



THE ONTARIO FEDERATION OF LABOUR'S Submission

In response to the
**2016 Changing Workplaces Review:
Special Advisors' Interim Report**

October 2016

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October 14, 2016

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

Dear C. Michael Mitchell and the Honourable John C. Murray,

On behalf of our 54 affiliates, the Ontario Federation of Labour (OFL) commends both of you for the 2016 *Changing Workplaces Review: Special Advisors' Interim Report*. The thoughtful analysis in this report provides insight into the evolving landscape of employment and labour law in Ontario and its impact on workers—particularly women, racial and ethnic minorities, immigrants, and youth. Most importantly, it offers potential pathways to make meaningful and enduring changes to employment conditions across this province. Indeed, the length and the breadth of the Interim Report not only reflect the immense challenge ahead of Ontario in reforming its outdated employment laws but also the need for immediate action.

We have a once-in-a-generation opportunity to bring in sweeping changes and create a governing framework and standard for employment that addresses the changing nature of work. The OFL's submission puts forth recommendations to both the *Employment Standards Act* and the *Labour Relations Act* that will raise the minimum standards for all Ontario workers, expand access to our fundamental freedom to associate for the meaningful pursuit of collective workplace goals, correct the inherent power imbalance in the employment relationship, and protect vulnerable workers. For millions of Ontario workers, who find themselves in a constant state of uncertainty with limited income, social benefits, and statutory entitlements, maintaining the status quo is no longer the answer. Similar to the mandate of the Review, we view our recommendations as a cohesive and comprehensive package to affecting positive change in Ontario.

In constructing our response to the Interim Report, the OFL worked closely with our partners in labour, the community, and academia to present recommendations that will foster decent work across the province. In fact, we support and endorse the Workers' Action Centre and Parkdale Community Legal Services *Building Decent Jobs from the Ground Up* submission. The OFL will continue to be fully engaged in the Changing Workplaces Review process, working alongside our partners towards changes that will benefit all Ontario families and workers.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Buckley".

Chris Buckley
President

A handwritten signature in black ink, appearing to read "P. Coates".

Patty Coates
Secretary-Treasurer

A handwritten signature in black ink, appearing to read "Ahmad Gaied".

Ahmad Gaied
Executive Vice-President

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The Ontario Federation of Labour – which represents 54 unions and one million workers – is pleased to make a submission in response to the 2016 *Changing Workplaces Review: Special Advisors’ Interim Report*. The Report examined potential changes to the *Employment Standards Act* (ESA) and the *Labour Relations Act* (LRA).

RAISING THE BAR FOR EVERYONE

1. MANDATE GENDER EQUITY

Although the gender wage gap is outside the scope of this Review, it is important to recognize that women in Ontario are denied one of the most fundamental human rights: the right to non-discriminatory pay and employment practices. In Ontario, the gender wage gap is 31.5 per cent. In other words, on average, women in this province earn approximately 68 cents for every dollar that a man earns. This gap is significantly more pronounced for Indigenous women, racialized and immigrant women as well as women with disabilities. For example, racialized women earn 19 per cent less than non-visible minority women and 24 per cent less than racialized men, while women with disabilities earn 75 per cent less than women without disabilities.ⁱ Women are also over-represented in precarious employment, denoting two-thirds of part-time workersⁱⁱ and over 60 per cent of the 1.7 million Ontarians who earn at or near the minimum wageⁱⁱⁱ. Moreover, women are more likely than men to be in jobs with multiple non-standard characteristics (e.g., low fringe benefits, little or no job security, limited training, little control over one’s work environment, and uncertainty over work scheduling).^{iv}

Collective bargaining and pay equity measures have proven to significantly reduce the gap between what women and men are paid for their time at work. In fact, unionized women receive an average pay boost of nearly \$8.00 an hour and benefit from better job security and workplace benefits.^v Making it easier and more accessible for women to join or form a union as well as collectively bargain for wages, benefits, and job security will help contribute to the elimination of precarious employment, the gender pay differential, and inequitable employment practices.

2. MANDATE EMPLOYMENT STATUS EQUITY

In the Interim Report, see Section 5.3.7: Part-time and Temporary Work – Wages and Benefits

The law currently allows Ontario workers to receive lower wages and fewer benefits – despite doing the same work – simply because of their employment status (i.e., part-time and temporary work). For employers, this situation is highly beneficial because they are able to extract the same work but at a significantly lower price. For employees, however, they are faced with “uncertainty, low income as well as limited social benefits and statutory entitlements”^{vi}. The existing legal framework continues to perpetuate the increase in precarious employment across the province and contribute to the growing divide between full-time permanent employees and others. Part-time, temporary, and casual employees should be entitled

to equivalent pay, benefits, and working conditions that full-time employees in the same establishment receive (see Option 2).

Benefits should be provided on an equivalent – not prorated – basis to ensure that benefits are equal in value and function (see Option 3). If a threshold for benefits is introduced, it must be sufficiently low to counter the “threshold effect” (i.e., where employers are incentivized to reduce part-time workers’ hours to avoid providing benefits). To minimize this effect, prorated benefits can be provided below the established threshold. It is important, however, to note that the OFL does not support a wage-based threshold for pay and benefits that will see the principle of equal treatment for equal work limited to lower wage employees (see Option 4). An unintended consequence of the ensuing “threshold effect” is the incentive for employers to reduce wages and benefits for those earning above the threshold – giving rise to more temporary, part-time, and casual jobs. To further promote more permanent full-time work, the duration of contracts and the number of successive contracts should also be limited – with just cause protection extending to affected workers (see Option 5). Specifically, employers should be required to provide just cause in the event that a contract expires and another contract worker is substituted in that position. Ultimately, the notion of equal treatment for equal work should extend to all Ontarians, with no exemptions. As such, there should be parity in wages, benefits, and working conditions – regardless of employment status.

3. INCREASE THE MINIMUM WAGE

Although the minimum wage is outside the scope of this Review, the OFL continues to strongly advocate for a \$15 an hour minimum wage. 1.7 million Ontarians earn at or near the minimum wage.^{vii} No one should work full-time and still live in poverty. Under the ESA, all Ontarians – with no exemptions – should earn at least \$15 per hour, with that amount adjusted for inflation annually.

4. LEGISLATE SCHEDULING PRACTICES

In the Interim Report, see Section 5.3.2: Scheduling

Many low-wage workers in Ontario receive their schedules with very little advance notice, have very little – if any – control over when they are scheduled to work, and work fluctuating hours week after week. This uncertainty in scheduling practices contributes to making work precarious (e.g., unpredictable incomes) as well as making it difficult for employees to arrange for childcare, partake in further training and education, make commuting arrangements, and plan other important activities.^{viii} Moreover, the current imbalance of power, where employers can demand a constant flexibility in schedules from their workers, is such that workers cannot search for or maintain a second job. They are either forced to leave their job, which comes with significant personal financial risk, or to make themselves always available to that employer in the event of additional work. These conditions of employment need to change.

Workers need to be adequately compensated for their time in the event that they are sent home due to a

shortage of work. Specifically, employers should pay four hours of regular pay or the length of the cancelled shift, whichever amount is less (see Option 2(c)). Because employers can bypass this requirement by scheduling workers for split or shorter shifts, workers should also be scheduled for a minimum of three-hour shifts to account for any arrangements that may need to be made to allow for attendance at work (e.g., family care, commuting). Workers must also have a job-protected right to request schedule changes – without a limitation on the number of requests (see Option 3). Furthermore, all employers should provide advance notice in setting and changing work schedules to infuse predictability for workers (see Option 4). This includes – but is not limited to – the following:

- require employers to post employee schedules at least two weeks in advance;
- require employers to provide employees with an idea of their expected minimum number of scheduled shifts per month and the days and hours of those shifts;^{ix}
- require employers to pay employees a premium for last-minute changes to employees' schedules;
- require the employer to pay employees a premium if an employee is required to be “on-call”, but they are not called into work;^x
- require employers to offer additional hours of work to existing part-time employees before hiring new employees (including those hired through temporary help agencies (THAs));
- require employers to provide part-timers and full-timers equal access to scheduling and time-off requests; and
- require employers to get consent from workers to add hours or shifts after the initial schedule is posted.

5. LEGISLATE PAID SICK DAYS

In the Interim Report, see Section 5.3.5: Paid Sick Days

Less than one in four low wage workers get paid sick leave.^{xi} Individuals should not be forced into a position where they must either compromise their own health and the welfare of others or risk losing wages and/or being terminated. Workers not only require the right to take time off when sick, but that leave provision must also be paid to make it a viable option for workers. Resting when sick is known to speed up recovery, deter further illness, and reduce overall health care costs.^{xii} All Ontario employees, regardless of their place of employment or employment status, should be provided with paid sick days. Specifically, this should be accrued at a rate of one hour for every 35 hours worked (see Option 2(a)ii) – with no cap established.

Paid sick leave should also be available to employees when they get sick – not after a qualifying period (see Option 2(b)). To make this time conditional defeats the purpose of introducing an entitlement that is meant to, among other things, minimize the spread of infectious disease, reduce obstacles to preventive care, and diminish health care costs.^{xiii} Moreover, enacting an eligibility period runs contrary to one of the intended

outcomes of this Review (i.e., to better protect vulnerable workers in Ontario) because these individuals are least likely to qualify due to their part-time and/or temporary employment status. Additionally, medical notes should not be required – even at the employers’ expense (see Option 2(c)). This measure fails to address the other costs to the health care system, such as getting more people sick as well as unnecessarily overburdening walk-in clinics, community health centres, and emergency rooms.

Again, the OFL strongly urges the government to consider paid sick days in the context of other leaves, including Personal Emergency Leave, as well as within the entire Review process.

6. ESTABLISH SHORTER HOURS OF WORK

In the Interim Report, see Section 5.3.1: Hours of Work and Overtime Pay

Within Canada, Ontario has one of the highest maximum daily and weekly work hours as well as one of the highest eligibility thresholds for overtime.^{xiv} A maximum 8-hour workday and a 40-hour workweek (see Option 3) should be the standard outlined in the ESA – with workers retaining the right to refuse work beyond these hours. It is important to note that although most workers can theoretically refuse to work overtime or to enter into an overtime averaging agreement, the power imbalance inherent within the employee-employer relationship makes it difficult for workers to do so without negative repercussions. In addition to this vulnerability faced by employees, overtime averaging agreements always lower the amount of overtime pay owed to workers. As a result, all overtime averaging provisions should be eliminated.

7. EXTEND PAID VACATION

In the Interim Report, see Section 5.3.3.2: Paid Vacation

Compared to other provinces and the federal jurisdiction, Ontario has the least generous provisions with respect to vacation time and pay. It is the only province to limit its paid vacation entitlement to two weeks, while all other jurisdictions have access to three weeks.^{xv} In fact, the International Labour Organization recommends that paid vacation be a minimum of three weeks.^{xvi} Furthermore, to introduce a 3-week vacation provision after workers reach a certain length of employment fails to recognize that a significant portion of the workforce (i.e., those that are employed part-time and/or temporarily) will face considerable difficulty in accessing this entitlement (see Option 2). The ESA should provide for a minimum of three weeks of paid vacation for all Ontario workers (see Option 3).

8. INCREASE ACCESS TO PUBLIC HOLIDAYS

In the Interim Report, see Section 5.3.3.1: Public Holidays

Paid public holidays are vital to achieving a work-life balance and providing workers with much needed rest and renewal. Nearly 30 per cent of Ontario workers, however, do not have full access to public holiday rights

across the province. Specifically, about 20 per cent of employees encounter special rules that limit their access while nearly 10 per cent of workers are completely excluded.^{xvii} In Ontario, this lack of access to public holiday pay costs workers and the economy over \$18 million per week (i.e., the opportunity cost of not receiving this wage),^{xviii} The OFL therefore respectfully believes that improving access to public holidays should be the focus of this discussion – instead of seeking to reduce the administrative burden on employers and retailers. Increased access can be achieved by repealing exemptions and special rules as well as improving proactive inspections to address the high rate of violations related to public holiday pay.

9. EXTEND JUST CAUSE PROTECTION

In the Interim Report, see Sections 4.5.2: Just Cause Protection and 5.3.8.3: Just Cause

Unionized

Almost all collective agreements contain a just cause provision that protects unionized employees from arbitrary and unjust dismissal. This right, however, is limited to when a collective agreement is in force. In other words, after certification, but before a first collective agreement is in place, an employee has no protection against unjust termination by the employer – unless the termination is a result of the employee's exercise of rights under the LRA. Employees are left vulnerable during this time because employers have the opportunity to terminate them where just cause does not exist. This lack of coverage further contributes to labour relations instability and inequity during this important time in the collective bargaining process. Employees should therefore be afforded just cause protection as soon as they have chosen to be represented by a union (i.e., immediately upon certification) (see Option 2). This right should not be contingent on the length of time parties require to negotiate a collective agreement nor should it create an incentive for employers to delay reaching an agreement.

Non-Unionized

As mentioned, the vast majority of unionized workers are protected against unjust dismissal. For non-unionized workers, however, employers can dismiss an employee for any reason – subject to certain limitations¹. Although these workers do have access to pursue protection from wrongful dismissal through common law, the costs associated with obtaining legal representation act as a significant barrier for many individuals. Moreover, there is no remedy of reinstatement open to these workers who are dismissed without cause at common law. To effectively address this gap in labour and common law, just cause protection should be extended to all workers through the ESA – regardless of employment type (e.g., permanent, temporary, full-time, or part-time) (see Option 3). By explicitly allowing for unjust dismissal protection in the law, all Ontario workers will not only have greater job security because they will be safeguarded against arbitrary and unfair terminations, but they will also be eligible for “make whole” remedies, including reinstatement.

¹ Under common law, a non-unionized employee can be dismissed without reasons if they are given reasonable notice or pay in lieu. In July 2016, the Supreme Court of Canada ruled that this rule does not apply to federally regulated employers because under the Canada Labour Code, dismissing an employee without cause is unjust and is therefore not permitted.

Furthermore, just cause protection should be extended to temporary foreign workers (TFWs) along with an expedited adjudication to hear unjust dismissal cases (see Option 2). It is important to recognize the substantial power imbalance in the TFW-employer relationship. Namely, the presence of TFWs in Canada is completely contingent on their employers' willingness to maintain an employment relationship. Current provisions fail to protect TFWs in the event of unjust dismissals, job-related injuries, and/or violations of their rights, because the significant risk of deportation or repatriation back to their home countries remains. Those that do voice any objections encounter significant barriers to securing other employment in Canada. As a result, unjust dismissal protections must be extended to these workers to not only protect them so that they can enforce their legal rights but to also discourage employers from arbitrary and unfair dismissals. The ESA should also explicitly prohibit an employer from forcing repatriation on an employee who has filed an ESA complaint.

10. STRENGTHEN ACCOUNTABILITY MEASURES

In the Interim Report, see Section 5.5: Enforcement and Administration

The Interim Report recognizes that “there are too many people in too many workplaces who do not receive their basic rights”^{xi} as a result of non-compliance with the ESA. In fact, “labour standards ultimately succeed or fail on the issue of compliance. 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, and weakens public respect for the law”.^{xx} Approximately, 15,000 ESA-related complaints are made annually.^{xxi} In response to the lack of enforcement issue, the Advisors have suggested a number of options – namely by increasing education and awareness, creating a culture of compliance, reducing barriers to make claims, and encouraging strategic enforcement. Please refer to the joint submission from the Workers’ Action Centre and Parkdale Community Legal Services for specific actions on enforcement provisions.



EXPANDING ACCESS FOR EVERYONE

11. REMOVE LABOUR AND EMPLOYMENT LAW EXEMPTIONS

In the Interim Report, see Sections 4.2.1: Coverage and Exclusions and 5.2.3: Exemptions, Special Rules and General Process

Standards for Labour Law

All workers in Ontario should have a mechanism to democratically choose a trade union to represent them and have employers that are bound by law to recognize and bargain in good faith with the elected unions. Exclusions from the LRA therefore substantially interfere with individuals' fundamental freedom to associate for the meaningful pursuit of collective workplace goals – which includes the right to organize, the right to join a union, the right to engage in meaningful collective bargaining, and the right to strike. Currently, a number of professions, including licensed professionals, agricultural and horticultural workers as well as domestic workers, are exempt for reasons that are no longer relevant² (see Option 2). As the governing framework and the standard for labour law in the province, it is important that the greatest number of workers are covered by the LRA to provide the broadest access to everyone's constitutional right to collectively bargain.

Standards for Employment Law

The ESA, which is meant to establish the minimum employment standards and conditions for workers across the province, contains more than 85 exemptions and special rules.^{xxii} In fact, less than 25 per cent of Ontario employees are fully covered under the ESA^{xxiii}. Most of the employees affected by exemptions are likely to be part-time, temporary, low-wage, and young workers.^{xxiv} Given that exemptions are inconsistent with the principle of universality, the ESA should be applied to ensure maximum coverage of employees. The Advisors have put forth a three-tiered process to address this issue. Based on this approach, the OFL recommends the following:

Tier 1: All, but one, of the Advisors' listed exemptions should be removed without the need for a subsequent review. Namely, information technology professionals; pharmacists; residential care workers; residential building superintendents, janitors, and caretakers; students (i.e., the minimum wage differential for those under 18 and "reporting pay"); and liquor servers (i.e., the minimum wage differential) should enjoy coverage under the legislation. For managerial or supervisory employees, however, there is concern that the definition of those excluded has been broadened to encourage misclassification. As a result, it should be further reviewed.

Tier 2: In 2005, the Ministry of Labour enacted a policy framework for approving exemptions and special rules. From 2005 to 2006, six industries (i.e., public transit, mining and mineral exploration, live performances, film and television industry, automobile manufacturing, and ambulance services) went through

² The historical exclusion of domestic workers, for example, was based on the belief that they formed an intimate social bond with the private households they worked for; unionization would therefore be an inappropriate barrier to this bond.

this internal process. Given the changing nature of work – particularly within the last decade – the exemptions and special rules for the aforementioned industries as well as the principles and criteria underlining the Ministry of Labour’s policy framework should be revisited with thorough consultation from appropriate stakeholders.

Tier 3: All other exemptions will be subject to further review. Please refer to the joint submission from the Workers’ Action Centre and Parkdale Community Legal Services on the recommended guiding principles and criteria to review exemptions and special rules. Furthermore, as they discuss, a commission should be struck within 18 months to review and eliminate all ESA exemptions and special rules unless they meet the defined criteria. Moreover, the commission must conduct a review of any future applications for exemptions and special rules and ensure that through periodic review, the existing exemptions and special rules continue to meet the defined criteria.

12. EXPAND THE DEFINITION OF AN EMPLOYEE

In the Interim Report, see Section 5.2.1: Definition of Employee

One of the most fundamental questions of this Review is the definition of an employer and of an employee. The answers will determine who is held accountable and who is protected under the law. As recognized in the Interim Report, it is often vulnerable workers most significantly impacted by these narrow definitions – particularly in light of the “fissuring” workplace. Specifically, the restructuring of employment relationships has seen large corporations/lead companies discard their role as direct employers of workers carrying out the businesses’ day-to-day operations in favour of outsourcing this work to a complicated network of smaller employers through various means, such as subcontracting, outsourcing, franchising, and indirect hiring through THAs. Accordingly, this change has created a spectrum of different workers – ranging from the traditional employee (i.e., those completely protected by the ESA) to so-called independent contractors (i.e., those outside of the ESA’s protections).

In an effort to extend the protections under the ESA to the greatest number of workers, the definition of employee should be as broad as possible. In the LRA, for example, a dependent contractor is defined as a “person who performs work or services for another person for compensation or reward on such terms and conditions that the [employee] is in a position of economic dependence upon, or under an obligation to perform duties for, that person”. A similar expansive definition should be applied to the ESA (see Option 6).

The legislation should also contain an overarching legal presumption of employee status for persons who perform work or supply services for monetary compensation. In addition to establishing a guiding principle for employment standards, this rebuttable presumption is meant to be a proactive response to the prevalent misclassification of employees, where businesses deem workers as independent contractors to avoid the direct financial costs of compliance with the ESA and other legislation (e.g., vacation, public holiday, overtime, termination, and severance pay). In other words, this presumption should not only be applicable to cases where there is a dispute over employee status (see Option 4), because the burden to make claims under the

ESA continues to fall on workers. For those who cannot afford legal representation, it is often difficult to make the case that their employment relationship resembles that of an employee and not an independent contractor. This creates a high barrier to accessing the ESA. Ultimately, unless an employer can demonstrate otherwise, a worker should be recognized as an employee for the purposes of the ESA.

13. EXPAND THE DEFINITION OF AN EMPLOYER

In the Interim Report, see Section 5.2.2: Who is the Employer and Scope of Liability

As the Interim Report acknowledges, the fissuring of employment relationships has allowed some employers to avoid the legal, statutory, and collective bargaining responsibilities associated with directly employing workers. To strengthen the lines of accountability around upholding workers' employment standards, the legislation should be amended to make companies – in all industries – jointly and severally liable for all ESA obligations of their contractors, subcontractors, and other intermediaries. Specifically, this should be done in situations where companies directly or indirectly exercise significant control or influence over the entity to a degree where it has a significant impact over terms and conditions of employment. To effectively realize this measure, employers and/or contractors must insert contractual clauses requiring ESA compliance (see Option 2). To determine when businesses should be held jointly and severally liable for the purposes of the ESA, a policy framework akin to the U.S. Department of Labor's joint employer test should be implemented (see Option 3). The joint employer definition should be sufficiently expansive to recognize both the horizontal³ and vertical⁴ relationship structure of related employers^{xxv} and capture the various fissured employment relationships in the modern workplace. Furthermore, the existing "intent or effect" requirement (i.e., the second criterion) associated with the related employer provision in the ESA should be repealed (see Option 5). This requirement limits the definition of a related employer by establishing a test that is quite difficult to overcome and fails to depict the myriad of related employer relationships that legitimately should attract joint liability under the ESA.

All franchisors – with no exemptions – should be held liable for all employment standard violations of their franchises (see Option 4). As entities that not only control funding but also exert significant indirect or direct control over the franchisee operations, they should be held accountable to their employees (see Section 28 on page 21 for full discussion).

To improve the collection of unpaid wages⁵, in cases where the company is insolvent or is found to be in violation of the Ministry of Labour's order to pay wages, the ESA should enact a remedy similar in principle to the oppression remedy set out in the *Ontario Business Corporations Act* (see Option 6). Further, a provision should be established that allows the Ministry to place a lien on goods that have been produced in

³ Horizontal joint employment exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee.

⁴ Vertical joint employment exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labour provider, or other intermediary employer) and the economic realities show that they are economically dependent on, and thus employed by, another entity involved in the work.

⁵ Only 40 per cent of the wages that the Ministry of Labour orders employers to pay is collected by workers.

contravention of the ESA (see Option 7). This measure will help ensure that the lead company and its subcontractors in the chain of production meet ESA standards. Because one of the greatest responsibilities of government is to set an example for its constituents to follow, a provincial fair wage policy should be implemented for the public procurement of goods and services as well as the funding of social services that receive government funding or contracts (see Option 8).

14. INCREASE ACCESS TO COLLECTIVE BARGAINING

In the Interim Report, see Section 4.6.1: Broader-based Bargaining Structures

The current industrial relations system in Ontario is rooted in the Wagner Act Model (WAM) of bargaining and union organization by workplace. It assumes that the collective bargaining process will occur between one union and one employer within an individual workplace. Over a number of decades, this model has proven to be effective for workers employed in a large, single site workplace with traditional hours of work. As a result, in sectors and industries where the existing legislation has been used to successfully organize a significant portion of workers, current bargaining structures should remain.

Over the last two decades, however, the proportion of workers in a different workplace configuration has been growing. In fact, in 2015, more than 85 per cent of workplaces in Ontario had fewer than 20 employees and nearly 30 per cent of all Ontario workers were employed in these small workplaces.^{xxvi} It is important to note that these workplaces are generally associated with high rates of part-time, temporary, and contract jobs^{xxvii} and that recent immigrants, women, and racialized individuals are typically overrepresented in these jobs^{xxviii}.

Moreover, with the fracturing of employment relationships, situations where there is no clear employer, where the perceived employer is not the real decision-maker, where there is no single workplace, where there are diffuse chains of production, where non-standard employment is prevalent, where workers are labeled as “self-employed”, and where workplaces are too small to organize on their own have become more and more common. In addition to the barriers unions encounter under the present legislation (e.g., inadequate access to employee lists, an unfair certification process), the institutional structure of workplaces has made it increasingly difficult to organize, administer, and bargain a collective agreement.

As such, for areas with low union density and/or little bargaining strength – which can largely be seen in industries where employment relationships are fissured and where small workplaces are prevalent – the current structure of bargaining (i.e., WAM) may need to evolve to provide more workers with meaningful access to collective bargaining. Overall, certification and bargaining on a broader basis will expand opportunities to represent workers that currently face barriers to organizing under the traditional model. Most importantly, it will allow for the broader distribution of the benefits associated with collective bargaining – namely, improved employment standards and conditions as well as strengthened enforcement of both legislated and bargained standards.

In an effort to ensure that the legal framework for labour standards in Ontario is relevant and provides meaningful collective bargaining opportunities for *all* Ontario workers, different models are therefore required

to respond to specific needs. It is, however, important that any new models considered for broader-based bargaining (BBB) structures not only ensure that more workers have meaningful access to collective representation but also address the needs of existing unionized workers. The OFL is supportive of the overarching principles in each of the following proposals, with the understanding that one model alone will not prove to be an effective solution.

Single-Employer, Multi-Location Certification and Multi-Employer/Multi-Location Sectoral Bargaining

See Options 4 and 5

This proposal, which is based on the governing framework of the Baigent-Ready model, involves single-employer, location-by-location certification and multi-employer/multi-location consolidated bargaining on a broader basis within the sector. The sector has two characteristics: a geographic scope and employees performing similar tasks. Multiple unions may be certified within a single sector with each union administering its own collective agreement. As such, unions that are certified within a sector do not have a monopoly on representation rights.^{xxix}

As a hybrid of Options 4 and 5, the OFL also suggests that this model should allow for bargaining with different employers in the same sector, where a union has organized employees of more than one employer. This picks up on an important feature of Option 5, which involves multi-employer bargaining and bargaining units in the same sector – namely, the principle that where a union has organized employees of different employers in the same sector or subsector, there should be an opportunity for a union to bargain on a broader basis through a single bargaining unit of multiple employers. This is an important step in the right direction. In this case, legislation should require those employers to bargain together through a council or an association.

This bargaining structure is meant to service smaller and fragmented workplaces that are “historically underrepresented by trade unions”^{xxx} – in other words, where precarious work is prevalent. The organization of small workplaces along sectoral lines will allow for more effective collective bargaining (i.e., the greater the number of employees, the stronger the union’s bargaining power), and it will also create the impetus for non-union employers in the industry to at least provide equivalent terms and conditions of employment provided under existing sectoral collective agreements – thereby raising the bar for everyone in the sector. This structure therefore provides a framework for developing and extending access to pay, benefits (e.g., pensions as well as health and welfare benefits), and workplace conditions that typically have not been made available to precarious workers.

Single Franchisor/Franchisee and Single-Employer, Multi-Location Certification and Bargaining

See Option 3

This model is based on a location-by-location approach to certification and a broad, multi-location approach to bargaining. By creating geographic and industry sector-wide bargaining for the operations of a particular franchisor, with both the franchisor and its franchisees, workers are able to organize and bargain collective agreements covering multiple locations of the same franchisor and to consolidate bargaining units (see

Section 15 on page 13 for further discussion) as more become organized – similar to the current structure employed in Ontario’s construction sector. This structure allows for the potential of all workers in a particular franchise to receive similar treatment in terms of pay, benefits, and working conditions.

Inherent within this particular BBB structure is establishing the employer(s) responsible for collective bargaining and compliance with collective agreements. As discussed, in Section 28 on page 21, for collective bargaining to be effective, both the real economic players and those that exert indirect or direct control over the operations must be required to bargain with employees. It is important to note that this joint accountability structure can extend beyond the franchisor relationship to also include subcontracting and supply chain interactions, for example.

The two BBB proposals below will assist in extending both statutory and non-statutory social insurance benefits and protections to individuals who are currently left uncovered or unprotected.

Sector-Specific Vulnerable Workers

See Option 7

There are significant and increasing numbers of workers, particularly women, racialized and ethnic individuals, immigrants, and youth, who find themselves in low wage jobs – many of them temporary, unstable with little or no security, and mostly without benefits. These groups are overrepresented in industries, such as food services, homecare, childcare, custodial services, and agricultural, where working conditions and the governing standards for labour and employment vastly diverge. To provide those that face inherent vulnerability in the labour market with greater access to meaningful collective bargaining, unique models of BBB structures should be created to respond to industry-specific needs (e.g., through a centralized single designated employer bargaining agency) in areas where WAM is unlikely to be effective because of the structure or history of the industry as well as in sectors that are not currently covered by the LRA.

Freelancers, Dependent Contractors, and Artists

See Options 8 and 9

This proposal suggests creating a bargaining model for freelancers, dependent contractors, and artists based on the federal *Status of the Artist Act (SAA)*. In an effort to address the precarious and insecure nature of this type of work, the SAA allows a number of different professional artists in the federally regulated cultural sector to form associations and bargain collectively with the producers who engage their services.^{xxxi} The adoption of a similar model can potentially extend meaningful collective bargaining to these professions.

It is, however, important to note that because of the desire to retain greater autonomy over the nature of their work and how it is conducted, these individuals are not considered employees for the purposes the LRA and their agreements are therefore outside of its protections. This can prove challenging: under the federal legislation, artists’ associations may be left without a sector-wide group with which to bargain because producers are not required to form associations for bargaining.^{xxxii} Some of the aforementioned issues can be addressed in separate provisions of the LRA that apply exclusively to the media industry and the groups affected by the SAA.

15. BROADEN THE BARGAINING UNIT

In the Interim Report, see Section 4.3.4: Consolidation of Bargaining Units

One of the most critical decisions in the certification process is determining the appropriate bargaining unit. Typically, this represents a single workplace within a single geographic area. This definition therefore implicitly assumes that the bargaining unit is based on a fairly large workforce with a single employer as per WAM. As discussed, the contemporary workforce no longer largely reflects this structure. Instead, it is characterized by growing employment in small workplaces and in non-standard work as well as complex employment relationships.

The Ontario Labour Relations Board (OLRB) recognizes that there is a greater need for flexibility in organizing and certifying an appropriate bargaining unit – particularly in industries where there is little history of organization.^{xxxiii} In an effort to create stable collective bargaining relationships in today’s labour force, upon application of either party, the OLRB should be given explicit power to consolidate existing bargaining units with newly certified units at either the same location or in multi-location situations – provided that all affected units are represented by the same trade union and the same (or a related) employer (see Option 2). Further, the OLRB should consider whether the proposed consolidation will facilitate viable and stable collective bargaining, reduce fragmentation of bargaining units, or cause serious labour relations problems (see Option 3).

Ultimately, these smaller units, once certified, can be combined together into more rational, long-term bargaining structures. As the OLRB points out “labour relations boards across the country have all recognized the utility of BBB structures, because they are more likely to: promote stability, increase administrative efficiency, enhance employee mobility, and generate a common framework for employment conditions for all employees in an enterprise. Bigger bargaining units also have more critical mass, so that they are better able to facilitate and accommodate change”.^{xxxiv}

16. STRENGTHEN PROTECTION FOR COLLECTIVE ACTION

In the Interim Report, see Section 4.6.2: Employee Voice

All Ontario workers should have the right to engage in concerted activity for the purpose of mutual aid or protection (see Option 5) – a protection that exists even in the US. Workers should not encounter any form of employer retaliation for exercising their constitutional right to freely associate with others to form groups and for those groups to take collective action to pursue the interests of its members.^{xxxv} Legislation should therefore protect the right to concerted activity through a statutory just cause provision.

As discussed, however, some workers – particularly those in part-time, temporary, contract employment – have been unable to access collective bargaining (i.e., partake in concerted activity) because of their particular workplace configuration. As a result, a pathway to organize and to collectively bargain in pursuit of common workplace goals – in an effort to exercise real influence over the creation of workplace rules – has

been largely unclear or non-existent for these workers. Given that the lack of “employee voice” disproportionately affects vulnerable groups, such as racial and ethnic minorities, recent immigrants, women, and youth^{xxxvi}, there needs to be a collective bargaining mechanism that allows these individuals to exercise greater input in and influence over the issues that affect them at work.

It is, however, important to note that structures for employee voice must correct the inherent imbalance of power between employers and employees. Unlike union representation, other models discussed in the Interim Report, do not ensure that employees’ voices are not dominated by the employer (see Option 3 and 4). In fact, the dismal experience with non-unionized health and safety committees has shown that the only real way to ensure meaningful and authentic employee voice is through some form of independent collective representation and collective bargaining. Further, models with some form of minority unionism will not be supported by the OFL (see Option 2). Majority support is currently required to certify a union in Ontario. This should not be seen as a barrier to workers exercising their freedom of association rights. Instead, it should be seen as a necessary means to facilitate the enjoyment of those freedoms.^{xxxvii} Rather than supporting this freedom or expanding workers’ rights, unionism that is neither majoritarian nor exclusive (i.e., minority unionism) may weaken and limit workers’ influence at the bargaining table and in the workplace.^{xxxviii} Namely, a lack of exclusivity allows an employer to promote rivalry and friction among multiple employee representatives to “‘divide and rule the work force’, using tactics like engaging in direct negotiations with individual employees to undercut ‘the credibility of the union...at the bargaining table’”^{xxxix}.

The OFL therefore respectfully submits that the implementation of the recommendations outlined in this paper, particularly around extending access to collective bargaining (e.g., BBB, consolidation of bargaining units) will significantly impact a large number of employees, including vulnerable workers. Together, these measures will provide them with the opportunity to meaningfully participate in the decision-making process and to shape the conditions of their employment – giving rise to the collective employee voice.

17. STRENGTHEN THE PROCESS TO UNIONIZE

In the Interim Report, see Sections 4.3.1.1: Card-based Certification and 4.3.1.2: Electronic Membership Evidence

An important element in the collective bargaining process is the mechanism available to workers to express their interest to freely associate with others for the meaningful pursuit of collective workplace goals – in other words, the manner in which a union is certified. Under the current mandatory vote model, an applicant union must submit membership evidence that demonstrates the support of 40 per cent of the bargaining unit. A vote is then typically held on the employer’s premises after five business days (see Section 20 on page 17 for further discussion). The union is then certified as the bargaining agent if the majority of the ballots cast are in favour of its representation. Conversely, the card-based system – which was in effect in Ontario for about 55 years until it was repealed by the Harris government – better facilitates the right of employees to join a union. It recognizes that when a worker signs a union card, they are expressing their desire to join a union. When a

majority of employees in the proposed bargaining unit sign membership cards, the union is automatically certified as the bargaining agent (see Option 2).

Not only does the current mandatory vote system require employees to reaffirm support that has already been demonstrated during the first step of the certification process but more importantly, it fails to recognize that from the first show of support to when the ballots are casted, the situation can drastically change. During this time, employees are vulnerable to employer coercion, harassment, and unfair labour practices. As a result, the second vote may not be reflective of employees' true wishes.

It is important to mention that the current system is unlike any other “democratic” vote. In a political election, for example, voters' financial and economic well-being are not directly controlled by a party nor does one party have the power to break the rules and use illegitimate tactics that cannot be effectively remedied before the election is held. Given that the Supreme Court of Canada has stated “the function of collective bargaining is not served by a process which undermines employees' rights to choose what is in their interest and how they should pursue those interests”^{xl}, the LRA should replace the mandatory vote system with the card-based certification system. Furthermore, the LRA should allow for the acceptance of electronic union membership evidence in support of certification applications (see Option 4). This provides workers with the choice to sign union membership cards away from the workplace, thereby mitigating concerns over disclosing their union support and employers ascertaining the identity of union organizers and supporters.

18. INCREASE ACCESS TO EMPLOYEE LISTS

In the Interim Report, see Section 4.3.1.3: Access to Employee Lists

As discussed, the composition of the modern labour market makes it difficult for vulnerable workers to exercise their constitutional right to freely associate for the meaningful pursuit of collective workplace goals. The current legislation creates yet another barrier to this right: workers seeking to bargain collectively face an increasingly difficult task of identifying and communicating with the members of a potential bargaining unit because unions can only obtain a list of employees, which often has inadequate content, once the certification application is filed. Because unions cannot campaign nor do they have direct access to employees inside a workplace, they must work based on the information they can ascertain from workers. As a result, the threshold to accessing the right to organize is high. Unions must spend a substantial amount of energy and resources to locate supporters during an organizing campaign – only to discover that they were working off of inaccurate or incomplete data once the list is received. This very issue frequently causes the demise of organizing drives. Moreover, the content of this list is highly limited; conversely, employers know the number of employees, where they work, and their contact information. The lack of access to and content of employee lists therefore impedes workers' right to participate in collective bargaining.

When a union demonstrates that it is engaged in a bona fide organizing drive, the employer should be required to disclose employee lists with contact information (e.g., employees' full name, phone numbers, email addresses, job title, and job department) (see Option 2). Furthermore, to ensure that these lists remain

effective, employers should also be obligated to update the contact information on a periodic basis. It is important to recognize that no other “democratic” vote process operates without basic voter information. In political elections, for example, all parties have equal access to a voters list – including names, addresses, and phone numbers – well in advance of a vote to ensure that there is sufficient time to engage people in a meaningful dialogue. As such, employee lists should not only be viewed as an opportunity for unions to distribute information to workers but most importantly, it should be viewed as an opportunity for workers to make informed decisions – regardless of whether the outcome is to unionize.

19. PROVIDE AUTOMATIC ACCESS TO FIRST COLLECTIVE AGREEMENTS

In the Interim Report, see Section 4.3.2: First Contract Arbitration

In principle, all workers are guaranteed the right to associate for the purpose of collective bargaining. In reality, however, this right remains restricted as a result of the barriers to establishing a first collective agreement. The first collective agreement creates the foundation and the precedence of the employer-unionized employee relationship moving forward. Significant delays to obtaining a tangible outcome renders the efforts, associated with the right to organize and the right to participate in collective bargaining, almost meaningless.

Although settlement of a first contract can be achieved through a process of arbitration, workers may be locked out or on strike because the employer has fulfilled the minimal requirements of the law – despite not having complied with its intent (i.e., to bargain in good faith and fairly). Employers understand that the longer they can delay first contract negotiations, the greater their ability to weaken the resolve of employees who have chosen to unionize. Automatic access to binding first agreement arbitration must therefore be legislated in an effort to encourage employers to engage in a meaningful process of collective bargaining (see Options 2 and 3). Not only will this incentivize quickly facilitating disputed bargaining issues and reaching the first collective bargaining agreement, but it will also discourage bad-faith bargaining and promote constructive bargaining relationships.



REBALANCING THE POWER IN THE EMPLOYMENT RELATIONSHIP

20. PROTECT THE VOTING PROCESS

In the Interim Report, see Section 4.3.1.4 Off-site, Telephone, and Internet Voting

Please note that this discussion is only applicable in the event that card-based certification (see Section 17 on page 14 for full discussion) is not reinstated in Ontario.

As discussed, the current two-step certification model allows for employer interference – particularly when representation votes are held onsite. By requiring that a representation vote occur offsite, employees will feel more comfortable expressing their true wishes (see Option 2). Namely, employees are removed from the current (and vulnerable) situation, where their employers can survey and scrutinize them at the vote as well as deduce, or think they have deduced, those employees that will likely support certification – especially in small workplaces. Moreover, to minimize coercive forms of employer interference, alternate voting methods such as internet or telephone balloting should be allowed – at the discretion of the applicant union. Ultimately, if a vote is to take place, it should occur in a manner that maximizes employee participation and reflects their true wishes.

21. PROHIBIT REPLACEMENT WORKERS

In the Interim Report, see Section 4.4.1: Replacement Workers

The decision to strike is not made lightly nor is it made often^{xii}. It is, however, a constitutional right that all Canadians enjoy – in addition to the right to join a union and the right to engage in meaningful collective bargaining. The legal provision of replacement workers continues to not only contribute to the power imbalance between employers and employees but most importantly, it undermines and threatens the collective bargaining process (see Option 2). The Supreme Court of Canada has found that the right to exercise economic sanctions forms an integral part of the process.^{xiii} A union's primary economic sanction (i.e., the right to strike) is, however, effectively compromised by allowing employers to use replacement workers during a legal strike or lockout. The LRA should unequivocally – and without qualification – prohibit the use of replacement workers during strikes and lockouts.

22. REINSTATE STRIKING EMPLOYEES

In the Interim Report, see Section 4.4.2.1: Application to Return to Work After Six Months From the Beginning of a Legal Strike

The LRA outlines its intent to protect an employee's right to return to work following a legal strike. This right, however, is restricted to the first six months – after which employers can make the case that employees no longer have the right to reinstatement. Combined with the existing provision that allows employers to use

replacement workers during a legal strike or lockout, this time limit further amplifies the power imbalance inherent within the employer-employee relationship during the collective bargaining process. With the understanding that every labour dispute is different, workers exercising their constitutional right to strike should be able to do so without fear of job loss once a legal strike concludes (see Option 2). Furthermore, the existing provision may incentivize employers to prolong a strike past six months to deny employees the right to reinstatement. The legislation should therefore be amended to protect the right of employees to return to work – without restriction – following a lawful strike or lockout.

23. REMEDY UNFAIR LABOUR PRACTICES

In the Interim Report, see Section 4.3.1.5: Remedial Certification

Currently, the OLRB can certify a union without a vote when the employer's actions have contravened the LRA in such a manner that it becomes difficult to determine the true wishes of employees. This measure, however, can only be adopted if no other recourse is sufficient to counter the effects of the contravention and if the union has "adequate membership support". The Board can also consider the results of the previous representation vote. The Advisors note that the OLRB does not often exercise its discretion to award remedial certification^{xviii} – despite the relative occurrence of unfair labour practices.

The present legislation therefore strongly favours a second representation vote over remedial certification without a vote. Ordering a second vote, where the employer has engaged in serious intimidation and coercion, is rendered meaningless. To effectively deter employers from engaging in unlawful conduct (e.g., discouraging employers from taking steps early in a union's organizing campaign to dismiss union supporters), the legislation should be amended by removing the requirement that the OLRB must consider whether a second vote is likely to reflect the employees' true wishes and whether the union has adequate membership support (see Options 2 and 3). This recognizes that the outcome of both requirements have been compromised by the employer and no longer truly represents the will of employees. It should also be noted that changes to remedial certification are only meaningful for workers if they are coupled with legislation that allows for automatic access to binding first agreement arbitration – at the union's request. Ultimately, employees should not be subject to the consequences of the employers' actions (i.e., contravening the LRA).

24. BROADEN INTERIM RELIEF POWERS

In the Interim Report, see Section 4.5.1: Interim Orders and Expedited Hearings

Currently, the OLRB can issue interim orders requiring an employer to reinstate a terminated employee in the workplace on such terms as it considers appropriate as well as amending an employee's terms and conditions of employment in cases where they have been subject to reprisal, penalty, or discipline by the employer. To do this, the OLRB must be satisfied that the applicant has established:

- the circumstances, giving rise to the pending proceeding, occurred at a time when a campaign to establish bargaining rights was under way;

- there is a serious issue to be decided in the pending proceeding;
- the interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives; and
- the balance of harm favours granting interim relief, pending a decision on the merits of the proceeding.^{xiv}

Granting interim relief should instead be decided on a less stringent legal test (see Option 2(d)). The statutory requirements that applicants must meet to receive interim relief should be eliminated, particularly where the onus is on the applicant to prove the necessity of relief to prevent irreparable harm or to achieve other labour relations objectives (see Option 2(c)). The OLRB should be left to develop its own jurisprudence regarding when it will issue interim orders. The Board should also be required to expedite hearings for interim relief by establishing statutory time limits so that hearings proceed without unnecessary delays (see Option 2(e)). This is particularly important in cases where a worker has been disciplined or terminated in the context of a union organizing drive. Furthermore, the purview of the OLRB should be expanded to include the power to consider a variety of applications seeking interim relief (e.g., related to hiring, union recognition, operation of a subcontracting clause, scheduling changes) and to grant such relief on such terms as the Board considers appropriate (see Options 2(a) and (b)).

25. DISCOURAGE UNFAIR LABOUR PRACTICES

In the Interim Report, see Section 4.5.3: Prosecutions and Penalties

Serious, unfair labour practices occur far too regularly. For some businesses, the costs associated with violating the LRA are viewed as the cost of doing business. The reality, however, is that unfair labour practices produce a very real cost to workers. They signal to the affected worker(s) and the public that such contraventions are acceptable and the protections afforded under the LRA can be violated at a price. As a result, the penalties under the LRA should be increased in a manner that deters businesses from willfully contravening the Act (see Option 2). Furthermore, it should be recognized that the amount of revenue generated is not just a reflection of the economic cost of contravening the LRA. It also captures the costs to society at large, the OLRB, and most importantly, workers and workplaces. Administrative monetary penalties are not meant to be punitive; instead, they are designed to address the aforementioned costs. The money should therefore be reinvested into the workplace – and not form part of the Consolidated Revenue Fund.

It is also important to mention that the OFL is not supportive of the establishment of a Director of Labour Enforcement, whose role is to “determine whether there is a public policy interest in achieving an outcome that better reflects the seriousness of the violation(s) alleged”^{xiv} (see Option 6). In collective bargaining, both parties must not only understand the sector, the industry, the company, and the workplace as well as the interests of all those employees, but they must also fully appreciate the short- and long-term implications of any decisions considered. Given the proposed mandate of the Director, they may seek to make a public example of a particular situation and unknowingly adversely impact employers and employees alike. Decisions regarding settlements for claims of unfair labour practices should therefore remain with the OLRB and the two parties.

PROTECTING VULNERABLE WORKERS

26. INTRODUCE PAID DOMESTIC/SEXUAL VIOLENCE LEAVE

In the Interim Report, see Section 5.3.6: Other Leaves of Absence

Individuals should not be penalized at work for being victimized at home.^{xlvi} Given that domestic violence is a gendered crime^{xlvii}, and given that women are overrepresented in precarious jobs^{xlviii}, legislating a job-protected paid leave for victims of domestic or sexual abuse will help a sizeable number of vulnerable workers across the province (see Option 3(a)). In fact, this type of provision has become a collective bargaining priority for a number of unions across Ontario. As victims seek safety away from their abusers, a separate leave provision provides time to address a number of issues that require immediate attention, such as locating shelter, seeking counselling, and attending court proceedings. Furthermore, given that the average woman makes up to five attempts to leave her abuser before permanently ending the relationship^{xlix}, a paid job-protected leave may help some women leave sooner because they know they can set aside time to deal with salient matters – without fear of loss income or termination. Like Manitoba⁶, Ontario's employment law should introduce ten days of job-protected Paid Domestic/Sexual Violence Leave – followed by a period of job-protected unpaid leave.

27. EXTEND SUCCESSOR RIGHTS

In the Interim Report, see Section 4.3.3: Successor Rights

Currently, the LRA fails to protect workers in situations where a lead company contracts out its work to a subcontractor or more typically, where one subcontractor service provider is replaced with another when contracts are retendered. Namely, when a service contract expires, employees may lose their union and therefore their bargained rights, their seniority status, and even their jobs if the service contract provider is not successful in its bid for another contract. It is important to note that even if the successor subcontractor hires many of the same employees to perform the same work in the same location, those employees have lost all of the rights they attained under their collective agreement. This, for example, is often the case in precarious sectors, including building services (e.g., security, cleaning, and food services) and homecare (e.g., housekeeping and personal support services). In an effort to strengthen the status of collective bargaining and employees' protections under the LRA, successor rights should be extended to all contract-service industries with the requirement that terms, including pay, employment status, benefits, and working conditions are equivalent or better than the provisions outlined in the previous collective agreement (see Options 2 and 3).

⁶ In 2016, the Government of Manitoba amended the province's Employment Standards Code to allow victims of domestic violence to have leave from work — both paid and unpaid — with guaranteed job security during the time off.

28. PROTECT WORKERS IN FISSURED EMPLOYMENT RELATIONSHIPS

In the Interim Report, see Section 4.2.2: Related and Joint Employers

As discussed, one of the most important issues that arise from the fissuring of employment relationships is determining who should be held accountable to employees. Currently, for the purposes of the LRA, the OLRB has the power to treat related or associated businesses as a single employer when they conduct complementary activities that are under common control or direction. The Board should still be able to render a related employer declaration even if that power is not actually exercised (see Option 3). To determine whether this declaration should be made, the Board should consider whether the entity can exercise direct or indirect influence or control over the operations – including the ability to fund the work as well as establish, monitor, and enforce standards that impact employment conditions for workers. It is important to note that with the advent of technology, lead companies can now access their network of workplaces through offsite monitoring – in a manner that was not available years ago. Ultimately, it is a question for the Board whether employees are seeing an erosion of their labour rights and whether a declaration is required to ensure effective collective bargaining. The purpose of this provision is to prevent mischief; it protects the bargaining rights that have been established by unions from being deliberately or inadvertently eroded by the commercial operations of related employers.¹

Similarly, the LRA should be amended to allow the OLRB to declare multiple entities as “joint employers”, where there are associated or related activities between two businesses and where a declaration is required to ensure effective collective bargaining (see Option 2). Further, a requirement that there be common control and direction between the businesses should not be imposed. The adoption of a general joint employer provision should encompass client company-THA and franchisor-franchisee relationships. The OFL, however, supports also explicitly declaring that both the client business and the THA as well as the franchisor and franchisee are joint employers – regardless of industry or sector (see Option 4). Collective bargaining is ineffective unless the real economic players in the enterprise are required to bargain with the employees. Furthermore, a rebuttable presumption that states that an entity that directly benefits from an employee’s labour is the employer of that employee for the purposes of the LRA (as well as the ESA) should also be created – given its particular importance in the cases of THAs and client companies.

Refer to Section 14 on page 11 for a discussion on a certification model for franchisors and franchisees.

29. PROTECT TEMP AGENCY WORKERS

In the Interim Report, see Section 5.3.9: Temporary Help Agencies

The relationship between assignment workers, client companies, and THAs is fraught with complexities. Although “rights technically may be the same, the economic and structural realities of the triangular relationship often mean that practically, rights are ephemeral and cannot be accessed”ⁱⁱ. It is imperative that the law reflects the reality of the workplace. Specifically, for workers hired through THAs, their day-to-day is

determined by the clients (e.g., supervision, work direction and scope) (see Option 2). The client company should therefore be the employer of record for *all* employment standards; alternatively, they can be deemed a joint employer with the THA.

Assignment workers, who perform substantially similar work to employees directly employed by the client company, should receive equal treatment – with no exemptions (see Option 3(a)). This principle extends beyond equal pay to also include equivalent benefits and equal working conditions. The latter is quite important given that temporary agency workers often face greater exposure to physical risks, higher intensity of work, and other work conditions (e.g., hours of work). To ensure that the principle of equal treatment is followed, a clear purpose clause should also be included in any statutory change. For a discussion on benefits, please see Section 2 on page 2.

Presently, there is a difference between the amount a client company pays for an assignment worker and the wage that individual receives. By mandating that all workers (i.e., direct and indirect hires) receive equal treatment for equal work, this negates the need for a mark-up fee (see Option 4). In the interim, THAs should disclose this fee to assignment workers.

To encourage more full-time permanent work, clients should face fewer barriers to directly hiring assignment workers, and temporary assignments should truly be temporary. The fee currently in place when client companies opt to hire assignment workers should be eliminated (see Option 5 (b)). Further, a limit on the proportion of the client's workforce that can be agency workers should also be established to minimize the prevalence of “perma-temps”⁷ (see Option 6). Moreover, after six months of employment at the client company, assignment workers should be deemed permanent employees of the client – with just cause protection extending to affected workers during this period to minimize the “threshold effect”⁸ (see Option 7(b)). Specifically, employers should be required to provide just cause in the event that an assignment period has concluded and another assignment worker is hired to perform the same work done by the previous assignment worker. Assignment workers should also be notified of all permanent jobs in the client's operation and be advised of how to apply – with employers giving due consideration to these applicants (see Option 7(c)).

Termination and severance pay provisions should extend to individual assignments (see Option 8(b)). Specifically, clients should compensate assignment workers for termination and/or severance pay (as owed) based on the length of assignment with the client. To minimize the clients' incentive to hire employees indirectly through THAs (i.e., where they can avoid liability for termination and severance of assignment employees), assignment workers should also continue to be eligible for separate termination and severance if their relationship with the agency is terminated.

⁷ In an attempt to shift employer responsibility and liability to THAs, some client companies keep assignment workers for years without changing their employment status.

⁸ In an attempt to avoid the costs and liabilities associated with a permanent employee, some client companies may hire another assignment worker for the same position.

SUMMARY OF RECOMMENDATIONS

Raising the Bar for Everyone

- **[ESA] Gender Equity:** Make it easier and more accessible for women to join or form a union as well as collectively bargain for wages, benefits, and job security.
Option(s): n/a
- **[ESA] Part-Time and Temporary Work:** Legislate parity in wages, benefits, and working conditions – regardless of employment status.
Section 5.3.7 Option(s): 2, 3*, 5**
- **[ESA] Minimum Wage:** Legislate a \$15 per hour minimum wage for everyone, with that amount adjusted for inflation annually.
Option(s): n/a
- **[ESA] Scheduling:** Legislate a minimum of three-hour shifts, job-protected request changes, and advance scheduling practices.
Section 5.3.2 Option(s): 2(c), 3, 4**
- **[ESA] Sick Days:** Legislate paid sick days at a rate of one hour for every 35 hours worked – without a limit on the number of entitled days, qualifying period, or medical note requirement.
*Section 5.3.5 Option(s): 2(a)ii**
- **[ESA] Hours of Work:** Legislate a maximum 8-hour workday and a 40-hour workweek – with no overtime averaging provisions.
Section 5.3.1 Option(s): 3
- **[ESA] Paid Vacation:** Legislate a minimum of three weeks of paid vacation for all Ontario workers.
Section 5.3.3.2 Option(s): 3
- **[ESA] Public Holidays:** Repeal exemptions and special rules as well as improve proactive inspections for public holidays.
Section 5.3.3.1 Option(s): n/a
- **[LRA] Just Cause Protection:** Legislate unjust dismissal protection for bargaining unit employees after certification but before the effective date of the first contract.
Section 4.5.2 Option(s): 3
- **[ESA] Just Cause Protection:** Legislate unjust dismissal protection for all employees and implement just cause protection for TFWs together with an expedited adjudication to hear unjust dismissal cases.
Section 5.3.8.3 Option(s): 2, 3

Expanding Access for Everyone

- **[LRA] Exemptions:** Eliminate current exclusions.
*Section 4.2.1 Option(s): 2**
- **[ESA] Exemptions:** Eliminate almost all Tier 1 exclusions, review all Tier 2 exclusions, and create a governing framework to review all other exemptions.
Section 5.2.3: Option(s): n/a
- **[ESA] Definition of an Employee:** Expand the definition of employee to include all dependent contractors and create a rebuttable presumption of employee status.
Section 5.2.1 Option(s): 3, 4, 6**
- **[ESA] Definition of an Employer:** Insert contractual clauses requiring ESA compliance; create a joint employer test; make franchisors in all industries liable for employment standards violations of their franchisees; and require Ministry of Labour to place a lien on goods produced in contravention of the ESA.
Section 5.2.2 Option(s): 2, 3, 4, 5, 6, 7, 8
- **[LRA] Broader-based Bargaining Structures:** Consider location-by-location approach to certification and a broad, multi-location approach to bargaining; consider single-employer, location-by-location certification, and multi-employer/multi-location sectoral bargaining; and extend both statutory and non-statutory social insurance benefits and protections to individuals who are currently left uncovered or unprotected.
Section 4.6.1 Option(s): 3, 4*, 7*, 8*, 9**
- **[LRA] Consolidation of Bargaining Units:** Consolidate existing bargaining units with newly certified units at either the same location or in multi-location situations – if all affected units are represented by the same trade union.
Section 4.3.4 Option(s): 2, 3
- **[LRA] Employee Voice:** Strengthen authentic employee voice by enacting recommended measures to expand access to collective bargaining for all workers.
Section 4.6.2 Option(s): 5
- **[LRA] Card-Based Certification:** Repeal existing mandatory voting system and replace it with card-based certification; allow for some form of electronic membership evidence.
Sections 4.3.1.1 Option(s): 2, 4*
- **[LRA] Employee Lists:** Provide access to employee lists when unions demonstrate they are engaged in a bona fide organizing drive and ensure that the list provides up-to-date contact information.
*Section 4.3.1.3 Option(s): 2**
- **[LRA] First Agreements:** Legislate automatic access to binding first agreement arbitration.
Section 4.3.2 Option(s): 2, 3, 5

Rebalancing the Power in the Employment Relationship

- **[LRA] Off-site, Telephone, and Internet Voting:** Legislate that voting should occur in neutral locations, where possible, and allow for the legal right to use telephone and/or online voting.
Section 4.3.1.4 Option(s): 2
- **[LRA] Replacement Workers:** Prohibit the use of replacement workers.
Section 4.4.1 Option(s): 2
- **[LRA] Reinstatement during Strike:** Remove the six-month time limit for workers' applying to return to work during a legal strike.
Section 4.4.2.1 Option(s): 2
- **[LRA] Remedial Certification:** Remove the requirements of the OLRB to consider whether a second vote is likely to reflect the employees' true wishes and whether the union has adequate membership support.
Section 4.3.1.5 Option(s): 2, 3
- **[LRA] Interim Orders and Expedited Hearings:** Broaden the OLRB's plenary power to issue injunctive relief on procedural and substantive grounds wherever it is just to do so.
Section 4.5.1 Option(s): 2
- **[LRA] Penalties and Prosecution:** Increase penalties in a manner that deters businesses from willfully contravening the LRA.
Section 4.5.3 Section 4.5.1: Option(s): 2

Protecting the Vulnerable

- **[ESA] Paid Domestic/Sexual Violence Leave:** Legislate ten days of job-protected Paid Domestic/Sexual Violence Leave, followed by a period of job-protected unpaid leave.
Section 5.3.6 Option(s): 3(a)
- **[LRA] Successor Rights:** Extend successor rights to all contract-service industries with the requirement that employment-related terms are equivalent or better than before.
Section 4.3.3 Option(s): 2, 3*
- **[LRA] Related and Joint Employers:** Allow the OLRB to declare multiple entities as "joint employers", to make a related employer declaration, to enact specific joint employer provisions for THAs and client companies as well as franchisers and franchisees.
Section 4.2.2 Option(s): 2, 3, 4
- **[ESA] Temporary Help Agencies:** Establish the client company as the employer of record for all employment standards; legislate parity in wages, benefits, and working conditions – regardless of employment status; and convert THA workers to permanent employees of the client after six months.
Section 5.3.9 Option(s): 2, 3(a)i, 4*, 5(b), 6, 7(b), 7(c), 8(b)*

*Note: * denotes a partial endorsement of the option presented in the Interim Report. Please see the discussion paper for details.*

APPENDIX

Implementation Strategy

As demonstrated, there has been a dramatic restructuring of Ontario's labour market over the last few decades, and new challenges continue to emerge. The OFL firmly believes that it is the collective responsibility of the partners and actors in the labour market – including government, educators, business, and labour – to help address the issues identified in the Changing Workplaces Review. To produce tangible outcomes, these labour market partners should come together on a regular basis to discuss, debate, research, and advise on such public policies and initiatives. As discussed in the OFL's submission on the *Premier's Highly Skilled Workforce Expert Panel*, we propose that the province establish a permanent Labour Market Partners Forum to speak to a broad range of labour market development issues and opportunities, including the challenges highlighted in the Interim Report.

Specifically, the Labour Market Partners Forum should consist of three bodies:

The Premiers' Advisory Council

The Premiers' Advisory Council should meet twice annually to establish goals, strategic plans, and priorities. These plans should be reviewed annually to evaluate their effectiveness. The Council should include political leadership from government and labour as well as thought leaders from academia and business.

Ministers: Finance, Economic Development and Growth, Labour, Education, and Advanced Education and Skills Development

Labour Presidents: from the Ontario Federation of Labour, including both private and public sector unions, and building trades unions

Academic Community: Interdisciplinary specialists and subject matter experts

Business: Industry leaders from key sectors such as auto, steel, aerospace, healthcare, hospitality etc.

Labour Market Partners Committee

The Labour Market Partners Committee should meet monthly to develop and inform goals and strategic plans, initiate research, collect labour market data, develop forecasting models, identify barriers, develop recommendations as well as build and foster partnerships and collaborative efforts. The Committee may initiate work groups to deliver on the priorities identified by the Premier's Advisory Council. Further, the Committee should include representatives at the staff level of government, business, and labour.

Government Representatives: four from key Ministries

Labour Representatives: four appointed through the OFL's equity, education, apprenticeship, and young workers' committees

Academic Representatives: four from various disciplines

Business Representatives: four from employers in key sectors

Partners' Secretariat

A small provincial secretariat can support the work of the forum.

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