



Building Decent Jobs from the Ground Up

Responding to the Changing Workplaces Review

Special Advisors' Interim Report

Workers' Action Centre

The Workers' Action Centre is a worker-based organization committed to improving the lives and working conditions of people in low-wage and unstable employment. We work with thousands of workers, predominantly recent immigrants, racialized workers, women, and workers in precarious jobs facing problems at work. The Workers' Action Centre provides information about workplace rights and strategies to enforce those rights, and participates in campaigns to improve labour legislation, wages, and working conditions.

Parkdale Community Legal Services




Parkdale Community Legal Services is a poverty law clinic providing workers' rights assistance and legal representation. We work with communities in low-wage and precarious employment to improve labour standards.



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Introduction

The Changing Workplaces Review (CWR) gives us a critically important opportunity to address the growing precariousness of the labour market by improving legislative protections to support decent wages and working conditions. We commend the Special Advisors on their Interim Report. It sets out a broad range of issues and options that have been raised through the CWR and seeks feedback to assist in the development of the final recommendations to the government. Our submission provides feedback on options and makes recommendations to help achieve the key objective of the CWR – “creating decent work in Ontario, particularly those who have been made vulnerable by changes to our economy and workplaces.”¹

Precariousness in our workplaces and economy is on the rise. The number of part-time jobs has risen much faster than that of full-time jobs. Since the last recession, many of the full-time, better-paid jobs have been permanently lost. New full-time job growth is taking place in lower-paid sectors of the economy.²

Ontario is developing a low-wage economy. In 2014, 33 percent of workers had low wages compared to only 22 percent a decade earlier.³

More flexible staffing through part-time, contract, and temporary work helps employers keep labour costs down. Employers rationalize these practices as necessities to improve flexibility in an increasingly globalized world. But outsourcing, indirect hiring, and misclassifying workers also take place in sectors with distinctly local markets: food and hospitality, business services, construction, and manufacturing of locally consumed goods. And it is not just the private sector. The public sector is also patching together our social services with a primarily female, often racialized workforce in low-paid insecure jobs (e.g. homecare).

Changes in labour market regulation and practices have realigned the distribution of risks, costs, benefits, and power between employers and employees. Employers' goals of flexibility have become more paramount to shaping the employment relationship, a trend which is reinforced by current labour and employment law. Our submission, *“Building decent jobs from the ground up”*, seeks to bring balance to labour market regulation and provide ways to rebuild our labour laws and employment practices to support decent wages and working conditions.

The Terms of Reference for the CWR call on the Advisors to address why “far too many workers are experiencing greater precariousness” today in Ontario.⁴ The Advisors’ have identified some

of the factors in why and how precariousness is growing. The Advisors acknowledge that the “fissuring” of employment relationships have resulted in many companies moving away from direct employment through a variety of organizational strategies such as subcontracting, outsourcing, franchising, indirect hiring through temporary help agencies and other methods. In part, these strategies expressly shield higher levels of business that benefits from the labour of those at the bottom. It insulates some employers from responsibility and liability for employment standards and collective bargaining. These practices drive down wages, working conditions and the ability to effectively collectively bargain. They create competitive conditions at the bottom of the chain which make compliance with employment and labour laws difficult and make it extremely difficult for workers to remedy wage violations and collectively bargain.

We need substantive changes in our employment and labour laws to address the realignment of risks, costs, benefits, power, and liability between employers and workers. Small updates in legislation will not do.

We need legislative change to address precarious work that will assign liability to the higher level companies to improve compliance by subordinate employers down the supply chain. This will change the economic model so that compliance with minimum employment standards is attainable by businesses performing the service or providing the goods. We need to reduce the legislative and economic incentives that enable employers to make work precarious.

One of the best ways to help vulnerable workers in precarious jobs is to expand collective organizing, representation and bargaining in workplaces and industries with precarious work. By modernizing the *Labour Relations Act* (LRA) to address changing workplaces and business models, we can reduce barriers to collective bargaining that exclude most people in precarious work. We endorse the Ontario Federation of Labour’s recommendations on the Labour Relations Act. In addition, we provide some recommendations to reduce barriers to collective bargaining and representation for people in precarious work.

Ontario needs to raise the floor of standards for all workers to improve income and security. We have provided a full review of the Advisors’ options to update the Employment Standards Act and have made recommendations to address our changing workplaces.

Advisors’ guiding principles, values and objectives

The Advisors have set out the principles, values and objectives that are guiding the Changing Workplaces Review.

Underpinning the Advisors' principles to guide the review are two important themes. One is the need to recognize the central importance of work in peoples' lives. Work contributes to our means of financial support, role in society, sense of identity, self-worth and emotional well-being. The second theme recognizes the inherent power imbalance and inequality of bargaining power between employers and employees. This power imbalance, the Advisors' state, manifests itself in almost every aspect of the employment relationship.

The Advisors rightly keep a focus on vulnerable workers in precarious jobs through most of their Interim Report. The exception would be on the issue of hours of work in which the key objective appears to be on increasing employer control over hours of work and overtime.

The Advisors' take a broader approach to vulnerability that understands it is not only workers social location (i.e., race, gender, migration status, disability), but it is also workers who are made vulnerable by the conditions of their work (e.g., low waged; non-unionized; without benefits; part-time, full-time, temporary or contract workers; temporary agency workers; seasonal or casual workers; solo self-employed; and, multiple job holders).

The Advisors rightly identify changes in business strategy as, in part, contributing to the current labour market and precarious work. Changes in business strategy and organization have "fissured" workplaces as addressed above. To make work less precarious and improve decency at work, we must address the roots of precarious work in current business strategies and organization.

The Advisor's guiding principles rightly include that decency at work should be a basis for all laws governing the workplace. Recommendations of the CWR should recognize and attempt to reduce barriers to access to justice. Freedom of association and a meaningful right to collective bargaining is a constitutional right. This is the first review of the Labour Relations Act that must consider how best to update the Act to comply with this constitutional right.

We believe that the primary objective of the review and legislative changes should be to create decent work in Ontario, particularly for those made vulnerable by changes to economy and workplaces.

Overview of submission

The Special Advisors have provided a comprehensive review of the *Employment Standards Act* (ESA) and *Labour Relations Act* (LRA). As such, the Workers' Action Centre has provided a comprehensive review of all the Employment Standards sections and reviewed two sections of the Labour Relations section ("Scope and Coverage and Other Models") of the Interim Report.

For clarity, our review follows the chapter and section headings of the Advisors' Interim Report. The structure of our review begins with a background section summarizing the key issues identified

by the Advisors. We then identify our key recommendations on these issues, followed by a review of each option put forward by the Advisors. Our review of the options adds to and expands on our key recommendations. A summary of our key recommendations serves as the conclusion to this submission.

Employment Standards Act

5.2 Scope and Coverage of the Employment Standards Act (ESA)

5.2.1 Definition of “Employee”

BACKGROUND

As workplaces have become fissured, the employment relationship between workers and their employers has evolved, ranging from a standard employment relationship at one end of the spectrum to independent contracting relationships on the other end. The Advisors conclude that the old definitions of “employer” and “employee” are not well-suited to the modern workplace.

At the same time, misclassification of employees as independent contractors has increased. Businesses that misclassify employees do so to avoid the direct financial costs of compliance with the ESA and other legislation. The Advisors conclude that misclassification has significant adverse impact on those Ontario workers who are labelled as independent contractors and not treated as employees.

The Advisors provide options to address the definition and misclassification of employees.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Expand the definition of employee to include dependent contractors.
- ✓ Establish a presumption of employee status (a worker must be presumed to be an employee unless the employer demonstrates otherwise).

REVIEW OF ADVISORS' OPTIONS:

The Advisors have put forward two approaches to addressing the problems of modernizing the definition of employee to include changing employment relationships and better protection against misclassification of employees as independent contractors. The two general strategies are to a) expand the definition of employee in the ESA to include dependent contractors; and b) increase education, improve enforcement and better protect workers who have been misclassified.

These two issues are related. When we decide who is protected under the ESA and who is not, a boundary is created. Enforcing that boundary is difficult, not just for decision-makers examining complaints of ESA violations, but also for the Ministry of Labour working to prevent misclassification of employees in general.

Misclassification of Employees

Option 1 is to maintain the status quo. We reject this.

Option 2 would increase education of workers and employers. While education may be useful, it will not stop employers from misclassifying workers.

Option 3 calls for proactive enforcement activities focusing on the identification and addressing of cases of misclassification.

We support this option with amendments. Strategic proactive enforcement would be more effective than relying on individual claims, as the latter are ineffective, costly, and do not address the systemic or structural features of misclassification.

We recommend:

- Developing a strategic program for enforcement involving partnerships with the federal Canada Revenue Agency and Employment Insurance programs, appropriate Ontario ministries, and community partners to map sectors where misclassification is growing or is already widespread and to carry out proactive enforcement.⁵
- Misclassification costs not only the worker, but also local economies and social programs operated by provincial and federal governments. For example, Ontario found that between 2007 and 2009 in the construction industry, the annual estimated revenue losses to WSIB, the tax system, Canada Pension Plan, and the Employment Insurance system was in the order of \$1.4 to \$2.4 billion, due to misclassification of workers as independent

contractors.⁶ Stiff penalties are required for employers to address both the costs of such violations and deter employers from future violations (see Section 5.5.5.3).

iii. Publicize names of companies found to have misclassified workers, in order to deter this practice (the public name of the business, rather than the business incorporation number, as is currently publicized on the Ministry of Labour website).

Option 4 would establish that, where a dispute takes place, the burden of proof is on the employer to prove that a person is not defined as an employee under the ESA. This proposal is similar to the existing responsibility under the ESA, whereby the employer must prove that there was no reprisal against a worker.

We reject this option and recommend a new provision.

This option is reactive rather than proactive. It relies on individual workers to make claims under the ESA, which, as discussed below, few workers do.

Regardless of the onus being on the employer to disprove reprisals or, in this case, misclassification, the claim process still requires workers to make the case, to establish the evidence, and make arguments about the reprisal or misclassification. With reverse onus on with employer with respect to reprisals, only 20 percent of workers are successful in their claims due to the difficulty in making the case.⁷ It is extremely difficult for workers without legal representation to argue that the relationship more closely resembles that of an employee than that of an independent contractor. While there should be a reverse onus on employers in disputes under adjudication, this will do little to address the systemic practice of misclassification, which is why a legal presumption of employee status is imperative.

New WAC Recommendation

We recommend the establishment of a legal presumption of employee status for workers performing labour services for a fee. That is, a worker must be presumed to be an employee unless the employer demonstrates otherwise.

ESA definition of “employee”

The Ministry of Labour practice of excluding workers considered dependent contractors under the *Labour Relations Act* has left many workers beyond the protection of the ESA. Further, this practice of exclusion from employment standards protection has created incentives for employers to move workers into dependent or independent contract work and/or misclassify workers as dependent or independent contractors.

Option 5 would maintain current Ministry of Labour practice and the ESA definition of employee. We reject this option.

Option 6 would require that the scope of the ESA be expanded to include dependent contractors and consideration given to exempting particular dependent contractors.

We support this option with amendments. We believe that this would be a good step forward in expanding the ESA, recognizing current employer practices and labour market trends. However, it would still exclude vulnerable workers who would benefit from statutory ESA protection but whose work does not conform even to an extended definition of employee (for example, new forms of “on-demand” work for multiple entities operating through computer platforms).

As such, we recommend the following:

- i. Make the new definition of employee as expansive as possible to include all workers in an economically dependent position. Expand the definition to include dependant contractors.
- ii. Establish a presumption of employee status (a worker must be presumed to be an employee unless the employer demonstrates otherwise).

The Advisors have, in Option 6, raised the possibility of establishing regulations that could be used to exempt some dependent contractors from minimum standards or create a different standard. We recommend that there be no exemptions from expanding the scope of the ESA to include dependent contractors. Not only would exemptions create gaps in ESA coverage, but they would make enforcing the new boundary of ESA coverage even more difficult.

Based on our experience representing workers under the ESA and common law, clear definitions and tests are necessary for workers, employers, and adjudicators. Clear guidance should be given to employers and decision-makers in employment standards matters in the form of an administrative guideline, similar to that developed by the US Department of Labor on employee misclassification.⁸

5.2.2 Who is the Employer and Scope of Liability

BACKGROUND

A century ago, labour subcontracting was known as the “sweating system.” Today, employers are once again using contracting as a key strategy to reduce labour costs and shift employer liabilities down the chain of the “sweating system” of production. This has realigned the distribution of risks, costs, benefits, power, and liability between employers and workers, such that current ESA regulation of employer liability is no longer effective.

The Advisors acknowledge that the “fissuring” of employment relationships has resulted in many companies moving away from direct employment through a variety of organizational strategies such as subcontracting, outsourcing, franchising, indirect hiring through temporary help agencies,

and other methods. In part, these strategies expressly insulate and shield higher levels of business benefiting from the labour of those at the bottom from responsibility and liability for employment standards. These practices drive down wages and working conditions, create competitive conditions at the bottom of the chain that make compliance with the ESA difficult, and make it extremely difficult for workers to remedy wage violations.

The Advisors' approach to regulating employment standards in order to address precarious work assigns liability to the higher level entities, seeking to improve compliance by subordinate employers down the supply chain. This would change the economic model, making compliance with minimum employment standards by businesses performing the service or providing the goods attainable.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Amend the ESA to make companies jointly and severally liable for the ESA obligations of their contractors, subcontractors, and other intermediaries.
- ✓ Create a joint employer test similar to the policy developed by the US Department of Labour.
- ✓ Make franchisors jointly and severally liable for the employment standards obligations of their franchises.
- ✓ Repeal the "intent of effect" requirement in Section 4 of the ESA "related employer" provision.
- ✓ Establish an "oppressions" remedy under the ESA when companies make their assets unavailable.
- ✓ Enable the Ministry of Labour to place a lien on goods that were produced in contravention of the ESA.

REVIEW OF ADVISORS' OPTIONS:

Option 1 would maintain the status quo. We reject this option as it maintains the business models and legislative and regulatory framework that give rise to precarious work and conditions creating vulnerability for workers.

Option 2 would amend the ESA to make companies jointly and severally liable for the ESA obligations of their contractors, subcontractors, and other intermediaries. This could, for example, result in employers inserting contractual clauses with subcontractors requiring compliance with the ESA.

We support this option with amendments.

Option 2 also provides the choice of applying joint and several employer liability universally or limiting it to certain industries where precarious work and vulnerable employees are commonplace. We recommend that joint and several liability apply to all employers. Joint and several liability is a key measure in meeting the guiding principles, values, and objectives of the Changing Workplaces Review (CWR): decency at work; meaningful enforcement; access to justice; consistent enforcement, compliance, and a level playing field for business; and stability and balance.

We reject the option to limit joint and several liability to certain industries. Making all employers responsible for ensuring that their business practices comply with the ESA is a central goal of the Review. Joint liability would provide a strong, proactive enforcement mechanism to deter non-compliance through contracting, and an effective mechanism for recovery of unpaid wages.

Option 3 would create a joint employer test similar to the policy developed by the US Department of Labour.

We support this option. Under administrative law (the ESA), a clear test to interpret standards would benefit employers, employees and decision-makers. Further, a joint employer test would reduce erosion of the provision's intent. History demonstrates that business seeks to limit its liability for compliance with employment standards, which will likely continue under new requirements for joint and several liability. Therefore, we recommend a clear test to guide interpretation of joint and several liability.

The US Department of Labour's Joint Employment Interpretation guide provides a good model for Ontario to follow. It relies on an expansive definition of employer, designed to define the employment relationship as broadly as possible. Expanding the definition of employee as discussed above will assist in the implementation of joint and several liability.

The test defines joint employment on a horizontal basis where two or more employers are sufficiently associated or related to an employee so as to jointly employ the worker. For example, where there is common management of two restaurants that are incorporated separately, the workers would be considered employed by the common management. Similarly, where a worker performs work that benefits two or more employers, she would be considered employed by joint employers. The test also defines vertical joint employment, which examines the economic realities of the relationship. An example of this would be a farmworker employed by a farm labour contractor performing work for a grower. A vertical joint employment analysis would look at the economic realities of the relationship between the farmworker and the grower to determine whether the employees are economically dependent on the labour contractor and the grower. To be compliant, the grower would have to ensure the labour contractor is complying with employment standards and would be held jointly liable should violations occur.⁹

Option 4 would make franchisors liable for the employment standards violations of their franchises.

We support this option.

The franchise model is built on clear strategies with respect to the franchisee establishment's control of its brand. This organizational model can easily bring compliance with employment standards into the contractual relationship between franchisee and franchisor. Joint liability for franchisors and franchisees would provide a strong proactive enforcement mechanism to deter non-compliance among franchisees and provides an effective mechanism for recovery of unpaid wages. We recommend that this provision be adopted for all franchise arrangements and not be limited by industry or other requirements.

Option 5 would repeal the “intent of effect” requirement in Section 4 of the ESA “related employer” provision.

We support this option. Section 4 of the ESA is supposed to protect workers in cases where related employers do not comply with the ESA (e.g., pay wages and comply with standards). While this provision is common across Canada, 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” of bypassing the *Act*.

The test for enforcing employment standards with respect to related employers has become so difficult to meet that it is largely ineffective when workers try to secure unpaid wages, termination pay, severance pay, and other minimum standards from related employers. Deleting the “intent or effect” requirement would enable the Ministry of Labour to enforce outstanding orders to pay wages when an employer continues to operate any related business.

Option 6 provides a remedy when workers are owed wages but the company is insolvent or not complying with Ministry of Labour orders to pay wages.

We support this option. Option 6 is modeled on the “oppressions” remedy under the *Ontario Business Corporations Act*, which gives creditors remedial action when companies become insolvent or make their assets unavailable (e.g., hide their assets from creditors using different companies or corporate veils). A new remedy under the ESA would allow workers to seek their unpaid wages in court or before the Ontario Labour Relations Board when the employer acts in a way that unfairly prejudices or disregards the interests of workers owed unpaid wages.

Of the \$47.5 million in unpaid wages employers were ordered to pay by the Ministry of Labour between 2009-10 and 2014-15, only \$19 million was collected for workers. As 60 percent of wages that the Ministry of Labour orders employers to pay goes unpaid, additional remedies and strategies are needed.

Option 7 would, like Option 6, provide tools to improve collection of unpaid wages and ESA entitlements, in line with new protections under joint and several liability.

We support this option. It would enact a provision allowing the Ministry of Labour to put an embargo or a lien on goods manufactured in violation of the ESA. This would create a penalty impacting the lead company and its subcontractors, compelling the company to ensure that minimum employment standards are complied with all along the chain of production.

Option 8 seeks to encourage best practices and employment standard compliance through subcontracting by requiring the provincial government to lead by example. We support the development of a provincial fair wage policy for government procurement of goods, contracts for work or service, and social service funding that would require those receiving government funding or contracts for services (and their subcontractors) to comply with employment standards, industry norms, and principles of decent work.

5.2.3 Exemptions, Special Rules, and General Process

BACKGROUND

The ESA is legislation designed to provide basic minimum terms and conditions of work that are applicable to all. Exemptions are inconsistent with this objective.

The ESA now contains more than 85 complex exemptions and special rules that permit some employers to avoid paying minimum wage, vacation pay, public holiday pay, overtime pay, and severance pay. Significant numbers of workers are denied protection by important provisions of the *Act*, such as hours of work and overtime. The Advisors conclude that that ESA should be applied to as many employees as possible and that any departures from the *Act* should be limited and justifiable.

Unlike other areas of the Interim Report, the Advisors are putting forward recommendations for addressing exemptions and special rules. They have “decided that it would not be in the public interest to recommend a wholesale elimination of all the exemptions without further review.”¹⁰ Such a review, they argue, is beyond the time and resources available in the Changing Workplaces Review.

The Advisors are recommending that:

- 1) some exemptions be eliminated or altered without further review (beyond what will happen through the CWR consultation);
- 2) the exemptions approved by the Ministry of Labour since 2005 under an internal policy framework should not be reviewed and should continue without modification; and
- 3) the remaining exemptions should be reviewed under a new process. The Advisors are seeking feedback on what that process should be.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

Over the years, exemptions and special rules have been introduced in response to industry or business requests with little or no involvement of the workers affected by the exemptions. Research conducted for the CWR estimates that the “cumulative costs of ESA exemptions and special rules for minimum wage, overtime pay, holiday pay, and vacation pay are associated with a potential loss of approximately \$45 million to Ontario employees *each week*.”¹¹ In addition to the economic costs to individual employees and the economy, there are social costs for families, communities, and the health care system, due to lost income, excessive overtime, and long hours of work. At present, only 24 percent of Ontario employees are fully covered under the ESA.¹² Part-time, temporary, low-wage, and young workers are much less likely to be fully covered by the ESA.¹³

While we continue to argue that exemptions are contrary to the principles of fairness, minimum standards, and universality the ESA is intended to protect and should be removed, the Advisors have determined that they will not proceed in this direction. Rather, they are recommending that a process be developed to review current exemptions and any possible future situations in which special treatment may be considered.

For this process to review exemptions and special rules, we suggest the following be defined in statute:

Principles:

- Universality and fairness of minimum standards is presumed
- That there be substantive fairness in the process of reviewing exemptions that recognizes the power imbalances in the employment relationship

Criteria:

- Economic cost of complying with the standard(s) is rejected as a rationale
- The onus to meet these criteria is on the employer or industry seeking to use an exemption or special rule
- The economic and social cost of the exemption to workers who would have their standards reduced shall be considered
- The nature of the work (not the employer's organization of the work) is such that applying the standard would preclude a type of work from being done at all
- The industry or business provide equal or greater benefit in compensation or alternative arrangements in instances where exceptions are permitted

We recommend that a commission be struck to review and eliminate all ESA exemptions and special rules unless they meet the above criteria. This review should be completed within 18 months.

The commission would be mandated to review any applications for future exemptions and special rules. Further, the commission would be mandated to review any exemptions or special rules that remain on a periodic basis (for example, every two years) to determine if they are still meet the criteria.

The commission would be chaired by a neutral person outside of the Ministry of Labour and would have substantive participation of employees from the sectors involved (including union and community-based, non-union representation). The commission could conduct surveys among workers and employers. The commission would have the resources to commission research on the social impacts and costs of exemptions under review.

REVIEW OF ADVISORS' OPTIONS:

Category 1 Exemptions to be eliminated or altered

The Advisors are seeking recommendations on whether to maintain, modify, or eliminate exemptions for: information technology professionals; pharmacists; managers and supervisors;

residential care workers; residential building superintendents, janitors and caretakers; special minimum wage rates for students under 18 and liquor servers; and student exemption from the “three-hour rule.”

We have provided recommendations for each of these exemptions:

Issue 1 – Information Technology Professionals

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

Issue 2 – Pharmacists

Pharmacists are exempt for all the hours of work rules, overtime pay, minimum wage, public holiday pay, vacation pay, and personal emergency leave. We recommend elimination of this exemption.

Issue 3 – Managers and Supervisors

Managerial or supervisory employees are exempt from overtime pay and some hours of work rules. We are concerned about how the definition of managerial exclusion has been broadened, giving rise to misclassification. As such, we would contemplate exempting managers (not supervisors) doing primary duty of managing an enterprise earning over \$75,000 annually.

Issue 4 – Residential Care Workers

Residential care workers are exempt from hours of work and overtime provisions. We recommend elimination of this exemption.

Issue 5 – Residential Building Superintendents, Janitors, and Caretakers.

Workers are excluded from hours of work, overtime pay, public holiday pay, and minimum wage rules. We recommend elimination of this exemption.

Issue 6(a) – Minimum Wage Differential for Students Under 18

The minimum wage exemptions allow employers to pay students under 18 less than the general minimum wage, which the majority of employers do. Ontario is the only province that allows employers to pay its young workers at a lower wage. We recommend elimination of this exemption.

Issue 6(b) – Minimum Wage Differential for Liquor Servers

The minimum wage exemption allows employers to pay liquor servers a lower minimum wage (87 percent of general minimum wage). The majority of Canadian jurisdictions do not have a lower wage rate for tipped workers. Alberta has just removed its exemption for liquor servers. We recommend elimination of this exemption.

Issue 7 – Student Exemption from the “Three-hour Rule”

Students of any age are exempt from the “three-hour rule,” which protects workers who report to work but are sent home before their shift is over. We recommend elimination of this exemption.

Category 2 Exemptions

The Advisors are recommending that six special industry rules approved through the Ministry of Labour policy framework (including principles and criteria) should be maintained and not undergo a review.

The Advisors are asking for submissions on whether there are reasons to review these specific exemptions at this time.

We recommend that the six industry special rules be reviewed.

First, the special rules were adopted in 2005-06, ten years ago. We have recommended that the special rules and exemptions that still exist after the full review of exemptions be reviewed on a frequent basis (every two years). As such, these ten-year-old exemptions with respect to rest periods and lunch breaks should be reviewed.

Second, we have no evidence of if or how workers were consulted regarding these six industry-wide exemptions. The automobile manufacturing, parts manufacturing, warehousing, and marshalling industry is quite expansive and appears to have relatively porous boundaries, making misclassification a real possibility. Further, there are many sites within this industry that are non-unionized and at risk of low-wage and precarious work. Similarly, the boundaries of the live performances, trade shows, and conventions industry are also quite porous (including hair styling, costume, make-up, props, set design – all jobs that can be fairly precarious and non-unionized). The special rules remove obligations to provide a minimum 11-hour break between shifts and, in some cases, to provide eating periods. These are important standards for ensuring a healthy work-life balance and should be reviewed after being enacted ten years ago.

Category 3 Exemptions to be reviewed through a new process

The Advisors have set out three options for development of a transparent and consistent review process to evaluate current exemptions and review exemptions proposed in the future.

Option 1 would use the policy framework developed by the Ministry to review the six special industry rules used to evaluate exemptions that have been passed since 2005.

The conditions of the Ministry of Labour's policy framework are:

- The nature of work in an industry makes it impractical to apply a minimum standard because doing so would preclude a type of work from being done at all.
- The industry employers do not control working conditions relevant to application of a minimum standard.

If one or both of these conditions are met, then:

- The social, labour market, or economic contribution justifies the absence of one or more minimum standards.
- The group of employees affected by the exemption or special rule should be

- readily identifiable to prevent misclassification of the exemption.
- Both employees and employers in the industry agree that a special rule or exemption is desirable.

We reject this option.

As discussed above, we believe the process for review should be governed by statutory principles and criteria; it should be a process outside the Ministry of Labour that is substantively fair for workers and recognizes the power imbalance between employers and employees.

Option 2 would create a new statutory process to review exemptions and make recommendations to the Minister for maintaining, amending, or eliminating exemptions/special rules. We have provided our recommendations for a statutory process of review in our key recommendations at the beginning of this section.

Option 3 would create a new statutory process giving the Ontario Labour Relations Board (OLRB) the authority to extend terms and conditions in a collective agreement across a sector.

This option would shift the power to enact terms and conditions of employment for an industry from the Ontario cabinet to the OLRB. In addition, the OLRB would be given the power to do the following:

- Define an industry and prescribe one or more terms or conditions of employment that would apply to employers and workers (union and non-union) in that industry through "sectoral orders";
- Implement sectoral orders through the formation of "Sectoral Standards Agreements," setting basic minimum conditions applied to all workplaces within an identified regional, occupational, or industrial labour market; and,
- Allow for application for a "Sectoral Standards Agreement" by a trade union or group of trade unions, a council of unions, an employer, or group of employers.

This provision to extend collective agreement provisions across a sector draws from the Quebec decree system and Ontario's former *Industrial Standards Act* (ISA). Created to reduce unfair competition for wages and working conditions among unionized and non-unionized firms, the decree system was established in 1934, substantially weakened in 1996, and currently covers over 75,000 workers in the service sector in Quebec. When a collective agreement is extended, a "parity committee" is established, including employer and employee representatives. As such, the decree system also provides a framework for collective bargaining.¹⁴

In the current context, we see some potential benefits to extending collective agreement provisions across a sector, particularly where people in precarious work are restricted in enforcing their rights or organizing a union. However, we have serious concerns about this option.

Under Option 3, as the vested body, the OLRB would hear applications either from employers or a union with a collective agreement. While presumably a union would apply for extension of greater

terms and conditions, an employer could also seek extension of the collective agreement on issues such as overtime averaging agreements or maximum workweek. It is not clear how the OLRB would determine the merits of such applications for sectoral agreements.

It is also unclear how the OLRB would maintain or update the sectoral agreements to keep pace with market- or government-regulated standards. A study of Decree wage rates in the building services sector between 1992 and 2004 found that wage increases under the Decree were lower than both the CPI and general minimum wage throughout the same time period.¹⁵

Option 3 does not address the issue of enforcement. Both the decree system and the *Industrial Standards Act* model require enforcement regimes run by employer-employee committees and paid by employer levies. Enforcement under the ISA was found to be inadequate, resulting in employer non-compliance.¹⁶ This is a more general problem with basic employment standards. However, without effective enforcement and deterrence measures, there is little to compel employers to comply.

5.2.4 Exclusions

5.2.4.1 Interns/Trainees

The ESA provides exclusions for interns or trainees under certain conditions (e.g., similar to vocational school; intern or trainee does not displace employee; employee does not derive benefit from trainee; etc.).

We recommend the intern/trainee exemption be revoked.

We believe people should be paid for their work, including while being trained. Removing the interns and trainees exemption would not affect the exclusions in the *Act* for secondary students fulfilling board-approved work experience programs and approved university or college programs.

5.2.4.2 Crown Employees

Employees of the government of Ontario or an agency of the government are excluded from hours of work, overtime pay, minimum wage, public holiday pay, and vacation with pay.

We recommend this exclusion be revoked. We do not see any basis for exclusion of government employees from basic minimum employment standards.

5.3 Standards

5.3.1 Hours of Work and Overtime Pay

BACKGROUND

Ontario's hours of work rules provide employers with a higher degree of flexibility than other Canadian jurisdictions in a number of ways. For example, only Alberta provides employers with longer limits on daily hours of work (maximum of 12 hours), while Ontario provides an 8-hour day or a regular, established workday up to an 11-hour maximum. All other provinces provide a maximum eight-hour workday. The majority of Canadian jurisdictions establish weekly maximum hours of 40 hours per week – PEI, Nova Scotia, and Ontario have a maximum workweek of 48 hours, with Ontario employers able to obtain Ministry approval to exceed the 48-hour weekly maximum (no limit). The majority of provincial and federal jurisdictions provide overtime pay after 40 hours; Ontario is one of three provinces that only pays overtime after 44 hours. Given this high degree of employer flexibility and control over hours of work, it is worrying to us that the majority of the Advisors' options on hours of work involve restricting or reducing workers' right to refuse overtime, reducing required rest periods between shifts, and reducing Ministry of Labour oversight of excessive hours of work and overtime averaging.

Ontario is one of four provinces that gives employees the right to decline working excess hours beyond the regular workday or workweek. Employers are trying to erode this right and it is reflected in many of the options provided by the Advisors. This section is a substantial departure from the rest of the Interim Report, in which the Advisors' review issues with a focus on how they impact people in precarious work.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

Violations of overtime and hours of work standards cut a wide swath across many industries and sectors.¹⁷ Unpaid overtime continues to be among the top four violations confirmed by the Ontario Ministry of Labour's proactive inspections and individual employment standards claims.¹⁸ Employers feel confident violating hours of work rules because enforcement has been inadequate. The Ontario Task Force on Hours of Work and Overtime found widespread violations in the late 1980s: for every hour worked with an overtime work permit, approximately 24 hours were worked without a permit.¹⁹ Little has been done to address violations and employers have consequently become more confident about escalating non-compliance.²⁰

Changes to the ESA in 2001 created greater flexibility for employers with respect to hours of work and overtime, and shifted control over work time to employers. Ministry of Labour regulation of work beyond 48 hours was shifted to individual firm-based agreements with employees for work up to 60 hours per week. Individual firm-based agreements with workers were introduced to

average overtime over two weeks or more. Ministry of Labour oversight was reintroduced in 2005 to approve excess hours of work agreements beyond 48 hours a week and overtime averaging. It is these oversight provisions that employers are seeking to revoke.

Workers are still, in theory, able to refuse overtime beyond the regular workday and maximum workweek. But for many people in non-unionized workplaces this right is illusory. The power imbalances in workplaces make it extremely difficult for workers to refuse overtime without risking penalties or job loss.

Unfortunately, both employers and the Advisors are seeking to remove or limit this right to refuse overtime and create further exemptions from maximum workweeks. This is the wrong direction. As the International Labour Organizations says, "Regular long working hours not only negatively affect the health and safety of workers but also decrease the productivity of enterprises."²¹ Ontario lags behind other jurisdictions in Canada and the US that have established shorter workdays and workweeks.

As such, we reject most of the options presented by the Advisors in this section. In the alternative, we recommend the following:

- i. Maximum workday and week – The ESA should provide for a maximum 8-hour work day and a 40-hour workweek. Workers should retain the right to refuse work beyond the 8-hour day and the 40-hour workweek. Overtime at time-and-a-half should be paid (or taken as paid time off in lieu) after 40 hours.
- ii. Repeal all overtime averaging provisions. Overtime averaging allows employers to enter into firm-based agreements with workers to average hours of work over a period longer than one week for determining workers' overtime pay. Averaging agreements always lower the amount of overtime pay owed to workers. These agreements ignore the power imbalances in the workplaces that the ESA is supposed to address. Workers in non-unionized workplaces have no real power to refuse to sign averaging agreements without penalty, enabling employers to effectively contract out of overtime pay requirements. Some workers have also reported that when Ministry of Labour inspections detect overtime pay violations, the employer is told to enter into overtime averaging agreements to bring the employer into compliance.
- iii. Overtime approvals/permits – Ministry of Labour approval for overtime in excess of 48 hours a week should only be given in exceptional circumstances and be conditional on demonstrated efforts to recall employees on layoff; offer hours to temporary, part-time, and contract employees; and/or hire new employees. Annual caps of no greater than 100 hours per employee should be set on overtime hours allowed by permits. Workers should retain the right to refuse overtime when their employer has been granted an overtime approval.
- iv. Maintain right to refuse overtime and Ministerial oversight of employer-employee agreements to vary or reduce hours of work standards.

REVIEW OF ADVISORS' OPTIONS

Option 1 would maintain current hours of work and overtime provisions.

We reject this option.

Option 2 seeks to remove the requirement for employers to obtain employee's written consent to work overtime and would establish statutory limits on when workers can decline to work overtime. The specific circumstances when workers could refuse to work overtime would be if they have "unavoidable and significant family-related commitments; schedule educational commitments or a scheduling conflict with other employment (part-time only)".

We reject this option. We do not believe the ESA should legislatively enable employers to use staffing strategies predicated on overtime and regular longer working days to meet production deadlines. Rather, employers should hire more workers to meet production needs.

Revoking the right to refuse overtime, even with the exceptions proposed, will shift important social policies on work-life balance and minimum standards on hours of work to a firm-based determination. Further, it negates the power imbalance in workplaces that make it difficult, if not impossible, for workers in non-unionized workplaces to assert their right to the exemption to the rule. Shifting enforcement of minimum standards onto the backs of workers, requiring them to negotiate with their employer with respect to what constitutes an "unavoidable or significant" family commitment is contrary to the purposes of the ESA.

Option 3 would maintain the requirement for employee-written consent to work overtime except in industries or businesses where employers believe they need overtime to meet production needs. In those cases, the requirement for individual consent would be replaced by collective secret ballot consent of the majority. Where there is consent by secret ballot, employees would still have a right to refuse if they have "unavoidable and significant family-related commitments; schedule educational commitments or a scheduling conflict with other employment (part-time only)" or by protected grounds under the Human Rights Code (e.g., disability). Such provisions would apply to unionized and non-unionized workers. This option would require industry or business-based legislated exemptions from the employee right to refuse overtime standard.

We reject his option. We do not support a further patchwork of exemptions on hours of work standards. We do not believe that a secret ballot should supersede an individual worker's right to decide to work or not to work beyond the regular workday or workweek. Not only does this process seem cumbersome, but it is doubtful that, without impartial oversight, such a vote would not be unduly influenced by the employer.

Option 4 would allow industries to seek regulatory exemptions from workers' right to refuse overtime / employee consent requirement through sectoral exemptions.

We reject this option for the reasons addressed above.

Option 5 would eliminate the daily maximum eight-hour day. Workers could be required to work up to thirteen hours a day (including two unpaid breaks) without the right to refuse.

We reject this option.

Option 6 would reduce or eliminate the requirement for a daily rest period between shifts of 11 hours (i.e., the required time off between work shifts), which could increase the workday to more than 12 hours.

We reject this option.

Option 7 would make a provision, similar to one that exists in British Columbia, that if the right to refuse and consent to overtime is removed or exemptions are brought in, no one can be required to work so many hours that their health is endangered.

We reject this option as it is based on removing workers' right to refuse overtime.

Option 8 would establish that written agreements to work beyond the daily and weekly maximum hours of work and for overtime averaging can be completed electronically (as opposed to only in writing, which is currently the case).

We reject this option. We are opposed to overtime averaging. In the alternative, we would only agree to adding electronic approval if workers have access and means to give electronic approval at the workplace and retain the right to refuse overtime.

Option 9 would maintain the requirement for employees to agree in writing to work beyond the 48-hour weekly maximum but would eliminate the requirement for employers to seek and obtain approval from the Ministry of Labour for excess hours.

We reject this option.

Option 10 would maintain the requirement for employees to agree in writing to work beyond the maximum workweek of 48 hours but would not require employers to obtain approval from the Ministry of Labour for excess weekly hours of work between 48 hours and 60 hours per week.

We reject this option.

Option 11 would reduce the weekly overtime pay trigger from 44 to 40 hours per week.

We support this option.

Option 12 would maintain the requirement for employees to agree in writing to have their overtime averaged over a period of two or more weeks but would not require employers to obtain Ministry of Labour approval for overtime averaging. Overtime averaging agreements should be limited to a maximum of four weeks (or more).

We reject this option and we recommend revoking overtime averaging completely.

5.3.2 Scheduling

BACKGROUND

The ESA is silent on the rights of workers to have advance notice of hours or a minimum guaranteed number of work hours.

Without a predictable and stable schedule, workers have difficulty budgeting, attending school, arranging child care, and retaining second, or even third, jobs. Workers experience last minute call-ins to work or cancellation of shifts. Some employers expect that workers will remain available for work as required by the employer. But there is no reciprocal requirement to provide a guarantee of hours or income. The Advisors acknowledge that uncertainty in scheduling practices may contribute to making work precarious. They provide options on scheduling.

Ontario, like many other jurisdictions, requires employers to compensate employees for a minimum number of hours when they report to work, but are sent home before the end of the scheduled shift. It is easy for employers to avoid this requirement by scheduling split shifts. The Advisors recognize that Ontario's current requirements should be expanded and provide a number of options for this expansion.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Require all employers to provide advance notice when setting and changing work schedules and include the following provisions:
 - ✓ Require employers to post employee schedules two weeks in advance;
 - ✓ Require employers to pay employees more for last-minute changes to employees' schedules (e.g., employees receive the equivalent of one hour's pay if the schedule is changed with less than two days' notice and four hours' pay for schedule changes made with less than twenty-four hours notice);
 - ✓ Require employers to offer additional hours of work to existing part-time employees before hiring new employees or using staffing agencies or contractors to perform additional work;
 - ✓ Require employers to provide part-timers and full-timers equal access to scheduling and time-off requests;
 - ✓ Require employers to get consent from workers in order to add hours or shifts after the initial schedule is posted;
 - ✓ Provide new employees with a good faith written estimate of the employee's expected minimum number of scheduled shifts per month and the days and hours of those shifts;²²
 - ✓ If an employee is required to be "on-call," but is not called in to work, the employer

must pay the employee 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.)²³

- ✓ Increase the minimum reporting pay to four hours of regular pay or length of the cancelled shift.
- ✓ The minimum allowable shift per day should be three hours.

REVIEW OF ADVISORS' OPTIONS:

Option 1 would maintain the status quo described above. We reject that option.

Lower-wage workers in particular need fair scheduling policies to have economic security and ultimately climb out of poverty. Without such regulation, incomes and hours of work become unpredictable. As of 2014, half of Ontario workers are working less than 40 hours per week. Forty-two percent of low-wage workers faced variable hours from week to week. Almost one in three workers earning more than \$15 also faced variable hours.²⁴

Option 2 would expand or amend existing reporting pay rights in the ESA. The Advisors recognize that workers should be better compensated when they go to work but are sent home due to shortage of work. To make the "three hour rule" more effective, the Advisors suggest the following:

- 2(a) increase minimum hours of reporting pay from three hours at minimum wage to three hours at regular pay;
- 2(b) increase minimum hours of reporting pay from three hours at minimum wage to four hours at regular pay;
- 2(c) increase minimum hours of reporting pay from three hours at minimum wage to the lesser of three or four hours at regular pay or length of the cancelled shift.

We support Option 2(c) to increase minimum hours of reporting pay from three hours at minimum wage to four hours of regular pay or length of the cancelled shift, whichever amount is less. Given the increasing costs of transit and often lengthy commuting time, we believe the four hour minimum pay requirement better addresses the realities of today's workforce.

The Advisors also note that employers can and, we would argue, do regularly avoid this requirement by routinely scheduling workers for split shifts or shorter shifts.

As such we would add a recommendation that the minimum allowable shift per day be three hours (i.e., no scheduled shifts shorter than three hours), thereby recognizing that shifts of less than three hours place burdens on workers, who must travel to and from work, arrange child or elder care, or juggle multiple part-time jobs.

Option 3 provides that employees receive job-protected rights to request changes to schedule at certain intervals; for example, twice a year. The employer would be required to consider such requests.

We support Option 3 in part. Workers must be able to ask employers to change schedules without penalty (i.e., protection from reprisals). Employers are more likely to permit changes when there is a job-protected statutory right to request schedule changes. We do not believe, however, that such a right should be limited by the number of requests or timing of such requests.

Option 4 would require all employers to provide advance notice in setting and changing work schedules to make them more predictable (e.g., *San Francisco Retail Workers Bill of Rights*). The Advisors set out various provisions to enact scheduling requirements.

We support the Advisors' options with amendments as follows (amendments and additions in italics):

- Require employers to post employee schedules *two weeks* in advance;
- Require employers to pay employees more for last-minute changes to employees' schedules (e.g., employees receive the equivalent of one hour's pay if the schedule is changed with less than two days notice and four hours' pay for schedule changes made with less than twenty-four hours notice);
- Require employers to offer additional hours of work to existing part-time employees before hiring new employees *or using staffing agencies or contractors to perform additional work*;
- Require employers to provide part-timers and full-timers equal access to scheduling and time-off requests;
- Require employers to get consent from workers in order to add hours or shifts after the initial schedule is posted;
- *Provide new employees with a good faith written estimate of the employee's expected minimum number of scheduled shifts per month and the days and hours of those shifts;*²⁵
- *Pay for on-call shifts - If an employee is required to be "on-call," but is not called in to work, the employer must pay the employee 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.)*²⁶

Option 5 would enable sectoral regulation of scheduling by encouraging sectors to come up with their own arrangements.

We reject this option unless it is combined with a statutory process that provides substantive fairness in the process of reviewing sectoral regulation, recognizes the power imbalances in the employment relationship, and substantively involves union and non-unionized workers.

5.3.3 Public Holidays and Paid Vacation

5.3.3.1 Public Holidays

BACKGROUND

Ontario has nine statutory public holidays. Workers are entitled to public holiday pay and, if the holiday day is worked, then additional premium pay for hours worked or a substitute day off with public holiday pay.

In their discussion of public holidays, the Advisors raise two issues: first, that employers find public holiday pay calculations time-consuming; and, second, that retailers find premium pay a burden when they are open on public holidays. While the Advisors did not respond to the second issue, they did address the issue of public holiday pay calculations. They set out four options for revising how calculations would take place.

REVIEW OF ADVISORS' OPTIONS:

Option 1 would maintain the status quo.

We reject this option. Addressing employer concerns over the paperwork burden does not touch on the substantial problems workers face in accessing public holidays. Only 71.5 percent of Ontario workers are fully covered for public holiday rights; 20.3 percent face special rules limiting access and 8.2 percent are fully exempt.²⁷ This lack of access to public holiday pay costs Ontario workers and the Ontario economy over \$18 million *per week*.²⁸ Violations of public holiday entitlements rank at the top of violations found by the Ministry of Labour in targeted inspections – 46.1 percent of employers were found to be in violation of public holiday rules.

WAC recommends two strategies required to improve access to public holidays. First, repeal exemptions and special rules for public holidays and, second, improve proactive inspections and deterrence measures to address the high rates of violation of public holiday rules.

Option 2 would revert to the former ESA's public holiday pay calculation, which sets out two paths for calculating holiday pay – one for workers with regular hours and another for workers with irregular hours based on the previous 13 weeks of work.

Option 3 would combine old and new methods of calculation. Full-time employees' holiday pay would be based on regular wages for the day, while part-time and casual workers' holiday pay would be based on the previous four weeks divided by twenty.

We support moving to the former ESA method for calculating holiday pay for workers with regular full-time hours. The issue for workers, however, is with the time period used to calculate holiday pay for workers with irregular hours. Would thirteen weeks or four weeks provide the best time

period for calculating public holiday pay when workers' hours are irregular? If a worker has only worked two months, the shorter term would be better. If a worker has worked fewer hours during the previous month, then the shorter term is a disadvantage. Therefore, we recommend that the determination of thirteen or four weeks be based on whichever option provides the greater benefit to the employee.

Option 4 would remove the requirement for employers to pay public holiday pay during the regular pay period in which the public holiday takes place. Instead, employers would pay workers a specified percentage (3.7 percent of wages earned each pay period) on each paycheque throughout the year. This would be equivalent to nine regular workdays, and is similar to vacation pay, which can, with employees' consent, be paid on the basis of 4 percent earnings for each pay period rather than the specific dates when the vacation is used.

We reject this option.

First, when wages for vacation are spread throughout the year, workers face financial challenges in taking what feels like unpaid days off for vacation. Consequently, many workers with vacation pay averaged over the year do not feel able to take vacation time off. Secondly, public holiday pay is more complicated than vacation pay. If a person works the public holiday and does not take another day off, she or he should be paid premium pay. This option is likely to lead to more violations of public holiday pay rather than less.

5.3.3.2 Paid Vacation

BACKGROUND

The ESA provides for two weeks paid vacation per year. There is no increase in vacation time beyond the two weeks. The Advisors rightly recognize that Ontario lags behind provincial and federal jurisdictions in vacation entitlement.

In addition to the status quo, the Advisors provide two options to move to three-week vacation entitlements.

WORKERS' ACTION CENTRE KEY RECOMMENDATION:

✓ Increase vacation entitlement to three weeks vacation per year for all employees.

REVIEW OF ADVISORS' OPTIONS:

Option 1 maintains the status quo of two weeks vacation.

We reject this option.

Option 2 increases vacation entitlement to three weeks after either five or eight years of service with the same employer.

We reject this option. Requiring a service period of five or eight years with the same employer does not address issues of the changing labour market and precarious work identified by the Advisors (e.g., temporary, contract, part-time job growth rising faster than full-time work).

Option 3 would increase entitlement to three weeks vacation per year for all employees.

We support this option. It addresses structural issues such as increased growth in temporary employment, which creates barriers to vacation for temporary employees.

5.3.4 Personal Emergency Leave

The government asked the Changing Workplaces Review Advisors to make recommendations in advance of the final recommendations emerging from the Changing Workplaces Review. This is because, in the 2016 Ontario Budget, the government committed to “seek advice ... from the Special Advisors on the Changing Workplaces Review to resolve concerns raised by business regarding the application of the emergency leave provisions” of the ESA on an expedited basis.²⁹ As such, we made [recommendations on Personal Emergency Leave](#) that were submitted August 31, 2016 (see Appendix for full submission).³⁰

Workers in precarious employment, particularly women, need full access to all the leave entitlements under Personal Emergency Leave (PEL) to manage paid work and unpaid caregiving work.

Employers want to reduce the entitlement under PEL by breaking up the ten-day unpaid leave into separate categories. For example, employers have called for a restriction on how many of the ten days can be used for personal vs. family emergency, for illness vs. bereavement, and so forth. Breaking down the ten-day PEL into separate leave categories would reduce the entitlement available to Ontario workers.

We believe the ESA should maintain the current scope and flexibility in emergency leave provisions to address the current and future realities of workers' lives. Further, this leave must be made accessible to *all* employees by removing the current exemption for firms that employ fewer than 50 employees.

5.3.5 Paid Sick Days

BACKGROUND

The ESA does not require employers to provide paid sick leave. Rather, workers are entitled to ten days of unpaid, job-protected Personal Emergency Leave, as discussed above.

The majority of workers in Ontario do not have access to employer-based sick leave policies. Less than one in four low wage workers gets paid leave.³¹ During consultations, the advisors heard from many groups about the need for paid sick leave to make taking time off when sick a viable option. When earning low wages, few workers can afford to lose a day's pay and therefore go to work sick.

The Advisors provide options for paid sick leave.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Require employers to provide paid sick days (One hour for every thirty-five hours worked, up to a cap of seven paid sick days). There should be no qualifying period before an employee is entitled to sick leave.
- ✓ Medical notes should not be required when employees take paid sick leave.

REVIEW OF ADVISORS' OPTIONS:

Option 1 would maintain the status quo.

We reject this option.

At least 145 countries provide paid sick days for short- or long-term illness. Many high-income economies require employers to provide upwards of ten paid sick days. Canada and the US are almost alone in having no national policy requiring employers to provide paid sick days.³² This is changing in the US, as five states, twenty-eight cities, and Washington DC have paid sick time laws on the books.³³

Employers participating in the consultation told the Advisors that they were opposed to paid sick days on the basis of cost and concerns that workers would abuse paid sick leave. But experience in the US demonstrates that employers' concerns about increased costs and abuse of the provision have proven unfounded. One-and-a-half years after Connecticut became the first state to implement a paid sick time law, researchers found that the law had either no or small financial effects on business; most employers said their employees did not abuse their sick time; and three-quarters of employers supported the law.³⁴ Moreover, a new cross-jurisdictional study has found no evidence of declining wages or employment rates in US states and cities with paid sick time laws.³⁵

Option 2(a) would introduce paid sick leave based on a fixed number of days per year or earned by an employee at a rate of one hour for every thirty-five hours worked.

We support this option and further recommend that paid sick leave should be provided at a rate of one hour for every thirty-five hours worked up to a maximum of seven days per year.

Not only do workers need the right to take time off when sick (i.e., repeal of PEL small business exemption), but workers need to have paid sick leave to make time off a viable option.

Providing paid sick leave speeds up recovery, deters further illness, and reduces health care costs. It enables workers to address health needs without putting their economic security at risk. Paid sick time helps prevent the spread of contagious illnesses to coworkers and customers, and curbs expensive hospital visits by allowing workers to see a health practitioner when needed.

Option 2(b) would permit a qualifying period before an employee is entitled to sick leave and/or permit a waiting period of a number of days away before an employee can be paid sick days.

We reject this option. We do not support a qualifying period before an employee is entitled to paid sick leave or other limitations on access. Paid sick leave is a public health issue and work policy that should be available to employees when they get sick, not after a qualifying period. Those who this Review strives most to protect (vulnerable workers in precarious employment) would be the least likely to qualify due to shorter job tenures.

Option 2(c) would require employers to pay for doctor's notes if they require them.

We reject this option. While we support shifting the cost burden to employers for fees associated with medical reports, it implicitly accepts the idea that employers should be able to require doctor's notes. The Advisors note that the Ontario Medical Association encourages employers not to require medical notes because of the public health risks.

Shifting the costs of obtaining doctor's notes to employers does not address other costs to the health care system, such as the many workers who rely on walk-in clinics, community health centres, and emergency rooms for their primary health care.

We recommend that Section 50(7) of the ESA be repealed and that the ESA prohibit employers from requiring evidence to entitle workers to paid sick days.

5.3.6 Other Leaves of Absence

BACKGROUND

As the Advisors note, Ontario's job-protected leaves are connected to federal income supports programs. And like other provinces, Ontario implements job-protected leaves as the federal government introduces new programs. The Advisors have put forward options to continue this process under the ESA and introduce two new leaves to address domestic and sexual violence, and the death of a child.

REVIEW OF ADVISORS' OPTIONS:

Option 1 would maintain the status quo.

We reject this option.

Option 2 would ensure that Ontario continues to monitor other jurisdictions and the federal government's approach to leaves and make changes as appropriate. This would require Ontario's ESA to be amended as new leave programs are implemented in other jurisdictions, to provide job-protected leave for Ontario employees.

We support this option. Job-protected leave provisions are necessary for non-unionized workers in low-wage and precarious work to access leaves. Without job-protected leave protection, it is those with the least bargaining power in the workplace that will be denied access to such leaves.

Option 3 puts forward three new leaves for consideration.

Option 3(a) would introduce paid Domestic or Sexual Violence Leave for a number of days followed by a period of unpaid leave.

We support this option. Implementing this option would further the government's goals as set out in the Action Plan to Stop Sexual Violence and Harassment. This leave protection will help provide the support that women need to escape abusive situations. Job-protected leave will help reduce barriers faced by survivors of sexual and domestic violence.

Option 3(b) would provide the same leave as 3(a) but without pay.

We reject this option.

Option 3(c) would extend the Death of a Child Leave to enable employees who are dealing with the death of a child that is not a result of a crime.

We support this leave option.

Option 4 suggests reviewing ESA leave provisions to consolidate some of the leaves.

We reject this option as it will likely result in the provision of lesser leaves through consolidation. It is ironic that business is seeking this review of leaves to consolidate them, while also seeking to break apart the current consolidated personal emergency leave into separate leaves.

5.3.7 Part-time and Temporary Work – Wages and Benefits

BACKGROUND

The Advisors confirm that Ontario employers commonly pay part-time workers less than comparable full-time workers without equitable access to benefits. Similarly, workers are often kept in fixed and limited term contracts to justify lower wages and lack of benefits. We would add that contract work also limits access to other ESA entitlements such as severance and termination provisions.

At the same time, the Advisors note that it is women, recent immigrants, and minimum wage earners who are over-represented in part-time work. Over the past 15 years, temporary and part-time work job growth has outpaced that of permanent jobs, leaving part-time and temporary workers with lower wages and less access to benefits.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Require that part-time, temporary, contract, and casual employees receive treatment in pay, benefits, and working conditions equal to that of full-time employees 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.
- ✓ For fixed term contract workers, the number and total duration of contracts should be capped. We recommend a one-year cap on term of contract, after which appropriate termination and severance provisions apply. The goal should be conversion of contracted employees to permanent employees where the position is not truly temporary. Just cause protection must be provided to contract workers if, at the end of a contract, another worker is hired to do the work previously done by the temporary contract worker.

REVIEW OF ADVISORS' OPTIONS:

The Advisors draw from other jurisdictions to provide options to address the inequality in pay and benefits and to limit fixed term contracts.

Option 1 is to maintain the status quo.

We reject this option as the ESA has a role in establishing a framework for equality among workers doing comparable work. Further, maintaining the status quo under the ESA would maintain the legislative infrastructure to increase precarious work and inequality in employment income and stability, which targets those in the most vulnerable labour market situations.

Option 2 would require that part-time, temporary, and casual employees be paid the same as full-time employees in the same establishment unless differences in qualifications, skills, seniority, or experience or other objective factors justify the difference.

We support this option with additional provisions.

As stated above, we support a statutory requirement for equal pay *and working conditions*. In the European Union, where such provisions are standard, the requirement for equal working conditions generally encompasses hourly wages, various leaves, sick pay, pension benefits, transfer possibilities, and other matters. We recommend that there be a requirement for equal pay and working conditions.

The requirement for equal pay and working conditions for workers doing similar work on a full-time basis requires a comparator. In some small businesses or establishments, there may not be a similar full-time comparator. Some employers may construct the part-time, temporary, or casual work in such a way as to avoid compliance with the equal pay and working conditions requirement. To address this issue, there should be provisions to determine that, where there is no comparable position in the establishment, similar work should be determined by appropriate collective agreement or by similar work for that occupation or sector.

Option 3 contemplates requiring employers to provide benefits to part-time, temporary, and casual employees in establishments where they are provided to other workers. As the Advisors note, employers are at least twice as likely to offer extended health, dental, insurance, and pension benefits to full-time permanent employees as to part-time and temporary employees.

We support this step. Employers should no longer be able to discriminate against certain groups of workers by only providing benefits to some workers and not others based on employment status or hours worked.

The Advisors state that benefits would be provided on a pro rata basis and that thresholds may be established for entitlements where such pro rata treatment is not feasible.

Pro-rated benefits do not amount to equivalent benefits, which are benefits equal in value and function. This will undoubtedly require private benefit carriers to adapt to new benefit requirements. Similarly, any contemplation of establishing thresholds must be based on the principle of equal treatment, not on private insurance carriers' current practices. For example, many private benefit carriers set thresholds of 20 to 24 hours per week, which may exclude many workers. Carriers would have to adapt to new provincial standards. Any threshold must be sufficiently low to avoid encouraging employers to reduce part-time workers' hours, thereby circumventing compliance with the benefit provision. Below the threshold, benefits should be provided on a pro rata basis.

Option 4 contemplates limiting equal pay and benefits to lower-wage employees, as is the case in Quebec, where it is limited to those earning less than twice the minimum wage.

We reject this option. A wage-based threshold is not consistent either with the purpose of the ESA to establish minimum standards for all workers or with the International Labour Organization's principles of decent work that include equal pay for equal work without distinction. A wage-based

threshold would encourage and enable employers to create temporary, part-time, and casual jobs to reduce wages and benefits for those earning above the threshold.

Option 5 would limit the number or total duration of limited term contracts.

We support this option with some amendments.

Option 5 seeks to address the use of fixed and limited term contracts to justify lower wages and lack of benefits. We recommend a one-year cap on term of contract, after which appropriate termination and severance provisions apply. To be effective, however, further measures are required to avoid unintended consequences of turnover from contract to contract to avoid service-based entitlements. We recommend that, in addition to limiting the number of successive contracts and duration of contracts, just cause protection should be provided to contract workers. Employers would have to provide just cause if, at the end of a contract, another worker is hired to do the work previously done by the contract worker.

5.3.8 Termination, Severance, and Just Cause

5.3.8.1 Termination of Employment

BACKGROUND

The requirement that employers provide notice or pay in lieu of notice recognizes that employees need time to look for new employment. One out of ten workers are exempt from termination notice or pay because they have worked less than three months, are construction workers with occupational exemptions, or are seasonal workers who have breaks in employment longer than 13 weeks. Research done for the CWR estimated that those workers excluded from termination may lose out on a median amount of \$3,200 in termination pay or its working time notice.³⁶

In the discussion of termination of employment, the Advisors rightly acknowledge that common law protections from wrongful dismissal are out of reach for most workers, due to the costs and delays of suing employers for wrongful dismissal. The result is that many workers rely on ESA termination entitlements, even though these entitlements are often substantially less than what is available under common law.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Eliminate the three-month eligibility requirement for termination notice or pay in lieu of notice.
- ✓ Require employers to provide notice of termination, or pay in lieu of notice, based on the total length of employment, including seasonal employees who have recurring periods of layoff beyond the 13-week layoff period.

REVIEW OF ADVISORS' OPTIONS:

The Advisors put forward a number of options to improve access to termination and notice entitlements.

Option 1 provides for maintaining the status quo.

We reject this option as there are a number of steps that should be made to improve access to termination entitlements and update termination provisions.

Option 2 raises the possibility of either increasing or decreasing the eight-week cap on notice or pay in lieu of notice for termination. Ontario has a stepped system that requires employers to provide one week of notice for every year worked up to a maximum of eight weeks of notice or pay for eight years worked.

We recommend that the cap not be lowered. The only bar for most employers on terminating employees under the ESA is to provide notice (or pay in lieu) that the employer is intending to do so. Reducing notice requirements would reduce employees' entitlements, making it harder to make arrangements for job loss and seeking new employment. We support increasing the caps to bring them in line with severance provisions.

Option 3 suggests eliminating the three-month eligibility requirement that employees must meet to be eligible for termination notice.

We support this option. Given that the growth in temporary employment outpaces that of permanent employment (45 percent versus 18 percent respectively), those 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 (or pay in lieu) to prepare for job loss and look for new employment. Such a move would ensure that all workers employed for less than a year would be entitled to one week notice of termination (or pay in lieu).

Option 4 would require employers to provide notice of termination based on the total length of employment, including employees with recurring periods of employment.

We support this option. Fixed-term contracts and seasonal employees would have their previous years' employment with the same employer counted for the purposes of determining their eligibility for termination pay as is the case for severance pay.

Many agricultural workers under the Seasonal Agricultural Workers' Program return year after year to work for the same employer, often for contracts of six to eight months. Enabling such workers to accumulate such terms of employment for the purposes of termination notice (or pay in lieu) would finally recognize this important sector of our labour market.

Option 5 contemplates requiring employees to provide notice of their termination of employment to employers.

We reject this option. Workers do not leave their employment lightly, given the costs they bear for doing so. For those workers who are made vulnerable by their work, being able to terminate their employment is often the only power they have to address egregious employment. In precarious work situations, workers would likely be unable to work out their notice periods and would suffer an economic loss in wages.

5.3.8.2 Severance Pay

BACKGROUND

Severance pay compensates an employee for their investment of service and loss of employment when the employment relationship is ended by the employer. Employers are required to pay one week's pay for every year of service up to a maximum of 26 weeks.

Over three million Ontario employees (just over 60 percent) are exempt from the ESA's severance pay provisions.³⁷ While fixed-term contract and seasonal employees may be able to include previous periods of employment with the same employer to calculate severance pay entitlements, other requirements of the provision or exemptions likely exclude them.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Make severance pay accessible to all workers by eliminating the employment, payroll, and firm size thresholds for severance pay (e.g., 5-year employment service requirement, 50-employee firm size and \$2.5 million employer payroll threshold)

REVIEW OF ADVISORS' OPTIONS:

The Advisors put forward a number of options to improve access to severance and improve entitlements.

Option 1 provides for maintaining the status quo.

We reject this option as access to severance pay is denied to the majority of Ontario workers. Our recommendations below are intended to make this basic entitlement available to all workers.

Option 2 would reduce or eliminate the 50-employee threshold to severance pay. We recommend eliminating the 50-employee threshold.

With 95 percent of businesses employing 49 or less employees, the removal of this threshold would reduce the barriers to severance pay to the 1.7 million workers that are employed by these companies.³⁸ Employees of small firms are more likely to be precariously employed and therefore removing this firm size would reduce precariousness.³⁹

Option 3 would reduce or eliminate the payroll threshold.

We recommend eliminating the payroll threshold.

Option 4 would reduce or eliminate the five-year condition for entitlement to severance pay.

We recommend eliminating the five-year condition. Job tenure has been on the decline since the 1980s.⁴⁰ Further, short-tenure workers are more likely to be precariously employed in low-wage, temporary, part-time, or contract jobs.⁴¹ Removing the job-tenure requirement will reduce precariousness.

Option 5 would increase or eliminate the 26-week cap.

We recommend eliminating the cap on severance pay entitlements. Common law has no cap on years of service considered in wrongful dismissal situations and neither should severance pay.

Option 6 contemplates updating the \$2.5 million payroll threshold to be calculated on the basis of payroll inside and outside Ontario, as the recent *Paquette v Quadraspec Inc.* case has established.

In the event that the \$2.5 million payroll threshold is not removed, we would support bringing Ministry of Labour practice in line with this recent decision.

5.3.8.3 Just Cause

BACKGROUND

Currently in Ontario, an employer can dismiss non-unionized workers for any reason (with some limitations).⁴² Workers can pursue protection from unjust dismissal through common law; however, this access to justice is typically only for higher income workers. Moderate and low-income workers cannot afford the legal representation that is necessary in order to sue their employers for wrongful dismissal.

Establishing unjust dismissal protection under the ESA would, as the Advisors correctly note, prevent arbitrary and unfair terminations; enhance job security; avoid the negative impacts on workers who have been summarily dismissed; and provide the possibility of reinstatement ("make whole" remedy). Such a statutory provision in the ESA would provide a remedial process accessible to all workers.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Require employers to have "just cause" for terminating an employee's employment to protect workers from unjust dismissal.
- ✓ Implement an expedited adjudication process for Temporary Foreign Workers who have been unjustly dismissed.

REVIEW OF ADVISORS' OPTIONS:

The Advisors have put forward options to provide just cause protection for temporary foreign workers in particular and all workers in general.

Option 1 would maintain the status quo.

We reject this option.

Option 2 would enact just cause protection for workers under the Temporary Foreign Worker Program (TFWP) and would provide an expedited adjudication process to hear unjust dismissal cases.

We support this option. There are key elements in the TFWP that structure and constrain workers, which must be addressed by specific strategies. Protection from unjust dismissal is one of those strategies.

Under the TFWP, workers are tied to one employer and face huge barriers securing employment when dismissal takes place. Those hired on a seasonal basis face immediate deportation / "repatriation" back to their home countries when unjustly dismissed, injured on the job, or fired for attempting to enforce their rights. Protection against unjust dismissal with an expedited adjudication process would provide a general deterrence effect and encourage employers to adopt progressive disciplinary measures, while providing individual migrant workers with essential protections against reprisals and unfair termination. We further recommend that the ESA should explicitly prohibit an employer from forcing "repatriation" on an employee who has filed an ESA complaint.

Option 3 would provide just cause protection and adjudication for all employers covered by the ESA.

We support this option. Just cause protection under the ESA would address the long-standing gap in labour law and common law that leaves non-unionized, moderate and low-income workers without access to protection from unfair and arbitrary termination. An effective program for protecting workers from wrongful dismissal will have a general deterrence effect for all employers. As Arthurs notes in his review of the *Federal Labour Code*, jurisprudence has been developed under the *Federal Labour Code*, providing principles of progressive discipline for employers to follow to avoid wrongfully dismissing employees.⁴³

5.3.9 Temporary Help Agencies

BACKGROUND

The Advisors gave considerable space in their Interim Report to the issue of employment through temporary help agencies (THA). They recognize that the triangular relationship between workers,

client companies, and THAs make workers' legal status complex. The Advisors note that while "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."⁴⁴ They have rightly recognized that while "Ontario made legislative changes in 2009 to regulate temporary help agencies, many important issues and problems remain."⁴⁵

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Make the client company the employer of record for all employment standards. In the alternative, make both the client company and temporary help agency joint employers for all employment standards.
- ✓ Require employers to provide equal pay and working conditions to an assignment worker who performs substantially similar work to workers directly employed by the 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.
- ✓ The government should move immediately to use the regulation-making authority it has to require the WSIB to assign injuries and accident costs to client companies rather than THAs.

REVIEW OF ADVISORS' OPTIONS:

The Advisors have set out numerous options to further regulate temporary agency work.

Option 1 would maintain the status quo as requested by the Association of Canadian Search, Employment and Staffing Services.

We reject this option.

Option 2 seeks to expand client responsibility for workers hired indirectly through THAs. This direction recognizes that for workers hired through temp agencies, the day-to-day reality of their work is controlled by the client company: what they do, when they work, how they work, supervision, hiring and firing, health and safety protection, etc. Only since 2009 has the ESA established the temporary help agency as the employer of record for the worker rather than the client company (prior to that it was Ministry policy). Under the *Labour Relations Act*, temp agency workers have not been treated as employees of the THA. When disputes arise, the OLRB determines who the employer is on the basis of the particular facts.

Option 2(a) would expand joint and several liability to clients for all violations.

Option 2(b) would make the client the employer of record for some or all employment standards or make both the client and THA joint employers.

We recommend that Option 2(b) be enacted to make the client company the employer of record. We recommend that the 2009 legislative recognition of THAs as the employer be revoked, client companies be deemed the employer, and THAs be regulated as recruitment agencies. The Advisors ask whether the employer client company should be the employer for some or all employment

standards. We recommend that the client be the employer of record for **all** employment standards. In the alternative, we recommend that the agency and client company be joint employers as is the case under the *American Fair Labour Standards Act*.

Regulating THAs, even within a framework of protecting agency workers from abuse, as Ontario sought to do in 2009 and 2014, has served to legitimize the THA business model. Temporary help agencies recruit workers for client companies. When recruitment is for permanent hire, the agency charges a fee for this “head hunting” service. When recruitment is for temporary assignments in which the agency provides additional payroll services, the industry has been successful in constructing this role as employer. In this case, a service provided to the client company is the ability to shift liability for employer responsibilities from the company to the agency. This creates economic incentives for companies to hire workers indirectly through agencies. As we have experienced, the result of this practice for temporary agency workers is lower pay, no benefits, job and income instability, increased health and safety risks, and barriers to permanent employment. We do not believe that the ESA should provide the legislative architecture to enable employers to evade compliance by shifting employer liabilities and lowering wages and working conditions.

Option 3(a) would require the employer to provide the same pay to an assignment worker who performs substantially similar work to workers directly employed by the client company, unless:

- i. there are objective factors which independently justify the differential; or
- ii. the agency pays the worker in between assignments as in the EU; or
- iii. there is a collective agreement exception, as in the EU; or
- iv. the different treatment is for a limited period of time, as in the UK (for example, three months).

We recommend that 3(a) be modified and enacted with a purpose clause as explained below.

Employers should be required to provide equal pay *and working conditions* to an assignment worker who performs substantially similar work to workers directly employed by the company.

We believe that this step will help address the often substantial pay gap suffered by those hired indirectly through THAs. However, we believe that, like the provisions in the European Union, we need to require equal treatment and equal pay. The principle of equal treatment includes not only equal pay but also equal working conditions – that is, the basic company guidelines relating to working conditions. This is important as temporary agency workers often face a greater exposure to physical risks, intensity of work, and different work conditions (for example, hours of work and overtime). As such, the working conditions that apply to the temporary agency worker would be those that apply to a comparable employee at the same company.

As the Advisors note in their review of the European Union, where most member states require equal pay and treatment of temporary agency workers and comparable employees of the client agency,

this provision is subject to abuse. As such, we recommend a purpose clause to assist adjudicative bodies to ensure that the principles of equal pay and working conditions are adhered to.

3(a) i. suggests that exemptions to the equal pay and working conditions requirement be subject to objective factors which independently justify the differential. The requirement for equal pay and working conditions for assignment workers doing similar work as directly hired employees requires a comparator. In some establishments, there may not be a similar comparator. Some employers may construct work in such a way as to avoid compliance with the equal pay and working conditions requirement.

To address this issue, there should be provisions to determine 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.

3(a) ii. would provide an exemption from equal pay and working conditions if the agency pays the worker in between assignments as is the case in some countries in the EU. Five countries permit unequal treatment in pay when temporary agency workers have a permanent contract with the temporary agency worker and are paid at least minimum wage between assignments.

We reject this option. It would be a derogation from equal treatment. Enabling some agencies to opt out of the equal pay and treatment requirement by paying minimum wage between assignments permits employers to evade this requirement and would reduce temporary agency workers' wages.

3(a) iii. would allow employers to deviate from or reduce the equal pay requirement where there is a collective agreement exception.

We reject this option.

3(a) iv. would exempt employers from the equal pay and working conditions requirement for a limited period of time, as in the UK (for example, three months).

We reject this option. As the Interim Report observes, the "principle of equal treatment has been rendered moot" when collective agreements deviate from equal treatment of agency workers and the principles of equal treatment and pay are not applied from the first day of the agency worker's assignment.

New WAC recommendation - WSIB and assignment workers

The Advisors discuss the issue of Workplace Safety and Insurance Board (WSIB) premiums and temporary agency work but do not bring forward options for review.

We recommend that regulation require the WSIB to assign injuries and accident costs to client companies rather than THAs.

In 2014, the government proposed making the client company more responsible for the injuries and accidents faced by assignment workers under the *Stronger Workplaces for a Stronger Economy Act* (Bill 18). This would be done through changes to WSIB premiums. Employers generally pay WSIB premiums based on experience rating – higher or lower premiums are based on an employer's accident record. In the case of assignment workers, it is the agency that is deemed the employer and pays WSIB premiums. These premiums are generally lower than those of the client.

Assignment workers' injuries occur at the client company, under the control of the client company. Yet the client company does not face the consequences of injuries and accidents involving assignment workers, as the experience rating premium costs are born by the agency not the company. In effect, this creates economic incentives for clients to use assignment workers for more dangerous work. Further, we believe that this shifting of employer liabilities for WSIB premiums is one of the services that agencies provide to its clients, and is allowed by the current statutes.

Bill 18 would have amended the WSIB to assign injuries and accident costs to the client companies where injuries and accidents take place, rather than to the THA. Both THAs and companies opposed this amendment. During the committee review of the proposed Bill, the government removed this amendment and instead gave the government the authority to make regulations on this issue, which the government has not done. Making the client company the employer of record would, of course, make this moot. However, if that does not happen, we recommend that the government move immediately to use the regulation-making authority to require the WSIB to assign injuries and accident costs to client companies rather than THAs.

Option 4 addresses the mark-up fee; that is, the difference between what the client company pays for the assignment worker and the wage the agency pays the assignment worker.

We support this option. We believe the best strategy is to require equal pay and treatment between direct and indirectly hired workers (through THAs). In the alternative, we recommend that the ESA require that THAs be required to disclose the mark-up fee to the assignment worker.

Option 5 seeks to reduce barriers to client companies directly hiring employees. Currently the ESA enables THAs to charge fees to clients for directly hiring assignment employees during the first six months of employment at the client company.

Option 5(a) would reduce that period from six months to three months.

We reject this option. It still limits the labour mobility of temporary agency workers.

Option 5(b) would repeal this provision and eliminate THAs' ability to charge any fee to clients for directly hiring workers.

We support this option. By removing the penalty on employers for directly hiring workers, this amendment will reduce precariousness among temp agency workers.

Option 6 would introduce limits on how much clients can use assignment workers. The option would establish a cap of 20 percent on the proportion of client's workforce that can be agency workers. We recommend that a 20 percent cap be introduced.

We support this option. As we discussed above, the best option is to make client companies the employer. If that recommendation is not implemented, it is important to set caps on the degree to which employers can shift their employer liabilities to agencies and create precarious work conditions. In our experience, some employers use assignment workers to staff the entire night shift or to do the worst jobs in the company. The employment services sector is growing quickly in Ontario, contributing to precarious work. Given the government's objective to address precarious work and better protect people made vulnerable through practices such as the THA model, it is appropriate for the ESA to set limits on such practices.

Option 7 seeks to promote the assignment worker's transition from indirect to direct employment with the client. While the ESA currently enables client companies to assign work from THAs on a **temporary basis**, the act fails to limit the duration of assignment, thereby leaving the *Act* open to abuse. Option 7 provides three strategies.

Option 7(a) would establish limits or caps on the length of time an assignment worker could be assigned to one particular client.

We reject this option. We are concerned that such a strategy would have the unintended consequences of workers being removed prior to the end of assignment and replaced with another agency worker, which could hurt the worker and fail to correct the problem.

We support options (b) and (c), which would work to promote transition to direct employment.

Option 7(b) would deem assignment workers to be permanent employees of the client after a set amount of time.

We support this option and would recommend six months and just cause protection. To be effective, measures are required to avoid unintended consequences (see discussion of Option 7(a)). We recommend that, in addition to establishing a conversion requirement after six months, just cause protection should be provided to assignment workers. Employers would have to provide just cause if, at the end of the assignment period, another worker is hired to do the work previously done by the assignment worker.

Option 7(c) would require assignment workers to be notified of all permanent jobs in the client's operation and be advised as to how to apply.

We support this option. Again, for this to be effective, the *Act* should mandate the employer to give due consideration to applications from these workers by the client.

Together, these steps would ensure that temporary assignments are indeed temporary. Such steps would not prevent employers from filling positions made vacant by workers accessing leave

provisions under the ESA. Rather employers can, as many do, hire workers directly on a term basis to fill positions made vacant during maternity and parental leaves.

Option 8 would expand termination and severance provisions to individual assignments for workers hired indirectly through THAs. Option 8(a) would require agencies to pay termination and/or severance pay based on individual assignment length. 8(b) would require client companies to pay termination and/or severance after the assignment is terminated.

We support Option 8(b). While the best solution for workers hired from agencies would be to make the client company the employer, as discussed above, we support 8(b), requiring clients to compensate assignment workers for termination and/or severance pay (as owed) based on the length of assignment with the client.

Clearly, the ESA's current provisions, which assign termination and severance obligations to the agency (with some modifications), create a cost incentive for clients to hire employees indirectly through agencies to avoid liability for termination and severance of assignment employees. Assignment workers should continue to be eligible for separate termination and severance if their relationship with the agency is terminated.

Option 9 considers licensing of THAs and a possible statutory code of conduct for THAs.

We reject this option.

On the first issue of licensing, we are not convinced of the efficacy of this measure. In the past, agencies were required to obtain a license to operate from the Ministry of Labour. It is unclear to what degree an agency's ability to get licensed was limited by evidence of employment standards violations. We do know that there are little capital costs in setting up and operating agencies. Increasingly, agencies operate through the internet and do not necessarily require much infrastructure. Therefore, owners easily shut down operations under one name and reopen under another. Even with respect to larger agencies that might be impacted by licensing, the ability to use licensing for employment standards enforcement depends on detection of violations through individual claims. As we know, assignment workers are in a more vulnerable position and least likely to make claims. The ability to use licensing to enforce employment standards is very limited.

Similarly, enacting a code of ethics for agencies through the ESA, as mentioned in Option 9, will not address the root problems of the THA model enabling employers to shift employer liabilities, and lower wages and working conditions. The Association of Canadian Staffing and Employment Search Services, which represents agencies, has a (voluntary) code of conduct for its members. We have not witnessed any noticeable benefits from such a voluntary code of conduct.

5.4 Other Standards and Requirements

5.4.1 Greater Right or Benefit

BACKGROUND

Employers and employees cannot agree to opt out of any provision of the ESA – that is, agree to not comply with an ESA standard. Any such agreement or contract would be null and void.

The ESA does say that if the employer provides a greater benefit, for example three weeks of paid vacation rather than the ESA two-week minimum vacation entitlement, the three-week vacation – the greater benefit – would then apply. In such a case, if the employer did not provide the greater benefit, the three weeks paid vacation, the employee could then file an employment standards claim for the outstanding vacation pay owing.

The *Act* is very clear, however, that a greater benefit has to be the same standard. An employer cannot rely on a greater benefit with respect to one standard to offset a lesser benefit with respect to another.

The Advisors report that, during the consultations, some employers requested that collective agreements or employer policies, taken as a whole, be assessed to determine whether the contract provides greater rights or benefits than the ESA standard, taken as a whole. The ESA prohibits this.

During the consultations, some large employers requested the ability to opt out of the ESA Personal Emergency Leave provisions because the employers provide one or more benefits they believe may be more generous than PEL, even if the benefits do not cover all the specific leave provisions of PEL (e.g., do not cover the same family members or reasons for taking unpaid emergency leave). The ESA prohibits this.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Maintain the status quo; prohibit any contracting out of the ESA.

REVIEW OF ADVISORS' OPTIONS:

The Advisors have provided options that maintain the current provisions or allow employers to contract out of the ESA.

Option 1 would maintain the status quo.

We support this option. We support maintaining the current prohibition on contracting out of the ESA and provisions for a greater right or benefit.

It is important for employers to bring their practices in compliance with employment standards so that all workers have access to basic minimum standards. Employers should not be able to choose to provide some standards and not others.

Employers can have their firm-based paid leave benefits recognized if they provide the benefits under the terms and scope of PEL (i.e., not restrict how the leave can be used), which would constitute a greater benefit under the *Act*.

Option 2 would allow employers to contract or opt out of the ESA based on a comparison of all the minimum standards with the full terms and conditions of employment, in order to determine whether the employer has met the overall objectives of the *Act* to contract out of the ESA based on a comparison of standards.

We reject this option.

Allowing an employer to provide a greater benefit to one standard, in order to opt out of compliance of another standard, would deprive workers of the benefits of some standards. Workers have different needs and circumstances. Allowing employers to opt out of some standards on a firm basis erodes the minimum floor of standards.

In the example of Personal Emergency Leave, if an employer provided five paid sick days and three days of paid bereavement leave as a bundle of greater benefits, and did not comply with the provision of ten days of unpaid job-protected personal emergency leave as a lesser benefit, it would not be comparable. Paid sick days provided by the employer may be restricted to the worker, her or his partner, and their children. They may be restricted to illness and not medical appointments. Whereas, under PEL the leave can be used by a worker for their own personal illness, injury, and medical emergency or for the death, illness, injury, medical emergency, or urgent matter concerning the worker's family (defined as: spouse; parent, step-parent or foster child of the employee or their spouse; grandparent; brother or sister; spouse of the employee's child; and a relative of the employee who is dependent on the employee for care or assistance). The employer's paid leaves are not comparable or better than PEL for all workers.

5.4.2 Written Agreements between Employers and Employees to Have Alternate Standards Apply

BACKGROUND

Agreements may be made between employers and employees to alter a standard. In some cases, this involves how a standard is administered (for example, how and where wages can be paid). In

other cases, it may, in our experience, reduce the standard that is available at individual companies (for example, agreements to work beyond the maximum workweek or average overtime over two or more weeks). We have addressed these issues above.

In this section of the Interim Report, the Advisors are mainly seeking feedback on how the *Act* should stipulate that agreements are done (i.e., in writing and/or electronic agreements). Unfortunately, the Interim Report does not detail how electronic agreements are made or how workers confirm their informed and voluntary consent to an agreement to alter minimum standards.

REVIEW OF ADVISORS' OPTIONS

Option 1 would maintain the status quo. In this case, it is Ministry of Labour policy that agreements be documented and electronic agreements as "agreements in writing" are accepted.

We cannot comment on these options pending further information about how and what electronic agreements are and how they further the principle of informed and voluntary consent.

On a more general basis, for the vast majority of non-unionized workers, agreements to lower or alter standards are rarely signed voluntarily. Workers often sign agreements as a condition of getting the job. Or, if they have been on the job, workers sign agreements because they are afraid of losing their job if they refuse. As we recommended in the Hours of Work section, we believe that agreements to reduce employment standards (e.g., limits to hours of work; rest periods; overtime averaging; requirement to work on a public holiday and vacation pay) be revoked.

Option 2 would amend the ESA to reflect government policy that electronic agreements can constitute an agreement in writing.

We cannot comment. See response to Option 1.

Option 3 would remove some or all of the requirements to have written agreements (i.e., electronic agreements would replace the requirement for written agreements).

We reject this option. We do not support the removal of the requirement for written agreements as per the discussion above.

5.4.3 Pay Periods

BACKGROUND

The Ministry of Labour is seeking changes to ESA requirements on pay periods to assist with enforcement of the *Act*.

We have no recommendations on this issue.

Option 1 would maintain the status quo.

Option 2 would require employers to harmonize their pay periods with their workweeks.

Option 3 would extend the special rule that applies to the automobile sales sector to other sectors where wages are earned by commission.

5.5 Enforcement and Administration

The Advisors conclude that there is a serious problem with ESA enforcement, as too many people in too many workplaces do not receive their basic rights.

Attaining a culture of compliance with the ESA in all workplaces is a fundamental goal guiding the Changing Workplaces Review. By this the Advisors mean:

- Employers would be aware of their legal responsibilities;
- Workers would know their rights and feel safe in asserting them;
- The ESA would be easy to access and administer;
- It would be legally impermissible and socially unacceptable to not provide workers with the minimum requirements that the law demands;
- There would be a strong element of deterrence in the system; and,
- For those flouting the law, there would be significant administrative monetary penalties.

In meeting these goals, the Advisors consider a range of strategies, including:

- Education and awareness
- Reducing barriers to making claims for unpaid wages
- Improving access to justice
- Greater deterrence for employers who do not comply
- More effective collection of monies owing to workers
- Strategic enforcement that addresses precarious work and limited government resources

The Advisors state that they seek to make a strategic shift to enforcement that can address the fundamental changes in the workplace. We will review the options presented by the Advisors through the lens of strategic enforcement.

5.5.2 Education and Awareness Programs

BACKGROUND

The Ministry of Labour provides education and outreach programs for employers and employees. The Advisors conclude that the *Act* could be simplified; new and better ways could be found to increase awareness, knowledge, and understanding; and they are seeking recommendations to achieve this.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Simplify the ESA by reviewing and eliminating exemptions and special rules that reduce employment standards (see Section 5.2.3).
- ✓ Require mandatory ESA training for all newly registered business owners and managers.
- ✓ Make ESA education part of the provincial high school curriculum.

5.5.3 Creating a Culture of Compliance

BACKGROUND

The Advisors seek to create a “culture of compliance” with the ESA by establishing an Internal Responsibility System (IRS). The Advisors suggest the IRS will achieve “greater awareness of rights and obligations directly in the workplace itself by making employers and employees responsible for compliance.”

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ 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. These themes will be discussed throughout the enforcement section.

REVIEW OF ADVISORS' OPTIONS:

The Advisors provide options to introduce joint employer-employee committees in non-unionized workplaces responsible for “increasing awareness and compliance,” similar to the Internal Responsibility System (IRS) established under the *Occupational Health and Safety Act* (OHSA).

Option 1 would expand the current Joint Health and Safety Committee⁴⁶ to give it authority to deal with ESA matters or have other committees/representatives appointed in the workplace to deal with ESA compliance. The obligations of the employer would be:

- to conduct a simplified self-audit developed and prescribed by the Ministry to check for compliance with the ESA; and
- to meet with the committee/representative and review the employer's compliance audit.

The employer might be required to send a copy of the compliance audit and confirmation of the meeting with the committee/representative to the Ministry.

Two possible models for ESA committees are set out as follows:

- 1) Basic Model – The basic requirement would be for the employer to conduct a compliance audit and for the committee to “receive and review” the employer's audit. The basic model would allow the committee or representative to request that the employer address any ESA complaints but the committee/representative would have no ongoing duty to monitor compliance or investigate any alleged violations.
- 2) Enhanced Model – In addition to the requirement to review the compliance audit with the employer, the committee/representative would have an ongoing responsibility to promote awareness of, and compliance with, the ESA.

We reject Option 1.

We oppose this option as it would shift government and employer responsibility for enforcing and complying with the ESA on to non-unionized workers who have the least power. Our reasons are as follows:

- One of the guiding principles of this review is the recognition of the “inherent power imbalance and inequality of bargaining power between employer and employee ... This power imbalance manifests itself in almost every aspect of the employment relationship, particularly in a non-union environment.” The IRS does not address or provide non-unionized workers with any protection from this power imbalance. Further, we would be concerned that such a model, with workers selected by employers, could be used to further non-compliance by seeking agreement of representatives/committees to contract out of ESA provisions or make firm-based agreements to reduce access to overtime and hours of work protections through averaging and hours of work agreements.
- The Ministry of Labour currently has the power to require employers to conduct self-audits and submit the results of the audit to the Ministry with evidence of steps taken to bring the company into compliance with the ESA. The government introduced these new powers through the *Stronger Workplaces for Stronger Economies Act* (2014) but does not appear to have implemented the self-audit program. Option 1 could be a form of employer self-audit that shifts the reporting from the Ministry to employees and extends the requirement to all employers. Unfortunately, this option relies on the employer voluntarily complying with the requirement to conduct a self-audit and report to employees who have no power to do anything about ESA violations.

- It is wrong to assume that the incentives for employers to comply with the OHSA and the ESA are the same. Under the *Ontario's Workers' Safety and Insurance Act*, employers have an economic incentive to reduce workplace injuries and illness because they are tied to the premiums they pay. The greater the rate of injury and illness, the greater the premiums paid. ESA non-compliance does not bear the same cost or consequences as health and safety violations. There is little risk of detection of violations, and little cost or legal consequence for ESA violations.
- This option is premised on the notion that the IRS model under the OHSA is effective in non-unionized workplaces. As advocates for non-unionized workers, it is our experience that non-unionized workers have little power to effectively participate in health and safety committees or even report accidents without fear of repercussions. A study on Employee Voice and Representation conducted for the CWR would seem to confirm this. It cites a study of the construction industry injury claims data, which found that, between 2006 and 2012, unionized workers reported 23 percent fewer injuries than non-unionized workers. He concludes that "unless workers have some form of representational support *inside* the workplace ... they will generally lack the knowledge, personal leverage and market resources to ensure that their rights are not being infringed upon, even in a legal regime that is protective of workers' interests."⁴⁷ That is, those with union representation were better able to exercise health and safety protections than those without.
- We are concerned that downloading Ministry of Labour enforcement onto employees in workplace committees may produce the unintended consequence of the Ministry shifting resources onto individual claims and away from more systemic and proactive enforcement activities.

Option 2 would require employers to conduct an annual self-audit on select standards and the results of the audit would be shared with all employees. Rather than a full audit of all ESA requirements, this option would only involve one to three standards that the Ministry of Labour would select for audit each year.

We reject this option. We have concerns about the efficacy of requiring employers to conduct annual self-audits in compliance with the ESA. We doubt employers operating in violation of the ESA would conduct such self-audits and there is no mechanism for the Ministry of Labour to be advised of such a failure to audit. Even if employers are required to provide employees with the self-audit, workers would need a robust model of anonymous and third party complaints (discussed further below), effective anti-reprisal protection, and protection against unjust dismissal to be able to take any action.

5.5.4 Reducing Barriers to Making Claims

5.5.4.1 Initiating the Claim

BACKGROUND

ESA enforcement relies largely on individual workers to enforce their own statutory rights by reporting ESA violations through individual claims filed at the Ministry of Labour. Unionized workers must enforce their ESA rights through the grievance and arbitration process.

A worker must first attempt to resolve the ESA violation with the employer prior to filing a claim at the Ministry; there are some exceptions to this rule. There is no process for individuals to file complaints anonymously. Nor can unions or other third parties file claims anonymously for an individual worker or a group of workers.

The majority (91 percent) of claims are filed by former employees after their work has been terminated due to workers' widespread fear of reprisals if they complain about violation of their ESA rights while on the job.⁴⁸ The number of claims filed at the Ministry of Labour has declined from 22,620 in 2006-07 to 14,872 in 2014-15. Research conducted for the CWR concludes that the significant decline in the number of claims filed relates to the introduction of the "self-help" provision introduced through the *Open for Business Act* (OBA) in 2010.⁴⁹

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Remove the ESA provision that allows the Ministry of Labour to require a worker to first attempt to resolve the violations with their employer (self-help provision).
- ✓ Establish formal anonymous and third party complaints as outlined below.
- ✓ Establish a reverse onus on employers to disprove the complaint against them rather than workers having to prove the employer violated the *Act*.
- ✓ Provide legal support for workers to file ESA claims (see Section 5.5.6).

REVIEW OF ADVISORS' OPTIONS:

The Advisors have set out a number of options to improve access to the claims process.

Option 1 maintains the status quo. We reject this option.

Option 2 would remove the ESA provision allowing the Ministry of Labour to require a worker first attempt to resolve the violation(s) with their employer before being permitted to make a complaint.

We support this option. The "self-help" requirement has created a barrier to workers pursuing their ESA rights. As the research paper commissioned for the Review states, "The balance of evidence

suggests that the decline in complaints corresponds to the introduction of the OBA (the self-help provision), the requirements of which may be dissuading workers from pursuing their rights."⁵⁰

Option 3 and 5 would allow anonymous claims and third party complaints in which the facts of the alleged violation must be disclosed to the employer by an employment standards officer (ESO) in order to permit an informed response.

We support Option 3 and Option 5 with amendments.

We support the establishment of a formal anonymous and third party enforcement system with the goal of remedying unpaid wages and other entitlements owing to current workers and ensuring future employer compliance. Anonymous and third party complaints should recognize the power imbalance in the workplace that prevents workers from filing complaints while they are still on the job.

Anonymous individual complaints:

Workers shall be able to file a claim confidentially (where the worker's name is known to the Ministry, but not to the employer). The Ministry of Labour should follow the policy of the Wage and Hour Division of the US Department of Labour to protect the confidentiality of the complainant in their investigations. If it is necessary to reveal a complainant's name to the employer, in order to pursue an investigation, then the Ministry must seek the permission of the worker to do so.

Third party complaints:

Unions, community organizations, or other individuals or parties should be able to file anonymous complaints on behalf of an individual or a group of workers.

Where individual and third party anonymous complaints refer to violations that affect more than one worker, then the complaint shall be reviewed for inspection of the workplace (not individual claim investigation). Inspections of employers should aim to detect and assess monetary (e.g., unpaid wages, overtime pay, public holiday and vacation pay, etc.) and non-monetary violations (e.g., hours of work, breaks, agreements to vary standards, etc.), remedy violations with orders to pay for all current employees, and bring the employer into compliance for the future.

Anti-reprisal protection must be provided to workers who make an anonymous complaint or who are the subject of a third party complaint.

The complainant should be informed if the Ministry of Labour is not going to proceed with an inspection of the employer. An appeal process should be available to anonymous complainants and third parties if the Ministry of Labour does not proceed with an inspection following an anonymous and third party complaint. A report of the inspection should be made available to all employees.

Option 4 would not allow anonymous complaints.

We reject this option.

New recommendation by WAC to reduce barriers to making claims

Create a reverse onus so that employers have to disprove a complaint against them, rather than workers have to prove the employer violated the *Act*. The claims process has shifted from investigating employer violations of minimum standards to a dispute resolution system. Workers are expected to prove their complaint and employers to defend themselves against the complaint. Workers need to follow rules of evidence providing documentary evidence to make their case. This is difficult to do, especially where employers do not provide workers with pay statements, or with issues of misclassification or reprisals. For example, only 22 percent of workers who made a claim of reprisal against their employer won their case. This suggests that workers may have difficulty proving more complex cases, given claims for termination pay and unpaid wages are won by workers 85 percent of the time.⁵¹ Many workers require legal support to establish their case through the claims process (see recommendation in Section 5.5.6).

5.5.4.2 Reprisals

BACKGROUND

The Advisors conclude that there is a widespread fear of reprisals among workers if they complain about violation of their ESA rights, which contributes to employer non-compliance. The ESA prohibits employers from intimidating, dismissing, or penalizing workers who attempt to exercise their ESA rights. Workers and their advocates reported to the Advisors that the current anti-reprisal provisions do not protect workers while they are employed and the cost of reprisal to employers is not a significant deterrent to employers.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Provide an expedited anti-reprisal process with an option for interim reinstatement while the reprisal complaint is investigated.
- ✓ Provide legal support for workers making anti-reprisal claims.
- ✓ Publicize successful anti-reprisal claims to increase awareness of reprisal protections under the *Act*.
- ✓ Prohibit employers of Temporary Foreign Workers from forcing deportation / "repatriation" of an employee who has filed an ESA complaint. The Ministry of Labour should 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.

REVIEW OF ADVISORS' OPTIONS:

Option 1 is to maintain the status quo. We reject this option.

Option 2 would require ESOs to quickly investigate and decide on reprisal claims involving termination.

We support this option. An expedited process on all reprisal claims should provide interim reinstatement, if requested by the worker, pending a ruling on cases of dismissal due to reprisals.

Currently, it is up to workers to enforce anti-reprisal protections by filing an individual complaint at the Ministry of Labour. As 91 percent of claims are filed after a worker has quit or been fired, the reality is that workers are fearful of asking about their ESA rights while they are on the job. An employer who penalizes a worker disciplines not just the worker who is terminated but other workers in the workplace as well. Co-workers see the immediate repercussions for the worker who tries to enforce their rights. A worker's ability to be reinstated, pending the investigation, would bolster some confidence in this provision not just for the individual worker but for co-workers as well.

Unfortunately, under the current claims process, employers face little cost and few risks from employee reprisals. Only 8.2 percent of claims filed over the past five years involved reprisals (compared to 48 percent involving unpaid wages).⁵² Such low rates of claims suggest that workers may not be aware of their right to file reprisal claims. Publicizing successful anti-reprisal decisions would help build awareness among employers and employees.

Only 22 percent of reprisal claims filed by workers were successful; that is, a claim of reprisals was confirmed by the ESO. Even though the onus is on employers to disprove reprisals, in reality, workers still have to prove their case during the claims investigation, often needing to make quite complicated legal arguments. The low success rate for reprisal claims suggests that workers have difficulty making the case that the reprisal is related to their attempt to enforce their ESA rights rather than some other matter. Employers only have to make the case that a penalty or termination was a result of something other than the worker's attempt to enforce their rights. In cases of termination due to reprisal, a broader anti-reprisal test would provide workers with a more accessible remedy.

Settlements are used disproportionately more often to resolve complaints involving a claim for reprisal. ESOs tend to use settlements when it comes down to the word of the worker versus the word of the employer – she said, he said. Given the power imbalance in the employer-employee relationship, it is very hard for workers to effectively make their case in settlement processes.

Clearly the anti-reprisal process is not working for workers. Ensuring workers have legal support for reprisals claims would help improve access to justice on reprisals.

People working through the Seasonal Agricultural Program and other Temporary Foreign Worker programs face significant barriers to taking action on reprisals. We recommend that employers be

prohibited from forcing deportation / “repatriation” of an employee who has filed an ESA complaint. In addition, the Ministry of Labour should 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.

Option 3 is similar to Option 2. Where a worker wants to review an ESO decision denying their reprisal claim for reinstatement, the OLRB will hear such applications on an expedited basis.

We support this option.

5.5.5 Strategic Enforcement

5.5.5.1 Inspections, Resources, and Implications of Changing Workplaces for Traditional Enforcement Approaches

BACKGROUND

This section of the Interim Report discusses the Ministry of Labour’s challenge in enforcing the ESA in an increasingly complex labour market through strategic proactive enforcement, while responding to individual claims with limited resources. The Ministry feels under pressure to use its limited resources to balance between reactive (individual claim investigations) and proactive (inspections) work.

While the number of individual claims has been declining, over the past five years, there has been an average of about 15,000 individual complaints submitted to the Ministry of Labour, with violations confirmed in about 69 percent of claims. On average, over the past five years, it takes over five months for a claim to be assigned for investigation. Individual claimants exert pressure to speed up claims processing to recoup outstanding wages and entitlements. At the same time, the Ministry conducts about 2,500 proactive inspections of workplaces (less than one percent of workplaces on an annual basis) that detect ESA violations in, on average, about 76 percent of inspections.

The Advisors conclude that the changing workplace presents significant challenges for traditional enforcement approaches. The number of employees represented by unions has declined. Companies are shifting their business model from direct to indirect employment through subcontracting, temporary help agencies, and franchising. More vulnerable employees in precarious jobs are created, whose basic employment rights are being denied. Workers’ fear of reprisal makes it difficult to detect violations.

The Advisors suggest that we may have to move away from investigating all individual complaints and develop strategic enforcement strategies. In part, such strategies would involve enforcement

at the higher levels of industry structures to bring compliance at lower levels and sectoral enforcement strategies to deter violations before they occur.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

Strategic enforcement:

- ✓ Expand the scope of the ESA to include dependent contractors (i.e., those who are economically dependent on an employer) (Section 5.5.2).
- ✓ Establish a presumption of employee status (a worker must be presumed to be an employee unless the employer demonstrates otherwise) (Section 5.5.2).
- ✓ Employers to be jointly and severally liable for ESA compliance of contractors, subcontractors, and other intermediaries and between franchisors and franchisees (Section 5.5.2).
- ✓ Improve related employer provision (Section 5.5.2).
- ✓ Adopt "oppressions" remedy (Section 5.5.2).
- ✓ Enable the Ministry of Labour to place a lien on goods that were produced in contravention of the ESA (Section 5.5.2).
- ✓ Effective deterrence strategies are central to effective proactive enforcement strategies (Section 5.5.5.3).

Individual claims and proactive inspections:

- ✓ Maintain requirement to investigate all individual claims of employment standards violations.
- ✓ Target proactive inspections in workplaces where misclassification takes place and where migrant and other people in precarious work are employed.
- ✓ Adopt a consistent strategy of expanding investigations when ESA violations are confirmed through individual claims to a full inspection of the employer.
- ✓ Increase the administrative fee payable when a restitution order is made to include the costs of investigations and inspections (as per Option 6, Section 5.5.5.3).

REVIEW OF ADVISORS' OPTIONS:

The Advisors put forward a number of options to address investigations, inspections, and other strategic enforcement.

Option 1 would maintain the status quo. We reject this option.

Option 2 would focus inspections in workplaces where misclassification issues are present, including misclassification in workplace inspections.

We support this option with conditions.

We support focused inspections on misclassification and have provided recommendations on targeted enforcement under Option 3, Section 5.2.1.

The current model of proactive inspections does not include identifying misclassification of employees as independent contractors. We support including misclassification within the inspection model.

It is not cost efficient or effective to pursue misclassification through proactive inspections alone. We recommend creating the legislative architecture to remove the incentives for employers to misclassify workers in the first place. To do that, we recommend the following:

- Expand the scope of the ESA to include dependent contractors (i.e., those who are economically dependent on an employer) (Section 5.5.2).
- Establish a presumption of employee status (a worker must be presumed to be an employee unless the employer demonstrates otherwise) (Section 5.5.2).

Addressing misclassification should be part of an enforcement strategy that identifies, maps, and targets emerging employer practices to evade, avoid, or abandon employment standards compliance.

Option 3 would increase inspections in workplaces where migrant and other vulnerable and precarious workers are employed.

We support this option.

Option 4 would cease giving advance notice of targeted blitz inspections to employers.

We support this option.

Option 5 would “adopt systems that prioritize complaints and investigate accordingly.” It is unclear what this option involves. Given the discussion of challenges with respect to current resources at the Ministry to investigate all individual claims filed and conduct other proactive enforcement strategies, this option may mean that some claims get prioritized if they relate to strategic enforcement priorities (e.g., misclassification).

We trust that Option 5 does not pertain to prioritizing individual claims over proactive enforcement strategies. While we support continuation of the requirement that the Ministry investigate all claims, we do not think this should be prioritized over proactive enforcement and deterrence strategies.

Option 5 and 6 are not clear. They both appear to suggest moving away from the current obligation under the *Act* to investigate all complaints that are filed at the Ministry of Labour.

We recommend adopting strategic enforcement measures that are outlined in Option 7 and elsewhere first, before any bars are placed on individuals pursuing claims for ESA violations.

Strategic enforcement that brings employers into compliance with the ESA will have a positive impact on the resources available for individual claims. In addition, workers with the financial capacity already go to small claims court regarding unjust dismissal, where the remedies are much better. It is low-wage workers who rely on the ESA claims process to recover unpaid wages.

Option 6 would “adopt other options for expediting individual claims investigation and/or resolution of complaints.” The Advisors do not specify what these options would be. However, they do suggest, in the Background Section of 5.5.5.1, that some individuals could be directed to file claims in small claims court, file directly with the OLRB (or a broader-based OLRB), or go through a simplified dispute resolution process where there is no little or no investigation of a worker’s complaint of violations.

As stated above, we do believe that workers should continue to be able to enforce their ESA rights through individual claims, which does not prevent people from proceeding through small claims court (although the costs of legal representation do). We would oppose requiring that people go directly to the OLRB, as it is a much more complicated process, in which most workers would require legal assistance (which creates barriers to access). Currently only about 5 percent of applications to the OLRB on ESA matters are allowed. We question whether the OLRB would have the capacity to conduct hearings on individual complaints. We also have concerns about a dispute resolution process, which tends not to recognize the power imbalance between employees and employers. As research on ESA enforcement commissioned by the CWR demonstrates, “Settlements yield a smaller percentage of the total initial claim amount compared to those investigated by an ESO.” Almost 40 percent of facilitated settlements are settled for less than half of a worker’s initial claim.⁵³

Option 7 would “develop other strategic enforcement options.” While not expressly stated, the Advisors are presumably considering options outlined in the background of this section that focus on the “top of industry” structures, including designing sectoral enforcement strategies to deter violations before they occur. Understanding supply-chain relationships, franchising, and other industry structures, the Advisors note, is essential to development of effective enforcement strategies.

We support such strategic enforcement; however, to put it into effect, there needs to be adoption of the following:

- Employers to be jointly and severally liable for ESA compliance of contractors, subcontractors, and other intermediaries, and between franchisors and franchisees (Section 5.5.2).
- Improve related employer provision (Section 5.5.2).
- Adopt “oppressions” remedy (Section 5.5.2).
- Enable the Ministry of Labour to place a lien on goods that were produced in contravention of the ESA (Section 5.5.2).
- Effective deterrence tools, as discussed below, are also central to effective proactive enforcement strategies (Section 5.5.5.3)

Violations are confirmed in close to 70 percent of individual claims filed. As such, individual claims are a good indicator of which employers are in violation of the ESA. While the Ministry of Labour can conduct full inspections of employers found in violation through individual claims, it does not regularly do so.

We recommend that there be a consistent strategy of expanding investigations to a full inspection of the employer when ESA violations are confirmed through individual claims.

We recommend that the government dedicate more resources to the Ministry of Labour for proactive enforcement. We further recommend increasing the administrative fee payable when a restitution order is made, to include the costs of investigations and inspections (as per Option 6, Section 5.5.5.3). These measures could mitigate some of the financial pressures the Ministry finds itself in and shift some of the burden of enforcing the ESA from the public to employers who violate the Act.

5.5.5.2 Use of Settlements

BACKGROUND

The ESA enables employers and employees to settle complaints during claims investigations and during review of Ministry of Labour decisions at the Ontario Labour Relations Board. Research suggests workers often settle for less than the amount that the ESO ordered the employer to pay. While 15 percent of claims are settled during claims investigation, 77 percent of reviews at the OLRB are settled.⁵⁴

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Establish criteria for settlement of ESA complaints, in which settlements shall not be for less than a worker's legal entitlement under the ESA.
- ✓ Provide legal or paralegal assistance for employees in the settlement process under the ESA.

REVIEW OF ADVISORS' OPTIONS:

The Advisors provide options to address vulnerabilities of employees during settlement proceedings.

Option 1 maintains the status quo. We reject this option.

Option 2 would provide a step in the settlement process to enable workers to take time to review the settlement and have an opportunity to seek independent advice before providing written confirmation of her or his willingness to settle. This step rightly recognizes the power imbalance between workers and employers with respect to settlement.

While we support steps to ensure that workers are not pressured into settlement, this option assumes that workers have access to legal support. Unfortunately, there are few options available for low-income workers to seek legal advice. See recommendations under Option 3 that address legal support for workers in settlement negotiation.

We agree that steps need to be taken to improve the settlement process within both the ESA claims process and the OLRB. One step would be to establish guiding principles for settlement of ESA complaints, in which settlements shall not be for less than a worker's legal entitlement under the ESA.

Option 3 would provide legal or paralegal assistance through the Office of the Workers Advisor for employees in the settlement process at the OLRB (see Section 5.5.6).

We support providing access to legal support for all workers who want to enforce their ESA rights through claims and review at the OLRB (see Section 5.5.6).

5.5.5.3 Remedies and Penalties

BACKGROUND

The Ministry of Labour enforcement strategy encourages employers' voluntary compliance and, where that fails, it relies on individual workers to seek payment of wages owing through individual claims. The costs on workers to enforce employment standards are often high – borrowing costs to replace unpaid wages; penalties for servicing the debt; stress on family income; lost income for days spent pursuing the claim, etc. Yet there is currently no remedy to compensate workers for the costs resulting from employer violations of the *Act*.

On the other hand, if a settlement is reached, employers only pay workers what they should have in the first place, or less. This creates incentives for employers to violate minimum standards with little monetary cost.

Deterrence is recognized as an important part of enforcement. However, under the Ministry of Labour, deterrence tools are rarely used. Research for the CWR found that of 46,000 complaints with confirmed violations over six years, only one percent of employers who failed to voluntarily comply was fined (through a Notice of Contravention). Of those fines levied, the lowest fine possible – \$250 – was issued in 75 percent of the cases. Even more troubling is that 49 percent of employers fined did not pay the fine.⁵⁵ Over the last three years, only 41 Part III prosecutions were launched – just 0.18 percent of cases of violations confirmed through complaints and inspections.⁵⁶ Of those found guilty through Provincial Part III offences, the average penalty per charge was \$7,740, just 8 percent of the maximum \$100,000 that corporations could be fined.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

We believe that a systematic and transparent deterrence model of enforcement is needed. Violations under the *Act* should be detected and punished rather than tolerated. The aim should be to prevent illegal actions such as employment standards violations from giving more advantages to those violating the law than to those adhering to the law.

In Section 5.2, the Advisors address employer strategies that expressly insulate and shield higher levels of business from responsibility and liability of employment standards, and set out strategies to make companies jointly and severally liable for the ESA obligations of their contractors, subcontractors, other intermediaries, and franchises. For the deterrence strategies discussed in this section (5.5.5.3) to be effective, legislated joint and several liability is essential. All parties to employment standards violations must also face the consequence of penalties and deterrence measures.

- ✓ Establish a systematic and transparent deterrence model of penalties.
- ✓ The ESA should be amended to make set fines automatic in **all** cases of confirmed violations, including when employers voluntarily comply with settlement and orders to pay.
- ✓ Increase fines (Notice of Contravention (NOC)) to double or triple the amount owed or double the dollar value of NOCs. Increase the fine for a first contravention to \$500, second contravention to \$1,000, and third contravention to \$2,000 (multiplied by the number of employees affected by the violation).
- ✓ Require employers to pay damages equal to twice the unpaid wages owing.
- ✓ Amend the ESA to require that interest be paid on all wages owing, both pre- and post-judgement.
- ✓ Require employers to post notices in the workplace where claims investigations have found contraventions.
- ✓ Establish a new director of enforcement who could take cases directly to the OLRB, to seek monetary penalties up to \$100,000 per infraction in cases of reprisals, multiple violations, or repeat offences.

REVIEW OF ADVISORS' OPTIONS:

The Advisors have provided a number of options to address remedies for works and penalties for employers who do not comply with the ESA.

Option 1 would maintain the status quo. We reject this option.

Option 2 would increase the use of Part III prosecutions under the Provincial Offences Act (POA), particularly for repeat or intentional violations and where there is non-payment of an order.

This option is inadequate. This is already Ministry of Labour policy. It is clear that more is needed. To create a real general and individual deterrence effect, employers must know that they will face Part III prosecution if they fail to pay an order, repeat a violation, or have intentionally violated the *Act*.

We recommend that there be a statutory requirement that Part III prosecutions will take place for failure to pay an order or when an employer has intentionally violated the *Act*.

Option 3 seeks to increase the frequency of use of Notice of Contraventions (fines ranging from \$250 to \$1,000) by the Ministry of Labour.

We support amendments to this option.

Options 3(a) and (b) seek to improve the ability of the Ministry of Labour to issue NOC fines (in the amount of \$250 to \$1,000). The current Ministry policy involves issuing Part I tickets rather than NOC fines. Last year, the Ministry issued 340 tickets as opposed to 99 NOC fines. This policy is the result of employers' right to appeal a NOC to the OLRB, while the OLRB requires the Ministry of Labour to prove that a contravention took place. This takes staff time and thus the Ministry discourages the use of NOC fines.

The Advisors propose options to:

- 3(a) Require employers to pay an amount equal to the administrative monetary penalty into trust, in order to have a NOC reviewed by the OLRB;
- 3(b) Remove the "reverse onus" provisions that require the Ministry of Labour to establish that a contravention occurred.

We support Option 3(a) and (b). Employers infrequently appeal a NOC at the OLRB (10 percent of NOCs stemming from complaints and 4 percent of NOCs from inspections) likely because of the small stakes involved.⁵⁷ Employers may currently appeal a NOC fine because it is arbitrarily determined by an ESO. Moving from discretionary fines to set fines will remove the impetus for employers to appeal NOCs, as they would automatically apply to all cases of confirmed violations.

Option 3 Amendment:

We recommend the ESA be amended to require mandatory NOC fines in all cases of confirmed ESA violation.

The ESA should be amended to make set NOC fines required in *all* cases of confirmed ESA violations, including when employers voluntarily comply with settlement and orders to pay. This would replace the Ministry of Labour's current practice of having discretion in issuing fines. We believe this will relieve the pressure on the Ministry resulting from NOC appeals, as all employees found in violation would be liable for the fine.

Establishing set fines in all cases of confirmed violations would establish a consistent and transparent penalty for violation of the ESA. Set fines would provide a general deterrence for employers and create incentives for employer compliance.

Establishing set fines will help create a "culture of compliance" by establishing that there is a cost to violating the ESA and not meeting basic minimum standards. Currently, employers are only required to pay workers what they should have been paid in the first place, or less if they reach a settlement.

Option 4 would require employers to pay a financial penalty to employees whose rights have been violated. This would compensate for the costs incurred by employees due to the employer's failure to pay wages/entitlements. The amount of financial damages paid to the employee would be

specified as a set amount or an amount equal to or double the amount of unpaid wages, with a set amount for non-monetary contraventions.

We support this option with amendments.

We support damages equal to twice the unpaid wages. Employers pay damages in small claims court when they have been found to have wrongfully dismissed employees. A financial penalty of liquidated damages recognizes that workers bear costs associated with wage violations (e.g., borrowing costs from banks, credit cards, family and friends, loss of housing in some cases). The compensation to workers who have experienced ESA violations should be high enough to make it worth the costs of making a complaint and to deter violations in the future.

Option 5 suggests increasing the dollar value of NOC fines.

We support this option with amendments.

The current use of Part I tickets (\$360 or less) or \$250 NOC fines do not provide adequate incentives to comply with the law. Rather, in pursuit of fairness and ESA compliance, NOC fines should be doubled. That is, the fine for a first contravention should be increased to \$500, a second contravention to \$1,000, and a third contravention to \$2,000 (multiplied by the number of employees affected by the violation).

Option 6 would increase the administrative fee payable when a restitution order is made, to include the costs of investigations and inspections.

We support this option with amendments.

We support the intent of Option 6, which is to shift some of the burden of investigating non-compliant employers from the public to employers who have been found in violation of the *Act*. However, only 15.7 percent of employers found in violation of the *Act* receive restitution orders (many employers under Ministry of Labour investigation will settle or pay unpaid wages without an order).⁵⁸

We recommend using monies from administrative fees and set fines (as recommended in Option 3 (this section)) to expand proactive inspections, extend investigations, and improve collection activities.⁵⁹

Option 7 would use the existing authority of an employment standards officer (ESO) to require employers to post notices in the workplace where claim investigations find contraventions.

We support this option with amendments.

We support the intent of this option, as it would notify workers of potential employment standards violations in their workplace. To be effective, however, ESOs should be directed to require notices be posted in all cases of violations – whether the matter is settled or not, whether the employer

provided restitution during the claims process, or compliance orders are issued. As noted above, few employers found in violation of the *Act* are actually given orders.

We recommend that ESOs require employers to post notices in the workplace in all cases of confirmed violations found during claim investigations (including settlement, employer compliance, or orders to pay).

In addition, the Advisors note that, on its website, the Ministry publishes the name of anyone convicted under the POA of contravening the ESA. However, in many cases, only the provincial or federal incorporation number is published, which defeats the purpose.

We recommend that the Ministry of Labour be required to post the common name of operation of the business convicted under the POA.

Options 8 and 9 put forward strategies requiring that employers pay interest on unpaid wages. The director of employment standards has long had the authority to require interest be paid on unpaid wages but has failed to do so.

Option 8 would request that the director of employment standards use the authority she has to set interest rates and ensure they are awarded.

We reject this option. Worker advocates have requested that the director set and authorize application of interest on workers' unpaid wages with little success.

Option 9 would amend the *Act* to require employers to pay interest on unpaid wages.

We support this option. There must be a statutory requirement for interest to be paid on pre- and post-decisions ordering that wages be paid, as is the case in small claims. Interest should be applicable for all monies deemed owing, regardless of how the matter is resolved (i.e., settlement, employer compliance, or orders to pay).

Option 10 would require the provincial government to make procurement contracts conditional on a clean ESA record.

We support this option. As we discussed in Option 8, Section 5.2.2 above, we support measures that require the provincial government to lead by example.

We support development of a provincial fair wage policy for government procurement of goods, contracts for work or service, and funding of social services, which would require those receiving government funding or contracting for services (and their subcontractors) to comply with employment standards, industry norms, and principles of decent work.

Option 11 suggests a model for a new enforcement program. It would establish a new director of enforcement in the Ministry of Labour who could take cases directly to the OLRB where there are serious breaches of reprisals, multiple violations, repeat offences, or other cases that would further

public policy interest in serious violations of the *Act*. The director would bear the burden of proof in establishing that violations took place and she or he could seek monetary penalties up to \$100,000 per infraction. The OLRB could be given the power to issue the monetary sanctions and order the employer, found in violation, to pay the cost of the investigation and costs of the hearing incurred by the director of enforcement. The monetary penalties could be directed to the Ministry of Labour and used for any outstanding wages owed to employee(s), fund increased enforcement and legal support for employees seeking review at the OLRB, and educating employers and employees.

The purpose of the program is to “underscore through monetary sanctions the important public policy objectives of compliance” and “act as a deterrent to respondents and others from engaging in future conduct that violates the ESA.”⁶⁰ Part III prosecutions differ from this program in that Part III prosecutions are rarely used for prosecuting employers for the initial violation of the *Act* (e.g., failing to pay wages, overtime). Rather, they are used to prosecute employers who have defied Ministry orders to pay or for interfering with ESO investigations. Presumably this is because it is easier to establish the offence of failure to abide by an order than it is to establish the initial contravention.⁶¹

We support this option with conditions. We support this proposal but *only if it is in addition to* existing enforcement measures and new deterrence strategies to establish set fines and provide monetary penalties to workers whose rights have been violated. Together, these measures would establish “appropriate legislative recognition of the need to impose sanctions that are more than the cost of doing business”⁶² in all confirmed violations of the ESA.

5.5.6 Applications for Review

BACKGROUND

Both employers and employees can appeal an ESO decision at the OLRB. On average, 735 review applications are filed annually, representing 6.5 percent of ESO decisions. The OLRB requires both parties to meet with a Labour Relations Officer to attempt to settle the case, which they do in approximately 80 percent of the time. The majority of applications are made by employers and directors of companies. Almost twice as many applications were dismissed (i.e., the ESO decision was upheld) than were granted.

The Advisors note some factors that create barriers to remedies at the OLRB. These include that most parties are self-represented and have the responsibility to present their case. Most OLRB hearings are held in Toronto, which can be expensive and time-consuming for employers and workers.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Require ESOs to provide claimants with all the documents the officers relied on when reaching the decision under review.

- ✓ Increase support for unrepresented workers with claims under the ESA and representation with reviews at the OLRB.

REVIEW OF ADVISORS' OPTIONS:

The Advisors outline a number of steps that could be taken to improve access to and effectiveness of the OLRB.

Option 1 would require ESOs to provide employers and employees with all the documents they relied on when reaching the decision under review.

We support this option. This would greatly assist workers who may not have copies of all their own relevant documents or documentation of the employer's case. Currently, workers and their advocates must go through the Freedom of Information Request process to get disclosure of the employer's case at the ESO level.

Option 2 would amend the ESA to provide that, on a review, the burden of proof would be on the party seeking the review to prove, on a balance of probabilities, that the order made by the ESO is wrong. Currently, the OLRB makes a decision based on the evidence and arguments of both the employer and the employee.

This suggestion offers some benefit to workers, as employers and directors of corporations make 69 percent of applications for review.⁶³ In such cases, workers would not be required to prepare all the evidence for a new review of their claim; rather, the burden of proof would be on the employer. Nonetheless, this would change the process and, as such, the standard of review should be on the correctness of the decision rather than the reasonableness of the decision (a higher test).

In cases of reprisals, the reverse onus on the employer to disprove reprisals should be maintained at the OLRB. If this change in the standard of review is contemplated, the ESO would be required to provide both parties with all documents she or he relied on in making their decision.

Option 3 would improve accessibility for employers and employees by increasing regional access to the review process through the appointment of part-time vice-chairs in various cities.

We support this option.

Option 4 would require the OLRB create explanatory materials in plain language for unrepresented parties, as the majority of people seeking review are not represented by legal counsel. Such materials would address applicable principles of law, including the burden of proof and basic rules of evidence.

We support this option; however, attention must also be paid to address parties who may face language or literacy issues.

Option 5 explores strategies to increase support for unrepresented workers with claims under the ESA and representation at the OLRB.

We support this option.

Research conducted for the CWR demonstrates that in settlements reached in employer appeals of monetary orders to pay, the worker settles for less than what is owed. The fact that adjudications uphold an ESO's decision 56 percent of the time suggests that employees are frequently foregoing some part of their entitlement as a cost of getting a settlement.⁶⁴ As such, we recommend that legal support be provided to workers through the settlement and review process.

The Advisors suggest one strategy would be to provide such support through increased funding and expanded mandate of the Office of the Worker Advisor (OWA). This would be useful, as the OWA has offices throughout the province. However, our experience with workers seeking support for WSIB claims at the OWA is that demand far exceeds capacity. Therefore, funding should be sufficient to address the need.

The government should look at other ways to support workers filing claims, such as increased funding for employment law in community legal clinics and community-based worker advocacy groups. These groups are best able to reach out to and support people in precarious work to support access to justice.

5.5.7 Collections

BACKGROUND

Most claims result in the employer paying workers through settlement or voluntary payment. In about half the complaints (51 percent), employers agree to pay wages assessed by the ESO to be owing. Over the last six fiscal years, workers recovered almost \$33 million through voluntary compliance with ESO assessment of wages owing. Where the employer does not pay wages deemed owing by the ESO, the recovery rate drops to 39 percent. Over the same period, \$28 million in unpaid wages went uncollected by the Ministry of Labour.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Prioritize Option 5, which would establish a provincial wage protection plan. Establish a provincial wage protection plan, paid for by employers, similar to the Workplace Safety and Insurance system.

WAC's Collection strategies from other sections of the report:

- ✓ The ESA should be amended to make companies jointly and severally liable for the ESA obligations of their contractors, subcontractors, and other intermediaries, as put forward in Section 5.2.2.

- ✓ Repeal the “intent or effect” requirement in Section 4 of the ESA related employer provision (5.2.2).
 - ✓ Establish an “oppressions” remedy under the ESA when companies make their assets unavailable (Option 6, Section 5.5.2).
 - ✓ The scope of director’s liability should be expanded to all employment standards violations (rather than just unpaid wages and vacation pay).
 - ✓ Make it a statutory requirement that Part III prosecutions will take place for failure to pay an order or when an employer has intentionally violated the *Act*.
- ✓ Amend the ESA to give the Ministry of Labour the authority to issue warrants and/or place liens on personal property.
 - ✓ Provide the authority to consider someone liable for a debtor’s debt if she/he is the recipient of the debtor’s assets.
 - ✓ Allow the Ministry to impose a wage lien on an employer’s property upon filing of an employment standards claim if there is a risk of non-payment of wages owing.
 - ✓ Allow the Ministry to require the employer to post a bond to cover future unpaid wages if the employer has a history of contraventions or operates in a sector with a high rate of ESA violations.
 - ✓ Provide the authority to revoke operating licences, liquor licences, permits, and driver’s licences of those who do not comply with orders to pay.

REVIEW OF ADVISORS’ OPTIONS:

The Advisors have set out a number of options to improve collections.

Option 1 would maintain the status quo. We reject this option.

We support Options 2 through 6. We believe that the priority should be on ensuring workers get their unpaid wages under the ESA, and would prioritize Option 5 to establish a provincial wage protection plan. Such a plan should be paid for by employers, similar to the workplace safety and insurance system, and not through general revenues. Employers, not the general public, should share the costs of employer practices that result in wage violations. When the Ministry of Labour has assessed violations, and employers do not comply with orders to pay, workers should be able to recover unpaid wages through a provincial wage protection plan.

A key factor in recovery of unpaid wages is the ability to collect from parties involved. That is why many of the recommendations made throughout this report are critical to improving the effectiveness of collections. We have outlined these strategies in our key recommendations for this section.

Option 2 would amend the ESA to improve the collection process by:

- (a) removing the administrative requirement to file a copy of the order in court so that creditors’ remedies would become available;
- (b) creating authority for warrants to be issued and /or liens to be placed on personal property; and

(c) providing the authority to consider someone liable for a debtor's debt if she/he is the recipient of the debtor's assets to prevent debtors from avoiding their ESA debt by transferring assets to a family member.

We support these options.

Option 3 would allow the Ministry to impose a wage lien on an employer's property upon the filing of an employment standards claim. This would likely be used in cases in which the employer was at risk of refusing to pay the outstanding wages or otherwise avoid payment by shifting assets under corporate veils.

We support this option.

Option 4 would require employers who have a history of contraventions or who operate in sectors with a high non-compliance rate to post bonds to cover future unpaid wages.

We support this option.

Option 5 provides for the establishment of a provincial wage protection plan.

We support this option and have discussed it in detail above.

Option 6 would provide the Ministry of Labour with the authority to revoke the operating licences, liquor licences, permits, and driver's licences of those who do not comply with orders to pay.

We support this option.

Labour Relations Act

One of the best ways to help vulnerable workers in precarious jobs is to expand collective organizing, representation, and bargaining in workplaces and industries with precarious work. By modernizing the *Labour Relations Act* (LRA) to address changing workplaces and business models, we can reduce barriers to collective bargaining that exclude most people in precarious work. This would reduce systemic discrimination faced by racialized and women workers who are over-represented in non-unionized precarious work. Adopting strategies for a labour relations system capable of addressing precarious work will meet the CWR's ultimate objective of "creating decent work for Ontarians, particularly those who have been made vulnerable by changes to our economy and workplaces."⁶⁵

We work with non-unionized workers in precarious work. Given this experience, we will only be addressing Section 4.2, Scope and Coverage of the LRA, and Section 4.6, Other Models, as these sections relate more directly to reducing barriers to collective bargaining and representation for people in precarious work. While the other sections are also critical in improving access to collective bargaining and effectiveness of bargaining, we do not have the expertise to comment on these sections. We do, however, endorse the Ontario Federation of Labour's submission and recommendations on these matters.

4.2 Scope and Coverage of the LRA

4.2.1 Coverage and Exclusions

BACKGROUND

The LRA excludes some workers on the basis of their occupation (e.g., domestic workers, agricultural workers), others on the basis of their profession (e.g., legal, dental, and medical

professions), and also those exercising managerial functions. In addition, the LRA does not apply to groups of employees in the public sector who are covered by specialized legislation.

The Supreme Court of Canada has confirmed that the *Charter of Rights and Freedoms* guarantees freedom of association and the right to collective bargaining for all workers.

WORKERS' ACTION CENTRE RECOMMENDATIONS:

- ✓ Remove all exclusions to the LRA with the exception of managers involved in labour relations.
- ✓ Remove exclusion of domestic workers (including workers under the Caregiver Program) and adopt sectoral bargaining and representation that fully enables these workers to unionize and bargain collectively.

REVIEW OF ADVISORS' OPTIONS:

The Advisors present options to eliminate some or most exclusions.⁶⁶

Option 1 would maintain the status quo. We reject this option.

Option 2 would eliminate some or most of the current exclusions as outlined in (a) and (b).

Option 2(a) would remove exemptions of employees who are members of architectural, dental, land surveying, legal, or medical professions and are employed in a professional capacity.

We support this option with amendments. A person employed in hunting or trapping, a person employed as a labour mediator or labour conciliator, a provincial judge, and employees who exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations would still be excluded.

With the exception of managers involved in labour relations and public employees covered by specific legislation, we believe all the current exclusions should be revoked. When measured against the principle of freedom of association, there should be no exclusions with the exception of managers involved in labour relations. Managers involved in labour relations would have a conflict of interest and should continue to be excluded.

Option 2(b) would permit access to collective bargaining by domestic workers employed in a private home. A collective bargaining model that differs from the *Wagner Act* model may have to be established to give domestic workers meaningful access to collective bargaining.

We support this option.

The term “domestic worker” includes workers employed through the Caregiver Program (previously Live-in Caregiver Program) under the Temporary Foreign Worker Program and other caregiver or domestic workers employed in the home. Caregivers and domestic workers are largely a female and racialized migrant workforce.

To provide access to collective bargaining, the domestic exclusion would have to be revoked and the statutory definition of a “bargaining unit” (which requires the existence of more than one employee at a place for work) would have to be changed to allow caregivers and domestic workers to unionize.

Caregivers face unique challenges that create barriers to employment rights and protections and create conditions of vulnerability to employment violations. The Caregiver Program, under Canada’s TFWP, requires caregivers to work the equivalent of 24 months (or 3,900 hours) within four years for government-approved employers. Caregivers are restricted to work providing care for children, people with disabilities, and elderly people in private homes. Their temporary work permit is tied to their employer. Caregivers are generally required to live in their employer’s home. Upon completion of this employment service under the program, caregivers are allowed to apply for permanent residency.

When a worker is subject to wages and working conditions that fall short of the terms set out in her employment contract or employment standards, it is the worker’s participation in the Caregiver Program and future citizenship that is put in jeopardy, not that of the employer.

Caregivers need access to a sectoral platform for collective bargaining. Importantly, the model for broader-based bargaining to provide real protection for these workers must acknowledge their isolation. We will discuss broader-based bargaining in Section 4.3 below.

4.2.1.1 Agricultural and Horticultural Employees

BACKGROUND

For the most part, most other Canadian jurisdictions include agricultural and horticultural workers under their general labour relations statutes. Ontario, on the other hand, has either excluded these workers or limited their rights to collective representation and bargaining.

Horticultural workers (e.g., gardening, landscaping) are excluded from the LRA. Since 2003, agricultural workers have been covered by the *Agricultural Employees Protection Act* (AEPA). This *Act* provides agricultural workers with the ability to form employee associations and make collective representations to employers, but it does not provide workers with the ability to engage in effective collective bargaining.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Remove exclusions of agricultural and horticultural workers from the LRA and repeal the *Agricultural Employees Protection Act*.

REVIEW OF ADVISORS' OPTIONS:

The Advisors have put forward options to include these workers in the LRA or enact new legislation to extend bargaining rights to them.

Option 1 would maintain the status quo. That is, leave in place the LRA exemption for agricultural and horticultural workers and maintain the AEPA for agricultural workers.

We reject this option.

Option 2 would eliminate the LRA exclusions for agricultural and horticultural sectors under the LRA and repeal the AEPA for agricultural workers. This option would enable these workers to unionize and collectively bargain.

We support this option and recommend the AEPA be repealed.

The LRA exclusions should be revoked for both agricultural and horticultural workers. Further, the precariousness of the work creates vulnerabilities that make unionizing difficult, particularly in smaller workplaces. Therefore, sectoral or broader-based bargaining should be developed for these precarious workers.

The AEPA fails to give agricultural workers meaningful protection. The *Act* only provides workers with the opportunity to form associations and make presentations to the employer, but the employer is only required to consider the request. There is no requirement to collectively bargain. There is neither a democratic process for forming associations nor any grievance procedure to address problems in the workplace. Unsurprisingly, there is no record of any associations being formed under this *Act* nor attempts to negotiate agreements with employers.⁶⁷ We recommend the AEPA be repealed.

The majority of agricultural workers are employed through the Seasonal Agricultural Worker Program and the agricultural stream of the Temporary Foreign Worker Program. The majority of workers currently come from Mexico, Jamaica, elsewhere in the Caribbean, Central and South America. The rules of the worker programs create vulnerability for farmworkers, including being tied to one employer; paying debts from recruitment fees; and they are isolated, often living in housing on the farm. The work is long and hard. Because workers rely on their employer to bring them back the following season, workers cannot enforce their employment rights.

While horticultural workers may not be as constrained as migrant farmworkers, they also work hard and for long hours. Being dependent on the weather, these low-waged workers face income insecurity.

Option 3 would enact new legislation, perhaps like the *Agricultural Labour Relations Act* (ALRA), for agricultural workers. Option 4 would include horticultural workers in any such legislation.

We reject options 3 and 4.

The ALRA was only in place for a year in 1994-95. It did extend the right to unionize and collectively bargain to agricultural and horticultural workers. The rights under this *Act* were limited; in particular, the certification of bargaining units containing seasonal workers. This could only be achieved through regulation and if the bargaining unit contained only seasonal workers. Workers were also denied the right to strike or undertake any work stoppages. We do not support such limitations on the rights of workers to bargain freely and form unions.

4.2.2 Related and Joint Employers

As discussed in Section 5.2.2, regarding scope of liability, the Advisors acknowledge that the “fissuring” of employment relationships have resulted in many companies moving away from direct employment through a variety of organizational strategies, such as subcontracting, outsourcing, franchising, indirect hiring through temporary help agencies and other methods. In part, these strategies expressly insulate and shield higher levels of business, which benefit from the labour of those at the bottom, from responsibility and liability for employment standards.

In the labour relations context, changing workplaces and business models challenge the effectiveness of the bargaining relationship if the parties who also impact the employment relationship are not at the bargaining table. Other jurisdictions such as the US are also addressing this challenge. In a case concerning temporary agency workers, the National Labour Relations Board (NLRB) held that the “common-law joint employer standard had failed to keep pace with changes in the workplace and economic circumstances.”⁶⁸

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ The OLRB may declare two or more entities to be “joint employers.” The criteria would not impose a requirement that there be common control and direction between the businesses.
- ✓ The OLRB may declare a related employer where an entity has the power to carry on associated or related activities with another entity under common control or direction, even if that power is not actually exercised.
- ✓ The joint employer provision should designate client companies and their temporary help agency as joint employers for the purposes of the LRA. Also for the purposes of the LRA, a rebuttable presumption that an entity directly benefitting from a worker’s labour (the client business) is the employer of that worker would be created.
- ✓ Franchisors and franchisees would be declared joint employers for all those working in the franchisee’s operations.

REVIEW OF ADVISORS' OPTIONS:

The Advisors address the limitations of joint and related employers under the LRA, thereby providing options with respect to the identified challenges.

Option 1 would maintain the status quo. We reject this option.

Option 2 would require a new provision to the LRA allowing the ORLB to declare two or more entities to be “joint employers”. The criteria to be applied include where there are associated or related activities between two businesses, and where a declaration is required in order for collective bargaining to be effective, without imposing a requirement that there be common control and direction between the businesses.

We support this option.

The criteria guiding the new joint employer provision would update the LRA to address our changing workplaces. It would enable the ORLB to address business practices such as franchising and contracting, where control is exercised indirectly through an intermediary. Like the NLRB ruling, control in the employment relationship need not be exercised directly and immediately. Enacting this option would clarify the rules and improve the effectiveness of collective bargaining.

Option 3 would amend or expand the related employer provision.

Option 3(a) provides that the OLRB may declare a related employer where an entity has the power to carry on associated or related activities with another entity under common control or direction, **even if that power is not actually exercised** [emphasis added].

We support this option. Similar to the discussion under Option 2, the criteria outlined in 3(a) would update the LRA to address our changing workplaces. This provision would better enable the ORLB to meet the purpose of the related employer provision, which is to prevent mischief, by protecting the bargaining rights of a union from being deliberately or inadvertently eroded by the commercial operations of related employers.⁶⁹

Option 3(b) merely calls for factors to be developed for the related employer provision.

We reject this option. We believe that 3(a) provides the criteria necessary for updating the related employer provision.

Option 4 suggests that a general joint employer provision not be enacted. Instead, Option 4 would enact specific joint employer provisions for temporary help agencies and their clients, and for franchisees and franchisors. We support a general joint employer provision as outlined in Option 2, as it would encompass client company/temporary help agencies and franchisee/franchisor relationships. In the alternative, we would support the joint employer provisions proposed by the Advisors’ as follows:

4(a) Regarding THAs and their client businesses:

- i. Create a rebuttable presumption that an entity directly benefitting from a worker’s labour (the client business) is the employer of that worker for the purposes of the LRA.

We support this option. It is consistent with our recommendation that, under the ESA, workers indirectly hired through a temporary help agency should receive the same wages and working conditions as those hired directly by the client company. By deeming temp agency workers to be employees of the client and under the protection of the collective agreement puts the liability where it should be: on the company directly benefiting from a worker's labour. Further, it reduces the economic incentive for companies to hire people indirectly through agencies except for truly emergency or temporary reasons.

Option 4(a) ii. suggests declaring that the client business and the THA are joint employers. As we recommended in Section 5.3.9, Temporary Help Agencies, Option 2(b) would make the client company the employer of record. We believe that this is the best strategy for regulating work through temporary help agencies.

4(b) Regarding franchises, create a model for certification that applies specifically to franchisors and franchisees and introduce a new joint employer provisions whereby:

- i. the franchisors and franchisee could be declared joint employers for all those working in the franchisee's operations.

We support this option. For collective bargaining to be effective, workers need to have employers at the table who directly or indirectly have control over their work.

Option 4(b) ii. would limit this provision to certain industries or sectors where there are large numbers of vulnerable workers in precarious jobs. We reject this option. The purpose of the CWR is to update our labour laws to address changing workplaces and ensure that all workers can access their freedom of association and meaningful collective bargaining.

4.6 Other Models

4.6.1 Broader-based Bargaining Structures

BACKGROUND

Workers, particularly those in precarious work, find it hard to organize into unions. The current system, based on the 1940s *Wagner Act* model, is unable to respond to the changing labour market characterized by growing employment in small workplaces and non-standard work. The current *Wagner Act* model limits access to collective bargaining for many workers because there is no practical way for collective bargaining to operate in much of the present economy. "Broader-based bargaining" or "sectoral bargaining" is advocated by labour and worker advocates as a necessary addition to the old industrial relations model.

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

The Advisors note that advocates for new broader-based bargaining structures have not spelled out the detailed applications of bargaining models. In her review of broader-based bargaining structures developed in Canada, Sara Slinn concludes, "It is clear that any broader-based bargaining system must be structured in light of the particular features of the work, workers and established bargaining practices in the industry."⁷⁰ As we update the LRA to address changing workplaces, we must not attempt to replace the *Wagner Act* with a new, one-size-fits-all, broader-based bargaining structure. Indeed, the Wagner model may still work in some sectors. Rather, a plurality of sectoral approaches will be necessary to respond to the challenges of changing workplaces.

Rather than enacting new models, we recommend enacting key changes to the LRA that would make post-Wagner, broader-based sectoral bargaining possible. We recommend the following:

- 1) Expand the recognition of who is an employee entitled to engage in collective bargaining. In addition to removing statutory exclusions (e.g., agricultural and domestic workers), extend access to collective bargaining to non-traditional arrangements (e.g., on-demand platform economy). This would be necessary to implement Options 7, 8, and 9.
- 2) Expand the recognition of who the employer is to include joint employers such as franchisors, lead employers in contracting relationships, and new, on-demand platform relationships. We have recommended this change in Section 4.2.2, Related and Joint Employers. Further, recognizing the "real employer" and joint employers would be necessary for Options 3, 5, 7, 8 and 9.
- 3) Enable workers to organize and bargain collectively from multiple locations with the same employer/franchisor. Additional units would be brought in under an initial agreement with a union or council of unions. This provision would be necessary for Option 3.
- 4) Enable organizing and collective bargaining on a multi-employer and/or sectoral basis. Empower the Board to require employers in the same sector to bargain together in a council where the workplaces have been organized. These measures would be necessary for Option 5.
- 5) Provide a legislative framework that enables and supports collective organizing, representation, and bargaining for workers in particularly vulnerable and precarious work. This would include, but not be limited to, migrant farmworkers and caregivers/domestic workers (see Option 7). 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:

- designating an employer entity that is the counterpart in bargaining;
- ensuring a strong floor of rights from which to bargain by revoking all exemptions and special rules from core employment standards;
- recognize the triangular relationship involved in some employment relationships involving recruitment agencies (migrant workers) and employment agencies;

- enforcement and labour inspection strategies that address the challenges in the caregiving and migrant farmworker sectors; and
- develop the capacity to enhance protection for social security, group benefits coverage, and entitlement.

The Ontario government has a positive duty under the constitution to ensure that workers do have the right to freedom of association and the right to effective collective bargaining. The recommendations outlined above suggest important steps to providing access to collective bargaining for people in precarious work.

REVIEW OF ADVISORS' OPTIONS:

The Advisors provide a number of options exploring a number of broader-based bargaining models. Rather than review each option or model, we have provided recommendations above of LRA changes necessary to open the *Act* up to non-Wagner models of collective bargaining.

4.6.2 Employee Voice

BACKGROUND

The Advisors cite the Freeman and Rogers study of American and Canadian private-sector workers that identifies the so-called “representation gap.” The authors conclude that:

given a choice, workers want “more,” including more say in the workplace decisions that affect their lives, more employee involvement in their firm, more legal protection at the workplace, and more opportunities for collective representation.⁷¹

At the same time, union density has been declining in the private sector. With reference to Rafael Gomez’s research on employee voice, conducted for the CWR, the Advisors report that this has created a vacuum in Ontario created by a “lack of meaningful ways for employees to express their voice in the vast majority of non-union workplaces.”⁷²

WORKERS' ACTION CENTRE KEY RECOMMENDATIONS:

- ✓ Enact legislation protecting concerted activity along the lines of that set out in the US *National Labor Relations Act* (NLRA).

REVIEW OF ADVISORS' OPTIONS:

The Advisors provide a number of options to address the gap in workers’ “voice.”

Option 1 would maintain the status quo.

We reject this option.

Option 2 would enact a model in which there is some form of minority unionism.

We reject this option. Minority unionism would not provide the right to collectively bargain, provide exclusive representation, or the right to strike. It would provide a minority association with the right to compel employers to consult with it and provide information on terms and conditions of employment. There could be more than one association in a workplace.⁷³

The Advisors rightly note in their guiding principles to the Interim Report that there is an inherent power imbalance and inequality of bargaining power between employer and employee. We do not believe a minority association can address this power imbalance. Further, minority unionism would not provide a meaningful voice for people made vulnerable in precarious work situations. Minority unions are similar to the *Agricultural Employees Protection Act* (AEPA), which has, in theory, enabled agricultural workers to form associations and make representations to employers. Yet there have been no associations formed since the *Act* came into effect in 2003. That is because such models do not address the substantial power imbalances in employment relationships in precarious work in particular and for workers in general.

Option 3 would enact a model in which there is some institutional mechanism for the expression of employee interests in the plans and policies of employers.

We reject this option. Similar to our discussion of minority unionism and internal responsibility systems (Section 5.5.3), we do not believe that a works council or joint employer-employee committee can provide vulnerable workers with a real voice in the workplace.

Option 4 would enact some variant of the models set out in Rafael Gomez's research report on Employee Voice.⁷⁴ In general, we recommend that the most effective way to give real voice to people in precarious work is to enact a legislative framework that enables and supports collective organizing, representation, and broader-based sectoral bargaining for workers in particularly vulnerable and precarious work. Our recommendations for these measures are outlined in Section 4.6.1.

Option 5 would enact legislation protecting concerted activity along the lines set out in the NLRA.

We support this option. Currently, workers only have job protection when they are directly engaged in union organizing. Workers do not have job protection if they collectively ask their employer for a wage increase or more generally try to improve wages and working conditions. The "concerted activity" provision of the NLRA (Section 7) gives employees the right to act together to try to improve their pay and working conditions, with or without a union. If employees are fired, suspended, or otherwise penalized for taking part in protected group activity, they can make a claim for unfair labour practice at the National Labor Relations Board.⁷⁵ Enacting this measure would provide workers with the protection necessary to express their voice in order to improve wages and working conditions.

Conclusion

Ontario has reached a critical moment. The Changing Workplace Review gives us the opportunity to develop a new legislative framework that can support decency in Ontario workplaces and economy. Our recommendations for building that framework are summarized below.

Summary of Key Recommendations

5.2 Scope and Coverage of the ESA

5.2.1 Definition of “employee”

- ✓ Expand the definition of employee to include dependent contractors.
- ✓ Establish a presumption of employee status (a worker must be presumed to be an employee unless the employer demonstrates otherwise).

5.2.2 Who is the Employer and Scope of Liability

- ✓ Amend the ESA to make companies jointly and severally liable for the ESA obligations of their contractors, subcontractors, and other intermediaries.
- ✓ Create a joint employer test similar to the policy developed by the US Department of Labour.
- ✓ Make franchisors jointly and severally liable for the employment standards obligations of their franchises.
- ✓ Repeal the “intent of effect” requirement in Section 4 of the ESA “related employer” provision.
- ✓ Establish an “oppressions” remedy under the ESA when companies make their assets unavailable.
- ✓ Enable the Ministry of Labour to place a lien on goods that were produced in contravention of the ESA.

5.2.3 Exemptions, Special Rules, and General Process

See submission for recommendations for review process.

5.3 Standards

5.3.1 Hours of Work and Overtime Pay

- ✓ Maximum workday and week – The ESA should provide for a maximum 8-hour work day and a 40-hour workweek. Workers should retain the right to refuse work beyond the 8-hour day and the 40-hour workweek. Overtime at time-and-a-half should be paid (or taken as paid time off in lieu) after 40 hours.
- ✓ Repeal all overtime averaging provisions.
- ✓ Maintain right to refuse overtime and Ministerial oversight of employer-employee agreements to vary or reduce hours of work standards.

5.3.2 Scheduling

- ✓ Require all employers to provide advance notice when setting and changing work schedules and include the following provisions:
 - ✓ Require employers to post employee schedules two weeks in advance;
 - ✓ Require employers to pay employees more for last-minute changes to employees' schedules (e.g., employees receive the equivalent of one hour's pay if the schedule is changed with less than two days notice and four hours pay for schedule changes made with less than twenty-four hours notice);
 - ✓ Require employers to offer additional hours of work to existing part-time employees before hiring new employees or using staffing agencies or contractors to perform additional work;
 - ✓ Require employers to provide part-timers and full-timers equal access to scheduling and time-off requests;
 - ✓ Require employers to get consent from workers in order to add hours or shifts after the initial schedule is posted;
 - ✓ Provide new employees with a good faith written estimate of the employee's expected minimum number of scheduled shifts per month and the days and hours of those shifts;⁷⁶
 - ✓ If an employee is required to be "on-call," but is not called in to work, the employer must pay the employee 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.)⁷⁷

- ✓ Increase the minimum reporting pay to four hours of regular pay or length of the cancelled shift.
- ✓ The minimum allowable shift per day should be three hours.

5.3.3.2 PAID VACATION

- ✓ Increase vacation entitlement to 3 weeks' vacation per year for all employees.

5.3.4 Personal Emergency Leave

See submission [Personal Emergency Leave](#) in Appendix

5.3.5 Paid Sick Days

- ✓ Require employers to provide paid sick days (One hour for every thirty-five hours worked, up to a cap of seven paid sick days). There should be no qualifying period before an employee is entitled to sick leave.
- ✓ Medical notes should not be required when employees take paid sick leave.

5.3.7 Part-time and Temporary Work - Wages and Benefits

- ✓ Require that part-time, temporary, contract, and casual employees receive treatment in pay, benefits and working conditions equal to that of full-time employees doing comparable work, unless there are objective factors to justify the difference. Where there is no comparable position in the establishment, then similar work shall be determined by appropriate collective agreement or by similar work for that occupation or sector. For fixed term contract workers, the number and total duration of contracts should be capped. We recommend a one-year cap on term of contract, after which appropriate termination and severance provisions apply. The goal should be conversion of contracted employees to permanent employees where the position is not truly temporary. Just cause protection must be provided to contract workers if, at the end of a contract, another worker is hired to do the work previously done by the temporary contract worker.

5.3.8 Termination, Severance, and Just Cause

5.3.8.1 TERMINATION OF EMPLOYMENT

- ✓ Eliminate the three-month eligibility requirement for termination notice or pay in lieu of notice.
- ✓ Require employers to provide notice of termination, or pay in lieu of notice, based on the total length of employment, including seasonal employees who have recurring periods of layoff beyond the 13week layoff period.

5.3.8.2 SEVERANCE PAY

- ✓ Make severance pay accessible to all workers by eliminating the employment, payroll and firm size thresholds for severance pay (i.e., 5-year employment service requirement, 50-employee firm size and \$2.5 million employer payroll threshold).

5.3.8.3 JUST CAUSE

- ✓ Require employers to have “just cause” for terminating an employee’s employment to protect workers from unjust dismissal. Implement an expedited adjudication process for Temporary Foreign Workers who have been unjustly dismissed.

5.3.9 Temporary Help Agencies

- ✓ Make the client company the employer of record for all employment standards. In the alternative, make both the client company and temporary help agency joint employers for all employment standards.
- ✓ Require employers to provide equal pay and working conditions to an assignment worker who performs substantially similar work to workers directly employed by the 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.
- ✓ The government should move immediately to use the regulation-making authority it has to require the WSIB to assign injuries and accident costs to client companies rather than THAs.

5.4 Other Standards and Requirements

5.4.1 Greater Right or Benefit

- ✓ Maintain the status quo; prohibit any contracting out of the ESA.

5.5 Enforcement and Administration

5.5.2 Education and Awareness Programs

- ✓ Simplify the ESA by reviewing and eliminating exemptions and special rules that reduce employment standards (see Section 5.2.3).
- ✓ Require mandatory ESA training for all newly registered business owners and managers.
- ✓ Make ESA education part of the provincial high school curriculum.

5.5.3 Creating a Culture of Compliance

- ✓ 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.

5.5.4 Reducing Barriers to Making Claims

5.5.4.1 INITIATING THE CLAIM

- ✓ Remove the ESA provision that allows the Ministry of Labour to require a worker to first attempt to resolve the violations with their employer (self-help provision).
- ✓ Establish formal anonymous and third party complaints provisions.
- ✓ Establish a reverse onus on employers to disprove the complaint against them rather than workers having to prove the employer violated the *Act*.
- ✓ Provide legal support for workers to file ESA claims (see Section 5.5.6).

5.5.4.2 REPRISALS

- ✓ Provide an expedited anti-reprisal process with an option for interim reinstatement while the reprisal complaint is investigated.
- ✓ Provide legal support for workers making anti-reprisal claims.
- ✓ Publicize successful anti-reprisal claims to increase awareness of reprisals protections under the *Act*.
- ✓ Prohibit employers of Temporary Foreign Workers from forcing deportation / "repatriation" of an employee who has filed an ESA complaint. The Ministry of Labour should 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.

5.5.5 Strategic Enforcement

5.5.5.1 INSPECTIONS, RESOURCES, AND IMPLICATIONS OF CHANGING WORKPLACES FOR TRADITIONAL ENFORCEMENT APPROACHES

Strategic Enforcement:

- ✓ Expand the scope of the ESA to include dependent contractors (i.e., those who are economically dependent on an employer) (Section 5.5.2).
- ✓ Establish a presumption of employee status (a worker must be presumed to be an employee unless the employer demonstrates otherwise) (Section 5.5.2).
- ✓ Employers to be jointly and severally liable for ESA compliance of contractors, subcontractors and other intermediaries and between franchisors and franchisees (Section 5.5.2).
- ✓ Improve related employer provision (Section 5.5.2).
- ✓ Adopt "oppressions" remedy (Section 5.5.2).
- ✓ Enable the Ministry of Labour to place a lien on goods that were produced in contravention of the ESA (Section 5.5.2).
- ✓ Effective deterrence strategies are central to effective proactive enforcement strategies (Section 5.5.3)

Individual claims and proactive inspections:

- ✓ Maintain requirement to investigate all individual claims of employment standards violations.
- ✓ Target proactive inspections in workplaces where misclassification takes place and where migrant and other people in precarious work are employed.
- ✓ Adopt a consistent strategy of expanding investigations when ESA violations are confirmed through individual claims to a full inspection of the employer.
- ✓ Increase the administrative fee payable when a restitution order is made to include the costs of investigations and inspections (as per Option 6, Section 5.5.3).

5.5.5.2 USE OF SETTLEMENTS

- ✓ Establish criteria for settlement of ESA complaints in which settlements shall not be for less than a worker's legal entitlement under the ESA.
- ✓ Provide legal or paralegal assistance for employees in the settlement process under the ESA.

5.5.5.3 REMEDIES AND PENALTIES

- ✓ Establish a systematic and transparent deterrence model of penalties.
- ✓ The ESA should be amended to make set fines automatic in **all** cases of confirmed violations, including when employers voluntarily comply, in settlement and in orders to pay.
- ✓ Increase fines (notice of contravention) to double or triple the amount owed or double the dollar value of NOCs. That is, increase the fine for a first contravention to \$500, second contravention to \$1,000 and third contravention to \$2,000 (multiplied by the number of employees affected by the violation).
- ✓ Require employers to pay damages equal to twice the unpaid wages owing.
- ✓ Amend the ESA to require that interest be paid on all wages owing, both pre- and post-judgement.
- ✓ Require employers to post notices in the workplace where contraventions have been found in claim investigations
- ✓ Establish a new director of enforcement who could take cases directly to the OLRB to seek monetary penalties up to \$100,000 per infraction, in cases of reprisals, multiple violations, or repeat offences.

5.5.6 Applications for Review

- ✓ Require ESOs to provide all the documents that they relied on when reaching the decision under review.
- ✓ Increase support for unrepresented workers with claims under the ESA and representation with reviews at the OLRB.

5.5.7 Collections

- ✓ Establish a provincial wage protection plan paid for by employers, similar to the Workplace Safety and Insurance system.
- ✓ The ESA should be amended to make companies jointly and severally liable for the ESA obligations of their contractors, subcontractors, and other intermediaries as put forward in Section 5.2.2.
- ✓ Repeal the "intent or effect" requirement in Section 4 of the ESA related employer provision (5.2.2)

- ✓ Establish an “oppressions” remedy under the ESA when companies make their assets unavailable (Option 6, Section 5.5.2)
- ✓ The scope of director’s liability should be expanded to all employment standards violations (rather than just unpaid wages and vacation pay).
- ✓ Make it a statutory requirement that Part III prosecutions will take place for failure to pay an order or when an employer has intentionally violated the *Act*.
- ✓ Amend the ESA to give the Ministry of Labour the authority to issue warrants and/or place liens on personal property.
- ✓ Provide the authority to consider someone liable for a debtor’s debt if she/he is the recipient of the debtor’s assets.
- ✓ Allow the Ministry to impose a wage lien on an employer’s property upon filing of an employment standards claim if there is a risk of non-payment of wages owing.
- ✓ Allow the Ministry to require the employer to post a bonds to cover future unpaid wages if the employer has a history of contraventions or operates in a sector with a high rate of ESA violations.
- ✓ Provide the authority to revoke operating licences, liquor licences, permits, and driver’s licences of those who do not comply with orders to pay.

4.2 Scope and Coverage of the LRA

4.2.1 Coverage and Exclusions

- ✓ Remove all exclusions to the LRA with the exception of managers involved in labour relations.
- ✓ Remove exclusion of domestic workers (including workers under the Caregiver Program) and adopt sectoral bargaining and representation that fully enables these workers to unionize and bargain collectively.

4.2.1.1 AGRICULTURAL AND HORTICULTURAL EMPLOYEES

- ✓ Remove exclusions of agricultural and horticultural workers from the LRA and repeal the *Agricultural Employees Protection Act*.

4.2.2 Related and Joint Employers

- ✓ The OLRB may declare two or more entities to be “joint employers.” The criteria would not impose a requirement that there be common control and direction between the businesses.
- ✓ The OLRB may declare a related employer where an entity has the power to carry on

associated or related activities with another entity under common control or direction, even if that power is not actually exercised.

- ✓ The joint employer provision should designate client companies and their temporary help agency as joint employers for the purposes of the LRA. Also for the purposes of the LRA, a rebuttable presumption that an entity directly benefitting from a worker's labour (the client business) is the employer of that worker would be created.
- ✓ Franchisors and franchisees would be declared joint employers for all those working in the franchisee's operations.

4.6 Other Models

4.6.1 Broader-based Bargaining Structures

Rather than enacting new models, we recommend enacting key changes to the LRA that would make post-Wagner, broader-based, sectoral bargaining possible. We recommend the following:

- 1) Expand the recognition of who is an employee entitled to engage in collective bargaining. In addition to removing statutory exclusions (e.g., agricultural and domestic workers), extend access to collective bargaining to non-traditional arrangements (e.g., on-demand platform economy).
- 2) Expand the recognition of who the employer is to include joint employers such as franchisors, lead employers in contracting relationships, and new on-demand platform relationships. We have recommended this change in Section 4.2.2, Related and Joint Employers.
- 3) Enable workers to organize and bargain collectively from multiple locations with the same employer/franchisor. Additional units would be brought in under an initial agreement with a union or council of unions.
- 4) Enable organizing and collective bargaining on a multi-employer and/or sectoral basis. Empower the Board to require employers in the same sector to bargain together in a council where the workplaces have been organized.
- 5) Provide a legislative framework that enables and supports collective organizing, representation and bargaining for workers in particularly vulnerable and precarious work. This would include, but not be limited to, migrant farmworkers and caregivers/domestic workers (see Option 7). 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:

- designating an employer entity that is the counterpart in bargaining;
- ensuring a strong floor of rights from which to bargain by revoking all exemptions and special rules from core employment standards;
- recognize the triangular relationship involved in some employment relationships involving recruitment agencies (migrant workers) and employment agencies;
- enforcement and labour inspection strategies that address the challenges in the caregiving and migrant farmworker sectors; and,
- develop the capacity to enhance protection for social security, group benefits coverage, and entitlement.

4.6.2 Employee Voice

- ✓ Enact legislation protecting concerted activity along the lines of that set out in the NLRA.

Endnotes

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Appendix A



Submission to the Changing Workplaces Review On Personal Emergency Leave

By the
Workers' Action Centre
Parkdale Community Legal Services
Monday August 29, 2016

Workers' Action Centre

The Workers' Action Centre is a worker-based organization committed to improving the lives and working conditions of people in low-wage and unstable employment. We work with thousands of workers, predominantly recent immigrants, racialized workers, women and workers in precarious jobs that face problems at work. The Workers' Action Centre provides information about workplace rights, strategies to enforce those rights and participates in campaigns to improve wages and working conditions in workplaces and in labour legislation.

Parkdale Community Legal Services

Parkdale Legal Services is a poverty law clinic providing workers' rights assistance and legal representation. We work with communities in low-wage and precarious work to improve labour standards.

For Information, contact Deena Ladd, Workers' Action Centre 416-531-0778 ext 222 or Mary Gellatly, Parkdale Community Legal Services 416-531-2411 ext 246.

Introduction

Since 2001, the *Employment Standards Act* (ESA) has entitled workers to take up to 10 days of unpaid Personal Emergency Leave (PEL) per year. This leave can be used by a worker for their own personal illness, injury, and medical emergency or for the death, illness, injury, medical emergency or urgent matter concerning the worker's family.¹ PEL is an unpaid leave which limits access to it for people in low-wage and precarious work. However, PEL does provide some workers with job-protected leave when sick, family illness and emergencies arise.

Workers in precarious employment, particularly women, need full access to all the leave entitlements under PEL to manage paid work and unpaid caregiving work.

Employers want to reduce the entitlement under PEL by breaking up the 10 day unpaid leave into separate categories. For example, employers have called for restricting how many of the 10 days can be used for personal vs. family emergency, or how many can be used for illness vs. bereavement, and so forth. Breaking down the 10-day PEL into separate leave categories would reduce the entitlement available to Ontario workers.

We believe the ESA should maintain the current scope and flexibility in emergency leave provisions to address the current and future realities of workers lives. Further, this leave must be made accessible to *all* employees by removing the current exemption for firms that employ fewer than 50 employees.

The government asked the Changing Workplaces Review Advisors to make recommendations in advance of the final recommendations emerging from the Changing Workplaces Review. This is because the government committed in the 2016 Budget to “seek advice ... from the Special Advisors on the Changing Workplaces Review to resolve concerns raised by business regarding the application of the emergency leave provisions” of the ESA on an expedited basis.²

We are concerned about the effectiveness of reviewing PEL in isolation from many related issues under consideration in the Changing Workplaces Review; in particular, paid sick days, and employers' demand to deem firm-based benefits as a greater benefit than PEL (even though they may be narrower in scope than PEL). Further, we believe that a separate consultation on PEL will make it difficult for the Changing Workplaces Review to meet its objective of “creating decent work for Ontarians, particularly for those who have been made vulnerable by changes to our economy and workplaces.”³

The Interim Report presents four options for public comment on PEL. We address each of those options below.

1 spouse; parent, step-parent or foster child of the employee or their spouse; grandparent; brother or sister, spouse of the employee's child; and a relative of the employee who is dependent on the employee for care or assistance.

2 Charles Sousa, Minister of Finance **Jobs for Today and Tomorrow** 2016 Ontario Budget: Budget papers. http://www.fin.gov.on.ca/en/budget/ontariobudgets/2016/papers_all.pdf

3 Mitchell, C. Michael and John C. Murray (2016) Changing Workplaces Review: Special Advisors Interim Report. Online: https://www.labour.gov.on.ca/english/about/pdf/cwr_interim.pdf.

Option 1: maintain the status quo, that is, no changes to the Personal Emergency Leave.

We reject this option as it leaves the exemption for small and medium businesses unaddressed. See discussion under Option 2.

Option 2: Remove the exemption for companies that regularly employ fewer than 50 employees

Option 2 would remove the exemption for workplaces with fewer than 50 employees. We recommend the firm-size exemption for PEL be removed and that all workers should be able to access PEL.

The majority of workers in Ontario do not have access to paid sick days or employer-based sick leave policies. Less than one in four low wage workers get paid leaves.⁴ Many workers rely on the job-protected, unpaid personal emergency leave as the only way to take care of themselves or dependents when sick without jeopardizing their employment when illness, injury or family emergencies arise.

Unfortunately, over 1.7 million Ontario workers⁵ do not have this job-protected leave. Only 5% of businesses employ 50 or more workers; 95% employ 49 or less and are therefore exempted from providing job-protected emergency leave to their employees. As a result, one in every three Ontario workers is denied basic job protection in the event of a family or personal emergency. We believe job-protected emergency leave is a necessary standard to support work-life balance that all workers should have access to.

The firm-size exemption denies access to those who need it most. Research done for the Changing Workplaces Review concluded that workers in small workplaces are more likely to be in precarious work (e.g., less likely to be unionized; more likely to be earning lower hourly wages and living in low-income families; and, more likely to be in temporary and part-time work).⁶ Removing the exemption is in line with the objectives of the Changing Workplaces Review to create decent work for Ontarians, particularly for those who have been made vulnerable by changes to our economy and workplaces

Losing pay is enough of a deterrent for workers facing a family or personal emergency. Denying job protection adds even more insecurity to vulnerable workers. Without job-protected leave, many people in exempted workplaces will be forced to work while sick or facing family emergencies. Being able to take time off when sick speeds up recovery, deters further illness, and reduces health care costs. Most people without job protected PEL work in retail, accommodation and food services,

4 Sheila Block (2015) "A Higher Standard: The case for holding low-wage employers in Ontario to a higher standard" Canadian Centre for Policy Alternatives. Online: https://www.policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2015/06/Higher_Standard.pdf p 15.

5 In 2015, 1,723,576 people worked in firms with 49 or fewer employees. Source: Statistics Canada, CANSIM, table 281-0042. <http://www5.statcan.gc.ca/cansim/a26>

6 Leah Vosko, Andrea Noack and Mark 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." <https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Vosko%20Noack%20Thomas-5-%20ESA%20Exemptions.pdf> p 61

construction, health care, and social services.⁷ The sectors where workers are most in contact with the public are the sectors with the least access to job-protected sick leave (PEL). Ontario's Ministry of Health and Long-Term Care advises people to stay home if they are sick, especially when it comes to infectious diseases like influenza.⁸ Ensuring workers have access to PEL, especially those in precarious work, will support public health goals.

Ontario is the only province to exempt employers from providing such leaves by firm size. Removing this exemption will bring Ontario in line with other jurisdictions.

Option 3: Remove the general 10-day leave entitlement and replace it with a number of separate leave categories (personal illness/injury, bereavement, dependent illness/injury etc)

Option 3 would break down the 10-day leave into separate leave categories but *not* increase the total leave entitlement (i.e., separate number of days for personal illness/injury, bereavement, dependent illness/injury or emergency leave).

We reject this option. Breaking down PEL into separate leave categories would reduce the types and scope of unpaid leave available to workers. Ten days of leave divided into separate categories for personal illness, injury, and medical emergency or for the death, illness, injury, medical emergency or urgent matter concerning the worker's family (spouse; parent, step-parent or foster child of the employee or their spouse; grandparent; brother or sister, spouse of the employee's child; and a relative of the employee who is dependent on the employee for care or assistance) would inevitably be a reduction in benefits available to workers.

The Interim Report states that employers want to limit the scope and nature of PEL so that workers cannot access both company-based leaves (e.g., paid sick leave) and unpaid leave under the terms of Personal Emergency Leave. We believe that the social and individual cost of reducing the leave entitlements and removing flexibility under PEL far exceeds the costs of this unpaid leave to some employers.

The reasons for workers using personal emergency leaves are changing. As more women enter the labour force, the need has grown for the critical ability to access leave in order to take care of dependents. The use of leaves for personal illness has shrunk (from 84% in 1976 to 54% in 2015). An aging population and social policies that rely on family to provide elder care are some of the factors in the shift to using emergency leave for personal/family responsibilities. In 2015, men took 26% of their leave for personal/family responsibilities while women took 56% of their leave for personal/family responsibilities (i.e., not personal illness). Removing flexibility under PEL would create a substantial burden on women workers. More, rather than less, flexibility is required in PEL to accommodate labour market, demographic and social policy changes.⁹

Some large companies want to be able to opt out of the ESA PEL provisions because they provide

7 Source: Statistics Canada, CANSIM table 281-0042 <http://www5.statcan.gc.ca/cansim/a47>

8 Ministry of Health and Long-term Care (2009) The H1N1 Flu in Ontario: A Report by Ontario's Chief Medical Officer of Health online: http://www.health.gov.on.ca/en/ccom/flu/h1n1/pro/docs/oh9100_report.pdf

9 For data and a fuller analysis of these issues, please see "Personal Emergency Leave: A Response to Options Identified in the Mid-Term Report of Changing Workplaces" by Researchers from Closing the employment Standards Enforcement Gap: Improving Protections for People in Precarious Jobs, August 26, 2016.

one or more benefits that they believe may be more generous than PEL even if the benefits do not cover all the specific provisions of PEL (i.e., do not cover the same family members or reasons for taking unpaid emergency leave). As the Advisors note, “An employer cannot rely on a greater benefit with respect to one standard to offset a lesser benefit with respect to another. This has not been permitted because the result would be that employees would be deprived of the benefit of some standards.”¹⁰ One of the fundamental principles of the ESA is to provide statutory minimum terms and conditions of employment. We strongly believe PEL should not be reduced in scope nor should amendments enable employers to contract out of PEL or other employment standards.

Option 4: Combine options 2 and 3 giving different entitlements for different sized employers.

Option 4 would break down the 10 day PEL standard into separate leave categories and maintain or create different obligations for different sized employers. We reject this option for reasons discussed above.

¹⁰ Mitchell, C. Michael and John C. Murray (2016) Changing Workplaces Review: Special Advisors Interim Report. Online: https://www.labour.gov.on.ca/english/about/pdf/cwr_interim.pdf. P 254