

November 17, 2015

Delivered by Email Andrea.Needham@ontario.ca

Ms. Amanda Needham
Special Events Coordinator
Ontario Ministry of Labour
Employment, Labour Corporate Policy Branch
400 University Ave
Toronto, ON M7A 1T7

Dear Ms. Needham:

RE: Submission to Justice Murray & Michael Mitchell in anticipation of an 8:30 a.m. meeting on November 30, 2015 at 400 University Ave in Toronto, Ontario.

The MacLeod Law Firm is an employment and labour law firm. We advise employees on their rights under the Employment Standards Act (the "Act") and we advise employers on their rights and obligations under the Act.

We are pleased to make this submission to Justice Murray & Michael Mitchell as part of their consultations into Ontario's Changing Workforce.

Our recommendations in relation to the Act are as follows:

1. Establish Offices to assist employers and employees.

Given the large number of amendments to the Act over the years, it is difficult for employers (especially small employers), and employees to navigate through the Act and its numerous regulations.

Employers and employees can get themselves into trouble when they call the Ministry of Labour (“MOL”) to find out their rights & obligations under the Act.

For example, when an employer calls the MOL and asks whether it can temporarily lay off an employee and avoid providing notice of termination under the Act the employer is told it can. The employer is not however told that a temporary layoff is generally a wrongful dismissal at common law.

Similarly, when an employee calls the MOL to find out her employer’s termination pay obligations she is told the minimum standard but she is not generally told if she files a complaint under the Act then she is precluded from bringing a wrongful dismissal action.

We therefore recommend that the MOL establish one office that helps employers and another office that helps employees understand their rights and obligations under the Act. Much like the Office of the Employer Advisor and the Office of the Worker Advisor under the Workplace Safety and Insurance Act.

2. Regulate Post-Secondary Internships

We recommend that the Act address internships which are becoming more prevalent for young people who have completed post-secondary education but can’t find a full-time job and need to obtain experience. This kind of intern/trainee is not exempt from the Act. These individuals should be paid the minimum wage, and we recommend that stakeholders (i.e. post-secondary institutions, student groups, employer groups) be consulted to determine whether any exemptions to the Act should apply

3. Establish Minimum Length of Shifts

Given the time and expense that it takes to travel to and from work, there should be a minimum shift length. Since call in pay is a minimum of 3 hours [section 5(1) O. Regulation 285/01] we recommend a minimum shift of 3 hours in duration however we recommend that stakeholders be consulted to determine whether certain industries and/or positions should be exempt such as CCAC workers.

4. Define Payroll for Severance Pay Purposes

Given the Paquette c. Quadraspec Inc., 2014 ONCS 2431 (CanLII), <http://canlii.ca/t/g6mzs> decision, we recommend that the Ontario government clarify whether the 2.5M payroll for severance purposes is an employer's Ontario payroll or the employer's total Canadian or worldwide payroll.

5. Explicitly address the Rights of Salaried Employees

Many salaried employees who perform little if any managerial or supervisory functions do not receive overtime pay because employees and employers simply are not aware that these salaried employees should be receiving overtime pay. We believe this is the most violated section of the Act. We therefore recommend that steps be taken to educate employees and employers on the issue. The Act could also be amended to explicitly state that salaried employees are entitled to overtime pay unless they are managers or supervisors, or one of the other exemptions in the Act apply.

6. Exempt High Wage Earners from the Overtime Pay provisions

The Act is not intended to benefit employees who earn high incomes. We therefore recommend creating an exemption to the overtime pay provisions for salaried, high wage earners with the definition of high wage earner to be determined through consultations with stakeholders. One option is to use the maximum insurable earnings amount used under the employment insurance legislation or workers compensation legislation.

7. Exempt Small Employers from Certain Leaves of Absence

It is extremely difficult for small employers to hire temporary employees because often an employee will hold a single incumbent position and the incumbent has acquired employer specific skills over a long period of time. We therefore recommend that small employers (i.e. employers with 50 or less employees) be exempt from the family medical leave, family caregiver leave, and the critically ill childcare leave provisions. We note that these employers have an obligation to accommodate employees on the basis of family status under the Ontario Human Rights Code.

8. Employees should be able to file a claim against Directors for Unpaid Wages without Condition

The MOL rarely accepts complaints against Directors for unpaid wages because an employee must prove a director is not required to pay wages to an employee under 108 (5) of the *Business Corporations Act* or subsection 146 (5) of the *Canada Business Corporations Act* and obtaining such an order is extremely difficult. We therefore recommend eliminating this requirement so employees can file a simple low cost, complaint against directors for unpaid wages under the Act.

9. Complaints from Unionized Employees

A unionized employee cannot file a complaint under the Act without the Director's permission (section 99). We believe it is unreasonable to expect an employee to commence and win a duty of fair representation case against her union under the Ontario labour Relations Act to enforce her rights under the Act. The fact is a union can sacrifice an individual's right to receive a minimum standard for the greater good of the bargaining unit and not breach its duty of fair representation. We therefore recommend that an employee not be required to obtain permission of the Director to file a complaint if his or her union refuses to file a grievance or refuses to take a grievance to arbitration if the employer has not provided the employee with a minimum standard.

10. The Complaint and Appeal Process under the Act Should be Modernized and mandatory mediation should be part of the process

Currently each employment standards officer has the power to decide how to investigate a complaint and there is no standardized process. The appeal of an officer's order to the Ontario Labour Relations Board (OLRB) is not really an appeal because the OLRB proceeding is effectively a trial de novo.

We recommend that the current complaint and "appeal process" be scrapped and a new system be substituted in its place. The human rights complaint process is one model to consider. There should be detailed rules in place in terms of what an employee must do before filing a complaint (i.e. prove she has asked the employer to pay all monies allegedly owed in writing) and a requirement that the employee and employer submit all relevant documents with the complaint or response (as the case may be).

We recommend that a summary hearing be incorporated into the new complaint process as we believe a summary hearing would resolve many complaints in an efficient and cost effective basis.

For complaints that are not determined by way of a summery hearing, we suggest that the parties be required to attend mandatory mediation. With the advent in technology such as the availability of no or low cost conference calls and video calls we do not believe that both parties need to attend at the same location during mediation. We suggest that mediations be scheduled for one hour unless the body overseeing the complain process orders a longer mediation.

All of which is respectfully submitted,

MACLEOD LAW FIRM



Doug MacLeod
LDM/nc
Direct: (416) 317-9894
Email: doug@macleodlawfirm.ca