

Ontario releases Changing Workplaces Review Final Report: Franchising gets more than it bargained for

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Authors: [Andraya Frith](#), [Dominic Mochrie](#), Paul Kotschorek

In this Update

- The Final Report of the Province of Ontario's *Changing Workplaces Review* was released on May 23, 2017. The report contains numerous references to the franchise business model and its role in creating a "fissured workplace" and employing a vulnerable workforce in need of enhanced protection, including through meaningful access to collective bargaining.
- While the Final Report specifically rejects the adoption of a new joint employer status for franchisors, preferring instead to maintain the status quo of assessing the issue on a case-by-case basis under the existing legal framework, it recommends a process that could create a more direct route to unionization and collective bargaining for employees of Ontario franchisees operating under the same brand.
- Included in the recommendations to enhance collective bargaining rights for employees of franchisees of the same franchisor are the following key elements:
 - Bargaining units of different franchisees of the same franchisor, with the same union in the same geographic area, would be required to bargain together centrally.
 - An "employer bargaining agency" made up of representatives of the franchisee employers would represent the franchisees at the bargaining table with the union. Unless the franchisor is also an employer in the affected geographic area, it would not have a seat at the bargaining table. The Ontario Labour Relations Board would be given the authority to require the formation of an employer bargaining agency and set its terms, if necessary. The franchisees' obligation to bargain centrally would remain so long as the union held bargaining rights.

The Final Report of the Province of Ontario's *Changing Workplaces Review* was released on May 23, 2017 (the Final Report). When the *Changing Workplaces Review* (the Review) was initiated in February 2015, the Government of Ontario stated that its objectives were to consider issues affecting the workplace, and assess how the current labour and employment law framework addresses current trends and issues with a focus on the *Labour Relations Act* and the *Employment Standards Act*. The Special Advisors to the Review, C. Michael Mitchell and

John C. Murray, were tasked with making recommendations to address the changing nature of the workforce, the workplace and the economy itself. The voluminous 400-plus page Final Report could have a significant impact on all employers in Ontario; however, this Update is focused on the recommendations that could result in systemic changes to the employment model in Ontario's franchising industry – changes that would affect both franchisors and franchisees.

In the Special Advisors' interim report in July of 2016, one of the key concerns among franchisors was the possibility that the Final Report would recommend making franchisors and their franchisees joint employers of the franchisees' employees. One of the most significant implications of a franchisor and its franchisees being deemed to be joint employers is that it could facilitate union certification and collective bargaining by creating larger pools of employees with a joint employer (i.e., employees of multiple franchisees of the same brand). While the Final Report *specifically rejects the adoption of a new joint employer status for franchisors*, it recommends a process that could in effect create a more direct route to unionization and collective bargaining that would allow employees of multiple franchisees operating the same brand at multiple locations the opportunity to bargain collectively.

The Final Report takes the position that there is a "structural weakness in the current legislation" that has the effect of denying employees of franchisees the opportunity to bargain collectively in a meaningful way. The Final Report recommends a process that would force collective bargaining on multiple franchisees of the same franchise system. The recommended model would include the following elements:

- Certified (or voluntarily recognized) bargaining units of different franchisees of the same franchisor, with the same union in the same geographic area, would be required to bargain together centrally.
- An "employer bargaining agency" made up of representatives of the franchisees would represent the franchisees at the bargaining table with the union. The Ontario Labour Relations Board (the Board) would be given the authority to require the formation of an employer bargaining agency and set its terms, if necessary. The franchisees' obligation to bargain centrally would remain so long as the union held bargaining rights.
- Each franchisee would have individual responsibility for compliance with the resulting collective agreement and would sign an agreement binding on its location(s).
- Multiple locations owned by the same franchisee could be consolidated as a single bargaining unit by the Board in appropriate circumstances. That employer would also participate in central bargaining as a franchisee of the same franchisor.
- If outlets owned by the franchisor were certified, these could be consolidated as a single bargaining unit. If it was the same union as the union bargaining with the franchisees, collective bargaining with the franchisor employer would be part of the franchisee employer central bargaining process.
- Any strike or ratification vote would involve all bargaining units and not individual bargaining units.
- The Board would have the authority, if requested by a party involved, to direct that the terms of a collective agreement between a franchisee and a union could be extended to

apply, with or without modifications, to a newly certified bargaining unit involving the same union and a different franchisee (in the same franchise organization).

It is important to remember that the Final Report contains recommendations only. Whether any of the recommendations will lead to legislative changes is not yet known. To that end, the Final Report was accompanied by a statement from the Ontario Minister of Labour, Kevin Flynn, indicating that the provincial government will announce its formal response to the Final Report within the next week. Any changes that the Ontario government endorses could take several months to several years to bring into force and could be affected by other priorities or events, including the next Ontario provincial election, which is currently anticipated for June 2018.

We will provide further updates as we continue to consider the recommendations in the Final Report following the release of the Ontario government's formal response.