

Ministry of Labour:

The Changing Workplaces Review

Submitted to:

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Honourable John C. Murray



**Restaurants
Canada**

The voice of foodservice | La voix des services alimentaires

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Executive Summary

The restaurant and foodservices industry is one of Ontario's largest employers, providing jobs for more than 450,000 Ontarians. Those jobs have been threatened in recent years by a number of challenges, from economic influences like declining tourism and skyrocketing food prices to legislative changes like minimum wage increases and payroll tax hikes, which have combined to limit sales and business growth in this important sector.

Because of the labour intensive nature of foodservice, the legislative framework surrounding employment standards is of vital interest to the foodservice industry. Labour represents a significant portion of a restaurant operator's cost – 34% average – and so any changes in employment standards must result in performance and productivity gains and not simply an increase in employer costs.

While it is tempting for governments to expand the provision of social services by embedding them in legislative tools such as the Employment Standards Act (ESA), this simply adds cost to business, reducing competitiveness and discouraging investment. It is questionable whether tying social benefits to employment is an efficient or effective way for government to achieve its social policy goals. The limitations of labour legislation in meeting broad-based societal objectives must be recognized.

Legislative interventions can also have costly and unintended effects. For example, legislation restricting new full-time hires to current part-time staff would discourage employers from hiring new workers. Similarly, the mandatory extension of benefits to part-timers may result in the scaling down or termination of benefits for full-time employees.

While it is necessary to ensure a basic standard of protection, foodservice employers and employees need employment laws that are realistic, fair, flexible, and that respect individual choices. Any changes to labour codes should recognize the diverse needs of employers and promote voluntary cooperation between them so that employees can make up their own minds about what kind of workplace arrangements best suit their needs.

Labour Standards in the Foodservice Industry

Restaurants Canada appreciates the opportunity to provide the foodservice industry's perspective on the changing workplaces in Ontario.

Restaurants Canada is the largest hospitality association in Canada. Since its founding in 1944, Restaurants Canada has grown to more than 30,000 members representing every type of foodservice operator. Our members include licensed and unlicensed restaurants, bars, cafeterias and caterers, as well as accommodation, entertainment and institutional foodservice businesses.

A review of Ontario’s legislative framework for employment standards is of critical importance to the foodservice industry because of its labour intensive nature. As Labour represents approximately 34% of a restaurant operator’s costs, any changes in employment standards must be balanced to provide productivity gains for operators, not just added costs.

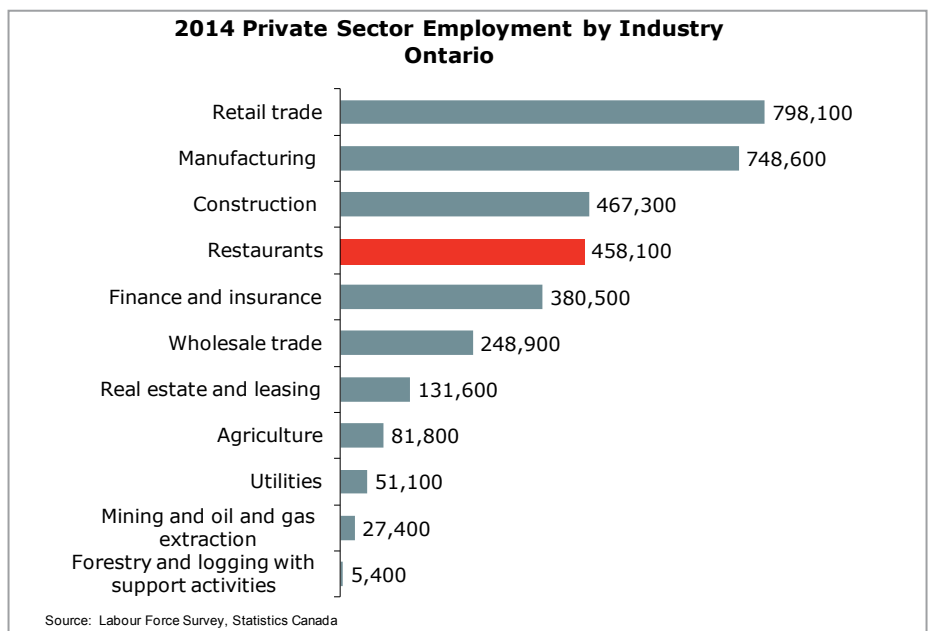
About Ontario’s Restaurant Industry

Ontario’s restaurant and foodservices industry represents one of the largest sectors of the Canadian economy with sales of \$28 billion representing 3.8% or Ontario’s GDP.

With 458 000 Ontarians on its payroll, foodservice is also one of the country’s largest private sector employers. The industry’s workforce represents 6.7% of the provinces total employment. A further 105,000 Ontarians are indirectly employed by the industry.

The restaurant industry is also a major source of youth and entry-level jobs, employing 197,000 Ontarians between the ages of 15 and 24. This represents

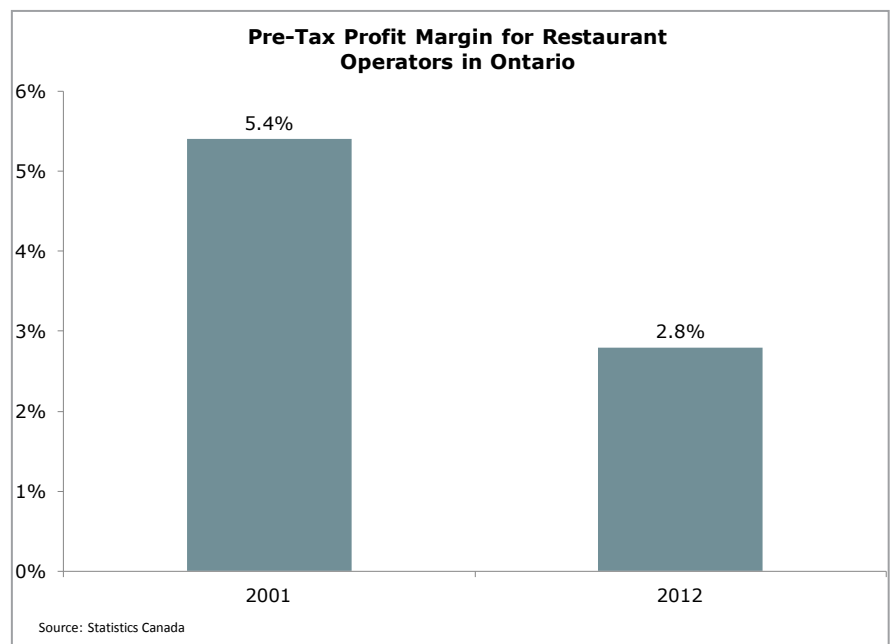
1 of 5 youth jobs in Ontario and 43% of the jobs in foodservice. The industry provides these young people with valuable job experience and training. The transferrable skills they acquire in the industry – communication, teamwork, customer service, and problem solving for example – can build a foundation for advancement within the foodservice industry or provide a springboard to other career paths. The flexible work arrangements offered by our industry appeal to many people looking to balance personal and educational commitments with the need to earn income.



State of the Restaurant Industry

Ontario’s restaurant industry has experienced steady sales growth since the recession. Despite rising sales, the restaurant industry faces a number of challenges, from rising food and labour costs to high household debt levels and a weak economy. As a result, foodservice sales are forecast to slow to 3.9% growth in 2016. Adjusted for menu inflation, real sales will grow an average of just 1.5% – a pace that is relatively on par with population growth. According to the most recent data from Statistics Canada (2012 reference year), rising food and labour costs reduced the pre-tax profit margin for the average foodservice operator to just 2.8% compared to 5.4% in 2001. The average business in Canada, in contrast, enjoyed a pre-tax profit of 8.8%. Ontario, the province with the largest foodservice industry has the lowest profit margin in the country.

The outlook for the foodservice industry remains uncertain. While Ontario’s growing economy will boost employment and household incomes, the foodservice industry is still threatened by a struggling tourist industry, which accounts for nearly 20% of foodservice sales. In addition, consumer confidence in Canada remains below pre-recession levels while household debt levels as a share of income is at an all-time high. Growing competition from grocery store pre-cooked meals has steadily eroded sales at restaurants.



Setting the Bar for Labour Standards

Foodservice employers and employees need labour laws that are realistic and fair. They need to respect individual choices and provide flexibility. Any changes to the *Employment Standards Act* (ESA) or the *Labour Relations Act* (LRA) should recognize the diverse needs of the employers and employees while promoting voluntary cooperation between both groups so that employees can decide what kind of workplace arrangements best suit their needs.

The current regulatory framework was designed for the traditional, industrial, male-dominated workforce where the norm was to work a “9-5” day. Simply layering on new regulations in an attempt to capture all aspects of the evolving nature of work would create a labyrinth of red tape and costs that could not be absorbed by business. While restaurants are not able to move across borders like other industries, they could be forced to mechanize, use prepared product from other jurisdictions, and cut staff hours to sustain profitability, all of which will result in job losses.

It is the quality of the work relationship, measured by the degree of trust, commitment, influence and communications that determines the value of the job.

Evolving customer service demands have increased pressures on businesses to become more flexible and adaptable. Customer needs cannot be accommodated within the confines of a “9-5” work day. Restaurants cannot inventory meals and must schedule employees when people want to be served, including evenings, weekends, and holidays.¹

In the foodservice sector, the vast majority of businesses are small and independently run. Rigid employment rules are particularly challenging for these operators. They do not have employees to reallocate when there are sharp fluctuations in business volume, so they must rely on flexible staff. They do not have the internal resources to interpret regulations and handle the paperwork that accompanies regulations and have fewer employees over which they can amortize the administrative cost of regulation.

At the same time, small business operators generally have more personal and supportive relationships with their staff because they understand it is in the best interest of their business to promote staff commitment and co-operation. They recognize that they can retain staff through flexible policies that accommodate employee wants and needs.

Labour organizations characterize the structural characteristics of the work relationship-- permanent or temporary, employed or self-employed, full or part time – as a primary determinant of a “good” or a “bad” job. In reality, it is the quality of the work relationship, measured by the degree of trust, commitment, influence and communications that determines the value of the job. These values cannot be legislated, but they can be restricted if subjected to inflexible rules.

In order to attract and retain quality staff, these relationship characteristics must be embraced by employers. Tight labour markets in every sector of the economy have been driving up labour costs and enhancing the ability of employees to negotiate working conditions and working relationships that suit their needs. Demographic outlooks indicate that labour shortages in many sectors of the economy will worsen in the coming years, further enhancing employee negotiating powers.

The limitations of labour legislation in meeting broad-based societal objectives must be recognized.

It is impossible to create universal legislation that will balance the stability and security needs of all workers with the flexibility and productivity needs of employers in today's changing work environment. The needs of employment and the requirements of employers differ substantially from workplace to workplace between sectors. The objective of labour standards should be to

provide a basic standard of protection in areas such as holiday and vacation pay, hours of work, and payment of wages. Voluntary arrangements should be encouraged at the business level so that employers and employees have the opportunity to mutually agree on working conditions that address the uniqueness of the company and the specific needs of its employees.

Employment laws have to be realistic as to how much protection can and should be achieved through legislation. Employment standards shouldn't be a collective agreement for the unorganized nor should they serve as a "grab bag" of benefits that labour unions have been unsuccessful in negotiating into collective agreements.

Similarly, labour legislation should not be used by government to expand the provision of social services. For example, additional paid vacation and sick leave, while attractive to many, simply add costs to business, reducing competitiveness and discouraging investment. Restaurants Canada does not believe that tying new social benefits to employment is an efficient or effective way for government to achieve its social policy goals. The limitations of labour legislation in meeting broad-based societal objectives must be recognized.

More paid breaks, increased paid vacation time, changes to holiday pay and increased leave provisions all have a certain attraction, but they are not guaranteed to improve workplaces in Ontario. All of these initiatives come with a cost to the employer which must be adjusted in higher prices or reduced hours for employees.

Union Participation

The Labour Relations Act has evolved over many years and has historically been a tool to ensure that employees are able to organize if they choose. It was never intended to guarantee a level of union participation in the workplace.

Union proponents argue that the declining union participation in the workplace is a cause for concern and requires legislative changes to provide unions with more tools to impose union participation on workers, regardless of worker preference.

Rather than accepting the premise that reduced workplace organization is negative, it is important to look further into the reasons behind the adjustment.

The trend of union amalgamation has increased to the point that the majority of unionized employees are represented by so-called “super-unions” that represent a wide variety of employees in disparate industries. As union makeup and upper leadership diverges further from the needs of the membership at large, unions’ voices are increasingly unrepresentative of the rank and file.

It can also be argued that the declining union membership is representative of government’s success in raising employment standards to the point that organization is no longer the sole avenue to seek workplace improvement. Labour standards have significantly enhanced the individual bargaining power of individual workers, allowing them the ability to work with employers to create flexible work environments for diverse requirements.

Union membership is not a standard that should be used to measure a positive work environment. While it will always be a tool available to workers, it is not a goal unto itself.

Card-based certification, first contract arbitration and sectoral bargaining are some of the tools that have been proposed to increase union membership. While they would have that effect, they also have a corresponding effect of restricting employee choice. In some cases, employees would be forced to accept the will of a minority, or an unrepresentative arbitration system.

In the case of sectoral bargaining, this would also take away the ability of employers to provide different workplace experiences to benefit employees with different personal needs.

RECOMMENDATIONS

- The ESA should ensure a basic standard of protection for employees while ensuring the flexibility needs of employers are met.
- The ESA must recognize the diversity of industry and workforce needs and encourage the voluntary determination of workplace arrangements, beneficial to both employers and employees, at the business level.
- The ESA and LRA must recognize the limitations of labour legislation in meeting broad-based societal objectives.

Current Labour Standards

Workplace regulations cannot and should not address every labour market situation. An overly-prescriptive legislative regime gives rise to further labour market adjustments.

When faced with a policy problem it is often tempting to design policy responses that deal with the symptoms rather than the cause of the problem. This is fostered by the fact that policy makers and politicians are often legally trained, in which case legislated and regulatory solutions come naturally as appropriate responses. Little attention is paid to the incentives that give rise to the problem in the first place, and hence how policy may alter those incentive structures to yield more socially acceptable outcomes. Furthermore, ignoring market mechanisms runs the risk that policy initiatives may "get undone" by private responses, as the parties adjust other margins in response to the policy initiatives. ⁱⁱ

Currently, prescriptive hours of work and termination requirements make it more cost effective for employers to contract out services rather than hire new employees. However, legislative attempts to put new parameters around contract work will likely result in other market responses that hurt, rather than help, workers such as replacing labour with capital investments in equipment or adding to existing job requirements.

■ Minimum Wage

The foodservice industry has had significant experience with minimum wage regulations as it is one of Ontario's largest employers of entry-level workers. Restaurants Canada believes that current provisions under the *Employment Standards Act* (ESA) to be appropriate and recommend that they be retained.

The bulk of empirical studies conducted in Canada and abroad confirms standard economic theory that mandated minimum wages set above the market clearing wage rate result in reduced employment. The research also indicates that those who experience the worst unemployment effects incurred by a minimum wage increase are young, inexperienced and unskilled workers.

Time-series econometric studies estimate that a 10% increase in the minimum wage reduces employment among teenagers (aged 15-19) by 1-3%, when other factors are held constant. ⁱⁱⁱ

Union and social action groups will suggest that minimum wage provisions be changed to ensure all Canadians have access to a "living wage". However, empirical evidence indicates that raising the minimum wage is an ineffective way to raise someone out of poverty. It will not help people out of work obtain employment and it will not necessarily help low income Canadians because minimum wage earners are typically young and unskilled but not necessarily poor. Traditionally, economists oppose the use of minimum wages as an instrument for redistributing income on the grounds that it is a relatively inefficient way to redirect resources to those in need. ^{iv}

■ Benefits

The extension or pro-rating of benefits to part-time workers would likely interfere with the needs of other employees. While mandatory provision of benefits might be helpful to some individuals, it would have negative consequences for others. In the foodservice industry, it could result in a diminution of existing benefits for other employees and it could discourage employers from providing new benefits. Employees who are already covered by a youth or spousal plan would see no added benefit despite the added cost.

Employers offer employees benefits such as health, dental, life and disability insurance to provide a competitive compensation package, to encourage and reward loyalty, and to provide a cost-effective way to pool risk. Because part-time employees are seeking extra income while attending school or pursuing other professional or personal interests, it is inaccurate to suggest that there is a universal demand amongst part-time workers for additional benefits.

Insurance companies are unwilling to provide insurance to employers with a high degree of turnover because of high administration costs and concerns about anti-selection, whereby employees take a job for a few months to put through an equivalent of two years' worth of dental, vision, and other benefits. Employers not able to access insurance should not be compelled to purchase it and insurance companies unable to offer it without losing money cannot be required to provide it or to provide it at a reasonable cost.

RECOMMENDATIONS

- Avoid overly prescriptive legislation that gives rise to labour market adjustments.
- Ensure more balance between employer and employee rights and responsibilities by requiring employees to give reciprocal notice when they intent to leave a job or when they don't intend to return to work after a leave.
- Allow the current legislation that sets the minimum wage to continue as it provides a growing minimum wage at a predictable rate.
- Avoid one-size-fits-all approaches that have unintended consequences for some employers and employees, such as mandated benefits.

Balancing Work and Personal/Family Responsibilities

Finding the right balance between work, personal, school and family responsibilities will always be a challenge for both employers and employees.

Non-standard work has grown in recent years in response to employees seeking a different balance between work and family life as well as opportunities to expand their training and education.

Most employers recognize that they must be flexible and adaptable to attract and retain good employees. Ontarians often seek out part-time jobs in the foodservice industry because these jobs allow them to balance their educational, career and lifestyle pursuits. Foodservice employers recognize that employee availability depends on school activities, homework assignments, exams et cetera in the case of students, and juggling of family responsibilities for others. However, as scheduling and overtime requirements become more restrictive, it becomes more difficult for employers to accommodate employee requests for shift changes and time off.

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Groups demanding more rigid workplace rules and the extension of these rules beyond the employee/ employer relationship are also demanding more flexibility from employers for leave situations. These groups must recognize that it is impossible to have both more workplace rules and more flexible work arrangements. Employers and employees should be able to tailor work arrangements to their own unique circumstances.

In the past, increased benefits for employees have not been met with corresponding responsibilities. For example, employees who go on leave for parental, medical or other reasons do not have any requirements to inform employers if they do not intend to return to work. This often leaves employers in the position of scrambling to fill positions with little notice.

Legislative changes often come with a significant administrative cost to business. Government should ensure that this is recognized by including provisions that give employers a remedy should abuse of the changes arise.

■ Part-time and Contract Workers

There is a tendency by some to force full-time and part-time work into the same restrictive boundaries. This discounts both the preference of many employees and the nature of the work

available. By forcing artificial standards on different types of jobs, government further restricts the ability of business to create jobs and meet employee requests.

A requirement that all workers are paid the same as full-time employees would have a negative impact on the work environment and hiring practices. Employees that are full-time are usually longer-term employees who have more training and have shown a loyalty to the company. Higher pay is recognition of these facts as well as a tool to retain employees. Forcing artificially inflated rates will have the effect of lowering full-time wages as well as discouraging worker loyalty.

Similarly, restricting the pool of applicants available for newly created full-time positions through “bumping rights”, hurts a business’ ability to hire the best fit for the job. It would also have the negative effect of giving a business pause before creating new, full-time positions.

The same principle covers temporary work. Temp workers are typically brought in when short-term help is needed in order to maintain shifts for other employees. Because of the fees paid by companies to the third-party agencies, these are not money saving decisions, but necessary fixes for short-term problems. If this is an increasingly unaffordable option, the jobs that are supported by these workers could be cut back or lost.

■ Scheduling Requirements

The creation and enforcement of shift schedules is one of the most difficult management tasks in our industry. Due to the nature of employee requests, the difficulty to fill certain shifts, and the high rate of absenteeism, legislative shackles on the process would not only create more problems for managers, it would also restrict the flexibility that foodservice employees’ desire.

Similarly other recommendations to put further restrictions on split and short shifts would encourage employers to under-staff shifts, to require non-core duties to fill required hours, or to not grant requests for shorter shift window.

RECOMMENDATIONS

- Resist expanding the scope of ESA and LRA in an attempt to provide coverage for all forms of non-standard work.
- Do not restrict hiring or pay practices with artificial regulations that do not allow for recompense for employee loyalty, training, or work experience.
- Avoid creation of an inflexible work environment by not constricting workplace scheduling with unnecessary regulation.

Compliance and Administration

We also strongly oppose regulations that punish honest employers along with the minority of bad apples.

Legislative compliance is generally very high when regulations are realistic, fair, easy-to-understand and simple to follow. Legislative compliance is generally low when regulations are overly bureaucratic, complex, perceived to be inequitable or create too much red tape for operators. Restaurants Canada recommends the drafting of regulations that are written in easy-to-read language that can be readily complied with.

Restaurants Canada believes the current complaints-based system is adequate, but care must be taken to ensure that inspectors are well-trained and take a balanced approach when enforcing its provisions, and that they do not misinterpret their role as serving exclusively as employee advocates.

Some have recommended a reverse onus be placed on employers in ESA disputes. This would excessively tilt the scales in favour of those complaining. While there may be instances that this would assist some individuals, a change at this level would inevitably lead to nuisance complaints and would significantly increase the cost to businesses who may be put in the position of paying for a complaint that is without merit rather than incur the cost of fighting it.

Restaurants Canada does not oppose stricter enforcement for those that intentionally circumvent labour regulations. They should be held to account as they negatively affect employees and employers alike.

In any system, there will always be those who look for shortcuts outside of the rules. Constricting the flexibility of the honest brokers does nothing to change that, it only punishes workplaces where employees and employers work cooperatively.

We are concerned that the government is being asked to implement new regulations that would be overly onerous on the vast majority of responsible businesses. We also strongly oppose regulations that punish honest employers along with the minority of bad apples.

■ Extended Employer Responsibility

Restaurants Canada has concerns about the calls that seek to extend employer responsibility to other businesses over which they do not have direct control. Whether through provisions that would broaden wage, benefit and employment standards through the ESA, or sectoral bargaining through the LRA, Restaurants Canada strongly opposes this direction.

This rewards bad behaviour by shifting responsibility away from the offender.

The idea that one business would be responsible for the practices and responsibilities of another is a slippery slope that cannot be justified. The principle would be the same if one entity was made responsible for a supplier who did not pay their bills. This rewards bad behaviour by shifting responsibility away from the offender.

■ Franchisee Independence

Along the same lines as extended employer responsibility, the push for “Common Employer” recognition would be harmful to the independence and flexibility of business owners.

The theory behind common employer requirements is the assumption that businesses that operate under a common banner – in most cases franchisees – have a single controlling interest that should be responsible for all business decisions.

This discounts the fact that, despite a common brand, franchises are independent businesses that have management teams - usually the small-business owner - responsible for payroll and the day-to-day management of the operation. By shifting responsibility to a larger entity, you essentially remove the owner’s ability to protect their investment by implementing local decisions.

Further, chains have different franchisee structures and creating a template whereby they lose control, or are forced to defend their business based other entities over which they have no control will only serve to restrict investment and productivity.

RECOMMENDATIONS

- Ensure labour laws are flexible to foster an adaptable and productive labour force, which is required to increase the standard of living for workers and for the long-term growth and prosperity of Ontario’s economy.
- Protect the common law right to presumption of innocence as set out in the Charter of Rights and Freedoms.
- Do not extend third-party responsibility to other businesses that do not have direct control over their day-to-day operations. This would only reward bad behaviour as the offender will no longer be responsible for transgressions.
- Do not take away the independence of small businesses to protect their investment by extending the common employer definitions.

Conclusion

Restaurants Canada would like to thank the members for allowing us to submit our positions to the Changing Workplaces Review Task Force. We are proud to be an essential part of Ontario's economy and look forward to future conversations as the Task Force continues with its important work.

We believe that, despite some unfortunate individual cases, existing legislation works well in providing protection for employees in an ever-changing workplace. We would encourage the members to make decisions based on the best information available, and avoid the temptation to create a patchwork of "fixes" that will only make the system more complicated and will not serve the complex interests and preferences of today's employee.

Summary of Recommendations

- The ESA should ensure a basic standard of protection for employees while ensuring the flexibility needs of employers are met.
- The ESA must recognize the diversity of industry and workforce needs and encourage the voluntary determination of workplace arrangements, beneficial to both employers and employees, at the business level.
- The ESA and LRA must recognize the limitations of labour legislation in meeting broad-based societal objectives.
- Avoid overly prescriptive legislation that gives rise to labour market adjustments.
- Ensure more balance between employer and employee rights and responsibilities by requiring employees to give reciprocal notice when they intent to leave a job or when they don't intend to return to work after a leave.
- Allow the current legislation that sets the minimum wage to continue as it provides a growing minimum wage at a predictable rate.
- Avoid one-size-fits-all approaches that have unintended consequences for some employers and employees, such as mandated benefits.
- Resist expanding the scope of ESA and LRA in an attempt to provide coverage for all forms of non-standard work.
- Do not restrict hiring or pay practices with artificial regulations that do not allow for recompense for employee loyalty, training, or work experience.
- Avoid creation of an inflexible work environment by not constricting workplace scheduling with unnecessary regulation.
- Ensure labour laws are flexible to foster an adaptable and productive labour force, which is required to increase the standard of living for workers and for the long-term growth and prosperity of Ontario's economy.
- Protect the common law right to presumption of innocence as set out in the Charter of Rights and Freedoms.
- Do not extend third-party responsibility to other businesses that do not have direct control over their day-to-day operations. This would only reward bad behaviour as the offender will no longer be responsible for transgressions.
- Do not take away the independence of small businesses to protect their investment by extending the common employer definitions.

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