Insight

IN-DEPTH DISCUSSION

SEPTEMBER 22, 2016

Canada: Time for Submissions Soon Expiring in Ontario under Changing Workplace Review

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As previously reported,[1] the Special Advisors to the Government of Ontario, Canada released their interim report on July 27, 2016 on ways in which the *Ontario Labour Relations Act* ("LRA") and *Ontario Employment Standards Act, 2000* (the "ESA") could enhance protections for workers and support for businesses in Ontario's evolving workforce (hereinafter the "Interim Report"). This is a reminder that the Special Advisors are seeking further input from the public on a wide range of issues. All submissions are due no later than October 14, 2016.

Some of these issues include the definition of employee and employer under the ESA and LRA. These issues will affect all employers in Ontario, including franchisors, as described below.

Definition of Employee

The Interim Report defines "employee" and who should be afforded protection under the ESA. The Interim Report also identifies the issue of workers misclassified as independent contractors, who are not covered by the ESA. Misclassification of employees as independent contractors is considered one of the most serious issues facing the Ontario economy.

Currently, the ESA applies only to "employees." The Interim Report opines that as the Ontario economy grows more sophisticated, a variety of relationships and working arrangements have evolved. The result of these changing relationships is that old definitions of "employee" and "independent contractor" are not well suited to the modern workplace; not every worker fits neatly into one category or the other. The Interim Report points to decisions under common law recognizing an intermediate category of worker better known as "dependent contractors." Both employee and employer advocacy groups have commented on this issue

1 *See* George Vassos, *Canada: Ontario Special Advisors Issue Interim Report on the Changing Workplace*, Littler ASAP (Aug. 5, 2016).

and the final report will review options to possibly amend the definition of "employee" in the ESA to also include "dependent contractors."

Suggestions from the Interim Report to remedy this problem include more enforcement/rectification of cases of misclassification and shifting the burden of proof to the employer to prove independent contractor status for purposes of the ESA.

As it stands, the LRA applies to most employees, including those who would be considered dependent contractors, but contains specific exclusions for managers, domestic workers, hunters, trappers, agricultural workers, and members of several professions. The Interim Report questions the historical justifications for excluding certain occupations. The Interim Report states, however, that exclusion of managerial employees remains justified on the basis of a potential conflict of interest within bargaining units that may include managerial and non-managerial employees.

Definition of Employer

Another critical section of the Interim Report deals with determining the appropriate employer(s), as well as other parties, responsible for providing minimum terms and conditions of employment. The issue is which entities should share liability and responsibility for compliance with employment standards legislation in Ontario.

The Special Advisors have already received submissions advocating that franchisors be deemed responsible for complying with employment standards legislation based on a franchisor's brand control, control of the business model, and control over how the business must operate. This responsibility would be held jointly with the franchisee (regardless of the amount of control over the terms and conditions of the franchisee's employees by the franchisor). In response, the franchise industry has argued, among other things, that making franchisors liable for employment standards obligations is unnecessary, costly, and threatens the franchise model as a whole.

Some of the options being considered include, but are not limited to:

- Holding employers responsible for their contractors' and subcontractors' compliance with employment standards legislation, requiring them to insert contractual clauses requiring compliance;
- Creating a new and expanded joint employer test akin that developed by the U.S. Department of Labor;
- Making franchisors liable for employment standards violations of their franchisees (either without limitation or, in more limited circumstances, where franchisors have more direct involvement); and
- Eliminating the ESA's requirement that a "related employer" finding may only be made where the "intent or effect" is to defeat the intent or purpose of the ESA.

Employers under the LRA

According to the Interim Report, it is becoming more important to determine which entity is the employer, whether a number of entities are "related employers," or whether two entities are "joint employers." This need arises from an increase in temporary agency work, but also applies to franchises. As it stands, the Ontario Labour Relations Board ("OLRB") determines the identity of the employer through a "purposive and contextual analysis" on a case-by-case basis, looking at a variety of factors, none of which are singularly determinative. The factors also are not found in a single, exhaustive list for easy reference.

The Interim Report states that the OLRB has been asked to treat franchisors and franchisees as "related employers", meaning they should be treated as a single employer under the LRA, but recognizes that the OLRB has not always done so.

Employers have provided comments largely stating that they prefer the current standard of determining employers in the franchise setting, arguing that franchisors should not be dragged into the labour relations world unless they affirmatively take a hands-on approach to the franchise operation. Union representatives, on the other hand, argue that the franchisor's levels of influence and control, and alternatively their economic power, should determine whether they should be required to bargain with employees directly and whether they should be joint employers for labour relations purposes.

Possible options on this issue put forth by the Interim Report include:

- Adding separate general provisions allowing the OLRB to declare two or more entities "joint employers," and specifying the criteria for doing so;
- Amending current provisions to allow the OLRB to make a related employer declaration where an entity has the power of common control or direction, and providing specific factors to consider when making such a declaration; or
- Enacting specific joint employer provisions dealing with temporary agencies and franchises. Regarding franchises, the new provisions may allow a franchisor and franchisee to be declared joint employers for all employees working in the franchisee's operations. Alternatively, they may allow a franchisor and franchisee to be declared joint employers for employees working in certain industries or sectors.

Other Parts of the Interim Report

Other parts of the Interim Report relevant to the ESA involve the scope of exemptions under the ESA, hours of work and overtime pay, vacations and public holidays, sick days, leaves of absence, termination pay, severance and just cause, part-time and temporary workers, temporary help agencies, written agreements, pay periods, and enforcement and administration of the ESA.

Next Steps - Submissions

While it is not clear whether the Special Advisors will make recommendations on all of the options being considered, the lack of employer participation may be interpreted as being a form of acceptance, or at least a lack of opposition.

Submissions on the options canvassed in the Interim Report must be made by **October 14, 2016**. The government has provided the following contact information for this purpose:

Email: CWR.SpecialAdvisors@ontario.ca

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Fax: 416-326-7650

Because the reviewing taking place is a public consultation process, all submissions may be made available to the public or to other persons or parties participating in the process.

For more information, please join us for an in-depth discussion of this topic at the Littler Breakfast Briefing, "2016 Hot Topics for Ontario Employers" taking place on September 29, 2016.