Less government involvement, more flexibility urged for Ontario's health and safety system

Date : April 1, 1997

Stating that it wants to make Ontario workplaces among the safest in the world, the provincial government, on February 6, 1997, released a discussion paper as part of its review of the *Occupational Health and Safety Act*. The specific objectives of the review are to strengthen the internal responsibility system (IRS) so that employers and employees bear the primary responsibility for health and safety, to make the legislation more flexible in terms of how compliance is achieved, to eliminate red tape and overlap with other legislation, and to make the Act easier to understand.

The paper notes that the role of the Ministry of Labour has been redefined towards one of setting, communicating and enforcing appropriate workplace standards. However, it also says that the Act still places too much stress on government involvement, underemphasizes the responsibilities of the workplace parties, and creates few incentives for those parties to improve health and safety.

FLEXIBLE HEALTH AND SAFETY REQUIREMENTS

The government believes that certain parts of the Act are too rigid and prescriptive. This is seen as a barrier to compliance, because the Act leaves little room for discretion, even if better results could be achieved in some other way. As examples, the paper cites the provisions concerning worker representatives, joint health and safety committees (JHSCs), and work refusals. The government favours making the legislation more performance-based, setting out goals to be achieved, rather than procedures to be followed.

The paper suggests that another way of making the Act less prescriptive would be to reward workplaces with good health and safety records by reducing government intervention in various aspects of their health and safety management, such as the structure and functioning of the JHSCs. "Exceptional performers" could also be rewarded through financial means, such as enhanced refunds on workers' compensation premiums.

WORKPLACE DUTIES AND THE JHSCs

The paper notes that the duties of the workplace parties set out in the current Act may be overly inflexible. These may require revision to respond to changes in the organization of work, such as where work is performed by self-directed teams or where workers have supervisory or managerial responsibilities. Because the Ministry of Labour is reducing its health and safety role, the paper also raises the possibility of extending the obligations contained in the Act to cover third parties providing health and safety services to the workplace.

While stating that the Ministry is committed to the principle of JHSCs in the health and safety

system, the paper expresses the view that the provisions governing their structure, function and role are too rigid. It cites the rules for committee composition, the requirement to meet at least every three months, and monthly workplace inspections as examples of this rigidity.

Under the current Act, JHSCs are required at a workplace where 20 or more employees are "regularly employed". The paper notes the confusion over how to treat those employed in the temporary help industry. As these persons are associated with two employers - the agency that pays them and the employer at whose location they actually work - it is not clear where they should be considered "regularly employed" for the purpose of JHSCs.

WORKERS' RIGHTS

Workers are given four rights under the Act: the right to know about potential hazards, to participate in identifying and resolving health and safety concerns, to refuse unsafe work, and the right of certified JHSC members to stop dangerous work. In terms of the rights to know and participate, the paper questions whether the current emphasis on their exercise by the JHSC and worker members, as opposed to individual workers, is sufficient to make the IRS function effectively.

On the contentious issue of the right to refuse unsafe work, the paper notes the concerns of employers that this right is being misused to settle non-health and safety issues. As well, employers question the subjective test set out in the Act, under which the worker must only have "reason to believe" that work is unsafe to justify a first stage investigation. Employers also generally oppose the "susceptible worker" policy of the Ministry, under which workplace conditions can be found to be likely to endanger a particular worker with a special susceptibility, rather than the average worker. (On a related topic, see "Red Tape Commission urges key amendments to Ontario employment statutes" on our Publications page).

Employees contend that, in some cases, work refusals arise when management responds inadequately to health and safety complaints, particularly those regarding ergonomic hazards and exposure to hazardous chemicals. Employees also generally favour broadening the category of workplace hazards justifying a refusal beyond those currently set out in the Act.

The unilateral right of a certified member to stop dangerous work has not yet been exercised. The paper outlines the objections of management that this right is unnecessary in view of the right to refuse work and is an encroachment on management's authority. Employees favour its retention as a tool of last resort where the IRS has broken down.

APPLICATION AND SCOPE OF THE ACT

A number of issues are raised about how and to whom the Act should be applied. Among them is the question of work performed in the home, which the paper notes is dealt with inconsistently under the Act. Work performed in a home can be covered, but only if it is not performed by the owner, occupant, or a servant of the owner or occupant. Therefore, home-based garment workers are not covered, but health workers providing home care to the disabled are. The paper asks

whether the Act should be extended to more home-based workers.

Other issues relate to the Act's interaction with the *Human Rights Code*. One is the matter of whether the Act should include provisions to accommodate employees' religious beliefs, such as the wearing of turbans instead of hard hats. Currently the Act makes no exemptions for any category of workers from compliance with health and safety regulations.

Another question is whether sexual harassment should be included as a health and safety matter. This issue has been raised twice before the Ontario Labour Relations Board (OLRB). In *Musty v. Meridian Magnesium Products Ltd.*, although the Board found there was an arguable case that sexual harassment was covered by the Act, it declined to deal with the complaint, deferring the matter to the Human Rights Commission. However, the Board took jurisdiction in another sexual harassment case, *Au v. Lyndhurst Hospital* (see "Sexual harassment: A health and safety hazard?" on our Publications page, "Ontario Labour Relations Board can hear novel sexual harassment case" on our What's New page and "Au health and safety complaint dismissed" on our Publications page.)

ENFORCEMENT

The paper questions whether the appeal provisions should be adjusted, noting that 14 days to appeal an inspector's order to an adjudicator is considered by some to be too short a time in which to determine the order's impact. Noting the increase, and resulting backlog, in appeals in recent years, the paper points to a tendency to appeal matters other than inspectors' orders or decisions, such as Ministry policy. Accordingly, it raises the possibility of restricting appeals to orders and decisions only.

Concerns are raised as to whether the maximum personal fine of $25,000. or 12 months in prison, and the maximum corporate fine of $500,000. are barriers to doing business in Ontario. It is suggested that maximum penalties be lowered and tailored in various ways, such as raising the fines for repeat offenders, imposing higher penalties where a fatality or serious injury results, and having set fines for each day the offence continues.

The paper notes several possibilities for change to the provisions protecting employees from reprisals for raising health and safety concerns. These include permitting inspectors to render decisions as to whether reprisals have occurred, requiring unionized employees to use grievance procedures for laying complaints rather than going to the OLRB, eliminating the burden of proof on the employer, and making the prohibition against reprisals apply to employees and unions as well as employers.

IN OUR VIEW

The emphasis on self-reliance and flexibility in labour legislation is a common theme in the government's initiatives. While many will applaud these suggestions as pointing towards a necessary overhaul of an overly prescriptive and adversarial system, others will criticize it as urging

a watering down of standards and a decreased government commitment to health and safety.

The review also must be seen as part of the government's overhaul of the workers' compensation system. Readers of *FOCUS* will recall that, under the new *Workplace Safety and Insurance Act*, many occupational health and safety matters are to be turned over to the Workers' Compensation Board, now to be known as the Workplace Safety and Insurance Board. (For previous articles on the subject, see "Emphasis on early return to work in new workers' compensation legislation" on our What's New page, and "Jackson report on WCB: Targeting the unfunded liability" on our Publications page. For more recent developments, see "New amendments to *Workers' Compensation Act* announced" on our Publications page.) Under the government's approach, the Board's mandate will be expanded to include the prevention of workplace injury and the promotion of health and safety.

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