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BY E-MAIL: CWR.SpecialAdvisors@ontario.ca

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

To The Honourable Justice Murray and Mr. Michael Mitchell:

RE: Changing Workplaces Review –
Response to the Special Advisors' Interim Report

Enclosed please find our response to the Interim Report by the Special Advisors for the Changing Workplaces Review ("Review") by the South Asian Legal Clinic of Ontario (SALCO).

SALCO is one of 76 community legal clinics funded by Legal Aid Ontario with a mandate to provide advice and representation to low-income South Asian communities in the Greater Toronto Area. Established in 1999, SALCO is at the forefront of advocacy and law reform in various areas of poverty law including employment law, immigration, human rights, and income security. Our mandate falls in line with the Terms of Reference of the Review wherein we seek to improve security and support opportunities for those made vulnerable by the economic system with access to justice.

We thank you for the opportunity to provide submissions and feedback to the Interim Report and can make additional submissions should you require before your final report is concluded.

Sincerely,

SOUTH ASIAN LEGAL CLINIC OF ONTARIO

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A. INTRODUCTION

The Changing Workplaces Review provides an unprecedented and necessary opportunity to tackle the root causes of precarious work. As the appointed Advisors to the Changing Workplaces review, you were asked by the government to address why "far too many workers are experiencing greater precariousness" today in Ontario. We are calling on you to reject options that will introduce more precarity to Ontario's labour market and instead recommend a bold and comprehensive vision that uproots the structural sources of precarious employment. As you well know, we cannot expect to fix systemic labour market problems with band-aid solutions.

We are heartened that you have correctly identified changing business practices as a source of precarious work. We note that many of these practices stem from the many exemptions and loopholes that make it possible for employers to evade their responsibilities under the law. Accordingly, we need to close the gaps in legislation that contribute to precarious work and that, left unchecked, will continue to exert downward pressure on the wages and working conditions of all of us. In addition to raising minimum standards for all workers, we must also reduce the barriers to collective bargaining that exclude most people in precarious work.

B. LABOUR RELATIONS

A majority of the clients served by SALCO come from non-unionized environments or sectors to which the Labour Relations Act (LRA) currently does not apply, such domestic workers or agricultural employees. Ontario receives the highest number of these categories, 'migrant workers', in all of Canada through the Temporary Foreign Worker Program (TFWP) or the Seasonal Agricultural Worker Program (SAWP)[1]. While some legislative protections have been put in place for migrant workers[2], there exists a gap in a migrant worker's ability to be protected by the laws of the province in which they are working, sometimes for several years at a time. It is well known to this panel of Special Advisors that migrant workers are the most vulnerable groups of workers in Ontario. It is our position that any labour law reform in Ontario must account for the specific vulnerabilities of these migrant workers, and that the final report should respond to the key reforms initially proposed by migrant worker groups otherwise this review of Ontario's employment and labour legislation will remain incomplete.

SALCO is a part of the Migrant Workers Alliance for Change (MWAC) is a migrant workers' rights coalition headquartered in Ontario. Established in 2007, MWAC is led by migrant worker groups and supported by community, provincial and national organizations. MWAC's feedback to the Interim Report summarizes the position on migrant workers most aptly here,

[1] Canadian Council for Refugees. *Migrant Workers: Precarious and Unsupported – Provincial Report: Ontario* (March 2016). Retrieved at: http://ccrweb.ca/sites/ccrweb.ca/files/migrant_workers-on_1.pdf.
[2] *Employment Protection for Foreign Nationals Act* (Live-in Caregivers and Others) (EPFNA), and the *Stronger Workplaces for a Stronger Economy Act.*

Ultimately, Ontario's labour and employment laws will be judged by how well they protect the workers least well-off within their jurisdiction. The particular vulnerabilities faced by migrant workers stem from the intersection of their precarious immigration status (triangulated between employers, recruiters, and immigration authorities) with their social and workplace locations (e.g. racialized, gendered, so-called 'low skilled' workers in low-waged, non-unionized sectors that are rife with legal exemptions). Specific legal and policy changes must be made at provincial, federal, and intergovernmental levels to address these vulnerabilities and their root causes.

As such SALCO supports the submissions made by MWAC[3] with respect to the LRA as summarized below:

1. Coverage & exclusions in the LRA

1.1 SALCO and MWAC support the option to eliminate the LRA exclusion of domestic workers employed in a private home and institute meaningful, non-Wagner Act models of collective bargaining.

1.2 SALCO and MWAC also support the option to eliminate the LRA exclusions for agricultural and horticultural sectors and to repeal the Agricultural Employees Protection Act.

1.3 SALCO and MWAC support amending the definition of "bargaining unit" to allow for workplaces with only one employee.

1.4 SALCO and MWAC emphasize that these changes can only be a starting point to meaningful participation by migrant agricultural workers and caregivers as part of a continuing process.

1.5 SALCO and MWAC supports the option to enact legislation protecting 'concerted activity' along the lines set out in the United States NLRA.

2 Broader-based bargaining structures

2.1 SALCO and MWAC support the recommendations by the Workers' Action Center (WAC) and Parkdale Community Legal Services (PCLS) on broader-based bargaining, including the recommendation to provide a legislative framework that enables and supports collective organizing, representation and bargaining for workers in particularly vulnerable and precarious work (including, but not limited to, migrant farmworkers and caregivers/ domestic workers). This framework must mitigate the power imbalances that exist for these vulnerable workers (immigration rules, isolation, nature of the work, employer-provided housing, etc.). Elements of this framework would include:

[3] Migrant Workers Alliance for Change, *Ensuring Migrant Worker Fairness – Response to the Changing Workplaces Review Special Advisors' Interim Report* (September 2016). Retrieved at http://www.migrantworkersalliance.org/wp-content/uploads/2016/10/MWAC_CWR_EnsuringMigrantWorkerFairness.pdf, pages 7-8
(Referred to as "MWAC, *Ensuring Migrant Worker Fairness*," in the remainder of this submission).

2.1.1 Designating an employer entity that is the counterpart in bargaining;

2.1.2 Ensuring a strong floor of rights from which to bargain by revoking all exemptions and special rules from core employment standards;

2.1.3 Recognizing the triangular relationship involved in some employment relationships through recruitment agencies (migrant workers) and employment agencies;

2.1.4 Addressing challenges in the caregiving and migrant farmworker sectors through relevant enforcement and labour inspection strategies; and,

2.1.5 Developing the capacity to enhance protection for social security and group benefits coverage and entitlement.

C. EMPLOYMENT STANDARDS

Ontario's existing employment law regime is not aligned with the reality of contemporary employment relationships. The ESA had more relevance when full-time, permanent, single employer arrangements were prevalent. However, significant structural changes in Ontario's labour market since 2000 has resulted in the rapid growth of precarious work, i.e.: part-time, temporary, and contractual labor that is characterized by low wages, limited job security and no benefits - a trend that shows no signs of slowing down.

In the face of such changes, the ESA cannot fulfill the promise to provide a floor of protection for Ontario workers, to the extent that it ever did. Instead, precariously employed workers are routinely denied basic employment rights, finding themselves at the mercy of the ESA's many exemptions, special rules, exclusions, major gaps in regulation, and with little to no recourse due to poor enforcement mechanisms. As SALCO and several other workers rights advocates observe, much of the ESA is simply inaccessible to those who need it most because of barriers in understanding employee rights, accessing recourse mechanisms (either directly through the Ministry of Labour or outside of it) or fear of consequences for enforcing their rights.

1. Scope and Coverage of the ESA

1.1 Definition of Employee and Misclassification

In addition to businesses avoiding the financial costs recognized in the Review, the misclassification of employees also allow employers to avoid one of the most basic ESA rights, paying appropriate minimum wage, amongst losing other protections of the ESA.

As the Review recognizes, intentional or unintentionally misclassification of employees is one of the most serious issues affecting workers. As such, we submit that a combination of the proposed options is will be most effective in allowing workers to access to justice.

- Increased education

SALCO support this option. While accurate data on the extent of employer misclassification is difficult to obtain because employers do not voluntarily report misclassification nor has there been a study done by the MOL, anecdotal experience of clinics and agencies show that delivery, trucking, building maintenance, janitorial, agricultural, home health care, and childcare industries are most likely to see misclassification of workers. A higher degree of vulnerable workers are found in these sectors as compared to white collar sectors.

Legal clinics and not-for-profit agencies that provide front-line services to these vulnerable workers and are skilled at providing accessible legal education should be supported by the MOL in providing education to both workers and employers on the law with respect to employees and independent contractors.

- Proactive enforcement

SALCO support this option, however we submit that proactive audits and enforcement alone would not be sufficient to tackle misclassification. In our work at SALCO we have found that many workers who have been classified as independent contractors only come to know about this label if and when they seek to enforce some part of the ESA. Until that time vulnerable groups of workers such as newcomers or temporary foreign workers are unaware that a separating classification exists as "a job is a job". In order for proactive enforcement to be efficient, we submit that it needs to be paired with education of workers as outlined above.

- Provision in the ESA

SALCO support this option. In practice, by the time a worker learns they have been classified as an independent contractor, he/she has difficulty establishing otherwise because of the power imbalance that exists in the relationship. Having an employer produce evidence will allow a worker to understand the case to meet and help right the imbalance.

- Definition of Employee

SALCO supports the option to include a dependent contractor provision in the ESA.

1.2 Who is the Employer and Scope of Liability

The Review appropriately recognizes the trend of "fissuring" of employment relationship. While some employers have a legitimate need for subcontracting or outsourcing, some engage in this setup to intentionally to protect higher levels of business from responsibility and liability of employment standards. SALCO echoes other employee-advocate organizations in the call for legislated joint and several liability of companies. This will serve to create a system of accountability in a domino-effect where the higher levels of a business will compel the lower level business to comply with ESA standards. While it is acknowledged that this could place obligations on businesses, any such burden

is outweighed by the benefit such a law would provide to those workers made vulnerable by the structural economical pressures of business.

- Hold employers and/or contractors responsible for compliance

SALCO support the option that joint and several liability apply to all employers. Employment standards under the ESA are a set of basic laws and principles designed to protect employees. Despite being legislated, contraventions are too common and employers, whether intentional or not. By requiring all employers and/or contractors to insert contractual clauses requiring compliance with the ESA will hold businesses to existing employment standards and create a form of proactive enforcement whereby violations can be avoided. It is our recommendation that joint and several liability not be limited by industry at it will result in barriers to enforcement and compliance for workers who are especially vulnerable due to the type of industry.

- Create a joint employer test

SALCO supports the option to create a joint employer test similar to the policy developed by the U.S. Department of Labor. Expanding the definition of 'employer' under a joint employer test reflects the malleable nature of today's businesses and will assist future forms of the employer-employee relationship we have not realized. This is in line with the goals of the Review and would benefit employers and employees.

- Make franchisors liable for employment standards violations

SALCO supports the option to make franchisors jointly and severally liable for the employment standards obligations of their franchises. We support the submissions of the Workers Action Center and PCLS[4] on this matter.

- Repeal the "intent or effect" requirement in section 4 of the ESA

SALCO supports the option to repeal the "intent of effect" requirement in Section 4 of the ESA "related employer" provision. As the Review acknowledges, Ontario is the only province that limits the "related employer" provision to cases in which the employer relationship is used for "the intent or the effect" to defeat the intent or purpose of the ESA. This creates an unwarranted barrier for workers in accessing justice on making a claim for their basic employment rights.

[4] See Workers' Action Center & Parkdale Community Legal Services, *Building Decent Jobs from the Ground Up: Responding to the Changing Workplaces Review Special Advisors' Interim Report* (September 2016). Retrieved at http://www.workersactioncentre.org/wp-content/uploads/2016/09/Building-Decent-Jobs-from-the-Ground-Up.pdf
(Referred to as "Worker's Action Centre, *Building Decent Jobs from the Ground Up*," in the remainder of this submission).

- Oppression remedy

SALCO supports the option to establish an "oppressions" remedy under the ESA when companies make their assets unavailable. Such a remedy would allow workers to pursue a claim for unpaid wages when the employer is insolvent or acts in unfairly prejudicial way or unfairly disregards the interests of employees.

- Lien on goods

SALCO supports the option to enable the MOL to place a lien on goods that were produced in contravention of the ESA. If the penalties are felt by all parties along the chain of production it would likely prevent a company from unfairly benefiting from the work of an employee while they remain without their basic employment standards minimums, such as wages.

- Government leading by example

SALCO supports the option to encourage best practices for ensuring compliance by subordinate employers through government leading by example. Establishing a provincial fair wage policy for government procurement of goods and contracts for work or service that would require adherence to minimum employment standards and industry norms would be a beneficial model for Ontarians to follow.

1.3 Exemptions, Special Rules, and General Process

For the significant majority of the ESA's exemptions, the Special Advisors have indicated that they will be recommending that the MOL establish a formal, neutral review process to determine whether any of the exemptions are justified on the basis of objective criteria. SALCO appreciates the recommendation of the Special Advisors to have a transparent and consistent review process to review these exemptions and the request for feedback on implementation of that new review process. As you are aware, exemptions and special rules have had scarce input from the Ontarians actually affected by these rules.

We respectfully submit that the categories identified in under "Approach for Existing Exemptions"[5] warrant a review. The economic reality of many of the professions subject to exemptions or special rules has changed since being implemented over a decade ago. The exemptions made for some white collar/professionals were established because of the idea that these employees performed a different type of work, held greater bargaining power, and were less likely to be exploited[6]. However, because of underemployment in sectors like engineering, where competition has grown but the available positions have not, it leaves workers at a disadvantage where they are likely to be exploited and subjected to unfair employment practices.

[5] Changing Workplaces Review, *Interim Report,* Section 5.2.3

[6] Vosko, Leah F., Andrea M. Noack and Mark P. Thomas (2016), *How Far Does the Employment Standards Act 2000 Extend, and What Are the Gaps In Coverage? An Empirical Analysis of Archival and Statistical Data.* Retrieved: https://cirhr.library.utoronto.ca, page 33.

SALCO supports the analysis and recommendations made by the WAC and PCLS in their report with respect to this section of the Review.[7]

We further support the submission made by MWAC with respect to migrant caregivers and agricultural workers and exemptions/special rules in the ESA.[8] The precarious nature of this group of workers necessitates the protections that the ESA can provide. This Review seeks to examine the changes needed to our employment and labour laws in "in light of relevant trends and factors operating on our society, including, globalization, trade liberalization, technological change, the growth of the service sector, and changes in the prevalence and characteristics of standard employment relationships."[9] This mandate requires that the state of migrant workers be considered. Migrant workers have very limited collective voice at work and cannot be realistically expected to contract for or complain about minimum employment standards in a context where more than 90% of Canadian workers complain only after being terminated or securing new job. Their work contribution to Ontario is invaluable, yet the lack of dignity and protection afforded by the employment and labour laws of this province fail to recognize the ongoing role played in the sustainability of our economy.

We urge the Special Advisors to recommend that agricultural workers should be immediately entitled to all of the following ESA provisions: minimum wage (including abolishing payment by piece rate), overtime, vacation and holiday pay, hours of work, daily and weekly/bi-weekly rest periods, eating periods, and time off between shifts.

1.4 Exclusions

1.4.1 Interns/Trainees

SALCO supports the option to remove the exemption for interns/trainees. This group of workers stands to be exploited by workplaces. Anecdotal data observed by our clinic indicates that employers use this exemption as a way to get free labour from people. Particularly vulnerable are newcomers in densely populated regions of Ontario who are 'hired' as trainees so that their work skill can be tested and then terminated from the workplace after a short period. The simple concept is that if the employer/business is benefiting from the labour of a worker, that worker should be paid. The concept comes from principle of maintaining dignity of the person and the economic systems of Ontario.

1.4.2 Crown employees

SALCO supports the option to remove the exclusion of Crown employees as Ontario is an outlier in this form of exclusion and no rational basis exists for it.

[7] Worker's Action Centre, *Building Decent Jobs from the Ground Up*, pages 15-20.
[8] MWAC, *Ensuring Migrant Worker Fairness*, pages 18-20.
[9] Ontario Ministry of Labour, *Terms of Reference – Changing Workplaces Review* (August 2016). Retrieved at https://www.labour.gov.on.ca/english/about/workplace/terms.php.

2. Standards

2.1 Hours of Work and Overtime Pay

The legislative history of hours of work and overtime hours reflects the need to protect workers over business needs. The requirement to have the Director of Employment Standards (DES) approve all agreements for excess weekly hours was indeed to ensure that workers were not exploited. However, unpaid overtime continues to be among the top five violations confirmed by the MOL's claim investigations.[10] Poor enforcement means there is little incentive for employers to comply with employment standards or orders made by the DES or the Ontario Labour Relations Board (OLRB) which emboldens employers in continuing to violate established laws. The Review also acknowledges that "while most employers likely comply or try to comply with the ESA, we conclude that there are too many people in too many workplaces who do not receive their basic rights."

- Employee written agreements

SALCO opposes the option to eliminate the requirement for employee written consent to work longer than the daily or weekly maximums but spell out in the legislation the specific circumstances in which excess daily hours can be refused.

Ontario employers who made submissions for the purposes of this Review regarding employee agreements complained that the requirements were burdensome and an employee's refusal to work excess hours threatened their business operations. However, there is no evidence as to the number of employees who refuse excess hours or who revoke written agreements once given. The Interim Report also finds that there does not seem to be widespread knowledge for alternate standards, such as electronic agreements for excess hours.

- Maximum hours of work

SALCO opposes the options recommended for changes to daily/weekly hours of work. We submit that the current protections offered by the ESA for employees address the power imbalance that occurs where an employee feels coerced to work excess hours. Giving control of this factor back to employees will revert the bargaining power solely back to the employer. Limiting the right to refuse excess hours to where the employee has "unavoidable and significant family-related commitments; scheduled educational commitments or a scheduling conflict with other employment (part-time workers only)" creates an unfair burden on employees to constantly prove an "unavoidable and significant" family-related commitment. Where the employer disputes that such a commitment is unavoidable and significant, the employee is put in the insecure position of either risking their job or their some part of their lives. Employment standards exist to regulate and protect rights of employees and not to provide staffing solutions for businesses based on the fluctuations of their production needs.

[10] Ministry of Labour, "Investigations and Inspections Statistics" (July 2014). Retrieved at: https://www.labour.gov.on.ca/english/es/pubs/enforcement/investigations.php.

SALCO opposes the proposed maximum daily/weekly hours of work. We support the options put forth by the WAC and PCLS.[11]

2.2 Scheduling

As recognized in the Interim Report, there is a high level of uncertainty when it comes to scheduling of work by employers, especially in the case of low-wage workers who have little or no control over their hours of work and schedules. Workers who are told they are "on-call" (without compensation to account for this) or generally have no stability in their work-life balance have the constant intimidation of being called into work or risk losing their job.

- Reporting pay rights

SALCO supports options 2(b) (to increase minimum hours of reporting pay from three hours at minimum wage to four hours at regular pay) and 2(c) (to increase minimum hours of reporting pay from 3 hours at minimum wage to lesser of 4 hours at regular rate or length of cancelled shift). These options serve to appropriately recognize and compensate employees who cannot control their scheduling and often have to pay a high cost for travelling to and from their work.

- Requests to change to schedules

SALCO opposes the option to limit job protection in requests for changes to schedules at certain intervals. Limiting a job-protected right to request changes to schedules could mean that a worker is unable to meet family, health, or other work obligations for half a year before he/she can request a schedule change without fear of reprisal. Hours and timing of work are a basic employment standard and an employee should not have to fear precarity or reprisal if an employer is approached to consider a schedule change.

- Advance notice of schedules

SALCO supports to option of adopting a model similar to the San Francisco Retail Workers Bill of Rights with a set timing for provision of schedules, offering additional hours of work to existing part-time employees before hiring new employees, requiring consent from workers to change the schedule once it is produced. SALCO also supports WAC/PCLS' recommendation for pay for on-call shifts[12] where an "on-call" employee who is not called into work would be paid a premium of two to four hours of pay at the employee's regular hourly rate (depending on the amount of notice and the length of the shift).

[11] Worker's Action Centre, *Building Decent Jobs from the Ground Up*, pages 21-22.
[12] Worker's Action Centre, *Building Decent Jobs from the Ground Up*, page 27.

2.3 Public Holidays and Paid Vacation

Vacation and public holiday pay ranked 2nd and 4th in the top 5 claims investigated in 2015-2016 by the MOL.[13]

2.3.1 Public holidays

Operating a business is complicated and requires commitments of time and labour. The argument that employers find public holiday pay calculations time-consuming is redundant. While businesses should be assisted in clarifying rules with respect to public holiday pay a majority of Ontarians are covered for public holidays, others either have special rules or are exempt. SALCO supports the option for a combined calculation done by reverting to the former ESA's public holiday pay calculations for full-time employees and commission employees and maintain the current ESA's formula for part-time and casual employees.

2.3.2 Paid vacation

SALCO supports combining the options recommended. Vacation entitlement should be increased to three weeks per year for all employees. After 5 years of service, vacation entitlement should be increased to 4 weeks. For Ontario's vulnerable workers, who are overworked and underpaid, "vacation" is often not utilized in the conventional sense. The luxury of travel and relaxation is not a reality for many low-income, racialized, immigrant and migrant communities. Instead, the time away from work is often used to attend to their lives outside of work, such as housekeeping and caregiving responsibilities, that are compromised due to the necessity of having to work around the clock just to make ends meet.

Furthermore, as noted by SALCO previously and in the current submission, Ontario's *most* vulnerable workers are often denied vacation entitlements (among other protections) altogether due to employer non-compliance with ESA standards, particularly misclassification of employee as independent contractors.

Ontario's vulnerable workers deserve time away from their workplace in order to care for themselves and their families. These are individuals who are often persevering through challenging circumstances in order to put food on the table and who form an integral part of sustaining Ontario's economic growth.

2.4 Personal Emergency Leave

SALCO supports and relies on the submissions made by the WAC in August 2016 with respect to the option to remove the exemption for companies that regularly employ fewer than 50 employees.[14]

[13] Ministry of Labour, "Investigations and Inspections Statistics" (July 2014). Retrieved at: https://www.labour.gov.on.ca/english/es/pubs/enforcement/investigations.php

2.5 Paid Sick Days

The ability to take protected time away from work for health is a protected interest as it goes to caring for a person's health and dignity. In that vein, the right to be paid for sick days should be similarly protected. The Interim Report notes that it is not only employee advocates who support paid sick leave, but also health care professionals who advise that the lack of paid sick days causes unnecessary costs to patients, other workers who become infected by colleagues who are ill, and the health-care system generally.

SALCO supports the option that all employees earn 1 hour of paid sick time for every 35 hours worked. In our initial submissions, we emphasized that for clients we serve, unpaid time off work is simply not feasible in their circumstances. We also reiterate the point that low-income racialized, immigrant and undocumented workers are overrepresented in non-unionized and small business settings, thus repealing the exemption of 49 or fewer workers is crucial in promoting racial justice and equality in the workplace. The Special Advisor's should instead amend the existing provision regarding paid sick days to create job-protected, paid days for sick leave, which would help to ameliorate the disadvantages faced by Ontario's vulnerable workers.

As for employers requesting "reasonable evidence" when employees take time off due to illness, we submit that employers should not be permitted to request such evidence, or at least that it is not an absolute condition for qualifying for paid sick leave. We are especially concerned for the workers in Ontario who do not have medical insurance for lack of meeting the requisite residency requirements or immigration status. Due to Ontario's existing health insurance regulations, many vulnerable workers are either uninsured or face a minimum 3 month waiting period before they are eligible for coverage. This means that there are one too many workers who will not seek health care until a severe circumstance arises. The Special Advisors must keep this reality facing Ontario's vulnerable workers at the forefront of designing equitable policy about sick leaves. If it is the case that employers are permitted to request medical documentation, then SALCO definitely supports the option that the ESA must require employers to shoulder the cost. Low-income workers who already battle with precarious housing and employment do not have extra money to pay for medical notes nor should they be penalized for in that way simply for being unwell.

2.6 Other Leaves of Absence

SALCO supports the option to introduce a paid domestic or sexual violence leave. The ESA should be amended to provide for at least 5 days of paid leave and a right to extend the leave on an unpaid basis as needed. In our initial submission, we noted that women face "triple intersecting barriers" due to race, gender and immigration status and are over-represented in precarious employment. We reiterate the point that the impact of precarious employment and related labour market disadvantages contribute to women's vulnerability to intimate partner violence. Victims of domestic abuse who are trying to leave an abusive situation face a multitude of barriers, including lack of financial and social supports. As the Advisors note, for those fleeing abuse, job-protected time away

[14] Workers' Action Centre, *Submission to the Changing Workplaces Review on Personal Emergency Leave* (August 2016). Retrieved at http://www.workersactioncentre.org/wp-content/uploads/2016/08/WAC-PCLS-submission-PEL.pdf.

from work permits time to attend to more urgent matters such as finding shelter, ensuring children's safety, and seeking counseling.

2.7 Part-time and Temporary Work – Wages and Benefits

Opportunities for full-time, permanent employment have faded over the last decade with many employers showing preference for part-time or temporary positions for their employees (or independent/dependent contractors). This has created a development of an unsteady and precarious category of workers in Canada. The growing number of reduced-hours and part-time positions as well as contract jobs, have widespread effects, not just for personal finances but for consumer demand and economic growth as a whole.[15]

As stated in the Interim Report, part-time employment jobs in Ontario are held by females, recent immigrants, and minimum wage earners and temporary employment has outpaced the growth of permanent employment by 30%. Concern was raised by SALCO and other employee-advocate organizations that employers are using part-time and/or temporary employment status to impose inferior pay on workers.

- Equal pay and benefits

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

2.8 Termination, Severance and Just Cause

2.8.1 Termination pay

- 8-week cap

SALCO supports increasing the 8-week cap on notice of termination to require employers to provide one week of notice for every year worked.

The purposes of termination pay under the ESA is to allow a worker to have adequate notice of the end of their employment and provide opportunity for the worker to find a new job. The longer an individual has been out of the workforce, the more difficult it tends to be for them to secure new employment and to support themselves during the search for employment.

- 3-month eligibility

[15] Grant, Tavia. The Globe and Mail. *The 15-hour workweek: Canada's part-time problem* (October 4, 2014). Retrieved at www.theglobeandmail.com.

SALCO supports eliminating the 3-month eligibility requirement. Current hiring practices are fickle in that there is a greater demand for jobs than there are positions, which has increased the precarity of workers employed less than 3 months in a position.[16] Employees employed on a short-term basis should not be denied the right to notice (or pay in lieu) when their employment is going to be terminated. Workers with less than three months service still need notice to prepare for job loss and look for new employment. This would ensure that all workers employed for less than a year would be entitled to one week notice of termination or pay in lieu thereof.[17]

- Recurring periods of employment

SALCO supports requiring employers to provide notice of termination based on the total length of an employee's employment. As stated by the Advisors, if an employer dismisses a seasonal employee during the season, the employee could be entitled to notice based on his/her entire period of employment (not just the period worked that season). As noted by the WAC, recommending this option would enable migrant agricultural workers to accumulate their separate, but repeated, terms of employment for the purposes of termination notice (or pay).[18] It is important to remember the precarious immigration status of migrant farm workers in accessing these entitlements, including that they are subject to the pressures of permanent recruitment from employers and consulates between seasons.

2.8.2 Severance pay

- Employee and payroll threshold

SALCO supports eliminating the 50-employee and payroll thresholds so that more vulnerable workers can have access to loss of job compensation. While the civil court and wrongful dismissal options are open to employees, the accessibility of accessing that option is limited to few. Accessing the civil claim system as a self-represented person poses its own steep challenges and though some employment lawyers offer contingency retainers so that there is no cost to claimants, many wrongful dismissal cases are rejected for not being 'worth' enough and/or the claimant walks away with much less than they should have had if they were able to access severance pay through Employment Standards.

- 5-year conditions

SALCO supports reducing or eliminating this condition for the reasons above and legislating the term that contract/temporary work terms for the same employer should be counted in determining the years of service. Due to the nature of employment in recent times that has been discussed, many employees are kept on contracts for several terms and may eventually be offered permanent

[16] Vosko, Leah F., Andrea M. Noack and Mark P. Thomas (2016), *How Far Does the Employment Standards Act 2000 Extend, and What Are the Gaps In Coverage? An Empirical Analysis of Archival and Statistical Data.* Retrieved: https://cirhr.library.utoronto.ca, page 29.
[17] Worker's Action Centre, *Building Decent Jobs from the Ground Up*, page 37.
[18] Supra.

employment. In order to compensate for the loss of their position, their tenure should be counted towards calculating years of service.

- Clarification of Ontario payroll requirement

SALCO supports this option. While a recent decision has confirmed that a business' national payroll can be used to determine eligibility for severance pay, this decision merits being codified in the ESA so that the law is clear to all employers and employees.

2.8.3 Just cause

As discussed, the common law protections of disputing a termination under wrongful dismissal are not accessible to all Ontarians. As the Special Advisor's have noted, unjust dismissal protection prevents arbitrary and unfair terminations; enhances job security; avoids the negative impacts on workers who have been summarily dismissed; and provides the possibility of reinstatement.

SALCO supports the options for just cause protection for all workers including TFWP workers which should be prioritized and expedited to allow them to pursue such rights before an immigration process forces deportation or "repatriation" back to their home countries.

2.9 Temporary Help Agencies (THA)

Workers who enlist the support of SALCO are often recent immigrants, temporary workers, and undocumented workers who are vulnerable because of their lack of knowledge of employment rights in Ontario and / or their need to work. Many of them find their first jobs through a temporary employment agency assignment, and are too often deprived of basic employment rights without a fear of reprisal from the agency or the client company. Employees of these agencies are characteristically paid less than workers hired directly by a traditional employer, subject to erratic scheduling, multiple short periods of employment, and often misclassified. The Interim Report well captures the realities and complexities of THAs on a personal and objective level.

- Expand client responsibility

SALCO supports the option to make the client company the employer of record for all employment standards. In the alternative, to make both the client company and the THA joint employers for all employment standards.

- Same wages for same/similar work

SALCO also supports the option to require the THA/client company provide the same pay to an assignment worker who performs substantially similar work to workers directly employed by the client company. Where there is no comparable position in the establishment, then similar work shall be determined by appropriate collective agreement or by similar work for that occupation or sector.

- Mark-up fee

SALCO supports the option to require disclosure of the mark-up to the assignment worker and to limit the amount of mark-up. The information on the mark-up should be open to the worker who forms an integral part of the contract that a THA has with their client company. Since the client company is paying for the worker's labour, the worker should know the 'value' of that work.

- Promote transition to direct employment

SALCO supports the options to (i) deem assignment workers to be permanent employees after a set amount of time, or to require client company to consider directly hiring the assignment worker after a set amount of time, and (ii) require that assignment workers be notified of all permanent jobs in the client's operation and advised how to apply; mandate consideration of applications from these workers by the client

However, there is caution with these options that deeming a worker to be a permanent employee after a set amount of time could have the unintended adverse effect of removing a worker from the assignment just before that period of time ends. This could be same result if the duration of the assignment is limited/capped.

3. Enforcement and Administration

The Interim Report recognizes that there are multiple factors that have contributed to noncompliance with employment standards and amendments to legislation or increased penalties alone will not create a custom of compliance. There is an important role for education and outreach to allow for better understanding of workplace rights and obligations. A key part of enforcement and administration is that employees must be able to assert his/her workplace rights without fear of reprisal and the process to access those rights must be fair and effective. Another important piece is to create a culture and responsibility of workplace compliance with the ESA rather than leaving it only to government to carry out inspections to assess compliance."[19]

3.1 Education and Awareness Programs

SALCO supports the recommendations made by employee-advocacy groups and employers that ESA educational materials for employees and employers be made in simple, clear language to be made accessible to allow these groups to be proactive in implementing in employment standards. Public awareness campaigns to promote the needs to ESA compliance would push employers/employees to access the already existing material produced by the MOL.

3.2 Creating Culture of Compliance

[19] Changing Workplaces Review, *Interim Report* at 269.

SALCO supports the recommendations made by WAC and PCLS:[20] "Rather than the Internal Responsibility System, we recommend a robust model of strategic enforcement to create a culture of compliance that includes: joint and several liability that compels lead companies to comply with the ESA throughout the chain of contracting; expanding the definition of employee to include all dependent workers (contractors); consistent and effective deterrence (monetary penalties) for violations that are then made public; and effective protection of workers from employer reprisals."

Other options which put the onus on the employers for self-audits/self-compliance are unlikely to result in changes in the workplace to benefit employees.

3.3 Reducing Barriers to Claims and Reprisals

While workers are technically protected from reprisals under the ESA, existing standards function more like an empty promise. First, most low-income, racialized, immigrant and migrant workers do not have the knowledge, resources, or support necessary to assert their rights to begin with. Many of the workers that SALCO represents also have linguistic and cultural barriers that impair their ability to exert employment rights.

Second, many express anxiety and fear of speaking out against employers for mistreatment (even when told it is their right), for worry they will lose their job, or in the case of migrant workers, be repatriated. For some, the fear arises from witnessing coworkers face the consequences of complaining, while others are discouraged by routine employer violations that go undetected - in all cases workers do not feel confident approaching employers about their workplace rights, which suggests stronger protections are needed. A comprehensive (including linguistic sensitivity), anonymous and third party complaint program is crucial for workers who are rightfully afraid of approaching their employer in the first place.

SALCO supports the option to establish formal anonymous and third party complaints in the format outlined by the WAC/PCLS report[21] and the UD Department of Labor's Wage and Hour Division policy to allow workers to access the ES claim process without fear of reprisal.

As discussed in submissions made by MWAC and WAC, SALCO further supports the recommendation to prohibit employers of TFWs from forcing deportation / "repatriation" of an employee who has filed an ESA complaint. Given the urgency of the state of migrant/agricultural workers, the MOL must work with the federal government to ensure that migrant workers who have filed complaints are granted open work permits so that they may continue to work while their claim is investigated.

[20] Worker's Action Centre, *Building Decent Jobs from the Ground Up*, page 51.
[21] Worker's Action Centre, *Building Decent Jobs from the Ground Up*, page 54-56.

3.4 Strategic Enforcement

The interim report also discusses the issue of strategic enforcement, noting that only 2500 of 400,000+ Ontario workplaces are inspected every year (0.6% of workplaces). The Special Advisors seek to find the best way to use limited enforcement resources, especially where proactive inspections might lead to longer wait times for reactive investigations of workers' claims. Given the resource challenges and fissuring of workplaces, the Special Advisors note a variety of ways forward toward more strategic enforcement, including through small claims court, the OLRB, some form of simplified, expedited dispute resolution with little to no investigation, and more top-of-industry regulation of the entire supply chain of work.[22] They mention the need to move away from complaints-based enforcement to more strategic proactive investigations based on geography or industry. Part of this discussion also mentions recommendations to focus on migrant and other vulnerable status workplaces, specifically to "increase inspections in workplaces where migrant and other vulnerable and precarious workers are employed".[23]

SALCO supports increased the previously discussed options, including expanding the definition of "employee" to include dependent contractors; making employers/related companies jointly and severally liable for ESA compliance; and permitting MOL to place liens on goods produced.

SALCO also supports having more proactive inspections in workplaces where misclassification occurs, and/or migrant and other vulnerable and precarious workers are employed. As seen in the results of two recent simultaneous blitzes by Ministry of Labour employment standards officers focusing on young workers and temporary foreign workers, there were very high rates of employer non-compliance that point to larger problems in these workplaces.[24]

3.5 Applications for Review

The Special Advisors note that one of the factors that create barriers to remedies at the OLRB include the fact that most parties are self-represented and have the responsibility to present their case. In order to create better access to justice and help the claimant know the case to meet, SALCO supports the option to require Employment Standards Officers (ESO) to include all of the documents that they relied upon when reaching their decision. We agree with the Special Advisors that making this process mandatory process will lead to better decision-making by ESOs, help provide an explanation for the decision, provide the OLRB with a better record and facilitate documentary disclosure for all parties.

SALCO further supports the remainder of the options recommended by the Special Advisors in this section, particularly the increase in support for unrepresented complainants/claimants. The Office of the Worker Advisor is one such form of support as is funding for community legal clinics, many of which provide employment law service, albeit with limitations. Legal clinics have an established

[22] MWAC, *Ensuring Migrant Worker Fairness*, pages 29.
[23] Changing Workplaces Review, *Interim Report*, at 285.
[24] "Blitz Results: Young Workers and Temporary Foreign Workers" (Sept. 30, 2016) for period from May 2 to June 30, 2016 (online: www.labour.gov.on.ca/english/es/topics/proactivein spections.php).

presence in communities and are able to outreach their services with partnering organizations/agencies to support access to justice.

3.6 Collections

For the average complainant, going through the MOL and/or OLRB system is onerous. To overcome the challenges in getting a successful decision only to find that the employer refuses to comply with an order causes disrepute to our system. SALCO supports all, but the first, options proposed by the Special Advisors to promote and enforce a better collection system in Ontario.

D. Conclusion

The Employment Standards Act is a crucial platform to implement and protect rights for Ontarians, particularly those vulnerable workers including racialized, immigrant and migrant communities who are already struggling to navigate systems from marginalized and disadvantaged social locations. In asking the question of how the ESA can better protect "vulnerable workers" it is crucial that the Special Advisors clearly identify who these workers are by expanding the definition of "employee" and "employer" to reflect the realities of today's labour force structures.

As noted in SALCO's submissions racialized, immigrant and migrant communities are overrepresented in precarious work settings. The statistics are significant, and call into question Ontario and Canada's commitment to fair and equitable treatment for all people. Where work is crucial to livelihood, Ontario's most vulnerable workers need special protections to ensure that they are also given an opportunity to lead full and meaningful lives.

SALCO reiterates the position of MWAC and other groups that it makes the most sense to include migrant workers at the core of the Changing Workplaces Review process. Put briefly, there are no other viable processes. The exemption of migrant workers' realities from a once-in-a-generation review of Ontario labour and employment laws would be a huge missed opportunity, especially where the Special Advisors otherwise put so much emphasis on changing workplaces, vulnerability from triangular relationships, and strategic enforcement and compliance.

The Interim Report has provided insight into the positions taken by employees, employers and advocates for both groups and while the positions differ, the need for amendments to the ESA/LRA are clearly needed.