

Rapid Policy Update: OCC Responds to Ontario's proposed labour and employment reform

BACKGROUND

Media reports in [CBC](#) and the [Toronto Star](#) state that government will take swift action around the final report of the Changing Workplaces Review, which is to be released “after Victoria Day” with reforms the government intends to adopt announced shortly thereafter. Media reports further suggest “it’s not clear whether legislation would be introduced before June 1, when Queen’s Park adjourns for the summer.”

Cabinet will hear, likely Wednesday, the provisions in the report that Ministry of Labour will recommend to proceed with.

Changes to the Employment Standards Act will include giving all employees in Ontario a minimum number of sick days, increasing annual paid vacation from the two-week minimum, boosting the minimum wage to \$15 an hour, and enhancing protections for workers in the most low-paid and vulnerable jobs. Senior government officials who have seen the report say it recommends eliminating some of the exemptions in the Act, which would give many more workers the right to such things as personal emergency leave and overtime pay. The Report is also set to mandate unpaid personal days. Right now, only companies with 50 or more employees are required to offer staff 10 unpaid personal emergency days per year, leaving some 1.7 million workers without that right. Some of the other Employment Standards Act recommendations, according to the officials:

- Ensuring that independent contractors doing the work of an employee are protected by employment laws
- Mandating that part-time workers be paid the same rate as full-time workers doing the same job in the same workplace
- Bringing some currently exempted classes of workers under the protection of the Employment Standards Act
- Providing workers the right to refuse shifts on short notice without fear of repercussions, while allowing employers the flexibility to make last-minute scheduling changes

On labour relations, the report recommends that union organizers be given access to computerized lists of employees, said one government official. Other Labour Relations Act reforms that are recommended, according to the officials:

- Expanding successor rights (requiring that a union contract remains in place when a company is sold) to unions in all sectors.
- Stronger rules to push employers toward negotiating a first contract after a union is formed.
- Enable union organizers to sign up a majority of members using card-based certification

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Officials are saying that they are responding to “general anxiety” and will act “as quickly as possible.”

As part of its work, the Changing Workplaces Review did not consider an increase to the Minimum Wage – it was outside of the parameters of the Review. Minimum wage is currently \$11.40 an hour and set to rise by the rate of inflation. But a government source said the Liberals are seriously considering a plan to phase in a more rapid minimum wage increase to \$15 an hour.

According to the Star, Minister Flynn “is braced for pushback from the private sector and the business press, but dismisses their warnings that higher unionization and labour standards will drive investment out of Ontario.”

OCC RESPONSE

Today, the OCC sent a letter to Premier Wynne [\[hyperlink\]](#) which objected in the strongest terms to many of the policies being considered and discussed in these media reports. The letter challenged the scale of the problem being discussed, and emphasized that these reforms are coming at a time when Ontario’s economy continues to show signs of vulnerability.

The OCC is asking that the Government of Ontario spend the coming months appropriately subjecting the proposed reforms in the final report of the Changing Workplaces Review to an economic impact analysis. This analysis should have clear acceptability thresholds, and the reforms implemented should be limited to those that pass such thresholds or are being implemented with a commensurate economic offset measure. We support reform where and when it is needed, but caution against change for change’s sake.

The OCC will work with the many industry and sector associations that have been involved in the Keep Ontario Working coalition to determine the most appropriate next steps to confront these changes.

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KEY ISSUES

Non-standard employment

- Non-standard employment can be of value to individuals looking for work-life balance, accommodating a disability, or transitioning from school to work or retirement back to work.
- Certain forms of non-standard work can be extremely well paid, in part to compensate for degrees of uncertainty. Moreover, some non-standard employees prefer higher wages to other benefits because of benefits already received through family members.
- Temporary work, in particular, can prove a useful stepping stone into more permanent jobs.
- A recent US survey shows that “more than 90% of establishments have converted temp agency workers to permanent employees”.¹
- Nearly 70% of Ontario’s part-time workers opted to do so of their own volition, not because of the lack of an alternative.²
- An 85 country analysis concludes that “heavier regulation of labor is associated with lower labor force participation and higher unemployment, especially of the young”.³

Impact of proposed changes - general

- Small business will have to minimize their staff because they won't be able to afford compensating employees for days not worked.
- Costs will be passed on the consumers. Everyday good and services will be more expensive.
- Prosperity cannot be legislated. If a business has a set amount of revenue budgeted for salaries, it will either have to hire fewer people or raise the cost of their products.
- These changes will have a profoundly negative impact on business investment. According to the Conference Board of Canada the main challenge facing the Canadian economy remains the lack of business investment. Without a material improvement on this front, Canada’s potential economic growth will remain below 1 per cent⁴. The implication of weak potential growth is that the Bank of Canada may have to begin increasing interest rates sooner than expected as excess slack dissipates early next year. In March, the CD Howe Institute reported “Business investment per worker in Canada is at its worst level compared to the United States in more than a quarter century... After years of narrowing the gaps between investment per worker in Canada and abroad, capital investments by Canadian businesses have fallen sharply, and 2017 looks especially bleak.”⁵

¹ Gunderson, Morley. 2015. Changing Pressures Affecting the Workplace and Implications for Employment Standards and Labour Relations Legislation. <https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Gunderson-3- Changing%20Pressures%20Trends.pdf>.

² Statistics Canada. Table 282-0014 - Labour force survey estimates (LFS), part-time employment by reason for part-time work, sex and age group, annual (persons), CANSIM (database). <http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2820014>.

³ Botero, J. C., Djankov, S., Porta, R. L., Lopez-de-Silanes, F., & Shleifer, A. 2004. The Regulation of Labor. *The Quarterly Journal of Economics*, 119(4), 1339-1382.

⁴ Conference Board of Canada. Economic Performance and Trends.

http://www.conferenceboard.ca/topics/economics/default/17-05-05/canada_s_labour_market_took_a_pause_in_april.aspx

⁵ "Canada's Business Investment Hits New Low against US - C.D. Howe Institute." <http://www.newswire.ca/news-releases/canadas-business-investment-hits-new-low-against-us---cd-howe-institute-617003574.html>

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Our position for change

- Ontario's economic recovery remains fragile and long-term growth projections are modest. Global pressures threaten our status as an investment destination of choice, and the cost of doing business in Ontario continues to rise. Compounding compliance costs brought on by the Review could limit business' ability to create jobs in the province. Reforms should be implemented only when a robust evidence base demonstrates the net benefit of such measures.
- We think it is critical that Government not make decisions prematurely and thus only introduce legislative reforms once this data is processed and published by Government. For this reason, our chief recommendation is that each policy option resulting from the Review be subject to a structured and publicly reported economic impact test. This analysis should have a clear acceptability threshold, and the reforms implemented should be limited to those that pass such thresholds or have clear offset measures attached.
- The Government should increase its investment in workplace rights education and regulatory enforcement to ensure that existing labour laws are being appropriately followed and that violators are being held to account.

Minimum wage

- In 2014, this government announced a new mechanism to calculate increases to the minimum, indexing increases annually to the Consumer Price Index (CPI). Tying minimum wage to the CPI brought much needed predictability, transparency and fairness to the entire process.
- The OCC was pleased to work with government to develop this approach, which insulated the process from political pressures while putting Ontario ahead of the pack and enabled predictability for business planning.
- We object in the strongest terms to an arbitrary increase. The decision would have profoundly negative impacts for the Ontario economy.
- In a recent release, the Conference Board of Canada emphasized that there are real costs associated with making labour more expensive, particularly when the proposed minimum wage is more than half of the average hourly wage in a jurisdiction, as it is in Ontario.⁶
- Research from the Ontario-based Institute for Competitiveness and Prosperity (ICP) argues that existing federal and provincial laws provide strong protection for employees and that "[r]einforcing these laws by increasing minimum wage or enforcing stricter labour standards is not a good way to improve the lot of the precariously employed, because these changes might increase unemployment and decrease productivity".⁷
- ICP has also called for a skills development approach to precariousness and has encouraged government to increase vocational education so as to create a professionalized routine-service workforce. ICP also suggests that, in some cases of precarious employment, public policy should look at ways of supplementing workers' income and benefits to ensure they can afford a decent quality of life.

⁶ Global News. "Reality check: Is a \$15 minimum wage bad for the economy?" <http://globalnews.ca/news/2937197/reality-check-is-a-15-minimum-wage-bad-for-the-economy/>

⁷ Institute for Competitiveness and Prosperity. 2013. Untapped Potential: Creating a better future for service workers. http://www.competeprosper.ca/work/working_papers/working_paper_17.

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Card based certification

- Card-based certification allows workers to unionize simply by signing a union card. The need for a secret ballot vote would be removed, marking a substantial change from the existing process. We believe this diminishes employees' rights and would prevent workers from having a real say about whether or not they wish to be part of a union.
- Secret ballot voting safeguards employees from external pressures and helps ensure their true opinion is represented. While a secret ballot vote is conducted in a neutral environment by the Labour Relations Board, the collection of signatures on union membership cards is controlled entirely by union leadership. For this reason, the federal government passed the Employees' Voting Rights Act which mandates that a secret ballot be held in every case of an application for certification.
- Many groups repeat a refrain that declining unionization rates in Ontario merit special rules for this province. This assertion is false. Ontario's unionization rate has remained largely static since the secret ballot was first introduced in the mid-1990s⁸. Further, it is important to note that over the last 20 years, there have only been a handful of instances where the outcome of the card-based certification vote was not reflected in the secret ballot.
- We are calling upon the government to ensure transparency in the union certification process and maintain the Labour Relations Act requirement for a secret ballot when attempting to certify or decertify a union. We are also calling on the Labour Relations Act to be amended to require that the list of employees provided in response to a certification application not be used for any other purpose than for the present application for certification.

Sector exemptions

- Abolishing sector exemptions would mark a significant change from Ontario's long-standing approach to Employment Standards legislation. For example, in knowledge-based occupations, like information technology, exemptions have been developed to recognize the distinct demands of entrepreneurial culture. Similarly, exemptions in agricultural sub-sectors recognize the fact that agricultural production is highly dependent on global market demand, external factors including weather, and the perishable nature of agricultural products. Sectors like these require legislated workplace standards that are sufficiently flexible.

Sectoral bargaining

- Under a Sectoral Standards Agreement, a labour union will certify one workplace and then extend that throughout a regional/occupational/industrial labour market. This could create a scenario where thousands of small employers are negotiating with one union bargaining council. For example, all coffee shop workers in Toronto would have one union, like construction trades. Some voices have gone so far as to suggest freelancers, dependent contractors, and self-employed workers be granted access to such a collective bargaining regime. This proposal raises more questions than answers.
- Rather than engage in legislative reform in this area, the Government should focus its efforts on compliance and enforcement of the current provisions of the ESA.

⁸ Statistics Canada. 2012. Long Term Trends in Unionization. <http://www.statcan.gc.ca/pub/75-006-x/2013001/article/11878-eng.htm>

Personal emergency leave

- Existing leave provisions are reasonable and that significant amendments could compromise productivity and investment and thus the economic wellbeing of both employers and employees.
- Government should preserve the 50 employee threshold for PEL and clarify the greater right or benefit provision in the ESA. We also think there is value in the PEL being broken down into more discrete categories, especially in the absence of an effort to consolidate PEL with the ESA's other nine leave categories.
- Employers value regulatory frameworks that align with compliance capacity. Considered changes to the PEL, outside of those we have expressed support for, could add a level of complexity and onerousness that would be difficult for business to navigate.
- Many small businesses have limited operational flexibility, particularly as it relates human resource management. Extension of PEL to this category of employer may constrain productivity and increase cost. Changes should not be considered without a full understanding of firm-level impact and a strategy as to how small businesses could be resourced by Government to absorb the additional pressures generated from an expansion of PEL policy.

Common employer and contracting

- The current law in Ontario already establishes a clear and effective test for determining whether two or more parties should be found to be joint or common employers. This test operates effectively and should remain in place. Changing the test for common employer status would be a fundamental and far reaching disruption to the current relationship between employees and employers and would create enormous uncertainty in an area of law which is currently clear. For business owners, there is legitimate concern that these changes may result in disruptions to contractual agreements without any consent of the contractual parties. Franchisors and franchisees are particularly vulnerable to this risk.
- It is both inaccurate and unfair to argue that, because franchisors want to maintain consistent brand standards, franchisors exert a level of control that should automatically make them a joint or common employer with the franchisee. Such a characterization is a direct contradiction of the very nature of the franchisor/franchisee relationship— two independent parties coming together in a relationship governed by a contract, containing terms which are clearly defined. It would also set Ontario apart from any other province in Canada, and necessarily reduce the number of new franchised businesses expanding into this province from other jurisdictions.