Retail Council of Canada | Conseil canadien du commerce de détail

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Retail Council of Canada Submission to the *Changing Workplaces Review*
September 2015

The Voice of Retail in Canada since 1963, Retail Council of Canada (RCC) welcomes the opportunity to provide our industry's perspective to the *Changing Workplaces Review.* RCC understands that the review will proceed through several phases and that this phase, in which submissions are required by September 18, 2015, will help focus the work of the Special Advisors and secretariat, identify key issues for additional study and discussion, which will be accompanied by further opportunities for stakeholders to present their views, whether in person or in writing.

About the Retail Industry

Retail is Canada's largest private employment sector, with 2.2 million people working in our industry, generating payroll approaching $60 billion annually and $505 billion in retail sales in 2014.

Retail Council of Canada (RCC) itself represents over 70% of core retail (i.e., excluding vehicle and gas station sales) by volume and our members employ 1.1 million Canadians. We are a not-for-profit, industry-funded association representing small, medium and large retailers across the country. Our members operate more than 45,000 storefronts in all retail formats, including department, grocery, specialty, discount, independent stores, franchises and online merchants.

The retail numbers for Ontario are similarly compelling. Statistics Canada's Labour Force Survey reveals that 11.3% of Ontario's labour force works in retail. With a labour force of 839,300 Ontarians at 51,918 locations, retail edges out manufacturing (781,900) as the Province's largest private employment sector.[i] Retail sales in Ontario exceed $177 billion annually, generating payroll earnings of almost $23 billion.[ii]

The retail sector's prominent role in the economy also means that merchants have a direct impact on the success of many other supporting industries and their workforces, including those in transportation, construction, information technology and financial services to name only a few.

About Our Workplaces

As the Special Advisors consider whether to recommend revisions to the *Employment Standards Act* and *Labour Relations Act*, RCC believes that it is important to understand how retail workplaces operate. Retail merchants can be forgiven for believing that the complexity of the retail industry is not always fully understood by most Canadians and even by policy-makers whose decisions may have a significant impact upon our operations and workforce.

There is an unfortunate tendency in some quarters to depict retail as a low-wage environment and one with relatively limited sophistication or career offerings. This is far from the truth.

Retail is a dynamic environment, constantly responding to evolving consumer preferences and economic circumstances. Our workforce is fluid, adaptable and finds many opportunities for good compensation and rapid career-growth.

Though the following categories are porous, retail employees could for convenience's sake be categorized in three broad groups.

Entry-Level Roles:

We do provide a large number of entry level and junior positions. Importantly, both from an income and experience standpoint, retailers provide the first opportunities for youth and students. We also employ large numbers of Ontarians engaged in family care-giving or looking to supplement a primary earner's income and we are one of the few settings to offer employment to the semi-retired and to those of pensionable age. In many communities, we are one of the few employment options available for people who are either unable to or do not wish to work on a full-time basis and for many inexperienced workers, retail is a setting but for which there might be few other opportunities for attachment to the labour force.

Specialized Roles:

Entry-level roles are one part of the picture and an important one from a societal perspective, but there are two other broad categories of a retail employee, one of which is specialized positions. Retail is a highly developed industry in its floor operations, supply chain management and back offices. To meet those needs, retailers employ tens of thousands of Ontarians as specialized staff (and where appropriate, as contract service providers) in a multitude of roles including, *inter alia*, buying, marketing and advertising, warehouse operations and transportation, accounting and law, human resources, web design and IT maintenance and security, and the skilled trades.

Longer-Term & Management Track:

Third, and importantly for the purposes of this review, retail promotes mainly from within. Retailers tend to have robust management-training programs and we look to fill management roles from employees with experience in a retail setting and an orientation toward customer service. For the right candidates, retail is a fast-track environment to a good career and income within our industry. A recent study found that 67% of management roles in retail are filled by those with prior experience at the level of frontline associate. RCC suggests that this is a number that few other industries can match. It also speaks to the need to view retail through a different lens than would be applied to a traditional industrial workplace. Retail does not operate with a rigid divide between management and labour. A manager may find himself or herself supervising staff one moment and dealing directly with customers the next. A frontline associate may take on a number of tasks, including direct contact with customers, point of sale, inventory control, and merchandising and in a larger setting may be rotated through several departments, gaining diverse experience along the way. That same associate may rapidly progress to become a supervisor or manager. This dynamic is highly relevant to the discussion below of issues like pay scales and overtime pay.

Other Factors Informing Our Views

Unionization:

Most of our observations for this review are in relation to the *Employment Standards Act,* though we do make several recommendations on the *Labour Relations Act.* Our members' workplaces vary, with some being unionized in whole or in part and others having entirely non-unionized settings. As an association, RCC does not take a position on whether a workplace should be unionized. We are largely comfortable with the existing regime of the *Labour Relations Act* but would be concerned were that statute to depart from its current balanced approach.

Competitiveness:

The other issue of significance to our industry in the context of this review is our economic competitiveness. It will come as no surprise to hear that retail is going through a disruptive period as consumer preferences and technology evolve rapidly. It may come as more of a surprise to hear that retail is responding well to that challenge. Despite several highly-publicized closings, retail is growing in Ontario. Our sector saw 5.0% sales growth in the Province during 2014[iii]. Even adjusted for inflation, our sales grew by 3.1%[iv] last year and our workforce grew by 1.1%.

Online sales are growing rapidly and to some extent at the expense of in-store sales but this is true both of Canadian-based and offshore online retailers. We can compete against Global players such that the Top 10 RCC member retailers' online sales now match those of Amazon & eBay in Canada. Online specialty retailers (e.g., Shopping Channel, Frank & Oak, Beyond the Rack, Clearly Contact) and Global ecommerce enablers (e.g., Shopify, Magento, Askuity and Workjam) give some idea of our strength in this area. With such successful online operations within our membership, RCC is supportive of the continuing evolution of customers' shopping preferences.

Concern does arise, however, with public policy decisions that tend to work against our competiveness and may in themselves contribute to increased reliance upon less labour-intensive channels. In particular, we are concerned with the increasing tendency for government to add fees and charges on to payroll, including in some cases (e.g., the Employer Health Tax), for policies that bear little direct relationship to the workplace. In Ontario, payroll-related fees include premiums for the Canada Pension Plan, Employment Insurance, Workplace Safety and Insurance Board and Employer Health Tax and, beginning in 2017, the Ontario Retirement Pension Plan. Viewed individually, many of these charges contribute to programs that are an important part of our social and economic fabric. Taken together, however, these charges can add 13% to employer payroll costs.[v]

RCC understands that the full-run of public policy initiatives is beyond the mandate of the *Changing Workplaces Review.* We raise these issues because we are concerned with the cumulative effect of wage-related public policy decisions upon our competitiveness.

EMPLOYMENT STANDARDS ACT

In general, retailers believe that the *Employment Standards Act* is working well and observe that where problems arise, they are often due to lack of compliance rather than to shortcomings in the law itself. Those who act in good faith but have an imperfect understanding of the *ESA* would benefit from greater efforts at educating stakeholders about the rights and responsibilities it prescribes. Scofflaws are unlikely to be motivated either by education or by legislative change and their workplaces would benefit from the Ministry of Labour (MOL) having the resources to conduct effective complaint-driven inspections and sectoral "blitzes".

Recommendation #1: The *ESA* should be revised where there are obvious deficiencies but care should be taken not to engage in broad-based revisions simply to deal with infractions by people who don't respect the current statute.

Most workplace problems arise not from the *ESA* but from people not respecting it, to which answers lie in providing sufficient resources to educate those who are educable and for stricter enforcement against the incorrigible.

It is also important to avoid painting all employers and all employees with the same brush when it comes to non-standard employment. Our industry believes in having a respectful and fair relationship with our employees, both for reasons of good corporate citizenship and in our own long-term interest of good work environments, staff retention and skill development.

Part-time employment, in and of itself, is not negative. Indeed, it provides vital opportunities and enables different types of employees to meet their own needs.

Examples:

- Students may need part-time jobs in order to support themselves while studying, to pay for their education or to gain useful experience. At the same time, the demands of their studies usually preclude their being burdened by the number of hours expected in full-time employment.
- Youth, and particularly at-risk youth, may be trying to enter the workforce without experience or well-developed job skills. Part-time employment may provide opportunities where few others exist and may allow for a gradual build up and diversification of skills and experience.
- Seniors look for part-time jobs as a way to transition out of a full-time career. Many are retiring younger or healthier than their parents did and will live longer. A part-time job is a way of continuing to contribute to society for many and to supplement their retirement incomes.
- Many other Ontarians are looking for complementary income, not a full-time career, in order to engage in other activities, especially child care and family care-giving.

- Seasonal employees, some of whom already have full-time employment in other settings, may be looking to supplement their incomes at a time of year when there may be additional expenses (e.g., the December holiday season).
- Still others, including, for example farmers, fishers, musicians and artists, may need to dovetail part-time work with their primary vocations or with seasonally-intensive employment.

Part-time, casual and seasonal work is thus a vital part of the system both for employers and employees, meeting the need for staffing during intensive periods without having an excess of staff during slower periods and providing flexible hours for a great many employees.

Part-Time Benefits

As noted above, part-time work should not be equated to precarious employment, nor should it necessarily lead to the same wages or benefits as those received by full-time workers. To begin with, full health and dental, life insurance and pension coverage may be superfluous for some Ontarians.

Students, who make up a large portion of the part-time workforce in retail, often don't require the same coverage, if any at all, as full-time workers. Many students are covered by their parents' insurance plans, by collegiate plans at their place of study or by social programs. To the extent that some benefits, like life insurance and pensions are contributory for workers, many students would be worse off financially by making these contributions at a time when their incomes are needed to support themselves and their educational costs. For a typically healthy tranche of the population, the most likely result of requiring students' participation at the same level as full-time workers would be to provide a subsidy from the former to the latter.

The same is true of many employees who work part-time as a way to find balance in their life or as a supplementary income – as their spouse's employer may provide benefits coverage.

Retirees are exempt from CPP and ORPP contributions after age 65, so it makes little sense to require their participation in company pension benefits. Seniors may also be covered by the extended health programs like the Trillium Drug Benefit. Life insurance can be very expensive if obtained after age 65 and would impose an unacceptable cost on contributors if mandatory.

This is not to suggest that benefit coverage is inappropriate for part-time employees but that one-size does not fit all. Many retailers in Canada do provide benefits to part-time employees, especially to longer term part-time employees. A recent Morneau Shepell study conducted for RCC, the *2015 Reward Compensation Survey of the Canadian Retail Sector* (attached hereto) found that 35% of part-time employees participate in workplace pension plans, 37% receive health and dental coverage and 33% participate in life insurance programs[vi]. Where appropriate, retailers are stepping up to provide coverage to part-time employees but in ways that are appropriate to those employees and that do not drive unsustainable costs for employers or for the employees themselves.

Full-Time Benefits for Part-Time Workers

RCC has noted the recommendation of the Workers' Action Committee to provide the same benefits to part-time employees as are provided to full-time employees.[vii]

There are several problems with this proposed approach. The first is to presume that there can never be a justification for providing differential total compensation between part-time workers and full-time workers. This issue is discussed more fully below but outside of collective agreements and the *ESA* rules on minimum wage and equal pay for equal work, RCC sees *rates* of compensation as being a prerogative of the employer. Employers use the total compensation package to reward experience and skill development and eligibility for different types of benefits are a part of this calculation. Many part-time employees are eligible for benefits but eligibility will often depend upon experience.

The second problem is that benefits have been framed as a relative entitlement but not an absolute one. Thus an employer who provides benefits would have to provide them universally but an employer who does not provide benefits would have no such obligation. An employer's current generosity would therefore widen the labour cost gap relative to less generous competitors. One can easily imagine the negative effect on benefit provision overall were this proposal to be adopted.

It also seems counter-intuitive to the Workers' Action Committee's push to increase the number of hours available to part-time employees. Amortizing the cost of full-time benefits over part time hours will inevitably mean that the cost of paying a part-time employee will rise relative to paying a full-time employee. If benefits represent $0.50/hr for a 40-hour week employee, then full benefits will cost $1/hr for a 20-hour week employee and $2/hr for a 10-hour a week employee. An employer faced with this calculation is not likely to increase the number of part-time hours available.

Recommendation #2: Employers should continue to be permitted to determine which employees are eligible for benefits and may if the employer wishes, provide them proportional to the amount of time worked.

Compensation Differentials

Outside of small settings, retail typically compensates individuals on an established scale. Diversity of skills and experience play a big part of establishing that scale and in most cases, it does not make sense for an employer to pay a newly-minted employee or one with developing skills as highly as an employee with diverse capabilities and years of experience on which to draw.

The concept of a single job rate, where tasks are strictly defined and compensated, does not work well in retail. Outside of certain specialized roles, retail's frontline employees are often called upon to perform a number of different tasks: customer service, including inquiries about

placement, product attributes and suitability to particular customers, complaint resolution and returns, inventory control, merchandising, and payments/point of sale. In mid-sized to larger establishments, employees may rotate between departments and with each new department comes added knowledge of products and customer interests.

There are of course some highly skilled and experienced part-time employees and they are usually compensated at levels higher than their peers. Typically, however, full-time employees have longer experience and a broader skillset and it is entirely appropriate to compensate them more generously. This principle applies to total compensation, including both wages and benefits.

Speaking more broadly than the issue of part-time versus full-time compensation, just because at a given instant, an employee may perform the same task as that performed by another employee does not mean that they should be necessarily paid the same rate. The quality of that performance can differ and one employee may be available for a broader range of tasks than the other.

Recommendation #3: Employers should continue to be permitted to determine appropriate compensation levels for their employees, subject to the *ESA* provisions on minimum wage and equal pay for equal work.

SPECIFIC RECOMMENDATIONS

ESA Summary to be Posted and Provided to Each Employee

RCC agrees with the principle embodied in s. 2 that employees are entitled to have up-to-date information about the rights prescribed by the *ESA.* We question, however, whether the current rules are necessarily the best way to achieve this purpose. For example, most employees have email addresses and email may be far more effective means of communication than presuming that an employee will read a poster. Similarly, employers may choose to use workplace video screens, intranet, social media or other means to convey important information to employees. Increasingly, some non-floor tasks, e.g., information technology work, may be performed by employees who rarely enter the physical workplace.

The printed poster seems to be a vestige of a time when there were few other means of communication available and we believe that employers should be provided with greater flexibility to ensure that the requisite information is provided to employees.

Recommendation #4: Employers should be able to use reasonable means to ensure that employees are made aware of the provisions of the *ESA* and of revisions to the *ESA* as they occur.

Greater Statutory or Contractual Right

This S. 5(2) provision is an important one for employers. Employers' HR policies vary widely and address many of the same matters covered by the *ESA.* As we understand the purpose of the *ESA,* it is to establish *minimum* employment standards and to ensure that these standards are met, which we fully support. The *ESA's* purpose should not be to stipulate *uniform* standards or to remove employer flexibility to determine which benefits will be offered over and above *ESA* minimum requirements.

Still less should the *ESA* fail to allow for the recognition of benefits, e.g., personal leave days, already being provided by an employer. To do so would be to penalize those who show generosity to their employees when compared to those who adhere to the minimum standards.

Recommendation #5: The *ESA* should maintain its greater contractual or statutory right provision. Wherever an existing right or benefit exceeds the minimum prescribed by the *ESA,* that right or benefit should be treated as superseding the ESA minimum standard *not* as the two benefits being additive.

Hours of Work Limits

Retailers recognize employees' need for work-life balance and our own interests in having rested, healthy and focused employees.

The *ESA* hours of work limits are however, complicated and may cause confusion, both with employers and employees, particularly the way in which the various limits interact with one another. The *ESA* provides the ability for an employer and employee to contract out from some limitations (e.g., 8 hours free from work between shifts) but not all of the hours of work limitations (e.g., 11 hours off in a day, defined as any rolling 24-hour period).

Recommendation #6: The limits should be simplified. For example, the 8 hours free from work between shifts limit is largely subsumed within the 11 hours off in a day limit.

Overtime Generally

Overtime is an inevitable part of any workplace with unpredictable demands. Retail settings can have spikes in overall traffic and in individual customer needs that may lead to additional demands for employees' time. Accommodating vacations or leaves of absence for one employee will often generate a requirement (and opportunity) for another employee's time.

Retailers believe that the current 44-hour weekly threshold for overtime pay is an appropriate one, typically representing a variance of 10-per cent over a standard eight hour day and five-day work week.

We have however, taken note of suggestions to this Review that the overtime threshold should be reduced to 40 hours weekly and feel the need to point out the implications of any such

move. Simply put, labour costs at 150% of standard are very expensive from an employer perspective. If those additional costs are not tightly controlled they can have a major impact on an employer's profitability. In consequence, employers work hard to ensure that overtime hours are kept to the minimum necessary to ensure that operations are maintained.

If overtime were to kick-in after 40 hours, the inevitable consequence would be for employers to reduce the number of standard hours worked weekly to a safe margin below 40 in order to ensure that overtime is not incurred regularly or inadvertently. This might conceivably free up hours for some additional employees but would reduce the pay available to most employees. Retailers do not believe that most of our full-time employees are seeking fewer hours and of course, the option to work part-time hours already exists for many of those who are prepared to make the trade-off between hours and income.

Even the assumption that more hours will be made available to others is not a safe one. If up to ten per cent of the current hours worked by a full-time employee were to be subject to a 50% cost increase, employers would review alternative means of service delivery, potentially decreasing hours of opening, staffing less intensively, or looking to less labour-intensive channels like online sales.

Overtime averaging provisions should be retained in the *ESA*. Overtime averaging agreements are the exception rather than the rule for most retailers but some do seek written agreement from time to time for key business areas during peak periods.

Given that overtime averaging requires the consent both of the employer and the employee, there is little need to require the agreement of both parties to revoke any such agreement. RCC would be comfortable if s. 22(6) were revised such that an employee may revoke an overtime averaging agreement on reasonable notice to the employer.

Recommendation #7: The *ESA*'s overtime threshold should continue to be set at 44 hours weekly and overtime averaging should continue to be permitted.

Time Off in Lieu of Overtime Pay

Retail employers are committed to work-life balance for their employees. While some employees, perhaps the majority, will prefer to be compensated for overtime through higher earnings, we have frequently been asked whether time off could be given in lieu of overtime pay. This is often appropriate, as employees will have had fewer hours for themselves in consequence of overtime work. RCC notes that s. 22(7) of the *ESA* permits and employer and employee to agree to time off in lieu of overtime. We believe that this provision could be expanded to overtime work more generally.

Recommendation #8: The *ESA* should provide that on request of an employee, an employer may choose to grant time off at the rate of 1.5 hours of time off for each hour of overtime worked, in lieu of overtime pay.

Overtime Pay for Managers

A particular concern of the retailers interviewed by RCC in preparing this submission is the notion that managers may be eligible for overtime pay under the *ESA*. Retailers understand the principle that employees should not be miscategorised as managers simply in order to avoid the payment of overtime. RCC and its members believe that the MOL should penalize any such practice where it occurs.

The problem arises with attempts to re-categorize employees on the basis of tasks that they may perform. The MOL states that "managers and supervisors don't qualify for overtime pay if the regular work they do is managerial or supervisory. Even if they perform tasks that aren't managerial or supervisory, they don't get overtime pay if these tasks are performed only on an irregular or exceptional basis"[viii].

The problem with this standard is that the determination of "irregular or occasional" is highly subjective. RCC is aware of instances in which employers have been ticketed and ordered to pay overtime to managers who, in addition to their other responsibilities, performed tasks that are usually performed by frontline associates. In our view, this kind of delineation has no place in retail whatever its virtues may be elsewhere.

Retail is a customer-service driven environment and the maintenance of a positive relationship with the consumer is paramount. The consumer has little interest in whether he or she is asking for help from a manager or an associate. Customers tend to vote with their feet if they don't get the assistance they require, so the practice of most if not all retail managers is to apply themselves to the task at hand. Even managers who are directing an entire store pitch-in.

RCC believes that the Ministry should take a purposive approach to any determination of who is a manager.

The kind of indicia that can prove helpful are the supervision and direction of others, the manager's total compensation (including benefits), whether or not some part of that compensation is variable based on sales or profitability, or whether specialized training has been provided.

A member company of RCC describes its distinctive treatment of management as follows:

> *We have a robust selection process for our Store Leadership team (Store Managers, Assistant Store Managers and Store Human Resources Managers) which includes successful completion of Customer Service, Leadership, Coaching and Business Acumen written assessments as well as a structured Interview. We have several extensive training programs including a seven (7) week Assistant Store Manager training program as well as an Accelerating Leadership Training program for our Store Managers. We are seen as a market leader in Assistant Store Manager and Store Manager total compensation which includes a competitive base salary, a management incentive*

program based on store financial results, a restricted stock unit and deferred profit sharing plan. These various programs set our Store Leadership team apart from our front line associates.

This same company was recently issued a Notice of Contravention on the basis that some of its managers were performing associate-level tasks, notwithstanding that these managers' primary responsibility is the supervision and direction of others and that their total compensation exceeds $100K annually.

Retailers believe that the test for managerial exemption should begin by looking at the primary purpose of the job. British Columbia's *Employment Standards Regulation* is helpful, defining a "manager" as a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources. A comparison of compensation levels and training can provide further certainty.

Recommendation #9: Replace the current "irregular or occasional" exception for managers with a purposive approach that looks at principal responsibilities, compensation and training.

Overtime Pay for Specialized Staff

Many of the current exemptions from overtime eligibility are cumbersome and difficult to apply with precision (e.g., information technology professionals, outside commission salespeople).

Furthermore, the idea that jobs can be performed within a standard number of hours of work per week is detached from the reality of most knowledge-based and professional jobs. For instance, a senior industrial hygienist or store designer making $100,000 per year would hardly expect to receive overtime pay each time he or she works more than 44 hours in a week.

Retail engages large numbers of non-managerial but specialized staff in areas where the culture and expectation of hours to be worked on occasion falls above the 44-hour weekly threshold for overtime but who may not fall within the limited exemptions under O. Reg. 285/01.

Manitoba has addressed this issue by exempting from overtime employees who earn a multiple of the average industrial wage, paired with a requirement that the employee must have substantial control over his or her hours of work and Ontario could look at the potential for a similar mechanism.

Recommendation #10: Ontario should examine the possibility of providing an overtime exemption for autonomous, specialized and/or high-earning employees.

Alternatively, the *ESA* should allow employers and employees to agree to a salary that compensates for all hours worked up to a certain maximum (e.g., 50 hours per week) without entitlement for additional payment. For many specialized positions that sometimes require working extra hours at the office, or checking emails and receiving phone calls outside of

normal working hours, this provides flexibility, simplicity in payroll administration, as well as predictability in earnings for employees.

Vacation Pay

The *ESA* requires employers to pay vacation pay on or before the payday for the period in which the vacation falls unless the employee agrees in writing that his or her vacation pay will be paid on each pay cheque as it accrues.

This creates a lot of unnecessary administration for employers who need to create and modify two separate pay treatments for associates based in Ontario. The most important issue is that employees are receiving their vacation pay entitlements and not the manner in which they receive them.

Recommendation #11: Employers should be allowed to choose the manner in which vacation pay is paid, subject to timely payment.

Personal Emergency Leave

Retailers understand the need to provide their employees with leave to deal with illness or personal emergencies involving themselves or their family members. Many of our employers already provide leave entitlements in excess of that required under s.s 49 and 50 of the *LRA.* It is not always clear however, especially where the wording of the leave provisions differs from that contained in the *LRA*, that employer-provided leave will be recognized as superseding the minimum requirements of the *LRA.*

Recommendation #12: Clarify that in those cases where an employer has existing leave entitlements that in aggregate equal or exceed 10 days (through policy or a collective agreement) those leave entitlements, however allocated, represent a greater right or benefit regardless of whether those entitlements are allocated in the same way as the emergency leave provisions set out in the *LRA*.

RCC has taken note of the Workers Action Committee proposal to repeal s. 50(7) such that employees could no longer be required to provide evidence to entitle workers to personal emergency leaves or paid sick days[ix].

In general, retailers believe in having a relationship of trust with employees and that works well in the overwhelming majority of instances. It would be wrong to deny, however, that employers do not have concerns from time-to-time as to whether these provisions may be misinterpreted by some employees or may even be abused by a few.

Retailers have for example, determined that a preponderance of personal emergency days or paid sick leave days are taken in conjunction with weekends. In itself, that may not be surprising. Days abutting the weekend are 40 per cent of weekdays. They may offer greater

opportunity to travel in order to help with family caregiving. Those contracting colds may be more apt to do so when in the company of children home from school and so on. Employers do not presume that emergency leave days taken abutting weekends, or paid sick days taken generally, are taken for reasons other than those stated by their employees.

Where however, these absences follow a pattern that is well outside of the norm, it is reasonable for employers to be able to require evidence of entitlement to personal emergency leave or paid sick days. Retailers need the ability to manage individual and business performance and these provisions provide a safeguard in doing so.

Recommendation #13: Maintain the *LRA* provisions allowing the employer to require reasonable evidence of leave entitlement.

Termination Provisions

It is absolutely necessary and appropriate for employers to inform employees in advance when mass terminations will occur and to provide time for all stakeholders, including the MOL, to try to work with the employees and the employers to limit the impact of such lay-offs.

But the rules around when notice must be provided, how to calculate notice and severance, what happens when the employees are unionized and can be laid off, when an employee can claim his or her severance, what the obligations of the employers are in this respect, etc. are confusing and sometimes appear contradictory and would benefit from review and simplification.

One is that s. 56(2)(c) provides that a period of temporary layoff can be any period agreed to by an employer and a union in a collective agreement. If an agreement provides for layoffs with rights of recall of up to a year, for example, anyone reading this s. would reasonably believe that a layoff of up to 52 weeks under that agreement would constitute a temporary layoff for *ESA* purposes. However this s. has been judicially interpreted as having a 35 week cap (*London Machinery Inc. v. CAW-Canada, Local 27*). The s. either needs to be re-drafted to reflect the judicial interpretation, or the cap needs to be legislatively removed to respect layoff periods negotiated in collective bargaining. The status quo is simply confusing.

A second example is found in the layoff provisions, where a layoff week for purposes of termination is defined as any week where the employee earns less than half his or her regular or average wages (ss. 56 (3.1 & 3.3)), whereas a layoff week for purposes of severance is defined as any week where the employee earns less than a quarter of his or her regular or average wages (ss. 61(2.1 & 2.3)). This can produce the absurd result where an individual employee can have two different dates for termination and severance. Layoff weeks for both severance and termination should be calculated in the same way.

Recommendation #14: The mass termination provisions in the *ESA* should be simplified, while retaining the obligation for notice to employees and for consultation with the Director on Employment Standards.

Enhancement to Enforcement Mechanisms

Inspections by employment standards officers should be re-focused on providing information and advice to employers on compliance. This is important in creating a level playing field for all employers, such that employers who are compliant with the required standards are not competing at a disadvantage vis-à-vis others who may not be.

Recommendation #15: Employment Standards Officers should take on a more proactive education role with employers.

Once a Notice of Contravention and penalty is issued under S. 113, the only recourse currently available to an employer is to apply for a review by the Ontario Labour Relations Board. There are occasions, the discussion re payment of overtime to managers comes to mind as an example, where the inherent subjectivity of a decision could lead to reconsideration by the officer, in the event of additional facts being presented. Alternatively, there may be inconsistency of application of the *ESA's* provisions as between employment standards officers which could be resolved at MOL rather than at the Board.

Rather than have a "once issued, never withdrawn" approach, the *ESA* should provide that on review in consultation with the Director, a Notice of Contravention may be withdrawn.

Recommendation #16: The Director of Employment Standards should be empowered to withdraw a Notice of Contravention and cancel any associated penalty.

Disclosure on a Complaint

ESA s. 96 is currently worded such that the Director *may* specify that a complainant shall inform the employer on the subject matter of a complaint (emphasis added). RCC can envisage circumstances in which the Director might decide to do so, particularly if the Director were concerned about the possibility that an employer is unlikely to comply with the S. 74 prohibition against reprisal.

As a general rule, however, complainants should be required to provide full particulars of their allegations and the MOL should be required to produce a copy of all employees' claims, as well as all particulars, regarding a complaint. Too often an employer is required to attend a meeting with an employment standards officer without advance notice of what the allegations are or even without the complainant being present. This lack of procedural fairness is a serious concern, particularly because the upper limit for claims has been abolished.

Recommendation #17: Absent exceptional circumstances, a complainant should provide the employer with full particulars of the complaint. In the alternative, MOL should provide timely disclosure to the employer.

OTHER ISSUES RELATING TO THE *ESA*

Union Representation of Non-Members

RCC has noted the suggestion of the Workers Action Committee's submission that unions should be allowed to represent employees who are not the union's members[x] or who are not even the employer's employees ("what is being referred to as outsourced workers"[xi]).

Those who work for an outsourcer are the outsourcer's employees, not the client company's. They have the right to decide for themselves whether they want to be unionized and if so, with which union. The statute already provides protection when relationships are not truly outsourced (*i.e.* common employer in s.4) and nothing more is required.

There would also be several challenges posed by such a suggestion. Many outsourcers have more than one client, some of which may be unionized and some not. Would the union at Retailer A be allowed to bargain for those employees of the outsourcer who support Retailer A while the union at Retailer B be allowed to bargain for those employees of the outsourcer who support Retailer B?

Would the same employee be represented in some settings by one union, in others by another union and be unrepresented in non-unionized settings?

Sometimes, the operations are in the same building or the employees themselves may move between settings. Would there be two different unions and collective agreements within the same building? How would the outsourcer move resources around its different operations (within same building, across buildings)?

Speaking more generally, unions should not be permitted to make claims to the OLRB (or other organizations) on behalf of non-unionized employees. The *LRA* is a delicately balanced instrument, with well-understood rules for engagement with employees. Adding a union as representative for non-members would alter that balance significantly and it is hard for employers to view it as anything other than a recruitment and certification tactic.

Recommendation #18: Unions should not be permitted to represent non-members, whether employees of the employer or otherwise.

Shift Cancellation Notice

Retail employers want to ensure a fair relationship with their employees. That includes providing employees with sufficient certainty about the hours to be worked and the income that can be expected from that work. Recently, the issue of uncertainty around scheduled shifts has received a lot of attention.

While RCC continues to support the three-hour rule under s. 5(7) of Ontario Reg. 285/01 we recognize that it does not apply to students, nor does it apply to employees who have not presented themselves for work or who do not regularly work for three hours or more. To ensure that employees do have sufficient certainty about the hours of work expected from them and the income that they may expect in turn, it may be appropriate to provide for some minimum notice period for a cancellation or shortening of a shift after which the employer is obligated to pay the employee for a set amount of time.

Recommendation #19: This Review should consider whether the reach of the three-hour rule (or similar rule) should be expanded to situations in which a shift is cancelled or abbreviated on less than a specified notice period. RCC would be pleased to participate in any consultations in this regard.

RCC has again taken notice of the submission on this subject made by the Workers Action Committee[xii]. The recommendation is a two part one, suggesting a two week notice requirement for work schedules and then proposing a payment for a set number of hours if the schedule is "changed" (presumably meaning shortened or cancelled rather than increased).

While retailers strive to provide as much scheduling notice as possible to employees, two weeks' notice cannot be made a hard and fast rule. Traffic spikes and short-notice leave requests from employees for sickness or personal emergencies mean that there will inevitably be requirements to schedule staff on less than two weeks' notice despite the best intentions of the employer when the original scheduling was communicated. We also note that another recommendation made in the same s. demands that employees must be able to ask employers to change schedules without penalty. This is inherently contradictory with the other two points. Aside from the lack of balance in this proposed approach, it means that if the employer then needs to schedule a replacement for the employee who has changed his or her schedule, that employer must do so on less than two weeks' notice. It may be more appropriate to stipulate that an employee is not *required* to work any shift for which they have received notice below a certain threshold.

Recommendation #20: This Review should consider whether to establish a notice threshold after which an employee has the option to accept or decline the offer of a shift. RCC would be pleased to participate in any consultations in this regard.

Temporary Help Agencies

At the outset of this submission, RCC recommended that changes to the *ESA* should be made where necessary but that policymakers should look first to existing remedies to deal with those employers who are failing to comply with the rules. The best approach to *that* problem will usually be a combination of education where the non-compliance is inadvertent, restoration of any pay or benefits due to the employee, and penalties for those who flout the law either deliberately or repeatedly.

This is particularly true with respect to temporary help agencies. We are aware of the kinds of concerns raised by the Workers Action Committee and others re non-payment of wages or benefits due, of payment that amounts to less than the minimum wage, of interference with assigned employees obtaining positions with the client, etc. Those actions are to be deplored and more importantly, to be remedied through enforcement of the existing provisions of the *ESA.*

Some retailers choose to work with temporary help agencies in order to meet spikes in customer traffic or to fill specific back-office needs. Typically, the retention of these agencies' services is not used to keep labour costs down but instead to boost labour supply in circumstances when it cannot be met from among the existing base of employees. Alternatively, a temporary agency may provide an assignment employee for the duration of a regular employee's absence for a leave entitlement prescribed by the *ESA,* particularly for pregnancy leave, parental leave, family medical leave and reservist leave.

Retailers accept the premise underlying s. 74.18(3) of the *ESA* that a client may be jointly and severally liable to the assignment employee for regular, overtime and public holiday pay earned during the assignment period. After all, the work was performed for the ultimate benefit of the client. It is unreasonable, however to hold client companies jointly responsible with the agency for things that are not under its control, like vacation pay, personal emergency leave, termination pay or benefit plans (if any).

Also, the proposal to compensate assignment employees like regular employees of the client makes little sense as they rarely have the same level of experience. And what would paying assignment employees the same mean? Where would the client employer start them in the wage scale? Would the employer have to provide increases as per the wage scale? Would they become entitled/forced to participate in the pension plan?

There are already limits on the use of agency workers to avoid turning them into permanent employees without paying permanent employee conditions (primarily through Canada Revenue Agency rules). Better coordination between the MOL and the CRA would be valuable in this context.

The Workers Action Committee proposal to limit temporary agency assignments to six months[xiii] cannot easily be reconciled with other rights provided for under the *ESA*, including up

to 37 weeks of parental leave under s. 48 (and often in practice, up to 52 weeks) or potentially, with reservist leave under s. 50.2.

Recommendation #21: Recognize that temporary employment agencies perform an important function in helping meet the demand for labour on a short-term basis and also in helping employers provide leaves of absence prescribed under Part XIV of the *ESA*. Increase enforcement against those agencies or employers who are failing to comply with the Act.

LABOUR RELATIONS ACT

As noted earlier in this submission, retail environments may be unionized or non-unionized and there are several large retailers in the grocery sector who have both union and non-union employees within their workforces. RCC takes no position on unionization and supports the continuation of the balanced approach that currently characterizes the *Labour Relations Act.*

SPECIFIC RECOMMENDATIONS

Certification and De-Certification

RCC has noted that the Ontario Federation of Labour has proposed a return to card-based certification on a general basis, beyond the exception that now exists in the construction industry, in which an exemption makes more sense given the mobility of employees and the diversity of worksites.

As we understand the OFL's argument, in a ballot-based certification system there are "opportunities for management to target workers prior to the balloted vote"[xiv], which seems to imply that the employer will commit unfair labour practices. We are unaware of any such practices by employers in Ontario's retail sector and note that in any event, there are adequate remedial provisions in s. 11(2) of the *LRA,* including the capacity for the OLRB to order automatic certification.

Weighed against this OFL proposal is the employee's security in knowing that in a secret ballot, he or she can cast a vote without any risk of that vote being identified by either management or organizers of the certification drive. While retail is not a setting in which one's position on unionization might later be expected to cause tension in the workplace, a secret ballot removes all doubt.

RCC would note that Newfoundland and Labrador has recently dropped its card-based certification rules and joined Ontario, British Columbia, Alberta, Saskatchewan and Nova Scotia in requiring a secret ballot vote for certification.

Recommendation #22: RCC supports the continuation of *LRA's* existing requirement for a secret ballot for union certification and decertification. RCC would support the Ontario Federation of

Labour's alternative recommendation to allow for electronic voting, subject to appropriate safeguards for accuracy and privacy.

Collective Bargaining and Dispute Resolution

RCC supports the current provisions of the *LRA* in regard to negotiation and conciliation. However, the conciliation process is not always used to best effect. For example, we are aware of instances in which a union sends a notice to bargain and immediately thereafter asks for conciliation so that the time starts running on the no-board report.

Despite the request for conciliation, the conciliator is not actually brought in, the no-board report is filed and the parties find themselves in a position to strike or lock-out without having had the benefit of assistance that a conciliator could bring to the parties.

Recommendation #23: The availability of a conciliator and actual engagement in the conciliation process should be obligatory before a no-board report can be issued, unless both parties agree that the conciliator's assistance is not required.

Employer's Last Offer

The purpose of s.42 is to allow the employer's last offer to be placed before employees for a vote and represents a sensible process step to help avoid strike action, lock-out or the absence of a collective agreement in the workplace. Currently, the *LRA* does not contemplate a circumstance in which an employer's final offer may be voted on more than once.

Presumably, final offers are carefully considered proposals, made in good faith. It is not unreasonable to expect that the final offer might continue to represent the employer's last, best position, even after that offer has been voted down by employees. We are aware of circumstances in which tweaks have been requested simply in order to differentiate one offer from another so that it can be voted on a second time.

Rather than preclude the employer's last offer being put forward again to the employees, it might be preferable to allow it to be voted on again after the passage of a reasonable amount of time.

Recommendation #24: Allow for the possibility of more than one vote on an employer's last offer, subject to reasonable timing requirements.

References

[i] Labour Force estimates for 2013.
[ii] Source: CANSIM Table 281-0063 and Catalogue No. 72-002 by JCI
[iii] Ontario retail sales of $168.3 billion in 2013 and $176.7 billion in 2014.
[iv] Inflation at 1.9% in 2014, Source: Bank of Canada
[v] Average cost for employer without current workplace pension plan. Those with "comparable" existing plans will see somewhat higher costs.
[vi] *2015 Reward Compensation Survey of the Canadian Retail Sector.* p.8
[vii] *Still Working on the Edge: Building Decent Jobs from the Ground Up,* Recommendation 2.5, at p.14
[viii] *Your Guide to the Employment Standards Act, 2000,* p.28
[ix] *Still Working on the Edge: Building Decent Jobs from the Ground Up,* Recommendation 3.13, at p.31
[x] *Still Working on the Edge: Building Decent Jobs from the Ground Up,* Recommendation 5.7, at p.52
[xi] *Still Working on the Edge: Building Decent Jobs from the Ground Up,* Recommendation 5.6, at p.51
[xii] *Still Working on the Edge: Building Decent Jobs from the Ground Up,* Recommendation 3.10, at p.29
[xiii] *Still Working on the Edge: Building Decent Jobs from the Ground Up,* Recommendation 2.6, at p.17
[xiv] http://ofl.ca/index.php/labourlawreform/

SUMMARY OF RECOMMENDATIONS

EMPLOYMENT STANDARDS ACT RECOMMENDATIONS

Recommendation #1: The *ESA* should be revised where there are obvious deficiencies but care should be taken not to engage in broad-based revisions simply to deal with infractions by people who don't respect the current statute.

Recommendation #2: Employers should continue to be permitted to determine which employees are eligible for benefits and may if the employer wishes, provide them proportional to the amount of time worked.

Recommendation #3: Employers should continue to be permitted to determine appropriate compensation levels for their employees, subject to the *ESA* provisions on minimum wage and equal pay for equal work.

Recommendation #4: Employers should be able to use reasonable means to ensure that employees are made aware of the provisions of the *ESA* and of revisions to the *ESA* as they occur.

Recommendation #5: The *ESA* should maintain its greater contractual or statutory right provision. Wherever an existing right or benefit exceeds the minimum prescribed by the *ESA,* that right or benefit should be treated as superseding the ESA minimum standard *not* as the two benefits being additive.

Recommendation #6: The hours of work limits should simplified. For example, the 8 hours free from work between shifts limit is largely subsumed within the 11 hours off in a day limit.

Recommendation #7: The *ESA*'s overtime threshold should continue to be set at 44 hours weekly and overtime averaging should continue to be permitted.

Recommendation #8: The ESA should provide that on request of an employee, an employer may choose to grant time off at the rate of 1.5 hours of time off for each hour of overtime worked, in lieu of overtime pay.

Recommendation #9: Replace the current "irregular or occasional" exception for managers with a purposive approach that looks at principal responsibilities, compensation and training.

Recommendation #10: Ontario should examine the possibility of providing an overtime exemption for autonomous, specialized and/or high-earning employees.

Recommendation #11: Employers should be allowed to choose the manner in which vacation pay is paid, subject to timely payment.

Recommendation #12: Clarify that in those cases where an employer has existing leave entitlements that in aggregate equal or exceed 10 days (through policy or a collective agreement) those leave entitlements, however allocated, represent a greater right or benefit regardless of whether those entitlements are allocated in the same way as the emergency leave provisions set out in the *LRA*.

Recommendation #13: Maintain the *LRA* provisions allowing the employer to require reasonable evidence of leave entitlement.

Recommendation #14: The mass termination provisions in the *ESA* should be simplified, while retaining the obligation for notice to employees and for consultation with the Director on Employment Standards.

Recommendation #15: Employment Standards Officers should take on a more proactive education role with employers.

Recommendation #16: The Director of Employment Standards should be empowered to withdraw a Notice of Contravention and cancel any associated penalty.

Recommendation #17: Absent exceptional circumstances, a complainant should provide the employer with full particulars of the complaint. In the alternative, MOL should provide timely disclosure to the employer.

Recommendation #18: Unions should not be permitted to represent non-members, whether employees of the employer or otherwise.

Recommendation #19: This Review should consider whether the reach of the three-hour rule (or similar rule) should be expanded to situations in which a shift is cancelled or abbreviated on less than a specified notice period. RCC would be pleased to participate in any consultations in this regard.

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LABOUR RELATIONS ACT RECOMMENDATIONS

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Recommendation #22: The availability of a conciliator and actual engagement in the conciliation process should be obligatory before a no-board report can be issued, unless both parties agree that the conciliator's assistance is not required.

Recommendation #24: Allow for the possibility of more than one vote on an employer's last offer, subject to reasonable timing requirements.

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