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**MANITOBA FEDERATION OF LABOUR**

**BRIEF TO THE**

**EMPLOYMENT STANDARDS CODE**

**REVIEW COMMISSION**

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December 12, 2005

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## **Introduction**

The Manitoba Federation of Labour (MFL) is pleased to present this outline of Employment Standards Code issues that are of interest to the organized labour community and many non-unionized working families. The MFL is chartered by the Canadian Labour Congress (CLC) and is charged with representing the interests of CLC affiliates, and the working people they represent, which are located in the province of Manitoba.

Representatives of the nearly 100,000 unionized workers who are members of our affiliates meet in General Convention every three years to debate issues and pass resolutions which form the official policies of the MFL. Many of the issues that are referenced in this document are the product of that process.

This paper is not an overview of all of our policies – simply those that have been identified as pressing. Failure to mention an issue should not be taken as an indication that it is no longer a priority for our affiliates; it is simply a reflection of priorities established for this presentation.

It is important that everyone understand that attacks on the government for undertaking this long overdue review are coming from partisan political figures that have an ideological, anti-union agenda. The fact is, nearly all union members have collective agreement clauses that exceed the provisions of the Employment Standards Code and will be mainly unaffected by improvements to it. The ESC is designed to address the needs of working people who are not members of unions, but who are vulnerable to the actions of employers who don't have their interests at heart.

The announcement of this review released by Labour and Immigration Minister Nancy Allan sets an important framework for the process now begun. Minister Allan made the following points:

- Employment Standards laws and regulations have not had a detailed review since the 1970's - thirty years. Manitoba's workplaces and the processes used in them have transformed dramatically in that time. In fact, one observer noted that thirty years ago, the Government of Manitoba had only one fax machine at its disposal.
- "The review will look at increasing flexibility and modernizing protection, coverage and compliance to reflect the realities of the modern economy, the changing face of today's labour force and the demands on today's families"
- Particular interest is focused on the rise of non-traditional employment relations, new technologies, hours of work and overtime provisions, protecting vulnerable workers improving work-life balance and strengthening compliance.

### **1.0 Non-traditional Employment Relations**

As noted above, there has been a significant increase in the number of people engaged in non-standard work. They are in jobs that do not fit into what used to be regarded as the traditional

mould – one employer; full-time, permanent work; full-time in one location; statutory benefits and entitlements; long-term career prospects. This departure is widely known in Canada as ‘non-standard’, ‘contingent’ in the United States and ‘precarious employment’ in most locations.

Statistics Canada published a report in its magazine **Perspectives** in October 2003 which contains an excellent overview of the issue and is the source for the following information.

Non-Standard employment has one or more of the following characteristics:

- Part-time employment
- Temporary employment (term or contract, seasonal, casual, hiring agencies, jobs with a specific end-date)
- Own-account self-employment (no employees, no protection from Employment Standards legislation)
- Multiple job-holding

The high growth period for non-standard employment in Canada was between 1989 and 1994 when it grew from 28% of the over age fifteen workforce to 34%, where it has hovered since (data current in 2003). Women are more likely to hold a non-standard job than men and young workers are more likely than workers at the peak of their career.

A study conducted by Professor Leah Vosko, York University, in 2002 found that in Canada, more than a quarter (27%) of the people in non-standard jobs, many self-employed, were there because they could not find full-time work with one employer. Others sought this kind of employment situation in order to accommodate education (42% of men, 25% of women), child care responsibilities (15% of women, 1% of men) or non-work related activities.

While Manitoba’s full-time job creation record in recent times has been encouraging, the national overall long term experience has been a higher growth rate for temporary employment than full-time employment.

Why has this trend occurred?

Simply put, it is more profitable (in the short-term) for some employers to adopt this employment strategy, driven by globalization, technological change and corporate restructuring. However, it does not work out well for the workers in these jobs.

A study of contingent work conducted in 2000 by the Contingent Workers Project (now called Toronto Organizing for Fair Employment), details a number of critical issues facing the non-standard workforce, including:

- Low income – nearly 70% of the studies respondents reported annual incomes of \$18,000 or less.
- Downloading of costs to the employee from employers and government by calling them “independent contractor” when in fact they are often in an employer-employee

relationship. Many were not eligible for Employment Insurance benefits for lack of insurable earnings hours and had no access to health and sick benefits normally associated with being employed.

- Rightly or wrongly categorized as independent contractors means workers have no, or believe they have no access to Employment Standards Code benefits such as vacation pay or overtime and notice of termination provisions.
- No access to full-time employment benefits such as medical insurance, pensions, child and elder care benefits, fitness programs, training and education and a variety of leave benefits.
- The study found that nearly half of the study group do not know their scheduled shifts in advance, worked split shifts and seemed to alternate between excessive work hours in some weeks and too few hours in other weeks.
- Workers reported being perpetually “on-call” and waiting for a telephone contact about their next shift which may or may not appear. This made seeking other employment difficult or not possible.
- The study documents serious job related stress issues. There are also serious concerns about health and safety issues related to lack of training and proper equipment.

These are just a few samples of the research on non-standard employment issues that is available. These glimpses into what has become common-place for many workers lend emphasis to the need for speedy and effective legislative action by the government of Manitoba.

Among the measures that will be outlined in this paper is one that deals with the conversion of full-time jobs to part-time jobs in order for an employer to avoid paying employment costs. **The MFL urges the provincial government to implement pay-equity, benefits and rights for part-time workers with complete recognition and protection.**

### **1.1 Coverage For Agricultural and Other Excluded Workers**

Currently, certain provisions of the ESC do not apply to all of the paid workforce, such as workers in the agricultural sector. An example of a just what does not apply to these workers is minimum wage provisions contained in the Act. We recommend that exclusions applied to the following workers by lifted in the ESC and any other Act that contains them:

An employee who is employed

- (a) in agriculture, fishing, fur farming or dairy farming; or
- (b) in the growing of horticultural or market garden products for sale.

An employee who is employed in a private family home, paid by a member of the family, and whose employment in the home consists of working as

- (a) a domestic worker for not more than 24 hours in a week for the same employer;
- (b) a sitter attending primarily to the needs of a member of the household who is a child; or

- (c) a companion attending primarily to the needs of a member of the household who is aged, infirm or ill.

A salesperson, other than a route salesperson, who is

- (a) remunerated in whole or in part by commission, and
- (b) engaged in soliciting orders, principally outside the employer's place of business, for goods or services to be later delivered or provided to the purchaser.

## **1.2 Minimum Wage**

The recently completed Minimum Wage Review was mandated to review the minimum wage schedule and to develop a strategy for directing Manitoba's minimum wage levels in 2006 and beyond. Last fall, Minister Allan invited stakeholders to submit comments on minimum wages as part of the process leading up to the April, 2005 increase.

The MFL's position boils down to the following:

The minimum wage is, by definition, the lowest rate of pay possible for paid work. It is not to be reduced for any reason such as working in a job that include gratuities, training period, age, or other considerations – with the possible exception of work done in life skills training environments for persons with disabilities and who receive adequate financial support from other sources, regardless of work done in the training environment.

In our view, the appropriate minimum wage should be sixty percent of the average weekly wage for Manitoba, as calculated by Statistics Canada. Historically, the minimum wage has been substantially below that level. Today, it stands at 43.26% of average weekly wages. By way of example, if minimum wage were 60% of the average weekly wage of about \$16.35/hour it would stand at \$10.05/hour. However, in our view, a four year strategy should be adopted to move it 60% of the average weekly wage as it stands on April 1, 2009.

Further, we recommend that the government amend the Employment Standards Code to provide for an automatic adjustment every January 1<sup>st</sup> so that the minimum wage remains at 60% of the average weekly wage.

Increasing the Minimum Wage in this fashion will provide a number of benefits. These include the fact that both workers and employers will know well in advance what adjustments will be made to the minimum wage, enabling both to do sensible financial planning. And further, increased spending power will benefit both workers and the provincial economy since most of the increase will re-enter the local financial stream almost immediately.

As noted above, the minimum wage provisions of the Employment Standards Code do not apply to a number of classes of workers in Manitoba and we recommend that this change. The guiding principle that a fair day's work should be work fairly paid.

For that reason, we recommend that workers currently excluded from the minimum wage provisions of the Employment Standards Code be included.

### **1.3 Leave**

An aspect of the modern workforce is that many families have two major income earners with a need for greater access to compassionate and family leave provisions. They need to be able to care for a sick or dying spouse, child, sibling or parent. They need access to leave for family business such as making financial arrangements, attending medical appointments and doing other business that must be done during business hours, as well as bereavement leave. For these reasons we recommend that all workers have access to short term paid leave to meet these needs and the entitlement to access long term Employment Insurance funded leave.

It is important that individuals who are on leave are not penalized by loss of seniority. We recommend that the Code be amended to spell out specifically that seniority will continue to accrue while a leave that is authorized under the Code, including maternity and paternity leaves, is in effect.

One thing we should flag for your government is the possibility that the federal Employment Insurance Act may soon be amended to expand benefit qualification to cover compassionate leave for family members beyond immediate family to include siblings. It is our understanding that the compassionate leave provisions under EI will be accessible by anyone who is designated by the person who is ill, family member or not. Provincial government amendments will be necessary in the near future to give workers access to this new entitlement. This development is partly the product of an action undertaken by Neil Cohen, the Executive Director of the Community Unemployed Help Centre. If successful, this expansion will benefit many Manitoba workers.

### **1.4 Benefits for Part-time Employees**

Many part-time and contingent workers, particularly those labelled “independent contractor”, need access to pro-rated benefits, vacations-with-pay, statutory and general holiday entitlements recognized. Without required entitlement to benefits, workers are at the mercy of employers who are determined to reduce costs by not offering benefits.

### **1.5 Paid Breaks**

Currently, the Code requires an employer to give workers a break after five hour of work. This is inadequate. People need relief from work at least every three hours. One of the disturbing aspects of the not giving employee’s breaks on a reasonable schedule is that some workers have resorted to wearing adult diapers to protect against the need for a bathroom break that is not granted by the employer. This measure results in a lack of dignity that seriously undermines any notion of an acceptable quality of life in the workplace and should not be tolerated in our society.

We recommend that the ESC be amended to provide employees paid breaks of at least 15 minutes, for every three hours of the work shift, in addition to unpaid meal breaks.

## **1.6 Overtime and Call In Protections**

Another aspect of the modern workplace is the pervasiveness of technology that enables employers to contact workers when they are not in the workplace, even while they are off-duty. Cell-phones, pagers, e-mail, home computers, website chat-rooms have made it impossible for some workers to ever be truly alone. Contacts made by the employer must be treated as an unscheduled call-in to work with the appropriate payment entitlements, that is, a minimum of three hours pay.

It has come to our attention that some employers circumvent the minimum three hour “call-in” credit by pressuring the employee to go home before the three hour period has been worked. The Labour Board has ruled that this is a voluntary action by the employee and removes the obligation of the employer to pay the minimum three hour call-in penalty. It is anything but “voluntary” since if employees do not agree to going home early, they are not called in for future shifts.

This leads to another aspect of overtime – unpaid overtime. It is estimated that as much as fifty percent of time worked that can be regarded as overtime is unpaid. Never mind not paid at the over-time rate, but totally unpaid. Particularly vulnerable are supervisors and salaried workers. Time worked should be time paid, except for managers who have the power to hire and fire and truly set their own hours. Supervisors in white collar work places are not managers – they are similar to workers who are “lead hands” in an industrial workplace.

Early this year, the Manitoba Labour Board made a ruling that could affect the lives of many workers. It ruled that salaried worker employment contracts that set a flat salary for an indeterminate number of hours are invalid, and that all salaried worker employment contracts should specify how many hours an employee is expected to work and what the rate of pay will be. Expecting a worker to work at straight time without such guidance “effectively allows an employer to demand of an employee excessive amounts of overtime without any further compensation.” The Board stated in its Reasons for Decision that “such an interpretation of the Code would be inconsistent with its fundamental purpose of preventing the exploitation of employees.”

Of course, the employer is appealing the decision.

The Code should be amended to ensure that all workers, salaried or hourly paid, should be entitled to fair compensation for hours worked beyond eight hours in one day and forty hours in one week.

There should also be protections against the assignment of excessive amounts of overtime, either in the form of a limit on the number of hours of overtime in a day or a week, or the establishment of higher overtime premiums after a reasonable number of hours. An example of this would be an overtime rate of twice the basic rate of pay after four hours of overtime in a day or twenty hours in a week with a minimum of eight hours off between the end of a shift and the start of the next shift.

## **1.7 Vacation and General Holiday Entitlement**

Currently, workers in Manitoba are entitled to two weeks of paid vacation per year after one year of continuous employment with the same employer and three weeks of vacation after five years. This should be increased to three weeks after one year, four weeks after five years, five weeks after ten years and six weeks after twenty years of service. This vacation entitlement should not be affected by a change of ownership of the workplace. Part-time workers should be entitled to the same increase of vacation time and pay using the appropriate calculation formula, without losing entitlement to seniority accrual and entitlement to EI benefits.

Currently, the August Civic Holiday and Boxing Day are not classed as General Holidays in Manitoba, allowing employers to pay straight time, or to close down for the day and not pay employees at all. To ensure fairness for all workers, these days should be designated as General Holiday days, subject to the same pay rules as other General Holidays. We also urge that provision be made to classify either Easter Sunday or Easter Monday as a general Holiday, with the selection of the appropriate day being subject to mutual agreement between the employer and union or an elected employee representative in the absence of a union. In addition, the province of Manitoba should follow establish a General Holiday in the month of February, Heritage Day.

Currently, employees of businesses classed as “continuous operations” and seasonally operations are not eligible to collect the overtime rate in addition to their basic rate for work performed on a general holiday. We believe this is unfair and the workers should be entitled to the same compensation as employees of other companies.

General Holiday pay should be calculated and pro-rated based on the average daily number of hours worked in the four weeks preceding the week of the general holiday. The requirement that an employee work at least 15 days in the prior 30 days to be entitled to General Holiday pay should be repealed.

## **1.8 Enforcement**

One of the most persistent complaints we hear from non-unionized workers is their reluctance to pursue their rights for fear of being terminated by the employer. There’s little point in having rights if it takes an act of courage to have them respected. There must be an increase in proactive workplace inspections of employment records throughout the province, and investigations triggered by anonymous and third-party complaints allowed. To accommodate this, there will need to be more resources dedicated to increasing the number of Employment Standards Officers and Inspectors.

There needs to be a means developed to monitor the working conditions of employees who perform work in their home, as in the needle trades, or in the home of their employers. Too often, these workers function in isolation and out of the public eye and are reluctant to step forward when their rights are being violated, or they are unaware of their rights because of lack of access to information or language barriers.



## 1.9 “Independent Contractors”

There are employers who seek to avoid employment expenses by hiring workers and calling them “independent contractors”, even though there is a true employer-employee relationship or at the very least, dependent contractor status. No statutory deductions such as EI and income tax are made and no Workers Compensation premiums are paid by the employer.

Often, workers don’t realize they are responsible to make statutory payments themselves, or they are paid so little that payment isn’t made. Insurmountable difficulties result when these workers need access to safety nets such as Workers’ Compensation, Employment Insurance or the Canada Pension Plan.

It is difficult to find a consistent definition of who is a genuine independent contractor through of a survey of existing legislation. At times, the definition varies within the same jurisdiction.

For example, in Manitoba:

- The Employment Standards Code does not contain such a definition.
- The Labour Relations Act is silent on the matter.
- The Workplace Safety and Health Act acknowledges that an independent contractor is different from an employee without saying what the difference is or what earmarks are unique to an independent contractor.
- The Workers Compensation Act defines an independent contractor as: *Independent Contractor includes a self employed person engaged in any of the industries set out in the Schedule.*

We recommend that the province provide a clear definition in the Employment Standards Code of who is a genuine independent contractor and what the implications are for that person when dealing with employment rights and obligations.

The Manitoba Labour Board has based some decisions on worker status by indicating that if a worker does not control the hours or work and the way work is carried out, then the worker is not an independent contractor.

## 1.10 Plain Language Guides and Legislation

A document as important as the Employment Standards Code should be in the hands of all working people in Manitoba and it should be written in plain language. Employers should be required to provide a new-hire with a guide to the Code, and other relevant labour legislation, on the first day of employment. These documents should be posted throughout the workplace and included in school curricula for work-age students.

Guides to Manitoba’s employment and labour relations laws need to be available in languages commonly used in our province, so that people are aware of their rights and better able to take appropriate action if their rights are violated.

### **1.11 Termination for Just Cause**

One of the provisions that exists in some other jurisdictions in Canada, but not in Manitoba, is the requirement of demonstrable just cause for termination. This speaks directly to a shameful problem that faces some women when they return to work following maternity or parental leave. Their employment is terminated for little or no reason shortly after their return-to-work and all employers have to do to protect themselves is ensure there is no mention of the child's birth or the maternity/parental leave on the separation documents. According to some labour appointees to the Manitoba Labour Board, these complaints are extremely difficult to respond to. A part of a remedy would be to require demonstrable just cause for employment termination.

### **1.12 Group Terminations Policy**

The MFL urges the province to amend group terminations provisions in the Code to include a mandatory termination procedure for employers of units of twenty or more employees to include the following:

- 1) That workers be given at least one year's notice of closure,
- 2) A committee, composed of employees, management and labour, meet after the notice is given to find alternatives to closure;
- 3) If closure is inevitable, at least one week of severance pay be given for every year of service;
- 4) All employers in Manitoba pay a closure tax to create a fund administered by the provincial government, which will, after severance pay is exhausted, supplement income of workers terminated by plant closure until they find suitable employment.
- 5) Employers should be required to provide sufficient funds for the cost of retraining, job searches, relocation and counselling of employees affected by a plant closure.

### **1.13 Job Losses as a result of corporate mergers**

A persistent cause of job losses is corporate mergers that are designed to limit competition or to acquire corporate assets such as technology. In our view, if a merger results in permanent job loss within five years following the merger, workers should be paid severance pay amounting to four weeks of pay per year of service. To ensure sufficient funds are available, companies should be required to contribute to a government administered fund that is guaranteed by a performance bond.

### **1.14 Severance**

The Canada Labour Code provides for severance pay. We believe that the Manitoba Code should allow for one week of severance pay per year of service, in addition to other payments such as pay in lieu of adequate notice of permanent layoff or termination. This should apply to all workers leaving the workplace, including injured and seriously ill workers.

### **1.15 Equal Pay for Work of Equal Value**

There can be no question that the nearly two decades of experience with public sector Pay Equity legislation has been positive and of great benefit to many working women. It is time to extend this brand of workplace fairness to women in the private sector.

We recommend that the essence of the Pay Equity Act that currently applies to the public sector be amended to include the private sector and included in the Employment Standards Code.

#### **Conclusion**

We are pleased that this long overdue review of the Employment Standards Code is taking place. Its provisions are very often the only shelter that non-union workers have from the excesses of unscrupulous employers.

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