

Ryerson University Equity, Diversity and Inclusion Submission

Follow up to the Special Advisors' Interim Report

October 31, 2016

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Introduction

Thank you for the opportunity to provide further input into changes to the Ontario *Employment Standards Act* (ESA), as a follow up to the Special Advisor's Interim Report (Interim Report).

To discuss our recommendations further, please contact Tamar Myers, Director, Strategic Planning, Assessment and Special Project, Office of Equity, Diversity and Inclusion, at 416-979-5000 ext. 7974 or tmyers@ryerson.ca.

This submission addresses the objective of the Changing Workplaces Review (the Review), “to improve security and opportunity for those made vulnerable by the structural economic pressures and changes being experienced by Ontarians.” Ryerson University’s Equity, Diversity and Inclusion division supports the Review’s objective, but suggests that this should not be the sole purpose for changes to the ESA.

Past issues that haven’t been addressed or addressed effectively in the ESA also need to be dealt with and the Interim Report does consider changes to address misuse of provisions or consistent violation of existing provisions. As part of that consideration, it should be recognized that workers from historically underrepresented and marginalized groups have faced barriers and biases in the workplace and have seen their disadvantages magnified by the growth of precarious work. Yet, the ESA has not included any provisions to promote equitable access to jobs or equitable treatment in the workplace for people from equity seeking groups.

In addition, the Review should consider establishing an ESA framework that not only addresses the current issues in the workplace, but promotes values and standards for workers that will apply regardless of present or future economic conditions. As Harry Arthurs indicated as a Commissioner reviewing federal labour standards, “Labour Rights are Human Rights.” To reflect this, we reiterate our **recommendation to incorporate values and principles, including equity, diversity and inclusion, and treating workers with dignity and respect, in the ESA.** The legislation should signal to businesses that employees are not a liability, but their most valuable asset, and reinforce the social responsibilities of employers.

Precarious Work

Ryerson University’s Equity, Diversity and Inclusion division supports changes to the ESA that will address precarious work. Precarious work has many negative consequences for society, as indicated in the research we included in our initial submission and the research sent from our Centre for Labour Management Relations.

As stated in our original submission, work is more likely to be precarious when there is a combination of the following factors:

- pay is low;
- employment is temporary, casual and/or part time;
- workplace is non-unionized;
- work is with smaller employers (e.g. 50 or less employees); and/or
- the employer or employee is exempted from ESA provisions.

Workers in precarious jobs are often from equity seeking groups such as, women, racialized people, new Canadians, Aboriginal peoples, persons with disabilities and LGBTQ people.

Changes to the ESA that address the adverse conditions of precarious work are critical to advancing equity, diversity and inclusion in the workplace. Therefore, Ryerson's Equity, Diversity and Inclusion division's recommendations in this submission will focus on employment equity and the provisions in the current legislation related to:

- the definition of employer and employee;
- compensation;
- hours of work; and
- work schedules and stability.

The recently published study by Ryerson researchers, "Working so hard and still so poor!" (Ng, Sundar, Poole, Karpoche, Abdillahi, Arat-Koc, Benjamin & Galabuzi, 2016), adds to the growing evidence of the adverse impact of precarious work on health, by exploring the impact on the health of racialized immigrant women, who the study suggests, "...make up a growing proportion of those in precarious employment."

The Ng et al study sounds the alarm of an imminent health crisis if precarious work is not addressed right away. The study found that not only was the health of workers negatively affected by precarious work, but that there were, "cascading effects on their families, their children and their communities."

Employment Equity and Vulnerable Workers

The literature provides substantial evidence of the barriers experienced by people in equity seeking groups, such as women, racialized people, Aboriginal people and persons with disabilities, which make them vulnerable in the workplace and make it more difficult to break the intergenerational cycle of precarious employment and poverty. Unfortunately, this literature also shows that not much progress in employment has been made over the last few decades. There are also many studies, such as the Ng et al study, that provide important findings about the impact of multiple intersecting social locations on the vulnerability of workers.

The Interim Report provides a list of populations that are overrepresented among vulnerable workers, however, that list is not complete, does not address intersectionality, and does not reflect all of the available evidence about social location, vulnerable workers and precarious work. We would be more than happy to discuss this further, in support of the recommendations we are making concerning Employment Equity.

Legislation

As recommended in our initial submission, we suggest that equity, diversity and inclusion access to jobs should be incorporated into the values and principles underlying ESA legislation. For many people from disadvantaged groups, such as Aboriginal peoples, persons with disabilities and new Canadians, access to good jobs is as critical an issue to a decent standard of living as protections once employed. In addition, **the ESA should include a reference to the**

Ontario *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act (AODA)* Employment Standard as a foundation for inclusion of workers in the workforce and workplace.

One of the key recommendations from the Ng et al study was that, “systemic discrimination, racism and intergenerational cycles of precarity and poverty,” need to be addressed by implementing an, “Employment Equity legislative framework.”

Similarly, in our earlier submission, Ryerson’s Equity, Diversity and Inclusion division recommended that **provisions be included in the ESA requiring businesses to prepare and implement plans to increase the diversity of workers in all occupations in their workforce and identify and remove systemic barriers, so that their workforce reflects the diversity of the community(ies) in which their workplace(s) is (are) located.** The legislative provisions do not need to be overly prescriptive and this is not a recommendation for quotas.

The provisions should allow flexibility for employers (e.g. small family owned business) to tailor their plans to specific circumstances. However, employers should be required to regularly report on their progress and explain any lack of advancement. Further direction can be provided through education, standards and guidelines and, if necessary, regulations.

Education

In addition to reiterating the recommendation for Employment Equity legislative provisions in the ESA, we also repeat our recommendation that the ESA require employers to provide educational programs for their employees to promote respect for differences and to create positive working environments where people with different experiences and knowledges can work together effectively. Businesses should be able to customize educational programs based on the nature of the work.

More specifically, in line with the Truth and Reconciliation Commission of Canada: Calls to Action (number 92.iii), we ask that **the ESA include a requirement for businesses to provide skills based training to their management and staff in, “intercultural competency, conflict resolution, human rights and anti-racism,” and more specifically in, “the history of Aboriginal Peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples...”**

If Ontario is to realize the potential benefits of the diversity of the workforce, businesses must create inclusive workplaces.

The Definition of Employer and Employee

Who is the Employer?

The Interim Report discusses the changes impacting businesses and workers from the “fissured” workplace. This business strategy, the Interim Report notes, allows the “lead” company to avoid responsibility for the employees of companies they outsource to or who work in franchises, while maintaining considerable control over products and services. This new reality lends support to changes to the ESA that **remove exemptions to ESA standards for small employers.**

In addition, agencies and recruiters, who act as intermediaries, can also be considered to be employing workers for “lead” employers and there should be joint responsibility for adhering to the ESA. The Ng et al study details some of the issues with “agencies” or “agents or recruiters.” The following quote from a worker in a potato-packing factory highlights the problems,

I get paid through the middleman every week. The pay is put in the envelope and sometimes there are certain amount missing but there is nothing I can say to him because he might say: “you don’t need to come from tomorrow” since I am under him, I simply have to accept it.

“Lead” employers can influence workplace practices and culture of the companies that provide workers, goods and services to them even if they have little or no direct control. Similarly governments can also influence the workplace practices of the organizations they fund to provide services. One example of this influence, which is often the subject of media attention, is seen in how expectations, such as low cost of production, can negatively impact workers in other countries (e.g. those who work in unsafe conditions in garment factories in other countries). Other examples, such as those that shed light on the negative experiences of Personal Support Workers who work for agencies funded by the Ontario government, can be found in the Ng et al study.

Therefore, we recommend that, in line with other jurisdictions in Canada, related employer provisions in the ESA remove the “intent and effect” criteria, and, at a minimum, make businesses jointly responsible for the employment practices of agencies, contractors, subcontractors and franchisees, by mandating contractual clauses requiring compliance with the ESA. Governments should also be required to share responsibility for treatment of workers in for-profit and not-for-profit organizations they fund, through similar contractual provisions.

Making businesses and governments share responsibility for workers in the above noted circumstances should also increase compliance with ESA standards and distribute responsibility for enforcement beyond the Ministry of Labour.

Who is an Employee?

The changes in the relationship between businesses and those who do work for them over the last decade have added to the issue of misclassification of employees.

Enforcement has been ineffective in addressing this issue, as the number of misclassified employees is growing with the changes in the workplace. Case law also takes time to evolve and reflect changes in society.

Fundamentally, if an individual or sole proprietorship is dependent on a business for income, minimum standards of the ESA, such as minimum wage, hours of work and notice provisions should apply. Therefore we recommend that the **ESA establish a new definition of worker that is as expansive as possible, to include individuals and sole proprietors who are in an economically dependent position.** This eliminates any perceived benefit for having workers classified as something other than employees.

Enforcement can also be enhanced through **putting the burden of proof on the employer in cases where there is a dispute about whether a person is an employee.**

Compensation

The term “compensation” is used here to recognize and refer to a number of components of worker compensation, including pay and benefits and paid leaves.

Minimum Wage

There is a significant amount of evidence pointing to growing income inequality in Canada, and around the world. Information from the Conference Board of Canada indicates that in the 33 years from 1976 to 2009, median income rose by just 5.5%. According to a 2010 study by the Canadian Centre for Policy Alternatives, between 1998 and 2007, the richest 1% accounted for 1/3 of the growth in income in that decade. Between the 1950s and 60s, another period of high economic growth, the 1% only accounted for 8% of income growth. This growth in income for the rich is attributed mostly to the increase in what this group is paid for the work they do.

Improving the security and opportunity for those made vulnerable by the changing economy requires addressing inequities in compensation that have grown with those changes. The ESA can help address these inequities directly by **increasing the minimum wage to \$15.00 per hour and creating a mechanism that automatically ties percentage increases to the minimum wage with percentage increases for the highest wage earners.** We also **recommend that cost of living in different regions of the province be considered, so that minimum wage rates in those regions provide a “living wage.”** The Ng et al study notes, for example, that the Canadian Centre for Policy Alternatives estimated that a living wage in Toronto was \$18.52/hr in 2015.

In addition to increasing the minimum wage and establishing a process for ongoing increases tied to the income of top earners, **we recommend that exemptions to the minimum wage be removed.** The Interim Report notes that many of these exemptions have been removed from most other jurisdictions in Canada and submissions to the Special Advisors imply that these exemptions are often based on assumptions, without any real evidence to support them. In addition, for some occupations, **where compensation is not based on an hourly rate, minimum compensation rates should be established.** For example, the British Columbia's ESA regulations provide specific minimum wage provisions for farm workers who are employed on a piece work basis. **A review process could be established,** as recommended in the Interim Report, **to determine appropriate minimum compensation for occupations that are not hourly paid.**

Overtime Pay

As noted above and in our initial submission, exemptions are often based on assumptions about certain kinds of work or workers. The Interim Report notes that exemptions have also lead to exploitation of employees through misuse of those exemptions.

Overtime pay provisions in the ESA can act as a deterrent to prevent employers from creating unreasonable workload demands that result in long hours. This is important to provide more predictable work schedules and support work/life balance. It can also lead to creation of additional jobs, e.g. hiring another employee can be less costly than paying existing employees more for overtime work that is performed on a regular basis.

As noted in our initial submission, exemptions may also create unintended barriers for some groups. For example, exemptions in the Ontario ESA to maximum hours of work, e.g. for manager, supervisors and many professionals, helps to perpetuate work environments where excessive hours can be seen as the norm. This, in turn, may inhibit some women and people from other equity seeking groups from pursuing careers in those professions. For the above reasons, **we recommend removing all exemptions to overtime pay.** Rather than a review process, we support a phased approach to the removal of exemptions to give industries the time they need to make necessary changes.

Minimum Hours of Work and Benefits for Part time, Contract and Casual Workers

Hours of work are a key component of compensation for those who are paid on an hourly basis. The Ng et al study recommends a number of changes to the ESA to help ensure workers get sufficient hours to provide a "decent standard of living." In line with our initial recommendations, **we support the recommendation to increase the minimum reporting pay requirements to 4 hours of pay, or the length of the cancelled shift, whichever is greater, and to provide minimum hours of work for shifts. We also support the recommendation to offer additional hours of work to part time workers before hiring new employees to do the same or similar work.**

Ryerson University's Equity, Diversity and Inclusion division supports the Ng et al study recommendation to provide **“parity” regardless of job status**, which was also included in our earlier recommendations. Regardless of whether workers are part-time, casual, etc. they should have the same wage rates and benefits (including paid and unpaid leaves) as other workers doing similar work.

We noted in our earlier submission that the Saskatchewan Employment Act, provides equal pay provisions for part time work that is the same as full time work and establishes minimum hours of work.

Paid Leaves

Workers should not lose pay to celebrate their important religious, spiritual and cultural events that are different from Christian or Western observances. Therefore, we reiterate EDI's recommendation from our initial submission **to establish two paid flexible “holidays” for workers, to match the Christian paid holidays provided for in the ESA**. This is consistent with Ontario Human Rights Commission policy and Ontario Human Rights Code case law.

As discussed in our initial submission, there is a growing amount of research that points to evidence of the benefits of vacations to employee productivity, health and wellbeing. Therefore, we repeat **our recommendation to extend vacation pay and time off to 3 weeks per year**, such as is provided in Saskatchewan's ESA (after 10 years the entitlement increases to 4 weeks), **or 3 weeks per year after 5 years working with the same employer**, which is what British Columbia, Alberta and Manitoba's ESAs provide.

Hours of Work

One of the most significant barriers for women in occupations in which they are historically underrepresented is the excessive work hours that many of these occupations, such as university professor, require. As Ryerson's EDI division indicated in the document, [“Creating an Inclusive Space for Faculty in the Academy,”](#) job expectations for university faculty were developed during a time when faculty members were more homogeneous. Up until the latter part of the 20th century, there were few women faculty and many women did not work after marriage. Given that reality, there were fewer tensions between personal and professional responsibilities. Demanding faculty workload responsibilities related to teaching, research and service could be met within that context.

Exemptions to the maximum hours of work for many professional occupations, such as IT professionals, help to perpetuate work environments that are not inclusive of workers who want a balance between their work and personal lives. In addition, many of exemptions don't make sense. For example healthcare professionals such as Nurses and Midwives are not exempt from hours of work limits, but Physiotherapists and Pharmacists are exempt. There is a growing body of evidence about the negative impact of excessive hours of work on the quality of care

provided by healthcare professionals. There is also growing evidence that fewer hours of work per day or week do not necessarily result in less productivity.

The changes to the **ESA should include removing exemptions to hours of work limits per day and per week**. In addition to making workplaces more inclusive, this change could also create more jobs, even if to a limited extent, as employers will need to hire sufficient staff to provide critical services instead of relying on exemptions to hours of work limits to avoid dealing with excessive workloads.

In terms of lowering or eliminating limits on hours per day or week, or other suggestions to make the ESA provisions more “flexible” for employers, particularly those in manufacturing, it is worthwhile to consider what this means in terms of the kind of workplace the ESA seeks to promote. A 2012 New York Times article discussed why fewer Americans were being employed by Apple to manufacture its products. The following story illustrates the differences between an American workplace and a Chinese workplace.

One former executive described how the company (Apple) relied upon a Chinese factory to revamp iPhone manufacturing just weeks before the device was due on shelves. Apple had redesigned the iPhone’s screen at the last minute, forcing an assembly line overhaul. New screens began arriving at the plant near midnight. A foreman immediately roused 8,000 workers inside the company’s dormitories, according to the executive. Each employee was given a biscuit and a cup of tea, guided to a workstation and within half an hour started a 12-hour shift fitting glass screens into beveled frames. Within 96 hours, the plant was producing over 10,000 iPhones a day.

Is the above example of a workplace that can meet “just in time” business requirements something we want the ESA to permit? Were there other alternatives that would have permitted quick production? It isn’t clear why a 12-hour shift was required. If there were different shifts covering a 24 hour period, could they have been shorter? Would shorter shifts have led to higher productivity? Were there quality control issues? Was cost a consideration that led to using the manufacturer in China? These stories can be accepted as evidence of changes needed here in Canada, or can be questioned by considering what the lack of protection for workers in workplaces in other countries really means.

From a health, mental health, and family and community relations perspectives, it is important for the ESA to **keep the limits on hours of work per day and week**.

Flexible Work Arrangements

While the power imbalance between employers and employees potentially can prevent employees from refusing to work excess hours, the ability to agree to alternate schedules can be an important way for employers to accommodate individual employee commitments and circumstances, such as through compressed work week schedules.

Therefore, we recommend **keeping the provisions that allow employees and employers to agree to work hours above daily or weekly limits**. However, as recommended in our initial submission, we **suggest that wording be added to indicate that these agreements are only permitted on an individual basis when the employee initiates the request, i.e. cannot be requested by the employer**. Wording could also be **added to permit requests by the employer when they involve a group of workers, but that requests would be subject to approval through anonymous voting by affected employees**, as described in one of the options in the Interim Report.

Work Schedules and Stability

Work schedules have not been addressed in the ESA until now. However, the scheduling of work and stability of work schedules has been shown to be an important issue for workers and society, and for women. As the Ng et al study indicates there are health, mental health, family and social consequences to precarious work, and work schedules play a large role in creating precarity.

Unpredictable schedules can impact the ability to work and how much an individual can earn because people may need childcare or care for a dependent family member to be available to work, have other jobs, be going to school part time, have a chronic health condition and/or may need time to arrange accessible transportation (e.g. Wheel-Trans).

Therefore, we support the Interim Report options for changes to the ESA listed below, with some additions and changes to reflect recommendations from the Ng et al study and to expand on general recommendations from our initial submission.

- **Require employers to post work schedules a least two weeks in advance;**
- **Require employers to ask for and consider individual accommodation requests when determining work schedules, such as in start and end times required because of unpredictable public transportation or because of daycare hours or requests to not work specific days of the week or dates because of religious or spiritual observances. There should be a reference to the OHC requirement to provide accommodation based on protected grounds unless it creates an undue hardship (with some education for employers and unions as to what this means) and a stipulation that if the basis of the request is not related to OHC protected grounds, approval of accommodation requests will not unreasonably be withheld.**
- **Require employers to pay employees a premium for last-minute changes to schedules;**
- **Require employers to get consent from workers to add hours or shifts after the initial schedule is posted;**
- **Require employers to provide new employees with a good faith written estimate of the employee's expected minimum number of scheduled shifts per month and the expected start/end times, breaks, days and hours of those shifts;**

- **Require pay for on-call shifts if an employee is required to be “on-call,” but is not called in to work (i.e. two to four hours of pay at the employee’s regular hourly rate);**
- **Provide employees with the job-protected right to request changes to their schedule at least twice per year. The employer would be required to consider such requests and would not be able to unreasonably refuse such requests. This is separate from recommendations in our initial submission to allow flexibility in work hours to accommodate individual employee needs.**
- Provide sectoral regulation of scheduling as described in the Interim Report.

Summary of Recommendations

1. Incorporate values and principles, including equity, diversity and inclusion, and treating workers with dignity and respect, in the ESA.
2. Include in the ESA a reference to the Ontario *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act (AODA) Employment Standard* as a foundation for inclusion of workers in the workforce and workplace.
3. Require that employers prepare and implement plans to increase the diversity of workers in all occupations in their workforce and identify and remove systemic barriers, so that their workforce reflects the diversity of the community(ies) in which their workplace(s) is (are) located.
4. In line with the Truth and Reconciliation Commission of Canada: Calls to Action (number 92.iii), we ask that the ESA include a requirement for businesses to provide skills based training to their management and staff in, “intercultural competency, conflict resolution, human rights and anti-racism,” and more specifically in, “the history of Aboriginal Peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples...”
5. Remove exemptions to ESA standards for small employers.
6. Remove the “intent and effect” criteria, and, at a minimum, make businesses jointly responsible for the employment practices of agencies, contractors, subcontractors and franchisees, by mandating contractual clauses requiring compliance with the ESA. Governments should also be required to hold for-profit and not-for-profit organizations they fund, to provide health care and other services, through similar contractual provisions.
7. Establish a new definition of worker in the ESA that is as expansive as possible, to include individuals and sole proprietors who are in an economically dependent position.
8. Put the burden of proof on the employer in cases where there is a dispute about whether a person is an employee and, therefore, subject to the ESA.

9. Increase the minimum wage to \$15.00 per hour and creating a mechanism that automatically ties increases to the minimum wage with percentage increases for the highest wage earners in the province.
10. Cost of living in different regions of the province be considered, so that minimum wage rates in those regions provide a “living wage.”
11. Remove exemptions to minimum wage. Where compensation is not based on an hourly rate, minimum compensation rates should be established through a review process.
12. Remove exemptions to overtime pay.
13. Increase the minimum reporting pay requirements to 4 hours of pay, or the length of the cancelled shift, whichever is greater, and to provide minimum hours of work for a shift.
14. Require that employers offer additional hours of work to part time workers before hiring new employees to do the same or similar work.
15. Establish provisions in the ESA to provide for parity in compensation (pay and benefits) regardless of status (part time, casual, short term contract, etc.).
16. Establish two paid flexible “holidays” for workers, to match the Christian paid holidays are provided for in the ESA.
17. Extend vacation pay and time off to 3 weeks per year or 3 weeks per year after 5 years working with the same employer.
18. Remove exemptions to hours of work limits per day and per week and keep those limits in place.
19. Amend provisions that allow for employees and employers to agree to work hours above daily or weekly limits to indicate that these agreements are only permitted on an individual basis when the employee initiates the request, i.e. cannot be requested by the employer.
20. Create a provision that allows requests by an employer for a group of employees to work above daily or weekly hours of work limits, subject to approval through anonymous voting by affected employees.
21. Require employers to post work schedules a least two weeks in advance.
22. Require employers to ask for and consider individual accommodation requests when determining work schedules, such as in start and end times required because of unpredictable public transportation or because of daycare hours or requests to not work specific days of the week or dates because of religious or spiritual observances. There should be a reference to the OHC requirement to provide accommodation based on protected grounds unless it creates an undue hardship (with some education for

employers and unions as to what this means) and a stipulation that if the basis of the request is not related to OHC protected grounds, approval of accommodation requests will not unreasonably be withheld.

23. Require employers to pay employees a premium for last-minute changes to schedules.
24. Require employers to get consent from workers to add hours or shifts after the initial schedule is posted.
25. Require employers to provide new employees with a good faith written estimate of the employee's expected minimum number of scheduled shifts per month and the expected start/end times, breaks, days and hours of those shifts.
26. Require pay for on-call shifts if an employee is required to be "on-call," but is not called in to work (i.e. two to four hours of pay at the employee's regular hourly rate).
27. Provide employees with the job-protected right to request changes to their schedule at least twice per year. The employer would be required to consider such requests and would not be able to unreasonably refuse such requests. This is separate from recommendations in our initial submission to allow flexibility in work hours to accommodate individual employee needs.
- 28.** Provide sectoral regulation of scheduling as described in the Interim Report.