



ONTARIO CHAMBER OF COMMERCE

SUBMISSION:

Consultation on *Employment Standards Act* *Exemptions and Labour Relations Act Exclusions*

December 1, 2017



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Ministry of Labour
400 University Avenue
Toronto, ON M7A 1T7

Subject: Consultation on *Employment Standards Act Exemptions and Labour Relations Act Exclusions*

Minister Flynn,

Thank you for the opportunity to comment on the government's review of the exemptions and exclusions under the *Employment Standards Act* (ESA) and the *Labour Relations Act* (LRA).

The ESA sets out the rights and responsibilities of employees and employers in most Ontario workplaces. The ESA establishes a "floor" or minimum employment standards with respect to the following major areas: maximum hours of work; rest periods; eating periods; overtime pay; minimum wage; public holidays; vacation with pay; pregnancy and parental leave; emergency leave; other leaves of absence; and termination and severance of employment.

The exemptions exist because past governments have acknowledged that particular positions or professions present certain scheduling and workload management difficulties. Prior to amending the current exemptions, the government should be mindful to consider whether those scheduling and workload management difficulties exist, whether the elimination of the exemptions would create an impossible situation for employers, and to what extent the employees are otherwise protected.

The Government of Ontario has been consulting on changes to the ESA and the LRA since 2015 with the launch of the Changing Workplaces Review. This has continued through the issuance of the Final Report of the Special Advisors on May 23, 2017, and to date with the government's work to pass Bill 148, the *Fair Workplaces, Better Jobs Act*. When the government announced the proposed Bill 148 amendments to the ESA, it announced that it would be conducting a review of ESA exemptions and special industry rules in phases.

The Ontario Chamber of Commerce (OCC) and our membership have been actively engaged in addressing the impacts of the Province's *Fair Workplaces, Better Jobs Act* and its effects on Ontario businesses. The legislation proposes a broad range of amendments to Ontario's ESA and the LRA, including changes to minimum wage compensation, paid vacation, overtime pay, employee misclassification, scheduling, and termination of assignment.

The first phase of the ESA exemption review focuses on eight occupations that are currently exempt from minimum employment standards: architects; domestic workers; homemakers; IT professionals; managerial and supervisory employees; pharmacists; residential building superintendents; janitors and caretakers; and residential care workers.

For the majority of the eight occupations under the ESA review, the government is seeking detailed information into the daily workings and operations of the specific occupations. In the case of the managerial and supervisory employee occupation, the government is proposing a legislative change to the current ESA exemption. It is proposing a salary-plus-duties threshold to be applied to the occupation before the exemption from the overtime provisions can apply.

Additionally, if passed, Bill 148 would introduce two new Parts to the ESA that would apply to some of the occupations under review (architects; managers/supervisors; IT professionals; residential building superintendents, janitors, caretakers; pharmacists). These two new Parts are Request for Changes to Schedule or Work Location (New Part VII.1 of the ESA) and Scheduling (New Part VII.2 of the ESA).

New Part VII.1 of the ESA would allow employees to have the ability to request changes to their schedule or work location after they have been employed for at least three months. Employers who receive these requests would be required to discuss them with the employee and either grant them or provide reasons for denial. New Part VII.2 of the ESA would establish minimum standards regarding scheduling. These include the three-hour rule; minimum pay for being on call; right to refuse; cancellation of shift; and limit on entitlement.

The OCC has conducted outreach to our members and received comprehensive feedback regarding several occupations under the exemption review. However, for a few occupations (architects, domestic workers, residential building superintendents, janitors and caretakers and residential care workers) the OCC received only very limited feedback from our membership.

For the occupations that the OCC is able to comment on more fully, our members would like to see the current exemptions remain the same and no changes take place. **If changes to the exemptions are deemed necessary, the OCC strongly urges the government to conduct a complete economic impact analysis of potential change to the exemptions as well as comprehensive evidence-based research into the actual need for changing these long-held exemptions.** The OCC would also strongly advise that any changes to the current exemptions are phased in over time and there is no sudden change to the established status quo.

PART 2 – OCCUPATION DISCUSSION

Managerial and Supervisory Employees

Currently under the ESA, managerial and supervisory employees are exempt from daily and weekly limits on hours of work; daily rest period rule; time off between shifts rule; weekly/bi-weekly rest period rule; and overtime pay.

OCC members believe that the current exemptions regarding managerial and supervisory employees should remain in place.

There is strong consensus that the current definition of the occupation of managerial and supervisory employees is clear and straightforward to interpret. The current language in the ESA notes that exemptions apply to “persons whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis”. The current language identifies that to be exempt, one must supervise

others. OCC members do not have concerns with the understanding of this wording and do not believe that a further clarification is required to the definition.

Some OCC members have noted that making the definition too prescriptive, such as attempting to attach precise value to the term “irregular” or “exceptional basis,” would reduce operational flexibility and would hamper the ability of businesses to address ever-changing capacity needs, especially in sectors where there is inconsistent or unpredictable flow of demand. Determining precise duties for managers and supervisors could be overly restrictive and would not permit for the flexibility that has historically been allowed for the occupation under the ESA.

A bright-line test or a very specific definition would have far-reaching negative implications. For example, in the construction industry, it is common to have a working foreman. Upon arriving at the job site, this individual oversees the unloading, holds the safety meeting, and directs the workers, then they work alongside the others. Under the *Occupational Health and Safety Act*, if an accident happened, they could be prosecuted as a supervisor. But, if there was a minimum percentage of strictly managing time required reach work day, this individual may not be a supervisor under the ESA. This scenario may be replicated in other industries and may send a mixed message to the worker as to their role, rights, and responsibilities.

It has been noted by OCC members that linking the salary threshold to the general minimum wage does not provide an appropriate point of reference. Members argue that this can create an artificial exemption simply by changing the manager’s salary. Mandating or dictating what a manager salary should be based on minimum wage takes away earning abilities from the employees and can impact their growth within the company. Members state that what makes an employee a manager or supervisor should not be defined based on what is earned but rather by the duties performed and the job’s responsibilities.

Therefore, the salary for managers and supervisors should not be subject to minimum wage rules and should remain covered under the ESA exemptions. Businesses should have the ability and flexibility to determine how they compensate managers and supervisors within their operations. It is also important to note that compensation is not just monetary value—many companies offer a full slew of benefits for their managers and supervisors, including educational funding and leadership opportunities. Many managers and supervisors may also participate in company bonus programs, which give them access to a level of variable pay based on reaching company objectives. If changes to the exemptions were to be made, many employers may re-consider these forms of compensation and/or potentially freeze base salaries if managers and supervisors were to be earning overtime.

OCC members have noted that making the definition of managerial and supervisory employees overly prescriptive or removing the current exemptions for this occupation in haste and without proper analysis could have detrimental unintended consequences both to businesses and to employees’ career trajectories. Employees may be restricted in helping when demand calls for it or employees may not be promoted in a timely manner.

OCC and our members would be open to a careful, thoughtful and methodical examination of the current exemptions and discussing whether these exemptions need to be updated. Some OCC members have advised that there should be a maximum number of hours worked for managerial and supervisory employees as well as a certain number of hours between shifts.

However, given the proposed legislative change in the form of Bill 148 potentially coming down the pipeline and its immediate impact to businesses, the OCC would strongly advise that the current exemptions remain in place for the time being. If any changes must be made in any capacity to the current exemptions, these changes should be carefully examined and

be evidence-based. Additionally, consultations with a wide range of stakeholders should be undertaken to ensure that any changes to the current exemptions do not contain unintended consequences for Ontario's businesses or economy.

IT Professionals

Currently, under the ESA, IT professionals are exempt from hours of work; daily rest periods; time off between shifts; weekly/bi-weekly rest periods; eating periods; and overtime.

OCC members caution that changing the current exemptions would be ill-advised, due to the proposed legislative changes within the *Fair Workplaces and Better Jobs Act*, which fail to differentiate between truly vulnerable workers and entrepreneurial knowledge workers who engage as independent contractors, oftentimes in the IT sector. Until the Act is clear in its implications for independent contractors, exemptions should remain as they are for IT professionals.

The IT industry is vast and encompasses a wide range of activities requiring differing degrees of knowledge, skills and problem-solving. Workers in the IT industry operate through a variety of business arrangements – independent contractors, consultancy arrangements and traditional employment relationships.

It is not an overstatement to say that IT underlies and permeates all aspects of Ontario's modern economy and, indeed, most aspects of modern life. IT professionals who are engaged as employees play an important role in supporting the very ability of a business or almost any other organization to operate in a modern, highly computerized economy.

Some other key features of the IT industry and the work of IT professionals strongly support the continuance of the existing IT professional exemption. First, the work of IT professionals is highly mobile. Much of the work depends on the knowledge and skill sets of individual workers and can be relocated to other jurisdictions if unfavourable regulations are passed or favourable regulations are removed. There is already a high degree of outsourcing in the industry, and this risk cannot be ignored.

Second, much of the work of IT professionals is short-term, project-based work, and needs to be performed within a tight schedule and often at times when there is limited usage of an organization's systems. For example, upgrades to underlying systems need to be completed quickly and during evenings or weekends when the work will not disrupt the organization's business and other activities. Moreover, work spent supporting and maintaining IT systems is often very time-sensitive and must be addressed as it arises – no organization can risk having key IT support not available when the need arises. Similarly, as IT professionals near completion of a project, they require flexibility to address unanticipated bugs or other complications that must be resolved before the project can be completed.

Third, many IT professionals are well-paid individuals because they possess skill sets that are in high demand and, as discussed in point one above, are highly mobile. In many cases, compensation levels have been set in light of the existing exemption from overtime pay.

Given these core characteristics, hours of work for IT professionals must be flexible and employers must have the ability to schedule these employees to respond quickly to organizational needs as they arise. It would be highly disruptive to the IT industry, and to any organization that relies on IT professionals to service and maintain IT systems, if the hours of work constraints and scheduling rules of the ESA were imposed on this group of employees.

For similar reasons, the application of overtime pay requirements is impractical in a field where for a large portion of employees, work flow is neither predictable nor steady. IT professionals

have skill sets that are in high demand, and they are quite capable of negotiating generous wages in exchange for their services.

The context for assessing whether the IT Professional exemption should be removed requires comparison to what is done in other competing tech jurisdictions (i.e. Boston, Austin, San Francisco, New York) to ensure that Ontario remains competitive and in step with technological landscape. IT Professionals and firms are highly mobile and legislation that makes it more difficult for firms and employees to operate in Ontario may result in loss of business and job opportunity for the province. This can have both an economic and cultural impacts, and it could have an adverse effect on Ontario firms retaining highly mobile knowledge workers relative to other jurisdictions. These changes would see flexible work arrangements limited and see engineers tracking their time rather than solving tough problems and competing with global companies chasing after the same market without the same restrictions.

The OCC would like to see the current exemptions for IT professionals remain the same with no changes taking place. If changes to the exemptions are deemed necessary, the OCC strongly urges the government to conduct a complete economic impact analysis of potential change to the exemptions as well as comprehensive evidence-based research into the actual need for changing these long-held exemptions. Additionally, if any changes to the current exemptions are made, those should be phased in over time to avoid sudden unintended consequences to the established status quo.

Pharmacists

Currently under the ESA, pharmacists are exempt from minimum wage; hours of work; daily rest periods; time off between shifts; weekly/bi-weekly rest periods; eating periods; overtime; public holidays; vacation with pay; and personal emergency leave.

OCC members note that pharmacists have the ability to structure their own hours of work as long as the full working day has coverage. Pharmacists also currently earn significantly more than the minimum wage requirements as defined the ESA, with an approximate average wage of \$50 per hour.

The OCC would like to see the current exemptions for pharmacists remain the same with no changes taking place. If changes to the exemptions are deemed necessary, the OCC strongly urges the government to conduct a complete economic impact analysis of potential change to the exemptions as well as comprehensive evidence-based research into the actual need for changing these long-held exemptions. Additionally, if any changes to the current exemptions are made, those should be phased in over time to avoid sudden unintended consequences to the established status quo.

Homemakers

Currently under the ESA, homemakers are exempt from minimum wage; hours of work; daily rest period; time off between shifts; weekly/bi-weekly rest periods; and eating periods.

OCC members note that considerations need to be made for the fact that hotels and most hospitality providers can have extremely unpredictable needs. A property may book dozens of rooms in one night with little notice, or in the same instance experience numerous cancelations that result in the loss of the bookings. Although the hospitality industry forecast to the best of their knowledge and try to confirm as much business as possible, nothing in the industry is guaranteed.

As this is the nature of the business, staffing plans must work within these parameters. Removing the existing exemptions would impede staffing and available working hours, especially to housekeepers.

Changes to hours of work and overtime currently covered by ESA exemptions could potentially translate to staff not receiving hours and loss of employment. The current exemptions allow for the unpredictable reality of the hospitality industry and provide necessary protections to ensure that the industry remains economically stable.

The OCC would like to see the current exemptions for homemakers remain the same with no changes taking place. If changes to the exemptions are deemed necessary, the OCC strongly urges the government to conduct a complete economic impact analysis of potential change to the exemptions as well as comprehensive evidence-based research into the actual need for changing these long-held exemptions. Additionally, if any changes to the current exemptions are made, those should be phased in over time to avoid sudden unintended consequences to the established status quo.

Part 3 - Conclusion

The OCC appreciates the opportunity to comment on the Province's review of exemptions and exclusions under the ESA.

The OCC has provided commentary on four of the occupations that the government is currently reviewing under the ESA. For those four occupations, the OCC would like to see the current exemptions remain in place. The OCC would be glad to work with government to further examine whether there is a concrete need to update the current exemptions and exclusions under the ESA.

However, given the fact that these exemptions have been part of businesses operations in Ontario for many years, any changes, however minimal, to the current exemptions must be done with great care and consideration to avoid any unintended consequences. Government should be mindful not to enact changes to the current exemption that hurt the very segment of the population it is trying to help.

Any changes to the current status quo of the exemptions should be based in comprehensive economic analysis and evidence-based research. Additionally, there should be a significant outreach to the public and businesses to ensure that the changes being proposed address actual needs on the ground. If any exemption changes are to be implemented, they should be done in a very gradual manner to ensure that there is no economic or social fallout.

The OCC would be happy to continue to work with government as it addresses these fundamental factors that have a pivotal role to play in ensuring that Ontario businesses and economy remain strong and competitive.

Sincerely,



Richard Koroscil
Interim President & CEO
Ontario Chamber of Commerce

ABOUT THE ONTARIO CHAMBER OF COMMERCE

For more than a century, the Ontario Chamber of Commerce (OCC) has been the independent, non-partisan voice of Ontario business. Our mission is to support economic growth in Ontario by defending business priorities at Queen's Park on behalf of our network's diverse 60,000 members.

From innovative SMEs to established multi-national corporations and industry associations, the OCC is committed to working with our members to improve business competitiveness across all sectors. We represent local chambers of commerce and boards of trade in over 135 communities across Ontario, steering public policy conversations provincially and within local communities. Through our focused programs and services, we enable companies to grow at home and in export markets.

The OCC provides exclusive support, networking opportunities, and access to innovative insight and analysis for our members. Through our export programs, we have approved over 1,300 applications, and companies have reported results of over \$250 million in export sales.

The OCC is Ontario's business advocate.