Submission to Employment Standards Review

on behalf of the Human Resource Management Association of Manitoba

Introduction:

The Human Resource Management Association of Manitoba ("HRMAM") has over 1100 human resource professionals and practitioners as members, representing approx. 425 Manitoba workplaces, and tens of thousands of employees, including the private, public and non-profit sectors. HRMAM is affiliated with its national organization and its provincial counterparts. Its members are significantly responsible for the administration of employment standards in the medium and large businesses that operate and employ people in Manitoba. Our members have a great deal of experience and education in the issues addressed in employment standards legislation.

At HRMAM, our primary interest in this review is in fair and efficient administration of employment terms and conditions of employment. While we would have welcomed the opportunity to do a thorough review of the substantive changes under consideration, and to have canvassed our membership to determine where consensus lies on changes to employment standards, the short time allowed by the Provincial Government to prepare submissions, in particular through the winter holiday season, has prevented a more comprehensive effort. What follows is what we have been able to assemble in the time permitted and to gain support at least from our Board if not our entire membership. Not allowing enough time for us to obtain input from our membership is in fact a significant lost opportunity for this government to get valuable insights from the people who work most closely with these issues.

HRMAM recently (August, 2005) established a Legislative Review Committee, composed of 15 of its members, which has more recently been retitled the Government Relations Committee. HRMAM had no idea until mid-November, 2005 that a comprehensive review of employment standards would occur in Manitoba, but the committee has done its best to focus its attention on this issue since the notice was received.

HRMAM attended the federal employment standards review in September, 2005, chaired by Harry Arthurs. This process seemed to be a more considered and balanced process with adequate notice (9 months for oral presentations and nearly 11 months for written briefs) for meaningful input from the community affected.

HRMAM believes that in general, Manitoba should have employment standards similar to those in other jurisdictions, but certainly no more generous than the average of the other provinces, given our relative economic position. It would be difficult to justify standards as generous as those in BC, Alberta, Ontario or Quebec, for example, whose economic and population base is far greater than Manitoba's.

While the members of HRMAM represent the interests of employers and are paid by employers to administer employment standards, we may surprise you in taking positions that are not those that business traditionally takes. You will see from our presentation that HRMAM favours effective enforcement of the Code and education of employees as to its contents, in the interests of assuring that what is written in the law is also what happens in practice. Unenforced standards simply has the effect of giving an unfair economic advantage to those who ignore the law, against those who comply. Those organizations who hire human resource professionals tend to be the compliant employers. For this reason, we believe we offer a balanced perspective in that respect.

Enforcement:

There is no point having employment standards at all if there is no effective enforcement of them. Lengthy delays in responding to complaints, or investigating them and bringing them to conclusion is essentially a motivation for unscrupulous employers to break the law. Employees who are delayed in receiving redress for Employment Standards violations should receive interest on amounts recovered, at a rate comparable to what they would have to pay to borrow money in the marketplace, rather than pegging interest to a prime rate or a court-based rate of interest. HRMAM also does not oppose the administration fee that is assessed against non-compliant employers (s. 96 of the Code), and says that the money collected under this section should be specifically dedicated to improving Code enforcement, rather than going to General Revenue of the Province.

The Provincial Government has to dedicate enough resources to the Employment Standards Division to have effective, efficient auditors and enforcers who respond and manage files in a speedy way. This has not been the case in the past, and so unless the Province commits to spending sufficient dollars to set up effective enforcement, we see little purpose to reviewing the standards. Department of Labour initiatives have been notoriously underfunded in the past, including the Labour Board and the Human Rights Commission.

HRMAM believes that spot or random audits are extremely important because in many smaller workplaces, employees do not feel empowered to complain about violations, or are ignorant of their rights. Who would complain about overtime not paid if the consequence of complaining could well be loss of the job? For this reason, the vast majority of complaints come from employees who have left the employment position. While audits will help in this regard, making the "no reprisal" provisions of the Code effective is also important. Employees should not feel that by raising an issue about their pay or working conditions that they are risking their job or career.

Education:

In the absence of an effective auditing system (and even where that audit system worked), educating workers of their rights is crucial to achieving workplace fairness, for both employees and compliant employers. Employees know best how they are being treated, but they also need to know what their rights are under statute and regulation. Technology offers many innovative ways to communicate legal rights to workers, such as:

- web page information;
- e-mails to workers; and
- posting of rules in lay language (and maybe several languages, as appropriate) where other bulletins are posted in the workplace.

The legislation should require employers to educate their workers as to their legal rights, similar to the material that is made available on Health and Safety, and on Workers Compensation.

Employment standards need to be expressed in the simplest, clearest language to enable even employees with modest amount of education or language skill to understand their rights. Having elaborate rights is of little use if employees do not know what those rights are.

Exemptions from legislation:

The Employment Standards legislation needs to make clear who is covered, and for which provisions, and who is not covered. Managers and employees practicing statutory professions (engineers, lawyers, doctors, etc.) should be exempt, and the same tests should apply for exemption as in labour relations (s. 1 of The Labour Relations Act and the case law flowing from it).

Those who make employment-related decisions on behalf of the employer (hiring, passing employees on probation, discipline, selection for promotion, lay-off, recall, authorizing time off and overtime, scheduling part-time staff, dismissals, etc.) can be exempted because they have the bargaining power to gain better employment conditions than can be provided in employment standards legislation. They would also be in a conflict of interest in administering the same legislation which benefits them.

Employees who determine their own hours of work, as opposed to receiving a schedule from their employer, should not be subject to hours of work provisions in the employment standards legislation, again due to the obvious conflict of interest.

In addition to managers, truly independent contractors should be exempt from employment standards as they are not "employees". The old statutory definition under The Employment Standards Act was fairly simple and clear in explaining the distinction between employment and independent contract: if you are paid to deliver a result, rather than being subject to the control of the employer while performing the work, then you are an independent contractor.

True independent contractors are not economically dependent on the employer because they are truly in business for themselves. They have discretion to decide who will actually perform the work, and even if they perform some of it themselves, they have the right to send a substitute worker at their discretion. They provide peripheral services, rather than performing the core function of the enterprise. If they are truly independent contractors by these definitions, they should be exempt from the legislation and the test should be clearly stated. If the Province opted to adopt the test for independent contract that is applied under The Income Tax Act, that would be simple and consistent. The important thing is to make the definitions of the exemptions CLEAR.

Substantive Standards:

Apart from the above "triple E" submission on the overall administration of the Code, HRMAM wishes to offer some comments on some selected areas of employment standards which have been identified as areas of concern in this review. We would have liked to comment on all of the topics under consideration, but the timeframe required for submission did not allow for a more exhaustive review, unfortunately. What follows then are a few specific recommendations on the statutory and regulatory standards themselves.

1. **Termination** of employment issues:

a) HRMAM is aware that the Province is considering a sliding scale of notice upon termination of employees without cause. This would be consistent with termination obligations in our neighbouring provinces. From our review, the average is about one (1) week of notice for each completed year of service, to a maximum of eight (8) weeks. HRMAM has no difficulty with bringing Manitoba into line in this regard.

b) If Manitoba goes the sliding scale of notice route, this should be subject to **mitigation,** as in the common law. Employees who immediately (or within the notice period) find alternate employment should not be paid for notice they do not require. If the new job pays less than the previous one, then the terminating employer should be liable to **top up** the employee for the shortfall. If mitigation is not adopted as a factor, then what is being legislated is not NOTICE but SEVERANCE. If that is the legislative intent, then use that word.

c) The standard for terminating an employee's employment without notice should be "**just cause**". This phrase is well defined in the common law, and is a fairer standard than the collection of language in the present *Code* (see the Convergys case in the Court of Appeal in 2005). Employment should also be terminable where the contract is frustrated (usually due to the medical incapacity of the employee), and no accommodation is possible without undue hardship to the employer. No notice or severance should be payable once the employer has proved the frustration.

d) **Contracting out** of the termination provisions of the legislation should be eliminated. The current termination requirements are subject to "an agreement to the contrary". While this may be truly a matter of agreement in some situations, it is more often the result of imposition by a dominant employer on an employee with little or no bargaining power. Industries could be exempted by regulation, but otherwise termination notice should be a true minimum standard.

e) **Probation** should be expressed in hours worked, not the passage of calendar days. The purpose of probation is to assess the suitability of the employee, and this can only happen while the employee is working. To be consistent with the three (3) month probation prevalent in other jurisdictions, a probation period of five hundred and twenty (520) hours worked would be appropriate.

f) **Resignation** should continue to require a notice period (we suggest two (2) weeks) to give the employer a chance to find a suitable replacement employee. The employer should not be able to waive the two (2) weeks of notice, only the amount of notice given in excess of two (2) weeks (Nygard decision). As with the current Code, an employee who fails to give the required notice should be liable for the amount of wages she would have earned during the notice shortfall.

g) **Adjudication** as per the federal system (s. 240 - 246 of Canada Labour Code) should not be adopted because it is too expensive in relation to the problems it solves. The Manitoba Labour Board (upon review/appeal of Emloyment Standards Branch orders) can continue to determine when there is just cause for the employment termination, and what damages are owed when there is no just cause, but reinstatement should not be an option. Outside adjudicators are unnecessary here.

2. **Child** labour:

The present system of allowing child employment with written permission of parents and school should be preserved. It is not right to deprive children of the opportunity to earn essential income, but we need to protect them from being enticed away from completing their education.

Here again, effective enforcement is crucial and is not happening now on a consistent basis. Protection of children in the workplace is and should be also linked to Workplace Safety and Health legislation. There should be different maximum numbers of hours of work on school days as opposed to non-school days.

3. **Part-time** and flexible hours work:

Much has been said about the need to protect employees in flexible working arrangements, including those who work out of their homes, on loose schedules. These employees need to be accountable for time when they are NOT working as well, or else the employers will be subject to being exploited.

Making employees accountable for the time they are absent from work as well as compensated for extra time that they DO work is especially an issue for salaried non-managers, since the practice has generally been NOT to track hours precisely, notwithstanding the provisions of s. 135 of the Code.

Compensation for part-time hours worked should be proportional to the hours worked, including holiday, vacation and other pay for particular leaves of absence. The system for calculating vacation pay under the current Code would be useful in this regard. To compensate part-time employees in a greater than pro-rated amount would be demoralizing to full time employees. Not all part-time employees work a reduced schedule because no full time work is available. Some do it by choice. They should not be over-rewarded for making that choice. The concept of an hour's pay for an hour's work remains a sound one, widely recognized in our labour, human rights and constitutional law. To deviate from that would be a fundamental error.

The legislation should set "standard" hours (more than the standard triggers overtime premium of 1.5) and "maximum" hours (even though the employer is prepared to pay a premium, the maximum hours cannot be exceeded).

Hours of work exemptions should continue to be available, but through the Employment Standards Division, rather than through the Manitoba Labour Board. The regulation should set clear criteria for when the exemptions can be granted, and then the Employment Standards officers can apply them. They should also be available based on industry norms, and not just when a majority of employees signs consent.

HRMAM supports "minimum" hours for a scheduled shift, and not just for call-ins as in the current Code. An employee expected to attend work should receive a meaningful pay cheque, unless the parties can convince the Division that an exception should apply. HRMAM suggests a minimum shift of two (2) hours.

One initiative that must be avoided is the Saskatchewan legislation that awards part-time hours by seniority. Such entitlements are rare even under long-established collective bargaining relationships, for many reasons. Aside from the patent unfairness and increased cost to the employer, such a principle means a hardship for newer employees, and makes it difficult for them to stay in the employment relationship as they are starved out. Many industries have seasonal fluctuations in work activity, and need to be able to offer a reasonable amount of work to newer part-time employees, even during slower periods, to keep them available when the season hits its peak.

4. **Leaves** of absence:

The minimum standards should provide only for UNPAID leaves. Bereavement leave, if incorporated, should be for IMMEDIATE family only, and for at most three (3) calendar days from date of death. Sick leave should be unpaid and should be a small amount, given that attendance is so crucial in some industries. Compassionate care leave should match the Employment Insurance entitlement.

Conclusion:

We applaud the Province for engaging in a consultative process before initiating a comprehensive overhaul of its employment standards legislation. We appreciate the positive response to our request to allow additional time to present and sharing the research "Inter-juisdicational comparison of employer/employe rights and obligations". To make that consultation process meaningful, the Province should allow the time this vast topic deserves for a thorough study. HRMAM would have welcomed the opportunity to address more of the substantive issues, had the Government provided any reasonable amount of time to review and prepare on these issues, including such issues as vacations, meal and rest periods, use of employment standards tribunals or arbitration, group termination of employment and liability of directors and officers, if sufficient time had been provided. This employment standards review process is a very important one in making and keeping Manitoba competitive and attractive to current and new businesses, and in providing a clearly understood and well-enforced set of workplace standards that are fair to all. However, good results will not be achieved by rushing through the community consultation process. Still, we are grateful for the opportunity to offer these ideas within this process, and hope that they will be carefully considered. Should you have any questions or other matters you want us to consider, we would make ourselves available to deal with them and would again be grateful for the opportunity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 23, 2006

HUMAN RESOURCE MANAGEMENT ASSOCIATION OF MANITOBA, per:

MARYANN KEMPE, PRESIDENT