Responding to the Changing Workplaces Review: Special Advisors Interim Report

Wednesday October 12th, 2016

Changing Workplaces Review
Employment Standards and Labour Relations Acts

12 October 2016

ONESTEP Position

These Acts are socially determined rules of behavior governing the labour market in Ontario. They set the minimum standards/rules for contracting workers while allowing employer/employees individually or by collective agreement to set a higher bar. As political commitments, they are subject to stakeholder commentary and subsequent reform. Our 80 member organizations provide employment and training services for all three orders of government and have a three-fold interest in these Acts – as small/medium employers themselves, as sources of candidates and as supports to employers seeking to fill job vacancies.

Small/Medium Enterprises (SMEs) are a key customer group – the employers with potential job opportunities for the clients we are serving (250,000+/year). Most SMEs are also active community members who in the main strive to be responsible and fair employers within the legislation and regulations currently in place. The ESA is society's rule setting for less scrupulous employers, but more positively to create a framework and minimum standards for decent work transparent to all parties.

The positions below are ONESTEP's recommendations for changes to these two Acts to further social progress towards an equitable, sustainable labour market with a priority for decent work standards. The Ministry of Labour published an extremely thorough and well researched paper by the Changing Workplaces Review panel. We acknowledge that our positions below are based on our reading of the panel's paper and also owe a great deal to the detailed research and analysis conducted by the Workers' Action Centre, Parkdale Community Legal Services, the Mowat Centre and the Ontario Federation of Labour. Consultation papers developed by the Ontario Chamber of Commerce were also reviewed as a key voice for SMEs in this province. Our bottom line is that clear, consistent employment and labour relations standards both underwrite a productive and engaged workforce while policing employers who evade or avoid standards to cut corners and thus compete unfairly.

What follows are specific recommendations for legislation changes keyed to the specific sections of each Act by number.

A specific process point that should be registered is the call from business representatives for no changes until evidence based cost impact studies are fully researched, presented for further consultation and final winnowing. There is already ample evidence, particularly regarding provisions in the Employment Standards Act, that reform is urgently needed. Far too many workers are denied adequate protections and rights under the current legislation and too many employers skate even on these minimal

standards. The onus should be on employers to demonstrate the need for special provisions after the new standards are set. Reform is needed now!

Employment Standards Act

5.2.1 Definition of Employee: To minimize the misclassification of employees as independent contractors so employers can avoid costs and legal obligations, that:

- The ESA create a positive duty on all employers to treat all workers as employees, unless they can persuasively demonstrate the worker is truly an independent contractor. Dependent contractors who perform work or services for compensation whose terms of work, pay and workplace conditions indicate an economic dependence and obligation to perform their duties for a specific employer must be treated as employees
- The Province establish and fund a strategic program of active enforcement with clear, unambiguous definitions and tests of employee status for the common understanding of both employers and employees, and that stiff penalties be available and levied for misclassification or non-compliance.

5.2.2 Definition of Employer: To address the prevalence and growth of "non-traditional" forms of employment (contract, outsourcing, temp agency, franchising, etc.) and precarious employment, that:

- Companies have a duty of care to ensure the ESA standards are complied with by their contractors, sub-contractors, franchisees and other intermediaries with a clear test to implement this obligation.
- Franchisors are liable for standards violations of their franchisees without limitation and be jointly required to ensure all employment and labour relations standards be complied with.
- Tools are provided for collection of and penalties for unpaid wages (including severance, termination pay, etc.) including authorizing the Ministry of Labour to place an embargo or lien on goods manufactured in violation of the ESA.

5.2.3 Exemptions and Special Rules: With 85 complex exemptions for specific industries, 61% of workers are not covered by some or all standards. Further study is warranted on the *bona fide* justification for each exemption, but the default position should be to disallow/negate exemptions without solid evidence of significant negative consequences for employers and workers equally. The onus should be on the employer to prove special circumstances or possible economic hardship if exemptions lifted.

5.2.4 Exclusions: Interns and trainees as well as Crown employees are affected by exclusions for some protections under the Act. For interns, work may be unpaid or under-paid constituting a dubious employer benefit. This requires further review as well. The guiding principle should be pay for work performed for and essential to the viability of the employer. Separate provision may be necessary for students on field placement as part of their course of study.

5.3.1 Hours of work and Overtime Pay: Currently, the standard working day is 8 hours, with allowance for up to 11 hours and a weekly maximum of 48 hours before overtime

standards apply. Individual firms may negotiate with employees for up to 60 hours/week using a 2 week averaging allowance. Unpaid overtime violations are widespread and increasing due to minimal inspection and enforcement. We recommend changes that:

- Define the standard work day as 8 hours and work week as 40 hours, with employees empowered to refuse work beyond these limits without reprisal, subject to individual or collective agreements specifying a shorter work week, e.g. 35 hours. Special provision may be needed for limited sets of workers whose standard shift if 12 hours, e.g. firefighters, nurses as part of negotiated employment contacts.
- Overtime at time-and-one-half pay (or equivalent lieu time) be mandated for all time worked over 40 hours/week.

5.3.2 Scheduling: With diverse non-work obligations and the high cost of transportation and day care, irregular shifts are onerous on workers. We recommend that:

- Shift minimums be raised to 4 hours/day at regular pay level
- Shift schedules be posted 2 weeks in advance of the first day with a minimum payment for cancelled shifts
- Employees be granted scheduling changes upon a reasonable request without penalty or reprisal and with no limit on the number of requests.

5.3.3.1 Public holidays pay: 20% of workers have special rules limiting access to paid holidays and another 8% are fully exempted.

- It is recommended that all employees be eligible for statutory holiday pay at full rates, pro-rated for part-timers.
- A strict test protocol for claimed employer hardship should be publicly established and enforced.

5.3.3.2 Paid Vacation: Employee health (mental and physical) plus meeting family responsibilities and work/life balance depend on vacation time without loss of income. Productivity is enhanced by reasonable time off.

- It is recommended all workers receive 3 weeks/year paid vacation at their full rate as a minimum, prorated for part-timers and subject to a higher provision and increases phased in with tenure upon mutual agreement.

5.3.4 Personal emergency leave (PEL): Employees face many and diverse life contingencies that should not affect income or their employment status. We believe that:

- All workers be eligible by removing the threshold of 50 employees unless undue economic hardship can be convincingly documented by the employer against pre-defined, public criteria
- Retain the 10 day minimum protection as a totality without any breakdown by causes for a leave
- Maintain the distinction between PEL and paid sick days as separate minimum standards addressing different circumstances with no allowance for "tradeoffs"

- Confirm the principle that these and other employment standards are the minimum standard while allowing for individual contracts and collective agreements to provide enhanced terms but prohibiting any contracting out from ESA provisions.

5.3.5 Paid sick days: Without some protection of income and tenure, workers will come to work sick, further downgrading their health and likely infecting co-workers and customers, as well as reducing productivity. We recommend that:

- All workers earn 1 hour of paid sick leave for every 35 hours work accumulating from the date of employment and capped at 7 days/year, unless a higher level is negotiated
- No requirement for a doctor's note.

5.3.6 Other leaves: Social progress and changing social norms is resulting in the addition of other forms of paid leave in other jurisdictions. We support the consideration of paid leave for employees victimized by domestic violence or sexual abuse and for the death of a child not resulting from a crime. Specification of a days' standard should be reviewed without delay, with 5 days for each leave as the default position. Any consultations on these new standards should not delay the adoption of the other changes being recommended here.

5.3.7 Part-time/temp work wages and benefits: Precarious work contracts impact in particular on marginalized groups and are a growing means for employers to reduce wage rates and benefits, for all employees. We recommend that:

- Part-time, temporary and causal workers be paid at the same hourly rate as co-workers performing substantially (80%+) the same tasks
- These same workers receive the same benefit coverage pro-rated as their full-time co-workers and that a low minimum threshold be defined to prohibit employers from evading benefits cost by reducing hours
- There be a review of repetitive short term contracting and job turnover without just cause with the onus on the employer to prove a *bona fide* business requirement.

5.3.8.1 Termination: The ESA standard is significantly lower that what the common law has sanctioned, but resource to tribunals or courts is costly and lengthy – putting the superior entitlement out of reach for most workers. We recommend that:

- The 8 week requirement for pay or time-in-lieu be increased in recognition of the tenuousness of quick re-employment and potentially linked to tenure of employment as occurs with severance pay for all employees
- Employers be prohibited from insisting that common law entitlements be waived by employees.

5.3.8.2 Severance pay: Precarious employment contracts are increasing with 3.1Million workers (over 60%) exempt from severance pay provisions. Interruption of income is a major social issue and produces spillover costs to the public purse if unemployment is longer term. We recommend:

- Removing the threshold of 50+ employees so severance applies to all workers
- Update the $2.5Million payroll threshold to include in and out of Canada payroll
- Retain the 26 week cap on severance payment.

5.3.8.3 Just cause: As resort to common law remedies is expensive and time consuming, workers need some greater protection from prejudiced and arbitrary termination. Low wage and non-unionized workers, especially women, youth and immigrants, are particularly vulnerable to wrongful termination. We recommend:

- Include Temporary Foreign Workers under a just cause requirement with an expedited adjudication process and protection against reprisals which could result in deportation
- Require all employers to demonstrate just cause for dismissals and the same expedited adjudication.

5.3.9 Temporary Help Agencies (THAs): The triangular relationship between temp agencies, the client (workplace) employer and employees is complex and has been used by some employers to evade/avoid ESA standards. Temp workers normally receive no benefits, lower pay and are employment vulnerable. We recommend:

- Make the client employer the employer of record with all the responsibilities and standards under the ESA and WSIB including severance pay
- Previous legislation recognizing THAs as the employer be rescinded and they be regulated as recruitment firms
- That temp workers receive the same rate of pay and treatment as directly employed co-workers in substantially (80%) comparable positions
- Include an enforcement regime under the relevant adjudicative body
- Prohibit THA fees for client employers who hire a temp worker.

5.4. & 5.5 Other Requirements and Enforcement: Several provisions complement the previous. Enforcement is as serious issue reflecting the power imbalance between employer and employee and the costs of seeking remedies. Some recommendations are that:

- Employers be required to conduct an annual compliance self-audit of all ESA standards using tools provided by the Ministry of Labour and provide results to all employees
- That anonymous and third party complaints be allowed without the requirement for a complainant to first seek resolution with their employer with a reverse onus on employers to demonstrate compliance.
- An expedited process at the OLRB for investigating complaints of reprisal be implemented with significant penalties if proven.
- Misclassification be included in any enforcement strategy along with other evasion, avoidance and noncompliance with ESA standards with no notice to the employer of inspections.

- Current provisions for penalties and remedies be reviewed and more active use made of these deterrent measures.

Labour Relations Act

This legislation is about management/labour relations with the goal of equitable and stable business development. For labour, the key goal is freedom of association and effective voice that is not hindered or diverted. Safeguards for decent workplace conditions are essential in the context of precarious employment, disruptive economic restructuring and global competition. Recognizing the superior economic power position of employers to devise workplace rules, contracts and entitlements, a counterbalancing capacity to affect workplace decisions is necessary. Legislation should remove barriers to freedom of choice in representation and to honest and fair labour/management negotiations. The overarching principle should be consistent protection of fair and transparent workplace relations, the unfettered right to unionize and collective bargaining standards that recognize the legitimate interests of both parties and support the achievement of fair, sustainable contracts.

Though not strictly an aspect of the LRA, regulations affecting business insolvency/bankruptcy should treat employees as the first set of creditors not the last. Management and the owners bear the principle responsibility for business failure. Employees should not be left both unemployed and without any pay owing, severance and benefits they contracted for in good faith.

Equally, steady and expedited progress should be made to achieve a minimum wage of $15 per hour ($2015) by 2020 and indexed to future inflation.

Changes recommended above for the Employment Standards Act must be reflected in related provisions under the Labour Relations Act. In addition, we recommend the following focused on selected provisions dealing with freedom of association and effective employee voice.:
4.3.1.3 <u>Access to Employee Lists</u>: While respecting and ensuring complete privacy protection, union organizing requires basic contact information on the workforce being organized. Requesting employee information from the employer would result in preemptive counter-organization and an uneven playing field. It is recommended that;

- Employers maintain a basic employee list with the Ministry of Labour, updated semi-annually, which a union may request access to via a procedure established by the Ministry and solely for the purposes of an organizing campaign. Such access should also be available with respect to applications for decertification.

4.3.3 <u>Successor Rights:</u> Cases have occurred of employers contracting out services as a means of reducing direct employees and their obligations under the ESA and LRA as a cost cutting measure.

- That successor rights be expanded in the contract sector with the same terms and conditions carried over from the previous employment agreement
- The union be automatically provided with access to the employee list via application to the Ministry of Labour.

4.4.2.2 <u>Refusal of Employers to Reinstate Employees Following a Strike or Lock Out</u>: Exercising the collective right to bargain contract and workplace conditions may require employees to

withdraw their labour as the ultimate resort they have when bargaining is stymied. Reprisals against workers after a new contract is negotiated should not be allowed.

- The employers be required to reinstate each striking employee to the position they held when the strike/ lock out began, as work becomes available if there is insufficient work and that returning employees have the right to displace replacement workers.

4.5.2 Just Cause Protection: Employers sometimes seek to terminate employees in the time between certification and the start of a collective agreement. This penalizes workers for seeking collective association and voice.

- Provide protection against unjust dismissal for bargaining unit employees after certification but prior to the start date of the first contract.

4.6.2 Employee Voice: Unions have proven to be an effective, collective voice for employees and have the ability to negotiate employment terms and conditions with employers on a more equal footing that individual employees can.

- That legislation be enacted protecting concerted activity by employees for an effective voice with management using the National Labour Relations Act (US) as a proven model.