

Comments on the Changing Workplace Review Interim Report

**Submitted by
Metro Toronto Chinese & Southeast Asian Legal Clinic**

INTRODUCTION

The **Metro Toronto Chinese & Southeast Asian Legal Clinic (MTCSALC)** is a community based legal clinic which provides free legal services to low income Chinese, Vietnamese, Cambodian, and Laotian communities in the Greater Toronto Area. Established in 1987, MTCSALC has served thousands of immigrants and racialized workers who find themselves in vulnerable, low-waged and non-unionized jobs.

MTCSALC is one of many community organizations which had made submissions to the Changing Workplace Review (CWR) panel with a view to strengthening protections for vulnerable workers in Ontario. The following are our comments on the CWR Interim Report (Report) and our recommendations as informed by our clinic's many years of experience working with low income workers.

COMMENTS AND RECOMMENDATIONS

Addressing Structural Inequities in the Labour Market

While the Report acknowledges the vulnerability of different segments of the population, many of the proposed options do not reflect this acknowledgement and may further accentuate this vulnerability. The Report puts forth a theoretical framework and statistical data which show that immigrant and racialized workers are particularly vulnerable, but do not examine how this vulnerability can be redressed.

While the Report also recognizes certain structural inequities in the labour market, yet it fails to offer any systemic solutions to address them. For instance, one of the key recommendations of MTCSALC is to bring back mandatory Employment equity to level the playing field for all workers. The Report fails to include Employment Equity as an option to bring about the necessary structural change.

Recommended Options and Proposals

We submit the following proposals to the CWR panel which we believe will address these systemic issues and structural inequalities in the labour market.

- Incorporate the principles of equality, equity, and fairness to the guiding principles of the Review.
- Add Employment Equity as an Option for action.

Scope and Coverage of the ESA

One way that employment vulnerabilities can be reduced is by extending the scope and coverage of the *Employment Standard Act (ESA)*, as it would provide more protection to the many precarious and low-waged workers in Ontario.

Recommended Options and Proposals

We recommend to the CWR panel the following options to broaden the coverage of *ESA*.

- Put the onus on the employer to prove that an employee is not covered by the *ESA* when there is a dispute about whether a person is employee or not.
- Eliminate the lower minimum wage for liquor servers.
- Require employers to pay part-time, temporary, and casual employees the same wages as full-time employees in the same establishment unless employers can justify the difference in pay by objectively demonstrating that there is genuine difference in qualifications, skills, seniority, experience, and other related factors.
- Eliminate the exemption for harvesters.

Options Not Recommended

We disagree with the option of allowing employers and employees to contract out of the *ESA* as this would greatly diminish the scope and coverage of the *ESA* and lead to undue pressure and exploitation by employers on workers, especially those within the immigrant and racialized communities. This option should not be implemented.

Tackle Misclassification of Employees and Under-Reporting of Hours Worked

Many clients we work with are forcibly being paid a combination of cash and cheque and the employer often under report the number of hours worked in the Record of Employment. To start, employer's misclassification of employees as "self employed" or as "independent contractor" has caused much loss to workers in pursuing both their *ESA* claims and EI benefits: workers who are being misclassified as self-employed would not be entitled to all the protections under *ESA* or EI (unless self-employed individuals register for EI benefits).

Many clients we work with also suffer from employer's improper record keeping practice. For example, knowing that the hours indicated in the paystub do not reflect the actual number hours of work, but they could not bring it up to employer for fear of being hired. Even after they quit or were fired, few of them eventually file a claim or complaint to MOL or to Canada Revenue Agency (CRA) due the reasons indicated above as vulnerable workers and a lack of sufficient proof.

As such, we believe a formal collaboration between the Ministry and Canada Revenue Agency would not only avoid duplication of investigations as the underlying facts are the same, but also enhance protections of vulnerable workers, while putting employers on alert that their practices will be monitored by both the provincial and the federal agencies at the same time.

Recommended Options and Proposals

We propose to the CWR panel that there should be formal collaboration between the Ministry and Canada Revenue Agency to combat misclassification of employees and under-reporting of the number of hours worked by employers.

We propose to the CWR to add an option that will allow workers to file claims against their employers for improper record keeping, and to attach severe penalties if a finding is made against the employers by the Ministry of Labour.

Scheduling and Pay Periods

Many of the MTCSALC clients who work in low waged jobs often complain about their irregular work schedule, which makes it difficult for the workers to organize and plan their lives, which in turn negatively impact on their quality of life as well as relationships with their families. We recommend to the CWR panel the following options to improve stability and predictability in employees' work schedule.

Recommended Options and Proposals

- Provide employees with a protected right to request changes to their schedules at least twice a year.
- Require all employers to provide advance notice in setting and changing work schedules in order to make schedules more predictable.
- Require employers to harmonize their pay periods, e.g. permitting only weekly or biweekly pay periods, and requiring the start and end days of the pay period to correspond to the employer's regular work week.

Vacation and Sick Leave

The ability to take time off to physically and mentally recover from the demands of work is an important right that should be strengthened. We recommend to the CWR panel the following options to strengthen this right.

Recommended Options and Proposals

- Increase paid vacation entitlement from 2 weeks to 3 weeks.
- Introduce paid sick leave for all workers regardless of workplace sizes.

Options Not Recommended

Paid sick leave is important to the well-being and productivity of a worker. We disagree with the option which requires an employee to go through a qualifying period before being able to access paid sick leave. This option should not be implemented.

Termination, Severance, and Just Cause

We believe that employees with seniority from smaller companies deserve the same recognition for their years of services as those in larger companies. We also believe all employees deserve the same protections as those available in a unionized workplace, when they are unjustly terminated by their employer.

In light of the financial hardship that often result from the sudden termination of employment, and keeping in mind the contributions of long term employees to their employers' business, we recommend to the CWR panel the following options.

Recommended Options and Proposals

- Remove the termination notice/pay cap to 8 weeks, or at the very least, extend the cap to beyond 8 weeks.
- Reduce or eliminate the current 50 employee/\$2.5 million payroll threshold, and the 5-year employment requirement, for accessing severance pay.
- Introduce just cause protection and adjudication options for all employees covered by the *ESA*.

Options Not Recommended

We are absolutely against the option which requires employees to provide notice of termination because it leaves workers more vulnerable to being terminated immediately after they submit their notice. This option should not be implemented.

Temporary Help Agencies (“THA”)

THA and client companies should be more closely regulated to ensure that they do not unduly profit from the hard labour of mostly low-waged workers. We recommend to the CWR panel the following options which further this objective.

Recommended Options and Proposals

- Expand the responsibility of unpaid wages to client companies.
- Ensure that workers from THAs who perform substantially similar work to workers directly employed by the employer are paid the same wages.
- Disclosure by THAs of the amount that they deduct as profit from the worker's wages.
- Limit the maximum percentage of the deduction.

We also propose to the CWR panel that employers be restricted from using THAs to bring in new workers in order to replace workers who had been directly employed by the employer. Employers should be required to apply for permission from the Ministry of Labour which should then conduct an investigation to ensure that previously hired workers have received all their *ESA* entitlements, and that no workers had been displaced by temporary hires.

Inspections

All the proposed substantive changes to the *ESA* and *LRA* will be rendered ineffective if there are no corresponding improvements in compliance and enforcement by the Ministry. One of the main flaws with the current system is that it is complaint driven. Such a system is particularly problematic for non-unionized workers who structurally suffer from a power imbalance vis-à-vis their employers. As a remedy, we recommend that proactive inspections be strengthened. To this end, we recommend to the CWR panel the following options.

Recommended Options and Proposals

- Increase inspections in workplaces where migrant and other vulnerable and precarious workers are employed.
- Focus these inspections on all *ESA* violations, not just specific violations only.
- Cease giving advance notice for targeted blitz inspections, have follow up monitoring procedures if employers need additional time to produce payroll and supporting documentation.
- Adopt systems that prioritize complaints and investigate according to the risks of *ESA* violations and vulnerability of workers.
- Require employers to conduct an annual self-audit on select *ESA* standards with an accompanying employee debrief.

Furthermore, to assist with inspections, we propose that there should be formal collaboration between the Ministry and the Health and Long Term Care inspectors to identify potential *ESA* violations in the workplace in conjunction with potential health and safety violations.

Complaint Process

The complaint process should be reformed in order to better protect workers. One common barrier to filing a claim is an employee's fear of reprisal by their employer. Even though the *ESA* provides for protection from reprisal, the reality is that as soon as a claim is filed, the employee's job will be at risk. As such, almost all the clients we have assisted filed their claims *after* they have already left the workplace.

To address employees' fear of reprisal, we recommend the following option:

Recommended Options and Proposals

- Allow anonymous or third party claims.

Options Not Recommended

We disagree with the option which would disallow anonymous claims as the lack of anonymity has led to harassment and reprisals from the employer.

Reprisals

Reprisals by an employer usually occur where the employer-employee power imbalance is most pronounced. Under the current law, the employer faces little penalty for reprisal. In our experience, employers often threaten workers to give up pursuing their rights either because the employers have more resources to fight against the workers' claim, or because they could make it hard for the workers to find jobs in the same field. This leaves workers feeling powerless. To address this, we recommend to the CWR panel the following option.

Recommended Options and Proposals

- Require Ministry officers to investigate and decide reprisal claims expeditiously where there has been a termination of employment and other urgent cases such as those involving an alleged failure to reinstate an employee after a leave.

General Compliance

A common issue in the current system is that employers can violate the *ESA* with little to no repercussions. To effectively deter non-compliance, the current penalties against employers for non-compliance should be significantly increased. We recommend to the CWR panel the following options which would strengthen deterrence.

Recommended Options and Proposals

- Require employers to compensate a worker for failure to pay wages at an amount that is equal to or double the owed wages.
- Significantly increase the monetary penalty for contraventions of the *ESA*.
- Increase the administrative fee against the employer, to be paid to the Ministry when an Order to Pay Wages is issued, to reflect the actual cost of the Ministry's enforcement of the *ESA*.
- Require employers to pay interest on unpaid wages to the employee.
- Provide the Ministry with authority to revoke the operating licences, liquor licences, permits, and driver's licences of directors/employers who do not comply with Orders to Pay.

In addition, we have seen many non-compliant employers attempting to avoid liability by abandoning their company and starting up the same business using another incorporated entity. We propose to the CWR panel that corporate directors' accountability be expanded to include not only unpaid wages, but all *ESA* protected pays including termination and severance pay. Additionally, the *ESA* should expand the powers available to Ministry officers to ensure that directors cannot use different shell corporations to insulate themselves from liabilities under the *ESA*. As such, we recommend:

- Repeal s.4(1)(b) of the *ESA*, i.e. the "intent" requirement for the related employer provision.

Collections

In order to facilitate recovery of unpaid wages, we recommend the following options.

Recommended Options and Proposals

- Streamline the collection process to provide additional collection powers in order to increase the speed and rate of recovery of Orders to Pay wages. This could include:
 - Allowing the Ministry to impose a wage lien on an employer's property upon the filing of an employment standards claim for unpaid wages.
 - Holding someone liable for an employer's debt if he/she is the recipient of the employer's assets, in order to prevent employer from improperly avoiding their *ESA* debts by transferring assets to a non-arm's length party.
- Re-establishing the provincial wage protection plan to compensate employees upfront for unpaid wages.

CONCLUSION

These recommendations address only a fraction of the multitudes of employment related issues confronting vulnerable workers in Ontario. We ask the CWR panel to incorporate and consider the perspectives of employees and organizations advocating on their behalf in the final report.