CPHR British Columbia & Yukon

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May 10, 2019

URGENT

Honourable Harry Bains
Minister of Labour
c/o LBR.Minister@gov.bc.ca

Honourable John Horgan
Premier
premier@gov.bc.ca

Dear Minister and Premier:

Re: Bill 8, the Employment Standards Amendment Act, 2019, Bill 30, the Labour Relations Code Amendment Act, 2019

On behalf of the Chartered Professionals Human Resources Association of British Columbia and Yukon ("CPHR BC"), we write to support many of the recommendations proposed under Bill 8 and Bill 30. However, we are requesting that you give consideration to some of the practical application challenges and perhaps unintended consequences that CPHR BC has identified may flow from certain of the amendments as they have been proposed. In the interests of timeliness, given both Bills will shortly be going to second reading, we will focus only on the latter.

Background on CPHR BC

CPHR BC represents over **6,000 human resource professionals and their service providers and advisors in BC and the Yukon**. Many of our members work every day in labour relations within the framework of the *Labour Relations Code* ("LRC") and the *Employment Standards Act* ("ESA") and so are not only directly affected by any changes to the LRC and ESA but offer a wealth of practical experience on the topics addressed below. We are thus uniquely positioned to provide insights into the practical impact of proposed ESA and LRC reforms. Our members, the **more than 2,650**

organizations they work for, and the employees our members serve within those organizations will be directly affected by changes to the ESA and LRC.

Bill 8, the Employment Standards Amendment Act, 2019

Proposed Amendment, Section 3:

- It also makes collective agreement provisions subject to the minimum requirements of the Employment Standards Act.

The current ESA allows unions and employers to bargain for terms and benefits which can allow them to agree to provide less than ESA minimum terms on select ESA standards (e.g. hours of work and overtime). In the unionized environment, it is our experience that any such "concessions" from ESA minimums are made in return for gains elsewhere by the union on behalf of employees. Parties in collective bargaining should retain the flexibility to enter into such bargains where employees are able to obtains gains they value above what are often modest departures from ESA minimums. In other instances, specific industries or workplaces may see flexibility in some areas like hours of work and overtime as a negotiated benefit that is more beneficial than the "one size fits all" minimum requirements of the ESA.

From a practical perspective, HR practitioners are also concerned about returning to an era where there is uncertainty about whether a particular collective agreement provision "meets or exceeds" the ESA minimum. In many cases, the provision on question, for example on hours of work and overtime premiums, may be complex and thus it is not easy to determine whether the provision "meets or exceeds" the ESA standard. This uncertainty can create and has in the past created disputes in the workplace that will lead to more grievances or ESA claims arising out of this issue. Also, in collective bargaining, uncertainty as to whether a set of proposed rules and rights around topics like hours of work and overtime "meet or exceed" ESA standards can be a barrier to concluding an agreement.

Proposed Amendment, Section 76:

- *Under the new legislation, the self-help kit is being eliminated as a required step before filing a complaint. Instead, B.C. will have an effective complaints process in place to support fair and objective enforcement of employment standards.*

The Employment Standards branch, by its own resolution guidelines, encourages employers and employees to resolve disputes themselves without immediate government intervention. The Self-Help kit or another form of request for payment is designed to do just that and we would strongly urge the government to maintain some form of requirement that employees show some kind of prior "request for payment" as a pre-condition to commencing the expensive and more complex adjudication of claim process. At a minimum, it makes sense to ensure the employee has brought the matter to the employer's attention and provided a fair opportunity for the employer to respond.

A "request for payment" helps to define the problem and the desired solution; an important first steps toward a resolution. As currently, it need not be in the form of the Self Help Kit but needs to be a reasonably clear request to the employer in writing. Such requests provide the opportunity for both parties to understand what part of the ESA might apply and whether there has been a contravention of the Act or whether there could have simply been a mistake or misunderstanding on the employee or employer's side. In our Committee members' experience, in many cases, presentation of the wage claim by the employee leads to a resolution, either through the employee receiving information that explains the employer's position which the employee accepts or through the employer getting informed and agreeing to pay some or all of the wages claimed.

We understand the Minister has stated that language barriers may deter some employees from filing a claim as they are unable to complete the Self Help kit or send a written request. We would suggest that some of the new staffing resources for the Employment Standards Branch including a resource person who could incorporate translation services and assist claimants to draft a request for payment. As presently, if the employer does not respond or does not resolve the wage claim, it then proceeds to adjudication.

CPHR BC is concerned with the additional administrative burden that will be placed on the Employment Standards Branch of unnecessary claims to be adjudicated if the requirement of a prior request for payment is removed completely. By making it easier for unfounded complaints, for example based on the employee's lack of understanding of the ESA or what the employer did through lack of communication, employers and employees will be burdened with participating in the more complex and time-consuming adjudication steps when a prior request for payment might have avoided the need for such steps. These steps will also take up ESB time and resources when they could have been avoided. This approach would mean more of the new resources to be provided to the Employment Standards Branch can be dedicated to enforcement and to the key role of education and advising employees and employers.

HR practitioners around the province regularly resolve concerns by using the Self-Help kits or emails or letters requesting payment of wages to understand employee concerns, identify gaps in either their own or the employee's application of the Act, and to identify subject matter that has already been decided by a court, tribunal, arbitrator or other settlement. This is evidenced by the sharp drop in filed claims once the Self-Help kits were put into practice to resolve employee concerns. In our experience, that drop reflects, in the main, a higher level of resolution of complaints without formal ESB adjudication, not unfair barriers to filing a claim. Indeed, filling out the Complaint form is, if anything, more challenging than filling out and delivering the Self Help Kit form to the employer.

We strongly recommend that if the Self-Help kit requirement is eliminated, that there is still a required first step specified by the Director by Regulation for the employee to request payment from the employer. Only if that is unsuccessful or they receive no response then a complaint be accepted for review or investigation by the director. The Director could retain a discretion to waive this requirement for good reason e.g. on evidence the employer is out of business, as we understand is done presently.

Bill 30, the Labour Relations Code Amendment Act, 2019

Section 35 Proposed Amendment:

(2.2) If a contract for services is retendered and substantially similar services continue to be performed, in whole or in part, under the direction of another contractor,

(a) the contractor is bound by all proceedings under this Code before the date of the contract for services entered into by the contractor and the proceedings must continue as if no change had occurred, and

(b) any collective agreement in force continues to bind the contractor to the same extent as if it had been signed by the contractor.

CPHR BC acknowledges that in some "recontracting out" of services to new service providers, the same employees, who had unionized, find themselves offered the same jobs but at lesser pay. Their new employer can ignore their union certification, requiring them to reapply for certification of the new employer (aka "contract flipping"). However, there are a broad variety of factual scenarios in the contracted services sector and in many cases, this is not what happens.

In our view, the proposed amendments regarding successorship are too sweeping in scope and will be problematic for many employers and employees, particularly the many situations where replacing a service provider is not an attempt to escape unionization or union negotiated wages and terms. The broad proposed form of extended successorship on contracting out would unfairly impact service providers, and therefore indirectly their customers, in scenarios where a new provider plans to staff the contract with existing and/or its own new hires and to employ them under their own terms of employment.

In these scenarios where the new contractor is not employing all or mostly the former contractor's employees, unilaterally imposing the union and collective agreement approved by a previous group of employees working for a different employer deprives the new employees of their fundamental and constitutional right under the LRC and the Charter's freedom of association to choose whether they want to join a trade union and, if so, which union, as well as to bargain for their terms of employment.

In addition, holding the new service provider and the new team of employees to the terms of a collective agreement that neither had an opportunity to participate in

negotiating may result in imposing terms of employment on them that do not reflect the needs of the new employees or what is best for them and their families, or what is practical for the new service provider with its own unique business model. HR practitioners can also see numerous challenges with the administration of a collective agreement that neither the new employer nor the new employees were party in negotiating, including the absence of bargaining history and past practice, opening up significant legislation at the LRB to interpret and apply language that neither party negotiated.

Automatic successorship could also, in some situations, tempt outgoing service contractors and their employees and unions into negotiating unsustainable provisions (i.e. term or wage costs) in a collective agreement reached near the end of the service contract term when, under the proposed amendment, they would know these terms would become a burden to some new service provider and possibly a different group of employees, rather than terms they themselves would have to live with. In extreme cases, onerous terms in such agreements could deter competitors from even bidding on the service contract, posing problems for the many organizations that rely on service providers in these sectors.

The "contract flipping" scenario above could still be addressed if the successorship is made conditional on the recontracted out work being performed by substantially the same employees or perhaps a majority of them.

This would broaden existing successor rights and obligations to address the identified problem of the same employees receiving reduced employment terms solely due to a retendering of the contract for service where the employees essentially remain the same, but would not create unintended consequences for employers and employees who simply find themselves as the new service provider with new employees who have successfully bid to perform those services without seeking to reduce pay for the existing workforce.

Conclusion

In conclusion, we thank you for your consideration of these submissions and would be happy to answer any questions about this letter.

Chartered Professionals in Human Resources, B.C. & Yukon

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