

WEST SCARBOROUGH COMMUNITY LEGAL SERVICES



Christie McQuarrie, LL.B., Executive Director, ext.227
Danny Rampersaud, Office Manager, ext. 222
Michelle Hoo, Administrative Assistant, ext. 221
Sheeba Sibal, Staff Lawyer, LL.B. ext. 225
Vanessa Emery, Staff Lawyer, J.D., ext. 228
Jill Zelmanovits, Staff Lawyer, LL.B. ext. 225
Gene Filice, Staff Lawyer, LL.B. ext. 224
Zoya Alam, Staff Lawyer, J.D., ext. 229
Regini David, Community Legal Worker/Paralegal, ext. 226
Oksana Grebnytska, Community Legal Worker/Paralegal, ext. 230
Lluc Cerda, Articling Student, ext. 229

Tel: (416) 285-0502
Fax: (416) 285-1070
website: www.westscarboroughlegal.ca

201-2425 Eglinton Avenue East
Scarborough, Ontario M1K 5G8

THIS IS A SCENT-FREE OFFICE!!

CELEBRATING 27 YEARS OF ACCESS TO JUSTICE IN SCARBOROUGH

Funded by Legal Aid Ontario

September 18, 2015

Sent Via Mail and Email to: CWR.SpecialAdvisors@ontario.ca

Changing Workplaces Review
Employment Labour and Corporate Policy Branch
Ministry of Labour
400 University Avenue, 12th Floor
Toronto, ON M7A 1T7

Re: Changing Workplaces Review Submissions

Dear Mr. Mitchell and the Honourable Justice Murray:

Please find enclosed with this letter the submissions to the Changing Workplaces Review from the East End Clinics Employment Law Project.

The East End Clinics Employment Law Project is a new pilot project of East Toronto Community Legal Services, Flemingdon Community Legal Services, Neighbourhood Legal Services, Scarborough Community Legal Services, West Scarborough Community Legal Services, and Willowdale Community Legal Services. The objective of the pilot project is to provide employment law services within East Toronto and Scarborough, recognizing that employment law is an underserved area of law.

Clinic staff would be pleased to meet with either of you or your staff to discuss any aspect of the submissions or the recommendations. We would like to thank you for your hard work so far on the Changing Workplaces Review and for taking the time to review our submissions. If there are any questions or you wish to speak with us, please do not hesitate to contact Regini David at reginid@lao.on.ca or (416) 285-0502 ext. 226.

Yours truly,

A handwritten signature in black ink that reads "Regini David".

Regini David
Community Legal Worker/Paralegal

Changing the Workplace Review 2015

Equal Rights for Workers: Building From the Bottom Up

Date: September 18, 2015

Submitted By: The East End Clinics Employment Law Project

East Toronto Community Legal Services, Flemingdon Community Legal Services,
Neighborhood Legal Services, Scarborough Community Legal Services, West
Scarborough Community Legal Services and Willowdale Community Legal Services.

Submitted to: Changing Workplaces Review

Employment Labour and Corporate Policy Branch,
Ministry of Labour
400 University Ave., 12th Floor
Toronto, ON M7A 1T7
E-mail: CWR.SpecialAdvisors@ontario.ca
Fax: 416-326-7650

The East End Clinics Employment Law Project

There are seventy-six Community Legal Clinics in Ontario. The Community Legal Clinics are funded by Legal Aid Ontario to provide low-income residents with legal services relating to poverty law.

We are six legal clinics in the East End of Toronto who have come together to form the East End Clinics Employment Law Project to provide free employment law services to low-income individuals. Our clients are extremely diverse including new immigrants, women, racialized persons, low-income individuals, and workers in precarious jobs and living in poverty. The participating clinics are East Toronto Community Legal Services, Flemingdon Community Legal Services, Neighborhood Legal Services, Scarborough Community Legal Services, West Scarborough Community Legal Services and Willowdale Community Legal Services.

The objective of the pilot project is to provide employment law services within each clinic, recognizing that this is an underserved area of law. Employment related issues impact a wide range of our clients. We aim to provide clients with access to information and advice that can empower them and allow them to assert their rights as workers.

A. Introduction and Overview

Today's job market has changed; many companies are restructuring their business-practices so that work is either being subcontracted or sought through a temporary agency. From our experiences working with communities in East Toronto and Scarborough, we see that many employers are violating basic workplace laws and looking for ways to avoid responsibilities by misclassifying workers as being independent contractors or self-employed. These violations are occurring across many industries, including cleaning, trucking, delivery, sales, retail and manufacturing. Over the past few years there have been a variety of reports such as *Still Working on the Edge*,¹ by the Worker's Action Centre tracing the rise of poverty, precarious work, and income inequality amongst various communities in Toronto.

Over the past three decades, temp work and short-term contracts, and own-account self-employment have grown at a much faster pace than jobs offering full-time, permanent employment. Finding a good job offering benefits, security, and the opportunity for career progress are becoming much harder to find due to the propensity of employers to rely on temporary, disposable workforces with few core employees.

According to the recent report, *It's More Than Poverty*, released by the United Way Toronto and McMaster University, precarious work has increased by 50% in the last 20 years in the Hamilton and the Greater Toronto Area. This report also found that "barely half of those working are in permanent, full-time positions that provide benefits and a degree of employment security."² These alarming statistics reflect the realities that workers face in the communities we serve.

¹ *Still Working on the Edge*, online: Worker's Action Centre <http://www.workersactioncentre.org/wp-content/uploads/dlm_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf>.

² *Poverty and Employment Precarity in Southern Ontario, It's More Than Poverty*, PEPSO: online <<https://pepsouwt.files.wordpress.com/2013/02/its-more-than-poverty-feb-2013.pdf>>.

Each day our clinics hear from workers that state they have not been paid their vacation pay, holiday pay, termination pay, overtime pay and even wages. We also see that even after the Ministry of Labour orders employers to pay unpaid wages, there is an issue with collection and enforcement. This has a huge impact on low-income workers, their families, our economy, and the health and social fabric of communities in East Toronto and Scarborough. These issues are an important struggle for our clinics to address given the rising prevalence across Ontario of precarious work, low-waged work and own-account self-employment.

The current workplace law regime in Ontario does not adequately protect precarious, low-waged, vulnerable workers in Ontario. All workers deserve to live and work with dignity and respect regardless of their work status. While we see a myriad of issues, the focus of our submissions will highlight the most common and difficult challenges that workers we represent face in asserting their rights under the *Employment Standards Act, 2000* ("the *ESA*").³ This submission covers a range of issues relating to: temporary agencies; vacation pay; leaves of absence; enforcement and employee misclassification; and, voluntary agreements. Each section includes a set of comprehensive recommendations aimed at improving workplace rights.

B. Temporary Agencies

The recent trend has been towards employers obtaining workers through intermediaries such as temporary agencies or subcontracting in order to save on the costs of hiring employees directly. Temporary agencies function by sending candidates to client companies who select candidates to work on temporary assignments. Many employers, including temporary agencies often misclassify the employee as an independent contractor, in order to avoid providing workers with protections such as minimum and overtime wages, social welfare benefits (i.e. CPP or EI), and various other entitlements.

³ *Employment Standards Act, 2000*, SO 2000, c 41 [ESA].

The rise in temporary agencies has corresponded with a shift amongst some employers in Toronto to download risks onto workers themselves. Workers employed by temporary agencies are not adequately protected under the *ESA*, which is outdated and currently does not protect the workforce. There is a systemic problem with temporary agencies violating the *ESA* as a recent inspection blitz by the Ministry of Labour found that close to seventy-five percent (75%) of companies audited were breaking the law.⁴ Given the power imbalance that temporary agency workers face, the apparent widespread non-compliance with the *ESA* is deeply concerning.

While the *ESA* is clear that workers are to be assigned work on a temporary basis,⁵ the lack of adequate regulation often results in workers working for long periods of time in not-so-temporary positions. Once an assignment is complete, the client company can terminate workers without providing the basic rights workers are entitled to under the *ESA* including termination pay. Additionally, workers are often denied access to social welfare benefits such as Employment Insurance.

Here is what Ms. Hassan* had to say about her experience working through a temporary agency for nine (9) years:

"I am a widow and mother to two sons. I am the sole income provider for my family. I worked for a temporary agency for 9 years as a personal support worker. I was treated differently from permanent workers who were paid more for the same work that I was doing. In fact, I was doing more work than the permanent workers, however, permanent workers were paid \$16 and I was paid \$13. Permanent workers got benefits after 3 months, in order for us to get benefits we had to work 40 hours in 6 months – the temporary agency ensured I was never able to make the 40 hours quota because they would reduce my hours to prevent me from earning the hours required to obtain benefits.

⁴ Sara Mojehezadeh, *Province-wide blitz shows majority of temp agencies on wrong side of the law*, online: The Toronto Star < <http://www.thestar.com/news/gta/2015/08/12/province-wide-blitz-shows-majority-of-temp-agencies-on-wrong-side-of-the-law.html>>.

⁵ *ESA*, *supra* note 3 at s 74.4(1).

*Names have been changed to protect the identity of workers

There is no schedule ahead of time; I had to call every day to see if I was assigned an assignment. I had to live with this uncertainty every day for 9 years. I was never given a set schedule. Permanent workers received benefits and perks that we never received as temporary agency workers such as gifts at Christmas time. We received differential treatment than the permanent workers, for example I wasn't allowed to sit on the chairs during breaks. The Client Company never took any responsibility or never hired me directly, as the rules do not allow temporary agency workers to be hired by the client company even if the company wants to. To get hired by the client company, you have to quit your job with the permanent agency and then apply after some time. I worked for the temporary agency for 9 years, my client at the nursing home died, there was no assignment left for me. I called every day for 2 months to get an assignment, but was not given one. When I was not given an assignment for over two months, I finally requested my Record of Employment (ROE). As soon as I requested my ROE, the temporary agency terminated me without any notice or termination or severance pay. My employer or Client Company did not take any responsibility and did not respect my work. When employers violate our basic rights, it impacts our health, families and the country. Because I was left with no income, my only option was to go on Ontario Works, but I decided not to because I want to work hard and contribute to my country. We also contribute to the economy by providing physical labour and the government should really ensure that temporary agency workers receive the same wages, benefits, and working conditions as other employees."

Temporary Agencies Recommendations:

1. The *ESA* should be amended to ensure that temporary agencies and their clients should be jointly and severally liable for all obligations under the *ESA*.
2. The *ESA* should be amended to prohibit long-term temporary assignment over one-hundred and eighty (180) days of duration and ensure that temporary agency workers who have worked a cumulative total over one-hundred and eighty (180) days are hired directly by the client company.
3. The *ESA* should be amended to require that temporary agencies and client companies provide temporary agency workers with information pertaining to the hourly mark-up fee for each assignment.

4. The *ESA* should be amended to ensure equal pay for equal work so that there is no differential treatment in pay or working conditions for workers who are doing the same work, but who are classified differently (i.e. part-time, contract, temporary, or casual).
5. The Government of Ontario should explore options as to how benefits could be extended for precarious, non-standard, temporary, and short term contract workers, such as a benefits bank or precarity premiums.
6. The Ministry of Labour and the Workplace Safety and Insurance Board ("WSIB") should review if the *Workplace Safety and Insurance Act* and WSIB policies are having a deleterious impact on workers of temporary agencies.
7. The Ministry of Labour should prioritize temporary agencies and temporary agency workers for proactive enforcement activities. Proactive enforcement activities would have enforcement officials investigate targeted industries such as temporary agencies and client companies to check on their payroll system and workplace policies. If violations are found, employers should be named publicly and their violations exposed. This would force employers to comply with the act.
8. The Government of Ontario should explore strategies to reduce the overall number and percentage of workers employed by temporary agencies in Ontario.
9. The Government of Ontario should adopt a similar policy to the Federal Government that provides for a statutory provision clearly stating that employers must provide a Record of Employment when there is no assignment within five (5) continuous working days. This policy should be adopted under the *ESA* and maintained as part of the record keep

responsibilities of the employer. If not provided, employers should be penalized and the worker should be accorded an automatic right to collect Employment Insurance.

10. The *ESA* should be amended to address reprisal arising out of employee requests for their Record of Employment to address situations like the one Ms. Hassan experienced.

C. Vacation Pay and Entitlements

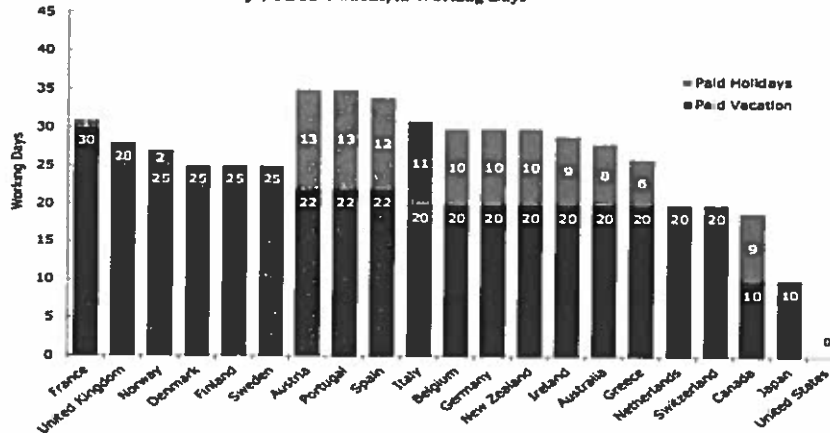
Workers in Ontario have poor entitlements to vacation time as compared to other developed countries. Vacations and time off from work is essential for a well-functioning, productive labour force, but this fact is not reflected in the *ESA* or prevailing employer attitudes. There are concerns about the *ESA* relating to the amount of vacation time provided to employees and the current qualifying periods for vacation entitlements. The tendency amongst sophisticated employers in Ontario is to provide vacation entitlements in excess of the *ESA* and it would appear that four (4) to five (5) weeks of vacation entitlement seems to be an emerging trend in Canada.⁶

In May 2013, The Center for Economic and Research Policy reviewed available data in its report *No Vacation Nation* from a range of international sources on statutory requirements for paid vacations and holidays in twenty-one (21) of the richest countries in the world.⁷ In its findings, European countries, such as France and the United Kingdom, were the most generous in providing legally mandated paid holidays, while Canada, Japan and the United States ranked the lowest in the total number of legally mandated paid holidays. See the graph below:

⁶ Sheryl Smolkin, *Top Companies Go Beyond Minimum Vacation Requirements*, online: <www.sherylsmolkin.com/top-companies-go-beyond-minimum-vacation-requirements/>.

⁷ *No Vacation Nation*, online: Center for Economic and Policy Research <<http://www.cepr.net/documents/no-vacation-update-2014-04.pdf>>.

**FIGURE 1:
Paid Vacation and Paid Holidays, OECD Nations, in Working Days**



According to the report, European countries are mandated to set a minimum amount of four (4) weeks or twenty (20) days of paid vacation per year.⁸ Currently under the *ESA*, Ontario employers can set the floor at two (2) weeks or ten (10) days of paid vacation per year.⁹

Mr. Ghaffouri’s story explains the importance of having more than a two (2) week vacation requirement per year:

“I am a father of three children and I am the sole income supporter in my family. Since I arrived in Canada I have mostly worked as a waiter at several restaurants. Most of my workplaces paid me for 1 or 2 weeks of vacation each year.

As a waiter, I worked long hours and most of my time was spent on my feet at work. I really needed a break to recuperate. 2 weeks of vacation in a 52 week period is not enough.

Due to the fact that I was working for many years and often had less than the minimum vacation time, it impacted my health and I had to take a long time off of work to recover.

This is not fair. We work hard and contribute to the economy. Without adequate vacation time, workers fall ill and this makes for extra costs on the healthcare system. Our hard work to bring money to the employer and the economy should be respected and recognized.”

Vacation Pay and Entitlements Recommendations:

⁸ *Ibid.*

⁹ *ESA, supra* note 3 at s 33(1).

1. The *ESA* should be amended to provide employees with three (3) weeks of vacation entitlement, in addition to statutory holidays, after one (1) year of service, and provide employees with four (4) weeks of vacation entitlement after five (5) years of service.
2. The *ESA* should be amended to provide new employees with vacation entitlements after three (3) months of service accumulating at a rate of 1.25 vacation days per month until the employee reaches one (1) year of service.
3. The *ESA* should be amended to provide employees of temporary agencies with vacation entitlements accumulating at a rate of two (2) vacation days per month.

D. Leaves: Emergency Leave, Sick Leave, Parental Leave, Maternity Leave, and Reprisal

Currently under the *ESA*, only employers with fifty (50) or more employees are required to provide job-protected, unpaid sick leave for employees who are sick or injured, whose family members need care, or have an emergency.¹⁰ The reality of workers in precarious employment is that many are not working in places with fifty (50) or more employees and those who are, often cannot afford to take a day off when they are earning minimum wage.

The following account is that of Ms. Munir, a hard-working mother whose experience describes the reality of many others who fall ill or take leave, particularly racialized women who often have extensive caregiving responsibilities for children and ill family members.

"I am a mother of 3 children aged 6, 4, and 1. I have been in Canada for 11 years since 2004. I came to Canada after completing a Master's degree in

¹⁰ *ESA*, *supra* note 3 at s 50(1).

Arts from my home country. Since I have arrived in Canada I have consistently worked in many general labour and precarious employment positions. I worked at a well-known coffee shop as a cashier, in a factory and worked through many temporary agencies. All of these work places had less than 50 workers and I did not qualify for any emergency leaves or was not eligible for any sick time off when I needed it.

Whenever I was sick I had to go to work struggling with my illness and could not afford to take the day off without pay because I would not be able to pay for my basic needs. When my children fell ill, I had to ask my family and friends to take care of my children and this was always difficult and stressful.

When I had my last child a year ago, I went on maternity and parental leave. When I returned, my hours were reduced, my shift was changed, and I was harassed by my employer making it impossible for me to work and take care of my children. This led to my health deteriorating – I had an anxiety attack at work and lost my job.

We work hard and the health of workers is important for a healthy and growing economy. When our rights are violated this affects the productivity and health of workers. This is not fair and not what I expected when I arrived in Canada with my Masters degree.”

Ms. Munir's story highlights the challenges for parents when they return from maternal, paternal, or parental leave and are treated differently. Some return to work to find they have lost their positions and must pursue lengthy legal processes to try to enforce their legal rights at work.

Leaves Recommendations:

1. The *ESA* should be amended to eliminate the requirement that employers have fifty (50) or more employees for employees to qualify for emergency leave. The Ministry of Labour should review the personal emergency leave provisions in the *ESA* to ensure each provision is justified on current public policy grounds and examine ways to extend the benefit to employees in firms with fewer than fifty (50) employees (including part-time, non-standard, casual, and temporary employees).

2. The *ESA* should be amended to provide employees with seven (7) days of paid sick leave per year. Additionally, for new hires the entitlement to paid sick leave would accumulate at the rate of 0.75 days per month of service for the first twelve (12) months of service.
3. The *ESA* should be amended to explicitly provide employees of temporary agencies with entitlement to paid sick leave accumulating at the rate of 0.75 days per month.
4. The *ESA* should be amended to ensure stronger penalties for reprisals against parents and caregivers who have been penalized for taking their right to leave. The *ESA* should be amended to require a rapid, proactive investigation of any employers who face a reprisal complaint in relation to this provision in order to make employers comply with the current provisions under the *ESA* pertaining to leaves

E. Enforcement and Misclassification

Workers go through a difficult and stressful process to enforce their rights under the *ESA*, however most often the battle continues for the workers even after they have obtained an order against the employer. Currently, employers found in violation of the *ESA* are expected to comply based on good faith that the employer will pay and comply with the order. In the meantime, workers must carry on without payment of unpaid wages, accruing debt and interests on loans to substitute unpaid wages. The employer has very little incentive to comply with the order as there is little consequence to violating the order and the *ESA*. The law is of little effect without appropriate enforcement.

The following is what Mr. Ramlingam experienced after getting an order from the Ministry of Labour. His experience is indicative of the wider problems relating to enforcement:

"I have been living in Canada for 19 years and was not able to bring my family from my home country due to income restrictions and restrictions by the immigration process. I left my youngest son when he was 2. I have not seen him or the rest of my family since then. My son is now 21-years-old.

Since I came to Canada, I have always worked in precarious employment. I worked as a cleaner, factory worker, paper delivery courier, painter, restaurant worker, and was employed through temporary agencies.

Most of the time I was paid minimum wage or less. My employers would misclassify me as a contract worker and not an employee. Due to this misclassification, I was never given overtime pay, vacation pay, holiday pay, and other benefits that other workers were getting.

When I learned about my rights, I filed a claim with the Ministry of Labour for my unpaid wages. The Ministry of Labour ordered my employer to pay, but the employer did not pay me or obey the order. The employer did not face any consequences either.

I worked with public action organizations to obtain my unpaid wages from my employer, but the employer still did not pay. I lost faith in the legal system. I continued to work for below minimum wage and in precarious employment to survive and pay my bills.

This is not only happening to me, but to many of my friends and co-workers."

Enforcement and Misclassification Recommendations:

1. The Government of Ontario should study the feasibility of re-establishing the Employee Wage Protection Program and enacting new legislation to enshrine such a program in statute.
2. The Ministry of Labour should conduct more proactive inspections in industries employing precarious, low-waged, and vulnerable workers at high risk for violations of their workplace rights including agriculture, hospitality and cleaning, and firms utilizing employees of temporary agencies.
3. The Ministry of Labour should act to reduce misclassification of employees as self-employed, volunteers, trainees, and interns by: (a) engaging in proactive compliance and enforcement processes directed at firms,

industries, and sectors with known high incidences of misclassification; (b) increasing transparency in decision-making through policy guidance and training for Employment Standards Officers on the definition of employee and the common law tests; and, (c) launching a public education campaign to raise awareness of the issue of misclassification of employees under the *ESA*.

4. The Ministry of Labour should: (a) substantially increase proactive inspections, particularly in higher risk industries based on established benchmarks and analysis of data metrics; (b) develop strategic, proactive enforcement initiatives that target high-risk for violation firms, including those comprised of concentrations of temporary foreign workers, temporary agency workers, recent immigrants, racialized workers, youth, the disabled, Aboriginal persons, as well as sectors and industries known for high-rates of *ESA* non-compliance; (c) conduct expanded investigations when *ESA* violations are detected; and, (d) ensure enforcement activities include follow-up on previous violations and complaints.
5. The Ministry of Labour should: (a) determine strategies to provide access to basic rights training to vulnerable, low-waged, and precarious workers; and, (b) identify sectors where there are concentrations of vulnerable, low-waged, and precarious workers so that proactive enforcement activities are directed at these sectors.
6. The Ministry of Labour should develop a body to address expedited *ESA* compliance and enforcement with a view to recommending best practices for responding to existing and emerging needs of vulnerable, low-waged, and precarious workers.

7. The Ministry of Labour should study how to increase *ESA* compliance to address concerns related to *ESA* violations arising from subcontracting, temporary agencies, and supply-chains.
8. The Ministry of Labour should hire additional Employment Standards Officers.

F. (Voluntary) Agreements

Under the *ESA*, employers and workers have the power to negotiate terms of their employment such as their hours of work and overtime pay. This does not take in to account power imbalance as workers do not have equal power to their employers. As a result, workers are in placed in vulnerable situations and work long hours for less money and more pressure.

For example, an employee and employer can agree to average an employee's hours of work over a specified period of two or more weeks for the purposes of calculating overtime pay. Once an employee enters in to an agreement, it is difficult for employees to break the agreement compared to agreements about their hours of work, which they can break by giving two weeks' notice. Agreements such as these place employees in positions where they are working longer hours for less pay. Workers are fearful to refuse agreements with their employers and workers sign these agreements to keep their job.

Mr. Sethu's experience negotiating averaging overtime with his employer is outlined below:

"I worked through various temporary agencies and was asked to average my overtime up to 4 weeks. I agreed to average my overtime because I wanted to keep my job, even though the agreement was not voluntary. I was forced to work long hours with minimal pay."

The Ministry of Labour should understand workers do not have equal power to negotiate with employers.

Voluntary Agreement Recommendations:

1. The *ESA* should be amended to remove the provisions¹¹ permitting voluntary agreements, particularly for averaging overtime.¹²
2. The *ESA* should be amended to better protect employees' interests related to averaging agreement as the current version of the *ESA* does not take in to account the vulnerabilities of precarious workers.

G. Conclusion

The issues under the *ESA* highlighted above pose a significant risk to the health and productivity of workers and the greater economy. A safe and equal work environment is a right that should be granted to all persons in the workplace. Workers face a number of barriers to securing their rights under the *ESA* and even greater challenges in having them enforced. The East End Clinics Employment Law Project stands in solidarity with workers who are voicing their concerns for change and it is our hope that through their struggles we may use their stories to propel change in the safety and regulation of the workplace. We are optimistic that the Changing Workplace Review will carefully consider the pre-existing workplace law regime in Ontario and recommend reforms that will protect workers both in the current labour market and what might emerge going forward.

¹¹ *ESA*, *supra* note 3 at s 17(2), 22(2).

¹² *ESA*, *supra* note 3 at 22(2).