

Changing Workplaces Review

GUIDE TO CONSULTATIONS

Ministry of Labour

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01 | The Changing Workplaces Review

On February 17, 2015, Ontario appointed two Special Advisors to lead and coordinate public consultations on the changing workplace and provide the Minister of Labour with a final written report with recommendations.

The Special Advisors are C. Michael Mitchell, formerly of Sack Goldblatt Mitchell LLP, and the Honourable John C. Murray, a former justice of the Ontario Superior Court and prominent management labour lawyer.

The Changing Workplaces Review will consider the broader issues affecting the workplace and assess how the current labour and employment law framework as set out in two specific Acts addresses these trends and issues. The Special Advisors have been asked to determine what changes, if any, should be made to the legislation in light of the changing nature of the workforce, the workplace, and the economy itself.

A note on the scope of this review:

The Changing Workplaces Review will focus on how the Employment Standards Act, 2000 and the Labour Relations Act, 1995 could be reformed to better protect workers while supporting businesses in our changing economy.

The Review **will not** consider:

- construction industry provisions of the Labour Relations Act, 1995;
- the minimum wage (which was recently subject of a separate review);
- policy discussions for which other independent processes have been initiated; in this regard, the Ministry of Labour has separate processes examining issues such as:

- the gender wage gap;
- some specific issues regarding migrant workers;
- legislation dealing with compulsory interest arbitration for groups such as police, firefighters and hospital workers; and
- broader public sector bargaining structures.

The concerns of various groups which may have an interest in these issues can still be considered as part of this review, but only as they relate to possible reform of the Employment Standards Act, 2000 and the Labour Relations Act, 1995.

02 | Letter from the Special Advisors

Greetings,

In early February, we were appointed as Special Advisors to the Ontario Minister of Labour, to lead and coordinate public consultations on the changing workplace. Our work will focus on how the Employment Standards Act, 2000 and the Labour Relations Act, 1995 could be amended to better protect workers while supporting businesses in our changing economy. Following the conclusion of the consultations, we will be providing the government with a written report and recommendations.

The topic of the changing workplace presents a broad and very challenging subject for review. We know that the world of work is changing, but the factors driving these changes, and the impacts on workers and employers, are complex.

We want to hear from you about how you've been affected by workplace change. And, specifically, **we want to get your advice on whether our employment and labour legislation also needs to change**, to keep pace with the needs of workers and employers in the modern economy. In this guide we ask for input specifically in several areas. However, aside from the areas excluded from our terms of reference, we would like to hear from you about other issues that are of concern to you so long as they concern the workplace and involve either of these two pieces of legislation.

Both of us have devoted much of our professional careers to helping workplace parties tackle the whole range of tough issues that arise in the employment relationship. We have great appreciation for the challenges that employees and employers face every day. We also recognize the tremendous potential that can be unlocked when parties in the workplace find solutions that work.

One overarching question that might be addressed is what values we should take into account in making our recommendations. In recommending changes to the two central pieces of legislation governing workplaces in Ontario, what goals and objectives do you think should guide our thinking?

For example, we are deeply aware of the central importance of work in our society. As former Chief Justice of the Supreme Court of Canada Brian Dickson wrote:

*“Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person’s dignity and self-respect.”*¹

The goal of protecting workers and supporting business in the modern economy is vital for all of us. **We hope you will join us in this conversation!** We will be visiting communities across Ontario to hear your views directly. Please see the last page of this document for more information on the many ways in which you can provide input.

C. Michael Mitchell
The Honourable John C. Murray
Special Advisors

¹ Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313.

03 | **Context: Changing Workplaces**

Key parts of our employment and labour law system were developed when our economy, our workplaces, the composition of our workforce, and the nature of the jobs workers performed was dramatically different than it is today.

The labour relations and employment standards legislation introduced in the 1950s and 1960s (such as the Labour Relations Act in 1950 and the Employment Standards Act in 1968), responded to the needs of an expanding labour market anchored in the manufacturing and resource sectors, characterized by relatively large workplaces and a stable workforce consisting primarily of full-time (usually male) workers, whose jobs were protected by limited international competition and protective tariffs.

The 21st Century Workforce

Since that time, the world of work has changed. The baby boom generation that swelled the growth of the post-war labour market is now nearing or commencing retirement. The days when women comprised a small minority of employees are long over. Workforce growth is driven by immigration, making today's workforce much more diverse. Younger workers entering the labour market bring with them new ideas, attitudes and expectations about employment.

Businesses today need to adapt to these changes to succeed. They will be competing for talent, and greater integration of historically under-represented groups (e.g., women, workers from racialized groups, aboriginal persons, and people with disabilities). These trends will increase the challenges as well as offer significant benefits associated with workplace diversity.

Changing demographics will drive changes in our workforce and our economy. For example:

- The percentage of persons aged 55 years or older in the Ontario labour force has increased from 10% in 1997 to 18% in 2013 and is projected to reach 24% by 2031.
- The proportion of foreign-born people in the Ontario labour force was 31% in 2006 and is projected to reach 41% by 2031. Starting in 2015, growth of the labour force is projected to come exclusively from immigration.
- In 2012, 11.4% of the Ontario labour force between the ages of 15 and 64 had a disability. Disability is more common among older people, and the disability rates are likely to increase as the population ages.

The Global Economy

Demographic changes are just part of the picture. Ontario's economy continues to change, driven in large part by globalization. Global commerce is not new – Canada has always relied on international trade. But globalization has been increasing with the emergence of new institutions like the World Trade Organization (WTO), trade agreements that promote freer trade in goods and services and make it easier to move capital, the growth of multinational corporations, and new technologies.

One of the consequences of globalization is ongoing, intense competitive pressures in sectors that are involved in international trade like manufacturing – a reality experienced everywhere. As well, governments are under pressure to compete for business investment and jobs.

Canada is one of the most open and “globalized” jurisdictions in the world. According to the federal government, trade is linked to one in five Canadian jobs. In Ontario, exports and imports of goods make up nearly two-thirds of gross domestic product (GDP). Over half of the province's manufacturing output is exported. Therefore, fostering an innovative, globally competitive economy is a priority for Ontario. At the workplace level, the competitive pressures on employers and workers to innovate and boost productivity will continue to grow.

Technological Change

From the printing press, to the steam engine, to the computer, technology has evolved over time to make work drastically different and more productive.

Some commentators believe that technological innovation – particularly in the form of information and communication technology – will make us more efficient, but will also change where we work, how we work, and even the nature of work itself.

There is no consensus on how this transformation will continue to unfold. But, it seems clear that emerging technologies could accelerate growth, spur the introduction of new products and services, shift the demand for labour skills and in some cases displace labour. For example, information and communication technology increasingly enables routine tasks to be performed by robots – resulting in a declining need for certain types of labour. At the same time, there may be increased demand for highly skilled workers who can perform tasks that require problem solving, intuition, persuasion, motivation, “people” skills and creativity – tasks that cannot be performed by computers.

Many studies have focused on the risk that technological advances will negatively impact some aspects of the economy. Others highlight the opportunities technology brings. There is no disputing that the impact of new technology is being felt by workers and employers, and it is reinforcing and amplifying the effect of related trends such as globalization.

Restructuring in the Service Economy

Driven by trends such as globalization and technological change, Ontario’s economy has undergone major restructuring over the past several decades. The biggest change has been the shift away from manufacturing and towards greater output and employment in service industries. The share of private-sector employees working in service-producing industries as a share of total employees increased from 51% in 1993 to about 59% in 2014. Comparable jurisdictions such as the United States have seen a similar trend.

We will continue to see growth in a wide variety of private service sectors, including knowledge-intensive industries such as professional, scientific and technical services, and financial services, many of which are traded internationally. These industries are relatively intensive in their inputs of research & development, advanced technology and highly skilled human capital.

Non-standard Employment

Non-standard employment can be defined in different ways. It includes temporary employment, self-employment without paid help, part-time employment where workers want more hours (“involuntary part-time employment”), and employment characterized by workers who hold multiple jobs but whose total earnings fall below the median wage. Non-standard employment can also include different work arrangements such as on-call work and telecommuting.

Overall, non-standard employment has been on the rise, primarily due to a significant increase in temporary and involuntary part-time employment. Non-standard employment has grown almost twice as fast as standard employment since 1997.

- Youth (under 25) and seniors (over 65) are more likely to be employed in non-standard jobs.
- About one-third of workers with non-standard jobs are currently found in retail trade, health care/social assistance, and professional, scientific and technical groups.

Typically, but not always, this category of employment provides lower wages than standard employment, and provides fewer benefits and less access to employer-supported training. At the same time, some forms of employment that vary from the “standard” model may respond to employee needs, for example balancing work and family responsibilities.

New Forms of Work Organization

In addition to providing “standard” employment, the traditional workplace was characterized by standardized production methods, highly delineated jobs, and rigid organizational and work structures. Many modern workplaces have become smaller, more flexible and leaner with more highly skilled workers and flatter hierarchies.

“High performance” organizations are described by features such as participative decision making, skill- or knowledge-based pay, open flows of information, flat organizational structures, an emphasis on training, – and the adoption of a workplace culture that embraces all of these features.

This transformation is not limited to a particular industry and can be found in both the public and private sectors. Many of these changes respond to new economic pressures from the global business environment. As well, global multinationals entering new jurisdictions often bring their business practices with them.

As a result, statistics on trends such as non-standard employment may understate the extent to which all workers and employers have been impacted by workplace change.

Collective Representation

Ontario, like other Canadian provinces and developed nations, has experienced a long-term decline in private sector unionization. Union coverage has declined most sharply in the private sector for young workers, blue collar workers, men, and those with high school education or less.

There is no consensus on the reasons for this trend, and there may be a number of contributing factors.

- Canada has experienced a long-term decline in unionization: for example, union coverage in the business sector fell from 27% in 1986 to 19% in 2009.
- Unionization has fallen in all provinces and in other jurisdictions
- Women now comprise a majority of union members in Canada
- Young workers are the least likely to be unionized

Q 1: *How has work changed for you?*

Q 2: *What type of workplace changes do we need to both improve economic security for workers, especially vulnerable workers, and to succeed and prosper in the 21st century?*

Q 3: *As workplaces change, new types of employment relationships emerge, and if the long term decline in union representation continues, are new models of worker representation, including potentially other forms of union representation, needed beyond what is currently provided in the LRA?*

Seeking the Right Balance

It has been suggested that there are three key objectives in the employment relationship:

- **Efficiency:** Economic performance (competitiveness, productivity, quality)
- **Equity:** Fair standards regarding outcomes and treatment
- **Voice:** The opportunity for meaningful input into decisions affecting the workplace

Q 4: *Are these the key objectives or are there others? How do we balance these objectives or others where they may conflict? What are the goals and values regarding work that should guide reform of employment and labour laws? What should the goals of this review be?*

04 | The Employment Standards Act, 2000 (ESA)

Ontario's ESA sets out minimum rights and responsibilities that apply to workers and employers in most Ontario workplaces. Until 1969, Ontario's employment standards were found in different Acts. In 1969, these acts were combined to form the first ESA. In 2000, the ESA went through a review to become modern and clearer, resulting in the ESA, 2000. Since then, there have been additional changes (e.g., averaging of hours of work approvals, rules around temporary help agency employment, minimum wage changes).

The current ESA sets out core standards, who they apply to, and provides tools to the Ministry of Labour to deal with those who break the law. For details about employment standards please visit the Ministry of Labour website.

A prior report by the Law Commission of Ontario in 2012 recommended many changes to the ESA. Some of these have already been adopted by the Ontario Government. This review will consider whether other changes, including those recommended by that Commission, should be made.

ESA Minimum Standards

The ESA's core standards generally set out;

- How many hours workers can work in a day or week (8 hours per day or 48 hours a week), breaks (30 minutes after 5 hours), and when overtime must be paid (after 44 hours in a week);
- How much workers must be paid (\$11/hour, \$11.25/ hour as of Oct. 1, 2015) and when and how they must be paid (regular pay periods);

- When workers can take a day off work with pay to observe a public holiday (9 days);
- The minimum number of weeks workers are allowed for vacation (2 weeks);
- When workers can be away from work for various leaves (10 different leaves); and
- How much notice and/or pay workers must be given when their employment ends (minimums: termination notice/pay of roughly 1 week per year of employment up to 8 weeks and severance pay of roughly 1 week per year of employment after 5 years up to 26 weeks).

These standards exist to protect workers from inadequate working conditions and wages, and to prevent unfair competition by creating a level playing field for employers based on such conditions and wages.

Q 5: *In light of the changes in workplaces, how do you feel about the employment standards that are currently in the ESA? Can you recommend any changes to better protect workers? Do the particular concerns of part-time, casual and temporary workers need to be addressed, and if so, how?*

Q 6: *Are changes needed to support businesses in the modern economy? How could the Act be simplified while remaining fair and comprehensive? Are there standards in the ESA that you find too complex? If so, what are they and how could they be simplified?*

Some concerns have been raised about how best to address an employee's need for short-term absences from the workplace (for example, for illness). Currently, an employee whose employer regularly employs 50 or more employees is entitled to an unpaid leave of absence of up to 10 days per year because of any of the following:

- A personal illness, injury or medical emergency;
- The death, illness, injury or medical emergency of certain relatives; or
- An urgent matter that concerns certain relatives.

Q 7: *Should this leave be revised in any way? Should there be a number of job-protected sick days and personal emergency days for every employee? Are there other types of leaves that are not addressed that should be?*

ESA Coverage

The ESA applies to most workers and employers in Ontario, but it is not universal. For example, certain employees are completely excluded from the ESA (e.g., politicians, judges, and inmates). Also, certain industries, occupations, and individuals have exemptions or special rules for some of the standards (e.g., students, construction workers, and information technology professionals). For more information about exemptions and special rules visit the Ministry of Labour website.

People who are classified as managers or who are self-employed (e.g., independent contractors and dependent contractors) are also excluded from the ESA.

Q 8: *In the context of the changing nature of employment, what do you think about who is and is not covered by the ESA? What specific changes would you like to see? Are there changes to definitions of employees and employers or to existing exclusions and exemptions that should be considered? Are there new exemptions that should be considered?*

Q 9: *Are there specific employment relationships (e.g., those arising from franchising or subcontracting or agencies) that may require special attention in the ESA?*

ESA Compliance

Ontario's employers are expected to operate lawfully. They are not allowed to punish workers who exercise their ESA rights. However, we know that violations happen and can have a harmful effect on the workers, especially those who are vulnerable. The ESA contains a number of tools for the Ministry of Labour to use when employers do not follow the law. The Ministry of Labour can order an employer to comply, to pay back monies, to reinstate or financially compensate a worker, and/or pay a fine.

The Ministry of Labour investigates claims that are filed by workers, conducts workplace inspections, and may prosecute employers. Recent changes to the ESA have created a new claims process and changed the amount of unpaid wages that the Ministry can recover.

Q 10: *Do the current enforcement provisions of the Act work well? In your experience, what problems, if any, exist with the current system, and what changes, if any, should be made? In your experience, what changes could help increase compliance with the ESA?*

05 | The Labour Relations Act, 1995 (LRA)

The LRA is the primary statute regulating labour relations for most Ontario workplaces, both in the private sector and parts of the public sector. This review is not examining the specific legislation that applies to public sector employees such as police and firefighters. This review is also not considering the construction industry provisions of the LRA.

LRA Coverage

Like the ESA, the LRA excludes several types of workers based on industry, occupation or professional status. Some (including agricultural workers and certain public sector workers such as firefighters) are covered by other labour relations legislation. Other excluded workers (e.g., domestics) and professional groups (e.g., architects) are not. In addition, some workers are not covered by the LRA due to the nature of their employment relationship (e.g., independent contractors).

Q 11: *In the context of the changing nature of employment, what do you think about who is and is not covered by the LRA? What specific changes would you like to see?*

The LRA has undergone major reforms at various times (in addition to periodic amendments to various sections of the Act). The last substantive LRA reform was in 2005. However, some of the key features of this legislative framework have been in place since its introduction in 1950.

Access to Collective Representation

The LRA provides that every person is free to join a trade union of the person's own choice and to participate in its lawful activities. The LRA sets out the means by which workers can organize into unions, and establish bargaining rights through certification. Generally, this process involves an application demonstrating at least 40% support among the appropriate bargaining unit of workers (typically in a single workplace), followed by an OLRB-supervised secret ballot vote. This vote is usually conducted within five working days of the application. Unfair labour practices (such as intimidation) by employers and unions in the course of this process are prohibited. There is a similar process for workers to apply for decertification if they no longer wish to be represented by their union. Bargaining and collective agreement rights are protected by the LRA, which provides generally that the purchaser of a business is bound by any bargaining rights and collective agreement then in effect (this is known as "successor rights").

Q 12: *In the context of changing workplaces, are changes required to the manner in which workers choose union representation under the LRA? Are changes needed in the way that bargaining units are defined, both at the time of certification and afterwards? Are broader bargaining structures required either generally or for certain industries? Are changes needed in regard to protecting bargaining rights?*

Collective Bargaining and Dispute Resolution

The LRA contains provisions pertaining to the negotiation, content and operation of collective agreements. For example, the LRA imposes on the parties a duty to bargain in good faith and make every reasonable effort to make a collective agreement. The law also prohibits strikes and lockouts during the term of a collective agreement, and establishes the grievance arbitration process for the resolution of workplace disputes during the term of a collective agreement.

Q 13: *Are changes required to the LRA with regard to the ground rules for collective bargaining? Are new tools needed in the LRA with respect to industrial disputes or to deal with protracted labour disputes?*

Powers of the Ontario Labour Relations Board

The LRA enumerates a number of unfair labour practices. For example, it is unlawful for an employer to discriminate or retaliate against an employee on the basis of that employee's support for a union. As well, the LRA sets out the power of the OLRB to respond to complaints of contravention of the Act. For example, the OLRB is able to order an employer to reinstate and compensate an employee who has been unlawfully terminated. Over time, the OLRB has also been given remedial jurisdiction under a number of other statutes (including the ESA). The OLRB is thus the cornerstone for providing administrative justice in the context of the LRA as well as other legislation.

Q 14: *In light of the changing workplace and the needs of workers and employers in the modern economy, are changes needed regarding the unfair labour practices set out in the LRA, or to the OLRB's power to provide remedies in response to unfair labour practices?*

Q 15: *Are there changes that could be made to the LRA that would enable the parties to deal with the challenges of the modern economy?*

06 | Conclusion

The purpose of this review is to consider what changes can and should be made in the context of Ontario's labour and employment law regime to continue to protect workers while supporting business in today's modern economy.

It is clear that Ontario's workplaces have undergone considerable change, and in many ways the pace of change appears to be accelerating.

It is important that employment and labour laws meet the needs of workers and employers in the current environment – and in the future.

Q 16: *Are there any other issues related to this topic that you feel need to be addressed? Are there additional changes, falling within the mandate of this review, that should be considered?*

07 | How You Can Provide Input For This Review

Further information about the Changing Workplaces Review, including the terms of reference and how to participate in regional consultations, is available on the Ministry of Labour website.

If you are interested in responding to this guide with your comments, ideas and suggestions, please contact the Ontario Ministry of Labour by:

E-mail: CWR.SpecialAdvisors@ontario.ca

Mail: Changing Workplaces Review, ELCPB,
400 University Ave., 12th Floor Toronto,
ON M7A 1T7

Fax: 416-326-7650

Comments are encouraged throughout the consultation period. Comments will be accepted until September 18, 2015.

If you are interested in making a presentation for the upcoming public consultation sessions, please contact The Changing Workplaces Review by email at: **CWR.SpecialAdvisors@ontario.ca** or by phone by calling 1-888-868-5844. Presenters will be given up to 10 minutes to provide their input.

Staff will confirm your request and assign a timeslot to maximize the number of presentations that can be heard.

Thank you for taking the time to participate.

Notice to Consultation Participants

Submissions and comments provided are part of a public consultation process to solicit views on reforms to Ontario's employment and labour law regime that may be recommended to protect workers and support business in the context of changing workplaces. This process may involve the Ministry of Labour publishing or posting to the internet your submissions, comments, or summaries of them. In addition, the Ministry may also disclose your submissions, comments, or summaries of them, to other parties during and after the consultation period.

Therefore, you should not include the names of other parties (such as the names of employers or other employees) or any other information by which other parties could be identified in your submission.

Further, if you, as an individual, do not want your identity to be made public, you should not include your name or any other information by which you could be identified in the main body of the submission. If you do decide to identify yourself in the body of the submission this information may be released with published material or made available to the public. However, your name and contact information provided outside of the body of the submission, such as found in a cover letter, will not be disclosed by the Ministry unless required by law. An individual who provides a submission or comments and indicates an affiliation with an organization will be considered a representative of that organization and his or her identity may be disclosed.

Personal information collected during this consultation is under the authority of subsection 23(1) and paragraph 2 of subsection 141(1) of the Employment Standards Act, 2000 and is in compliance with subsection 38(2) of the Freedom of Information and Protection of Privacy Act.

If you have any questions regarding privacy matters, you may contact the Ministry's Freedom of Information and Privacy Office at 416-326-7786.