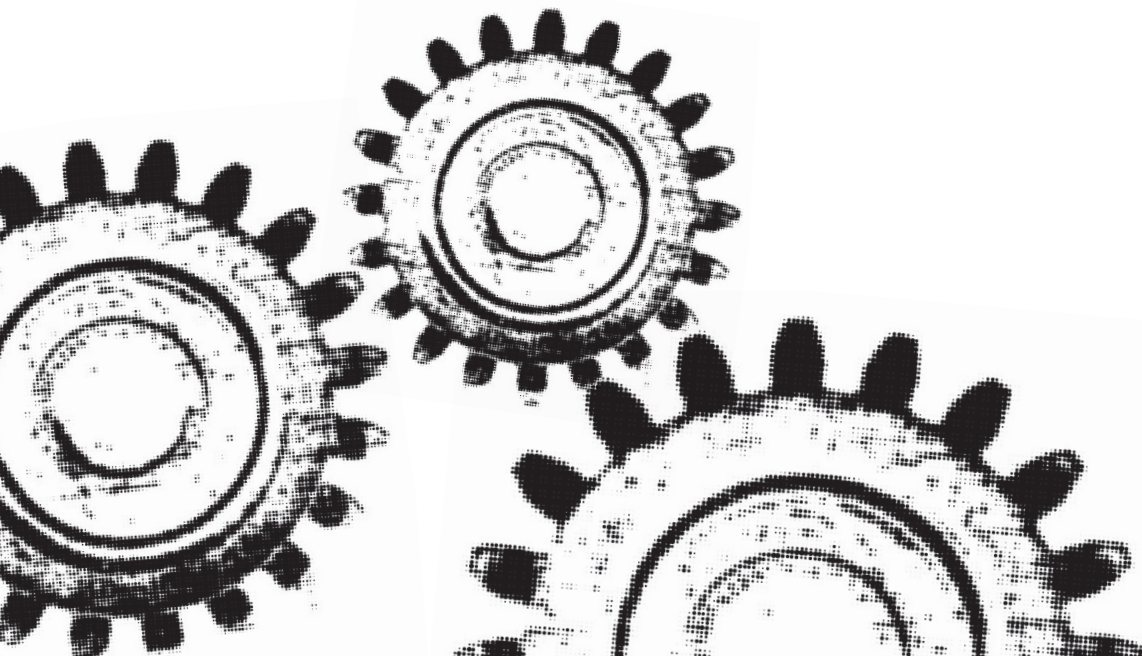


STILL WORKING ON THE EDGE

**BUILDING DECENT JOBS FROM
THE GROUND UP**



Workers' Action Centre

March, 2015

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This report is the collective effort of people in precarious work, members, staff, and volunteers of the Workers' Action Centre, supporters, and Parkdale Community Legal Services. Everyone contributed their knowledge, skills, and insights. The report would not have been possible without the workers who participated in the interviews: Miguel, Lee, Nikita, Serena, Angelina, Adolfo, Vashti, Daniella, Isabel, Sung, Nuan, Alberto, Samuel, and Mei. We also would like to thank the Workers' Action Centre members who reviewed the draft of this report and provided their feedback and insight: Acsana Fernando, Dominique Jacobs, Gary Thompson, Justin Kong, Laurie Fisher, Linda Bernard, Lorraine Ferns, and Sung. A special thanks to Leah Vosko and the community-university research alliance, Closing the Gap on Employment Standards Enforcement.

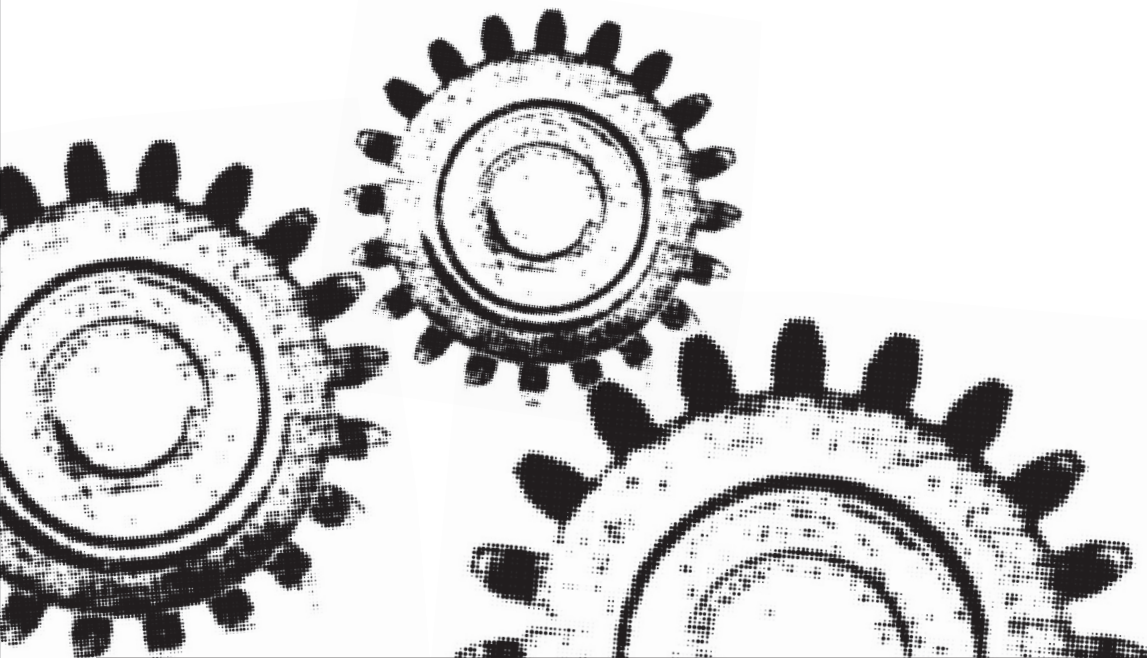
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INTRODUCTION



**LIKE VASHTI, MANY
PEOPLE ARE JUGGLING
TWO OR THREE JOBS
JUST TO GET BY.**

Vashti

I have three jobs. I work two hours at a public school taking care of the students over lunch. I work for a temp agency that places me either as a health care provider in a group home or with residents in a youth shelter. We provide evening relief shifts. Then my third job is through another agency where I am placed as a personal support worker in a hospital or in the community taking care of seniors. One day I'm in uniform working in a hospital, the next day I'm in street clothes working in a shelter. So every day, it's on call.

I was working for minimum wage. Four years I worked for minimum wage. The only increase I got was when minimum wage went up. So I went back to school to upgrade myself. I spent one year upgrading myself, changing my career to become a Personal Support Worker. Finally, when I went back to work, what did I get? Minimum wage!

Yesterday I had to travel two hours each way to get to the hospital for a four-hour shift. Sometimes for the community job, I have to travel one hour for a two-hour shift.

They give us the name "agency". You go to the hospital; they say, "Oh, where is agency?" The "agency" she does everything, but they don't recognize what we do.

When you're sick, you're sick. You don't get paid. I was working a lot in December because there were extra hours. But my body got weak. You work with little children in group homes and they are sneezing and coughing all over you. I got sick but I had to keep working. Then it developed into pneumonia and I ended up in hospital. I was off for a month so I didn't get paid.

That was a really difficult time for us. My husband works, but for the last

eight years he is classified as a casual worker. We don't have health coverage. I have to pay for the dispensing fee and medication out of my minimum wage pocket. It's a big challenge that you have to provide for your family and you cannot meet basic demands. The children want to be like other children. It's a big shame to know you can't provide. I have to think smart. Say today, tomorrow, something goes wrong—like I ask the lady at the agency the wrong question, her agency kicks me out. I take home \$6-7,000 a year. So, that is why I do it so."

Vashti's experiences are becoming all too common for people working for low wages in part-time, temporary, or contract jobs without employment benefits or workplace protection. Like Vashti, many are juggling two or three jobs just to get by. But Vashti and other members of the Workers' Action Centre (WAC) believe that it does not have to be this way.

The Ontario government launched the **Changing Workplace Review** on February 17, 2015 to identify potential labour and employment law reforms. The review gives Ontarians the opportunity to address the growing precariousness of the labour market and how to improve legislative protections to support decent wages and working conditions. This report, *Still Working on the Edge*, brings workers' experience, knowledge, and voice to this important public discussion on the future of work in Ontario.

We say we are still working on the edge, because conditions have gotten worse since WAC released its 2007 report, *Working on the Edge*, which documented workers' experiences of low-wage and precarious work.

The number of part-time jobs has risen much faster than that of full-time jobs. Many people, like Vashti, are trapped in part-time work but would rather be working fulltime. Since the last recession, many of the full-time, better-paid jobs have been permanently lost. New full-time job growth is taking place in lower-paid sectors of the economy.¹ Ontario is developing a low-wage economy. In 2014, 33 percent of workers had low wages compared to only 22 percent a decade earlier.²

More flexible staffing through part-time, contract, temporary work helps employers keep labour costs down. But as WAC member Lee says, “It’s flexibility for employers; it’s not flexibility for us.” Employers rationalize these practices as necessities to improve flexibility in an increasingly globalized world. But workers’ experiences show that outsourcing, indirect hiring, and misclassifying workers also takes place in sectors with distinctly local markets: food and hospitality, business services, construction, and manufacturing of locally consumed goods. And it’s not just the private sector. All of Vashti’s part-time and temporary agency jobs were for public schools, youth shelters, hospitals, and home care. The public sector is also patching together our social services with a primarily female, often racialized workforce in low-paid insecure jobs.

Changes in labour market regulation and practices have realigned the distribution of risks, costs, benefits, and power between employers and employees. Employers’ goals of flexibility have become more paramount to shaping the employment relationship, a trend which is reinforced by current labour and employment law. Our report, *Still Working on the Edge*, seeks to bring balance to labour market regulation and provide ways to rebuild our labour laws

and employment practices to support decent wages and working conditions.

Alberto speaks for many workers when he says, “I would like to get a strong voice to tell the government what is happening and that they should hear.” What is usually absent from policy discussions about work and poverty is the voice of workers who live with the reality of low wages, income instability, and few employment benefits or protections. Workers are often portrayed as victimized or vulnerable, shifting the focus to individual characteristics and coping mechanisms, and away from the social, economic, and structural forces giving rise to vulnerable conditions. The development of this report by the Workers’ Action Centre seeks to bring not just the voice of workers into the public debate of labour laws, but the knowledge that workers’ experience brings, and the analysis of which changes are necessary.

Over the past year, the Workers’ Action Centre has held meetings with members, precarious workers, and allies to identify key problems facing workers under the *Employment Standards Act* (ESA) and develop recommendations for improving the ESA. We focused on the ESA because, for the majority of workers, it sets the minimum terms and conditions of work, such as wages, hours, vacation, leave, and termination. These standards reflect society’s norms of which standards should be met in our jobs and in the labour market. Employment standards are supposed to establish a minimum floor for those who have the least ability to negotiate fair wages and working conditions. Not only is the ESA a central feature of labour-market regulation, but it is also an important social policy tool in fighting poverty.

Given our goal of building jobs that have decent and fair wages and working conditions, we believe that any review to

IN 2014, 33 PERCENT OF WORKERS HAD LOW WAGES COMPARED TO ONLY 22 PERCENT A DECADE EARLIER.²

“I would like to get a strong voice to tell the government what is happening and that they should hear.”

THE INTERNATIONAL LABOUR ORGANIZATION (ILO) SETS OUT FUNDAMENTAL PRINCIPLES OF DECENT WORK THAT INCLUDE FAIR WAGES AND EQUAL PAY FOR EQUAL WORK WITHOUT DISTINCTION TO ENSURE A DECENT LIVING FOR WORKERS AND THEIR FAMILIES.

employment standards must be based on the principle of fairness and decency. The International Labour Organization (ILO) sets out fundamental principles of decent work that include fair wages and equal pay for equal work without distinction to ensure a decent living for workers and their families.³

RECOMMENDATION 1.1

The **Changing Workplace Review** should be guided by the principle of decency, as was the case in Harry Arthurs' review of the *Federal Labour Code*:

Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as "decent." No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.⁴

WHAT'S IN THIS REPORT?

In **SECTION 2**, "*Inclusive Employment Standards Protections*," we highlight gaps in our labour laws that create incentives for employers to move work beyond the reach of ESA protection. Work that used to be done in-house is now outsourced to subcontractors. Employers hire people indirectly through temporary help agencies to shift liabilities to other entities. Employers misclassify employees as independent contractors to shift liabilities and the cost of doing business on to workers, who have little power to refuse. The workers' experiences illustrated in this report also highlight how the floor of our labour standards has deteriorated

through exemptions to minimum standards. Recommendations are provided on closing the gaps and improving universality of coverage, restricting discriminatory practices in wage and working conditions, improving protections for temporary agency workers, and ending the misclassification of employees.

In **SECTION 3**, "*Decent Hours for a Decent Income*," workers' experiences demonstrate how temporary jobs, erratic scheduling, insecurity regarding hours of work, and lack of permanence is creating substantial income insecurity, limited access to benefits, and substantial challenges for workers and their families. Recommendations are provided to make work hours more predictable, healthy and economically secure, promote job growth, and improve leave entitlements such as sick leave and vacations.

SECTION 4, "*Rights without Remedies*," explores how violations of basic standards such as overtime pay and vacation pay have become the norm rather than the exception in many workplaces. Workers are being forced to accept substandard conditions. Workers' experiences challenge the notion that the problem is caused just by a few "bad apples," that only a few employers violate the law. Recommendations are provided to shift from more reactive enforcement strategies to proactive enforcement in order to protect workers in their current jobs. Recommendations seek to improve deterrence strategies to make employers comply with the *Act* and improve collections of unpaid wages. Given the changing nature of contemporary workplaces, strategies are put forward to enforce standards in the context of indirect staffing strategies and sub-contracting.

SECTION 5, "*Workers' Voice*," examines how the erosion of employment standards enforcement has shifted

the onus for enforcement of unpaid wages onto workers who have the least power. Strategies are put forth to improve workers' ability to enforce their rights at work through an anonymous and third party complaints program. Recommendations seek to improve job security through anti-reprisals and unjust dismissal protections. Our recommendations also seek to improve workers' voice through expanding access to collective representation and multi-employer bargaining strategies.

While the substantial challenges facing migrant workers are addressed in **SECTION 6**, "*Migrant Workers*," challenges and recommendations for migrant workers are also addressed throughout the report. Only those recommendations relating specifically to migrant workers are addressed in this section. Federal immigration policies and practices structure and constrain migrant workers' lives, especially at work. Recommendations seek to address those structural constraints through regulating recruiters and employers of migrant workers, expanding employment standards coverage of migrant workers and improving access to ESA protections.

The issues addressed in **SECTION 7**, "*Fair Wages*," cut through the entire report. Fair wages is a fundamental issue in today's labour market, as evidenced by workers' experiences in this report. Employment security and income security are inextricably intertwined. Recommendations in this section seek to update minimum wage policy by removing exemptions and special rules that leave entire categories of workers, such as farmworkers, working below the minimum wage. We also make recommendations to bring decency to Ontario's minimum wage policy.

Recommendations are listed throughout the report, as well as summarized in the Appendix, and are derived from comprehensive strategies that members of the Workers' Action Centre have developed to address the changing workplace.

METHODS

The Workers' Action Centre is a worker-based organization committed to improving the lives and working conditions of people in low-wage and unstable jobs. We support workers in having a voice at work and being treated with dignity and fairness. We are engaged with workers through information sessions, workers' rights workshops, and training sessions for frontline workers in community agencies. Through our Workers' Rights Information Line, we provide information and one-on-one support to workers who have workplace problems. The Centre engages with thousands of workers a year. Parkdale Community Legal Services is a poverty law clinic that provides legal representation to people in low-wage work, among other services. We have brought this collective experience together in developing this report.

This research was conducted using a number of methods stemming from our goal of maximizing workers' voices. The research involved the active participation of members of the Workers' Action Centre. From June 2014 to January 2015, members, staff, volunteers, and allies met to identify key issues and recommendations for this report. We reviewed workers' experiences from the Workers' Action Centre database, which is generated from the cases we receive through the Information Line. We receive approximately 1,000 callers to the hotline per year.

THE EROSION OF EMPLOYMENT STANDARDS ENFORCEMENT HAS SHIFTED THE ONUS FOR ENFORCEMENT OF UNPAID WAGES ONTO WORKERS WHO HAVE THE LEAST POWER.

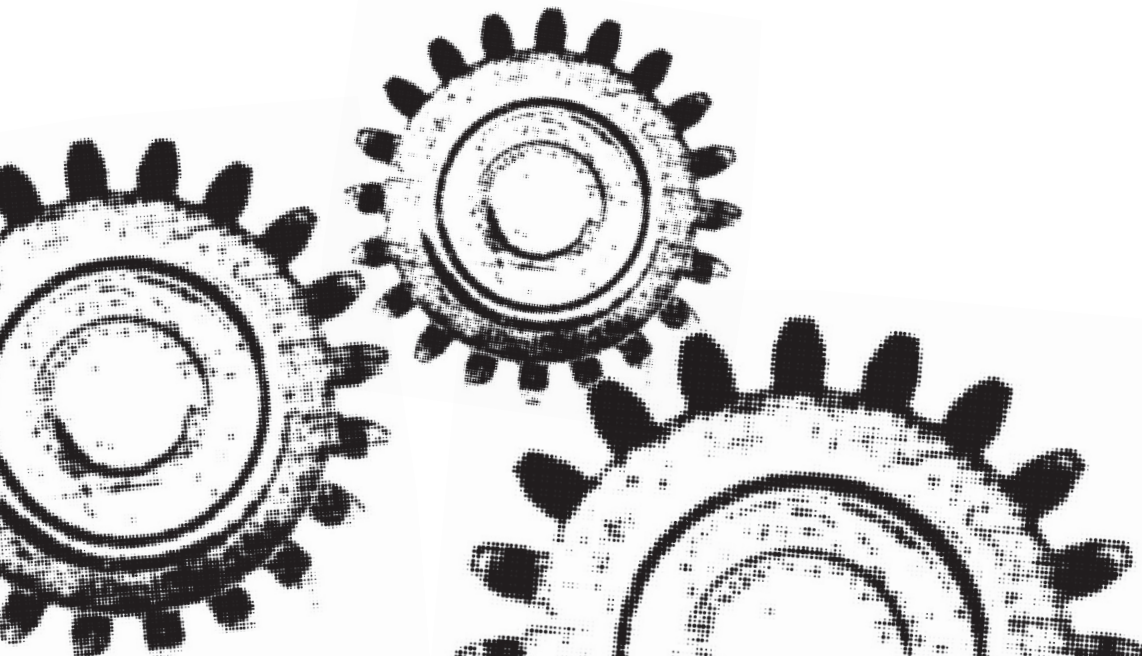
**WORKERS WANT THEIR
STORIES HEARD, SO THAT
CHANGE CAN HAPPEN.**

We asked 14 women and men who experience various forms of precarious work and represent different racialized groups to take part in this research through in-depth interviews. Staff and volunteers of the WAC conducted interviews in the winter of 2015 with the assistance of translators when necessary. We also invited eight WAC members to review a draft of the report, to provide feedback on the content and recommendations, and to confirm key findings of the report.

Despite long hours of work, challenging conditions, and family responsibilities, workers want their stories heard, so that change can happen. Due to the risks they might face at work for having shared their experiences of workplace violations, some workers wanted to remain anonymous. We have used pseudonyms for all of the workers whose experiences are presented in this report.



INCLUSIVE EMPLOYMENT STANDARDS PROTECTIONS



Expanding the scope of the ESA

FORTY-ONE PERCENT OF WORK IS PART-TIME, CONTRACT, OR OWN-ACCOUNT SELF-EMPLOYED¹¹

Orlando

When I worked last summer as a landscaper, the employer would drop us off at worksites where there was no transportation. There was no place to buy food. He would leave us all day, sometimes to 11 p.m. at night. He wanted to make sure we finished the job. He didn't care that we were starving. We were paid cash, no benefits, no overtime pay.

EROSION OF THE ESA

The erosion of employment standards has, as a Law Commission of Canada report observes, developed both actively and passively.⁵ Active erosion of standards has occurred through the adoption of explicit exemptions in the scope of the ESA. For example, workers in agriculture, information technology, and construction do not have the same protections afforded to hours of work and overtime that other workers have. Changes to the ESA introduced in 2000 enabled employers to obtain overtime permits to schedule more than 48 hours of work a week. Employers can enter into agreements with workers to average overtime pay over longer periods, thereby requiring longer hours of work for less overtime premium pay. Most of the exemptions relate to regulation of overtime pay, hours of work, and minimum wage, enabling a regulatory regime that allows employers to reduce the costs of labour while increasing workers' vulnerability to exploitation. Many of the changes to the ESA in 2000 reduced government regulation of workplace standards, promoted

greater employer control over work time, normalized non-standard employment relationships, and increased the vulnerability of workers in non-unionized workplaces.⁶

Lee

People are on minimum wage for many years. Sometimes they might get 25-cent increase if they move to a different part of the warehouse, but it's essentially minimum wage. You can't live on that.

More passive erosion of standards have also undermined the ESA's capacity to protect workers in low-wage and precarious work. From the late 1970s until quite recently, Ontario's minimum wage was substantially below the poverty level.⁷ It remains at 17 percent below the poverty line, contributing to a low-wage labour market in Ontario. The Organization of Economic Cooperation and Development's comparative data shows that Canada is second only to the US as a low-wage country. The proportion of Canadian workers who are low-paid (less than two-thirds of the median wage) is about double that of workers in continental Europe.⁸

EVASION OF THE ESA

Over the past three decades, employers have adopted strategies for work organization that evade core labour laws and create legal distance between the employer and workers.⁹ Even harder to quantify than violations of employment standards are practices

of evading the ESA, precisely because these practices fall outside the scope of the Act. There has been growth in work outside of standard, full-time, permanent employment with a single employer.¹⁰ Forty-one percent of work is part-time, contract, or own-account self-employed.¹¹ Yet our labour laws, regulatory regimes, and employment benefits are still based almost exclusively on a standard employment relationship developed after World War II, which linked decent wages, benefits, working conditions, and job security to the full-time standard employment relationship—a form of employment in which non-racialized men were over-represented.¹²

Historic exclusions of certain types of work organization from employment standard protections, such as independent contractors, have created incentives for employers to move workers into these forms of work, where employers have fewer responsibilities. Contracting out of work that can be done in-house is yet another practice that is re-emerging. This was a common practice in garment manufacturing at the beginning of the last century. Externalizing employment costs to temporary help agencies is yet another fast-growing strategy for just-in-time labour sourcing.

These practices shift the legal liability that employers have for their employees, shift working conditions and employment benefits on to intermediaries, and, in the case of misclassified independent contractors, on to workers themselves. While employers may argue that these strategies are justified in an increasingly global market with intense international or local competition, this does not explain such practices in Ontario. As the Workers' Action Centre has found, many employers and industries are

engaged in outsourcing, indirect hiring, and misclassification of workers in distinctly local markets—restaurants, business services, such as janitorial and couriers, construction, trucking, home health care, social services, warehousing, and manufacturing of locally consumed goods.¹³

Employers are able to deprive workers of employment rights, benefits, and protections because work arrangements do not conform to the standard employment model underlying employment standards, policies, and practices. We need to seek a universal approach to coverage under the ESA, which effectively provides basic minimum standards for all workers. The starting point should be that all workers, regardless of form of work, are entitled to minimum employment standards.

RECOMMENDATION 2.1

Broaden the definition of employee along the lines of Ontario's *Health and Safety Act*, which defines a worker as "a person who is paid to perform work or supply services for monetary compensation."

THE STARTING POINT SHOULD BE THAT ALL WORKERS, REGARDLESS OF FORM OF WORK, ARE ENTITLED TO MINIMUM EMPLOYMENT STANDARDS.

Who's the boss?¹⁴ Restoring employer accountability for employment standards

EMPLOYERS ARE ONCE AGAIN USING CONTRACTING AS A KEY STRATEGY TO REDUCE LABOUR COSTS, INCREASE PROFITS, AND SHIFT LIABILITIES DOWN THE CHAIN OF THE 'SWEATING SYSTEM' OF PRODUCTION.

Miguel

I was hired by a cleaning company that cleaned big chain restaurants. We would have to travel quite far to get to the restaurants we worked at—Burlington, Barrie, London. My boss picked me up and drove us there and back. Sometimes I'd get picked up at 10 p.m. and only get back home at 10 a.m. the next morning. I only got paid from the moment we started cleaning until we finished. I never got paid for the travel time.

Many weeks I only got two or three shifts. I asked for full-time work, but they offered conditions. They wanted to do a contract with me and so that I would become in charge of a restaurant. They wanted me to work as an entrepreneur for them. I said no because I don't have a car and it didn't sound right.

My boss would get the cheque from head office and then pay me cash - \$12 an hour. Each time that I requested my payment, I got excuses like "the cheque hasn't been done, something had not been paid". Always delays and evasion. I would text him but he never responded. It would be close to a month and no pay.

Finally after four months of this, I came to the Workers' Action Centre. They helped me go up the chain to the top of the company. I got a paycheque for what I was owed. I realized that my supervisor didn't pay me what I was owed. He received my cheque, deposited it in the bank and paid me in cash.

Having to beg for your salary; having to receive cold answers. It's below one's dignity. It was hard on my family. We went into debt, had trouble paying the rent and buying food. More than once I

asked for help of a friend. He loaned me money to cover my needs. It's a difficult thing. One is not used to it, that's why one works.

Miguel was paid as an independent contractor—no deductions, no vacation pay, and no public holiday pay. His only way to get more hours was to set himself up as a subcontractor. After months of erratic pay, Miguel was able to go up the chain to get his unpaid wages with the help of the Workers' Action Centre. Miguel has experienced one of the many ways companies are organizing work to shift liabilities to subcontractors and, as in Miguel's case, on to workers themselves.

A century ago, labour subcontracting was known as the "sweating system." Today, employers are once again using contracting as a key strategy to reduce labour costs, increase profits, and shift liabilities down the chain of the "sweating system" of production. Employers should at least be held jointly responsible and liable for the employment conditions of all indirect workers. In Quebec, for example, the Act Respecting Labour Standards makes companies that engage subcontractors jointly liable for monetary obligations under the Act.¹⁵

RECOMMENDATION 2.2

Make employers who enter into contracts with subcontractors and other intermediaries, either directly or indirectly, liable both separately and together for wages owed and for statutory entitlements under the ESA and its regulations.

Where's the floor?

Exemptions and special rules have eroded the floor of minimum standards. Some workers are exempted because of age—students under 18 are paid a lower minimum wage than all other workers. Some workers are exempted because of occupation. For example, farm workers are exempt from minimum wage, hours of work, daily rest periods, time off between shifts, weekly/bi-weekly rest periods, eating periods, overtime, public holidays, and vacation with pay. Another type of exemption is based on a worker's status in their workplace (for example, managers who are not covered by hours of work and overtime provisions). Exemptions are also based on how long you work for a company. Workers employed for less than five years are not able to get severance pay. A final type of exemption is based on the size of employer. Workers are only entitled to ten days of personal emergency leave (sick leave) if the company has 50 or more employees.

In an analysis of ESA exemptions and special rules, Vosko et al. conclude that “the ESA's capacity to provide a floor of rights is eroding. . . . Other provisions, such as those related to minimum wage, working time (hours, rest periods, time off), and personal emergency leave, are weakened by an expanding series of partial and full exemptions. Finally, some provisions, such as those related to public holidays, overtime and severance pay, have become inaccessible to such a large proportion of employees that they can no longer be reasonably

conceptualized as universal minimum protections.”¹⁶

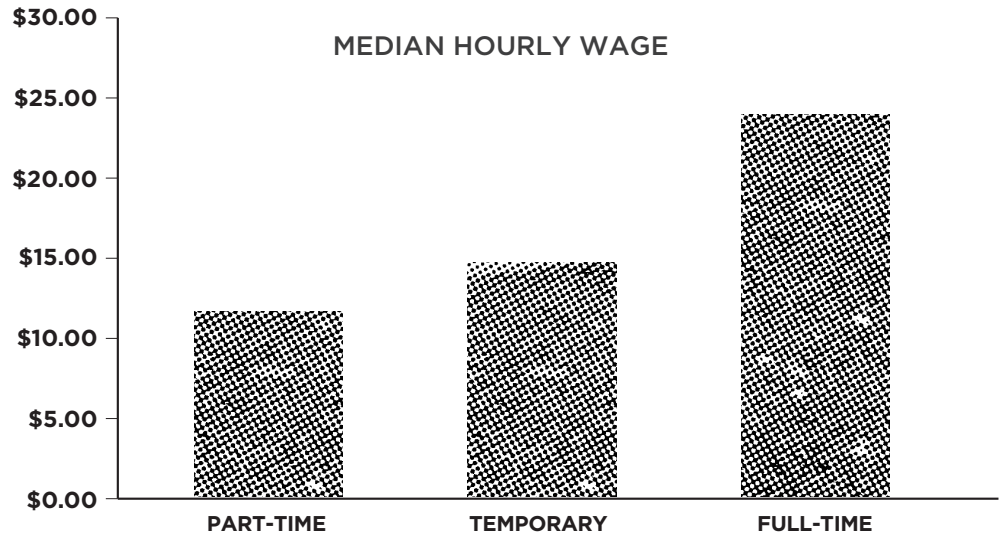
The authors further conclude that exemptions and special rules disproportionately affect some groups, thus reinforcing existing labour market inequalities. Low-income employees are much less likely to be covered by most ESA provisions, including those related to minimum wage, overtime public holidays, personal emergency leave, and severance pay. Recent immigrants are less likely to be fully covered by the ESA for minimum wage, overtime, public holidays, and severance pay. Young, racialized, and recent immigrant women are much less likely to be fully covered for minimum wage than their male counterparts. Similarly, in relation to personal emergency leave (sick leave), racialized women and recent immigrant women are less likely to have full coverage than their male counterparts. This is troubling, as women are the most likely to take on responsibilities of caring for sick children and parents.¹⁷

“THE ESA'S CAPACITY TO PROVIDE A FLOOR OF RIGHTS IS ERODING.”

RECOMMENDATION 2.3

No exemptions to the ESA and no special rules.

Equal pay and benefits for equal work



JANUARY 2015 MEDIAN HOURLY WAGES FOR PART-TIME, TEMPORARY, AND FULL-TIME WORKERS IN ONTARIO
SOURCES: STATISTICS CANADA, CANSIM TABLES 282-0069 AND 282-0073.

JOB GROWTH IN PART-TIME AND TEMPORARY WORK HAS OUTSTRIPPED FULL-TIME WORK, WITH PART-TIME JOBS GROWING 25 PERCENT, AND TEMPORARY EMPLOYMENT GROWING 40 PERCENT, WHILE FULL-TIME WORK HAS INCREASED ONLY 16 PERCENT SINCE 2000.

More precarious forms of work have grown faster than full-time work. Job growth in part-time and temporary work has outstripped full-time work, with part-time jobs growing 25 percent, and temporary employment growing 40 percent, while full-time work has increased only 16 percent since 2000.¹⁸

More people are unable to get full-time work. In 2013, 32 percent of all part-time workers reported they would rather be working full time. That is an increase of 43 percent in involuntary part-time workers since 2000.¹⁹

We are facing a labour market where 41 percent of work is outside the standard, full-time, permanent employment contract with a single employer. Part-time work makes up 19 percent of total employment, temporary work 12 percent,²⁰ and own-account self-employed makes up 10 percent.²¹

The ESA has failed to regulate the growing predominance of part-time, temporary, and self-employed work. In the absence of such regulation, employer practices have developed that pay part-time, temporary, and contract workers less in wages and benefits than full-time employees.

Deep rifts have grown between the wages of part-time and full-time workers. For women workers, a 57 percent wage gap between median hourly part-time and full-time wages exists. For men, the gap is smaller: 47 percent. Temporary workers fare slightly better, earning a median hourly wage of around \$15.19, while their full-time counterparts earn \$24 per hour. There is no inherent reason why employers pay precarious workers less, except, simply, that they can. The use of part-time and contract forms of work are strategies used by employers to enhance flexible labour sourcing. The low average wages of part-time workers

exist not only because work may be concentrated in low pay sectors, but also because there are no restrictions on paying these workers less than full-time workers who do the same or similar work. People in temporary and fixed-term contract work are less likely to have benefits to pay for prescriptions and health care not covered by Ontario's health services. A survey in 2006 found that only 23 percent of temporary and contract workers had some form of benefits, as compared with 86 percent of full-time, permanent workers.²²

Sung works two contracts for the same community mental health organization. One is part-time and one is casual relief. "It's crazy. My responsibilities are the same. But when I work part-time I get \$23 an hour and when I work relief I get paid \$16 an hour – for exactly the same responsibilities." Sung works only ten hours at the part-time rate but she can get close to 30 hours at the relief rate.

Other jurisdictions have chosen a different path, with a goal of reducing the discrimination against workers based on type or form of employment. The European Union (EU) adopted a Framework Agreement in 1997 that "sets out to eliminate unjustified discrimination against part-time workers and to improve the quality of part-time work. It also aims to facilitate the development of part-time work on a voluntary basis."²³ Since then, most countries in the EU have adopted the EU Directive on Part-Time Work, which has the following goals:

- Eliminate discrimination against part-time workers;
- Improve the quality of part-time work;
- Facilitate development of part-time work on a voluntary basis; and

- Contribute to flexible organization of working time in a manner which takes into account the needs of employers and workers.

Provisions of the directive include:

- Part-time workers may not be treated in a less favourable manner than comparable full-time workers solely because they work part-time, unless different treatment is justified on objective grounds;
- The ability for workers to request transfer from full-time to part-time work that becomes available;
- The ability for workers to request transfer from part-time to full-time work or to increase their working time should the opportunity arise; and
- Provision of timely information on the availability of part-time and full-time jobs.

These measures have been adopted by Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. Some countries have gone further, such as Germany, which adopted measures to ensure part-time workers have access to training and further education in order to promote professional development and mobility.²⁴ Australia also requires that part-time workers have equivalent pay and conditions of work to full-time workers.

On the heels of the non-discrimination measures for part-time workers, the EU passed a Directive on Fixed-Term Work in 1999. Similarly, this Directive sought non-discrimination in the pay and conditions of work between fixed-term and permanent workers. It also limits abuses arising from the use of successive fixed-term employment contracts. The

"It's crazy. My responsibilities are the same. But when I work part-time I get \$23 an hour and when I work relief I get paid \$16 an hour – for exactly the same responsibilities."

THE EUROPEAN UNION DIRECTIVE ON PART-TIME WORK SETS OUT TO ELIMINATE UNJUSTIFIED DISCRIMINATION AGAINST PART-TIME WORKERS AND TO IMPROVE THE QUALITY OF PART-TIME WORK.

EQUAL PAY AND WORKING CONDITIONS REGARDLESS OF HOURS WORKED COULD BE A KEY STRATEGY IN ADDRESSING PREMIER WYNNE'S MANDATE TO REDUCE THE GENDER WAGE GAP.

15 countries that are members of the EU have implemented most of the terms of the directive.²⁵

In Canada, Quebec has led the way in addressing discriminatory practices against workers on the basis of form of work. Quebec's *Act Respecting Labour Standards* prevents employers from paying an employee less than other employees doing the same work, solely on the basis that they work fewer hours each week.

EQUAL PAY FOR EQUAL WORK

The ESA has a role in establishing a framework for equality among workers doing comparable work. The government should not enable employers to impose inferior pay or conditions on part-time, contract, or casual workers simply because of the form of their employment. Equal pay and working conditions regardless of hours worked could be a key strategy in addressing Premier Wynne's mandate to reduce the gender wage gap.²⁶ As noted above, a 57 percent wage gap exists between women's part-time and full-time median wage.

RECOMMENDATION 2.4

There should be no differential treatment in pay and working conditions for workers who are doing the same work but are classified differently, such as part-time, contract, temporary, or casual.

EQUAL BENEFITS FOR PRECARIOUS WORK

Society needs universally available, public, statutory rights and entitlements, regardless of paid or unpaid work status, to provide income security in retirement and coverage for prescription drugs, eye care, dental care, and other basic health care needs. But until that time, employers should no longer be able to discriminate against certain groups of workers by only providing benefits to some and not others based on employment status or hours worked.

RECOMMENDATION 2.5

- » Where an employer provides benefits, these must be provided to all workers regardless of employee status (e.g. part-time, contract). Full and equal benefits are the priority, as pro-rated benefits do not amount to equivalent conditions.
- » Where an employer provides benefits, they cannot discriminate due to age, sex, or marital status of the employees. Amend the ESA to prohibit discrimination on the basis of form of the employment relationship (e.g., hours usually worked each week).

Temporary agency workers

On the heels of the last recession, the temporary staffing industry is developing new practices that promise, as industry leader Apple One says, “Just-in-time staffing [that] enables you to produce maximum results without the overhead of a full-time employee.”²⁷

Angelina

I just hope we will reach the stage where there will no longer be any temp agencies and that employers will just hire people.

Legislators and policy-makers in European countries, as well as the International Labour Organization, recognize that regulating employment agencies, even within a framework of protecting agency workers from abuse as Ontario sought to do in 2009 and 2014, serves to legitimize temporary staffing agencies. Failure to recognize the triangular employment relationship opens up the space for the industry to develop new practices to evade the ESA, shift employer liabilities, and lower wages and working conditions.

Nikita is one of a new breed of temp agency workers. Her agency classifies her as an independent contractor and has placed her at a group home. The agency deducts 7 percent from her \$11 hourly wage. Because she is misclassified as an independent contractor, she receives no employment standards entitlements from the agency.

Nikita

I work in a small group home providing care for young men who have developmental disabilities. I work from

7 a.m. to 11 p.m. Friday, Saturday and Sunday—48 hours in three days. My client should have two staff caring for him because aggression is one of his symptoms, but I am usually the only one with him. In addition to providing meals, medications, life skills activities, I assist with personal hygiene and bathing. I am also responsible for cooking meals and laundry for all four clients and general cleaning of the group home.

For this work I get paid minimum wage. Well, actually less than minimum wage. The group home hires the majority of us indirectly through temp agencies. My temp agency provides five of us to the group home. The agency says we are independent contractors. For giving us this assignment, the agency deducts 7 percent from our minimum wage pay. Every pay. No public holiday pay. No vacation pay. No overtime pay. No paid sick days.

I've asked the group home if they can hire me directly, but there is an agreement with the agency that prevents the group home from hiring people directly for two years. And even then, after two years working through the agency, the group home would not recognize my two years of service working through the agency so I would have to start at the bottom. The group home is starting up its own temp agency to hire workers indirectly at \$14. But I can't switch agencies because of the two year agreement.

Manpower boasts that, “By partnering with Manpower, you’ll be able to spend more time on your core business. We’ll manage any aspect of your contingent workforce program—from staff orders and assignments to full-scale, on-site program management.”²⁸ These are just some of the emerging practices:

NIKITA IS ONE OF A NEW BREED OF TEMP AGENCY WORKERS. HER AGENCY CLASSIFIES HER AS AN INDEPENDENT CONTRACTOR AND HAS PLACED HER AT A GROUP HOME. THE AGENCY DEDUCTS 7 PERCENT FROM HER \$11 HOURLY WAGE.

“I’ve asked the group home if they can hire me directly, but there is an agreement with the agency that prevents the group home from hiring people directly for two years.”

THE TEMPORARY STAFFING INDUSTRY GENERATES \$11.5 BILLION IN REVENUE IN 2012, UP FROM \$8.3 BILLION IN 2009. OVER 50 PERCENT OF REVENUES ARE GENERATED IN ONTARIO.³⁰

“When you are in between work, you are so stressed because you don’t know where your next paycheque is coming from. Even if you are on assignment, you don’t know for sure how long the assignment will last. You remain stressed because of that.”

TEMP-TO-HIRE: The agency agrees to send candidates for selection and hiring on temporary assignment by the client company. The company can then do an on-the-job evaluation with the option of hiring the worker directly or dismissing them with, as Apple One says, “highly cost-effective liquidation”²⁹—that is, not complying with termination requirements under the ESA.

INDEPENDENT CONTRACT: Drawing on professional and skilled workers, temporary staffing agencies are placing workers not as employees but as independent contractors, thereby trying to evade the ESA. Projecting growth in contract staffing, industry sources say contract staffing is lucrative because the contracts offer a recurring revenue stream and demand for this kind of staffing is projected to grow. According to analyst Timothy Landhuis, “Companies hire independent contractors using staffing firms as intermediaries, but the workers remain independent. The same computer programmer who might be working as an employee of a temp agency in the US would likely be working as an independent contractor through a staffing firm in Canada. In the US, staffing agencies avoid taking on independent contractors because of the fear of misclassification and resulting penalties brought by the IRS.”³⁰

The temporary staffing industry generates \$11.5 billion in revenue in 2012, up from \$8.3 billion in 2009. Over 50 percent of revenues are generated in Ontario.³¹

Jade

Ever since I got laid off from my full-time work in 2008, I have been working through the agency. It’s a struggle day by day.

All the jobs are minimum wage. Jobs can range from four weeks to four or five months. I was lucky with my last one. I worked full-time and it lasted six months. Then December 16, that was it. No notice.

They said they would call when things get better, but they haven’t called. I have one job that is two days a month. January and February are tough months for companies. So they are tough months for us. I just applied for EI to get by.

You are on call every day. You keep touch with them, calling to let them know that you are available for work. I go through about six or seven temp agencies.

When you are in between work, you are so stressed because you don’t know where your next paycheque is coming from. Even if you are on an assignment, you don’t know for sure how long the assignment will last. You remain stressed because of that. You have your rent to pay, you have groceries. I had to get a line of credit to manage the gaps—I don’t want to be out on the street. I can’t eat out; I don’t go to the movies. I hand wash my clothes so I don’t have to pay. It means you can’t go out every day because you have to pay the TTC which is going up again.

Working for the agency is stressful. You have to go; you have to push. They will be watching you to see if you are too slow. You have to get production going. I told my doctor about the stress I am under and he gave me medication for the stress. That was November. I still have it there; not filled because I can’t afford to. I used the samples the doctor gave me bit by bit. But now if the agency calls me for work, I will to buy my medication so I can work. It means I will go hungry.

The government sought to improve protections for temporary agency workers in 2009 through Bill 139, the *Employment Standards Amendment Act* (Temporary Help Agencies) and in 2014 through Bill 18, the *Stronger Workplaces for a Stronger Economy Act*. There is still much work to be done to protect temporary agency workers.

Many European countries require equal treatment with respect to wages and working conditions for workers hired through temp agencies. That is, temporary

agency workers should receive the same wages and working conditions as if they were hired directly by the client company. The UK government agreed in 2008 that agency workers should receive equal treatment. This is notable as the UK has one of the largest temp industries in the EU.³² Many other countries in Europe have adopted provisions for equal treatment for temporary agency workers (Austria, Belgium, Finland, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, and Sweden). French regulation also provides for precarity pay as a premium for uncertainty. At the end of the assignment, workers get an additional ten percent of the total gross pay.³³

Lee

It's flexibility for them; it's not flexibility for us. I worked in a warehouse of a major telecommunications company through a temp agency. When they want us to come in, we come in. When they don't, we stay home.

We worked day shift and evening shift. The day shift was largely permanent workers making \$25 to \$30. Sometimes when I worked the day shift I would work with the permanent workers. They were making like \$30 and I was making \$11—doing exactly the same work.

The night shift was all temp workers—making minimum wage. Some of the temps had been there 10 to 15 years—probably about 15 percent of them. And then there were a lot who were there for one to five years. These we called the perma-temps. Then there were people like me—rotating temps—that would get rotated out. I was terminated. One day you're working, and the next day you are not and you have no idea why.

Lee's assignment is not the only workplace that uses agency workers as a permanent part of their labour force. Other temp agency workers have reported such perma-temp arrangements to the Workers' Action Centre. The ESA clearly states that agency workers are

to be “assigned to perform work on a **temporary basis** for clients of the agency.”³⁴ [emphasis added] The Act fails to limit the term of assignment, leaving the Act open to abuse. We have recommended limits on the term of assignment and other measures to protect temporary agency workers.

RECOMMENDATION 2.6

- » Ensure that temp agency workers receive the same wages, benefits, and working conditions as workers hired directly by the client company.
- » Require temporary help agencies to provide employees with the hourly markup fees for each assignment (i.e., the difference between what the client company pays for the assignment worker and the wage the agency pays the assignment worker).
- » Make client companies jointly responsible with temp agencies for all rights under the ESA, not just wages, overtime, and public holiday pay.
- » Eliminate barriers to client companies hiring temp agency workers directly during the first six months (repeal Section 74.8(1)8 of the ESA which allows agencies to charge fees during the first six months).
- » Make the client companies and agency liable for termination notice or pay in lieu of notice when the assignment is without a term or when a worker is terminated before the assignment is completed.
- » Prohibit long-term temporary assignments. Require that agency workers become directly hired employees after a working a cumulative total of six months for the client company.
- » No more than 20 percent of staff can be assignment employees. Every employer shall ensure that the total number of hours worked by assignment employees in a work week does not exceed 20 percent of the total number of hours worked by all employees, including assignment employees, in that work week.

TEMPORARY AGENCY WORKERS SHOULD RECEIVE THE SAME WAGES AND WORKING CONDITIONS AS IF THEY WERE HIRED DIRECTLY BY THE CLIENT COMPANY.

“The night was all temp workers – making minimum wage. Some of the temps had been there 10 to 15 years – probably about 15 percent of them. And then there were a lot who were there for one to five years. These we called the perma-temps. Then there are people like me – rotating temps – that would get rotated out.”

Misclassification

“All the employees were expected to register as their own business and that costs money. I was only making \$12 an hour.”

WHEN WORKERS ARE MISCLASSIFIED, THEY GET CHEATED OUT OF VITAL BENEFITS AND PROTECTIONS. WORKERS LOSE OUT ON DECENT WAGES, OVERTIME PAY , PAID LEAVE, EMPLOYER-PROVIDED BENEFITS AND PENSIONS.

Like Nikita, more workers are being misclassified as independent contractors. Misclassification practices dominate sectors such as cleaning, trucking, food delivery, construction, courier, and other business services. But misclassification reaches into many other sectors, such as information technology, copy editing, and nail salons.

Samuel

I was hired to work at a company that developed sales software. The job posting didn't say anything about what kind of job it was. So when I started, I was a little bit surprised because my boss hired me as an independent contractor. All the employees were expected to register as their own business and that costs money. I was only making \$12 an hour.

I was suspicious so I asked my co-workers how they liked working there. I noticed that they seemed scared about the question. After about three weeks I got another job offer. Because I was uncertain about this company, I took the other job. I worked an extra week completing my work. But when I asked for my four weeks wages, my boss said I was missing documents that she needed to send to head office and without them she wouldn't pay me. I prepared the documents and she said this wasn't enough. It went back and forth; always something missing. This went on for a couple months.

My boss was really aware of how the policies work and the loopholes too and how she can go around them. I got help from WAC and found out I was misclassified. I talked to other people that were still working for the company; some that replaced me and some that were

there before me. All of them said that they didn't get their wages paid properly; some got wages but only partially.

When workers are misclassified, they get cheated out of vital benefits and protections. Workers lose out on decent wages, overtime pay, paid leave, employer-provided benefits, and pensions. Workers face problems trying to enforce their rights under the ESA when they have been misclassified, or accessing workers' compensation if injured or sick on the job.

Employers cannot legally get out of their statutory obligations by misclassifying workers as “independent contractors.” But the label has an effect. Workers often have no choice but to accept what employers tell them. When problems arise, such as when already substandard wages go unpaid, workers believe they have no rights because they signed a contract with their employer. Regulatory regimes can vary greatly in their responses to misclassified employment. Revenue Canada may rule that workers are employees, while an Ontario Employment Standards officer may rule that a worker is self-employed. Practices such as misclassification have become increasingly commonplace, which means that officials within regulatory regimes begin accepting the employer's assertions without looking at the substantive employment relationship.

Employers misclassify to save on payroll taxes, avoid complying with the ESA and other labour laws, and to shift liability and risks on to workers. And these are not isolated cases. A recent review of the

construction industry in Ontario found that, between 2007 and 2009, the annual estimated revenue losses to WSIB, the tax system, Canada Pension Plan, and the Employment Insurance system was in the order of \$1.4 billion to \$2.4 billion due to misclassification.³⁵

Misclassification undercuts the competitiveness of law-abiding businesses. The Organization for Economic Co-operation and Development and the International Labour Organization recognize the growth of nominal self-employed or misclassified employment. They have called on countries to devise policies to extend social protections and benefits to this segment of workers.³⁶ The most effective laws combatting independent contractor misclassification are those that are the simplest to administer. Placing the onus on employers to disprove employee status, rather than the other way around, is a “simple fix.”³⁷

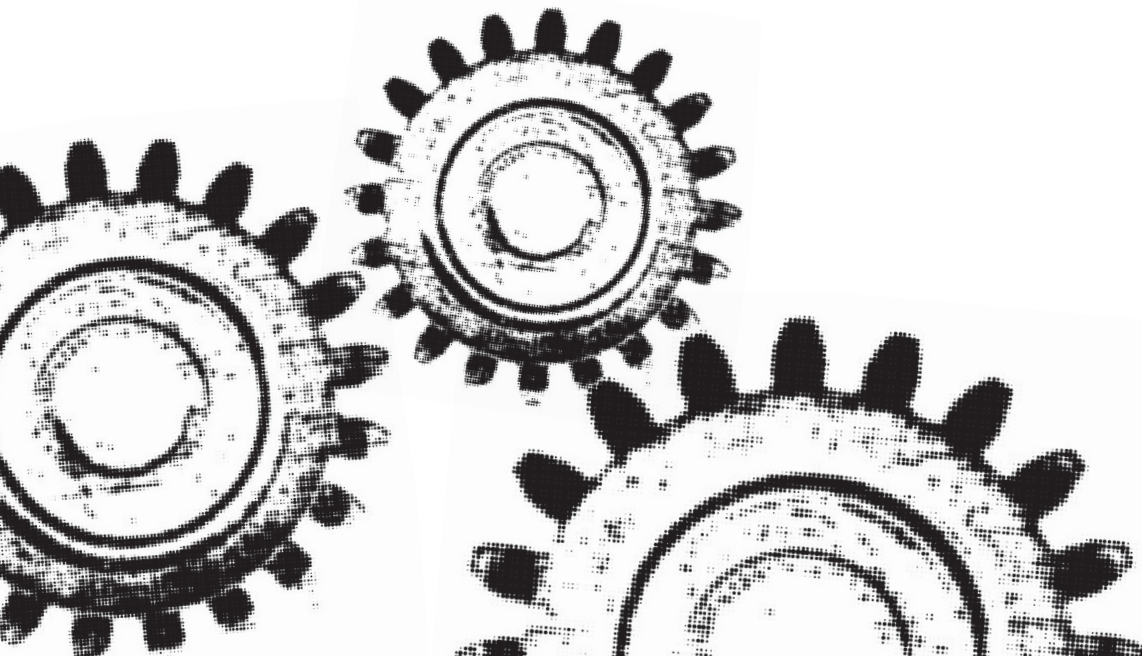
BETWEEN 2007 AND 2009, THE ANNUAL ESTIMATED REVENUE LOSSES TO WSIB, THE TAX SYSTEM, CANADA PENSION PLAN, AND THE EMPLOYMENT INSURANCE SYSTEM WAS IN THE ORDER OF \$1.4 BILLION TO \$2.4 BILLION DUE TO MISCLASSIFICATION.

RECOMMENDATION 2.7

- » Establish a reverse onus regarding employee status, under which a worker is presumed to be an employee unless the employer demonstrates otherwise.
- » Work with federal agencies such as the Canadian Revenue Agency and Employment Insurance to map sectors where misclassification is growing or is already widespread. Undertake proactive sectoral inspections with stiff penalties for those in violation. Publicize names of companies in violation to deter misclassification.



DECENT HOURS FOR A DECENT INCOME



EMPLOYERS HAVE SUBSTANTIAL CONTROL OVER HOURS AND SCHEDULING, LEAVING WORKERS WITH LITTLE PREDICTABILITY IN THEIR WORKING LIVES AND SECURITY OF INCOME.

“We were afraid of speaking up. But one of my co-workers asked about the overtime... The employer said, ‘This is the way we work. If you don’t like it, go and get another job.’”

All too many workers like Vashti are struggling to piece together two or three part-time jobs in order to survive. Others, like Adolfo, are working long hours because wages are not enough to live on. “Before our baby was born, I worked lots, 70 hours a week, because I had to save money for the extra expenses with a new baby.” Alberto has no choice but to work long hours without overtime premium pay or lose his job.

Alberto

I was working for a renovations company doing painting and hardwood floor installation. We worked from 9 a.m. to 10 p.m. with only half an hour off for lunch. No overtime premium pay.

Sometimes we worked outside Toronto; places like London or Hamilton. The employer always wanted to finish the job before returning to Toronto because gas is expensive. So we had to stay and keep working until it was done. We had no other choice. If we asked not to stay, he would fire us.

We were afraid of speaking up. But one of my co-workers asked about the overtime (premium pay). The employer said, “This is the way we work. If you don’t like it, go and get another job.”

Employers have substantial control over hours and scheduling, leaving workers with little predictability in their working lives and security of income. Some people are working very long hours, while other people do not have enough hours of work to support themselves and their families at a decent standard of living. Research shows that the redistribution of work hours is central to addressing the unequal distribution of earnings.³⁸ The International Labour Organization (ILO) has called on countries to tackle working time on multiple levels to improve working conditions.³⁹ In Ontario, that means we have to examine changes to hours of work, overtime, part-time and temporary work, and leaves, in order to address economic inequalities and work-life imbalance, and to support the development of decent jobs.

Hours of Work and Overtime

Miguel

My boss owned my time. He said when we started and when we finished; sometimes from 10 p.m. to 10 a.m. I couldn't get a schedule. It was only when he wanted that I got work.

Miguel is not alone. Violations of overtime and hours of work standards cut a wide swath across many industries and sectors.

Over one million Ontario workers worked overtime in 2014 and 59 percent of these workers did so without overtime pay. People putting in overtime worked an average eight hours extra per week.⁴⁰ Many of these workers, like Alberto, should be paid for hours worked and premium pay after 44 hours. Unpaid overtime continues to be among the top four violations confirmed by the Ontario Ministry of Labour's proactive inspections and individual employment standards claims.⁴¹ Workers settled a class action suit for unpaid overtime at Scotiabank in 2014. Approximately 16,000 Scotiabank employees across Canada can claim unpaid overtime owing between January 1, 2000 and December 1, 2013; estimates of the unpaid overtime the bank could owe its workers go as high as \$95 million.⁴²

Employers feel confident violating hours of work rules because enforcement has been inadequate. The Ontario Task Force on Hours of Work and Overtime found widespread violations in the late 1980s: for every hour worked with an overtime work permit, approximately 24 hours were worked without a permit.⁴³

Yet nothing was done to address these violations, so employers became more confident about expanding non-compliance.

There is a confusing myriad of industry and occupational exemptions and special rules for hours of work and overtime. For example, farmworkers, information tech workers, and homemakers are exempted from maximum hours of work, overtime, breaks, and time off between shifts. These exemptions mean that there is no real ceiling of maximum work hours. Instead, there is a rather a bewildering array of "special rules" that works against protecting the health and safety of workers, protecting those with little bargaining power, or encouraging job development.

EIGHT-HOUR DAY AND 40-HOUR WORKWEEK

Generally, workers cannot be required to work more than eight hours a day (or the number of regular hours established if it is longer than eight hours) or 44 hours in a week. After 44 hours a week, the employer must pay premium overtime pay (1.5 times the regular hourly wage) or paid time off in lieu (at 1.5 paid hours for each hour of overtime worked). The standard work day and week is subject to many industry- or occupation-specific exemptions and special rules.

As the ILO says, "Regular long working hours not only negatively affect the health and safety of workers but

OVER ONE MILLION ONTARIO WORKERS WORKED OVERTIME IN 2014 AND 59 PERCENT OF THESE WORKERS DID SO WITHOUT OVERTIME PAY. PEOPLE PUTTING IN OVERTIME WORKED AN AVERAGE EIGHT HOURS EXTRA PER WEEK

"My boss owned my time ... I couldn't get a schedule. It was only when he wanted that I got work."

EXEMPTIONS TO OVERTIME RULES OVER THE PAST FIVE DECADES HAVE RESULTED IN JUST THREE OUT OF FIVE ONTARIO WORKERS (62 PERCENT) HAVING FULL COVERAGE UNDER THE ESA OVERTIME PROVISIONS.

also decrease the productivity of enterprises.”⁴⁴ Ontario lags behind other jurisdictions in Canada that have established a shorter workweek of 40 hours per week with overtime thereafter.⁴⁵ *The Fair Labor Standards Act* in the US also provides for a 40-hour week with overtime after that.

RECOMMENDATION 3.1

The ESA should provide for an eight-hour day and a 40-hour workweek. Employees should have the right to refuse work beyond 40 hours. Overtime at time and a half should be paid (or taken as paid time off in lieu) after 40 hours.

OVERTIME EXEMPTIONS AND SPECIAL RULES

International standards restrain excessively long hours. Regulations are needed to protect workers' health and safety and the general public (e.g., regulations restricting working hours of truck drivers).

Exemptions to overtime rules over the past five decades have resulted in just three out of five Ontario workers (62 percent) having full coverage under the ESA overtime pay provisions. This erosion of employment standards impacts low-income employees who have dramatically lower rates of coverage than other groups. Less than a third of low-income employees (29 percent) are fully covered by the ESA's overtime pay provisions, compared to 69 percent of middle-income and 71 percent of higher-income employees.⁴⁶ Low-income workers such as residential care workers, farm workers, swimming pool installers, and landscapers are just some of the workers fully excluded from overtime premium pay.

Exemptions and special rules on overtime allow employers to evade minimum standards. There is evidence

in the retail sector of deliberate misclassification of employees as managers or supervisors as a strategy to avoid paying overtime. The Ministry of Labour's 2013 retail enforcement blitz emphasized managerial misclassification as a priority for inspectors.

RECOMMENDATION 3.2

Repeal overtime exemptions and special rules.

OVERTIME AVERAGING

Overtime averaging allows employers to seek written agreements with workers to average overtime over two or more weeks. Under a four-week averaging permit, workers would only get overtime premium pay after 176 hours during the four weeks, regardless of the number of hours worked each week, such as 60 hours one week, and 50 the next. Averaging agreements expire after two years and can only be revoked if **both** the employer and the employee agree in writing to end the agreement prior to its expiry. Workers have little bargaining power to negotiate overtime agreements.

Averaging overtime over an extended period enables employers to not only schedule workers for excessive overtime, but to do so without paying them time and a half after working 44 hours in a week. Unless this provision is revoked, erratic work schedules and excessive overtime will continue in Ontario. They will persist without the employer paying the overtime that people deserve, without any public policy commitment to examine how work could be more equitably distributed, and without any concern for balancing family and work life commitments. This problem requires a legislative response because non-unionized workers do not have ESA

protections allowing them to refuse to sign agreements without penalty or job loss.

RECOMMENDATION 3.3

Repeal overtime averaging provisions in the ESA.

PERMITS FOR WORKWEEKS BEYOND 48 HOURS

While the general maximum workweek under the ESA is 48 hours per week, employers are allowed to obtain permits to extend work beyond the eight-hour work day (or the number of hours in the regular work day if that is longer) and the 48-hour workweek.

RECOMMENDATION 3.4

Permits for overtime in excess of 48 hours per week must be reviewed. Permits should only be given in exceptional circumstances and be conditional on demonstrated efforts to recall employees on layoff, offer hours to temporary, part-time, and contract employees, and/or hire new employees. Annual caps of no greater than 100 hours per employee must be set on overtime hours allowed by permits. Annual permits must set a weekly or quarterly cap to avoid unhealthy overtime in busy periods. Workers should retain the right to refuse overtime when their employer has been granted an overtime permit. Names of companies with overtime permits should be publicized.

MEAL BREAKS

Adolfo

We haven't ever had a regular work schedule. No regular hours of work or of breaks. There is no time to eat or have lunch at the appropriate time. If you are busy, your break has to be postponed. This has affected me lots. I saw the doctor and he says I have gastritis because I skipped meals at work.

The ESA only provides for an unpaid half-hour break after five hours of work. The half-hour break can be split into two 15-minute breaks if the employer and employee agree. There is no provision for “coffee breaks.” As Adolfo’s experience suggests, in workplaces that are highly unstructured or where abuse of breaks exists, employers must be required to provide an unpaid half-hour break that cannot be split in two. Two paid refreshment breaks plus an unpaid half-hour lunch is a reasonable response to workers’ needs for breaks to refresh themselves and to conduct safe and productive work.

RECOMMENDATION 3.5

In addition to an unpaid half-hour lunch break, two paid breaks, such as a coffee break, should be provided by the employer.

ANNUAL VACATIONS AND GENERAL HOLIDAYS WITH PAY

Jade

For temp agency workers, you can't actually take vacation. Say you want to take a week vacation; when you come back your work is gone. That's happened to me when I had to take vacation to deal with a family emergency. I notified them, but still when I came back they had given away my job because they are not going to wait for you.

Jade’s experience is not unique. Many low-wage workers can take vacation but they are told it will not be paid. For others in low-wage and precarious positions, two weeks of annual paid vacation is all they will see in their working life. The employment standards minimum vacation entitlement is what many workers rely on.

IN A GLOBAL COMPARISON, CANADA RANKED LOWEST, ALONGSIDE CHINA, WITH RESPECT TO VACATION ENTITLEMENTS.

“For temp agency workers, you can't actually take vacation. Say you want to take a week vacation; when you come back your work is gone.”

WHEN IT COMES TO ACCESSING PUBLIC HOLIDAYS, ONLY 61 PERCENT OF WORKERS ARE FULLY COVERED; 34 PERCENT FACE SPECIAL RULES; 5 PERCENT ARE FULLY EXEMPT.

In a global comparison, Canada ranked lowest, alongside China, with respect to vacation entitlements.⁴⁷ Most major industrialized countries—Sweden, Germany, the United Kingdom, and others—all have legislation giving workers at least four weeks of paid vacation. The International Labour Organization recommends that the period of paid vacation should not be less than three weeks. Some Canadian provinces and territories have started moving in the right direction. Only Ontario and Yukon limit vacation to two weeks of paid vacation, while all other jurisdictions have access to three weeks of vacation. Saskatchewan provides three weeks of paid vacation after one year of service, and four weeks of vacation after nine years. European countries average more than five weeks of annual paid vacation.

RECOMMENDATION 3.6

Increase paid vacation entitlement to three weeks per year. After five years of service, increase vacation to four weeks of paid vacation per year.

Public holidays are important for balancing work, family life, and community involvement, and for providing workers with rest and renewal. Yet when it comes to accessing public holidays, only 61 percent of workers are fully covered; 34 percent face special rules; 5 percent are fully exempt⁴⁸. Violations of public holiday entitlements rank at the top of violations found by the Ministry of Labour in targeted inspections in 2013-14.⁴⁹ In part, the high rate of violations is due to the confusion created by exemptions and special rules.

RECOMMENDATION 3.7

Repeal exemptions from public holidays and public holiday pay.

Part-time, temporary and casual hours of work

Samuel

I worked for a Canada-wide retail store. It is the instability, not knowing how many hours I would get in a week. Wages are low, so it's really hard to plan my life.

At the beginning of 2013, they had a huge layoff. Our supervisor, who was with the company for 15 years, he was laid off. Everyone who was full-time was laid off. Full-timers were getting around \$16. After that, they didn't really hire anyone full-time any more. It's all part-time now. We get about \$11 or \$12.

The number of hours you get are all over the place. There is no fixed number. It's impossible to plan your life.

Since 2000, part-time jobs have grown faster than full-time. One in five people work part-time.⁵⁰

Adolfo

Currently I'm working as painter in office buildings. We work evening shifts, from 6 p.m. to 10 p.m.; sometimes to midnight. But it is only 20 to 25 hours a week so me and my co-worker get casual jobs in the morning. My boss says he doesn't have any more hours. I am constantly looking for casual jobs in the mornings, but there are not many offers of jobs. It is worse in the winter.

This is very stressful because you don't know how to handle your schedule. For example, I have two daughters and my wife and it is very complicated to know when I can see them. I can't quit the evening job because it is the most stable job I have. When I get jobs in the mornings, I sometimes leave home at 6 a.m. and come back at 11 p.m. or

midnight. So I don't see my daughters for two, three days. They ask for their Dad.

Women are more likely to have part-time employment because of the need to take care of children. Racialized and recent immigrant workers are more likely to have temporary part-time work.⁵¹

Sung

I work for a large community mental health organization providing support for people who are dealing with homelessness and mental health illness. The community organization I work for hired me for one part-time position on the weekend and as a relief worker. The casual position is unpredictable. I work shifts, often getting called in at the last minute. Last week I worked 38.5 hours, which was lucky, but there's no guarantee.

It's hard to make ends meet. In December I got a lot of hours because it was the holidays but in January I hardly got any hours. I saved up in December to cover January, but it never seems enough. My savings are quickly depleting. My friends help sometimes but everyone is in the same boat. Sometimes we rely on food banks.

My hours of work are quite random. I can get a call to do a shift at any time. Doing night shifts is quite intense. It usually takes me more than a day to recover, but if I get a call to come back in I have to do it.

I have tried to get additional hours. But my manager said it was not her responsibility to ensure that everyone receives hours. But whose responsibility is it?

SINCE 2000, PART-TIME JOBS HAVE GROWN FASTER THAN FULL-TIME. ONE IN FIVE PEOPLE WORK PART-TIME.⁴⁸

“I can't quit the evening job because it is the most stable job I have. When I get jobs in the mornings, I sometimes leave home at 6 a.m. and come back at 11 p.m. or midnight. So I don't see my daughters for two, three days. They ask for their Dad.”

AS MANY OF THE WORKERS ATTEST, EMPLOYERS EXPECT THAT PEOPLE WILL REMAIN AVAILABLE FOR WORK AS REQUIRED BY THE EMPLOYER. BUT THERE IS NO RECIPROCAL REQUIREMENT TO PROVIDE A GUARANTEE OF HOURS OR INCOME.

“I looked for other sources of work but it is very difficult because with these schedules I don’t know what to say because I don’t know at what moment the agency would call me. I feel very depressed with this situation.”

REDUCING INSECURE AND INADEQUATE HOURS OF WORK

The ESA is silent on the rights of part-timers to have advance notice of hours, minimum or guaranteed hours, or equal wages and benefits equivalent to full-time workers. As Sung asks, “Whose responsibility is it” to provide decent hours? In the absence of regulation, this has been left to the discretion of employers and the growth of low-wage, part-time, insecure work is the consequence. Without such regulation, employers have been allowed to discriminate against workers who may do the same work but for fewer hours, creating huge wage gaps between full-time and other workers. In 2014, part-time workers earned, on average, 40 percent less per hour than full-time workers, while temporary workers earned 30 percent less.⁵² Some part-time jobs may provide good, regular work. But in sectors such as food, hospitality, retail, health care, and child care, hours of work and incomes are unpredictable. These are sectors dominated by women workers, racialized workers, recent immigrant workers and migrant workers. Regulating hours and scheduling could contribute to job creation while improving the quality of existing part-time, casual, and temporary jobs.

As many of the workers attest, employers expect that people will remain available for work as required by the employer. But there is no reciprocal requirement to provide a guarantee of hours or income. Despite inadequate incomes, workers such as Samuel and Sung need to be available when required, often at short notice. This hinders workers from finding other work and contributes to underemployment.

RECOMMENDATION 3.8

- » All workers should receive a written contract on the first day of employment setting out terms and conditions, including expected hours of work.
- » Require employers to offer available hours of work to those working less than full time before new workers performing similar work are hired.
- » Require employers to preferentially consider current part-time or casual employees before hiring additional part-time or full-time workers.
- » Provide just-cause protection to contract workers if, at the end of a contract, another worker is hired to do the work previously done by the contract worker.
- » Regulate renewal of contracts so that seniority translates into permanent job status.

MINIMUM SHIFTS

There are no minimum shifts under the ESA. For people like Isabel, an early childhood educator, this makes her work in afterschool programs unsustainable.

Isabel studied and obtained an Early Childhood Education Assistant diploma with the hopes of working in her chosen field and securing decent work. But since graduating, she wonders if it was worth the time and expense of furthering her education. She has only been able to get part-time work through an agency that provides assistants to schools for before- and after-school programs.

Isabel

I asked to be placed in schools close to home. But they assigned me all over the place. They do not pay for transportation and I had to travel very far to get to some of the schools.

My shifts are truly irregular. Sometimes I would work at a school for two hours in the early morning and then again for two

or three hours in the late afternoon. I had to look at what to do in between the split shifts.

The hours of work varied. It could be three hours or six hours a day. It also varies each week. Some weeks it is two or three days and another week it will be one day.

My income is totally insufficient to support myself. My husband was not working for a while and it became very difficult. For a while there was no work and we had to submit ourselves to ask the government for help. We have had to get some help from friends to pay the rent, which we received with appreciation; but I never imagined that I was going to live like this.

I looked for other sources of work but it is very difficult because with these schedules I don't know what to say because I don't know at what moment the agency would call me. I feel very depressed with this situation.

The ESA requires workers to be paid a minimum of three hours whether employees work their whole shift or not (e.g., restaurant workers who are told to clock off on slow days). Yet the ESA allows employers to schedule shifts of less than three hours (e.g., a two-hour split shift).

RECOMMENDATION 3.9

Amend the ESA to require that the minimum shift per day be three hours, scheduled or casual.

SCHEDULING

As long-time retail worker Samuel says,

They only schedule you for three days, but they still want a four- to five-day commitment from you. It makes it hard on workers who get other jobs in retail, trying to juggle changing schedules. There's no protection when problems come up in scheduling. We give our

availability. But they would sometimes still schedule me on days I said I couldn't work. My manager told me I had to find someone to take my shift. Sometimes it works out because so many people are trying to pick up shifts to increase their hours. But it's stressful because we have to find people to cover us. It creates problems between workers.

Retail workers are reporting increased “just-in-time” scheduling, in which they get fewer hours while employers expect them to remain on call for last-minute changes.⁵³ Such erratic schedules create stress and hardships for people trying to plan child care, education, or coordinate multiple jobs and ensure economic security.

Serena was lucky to find a full-time job in retail, but scheduling is still a problem.

They use the schedule to control us. There are three shifts per day. We don't get to see the schedule until the Saturday evening for the week. You get scheduled all over the place. Even though it's a full-time job it's only minimum wage. The scheduling makes it hard to get other work to increase my income.

RECOMMENDATION 3.10

- » Require two weeks' advance posting of work schedules (including when work begins, ends, shifts, meal breaks).⁵⁴
- » Require that employees receive the equivalent of one hour's pay if the schedule is changed with less than a week's notice, and four hours' pay for schedule changes made with less than 24 hours' notice.⁵⁵
- » Workers must be able to ask employers to change schedules without penalty (i.e., protection from reprisals).

RETAIL WORKERS ARE REPORTING INCREASED “JUST-IN-TIME” SCHEDULING, IN WHICH THEY GET FEWER HOURS WHILE EMPLOYERS EXPECT THEM TO REMAIN ON CALL FOR LAST-MINUTE CHANGES.

“They only schedule you for three days but they still want a four- to five-day commitment from you. It makes it hard on workers who get other jobs in retail, trying to juggle changing schedules.”

Sick leave

ALMOST ONE IN THREE WORKERS IS WITHOUT SICK LEAVE PROTECTION. MOST OF THESE WORKERS WORK IN RETAIL, ACCOMMODATION AND FOOD SERVICES, CONSTRUCTION, HEALTH CARE, AND SOCIAL SERVICES.

“A lot of people go to work sick, that’s the issue. One day you don’t work is one-fifth your week’s pay ... one day you don’t work and you’re thinking, ‘Am I gonna have this job when I go back?’”

Lee

A lot of people go to work sick, that’s the issue. One day that you don’t work is one-fifth your week’s pay. So that’s why a lot of people go in to work sick. Doesn’t matter if they have fevers, sometimes they have colds, sometimes they’re coughing. They work through it. One day you don’t work and you’re thinking, “Am I gonna have this job when I go back?”

For public health concerns, the Ontario Ministry of Health tells people to stay at home when sick. Yet for 1.6 million Ontario workers, that may not be possible. Small businesses (less than 50 employees) are not required to provide job-protected, unpaid sick leave (personal emergency leave). The ESA only requires employers with 50 or more employees to provide up to ten days of unpaid leave for employees who are sick, injured, have an emergency, or need to take care of family members.

Almost one in three workers is without sick leave protection. Most of these workers work in retail, accommodation and food services, construction, health care, and social services. Those sectors where workers are most in contact with the public are also the sectors with the highest number of workers excluded from sick leave protection. Women are at the greatest disadvantage because they generally take care of sick family members. Racialized women are over-represented in health care, social services, accommodation, and food services.⁵⁶ It is time to repeal the small

business exemption from personal emergency leave that was introduced in 2000.

RECOMMENDATION 3.11

Repeal the exemption for employers of 49 or less workers from providing personal emergency leave.

UP TO SEVEN PAID SICK DAYS PER YEAR

Not only do workers need the right to take time off when sick, but workers need to have paid sick leave to make time off a viable option. For all the workers participating in this report, taking a sick day means losing wages. When earning minimum wage or low wages, few can afford to lose a day’s pay.

As Angelina says, “If I am sick I won’t get paid. I force myself to go to work because I won’t get paid. I know it’s not good for other people in the workplace because you can spread something. But I can’t afford not to be paid.”

Providing paid sick leave speeds up recovery, deters further illness, and reduces health care costs. At least 145 countries provide paid sick days for short- or long-term illness. Many high-income economies require employers to provide paid sick days upwards of ten days. Canada and the US are almost alone in having no national policy requiring employers to provide paid sick days.⁵⁷ In the US, that is changing, as three states and 15 cities have recently adopted guaranteed paid sick days.

President Obama called for paid sick leave in his recent State of the Union address. “Send me a bill that gives every worker in America the opportunity to earn seven days of paid sick leave,” Obama said. “It’s the right thing to do.”⁵⁸

Canada should catch up on this important health care and workplace public policy. Only a third of employees between the ages of 18 to 24 have any paid sick days; fewer than half of all Canadians are covered by employer-paid sick leave.⁵⁹ Low-wage workers are least likely to have paid sick leave. A Centre for Disease Control study of nearly 500 food service workers found that half of them worked while ill, largely because they did not want to lose pay or risk losing their job.⁶⁰ Ontario can lead the way by requiring employers to provide paid sick leave.

RECOMMENDATION 3.12

All employees shall accrue a minimum of one hour of paid sick time for every 35 hours worked. Employees will not accrue more than 52 hours of paid sick time in a calendar year, unless the employer selects a higher limit. For a full-time 35-hour per week employee, this works out to approximately seven paid sick days per year.

NO REQUIREMENT FOR MEDICAL NOTE

Samuel

I would get a verbal warning if I didn't have a doctor's notice after I was off sick. The doctors understand because they know it's for work. But for me, it's like the employer doesn't believe you and you're trying to prove that you are not lying. It's weird. And on top of that, they shift the cost on to us. It's \$20 [for a doctor's note], the time commuting to the doctor . . . if you're making \$11 then you have to work two hours to see a doctor for two minutes.

The ESA currently allows employers to require workers who take personal emergency leave to provide evidence that the employee is entitled to the leave. Not only does this create a barrier to workers taking such leave (cost of medical notes, time and transit to doctor), but the medical profession is urging employers in Ontario not to require sick notes due to the costs to the health care system and public.⁶¹

RECOMMENDATION 3.13

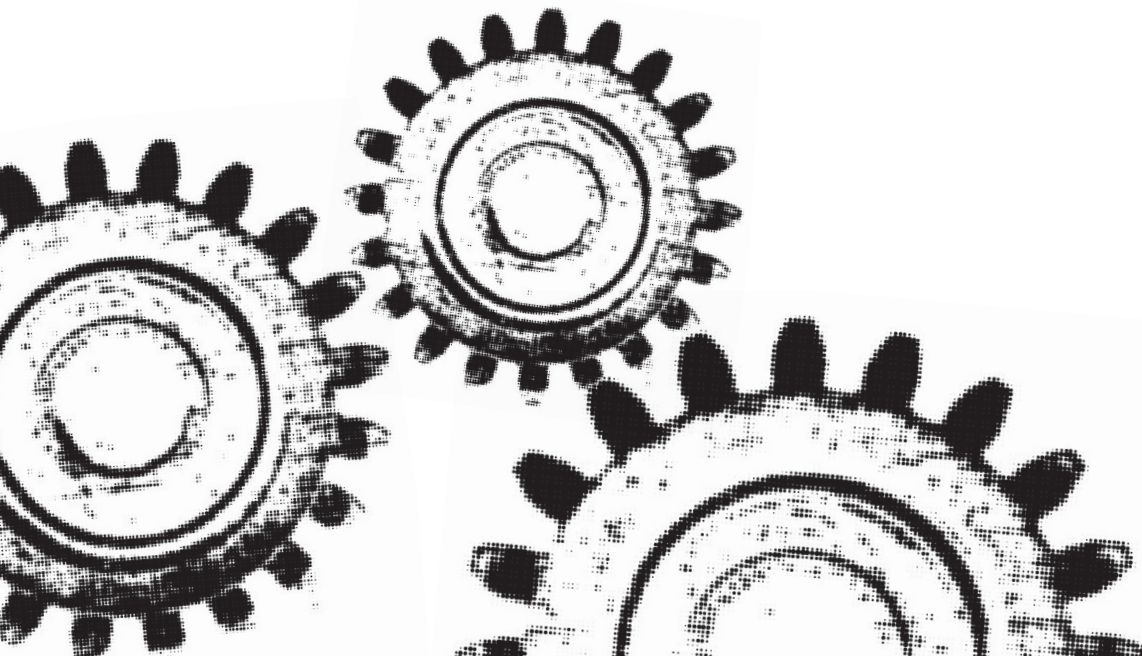
Repeal Section 50(7) and amend the ESA to prohibit employers from requiring evidence to entitle workers to personal emergency leave or paid sick days.

PROVIDING PAID SICK LEAVE SPEEDS UP RECOVERY, DETERS FURTHER ILLNESS, AND REDUCES HEALTH CARE COSTS.

THE MEDICAL PROFESSION IS URGING EMPLOYERS IN ONTARIO NOT TO REQUIRE SICK NOTES DUE TO THE COSTS TO THE HEALTH CARE SYSTEM AND PUBLIC.



RIGHTS WITHOUT REMEDIES: IMPROVING ENFORCE- MENT



THE WORKERS' ACTION CENTRE SURVEYED PEOPLE IN LOW-WAGE AND PRECARIOUS WORK IN 2011 AND FOUND SUBSTANTIAL VIOLATIONS OF CORE STANDARDS. WE FOUND THAT 22 PERCENT OF WORKERS SURVEYED EARNED LESS THAN MINIMUM WAGE; 33 PERCENT WERE OWED UNPAID WAGES; 39 PERCENT DID NOT RECEIVE OVERTIME PAY; AND 36 PERCENT LOST THEIR JOBS WITHOUT RECEIVING TERMINATION PAY OR NOTICE

“There are too many troubles with cash jobs. No public holiday pay, no vacation pay, no overtime, nothing there. I asked employers to pay me cheque, but they would not. But what could I do? You need to eat; you need to pay the rent.”

Improving the rights of workers will do little if these rights are not enforced.⁶² But Ontario's current system of enforcement relies on workers to enforce rights once violations occur. Without active enforcement of minimum standards in workplaces, workers have little protection when their employers violate employment standards. Increasingly workers are being conditioned to accept substandard working conditions.

Nuan

I have worked for 19 different employers since 2008. All were cash jobs except one at [a chain restaurant] where they paid me \$10.25. That's the highest pay I have got since coming to Canada. On all my other jobs, my wage rates ranged from \$5 an hour to \$10 an hour.

At my first job I sold sweets in a mall. The boss said he would pay me \$5 an hour but he is so cheap, he took advantage of me. He always short-paid me. He made me work 5 hours and 59 minutes, then he only paid me for 5 hours. One day I asked the boss to pay me for the actual hours I worked. I was fired right there.

I worked for a buffet restaurant in Hamilton, doing cooking and cleaning. I worked 6 days a week 12 hours a day and got paid \$430 in cash each week (about \$6 an hour). No holiday pay. No vacation pay. No overtime pay. I was allowed to eat two meals a day— everyday tofu only. After a few months, I felt dizzy and I was often sick and weak. Thank heaven I was let go after six months.

At another restaurant I was paid five hours a day but they gave me so much work, it always took me more than five hours but I only got paid for five hours. A worker told me that the job I did was originally for a full-time worker.

There are too many troubles with cash jobs. No public holiday pay, no vacation pay, no overtime, nothing there. I asked employers to pay me cheque, but they would not. But what could I do? You need to eat; you need to pay the rent.

Many of the people represented in this report experienced what Nuan did: workplaces and sectors where violations are rampant and minimum standards unheard of. As Alberto reports, During the seven years that I have worked in construction, I have met lots of people in the sector. Less than two percent received a fair payment; the other 98 percent do not receive overtime pay, vacation, public holiday, any insurance, nothing . . . the problem has become so big that violations look normal.

There are few studies documenting the pervasiveness of labour standards violations, but the ones that are available confirm what workers say. The federal government's Labour Standards Evaluation surveyed federally regulated employers and found that 25 percent of employers were in widespread violation and that 50 percent were in partial violation of the federal Labour Code.⁶³ This study was confirmed a decade later by Statistics Canada.⁶⁴ The Workers' Action Centre surveyed people in low-wage and precarious work in 2011 and found substantial violations of core standards. We found that 22 percent of workers surveyed earned less than minimum wage; 33 percent were owed unpaid wages; 39 percent did not receive overtime pay; and 36 percent lost their jobs without receiving termination pay or notice.⁶⁵ As Arthurs states in his 2006 review of federal labour standards, “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.”⁶⁶

New model of enforcement needed

The Ministry of Labour uses a reactive compliance model in enforcing the ESA. Through education, complaints investigations, and proactive inspections, the government seeks voluntary employer compliance with the ESA. Only when that compliance is not forthcoming are some deterrence strategies used, such as ordering the employer to pay unpaid wages or issuing a Part I ticket (a penalty of about \$355). Under this system of enforcement, there is little risk of detecting violations of the Act, no cost to violation other than what employers should have paid in the first place, and, as a consequence, little incentive for employers to comply.

The result of this model of ESA enforcement is a reactive system that relies largely on individual workers to enforce their own statutory rights by reporting ESA violations through individual claims. Saunders and Dutil note that the “practice of dealing with compliance one case at a time is expensive and risks overloading the available capacity.”⁶⁷ While the Ministry of Labour has attempted to shift resources to more proactive enforcement measures, an increase in individual claims has restricted its ability to do so. In 2014, the number of Employment Standards officers doing proactive inspections was halved from 30 to 15, as officers dealt with a backlog in claims.

The reactive compliance model is not capable of addressing the structural features of the labour market that produce ESA violations. This is particularly the case with respect to new forms of work organization, in which responsibility for employment is being shifted to contractors, temporary agencies, and workers, in highly competitive environments where pressure to cut regulatory corners is high.⁶⁸ As the Law Commission of Ontario concludes, “There is a general consensus that proactive enforcement is a much more effective mechanism for ensuring the protections of the ESA than the reactive system of responding to individual complaints.”⁶⁹

“During the seven years that I have worked in construction ... Less than two percent received a fair payment; the other 98 percent do not receive overtime pay, vacation, public holiday, any insurance, nothing...the problem has become so big that violations look normal.”

RECOMMENDATION 4.1

- » Implement a deterrence model of enforcement that compels employers to comply with the ESA.
- » Develop an expanded, proactive system of enforcement to increase compliance.

Increase risk of detection of ESA violations

“The Ministry of Labour goes on the assumption that people will complain if they see irregularities. But most people are afraid to talk about it. They are afraid to lose their job.”

Samuel

The Ministry of Labour goes on the assumption that people will complain if they see irregularities. But most people are afraid to talk about it. They are afraid to lose their job. So after I filed a claim and won my appeal confirming that my boss misclassified me and violated many standards, the Ministry of Labour should have done an inspection of the whole company. I know one person that was owed over \$10,000 and many others were also owed unpaid wages. But the boss, she didn't care. Even though I won my case, she doesn't lose anything. She keeps breaking the law.

EXPANDED INVESTIGATIONS

Individual claims do provide an excellent way to detect employer violations. ESA violations are generally confirmed in 75 percent of individual claims. As Samuel notes, employers found in violation of individual claims are likely also violating the rights of their other employees. But individual claims investigations are rarely extended to expose violations against current employees. One year for which information is available shows that there were 11,000 individual claims with confirmed violations, yet this triggered only 142 broader inspections of the employer.⁷⁰

RECOMMENDATION 4.2

Where individual claims confirm employer violations, then an inspection shall be expanded to determine if the employer has violated the rights of current employees and remedies all monetary (e.g., unpaid wages, overtime pay,

public holiday pay, vacation pay, etc.,) and non-monetary violations (e.g., hours of work, breaks, agreements etc.,) detected.

NEW MODEL OF PROACTIVE INSPECTION

In addition to examining individual claims, the Ministry of Labour conducts proactive inspections of employers it suspects are not complying. The current model of proactive inspections focuses on education and voluntary compliance. Officers give employers advance notice of a proactive inspection, asks the employer to conduct a self-audit of the payroll to expose violations, and focuses on bringing the employer into future compliance. The goal of proactive inspection is not to detect current violations in order to ensure unpaid wages and entitlements are paid to current workers. As Adolfo says, “Workers cannot do anything while they are on the job. Please make sure the government investigates employers deeply. They must go deep to see how they are breaking the law. They are not investigating enough.”

RECOMMENDATION 4.3

Change the proactive inspection model to enforce rights for current employees. The goal of proactive inspections should be to ensure current workers get unpaid wages and core standards are adhered to, in addition to educating employers to guarantee future compliance.

BUILD CAPACITY FOR PROACTIVE ENFORCEMENT

RECOMMENDATION 4.4

- » Increase staffing to the dedicated enforcement team in order to increase proactive inspections.⁷¹
- » Partner with organizations working directly with precarious workers (e.g., workers centres, community legal clinics, unions, immigrant serving agencies) to identify where violations are occurring and identify which investigative strategies will best uncover employer tactics to evade or disguise violations.
- » Strategically target emerging employer practices, such as misclassification of employees as independent contractors or failure to pay overtime, for proactive sectoral inspection blitzes.
- » Establish a provincial fair wage policy for government procurement of goods and contracts for work or service that would require adherence to minimum employment standards and industry norms.

- » Hold companies in low-wage sectors responsible under a duty-based regime for subcontractors' violations of ESA wages and working conditions. Companies would have the duty to know that sufficient funds exist in the contract with subcontractors to comply with the ESA. This would follow the State of California's Labour Code section known as the "brother's keeper" law.⁷⁴

“Workers cannot do anything while they are on the job. Please make sure the government investigates employers deeply. They must go deep to see how they are breaking the law. They are not investigating enough.”

MOVE ENFORCEMENT UP THE CHAIN OF SUBCONTRACTING

As the Law Commission on Ontario recommended, the Ministry of Labour should develop processes of reaching out to and focusing on the top echelon of industry, to address ESA non-compliance when workers are affiliated with the company, particularly subcontracted and temporary agency workers.⁷² Two such measures that could be enacted include:

RECOMMENDATION 4.5

- » Enact a “hot cargo” provision in the ESA that would enable inspectors to impose an embargo on goods manufactured in violation of the Act to ensure that, in fairness, penalties are felt by all parties along the chain of production.⁷³

Support workers in making employment standards claims

“But I kept going, trying to find my way through the maze on the Ministry of Labour website to find out about independent contractors vs employees. I realized I could file a claim. So when I went for my first hearing, the officer, as soon as he saw the contract he dismissed my case... it was really stressful for me. I felt helpless. The officer wasn’t even willing to hear me.”

Samuel

I was misclassified as an independent contractor when I should have been treated like an employee. I wasn’t getting paid. By the time I left I was owed for four weeks wages. I didn’t have any luck getting my wages after months of trying. So I contacted the Ministry of Labour over the phone to make sure the information was correct that I was misclassified. They said right away that they didn’t deal with that, even without hearing what my situation was.

But I kept going, trying to find my way through the maze on the Ministry of Labour website to find out about independent contractors vs. employees. I realized I could file a claim. So when I went for my first hearing, the officer, as soon as he saw the contract he dismissed my case, without hearing any details about it. I was trying to explain my situation but he was always going back to the contract that said I was an independent contractor, even though by the definitions of the MOL everything I did fell into the employee part.

It was really really stressful for me. I felt helpless. The officer wasn’t even willing to hear me. He dismissed it by only seeing one document. At that point I felt even worse than I was feeling before.

I got help from a legal clinic and we appealed the dismissal. But it took a long time to get my wages. Between filing the claim, going to hearings and stuff it was almost two years.

Most workers file claims for unpaid wages when they are no longer employed. Workers, particularly those in precarious work, face substantial barriers to making

claims for unpaid wages. With some exceptions, workers are first required to try enforcing their rights with their employer. When that fails, workers may file a claim.

Daniella

In the cleaning industry they don’t follow the rules. My boss told me I was a subcontractor. I phoned Employment Standards and the representative described to me what rules to apply to figure out if you’re an employee. That helped; getting confirmation that I was an employee. But I also told her I wasn’t getting paid. I wanted help about what to do. The representative told me that if I did not turn up to work according to the arrangement the employer could fire me with cause. So even though my friends and family told me to leave, I felt I had no choice but to continue to work.

After my boss fired me I was still owed a lot of wages. I was trying to see where I could get some help. I called the law society and they gave me the names of two lawyers for 30 minutes of advice. So I spoke to a lawyer. She would write my boss a letter but it would cost \$200 plus GST. I would have to gather all the information, do the calculations, and gather evidence such as copying all the text messages and copy of the money order. It was so overwhelming. At that time, I would not know where to start.

Finally I found the Workers’ Action Centre that supported me. I made a claim at the Ministry of Labour for my unpaid wages. They ordered her to pay almost \$1,000 on April 23, 2014. She did not pay anything. The whole list of things the government told her to pay, there was nothing.

Workers face significant barriers to pursuing their unpaid wages through the claims process:

- Claim forms can be found at ServiceOntario or on the Ministry of Labour website. Information on how to file claims is on the Ministry's website. But this can be very difficult to find, as Samuel experienced. There is a digital divide in internet access. If you are poor, older, have less formal education, live in a rural community, or were born outside Canada you are less likely to have familiarity with or access to the internet.⁷⁵
- The claims process is difficult for workers who do not speak English, as there are no interpretation services provided. In a changing labour market, it is becoming more difficult for workers to make complex legal arguments when, for example, they are misclassified as independent contractors.
- The claims process has shifted from investigating employer violations of minimum standards to a dispute resolution system. Workers are expected to follow rules of evidence, providing documentary evidence to make their case. This is very hard for workers to do. The Act recognizes this, but only in cases of employer reprisal against a worker who has tried to enforce their rights. In cases of reprisal, it is the employer who must disprove the claim, rather than the worker having to prove the claim. The evidentiary onus should be on employers, not workers.
- Workers without regularized immigration status and migrant workers (such as farm workers, live-in caregivers, and other migrant workers) fear that employers will have them deported or returned to their home country if they speak out. Because

of this, most such workers will never pursue claims against employers who have violated the law.

- Employment standards is one of the few areas of employment rights that does not receive funded legal services to help workers (or their employers).⁷⁶ Providing legal supports would not only improve access to justice, but it would improve the efficiency of claims investigations, and help reduce backlogs in claims.

To improve access to justice, there are a number of strategies that could help reduce barriers faced by workers pursuing their rights through the claims process.

RECOMMENDATION 4.6

- » Create a reverse onus, so that employers have to disprove a complaint against them, rather than workers having to prove that the violation occurred.
- » Fund direct one-on-one legal assistance to workers to make employment standards claims.
- » Revoke the requirement that workers first attempt to enforce their ESA rights with the employer before they are allowed to file a claim.
- » Fund interpreters for the claims process to ensure access for employers and employees who do not speak English.

“Finally I found the Workers’ Action Centre that supported me. I made a claim at the Ministry of Labour for my unpaid wages. They ordered her to pay almost \$1,000... She did not pay anything. The whole list of things the government told her to pay, there was nothing.”

Effective deterrence strategies

IN 2009-10, 20,762 CLAIMS WERE INVESTIGATED, FINDING THAT EMPLOYERS OWED \$64.4 MILLION TO WORKERS; YET ONLY 86 FINES (NOTICES OF CONTRAVENTION) AND 298 TICKETS (WITH A PENALTY OF \$360 EACH) WERE ISSUED, AND 13 PROSECUTIONS OF EMPLOYERS IN VIOLATION WERE INITIATED. THERE IS NO GENERAL DETERRENCE TO EMPLOYERS WHEN THERE SO LITTLE COST FOR BEING FOUND IN VIOLATION OF THE LAW.

Under the Ministry of Labour's compliance model, penalties for violations are rarely used, and then only when voluntary compliance fails. In 2009-10, 20,762 claims were investigated, finding that employers owed \$64.4 million to workers; yet only 86 fines (notices of contravention) and 298 tickets (with a penalty of \$360 each) were issued, and 13 prosecutions of employers in violation were initiated.⁷⁷ There is no general deterrence to employers when there so little cost for being found in violation of the law.

A deterrence model of enforcement would be based on the understanding that illegal activities should be detected and punished rather than tolerated. The aim should be to prevent illegal actions such as employment standards violations from giving more advantages to those violating the law than to those adhering to the law. This is the approach taken by governments in the regulation of income taxes and parking violations. The principle that deterrence is central to improving efficacy of employment standards enforcement is gaining traction in proposals emerging from movements against wage theft in Canada, Australia, the UK, the US, and elsewhere.⁷⁸

One of the most common recommendations from workers is that employers should face a penalty when they do not pay workers' wages or follow basic employment law. As Daniella says, you have to enforce clear consequences for employers who have failed to pay wages early in the claims process.

Daniella

When officers are doing their interviews with employers, they should tell them that if they do not pay the unpaid wages then their car licence or other privileges will be taken away.

We believe Daniella is right. Most businesses require some kind of license to keep their doors open. For some, it can be as simple as a city-issued business license. For other industries, regulation is much more detailed and more closely monitored, as with liquor licenses or health permits. One way to raise compliance with the ESA is to require employers to disclose any outstanding wages owed and orders of unpaid wages, and to pay all wages due, as a condition for issuance or renewal of business licenses or registrations.⁷⁹

RECOMMENDATION 4.7

When employers do not comply with orders to pay unpaid wages, the Ministry of Labour may take any appropriate enforcement action to secure compliance, including requesting that provincial or municipal agencies or departments revoke or suspend any registration certificates, permits, or licenses held or requested by the employer until such time as the violation is remedied.

Other workers raised the importance of increasing the costs of violation to create a real deterrence. As Samuel says, "When I researched what the fines were for employers, it was laughable. The fines are so small that employers will pay them without having any impact on their business."

The current use of Part I tickets (at a penalty of \$360 each) does not provide an adequate incentive to comply with the law. Fines doubling or tripling the amount of wages owed, such as provided by the *New York State Wage Theft Law*, would provide a better incentive.

RECOMMENDATION 4.8

- » Establish set fines (rather than Employment Standards Officer discretion) for confirmed violations, including settlements and voluntary compliance.
- » Increase fines to double or triple the amount of wages owed to provide adequate deterrence for violations.
- » Use monies collected as fines to expand proactive inspections, extended investigations, and collection activities.⁸⁰
- » Make prosecution policy simple and transparent. Each repeat violation or non-payment of orders must be prosecuted under Part III provincial offences.
- » The names of all employers found in violation of Employment Standards should be publicized on the Ministry of Labour website.⁸¹

ONE OF THE MOST COMMON RECOMMENDATIONS FROM WORKERS IS THAT EMPLOYERS SHOULD FACE A PENALTY WHEN THEY DO NOT PAY WORKER'S WAGES OR FOLLOW BASIC EMPLOYMENT LAW

“When I researched what the fines were for employers, it was laughable. The fines are so small that employers will pay them without having any impact on their business.”

Remedy for victims of ESA violations

A US THREE-CITY STUDY OF WORKERS IN LOW-WAGE INDUSTRIES FOUND THAT, IN ANY GIVEN WEEK, TWO-THIRDS EXPERIENCED AT LEAST ONE PAY-RELATED VIOLATION. THE RESEARCHERS ESTIMATED THAT THE AVERAGE LOSS PER WORKER OVER THE COURSE OF A YEAR WAS US\$2,634, OUT OF TOTAL EARNINGS OF US\$17,616. THE TOTAL ANNUAL WAGE THEFT FROM FRONTLINE WORKERS IN LOW-WAGE INDUSTRIES IN NEW YORK, CHICAGO, AND LOS ANGELES APPROACHED US\$3 BILLION.⁸⁰

People in low-wage and precarious work are struggling to get by. The failure to pay workers what they are legally entitled to has not been mapped in Ontario. But a US three-city study of workers in low-wage industries found that, in any given week, two-thirds experienced at least one pay-related violation. The researchers estimated that the average loss per worker over the course of a year was US\$2,634, out of total earnings of US\$17,616. The total annual wage theft from frontline workers in low-wage industries in New York, Chicago, and Los Angeles approached US\$3 billion.⁸⁰ Certainly this experience is mirrored in the experiences of workers in this report.

While no direct comparisons can be made, workers in Ontario do experience working year after year with unpaid wages and overtime outstanding. We see this at the Workers' Action Centre every day. Workers who least can afford it are being forced to bear significant loss of income due to employer violations. Low-wage workers may be forced to make up the unpaid wages by working longer hours or getting a second job.

Daniella

The Ministry of Labour ordered my employer to pay almost \$1,000, but she never paid up. It has had a big impact on me. I had to borrow money to pay bills. My unemployment had run out. My son is in an after-school program and I wasn't contributing, as I should be. I now have three visa bills to pay. Because I was out of those wages, there were bills to pay that I could not pay and I was penalized

for that. The labour board should penalize her for that. She is still working. She is still making money and has not paid me.

Workers bear the costs associated with unpaid wages (e.g., borrowing costs from banks, credit cards, family, and friends) and these costs should be awarded as damages. The compensation to workers who have experienced wage theft should be high enough to make it worth the trouble to make a complaint and to deter violations in the future. Triple (or treble) damages laws force the employer to pay the worker three times the amount of wages owed but not paid. Many US jurisdictions have led the way in introducing damages, including Arizona, Idaho, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Mexico, New York, North Dakota, Ohio, Vermont, and West Virginia.⁸³

RECOMMENDATION 4.9

- » Order employers to pay interest on all unpaid wages in all cases confirmed by the claims investigation (regardless of whether claims are settled, voluntarily complied with, or result in order to pay).
- » Require any employer who fails to pay the wages required under the ESA to pay the employee the balance of the wages owed and an additional amount equal to twice the unpaid wages. The Ministry of Labour shall have the authority to order payment of such unpaid wages and other amounts.⁸⁴

Collections

As Samuel's experience shows, it is a long, complex, and stressful process to try to recover unpaid wages through Ministry of Labour claims. Once successful, workers like Daniella, who have gone through the process, may end up with a hollow victory when employers refuse to comply with government orders to pay.

On average, 25 to 30 percent of unpaid wages confirmed through claims (not including bankruptcies) do not get collected for workers. That is an average of \$6.5 million each year between 2006-7 and 2009-10, which workers who were successful in their claims did not recover.⁸⁵ As most claims result in the employer paying workers through settlement or voluntary compliance, the substantiated claims that go unpaid are the hardest to collect. These are the cases where the employer has refused every opportunity to pay the unpaid wages and has little intention of doing so.

In addition, bankruptcies and insolvencies account for 40 to 73 percent of uncollected wages owing (that was \$12 to \$42 million per year over the same period). In the case of bankruptcies, the federal Wage Earner Protection Plan (WEPP) provides for a maximum recovery of \$3,000 in unpaid wages. The \$3,000 cap should be removed, similarly for all employment standard violations. The federal WEPP does not protect workers whose wages go unpaid when employers become insolvent or ignore Ministry of Labour collection efforts. In many cases, employers have abandoned, transferred, or sold their businesses.

Several states in the US have developed helpful tools to assist in the recovery of unpaid wages. Modeled after "mechanic's liens,"⁸⁶ wage liens place a temporary

"hold" on the employer's property until the employer pays the worker the wages they have earned. At least six states have enacted wage lien laws. Wisconsin's wage lien provision provides the best example because it allows wage liens to be filed at the beginning of the claims process. Therefore, the Department of Workforce Development can take action immediately if the employer appears resistant to payment. Wisconsin has achieved 80 percent recovery rates (paid or partly paid) in cases using prejudgment wage liens.⁸⁷

Governments often require wage bonds for public works projects and construction projects. Bonds can also be useful for workers in sectors with high rates of violations, such as caregiving, food, and industries that are typically undercapitalized or heavily subcontracted such as agriculture, garment, construction, and janitorial work. To be most effective, a bond has to be large enough to cover wages owed to workers with potential claims.

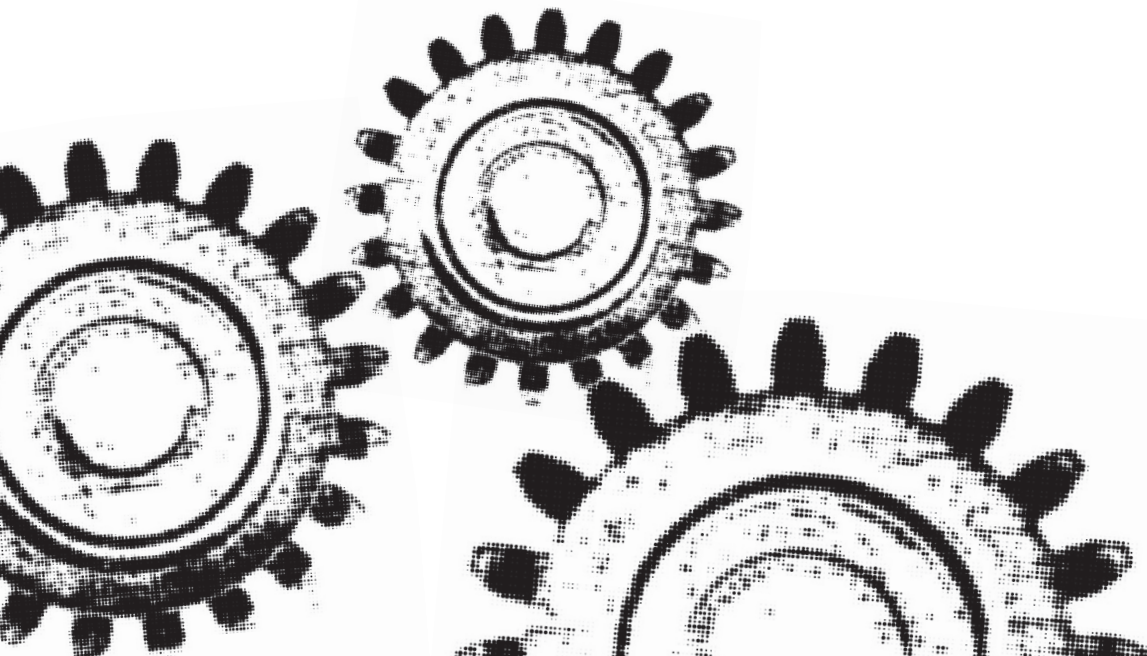
ON AVERAGE, 25 TO 30 PERCENT OF UNPAID WAGES CONFIRMED THROUGH CLAIMS (NOT INCLUDING BANKRUPTCIES) DO NOT GET COLLECTED FOR WORKERS. THAT IS AN AVERAGE OF \$6.5 MILLION EACH YEAR BETWEEN 2006-7 AND 2009-10, WHICH WORKERS WHO WERE SUCCESSFUL IN THEIR CLAIMS DID NOT RECOVER.⁸³

RECOMMENDATIONS 4.10

- » Authorize the Ministry of Labour to impose a "wage lien" on an employer's property when an employment standards complaint is filed for unpaid wages (i.e., prejudgment).
- » Authorize the Ministry of Labour to request bonds in cases where wages may go unpaid due to an employer's history of previous wage claim violations or sectors at high risk of violations (e.g, migrant worker recruitment).
- » The Ministry of Labour should establish a wage protection plan paid for by employers, similar to the Workplace Safety and Insurance system, not through general revenues. Employers, not taxpayers, should share the costs of restructuring and of employer practices that result in violations.
- » Make Part III prosecution mandatory in all cases where wages go unpaid to deter the practice of non-compliance with Ministry of Labour orders to pay.



WORKERS' VOICE



WHEN THE SYSTEM OF ENFORCING MINIMUM EMPLOYMENT STANDARDS BREAKS DOWN, BASIC, SOCIALLY ACCEPTED, MINIMUM STANDARDS ERODE; GAPS OPEN UP IN REGULATION WHICH DESTABILIZE THE LABOUR MARKET, HARMING WORKERS AND THEIR FAMILIES, AND EMPLOYERS WHO DO COMPLY WITH THE ESA.

Alberto

By not paying overtime and vacation pay, employers save money. If they hire a person who is afraid to ask for his rights, they have a person who is a “modern slave.” A slave that will only work, work, work with no rights. Work and payment—that is it. They only like people that don’t ask for their rights. I want to tell everything to their [employers’] faces, but I feel impotent.

Our society has an interest in ensuring minimum social norms are met for pay and working conditions. When the system of enforcing minimum employment standards breaks down, basic, socially accepted, minimum standards erode; gaps open up in regulation which destabilize the labour market, harming workers and their families, and employers who do comply with the ESA.

The system of enforcement largely relies on the most vulnerable workers to detect violations and enforce unpaid wages through individual claims. Yet most workers cannot make claims while they are on the job. Some workers are forced to put up with substandard conditions for years, further entrenching illegal practices. Fraying social programs, such as employment insurance, create barriers to leaving substandard jobs.

Some workers face structural barriers not contemplated by the ESA, such as migrant workers (e.g., farm workers, caregivers) who fear that employers will have them deported or returned to their home country if they speak out. Because their work permits are closed, they are tied to one employer. Migrant workers do not just lose their job when they speak up about their employment rights. They also lose their status as workers. Seasonal agricultural farmworkers can be banned by employers or recruiters from returning the following season if they make claims. Recent immigrant workers cannot risk job loss when they are trying to sponsor family members.

Alberto speaks for many workers when he says, “I would like to get such a strong voice to tell the government what is happening and that they would hear.” Employees do have a role in helping the system to detect violations. But we need to adopt new measures of protection to enable them to do so.

Anonymous and third party complaints

Because worker complaints are essential to effective enforcement, protecting a worker's identity can contribute toward increased employer compliance. While the Ministry of Labour does not have a program established for anonymous or third party complaints, it does state on its "Contact Us" web page that people can call the general information centre and report possible violations. Information centre staff will pass the information to Ministry staff for review and possible proactive activity. The Ministry of Labour does not tell the employee if there will or will not be a review, nor do they seek further information from the employee when deciding if an inspection will take place. Further, workers are warned that, in providing anonymous information to the Ministry, they will not have anti-reprisal protection and would not have the right to appeal if they are dissatisfied with the outcome.⁸⁸ When workers call the information centre, they are told that the only sure way of having their complaint for unpaid wages and other entitlements heard is to file an individual complaint.

We need a comprehensive anonymous and third party complaint program that recognizes the power imbalance in the workplace preventing workers from filing complaints while they are still on the job. Saskatchewan's model of anonymous complaints has some good features. It requires an individual, family, friend, or community member to file an anonymous complaint describing the violations and providing evidence. Appointments can be made with an Employment Standards officer to assist with this process.⁸⁹ However, the inspection will only attempt to correct the situation going forward,

not rectify violations of unpaid wages for current employees. This leaves workers without remedy to collect unpaid wages while they are in the workplace.

Ontario needs an anonymous complaints program that has as a central goal the remedy of unpaid wages and other entitlements owing to current workers.⁹⁰ The best way to get an employer to comply with the law is to ensure existing violations have consequences. Otherwise the message sent is that compliance does not matter because there is no cost in being caught.

ONTARIO NEEDS AN ANONYMOUS COMPLAINTS PROGRAM THAT HAS AS A CENTRAL GOAL THE REMEDY OF UNPAID WAGES AND OTHER ENTITLEMENTS OWING TO CURRENT WORKERS.

RECOMMENDATION 5.1

- » Establish a formal anonymous and third party complaint system. To make employment standards enforcement and legal remedy accessible to current employees, inspection initiated after a formal anonymous or third party complaint is filed should aim to detect and assess monetary (e.g., unpaid wages, overtime pay, public holiday pay, vacation pay, etc.) and non-monetary violations (e.g., hours of work, breaks, agreements etc.), remedy violations with orders to pay for all current employees, and to bring the employer into compliance for the future. Institute an appeal process if a proactive inspection is not conducted. Make the report of the proactive inspection available to all employees. The officer's decisions could be appealed either by employees or the employer.
- » Provide anti-reprisals protection to those workers whose workplace is subject to proactive inspection.

Stand up and be fired: Improving anti-reprisals protection

“There’s nowhere to turn when workers are treated badly at work. I tried to stand up for my co-workers. But my hours just got cut until I was fired altogether.... My manager advised me once when I reported the bullying to him. He said, ‘The boss won’t side with who is right; he will only stand with who is more useful for him. If you can’t accept this, you can leave.’”

Mei

There’s nowhere to turn when workers are treated badly at work. I tried to stand up for myself and my co-workers. But my hours just got cut until I was fired altogether.

I worked at a factory that produces food supplements, herb products, and cosmetic products for four years. Not long after I started to work there, I notice that my supervisor would bully new employees. My manager advised me once when I reported the bullying to him. He said, “The boss won’t side with who is right; he will only stand with who is more useful for him. If you can’t accept this, you can leave.” I was handed a notice that my work was reduced from five days to four days. Later, it was dropped to three days.

One day I had a sore swollen arm. My manager asked me to do a heavy lifting work. I asked him to allow me to do it after I get better. He said no and forced me to do it, which made me get even sicker. I had to go to see my doctor next day. The doctor gave me a note to explain that I can’t do any heavy lifting work before I get healed. I submitted the doctor note to my manager, the next day my work was reduced from three days to two days.

I was owed public holiday premium pay. I asked the management three times about this. They denied my request each time and said that they owed nothing to me. I told them that I would file a complaint at Ministry of Labour. After that, I was picked on by the management for everything. The other workers were not required to fill a so-called “production sheet” but I was

required to fill it. When I complained about the selective unfair practice, they gave me another warning letter, and then fired me.

The Section 74 anti-reprisals provisions prohibit employers from intimidating, dismissing, penalizing, or threatening workers who ask about their ESA rights. While there is a reverse onus on the employer to disprove reprisals, it is up to workers to enforce anti-reprisals through individual claims, usually after they have lost their job. Workers have little confidence in the ESA anti-reprisals provisions. Violations have become normalized in many workplaces. People see their co-workers, like Mei, penalized for trying to enforce their rights. Anti-reprisals protection needs to be strengthened to support workers who try to enforce their rights.

RECOMMENDATION 5.2

- » Protect workers who come forward to assert their rights by establishing substantial fines for employers who retaliate against them.
- » Conduct education and outreach to inform employers and employees about anti-reprisals protections.
- » Publicize confirmed anti-reprisal cases (protecting employee confidentiality) in the media, on government websites, and in educational materials.
- » To enable some workers to file individual claims while still on

the job, develop an expedited investigation process for reprisals so that reprisal complaints will be heard immediately. Provide interim reinstatement, if requested by the worker, pending a ruling on cases of dismissal due to reprisals. This would reduce the penalizing impact of reprisals on workers.

- » In the case of migrant workers, prohibit employers from forcing “repatriation” of an employee who has filed an ESA complaint.
- » The Ministry of Labour should work with the federal government to ensure that migrant workers who have filed complaints are granted open permits. See additional information on this recommendation in the Migrant Workers section of the report.

UNJUST DISMISSAL

The ESA has no protection for employees who have been unjustly dismissed. Workers, especially those in low-wage and precarious work, have little real ability to sue employers in court for unjust or wrongful dismissal, due to the cost of legal representation and the risk of costs associated with civil suits.

Central to giving workers power to enforce their ESA rights is assuring workers know they cannot be unjustly fired for doing so. Given that so much of the ESA enforcement system rides on workers’ ability to make claims, employees need real protection while still on the job. Having an effective means of challenging their dismissal will assist employees in asserting their statutory and contractual rights. Further, an effective program for protecting workers from wrongful dismissal will have a general deterrence value for employers.

The federal Labour Code protects the rights of workers to challenge their unjust dismissal and receive effective remedies, including reinstatement, if they

have been wrongly dismissed. As Arthurs notes, jurisprudence has been developed under the unjust dismissal provision brought in under the Labour Code in 1978, providing principles of progressive discipline for employers to follow to avoid wrongfully dismissing employees.⁹¹ For the many workers represented in this report, having a clear process for progressive discipline and protection from wrongful dismissal is necessary to support job and income security and strengthen the voice of workers in the workplace.

RECOMMENDATION 5.3

- » Amend the ESA to include protection from wrongful dismissal. Authorize a procedure for making complaints against a dismissal considered unjust by an employee.⁹²
- » Claims of unjust dismissal should be prioritized and investigated quickly, with interim reinstatement, if requested by the worker, pending ruling on cases of dismissal.

CENTRAL TO GIVING WORKERS POWER TO ENFORCE THEIR ESA RIGHTS IS ASSURING WORKERS KNOW THEY CANNOT BE UNJUSTLY FIRED FOR DOING SO.

Psychological harassment / Workplace bullying

“All the time, screaming, humiliating people. That impacts you. Emotionally we are affected. You bring that stress home every day. On weekends you have that stress and when you are getting ready to go back to work you are very anxious.”

Mei

The atmosphere in the factory is so depressing. The workers worked there in a fear of being bullied. It's very difficult to endure the bullying and abuse. One day my manager took me and another worker to the office to package samplers. The boss looked at me and yelled loudly, “Why is she here?” The manager did not say anything. I felt so embarrassed and felt it's so unfair. I could not keep silent any more. I explained it to the boss and asked him to respect me as I am the same age as he is. He yelled at me even louder, “If you don't like to work here, you can leave.”

One time, I even tried to report the bullying to the owner, he bluntly interrupted me and said, “Don't tell me about this, I know what's going on, everything.” I was speechless.

The worst thing for me working in the factory is not that I was owed wages, it is the mental stress and psychological hurt. I was so stressed that I could not sleep (my doctor had to prescribe strong medicine to help me to sleep), woke up in the middle of night in a nightmare, venting anger toward my husband for no reason. . . . It's so unfair that what the boss did is totally wrong but we had to take it to keep the job.

Our society should value a person's right to dignity, respect, and integrity. Many of the people the Workers' Action Centre works with suffer from psychological harassment by management and co-workers to devastating effects. Workplace bullying can cause mental and physical health problems.

Adolfo

The boss yelled at us for not speaking English very well. All the times, screaming, humiliating people. That impacts you. Emotionally we are affected. You bring that stress home every day. On weekends you

have that stress and when you are getting ready to go back to work you are very anxious.

While Ontario introduced changes to the *Occupational Health and Safety Act* to require employers to develop a workplace harassment policy, there is nothing to ensure the employer makes the workplace free from bullying, or that the employer takes reasonable actions to prevent and stop bullying when they become aware of any problems. Quebec was the first province in Canada to introduce anti-psychological harassment legislation, which remains the most comprehensive, as it requires the employer to take action to address and prevent workplace bullying. Most other jurisdictions only require a policy be developed. Saskatchewan at least requires employers to take action to address harassment but does not provide for remedies for psychological harassment as done in Quebec.

RECOMMENDATION 5.4

Ontario should adopt Quebec's legislative approach to anti-psychological harassment under its labour standards. Like Quebec, Ontario should ensure that employees have a right to a workplace free from psychological harassment. Employers must take reasonable action to prevent harassment, and whenever they become aware of such behaviour, put a stop to it. Workers should have recourse against psychological harassment, including reinstatement, punitive and moral damages, indemnity for loss of employment, compensation for psychological support if needed, and the ability to order the employer to take reasonable action to put a stop to harassment.⁹³

Collective representation and unionization

SECTORAL BARGAINING

Well-established in other jurisdictions, sectoral bargaining can contribute to improving employees' voice in precarious sectors in Ontario. The rationale for an inclusive structure of multi-employer bargaining at the sector level is well-established. Multi-employer bargaining establishes the common rule through standard terms and conditions. It provides comprehensive regulation of the labour market, covering many smaller firms where unions face difficulties organizing. Multi-employer bargaining provides employers with a degree of market control by taking wages and key conditions out of competition. Depending on the legal framework, multi-employer agreements can be legally enforceable contracts, but also compulsory codes, whose provisions can be extended throughout entire industries.⁹⁴ But for workers in precarious work, sectoral bargaining would play an important role in regulating the use of precarious work.⁹⁵ This would be particularly useful where highly fissured organizational methods are used, such as subcontracting, franchising, and third party management, where changing employees to self-employed businesses make the worker-employer ties more complicated and tenuous.

RECOMMENDATION 5.5

- » Establish the legislative framework to enable sectoral bargaining in Ontario.
- » Allow caregivers under the Temporary Foreign Worker Program (TFWP) to unionize and bargain sectorally with employer representatives.
- » The *Agricultural Employees Protection Act* established in 2002 is so ineffective that no collective bargaining relationship has ever been established. This *Act* should be repealed and farmworkers should have the same right to general collective bargaining under the *Ontario Labour Relations Act* (OLRA) that other workers have.

SECTORAL BARGAINING CAN CONTRIBUTE TO IMPROVING EMPLOYEES' VOICE IN PRECARIOUS SECTORS IN ONTARIO.

WORKERS AND AGENCY WORKERS

Unions should be able to negotiate the scope of outsourcing, terms, and conditions of employment for agency workers in the unionized company, and to support direct employment.⁹⁶ Care must be taken to ensure that the measures to benefit precarious workers do not result in them becoming more insecure.

RECOMMENDATION 5.6

Enable unions to negotiate the terms and conditions of outsourced workers.

**UNIONS COULD
CONTRIBUTE
SIGNIFICANTLY TO THE
DETECTION OF ESA
VIOLATIONS IF THEY WERE
ABLE TO MAKE THIRD
PARTY COMPLAINTS AND
MAKE CLAIMS AT THE
MINISTRY OF LABOUR FOR
ESA VIOLATIONS.**

UNIONS' ACCESS TO ESA

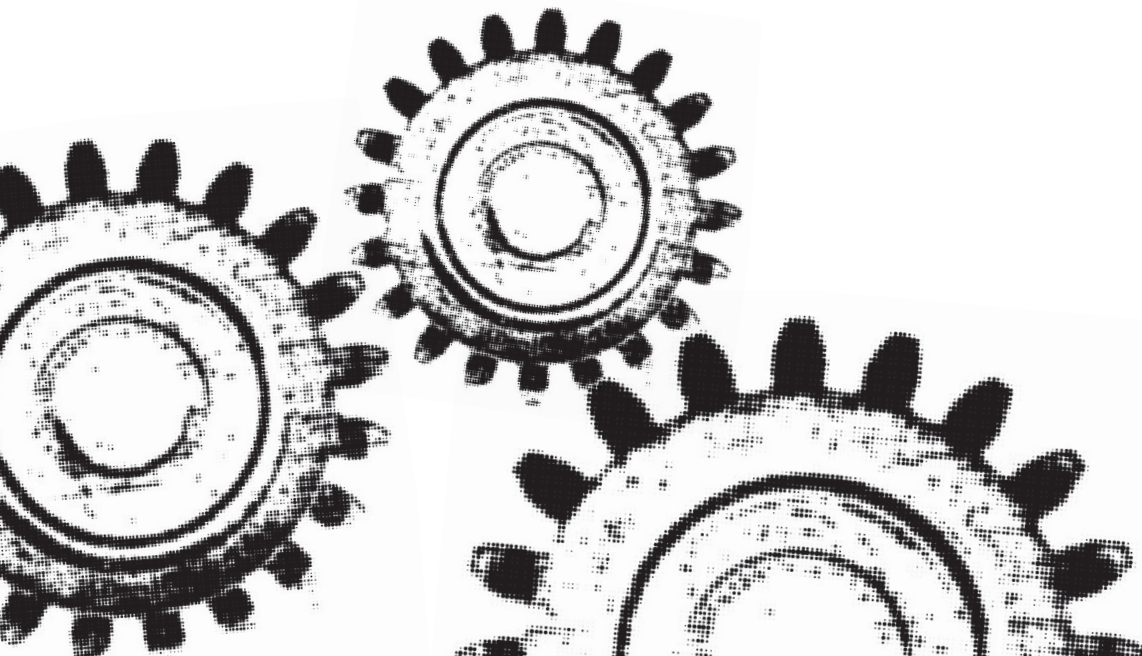
In 1996, the government barred unionized workers and their unions from making claims through the ESA. Instead, unionized workers with ESA violations must go through the grievance-arbitration process.⁹⁷ Employment standards form the foundation of many parts of collective agreements. Not only does this practice privatize ESA enforcement for unionized workers, but it undercuts the important role that unions can play in enforcing and testing ESO decisions at the Ontario Labour Relations Board. Unions could contribute significantly to the detection of ESA violations if they were able to make third party complaints and make claims at the Ministry of Labour for ESA violations on behalf of their members.

RECOMMENDATION 5.7

Repeal the bar on unionized workers from making claims through the ESA and enable unions to make third party complaints on behalf of non-unionized workers.



MIGRANT WORKERS



BETWEEN 2002 AND 2012, THE NUMBER OF FOREIGN WORKERS IN CANADA INCREASED MORE THAN THREE-FOLD FROM JUST OVER 100,000 TO 338,000, WITH A PAUSE ONLY IN 2009 DURING THE RECESSION.⁹⁷

Canadian employers have increasingly sought a flexible workforce of migrant workers.⁹⁸ Between 2002 and 2012, the number of foreign workers in Canada increased more than three-fold from just over 100,000 to 338,000, with a pause only in 2009 during the recession.⁹⁹ Many of these workers come through the Temporary Foreign Worker Program (TFWP), which is divided in to four sections: the Temporary Foreign Workers Program (low-wage and high-wage); the Live-in Caregiver Program, recently changed to the Caregiver Program; and the Seasonal Agricultural Workers Program. Workers with temporary immigration status or temporary work authorization also include students, refugee claimants, and members of the International Mobility Program.

There are key elements in the migrant worker program that structure and constrain working lives, creating conditions ripe for the abuse of minimum employment standards. Workers under the TFWP are tied to one employer and are restricted from moving from one job to the next when violations occur. That is because workers are required to get a new work permit tied to another employer who has been approved under the TFWP. Recruiters target migrant workers and charge exorbitant fees, creating huge debt bondage for many workers, which acts as a further disincentive to workers asserting their rights.

Caregivers rely on employers for their pathway to permanent residency, while seasonal agricultural workers depend upon employers for a return to work the following season. When workers under the TFWP lose their jobs, they lose their residency status in Ontario and can be subject to deportation. Workers

who have established themselves in Ontario but have lost their status and become undocumented due to changes in immigration rules are particularly vulnerable to abuse, as Miguel attests to below. No other sectors of our labour market face such substantial power imbalances.

Miguel

There are people who get their salary stolen who don't say anything because they fear that they will be deported. I wish there was a way that one could help make their rights upheld. There are people who come here to very difficult conditions, leaving their homes, getting loans, an infinity of things to come to this country. And then to have someone not pay them, it's a disgrace. It's very cruel.

Caregivers, seasonal agricultural workers, and temporary foreign workers face long hours of work for little pay, almost no benefits, and no protection against employer violations. If workers try and enforce their rights, they can be penalized and subject to “repatriation” (deportation) or loss of potential permanent residency.

Caregivers do not have the right to unionize. Agricultural workers do not have real access to collective bargaining for their rights, and are exempt from many basic standards, such as minimum wage, hours of work, and overtime.

Migrant workers seek permanent residency upon arrival as the key strategy to addressing their vulnerability at work. The Ontario government should advocate for this change in the federal immigration system. But there is still much that can be done to improve protections for migrant workers under the ESA.

Recruitment of employment of migrant workers

Migrant workers are regularly forced to pay unscrupulous recruiters thousands of dollars in fees, just to find a job in Canada. Many workers have little choice but to borrow the money, which imposes a debt burden on the workers and their families, and makes them even more vulnerable to exploitation. While the *Stronger Workplaces for a Stronger Economy Act* extended a prohibition on recruitment fees to include all temporary foreign workers, it failed to implement an effective proactive enforcement mechanism. Following an analysis of recruitment under the temporary foreign worker program, the Metcalf Foundation developed comprehensive recommendations. We support the following Metcalf recommendations:

RECOMMENDATION 6.1

“Legislation to protect migrant workers from exploitation by recruiters and employers must be designed on a proactive platform that meets international best practices and domestic best practices represented by the *Manitoba’s Worker Recruitment and Protection Act* and the enhancements developed in Saskatchewan and Nova Scotia.

Ontario should adopt a proactive system of employer registration, recruiter licensing (including the mandatory provision of an irrevocable letter of credit or deposit), mandatory filing of information about recruitment and employment contracts, and proactive government inspection and investigation in line with the best practices model adopted in Manitoba’s *Worker*

Recruitment and Protection Act and the enhancements developed in Saskatchewan and Nova Scotia.

Specific enhancements to the Manitoba model that should be adopted in Ontario include:

- » Mandatory reporting of all individuals and entities that participate in the recruiter’s supply chain in Canada and abroad;
- » Mandatory reporting of detailed information regarding a recruiter’s business and financial information in Canada and abroad as developed in Nova Scotia’s legislation;
- » Explicit provisions that make a licensed recruiter liable for any actions by any individual or entity in the recruiter’s supply chain that are inconsistent with the Ontario law prohibiting exploitative recruitment practices;
- » Public registries of both licensed recruiters and registered employers;
- » Explicit provision that makes it an independent offence for an employer to engage the services of a recruiter who is not licensed under the legislation;
- » Explicit provisions that make an employer and recruiter jointly and severally liable for violations of the law and employment contract;
- » Protections against the broader range of exploitative conduct that is prohibited under s. 22 of FWRISA in Saskatchewan (i.e., distributing false or misleading information, misrepresenting employment

MIGRANT WORKERS ARE REGULARLY FORCED TO PAY UNSCRUPULOUS RECRUITERS THOUSANDS OF DOLLARS IN FEES, JUST TO FIND A JOB IN CANADA.

Anti-reprisal protection for migrant workers

opportunities, threatening deportation, contacting a migrant worker's family without consent, threatening a migrant worker's family, etc.); and

- » Provisions allowing for information sharing that enhance cross jurisdictional enforcement of protections against exploitative recruitment practices, including information sharing with other ministries or agencies of the provincial government, department or agencies of the federal government, departments or agencies of another province or territory or another country or state within the country as developed in Saskatchewan's legislation." 100

Employers are able to immediately deport seasonal agricultural workers who try to enforce workplace rights. We have heard many reports of employers threatening other migrant workers with deportation or contracting immigration authorities, even when they do not have the authority to do so. To address these barriers, specific changes to the anti-reprisals provisions should be made.

RECOMMENDATION 6.2

- » Amend the ESA to include a process for expediting complaints of reprisals and, in the case of migrant workers, ensure that such complaints are heard before repatriation. Where there is a finding of reprisal, provision would be made for transfer to another employer or, where appropriate, reinstatement.
- » The ESA should explicitly prohibit an employer from forcing "repatriation" on an employee who has filed an ESA complaint.
- » Change the Canada-Ontario Immigration Agreement (COIA) to create an open work permit program for migrant workers who have filed complaints against recruiters, under the Employment Protection for Foreign National Act, and ESA.¹⁰¹

Conditions of employment

Migrant workers require special protection under the ESA to prohibit employers from reducing conditions of work specified in their contract of employment. Workers should be entitled to the greater of the number of hours actually worked per week versus the number of hours specified in the contract. Where an employer has reduced hours below those promised in the contract, workers should be able to claim the difference in salary through an employment standards complaint. Employers who reduce wages and working conditions provided in an employment contract or agreement must also face a penalty.

RECOMMENDATION 6.3

Migrant workers should be able to make claims under the ESA when conditions of the employment contract have been reduced or not complied with.

ACCESS TO TERMINATION AND SEVERANCE PAY FOR SEASONAL AGRICULTURAL WORKERS

Many agricultural workers return year after year to work for the same employer, often for contracts of six to eight months. In the event of a termination, these seasonal workers face barriers accessing termination and severance pay that acknowledges their actual years of employment, as any break in employment between contracts may be longer than the 13 weeks enumerated in the *Act*.

RECOMMENDATION 6.4

The ESA should be amended to allow seasonal migrant workers access to termination and severance pay recognizing their years of service and the continuity of an employment relationship with the same employer. Migrant workers should be considered to be on a temporary layoff between their yearly contracts with the same employer.

EXTEND TIME LIMITS FOR FILING AN ESA CLAIM

Given that most migrant workers have contracts for up to four years, the two-year time frame for filing claims does not address those specific realities. Migrant workers cannot file claims while they are under contract with employers. Many workers are only comfortable filing a claim once their immigration status is less precarious. As such, migrant workers require longer time limits for filing claims.

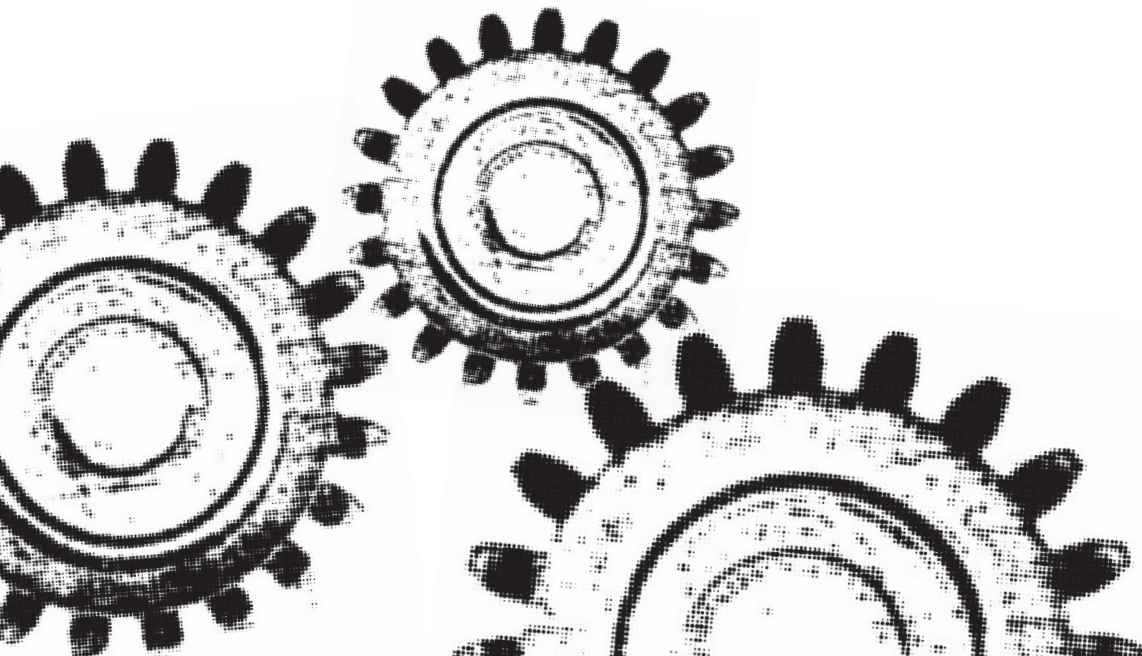
RECOMMENDATION 6.5

Extend time limits on ESA claims filed by migrant workers to five years.

MIGRANT WORKERS REQUIRE SPECIAL PROTECTION UNDER THE ESA TO PROHIBIT EMPLOYERS FROM REDUCING CONDITIONS OF WORK SPECIFIED IN THEIR CONTRACT OF EMPLOYMENT.



FAIR WAGES



ACCORDING TO STATISTICS CANADA, BETWEEN 1975 AND 2013, AFTER ADJUSTING FOR THE EFFECTS OF RISING PRICES, THE MINIMUM WAGE INCREASED BY ONLY ONE SINGLE PENNY.¹⁰²

THE CURRENT \$11 MINIMUM WAGE IS 17 PERCENT (\$4,225) BELOW THE POVERTY LINE.

Mei

When the minimum wage goes up, that is the only time I get a raise. Actually almost all my co-workers are paid the minimum wage.

Many Ontario workers are struggling to get by. More and more decent jobs are being replaced by low-wage work. The fastest growing jobs in Ontario are in the service sector, where wages are the lowest. Even before the recession, our economy was shifting to lower-wage work. In 2014, 33 percent of workers had low wages, compared to only 22 percent in 2004.¹⁰²

Serena

I had been working at one of the major grocery store chains for years. But they cut back everyone's hours to part-time. I couldn't survive on that. So I was happy when I found a grocery store that promised 40 hours a week – still at minimum wage but it was full-time.

It's me and my son. The money I am making now is not enough. I make sure to pay my rent so I have a roof over my head. Usually I have to skip a month in paying utilities, but then I catch up. I use food coupons and go to stores that do price match. You can hardly go out; you can't go to a movie, you can't go to a dinner.

As the experiences represented in this report indicate, low wages cut across all dimensions of precarious work. While Serena has a permanent, full-time job, her minimum wage means that her income is below the poverty line. A comprehensive approach to addressing precarious work must include improvements to minimum wage.

Miguel

For a person with a family it is impossible to live on minimum wage; even if it is only one person it is impossible. Rent is very expensive, food is expensive, and clothing is expensive.

Ontario workers' median incomes have stagnated since the 1980s, while

incomes for the top one percent grew by 71 percent.¹⁰³ Canada's output and productivity have grown substantially since the 1970s, but workers' share of that productivity has not. After peaking in the late 1970s, the real value of the purchasing power of minimum wages declined in the 1980s and 1990s. According to Statistics Canada, between 1975 and 2013, after adjusting for the effects of rising prices, the minimum wage increased by only one single penny.¹⁰⁴

Working families spend wages on necessities at local businesses, putting money back into local economies. Consumer spending is the engine that powers our domestic economy. Household spending drives 54 percent of our gross domestic product.¹⁰⁵ Raising wages for low- and moderate-income workers is an effective strategy for boosting demand and helping Ontario's economic recovery.

Raise the minimum wage

The minimum wage lays the wage floor to stop employers from taking unfair advantage of workers with little bargaining power.¹⁰⁶ Workers should not be paid so little that, after working full-time, they still find themselves with less money than is needed to live above the poverty line.¹⁰⁷ The current \$11 minimum wage is 17 percent (\$4,225) below the poverty line.¹⁰⁸ The minimum wage should bring workers out of poverty. That is why the minimum wage should be at least ten percent above the poverty line (Low Income Measure).

RECOMMENDATION 7.1

Raise the minimum wage to \$15 per hour in 2015.

Exemptions to minimum wage

Not all workers get minimum wage. Eleven percent of employees in Ontario are not fully covered by minimum wage. Employees who are low-income, women, youth, and recent immigrant workers are most likely to be fully or partially exempt from the minimum wage protections, compared to those with higher incomes.¹⁰⁹

EXEMPTIONS FROM GENERAL MINIMUM WAGE BY OCCUPATION

Farmworkers, harvesters, fishers, residential care workers, and building superintendents are not entitled to Ontario's minimum wage. Employers can, and do, pay workers in these occupations less than the minimum wage. This is contrary to the principles of decent work and socially accepted minimum standards.

RECOMMENDATION 7.2

Repeal occupational exemptions to minimum wage.

TIPPED WORKERS

Ontario is in the minority of Canadian provinces and territories with lower set wages for liquor servers: \$9.55. Nine other jurisdictions in the country have no lower tipped wage rate. The tipped wage is premised on the assumption that tips make up the difference in workers' hourly wages. But tips are notoriously erratic, varying from shift to shift and from season to season. Tipped workers

are hit hard during economic downturns as financially squeezed consumers often have no choice but to leave smaller tips.

Tips are not protected as wages under the ESA and there is no guarantee that workers receive the tips they are given. Tipped workers commonly share their tips with co-workers who do not receive tips (food carriers, hosts, kitchen staff). However, as MPP Michael Prue's private members bill prohibiting restaurant owners and managers from taking tips has shown, the practice of employers taking workers' tips is common. Given the lack of protection for tips, there should be no lower minimum wage rate for liquor servers in Ontario.

RECOMMENDATION 7.3

Repeal liquor servers minimum wage.

YOUNG WORKERS

Workers under 18 years of age working 28 hours or less per week have a lower minimum wage in Ontario, at \$10.30 per hour. Ontario is the only province that allows employers to pay its young workers a lower minimum wage. All other provinces have repealed youth rates because they could be contrary to the *Canadian Charter of Rights and Freedoms*, which prohibits discrimination on the basis of age. Ontario must also end lower minimum wage rates for young workers.

RECOMMENDATION 7.4

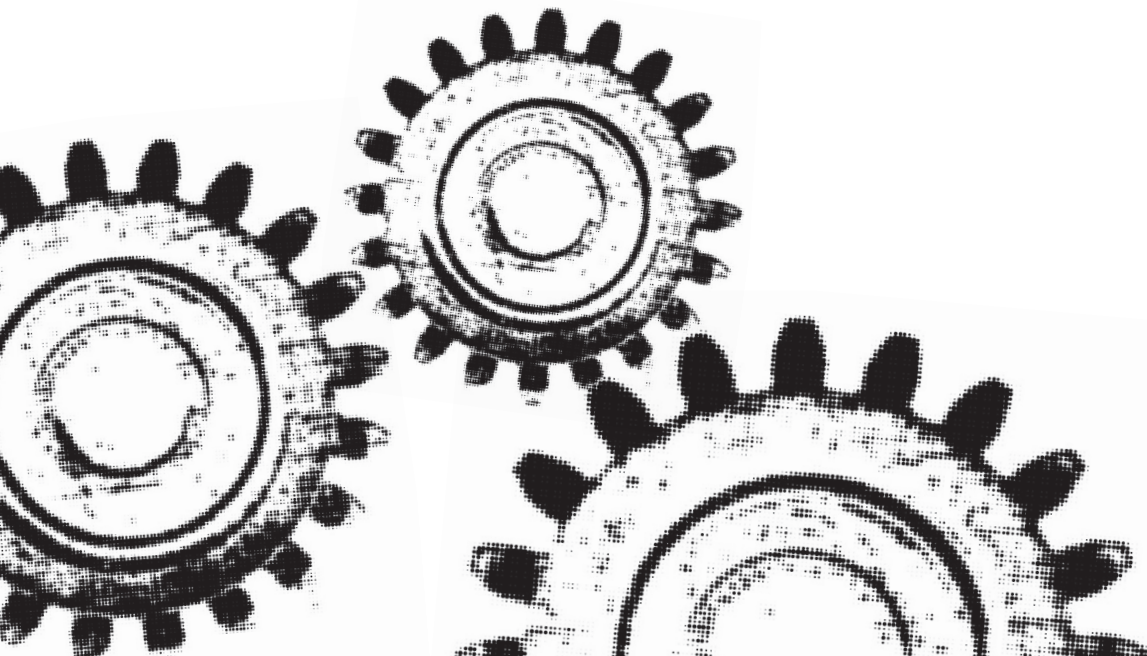
Repeal student minimum wage.

ONTARIO IS THE ONLY PROVINCE THAT ALLOWS EMPLOYERS TO PAY ITS YOUNG WORKERS A LOWER MINIMUM WAGE.

“For a person with a family it is impossible to live on minimum wage; even if it is only one person, it is impossible. Rent is very expensive, food is expensive and clothing is expensive.”



CONCLUSION



“It worries me all the time because I can’t make plans because I don’t know when I will have another job or how long it will last. Always trying to survive.”

Angelina

Working unstable is stressful. Not being able to make any plans. It worries me all the time because I can’t make plans because I don’t know when I will have another job or how long it will last. Always trying to survive.

It’s clear to see from this discussion what the consequences are for workers and their families when the ESA doesn’t address the changing nature of work. Employment and income instability do not just affect workers, but are also hard on families and communities. As Angelina notes, “It’s bad for the economy too. If people don’t have a good permanent job they can’t make plans.”

Ontario has reached a critical moment. The government’s Changing Workplace Review gives us the opportunity to open up labour laws, identify the gaps, and develop a new legislative architecture that can support decency in Ontario workplaces.

The employment practices such as flexible staffing, low wages, and abandonment of basic minimum standards exposed in this report are not permanent features of our economy. Rather, they are symptoms of labour regulations that have failed to keep pace with changing workplaces.

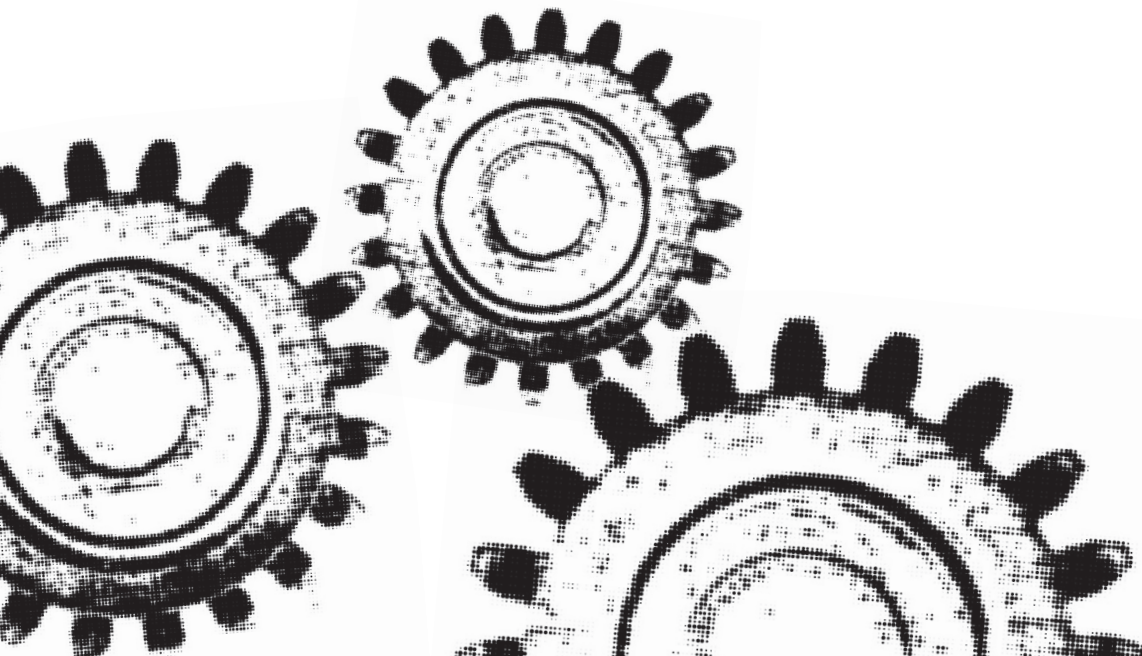
Members of the Workers’ Action Centre have developed comprehensive strategies outlined in the report that offer a pathway to decent work, guided by the ILO principles of decency at work. But as the title of this report says, people are working on the edge. It is crucial that real change begins now.

IT’S TIME.



Appendix

LIST OF RECOMMEND- ATIONS



Introduction

RECOMMENDATION 1.1

The **Changing Workplace Review** should be guided by the principle of decency as was the case in Harry Arthurs' review of the Federal Labour Code:

Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as "decent." No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.

Inclusive Employment Standards Protection

RECOMMENDATION 2.1

Broaden the definition of employee along the lines of Ontario's Health and Safety Act, which defines a worker as "a person who is paid to perform work or supply services for monetary compensation."

RECOMMENDATION 2.2

Make employers who enter into contracts with subcontractors and other intermediaries, either directly or indirectly, liable both separately and together for wages owed and for statutory entitlements under the ESA and its regulations.

RECOMMENDATION 2.3

No exemptions to the ESA and no special rules.

RECOMMENDATION 2.4

There should be no differential treatment in pay and working conditions for workers who are doing the same work but are classified differently, such as part-time, contract, temporary, or casual.

RECOMMENDATION 2.5

» Where an employer provides benefits, these must be provided to all workers regardless of employee status (e.g. part-time, contract). Full and equal benefits are the priority, as prorated benefits do not amount to equivalent conditions.

» Where an employer provides benefits, they cannot discriminate due to the age, sex, or marital status of the employees. Amend the ESA to prohibit discrimination on the basis of form of the employment relationship (e.g., hours usually worked each week).

RECOMMENDATION 2.6

- » Ensure that temp agency workers receive the same wages, benefits and working conditions as workers hired directly by the company.
- » Require temporary help agencies to provide employees with the hourly mark-up fees for each assignment (i.e., the difference between what the client company pays for the assignment worker and the wage the agency pays the assignment worker).
- » Make client companies jointly responsible with temp agencies for *all* rights under the ESA, not just wages, overtime and public holiday pay.
- » Eliminate barriers to client companies hiring temp agency workers directly during the first six months (repeal Section 74.8(1)8 of the ESA which allows agencies to charge fees during the first six months).
- » Make the client companies and agency liable for termination notice or pay in lieu of notice when the assignment is without a term or when a worker is terminated before the assignment is completed.
- » Prohibit long-term temporary assignments. Require that agency workers become directly hired employees after a working a cumulative total of six months for the client company.
- » No more than 20 percent of staff can be assignment employees. Every employer shall ensure that the total number of hours worked by assignment employees in a work week does not exceed 20 percent of the total number of hours worked by all employees, including assignment employees, in that work week.

RECOMMENDATION 2.7

- » Establish a reverse onus regarding employee status, under which a worker is presumed to be an employee unless the employer demonstrates otherwise.
- » Work with federal agencies such as the Canadian Revenue Agency and Employment Insurance to map sectors where misclassification is growing or is already widespread. Undertake proactive sectoral inspections with stiff penalties for those in violation. Publicize names of companies in violation to deter misclassification.

Decent Hours for a Decent Income

RECOMMENDATION 3.1

The ESA should provide for an eight-hour day and a 40-hour work week. Employees should have the right to refuse work beyond 40 hours. Overtime at time and a half should be paid (or taken as paid time off in lieu) after 40 hours.

RECOMMENDATION 3.2

Repeal overtime exemptions and special rules.

RECOMMENDATION 3.3

Repeal overtime averaging provisions in the ESA.

RECOMMENDATION 3.4

Permits for overtime in excess of 48 hours per week must be reviewed. Permits should only be given in exceptional circumstances and be conditional on demonstrated efforts to recall employees on layoff, offer hours to temporary, part-time and contract employees, and/or hire new employees. Annual caps of no greater than 100 hours per employee must be set on overtime hours allowed by permits. Annual permits must set a weekly or quarterly cap to avoid unhealthy overtime in busy periods. Workers should retain the right to refuse overtime when their employer has been granted an overtime permit. Names of companies with overtime permits should be publicized.

RECOMMENDATION 3.5

In addition to an unpaid, half-hour lunch break, two paid breaks, such as a coffee break, should be provided by the employer.

RECOMMENDATION 3.6

Increase paid vacation entitlement to three weeks per year. After five years of service, increase vacation to four weeks of paid vacation per year.

RECOMMENDATION 3.7

Repeal exemptions from public holidays and public holiday pay.

RECOMMENDATION 3.8

- » All workers should receive a written contract on the first day of employment setting out terms and conditions, including expected hours of work.

- » Require employers to offer available hours of work to those working less than fulltime before new workers performing similar work are hired.
- » Require employers to preferentially consider current part-time or casual employees before hiring additional part-time or full-time workers.
- » Provide just-cause protection to contract workers if, at the end of a contract, another worker is hired to do the work previously done by the contract worker.
- » Regulate renewal of contracts so that seniority translates into permanent job status.

RECOMMENDATION 3.9

Amend the ESA to require that the minimum shift per day be three hours, scheduled or casual.

RECOMMENDATION 3.10

- » Require two weeks' advance posting of work schedules (including when work begins, ends, shifts, meal breaks).
- » Require that employees receive the equivalent of one hour's pay if the schedule is changed with less than a week's notice, and four hours' pay for schedule changes made with less than 24 hours' notice.
- » Workers must be able to ask employers to change schedules without penalty (i.e., protection from reprisals).

RECOMMENDATION 3.11

Repeal the exemption for employers of 49 or less workers from providing personal emergency leave.

RECOMMENDATION 3.12

All employees shall accrue a minimum of one hour of paid sick time for every 35 hours worked. Employees will not accrue more than 52 hours of paid sick time in a calendar year, unless the employer selects a higher limit. For a full-time 35-hour per week employee, this works out to approximately seven paid sick days per year.

RECOMMENDATION 3.13

Repeal Section 50(7) and amend the ESA to prohibit employers from requiring evidence to entitle workers to personal emergency leave or paid sick days.

Rights without Remedies: Improving Enforcement

RECOMMENDATION 4.1

- » Implement a deterrence model of enforcement that compels employers to comply with the ESA.
- » Develop an expanded proactive system of enforcement to increase compliance.

RECOMMENDATION 4.2

Where individual claims confirm employer violations, then an inspection shall be expanded to determine if the employer has violated the rights of current employees and remedies all monetary (e.g., unpaid wages, overtime pay, public holiday pay, vacation pay, etc.) and non-monetary violations (e.g., hours of work, breaks, agreements etc.) detected.

RECOMMENDATION 4.3

Change the proactive inspection model to enforce rights for current employees. The goal of proactive inspections should be to ensure current workers get unpaid wages and core standards are adhered to, in addition to educating employers to guarantee future compliance.

RECOMMENDATION 4.4

- » Increase staffing to the dedicated enforcement team in order to increase proactive inspections.
- » Partner with organizations working directly with precarious workers (e.g., workers centres, community legal clinics, unions, immigrant serving agencies) to identify where violations are occurring and identify which investigative strategies will best uncover employer tactics to evade or disguise violations.
- » Strategically target emerging employer practices, such as misclassification of employees as independent contractors or failure to pay overtime, for proactive sectoral inspection blitzes.
- » Establish a provincial fair wage policy for government procurement of goods and contracts for work or service that would require adherence to minimum employment standards and industry norms.

RECOMMENDATION 4.5

- » a “hot cargo” provision in the ESA that would enable inspectors to impose an embargo on goods

manufactured in violation of the Act to ensure that, in fairness, penalties are felt by all parties along the chain of production.

- » Hold companies in low-wage sectors responsible under a duty based regime for subcontractors’ violations of ESA wages and working conditions. Companies would have the duty to know that sufficient funds exist in the contract with subcontractors to comply with the ESA. This would follow the State of California’s Labour Code section known as the “brother’s keeper” law.

RECOMMENDATION 4.6

- » Create a reverse onus so that employers have to disprove a complaint against them, rather than workers having to prove that the violation occurred.
- » Direct one-on-one legal assistance to workers to make employment standards claims.
- » Revoke the requirement that workers first attempt to enforce their ESA rights with the employer before they are allowed to file a claim.
- » Fund interpreters for the claims process to ensure access for employers and employees who do not speak English.

RECOMMENDATION 4.7

When employers do not comply with orders to pay unpaid wages, the Ministry of Labour may take any appropriate enforcement action to secure compliance, including requesting that provincial or municipal agencies or departments revoke or suspend any registration certificates, permits, or licenses held or requested by the employer or until such time as the violation is remedied.

RECOMMENDATION 4.8

- » Establish set fines (rather than Employment Standards Officer discretion) for confirmed violations, including settlements and voluntary compliance.
- » Increase fines to double or triple the amount of wages owed to provide adequate deterrence for violations.
- » Use monies collected as fines to expand proactive inspections, extended investigations and collection activities.
- » Make prosecution policy simple and transparent. Each repeat violation or non-payment of orders must be prosecuted under Part III provincial offences.

- » The names of all employers found in violation of Employment Standards should be publicized on the Ministry of Labour website.

RECOMMENDATION 4.9

- » Order employers to pay interest on all unpaid wages in all cases confirmed by the claims investigation (regardless of whether claims are settled, voluntarily complied with or result in order to pay).
- » Require any employer who fails to pay the wages required under the ESA to pay the employee the balance of the wages owed and an additional amount equal to twice the unpaid wages. The Ministry of Labour shall have the authority to order payment of such unpaid wages and other amounts.

RECOMMENDATION 4.10

- » Authorize the Ministry of Labour to impose a “wage lien” on an employer’s property when an employment standards complaint is filed for unpaid wages (i.e., prejudgment).
- » Authorize the Ministry of Labour to request bonds in cases where wages may go unpaid due to an employer’s history of previous wage claim violations or sectors at high risk of violations (e.g, recruitment).
- » The Ministry of Labour should establish a wage protection plan paid for by employers, similar to the Workplace Safety and Insurance system, not through general revenues. Employers, not taxpayers, should share the costs of restructuring and of employer practices that result in violations.
- » Make Part III prosecution mandatory in all cases where wages go unpaid to deter the practice of non-compliance with Ministry of Labour orders to pay.

Workers’ Voice

RECOMMENDATION 5.1

- » Establish a formal anonymous and third party complaint system. To make employment standards enforcement and legal remedy accessible to current employees, inspection initiated after a formal anonymous or third party complaint is filed should aim to detect and assess monetary (e.g., unpaid wages, overtime pay, public holiday pay, vacation pay, etc.) and non-monetary violations (e.g., hours of work, breaks, agreements etc.), remedy violations with orders to pay for all current employees, and to bring the employer into compliance for the future. Institute an appeal process if a proactive inspection is not conducted. Make the report of the proactive

inspection available to all employees. The officer’s decisions could be appealed either by employees or the employer.

- » Provide anti-reprisals protection to those workers whose workplace is subject to proactive inspection.

RECOMMENDATION 5.2

- » Protect workers who come forward to assert their rights by establishing substantial fines for employers who retaliate against them.
- » Conduct education and outreach to inform employers and employees about anti-reprisals protections.
- » Publicize confirmed anti-reprisal cases (protecting employee confidentiality) in the media, on government websites, and in educational materials.
- » To enable some workers to file individual claims while still on the job, develop an expedited investigation process for reprisals so that reprisal complaints will be heard immediately. Provide interim reinstatement, if requested by the worker, pending a ruling on cases of dismissal due to reprisals. This would reduce the penalizing impact of reprisals on workers.
- » In the case of migrant workers, prohibit employers from forcing “repatriation” of an employee who has filed an ESA complaint.
- » The Ministry of Labour should work with the federal government to ensure that migrant workers who have filed complaints are granted open permits. See additional information on this recommendation in the Migrant Workers section of the report.

RECOMMENDATION 5.3

- » Amend the ESA to include protection from wrongful dismissal. Authorize a procedure for making complaints against a dismissal considered unjust by an employee.
- » Claims of unjust dismissal should be prioritized and investigated quickly, with interim reinstatement pending ruling, if requested by the worker.

RECOMMENDATION 5.4

Ontario should adopt Quebec’s legislative approach to anti-psychological harassment under its labour standards. Like Quebec, Ontario should ensure that employees have a right to a workplace free from psychological harassment. Employers must take reasonable action to prevent harassment and, whenever they become aware of such behaviour, put

a stop to it. Workers should have recourse against psychological harassment including reinstatement, punitive and moral damages, indemnity for loss of employment, compensation for psychological support if needed, and the ability to order the employer to take reasonable action to put a stop to harassment.

RECOMMENDATION 5.5

- » Establish the legislative framework to enable sectoral bargaining in Ontario.
- » Allow caregivers under the Temporary Foreign Worker Program (TFWP) to unionize and bargain sectorally with employer representatives.
- » The *Agricultural Employees Protection Act* established in 2002 is so ineffective that no collective bargaining relationship has ever been established. This Act should be repealed and farm workers should have the same right to general collective bargaining under the Ontario Labour Relations Act (OLRA) that other workers have.

RECOMMENDATION 5.6

Enable unions to negotiate the terms and conditions of outsourced workers.

RECOMMENDATION 5.7

Repeal the bar on unionized workers from making claims through the ESA and enable unions to make third party complaints on behalf of non-unionized workers.

Migrant Workers

RECOMMENDATION 6.1 (METCALF FOUNDATION)

Legislation to protect migrant workers from exploitation by recruiters and employers must be designed on a proactive platform that meets international best practices and domestic best practices represented by the *Manitoba's Worker Recruitment and Protection Act* and the enhancements developed in Saskatchewan and Nova Scotia.

Ontario should adopt a proactive system of employer registration, recruiter licensing (including the mandatory provision of an irrevocable letter of credit or deposit), mandatory filing of information about recruitment and employment contracts, and proactive government inspection and investigation in line with the best practices model adopted in *Manitoba's Worker Recruitment and Protection Act* and the enhancements developed in Saskatchewan and Nova Scotia.

Specific enhancements to the Manitoba model that should be adopted in Ontario include:

- » Mandatory reporting of all individuals and entities that participate in the recruiter's supply chain in Canada and abroad;
- » Mandatory reporting of detailed information regarding a recruiter's business and financial information in Canada and abroad as developed in Nova Scotia's legislation;
- » Explicit provisions that make a licensed recruiter liable for any actions by any individual or entity in the recruiter's supply chain that are inconsistent with the Ontario law prohibiting exploitative recruitment practices;
- » Public registries of both licensed recruiters and registered employers;
- » Explicit provision that makes it an independent offence for an employer to engage the services of a recruiter who is not licensed under the legislation;
- » Explicit provisions that make an employer and recruiter jointly and severally liable for violations of the law and employment contract;
- » Protections against the broader range of exploitative conduct that is prohibited under s. 22 of FWRISA in Saskatchewan (i.e., distributing false or misleading information, misrepresenting employment opportunities, threatening deportation, contacting a migrant worker's family without consent, threatening a migrant worker's family, etc.); and
- » Provisions allowing for information sharing that enhance cross jurisdictional enforcement of protections against exploitative recruitment practices, including information sharing with other ministries or agencies of the provincial government, department or agencies of the federal government, departments or agencies of another province or territory or another country or state within the country as developed in Saskatchewan's legislation.¹¹⁰

RECOMMENDATION 6.2

- » Amend the ESA to include a process for expediting complaints of reprisals and, in the case of migrant workers, ensure that such complaints are heard before repatriation. Where there is a finding of reprisal, provision would be made for transfer to another employer or, where appropriate, reinstatement.
- » The ESA should explicitly prohibit an employer from forcing "repatriation" on an employee who has filed an ESA complaint.

- » Change the Canada-Ontario Immigration Agreement (COIA) to create an open work permit program for migrant workers who have filed complaints against recruiters, under the Employment Protection for Foreign National Act, and ESA.

RECOMMENDATION 6.3

Migrant workers should be able to make claims under the ESA when conditions of the employment contract have been reduced or not complied with.

RECOMMENDATION 6.4

The ESA should be amended to allow seasonal migrant workers access to termination and severance pay recognizing their years of service and the continuity of an employment relationship with the same employer. Migrant workers should be considered to be on a temporary lay-off between their yearly contracts with the same employer.

RECOMMENDATION 6.5

Extend time limits on ESA claims filed by migrant workers to five years.

Fair Wages

RECOMMENDATION 7.1

Raise the minimum wage to \$15 per hour in 2015.

RECOMMENDATION 7.2

Repeal occupational exemptions to minimum wage.

RECOMMENDATION 7.3

Repeal liquor servers minimum wage.

RECOMMENDATION 7.4

Repeal student minimum wage.

Endnotes

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- 70** This was for 2006-07. Stephen Grier, Provincial Coordinator, Employment Practices Branch, Ontario Ministry of Labour, personal communication, April 16, 2007
- 71** In recent years, the 20 to 30 officers doing inspections have often been pulled into individual claims investigations to reduce backlogs
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- 73** The 'hot cargo' (S. 15(a)) provision of the *American Fair Labour Standards Act* (FLSA) allows the Wage and Hour Department (WHD) to embargo or threaten to embargo a manufacturer's goods due to a violation of the FLSA at one of the subcontractors responsible for assembly work. Manufacturers enter into monitoring arrangements as a result of enforcement commenced by the WHD. Agreements require manufacturers to take timely action to rectify violations on the part of its contractors, both by ensuring that back wages are paid in cases where

non-payment of wages are discovered and by notifying the WHD of such a finding. The hot cargo provision can lead to monitoring of small firms at the bottom of the contracting hierarchy by the manufacturers at the top (or the brand names) rather than state inspectors directly. See Leah Vosko, Eric Tucker, Mark Thomas & Mary Gellatly, (2011), "New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada. Paper commissioned for the Law Commission of Ontario. <http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-tucker-thomas-gellatly.pdf>.

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75 Although those immigrants arriving in the last 10 years that live in urban centres are slightly more likely to use the internet than Canadians as a whole. Statistics Canada (2008), "Canadian Internet Use Survey" *The Daily*, June 12, 2008. <http://www.statcan.gc.ca/dailyquotidien/080612/dq080612b-eng.htm>

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80 Monies from fines currently go into the province's general revenue fund; fines from Part III provincial offences go to municipal general revenue funds.

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86 Mechanic's liens covers work performed or materials furnished in construction or land improvements.

87 Eunice Hyunhye Cho, Tia Koonse, Anthony Mischel (nd) *Hollow Victories: the crisis in collecting unpaid wages for California's workers*, National Employment Law Project and UCLA Labour Centre. Online: http://nelp.3cdn.net/f6fc363a30266f0cd3_pzm6id1xa.pdf

88 Ontario Ministry of Labour, "Anonymous Information, Employment Standards Information Centre" <http://www.labour.gov.on.ca/english/feedback/>

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92 *Canadian Labour Code* <http://laws-lois.justice.gc.ca/PDF/L-2.pdf>. Quebec also provides for protection against wrongful dismissal.

93 *The Quebec Labour Standards Act* defines harassment as "any vexatious behavior in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that result in a harmful work environment for the employee. A single serious incident of such behavior that has a lasting harmful effect on an employee may also constitute psychological harassment." *La Loi sur les normes du travail* RSQ 2002, c. 80, s. 47.

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- 108** Updated StatsCan LIM tables: <http://www12.statcan.gc.ca/nhs-enm/2011/ref/dict/table-tableau/t-3-2-eng.cfm> . Based on StatsCan Ontario CPI tables: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/cpis01a-eng.htm>
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