SUBMISSION OF THE

MANITOBA EMPLOYERS COUNCIL

REGARDING THE EMPLOYMENT

STANDARDS REVIEW 2005

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A. INTRODUCTION

Established in 1980, the MEC is the largest confederation of employer associations in Manitoba and represents more than 24,000 individual employers and employer associations.

The Employment Standards Code has enormous effect, for good or ill, upon the employed population in Manitoba. In considering the Code and possible amendments it is important to keep in mind that all legislation is a blunt instrument and has the potential to be counter-productive. Where, as here, we are dealing with legislation which affects all employed persons in the province, there is great potential to achieve the opposite of what we intend unless care is taken. Legislative change which is ill advised or too inflexible can kill jobs rather than create them, frustrate employee preferences rather than advance them, and discourage investment rather than attract it.

In our view the best approach is one which is moderate, prudent and cautious. Given Manitoba's relative standing in the national economy, it is reasonable to achieve legislative change which is middle of the road and be careful not to exceed to the norm in other jurisdictions.

At the same time we have learned from experience that allowing flexibility is often in the interests of everyone. A good example of this is the provision in the current code allowing exceptions to the standard 8 hour day without attracting overtime (eg. four ten hour shifts per week) as long as the weekly threshold is not exceeded on average. This particular alternate shift schedule has proved very popular with many

employees who appreciate, and in fact prefer, the extra day off with no loss of weekly earnings.

Also, it is important to correct provisions which on the basis of experience are demonstrably counter-productive.

B. REFLECTING THE REALITIES OF THE MODERN ECONOMY: FLEXIBILITY, PROTECTION, COVERAGE AND COMPLIANCE

1. Hours Of Work And Overtime

(a) *Hourly Workers:*

As indicated flexible arrangements which alter the standard eight hour day have been shown to benefit both employees and employers in certain circumstances. In our view this flexible approach allowing solutions to be achieved at the workplace and to be tailor-made to fit individual circumstances should be maintained and enhanced.

We do feel that some of the administrative burden could be lifted from the Manitoba Labour Board and placed at least in first instance with the Director of Employment Standards.

Accordingly, we suggest that the legislation be amended so that the Director of Employment Standards would be empowered to issue variances. In the event any stakeholder disagrees with the

decision of the director, an appeal would lie within thirty (30) days to the Manitoba Labour Board.

A variance once issued should remain in effect until an application was made to amend or cancel it. The sole criterion for acceptance would be support by a majority of the employees affected as indicated in a written petition or a sign-up sheet.

Further we would suggest that the averaging period be extended to six months to allow for seasonal variations.

(b) *Salaried Employees:*

There are many advantages in certain circumstances to an approach which compensates employees on the basis of a salary rather than an hourly wage. Often salaried employees work less in a day or a week than the standard threshold and yet receive a full salary. Employers frequently provide more flexibility to salaried employees to take time off without loss of pay. Salaried employees are not subject to the constant scrutiny of a time clock.

At present the approach taken by the Employment Standards Branch and the Labour Board of affording the right to overtime to non-managerial salaried employees appears designed to protect employees. Certainly there is no lack of decisions awarding overtime to salaried employees in circumstances where the Labour Board is satisfied that hours had been worked without compensation at overtime rates.

The Code clearly mandates that the terms and conditions of a salaried employee's requirement to work overtime hours without additional pay be set forth specifically in the contract of employment. Any lack of clarity is resolved in favour of the employee as was recently demonstrated in the Nygard case.

In our view however there is a need to amend the legislation so that a clear intention expressed by the parties that the salary of the employee is intended to cover all hours worked is given effect so long as the employee does not fall below the minimum wage for either standard hours or overtime hours.

Accordingly we would suggest the legislation allow a clause such as the following to be contained in an employment agreement and to be upheld:

> *"Your salary is fashioned to compensate you for all hours worked including hours in excess of eight (8) in a day and forty (40) in a week so long as you earn minimum wage for the first forty (40) hours per week and time and a half minimum wage thereafter, unless otherwise agreed."*

(c) *Incentive-Based Workers:*

Properly constructed incentive systems are a good way of motivating employees and allowing highly productive employees the opportunity to earn income which is much greater than their

basic rate. At the same time the employer benefits through increased productivity and profitability.

We suggest that by definition incentive systems which are unfairly weighted in favour of the employer will fail in their purpose which is to motivate employees. This in our view is the best safeguard against schemes which exploit employees.

We note that current Manitoba law is not significantly out of line with the norm across Canada. Accordingly we would suggest no change in this area.

We note that more education needs to be given to employers about general holiday pay and vacation pay including incentives where applicable.

(d) *Managers:*

There is an obvious need to address the current legislation in this area. As became very clear in the wake of the Nygard decision the absence of the term "Manager" in the definition of "Employer" has caused considerable uncertainty and concern.

Previously the Employment Standards Act included the word "Manager" in the definition of the "Employer". This was taken out when the *Employment Standards Code* was enacted.

We would suggest that the definition of "Employer" be revised to return "Manager" in the definition. We suggest that the term "Supervisor" similarly be defined since that word is used in the regs.

Further we recommend that "Manager" also be defined in the Code and that the definition be the exact wording which appears in the *Labour Relations Act*. This would allow the substantial body of *jurisprudence* which has been developed by the Labour Board to be used in determining whether an individual is a "Manager" for the purposes of the Code, thus avoiding uncertainty and fresh rounds of litigation.

A need would then arise to consider what provisions of the Code, if any, would still apply to a manager who otherwise would be excluded from the operation of the Code in its entirety. We suggest, for example, that Mangers should be entitled to maternity and parental leave, compassionate care leave, as well as the equal pay provisions. Otherwise, we would suggest that the terms and conditions of employment of a manager be left to the parties to fashion. Obviously, a manager will be compensated in a manner which is more favourable than the individuals who are supervised by the manager. If not, employers will not have success recruiting capable individuals to take the role of manager.

This approach will not carry the danger of employers taking advantage by simply giving them the title of "Manager". The Labour Board has had little difficulty over the years differentiating between someone who merely supervises and someone who exercises true managerial functions.

2. Exclusions From The Code: Agricultural Workers

Agriculture based industries are very important to the Manitoba economy. Agribusiness is one of a relatively small number of growth industries in the province and it is important to nurture and enhance such growth.

Equally, it is important to protect agricultural employees where it is appropriate to do so.

In our view an approach to changes in this area cannot be considered without consultation with the stakeholders. Accordingly, we would suggest there be no change in the legislation until thorough consultation has been held with stakeholders.

3. Promoting Compliance

In Manitoba, enforcement of *The Employment Standards Code* is effected on a complaint based model. Considerable protection exists in both *The Employment Standards Code* and *The Labour Relations Act* for employees who choose to bring a complaint or who provide information once a complaint has been given.

We note that the Code recently has been amended to enhance these protections. In some areas (such as Section 7 of *The Labour Relations Act*), the protection afforded to employees in Manitoba exceeds that which is available in other jurisdictions.

While rarely used, the Code also provides a number of offences which can be prosecuted at the discretion of the Director. The

existence of an offences and penalties division serves as a deterrent to employers who would violate the Code. Frankly however, the requirement to pay large awards (such as in the event of overtime claims), is itself a significant deterrent. The current example of the Nygard appeal with all its attendant costs to the employer (especially regarding legal fees) is a good demonstration of the fact that employers do not take this matter lightly.

In our view there is no need to change current enforcement tools. We do however support an approach to improve education of employers and employees. Specific ways to achieve greater knowledge and understanding should be fashioned in consultation between stakeholders.

C. REFLECTING THE CHANGING FACE OF TODAY'S LABOUR FORCE AND THE DEMANDS ON TODAY'S FAMILIES

4. Termination Notice

One area where Manitoba clearly lags behind other Canadian jurisdictions is with respect to individual notice of termination. It frankly does not make sense for an employee of 31 days to receive the same notice as one with many years of service.

Accordingly, we would support amendments to the Code which provide notice on a graduated scale. However, this should be done with care and amendments should be focused on notice of

termination (which could be given either as working notice or pay in lieu of notice). It should also be stipulated that mitigation is an element to be considered in the context of entitlement to notice for both the individual and group termination provisions.

It should remain possible for employers and employees to agree to alternate arrangements. However, such arrangements would be subject to approval by the Director of Employment Standards.

Employees should remain obligated to provide notice of resignation on a basis which is equivalent to notice of termination. The current right to collect a financial penalty from an employee who leaves without giving proper notice should be continued. As well as the right to hold back vacation pay, the employer should be entitled to hold back statutories in order to satisfy the monetary value of a claim against an employee who leaves without giving proper notice.

In the context of termination an exception to the obligation of either the employer or the employee to give notice should include circumstances where just cause to terminate (or resign) exists. The test of just cause should be the same as applies at common law. The current lack of reference to just cause in the Code creates needless confusion and expensive legal disputes which would be avoided with a uniform approach to the common law.

Finally, the obligation of directors to pay employees amounts representing pay in lieu of notice should be removed from the

legislation, both in the context of individual and group terminations. It is important to keep in mind that in circumstances where the employer is financially incapable of meeting its obligations in this area, the responsibility to do so should not be placed on an individual who also will have suffered (by losing his investment) as well as the individual employees.

This unfairness is particularly true in the case of group terminations. Here by definition the requirements to give notice is for the benefit of the state, not the individual employee. If this were not so, then the notice periods in group terminations would be the same as individual terminations and a graduated approach would apply. In fact, the purpose of the group termination notice provisions is to avoid unfavourable financial consequences to government (for example, as occurs when a large number of employees apply for employment insurance or other forms of income support at the same time).

The problem with this is that in order to avoid the requirement to pay amounts pursuant to individual and group notice, directors may choose to discontinue a business even where some chance of survival exists. Alternatively they may avoid doing business in Manitoba at all or pay expensive premiums for Directors' liability insurance. Money paid in this way is not available to pay wages and benefits, to invest in the business or pay dividends to shareholders.

5. Statutory Holiday Pay For Part-Time Workers

It is reasonable for individuals who are employed on a regular part-time basis to receive statutory holiday pay on a pro rata basis. However, casual employees by the very nature of their engagement should not be entitled to statutory holiday pay unless they are employed on a basis which brings them within the 15 in 30 days standard.

The way to achieve payment for regular part-time employees is simply to pay a percentage of their wages representing the number of statutory holidays. The same definition of "wages" as is used for vacation allowance should be applied in order to achieve consistency and ease of administration.

The requirement for a regular part-time employee to be actively employed for 15 of the last 30 calendar days should be retained as a prerequisite.

6. Wage Deductions

Currently in Manitoba the provisions of the Code and policy applied by the Employment Standards Branch requires specific authorization for a wage deduction. Accordingly a blanket authorization by an employee permitting deductions of (any amounts owing by the employee to the employer) is not enforceable.

In our view, this provides adequate protection and no changes should be made except for failure to give notice of resignation.

7. Employment Of Children

In our view, the current provisions which give authority to grant permits to the Director of Employment Standards are adequate. The Director has discretion whether or not to issue a permit and since the Director may take into account the age of the child and other relevant factors including education and social development as well as the nature of the industry (including whether machinery is present). This approach combines flexibility and protection. Accordingly, we would suggest no change in this area although the Director of Employment Standards may wish to consider preparing a checklist which could be promulgated and amended from time to time in order to ensure that all relevant factors are considered.

8. Unpaid Leaves And Work-Life Balance

It is noted that Manitoba has maternity and parental leave provisions which reflect the norms in other jurisdictions. Further, Manitoba, with the introduction of compassionate care leave, remained at the forefront of Canadian jurisdictions in this area. It is noted that a number of jurisdictions have yet to enact compassionate care leave provisions.

Accordingly we would argue that Manitoba does not on the whole lag behind other jurisdictions in this area and no additional change is necessary.

D. CONCLUSION

In conclusion, we note that two factors above anything else are critical to the advancement of employees in Manitoba:

- improved educational and training opportunities; and
- enhanced private sector investment.

More than anything that can be done in employment standards and other labour legislation, these two factors deserve the focus of our attention and efforts.

What this means for the present exercise of the Employment Standards Review is that care should be taken not to introduce change which has a detrimental effect on private sector investment or which deemphasizes the effort to provide a well educated, highly skilled labour pool to ensure that the best jobs are not sent out of the province.

All of which is respectfully submitted this 12th day of December, 2005.

Manitoba Employers Council

Per:

William S. Gardner