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Northwest Territories Justice

RENEWING THE *LABOUR STANDARDS ACT OF THE NORTHWEST TERRITORIES*

A CONSULTATION PAPER

October 2004

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RENEWING THE *LABOUR STANDARDS ACT OF THE NORTHWEST TERRITORIES*

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The *Labour Standards Act* of the Northwest Territories lays out a code of employment standards for non-unionized businesses in the territory. It was first enacted in 1968, and was modeled on legislation then in effect across the country. It has been amended over the years on a piece meal basis, with the result that the Act is now somewhat disjointed and at times difficult to interpret.

The Department of Justice has initiated a review of the legislation, and has set out in this consultation paper some proposed directions for reform. This consultation provides you with an opportunity to participate in the timely review of this important legislation.

This paper contains a brief commentary on the major components of employment standards legislation, proposes directions for change and poses questions for discussion.

The Department of Justice is interested in hearing your views on the specific proposals and questions raised, as well as any other comments or suggestions you may wish to raise about reforming employment standards legislation in the Northwest Territories.

After the consultation is completed the Government of the Northwest Territories will review the comments and decide whether to proceed with reform of the legislation.

Charles Dent
Minister of Justice
October 2004

Introduction

Labour standards legislation (or "employment standards" legislation, which is now the common and preferred terminology") is social legislation designed to ensure minimum standards of employment, especially in the non-unionized workplace. It lays out certain universal and minimum standards in the employer-employee relationship with respect to wages and benefits, and provides a regime to enforce those standards. Overall, the intention of the legislation is to balance employer concerns in having work efficiently performed at a reasonable cost against employee interests in receiving just treatment and fair payment for work.

Employment standards legislation determines:

- What kinds of businesses and employment are covered and who is an employee for the purposes of the legislation.
- The minimum standards and benefits that are protected, and
- How are these standards enforced

The following are the protections and benefits usually included in this kind of legislation:

- The maximum hours and days of work at one time
- The standard hours of work and overtime pay
- In what circumstances the maximum and standard hours can be altered
- The minimum wage
- How wages and benefits are calculated when compensation is paid on a basis other than time (e.g. commissions)
- Notice and other provisions relating to the termination of employment
- The standard entitlements to annual vacations and vacation pay
- The entitlements to general (statutory) holidays and how holiday pay is calculated
- Pregnancy and parental leave
- Other leave entitlements and benefits (such as "compassionate leave" and "bereavement leave".)

This effectively describes the range of benefits that are common to all jurisdictions in Canada, and the general reach of the legislation. There may be variations in coverage, but not so extensive that a given jurisdiction can be said to be outside the norm. However, some jurisdictions have provisions that go beyond employment standards. For example, Canada, Nova Scotia and Quebec have provisions in their legislation providing for the regulation of unjust dismissal.

Recent reforms to employment standards legislation in Ontario and British Columbia have not significantly changed the general character of this kind of legislation in Canada or the kinds of benefits covered.

Scope of the Review of the NWT Legislation

While the NWT legislation is in need of reform, it is not in the interest of the Government or the public to alter the basic purpose of the legislation: setting minimum standards of employment in legislation, and providing a regime to enforce those standards. Generally speaking, the balance of power between employer and employee in the non-union workshop is in favour of the employer; employment standards legislation is an instrument of social policy designed to ensure that all employees are protected in relation to matters such as hours of work, wages and holidays. It is not intended that this review would result in amendments that would change the status quo by tilting the legislation to give a new advantage to either the NWT employer or the employee

However, modernization, simplicity and efficiency in the administration of employment standards are always desired. Legislation can become out of date and in need of overhaul. Similarly, it is desirable that "flexibility" should be maintained and introduced wherever possible, where it results in a benefit to employer, employee and the public, and does not compromise the integrity of the legislation.

Overall, the regime, whatever its limitations, has served employees, employers and the public of the NWT well. A radical restructuring does not appear to be in anyone's interests at this time. The intent behind an overhaul would be to make only those changes that would make the regime more effective, without disturbing the overall, status quo balance of power between employers and employees. Consequently, it is not contemplated that coverage under the legislation be expanded to include matters such as unjust dismissal and discrimination, although the views of the public on this and other issues would be most welcomed.

The Department is assuming that an expanded jurisdiction and role for the Labour Standards Officer is not desirable, unless compelling arguments can be made to support that outcome. An expanded jurisdiction would add to the complexity of the mandate and inevitably raise a demand for more resources for that office.

However, in the interests of modernization, simplicity and efficiency it is important that the Government and the public contemplate certain changes in the administration of the legislation. Particularly, the public is invited to comment on a shift of certain administrative responsibilities from the Labour Standards Board to the Labour Standards Officer. (See below.)

Another possible reform that would serve modernization, simplicity and efficiency is a change in the way that general holiday pay is calculated and paid. The public is particularly encouraged to comment on that issue.

Coverage

All jurisdictions will define who is covered by the Act, for example managers are usually excluded, and designated professionals may also not be covered. In the NWT, domestic workers have not been brought under the Act. (See below for further discussion on the application of the Act to professionals and domestic workers.)

In addition, there are related or parallel processes which deal with the employment relationship in the Northwest Territories (such as collective agreements or safety in the workplace), and the federal government has jurisdiction over certain industries. In most cases, these processes take priority over the *Labour Standards Act*, but it does create challenges for the Labour Standards Office and other agencies in identifying which body has jurisdiction and responsibility in a given case.

Collective Agreements

The provisions of the *Labour Standards Act* do not normally apply to workers who are covered by a collective agreement. In most jurisdictions, including the NWT, the benefits in a unionized shop will exceed the minimum standards in employment standards legislation, and the collective agreement (and the relevant labour legislation) will provide mechanisms for addressing and resolving agreements processes that address grievances under the legislation. However, specific provisions in employment standards legislation may apply to unionized shops, particularly those dealing with mass layoffs and terminations, because unique public policy issues apply in these circumstances.

Moreover, regulating employment standards in a unionized shop increases the risk of intruding into the jurisdiction of the federal government over labour relations.[1]

> *The Department has concluded that there are no compelling practical reasons why NWT employment standards legislation should be routinely applied to workers who are covered by a collective agreement.*

Are you aware of any circumstances where the legislation should be applied to workers who are covered by a collective agreement?

[1] The GNWT does not have jurisdiction over labour relations in the private sector. These are covered by the *Canada Labour Code*.

Trucking

Both the Labour Standards Office and the Motor Vehicles Branch of the Department of Transportation are involved in the regulation of hours of work in the intra-provincial trucking industry, and impose different standards. The *Labour Standards Act* restricts the working hours of drivers who are employees to 10 hours a day and 60 hours a week, unless there is an emergency or the employer has obtained a waiver from the Labour Standards Officer. Meanwhile, the *Hours of Service Regulations* under the *Motor Vehicle Act* permit self-employed drivers to work 105 hours in a seven consecutive day period on winter road operations, which arguably has the effect of giving a competitive advantage to independent contractors, if the Labour Standards Officer imposes higher standards.

> *The Department is proposing that employees in the trucking industry should be excluded from the sections of the legislation that regulate hours of work for truck drivers who work during the winter road season, making this the exclusive responsibility of the Department of Transportation. However, the employment standards legislation would continue to apply in all other respects to the trucking industry.*

Do you agree that hours of work for trucking during the winter road season should be consolidated in the Department of Transport?

Construction and Mining

There is no definition of "construction industry" in the Act. It is defined in the regulations, where it is used in the context of the employment of children (see below.) The "construction industry" is also exempted by the Notice of Termination Exemption Regulations from the section of the Act requiring notice of termination (Section 14.03), but no definition of "construction industry" is offered.

Confusion has arisen as to whether construction on mine sites is "construction" or "mining". Mining Safety treats it as "mining", but Labour Standards treats it as "construction". This has lead to some confusion.

> *"Construction" and the "construction industry" should be defined in the legislation.*
>
> *The Department of Justice and the Workers Compensation Board would be expected to coordinate amendments to their legislation in the interests of clarifying when activity should be classified as "construction" or "mining".*

Do you have any views on the regulation of construction in the mining industry?

Human rights legislation

Some jurisdictions include discrimination in their employment standards legislation. Most jurisdictions deal with discrimination in relation to employment under their human rights legislation, where boards and officials are equipped to deal with such issues. This has been the practice in the NWT, where the *NWT Human Rights Act* provides for non-discrimination in employment.

> *The Department believes that discrimination in employment should continue to be covered by the Human Rights Act, not in employment standards legislation.*

Are you aware of any reasons why employment standards legislation should cover discrimination?

Wages Recovery Act

The *Wages Recovery Act* is very rarely used legislation that provides a summary procedure for the recovery of unpaid wages before a Justice of the Peace. Since 2000 only five cases were opened (one in 2000, two in 2002 and two in 2003). Arguably, if the procedures under the *Wages Recovery Act* have any ongoing purpose or use, these should be incorporated into the *Labour Standards Act*, where a regime exists for the recovery of unpaid wages.

There might have been a rationale for the *Wages Recovery Act* in the days when communities were isolated. However, communications technology has improved significantly over the years, and while the Labour Standards Office has a limited travel budget, complaints can be processed effectively by telephone, fax and email.

> *The Department is proposing that the Wages Recovery Act be repealed in the interest of consolidating standards and enforcement procedures in a new "Employment Standards Act".*

Are there any reasons why the Wages Recovery Act should not be repealed?

Coordination

Given the number of agencies that have a regulatory interest in matters touching upon employment, and the apparent overlap of jurisdiction, the employee can be faced with a conundrum as to which agency s/he should be appealing to. However, in most cases, it is normal and unavoidable that more than one agency of government is involved in the regulation of the employment relationship. Normally, the complaint can be remedied without a great deal of frustration if the various agencies operate in an institutional climate where the obligation rests on all to ensure that the employee is steered towards the office with primary responsibility under the circumstances.

Some employees are very strategic and have been known to use a shotgun approach as a hedge, so that they can be sure that all bases are covered. This presents a problem for the government offices affected, and the Labour Standards Office, in particular, in assessing how to handle the complaint. In some cases, it may be clear, such as when the matter is covered by collective agreement, but not always. For example, if the employee is successful under grievance procedure pursuant to collective agreement, the matter is effectively ended, but if he is not fully successful, is the Labour Standards Office entitled to deny the employee a review under its legislation?

In other circumstances an employee may elect to undertake a suit against the employer in the courts. The current practice of the Labour Standards Officer is to refuse to take on a complaint on a matter before the courts, but will take on a complaint after the court action is concluded if there is a matter outstanding that was not covered by the court judgment.

> *The Department believes that the Labour Standards Office should have the capacity to refuse to receive a complaint if the matter is being pursued in another forum, provided that the Labour Standards Officer should have the discretion to open a file on an employment standards matter that is not dealt with in a decision made in the other forum.*

Do you have any suggestions on how to improve coordination between the various offices involved in resolving employment standards issues?

Government of the NWT

The Act does not apply to the Government of the NWT, because of section 8 of the *Interpretation Act*. Grievances and complaints of government employees are therefore covered by the processes and procedures established by the collective agreement between the Government and its employees. Neither does the Act apply to government agencies such as NWT Power Corporation.

An argument can be made that all employees should be covered by the legislation as a matter of principle. In fact, most provinces do provide for the application of at least parts of their legislation to the provincial government.

In practice, the *Labour Standards Act* would not normally be used to deal with complaints from government employees even if the Act covered them, because their benefits invariably exceed those set by the legislation. Moreover, dispute resolution is provided for in the agreement and the relevant labour legislation. However, there may be circumstances where a government employee might fall through the cracks, and therefore might be denied a remedy where minimum standards have been breached.

From the perspective of the Government, and its agencies, the exemption of Government employees from the application of employment standards legislation means that they as employer do not have the advantage of overtime averaging under the Act. (But it could be provided for in the relevant collective agreement.)

There is, however, a problem when a government employee (the Labour Standards Officer) is called upon to deal with a complaint involving the government and another government employee. On one hand the employment standards official is assessing a complaint of a peer, and on the other hand s/he is doing so as an officer who is an employee of and accountable to the employer in the dispute. For the employment standards official, it is a difficult position to be in.

> *Given the comprehensive character of collective agreements and potential compromise (real or perceived) of the impartiality of the Labour Standards Officers, it is proposed that government employees should continue to be excluded from the application of employment standards legislation in the NWT.*

Can the case be made for extending the reach of employment standards legislation to cover the Government of the NWT?

Professionals

The Act currently provides for the exclusion of employees "who are members or students of such professions as may be designated by regulation as professionals to which this Act does not apply." This "all or nothing" wording is arguably unnecessarily inflexible, and in the result, potentially unfair. For example, the differentiation between members and students may be important in some circumstances, and conceivably there may be aspects of the legislation which should apply to professionals, who are employees. For example, why should leave provisions not apply to professionals who are employees? On the other hand, overtime provisions may be inappropriate to the culture of some professions, such as law.

> *The Department is proposing that the legislation be reformed to allow for more flexibility in the coverage of members or students of professional societies.*

1. *Should employment standards legislation cover professionals?*
2. *To what degree should they be covered?*

Domestics

The Act currently applies to domestic workers only to the extent that is provided for in regulation. No regulation has ever been passed, so they are effectively excluded.

Domestic workers are not defined, so the full range of the exclusion is not clear.

"Domestic workers" commonly includes persons who provide services such as washing, cleaning and gardening. It can also include caregivers, those caring for children and the elderly, and in some case, includes persons, such as "nannies", who provide both kinds of services. Domestic workers can also be "come-in" or "live-in".

Generally speaking, domestic workers in Canada - other than part-time domestics and baby-sitters - are partially covered by employment standards legislation. The exceptions seem to be the NWT and Nunavut, although it appears that not all domestic workers are covered in Nova Scotia (caregivers are excluded) and New Brunswick (which has a narrow definition of "employer" that works to exclude benefits for some domestic workers.) It appears that domestic workers in Quebec are covered effective June 2004.

Some jurisdictions will cover minimum wage and holidays, but overtime provisions may be excluded (as in Alberta and the Yukon). Many jurisdictions have restrictions on what can be deducted for room and board for live-in domestics, and for meals for come-in domestics (e.g. BC, Alberta, Saskatchewan, Manitoba.)

The Department believes that the status quo exclusion of domestic workers in the NWT from all aspects of employment standards cannot be supported.

1. *Should domestics be covered by the legislation?*
2. *If so, to what degree should they be covered?*

Trappers and persons engaged in commercial fisheries

Currently the Act excludes trappers and persons engaged in commercial fisheries from the Act, in its entirety. Trappers are seldom employees, so would not be covered by the Act in any event. While it is difficult to contemplate the circumstances where a trapper would be an employee, there are no obvious reasons why a trapper, employed in that industry, should be excluded from protection under at least some aspects of the legislation. For example, trappers employed in that industry should be able to secure the assistance of the Labour Services office in recovering unpaid wages.

The Department is proposing that the blanket exclusion of all trappers should be repealed. Virtually all trappers would continue to be excluded from the legislation, but it would allow for coverage in the rare case when a trapper was determined to be an employee.

Should the legislation be changed to protect trappers who might also be employees?

The case for excluding persons employed in the commercial fishery is not clear at all. While many fishers are independent contractors (and therefore excluded from the legislation), some may be employees. Persons employed on fishing boats are covered by federal legislation (the *Canada Labour Code*). But persons employed in fish plants located on land would normally be covered by the *Labour Standards Act*, if they were not specifically excluded.

> *The Department can identify no credible reason for excluding persons who are employed in the on-land commercial fishery from protection under employment standards legislation, and believes they should be covered by at least some of the aspects of the legislation, such as minimum wage and the recovery of unpaid wages.*

Are there any reasons why employees in the on-land commercial fishery should not be protected?

Young Persons

The hiring of young persons is currently covered by regulation, not by the Act. The Labour Standards Officer must approve the hiring of any young person (under the age of 17) by an employer in the construction industry, and when a young person is hired in any job or occupation the employer must be able to satisfy the Labour Standards Officer, on request, that the employment is not detrimental to the health, education or moral character of the young person.

The Labour Standards Officer is not in a position to monitor the employment of minors in all industries throughout the NWT. Consequently, the Department believes that the onus should be placed as much as possible on employers that the employment of children is in conformity with the Act and is not detrimental to the health, education or moral character of a young person.

Similarly, some responsibility has to be placed on parents to ensure that the futures of their children are not being compromised by pre-mature entry into the workplace.

Overall, public policy in the NWT favours a sharing of responsibility by parents, employers and the state. The legislation should articulate public policy with relation to the employment of children and provide realistic measures for enforcement of standards.

The Department believes that:

- *The regulation of the hiring of children should be covered in the legislation itself, not merely in the regulations.*
- *The onus on employers to justify their hiring of children should be retained.*
- *It is difficult to rationalize a reduction of the age defining young people, from under 17 to under 15, as in some jurisdictions, given the growing importance of education and the high drop out rate in the NWT.*
- *The restrictions on the hiring of young persons in high-risk industries like construction should be retained, but should perhaps become part of the jurisdiction of the WCB, because it is a work injury issue, not employment standards.*
- *The employer should be required to secure the consent of the parent or guardian for the employment of young persons who are students.*
- *The employment of persons under the age of 16 (the age of compulsory schooling) during school hours should be prohibited.*

Views of the public, employers and young people, in particular, on the employment of children would be most welcomed.

Educational Work Experience Agreement Regulations

These regulations authorize employers to have a student work for them so that they can earn credits as part of the student's curriculum, without the payment of wages. An application is filled out and signed by the student, parent or guardian, and the employer, and submitted to the Labour Standards Officer, who forwards it to the Safety Officer at WCB, who ensures that the employer is in good standing and has a good safety record. The involvement of the Labour Standards Officer is enigmatic, since these agreements concern the educational interests of the young person in question (the Department of Education, Culture and Employment) and workplace safety (the WCB).

The Department is proposing that the Educational Work Experience Agreement Regulations should be repealed, and work experience be brought under the jurisdiction of the Department of Education, Culture and Employment and the WCB.

1. *Should the Educational Work Experience Agreement Regulations be repealed?*
2. *Which agency should be responsible for this program?*

Hiring[2]

Except for the licensing of "employment agencies" (under the *Employment Agencies Act*), and the restrictions on the hiring of children (in the regulations), hiring is not regulated in the NWT.

The legislation in some jurisdictions prohibits employers from misrepresenting that a job is available, the wages to be paid, the type of work to be done, or the terms of employment. Nor may an employer ask for or receive payment from a person (directly or indirectly) in return for hiring that person.

Misrepresentation of employment is all too frequent in the NWT. An employee is promised a job, high wages, accommodation and airfare as an inducement to relocate in an isolated community. Once s/he arrives, the job is not what was promised, the employee's hours are increased, the accommodations are unacceptable, and the airfare is deducted from salary. In the end, the employee may be ineligible for UI if s/he quits, and the taxpayer may be stuck for the costs of transporting the employee back home.

The introduction of penalties for misrepresentation, plus the capacity for the Labour Standards Officer (and the courts, if applicable) to recover the costs of transportation from the employer, would help address this problem.

Another possibility is to require signed contracts for out of territory hiring with the terms spelled out (similar to contracts for live-in domestic workers, recruited from abroad.)

> *The Department is proposing that the terms of the Employment Agencies Act (the licensing of employment agencies) be rolled into the new Employment Standards Act, and the legislation prohibit anyone from charging a fee to prospective employees.*

[2] Note that discrimination in hiring is prohibited in all jurisdictions, the NWT included, under human rights legislation.

It is also suggested that serious consideration be given to the addition of penalties (including the recovery of costs) for misrepresenting employment.

1. *Should employers and employment agencies be prohibited from charging a fee to prospective employees in connection with hiring?*
2. *Should penalties be added for misrepresenting employment?*

Standards and Benefits

As indicated above, the categories of standards and benefits created by the NWT legislation are basically consistent with those in other legislation in Canada, with some variation reflecting the different conditions and political cultures across the country. There is not a great demand for radical changes in this area, but in some cases there is a need for clarification and improvement.

Maximum hours and days of work at one time

The legislation identifies the "maximum hours of work" at 10 hours a day and 60 hours a week, unless an emergency exists or a permit is given by the Labour Standards Officer to work extended hours. No significant changes are required in this regard.

Section 10 currently says that "except as may be otherwise prescribed", hours of work must be scheduled so that each employee has at least one full day of rest a week. No exceptions are provided for. Arguably, there is room for flexibility here. For example, the Alberta act provides for at least:

a) one day of rest in each work week,
b) 2 consecutive days of rest in each period of 2 consecutive work weeks,
c) 3 consecutive days of rest in each period of 3 consecutive work weeks, or
d) 4 consecutive days of rest in each period of 4 consecutive work weeks, and
e) Every employer must allow each employee at least 4 consecutive days of rest after each 24 consecutive workdays.

The Department is recommending the adoption of the Alberta scheme for scheduling days off.

Standard hours of work and overtime pay

Standard hours of work are 8 hours in a day and 40 hours in a week. Overtime is not less than 1.5 times the regular rate of pay. The Act does not currently recognize the standard practice of paid time off for overtime.

Paid time-off for overtime requires agreements allowing for the banking of overtime, in lieu of payments at the time when regular pay is due.

> *The Department is recommending that the legislation be clear that, provided the employee agrees, paid time off might be compensation for overtime.*

Increasing Maximum hours and Averaging Permits

The Act currently allows the Labour Standards Officer to increase the maximum hours of work (10 hours a day and 60 hours a week) where the work is intermittent or seasonal.

The Act also allows the Labour Standards Officer to authorize the standard and maximum hours of work to be averaged over a period of one or more weeks. This is an important feature of work in the North were work is often seasonal and can be intensive. No substantial changes are proposed.

However, overtime averaging and extended hours has proven to be problematic in the diamond industry in the NWT, in situations where both an extended hours permit and overtime averaging permit are given, and the employee is paid a salary. For example, the employee might be on a two weeks on, two weeks off, rotation. If the employee is paid bimonthly, at the same rate each pay period, because of the overtime averaging permit, it is difficult to determine if s/he has been properly compensated for overtime, and it is also difficult to determine how the permit relates to general holiday and vacation pay, etc. The Labour Standards Officer cannot determine that without a thorough and labourious investigation.

The solution must allow for overtime to be transparent, while also allowing for rotations. One possibility would be to give the Labour Standards Officer the capacity to require the employer to convert the salary to hourly rates, so that overtime can be tracked.

> *The Department is recommending that the legislation should be reformed to remedy confusions respecting overtime averaging and extended hours.*

Do you have any comments with respect to overtime, and overtime averaging and extended hours, in particular?

Minimum wages

The minimum wage is currently set by the Act, as opposed to regulation, which is the common mechanism in most jurisdictions.

> *The Labour Standards Act should be amended to allow for the setting of the minimum wage by regulation.*

Do you have any comments with respect to the minimum wage?

Wages and benefits when compensation is paid on a basis other than time

Compensation for labour is commonly based on the hours worked under the supervision of the employer. Therefore, wages for standard hours of work and for overtime can be determined in a fairly straightforward manner. The matter is obviously not nearly so clear when compensation is determined on a basis other than time, such as commission, or a mixture of wages for hours worked plus commission.

In 1999 the Act was amended to deem that the regular rate of wages for such a worker for the purposes of calculating overtime is the minimum wage (or the greater of the minimum wage or the time component of the compensation when the employee is paid a mixture of wages for time and on another basis than time, e.g. commission.) This methodology is used in a number of jurisdictions, and is regarded as fair with respect to overtime in general, insofar that it protects the commission worker who is paid at low rates of compensation, while acknowledging the advantages of commission work, in the way of flexible working hours, etc.

> *The Department is recommending retention of the minimum wage as the basis for calculating overtime for commission workers and other workers paid on a basis other than time.*

(As to how commission workers and others paid on a basis other than time are compensated for general or statutory holidays, see below: "General Holidays".)

Do you agree that the minimum wage should be the standard for calculating overtime for commissioned workers?

Termination of employment (notice, etc.)
The Act provides for notice of termination for the individual employee and for notice of group termination in the case of mass layoffs. In either case, compensation may be given in lieu of notice.

The intent of the notice of mass termination provisions was to give government notice in advance so that measures can be taken to prepare for it, and disincentives be given to fly by night operators who would pack up and leave without notice, leaving the NWT with dislocated families and communities.

Note that NWT legislation cannot address the problems raised by bankruptcy, given that bankruptcy is federal legislation. Similarly, NWT legislation cannot address problems raised by under-funded pensions, as this too is federal jurisdiction. Nevertheless, the current legislation does require amendments to make it more effective and equitable.

The Department is recommending a rewriting of the provisions respecting notice of termination.

Do you have any views on how termination of employment should be regulated by NWT employment standards legislation?

Annual vacations and vacation pay
No significant alterations are being proposed in this area. The Act currently provides vacation pay at 4% of wages for employees entitled to a vacation of 2 weeks (in the first five years of employment) and 6% for those entitled to 3 weeks (after five years of employment). These entitlements fall somewhat short of the standards in collective agreements, and there is a question as to whether the conditions in the North warrant a change (e.g. increase from 2 weeks to 3 weeks vacation after three years of employment.)

Currently, employees can wait up to 22 months from beginning employment before the employer is required to grant a vacation.

The Department is suggesting that 22 months is arguably an excessively long a period between holidays.

What are your views on minimum standards for vacations and vacation pay?

General holidays

The current provisions of the *Labour Standards Act* with respect to the entitlement for a paid general (statutory) holiday are very confusing for employees and employers, and for staff in the Labour Standards office. Currently, an employee is entitled to be paid the equivalent of the wages the employee would have earned at the regular rate of wages for the normal hours of work. Assessing this is often a challenge.

One way of simplifying this would be to include compensation for general holidays as a percentage of each pay cheque. The percentage would be based on the number of days of general holidays in a year (e.g. 3.6%).

This would not involve any additional costs to employers, with respect to employees who are entitled to general holidays. However, the simplicity of the proposed system requires that all employees receive general holiday pay. This would add some minimal extra cost to employers with respect to employees who are currently not entitled to general holiday pay (section 28.) For example, employees who have worked less than 30 days during the previous 12 months, and employees on pregnancy or parental leave would be entitled to general holiday pay, where currently they are not entitled.

On the other hand, the change would address the complaint that employers have in relation to holidays for temporary, part time staff, who are currently entitled to a paid holiday on the same basis as full time employees.

The introduction of this scheme of payment of general holiday pay would be unique in Canada, and is therefore potentially controversial. However, it is not a new idea, and NWT employers and employees may find the simplified scheme attractive.

The Department is recommending a significant restructuring of the method for determining general holiday pay.

1. *Your views on general (statutory) holiday pay would be welcomed.*
2. *Do you agree with the proposal that holiday pay be included in each pay cheque?*

The fact that the legislation does not include a list of statutory holidays has been a chronic problem for employees, employers and members of the public.

The legislation should either include a list of statutory holidays or a reference to where a list might be found.

Do you have any views on the publication of statutory holidays?

Commission or other workers who are paid on a basis other than time would be covered by the above change in the way that holiday pay is calculated. Compensation for working on a statutory holiday is currently calculated on the basis of the minimum wage, in the same way as overtime; that is, the employee would receive 1.5 times the minimum wage (in addition to the compensation for holiday pay included in each pay cheque). An argument can be made that the use of the minimum wage in this way leaves the productive, hardworking commission worker vulnerable to losing a deserved break. This would be avoided if the compensation to be paid were the greater of the minimum wage or the average daily wage for the previous month.

The Department is recommending reconsideration of the way that compensation for commission workers working on a statutory holiday is calculated.

Do you feel that the minimum wage should be used to calculate compensation for commissioned workers who work on a statutory holiday?

Pregnancy and parental leave

No significant changes are proposed with respect to pregnancy and parental leave.

However, it should be noted that under the Act the employee is considered to be employed during the leave period, but no benefits need be paid and no seniority need accumulate during the leave period. It was written this way to address the concerns of northern employers, at the time, when housing was provided and housing allowances were paid. The situation regarding housing has since changed dramatically in the North, so it may be timely to reconsider the matter of benefits during the period of leave.

The Department is proposing that benefits and the accumulation of seniority continue during pregnancy and parental leave.

1. *Do you agree that benefits and the accumulation of seniority should continue during pregnancy and parental leave?*
2. *Do you have any other comments with respect to pregnancy and parental leave?*

Other forms of leave

Other jurisdictions have other forms of unpaid leave not found in the NWT legislation, which provide for certain measures of job protection for the employee.

Most jurisdictions provide for unpaid leave relating to the employee's family responsibilities, such as the care of ill or dying family members, and bereavement. The various forms of this kind of leave can be lumped together under a category such as *Family Responsibility Leave*, or treated separately, as in the case of *Compassionate Care Leave* and *Bereavement Leave*. The leave entitlement varies across the country. British Columbia allows for up to 5 days of unpaid *Family Responsibility Leave* for an employee's responsibilities relating to the care, health or education of any member of the employee's immediate family, and an additional 3 days of unpaid *Bereavement Leave*. Ontario has up to ten days of unpaid *Family Leave* to deal with a family crisis, personal or family illness and bereavement situations. (However, this is only available to employees in workplaces with 50 or more employees.) Canada has up to 8 weeks of *Compassionate Care Leave* with respect to the care of a dying family member. *Bereavement Leave* is a separate leave entitlement in Canada and other jurisdictions (e.g. Manitoba). Alberta does not provide for unpaid leave with respect to any form of family responsibility other than maternity and parental leave.

(BC also protects the employee with unpaid *Jury Duty Leave*, which is probably best dealt with in the NWT *Jury Act.)*

> *The Department of Justice recommends that employment standards legislation in the NWT should include unpaid leave for compassionate care and bereavement.*

1. *What are your views on extending the legislation to cover additional types of leave?*
2. *What about compassionate care leave and bereavement leave in particular?*

Appeals and Enforcement

Mechanisms for the enforcement of employment standards typically include a Director and Office of Employment Standards (in the NWT, the "Labour Standards Officer" and a number of "inspectors" reporting to her.) The Director and the Office receive complaints from employees, alleging that they have been denied wages or benefits they are entitled to under the legislation. However, a complaint is not required in all cases; the Director can initiate an investigation or inquiry. In either case, an investigation will result in a determination, which may lead to the launching of an appeal (usually by the employer) to a tribunal established to review all determinations of the Director or the Office. In the NWT, this is the Labour Standards Board, a para-statal board created by statute, consisting of 5 members, including the Chair, from the public, appointed by the Minister.

The employee is seldom represented by legal counsel, whereas the employer is more often represented than not. In the NWT, the Labour Standards Officer, or staff in the Office, does not participate in the hearing, since the Board is hearing an appeal from a decision of the Labour Standards Officer.

Decisions of the tribunal are final, subject to the right of a party (invariably the employer) to appeal on a question of law to the Supreme Court of the NWT, and are enforceable in the same manner as decisions of the Supreme Court.

In 1999 there were 43 files opened and 29 decisions by the board. Members are paid on a per diem basis for their work on the board and are expected to assume their share of responsibility in the writing of board decisions. This is demanding on the time of members, and it is a challenge to maintain a roster of members who are suitably skilled and prepared to make this commitment.

In nearly all jurisdictions a body similar to the NWT Labour Standards Board hears all appeals, but the appeal body is not otherwise involved in the administration and enforcement of the Act. The NWT regime forms part of the exception, in this regard, and it makes a lot of sense that administrative matters be the responsibility of the Labour Standards Officer, not the Board.

> *It is proposed that the role of the Labour Standards Officer be restructured to include administrative responsibilities currently exercised by the Labour Standards Board, such as pursuing collections of wages owed, etc.*

The body responsible for the enforcement of orders and judgments (whether it is the Board or the Labour Standards Officer) must have certain powers if they are to be able to execute their responsibilities.

> *It is recommended that enforcement be improved by including the power to attach the assets of debtors, including the assets of directors of corporations. Best practices from other jurisdictions should be canvassed and the Act modeled to facilitate those practices where practicable (e.g. referring enforcement to a collection agency in certain circumstances).*

Do you have any views on how the administration of employment standards could be improved?

Appeal Procedures

Sections in the *Labour Standards Act* dealing with appeal procedures to both the Board and the Supreme Court are sparse and lack clarity. In the case of appeals to the Supreme Court, no procedures are identified, with the consequence that procedures must be gleaned from the Rules of Court or other legislation. Thus, it is made imperative that a lawyer be hired if a party wants to take the matter to that level.

> *Appeal procedures should be specified in the Act, or the regulations, with as much detail as is reasonable.*

Do you have any comments with respect to appeals?

Enforcement

Enforcement covers a range of issues. Particularly it includes the powers of officers and procedures for the resolution of complaints.

- *Minor amendments are recommended with respect to the powers of officers, such as the capacity to remove records from a place of employment for the purposes of copying, and the power to enter a private residence to retrieve records.*

- *Additions to the Act are required that would give more clarity with respect to the procedures for claims, such as setting time limits for submitting claims and giving the Labour Standards Officer the capacity to dismiss frivolous complaints.*

1. Do you have any views on how the enforcement of the legislation could be improved?
2. What about the proposed power to enter a private residence to retrieve records?

Administrative Fees

Some jurisdictions give the Director of Employment Standards the power to add an administrative fee to the order of the Director for the payment of compensation. Manitoba, for example, allows for an order to pay administrative costs of $100, or 10% of any compensation ordered, whichever is more, to a maximum of $1,000. This adds an element of deterrence, and helps to recover at least some of the costs to the taxpayer.

It is recommended that the Labour Standards Officer be given the power to assess administrative fees.

Do you agree that employers who are in violation of the legislation should be subject to an administrative fee?

Payroll Records

The Act requires that employers maintain records containing the details of employment. There is no greater barrier to the efficient resolution of disputes and the enforcement of employment standards than the quality of records maintained by employers. Long delays in the settlement of claims are invariably due to the difficulty in securing the evidence of the terms of employment and the record of compensation. There are limited changes that could be made to the legislation that would improve the quality of day to day record keeping. In any case, the Labour Standards Officer must make a determination based on the evidence available.

Changes in the legislation are recommended that would give more clarity to the information that must be maintained in payroll records, the period of time that certain payroll information needs to be retained, and prescribing penalties for non-compliance with the requirements for maintaining payroll records.

Do you have any comments on how employers could be encouraged to maintain a record of employment that could be easily tracked?

Other Administrative Changes

Other administrative matters include: pay periods, method of payment, assignment of wages, the recovery of wages (including role of the Labour Standards Board), reciprocal enforcement, wages as a lien on property and prosecutions of corporations and directors.

Changes are required because of the redefinition of the roles of the Labour Standards Office and the Labour Standards Board.

> *The Department is recommending a number of miscellaneous changes to enhance the administration of the Act.*

Do you have any other comments regarding the administration of employment standards legislation?

Offences and Punishment

The sections dealing with fines and punishment are arguably inadequate. For example, is a fine of $50 a day an adequate deterrent for failing to comply with an order of a court?

> *The Department is recommending that the sections dealing with offences and penalties be brought into line with those in other jurisdictions.*

Do you have any comments about activity that should be prohibited under the legislation, and the penalties that should be imposed for a breach of minimum standards?

Conclusion

The *Labour Standards Act* has served the NWT well, but it is seriously in need of an overhaul. The changes to be made need not involve a radical restructuring of the relationship between employers and employees, nor a major alteration of the standards to be enforced. However, improvements can and should be made that would enhance the relationship, while at the same time introducing more clarity and efficiency, together with improved processes for enforcing standards.

How to Provide Your Input and Comments ...

The Department of Justice is keen to hear your views on the proposed changes to the employment standards legislation in the Northwest Territories (the *Labour Standards Act)*, and would also encourage comments you might like to make on any other aspect of the legislation, all in the interest of making the legislation more effective and responsive to the interests of northerners.

You should address your views to:

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