Neighbourhood Legal Services
London & Middlesex

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Ontario Ministry of Labour
Changing Workplaces Review, ELCPB
400 University Ave., 12th Floor
Toronto, Ontario M7A 1T7

To whom it may concern;

Submissions regarding the *Changing Workplaces Review Special Advisors' Interim Report*
Employment Standards Act, 2000 Interim Report

Neighbourhood Legal Services - London & Middlesex ("NLSLM") is a poverty law clinic that provides legal advice and assistance to low income individuals who live in London and Middlesex County. In 2015 *NLSLM* started providing legal services in employment law, due to a noticed increase in precarious employment and the increase in vulnerable workers in our area. *NLSLM* would like to provide input regarding the *Employment Standards Act*, as we represent the employees who have a stake in the changes being proposed. *NLSLM* does not provide services to unionized workers, or federal employees, and will therefore not comment on the *Labour Relations Act*.

Please find below an index of the issues we have identified as requiring change or review of status quo practices.

***NLSLM* has provided input on the following *ESA* issues:**

1. **5.2.1 - Definition of Employee in the ESA**
2. **5.2.3 – Exemptions, Special Rules and General Process**
    a. Information Technology Professionals
    b. Pharmacists
    c. Residential Building Superintendents, Janitors and Caretakers
    d. Minimum Wage Differential for Students Under 18
    e. Minimum Wage Differential for Liquor Servers
    f. Student Exemption from the "Three Hour Rule"
    g. 5.2.4.1 Interns/Trainees
3. **5.3.2 Scheduling-**
4. **5.3.7 Part-time and Temporary Work – Wages and Benefit**
5. **5.3.8 Termination, Severance and Just Cause**
    a. 5.3.8.1 Termination
    b. 5.3.8.2 - Severance
    c. 5.3.8.3 - Just Cause
6. **5.5.4.1 Initiating The Claim**
7. **5.5.4.2 Reprisals**

Issue 1 - 5.2.1 Definition of Employee in the ESA

Based on *NLSLM's* experience, employees who have been wrongly classified as independent contractors face barriers to being properly characterized as employees. This is especially problematic for employees who carry on employment as a misclassified independent contractor due to fear of reprisal if seeking proper classification. Furthermore, the process for proper identification of employment status is complex, and likely inaccessible for employees who do not have guidance or legal representation. More protections must be established to prevent misclassifications of employees as contractors.

***NLSLM* rejects option #1 - the proposal to maintain the status quo** – as we feel it fails to address the increasingly complex employment relations that have developed over time, which make the ESA outdated. In addition, technology has further complicated employment relations. For example, the emergence of *Uber* into the taxi industry has created debate as to how *Uber* drivers should be classified.

***NLSLM* supports option #2 - increase education of workers and employers with respect to rights and obligations.** Education will be useful in informing individuals of their proper

employment classification. However, this will not stop employers from misclassifying workers. Misclassified workers will still face barriers to seeking proper classification of their employment. More proactive measures must be taken to assist misclassified workers.

***NLSLM* supports option #3 - increased proactive enforcement activities on the identification and rectification of cases of misclassification.** Proper classification of employees would be more likely if employers knew enforcement was probable and consistent. We support the *Workers' Action Centre & Parkdale Community Legal Services'* proposal, provided in their submissions entitled *"Responding to the Changing Workplaces Review"* to:

i. Develop strategic program for enforcement that would enter into partnership with the federal Canada Revenue Agency and Employment Insurance programs, appropriate Ontario ministries, and community partners to map sectors where misclassification is growing or is already widespread and carry out proactive enforcement.
ii. Ensure stiff penalties to employers who misclassify employees.
iii. Publicize names of companies in violation to deter misclassification.

***NLSLM* does not support option #4 - put the onus on the employer to prove that a person is not an employee under the ESA where there is a dispute.** *NLSLM* feels that this option may be less effective as it is reactive rather than proactive. This proposal is similar to existing claims regarding reprisals; while the onus is put on the employer to disprove a reprisal, the employee must first make their case that a reprisal occurred. However, in *ESA* reprisals only about 20% of workers are successful in these claims. It is extremely difficult for workers to prove their case, especially without legal representation. While we agree a reverse onus on the employer to prove that the person is not an employee if disputed is needed, we feel this will not solve the problem of employee misclassification.

A more proactive option would be to have a 'presumption of employee status'. Employers would be required to prove that an employee is an independent contractor before treating them so. This would create proactive barriers that would protect an employee from being misclassified.

Definition of Employee in the ESA Suggestions

***NLSLM* rejects option #5 - maintain the status quo.**

***NLSLM* supports in part option #6 - to include a dependent contractor provision in the ESA, and make clear that regulations could be passed, if necessary, to exempt particular dependent contractors from a regulation or to create a different standard that would apply to some dependent contractors.** The *ESA* as it stands fails to address developing models for employee – employer relationships. Providing *ESA* protections to dependent contractors would better address developments in the labour market. While this is a step in the right direction, this solution would still leave out vulnerable workers who would benefit from statutory *ESA* protections, but whose work does not conform to the extended definition of employee. This would create gaps in *ESA* coverage, and would also make enforcing the new boundary of the *ESA* more difficult – due to checkerboard application.

Therefore, if dependent contractor provisions were to exist, we recommend that; 1) the definition be as expansive as possible to include all workers in economically dependent position, and 2) there be no exemptions for dependent contractors.

Issue 2 – 5.2.3 - Exemptions, Special Rules and General Process

The purpose of the *ESA* is to protect vulnerable workers. These standards should be important enough to be deemed necessary in all employment contracts. Creating exemptions undermines this goal. We recommend that basic minimums for all workers should be the presumption, and employers should be imposed with a sufficiently high burden to prove that an exemption is justifiable - with input from employees. Establishing universal employment rights creates fairness, equity, predictability, and in principle is correct - as the purpose of the legislation is to impose employment standards.

CATEGORY 1 EXEMPTIONS

Information Technology Professionals – Currently, this category of workers is exempt from all the hours of work, rules, and overtime pay provisions. We recommend elimination of this exemption.

Pharmacists – Remove exemption. Lack of protections in the Employment Standards Act creates safety concerns regarding employee's health, as well as safety risks regarding clients of the Pharmacists. Given Pharmacists are less likely to be self-employed, and the fact that large corporations seem to abuse the lack of rights provided to Pharmacists, *NLSLM* recommends removal of the exemption.

Residential Building Superintendents Janitors and Caretakers - The most common type of employee Neighbourhood Legal Services (London & Middlesex) encounters in regards to wrongful dismissal claims and *Employment Standards Act* claims is the superintendent. Under the *ESA* superintendents have almost no employment protections: they are exempt from minimum wage, hours of work, daily rest periods, time-off between shifts, weekly/biweekly rest periods, overtime, and public holidays. While an employer would argue these exemptions are necessary – we would argue they are extremely problematic. Employer's abuse these exemptions and expect superintendents to be available 24/7, without extra pay. Even if their contract states that an employee will get time off – often superintendents are called into work during their time off with no compensation, and it becomes difficult to determine amount owed, as they are not covered by minimum wage protections.

Based on conversations with superintendents about the issue - superintendents understand that the employers in this industry are small in number (especially in London), and superintendents can be easily blackballed from other superintendent jobs if their employer is unsatisfied with their work. In addition, superintendents understand that if they complain too much about the responsibilities of their job, their employer will terminate their employment and find someone else. Therefore, most superintendents condone the lack of job protections and the exploitation of this, in order to maintain their employment and place of residence.

NLSLM recommends removing the exemption.

Minimum Wage Differential for Students under 18 – Ontario currently is the only Province to have this exemption. We recommend removing this recommendation.

Minimum Wage Differential for Liquor Servers - This minimum wage exemption allows employers to pay liquor servers a lower minimum wage (87% of general minimum wage). The majority of Canadian jurisdictions do not have a lower wage rate for tipped workers. We recommend removing this exemption.

Student Exemption from the "Three Hour Rule" - Students of any age are exempt from the "three hour rule" which protects workers who report to work but are sent home before their shift is over. We recommend elimination of this exemption. Students require predictability in income due to hectic school and work schedules. Additionally, students, now more than ever, require additional income to cover increasing school costs as well as living expenses.

5.2.4.1 Interns/ Trainees - More should be done to protect unpaid interns, such as eliminating exemptions altogether or having more proactive measures to prevent employers from being able to abuse such exemptions. Based on statistics provided by the Ministry of Labour on April 29, 2016, regarding inspection blitzes in 2015 to 123 workplaces across Ontario: 77 employers had interns – of these 77 employers; 41 were found to have programs that exempted the intern from the *ESA,* 18 had paid interns in compliance with the *ESA*, and *18* interns were in contravention. Based on these numbers, approximately 15% of employers are in direct contravention of the *ESA.* While the number of violations might seem small, the numbers also show that more than half of interns were unpaid due to exemptions, or contraventions.

We recommend elimination of the trainee exclusion. Interns should be paid for their work, including while being trained. Removing the interns and trainees exemptions would not affect the exclusions in the Act for secondary students under board-approved work experience programs and approved programs with universities and colleges.

ISSUE 3 – 5.3.2 – SCHEDULING

A significant proportion of individuals in precarious employment positions report that their work schedules are frequently released less than a week before they go into effect. This practice is allowed with the current *ESA*, which does not mandate that employers give advance notice of scheduling. Furthermore, there are no penalties for cancelling an employee's shift, nor is there an obligation to guarantee part- time workers a certain number of hours per week. Given the increased number of individuals who work multiple jobs in order to get by – scheduling becomes a huge concern. Employees who work multiple jobs require predictability in work schedules in order to be able to accommodate for other avenues of income. Furthermore, students who often have hectic lives due to complex scheduling of classes – require predictability in work scheduling.

Another problem *NLSLM* has noticed regarding scheduling is that because employers are not required to provide schedules in advanced, it becomes difficult for workers to schedule time off for personal emergencies. *NLSLM* has encountered a situation where a fast food employer required their employees to find a replacement for their shift, in order to take time off. Our client scheduled time off for surgery 2 months in advanced, however, the employer only notified her a day before her surgery that she could not take time off on the day scheduled off. Due to this dispute, the employee was terminated.

***NLSLM* supports option #4** - that the *ESA* be amended to require advanced notice of scheduling by employers to minimize the impact of irregular shifts. Workers in precarious employment positions should be afforded an appropriate opportunity to arrange child care services, to run necessary errands, to accommodate for other income streams, and to participate in community activities.

The San Francisco Retail Workers Bill of Rights is attractive an attractive model. We support the Advisors' options with amendments suggested by the *Workers' Action Centre & Parkdale Community Legal Services,* as follows (amendments and additions in italic);

- Require employers to post employee schedules 2 weeks in advanced;

- Require employers to pay employees more for last-minute changes to employees' schedules (e.g., employees receive the equivalent of 1 hour's pay if the schedule is changed with less than 2 days' notice and 4 hours' pay for schedule changes made with less than 24 hour' notice);
- Require employers to offer additional hours of work to existing part-time employees before hiring new employees or *using staffing agencies or contractors to perform additional work;*
- Require employers to provide part-timers and full-timers equal access to scheduling and time-off requests;
- Require employers to get consent form workers in order to add hours or shifts after the initial schedule is posted.
- *Provide new employees with a good faith written estimate of the employee's expected minimum number of scheduled shifts per month and the days and hours of those shifts.*
- ***Pay for on Call Shifts** – if an employee is required to be "on-call", but is not called into work the employer must pay the employee a premium of 2 to 4 hours of pay at the employee's regular rate (depending on the amount of notice and the length of the shift).*

Issue 4 - 5.3.7 Part-time and Temporary Workers – Wages and Benefits

The increase in Part-time and temporary work is troubling. Full-time jobs are harder to obtain, and data shows that part-time temporary workers are not getting paid equally in comparison to their full time counter-parts. In addition, part-time and temporary workers are less likely to have employment benefits.

NLSLM recommends that part-time, temporary, contract and casual employees receive equal treatment in pay, benefits and working conditions as full-time employees doing comparable work unless there are objective factors to justify the difference. Where there is no comparable position in the establishment, then similar work shall be determined by appropriate collective agreement or by similar work for the occupation or sector.

In regards to fixed term contract workers – *NLSLM* recommends that the number and total duration of contracts should be capped; a one year cap on term of contract after which

appropriate termination and severance provisions should apply. The goal of a fixed term employment contract should be to transition an employee into full-time work. Fixed term contracts should not be used superficially to avoid *ESA* requirements.

***NLSLM* supports options #5 – Limit the number or total duration of limited term contracts**. Limiting the duration of temporary assignments would prevent "abuse" of the legislation, and would ensure improved quality of life for the workers affected. Alternatively, other jurisdictions have applied different models to regulate temp-agency employment. Temporary workers in the UK are entitled to receive the same pay as permanent employees in equivalent positions after three months, whereas in Italy, temporary positions automatically become permanent after 36 months. In Australia, employers are required to pay a 15 to 25 percent premium on the wages of temporary workers to compensate for the fact that they do not receive benefits.

Issue 5 – 5.3.8 Termination, Severance and Just Cause

As it stands, '*generally*' there is a two tier system for dealing with arbitrary terminations in Ontario for non-unionized workers: pursue termination pay and severance pay (if eligible) through the *ESA,* or pursue wrongful dismissal damages through the common law court system. As it is widely acknowledged, damages through the common law are generally larger than what is provided through the *ESA.* This is problematic for vulnerable workers who cannot afford to pursue legal remedies through the common law. Vulnerable workers who are unable to pursue their damages through the common law are forced to use the *ESA.* This arguably has created an access to justice issue where there is a two tier system; employees who can afford to pursue damages through the common law are provided significantly larger awards regarding termination, while vulnerable workers who cannot afford to pursue damages through the common law get significantly less.

5.3.8.1 - Termination of Employment

The requirement that employers provide notice or pay in lieu of notice recognizes that employees need time to look for new employment. One out of 10 workers are exempt from termination notice or pay because they have worked less than three months, are construction

workers with occupational exemptions or are seasonal workers who have breaks in employment longer than 13 weeks. Steps should be taken to both increase eligibility of termination notice or pay in lieu of notice to employees through the *ESA*, and increase the amount of termination notice or pay in lieu of notice in the *ESA*, to better reflect common law damages regarding wrongful dismissals.

***NLSLM* does not support option #1 – maintain the status quo.**

***NLSLM* supports option #2 – that the 8 week cap on notice or pay in lieu of notice for termination be increased.** We support increasing the caps to bring it in line with severance provisions.

***NSLM* supports option #3 - that the 3 months eligibility requirement for termination notice or pay in lieu of notice be removed.** *NLSLM* has encountered an employer who is notorious for ending employment contracts before an employee reaches their 3 months of employment length, to avoid paying out pay in lieu of notice. The removal of the requirement to have 3 months of employment length before being entitled to termination pay would not be too onerous for employers, as employers always have the option to give notice prior to termination, to avoid pay in lieu of notice.

***NLSLM* supports option #4 - require employers to provide notice of termination or pay in lieu of notice, based on the total length of employment, including seasonal employees who have recurring periods of layoff beyond the 13 week layoff period.** This would address the problem of seasonal workers, who are regularly employed on a seasonal basis due to the nature of their work.

***NLSLM rejects option #5* – requiring employees to give notice would only further detriment vulnerable employees.** Leaving their job is the only sure right an employee has, given the issues regarding enforcement, and considering situations of egregious employer conduct.

5.3.8.2 Severance Pay

In *NLSLM's* experience, most of our clients are exempt from severance pay provisions, given the requirement that the employer must have a payroll of $2.5 million, and 50 employees. This has created a situation where *ESA* standards and common law entitlements regarding notice periods are at complete odds. *ESA* entitlements should better reflect common law entitlements, as this would better address the issue of access to justice to vulnerable workers. Removing the requirements to qualify for severance pay would bring *ESA* entitlements upon termination closer to common law damages regarding wrongful dismissals.

***NLSLM* rejects option #1 – maintaining the status quo.**

***NLSLM* supports: option #2, #3, and #4.** If the barriers to eligibility for Severance Pay were removed, *ESA* rights regarding severance and termination pay would be much closer to common law entitlements regarding wrongful dismissal damages. This would address access to justice issues for vulnerable workers who are unable to afford the legal costs associated with going to court.

***NLSLM* supports options #5 – increase or eliminate the 26 week cap.** By removing the 26 week cap regarding severance pay, *ESA* entitlements would be more similar to common law entitlements regarding reasonable notice in wrongful dismissal cases.

5.3.8.3 Just Cause

The workers that *NLSLM* deals with are provincial employees, and thus do not have just cause protections.

Just Cause protections are important because they protect workers from arbitrary terminations. While employees without just cause protections can litigate a wrongful dismissal through the common law in order to obtain damages – the reality is that most individuals cannot afford pursuing their rights in court.

Inaccessibility to employment law services should be considered when considering whether common law protections regarding wrongful dismissals are an adequate alternative to just cause

protections. There is a significant gap in regards to employment services available to low income individuals. In London, it is not uncommon for employment lawyers to charge $400/hr – significantly out of range for most individuals who have just lost their job. Additionally, it is rare that an employment lawyer will take on a case on a contingency fee basis – and if they do they take a significant portion of the damages received. Our legal clinic is very limited in our resources and thus can only assist a small amount of need in this area. Therefore, employees without just cause protections - who cannot find or afford legal representation - are forced to pursue their wrongful dismissal damages through the *ESA* with the Ministry of Labour. This is a problem in itself, because as indicated above, *ESA* entitlements to termination pay and severance pay are extremely limited to employees, in comparison to entitlements through the common law.

***NLSLM* rejects option #1 - to maintain the status quo.**

***NLSLM* supports option #2 – enact just cause protections for workers under the Temporary Foreign Worker Program, and have an expedited adjudication process to hear unjust dismissal cases.** While *NLSLM* does not have experience with TFW, we understand that there is a huge problem regarding enforcement of employment rights once terminated, as employees are frequently faced with immediate deportation once losing their employment. Injured workers who are also unjustly terminated face additional barriers in obtaining WSIB benefits entitled to – as many are sent home once dismissed. Just cause protections may assist TFW in dealing with these issues.

***NLSLM* strongly supports option #3 – provide just cause protection and adjudication for all employees covered by the ESA.** Just cause protections under the ESA would address the long-standing gap in labour law and common law that leaves non-unionized moderate and low income workers without access to protection from unfair and arbitrary termination. An effective program for protecting workers from wrongful dismissal will have a general deterrence effect for all employers.

Issue 6 – 5.5.4.1 Initiating the Claim

It is *NLSLM's* experience that the overwhelming majority of the alleged *ESA* claims that *NLSLM* receives from clients is post-termination. Employees' are hesitant to make an *ESA* claim against their employer, especially if they are currently employed by the employer they are making a claim against. The requirement that the employee contact the employer prior to filing a claim is extremely problematic for employees who have not been terminated from their employment – as they fear reprisal.

It is *NLSLM's* submission that the requirement that employees contact their employer before filing an *ESA* claim is practically useless. Employers are way more likely to settle a dispute once the claim has been filed – giving some leverage to an employee. An employer who is not following the *ESA* is unlikely to do so at the request of an unrepresented employee. This requirement only lengthens the time it will require to settle an *ESA* dispute.

***NLSLM* refuses option #1 - support the status quo.**

***NLSLM* supports option #2 - the removal of the requirement that the employee first contact the employer before being permitted to make a complaint to the Ministry.**

***NLSLM* supports the suggestion of allowing anonymous claims (Option #3) – it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response.** *NLSLM* feels that this is a step in the right direction to mitigate potential affects regarding reprisal. However, given the requirement to disclose facts to employer to allow informed response, it may be impossible to protect fully protect an "individual" from reprisal.

***NLSLM* supports the suggestion to allow third parties to file claims on behalf of an employee or group of employees (Option #5)– it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response.** This may best fit situations where there are more than 1 individual whom employment rights are being violated by the employer – as it may potentially protect a group from reprisal given identities regarding the complaint would be kept secret. However, this

solution does not solve problem of reprisal where employment violations revolve one employee. *NLSLM* feels this is a step in the right direction to prevent reprisal.

If anonymous complaints are allowed, anti-reprisal protections should be provided to workers who make anonymous complaints.

Issue 7 – 5.5.4.2. Reprisals

Anti-reprisal protections are critical to the enforcement of *ESA* rules and regulations. Employers must be sent the message that *ESA* rules and regulations must be followed, and respected. Attempts to undermine their enforceability through reprisal should lead to serious consequences as a deterrent. The Ministry of Labour should prioritize reprisal claims to ensure they get enforced in a timely manner. Employers will be deterred from reprising employees if the Ministry of Labour is timely, and consistent in enforcing alleged reprisal claims.

***NLSLM* does not support option #1** - maintain the status quo.

***NLSLM* supports option #2** – require ESOs to investigate and decide reprisal claims expeditiously where there has been a termination of employment (and other urgent cases such as those involving an alleged failure to reinstate an employee after a leave).

***NLSLM* also supports option #3** – require the OLRB to hear applications for review of decisions in reprisal on an expedited basis if the employee seeks reinstatement. This would bolster option #2, as the appeal following a reprisal claim would be also expedited.

Yours truly,

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