

Employment Standards to Reflect BC's Workplace Reality

Submission to the Ministry of Labour Employment Standards Review

Introduction

The Coalition of BC Businesses welcomes the opportunity to respond to the B.C. Government's latest review of employment standards, in an effort to build on the progress of the 2002 legislative amendments and to catch up to the reality of today's workplace.

The Employment Standards Act should provide basic standards for workplaces in British Columbia. The challenge is to strike a fair balance between the need for businesses to operate with flexibility and the need to provide adequate protection for employees.

B.C.'s small and medium-sized businesses are creating jobs and driving B.C.'s economic recovery. Employers need workplace rules and regulations that allow B.C.'s unique business sectors to respond effectively to the ebbs and flows of economic cycles and employment that is project-oriented or seasonal in nature.

Employment standards should also be sufficiently flexible so that employers and employees are able to structure their working relationship to their mutual benefit.

Prior to the 2002 legislative amendments, the Employment Standards Act imposed very rigid standards with virtually no opportunity for employers and employees to adapt those standards to meet their own unique needs and circumstances. The Coalition of BC Businesses supported these changes as they were seen to modernize and simplify B.C.'s employment standards rules.

In this paper, we provide recommendations and specific proposals for amendments to certain provisions of the *Act*. These recommendations and proposals are designed to promote the key principles of flexibility, realism, mutual fairness, individual choice, and promotion of voluntary cooperation between employers and employees.

About the Coalition of BC Businesses

The Coalition of BC Businesses was formed in 1992 to represent the voice of small and medium-sized businesses in the development of British Columbia's labour and employment policies. It is made up of organizations that collectively represent over 50,000 small and medium-sized businesses active in all sectors of BC's diverse economy in communities throughout the province.

The Coalition's sole focus is the development of labour policies that will help foster a positive relationship between employers and employees and a climate for new economic growth, opportunities and jobs.

Recommended Employment Standards Changes

1. Setting the Minimum Wage Rate

The Coalition proposes a minimum wage policy framework before consideration is given to any change to the minimum wage rate. By developing such a framework, B.C. will be at the forefront in Canada on this issue by ensuring that certainty, predictability and affordability are cornerstones of any future minimum wage changes. Our proposed framework is as follows:

Keep it affordable - Any increase to the minimum wage should be measured in small increments. Employers should not be subjected to large minimum wage increases that are inconsistent with current and forecasted economic indicators. No single minimum wage rate increase should exceed 50 cents per hour.

Stagger rate changes - Any increase to the minimum wage should be spread out over a protracted period of time. The first rate increase should provide employers with a six-month lead-time prior to a January 1 implementation date. Additional rate increases should not be implemented any sooner than six-month intervals.

Link rate changes to economic indicators - Any future increases to the minimum wage should be linked to economic indicators, such as the Consumer Price Index, that reflect current and forecast market conditions. No increases would occur in years of flat or negative economic growth. We hope to learn from the mistakes of Ontario where prescriptive rate increases occurred during a recession, leaving many employers and employees in a vulnerable position.

Consider the wider economic strategy - Keep minimum wage changes in context of B.C.'s wider economic strategy. Rate increases should be weighed against a wider strategy to provide relief to low-income earners, such as increases to the basic personal exemption, low income taxes and job training programs.

Legislate the policy change - This new policy framework, once established, should be enshrined in legislation, requiring any future government to maintain the policy and its key principles before considering any increase to the minimum wage.

Recommendation A: No single minimum wage rate increase should exceed 50 cents per hour.

Recommendation C: The first rate increase should provide employers with a six-month lead-time prior to a January 1 implementation date.

Recommendation C: Additional rate increases should not be implemented any sooner than six-month intervals.

Recommendation D: Link minimum wage increases to an economic indicator such as the Consumer Price Index. No increases would occur in years of flat or negative economic growth.

Recommendation E: Measure need for a minimum wage increase against B.C.'s wider economic strategy to assist low-income earners.

Recommendation F: Provide long-term stability by enshrining policy change on minimum wage in legislation.

2. Greater Qualifying Conditions for Statutory Holidays

The Coalition recommends that the qualifying conditions for entitlement to statutory holiday premiums be altered to better reflect the purpose of statutory holiday entitlements and to prevent abuse. The Coalition makes two specific recommendations in this regard. First, the qualifying period for statutory holiday entitlements should be increased to 90 days' employment. Second, as in most other provinces, eligibility for statutory holiday pay should be dependent upon the employee meeting the "qualifying conditions" of working the last scheduled day prior to the holiday and the first scheduled day after the holiday, unless excused from working for some bona fide reason, such as illness, vacation, or other authorized leave of absence.

Recommendation: The qualifying period for statutory holiday entitlements should be increased to 90 days and the qualifying conditions of working the scheduled day before and day after the holiday should be introduced.

3. Statutory Holiday Selection

The growing diversity of our workforce, driven by demographic changes and immigration, calls for a flexible approach to statutory holidays. In our society, there are many reasons why employees may wish to select days other than the designated statutory holidays as their "holidays". This could be for religious or cultural reasons, out of a desire to work on the day generally celebrated as the holiday in order to maximize income, or simply to take the holidays at a time, which is most convenient for the employee in the context of his or her family life. At present, our *Act* allows for employers and employees to agree to substitute another day for the designated statutory holiday only if a majority of affected employees agree or, in a unionized workplace, if the substitution is provided for in a collective agreement. In the Coalition's view, this should be amended to allow employers and individual employees to make arrangements that suit them, even if these arrangements may be different than those pertaining to other employees.

Recommendation: The Act should accommodate employers and individual employees to mutually agree to allocate the employee's statutory holiday to a different day, even if this results in some employees observing different days as statutory holidays than the majority.

4. Overtime

Commission Sales or Other Incentive-Based Pay

Workplaces and compensation agreements vary throughout the economy, given the predominance of small businesses. Many businesses are not tied to 9 to 5 schedules and compensation is not based on an hourly wage or monthly salary.

Commissioned salespeople and others in incentive-based jobs such as piecework jobs earn in accordance with the amount of sales or production, which they are able to achieve. Their

ability to maximize their earnings does not fit with a 9 to 5 schedule or, indeed, within any strict schedule of hours of work. The salesperson must deal with his/her customers at their convenience, and cannot simply cut off a sales transaction because it is "quitting time". Nor do commissioned salespersons expect their earnings to be based on the hours they actually work; rather, they expect their compensation to reflect their sales success.

Currently, an employer who allows a commissioned salesperson or other incentive based employee to work beyond an eight hour day in order to close a sale or complete a piece of work is penalized for doing so, because the employer is required to pay that person overtime for the time worked over eight hours. This is despite the fact that the person is already being compensated for that time through the incentive pay. Further, the manner in which the overtime rate for such people is calculated is extremely complex and punitive to the employer: the employees' gross earnings (including salaries and commissions) for the pay period must be divided by the actual hours worked to get an hourly rate, which is then multiplied by the overtime premium to determine the overtime rate.

Recommendation A: Amend the *Act* to recognize the unique circumstances arising from incentive based compensation schemes.

Recommendation B: Hours of work and overtime for commissioned salespeople should be compensated based on gross earnings (including commissions and any salary or hourly wage) over a four week period so long as this amount is greater than what the employee would have earned at minimum wage (including overtime rates) for all hours worked over the period.

Overtime Premiums

The Coalition fully agrees with and supports the need to increase flexibility within the workplace so as to allow employers and employees to tailor their workplace arrangements to respond both to business requirements and to the personal needs of employees. The present *Act* fails to recognize that neither modern businesses nor modern lifestyles fit within a nine to five framework, and penalizes employers who respond flexibly to today's realities.

In order to allow BC businesses to respond appropriately to business realities and to the needs and interests of employees, it is vital that the hours of work and overtime provisions be significantly altered in order to provide for increased flexibility and cost-effectiveness. This is achieved in two ways. Overtime premiums should be based upon an averaging of hours over a multi-week period, with overtime premiums payable for hours in excess of an average of 40 hours per week. The default number of weeks for averaging purposes should be four weeks, with employers and employees being able to agree to longer or shorter averaging periods if they wish.

Recommendation: The hours of work and overtime provisions of the *Act* should be significantly revised to create a flexible system wherein hours of work are averaged over a multi-week period, for the purposes of determining payment of overtime premiums, while maintaining protections for employees.

5. Flexibility and Compensation Packages

The Coalition believes that employers and their senior technical and professional employees require more flexibility in the structuring of compensation packages.

Currently, employers and senior level employees are restricted in their ability to negotiate flexible compensation packages and incentive schemes by the need to comply with hours of work and overtime requirements for all employees who do not fall within the definition of a manager or within one of the narrow professional exemptions.

This is so even for high-level employees who have a high degree of responsibility and/or technical skill and who may perform the same functions as other employees who do fall within the professional exemptions. These employees command a significant salary in the marketplace and have a strong ability to negotiate their own working conditions and compensation packages.

Recommendation: Employees at this level should be free to negotiate and agree in writing with their employers to hours of work and compensation packages, which differ from the requirements of the Act.

6. Unified Workplace Tribunal

Overlapping jurisdiction and duplication among adjudicative tribunals in the workplace has created confusion and uncertainty for employees and employers. Small and medium-sized employers have expressed misgivings particularly about having their workplace-related disputes heard by the Human Rights Tribunal.

Another concern is that participants in workplace-related disputes may have incentives to “shop their case” to the agency expected to award the most favourable outcome. In some cases, unions have used the Tribunal to make progress where the arbitration process has not worked in their favour, instead of appealing an arbitration award to the Court of Appeal.

The BC Government should give consideration to a ‘unified workplace tribunal’ to deal with workplace-related disputes and other matters currently overseen by the BC Labour Relations Board, the Employment Standards Branch and the BC Human Rights Tribunal.

It is proposed that the unified workplace tribunal merge these agencies on matters relating to the workplace. A single, unified tribunal would eliminate jurisdictional disputes, improve efficiency and access to workplace-related dispute resolution services and provide an adjudicative system that is both fair and impartial.

Although a unified workplace tribunal would have jurisdiction on most workplace-related disputes, the BC Human Rights Tribunal would continue to hear and rule on complaints, outside of the workplace.

Recommendation: The Coalition calls on the BC Government to eliminate jurisdictional disputes and adjudicative duplication by forming a unified workplace tribunal.