

Joint Business Community response to the Ministry of Labour Employment Standards Act - Consultation Paper

Prepared for:

Honourable Harry Bains, Minister of Labour

Prepared and Endorsed by:

Business Council of British Columbia

BC Chamber of Commerce

British Columbia Hotel Association

Canadian Federation of Independent Business

Canadian Home Builders' Association of British Columbia

Canadian Manufacturers & Exporters

Greater Vancouver Board of Trade

Independent Contractors and Businesses Association

Restaurants Canada

Retail Council of Canada

Urban Development Institute

March 29, 2019

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Submitted via email: ESAReview@gov.bc.ca

Honourable Harry Bains
Minister of Labour
Government of British Columbia
PO Box 9064 Stn Prov Govt
Victoria BC V8W 0E2

Dear Minister:

**Re: Joint Business Community Response to the Ministry of Labour
Employment Standards Act Consultation Paper, March 2019**

We are writing in response to your recent Consultation Paper asking for further input from stakeholders and the public regarding the “first areas of focus for possible amendments” to the *Employment Standards Act* (“ESA”).

We note that the BC Law Institute’s Final Report on the Employment Standards Act (the “BCLI Report”) was the result of an exhaustive multi-year review. The associations signatory to this response provided a detailed submission to the BCLI in August 2018. We reiterate and clarify, where necessary, these positions again in response to your request for further input. Each theme within your Consultation Paper is addressed in turn below.

Theme 1: Increasing protection for child workers

We agree with the majority recommendations of the BCLI Project Committee.

We do not agree with the minority recommendation of the BCLI review committee, which would prohibit the employment of anyone under age 15, except by regulation in the entertainment industry. We believe the minority recommendation if implemented would lead to unintended consequences. For example, presumably summer camp work, lawn mowing or other meaningful routine work undertaken by youth under the age of 15 would be prohibited. The majority recommendations of the BCLI Project Committee are as follows:

46. Employment of persons under 16 in industries or occupations prescribed by regulation as being likely to be injurious to their health, safety, or morals should be prohibited.

47. The ESA should be amended to confer authority to (a) designate by regulation industries and occupations likely to endanger the health, safety, or morals of persons under 16; and (b) set a minimum age between 16 and 19 for employment in any one or more of the said industries and occupations.

48. The special regime for employment of children in recorded and live entertainment under Part 7.1, Divisions 2 and 3 of the Employment Standards Regulation should be retained.

A majority of the members of the BCLI Project Committee recommend:

49. The ESA should be amended to:

(a) require a permit from the Director to employ a child below the age of 14, except for employment with parental consent in recorded and live entertainment;

(b) allow employment at age 14 and 15 (i) with parental consent in (A) an artistic endeavour (including recorded and live entertainment); or (B) forms of “light work” designated by the Director and listed on the Employment Standards Branch website; (ii) with a permit from the Director, in cases other than those mentioned in subparagraph (i).

In our view, the majority recommendation strikes the appropriate balance while still protecting vulnerable young workers.

Theme 2: Transforming the Employment Standards Branch

Within the exhaustive section dealing with transforming the Employment Standards Branch, most of the recommendations reflect a consensus of the BCLI Project Committee. We are in agreement with the recommendations. There are, however, two specific recommendations – 59 and 60 – where there were majority and minority positions presented.

We support the majority recommendations of the BCLI Report which we reiterate below:

59. The ESA should clearly permit a complaint to be filed on behalf of another person with the written authorization of the person who is the subject of the complaint.

60. The ESA should be amended to provide that a complaint based on a contravention of section 10 must be delivered within the shorter of six months from the last day of employment and two years from the date of the contravention.

Theme 3: Supporting families with job protected leaves of absence

We support the majority recommendation within the BCLI Report, and do not support the expansion of leaves. We also agree with the majority recommendation contained in the BCLI Report which calls for 3 months of continuous employment with the same employer as a minimum requirement to be eligible for statutory leaves, other than annual vacation, leave for jury duty and reservist leave.

The BCLI Report had three minority recommendations, two of which called for the expansion of leaves of absence, while the third called for there to be no qualifying period of employment for a non-discretionary leave of absence. We do not agree with these minority recommendations.

Theme 4: Strengthening workers ability to recover wages/monies owed

We agree with the majority recommendation of the BCLI Report that no change is necessary regarding the wage recovery period under section 80(1) of the ESA, except with regard to contraventions of section 10, as stated in recommendation 68 of the BCLI Report.

A six-month wage recovery period encourages employees to raise complaints quickly so that inadvertent errors are resolved without undue delay and within a period where there is likely to be reliable records or evidence available.

Theme 5: Clarifying hours of work and overtime standards

The BCLI Report, in general, recognizes the need to maintain flexibility in the provisions governing hours of work rules, overtime, and averaging provisions.

Averaging Hours of Work

The BCLI acknowledges there are differing views on the matter of averaging working hours. In response to the initial BCLI Consultation Paper, employer groups urged that averaging be the default standard for employees covered by the Act with overtime rates paid only for the time worked in excess of an average of 40 hours per week over an averaging period on a specified number of weeks. The BCLI Project Committee recognizes “that some flexibility in hours of work and overtime requirements is necessary to be ‘consistent with the realities of a modern workplace’.” In Ontario, the Changing Workplaces Review recognized a role for averaging to accommodate the interests of employees in having a flexible work schedule, or to meet business needs when employees are agreeable to the arrangement.

Averaging provides an important element of flexibility for employers and employees. As the BCLI Report summarizes: “[t]he concept of averaging is a part of the landscape of employment law in several provinces and territories as well as in the federally regulated sector. It is also an accepted practice under the only International Labour Organization (ILO) convention on hours of work that Canada has ratified.” The BCLI Project Committee concludes: “For these reasons, a provision allowing averaging of hours of work, together with proper safeguards against misuse of the provision and exploitation of employees, should be retained in the ESA.”

A majority of the members of the BCLI Project Committee recommends that:

11. An averaging provision replacing the present section 37 should provide that:

- (a) an averaging agreement may have a term of up to 2 years, subject to renewal within the term;*
- (b) the period over which hours of work may be averaged for purposes of overtime must not exceed 8 weeks;*
- (c) the number of working hours per day within an averaging period must not exceed 12 unless overtime is paid for hours worked in excess of 12 in any one day;*
- (d) the number of working hours per week within an averaging period must not exceed 48 unless overtime is paid for hours worked in excess of 48 in any one week;*

(e) if a layoff occurs during an averaging period, the laid-off employee is entitled to be paid overtime for hours worked in excess of 8 on any day in that period, rather than on an averaged basis over the length of the averaging period in which the layoff occurs;

(f) the Director may terminate an averaging agreement on application by the employer or affected employees if the Director is satisfied that hardship would otherwise result.

Currently the maximum length of an averaging period under section 37 is four weeks. A majority of the BCLI Project Committee proposes that it be increased to eight weeks, as under the earlier regime recommended by the Thompson Commission in order to cover variations between industries. A minority of the BCLI Project Committee favours a shorter maximum length for an averaging period.

The signatory associations generally support the above recommendations. However, for many employers the maximum cycle of 8 weeks is unduly restrictive. The critical point is that averaging provisions are primarily used to address fluctuations in work and often work cycle fluctuations occur over periods longer than 8 weeks, such as seasonal work or project work.

We recommend the averaging provision be applied over a much longer time period. An annual cycle, similar to the Canada Labour Code, would address concerns related to seasonal employment and other kinds of employment with strong cyclical patterns.

Hours of Work within an Averaging Period

The BCLI Consultation Paper proposed that the 12-hour daily limit applicable during an averaging period be retained, but also proposed a weekly upper limit of 48 hours. If more than 48 hours were worked in a single week during an averaging period, the hours in excess of 48 would have to be paid at the overtime rate. The BCLI Project Committee recognizes that a number of employers and business organizations responding to the BCLI Consultation Paper objected to a 48-hour weekly limit as being too restrictive.

The Project Committee took note of this objection, but also noted that a 48-hour weekly limit under averaging is also found in Part III of the Canada Labour Code and in Ontario regulatory approval is needed to exceed a 48-hour work week. In the BCLI Report, the BCLI Project Committee indicated it was not persuaded to move away from a 48-hour weekly limit applicable under averaging.

We reiterate our earlier input that employers and employees frequently enter into mutually beneficial agreements for longer work periods, balanced off by a longer stretch of days off. Such arrangements are common in major infrastructure, energy and forestry projects in remote locations where employees stay in work camps but are also used on other large projects and in other circumstances where these mutually beneficial agreements are reached. The difficulty is that the suggested 48-hour average is quite restrictive.

We strongly encourage the government to expand the number of hours permitted within an averaging agreement or provide more flexibility to accommodate work specific circumstances (such as, but not limited to, remote work camps) where employees and employers both benefit from extended working periods and extended periods of days off.

Refusing Overtime

We recognize the BCLI Project Committee amended some of its wording in its recommendations relating to refusal of overtime and justification. The Committee responded to concerns relating to wording that might have broadened the scope of reasons to refuse overtime.

The BCLI Project Committee recommends that the ESA should be amended to provide that:

(a) an employee may decline to work outside the employee's scheduled hours of work if doing so would:

(i) conflict with significant family-related commitments that the employee cannot reasonably be expected to alter or avoid;

(ii) interfere with scheduled educational commitments or with appointments or procedures in connection with professional health care;

(iii) create a scheduling conflict with other employment;

(b) an employee may decline to work more than 12 hours in a day or 48 hours in a week except in the event of an emergency, or as otherwise provided in an applicable regulation, variance, or averaging agreement.

The amendments that the BCLI Project Committee made address some of the concerns we had with the original wording that would have made reasons for refusing overtime too broad and difficult to interpret or apply.

Banking Overtime

In the BCLI Report, recommendation 9 is to abolish the banking of overtime, which is presently permitted by the Act. The BCLI Project Committee believes time banks are "excessively complicated and costly to administer, and that the concept of the time bank is also abused to avoid paying employees for earned overtime."

Employers have found that voluntary arrangements are generally more helpful and provide additional flexibility for a modern, changing workforce. We find it difficult to reconcile the BCLI Project Committee's concerns with the fact that time banks are voluntary. We believe time banks provide additional flexibility that is helpful to both employees and employers and as such do not support this recommendation.

Theme 6: Improving fairness for terminated workers

Eligibility for Termination Notice or Pay

The BCLI Report considered the three-month eligibility period to receive notice of termination or pay in lieu of notice and did not recommend any changes.

We agree with the three-month eligibility period for the statutory minimum notice of termination.

The general rule regarding termination of employment by an employee is found in section 63(3)(c). The employer is deemed to have discharged the liability under section 63(1) to pay compensation for length of service if the employee quits. The *ESA* is not clear on what happens if the employer does not wait for the period of notice given by the employee to elapse before terminating the employee; the employment relationship will have come to an end because of the employer's action rather than that of the employee.

The Employment Standards Branch's Interpretation Guidelines Manual states that in those circumstances, the employer would be liable for the lesser of the wages the employee would have earned in the remainder of the notice period given by the employee and the amount that would be payable under section 63 if the employee in question had simply been terminated without notice. This makes sense, because neither party then incurs a loss because of the action of the other. Termination following a notice to quit by an employee may be a fairly common situation. It would be helpful if the *ESA* stated expressly what it requires in those circumstances.

The BCLI Project Committee recommended as follows:

The ESA should be amended to expressly clarify that if an employer terminates an employee following a notice of intention to quit given by the employee, the employer is required to pay the employee the lesser of (a) the amount of wages the employee would have earned during the rest of the period of notice the employee gave to the employer; and (b) the amount that would be payable to the employee as compensation for length of service if the employee had been terminated without notice.

The signatory associations agree with the above recommendation that clarifies what happens when an employer terminates after an employee gives notice of intention to quit.

Group Termination

The group termination provisions of the ESA should be amended to allow an employer's obligations to affected employees to be satisfied through a combination of notice and termination pay, whether or not the employer has given the required notice to the Minister within the required timeframe.

We agree with the above recommendation that the group termination provisions of the ESA be amended to allow an employers' obligations to be satisfied through a combination of notice and termination pay, whether or not the employer has given the required notice to the Minister within the required time frame.

Conclusion

Thank you for the opportunity to provide further feedback in advance of prospective changes to the Employment Standards Act during the current sitting of the Legislature. We encourage you and your Cabinet colleagues to make changes that are in keeping with the majority recommendations in the BCLI Report, an exhaustive non-partisan multi-year review that provides generally balanced proposals to update the Employment Standards Act.

We would be pleased to discuss these matters further with you or senior Ministry staff.

Sincerely,



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