contracted out laundry services, food services, and sterilization of equipment in order to achieve economies of scale. This activity should be encouraged, as it allows hospitals to reinvest in core, front-line staff and equipment.

Since the services that are contracted out are vital to the operation of a hospital, hospitals take the time to ensure that they contract with reputable organizations with the capacity to meet their high standards. As part of this, hospitals expect that the companies they contract with will comply with all relevant legislation, including employment related legislation.

In the Interim Report the argument for joint liability between employers and contractors is based on an argument that employers use contracting out arrangements in an attempt to avoid employment standard obligations and/or shield an employer from liability for breaches on employment standard obligations. The OHA submits that Ontario hospitals do not enter into contracts for services for these reasons. The OHA further notes that in its review of the submissions from employee groups, there is no suggestion that contracting out by hospitals has led to increases in employment standards violations in the sector.

However, despite the care taken by hospitals, they are not able to control the employment practices of other companies. In such circumstances, the failure of a contractor to properly implement employment standards should not result in hospitals becoming liable.

If the advisors decide to recommend that the *Employment Standards Act, 2000* be amended to create joint or vicarious liability between employers and contractors then this should only be implemented in industries where there are demonstrated concerns over the use of such relationships to avoid employment standards obligations.

5.3.9 Temporary Help Agencies

Interim Report options:

1. Maintain the status quo.
2. Expand client responsibility:
    1. expand joint and several liability to clients for all violations – e.g., termination and severance, and non-monetary violations (e.g., hours of work or leaves of absence);
    2. make the client the employer of record for some or all employment standards (i.e., client, agency, or make both the client and the THA joint employers).
3. Same wages for same/similar work:
    1. provide the same pay to an assignment worker who performs substantially similar work to workers directly employed by the client unless:
        i. there are objective factors which independently justify the differential; or
        ii. the agency pays the worker in between assignments as in the EU; or
        iii. there is a collective agreement exception, as in the EU; or
        iv. the different treatment is for a limited period of time, as in the UK (for example, 3 months).
4. Regarding mark-up (i.e., the difference between what the client company pays for the assignment worker and the wage the agency pays the assignment worker):

1. require disclosure of mark-up to assignment worker;
2. limit the amount of the mark-up.

5. Reduce barriers to clients directly hiring employees by changing fees agencies can charge clients:
   1. reduce period (e.g., from 6 to 3 months);
   2. eliminate agency ability to charge fee to clients for direct hire.
6. Limit how much clients may use assignment workers (e.g., establish a cap of 20% on the proportion of client's workforce that can be agency workers).
7. Promote transition to direct employment with client:
   1. establish limits or caps on the length of placement at a client (i.e., restrict length of time assignment workers may be assigned to one particular client to 3, 6, or 12 months, for example);
   2. deem assignment workers to be permanent employee of the client after a set amount of time or require clients to consider directly hiring assignment worker after a set amount of time;
   3. require that assignment workers be notified of all permanent jobs in the client's operation and advised how to apply; mandate consideration of applications from these workers by the client.
8. Expand Termination and Severance pay provisions to (individual) assignments:
   1. require that agencies compensate assignment workers termination and/or severance pay (as owed) based on individual assignment length versus the duration of employment with agency (as is currently done). For example, if an assignment ends prematurely and without adequate notice provided but has been continuous for over 3 months or more, the assignment worker would be owed termination pay;
   2. require that clients compensate assignment workers termination and/or severance pay (as owed) based on the length of assignment with that client. Assignment workers would continue to be eligible for separate termination and severance if their relationship with agency is terminated.
9. License THAs or legislate new standards of conduct (i.e., code of ethics for THAs).

OHA recommendations:
Maintain status quo.

The impetus for the recommendations found in the Interim Report appears to be from the argument from employee groups that assignment, or agency, workers are "fundamentally vulnerable".

Ontario hospitals will contract with temporary help agencies in order to have access to pools of Registered Nurses, who can cover gaps in schedules on an ad hoc basis which cannot be covered internally. In those hospitals where the nurses are unionized, the ONA central collective agreement significantly restricts the use of agency nurses to ensure that they do not become a contingent workforce. Without agency nurses, hospitals would be required to overstaff their operations in order to handle short term, unplanned, surges in patient population. This will only serve to increase labour costs and make hospital operations less efficient.

In contrast to the arguments raised in the submissions of employee groups, agency nurses are not "fundamentally vulnerable". They hold the same qualifications as nurse employees. They command the same, or similar, terms and conditions of employment from agencies as compared to health care organizations since each agency needs to compete with these organizations for labour. There has been no suggestion, and no evidence, that agency nurses are being exploited or are used in a way to avoid employment regulations.

5.3 Standards

Generally, the OHA does not support recommendations to introduce new minimum standards into the *Employment Standards Act, 2000*. The reason for this position was set out in our initial submission to the Changing Workplaces Review where we wrote:

> The terms and conditions of employment, whether established through collective bargaining or in order to attract high quality candidates to non-union positions, are crafted in consideration of the specific needs of hospital operations. Hospitals generally operate 24 hours a day and a significant part of the workforce are required to work a variety of shifts to cover the needs of patient care throughout a 24 hour period. As such, the process of crafting terms and conditions of employment to meet these needs creates a specific balance between the employees' interests and the needs of hospital operations. This is distinct from the *ESA* which presents, at its base, a "one size fits all" model for terms and conditions of employment.
>
> The terms and conditions of employment in hospitals have been developed, through negotiations and trade-offs between sophisticated parties, to be responsive to the needs of both the employees and hospitals. The OHA is concerned that amendments to the *ESA* may disrupt this balance and further increase labour

costs which already represent approximately 68% of total hospital expenses. When the *ESA* is amended to provide a new benefit, it could result in a situation where the compensation and benefits package provided by hospitals, while remaining generous on the whole, no longer reflects the specific requirements of the Act.

5.3.1 Hours of Work and Overtime Pay and 5.3.2 Scheduling

Interim Report options:

Hours of Work and Overtime Pay:

1. Maintain status quo.
2. Eliminate the requirement for employee written consent to work longer than the daily or weekly maximums but spell out in the legislation the specific circumstances in which excess daily hours can be refused.
   For example, in *Fairness at Work*, Professor Arthurs effectively recommended that employers should be able to require employees to work, without consent, up to 12 hours a day or 48 in a week (with exceptions where they could be required to work even longer) but that there should be an absolute right to refuse where: the employee has unavoidable and significant family-related commitments; scheduled educational commitments or a scheduling conflict with other employment (part-time workers only). This change would mean employers could require employees to work excess daily hours without consent as set out above.
3. Maintain the status quo employee consent requirement, but:
   1. in industries or businesses where excess hours are required to meet production needs as, for example, in the case of "just-in-time" operations, the need for individual consent would be replaced by collective secret ballot consent of a majority of all those required to work excess hours; and
   2. employees required to work excess hours as a result of (a), would still have a right to refuse if the employee has unavoidable and significant family-related commitments; scheduled educational commitments or a scheduling conflict with other employment (part-time workers only); or protected grounds under the Human Rights Code such as disability. This "right to refuse" would also apply to unionized employees.
4. The same as option 3, except that instead of a blanket legislative provision as in (3a), where a sector finds it difficult to comply with the daily hours provisions, exemptions could be contemplated in a new exemption process, the possibility of which is canvassed in section 5.2.3.

5. Eliminate daily maximum hours, but maintain the daily rest period requirement of 11 hours, and the weekly maximum hours of work of 48.
6. Eliminate or decrease the daily rest period below 11 hours which would effectively increase the potential length of the working day above 12 hours.
7. Enact a legislative provision similar to one in British Columbia that no one, including those who have a formal exemption from the hours of work provisions, can be required to work so many hours that their health is endangered.[159]
8. Codify that employee written agreements can be electronic for excess hours of work approvals and overtime averaging.
9. Eliminate requirement for Ministry approval for excess hours (i.e., only above 48 hours in a week). Maintain requirement for employee written agreement.
10. Eliminate requirement for Ministry approval for excess weekly hours between 48 and 60 hours. Maintain requirement for Ministry approval for excess hours beyond 60 hours only. Maintain requirement for employee written agreement.
11. Reduce weekly overtime pay trigger from 44 to 40 hours.
12. Limit overtime averaging agreements – impose a cap on overtime averaging (e.g., allow averaging for up to a 2- or 4-week or some other multi-week period). Maintain requirement for employee written agreement. Ministry approval could (or could not) be required.

Scheduling:

1. Maintain the status quo.
2. Expand or amend existing reporting pay rights in ESA:
    1. increase minimum hours of reporting pay from current 3 hours at minimum wage to 3 hours at regular pay;
    2. increase minimum hours of reporting pay from 3 hours at minimum wage to 4 hours at regular pay; or
    3. increase minimum hours of reporting pay from 3 hours at minimum wage to lesser of 3 or 4 hours at regular rate or length of cancelled shift.
3. Provide employees job-protected right to request changes to schedule at certain intervals, for example, twice per year. The employer would be required to consider such requests.
4. Require all employers to provide advance notice in setting and changing work schedules to make them more predictable (e.g., San Francisco Retail Workers Bill of Rights). This may include (but is not limited) to:
    - require employers to post employee schedules in advance (e.g., at least 2

weeks);

- require employers to pay employees more for last-minute changes to employees' schedules (e.g., employees receive the equivalent of 1 hour's pay if the schedule is changed with less than 2 days' notice and 4 hours' pay for schedule changes made with less than 24 hours' notice);
- require employers to offer additional hours of work to existing part-time employees before hiring new employees;
- require employers to provide part-timers and full-timers equal access to scheduling and time-off requests;
- require employers to get consent from workers in order to add hours or shifts after the initial schedule is posted.

5. Sectoral regulation of scheduling

OHA Recommendation:

Hours of Work:
Maintain status quo.

Scheduling:
Maintain status quo.

With regard to hours of work, overtime, and scheduling, the central collective agreements provide very strict regimes governing these issues. The central collective agreements provide protections for employees, as well as flexibility for hospitals to staff their operations. Given that employee groups, such as ONA[2], are also opposed to measures that limit the ability to negotiate flexible schedules for workers, the OHA would ask that consideration be given to the benefit of such a change.

5.3.5 Paid Sick Days and 5.3.7 Part-time and Temporary Work – Wages and Benefits

Interim Reports options:

Paid Sick Days

1. Maintain the status quo.
2. Introduce paid sick leave –
    1. Paid sick leave could:
        i. be a set number of days (for example: every employee would be

[2] Ontario Nurses' Association, *Submission to the Ontario Changing Workplaces Review*, September 18, 2015 at page 7

entitled to a fixed number of paid sick days per year); or

ii. have to be earned by an employee at a rate of 1 hour for every 35 hours worked with a cap of a set number of days;

2. Permit a qualifying period before an employee is entitled to sick leave, and/or permit a waiting period of a number of days away before an employee can be paid for sick days;
3. Require employers to pay for doctor's notes if they require them.

Part-time and Temporary Work – Wages and Benefits

1. Maintain the status quo.
2. Require part-time, temporary and casual employees be paid the same as full-time employees in the same establishment unless differences in qualifications, skills, seniority or experience or other objective factors justify the difference.
3. Option 2 could apply only to pay or to pay and benefits, and if to benefits, then with the ability to have thresholds for entitlements for certain benefits if pro rata treatment was not feasible.
4. Options 2 or 3 could be limited to lower-wage employees as in Quebec where such requirements are restricted to those earning less than twice the minimum wage.
5. Limit the number or total duration of limited term contracts.

OHA Recommendations:

Paid Sick Leave:
Maintain status quo.

Part-time and Temporary Work – Wages and Benefits:
Maintain status quo.

With regard to paid sick leave and part time/temporary employee wages and benefits, the recommendations contained in the Interim Report have the potential to upend the long-standing terms and conditions of employment for part time hospital employees. Generally, part time employees do not have access to paid sick leave. Further, generally, part time employees do not have an absolute right to benefits coverage. Instead of receiving these benefits, part time employees are paid percentage in lieu in addition to their wages. This trade-off is codified in all of the central collective agreements and is as old, if not older, than the central collective agreements themselves.

In recent years, various alternatives have been agreed upon respecting this trade-off. For example, the ONA central collective agreement now has a Letter of Understanding which allows local parties to agree to allow part time employees to voluntarily participate in group benefit plans.

Unions have been in a position for a long time to pursue proposals related to part time paid sick leave and group benefits, and make these proposals a priority. Adding entitlements to paid sick leave and benefits to part time employees to the *ESA* would undermine the nature of collective bargaining, which is symbolized by difficult choices on both sides regarding what to pursue.

Given the significant issues that these minimum standards would create for Ontario hospitals, the OHA recommends that the status quo should be maintained.

5.4.1 Greater Right or Benefit

Interim Report options:

1. Maintain the status quo.
2. Allow employers and employees to contract out of the ESA based on a comparison of all the minimum standards against the full terms and conditions of employment in order to determine whether the employer has met the overall objectives of the Act.

OHA Recommendations:
Allow employers and employees to contract out of the ESA based on a comparison of all the minimum standards against the full terms and conditions of employment in order to determine whether the employer has met the overall objectives of the Act.

The Interim Report makes it clear that the advisors appreciate that the *ESA* should not apply equally to all industries. The advisors note several ways that this can be achieved, either through creating a streamlined process to apply for exemptions (5.2.3 Exemptions), or by introducing certain standards into the *ESA* on a sectoral basis (5.3.2 Scheduling). It is also clear that the advisors would prefer to limit exemptions as much as possible.

Relying on exemptions and sectoral specific standards to ensure that the *ESA* does not result in undue hardships in particular industries is inefficient. It also does not fully address all of the OHA's concerns as set out above. For example, there is no suggestion that paid sick leave would be subject to exemptions, however if this standard were added to the *ESA,* it would distort the long-standing trade off between part time benefits and percentage in lieu.

Rather than rely on exemptions in order to achieve the necessary flexibility within the *ESA,* the OHA recommends the above noted change to the greater right or benefit provision of the *Act.* A global assessment approach under the greater right or benefit provision does not

necessarily need to be any more complicated than the exemption process laid out in the Interim Report in section 5.2.3. In fact, it could be less complicated. Given that the exemptions would be broad based and built into the *ESA* itself, the procedural safeguards would be significant and time consuming. Further, the exemptions would not be responsive in the face of changes in a particular sector or employee group. In comparison, expanding the greater right or benefit provision could easily be fulfilled by a simple review of the provisions of the *ESA* against the terms and conditions of employment. In the vast majority of cases it should be easy to see whether the overall terms and conditions of employment fulfill the underlying purpose of the *Act*. Further, unlike the proposed exemptions process, presumptions can be built into the process, such as a rebuttable presumption that a collective agreement provides greater rights than the *Act* on balance.

Opponents to the broader greater right or benefit provision claim that different employees have different needs. Rather than being a drawback of the proposal, it is actually the crux of why this approach makes the most sense. Employees and employers should be encouraged to craft terms and conditions of employment which reflect the needs of both parties. This will often mean maximizing some terms at the expense of other terms, such as receiving higher pay as a trade-off for not being enrolled in a group benefits plan.