



Changing Workplace Review Consultation

Submitted to: Ministry of Labour

Submitted by: Ontario Bar Association



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to comment to the Special Advisors for Ontario’s Changing Workplace Review, which examines the changing nature and trends of the modern workplace in today’s economy.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 16,500 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 39 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists government with dozens of legislative and policy initiatives each year - in the interest of the public, the profession and the administration of justice.

This submission was formulated by a working group of members from our Labour and Employment Section and Constitutional, Civil Liberties and Human Rights Law Section (the “Working Group”), with additional input from our Franchise Law Section. The sections which form the Working Group represent approximately 1,250 lawyers who serve as legal counsel to employers and employees in unionized and non-unionized environments, and they have experience in a wide range of legal issues arising in the workplace that are dealt with through bargaining or come before the Labour Board, arbitrators, courts and human rights commissions.

Comments

The OBA applauds the provincial government and Special Advisors for undertaking this broad review of significant changes in Ontario workplaces since the province’s employment and labour framework was enacted and last updated. For the purposes of this submission, we have not focused on historical differences on sectoral issues, but, rather, we have embraced the mandate of the Special Advisors to look at demographic and global shifts that are changing work. Because OBA members act for both employers and employees, the Working Group has focused on highlighting new developments and emerging trends where the law and workplace policies have not always kept pace. In many instances, the developments we are highlighting are matters where clients come to us for advice and conflicts are addressed privately rather than before courts or tribunals.

1. An New Category of Worker

One shift in today’s economy has been the emergence of a new type of worker that may be called “self-starters.” These workers bear some of the hallmarks of a traditional employee, yet they manage their own business and set their own work hours. They are not part of a management team



or “supervisors” as contemplated by the *Occupational Health and Safety Act*, in that they do not have charge of a workplace or authority over other workers.² Self-starters may be found in the financial services sector and other service sectors and often work from home.

In our view, the rights and responsibilities of these workers are not clear in the current legal framework. These workers also experience issues as to whether and to what extent the *Employment Standards Act, 2000*³ (the “*ESA*”) applies. The answer has implications for a range of employment issues – from entitlement to overtime and other benefits to where responsibilities lie for workplace harassment, as just a few examples. In our view, it is timely and preferable to take a systemic approach to defining the employment relationship and protections for these workers.

One way to provide greater clarity for the rights and responsibilities of self-starter workers would be to add definitions of “manager” and/or “supervisor” to the *ESA* and determine whether self-starters should or should not be exempt for the purposes of overtime and other benefits. While the Working Group acknowledges that how a “manager,” “supervisor” and self-starter work are defined may be controversial, the consensus among us is that definitions are needed to set expectations and standards for entitlements and responsibilities of these workers.

2. Changing Work in a Service Economy

Another change emerging from the growth of the creative sector, service and similar industries is a shift toward workplaces that are project-focused, where work is performed during periods of intense activity followed by periods of less work. Innovations like flexible work hours and working from home or remote locations support project-focused workplaces. These changes to traditional work structures are often desired by both employers and employees – even if they do not always fully appreciate how the changes may affect broader employer-employee relationships.

In certain industries, for example marketing and advertising, the Working Group has observed that the general attitude appears to be everyone will work when it is busy, and they will take time off when there are fewer projects or less work. This sometimes means working longer hours on one day, but coming in later or not at all the following day. Time is not always tracked. Workers are often treated as though they exempt from overtime, even when they are not. These are often mutually satisfactory arrangements, but we have seen them lead to conflict over expectations about vacation pay, overtime or other benefits where employers believe the arrangement overall exceeds *ESA* provisions.

² R.S.O. 1990, c. O.1

³ S.O. 2000, c. 41, s. 1



3. Technology-Driven Changes in Workplaces

New technology has had a further, similar impact on employer-employee relations in a changing workplace. Employer-issued handheld devices have created a new degree of connectivity to the workplace, often blurring the distinction between work and personal time for many workers. Employers give the devices to their employees, and they may send work-related messages afterhours – with or without expectation of a reply. Workers may answer those messages. Few workplaces have given thought to the implications this has for overtime or the increments, if any, workers should be paid for answering work messages during off-work hours. Even in unionized workplaces, where collective agreements have overtime provisions, the Working Group has seen instances of disagreement about whether checking work emails during off-work hours is overtime.

The advent of social media has had a similar impact on workplaces. Using social media may or may not be part of a worker's job, but access at work to web-based mail, Facebook, LinkedIn, Instagram, Snapchat and other media, has become commonplace. In some workplaces, it may be acceptable to check social media at work, and in others it may not. Sometimes allowances for social media use are treated as a trade-off for expectations (expressed or unstated) that workers will answer work messages during off-work hours. While workplace policies can be developed for social media use, the impact of social media and new technologies on workplace expectations and employment relationships warrants consideration from a broader systemic level.

4. Precarious Workers

Another change that the Working Group has observed in recent years is an increase in precarious workers. These are workers who often work at more than one job, at the lower end of the income spectrum, and sometimes involves doing piece-work or flat-fee contract work. Those doing piece-work and consulting are often left without the range of benefits that full-time employees take for granted. They may not have health benefits, vacation days, or sick days. Often the work falls below minimum wage guidelines.

The wage-gap for these workers requires a systemic approach to reviewing the range employment and social benefits for precarious workers. While contract workers are allowed to buy into Employment Insurance ("EI"), many do not reach a level of earnings where this is realistic or likely. As well, because of the nature of contract work, they may not achieve a level of work continuity to meet the required hours to qualify for EI benefits even if they paid into it. Precarious workers have up-and-down income levels, are not always fully employed or are underemployed, and they are trying to fill things in by piecing together more than one job to reach the income they want or need.



5. Older Workers and Change

Among this group are older workers – people who reach 60 and feel they are being pushed out of the workplace, regardless of whether that is actually the case. They may have many more vibrant years to contribute, but they find themselves removed from more lucrative employment opportunities and forced into less lucrative consulting and contract work. While these workers have human rights protections and may qualify for EI benefits, there may also be a need for the *ESA* to provide guidance, and possibly protections, for these workers as well.

6. Other Considerations

The Working Group also has identified a need for review of the statutory holiday provisions of the *ESA*, which are too complicated and should be streamlined to accommodate the changing workplace. Today's businesses employ a multicultural workforce and transact beyond borders more than ever in Ontario's history. We have had to advise responsible employers wishing to accommodate days of observance for employees by trading off statutory holidays, or trying to manage dealings with foreign clients who do not observe the same holiday, on how to interpret the *ESA*. While we are not necessarily advocating a policy change, we do believe that the existing sections of the *ESA* need to be simplified and clearer for everyone to understand.

Finally, the Working Group would take this opportunity to advocate some changes that update the *ESA* with current realities and processes. Specifically, the personal emergency leave provisions should be reviewed for a rational connection to the number of employees in a business for the benefit to be available. As well, *ESA* compliance processes should be updated to rectify the current situation in which employers are not given full disclosure of the nature of a complaint made to the Ministry, so that they meet with the principles of natural justice.

Conclusion

Once again, the OBA appreciates the opportunity to comment to the Special Advisors for Ontario's Changing Workplace Review, and to provide our perspective on the changing nature and trends of the modern workplace in today's economy. We welcome the opportunity to meet with the Special Advisors to discuss our comments and any questions you may have about trends we are observing in today's workplaces.