



**Personal Emergency Leave:**

**A Research Brief Addressing Options Identified in the Interim Report of the Changing Workplaces Review**

**Submitted by:**

**Researchers from Closing the Employment Standards Enforcement Gap:  
Improving Protections for People in Precarious Jobs**

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Since September 2001, the *Employment Standards Act (ESA)* has provided unpaid Personal Emergency Leave (PEL) not exceeding 10 days each calendar year to employees who work in establishments that regularly employ 50 or more people. Reasons for PEL can include personal illness, or the death, illness or other emergencies concerning an immediate family member or other dependent relatives. The legislative intent behind the PEL standard is to allow employees in firms employing 50 or more people time off to deal with emergencies without penalty.<sup>1</sup>

The Interim Report of the Changing Workplace Review (CWR) sets out four options for reforming the PEL provisions of the *ESA* and is seeking public input on the alternatives posed. Prepared by researchers affiliated with the research partnership “Closing the Enforcement Gap: Improving Protections for People in Precarious Jobs,” this research brief responds to this call for input drawing upon both preliminary findings of our research, evidence from other jurisdictions, and scholarly literature and policy analysis on the subject of PEL. In what follows, Option 2 is recommended as it will address a notable weakness in Ontario’s *ESA* around PEL, specifically the exemption for workplaces with fewer than 50 employees.

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<sup>1</sup> Carswell, *Employment Standards Act 2000: Policy and Interpretation Manual*, s. 18.1.2 (October 2014).

### **Option 1: Maintain the current exemption for workplaces with fewer than 50 employees.**

The first option set out in the CWR's Interim Report is to maintain the status quo, including the current exemption for workplaces with fewer than 50 employees.

Research shows that maintaining the firm size exemption for PEL provisions will perpetuate what is recognized as an arbitrary and poorly justified exclusion of employees from full protection of the *ESA*.<sup>2</sup> It is widely acknowledged that this exemption results in different workplace standards for employees in firms of nearly identical sizes. If adopted, the option would also perpetuate legislative inconsistencies, as the *ESA*'s other leave provisions are not restricted only to employees in larger firms.<sup>3</sup> Additionally, the PEL firm-size threshold may promote contracting out and the use of agency workers in order to avoid "regularly" employing 50 or more employees since research shows that labour legislation that varies depending on firm size can trigger threshold effects. Although detailed Canadian data are not available, Gourio and Roys, for example, demonstrate how firm size-dependent labour regulations in France have led to a larger-than-expected proportion of firms of a size just below the legislative threshold.<sup>4</sup>

Furthermore, as a study of exemptions and special rules commissioned for the CWR using data from Statistics Canada's Labour Force Survey demonstrates, the firm-size exemption for PEL exacerbates inequities in Ontario's labour market. The approximately 30% of Ontario employees who work in small firms (of fewer than 20 employees)<sup>5</sup> are more likely to be precariously employed – specifically, they are more likely to earn low wages and to belong to low-income families, to lack control over the labour process, and to experience high levels of uncertainty. Indeed, fully 44% of employees in small firms earn \$15 per hour or less, and 26% are members of an economic family with earnings in the bottom quintile.<sup>6</sup> Employees in small firms are also less likely to be unionized. Whereas about 25% of Ontario employees not employed in federally

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<sup>2</sup> Law Commission of Ontario (2012) "Vulnerable Workers and Precarious Work: Final Report." Online: <http://www.lco-cdo.org/vulnerable-workers-final-report.pdf>.

<sup>3</sup> Ibid.

<sup>4</sup> Gourio, Francois and Nicholas Roys (2014) "Size-Dependent Regulations, Firm Size Distribution, and Reallocation." *Quantitative Economics* 5: 377-416.

<sup>5</sup> CANSIM Table 282-0076 Labour Force Survey estimates, employees by establishment size, North American Industry Classification System, sex and age group. Labour Force Survey data demonstrate that the share of Ontario employees who work in small businesses (fewer than 20 employees) has remained steady at approximately 30% between 2011 and 2015. Data limitations do not allow us to identify the exact share of Ontario employees who are subject to the PEL exemption because they work in firms with fewer than 50 workers.

<sup>6</sup> Vosko, Leah F., Andrea M. Noack and Mark P. Thomas (2016) "How Far Does the Employment Standards Act 2000 Extend, and What Are the Gaps In Coverage? An Empirical Analysis of Archival and Statistical Data." Online: <https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Vosko%20Noack%20Thomas-5-%20ESA%20Exemptions.pdf>, p. 61.

regulated industries are unionized, this is so for only about 5% of employees in small firms.<sup>7</sup> Compared to other Ontario employees subject to the *ESA*, a larger percentage of employees in small firms are employed part-time (25%) or on a temporary basis (17%).<sup>8</sup> And young employees (ages 15-29) are also concentrated in small firms.<sup>9</sup> In short, the current exemption for PEL exacerbates labour market insecurity for employees already experiencing social disadvantages and precariousness in employment. It is especially detrimental to women in small firms, given the assumption (and statistical reality) that they are responsible for the majority of unpaid care giving, and are therefore more likely to need to access leaves. The PEL exemption is out of sync with growing recognition that demographic shifts, including the dramatic rise in labour force participation among women, the increasing number of single parent families, and population aging heighten the need for leave policies that better enable employees to manage paid work and care giving.<sup>10</sup>

The negative consequences of this option for the health and well-being of all employees, employers and the broader public in Ontario should also be emphasized. The current exemption means that many employees in smaller workplaces will continue to face heightened pressure to work when they are sick or are confronting distressing situations affecting their immediate family members outside the workplace (e.g., emergencies, illness, death etc.). A growing body of research on the problem of presenteeism, or working when ill or under distress, demonstrates that its costs are potentially greater than those associated with absenteeism.<sup>11</sup> When employees who are sick go to work instead of rest, individual recovery is delayed, productivity suffers, and co-workers' and the broader public health can be put at risk.<sup>12</sup> A meta-analysis of existing research on employees who work when they are sick demonstrates that

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Vosko, Leah F. and Andrea M. Noack (2011) "Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context." Online: <http://www.lco-cdo.org/vulnerable-workers-call-for-papers-noack-vosko.pdf>.

<sup>10</sup> Arthurs, Harry (2006) "Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century." Gatineau: Human Resources and Skills Development Canada, p. 109; Fudge, Judy (2011) "Working-Time Regimes, Flexibility, and Work-Life Balance: Gender Equality and Families." In Catherine Krull and Justyna Sempruch (eds.) *Demystifying the Family/Work Conflict: Challenges and Possibilities*. Vancouver: University of British Columbia Press, pp. 170-193; Government of Canada (2016) "Flexible Work Arrangements: A Discussion Paper." Online: [http://www.esdc.gc.ca/en/consultations/labour/flexible\\_work\\_arrangements/discussion\\_paper.page](http://www.esdc.gc.ca/en/consultations/labour/flexible_work_arrangements/discussion_paper.page).

<sup>11</sup> Gary, Johns (2015) "Presenteeism." In David E. Guest and David J. Needle (eds.) *Wiley Encyclopedia of Management: Volume 5: Human Resource Management*. London: Wiley, p. 233.

<sup>12</sup> Rousculp, MD et al (2010) "Attending Work While Sick: Implications of Flexible Sick Leave Policies." *Journal of Occupational Environmental Medicine* 52(10): 1009-13; Carpenter, L et al (2013) "Food Worker Experiences With and Beliefs about Working While Ill." *Journal of Food Protection* 76(12): 2146-2154.

employees' decisions to do so are shaped by both their employment and financial insecurity and the existence of strict workplace-based absence policies.<sup>13</sup>

**Option 2: Remove the exemption for workplaces that employ fewer than 50 employees.**

The second option for PEL entails the removal of the exemption for workplaces that employ fewer than 50 employees.

This is a relatively straightforward measure to implement that would contribute greatly to employee well-being, serve the public good, and mitigate unprincipled inequities in the *ESA's* scope of coverage. Implementing this option would also eliminate Ontario's anomalous status as the only jurisdiction in Canada that allows for exemptions to leaves on the basis of workplace size.<sup>14</sup> For these reasons, and since cost-based arguments for exempting employees in small firms from PEL are not justifiable given that all standards entail costs, Option 2 is the most appropriate of those proposed.

**Option 3: Replace the general 10-day entitlement to PEL with a number of separate leave categories (illness, bereavement, dependent illness/injury).**

The CWR Interim Report outlines a third option for reforming PEL that would involve replacing the general 10-day entitlement with a number of separate leave categories (i.e., illness, bereavement, dependent illness/injury). Under this option, each leave category would entail a set number of days not exceeding 10 in total.

This option runs counter to employees' growing need for flexible leave provisions directed explicitly at enabling employees to manage paid work and unpaid care-giving responsibilities.<sup>15</sup> Data from Statistics Canada's Labour Force Survey indicate that Ontario employees' reasons for personal-emergency absences have changed over the past thirty years; these changes are likely to continue as a result of shifting demographics, social pressures and policy enactments. Considering Ontario employees' absences for personal emergency reasons, we see that own illness/disability accounts for a shrinking share of lost hours (from 84% in 1976 to 54% in 2015), whereas personal/family responsibilities account for a growing share of lost hours (from 16% in 1976 to 46% in 2015). These changes suggest that the adoption of

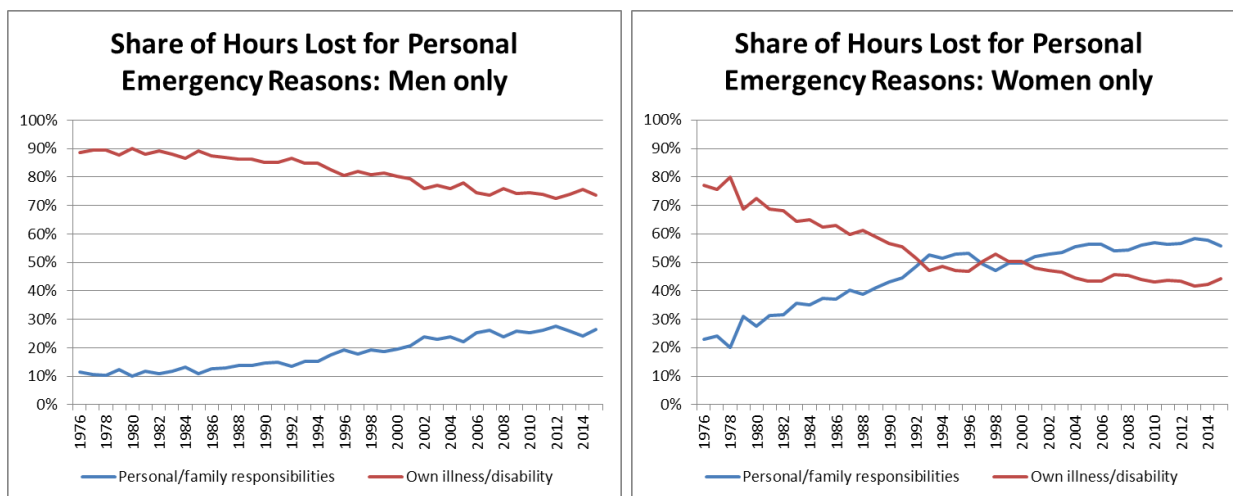
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<sup>13</sup> Miraglia, Mariella and Gary Johns (2016) "Going to Work III: A Meta Analysis of the Correlates of Presenteeism and a Dual-Path Model." *Journal of Occupational Health Psychology* 21(3): 261-283.

<sup>14</sup> Mitchell, C. Michael and John C. Murray (2016) Changing Workplaces Review: Special Advisors Interim Report. Online: [https://www.labour.gov.on.ca/english/about/pdf/cwr\\_interim.pdf](https://www.labour.gov.on.ca/english/about/pdf/cwr_interim.pdf).

<sup>15</sup> Employer Panel for Caregivers (2015) "When Work and Caregiving Collide: How Employers Can Support Their Employees Who Are Caregivers." Online: <http://www.esdc.gc.ca/eng/seniors/reports/cec.shtml>; Government of Canada (2016) "Flexible Work Arrangements: A Discussion Paper." Online: [http://www.esdc.gc.ca/en/consultations/labour/flexible\\_work\\_arrangements/discussion\\_paper.page](http://www.esdc.gc.ca/en/consultations/labour/flexible_work_arrangements/discussion_paper.page).

discrete leave categories based on the current distribution of employee absences is likely to become rapidly outdated. Further, there is a clear differentiation between how men and women use personal emergency leave. In 2015, among men with absences for personal emergency reasons, only 26% of lost hours were for personal/family responsibilities and 74% of lost hours were for own illness/disability. Amongst the comparable group of women, 56% of lost hours were for personal/family responsibilities and only 44% were for own illness/disability. Given the differing needs of men and women, the imposition of separate leave categories is likely to exacerbate gender inequalities in the labour force, whereas a more flexible and inclusive PEL entitlement serves men and women equally well.



*Note: Ontario employees only; Labour Force Survey data from CANSIM Table 282-0213*

Dispensing with the flexibility built into current PEL provisions in favour of more rigidly defined and shorter leave sub-categories is thus inadvisable on several grounds. Doing so would disproportionately burden women employees who are more likely than men to be primary caregivers for dependents. Changing workforce demographics, such as women's increasing participation in employment and the aging workforce, suggest that the reasons behind employees' use of PEL will continue to change in ways that are difficult to predict, and that more rather than less flexibility in PEL provisions is required to accommodate these changes. Option 3 also risks embroiling employees and employers in potentially contentious disagreements over the exact nature of employees' emergencies for the purpose of determining leave entitlements. These costs are more serious than the issue of some employees who may lay claim to both employer provided paid sick leave and the PEL entitlements of the *ESA*. This concern could be easily resolved if employers bring their paid leave policies into alignment with the scope of the *ESA's* PEL provision (i.e. allowing for 10 days of paid personal emergency leave rather than sick leave only).

**Option 4: Combining Options 2 & 3**

A fourth option involves combining options 2 and 3. This option entails the consequences of option 3.

**About Closing the Employment Standards Enforcement Gap:**

“Closing the Employment Standards Enforcement Gap: Improving Protections for People in Precarious Jobs” is a collaborative research initiative of 16 cross-sectoral partner organizations including researchers from seven Ontario universities. Funded by the Social Sciences and Humanities Research Council (SSHRC), this five-year project seeks to inform effective employment standards policies in Ontario.