

LABOUR MANAGEMENT REVIEW COMMITTEE

March 9, 2011

Honourable Jennifer Howard
Minister of Labour and Immigration
Room 317,
Legislative Building
Winnipeg MB R3C 0V8

Dear Minister:

As requested on September 20, 2010, The Manitoba Labour Management Review Committee (LMRC) would like to thank you for the opportunity to review and make recommendations on the issue of amending *The Employment Standards Code* (the Code), as well as a review of 87.1-87.3 of *The Labour Relations Act*.

Consensus recommendations for changes to the Code were agreed to with respect to issues referred to the LMRC by the Department:

1. Individual Flex-time Agreements
2. Averaging permits – hours of work for a workplace or occupation
3. Climate Controlled Agricultural Businesses – holiday pay

In addition, we appreciated the opportunity provided to the members of the LMRC, to raise other issues relating to the Code for discussion and review. As a result of these deliberations, two additional consensus recommendations were developed by the committee relating to the following:

1. Termination for “just cause”.
2. Deductions from employees’ pay for payroll errors and unpaid cash advances.

As required under Section 87.4 of *The Labour Relations Act* (the Act), the LMRC also considered sections 87.1 - 87.3 of the Act but was unable to achieve any recommendations based on their review. Both labour and management caucus’ have strong opinions on these sections. Management feels very strongly that this legislation is an intrusion in the collective bargaining process. It can be noted, however, that both the labour and management caucuses agreed the conditions for ordering the settlement of a dispute should remain in the legislation. These are:

- work stoppage must have continued for over 60 days;
- determination by the Board of good faith/bad faith bargaining; and
- determination by the Board that the applicant has bargained seriously and sufficiently.

We would like to thank the members of the LMRC for their hard work and time they have spent on these various issues. Once again, thank you to the staff in the Department for providing assistance to the Committee on these matters.

Sincerely,

Original signed _____
Kevin Rebeck
Labour
Caucus Chair

Original signed _____
Michael Werier
Chairperson

Original signed _____
Peter Wightman
Management
Caucus Chair

Enclosure

cc: Members of the Manitoba Labour Management Review Committee

REPORT OF
THE MANITOBA LABOUR MANAGEMENT REVIEW COMMITTEE

Review of the Employment Standards Code

Re: Individual Flex-time Agreements
Just Cause
Recovery of Overpayments to Employees
Climate Control Businesses

March 9, 2011

MANDATE OF THE LABOUR MANAGEMENT REVIEW COMMITTEE

The Manitoba Labour Management Review Committee (LMRC) was tasked with conducting a review of proposals under *The Employment Standards Code* (the Code) with respect to a number of issues forwarded by the Department of Labour and Immigration and was provided the opportunity to raise issues for review as well. Following careful deliberation, the LMRC achieved consensus on the recommendations contained in this report.

RECOMMENDATIONS ON ISSUES FORWARDED BY THE MINISTER

1. Proposal - Individual Flex-time Agreements

Currently, the Employment Standards Code provides for standard hours of work of eight hours per day or 40 hours in a week. These hours can be modified by collective agreement or by the employer applying to the Director of Employment Standards for an averaging permit. The legislation does not currently allow for flex-time arrangements for individual employees.

Currently, a significant number of collective agreements provide for standard hours of work that differ from the Code (e.g., 10 hours for four days per week with three days off - 40 hours per week total). This reflects the wishes of many workers to have more flexible hours to deal with work/life balance.

The LMRC unanimously recommends that the Code be amended to provide for individual flex-time agreements as follows:

- At the request of an employee, who regularly works at least 35 hours per week, a written agreement can be entered into allowing the employee's standard hours of work to be altered to a maximum of 10 hours a day and 40 hours a week (instead of 8 hours a day and 40 hours a week).
- The agreement would set out the revised work schedule for the employee, agreed to by the employer and employee, in writing. The employee would continue to have the general right under the Code to refuse any hours outside of the agreed upon schedule.

- Either the employee or the employer can cancel an agreement by providing 2 weeks notice, unless the parties agree to a shorter period. Upon cancellation, the normal standard hours of work will begin to apply again (8 hours a day and 40 hours a week).
- Approval of the Director of Employment Standards would not be required. However, the Director could revoke the ability of entering into these agreements if they are deemed to be misused upon investigation, or if there is a pattern of past non-compliance with the Code.
- The individual agreement cannot become a condition of employment or be related to the organizational needs of the employer. The Code currently provides that an employer wanting to alter standard hours of work as a condition of employment, or to meet organizational needs, may apply to the Director of Employment Standards for an averaging permit.

Additional Provision

- The LMRC also recommends that, at the employee's request, an employer may agree to alter the employee's work schedule under the agreement on an ad-hoc basis to accommodate personal matters/emergencies. The maximum of 10 hours a day and 40 hours a week would also apply in these situations.

2. Proposal - Workplace/Occupational Agreements – Averaging Permits for Hours of Work

The standard hours of work are 8 hours a day and 40 hours a week. Hours worked above these are overtime. Employers may apply to increase the daily hours in a 40-hour work week or to average the hours across a longer period such as 80 hours in a two-week period, 120 hours in a three-week period, 240 hours in a six-week period, and so on. Permits are not given to workplaces where the majority of employees disagree with the proposal.

Currently under the Code, the Director must consider criteria “relating to industry customs or practices” to determine whether hours of work, for a class of employees or a workplace, can be modified through an averaging permit. There are situations where such industry customs or practices do not exist. It is felt that this provision does not provide the flexibility to deal with evolving and modern work practices.

The LMRC therefore unanimously recommends that the Director have the ability to grant an averaging permit based on the following criteria:

- 75% of employees within the class or workplace under consideration agree to the new hours proposed.
- The work schedule is posted two weeks in advance, and any unscheduled work beyond 8 hours in a day would be paid at the overtime rate.
- No adverse effect on safety, health or welfare to the employee or the public as a result of the permit.
- Under Section 14(3) of the Code, criteria (a) relating to industry customs or practices will no longer be considered.
- A history of general compliance with the Code by the employer.

- The right to refuse overtime would not be available to employees for those hours contained in the schedule, as long as the schedule is posted and other terms of the permit are adhered to.
- The Director's discretion when granting a permit would remain. This would allow for consideration of averaging permits in workplaces such as those of a seasonal nature or start-up operations without an existing workforce.
- Maximum hours regarding workday and week lengths would remain at the discretion of the Director.

3. Proposal – Holiday Pay - Continuously Operating Agricultural Workplaces

Manitoba allows certain industries to require their workers to work on public holidays without paying a wage premium. However, workers who are required to work on public holidays in these industries must be given an alternate day off, with pay, within 30 days.

Under the Code, the exception applies to employees employed in a continuously operating business, seasonal business, place of amusement, gasoline service station, hospital, hotel or restaurant, or in domestic service.

The LMRC unanimously recommends that the exceptions to premium pay for work on a holiday also apply to climate controlled facilities operating in the agricultural industry.

RECOMMENDATIONS ON ISSUES RAISED BY THE LMRC

1. Proposal - Just Cause

Currently under *The Employment Standards Code*, an employer, when terminating an employee from employment, must provide the employee with a notice of termination, or pay in lieu, unless the employer can show evidence that the employee has acted in a manner that is not condoned by the employer and that

- (i) constitutes wilful misconduct, disobedience or wilful neglect of duty, or
- (ii) is violent in the workplace, or
- (iii) is dishonest in the course of employment.”

An employee who believes they are owed wages in lieu of notice may have their complaint investigated by Employment Standards.

In several other Canadian jurisdictions, and under collective agreements, the employer must show that there was “just cause” in terminating an employee without wages in lieu of notice.

The LMRC unanimously recommends that the Code be amended to provide for the “just cause” standard for termination of an employee in place of the “wilful misconduct” standard, consistent with other Canadian jurisdictions.

It should be noted that under the Code, when it has been established that an employee was dismissed without notice or compensation, the burden of proof would be on the employer to put forward evidence to show “just cause” for termination exists. Many arbitration decisions relating to collective agreements exist that deal with the issue of “just cause” in terms of terminations.

2. Proposal - Recovery of Overpayments to Employees

Under the *Employment Standards Code*, an employer may only deduct money from an employee's pay for something that is a direct benefit; and only if the employee agrees. Other allowable deductions prescribed by the legislation are legal source deductions, recovery of pay advances, money for red light or photo radar tickets, and charges for board, lodging and meals.

The LMRC unanimously recommends that provisions be added to the Code that will clarify when an employer may deduct monies from an employees pay for reason of pay roll error or advances in pay that have not been repaid.

It is recommended that the employer have the ability to deduct monies from an employee's pay where there has been a pay advance by the employer that is unpaid, or monies have been paid to the employee as a result of a bona fide payroll error. In addition:

- An employer must address a payroll error as soon as they become aware of it and ensure that the error is brought to the attention of the employee immediately. An employee should have the duty to bring a payroll error to the employer's attention as soon as they become aware of it.
- An employer and employee can agree in writing to a re-payment scheme. If they cannot agree on a re-payment scheme, the provisions of *The Garnishment Act* would apply.

The Garnishment Act provides that 70% of an employee's wages are exempt from deduction. Furthermore, the exempted portion of wages cannot amount to less than \$250 per month for an employee without dependants or \$350 per month for an employee with dependants.

This recommendation reflects that these monies are monies that are truly the property of the employer and in these two cases should not be withheld by the employee.

CONCLUSION

The recommended changes reflect the nature of modern workplaces, and relations between employees and employers in the non-unionized workplaces where the parties are seeking greater flexibility in the workplace. These recommendations are consensus recommendations of the LMRC.

The LMRC has been able to reach consensus on a number of significant issues in recent months and years and is pleased to have achieved consensus on all of the proposed issues under the Code.

The Committee wishes to thank the Minister of Labour and Immigration for the opportunity to express its views to the Government on this important issue.