

REPORT OF THE LABOUR MANAGEMENT REVIEW COMMITTEE ON THE REVIEW OF THE EMPLOYMENT STANDARDS CODE – REGULATORY ISSUES

Introduction

On February 3, 2006, the Honourable Nancy Allan, Minister of Labour and Immigration requested that the Labour Management Review Committee (LMRC) convene to review the Department's package of proposals as they relate to the review of *The Employment Standards Code* and associated regulations.

In May of this year the Committee responded to the Minister with a consensus recommendation on all issues requiring a statutory change while requesting additional time to review proposals regulatory in nature. On May 9, 2006 the Committee reconvened to review nine outstanding regulatory proposals submitted by the Department. In addition to these proposals the Committee revisited two other proposals dealing with overtime for incentive pay workers and the definition of family. The Committee devoted much time and effort to the review of these eleven issues through five formal meetings, and a number of individual meetings with their respective caucuses and constituencies.

As mentioned in the previous report, the Committee took into account a variety of factors when evaluating these proposals. These included the interests and needs of their respective constituencies and an analysis of how Manitoba's employment standards legislation compares to other Canadian jurisdictions. Consultation with respective constituencies is an important component to the Committee process as recommendations reflect the unique nature of each industry. As a result, the Committee has agreed that additional time can be taken to consult with the agricultural industry to ensure recommendations balance protections for agricultural workers with the unique operational requirements of that industry.

On behalf of the Committee I am pleased to provide a consensus recommendation on each of the non-agricultural proposals.

LMRC Joint Recommendations on Regulatory Proposals

1.0 Consistent set of regulations for meals and lodging.

The three current regulations each provide separate rules restricting deductions for purposes of meals and lodging. The Department proposed that meals and lodging provisions found in the *Minimum Wage and Working Conditions Regulation* be adopted as the sole standard addressing this issue. That is, deductions for meals and lodging cannot take the employee below the minimum wage by more than \$1 per meal and \$7 per week for lodging. This will ensure greater consistency and clarity.

The Committee concurs with the Department's proposal.

2.0 Consistent language throughout regulations to reflect managerial exclusion.

The Department proposed that the regulation excluding "employees employed in supervisory, managerial or confidential positions" from the weekly day of rest be changed to exclude "employees that perform management functions primarily." This proposal ensures that language in the regulations is consistent with the consensus recommendation of the LMRC regarding managers and overtime.

The Committee concurs with the Department's proposal.

3.0 Repeal the "call in wage" exclusions for students / rural locations

In light of the new reporting pay provisions, previously recommended by the Committee, the Department proposed that call in pay provisions, and all exclusions from those provisions, are repealed. The repeal of exclusions for an "employee of a theatre, hotel or restaurant in a rural area or an employee who is a child" from call in pay will not affect scheduling flexibility in those industries. The new reporting pay provisions will continue to provide flexibility by allowing regularly scheduled shifts of less than 3 hours.

The Committee concurs with the Department's proposal.

4.0 Prohibit child employment in high risk industries

The Committee previously recommended that the employment of children in certain high risk industries be specifically prohibited in regulation. The Committee requested that the Department submit specific recommendations on proposed industries where a prohibition would apply. After extensive discussions with Workplace Safety and Health the Department is proposing the following prohibitions:

Under 18 Prohibitions

- Forestry and logging
- Sawmills or pulp mills
- Confined space
- Underground workings of a mine or the face of an open pit quarry working (this simply recognizes a prohibition already in place under *The Operation of Mines Regulation*).
- Asbestos abatement and removal

Under 16 Prohibitions

- On a construction site
- In the industrial or manufacturing production process
- On a drilling or servicing rig
- In work involving scaffolding or swing stages
- In arboriculture (the pruning, repair, maintenance, or removal of trees).

The Committee concurs with this proposal based on the following clarification:

- This list attempts to capture those types of industries where greater maturity and judgment are required. However, there are many other dangerous industries and work tasks where the Director may prohibit a child from working. The legislation currently requires any person that employs a child obtains a child employment permit. Prior to issuing a permit the Director evaluates the nature of employment and shall not

issue a permit if in his or her opinion the safety, health, or well-being of the child is likely to be adversely affected. As a result, there may be other situations where the Director prohibits child employment by refusing to issue a child employment permit. This will be evaluated on a case-by-case basis.

- The prohibition on arboriculture is not intended to limit opportunities for young people to plant trees. The prohibition is specific to those activities where dangerous tools or machinery are used.
- The intent of this proposal is to protect the health and well-being of young Manitobans' not to limit valid employment opportunities. The director will have the ability to evaluate each case on its own merit and may issue a permit in exceptional circumstances where the health and safety of a child is not adversely affected (e.g. in the construction industry the director may issue a permit for a child that is isolated from the jobsite and whose work activities are not construction related such as assisting with paperwork).

5.0 Industry-wide hours of work variance for landscaping

The Committee previously recommended that certain industry wide variances be streamlined and placed in regulation as long as those industries are well defined in order to prevent abuse. After further discussions with the Manitoba Labour Board (MLB), the Department proposed that the specific standard hours of work for the landscaping industry be placed in regulation. This will formalize the current MLB practice of issuing variances to landscaping companies.

The Department proposed that standard hours of work for landscaping be 10 hours per day / 50 hours per week / 2080 hours per year. Overtime would be payable for hours of work in excess of these standards. These standard hours of

work reflect the seasonal nature of this industry and therefore it is proposed that these hours of work only be in effect from April 15 to November 30 of each year.

For greater clarity the Department proposes that “landscaping” be defined to include the construction of a landscape such as the maintenance of gardens, lawn cutting, fertilization, sod applications and weed control. However, this will not include “in-house” employees of landscaping companies (e.g. customer service personnel or bookkeepers) nor would it apply to the maintenance and cleaning of parking lots or the removal of snow.

The Committee concurs with the Department’s proposal.

6.0 Administrative penalties for prescribed violations of the Code

The Committee previously recommended that the Director of the Employment Standards Division have the ability to issue an administrative penalty for prescribed repeat violations of the Code. The Committee requested further clarification on the specific contraventions of the Code where an administrative penalty would apply.

The Department proposed that administrative penalties apply to repeat violations that occur after the person has been notified of a previous failure to comply with that provision. The Department proposed a \$500.00 per violation per employee penalty for most occurrences of continued non-compliance such as failure to pay overtime, failure to pay minimum wage, etc. The Department proposed a higher penalty for violations where an employer continues to employ a child in a prohibited industry or without a child employment permit. The Committee was asked to consider a penalty in the range of \$1000.00 - \$3000.00 for these types of violations.

The Committee concurs that there should be a system of administrative penalties for repeat violators. However, they recommend the following modified structure:

The Committee recommends that a list of specific contraventions is placed in regulation. The Committee agreed to a sample list of violations provided by the Department, however acknowledged that the sample list only provides guidance and that a final list would appear differently in regulation based on drafting requirements and other changes being made to the legislation not reflected in the sample.

The Committee concurs that the Director of Employment Standards be able to issue an administrative penalty of \$500.00 per violation per employee for most violations of the Code and recommends that the penalty for violations of child employment provisions be set at \$1000.00 per employee per violation. The Committee recommends that the Director have the ability to issue penalties up to a maximum of \$10,000 at any one time.

7.0 Improve protections and provide flexibility for temporary lay-offs

The Department proposed that the Director of Employment Standards replace the Minister as the entity with the authority to extend the time before a lay-off becomes a termination. The Director would follow guidelines before deciding to extend a period of a lay-off (e.g. the director would only extend the period of a lay-off if it is not deemed to be prejudicial to the interests of the employees).

The Department proposed that the ability to lengthen a lay-off be streamlined where there is a collective agreement by allowing parties to negotiate their own lay-off and recall provisions. *The Employment Standards Code* would apply where the collective agreement is silent on the issue.

The Department proposed that the current definition of “seasonal” used for purposes of lay-offs be made more restrictive to protect employees by requiring that employees know in advance that a lay-off will occur. Instead of using

“seasonal” the Department proposes that the regulations refer to “regular and reoccurring” disruptions in employment.

The Department proposed that employees be granted a choice regarding whether they want to accept that they are on lay-off by continuing to receive payments from the employer or whether they choose to activate the termination.

The Committee concurs with the Department’s proposal with some modifications regarding the ability of the Director to lengthen the period of the lay-off. The Committee recommends that the regulation prescribe that the Director take into consideration the following guidelines prior to lengthening the lay-off:

- The lengthening of the layoff is not to be prejudicial to the interests of the employees;
- There is majority support among the affected employees;
- The employer is able to demonstrate a timeframe for recall; and
- Any other factor that the Director deems reasonable to evaluating the request.

8.0 Improve protections for domestic workers

The Department proposed the following modified definition for domestic worker:

- An individual hired and paid by a member of the family to:
 - (a) perform work in the private residence of the employer for activities primarily related to the management and operation of the household including such activities as cleaning, washing, cooking, and gardening but not including an individual that comes-in to the household to primarily sit for a member of that household;
 - (b) provide care for a member of the household if the individual is required to live at the residence of the family in an employment relationship of some permanence. (This

would not apply to the babysitter that lives at the residence for a week to look after the children while the family is on vacation).

The Department proposed that all domestics meeting the above criteria would be included for coverage. This would necessitate the removal of the current threshold requiring a domestic to work more than 24 hours for coverage.

The current legislation caps a domestic's pay at 12 hours per day regardless of the actual number of hours worked. The Department is proposing that this section be repealed and that a domestic be paid for all hours worked.

The Committee concurs with the proposed definition of domestic worker. The Committee concurs that the current cap on a domestic workers pay should be repealed. However, the Committee recommends that a threshold for coverage continue to apply. The Committee feels that it would be appropriate to reduce this threshold from 24 hours to 12 hours. As a result, all domestic workers that work more than 12 hours per week will be covered.

9.0 Extend some provisions of the Code to agricultural workers

When the LMRC first considered this matter in February, 2006 the Committee recommended that the Minister provide additional time for consultations with agricultural stakeholders prior to the formulation of specific recommendations. The Committee would like to thank the Minister for providing this additional time and for meeting with Keystone Agricultural Producers (KAP) and other agricultural stakeholders, along with the Minister of Manitoba Agriculture, Food, and Rural Initiatives (MAFRI).

Over the past number of months, the Department has also been involved in consultations with the following agricultural stakeholders:

- Keystone Agricultural Producers
- Vegetable Growers Association of Manitoba
- Dairy Farmers of Manitoba
- Manitoba Pork Council
- Manitoba Egg Producers
- Manitoba Chicken Producers
- Manitoba Agriculture, Food, and Rural Initiatives (MAFRI)

The consultations have focused on informing agriculture stakeholders about employment standards and requesting input from the agriculture sector on three main issues:

- Ways to ensure that any exclusion for agricultural workers is clear and appropriate by revising the current definition of agriculture in the Code. This might include focusing the definition on those who work on a farm and are directly engaged in primary production of certain agricultural products.
- Ways of recognizing the special circumstances of smaller family-run farms by considering such matters as the exclusion of family members from employment standards provisions and determining the appropriate definition of family members.
- Ways to ensure provisions that might be extended to agricultural workers reflect the industry and employment realities of various sectors of the agriculture industry. Certain core provisions of the Code already apply to all agricultural workers; others may also be appropriate to apply to all workers in this industry. Other provisions may be more appropriate for certain sectors, and/ or may require modification to reflect the realities in that sector of the agriculture industry.

While the Committee believes that consultation should not continue indefinitely, it also values the importance of proper consultation with agriculture stakeholders given the unique and complex nature of the industry. The Committee also agrees

on the importance of receiving input from commodity groups and their respective constituencies on specific proposed changes prior to a formal recommendation being made by the Committee.

The Committee is therefore recommending that the Department complete its initial consultation with agricultural stakeholders and, based on these consultations, develop proposals regarding the status of agricultural workers under the Code in light of the three themes outlined above. Taking into account the feedback from agriculture stakeholders, final proposals would then be submitted to the LMRC. At that time the LMRC will formulate recommendations for the Minister. The LMRC will ensure consultation with the agricultural stakeholders in its deliberations regarding agricultural issues.

LMRC Joint Recommendations on “Other Issues”

10.0 Definition of family

The Committee previously recommended that the definition of family in the Code be consistent with the federal definition used for the purposes of Employment Insurance.

The federal definition of “family” recently changed (please refer to column A below). Some argue that the new federal definition is unnecessarily complex. As a result, the Department proposed that the Committee consider an alternative definition (column B) that may capture the same intent as option A.

Option A – New Federal Definition	Option B – Modified Version of Federal Definition
<p>a) a child of the individual's parent or a child of the spouse or common-law partner of the individual's parent;</p> <p>b) a grandparent of the individual or of the individual's spouse or common-law partner, or the spouse or common-law partner of the individual's grandparent;</p> <p>c) a grandchild of the individual or of the individual's spouse or common-law partner, or the spouse or common-law partner of the individual's grandchild;</p> <p>d) the spouse or common-law partner of the individual's child or of the child of the individual's spouse or common-law partner;</p> <p>e) a parent, or the spouse or common-law partner of a parent, of the individual's spouse or common-law partner;</p> <p>f) the spouse or common-law partner of a child of the individual's parent or of a child of the spouse or common-law partner of the individual's parent;</p> <p>g) a child of a parent of the individual's spouse or common-law partner, or a child of the spouse or common-law partner of the parent of the individual's spouse or common-law partner;</p> <p>h) an uncle or aunt of the individual or of the individual's spouse or common-law partner, or the spouse or common-law partner of the individual's uncle or aunt;</p>	<p>A person, whether or not related to the individual by blood, adoption, marriage or common-law partnership, considered to be like a close relative.</p>

<ul style="list-style-type: none">i) a nephew or niece of the individual or of the individual's spouse or common-law partner, or the spouse or common-law partner of the individual's nephew or niece;j) a current or former foster parent of the individual or of the individual's spouse or common-law partner;k) a current or former foster child of the individual or the spouse or common-law partner of that child;l) a current or former ward of the individual or of the individual's spouse or common-law partner;m) a current or former guardian of the individual or the spouse or common-law partner of that guardian;n) in the case of an individual who has a serious medical condition, a person, whether or not related to the individual by blood, adoption, marriage, or common-law partnership, whom the individual considers to be like a close relative; ando) in the case of an individual who is the claimant, a person, whether or not related to the individual by blood, adoption, marriage or common-law partnership, who considers the individual to be like a close relative.	
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The Committee concurs that it would be beneficial to use an alternative to the lengthy and complex definition chosen by the federal government. However, the Committee is concerned that option B may not be as expansive as the federal definition. There was some concern expressed that there is room to argue that the person in question is "not like a close relative." As a result, the Committee recommends that any legislative change should capture the broad intent of the

federal definition. However, the Committee requests that the legislative drafters do their best to simplify the federal definition where possible.

11.0 Change method of calculating overtime for incentive-based workers

The Committee previously recommended that the following formula be adopted as a way to provide incentive-based workers with a premium for overtime hours worked:

- A worker's hourly "base" wage would be determined by dividing the total wages earned in a pay period by the total hours worked in that pay period, and the worker would be paid time-and-a-half of that base rate for all hours worked after 8 in a day or 40 in a week.
- In cases where productivity can be measured, the overtime rate should be time-and-a-half of that productivity (e.g. 1.5X the commission, piece-rate, etc during the overtime hours).

Upon further reflection, the Committee asked that the Department consider alternatives that provide incentive-based workers with overtime while acknowledging the need for flexibility for employment relationships structured under multiple compensation schemes (e.g. a worker is paid a base-rate plus incentive rate).

In response to this request, the Department suggested the following modified proposal:

- The original consensus will continue to apply to those workers paid purely incentive pay.
- Where a worker earns a base rate plus incentive pay, and the base rate is equal to at least two-times the minimum wage, overtime is

payable on the base-rate but not on the incentive pay component of the compensation package.

The Committee concurs with the Department's modified proposal.

Conclusion

In closing, I would once again like to acknowledge the contributions made by all the Committee members who donated significant time to reaching a consensus on issues that serve the best interests of all Manitobans.

Submitted this 9th day of November, 2006.

A handwritten signature in black ink, appearing to read "M. D. Werier". The signature is written in a cursive style with a horizontal line underneath it.

MICHAEL D. WERIER
Chair, Labour Management Review Committee