

# **EMPLOYMENT STANDARDS COMPLAINT RESOLUTION, COMPLIANCE AND ENFORCEMENT: A REVIEW OF THE LITERATURE ON ACCESS AND EFFECTIVENESS**

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Statement of Work # 6B

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**This paper represents the views of the author and not necessarily those of the  
Ministry of Labour.**

**Employment Standards Complaint Resolution, Compliance and Enforcement:  
A Review of the Literature on Access and Effectiveness**

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## **Executive Summary**

This report was undertaken in response to concerns about whether Ontario's current processes and tools for enforcing the *Employment Standards Act, 2000* ("ESA") are effective and adequate. It reviews and synthesizes findings of the literature on the accessibility of claims resolution and the effectiveness of compliance and enforcement systems under employment standards and similar statutes in common law countries, in light of the more general literature on regulatory compliance and enforcement. On that basis, it identifies good practices and options for further consideration. In specific terms, the report seeks to address, to the extent that this literature permits, the questions set out in its mandate, reproduced in Annex A. This is not an assessment of the current systems and practices of the Ontario Ministry of Labour.

The two overarching issues addressed by this report are fundamental and distinct. Barriers to access put redress for violations of the law out of reach. But remedying violations in response to complaints is not enough to give effect to the Act. As the Federal Labour Standards Review Commission (FLSRC) observed:

Labour standards ultimately succeed or fail on the issue of compliance.

Widespread non-compliance destroys the rights of workers, destabilizes the labour market, creates disincentives for law-abiding employers who are undercut by law-breaking competitors, weakens public respect for the law. (FLSRC, at 53)

The growth of the vulnerable workforce and the fissuring of workplaces in many networked industries pose very significant and likely insuperable challenges to the effectiveness of any approach to compliance and enforcement that is primarily complaint-driven. The literature suggests that attending to these changes in Ontario workplaces will require a renewed focus on (1) strategically targeted and proactive inspection; (2) deterrence of deliberate or recurrent non-compliance; and (3) strategies for networked industries aimed at root causes of non-compliance.

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Part 1 of the report first reviews the theoretical and empirical literature on the nature and extent of barriers to bringing forth employment standards complaints for resolution. It concludes that many workers, especially those who are most vulnerable to low pay and precarious working conditions, are likely to face barriers to accessing the complaints system. These include well-founded fears of employer reprisal, direct and opportunity costs of the claims process, difficulties presenting and documenting their claims, and lack of access to professional advice or representation. Part 1 next reviews options. Among other options, it suggests that the review give further consideration to:

- ensuring that workers know that they need not first contact their employer about a claim when they are afraid of employer reprisal;
- providing stronger remedies for violation of the *ESA*'s anti-reprisal provisions;
- reviewing options for delivering free advice to workers on how to file and pursue a claim;
- enabling workers to recover some of the costs associated with pursuing a claim and interest on amounts owing;
- clearly communicating to workers, employers and the general public the limits on the role of Employment Standards Officers in effecting settlements of claims; and
- reviewing the policy benefits and risks of allowing class actions to pursue claims for amounts owing as a result of violations of the *ESA*.

The report does not find strong justification in the literature for further consideration of allowing anonymous, confidential or third party complaints.

Part 2 reviews the theoretical and empirical literature on the likely extent of compliance with employment standards laws, and on reasons for compliance or non-compliance with employment standards and similar regulatory laws. The report finds that the literature is consistent with the view that most employers probably comply with most employment standards most of the time. It also indicates however that at least a significant minority of employers does not. Of these, there are probably many whose failure to comply is due to inadvertence. But there is probably a substantial fraction

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whose non-compliance is deliberate. Of these, many are responding to systemic competitive pressures not to comply, pressures that have intensified with changes in workplaces and the economy that have fissured employment relationships, detaching legal responsibility for working conditions from the economic power to influence them, and heightening competitive pressures on labour costs.

This analysis suggests that separate strategies are needed for each of three broadly defined groups of employers. First, for many employers an effective compliance strategy mainly entails dissemination of clear information on what compliance requires. For a second group, compliance may impose moderate cost and administrative burdens. For such employers a sense of normative duty and/or reputational incentives may nonetheless be sufficient to maintain compliance. Compliance and enforcement strategy might therefore:

- enlist the support of respected industry and professional human resource associations;
- use an approach to enforcement that avoids the appearance of unreasonableness that can arise through sanctioning technical violations or stigmatizing unintentional violations;
- conversely, use an approach to enforcement that visibly and firmly deals with deliberate non-compliance so as to provide reminders and reassurance to the community of regulated employers that the government takes the rules seriously and to provide a level playing field; and
- use an approach to enforcement publicizing findings of deliberate non-compliance in order to provide reassurance and reminders to compliant members of the employer community and to provide appropriate incentives to those facing moderate incentives not to comply.

Finally, for employers that operate under competitive conditions placing compliance with labour standards under continuous pressure and having weak reputational incentives to comply, an effective enforcement strategy will likely require:

- reliable detection of violations;

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- predictable imposition of monetary remedies and sanctions with significant deterrent value;
- problem-solving approaches that seek to relieve where possible some of the competitive pressures that lie at the roots of systematic non-compliance.

The report goes on to propose seven principles of good practice that emerge from the literature on effective regulatory compliance and enforcement strategy. It then discusses the evidence and analysis in support of, and the implications of, each principle. It lists under each a range of options to give it effect. The principles are:

1. Information on what compliance requires should be readily available and proactively disseminated to employers and employees.
2. Non-compliance should be detected and targeted proactively and strategically.
3. Voluntary compliance approaches should be preferred in dealing with non-deliberate non-compliance, or where an employer is willing to commit to credible and enforceable undertakings to eliminate deliberate non-compliance.
4. Deliberate or persistent non-compliance should face deterrent remedies and sanctions.
5. Enforcement methods should include tools and strategies addressing systemic root causes in sectors where non-compliance is pervasive.
6. Consider enlisting complementary state and non-state regulatory systems.
7. Be prepared to consider increasing resources.

For convenience the full list of the identified options for further consideration is set out in Part 3, the report's conclusion.



## **Background**

Concerns have been raised as to whether Ontario's current processes and tools for enforcing the *Employment Standards Act, 2000* ("ESA") are effective and adequate, especially in the context of workplace change and the changing nature of employment standards issues.

The Ministry of Labour's Employment Standards Program ("ESP") administers and enforces the ESA. The Program's activities include:

- Claims investigations
- Inspections
- Prosecutions
- Education, Outreach and Partnerships

These activities are based on the ESA and on operational and administrative policies developed by the ESP.

When an Employment Standards Officer ("ESO") finds an ESA violation, the employer is often given the opportunity to voluntarily comply with the officer's decision. There are a number of enforcement tools available where an employer does not voluntarily comply with an ESO's decision. (All but the first of these may be used even if an employer does voluntarily comply.) The ESO can:

- Issue an order (e.g., order to pay wages or compensation; order to reinstate an employee; compliance order)
- Issue a notice of contravention with prescribed penalties
- Issue an offence notice ("ticket") under Part 1 of the *Provincial Offences Act* ("POA")

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- Make a recommendation for a Part III prosecution under the POA to the Ministry of the Attorney General

If an employee or employer is not satisfied with an officer's decision, then he, she or it can apply to the Ontario Labour Relations Board for a review (appeal) of the decision.

This report first reviews the literature on the accessibility of employment standards claims resolution and enforcement processes in Canada, and in comparable jurisdictions. It then turns to the effectiveness of compliance and enforcement systems. The report seeks to address, to the extent that this literature permits, the questions addressed to me and set out in Annex A. As there appears to be no literature evaluating the effectiveness of the employment standards appeal system, that issue is not addressed in this report.

This is not an assessment of the current systems and practices of the Ontario Ministry of Labour. Taken on its own, the literature does not contain sufficient information on current Ministry practices to enable such an assessment. Nor is it a full evaluation of options for reform. The literature seldom undertakes such evaluations. Instead this report analyzes what the literature can tell us about good practice. In accordance with my mandate, I identify options for reform or further study, in light of what we can learn from the literature.

The complaints resolution, compliance and enforcement systems under the *Employment Standards Act, 2000* serve two broad objectives, each an aspect of the rule of law in a modern economy and society:

- (1) *Providing access to justice in the determination of claims of rights violations.* In the workplace context this means prompt, affordable, and fair resolution of legal claims and enforcement of any remedies flowing therefrom. The employment standards complaint investigation process is the primary and often the sole

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means by which the rights of claimants and defendants are determined and vindicated.

*(2) Maximizing respect for the legal rights and compliance with the legal duties and obligations contained in legislation.*

These objectives clearly overlap. A fair, efficient and effective claims resolution system clearly enhances respect for legal rights and compliance with legal obligations and duties.

But they are also distinct both in the values that they advance and the implementation strategies that they require.

Access to justice in claims resolution has intrinsic value distinct from effective enforcement. It provides remedies without which rights cannot be said to exist in any meaningful sense. It vindicates the claimant as a rights-holding member of the community, the defendant as entitled to freedom from liability in the absence of a proven claim establishing it, and both as worthy of a fair process for determining the relevant facts and interpreting and applying the relevant law. Without resources sufficient to promptly and fairly determine employment claims as they are presented for resolution, these aims, which are intrinsic to the rule of law, cannot be realized in Ontario workplaces. The Law Commission of Ontario is correct, in my view, in saying that “a purely public law model<sup>1</sup> of enforcement is not workable for employment standards because a key objective must be compensating individuals for their loss.” (LCO, at 53)

On the other hand, as the FLSRC observed:

Labour standards ultimately succeed or fail on the issue of compliance.

Widespread non-compliance destroys the rights of workers, destabilizes the labour

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<sup>1</sup> That is, one that does not vest rights to file complaints in individuals.

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market, creates disincentives for law-abiding employers who are undercut by law-breaking competitors, weakens public respect for the law. (FLSRC, at 53).

Claims resolution is an incomplete response to these concerns. It does not address matters never raised as claims. It therefore may not be fully effective, or very effective at all, as a strategy for securing compliance with legal duties and obligations imposed by statute. It may therefore not be sufficient on its own to give effect to the purposes of the Act. As will become clear below, in many of Ontario's changing workplaces this is likely to be the case.

This report will therefore consider each aspect of the system on its own terms.

## **Research Findings and Analysis**

### **1. Access to Claims Resolution**

#### **1.1 Barriers to Access**

The literature indicates that the costs, risks and potential benefits of filing a complaint each influence worker decisions to pursue claims under the ESA. Against the potential benefits of remedies (generally compensation) for alleged rights violations, workers weigh both a fear of reprisal by their employer and the challenges and opportunity costs associated with pursuing a claim. Relying on complaints as a means of securing compliance thus poses what economists refer to as a “public goods” problem: the individual bears the cost of the complaint (including possible reprisal costs) while other workers (and the public interest) benefit from any precedent or deterrence established as a result of the complaint. Economists have long noted, not surprisingly, that such public goods tend to be underprovided.

The literature reviewed below suggests that fear of reprisal and the challenges and opportunity costs associated with pursuing a claim can each be a significant barrier to pursuing claims, and that this is particularly so for workers who are low paid and lack job security. Such workers are disproportionately women and/or members of ethnic or racial minority groups who are more likely to face linguistic and cultural barriers or stereotyping. (Statistics Canada, 2000, at 103; Vosko, 2010, at 634; Thomas, 2009, at 24; Noack et al, 2015, at 89) They are more likely to be persons with disabilities, who often face stereotyping in the labour market and often do not have access to accommodations that they need in order to work with equal opportunity (Banks, Chaykowski & Slotsve 2013). Low-wage workers are less likely to be unionized, or to have access to health and disability benefits that improve income security. (Chaykowski 2005, Marshall 2003, Zeytinoglu & Cooke 2004) Workers in a temporary

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or otherwise insecure residency status, recent immigrants, racialized workers, and people with disabilities are all over-represented in precarious forms of employment (Noack et al, 2015, at 89). While members of racialized groups comprise approximately 13% of the Canadian population, through the late 1990s and into the 21<sup>st</sup> century they have been disproportionately represented in low-income, low-security occupations such as those of harvesting labourers (40%), sewing, textile and fabric workers (40%), and electronics assemblers (42%) (Thomas, 2009, at 25).

The literature refers to such workers as vulnerable, a term that is now also commonly used in policy discourse. The concept of vulnerability refers to the effect of various disadvantages both on labour market participation and success – labour market vulnerability - and in impeding access to full benefit and protection of the law. The available evidence (discussed below) suggests that workers who are vulnerable in the former sense are also more likely both to experience employment standards violations and to face barriers to enforcing their rights, and that the two types of vulnerability are causally related (Fudge, 2001, at 4-5). US-based research finds that significant factors decreasing the likelihood that a worker will complain about an employment standards violation include immigration status, lack of union representation, lack of education or knowledge of basic rights, and costs of job loss, notably the local rate of unemployment (Weil & Pyles 2005-6, cited in Weil 2010) The extent of the vulnerable workforce is very significant but difficult to measure precisely.<sup>2</sup>

Vosko points out that various indicia of vulnerability are more prevalent within Ontario's temporary agency workforce. Among women visible minorities who are recent immigrants have 4.5 times higher odds of engaging in temporary agency work than other women (Vosko, 2010, at 634). Temporary agency workers in triangular

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<sup>2</sup> Statistical surveys in Canada do not directly measure vulnerability. The Federal Labour Standards Review Commission observed that about 32% of the Canadian labour force falls into categories of employment that tend to be precarious in terms of income security: temporary employment, part-time employment, and own-account self-employment. Not all precarious workers are vulnerable however. While most temporary employees would prefer more secure employment, not all would. Most part-time employees are so by choice, though many may be choosing this option for lack of affordable child care. While own-account self-employed workers are disproportionately low paid in comparison with the rest of the labour force, this category also includes successful professional entrepreneurs.

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employment relationships have the lowest levels of union coverage among the types of temporary employment (i.e. contract, seasonal, and casual employment) (Vosko, 2010, at 634). It has also been pointed out by one advocacy group that the temp industry is concentrated in Ontario with over 60% of the industry's revenue generated in this province (WAC, 2007, at 18).

### ***1.1.1 Fear of Reprisals/Job Loss***

Many sources contend that fear of reprisal presents a major barrier to filing employment standards complaints (Vosko 2011; WAC 2015; Weil 2010; Weil & Pyles 2007). This conclusion is based on a number of propositions or suppositions about the behaviour of workers in light of the economic and social context in which they find themselves. Some of these are essentially about the value of a job and the economic rationality of workers: that where a worker perceives a significant risk of dismissal he or she is likely to decide not to pursue a claim worth less than the potential future income stream provided by continued employment; and that many employment standards claims will be worth less to workers than continued employment or diminished employment prospects (Weil, 2012, at 3). There is little evidence in the literature addressing these suppositions, but there is also little reason to doubt that they are correct.

Other suppositions are about how workers actually perceive the risk of reprisal and the accuracy of those perceptions: that many workers perceive that there is a significant risk of dismissal or other forms of reprisal if they file an employment standards claim against their employer; and that workers may perceive that the risk of dismissal will be greater where their employment is already precarious, such as in relatively low paid positions with high turnover (Procyk, 2014 at 1).

There is little in the way of systematic study directly examining the bases for employee fear of reprisal. In the one relevant empirical study, Berhardt et al (2009) found that in their sample of 4387 low-wage workers in three major US cities, 43% of workers who had filed a complaint or attempted to form a union in the previous 12 months reported some form of employer or supervisor retaliation. Of these workers, 35% reported

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having been dismissed or suspended. Such rates of reprisal can be expected to have ripple effects. As Weil notes, the silence of other employees in the face of workplace problems or rights violations provides workers with information about how longer serving colleagues perceive the risks of speaking up (Weil 2012).

Analysts also point out that the consequential risks associated with job loss will often be higher for workers with low incomes or short job tenures. Low-income workers are more likely to have little or no savings upon which to draw to meet basic needs during a period of unemployment (Weil, 2012, at 3). Many workers with short job tenure are not eligible for employment insurance benefits, which in Ontario cover only 41 per cent of unemployed workers, and in any event replace only 55% of wages (Vosko, 2011, at 33). Migrant workers face additional risks associated with dismissal. Workers engaged under temporary work permits are most often tied to a single employer such that dismissal may result in their repatriation. (LCO 2012) Undocumented workers face the risk that their status may be reported to immigration authorities, resulting in deportation (Noack et al, 2015, at 92; Vosko, 2011, at 33).

There is relatively little statistical research on the influence of fear of reprisal on willingness to report. What evidence is available does however indicate that fear of job loss and other forms of employer reprisal most likely does undermine the willingness of many workers to complain about employment standards violations in Ontario, and elsewhere:

- The Ontario Auditor General found in 2004 that 9 out of 10 workers who file claims for unpaid wages and entitlements in Ontario do so after they have left the job. (Vosko, 2011, at 34). Similarly the Federal Labour Standards Review Commission found that 92% per cent of complaints filed under Part III of the Canada Labour Code were filed by persons no longer employed in the same workplace. (FLSRC at 192) While these studies do not identify the reasons of workers for waiting until after they have left the job, it is reasonable infer that fear of reprisal is an important reason, since most complaints concern



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fundamental issues such as non-payment of wages, benefits or overtime that arise during the employment relationship (FLSRC, at 192-3).

- Berhardt et al's survey low-wage workers in New York, Chicago and Los Angeles about violations of their rights under employment standards laws found that 20 per cent of their sample did not file a complaint during the prior year despite having experienced serious problems such as dangerous working conditions, discrimination, or not being paid a minimum wage. (Bernhardt et al, 2009, at 24). The most common reason, cited by 51% of those who chose not to complain, was fear of job loss (Weil, 2012, at 6).
- The Federal Labour Standards Review Commission also noted that the number of complaints is small in relation to the likely prevalence of labour standards violations (FLRSC, at 192). Similarly, a study by Weil and Pyles examining complaint rates under the US Fair Labor Standards Act for the period 2000-2004 found that there were about 25 complaints for every 100,000 workers, and that it took on average about 130 violations of the overtime provisions of the Act to elicit a single complaint. (Weil & Pyles, 2006) While other factors such as the low value of some claims or difficulties in accessing claims procedures probably play a role in these low complaint rates, it is quite likely in light of the other evidence and considerations reviewed here that fear of retaliation plays a very important role in these trends.

There is also an extensive literature on internal and external whistleblowing in the United States with respect to corporate wrongdoing. In the US there are dozens of federal health, safety, and environmental statutes that contain provisions that prohibit retaliation by private employers against employees for engaging in whistleblowing activity (Berkowitz et al, 2011, at 17). Researchers have observed that organizations with strong threats of retaliation and those without support mechanisms for employees

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disincentivized whistleblowing (Yeoh, 2014, at 465), and that lack of anonymity was among the main factors discouraging reporting of wrongdoing (Yeoh, 2014, at 464; see also ERC/KPMG 2011).

The anti-reprisal provision (s. 74) in Ontario's *Employment Standards Act, 2000* prohibits employers from intimidating, dismissing, penalizing or threatening workers who ask about their rights, ask the employer to comply with the Act, file a claim or participate in any investigations. One worker advocacy group has said however that most workers do not have confidence in the province's anti-reprisals provisions, and suggests that it has rarely been used since it came into force in 2001 (WAC, 2007, at 73).

There has not been any research into the effectiveness of these provisions. It is notable however that economically vulnerable workers, even if aware of the anti-reprisal provisions, might reasonably regard them as insufficient protection of their interest in continued employment because interim reinstatement is not available under the Act (WAC, 2007, at 73). Such workers may be unwilling to risk a period of unemployment while a claim under section 74 is decided. On the other hand, studies of reinstatement in non-union environments cast some doubt on potential effectiveness of this remedy. (England) Nonetheless, it may deter reprisals that arise out of systemic problems for the effectiveness of the Act.

Finally, both the Law Commission of Ontario (at 73) and the Federal Labour Standards Review Commission (at 244) have recommended that expeditious and fair processes be put in place for dealing with alleged reprisals against Temporary Foreign Workers, and for hearing cases that could result in repatriation, since the risk of repatriation is a significant deterrent to filing a complaint, and repatriation can have the effect of denying a worker any effective remedy.

### *Options for further consideration*

- *Ensure that the Act's anti-reprisal provisions are clearly communicated to*

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*workers and employers.*

- *Ensure that reprisals are subject to sufficiently deterrent sanctions.*
- *Make interim reinstatement available through expedited processes where there is a strong prima facie case of reprisal contrary to the Act.*
- *Ensure that expeditious procedures are available to address cases of alleged reprisal against temporary foreign workers, and to address their claims of other violations of the Act prior to their potential repatriation under the terms of their work permits.*

### **1.1.2 Perceptions of ineffectiveness or unfairness in the enforcement process**

Workers may discount the benefits of pursuing a complaint where they perceive enforcement procedures to be ineffective or unfair. There has been little direct study of such perceptions. In their US-based study of low-wage workers, Bernhardt et al (2009) found that the second most common reason, cited by 36 percent of those who chose not to complain of dangerous working conditions, discrimination or minimum wage violations was the perception that complaining would not make a difference. This study did not however explore the bases of that perception.

Worker advocates argue that workers may perceive that combining settlement negotiation and adjudication in an investigation, with the ESO playing both roles, is not a fair process. In their view it is difficult for parties to have negotiations without prejudice if the decision maker is also the mediator. They argue that workers and employers may feel they cannot refuse settlement negotiation lest they be penalized in the final decision on their claim (WAC, 2010, at 9).

There is no empirical research on this question. While mediation-arbitration is commonly used in collective agreement grievance dispute resolution, that context is

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quite different, since it generally involves sophisticated and experienced parties who have most often agreed upon the selection of the arbitrator.

Ministry officials inform me that Employment Standards Officers (ESOs) may introduce the idea of a settlement in exercising their discretion under *ESA* s.101.1. If either party introduces the idea of a settlement an ESO may relay offers and may describe the case of a party to the other party. Ministry officials tell me that generally ESOs do not comment on the strength of a case, but do have discretion under Program procedures to offer, where they consider it appropriate, an evaluation of the strengths and weaknesses of the case to either both or one of the parties. Importantly however, Employment Standards Officers are directed not to participate in settlement discussions once they have made a determination, or to delay an investigation pending settlement discussions. Ministry officials inform me that in practice less than 10% of cases are settled, and that most such cases are more complex matters where there are issues of credibility that are difficult to resolve, the facts are unclear, the application of the law is uncertain, or the parties' positions are equally strong or weak. .

This approach appears to offer appropriate safeguards, provided of course that the role of the ESO is clearly communicated at the outset to both Parties.

The questions of how parties perceive the role of the ESO with respect to settlement discussions, and what effects ESO involvement in facilitating settlements has on complaint outcomes should be considered, but those questions lie outside of the mandate of this study.

*Option for consideration*

*Clearly communicate to workers and employers Ministry policy with respect to the role of ESOs in effecting settlements.*

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### ***1.1.3 Requirements of the Claims Process***

For most workers, legal claim processes are not familiar. For members of linguistic and cultural minorities, participating in such processes may also require overcoming linguistic and cultural barriers. In addition to these barriers, which are common to most legal proceedings, the literature identifies the following potential barriers specific to *ESA* enforcement processes.

#### ***1.1.3.1 Requirements to first present the claim to the employer***

Under *ESA* section 96.1 the Director may require workers to inform their employers of the basis of their claim of *ESA* violation before the claim will be assigned for investigation. The Ministry's complaint form contains a mandatory field in which the complainant must either indicate that he or she has contacted the employer about the matter, or provide a reason for not having done so. The Ministry's web site, until recently, informed workers that if they did not contact their employers they ran the risk that their complaint would not be investigated. It now says only that the Employment Standards Program encourages them to contact their employers.

A number of authors contend that such requirements heighten the opportunity for employer pressure to deter a complaint from going forward to the Ministry of Labour (Vosko, 2010, at 12; Gellatly et al, at 92). They argue that a requirement for self-enforcement before a claim can be filed effectively ensures that to pursue a claim for unpaid wages, workers must already have left the workplace or be prepared to be fired for confronting their employer about *ESA* violations (Gellatly et al, at 92). By contrast, proponents view the requirement to approach the employer as facilitating expeditious claims resolution, on the understanding that most employers wish to comply with the law and will do so readily if their non-compliance is explained.

The extent to which employer non-compliance may be due to easily corrected misunderstandings or mistakes will be considered below based on the limited data and

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analysis available. For now it is sufficient to state the conclusions of those considerations: that the reasons for non-compliance vary widely; that some employers will comply willingly, while some will not; that those who will not are likely more than just a “few bad apples”; and that the workers most likely to suffer from deliberate non-compliance are also those who are most likely to be vulnerable in the event of employer reprisal. To the extent that employees have well-founded fears of reprisal, a requirement to first approach the employer is likely to constitute a significant barrier to access.

The ESA gives the Director discretion to investigate claims despite an employee’s not having first contacted the employer. Under Ministry policy an ESO need not require an employee to approach the employer where the employee is afraid to do so. I am informed by Ministry officials that in practice the Ministry will not refuse to investigate a claim where the claimant has indicated that he or she is afraid to contact the employer, and that where a complainant has not contacted the employer and not provided a reason for this, Ministry claims processors will contact the complainant and will try to find out why.

In 2002, British Columbia introduced mandatory first-step self-enforcement (called self-help) requiring workers to seek employer compliance prior to filing a claim. After introduction of this requirement in 2002, claims dropped from over 12,000 per year to between 3,400 and 6,500 – an immediate drop of at least 46%. Policy analysts and advocates from BC argue that it is not because workers are getting their unpaid wages. Rather, they say, the decline is due in large part to barriers created by the mandatory ‘self- help step’ (WAC, 2010, at 5). Critics of Ontario’s 2010 reforms have pointed to these numbers as suggesting that such reforms pose significant barriers to access. The causes of the drop in claims in British Columbia have not been studied systematically. It is quite possible that some of the drop was due to increased rates of claim resolution at the first stage. Nonetheless, for reasons discussed above, it is a plausible hypothesis that the drop was due in significant part to barriers to access, most notably fear of retaliation.

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Accepting for the sake of argument that this hypothesis is correct, a comparison with changes in rates in complaints might yield some insight into the difference in the level of barriers posed by the relatively absolute requirements of employee self-help in B.C. and the more discretionary approach to such requirements under Ontario policy. Data provided to me by the Ministry officials show that complaints did decline following the 2010 amendments from around 19,000-23,000 complaints per year in the five years up to and including 2009/10, to about 15,000-17,000 thereafter. This is a more modest decline than in B.C. and it may be due in part to changes in how complaints were counted, but nonetheless should be studied more closely.

### *Option for consideration*

*Clearly communicate to workers that the Ministry will not require them to first contact their employer regarding a complaint before investigating it if they are afraid to do so.*

#### **1.1.3.2 The employee's burden of substantiation**

Section 96.1 empowers the Director to impose requirements with respect to the information that a complainant must provide before a complaint will be assigned for investigation. In practice, the claim must contain details about: which minimum standards were violated, when it happened and how much money is claimed to be owed (e.g. dollar amounts, if known). Under Section 102.1 if an officer determines that there is insufficient evidence provided by an employee or an employer, then the officer may make a decision based on available information. According to one source, when consulting with worker advocates about proposed changes to the *Act*, Ministry of Labour staff stated that a key problem contributing to the backlog was that claimants did not provide properly filled-out claim forms (Gellatly et al 2011).

Critics of these changes argue the new information requirements are difficult for many vulnerable workers to meet, inappropriately shifting responsibility for unsatisfied or

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delayed claims from Ministry officials back onto those workers (Gellatly et al 2011; Vosko, 2011, at 13, 16-17). They contend that under the new system workers must figure out how to apply legal rights to their specific conditions, gather evidence to prove their case, and devote the time and resources to assemble and deliver it first to their (former) employers and then if necessary to the Ministry of Labour. They argue that many workers may need assistance to adequately determine entitlements, prepare the narrative of what happened, determine what evidence is important, and identify supporting documentation (Vosko, 2011, at 35; WAC, 2007, at 56). They note that many claimants will have difficulty acquiring the necessary employment records to substantiate a claim—a difficulty more common among the precariously employed, and that this may lead an ESO to deny the complaint on insufficient grounds potentially even in the case of probable ES violation (Noack et al, 2015, at 88). They further contend that language and literacy barriers, difficulties attending decision making meetings or telephone interviews during the ESO's normal work day, lack of computer or fax equipment to respond to ESO requests for information and lack of legal representation present additional barriers to access. The new information requirements also disadvantage employees in relation to employers, they suggest, because employers are more likely to be represented by lawyers or HR professionals who can present information in a manner consistent with rules of evidence (Gellatly et al, 2011, at 94). Critics also note that prior to the introduction of the *Open for Business Act*, when a worker filed a claim, an ESO investigated whether or not ES violations had taken place by seeking information from both the claimant and the employer through telephone calls, letters, and fact-finding meetings in which both parties were given the opportunity to present their cases. The ESO then evaluated evidence provided by the employer and the employee and made a determination. ESOs could thus gather evidence in ways attentive to barriers faced by workers in precarious jobs (Vosko, 2013, at 857).

On their face, neither the discretion given to the Director nor the requirements of Ministry policy necessarily pose barriers to access. Claimants are simply required to state the basic elements required to make out a claim.



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But it is also clearly possible that if these requirements were applied in a relatively demanding fashion, so as to require production of full particulars and supporting evidence upon filing, for example, the new requirements could create significant barriers to access.

The Ministry makes available a toll-free telephone information service. Employees can phone the Employment Standards Information Centre (ESIC). I understand from Ministry officials that the ESIC will not assist claimants in how to fill out the form per se, but it will help claimants to identify the issue, and tell them where they can find the claim form and other documents that can assist them in filling it out. The ESIC handles about 200,000-300,000 calls per year from employers and employees. The Ministry also makes available a “before you start” kit and a worksheet to calculate amounts that may be owed. Online resources are available in many languages. Self-help documents and the claim form itself have been recently updated in an effort to make them more user-friendly. Once a claim is filed it is sent to a Claims Centre for review. If a claim is lacking required information a Provincial Claim Centre representative will contact the claimant seeking that information. However, since around 2006, claimants have not had access to person-to-person assistance prior to filing a claim, or to face-to-face assistance in order to complete an incomplete claim. Those kinds of support ended when the Ministry closed down its intake offices and moved intake into select Service Ontario offices.

Ministry officials note that there is no legal or policy requirement per se for the claimants to substantiate their claim, and officers can often make determinations based solely on the employer’s records. They also inform me that, in their view, s. 102.1 was substantially simply a codification of practice: ESOs have always advised the parties as to what evidence the ESO thinks is necessary for the investigation, and if the parties did not provide the evidence within a reasonable period of time, the ESO would make a decision based on the best available evidence prior to the enactment of that section.

I cannot conclude on the basis of the current literature that the requirements of the

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claims intake process do or do not pose barriers to access. The important questions for present purposes are how the Director's discretion with respect to accepting claims is in fact being exercised, and what level of assistance is in fact available to claimants.

Neither question has been the object of a published study. Both questions merit further study. There is no literature on the latter question. I return to the question of assistance to employees below.

*Option for consideration:*

*Review how the Director's discretion with respect to accepting claims is in fact exercised with a view to determining whether the exercise of such discretion constitutes a barrier to access.*

### **1.1.3.3 The move to online claim filing**

Critics have also pointed out that the Ministry has closed field offices while moving some of its intake function online. They argue that this effectively means that many workers must have access to the internet to learn about their rights and file claims. They point to statistics on the digital divide in Canada, which indicate that many economically disadvantaged workers do not have such access (Statistics Canada 2008; Vosko, 2013, at 857).

It should be noted that the Ministry still accepts claims presented in person and by mail and fax, through select Service Ontario offices rather than through Ministry intake offices. There are in fact many more Service Ontario offices than there were Ministry intake offices. Moreover, data on the volume of claims indicate that there was in fact a significant increase in claims once it became possible to file them online, though this may have been in part due to changes in the way that claims were counted. (Gellatly et al 2011).

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Nonetheless, it is possible that emphasizing online service at the expense of in-person intake may disadvantage some of the most vulnerable members of the workforce. There are however no studies documenting the extent of any such barriers.

### ***1.1.4 Opportunity Costs of the Claims Process***

Vosko et al (2011) point out that where there are fact-finding meetings, workers, who are often in another job, must take time off from employment, generally without pay. She also points out that there is no remedy under the ESA to provide workers with compensation for the substantial time and resources that they may spend trying to obtain the wages and entitlements they have earned, or for any interest on unpaid wages (Vosko et al, 2011, at 37). The absence of such remedies increases the opportunity costs of pursuing claims and will quite clearly pose a barrier for numerous claimants. The pervasiveness of such opportunity costs has not been studied. There has been no published analysis of other policy considerations associated with providing such compensation.

#### *Options for consideration*

*Enable workers to recover, where a claim is upheld, costs associated with gathering information to file the claim and with attending fact-finding meetings, perhaps on the basis of a fixed tariff.*

*Enable workers to recover interest on unpaid wages.*

### ***1.1.5 The Influence of Bargaining Power on Settlement Outcomes***

Amendments to the ESA through the *Open for Business Act (OBA)* give ESOs a role in bringing employers and employees to a mediated and voluntary settlement (per Section 101.1 of the *ESA*). A number of writers have raised concerns about the role of mediated settlement in ESA claims resolution (Gellatly et al, at 94-95; WAC, 2010, at 9).

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### ***1.1.5.1 Compromising Rights***

Most legal dispute settlement systems permit parties to settle disputes by compromising claims in light of the risks and expenditure of time and money required to litigate them. However, where factors leading to the compromise of a claim are not confined to the likelihood that a claim can be proven, or a desire by the employee to avoid delaying payment by the time reasonably required for the investigation of a claim, they may instead reflect the relative negotiating power of the parties. In settlement negotiations the normal “give-and-take” of negotiation may reduce the value of the rights held by a worker, as claims are compromised in the interests of reaching a settlement. The vulnerabilities of workers, especially precariously employed workers and members of disadvantaged minority groups, also stand to negatively affect the value of settlements that they negotiate (Gellatly et al, at 95).

Some employee advocates have argued that even with principles or criteria to determine what cases would be mediated, operational imperatives will place pressure on individual ESOs to close files through settlement. They point to a period in the early 1990s that saw a spike in ESA claims. They argue that as a result, ESOs were compelled to settle cases to close files. This, they argue, reduced the enforcement effectiveness of the Program (WAC, 2010, at 10). However, I am informed by Ministry officials that the claims increase in the early 1990s was directly related to the Employee Wage Protection Program (EWPP) and that in fact more claims were not settled because there was an opportunity for employees to be paid through EWPP. I am also informed by Ministry officials that currently relatively few claims are settled, in part because it is often more efficient and less time-consuming for inspectors simply to complete an investigation and make an order to pay than it is to participate in facilitating a settlement.

These are important safeguards and considerations. However, they leave open the possibility that some vulnerable workers may be pressed by their employers into unduly

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compromising their claims within, or perhaps more likely outside of, ESO facilitated settlement discusses. This raises the question of whether claims settlements between private parties should be permitted.

That question in turn requires consideration of which public interests are at stake in claim settlement negotiations, and whether those public interests require curtailing the carriage by employees of complaints that they file. In Part 2 of this report I suggest that complaints revealing deliberate non-compliance in sectors with high rates of non-compliance should lead to extended investigations. In such circumstances there may be a public interest in ensuring that the initial claim is not compromised.

That interest would nonetheless have to be weighed against those of the claimant and the employer in reaching an early resolution of the claim. It is a significant step to remove the ability of party with a private right of claim to compromise that claim, and doing so might have unintended negative consequences for employees, particularly since it appears that settlements often deal with complex matters including termination and severance pay due upon termination of employment.

The literature provides no guidance on these questions.

### *Option for consideration*

*Consider further and, if appropriate, delineate the circumstances under which claimants, particularly vulnerable workers, should or should not be allowed to settle a claim that has been accepted for investigation.*

#### **1.1.5.2 Enforceability of Settlements**

The Worker Action Centre also notes that because settlements are between the worker and employer and because there is no Program order confirming the violation and requiring the employer to pay, there is no recourse under the Act if wages still go

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unpaid. These concerns again point to the possibility that vulnerable worker may be disadvantaged by settlement processes.

Under Section 101.1(2) where an ESO effects a settlement, a complaint is only deemed to have been withdrawn when the employer and employee have done what they agreed to do in any such settlement. Section 112 provides similarly in the event of a settlement directly between employer and an employee. These sections do not, however, prevent an employee from withdrawing a complaint pursuant to a privately negotiated settlement.

### *Option for consideration*

*Provide to a complainant withdrawing a complaint pursuant to a settlement with his or her employer a non-waivable right to re-file the complaint where the complainant alleges that the employer has not complied with the terms of that settlement.*

### **1.1.6 Access for workers represented by trade unions**

Section 99(1) of the ESA provides that in a workplace covered by a collective agreement, “this Act is enforceable against the employer as if it were part of the collective agreement with respect to an alleged contravention of this Act...” Section 99(2) precludes an employee covered by a collective agreement from bringing a complaint under the Act, and sections 99(3) and 99(4) state that the employee “is bound by any decision of the trade union with respect to the enforcement of this Act under the collective agreement, including a decision not to seek that enforcement,” whether or not the employee is a member of the union. On the other hand, section 99(6) gives the Director of Employment Standards the authority to allow an employee to pursue a complaint in the statutory forum “if the Director considers it appropriate in the circumstances.”

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The access of unionized employees to ESA claims resolution therefore depends first of all on the willingness and ability of their union to pursue such matters, and secondly on how Ministry officials exercise their discretion under section 99(6) in the event that a union refuses to pursue a claim.

There are no published empirical studies of these matters. Nor are there any published analyses of the likelihood that section 99 poses barriers to access for unionized workers. It should be noted, however, that both a report to the US Department of Labor (Weil 2010) and Canada's Federal Labour Standards Review Commission (FLSRC, at 226) recommend enforcement of labour standards in unionized workplaces through grievance and arbitration processes, in order to make government enforcement resources available to deal with sectors where detection and redress of violations are more difficult.

The FLSRC makes this recommendation subject to the condition that where the union refuses to proceed with a claim to arbitration the employees should be able to bring his or her claim to an inspector. This implies that a union should not be able to preclude a claim from proceeding where it believes it to lack merit or where it believes that it can settle the claim in the best interests of the employee or the larger group of employees that it represents. The Commission reasons that an inspector can summarily dispose of claims without merit and that an employee should not be required to pursue a potentially lengthy and expensive duty of fair representation claim to challenge a union's decision with respect to statutory rights. This raises the question of whether a union should be able to compromise the statutory rights of an individual or group in return for greater or other benefits to the individual or group. The Commission's understanding that the Act provides a basic floor of rights designed to secure decent working conditions (FSLRC, Chapter 3) would suggest that such rights should not be waivable, even by a democratically elected collective bargaining representative. This issue, however, is not systematically canvassed anywhere in the literature.

*Option for consideration*

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*Allow a unionized worker to pursue employment standards claims through regular claims processes whenever a union declines to proceed with his or her claim.*

### **1.2 Specific Options for Improving Access**

I was asked to review the literature on two options that could serve to reduce opportunities for reprisal: anonymous or confidential complaints, and third party complaint mechanisms. Third party complaint mechanisms might also provide workers with access to knowledge and resources needed to properly present their claims. A variety of recent sources advocate amending the *ESA* to include provisions providing for anonymous complaints as well as permitting complaints to be filed by third parties such as community/public interest groups (Faraday, 2012, at 9; Vosko, 2013, at 860; Association of Ontario Health Centres at 8; WAC, 2015, at 47). In addition, I was asked to review the literature on support services to workers with ES claims. Below I consider each in turn.

#### **1.2.1 *Anonymous or confidential complaint systems***

On its face, the *ESA* does not appear to prevent the investigation of anonymous complaints. Section 96(1) of the Act provides that:

A person alleging that this Act has been or is being contravened may file a complaint with the Ministry in a written or electronic form approved by the Director.

As a matter of Ministry practice, all information provided anonymously by third parties to the Employment Standards Information Centre about possible violations is passed to the appropriate Ministry staff for review and for possible proactive activity. In other words, anonymous information may lead to an inspection under the Ministry's proactive



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enforcement program, but it does not serve as the basis for a complaint that may be sent for investigation under section 96.

Proponents of anonymous complaint systems advance several arguments:

- Anonymity provides protection against reprisal, enhancing the likelihood that violations of the Act will come to the attention of enforcement officials (Vosko, 2014, at 20).
- Such complaints can be an important source of information about violation of the Act, particular within a system that allocates most of its resources to complaints investigation (WAC, 2015, at 47).
- The availability of anonymous, confidential, and third-party complaints can convey to employers the message that coworkers and worker representatives form a larger community in which workers (especially those in relatively secure employment) act as other workers' keepers (especially the precariously employed) (Vosko, 2013, at 862). Employers will understand that the likelihood of detection of non-compliance, and especially non-compliance in relation to vulnerable workers, is substantially increased. Employers with tendencies towards non-compliance will adjust their behaviour accordingly.

On the other hand, truly anonymous complaints – i.e those with respect to the identity of the complainant is not provided to the Ministry - can be costly to investigate because the lack of identifying information makes it impossible to locate information specific to the complainant. Anonymous complaints thus of necessity become extended investigations. Further, since matters treated as complaints must be investigated, permitting anonymous complaints essentially enables anonymous complainants to trump the priorities that may be established by the Ministry's targeting strategy for extended investigations. Finally, it is possible, though it is not at all clear to what extent it is likely, that anonymous complaints could be used as a harassment tactic by former employees, or competitors.

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Confidential complaints, it might be argued, would avoid these problems since the Ministry would know the identity of the complainant (but keep it from the employer). Confidential complaints, however, raise similar problems. An employer has a right to defend itself against a complaint, and therefore must be given the name of the complainant at some point in order to locate information in its defense (*Cineplex Odeon*). In a small workplace and/or where the issue remains confined to one individual, it will be difficult – in some cases, impossible – to protect confidentiality as the case proceeds (Dutil & Saunders, 2005, at VII). In a larger workplace it may be possible to do so where a complaint triggers a broader investigation and the complainant's case is one of several investigated. But protecting confidentiality by routinely triggering broader investigations would raise the problem of trumping the Ministry's priorities for targeted investigations. Below I will argue that targeting such investigations strategically is a central plank in an effective compliance and enforcement strategy. In any event, if confidential complaints were allowed, complainants should be informed that their identity may become known to the employer during the course of an investigation even if the Ministry does not directly disclose it, since the employer has a right to know and respond to the evidence upon which a complaint is based.

Anonymous labour standards complaints are expressly permitted in a number of jurisdictions.

In Saskatchewan, the anonymous complaint option is available if the worker is still employed at the workplace, believes that provisions of the province's *Labour Standards Act* are not being followed, and wants to seek redress but is not in a position to file a formal complaint. Only written complaints with supporting evidence are reviewed. The Compliance and Review Unit pursues expanded investigations in some such cases. For example, where a claim submitted by a worker is found to apply to more than one worker at the worksite, the unit will expand its inspection to protect all workers present (Vosko & Thomas, at 638). However, the inspection will only attempt to correct the situation going forward, not rectify violations of unpaid wages for current employees.

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This leaves workers without remedy to collect unpaid wages while they are in the workplace (WAC, 2015, at 47).

Anonymous complaints are permissible under Australia's *Fair Work Act* (2009), which allows the Office of the Fair Work Ombudsman (FWO), the federal statutory agency responsible for minimum employment standards regulation, to receive complaints from any party who wishes to complain about an alleged breach of Commonwealth workplace laws. The FWO does not however guarantee complainants that it will be able to maintain their anonymity during the course of an investigation (Vosko, 2013, at 861).

Anonymous complaints are also accepted in six labor agencies in the United States; Colorado, New Jersey, California, Connecticut, Illinois, and New York (Vosko, 2011, at 73).

There have been no systematic studies or evaluations of the operation of anonymous complaint systems in employment law. One recent report by the Calgary Workers' Resource Center suggests that fear of retaliation may limit the value of anonymous reporting systems for vulnerable workers. This report found that it is unlikely for temporary agency workers to contact the Workplace Health and Safety agency, for fear that even an anonymous complaint might be traced back to them. The report concludes that unless a client company worksite is included in the government's OHS targeted inspections program, many of the OHS concerns experienced by temporary workers will remain unaddressed (Calgary Workers' Resource Centre (CWRC), at 133).

On the whole the literature does not, in my view, offer strong justifications for permitting anonymous complaints, but does justify the Ministry's current practice of receiving anonymous information. Providers of anonymous information are likely to be protected by the anti-reprisal provisions of the Act, provided that they are acting in good faith and do not present vexatious allegations. Ministry officials can be counted upon not to act upon frivolous claims that clearly have no merit.

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### ***1.2.2 Third party and representative complaints***

Third party or representative complaint mechanisms may also provide an alternative means of overcoming barriers created by the knowledge and resource requirements of complaint processes. Community organizations or trade unions might, for example, be in a position to bring such knowledge and resources to bear on behalf of workers that they represent. For this reason, worker advocates have recommended that third party complaints from organizations representing workers should be pursued, and that the government should provide funding to support such organizations (WAC, 2007, at 73).

There is a difference between allowing third party agents to represent complainants (who maintain carriage of their complaint) and allowing third parties to act directly as complainants. The former situation, which is permitted under Ontario law, simply reflects a choice by a worker to be represented. That latter would allow third parties to bring complaints forward even when they had no direct interest in them. The basis for doing so would presumably be that those third parties would seek to advance public interests in enforcement of and compliance with the Act.

The United States has witnessed over the last decade an explosion of class actions to recover wages alleged to be owing under contractual terms and under legislation. There is little doubt that these have increased access to representation and the ability of workers willing to participate in claims to pursue redress of wage and hours violations. The availability of such claims has also leveraged compliance agreements that stand to alter systemic causes of wage and hours violations (Weil 2010). Class actions are a form of third party representation of claimants. They do not empower third parties to act directly as claimants.

California went one step further with legislation enabling private parties (referred to as “Private Attorneys General” to sue to enforce and collect penalties for violations of employment standards legislation. (Bertagna) This legislation has been controversial,

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(Bertagna) but appears not to have been systematically evaluated. I am not aware of any other examples in which third parties have been granted direct carriage of complaints under employment standards legislation. It should be noted that the private attorney general model was adopted in California in response to resource constraints facing the inspectorate, which in the view of legislators prevented the effective enforcement of employment standards. Below I suggest that systematically targeted proactive inspections are likely the most effective means of increasing compliance in sectors of the economy where compliance is problematic. Systematic targeting is not possible under a private attorney general model. Nonetheless, the review may wish to consider that model or other third party complaint systems further if it becomes clear to it that resource constraints stand to seriously limit public enforcement.

In Canada one court of appeal has declined to allow class actions for pursuit of wages owing under employment standards legislation, on the grounds that employment standards acts reflect a legislative intent to provide complete means to redress violations, and that such standards are not implied by legislation into employment contracts. (*Macareag v E-Care Contact Centers*) In other instances courts have allowed claims to proceed where employers conceded or did not contest that the relevant statutory employment standards were incorporated into employment contracts. (*Fulawka v Bank of Nova Scotia; Rosen v BMO Nesbitt Burns*) It remains unclear whether class proceedings can be brought purely on the basis of statutory rather than contractual obligations.

Some commentators have argued that class actions provide employees with affordable representation and access to redress core areas covered by employment standards. (Bertagna) The availability of class actions to recover amounts owing under employment standards acts might on this theory provide access to a cost-effective means of rights enforcement and dispute resolution. This might in turn relieve pressure on traditional employment standards systems, freeing them up to address the complaints of vulnerable workers for whom participation in class actions is not an option, and to pursue proactive enforcement. It should be noted however that the

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economics of class actions are much more likely to be viable in respect of large groups of employees of the same employer.

There appears to be no research into the benefits and risks for workers and employers of wage and hours class actions in the United States. There is a large literature on class actions outside of the employment field. The phenomenon of wage and hours class actions in the US merits further study, in light of the potential contribution of class actions to improving enforcement and access.

### *Options for consideration*

*Commission further research into whether allowing class actions to recover amounts owing under the wage and hours provision of the Act could advance the accessibility of recourse consistently with other public policy objectives.*

*Consider enabling third party complaints if it becomes clear that resource constraints stand to seriously limit proactive public enforcement.*

### **1.2.3 Support services**

Employees with agents to represent them are more likely to file complaints. (Weil, 2007, at n.27) Agents can be effective as representatives when their interests are aligned with those of the worker they represent, when they are able to help with information gathering or with the complaint process, or when they are able to protect against reprisal. In the United States, law firms have been willing to pursue actions in respect of wage and hour actions, in large part because the double damages are the norm rather than the exception. (Weil & Pyles, 2005, at 86-91) As discussed above, in Ontario unions represent unionized employees with respect to their employment standard claims. There is no legal barrier to their providing such representation to workers who are not members of certified or voluntarily recognized bargaining units. On the other

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hand, devising a viable funding model for such services may not be straightforward. The employment standards enforcement literature provides no guidance in this respect.

Critics of ES enforcement have noted that employees are unlikely to secure professional advice or representation. The low dollar value many ESA claims means that few private bar lawyers would represent workers in ESA matters. In 2008 Ontario's Community Legal Clinic system provided ESA representation in only 86 cases, 90 brief services, and advice for just over 850 workers in 2008 (Vosko, 2011, at 35). By contrast, the government provides direct and indirect funding for Occupational Health Clinics for Ontario Workers, the Office of the Workers Advisor, and the Human Rights Legal Support Centre.

Prior to the introduction of the Service Ontario model, lack of ESA claimant representation was offset to an extent by ESOs conducting their investigations in such a manner as to assist claimants in understanding what information they need to present in order to support their claims. Claimants now do not have access to the assistance of claims processors until after their claim is filed, and then generally only over the telephone rather than in person. Such assistance, as under the previous model, helps workers to clarify their claim, but is not advice on how best to present or pursue that claim.

Worker rights advocates have also argued that the "Service Ontario" model may not be appropriate for the proper enforcement of the ESA. They say that experience with generalized government access centres and call centres that use non-specialists suggests that both employers and workers are often given incorrect information and conflicting advice. They have argued that employers and workers need to deal with staff who know the ESA and Program policies and practices (WAC, 2007, at 75). They argue in particular that to ensure that claim forms contain sufficient information for investigation workers need direct assistance to prepare their claims. One of the most effective strategies to streamline the process and reduce backlogs would be, they argue, to provide, as a first step in the claims process, assistance to workers to prepare

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their claim so that investigators can expeditiously adjudicate the matter (WAC, 2010, at 98). Worker advocates have also taken the position that non-unionized workers who file a complaint under the ESA should be provided with free legal representation (WAC, 2007, at 75) that there should be funding and support to improve community legal services for employment violations, and that the Legal Aid Certificate plan should be expanded to include ESA matters (WAC, 2007, at 75).

Given the growing importance of employment standards to an increasing share of the Ontario workforce, the question of whether services equivalent to those offered to occupational safety and health, workers' compensation and discrimination claims should be addressed. While the literature convincingly raises this issue, it does not provide enough information on alternative service delivery or funding models to assess, cost or recommend options.

### *Option for consideration*

*Following an assessment of alternative funding and service delivery models, provide workers increased access to free or low-cost basic advice on how to present and pursue employment standards claims.*



## **2. Effective Compliance and Enforcement Strategy**

### **2.1 What we know about the extent and location of non-compliance**

There are few reliable direct measurements of compliance with employment standards in Ontario or elsewhere. Labour ministries often track complaint statistics, but it is widely accepted in the literature that complaint statistics are not a reliable measurement of compliance (Weil & Pyles 2007; Noack et al 2015). For reasons discussed above, there are often significant barriers to filing complaints and therefore complaint activity is very unlikely to capture the full extent of non-compliance. It is possible that complaints activity may be very low in sectors with serious compliance problems (Weil, 2010). Some have argued that for many workers the daily reality of labour-law violations have made them seem ordinary and expected, particularly in labour sectors where new immigrants, racialized, women and low-wage workers are predominant (WAC, 2007, at 49). As a result, the threshold point at which workers register ES violations as a problem may be quite high, especially at the lower end of the labour market, where habituation to experiences such as work intensification, insecurity, low pay and coercion lower expectations of working life (Noack et al, 2015, at 93). In the presence of persistent violations, keeping one's head down, "staying out of other people's business," and turning a blind eye to unfair treatment of others is a survival strategy (Weil 2012). Weil makes the analogy between such workplaces and neighbourhoods with "broken windows", i.e. in which property and other crimes are widespread. This perspective suggests that workers often do not complain when faced with the equivalent of "neighborhood disorder" at the workplace. In the face of deteriorating conditions and greater barriers to speaking out (e.g. from increased economic vulnerability), people retreat from the "unsafe street" and the likelihood of complaining decreases even further (Weil 2012).

A recent report by the Law Commission of Ontario (LCO) stated that "the LCO's

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research and consultations revealed that most employers are compliant with the legislation” (LCO, at 56). The LCO did not undertake any new systematic empirical research on the extent of non-compliance, but its conclusion is plausible in light of the limited available evidence, discussed below. That evidence also suggests however that at least a significant minority of employers are not in compliance with some employment standards, and that vulnerable workers are most likely to be affected by non-compliance.

The available direct measurements of compliance are derived from observations during proactive inspections in Ontario and from employer surveys in the federal jurisdiction. Each source has limitations as a basis for inferences about the overall extent of non-compliance. Proactive inspections tend to be aimed at sectors in which the inspectorate has reason to believe there are widespread violations and therefore percentages of non-compliance found in such inspections may exceed the extent of non-compliance within the overall employer population. The federal jurisdiction is composed of employers in particular set of industries not regulated by Ontario. It has a much higher proportion of employment in large employers than the Canadian economy as a whole. (FLSRC 2006). Nonetheless, data from surveys of employers in the federal jurisdiction may be useful in estimating roughly and conservatively the extent of non-compliance elsewhere in Canada. One might expect employer surveys to under-report non-compliance because employers may be reluctant to disclose non-compliance in a survey questionnaire. Given the composition of the federal jurisdiction’s cohort of employers, there is no evident reason to think that non-compliance in the federal jurisdiction should be significantly higher than it is in Ontario. If anything, the considerations outlined below would suggest the contrary.

Both sources of information are also quite dated. On the other hand, reasonable suppositions about the drivers of non-compliance, discussed below, suggest that those drivers are unlikely to have changed for the better in recent years. Even if new compliance and enforcement strategies have improved compliance trends in recent

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years, the underlying challenges facing enforcement likely remain, and older data probably provide a good indicator of the extent of those challenges.

Taken together, and viewed in the light of the theories of non-compliance discussed below, available sources suggest the likelihood both that at least a substantial minority of Ontario employers tend not to comply with some or many employment standards:

- The Ontario Auditor General noted in a 2004 report that violations were uncovered in 40 to 90 per cent of the proactive inspections conducted by the Ministry, depending on the business sector being inspected. (Auditor General, 2004, at 240). (This may not be precisely indicative of overall compliance rates however, since proactive inspections are often targeted on the basis of a higher likelihood of non-compliance.)
- A 1997 Labour Standards Evaluation survey of federally-regulated employers undertaken for the federal labour ministry found that 25 percent of employers were not in compliance with most obligations under the federal labour standards code and that 75% of these employers were not in compliance with at least one provision of the code (FLSRC, at 192). No more than 5% of respondents, depending on the provision in question, acknowledged knowingly and deliberately violating the code (FLSRC, at 211).
- A 2006 analysis of the Federal Jurisdiction Workplace Survey by the Federal Labour Standards Review Commission found that 12% of federal jurisdiction employers failed to provide three weeks of vacation to employees with more than ten years of service even though under the Canada Labour Code employees are entitled to that amount after six years of service, and that 78 per cent of federal jurisdiction employers did not have a policy on sexual harassment as required by the Code. Survey questions were not drafted with a view to detecting non-compliance, and as a result the survey provided no

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findings on compliance levels with other provisions of the Code. (FLSRC, at 192)

- Surveys of employees can provide another measure of the extent of compliance with labour standards. These can be difficult to design and administer. Noack et al (2015) discuss these difficulties, which include reaching employees, worker discomfort with disclosure and workers' limited knowledge of employment standards. A survey using a method that seeks to address these difficulties is underway in Ontario, but the results are not available yet. (Noack et al 2015) Two earlier surveys provide an indication that vulnerable workers in Ontario and elsewhere in North America are likely to experience labour standards violations:
  - The Workers' Action Centre (WAC) surveyed 520 low-wage and precariously employed workers from Toronto (including the GTA) and Windsor (WAC, 2011) between November 2010 and March 2011. The WAC relied upon a "snowball sampling" method to collect the surveys, which included asking upon front-line services to distribute the survey (e.g. Parkdale Community Legal Services, settlement and employment agencies) and requested workers who completed a survey to recruit their friends. The research showed that:
    - 22% of the workers surveyed reported being paid less than minimum wage,
    - 33% of workers reported being owed wages,
    - 60% reported working more than 44 hours in a week in the past 5 years, 39% of those workers reported never receiving overtime pay,
    - 34% of workers reported issues with accessing their vacation pay entitlements,

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- 36% of workers reported being dismissed with no notice or termination pay,
  - 37% of workers reported not receiving a day off with pay on public holidays, and of the 62% that reported working on a public holiday, 57% did not receive any premium, and
  - 31% reported receiving their wages late.
- Bernhardt and colleagues (2009) surveyed 4,387 workers in three cities (Cook County, Chicago; Los Angeles County, Los Angeles; New York City) in 2009, finding that 25.9% workers were paid below minimum wage, 19.1% worked unpaid overtime (this figure jumped to 76% when “workers at risk” were considered), and 58.3% suffered a meal break violation (20).

Research into compliance with workplace anti-discrimination law also suggests that a significant minority of employers may be non-compliant with those legal obligations, though the extent of non-compliance cannot be precisely estimated on the basis of existing data (Banks, Chaykowski & Slotsve 2013; Tellucksingh & Galabuzi 2005). The causes of non-compliance with anti-discrimination law appear to overlap with, but also to be distinct from, the causes of non-compliance with employment standards, so care must be taken in drawing any inferences across these two fields of regulation.

The limitations of the available evidence require some caution about inferences with respect to which employers are more likely to be non-compliant. Dutil and Saunders (2005, at 7) point out that the highest ratios of complaints in employment are in agriculture, accommodation and food services, in the retail/wholesale trade, construction and in trucking; that complainants are more likely to be between 14 and 24 years of age with, with less than high school completion; that they are likely to be working for a small business with less than 20 employees; and they are likely to be part-time, non-permanent, with less than five years of job tenure, and earning low pay. There

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are some good reasons in theory (discussed below) to believe that some or all of these differences in complaint rates may reflect differences in compliance rates. However, as discussed above, the absence of complaints in particular sectors may reflect a pervasive unwillingness to complain rather than high levels of compliance. Moreover, different rates of employee turnover may result in different complaints levels between sectors - since former employees file complaints much more often than employees - but may or may not be associated with different rates of compliance.

### **2.2 Causes of compliance and non-compliance**

Non-compliance with employment standards, as with any other legal requirement, may be due to inadvertence – mistakes in interpreting or applying the law or lack of awareness of the law - or due to deliberate decision making. There is very little research directly observing employer reasons for complying or not with employment standards. But the question of whether and why businesses will or will not comply with employment standards raises the same two fundamental issues that arise in many other fields of regulation: (1) to what extent do businesses understand and have the ability to implement what is legally required; and (2) why do businesses comply with regulations that impose costs on them.

#### ***2.2.1 Understanding and ability to implement what is legally required***

Ministry compliance systems, like those in other jurisdictions, place significant emphasis on education and information dissemination, on the supposition that many employers can and will improve their compliance if they access such services. There are few studies directly observing the extent of employer awareness of or capacity to implement employment standards in common law jurisdictions. In the one available survey - the 1997 LSE survey of federal jurisdiction employers - significant percentages of employers reported that they did not know what the federal labour standards code required of them (FLSRC, at 196). There is, in addition, research suggesting that in many fields of employment law smaller firms often lack information and capacity to

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comply (Edwards 2012). Studies in the field of occupational safety and health indicate that smaller firms, which tend to have less in-house expertise in such matters, are more prone to non-compliance and that this is often for reasons of competence, that is, of lack of knowledge and developed capacities to implement legal requirements. (Amodu, 2008, at 22-23) Similarly, some small-scale survey evidence suggests that many small and medium-sized employers perceive a need for technical assistance in accommodating workers with disabilities (Lysaght, Krupa & Gregory 2012, at 20). The fact that the U.S. Department of Labor has for more than 25 years maintained its Job Accommodation Network, a free advisory service available to employers of all sizes providing access to expert consultants on workplace accommodation, also suggests an ongoing need for such help. A roundtable of Canadian employer, government and worker representatives confirmed that employer awareness of employment standards requirements was often a problem, particularly with respect to more complex aspects of employment standards and in smaller enterprises (Saunders & Dutil 2005, at 8). Companies employing fewer than 50 employees make up more than 92 percent of Ontario's businesses and 66 percent of ESA claims in 2009/10 (Vosko et al, 2011, at 31). Moreover, 75 percent of businesses in Ontario have fewer than 10 employees. Many of these employ part-time, casual and seasonal workers, pay at or near minimum wage and have limited financial resources and narrow profit margins (LCO 2012, at 8-9). Even in larger enterprises, awareness at the level of human resource staff did not necessarily translate into awareness at the level of shop floor management (Saunders & Dutil, 2005, at 8)

It appears to be a reasonable supposition that a portion of total non-compliance is simply attributable to information and implementation problems. It is very difficult to estimate the extent of such problems with any precision.

### ***2.2.2 Employer motivations***

Literature reviews in the fields of occupational safety and health (Amodu) and environmental regulation (Gunningham, Thornton & Kagan 2003) indicate that both cost considerations (direct and reputational) and acceptance of normative duty influence

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employer decisions with respect to compliance. The nature of and interactions between these considerations are likely to vary widely across the employer population.

Fairly standard economic analysis suggests that employers will comply with costly regulations only if the probability of getting caught times the cost associated with getting caught is greater than the cost savings of non-compliance times the probability of not getting caught (Willborn, 2014, at 163). The relevant costs may extend well beyond the direct economic costs entailed by compensation required or sanctions imposed by regulators. Costs can also flow from damage to reputation (Gunningham, Thornton & Kagan 2003). Firms with an investment in and expected return on their brand image may fear loss of market share as consumers turn away from their products (Locke; Doorey 2011). Firms aiming to recruit the best talent may fear the effects of reputation for non-compliance. Firms may also fear a loss of “social license”. For example, studies suggest that manufacturing or resource extraction firms often fear that a reputation for non-compliance with environmental laws will undermine their ability to secure approvals to establish new facilities or expand existing ones (Gunningham, Thornton & Kagan 2003).

There is considerable evidence that directly changing cost structures for regulated entities through sanctions and compensation orders can be effective. Researchers have found reductions in mining fatalities in the US following significant increases in enforcement budgets of federal mine inspection agencies. (Lewis-Beck & Alford 1980). Violations of occupational safety and water pollution regulations decline among firms that have recently been visited by inspectors and fined for violations (Gray & Sholz 1991; Siskind; Weil, 1996; Ko, Mendeloff & Gray 2010).

On the other hand, many researchers argue that a direct cost-based incentive model cannot account for observed levels of compliance with many forms of regulation. For example, studies of environmental regulation have tended to find that in advanced industrial democracies most business firms, particularly large ones, tend to substantially comply with most environmental regulations most of the time. This is despite the fact



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that the likelihood of an inspection at any given firm is often very low, that compliance is often complex and costly, and the deterrent messages sent by penalties imposed on other firms often do not make it through the cacophony of information and urgent demands facing business managers (Gunningham, Thornton & Kagan, 2003, at 40). One study of general deterrence of non-compliance with US environmental laws found that the magnitude, effort or expenditure of firms on compliance did not correlate with managers' estimates of the probability that a serious violation would be detected and punished (Gunningham, Thornton & Kagan 2005).

Studies of environmental regulatory compliance suggest that for many firms reputational or social license concerns play a major role, and that managers believed that neighbours, employees, community groups, news media and environmental advocacy groups could generate adverse publicity damaging the firms' reputation leading to consumer defection, recruiting difficulties, promulgation of more stringent regulation, or declines in stock prices (Gunningham, Thornton & Kagan, 2003, at 40-44; Fisse & Braithwaite 1993; Bardash & Kagan 1982; Gunningham, Thornton & Kagan 2005). One study found that in fact the environmental performance of facilities varied in relation to the intensity of social license pressures rather than with the regulatory enforcement style of different jurisdictions (Gunningham, Thornton & Kagan 2003).

Socio-legal research also suggests that compliance often cannot be fully explained by direct cost or reputational cost considerations alone. Interview-based research has found that managers and business owners often report a strong sense of duty to comply with laws and rate its influence as more significant than fear of punishment (Gunningham, Thornton & Kagan, 2003, at 44-46). Professional groups such as builders, nurses, and human resource professionals often develop and act on commitments to basic regulatory norms. (Gunningham, Thornton & Kagan, 2003, at 45) For example, in a study of pulp mill operators researchers found that managers tended to be committed to regulatory compliance and that this commitment translated into actions and decisions that supported it (Gunningham, Thornton & Kagan 2003). Further, the sense of duty within one's social circle can exert influence. For example, a

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study of compliance with tax laws suggest people often fear disgrace in the eyes of family members or social peers in the event that they were caught violating the law (Friedman). The socio-legal literature thus suggests that such normative commitments can often exert an independent influence in favour of compliance.

A sense of duty may strengthen and in turn be reinforced by concerns for maintaining a good reputation. The extent of the sense of duty to observe legal norms appears to be tied to the perceived legitimacy of the norm in question. This in turn tends to depend not simply on the normative orientation of the individual manager or firm but also upon perceptions that the law will be consistently applied to others so as to provide a level playing field amongst competitors, and that cheaters will be punished. Some researchers, echoing what they have been told by regulatory officials in contemporary regulatory agencies, suggest that a population of regulated enterprises can often be conceptualized in the form of a bell curve, in which one tail is comprised of “duty-driven good apples”, the other of “bad apples” with little sense of duty towards compliance or fear of consequences of non-compliance, and the bulk as “contingent good apples generally willing to comply but not when they think a regulatory requirement is unreasonable or excessively burdensome, or when they think that most of their competitors are cheating” (Gunningham, Thornton & Kagan, 2003, at 36).

On the other hand, researchers have observed important limits on the influence of concern for reputation and normative duty. (Gunningham, Thornton & Kagan 2003, at 49-52) Reputational pressures are naturally lesser where risks to brand value, social license, or human resource strategy are low. (Banks & Shilton 2012; Doorey 2011; Locke) There are also important limits to the potential influence of normative duty. In for-profit enterprises normative duty will also tend to yield at some point to the requirements of the “economic license” to operate: they are unlikely to trump the viability or profitability of the enterprise. (Gunningham, Thornton & Kagan 2003)

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These general observations in the regulatory studies literature are consistent with observed patterns of compliance and non-compliance with employment standards, and with workplace law more generally.

Compliance with employment standards can be consistent with a firm's business and human resource management strategies. If a firm seeks to recruit and retain employees on the basis of working conditions better than those required by basic minima, labour market pressures may be sufficient to ensure its compliance with them. In a 1997 survey of federal jurisdiction employers, most agreed that compliance with federal labour standards imposed no significant costs on them, and a 2006 survey in the same jurisdiction found that most employers exceeded most code standards. (FLSRC, 2006, at 31)

This is clearly not the case for all employers however, as the literature on minimum wages and the costs of other standards such as overtime rules suggests. (Gunderson) Even if such standards may lead to changes in human resource management practices that increase productivity, they may reduce profitability or require changes to methods of production that some employers may be reluctant to undertake. Moreover, for many such employers the potential reputational costs of proven non-compliance are likely to be low. This will be the case for many producers not having brands recognizable to consumers or customer bases sensitive to moral concerns about working conditions, not depending upon social or regulatory licenses to operate, and able to operate without recruiting employees with the skills or mobility options to resign and obtain better employment in the face of labour standards violations. As a result, cost considerations will create incentives for non-compliance.

In these circumstances employers may still comply out of a sense of normative duty. But they risk being undercut by less scrupulous competitors. If profit margins are thin, they may also face steady pressures to reduce costs. Enforcement action will likely be necessary both to maintain the legitimacy of employment standards norms that

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underpins the sense of duty to comply, and to deter those lacking this sense of duty from undercutting their competitors.

It is difficult to know the precise extent of such conditions in the Ontario economy. But there are good reasons to think that they are becoming more pervasive. In a growing number of industries with large concentrations of low wage workers lead firms that determine product market conditions have become separated from employment of the workers who provide the goods or services. Those workers are instead employed by firms operating in far more competitive markets that create conditions for non-compliance, a process that Weil's (2014) influential work labels "fissuring". Fissuring results from a wide variety of organizational methods: subcontracting, franchising, third party management, changing workers from employees to self-employment, and triangular employment relationships that change the employer of record. It has been driven by multiple motivations including:

- shifting costs and liabilities
- focusing on core competencies
- creating conditions of competition between those providing non-core services that lowers the cost at which they are supplied (Weil, 2014).

Fissured organizational structures reflect intents to lower costs while preserving sufficient control of conditions of production to ensure that brand standards are met and brand value is protected (Howe, Hardy & Cooney 2014). In some sectors, such as agriculture or garment production, these changes are also fueled by the competitive pressures of globalization. But they are more widespread, and indeed quite commonly found in non-traded sectors. While these shifts in the organization of production have been observed in North America for quite some time (Harrison, 1994), they appear to have grown in recent years. (Weil 2014)

These considerations provide a plausible and likely account of the patterns of compliance and non-compliance observed in the data discussed above. Many, perhaps even most employers probably have little reason not to comply with employment standards, may in fact have positive incentives to comply, or to varying degrees accept

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a normative duty to comply. This accounts for observations suggesting that most employers are in compliance with most standards most of the time. On the other hand, conditions for many employers, perhaps a substantial minority of the employer population, are such that competitive pressures create incentives not to comply, and labour and product market conditions create no countervailing reputational concerns. Bernhardt et al's 2009 US-based study finds that rates of non-compliance are much higher than average in many industries with a fissured structure: home health care; grocery stores; restaurants and hotels, residential construction, building and grounds security, and retail and drug stores (Weil, 2011, at 36). Labour market forces combined with patterns of social exclusion are likely to leave the most economically vulnerable workers in these sectors of the economy. It is not surprising therefore that surveys of low wage workers report high rates of labour standards violations (WAC 2011; Bernhardt et al 2009).

These observations about the interplay of incentives, reputational concerns and normative commitment are to some extent validated by examining the literature on compliance with workplace anti-discrimination law (Banks, Chaykowski & Slotsve 2013).

None of these sources of non-compliance provides a justification for lowering standards or failing to enforce them. In non-traded industries conditions of competition lie within the jurisdiction of provincial authorities. In traded sectors, Ontario's global competitive position need not, and indeed cannot, depend on low labour standards or weak enforcement (Banks). Further, while low standards or weak enforcement may provide a marginal competitive advantage in a few labour-intensive traded sectors, effectively exempting them from employment standards risks undermining the normative legitimacy of the system as a whole, upon which the compliance of many if not most employers depends.

### **2.3 Maintaining compliance and responding effectively to non-compliance**

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The foregoing analysis of the likely extent and causes of compliance and non-compliance with labour standards has a number of broad implications for compliance and enforcement strategy. Specifically, it suggests that separate strategies are needed for each of three broadly defined groups of employers.

First, for many employers an effective compliance strategy simply entails dissemination of clear information on what compliance requires. These employers will probably tend to be those that provide terms and conditions well above minimum standards in order to pursue a competitive strategy based on retaining and rewarding employees with marketable skills and abilities. These employers have few if any incentives not to comply.

For others, compliance may impose moderate cost and administrative burdens. For such employers a sense of normative duty and/or reputational incentives may nonetheless be sufficient to maintain compliance. Compliance and enforcement strategy might therefore:

- enlist the support of respected industry and professional human resource associations;
- use an approach to enforcement that avoids the appearance of unreasonableness that can arise through sanctioning technical violations or stigmatizing unintentional violations;
- conversely, use an approach to enforcement that visibly and firmly deals with deliberate non-compliance so as to provide reminders and reassurance to the community of regulated employers that the government itself takes the rules seriously and is trying to provide a level playing field;
- use an approach to enforcement making use of publicity in cases of deliberate non-compliance in order to provide reassurance and reminders to the compliant members of the community and to provide incentives to those facing moderate incentives not to comply.

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Finally, there is a significant and probably growing group of employers that operate under competitive conditions that place compliance with labour standards under continuous pressure. These pressures will often combine with weakness in reputational incentives to comply. With respect to this group, an effective enforcement strategy will likely require:

- reliable detection of violations;
- predictable imposition of monetary remedies and sanctions with significant deterrent value;
- problem-solving approaches that seek to relieve where possible some of the competitive pressures that lie at the roots of systematic non-compliance.

An effective compliance and enforcement strategy will therefore seek to inform about, strengthen normative commitment to, and detect, deter and where possible address systemic root causes leading to violations of employment standards. Doing this requires a tool kit that combines information dissemination, outreach, persuasion to voluntarily comply, proactive detection of non-compliance, and enforcement of deterrent remedies and sanctions. Deploying these tools effectively to increase compliance requires intelligence gathering and the capacity to evaluate alternative strategies.

The literature does not provide sufficiently detailed information on the regulatory context to enable evidence-based options on specific enforcement priorities or detailed allocation of resources between compliance and enforcement techniques. Factors like industry competitive conditions, the structuring of supply chains, organizational leadership and culture, and the labour market vulnerability of the employer's workforce are likely both to have an important influence on compliance rates and to vary widely across the employer population. The specifics of effective strategy require further information on, and adaptation to, context (Gunningham, Thornton & Kagan 2003; Sparrow).

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On the other hand, a reading of the literature on employment standards in light of more general, empirically grounded theories of effective compliance and enforcement strategy yields some guiding lessons and principles with concrete implications:

1. Information on what compliance requires should be readily available and proactively disseminated to employers and employees.
2. Non-compliance should be detected and targeted proactively and strategically.
3. Voluntary compliance approaches should be preferred in dealing with non-deliberate non-compliance or where an employer is willing to commit to credible and enforceable undertaking to eliminate deliberate non-compliance.
4. Deliberate or persistent non-compliance should face deterrent remedies and sanctions.
5. Enforcement methods should include tools and strategies addressing systemic root causes in sectors where non-compliance is pervasive.
6. Consider enlisting complementary state and non-state regulatory systems.
7. Be prepared to consider increasing resources.

I will consider each in turn.

### ***2.3.1 Information on what compliance requires should be readily available and proactively disseminated to employers and employees***

There is broad consensus in the literature that agencies responsible for compliance and enforcement should make information on what compliance requires readily available, and should actively disseminate it to targeted groups of employers and employees who may need it the most. (See for example FLSRC, 2006, at 196-200).



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Providing this information to employees is a crucial step in ensuring that they have access to the enforcement of their rights. Providing information to employers responds directly to the needs of many. The literature treats this as a cost-effective means of increasing compliance, though it contains no systematic demonstration that this is the case. Nonetheless, there are reasonable grounds to suppose that it is. As discussed above, the motivations of many employers will dispose them to comply if they know what is required of them. Once produced, informational materials can be reproduced and distributed at relatively low cost.

Case study literature also points to the value of partnerships with employer, worker and other organizations in disseminating compliance information, drawing on the access and trust that they enjoy with their constituencies (Hardy, 2011, at 130-1; LCO 2012, at 69).

The literature points to some promising but potentially more costly outreach initiatives that might also be considered:

- *Free Tailored Education:* Australia Fair Work Ombudsman (FWO) has established a National Employer Program that delivers free tailored education to employers with more than 1000 employees to help them understand and apply Australia's employment standards laws. FWO has targeted industries in which illegal unpaid work arrangements are more prevalent, and industries with high levels of procurement in an effort to increase compliance among subcontractors (Vosko et al., 2014, citing FWO 2012 and 2013). FWO also has a National Franchisees Program that works with franchisors aiming to improve the employment standards compliance performance of their franchisees. Participating employers have demonstrated satisfaction with the program. This is a purely voluntary program, as firms derive no legal advantage in the form of reduced inspection. While it has been pointed out that both programs may be targeting resources towards compliance where it is most easily achieved (Vosko, Grundy & Thomas 2014), this may be an efficient means of raising compliance if

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the costs of the program are low. There is no costing of these programs in the literature.

- Saunders and Dutil (2005) endorse the suggestion of Quebec enforcement officials that labour ministries target accountants, who often provide book-keeping services to small firms and therefore are in a good position to ensure their clients' compliance. Ontario officials inform me that in their experience many accountants and bookkeepers are unfamiliar with the requirements of the *ESA*.
- In 2010 the US WHD launched its "We Can Help" initiative attempting to connect the precariously employed with its services via collaboration with a local worker advocacy and interfaith organizations to enhance its presence and improve in-person assistance in complaints processes (Vosko, 2011, at 863).
- *Broadcast messages on single issues.* Saunders and Dutil 2005 also point to a consensus among stakeholders that broadcast messages on single key issues can be an effective way to raise awareness. In Québec such messages appear to have been effective in raising awareness of psychological harassment provisions introduced into the employment standards code. There does not appear to have been any published study of the cost-effectiveness of such initiatives.

As the LCO (2012) notes, the Ministry has a multilingual phone service that handled over 300,000 calls from employees and employers in 2011. The ministry responds to thousands of email inquiries every year and has extensive tools, videos and explanatory materials with many resources available in multiple languages (LCO, 2012, at 54). The Ministry also does direct informational sessions with employers and employees. To the extent that the literature comments on these initiatives they are viewed favourably.

*Option for consideration*

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*Evaluate the potential cost-effectiveness of targeted information outreach programs such as free tailored education programs for employers and community associations, and targeted single-issue broadcasts.*

### **2.3.2 Non-compliance should be detected and targeted proactively and strategically**

For good reasons, the literature is essentially unanimous in concluding that labour standards compliance and enforcement agencies need to proactively and strategically detect and target non-compliance.

As discussed above, the need for proactive detection arises because many workers are unlikely to complain about violations of their employment standards rights during the life of the employment relationship, or at all. Moreover, as Weil points out:

“Although most complaints relate to real problems, there is nothing to say that they represent problems of the highest order if compared to the "dog that doesn't bark" - that is, those workplace problems which may exist but which, for one reason or another, are not reported via complaint processes. ... [C]omplaints are often driven by specific problems facing particular workers. They may or may not be related to more systemic issues. And even if they are, investigations arising from a complaint process may not be perceived as part of a wider systemic problem. This compounds their reactive nature.” (Weil, 2008, at 356).

While allowing class actions in respect of alleged *ESA* violations may provide greater access to some workers, it is unlikely to help workers at smaller employers or many of the most vulnerable members of the workforce.

As a result, relying on complaints or legal actions to detect violations leaves much if not most non-compliance undetected. Without risk of detection, there can be little

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deterrence. To the extent that education and information initiatives are not enough to correct non-compliance, as is likely often the case, it will persist without remedy.

Proactive inspections provide an effective means of detecting and remedying non-compliance. The LCO notes that in 2011-12, Ministry figures show that 83% of such inspections detected violations (LCO 2012, at 56). Vosko, Noack and Tucker (2016, Appendix B, Table 3.1a) find that the proportion of inspections that detected violations ranged from 75% to 77% in the years between 2011/12 and 2013/14, but dropped to 65% in 2014/15. Vosko et al (2011) also point out that 92 to 99 per cent of confirmed unpaid wages were recovered through proactive processes, much higher than the 60% more typical in complaints investigations, though as Ministry officials suggest this difference is likely due in part to a higher proportion of insolvent employers among the population of employers that is the subject of complaints. (Vosko et al 2011; LCO, at 54) Regular enforcement sweeps also provide low risk opportunities for workers to voice their complaints of alleged non-compliance (Vosko, 2012, at 873).

In recent years, the Ministry has undertaken about 2000 proactive inspections per year (Vosko, Noack and Tucker, 2016, at Appendix B, Table 3.1a). The literature, to the extent that it considers the question, is unanimous in recommending that the Ministry place greater emphasis on proactive inspection (see for example LCO, 2012, at 57). The literature does not however evaluate the extent of the increase in proactive inspection that may be required.

The consensus in favour of increased proactive inspection is essentially based on evidence of significant non-compliance (discussed above) and the proposition that proactive inspection is the most effective available means of addressing non-compliance not detected through complaints. This is plausible in light the discussion of alternative complaints mechanisms above, and the discussion of alternative compliance and enforcement mechanisms below. Proactive inspection campaigns can, if properly targeted, achieve “wholesale-level” economies of scale that cannot be matched by “retail” interventions in response to particular complaints. Further, the use of targeted

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campaigns stands to have a deterrent effect as it increases the risk of non-compliance detection.

On the other hand, to the extent that targeted enforcement campaigns reallocate resources from other sectors, employers in those other sectors might engage in more non-compliance because they feel that they have a lower chance of being monitored. In addition, if particular enforcement campaigns are announced in advance, the deterrent value of the overall proactive inspection program is likely to be diminished as advance notice lowers the risk of detection of non-compliance.

While there is no literature assessing the magnitude of such resource diversion effects, in principle there should be a net gain in detected violations if proactive enforcement is accurately targeted to areas of highest non-compliance. Because of this, there should also be a net gain in deterrence, at least if the time and location of the next enforcement campaign cannot be accurately predicted.

Not surprisingly then, the literature is also unanimous in concluding that proactive inspection and enforcement should be strategically targeted. In this respect recent analyses have been guided by Weil's seminal 2010 report to the United States Department of Labor (Weil 2010). Weil argues that enforcement activity should be targeted at particular industrial sectors and geographic locations according to three priorities: (1) concentration of vulnerable workers; (2) likelihood of complaints in relation to extent of non-compliance, i.e. sectors where workers are particularly unlikely to file complaints and in which non-compliance is likely to be relatively high; and (3) likelihood that enforcement and compliance action can change behavior (Weil, 2010, at 75; LCO 2012, at 64; Howe, Hardy & Cooney 2013, at 136). In recent years the US Department of Labor has explicitly targeted industries with higher concentrations of vulnerable workers (Weil, 2011, at 49).

The third of these priorities calls for special attention to two sets of factors. The first is the potential influence of leading firms (such as franchisors, leading brand, or major

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retailers) within fissured networks of employers on the compliance behaviour of subordinate firms, and to how remedies can engage those firms in order to change systemic conditions creating incentives for non-compliance. This is discussed further in section 2.3.5 below. The second is the extent to which targeted proactive inspection campaigns may have ripple effects within industries. As Weil notes:

All investigations are not created equal. Some investigations have very local effects, essentially limited to the worksite being investigated. But other investigations seem to have much stronger ripple effects that go on to affect the behaviour of other establishments controlled by the firm, or, more interestingly, the behaviour of other companies in the same industry or geographic area. (Weil, 2010, at 81)

These three priorities are based essentially on the need to use scarce inspectorate resources efficiently. They accept the premise that even with increased resources it is neither feasible nor desirable to inspect every workplace with regularly. An efficient and effective use of inspection resources requires an analysis of where risks of non-compliance are greatest, where alternative means to secure compliance and redress such as complaints or legal actions are least likely to be used, and where remedies are likely to have the greatest sustainable impact in improving compliance.

Targeted programmed investigation programs need to be maintained over time. They will likely not have sustained effects if they are seen as one-time events rather than part of an ongoing initiative (Weil, 2008, at 365).

Given scarce inspection resources, these priorities should guide the targeting not only of inspections undertaken at the Ministry's initiative, but also of random audit programs and of extended inspections following up on individual complaints revealing violations.

A strategic approach to targeting enforcement resources requires evidence-based assessment of risks of non-compliance across the regulated economy, and of outcomes of regulatory interventions (Sparrow; Baldwin & Black, 2008, at 65). Each in turn

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requires data on likelihoods of non-compliance, seriousness of non-compliance and the number of workers affected.

Further, as Weil notes, to pursue strategies that focus at the top of industry structures, on the companies that affect how markets operate and many of the incentives that ultimately affect compliance, inspectorates need to have a clear “map” of how priority industries operate and how that affects employer behaviour. (Weil, 2010, at 78-79) Strategic enforcement also requires information that enables the inspectorate to take into account the likely ripple effects of investigations. As Weil points out, these ripple effects will not only depend on the characteristics of the particular industry or geographical area, but will also be conditional on the relationship between the state inspectorate and key non-state actors. Lead firms, unions, employer associations and other influential community groups can all be critical for magnifying the necessary ‘ripple effects’ of investigations and prosecutions. (Weil, 2010, at 76-82)

One key challenge to implementing such approaches is to obtain good information on risk factors and industry operations, particularly with respect to new and emerging risks that may require new information collection strategies.

Good practices and proposals to address data needs include the following:

- *Regularly collecting and analyzing statistical survey data on compliance.* Statistics Canada surveys do not ask questions that allow observation or inferences about employment standards compliance. Other options are available however, and may offer advantages in terms of collecting data from vulnerable workers. These include collecting data in the course of random audit investigations (Weil, 2010, at 89; Vosko, 2011, at 873), or undertaking or commissioning surveys following the Berhardt et al 2009 model or the Vosko et al 2014 model. It should be sufficiently detailed that trends within four digit NAICS industry codes can be analyzed. It should include information on

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employer size and worker characteristics, particularly those associated with labour market vulnerability. (Howe, Hardy & Cooney, 2013, at 136)

- *Analyze complaint data to further focus enforcement within high-risk areas identified on the basis of survey data.* Once high-risk sectors have been identified, proactive inspection data can provide further information levels of non-compliance within those sectors. The ratio of complaints to non-compliance can provide information on the propensity of workers to file complaints within such sectors. Once statistical data is available to identify and control for variables associated with different rates of compliance, examining complaint rates per worker within occupational categories may yield further insights into patterns of compliance or non-compliance (Weil, 2010, at 85). Officials may also be able to use complaint data in this way to identify higher than average rates of validated complaint, and presence of vulnerable workers. (Howe, Hardy & Cooney, 2013, at 136) Statistical information should be collected at regular intervals so that trends over time can be analyzed.
  
- *Supplement statistical analysis with intelligence from other sources.* Information from individual workers, anonymous sources, unions, community organizations and employer associations can of course provide valuable insights into particular employers that are likely to be non-compliant, how fissured industries are organized, and the extent to which lead firms and employer associations might be engaged to alter systemic conditions fostering non-compliance. Specifically, good practices include:
  - *Dialogue with employer and worker organizations.* Private organizations can play an important role in informing the development of public compliance and enforcement strategy. Weil recommends to the US Department of Labor that it regularly convene worker advocate dialogues to discuss observed patterns of non-compliance, enforcement priorities, and upcoming and



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ongoing targeted enforcement initiatives (Weil, 2010, at 87). In Australia, the FWO regularly consults with employer and union organizations with respect to targeting of enforcement campaigns. The organizations provide a key source of information on how industry operates and how to approach compliance and enforcement for maximum effect (Hardy & Howe, 2009, at 129). Hardy also reports that FWO also increasingly uses migrant resource networks, ethnic business groups and community legal centres for whistle-blowing (Hardy, 2011, at 131). Vosko suggests that the Employment Standards Program Advisory Committee might provide a potential means for communicating with worker advocacy groups about improving employment standards enforcement (Vosko 2011). The same might be true with respect to employer organizations.

- *Inviting anonymous information and providing protection against reprisal to anonymous sources of information, subject to appropriate safeguards against frivolous or vexatious accusations.*
- *Investigations should collect data about industry structures and practices: including common employers, management structures, franchising and ownership structures, and how decisions are made about personnel policies (Weil, 2010, at 88-9).*
- *Treat evidence of deliberate non-compliance uncovered in the course of complaint investigation as prima facie warranting extension of the investigation, subject to any overriding priorities established within a strategic approach to targeting inspections.*

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- *Develop the capacity to link quickly to other sources of government data that may indicate a propensity towards non-compliance or evasion, such as data on occupational safety and health law violations, or on compliance with tax laws with respect to the classification of employees and independent contractors. (Weil 2010)*

The Ministry has a targeted, proactive enforcement strategy that relies on a risk-based analysis and a range of data sources, including complaint / event data and consultations with stakeholders. An assessment of that strategy and its implementation lies beyond the scope of this report. The following options may provide good practice benchmarks for such an assessment.

### *Options for consideration:*

- *Evaluate the extent of increased proactive inspection required to significantly improve compliance, and expand proactive inspection activity accordingly.*
- *Strategically target for enforcement and compliance activity sectors, jobs and geographic locations according to four priorities: (1) concentration of vulnerable workers, (2) low likelihood of complaints, (3) relatively high rates of non-compliance, and (4) likelihood that enforcement and compliance action can change behavior.*
- *Regularly collect and analyze statistical survey data on compliance to determine the likely extent of non-compliance and concentrations of vulnerable workers in various sectors of the economy.*
- *Convene regular dialogue with worker, community and employer representatives with respect to how and where to target proactive compliance and enforcement initiatives.*
- *Analyze incoming and processed complaints for data that may help to focus proactive compliance and enforcement initiatives within priority areas identified on the basis of survey data.*

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- *Treat evidence of deliberate non-compliance uncovered in the course of complaint investigation as prima facie warranting extension of the investigation, subject to any overriding priorities established within a strategic approach to targeting inspections.*
- *Collect data during investigations about industry structures including such matters as common employers, management structures, franchising and ownership structures, and how decisions are made about personnel policies.*
- *Develop the capacity to link quickly to other sources of government data that may indicate a propensity towards non-compliance.*
- *Ensure that the time and location of particular enforcement campaigns are not known in advance to employers.*

### **2.3.3 Voluntary compliance approaches should be preferred in dealing with non-deliberate non-compliance or where an employer is willing to commit to credible and enforceable undertaking to eliminate deliberate non-compliance**

The influential model of “Responsive Regulation”, originating in Ayres and Braithwaite’s (1992) book of the same name endorses the use of a compliance and enforcement pyramid at the base of which most cases of non-compliance are handled through persuasion to comply voluntarily and sanctions are increased with the seriousness of the contravention or the recidivism of the regulated actor (Ayres & Braithwaite). Responsive regulation can be described as “tit for tat” approach whereby regulators enforce in the first instance by compliance strategies, such as persuasion and education, but apply more punitive deterrent responses (escalating up a pyramid of such responses) when the firm fails to behave as required by law (Baldwin & Black, 2008, at 62).

This approach can be efficient because it reserves more costly punitive actions for cases in which less costly compliance approaches have proven ineffective. It can enhance effectiveness by enlisting, sometimes under the implicit threat of sanction, the cooperation of regulated enterprises through less adversarial interactions. In employment standards regulation a willingness to take a less adversarial stance may

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also enhance the perception of the legitimacy of employment standards within the population of employers who are contingently disposed to comply with them already, as discussed above.

The regulatory pyramid model is widely applied around the world. It has however been subject to a number of criticisms. Among these the most relevant for present purposes are the following.

First, it can be wasteful to operate a tit for tat escalating approach across the board. Where corporate behaviour is driven not by regulatory interventions but by more pressing competitive pressures and a culture of non-compliance prevailing in a sector or industry, compliance strategies are likely to prove ineffective (Baldwin & Black, 2008 at 63). This, for reasons discussed above, is likely to be the case in many cases of non-compliance with employment standards.

Second, regulator influence based on the ability to move up and down the pyramid is less when there are relatively few interactions between regulators and enterprises (Gunningham & Johnstone, 2012, at 123-129). This will often be the case for the great many small enterprises dealing with Ministry inspectors.

Third, because it focuses on the relationship between the regulator and the regulated enterprise, the responsive regulation pyramid has little to say about addressing problems that arise out of industry conditions out of the control of the enterprise itself.

Each of these limitations is of particular concern in cases of deliberate non-compliance. The analysis of employer motivations in section 2.2.2 suggests that where non-compliance is not inadvertent it is likely due to economic incentives not being countered by either a sufficient level of normative commitment, or by a sufficient risk of adverse economic or reputational consequences. A voluntary compliance approach will of course lower the perceived risk of such consequences.

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The effectiveness of a compliance strategy in cases of deliberate non-compliance thus depends entirely on two premises: (1) that dealings with the inspector will strengthen the normative commitment of the employer through reminder and assurance effects; and/or that (2) the threat of sanctions in the case of repeat offense will overcome the incentives that led to non-compliance in the first place. It is worth thinking through the logic of each of these propositions.

A firm might increase its normative commitment enough to reverse deliberate economic decision-making where its economic incentives towards non-compliance are weak and its normative commitment is susceptible to renewal. This might happen in the case of a “contingent good apple” that perceived that the state and other firms were not behaving as though employment standards embody important community values. The inspection and voluntary compliance process might alter that perception, serving as both reminder of the value of employment standards and an assurance that others will be required to comply as well. In addition, or in the alternative, the inspection might cause more senior firm leadership with greater commitment to employment standards norms to over-ride the decision of lower level managers.

The first thing to note however is that the evidence on patterns of non-compliance discussed above suggests that the normative influence of employment standards law is insufficient to overcome the incentives generated by highly competitive industry conditions in which economic pressures towards non-compliance are pervasive.

Secondly, a regularized failure to impose any sanction for deliberately violating employment standards may work at cross purposes to such reminder and assurance effects, because it implicitly undermines the message that such standards are in fact important social norms. The imposition of notable yet reasonable sanctions or remedial awards in such instances may be much more effective in reinforcing normative commitment than systematically allowing deliberate violators a second chance before they are required to pay anything beyond what they were legally required to pay to their employees in the first place.

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There are, in short, good reasons to doubt the efficacy of systematically relying on voluntary compliance approaches to strengthen normative commitment in cases of deliberate non-compliance with employment standards.

The efficacy of a threat of economic or reputational sanctions in the event of a repeat violation to deter the first violation depends of course upon the likelihood that the repeat offense will be discovered, the likelihood that sanctions will be imposed the next time, and the costs associated with those sanctions. Given the limitations of complaint-driven enforcement and on the number of proactive inspections, the perceived likelihood of detection will be low unless deliberate violators are targeted for repeat inspections. The perceived risk and potential sanctions will also be low unless there is a policy of consistently sanctioning repeat violators. The perceived average cost of sanctions will be lowered by the fact that the first case of deliberate non-compliance was sanction-free, and therefore the value of subsequent sanctions would have to be correspondingly increased.

These considerations suggest that the incentives leading to deliberate non-compliance may be best countered through a policy default of applying notable yet reasonable economic or reputational sanctions even in the first instance. On the other hand, there are costs associated with more widespread deployment of deterrent sanctions in first instances of deliberate non-compliance. Unfortunately there are no studies that compare the cost effectiveness of using voluntary compliance as a default in the first instance and strong deterrence of repeat violation with the cost effectiveness of applying deterrent measures to all first instances of deliberate non-compliance.

Vosko, Noack and Tucker (2014, at Chapter 4) describe the Ministry's compliance and enforcement tools. The data available to them indicate that in the vast majority of cases ESOs do not impose any sort of economic sanction above the greater of \$100 or a 10% surcharge on amounts found to be owing. This is despite policy direction to consider sanctions where an ESO believes a contravention to be deliberate, raising the question

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how often ESOs consider whether the contravention is in fact deliberate. While admittedly imprecise, the evidence and analysis of the extent of non-compliance set out above raise genuine doubts as to whether deliberate non-compliance with employment standards is in fact as infrequent as the imposition of monetary sanctions would suggest, and indicate that it would be worth considering increased use of deterrent sanctions in cases of deliberate non-compliance. At a minimum, it may be advisable to regularly investigate in the course of inspections whether non-compliance is intentional. It may also be appropriate to issue policy direction to apply sanctions in cases of deliberate non-compliance unless exceptional circumstances justify doing otherwise. The resource implications of such directions would need of course to be considered.

Where sanctions are imposed, Ministry policy apparently favours the imposition of tickets over Notices of Contravention, which carry potentially greater monetary consequences. The ticket penalty for a first contravention (other than of provisions dealing with posters and records) is \$250 multiplied by the number of employees affected. It is possible that the cost to the employer of paying compensation plus a ticket, when that cost is weighted by the risk of detection, will often be less than the money saved through non-compliance. If so, while tickets may serve a reminder function in dealing with employers disposed to voluntarily comply, it is difficult to see how they could deter employers who are not so disposed because of such cost considerations. The evidence reviewed above suggests the likelihood that many if not most instances of deliberate non-compliance will result from an employer facing incentives that dispose it not to comply.

Finally, it appears that prosecutions are mostly launched in response to refusals to comply with Ministry orders, rather than to sanction deliberate non-compliance with the Act per se. While this serves a valuable deterrent function, it is not the same as deterring egregious initial violations of the Act.

*Options for consideration*

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- *Provide clear policy direction that deterrent sanctions and remedies should normally be imposed where an inspector believes that non-compliance is deliberate.*
- *Increase the value and frequency of sanctions and remedies to deter repeat violations.*
- *Regularly investigate in the course of inspections whether non-compliance is intentional.*
- *Increase the willingness to prosecute egregious violations of the Act, including but not limited to refusals to comply with Ministry orders, and publicly communicate that willingness.*

The specifics of potential deterrent sanctions and remedies are considered in section 2.3.4 below.

Enforceable undertakings (described immediately below) may provide an alternative to directly imposing sanctions. Such undertakings can combine the virtues of a voluntary compliance approach -- avoiding the potential costs of legal proceedings associated with sanctions, and opportunities to enlist employer cooperation – with the leverage provided by the potential imposition of sanctions.

Australia's FWO makes use of enforceable undertakings as a compliance tool. An enforceable undertaking is a statutory agreement between a regulator and an alleged wrongdoer which sets out a number of promises or commitments intended to rectify past contraventions and encourage future compliance. Failure to meet these commitments can lead directly to the enforcement of the undertaking in court (Howe & Hardy 2013). Howe and Hardy examine the experience with enforceable undertakings in Australia and conclude that they have provided a valuable tool to Australian regulators. They sum up the advantages of enforceable undertakings as follows:

[E]nforceable undertakings also have the potential to secure employer commitment to, and capacity for, ongoing and sustained compliance. Both the



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process of negotiation and the content of enforceable undertakings should help to institutionalise positive compliance behaviour. Discussing and then giving an enforceable undertaking allows a business to 'take ownership of the regulatory solution presented.' Indeed, enforceable undertakings can be particularly effective in instances where a financial penalty imposed as a result of litigation or prosecution might be absorbed by a company without necessitating or initiating more widespread cultural change.” (Howe & Hardy, 2013, at 5)

“Enforceable undertakings are also seen to represent a tailored enforcement response to the contours of each specific case and can be varied to take into account individual circumstances of the contravention and the compliance motivations of the firm, industry structures and company size and resources. In this sense, enforceable undertakings can be understood as an important part of 'responsive regulation'.” (Howe & Hardy, 2013, at 6) (footnote omitted).

“In sum, enforceable undertakings offer a number of distinct advantages over prosecution: they are generally quicker, less costly and more certain. Further, these benefits do not necessarily come at the expense of deterrent, rehabilitative or restorative outcomes.” (Howe & Hardy, 2013, at 7).

### *Option for consideration*

- *Enable the use of enforceable undertakings as an alternative or complementary means of responding to deliberate non-compliance.*

### **2.3.4 Deliberate or persistent non-compliance should face deterrent remedies and sanctions.**

Most analysts of employment standards enforcement in Ontario, and elsewhere in the common law world, share the doubts of this report that the motivations of employers that deliberately fail to comply with employment standards can generally be changed solely through a combination of voluntary compliance initiatives and remedies that

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compensate employees only for the losses that result directly from non-compliance with employment standards.

Analyses of enforcement in Ontario have tended to support more frequent use and increasing the value of deterrent remedies and sanctions, particularly for deliberate non-compliance that falls short of the standard of seriousness that would warrant prosecution (see for example LCO, 2012, at 64-65; Saunders & Dutil 2005; Vosko et al 2011; WAC, 2015, at 40-2). The LCO, for example, recommends policy direction to ESOs to use deterrent sanctions (notices of contravention and prosecutions in appropriate cases), most particularly for repeat violators and those who fail to comply with payment orders. It also recommends amending the Act to permit orders to cover costs of investigations and inspections in appropriate cases (LCO, at 64). The Federal Labour Standards Review Commission similarly recommended that federal inspectors be given a graduated range of remedial powers that they did not have, including:

- the right to order compensation for advocacy and other costs incurred by employees in seeking redress;
- the power to issue cease-and-desist orders;
- the power to order employers to pay the ministry's cost of investigation and hearings, according to a fixed tariff; and
- the power to levy fines of fixed but significant amounts for first offenses, escalating for second and subsequent offenses (FLSRC, 2006, at 222-4).

For more serious or repeated offenses, analysts have also tended to recommend increased but still sparing use of prosecution, both against corporate employers and against managers, directors or proprietors (FLSRC, 2006, at 221; Weil, 2010, at 82). The Federal Labour Standards Review Commission also recommended the creation of civil unfair labour practice proceedings through which the director of employment standards enforcement could seek pre-emptive remedies from the Canadian Industrial Relations Board, such as requirements to file periodic reports, to post bonds available to

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reimburse employees in the event of future violations and to be subject to regular audits at their own expense (FLSRC, 2006, at 219-220, 224-5).

Analysts and advocates point to a number of examples remedies available in other jurisdictions that may impose deterrent economic or reputational costs (National Employment Law Project, 2013, at 17-20):

- New York state's Wage Theft Prevention Act authorizes the state's Department of Labor to post notices visible to the public for 90 days, and to order payment of damages above lost wages of up to 100% of the wage order.
- A number of U.S. states allow for treble damages in wage claims through private action or department of labor enforcement.
- California's Employee Misclassification Act provides for substantial fines for employers found guilty of willful misclassification and for requirements to post a notice of violation in a prominent place or on the employer's website.
- In Australia, enforceable undertakings may be accompanied by a requirement to publish a notice acknowledging contraventions and the remedial actions to take place.

Public notice and other reputational sanctions stand to play an important role in deterring non-compliance. As Weil observes, given a low probability of investigation even significantly increased penalties or damages are unlikely to be sufficient on their own to deter non-compliance in the face of strong incentives to not comply (Weil, 2010, 78). The potential effectiveness of measures such as public posting requirements is indicated by research showing that brand management and related concerns for reputational loss are major drivers of compliance (Weil 2010; Purse & Dorrian 2011).

*Options for consideration in cases of deliberate or repeat non-compliance:*

- *Increased use of Notices of Contravention*
- *Increased monetary penalties under Notices of Contravention or Tickets*

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- *Double or treble damage awards*
- *Compensation for Ministry costs associated with enforcement*
- *Increased and more visible public posting (physical and electronic) of plain language notices of violation of the Act and remedies imposed*
- *Increased use of prosecution in egregious cases.*

### ***2.3.5 Compliance and enforcement options should include tools and strategies to identify and address systemic root causes in sectors where non-compliance is pervasive***

The sustainability of compliance requires employer institutionalization of positive compliance behaviours and approaches. This will often require that remedies aim for 'systemic effects', particularly in fissured industries. As Weil observes:

Increasingly complex workplace settings require inspectorates to consider how to achieve geographic, industrial and/or product-market effects. Employer practices in the workplace are an outgrowth of broader organizational policies and practices, often driven (implicitly or explicitly) by competitive strategies or forces. Bringing an understanding of the impact of these larger factors into the regulatory scheme potentially allows enforcement to have systemic rather than local effects.

This requires that inspectorate activities move beyond focusing on changing compliance motivations at the workplace level, to altering system-wide incentives for compliance (Weil, 2010, at 60-9; Howe, Hardy & Cooney 2013, at 106-9).

Weil (2010) points out that addressing non-compliance within fissured networks of firms may require attention to the role of lead firms in setting terms of product market competition and their potential role in altering those terms. For example, to determine whether there are systemic pressures for non-compliance within such networks, investigations into eating and drinking establishments should focus on other establishments owned by the same franchisee, and consider whether there is a pattern

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of non-compliance within the brand (Weil, 2010, at 78) . If such pressures exist, enlisting top-level businesses may be crucial to improving compliance, drawing on their capacity to monitor and regulate conditions of production within the networks of enterprises that they lead. This strategy has the support of the LCO (2012, at 69).

However, without reforms to the legal rules of responsibility for terms and conditions of employment such firms may not have any legal obligation or liability for employment standards violations in lower level firms. The lead firms generally will not be the employer of record for the purposes of employment standards legislation. They therefore may have no interest in participating in such agreements. In fact, they may have positive incentives not to get involved in such matters, in order to avoid liability.

Nonetheless, lead firms sometimes do have incentives to participate in negotiated agreements to change systemic pressures on labour standards. These incentives can arise out of a desire to protect their brand from damage to reputation that flow from labour standards violations of suppliers, franchisees, or agencies supplying workers upon whom they rely. Lead firms may also have incentives to reduce the potential liability of franchisees in order to protect the value of franchises.

A sustainable compliance strategy might therefore seek to mobilize such incentives. Weil argues that regulatory agencies could potentially make use of information disclosure as a way to promote compliance: "...reputation can be a source of regulatory jujitsu—even without recourse to legal strategies. Workplace regulatory agencies could map relations—whether subcontracting, third-party management, or franchising—of the entities they inspected routinely to the entities that had an overarching role in their activities and report on violations and investigations to that controlling entity. And these agencies could also provide information on their activities via the Web as a matter of course, irrespective of other enforcement activities" (Weil, 2014, at 235).

Civil litigation and investigation campaigns have in fact lead to settlements that change the way that lead firms do business with suppliers or franchisees, and include

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monitoring and disclosure provisions that have sustainable impacts on employment standards compliance (Weil, 2010, at 83). Agreements can require changes to payroll procedures, training of managers, franchisees and contractors, and ongoing site review by a corporate manager within the lead firm (Weil, 2010, at 88). Such agreements can also have ripple effects within an industry, facilitating diffusion of successful compliance practices among other industry members through emulation or industry associations (Weil, 2010 at 88). Top brands in fast food, for example, seem sensitive to investigations of other top brands, and independent restaurateurs are sensitive to investigations of other independents (Weil, 2010, at 78-9). This sensitivity may cause lead firms to change practices to preempt the risks associated with enforcement proceedings against subordinate firms.

Weil also notes that such problem solving approaches can also be pursued even outside fissured networks of firms, to regulate working conditions within some industries dominated by small firms facing vigorous product market competition. He points to a case in which the Korean American Association of Greater New York entered into an agreement in relation to working conditions within greengrocers in New York City, many of whom were members of the Association. The agreement created a code of conduct, monitoring, and training of employers. This proved effective for the duration of the agreement (Weil, 2010, at 77).

In the United States section 15(a) of the Fair Labor Standards Act permits Department of Labor inspectors to embargo goods made in violation of the Act. This provision has been used by the Wage and Hours Division (WHD) to influence working conditions within garment supply chains. Sewing firms often face intense competitive pressures on labour costs and working hours. On the other hand, leading retailers at the top of supply chains use lean “just-in-time” retailing practices with little inventory. As a result they are responsive to risks that goods produced within their supply chain may be embargoed. Studies have shown that the US Wage and Hours Division had been able to use “hot cargo” provisions as leverage to get monitoring agreements with suppliers than have improvement compliance in a sustained manner. On the other hand, once

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the Department stopped using these provisions (due to a change of elected administration) compliance deteriorated to previous levels (Weil, 2014, at 227). Hot cargo provisions have also been used in the agricultural sector in the United States. (Leonard 2000 cited in Weil 2010) Based on these experiences a number of Canadian writers have advocated their use in Canada (Vosko 2011). The literature contains no full evaluation of their potential benefits and risks.

### *Options to consider*

- *As part of a strategic approach to targeted, proactive enforcement, seek agreements with lead firms in networked industries to address underlying conditions driving pressure for non-compliance.*
- *Consider the potential benefits and risks of giving the Director the capacity to embargo the shipment of goods produced in contravention of the Act.*
- *Assess the legal bases of responsibility for working conditions within supply chains and other networks of employers.*

### **2.3.6 Consider enlisting complementary state and non-state actors and regulatory systems**

The Smart Regulation approach (Gunningham & Grabosky 1998) builds upon the Responsive Regulation model discussed above by, among other things, recommending that policy makers consider whether broader regulatory influences and institutions might complement particular public regulatory compliance and enforcement systems (Howe, Hardy & Cooney, 2014, at 61). Such influences and institutions might include the internal rules and governance structures of private associations and firms, market pressures, and other public systems of regulation.

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I have discussed above how private rights of action can complement public enforcement, and how private parties can assist in the development and implementation of public compliance and enforcement strategies. Here I consider three further proposals found in the literature: publicly monitored private self-regulation; targeted mandatory transparency; and enlisting other public regulatory systems.

### ***2.3.6.1 Monitored self-regulation***

The monitored self-regulation model builds on initiatives by private enterprises to visibly and credibly respond to the risk of labour standards violations within their own operations or within their supply chains by implementing private codes of conduct. Such initiatives are often adopted to manage risks of damage to firm or brand reputation that can result in loss of market share and firm value. Codes have been most prominently used to address working conditions within the transnational supply chains of major clothing and footwear brands that rely on their image, though some have been adopted in response to pressure over working conditions within home operations in industrialized countries. Over the years, as a result of worker rights group pressure, the standard for what constitutes a credible transnational code of conduct system has evolved to the point where the most advanced codes now include: (1) precisely articulated standards; (2) a commitment to code implementation from top corporate leadership; (3) management systems holding relevant decision makers accountable for honouring labour standards commitments; (4) third-party monitoring; (5) disclosure of monitoring reports; and (6) worker information, involvement and complaint systems. (Banks & Shilton 2012)

The monitored self-regulation model would seek to extend and reinforce such self-regulatory initiatives, essentially by lending them credibility in return for public accountability and disclosure. Companies would sign an agreement to comply with a code (which could include requirements to respect statutory employment standards) and to permit an external monitoring process. Monitoring would be carried out by independent monitors accountable to public regulators. Communication between



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workers and monitors would be protected by anti-reprisal laws (Estlund 2005). The role of public authorities thus shifts from direct enforcement to ensuring compliance with the code implementation agreement.

Such arrangements have already been implemented in response to lawsuits and regulatory enforcement action, as discussed above in section 2.3.5. As Hardy notes, such self-monitoring arrangements tend to be adopted in response to regulatory crisis that can trigger or reinforce social motivations to comply (2011, at 130).

Proposals to foster employer self-regulation see potential to reach beyond crisis management, leveraging proactive employer efforts to build or protect a reputation as a good employer. There are case studies suggesting such potential (Estlund 2005). For example, in Australia the FWO enrolled MacDonald's through a "proactive compliance deed" in systematic pay packet audits of franchisees. This brought to bear private monitoring resources and influence to comply. FWO in turn publicly stated that the arrangement would serve as a model for enterprises that want to be known as a great place to work. The success of initiative appears to have been enhanced by FWO use of media to reach consumers and prospective employees (Hardy, 2011, at 129-30).

Such initiatives offer potential benefits to public regulators. If they are carried out in good faith, the extent of monitoring and disclosure of working conditions is increased and the cost of this is born by private parties. If they are actively supported by corporate leadership they stand to institutionalize positive compliance behaviours.

They also entail certain risks and costs. Compliance with self-monitoring needs to be tracked by reviewing monitoring reports, interviewing monitors, and so on. If self-regulation agreements result in less direct enforcement the Ministry will face a risk that it will appear to have "gone soft" on the employer in question in the event that the arrangement fails. The Ministry would also need to manage the risk that it may lose credibility if it endorses an arrangement or employer that fails to deliver compliance.

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Assessing these benefits and risks requires an analysis of the likelihood that such self-regulation can influence employer behaviour so as to maintain or improve employment standards compliance. Some insights can be gained from the extensive literature on private transnational codes of conduct. Such codes often contain provisions requiring businesses to comply, among other things, with local employment standards laws.

While many codes are not supported by credible incentive or monitoring systems, multi-stakeholder codes generally require independent verification of and disclosure of supply chain working conditions. This provides incentives to comply not only through the threat of withdrawal of the visible credibility acquired through membership in the association certifying code compliance, but also through the risk of a well-informed consumer boycott.

Two important lessons emerge from this literature. First, while there are relatively few studies of the effectiveness of such codes in bringing about change on the ground, what studies do exist suggest that the compliance pressures brought to bear by independent monitoring and transparency cannot overcome the market pressures on wages and hours of work operating within supply chains where lead firms do not address the root cause of non-compliance. (Locke) The Ministry should therefore only participate in such arrangements if it has sufficient information to understand the systemic drivers of non-compliance within the firm or industry in question, and if the firm or firms with the power to alter such conditions is or are willing to do so.

Second, the diffusion of most advanced codes remains limited to firms with high sensitivity to brand damage. Given the monitoring and disclosure requirements for effective self-regulation one should not expect widespread uptake outside of firms whose brand image or business model depends on maintaining a reputation as a good employer.

Subject to these caveats and limitations, the monitored self-regulation model does seem to offer a means to efficiently incentivize compliance by leveraging the reputational concerns of leading employers.

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*Option to consider*

*Proactively pursue monitored self-regulation arrangements with leading employers in situations where the Ministry has sufficient information to understand the systemic drivers of non-compliance within the firm or industry in question, and if the firm or firms with the power to alter such conditions is or are willing to do so.*

### **2.3.6.2 Targeted Transparency**

Targeted transparency - the mandatory disclosure of standardized information about firm performance to serve a regulatory purpose – has become widespread in a number of regulatory fields (Fung, Graham & Weil 2007). It has traditionally played less of a role in employment regulation. Estlund argues that by supplying standardized information about working conditions disclosure could, among other things, help to improve compliance with employment legislation. It would do this by influencing workers' choice of employer, and consumer choice of product and service providers. (2011, at 355).

In the case of employment standards, the first issue to consider is whether any information about working conditions that is both important enough to influence such decisions and not already disclosed as a result of Ministry enforcement can be presented in a standardized and accessible form.

There are reasons to doubt this. What matters with respect to employment standards compliance is generally not what is contained in an employee's employment contract, which may be silent on matters such as hours of work and payment for overtime. Rather, what matters is the employer's actual practice. That practice may be highly variable. Moreover, given the number of exceptions to key standards, such as hours of work rules, it is far from clear that information about compliance with those rules could be presented in a standardized and accessible format.

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Concrete proposals for mandatory disclosure in employment tend to focus instead on such matters as non-competition clauses, workplace privacy policies and the like, for which the relevant point of comparison is the practice of other firms rather than what is required by statute. Targeted transparency may be a valuable tool to enhance market pressures for good working conditions, and may for that reason be worth considering as a type of new employment standard. It is difficult to see however that it is likely to play a prominent role in increasing compliance with statutory employment standards.

### ***2.3.6.3 Enrolling Other Public Regulators and Programs***

The Ministry might consider the potential of joint initiatives with other government departments, and of conditionality within procurement and licensing programs.

#### ***2.3.6.3.1 Joint task forces***

There are few examples of joint task forces in the literature. New York State's Joint Task Force on Employee Misclassification is a joint initiative of the labour department, the Department of Finance, and workers compensation authorities. Its proactive enforcement sweeps have uncovered 50,000 misclassified employees and over \$704 million in unreported wages between 2007 and 2010 (Vosko et al 2011, at 68).

As noted above, non-compliance with other labour and employment laws may indicate a propensity towards non-compliance with employment standards. (Weil 2010) The Ministry might therefore also consider implementing comprehensive audits of employment legislation compliance, in cooperation with other Ministry compliance and enforcement branches, to enhance both the deterrent value and the effectiveness of proactive inspections. Weil recommended such an approach to the US Department of Labor. (Weil, 2010, at 91)

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### ***2.3.6.3.2 Public procurement and licensing***

A number of sources, including the Federal Labour Standards Review Commission suggest that in cases of serious non-compliance eligibility for government contracts, grants, tax benefits or licenses could be revoked in cases of deliberate or persistent non-compliance (FLSRC, 2006, at 244; WAC, 2015, at 40-2). The logic of such measures would be both to enhance incentives for compliance and to reinforce the normative legitimacy of employment standards. There are a number of examples, all in the field of public procurement:

- Ireland's Public Sector Procurement Policy calls for adhering to employment standards and statutory norms while also ensuring competitive tendering and value for money.
- The Sweatfree Purchasing Consortium is a group of state and local governments that help other such governments and school districts, often in conjunction with union organizations to develop and implement procurement policies based on fundamental internationally recognized labour principles and rights.
- Closer to home, the Good Jobs for All Coalition convinced Toronto City Council to review all cleaning contracts to prevent engagement of firms that have violated the Employment Standards Act.

The rationale for conditionality in public procurement is relatively straightforward. It is consistent with the notion that employment standards are important publicly endorsed norms. The cost competitiveness of bids should not be influenced by persistent non-compliance, and it is inconsistent with the public policy reflected in the Employment Standards Act for the government to reward persistent violators of that policy with its business.

On the other hand, licensing systems bring to bear a range of other policy considerations such as the need to make available or limit the supply of goods and services to the public, the professional qualification and competency of service

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providers, and so on. The suitability of conditioning licenses on employment standards has not been systematically evaluated anywhere in the literature, which therefore offers no guidance on how to reconcile potentially competing policy concerns.

### *Options to consider*

- *Consider the feasibility, risks and benefits of conditioning access to government procurement on an enterprise's not having a record of repeated and deliberate non-compliance within a period of recent years.*
- *Consider the potential for strategic alliances with other Ministry compliance and enforcement branches and with other government departments and agencies to conduct targeted or comprehensive compliance audits. One issue that might be addressed in this manner is the problem of employee misclassification.*

### **2.3.7 Be prepared to consider increasing resources**

The simultaneous pursuit of fair and accessible complaints resolution on the one hand and effective compliance and enforcement on the other may present difficult choices. Certainly, it is possible that enhancing compliance with the law will reduce the demand for claims resolution. If compliance becomes more widespread the likelihood of violations to complain about will be diminished. But it is also possible that complaints will increase as workers - made more aware of their rights through more effective compliance promotion and enforcement action - more often perceive and pursue resolution of claims of rights violation. Scarce enforcement and compliance resources may therefore create trade-offs at the expense of one aspect of the rule of law or the other. If those trade-offs are not acceptable, then additional resources may need to be found. It is noteworthy that both the Federal Labour Standards Review Commission and the Law Commission of Ontario recommended increasing the resources available for proactive compliance and enforcement.

### *Option to consider*

## **Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness**

*Consider the potential need for additional resources to support enhanced proactive compliance and enforcement programs.*

### **3. Conclusion – A Summary of Options for Further Consideration**

Below I have grouped options for further consideration thematically. The first set of options addresses improving access to complaint resolution, while the second set focuses on effective compliance and enforcement systems. Access to complaint resolution is intrinsically important as a means of access to justice. On the other hand, the growth of the vulnerable workforce and the fissuring of many industries and workplaces pose very significant and likely insuperable challenges to any approach to compliance and enforcement that is primarily complaint-driven. The literature suggests that attending to these changes in Ontario workplaces will require a renewed focus on (1) strategically targeted and proactive inspection; (2) deterrence of deliberate or recurrent non-compliance; and (3) strategies for networked industries aimed at root causes of non-compliance.

#### **3.1 - Improving Access to Complaint Resolution**

##### ***3.1.1 Reducing the Risks of and Remediating Reprisal***

*Clearly communicate to workers that the Ministry will not require them to first contact their employer regarding a complaint before investigating it if they are afraid to do so.*

*Ensure that the Act's anti-reprisal provisions are clearly communicated to workers and employers.*

*Ensure that reprisals are subject to sufficiently deterrent sanctions.*

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*Make interim reinstatement available through expedited processes where there is a strong prima facie case of reprisal contrary to the Act.*

*Ensure that expeditious procedures are available to address cases of alleged reprisal against temporary foreign workers, and to address their claims of other violations of the Act prior to their potential repatriation under the terms of their work permits.*

### **3.1.2 Enabling Fuller Recovery of Costs Associated with Pursuing a Claim**

*Enable workers to recover, where a claim is upheld, costs associated with gathering information to file the claim and with attending fact-finding meetings, perhaps on the basis of a fixed tariff.*

*Enable workers to recover interest on unpaid wages.*

### **3.1.3 Fairness and Enforcement of Settlements**

*Clearly communicate to workers and employers Ministry policy with respect to the role of ESOs in effecting settlements.*

*Consider further and, if appropriate, delineate the circumstances under which claimants, particularly vulnerable workers, should or should not be allowed to settle a claim that has been accepted for investigation.*

*Provide to a complainant withdrawing a complaint pursuant to a settlement made with his or her employer a non-waivable right to re-file the complaint where the complainant alleges that the employer has not complied with the terms of that settlement.*



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### **3.1.4 Access for Unionized Workers**

*Allow a unionized worker to pursue employment standards claims through regular claims processes whenever a union declines to proceed with his or her claim.*

### **3.1.5 Further Consideration of Representative and Third Party Claims**

*Commission further research into whether allowing class actions to recover amounts owing for violations of the Act would advance the accessibility of recourse consistently with other public policy objectives.*

*Consider enabling third party complaints if it becomes clear that resource constraints stand to seriously limit proactive public enforcement.*

### **3.1.6 – Access to Basic Advice**

*Following an assessment of alternative funding and service delivery models, provide workers increased access to free or low-cost basic advice on how to present and pursue employment standards claims.*

### **3.1.7 – Requirements for Accepting Claims for Investigation**

*Review how the Director's discretion with respect to accepting claims is in fact exercised with a view to determining whether the exercise of such discretion constitutes a barrier to access.*

## **3.2 - Effective Compliance and Enforcement Strategy**

### **3.2.1 – Targeted Information and Outreach Programs**

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*Evaluate the potential cost-effectiveness of targeted information outreach programs such as free tailored education programs for employers and community associations, and targeted single-issue broadcasts.*

### **3.2.2 – Strategically Targeted, Proactive Inspection**

*Evaluate the extent of increased proactive inspection required to significantly improve compliance, and expand proactive inspection activity accordingly.*

*Strategically target enforcement and compliance activity for sectors, jobs and geographic locations according to four priorities: (1) concentration of vulnerable workers, (2) low likelihood of complaints, (3) relatively high rates of non-compliance, and (4) likelihood that enforcement and compliance action can change behavior.*

*Regularly collect and analyze statistical survey data on compliance to determine the likely extent of non-compliance and concentrations of vulnerable workers in various sectors of the economy.*

*Convene regular dialogue with worker, community association and employer representatives with respect to how and where to target proactive compliance and enforcement initiatives.*

*Analyze incoming and processed complaints for data that may help to focus proactive compliance and enforcement initiatives within priority areas identified on the basis of survey data.*

*Treat evidence of deliberate non-compliance uncovered in the course of complaint investigation as prima facie warranting extension of the investigation, subject to any overriding priorities established within a strategic approach to targeting inspections.*

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*Collect data during investigations about industry structures including such matters as common employers, management structures, franchising and ownership structures, and how decisions are made about personnel policies.*

*Develop the capacity to link quickly to other sources of government data that may indicate a propensity towards non-compliance.*

*Ensure that the time and location of particular enforcement campaigns are not known in advance to employers.*

### **3.2.3 – Deterring Deliberate or Recurrent Non-Compliance**

*Provide clear policy direction that deterrent sanctions and remedies should normally be imposed where an inspector believes that non-compliance is deliberate.*

*Increase the value and frequency of sanctions and remedies to deter deliberate or repeat violations.*

*Regularly investigate in the course of inspections whether non-compliance is intentional.*

*Increase willingness to prosecute egregious violations of the Act, including but not limited to refusals to comply with Ministry orders, and publicly communicate that willingness.*

*Enable the use of enforceable undertakings as an alternative or complementary means of responding to deliberate non-compliance.*

*In cases of deliberate or repeat non-compliance:*

- *Increased use of Notices of Contravention*
- *Increased monetary penalties under Notices of Contravention or Tickets*

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- *Double or treble damage awards*
- *Compensation for Ministry costs associated with enforcement*
- *Increased and more visible public posting (physical and electronic) of plain language notices of violation of the Act and remedies imposed*
- *Increased use of prosecution in egregious cases.*

*Consider the feasibility, risks and benefits of conditioning access to government procurement on an enterprise's not having a record of repeated and deliberate non-compliance within a period of recent years.*

### **3.2.4 - Addressing Underlying Conditions that Foster Non-Compliance in Networked Industries**

*As part of a strategic approach to targeted, proactive enforcement seek agreements with lead firms in networked industries to address underlying conditions driving pressure for non-compliance.*

*Consider the potential benefits and risks of giving the Director the capacity to embargo the shipment of goods produced in contravention of the Act.*

*Assess the legal bases of responsibility for working conditions within supply chains and other networks of employers.*

### **3.2.5 – Promoting Good Practice**

*Proactively pursue monitored self-regulation arrangements with leading employers in situations where the Ministry has sufficient information to understand the systemic drivers of non-compliance within the firm or industry in question, and if the firm or firms with the power to alter such conditions is or are willing to do so.*

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### **3.2.6 – Strategic Alliances**

*Consider the potential for strategic alliances with other Ministry compliance and enforcement branches and with other government departments and agencies to conduct targeted or comprehensive compliance audits. One issue that might be addressed in this manner is the problem of employee misclassification.*

### **3.2.7 - Funding**

*Consider the potential need for additional resources to support enhanced proactive compliance and enforcement programs.*

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## **Annex A**

### **Project Goals**

The goal of this project is to summarize and assess the relevant academic literature examining employment standards violations and enforcement in Ontario.

Questions to be investigated include:

- What legislative and administrative processes exist that may present barriers to filing an employment standards claim?
  - Is there empirical evidence on whether, and/ the extent to which, employees do not file claims:
    - Because they believe that their claim will not be accepted unless they contact their employer first?
    - Because they believe that they must have records or evidence before they file a claim?
    - Because they are afraid that their employer will fire them or otherwise penalize them for filing a claim?
  - What is the impact of requiring unionized employees to enforce their ESA rights through the grievance process?
- What models exist to provide employees and employers support during the claims process? How are these models funded?
- What are the pros and cons of allowing anonymous complaints, including by third parties?
- How effective are existing enforcement tools, remedies, penalties, processes, or public information in deterring violations, facilitating and encouraging compliance, etc.? Are there other models, tools, remedies, penalties or processes that would be more effective? What would be an appropriate mix?
- Are there lessons to be learned from enforcement procedures in other legislative initiatives including health and safety, human rights, pay equity and worker's compensation? If detecting infractions is more difficult in the changing workplace, would it make sense to enhance other components of the compliance function such as the magnitude of the fine?
- If the "stick" approach of strict enforcement and penalties is more difficult to implement in today's workplace, are more co-operative "carrot" approaches through education and information to alter (e.g., nudge) norms of behavior feasible, or are they simply "smokescreens"?
- How effective is the appeals process? What works well, what doesn't?
- What would be the implications of potential changes on employees and employers?