November 18, 2021

Ms.Natalia Kusendova, MPP, Chair
Ms.Tanzima Khan, Clerk

99 Wellesley Street West Room 1405, Whitney Block
Toronto, Ontario M7A 1A2

Sent Via Email: Government online portal

RE: Standing Committee on Social Policy and Bill 27, *Working For Workers Act*

Canadian Manufacturers & Exporters (CME) thanks the Standing Committee on Social Policy for the opportunity to provide input to Bill 27, *Working For Workers Act*.

From the first industrial boom in Canada, CME has been advocating for and representing member interests for 150 years. CME has earned an extensive and effective track record of working for and with 2,500 leading manufacturers from coast to coast to help their businesses grow.

By any measure, manufacturing is critical to Ontario's economy. The sector's 36,400 manufacturing firms directly generate over 12 per cent of the province's GDP and nearly 80 per cent of its merchandise exports. Including direct and indirect impacts, the sector's footprint amounts to more than 30 per cent of Ontario's economic activity. The sector also employs 760,000 Ontarians, directly supporting their families and communities through stable, highly skilled, high wage jobs, as well as indirectly supporting over 1.5 million more of the province's workers through its massive integrated supply chain.

Accordingly, CME's members have extensive insight and knowledge about the proposed legislative changes in Bill 27.

As such, CME makes the following three submissions to the Standing Committee on Social Policy (attached):

1. Submission on Schedule 2 – Prohibition of Non-Compete Agreements
2. Submission on Schedule 2 – A Written Policy on the Right to Disconnect
3. Submission on Schedule 6 – Amendments to the *Workplace Safety & Insurance Act*

The comments noted below are dealt with in more detail in our attached submission.

Prohibition of Non-Compete Agreements

A blanket prohibition on non-compete agreements poses a significant risk for Ontario employers and far exceeds the Ontario government's rationale for it. The risks include:

1. Creating vulnerabilities for companies when executives or key employees leave and engage in competitive practices.
2. The scope of prohibited non-compete agreements could inadvertently be expanded.
3. Invalidating other key provisions of an employment contract, such as a termination provision, which may create a large financial risk for employers at the end of the employment relationship.

The CME submits the following recommended amendments to Schedule 2 of Bill 27 to balance the need to protect legitimate business interests with the Government of Ontario's rationale for reducing the use of non-compete agreements:

- Permit non-compete agreements where the employee is compensated for agreeing to it;
- Prohibit non-compete agreements in the industries struggling to attract talent; and
- Exempt executives, salespeople and other key employees from the prohibition of non-compete agreements.

Written Policy on the Right to Disconnect from Work

It is imperative that any amendments to the ESA, and any requirements that may be prescribed by regulation, contemplate that certain employers, and employees within their organizations, do not operate on standard hours and they demand flexibility in order to meet business and operational needs.

A one-size fits all approach that prescribes blanket rules to all employees and employers is simply unworkable. The legislation must allow an employer the flexibility to account for individual workplace conditions in its "disconnecting from work" policy.

Ultimately, the legislative requirement for an employer to develop and implement a "disconnecting from work" policy must not create rights or obligations in excess of those already established in the ESA, and the regulations thereunder, with respect to hours of work, hours free from work, and compensation for work performed. The proposed legislation should simply complement, and rely upon, the existing provisions of the ESA.

As a result, it would be inappropriate and unreasonable for the legislation to impose a prohibition or blockage on all work-related communications. It would also be inappropriate and unreasonable to strictly define in the legislation, or require an employer to strictly define in its policy, particular hours during which the employee is "free from the performance of work" in accordance with the definition of "disconnecting from work". In this regard, the legislature must be careful to ensure that any period during which the employee is not defined to be "disconnect[ed] from work" is not inadvertently deemed to be work performed for the employer.

Finally, the legislation need not introduce any new prohibition against reprisal or complaint and enforcement mechanisms specific to the "disconnecting from work" policy. The existing provisions of the ESA provide a satisfactory means to enforce compliance with an employee's rights and an employer's obligations under the ESA.

Amendments to the *Workplace Safety & Insurance Act*

The Workplace Safety & Insurance Board's (WSIB) insurance fund is funded primarily by employer premiums. Accordingly, the WSIB has achieved 100% funding almost a decade ahead of its mandated targets due to Ontario employers.

The WSIB has been more than 100% fully funded for the last three years, which means Ontario employers have essentially been overpaying for their WSIB coverage. Bill 27 is an opportunity to address this issue.

Bill 27 provides the legislative framework to create the mechanism the WSIB needs to redistribute surplus employer funds back to employers. The CME supports this very important legislative change being proposed by the government. The current inability by the WSIB to return these surplus employer funds takes much needed business money out of the economy and prevents employers from reinvesting that money back into job creation and business expansion. The proposed changes will create the legislative framework for employer premium surpluses to be returned to employers.

CME submits, however, that the sufficiency ratios contained in the proposed s. 97.1(1) and (2) are too high and are not necessary. While CME strongly agrees that a modest revenue surplus is a prudent approach, the proposed funding corridor will remove billions of dollars from the Ontario economy.

For the purposes of 97.1(2), CME suggests the reserve threshold be lowered to 105% - 115% from the proposed 115% - 125% corridor. By lowering these thresholds, more reserve funds can be re-distributed to employers while still maintaining over 100% funding of the insurance funds.

Regards,

Maria Marchese

Maria Marchese
Director, Workplace Safety & Compensation Policy
CME-Ontario
Attachments

Canadian Manufacturers & Exporters: Written Submission on Bill 27 - An Act to amend various statutes with respect to employment and labour and other matters

Introduction

From the first industrial boom in Canada, Canadian Manufacturers & Exporters (CME) has been advocating for and representing member interests for 150 years. CME has earned an extensive and effective track record of working for and with 2,500 leading manufacturers from coast to coast to help their businesses grow.

By any measure, manufacturing is critical to Ontario's economy. The sector's 36,400 manufacturing firms directly generate over 12 per cent of the province's GDP and nearly 80 per cent of its merchandise exports. Including direct and indirect impacts, the sector's footprint amounts to more than 30 per cent of Ontario's economic activity. The sector also employs 760,000 Ontarians, directly supporting their families and communities through stable, highly skilled, high wage jobs, as well as indirectly supporting over 1.5 million more of the province's workers through its massive integrated supply chain.

Accordingly, CME's members have extensive insight and knowledge about the proposed legislative changes in Bill 27.

As such, CME makes the following three submissions to the Standing Committee on Social Policy:

1. Submission on Schedule 2 – Prohibition of Non-Compete Agreements

2. Submission on Schedule 2 – A Written Policy on the Right to Disconnect

3. Submission on Schedule 6 – Amendments to the *Workplace Safety & Insurance Act*

1. Submission on Schedule 2 – Prohibition of Non-Compete Agreements

A blanket prohibition on non-compete agreements poses a significant risk for Ontario employers and far exceeds the Ontario government's rationale for it. The risks include:

1. Creating vulnerabilities for companies when executives or key employees leave and engage in competitive practices.
2. The scope of prohibited non-compete agreements could inadvertently be expanded.
3. Invalidating other key provisions of an employment contract, such as a termination provision, which may create a large financial risk for employers at the end of the employment relationship.

Competitive Behaviours by Executives and Key Employees

Admittedly, non-compete agreements between an employer and employee are largely unenforceable for most employees. Employers may seek to use a non-competition agreement when a lesser restrictive covenant, such as a non-solicitation clause, would suffice. However, this does not justify the total outlawing of all non-compete agreements for employees. Such a broad prohibition goes beyond the rationale for this amendment to the *Employment Standards Act* ("*ESA*") and it will negatively impact Ontario businesses.

A non-compete agreement can serve a valid purpose and accord with public policy and fairness when the employees subject to it are senior managers and key employees in a company. Not only are these individuals well compensated in exchange for agreeing to a non-compete agreement, they hold positions of trust and have such an impact on a business that a non-solicitation agreement is insufficient to protect a company's legitimate interests.

These are employees who, by the nature of their position, gain intimate access to business plans, confidential information, and may even be the face of a company to its customers. Accordingly, if these key employees were to go out and start a business or join an existing business that is competitive with their previous employer, they may "appropriate the employer's trade connection through [their] acquaintance with the employer's customers."[1]

As the Supreme Court of Canada held in the leading decision of *Elsley v. J.G. Collins Ins. Agencies Limited*:[2]

> [N]evertheless, in exceptional cases, of which I think this is one, the nature of the employment may justify a covenant prohibiting an employee not only from soliciting customers, but also from establishing his own business or working for others so as to be likely to appropriate the employer's trade connection through his acquaintance with the employer's customers. This may indeed be the only effective covenant to protect the proprietary interest of the employer. A simple non-solicitation clause would not suffice.

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[1] *Elsley*, *infra* note 2 at 926.
[2] [1978] 2 SCR 916 [*Elsley*].

> There are cases which uphold the validity of a covenant prohibiting an employee from engaging in a particular type of work within a specified area, and for an acceptable period of time after the termination of his employment: see e.g. *Fitch v. Dewes*[12]*; Marion White v. Francis*[13]*; P.C.O. Services Ltd. v. Rumleski*[14]*; Campbell, Imrie and Shankland v. Park*[15]. In each of these cases the employee was in a position where he acquired a close personal acquaintance with the clients or customers of the business. Such a restrictive covenant was reasonable, in the words of Lord Birkenhead in *Fitch v. Dewes* at p. 165, in order that the employee "should not be in a position to use the intimacies and knowledge which he had acquired in the course of his employment in order to create a practice of his own in that same place and by doing so undermine the business and the connection of the [employer]." In the present case, when the clause was drafted it was known that Elsley had, or would acquire, a special and intimate knowledge of the customers of his prospective employer and the means of influence over them.[3]

Without this protection, existing businesses would be exposed to unfair competitive practices and would lose the value of their investment in their products, customers, and employees. As a result, the Supreme Court of Canada recognizes there are some employees whose competitive behaviour must be proscribed for a period of time in order for their previous employer to protect itself and shore up its customer base.

CME submits the following recommended amendments to Schedule 2 of Bill 27 to balance the need to protect legitimate business interests with the Government of Ontario's rationale for reducing the use of non-compete agreements:

- Permit non-compete agreements where the employee is compensated for agreeing to it;
- Prohibit non-compete agreements in the industries struggling to attract talent; and
- Exempt executives, salespeople and other key employees from the prohibition of non-compete agreements.

Each of these recommendations will be addressed in more detail below.

Permit non-compete agreements where the employee is compensated

When an employee is compensated for agreeing to a non-compete agreement, the unfairness that Bill 27 seeks to address is removed. If the employee is compensated, then he or she is not financially disadvantaged by entering into a non-compete agreement and, given the additional cost to employers seeking to enter into these types of agreements, employers will be more selective with their use.

This approach is what the State of Massachusetts implemented. Massachusetts allows for non-compete agreements provided certain conditions are met, many of which include compensating

[3] *Ibid* at p 926.

the employee. Specifically, the *Massachusetts Noncompetition Agreement Act* (the "*MNAA*")[4] allows for a non-compete agreement provided, amongst other things:

- The agreement is in writing and signed by the employee and employer and expressly states the employee has the right to consult with counsel before signing it. The employee then has 10 business days to consider it.
- If the agreement is entered into after the employee commenced employment, it must be supported by fair and reasonable consideration independent of continued employment.
- The agreement is supported by a "garden leave" clause or other mutually agreed upon consideration. The "garden leave" must:
  - provide for payment on a pro-rata basis for the entirety of the restricted period of at least 50 percent of the employee's highest annualized base salary paid by the employer in the two years before the termination; and
  - unless the employee breaches the agreement, not allow the employer to unilaterally discontinue or otherwise fail or refuse to make the payments.

Incorporating these requirements into a non-compete agreement ensures an employee is a) financially compensated for agreeing to it, and b) provided with a significant amount of time to assess if they wish to enter it.

Furthermore, the most negative impact of a non-compete agreement for an employee, *i.e.*, the inability to work in the field they are trained in within a defined geographic area, is remedied as the employee would be on a "garden leave" and compensated for the duration of the restricted period.

Prohibit non-compete agreements in industries struggling to attract talent

Another way to address one of Bill 27's goals to increase the talent pool available to start-ups in Ontario is to tailor the restrictions to those industries where non-compete agreements are a problem. For example, in 2015, the State of Hawaii enacted legislation[5] prohibiting non-compete agreements by technology businesses. The prohibition was enacted to increase employee mobility for these employees in this industry as the Hawaii was concerned non-compete agreements forced people to move to a different state for work.

If the use of non-compete agreements truly impacts the amount of talent available to start-ups in Ontario's flourishing technology sector, then a sector specific prohibition on non-compete agreements addresses this issue. An outright prohibition is not necessary.

Exempt executives, salespeople and key employees from the non-compete agreements ban

Executives, salespeople, and key employees can become so vital to a business that their engaging in competitive business practices negatively impact their previous employer even if they agree to a non-solicitation agreement. In recognition of this impact to the business, they receive a compensation package commensurate with their role and responsibilities. In other words, they are compensated not only for performing their duties, but also for what is required of them when

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[4] *Mass. General Laws c. 149 § 24L Massachusetts Noncompetition Agreement Act* [the "*MNAA*"].
[5] *Hawaii Revised Statutes*, at §480-4(d).

the employment relationship ends. Accordingly, like other parts and sections of the *ESA*, executives, salespeople, and key employees whose competitive activities could be detrimental to a company should be exempt from the proposed ban on non-compete agreements.

However, because the determination of whether someone is an executive, salesperson, or key employee could involve a detailed analysis of the duties they perform each day, the exemption should not be duties based, but based on the employee's compensation. Having an exemption based on compensation not only ensures both parties know when a non-compete agreement is enforceable under the *ESA* it also ensures the employee is compensated in exchange for being bound to a non-compete agreement.

The scope of prohibited non-compete agreements could inadvertently be expanded

At Bill 27's second reading, the intended scope of the ban on non-compete agreements was made clear by various Members of Provincial Parliament. They explained, notwithstanding the ban on non-compete agreements, employers would still be able to use other means to protect their business interests, such as with non-solicitation and confidentiality agreements.

However, Bill 27's definition of a "non-compete agreement" does not address the existence of and legality of these other agreements. To eliminate uncertainty around the scope of Bill 27's ban on non-compete agreements, the definition of a "non-compete agreement" should be expanded to expressly recognize the permissibility other agreements. This was the approach used in the *MNAA*'s "noncompetition agreement" definition.[6]

For example, Bill 27 could be amended as follows to provide greater clarity for employees and employers alike:

> "non-compete agreement" means an agreement, or any part of an agreement, between an employer and an employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends **but does not include (i) covenants not to solicit or hire employees of the employer; (ii) covenants not to solicit or conduct business with existing or prospective customers, clients or vendors of the employer; (iii) noncompetition agreements outside of an employment relationship; (iv) forfeiture agreements; (v) nondisclosure or confidentiality agreements; (vi) intellectual property assignment agreements; (vii) agreements by which an employee agrees to not reapply for employment to the same employer after termination of the employer.**

Invalidating other key provisions of an employment contract

All levels of Ontario's courts and the Supreme Court of Canada recognize the importance of the rights the *ESA* guarantees for employees in Ontario. These rights are vigorously protected by the courts. To protect these rights, the courts interpret the *ESA* in a way that it "encourages

[6] *Supra* note 4 at s (a).

employers to comply with the minimum requirements of the Act".[7] Special attention has been drawn to the termination provisions in an employment agreement such that if the agreement can be read as violating the *ESA*, courts void the termination provision. This occurs even if the employer acted in compliance with the *ESA*.

A common way in which termination provisions are voided for violating the *ESA* occurs when the "for cause" provision is contrary to Regulation 288/01 (*i.e.*, it allows for termination without notice for just cause, not wilful misconduct, disobedience or wilful neglect of duty that is not trivial). When this occurs, the court voids the entire termination provision, including the "without cause" provision, even if the employee was terminated without cause and the without cause provision complied with the *ESA*. This occurs even when the provision has a severability clause and guarantees entitlements will be paid out.

A non-compete agreement governs what an employee can or cannot do if they are terminated. They are often referenced in termination letters and cross-referenced with the termination provisions in an employment agreement. Additionally, when a judge interprets an employment agreement or a non-compete agreement, they consider the agreements as a whole, not as individual sections. As a result, there is a risk the banning of non-compete agreements will make **all** employment agreements vulnerable to voiding otherwise lawful termination provisions, thereby exposing employers to significantly higher common law notice amounts, not the amounts provided for in the *ESA* or a greater amount in the agreement.

There are two simple ways this risk can be avoided entirely. Both can be implemented simultaneously:

- Make the non-compete agreement ban effective on only new employment agreements entered into after Bill 27 comes into force. This way, employers have time to adjust their employment agreements and practices. It also protects those employment agreements that were legal at the time they were entered into.
- Expressly state in the *ESA* the presence of a non-compete agreement does not affect the legality or enforceability of any other provision of an employment agreement. For this purpose the following language adapted from the *MNAA*[8] could be added to Bill 27:

> 67.2(2) This section does not render void or unenforceable the remainder of a contract or agreement containing the unenforceable non-competition agreement nor does it preclude the imposition of a noncompetition restriction by a court, whether through interlocutory or permanent injunctive relief or otherwise, as a remedy for a breach of another agreement or a statutory or common law duty

[7] *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986 at 1003. See also *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 (CanLII) and *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (CanLII).

2. Submission on Schedule 2 – Written Policy on the Right to Disconnect from Work

It is imperative that any amendments to the ESA, and any requirements that may be prescribed by regulation, contemplate that certain employers, and employees within their organizations, do not operate on standard hours and they demand flexibility in order to meet business and operational needs.

A one-size fits all approach that prescribes blanket rules to all employees and employers is simply unworkable. The legislation must allow an employer the flexibility to account for individual workplace conditions in its "disconnecting from work" policy. It must allow an employer to develop a policy that reflects nature of its business and responds appropriately to:

- Employees working in functions which must be available to respond in the event of an emergency (*e.g.*, IT, security, building maintenance)
- Employees in supervisory or managerial positions
- Employees working in continuous (24/7) operations
- Employees working across time zones (nationally or internationally)
- Employees who are required to be on-call
- Employees who may be called-in to work or called-off in the event of schedule changes or unanticipated circumstances (*e.g.*, an employee calling in sick)
- Employees working in remote and/or hybrid work arrangements
- Employees who want the freedom and flexibility to work (and respond to work-based communications) at times that fit their needs and/or preferences (*e.g.*, around child care obligations)

This flexibility to tailor a policy to individual employers and employees can—and must—be exercised in accordance with existing the rights and obligations under the ESA.

The concept of "disconnecting from work" engages several provisions of in the ESA, including but not limited to:

- Definitions of "regular work day" and "regular work week"
- Record keeping obligations (we note that as a practical matter, it will be even more important for an employer to have proper mechanisms to track an employee's hours of work)
- Daily and weekly limits on hours of work (with the ability for an employer and employee to enter excess hours agreements, as well as an exception for "exceptional circumstances")
- Hours free from work each day and between shifts

- Weekly / biweekly rest periods
- Overtime pay (with the ability for an employer and employee to enter overtime averaging agreements)
- Vacation with pay
- Leaves of absence
- Reprisal

The concept of "disconnecting from work" also engages Ontario Regulation 285/01 (the "Regulation"), including but not limited to:

- When work is deemed to be performed (importantly, work is **not** deemed to be performed when an employee is not at the place of employment and is waiting or holding himself or herself ready for a call to work)
- Exemptions from certain minimum standards of the ESA in respect of certain occupations and/or roles within an organization, include but are not limited to:
    - A person whose work is supervisory or managerial in character
    - An information technology professional
    - A duly qualified practitioner of law, professional engineering, public accounting, dentistry, medicine, pharmacy, and many others
    - A salesperson
    - A construction employee
    - A person engaged in local cartage or highway transport
    - A person who is employed in certain seasonal businesses

The Regulation also recognizes that in the context of certain professions, it could constitute an "act of professional misconduct" or "dereliction of professional duties" to take certain ESA leaves. It is possible this concept could be extended (through amendments to the legislation) to apply to an employee's failure to respond to work-related communications in a circumstance in which they are reasonably expected and required (based on the terms and conditions of their employment) to do so.

Ultimately, the legislative requirement for an employer to develop and implement a "disconnecting from work" policy must not create rights or obligations in excess of those already established in the ESA, and the regulations thereunder, with respect to hours of work, hours free from work, and compensation for work performed. The proposed legislation should simply complement, and rely upon, the existing provisions of the ESA.

As a result, it would be inappropriate and unreasonable for the legislation to impose a prohibition or blockage on all work-related communications. It would also be inappropriate and unreasonable to strictly define in the legislation, or require an employer to strictly define in its policy, particular hours during which the employee is "free from the performance of work" in accordance with the definition of "disconnecting from work". In this regard, the legislature must be careful to ensure that any period during which the employee is not defined to be "disconnect[ed] from work" is not inadvertently deemed to be work performed for the employer.

Finally, the legislation need not introduce any new prohibition against reprisal or complaint and enforcement mechanisms specific to the "disconnecting from work" policy. The existing provisions of the ESA provide a satisfactory means to enforce compliance with an employee's rights and an employer's obligations under the ESA.

3. Submission on Schedule 6 – Amendments to the *Workplace Safety & Insurance Act*

Introduction

CME has been an active participant in the debates surrounding Ontario's workers' compensation system since 1914. In fact, CME was the employer voice during Justice Meredith's development of a system to fairly compensate workers for workplace injuries while creating a collective liability system for employers.

Schedule 6 of Bill 27 proposes to repeal sections 96.1, and 97(2) of the *Workplace Safety Insurance Act* ("*WSIA*"). These sections of the *WSIA* deal with the sufficiency of the insurance fund and the use of reserve funds.

The proposed section 97.1(1) will grant the Workplace Safety and Insurance Board ("WSIB"), the discretion to disburse excess insurance funds to employers when the insurance fund's sufficiency ratio is more than 115% but less than 125%.

The proposed section 97.1(2) will direct the WSIB to redistribute reserve funds when the sufficiency ratio is equal to 125%.

CME supports the government's proposed amendments to the *WSIA* in principle, but submits the sufficiency ratios in the proposed sections should be lower.

Background

Ontario Regulation 141/12 ("O.Reg 141/12"), which came into force January 1, 2013, required the WSIB to meet prescribed sufficiency ratios by certain dates over the next 15 years. O.Reg 141/12 mandated that the WSIB's sufficiency ratio meet the following prescribed ratios:

- 60% by December 31, 2017
- 80% by December 31, 2022
- 100% by December 31, 2027

However, as noted in the *WSIB's 2020 Annual Sufficiency Report*, the WSIB has achieved sufficiency ratios of:

- 108.0% in 2018
- 113.7% in 2019
- 117.3% in 2020

The WSIB's *Second Quarter 2021 Sufficiency Report* places the sufficiency ratio at 119.5%.

The insurance fund is funded primarily by employer premiums. Accordingly, the WSIB has achieved 100% funding almost a decade ahead of its mandated targets due to Ontario employers.

The WSIB has been more than 100% fully funded for the last three years, which means Ontario employers have essentially been overpaying for their WSIB coverage. Bill 27 is an opportunity to address this issue.

Submission

Bill 27 provides the legislative framework to create the mechanism the WSIB needs to redistribute surplus employer funds back to employers. CME supports this very important legislative change being proposed by the government. The current inability by the WSIB to return these surplus employer funds takes much needed business money out of the economy and prevents employers from reinvesting that money back into job creation and business expansion. The proposed changes will create the legislative framework for employer premium surpluses to be returned to employers.

CME submits, however, that the sufficiency ratios contained in the proposed s. 97.1(1) and (2) are too high and are not necessary. While CME strongly agrees that a modest revenue surplus is a prudent approach, the proposed funding corridor will remove billions of dollars from the Ontario economy.

For the purposes of 97.1(2), CME suggests the reserve threshold be lowered to 105% - 115% from the proposed 115% - 125% corridor. By lowering these thresholds, more reserve funds can be re-distributed to employers while still maintaining over 100% funding of the insurance funds.

CME supports the need for the full funding of 100% of Ontario's workplace safety and insurance system and that this 100% funding level be specified in the *WSIA*. A provision to this effect needs to be added to the legislation as it will provide certainty for the workplace safety and insurance system on the funding level on a going forward basis.

CME proposes the following changes to section 97.1(1) and (2):

> *97.1 (1) If the amount of the insurance fund meets a sufficiency ratio that is equal to or greater than **100** per cent and less than **110** per cent, the Board may distribute any amount in excess of the amount prescribed under clause 100 (c) that it considers appropriate among Schedule 1 employers having regard to such criteria as may be prescribed and such other factors as the Board considers appropriate.*
>
> *Same*
>
> *(2) Except in such circumstances as may be prescribed, if the amount of the insurance fund meets a sufficiency ratio that is equal to **110** per cent,*
>
> *(a) the Board shall distribute the difference in the amount prescribed under clause 100 (f.1) and the amount in the insurance fund among Schedule 1 employers; or*
>
> *(b) if no amount is prescribed under clause 100 (f.1), the Board shall distribute any amount in excess of the amount prescribed under clause 100 (c) that it considers appropriate among Schedule 1 employers having regard to such criteria as may be prescribed and such other factors as the Board considers appropriate.*

Since full funding of Ontario's workplace safety and insurance system was achieved, the primary focus of employers has been on achieving WSIB premium rate stability. Employers want a funding sufficiency level maintained so that there is a reduced chance of an unanticipated premium rate increase and the accumulation of unnecessary excess surplus funds would be avoided.

CME submits that all Schedule 1 employers be eligible to receive a surplus**.** All ongoing/continuing employer accounts should be eligible for their share of any distributions of surpluses made by the WSIB. If an employer is in arrears, it should be pursued for payment in the normal manner and the WSIB should actively pursue employer accounts that are in arrears.

CME does not support the issuance of cheques as part of the surplus distribution model. The surpluses should be distributed as a surplus funding credit**.** Surpluses should be distributed as an element of the employers' WSIB premium rates. Regarding a surplus distribution model, CME believes surpluses should be made in the manner that is the simplest, easiest to understand, and most efficient, including:

- It should be made across the board on pro-rata basis based on premium;
- While we understand that employers which are poor performers (from a risk and claims experience perspective) will be entitled to receive a larger share of the distribution than their better performing peers, this is purely a reflection of the fact that these employers also pay higher premiums relative to similar sized employers that perform the same type of work;
- The determination of a surplus funding distribution to employers should be made annually to coincide with the WSIB rate setting process; and
- Similar to the previous "unfunded liability charge" that was an element of an employer's premium rate along with the cost of new injuries ("CNI") and administration costs, a surplus distribution should be an element of an employer's premium rate in the opposite direction, *i.e.*, a credit instead of a charge. It could be called a "surplus funding credit".

CME also submits that the operationalization of any amendments to the *WSIA* be left to the discretion of the WSIB and should not form a part of any regulatory amendment. The WSIB should be given total control to develop a funding policy and that such a policy should not be prescribed by way of a regulation under the *WSIA*.

CME maintains that the WSIB must immediately engage stakeholders to develop a complete funding policy with the objective of premium rate stability. The policy should include guidelines to restore any ratios below 100% back up above 100% in a short period of time. It also should include guidelines on reducing the rate back below 115% when it exceeds that level. In considering making a surplus distribution to employers, the WSIB must engage in meaningful consultations with employer stakeholders.

CME believes the WSIB should always be predisposed to making distributions back to employers when funding exceeds the lower limit of the funding corridor. The ultimate objective is to maintain a sufficiency ratio at an acceptable risk level to employers so that premium rate stability is maintained and there is no need for annual pressure on premium rates.