wide margin, but only 53 per cent say they are satisfied with their base pay. Slightly more (58 per cent) feel they are paid fairly given their performance and contribution to the organization. The survey also showed that employees are less committed to their employers. A full 58 per cent are "checked out" on some level, and one in three is seriously considering leaving. Download the full *What's Working*™ report at **www.mercer.ca**.

"Retaining key talent will be a key priority for employers as the economy recovers. Top talent are the first to find new opportunities elsewhere", says Iain Morris, Human Capital business leader for Mercer in Canada. "Employers with modest budgets for salary and promotional increases may be left with few tools to recognize and retain key people."

Further details on pay increases by job level, geography, and industry will be released in late August.

Any Distinction Between Employees and Independent Contractors?

By: Ralph Nero, Partner with Fasken Martineau's Labour, Employment & Human Rights group. Fasken Martineau is a leading international business law and litigation firm. This article originally appeared in Fasken Martineau bulletin's The HR Space. © 2011 Fasken Martineau. Reproduced with permission.

Employers have typically understood employees and independent contractors to fall into distinct legal categories. However, recent jurisprudence indicates that the traditional definition of "employee" continues to expand.

Ontario Court of Appeal Interprets Health and Safety Obligations

In *Ontario (Ministry of Labour) v. United Independent Operators Limited*, the Court ruled that independent contractors can be considered employees for health and safety purposes.

When a truck driver who worked for United Independent Operators Limited ("UIOL") was crushed between two trucks at a customer worksite, he suffered a broken pelvis and two broken legs. The Ministry of Labour investigated and determined that UIOL contravened the section of the *Occupational Health and Safety Act* ("OHSA"), which requires a joint health and safety committee at a workplace at which 20 or more workers are regularly employed. The Ministry prosecuted UIOL.

UIOL argued that it was not required to establish such a committee, as it had only 11 full-time employees. It asserted that the truck drivers were independent contractors. The company was successful at trial and on the first appeal. The Ministry then appealed further, to the Ontario Court of Appeal.

Definition of "Regularly Employed"

Interestingly, the drivers had been found to be independent contractors in prior decisions relating to employment standards, income tax and workers' compensation. This did not stop the Court of Appeal.

The Court considered the interpretation of the phrase "regularly employed". "Employer" is defined in the Act as a "person who employs one or more workers or contracts for the services of one or more workers and *includes a contractor or subcontractor who performs work or supplies services*". The Court said that, "As UIOL is an employer of the truck drivers, within the meaning of the OHSA, it stands to reason that the truck drivers are employed by it." Further, the dictionary definition of "regular", being normal or customary, and the fact that UIOL customarily had between 30 and 140 drivers, helped lead to the conclusion that it "regularly employed" the truck drivers.

Also key in the decision was the so-called contextual analysis and purpose of the OHSA. When these words are uttered, employers should generally brace for impact. It was observed that a narrow interpretation of the term "regularly employed" would limit or interfere with the broad purpose of the OHSA as a remedial public welfare statute designed to guarantee a minimum level of health and safety protection for workers in Ontario.

The Court found that the independent truck drivers must be counted when determining whether the employer had the obligation to create a joint health and safety committee.

The Alberta Taxi Cases

The Alberta Labour Relations Board recently considered a series of union applications for certification by independent taxi drivers in Alberta cities. The reasoning in *Miscellaneous Employees, Teamsters, Local Union No. 987 of Alberta v. 1093507 Alberta Ltd. o/a Access Taxi* is mirrored in the other three decisions, *Sun Taxi*, *United Class Cabs*, and *Barrel Taxi*.

Definition of Employee

Under the Alberta *Labour Relations Code*, "employee" is defined to mean a person employed to do work who is in receipt of or entitled to wages. Unlike [in] some other provinces, the definition does not expressly include dependent contractors. However, the Board found that the question of economic dependence is relevant to the consideration of employee status. The narrower definition does not preclude dependent contractors from being treated as employees under the statute.

The Board stressed that the *Labour Relations Code* is, wait for it, remedial legislation that requires a liberal and purposive interpretation. Where an individual falls in the middle of an "economic spectrum" between a worker and a true entrepreneur, " ... a purposive interpretation ... favour(s) finding the individual an 'employee' entitled to legislative protection of the right to organize."

Decision

The Board focused on the level of control exercised over the drivers and owner-operators. This included imposition and enforcement of rules on operation of taxis, customer service, accident reporting and charge accounts.

The taxi companies also had substantial influence over the work available to the drivers. This included access to taxi stands, corporate customers, promotional activities and dispatch. The Board found that in reality, the taxi drivers were promoting the taxi company's brand and business, not their own.

Based on the foregoing factors, and a purposive interpretation of the Code, the Board found that the drivers and owner-operators were employees. They were therefore entitled to unionize.

Takeaway for Employers

These decisions represent an expansion of the traditional definition of "employee" and blur the historical distinction between employees and contractors. Employers can no longer rely on a bright line between the categories of employees and independent contractors. Rather, the overall relationship will be taken into consideration by decision makers. Contractors who are economically dependent on, and significantly controlled by, an employer may be entitled to unionize. Independent contractors may also be considered employees for health and safety and other purposes.

Legislative Update

Canada

Employment Insurance Pilot Projects Extended

The *Regulations Amending the Employment Insurance Regulations*, SOR/2011-127, extends two EI Pilot Projects until 2012.

The **Best 14 Weeks** project, originally implemented in October 2005, has been extended to June 23, 2012. This project targets 25 EI regions wherein the EI benefit rates will be calculated based on the highest 14 weeks of insurable earnings earned over the previous 52 weeks. This project impacts employers in that 53 weeks (52 plus one extra week) of pay period information is required, compared to the current 27 weeks of information requested on the Record of Employment.

The **Increased Allowable Earnings** project, originally implemented in December 2005, has been extended to August 4, 2012. This national project tests whether increasing the amount of allowable earnings from employment during an EI claim will encourage more individuals to accept employment while on a claim. Regular claimants can earn up to $50 a week or 25% of their weekly benefit, whichever is higher, without deductions from their benefits. This project allows individuals to earn the greater of $75 a week or 40% of their weekly benefits.

Regulation SOR/2011-127 was introduced on June 16, 2011. The Best 14 Weeks extension came into force on June 26, 2011; the Increased Allowable Earnings extension came into force on August 7, 2011.

Manitoba

Employment Standards Changes in 2012

The Manitoba Ministry of Labour and Immigration has posted a fact sheet on its Web site regarding employment standards changes that come into effect on January 1, 2012 as a result of recent amendments to the *Employment Standards Act*. To see the fact sheet visit **www.gov.mb.ca/labour/standards/doc,whats-new-2012,fact-sheet.html#q1394**.