

10-2016

## **Improving Employment Standards and their Enforcement in Ontario: A Research Brief Addressing Options Identified in the Interim Report of the Changing Workplaces Review**

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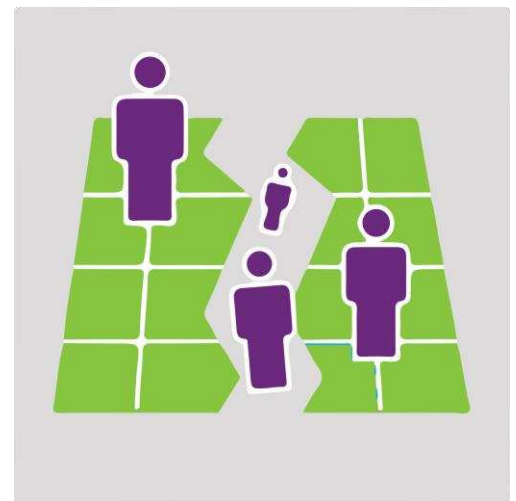
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# CLOSING THE EMPLOYMENT STANDARDS ENFORCEMENT GAP

## Improving Employment Standards and their Enforcement in Ontario:

A Research Brief Addressing Options  
Identified in the Interim Report of the  
Changing Workplaces Review



Submitted by:

Closing the Employment  
Standards Enforcement Gap:  
Improving Protections for  
People in Precarious Jobs

October 2016

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## Introduction

The quality of employment available to Ontarians is a growing concern among legislators, policymakers, and the general public alike. There is widespread recognition that precarious employment and the challenges posed by the associated realignment of risks, costs and power relations between employees and employers require improvements to employees' legislative protection. Ontario's Changing Workplaces Review (CWR) affords us an opportunity to take stock of important changes taking place the province's labour market. As the Terms of Reference introduced at the outset of the CWR note, "far too many workers are experiencing greater precariousness"<sup>1</sup> in employment in Ontario today than in the recent past. Accordingly, with the aim of "creating decent work in Ontario, particularly [for] those who have been made vulnerable by changes in our economy and workplaces,"<sup>2</sup> such terms directed the Special Advisors to investigate the dynamics underlying the magnitude of precariousness in the province's labour market and to pose options for mitigating this fundamental social and economic problem through reforms to Ontario's *Labour Relations Act (LRA)* and *Employment Standards Act (ESA)*.

Charged with these objectives, the Special Advisors have commissioned studies and solicited public input on the parameters of their investigations as well as on the appropriate content to be covered in their review. The result is arguably one of the most thorough legislative reviews of the *LRA* and the *ESA* undertaken in recent decades. Reflecting the CWR's impact to date, partly on the basis of its findings on this domain, the Premier's Mandate Letter of September 2016 to the Minister of Labour, the Hon. Kevin Flynn, calls for "strengthening enforcement of employment standards, through further resources if necessary, ensuring employers who do not respect protections for workers are held to account."<sup>3</sup>

Against this backdrop, this research brief responds to the request for input on options set out in the Interim Report on the CWR for reforming Ontario's *LRA* and *ESA*. It is the product of the collective efforts of researchers affiliated with "Closing the Employment Standards Enforcement Gap: Improving Protections for People in Precarious Jobs," a multi-year research partnership – now in its fourth year – supported by the Social Sciences and Humanities Research Council of Canada, and involving researchers from eight universities, an international

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<sup>1</sup> Ontario Ministry of Labour (2016) Terms of Reference - Changing Workplaces Review. Online: <https://www.labour.gov.on.ca/english/about/workplace/terms.php>

<sup>2</sup> Ibid.

<sup>3</sup> Government of Ontario (2016) September 2016 Mandate letter: Labour. Online: <https://www.ontario.ca/page/september-2016-mandate-letter-labour>

advisory team of academic experts drawn from Australia, the United States, and parts of Europe, and numerous organizations and agencies outside the academy.

“Closing the Employment Standards Enforcement Gap” is premised on two guiding assumptions: first, that Ontario’s *ESA*, in establishing minimum workplace conditions related to wages, hours of work, overtime pay, vacations, public holidays, and termination and severance, is the foremost vehicle for extending entitlements to all Ontario employees regardless of their bargaining power in the labour market. It thereby reflects a collectively-established, normative judgment about minimally decent working arrangements that must be provided. Its second overarching assumption, informing participants’ substantive research focus, is that if employment standards (ES) are to provide a floor of social minima below which Ontario’s employees shall not fall, employees must be able to effectively access the rights to which they are legally entitled. For this reason, the *ESA* creates statutory rights enforceable by the state and thus positions state officials as those who bear principal responsibility for the *Act*’s enforcement and provides them with a range of enforcement tools.

Given these guiding premises, the ensuing brief focuses principally on responding to issues and options raised by the Special Advisors that relate to ES and their enforcement (i.e., the *ESA*). At the same time, it also addresses select issues and options pertinent to improving conditions for vulnerable employees in precarious employment that lie at the interface of the *LRA* and the *ESA*, specifically, access to collective bargaining and thus broader-based bargaining and employee voice. The rationale for this supplemental emphasis is that, as research shows, expanding access to representation through unions and collective bargaining among vulnerable employees in precarious employment is integral to improving their working conditions.

The material cited in the brief draws on research findings of “Closing the Employment Standards Enforcement Gap” to date, evidence from other jurisdictions, and secondary scholarly literature and policy analysis. Most of the issues addressed are either outlined in Chapter 5 of the Interim Report or raised in Chapter 4 but pertain to the relationship between aspects of the *LRA* and the *ESA*. To facilitate easy cross-referencing, the brief adopts the section numbering of the Interim Report.

## Part I: Responses to Options Posed in Chapter 5 on Employment Standards

### 5.2.1 Scope and Coverage of the ESA: Misclassification of Employees and the Definition of Employees

#### **Background:**

Like all protective labour and employment statutes, the *ESA* defines to whom it applies and to whom it does not. In the case of the *ESA*, the statute applies to “an employee and his or her employer” provided that the work is to be performed in Ontario or, if outside, is a continuation of the work performed in Ontario.<sup>4</sup> While the legislative choice to limit the scope of coverage to employees goes back to the origins of the *ESA*, it is neither natural nor neutral. This is because workers sell their services in the labour market under a variety of contractual forms, including as employees and as self-employed workers or independent contractors, and so it is a policy choice whether or not to cover all workers, as does the *Occupational Health and Safety Act (OHS)*, or a subset of workers, as does the *ESA*.

However, as the Special Advisors recognize, the choice to only cover employees and not all workers does not resolve the issue of coverage fully; indeed it generates problems of its own. First and foremost, by constituting in law that employees are entitled to a different set of rights than other workers, the policy choice not only affirms that employers enjoy the power to substitute contracting for employment, it attaches a particular set of legal consequences to that choice that may create incentives to contract rather than employ that would not otherwise exist. The Special Advisors have not chosen to inquire into whether this choice is justified, but rather have elected to accept it and consider options for dealing with its consequences. These consequences are, first, the problem of definition (who constitutes covered employees) and, second, the problem of enforcement (how to ensure that covered employees are not deprived of their *ESA* entitlements through being misclassified).

The difficulty of resolving these twin problems has increased as a result of the changing workplace. As the Special Advisors discuss in the Interim Report, many employers are under increasing competitive pressure that has contributed to the erosion of the standard employment relationship and greater reliance on novel and often more precarious contracts for the performance of work that do not clearly fall within the traditional legal parameters of

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<sup>4</sup> The policy options that respond to concerns about the exclusions of certain groups of employees from coverage and of exemptions and special rules are addressed in the response to 5.2.3 in this brief.

employment, making it more difficult to define and determine who is covered by the *ESA*. As well, some employers have responded to increased competitive pressure by misclassifying employees as excluded workers in order to evade their legal obligations and reduce their labour costs.

Not only do the growing problems of definition and misclassification have common causes, they are mutually reinforcing. The erosion of the standard employment relationship makes it increasingly difficult to provide a bright line definition of employment, which in turn produces an environment in which misclassification, innocent or intentional, may increase. Employers may not fully understand where the boundaries of employment end and self-employment begin. They may feel emboldened to intentionally misclassify employees because they perceive that the risk of being caught is reduced since their employees do not understand their legal status, are too vulnerable to complain, or that the official test for determining employee status is open-ended and hard for officials to apply.

Employee misclassification is recognized as a pervasive and serious problem in many jurisdictions. For example, in the United States, recent studies estimate that between 10% and 20% of employers misclassify at least one of their employees as an independent contractor, and that misclassification is likely increasing.<sup>5</sup> Misclassification imposes costs on workers by depriving them of access to workplace standards. It also makes the playing field uneven, which in turn may encourage more employers to abandon standard employment relationships and avoid or evade the *ESA* in order to remain competitive. Yet misclassification is not just a problem under the *ESA*. Misclassified employees are deprived of workers' compensation, employment insurance, and other employment-related benefits. As well, misclassification deprives government of payroll and income taxes that should be paid. Indeed, studies focussing on the case of the United States estimate that such losses in government revenue are in the billions of dollars, and thus efforts to detect and remedy misclassification have been increased.<sup>6</sup>

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<sup>5</sup> Carré, Françoise (2015) "(In)dependent Contractor Misclassification." Washington: Economic Policy Institute Briefing Paper. Online: <http://www.epi.org/files/pdf/87595.pdf>, p. 1; see also Donahue, Linda H., James Ryan Lamare, and Fred B. Kotler (2007) *The Cost of Worker Misclassification in New York State*. Ithaca, NY: Cornell University, School of Industrial and Labor Relations. Online: <http://digitalcommons.ilr.cornell.edu/reports/9/>; Law Commission of Ontario (2012) "Vulnerable Workers and Precarious Work: Final Report." Online: <http://www.lco-cdo.org/vulnerable-workers-final-report.pdf>, p. 95; Smith, Rebecca, David Bensman, and Paul Alexander Marvy (2015) "The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at America's Ports." Online: <http://nelp.org/content/uploads/2015/03/PovertyPollutionandMisclassification.pdf>

<sup>6</sup> Department for Professional Employees, AFL-CIO (2016) "The Misclassification of Employees as Independent Contractors." Online: <http://dpeaflcio.org/wp-content/uploads/Misclassification-of-Employees-2016.pdf>, pp. 6-7;



## **Misclassification of Employees**

### *Option 1: Maintain the status quo*

The first option is to maintain the status quo, but the Interim Report does not identify precisely what the status quo is, and so it is necessary to begin there. Misclassification in and of itself is not a violation of the *ESA*; rather a violation occurs when the employer fails to provide an employee with a minimum standard required by the *Act*. As a result, disputes about misclassification arise when employers are alleged to have violated a standard either as a result of a complaint<sup>7</sup> or an Employment Standards Officer (ESO) inspection. The status quo with regard to misclassification, therefore, is one in which the issue only gets raised if a worker makes a complaint alleging that he or she is an employee who is being deprived of the protection of the *ESA* or if an ESO conducts an inspection in which he or she makes an assessment that one or more workers is an employee whose *ESA* entitlements are being violated. Misclassification as such is not the direct target of enforcement.

Because misclassification is not itself a violation of the *ESA*, the Employment Standards Branch's administrative database (ESIS) provides no direct information on the number of cases which involve employee misclassification. However, research indicates that the present regime fails to adequately protect employees against the risk of being misclassified for two principal reasons: first, to the extent that detection of misclassification depends on employee complaints, it will result in significant under-enforcement. The reasons for under-enforcement are discussed at length in Section 5.5.4 of this brief).<sup>8</sup> Second, it is likely the case that many workers who are told by their employers that they are not employees, and therefore not entitled to *ESA* minimums, may not be aware that they may, in fact, be employees as a matter of law and that they could challenge their classification and claim their *ESA* entitlements. These problems are greatest among those employees who are most vulnerable because of their social location or context.

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U.S. Treasury, Treasury Inspector General for Tax Administration (2013) "Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings." Ref. 2013-30-058.

<sup>7</sup> In this analysis, to enhance precision, and following the convention of other scholars working in this area internationally, the term "complaint" is used to refer to the entire submission made by an employee to the Ministry of Labour. Each complaint includes one or more "claims" which refer to alleged violations of particular employment standards.

<sup>8</sup> Vosko, Leah F., Andrea M. Noack, and Eric Tucker (2016) "Employment Standards Enforcement: A Scan of Employment Standards Complaints and Workplace Inspections and Their Resolution under the Employment Standards Act, 2000." Online: <https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Vosko%20Noack%20Tucker-%206A%20-ESA%20Enforcement.pdf>

Proactive enforcement may also lead to the detection of misclassification, but the actual target of proactive inspections is employer violations of substantive standards. In recent years, the Ministry of Labour (MOL) has adopted a strategy of blitzes that target sectors where violations are suspected to be more frequent or groups of employees who are perceived to be more at risk. For example, there have been several blitzes targeting precarious employment, vulnerable and temporary foreign employees. In such blitzes, ESOs target “core” standards, such as record-keeping and hours of work, but do not seem to focus on misclassification as such, although presumably the sectors and groups of workers selected are likely to also be disproportionately sites where misclassification is more prevalent. But even if misclassification is detected in such contexts, it has no direct consequences. Most employers will simply be ordered to comply with the standards they have violated, a few may face minor penalties through tickets or notices of contravention, and even fewer will be prosecuted for regulatory offences (usually only in cases where they refuse to comply with orders to pay) but these penalties will be imposed because of the substantive violation, not because of the misclassification. To our knowledge, no employer has ever been sanctioned or prosecuted for the misclassification itself.

For these reasons, maintaining the status quo is not a satisfactory response to the problem of misclassification, and we do not recommend option 1.

*Option 2: Increase education of workers and employers with respect to rights and obligations*

No one can object to increasing the education of employees and employers with respect to their rights and obligations under the *ESA*. First, with regard to employer education, undoubtedly, some proportion of misclassification is the result of innocent error by employers who erroneously believe that some workers are not covered employees. Thus, reducing the frequency of these errors through employer education will be beneficial. The important question, however, is whether employer education by *itself* can be expected to be an adequate response to the problem of misclassification. There is no empirical evidence on the frequency of misclassification in Ontario or on the proportion of misclassification that is innocent. However, studies from other jurisdictions, most notably the United States,<sup>9</sup> suggest that a significant proportion of misclassification is intentional and promoted by the structural pressures described earlier.

With regard to worker education, it is also undoubtedly true that some unknown proportion of the workforce does not understand the law regarding employee status and therefore may accept the designation they are given by their employers as determinative of their legal status.

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<sup>9</sup> For a recent review of the US literature on the prevalence of misclassification, see Carré, “(In)dependent Contractor Misclassification.”

However, as discussed above, there is clear evidence that labour force participants do not assert their rights not simply because of a lack of knowledge, but also because of the fear they will suffer adverse employment consequences.

Therefore, while option 2 may contribute to a solution, research indicates that education on its own is unlikely to reduce substantially the level of misclassification.

*Option 3: Focus proactive enforcement activities on the identification and rectification of cases of misclassification*

Proactive inspection aimed at misclassification would be a beneficial policy option. However, the more important question is how that might be undertaken. As noted, the *ESA* does not specifically make misclassification a violation of the *Act* and there are no administrative records which identify when, where or how often misclassification occurs. The absence of data makes it difficult to target misclassification as an enforcement priority. We simply do not know, for example, what percent of employees who suffer minimum wage or vacation pay violations do so because they are misclassified by their employers. One way to begin to address this problem is to amend the *ESA* to make misclassification a separate and distinct offence. Not only would such a measure make it clear to employers that misclassification is itself a wrong for which they may be sanctioned (in addition to being ordered to pay what they owe), it would also begin to generate much-needed administrative data on misclassification that could be used to better target enforcement resources toward its elimination.

Additionally, in the United States, inter-agency taskforces and commissions have been established at the federal and state levels to coordinate and strengthen enforcement. A similar approach could be considered for Ontario.<sup>10</sup> This might include agreements at the provincial level, such as an agreement between the Employment Standards Branch and the Workplace Safety and Insurance Board, as well as agreements with federal bodies such as the Canada Revenue Agency.

Finally, as part of a proactive approach to enforcing misclassifications, the Special Advisors might also consider proposing that intentional misclassification should be singled out for more stringent penalties, such as an obligation to pay affected workers double what they are owed, or to pay elevated fines. For example, California's *Employee Misclassification Act*, which amended the state's labor code, levies substantial fines on employers found guilty of "willful"

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<sup>10</sup> Vosko, Leah F. et al (2011) "New Approaches to Enforcement and Compliance with Labour Regulatory Standards." Online: <http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-tucker-thomas-gellatly.pdf>, pp. 67–68.

misclassification of employees as independent contractors. These include a civil penalty between \$5,000 and \$15,000 USD for each violation which can be increased to \$10,000 and to \$25,000 USD if the activity is deemed to be repeated. The *Act* also mobilizes the threat of reputational loss: it requires employers found to have misclassified workers to display a notice on the company website, or in another prominent space, which indicates that “the Labor and Workforce Development Agency or a court...has found that the person or employer has committed a serious violation of the law by engaging in the willful misclassification of employees.”<sup>11</sup>

*Option 4: Provide in the ESA that in any case where there is a dispute about whether a person is an employee, the employer has the burden of proving that the person is not an employee covered by the ESA and/or has an obligation, similar to Section 1(5) of the LRA in relation to related employers, to adduce all relevant evidence with regard to the matter*

This is a relatively straightforward measure that could marginally improve the efficiency and accuracy of decision-making. Placing the burden of proof on the employer (which requires the employer to adduce evidence at the risk of failing to discharge the burden) and additionally requiring the employer to adduce all relevant evidence in its possession should help to insure that decision-makers have more of the relevant facts at their disposal.

The other potential effect of the proposal is to incrementally expand the scope of coverage with regard to workers who are on the margin between employment and self-employment because the test for who is an employee for the purposes of the *ESA* cannot produce a bright line distinction between these two categories. Therefore, ESOs and other adjudicators always have to make judgments about where to draw the line in a particular case. A shift in the burden of proof onto employers should result in more of these marginal cases being decided in favour of employee status, even in the absence of a change in the definition of employee. This is a desirable outcome if we accept that an underlying policy goal for ES legislation favours “a presumption of broad coverage.”<sup>12</sup>

An even stronger measure that also does not require a change in the definition of employee would be to create a legal presumption of employee status for workers performing or providing

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<sup>11</sup> California Labor Code S. 226.8(1). In addition, the *Act* allows for fines to be levied against any third party advisors such as an accountant or human resource professional (but not attorneys) who “knowingly advises an employer to misclassify an individual as an independent contractor to avoid employee status” (California Labor Code S. 2753).

<sup>12</sup> Arthurs, Harry (2006) *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century*. Gatineau, QC: Human Resources and Skills Development Canada, p. 59.

labour services for a fee. The effect of a legal presumption of employment status is to shift the burden of proof onto employers, but unlike option 4, the issue is not posed as an evidentiary matter that arises only in the context of a dispute. Rather, it states a more general principle in favour of coverage. To strengthen the presumption, the law may also specify what the employer must demonstrate to overcome the presumption. Twenty-seven American states have what is called the “ABC” test,<sup>13</sup> which requires employers to show:

- (a) an individual is free from control or direction over performance of the work, both under contract and in fact;
- (b) the service provided is outside the usual course of the business for which it is performed; and
- (c) an individual is customarily engaged in an independently established trade, occupation, or business.

The articulation of factors that must be established to rebut the presumption of employee status, however, begins to touch on the question of definition, the issue to which we now turn.

### ***Definition of Employee in the ESA***

#### *Option 5: Maintain the status quo*

As the Interim Report makes clear, the status quo is unsatisfactory. Employment and independent contracting do not exist as discrete categories separated by a bright line but rather are endpoints on a spectrum of work arrangements. The existence of this spectrum is not new but recent developments such as cybernetics that have lowered the cost of contracting<sup>14</sup> and facilitated the proliferation of platform work and other innovative arrangements that challenge existing legal categories. As a result, the difficulty of distinguishing between covered employees and other workers has grown.

The statutory definition of employee under the *ESA* is rudimentary, but the problem of determining who is or is not an employee is not unique to this context. In an effort to apply a categorical distinction to complex factual arrangements, adjudicators have adopted multi-factor tests that look at such things as control, ownership of tools, chance of profit etc., while

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<sup>13</sup> Leberstein, Sarah and Catherine Ruckelshaus (May, 2016) “Independent Contractor vs. Employee.” New York: National Employment Law Project, Policy Brief. Online: <http://www.nelp.org/content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf>

<sup>14</sup> Dyer-Witheyford, Nick (2015) *Cyber-Proletariat: Global Labour in the Digital Vortex*. London: Pluto Press.

acknowledging “there is no conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor.”<sup>15</sup> Arguably, one potential benefit of a multi-factor test is that it can be applied flexibly to ensure that the purposes of the *ESA* are achieved. However, there is a limit to how far a purposive application of a multi-factor test can go if the underlying statutory categories no longer fit the reality in which it operates. This is the case with the *ESA*.

*Option 6: Include a dependent contractor provision in the ESA, and consider making clear that regulations could be passed, if necessary, to exempt particular dependent contractors from a regulation or to create a different standard that would apply to some dependent contractors*

We recommend the creation of a dependent contractor provision in the *ESA*. Such a provision would be a positive step that responds to the reality that work arrangements exist on a continuum and that the traditional category of employee may not adequately capture the full range of workers who are in need of statutory protection against unacceptable forms of work<sup>16</sup> or working conditions.<sup>17</sup> The effect of such a measure would be to extend outwards the boundaries of protection, but the actual effect of such a measure will depend on its implementation. In other areas of the law, particularly labour relations, where dependent contractor provisions are common, the application of the provision depends on its interpretation and application by adjudicators who face the same problems that arise in the interpretation and application of the term “employee” but at a new margin. There is no bright line that differentiates dependent from independent contractors and so multi-factor tests are adopted and usually applied purposively, to include workers who are in a relation of economic dependence with the party to whom they perform work or provide service for compensation. Not surprisingly, almost all disputes about coverage take place at the new margin. Therefore, it is crucial that careful consideration be given to how best to define dependent contractor and provide clear guidance to employers and adjudicators about the scope and purpose of the dependent contractor category. In regard to the definition, there is much to be said in favour of replicating the definition in the *LRA*, both because that definition emphasizes the importance of economic dependence and because a different definition of the term is likely to create

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<sup>15</sup> *671122 Ontario Ltd. v Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983, para. 46.

<sup>16</sup> For a recent discussion of the parameters of this emerging principle, see Fudge, Judy and Deidre McCann (2015) “Unacceptable Forms of Work: A Global and Comparative Study” Geneva, International Labour Organization. Online: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/documents/publication/wcms\\_436165.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/documents/publication/wcms_436165.pdf)

<sup>17</sup> The Law Commission of Ontario “Vulnerable Workers and Precarious Work: Final Report,” has recommended “extending some *ESA* protections to self-employed persons in dependent working relationships with one client, focussing on low wage earners, and/or identifying other options for responding to their need for employment standards protection,” p. 95.

unnecessary confusion. Consideration should also be given to issuing administrative guidelines similar to those issued in regard to the identification of employees misclassified as independent contractors by the U.S. Department of Labor's Wage and Hour Division (WHD), in 2015.<sup>18</sup> Finally, consideration should be given to creating regulatory power to deem particular groups of workers to be dependent contractors. This would enable the government to expand the scope of coverage without having to amend the *ESA* in the event that the adjudicatory process fails appropriately to do so.

The final issue is whether there should be the power to tailor the application of the *ESA* to fit the specific circumstances of particular groups of dependent contractors and whether regulations are the best way to accomplish this. However, no explanation is provided as to why the issue of special rules and exemptions should be treated differently for dependent contractors than for employees and we cannot think of one. Past experience with special rules and exemptions suggests great caution should be taken in this regard. Elsewhere in the Interim Report, options are presented for the review of existing special rules and for the creation of new ones, including the MOL's current Special Industry Rules (SIRs) process. We see no reason why any tailoring of the *ESA* for dependent contractors should take place through the creation of a separate regulatory power, especially one that lacks an articulated set of principles to guide decision-makers and that does not guarantee the participation of workers in the decision-making process.

### 5.2.2 Who is the Employer and Scope of Liability

#### **Background:**

Just as labour and employment laws create rights for employees, they also impose correlative duties and therefore must identify who is responsible for their fulfillment. Traditionally, the answer was obvious: the direct employer owed the duty to comply with the minimum standards and could be held liable for failing to do so. However, as the Special Advisors recognize, the changing workplace has resulted in a fissuring of what were formally integrated employing entities through sub-contracting, franchising, supply-chains, and use of temporary help agencies, among other mechanisms. These arrangements often create conditions that are conducive to ES violations and also pose challenges to effective enforcement, raising the question of whether it is adequate to impose duties only on direct employers narrowly

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<sup>18</sup> U.S. Department of Labor, Wage and Hour Division (WHD) "Administrator's Interpretation No. 2015-1" (Issued July 15, 2015 by David Weil, Administrator). Online: [https://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.pdf](https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf)

conceived or whether the definition of the employer should be expanded or other entities be made jointly responsible for the duties imposed on the direct employer.

This is not the first time the issue has come up and as the Special Advisors note there are precedents in the *ESA* for imposing duties more broadly. For example, shareholder and subsequently director liability for unpaid wages dates back to the first general incorporation statutes.<sup>19</sup> Related employer provisions are also a longstanding feature of ES statutes and more recently client liability for non-payment by temporary help agencies (THAs) (the legal employer) were added.<sup>20</sup> These extensions of liability cover diverse situations. There are nevertheless at least three common characteristics that can be derived from them that help establish normative principles for holding an entity jointly responsible for the legal employer's non-compliance with its *ESA* responsibilities. First, there is a causal contribution insofar as the non-employing entity has entered into an arrangement that increases the risk of violations or undermines effective enforcement; second, the non-employing entity has benefited from the arrangement economically; and, third, the non-employing entity has the capacity to rectify the problem by insisting on contractual terms that hold the immediate employer responsible for complying with the *ESA*.<sup>21</sup>

#### *Option 1: Maintain the status quo*

We do not recommend the option of maintaining the status quo because it is inadequate to deal with the full range of organizational arrangements into which businesses enter that should be captured by the principles articulated above. In short, the current law is under-inclusive and as a result creates an uneven playing field which creates incentives to enter into particular arrangements because they enable one party to avoid legal duties under the *ESA*.

#### *Option 2: Contractor Liability*

Contractor liability has a long history and has been used in a variety of situations. For example, beginning the late-nineteenth century, governments were made liable for the unpaid wage

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<sup>19</sup> Tucker, Eric (2008) "Shareholder and Director Liability for Unpaid Workers' Wages in Canada: From Condition of Granting Limited Liability to Exceptional Remedy." *Law and History Review* 26(1): 57-97.

<sup>20</sup> The Government of Ontario's *Stronger Workplaces for a Stronger Economy Act, 2014*, amended the *ESA* to extend joint and several liabilities to client firms for unpaid wages, overtime pay, public holiday pay and premium pay. See *ESA* s. 74.18.1.

<sup>21</sup> For a more expansive discussion of these and other principles justifying the imposition of liability, see Davidov, Guy (2015) "Indirect Employment: Should Lead Companies be Liable?" *Comparative Labor Law and Policy Journal* 37(5): 18-29.



liabilities of their contractors on public works' projects.<sup>22</sup> Not only is there precedent for holding contractors liable for the wage liabilities of sub-contractors, but more importantly the imposition of such liability is justified according to the principles we have identified. It is well documented that sub-contracting increases the risk that workers' rights will be violated;<sup>23</sup> sub-contracting arrangements produce economic benefits for the contracting firm, and contracting firms have the capacity to remedy the problem. Moreover, the imposition of liability on contractors for *ESA* violations by sub-contractors does not interfere with the freedom of businesses to organize their activities through sub-contracting where it is advantageous for them to do so; it merely prevents them from gaining in addition immunity from liability for *ESA* violations by adopting this form.

The Special Advisors raise the possibility that contractors should be legislatively compelled to require their sub-contractors to comply with the law. We recommend such a measure as a means of fostering compliance among employers along the supply chain, and enhancing the ability of aggrieved employees of sub-contractors to recoup back wages. We do not see any reason for limiting contractor liability to particular sectors or industries where vulnerable employees and precarious jobs are commonplace. The problem with such an approach is that it risks creating a regime that will need to be periodically re-evaluated to ensure that its coverage is appropriate as the work arrangements vary over time in economic sectors. Moreover, given that the potential costs of joint liability are low for companies that operate in sectors where *ES* violations are infrequent, the complexity and inefficiency of creating sector specific liability is not justified. For these reasons, we recommend the adoption of contractor liability across all sectors.

### *Option 3: Create a joint employer test akin to the DOL Policy*

While option 2 essentially involves imposing joint liability on one entity for the violations of another entity that is the legal employer, option 3 provides a remedy based on an expanded definition of who is the legal employer. In effect, it would extend employer status to joint employers based on an economic realities test. We would therefore recommend such a measure. If it is the case that the economic reality of the situation is that more than one entity is directing, controlling or supervising the work and is in control of the employment conditions

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<sup>22</sup> For example, see S.C. 1896. c. 5.

<sup>23</sup> Mayhew, Claire, Michael Quinlan and Rande Ferris (1997) "The Effects of Subcontracting/Outsourcing on Occupational Health and Safety: Survey Evidence from Four Australian Industries." *Safety Science* 25(1-3): 163-178; Weil, David (2014) *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*. Cambridge, MA: Harvard University Press.

etc., then both those entities should be held jointly and severally liable for complying with the *ESA*.

However, while we believe that the measure is justified, we would see its role as a secondary one, to fill the gaps not covered by option 2 (contractor liability) and option 4 (franchisor liability). (We would also urge that the Special Advisors seriously consider the option of creating supply chain liability. A growing body of literature points to the effectiveness of such measures in fostering compliance at the bottom of supply chains.<sup>24</sup>)

Contractor, franchisor and supply chain liability provisions are more categorical in their approach and thus easier to apply.<sup>25</sup> The frequency of disputes about whether the parties are in a sub-contracting or franchising arrangement is likely to be low compared to the level of litigation that is likely to arise about whether two entities are joint employers based on a multi-factor test. Moreover, a categorical approach is less amenable to gaming and manipulation. That said, a categorical approach cannot capture all situations in which the imposition of joint liability is justified, and so a more open-ended joint-employer test is also required.

#### *Option 4: Franchisor Liability*

Like contractor liability (option 2), franchisor liability is justified on the basis of the normative principles articulated above. As Weil<sup>26</sup> shows, there is a causal relation between franchising and an increased risk of employment standards violations; franchisors economically benefit from the arrangement and are in a position to rectify the situation. With regard to the last point, franchisors are in an extremely strong position to minimize the risk that their franchisees will violate their ES obligations. Franchise agreements impose detailed requirements on franchisees and control how they conduct their businesses in minute detail in order to ensure that customers will have the same experience in every franchised location and to protect the brand. In this context, it should not be difficult for franchisors to include requirements regarding *ESA* compliance in the franchise agreement as well as to provide the franchisor with remedies against the franchisee in the event on an *ESA* violation for which it is jointly liable. Finally, the imposition of joint liability does not in any way limit the freedom of businesses to organize as a

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<sup>24</sup> Hardy, Tess and John Howe (2015) "Chain Reaction: A Strategic Approach to Addressing Employment Non-Compliance in Complex Supply Chains." *Journal of Industrial Relations* 57(4): 563-584; Locke, Richard M. (2013) *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*. Cambridge: Ithaca, NY: Cornell University Press; Weil, *The Fissured Workplace*.

<sup>25</sup> A categorical approach is one that establishes legal responsibilities on the basis that the parties have entered into a well-recognized legal relationship whose nature is unlikely to generate significant disputation.

<sup>26</sup> Weil, *The Fissured Workplace*.

franchised business in order to obtain their legitimate benefits. What it prevents is lead businesses from gaining the additional advantage of gaining immunity from *ESA* violations through franchising. For these reasons, we recommend option 4.

*Option 5: Repeal the “intent or effect” requirement for related employers*

The related employer provision is generally applied to another categorical situation, one in which a corporation operates through a number of subsidiary corporations. The question is when the parent or one of its subsidiaries should be held liable for the *ESA* violations of another subsidiary. Related employer provisions in most jurisdictions simply require that the businesses are associated or related. Ontario is unique in also requiring that the “intent or effect” of the arrangement directly or indirectly defeats the purpose of the *Act*. We would argue that this requirement is “always” fulfilled where the arrangement of businesses in that manner deprives employees of the ability to access the deeper pockets of the broader business to secure their monetary entitlements. More generally, if we turn to our three normative principles for imposing broader liability, there is a causal contribution between the business arrangement and the risk of violation or the avoidance of liability; lead businesses benefit from such arrangements and they are in a position to rectify the problem. Moreover, as is the case for contractor and franchisor liability, related employer liability does not limit the freedom of businesses to organize through subsidiaries, it merely removes the advantage of gaining immunity for *ESA* violations in one part of the business.

Unfortunately, the Ontario Labour Relations Board (OLRB) has adopted a narrower interpretation of the “intent or effect” requirement that imposes a more stringent causation test in order to establish related employer liability. The implementation of this interpretation has resulted in employees who have suffered significant monetary violations being unable to collect what they are owed despite the fact that the parent corporation or one of its subsidiaries continues to operate. In our view, this is a case where a categorical approach is justified and this is best achieved by the repeal of the “intent and effect” requirement. Therefore, we recommend option 5.

*Option 6: Create an analogy to the “oppression remedy”*

Our understanding is that a broad related employer provision would cover many situations that an oppression remedy might be used to address, particularly if a remedy is being sought against another corporate entity that is related to the employing corporation. However, it is also our understanding that the oppression remedy may be used to impose liability on directors for the

debts of the corporation.<sup>27</sup> While it is not clear whether the Special Advisors contemplate imposing liability through this new oppression remedy, we would strongly recommend that they do so and that they also consider the option of expanding director liability to include unpaid termination and severance pay.

*Option 7: Liens*

While this option has less to do with the scope of liability than the previous ones, we recommend it, as it would provide an additional tool to improve the collection of monetary violations. This issue is discussed elsewhere in our response (see response 5.5.7 on Collections, options 2 and 3).

*Option 8: Encourage best practices through government leading by example*

This option is clearly sensible. As the government aims to be a model employer, it should be standard practice for it to lead by example in all of its activities (see response to 5.5.5.3 on Remedies and Penalties, option 11).

### 5.2.3 Exemptions, Special Rules and General Process

***Background:***

The *ESA* is intended to establish minimum working conditions and terms of employment in Ontario. As the Special Advisors note, the *Act* and its regulations include a complex web of more than 85 exemptions, partial exemptions, and qualifying conditions, which limit the application of ES.<sup>28</sup> Many exemptions are decades old and have persisted through multiple iterations of the *Act*.

The Interim Report divides existing exemptions into three distinct categories, and the Special Advisors are seeking public input on the alternatives proposed for each category, which we offer below.

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<sup>27</sup> For example, see *Downtown Eatery (1993) Ltd. v. Ontario*, [2001] O.J. No. 1879 (ONCA), in which the oppression remedy was used to find two corporate directors personally liable for the unpaid termination pay owed by the corporation.

<sup>28</sup> 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](https://www.labour.gov.on.ca/english/about/pdf/cwr_interim.pdf), p. 136.

### **Guiding Principles**

Before addressing the specifics of each category, some guiding principles for assessing ES coverage and exemptions must be established. These principles emanate, in part, from the Interim Report. For instance, the Special Advisors assert that, since exemptions normally reduce or curtail rights,<sup>29</sup> “the ESA should be applied to as many employees as possible and that departures from, or modifications to, the norm should be limited and justifiable.”<sup>30</sup> This goal of *universal*, or near-universal, coverage supports an approach whereby the default position is that exemptions should be eliminated unless an employer can clearly establish a case for their retention. Globally, ES researchers note that modified or curtailed access to ES protections is a feature of precarious employment.<sup>31</sup>

The Interim Report is mandated to pay particular attention to workers in precarious employment, and to those workers who are made vulnerable by labour market changes and disparities. Any assessment of exemptions should thus seek to attend to whether they have the potential to adversely affect workers who have been historically disadvantaged in the labour market, or who are becoming disadvantaged. By establishing *social minima* that workers – particularly those in precarious employment – cannot fall below, Ontario establishes itself as a jurisdiction that is committed and attentive to the maintenance of human rights and Charter protections against discrimination.

In addition, as established by the SIRs process, a core principle for justifying an exemptions is that the nature of work is such that applying a standard would “preclude a particular type of work from being done at all or would significantly alter its output; the work could not continue to exist in anything close to its present form.”<sup>32</sup> Stringently applying this principle ensures *fairness* for both employees and employers. As the MOL noted at its inception, the *Act* is intended to “safeguard workers against exploitation” and “protect employers against unfair

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<sup>29</sup> Ibid., p. 160.

<sup>30</sup> Ibid., p. 155.

<sup>31</sup> Bosch, Gerhard (2004) “Towards a New Standard Employment Relationship in Western Europe.” *British Journal of Industrial Relations* 42(2): 617–636; Burgess, John and Iain Campbell (1998) “The Nature and Dimensions of Precarious Employment in Australia.” *Labour and Industry* 8(3): 5–21; Carré, Françoise et al (eds.) (2000) *Nonstandard Work: The Nature and Challenges of Changing Employment Arrangements*. Industrial Relations Research Association Series. Champaign, IL: University of Illinois at Urbana-Champaign; Rodgers, Gerry and Janine Rodgers (eds.) (1989) *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe*. Geneva: International Institute for Labour Studies; Vosko, Leah F. (2010) *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment*. Oxford: Oxford University Press.

<sup>32</sup> Mitchell and Murray, “Changing Workplaces Review,” p. 158.

competition based on lower standards.”<sup>33</sup> That is, employers should not gain a competitive advantage by depriving employees of their rights, nor should they be undercut by competitors who are exempt from employment standards.

***Category 1: Existing exemptions that might be recommended for elimination or variation without a further review***

The Special Advisors have identified six current exemptions that might be dealt with in the context of this review, and provided options relating to each one. In general, the principles established above suggest that the option of maintaining the status quo is not appropriate. Either the exemption should be removed or, at minimum, reviewed in relation to the principles of universality, social minima, and fairness.

For *residential care employees and residential building superintendents, janitors and caretakers*, we recommend the option to remove the exemptions and special rules. The limited data available suggest that both of these groups of employees are likely to be precarious and disadvantaged in the labour force. A small-scale survey of residential care employees in homes for older people in Ontario and two other provinces finds that this work is highly gendered, and that the women in these jobs were more likely to involuntarily be part-time employees, and hold multiple jobs.<sup>34</sup> Residential care employees in homes for children and the developmentally handicapped, to whom these exemptions apply, may experience similar working conditions. A qualitative study of apartment superintendents found that these low-status employees are left in a position of perpetual insecurity and vulnerability, since they must negotiate the competing demands of tenants and managers, and managers’ knowledge of their work is often derived solely from tenant complaints.<sup>35</sup>

For the *special minimum wage rates for students under 18* and the *student exemption from the “three-hour rule”*, we recommend the options to eliminate the special rate and the exemption. The special minimum wage rate for students under 18 amounts to a form of age discrimination and should be eliminated on that basis. The student exemption from the three-hour rule relies on a vague definition of student status, and thus potentially applies to anyone engaged in any

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<sup>33</sup> Archives of Ontario (AO) (1969) Record Group 7-1, File 7-1-0-1532.1, box 54, Notice to Employers and Employees, 1969.

<sup>34</sup> Daly, Tamara, and Marta Szebehely (2012) “Unheard Voices, Unmapped Terrain: Care Work in Long-Term Residential Care for Older People in Canada and Sweden.” *International Journal of Social Welfare* 21(2): 139–48.

<sup>35</sup> Asbury, Kathryn E. (1988) “Social Control in a Local Community: The Role of the Apartment Superintendent.” *Journal of Research in Crime and Delinquency* 25(4): 411–25.

type of formal learning. Most notably, both of these exemptions rest on criteria that are inherent to an employee, and are not related to the nature of the work being performed. Across Canada, student debt has grown substantially over time: in 2012, Ontario households owed \$12.3 billion in student loans, up 46% from 2005.<sup>36</sup> Students studying in Ontario (and in the Maritimes) graduate with higher average debt loads than students studying elsewhere in Canada.<sup>37</sup> Eliminating the student *ESA* exemptions would ensure that students earn wages equal to other employees.

For the *special minimum wage rate for liquor servers*, we recommend the elimination of the lower rate. Liquor servers in Ontario are overwhelmingly women and young people.<sup>38</sup> They are much more likely to live in low-income families and to hold multiple jobs.<sup>39</sup> Approximately 20% of liquor servers in Ontario do not earn the minimum wage, even after tips and commissions.<sup>40</sup> The recent passage of the *Protecting Employees' Tips Act, 2015*, which prohibits employers from taking any portion of an employee's tips or other gratuities, as well as the recent Ontario government campaign to train bartenders and servers on how to manage incidents of sexual harassment and violence involving colleagues and customers, highlights the precarious and potentially unsafe nature of this work. At minimum, these employees should be compensated at a rate that is equal to other Ontario employees.

For *pharmacists*, we recommend the removal of all exemptions. Like other health care professionals (e.g., nurses, dieticians, and lab/radiation technicians), the special rule limiting the entitlement to personal emergency leave "where taking the leave would constitute an act of professional misconduct or a dereliction of professional duty"<sup>41</sup> should be retained. Little research is available on Ontario pharmacists; but a recent survey of BC pharmacists – who are not exempt from ES – shows that working time and quotas are a common concern.<sup>42</sup> Almost a

<sup>36</sup> Statistics Canada (2014) "Survey of Financial Security, 2012." Online: <http://www.statcan.gc.ca/daily-quotidien/140225/dq140225b-eng.htm>

<sup>37</sup> Canadian Federation of Students (2013) "Student Debt in Canada." Online: <http://cfs-fcee.cfswpnetwork.ca/wp-content/uploads/sites/2/2013/11/Factsheet-2013-11-Student-Debt-EN.pdf>

<sup>38</sup> Vosko, Leah F., Andrea M. Noack, and Mark P. Thomas (2016) "How Far Does the Employment Standards Act 2000 Extend, and What Are the Gaps In Coverage? An Empirical Analysis of Archival and Statistical Data." Online: <https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Vosko%20Noack%20Thomas-5-%20ESA%20Exemptions.pdf>

<sup>39</sup> Ibid.

<sup>40</sup> Ibid., p. 20.

<sup>41</sup> Ontario Regulation 285/01: Exemptions, Special Rules and Establishment of Minimum Wage, s. 3, para. 2.

<sup>42</sup> Tsao, Nicole W. et al (2016). "Factors Associated with Pharmacists Perceptions of Their Working Conditions and Safety and Effectiveness of Patient Care." *Canadian Pharmacists Journal/ Revue Des Pharmaciens Du Canada* 149(1): 18–27.

third of BC pharmacists report working more than 40 hours a week, and about half of pharmacists say they do not have adequate time for breaks/lunches.<sup>43</sup> These strains were particularly associated with workplaces that had monthly quotas for advanced pharmacy services (e.g., immunizations or medication reviews), a situation which is more common among retail chain pharmacies. Given pharmacists' changing working conditions, the removal of exemptions related to working time particularly is important to ensure patient safety.

For *information technology (IT) professionals*, we recommend the removal of the exemptions from overtime pay and all five of the standards relating to hours of work. The nature of the work these employees perform is not precluded or significantly altered by adherence to minimum ES. The substantial growth of employment in IT occupations is also worth noting. The rate of employment growth for IT occupations in Ontario has vastly surpassed the rate of employment growth overall since this exemption was established: from 2001 to 2011, there was a 29% increase in employment levels for information systems analysts and consultants, and a 55% increase in employment levels for computer and information systems managers, compared to a 14% increase in employment levels for occupations overall.<sup>44</sup> Whereas IT jobs were previously clustered into specialized firms, these jobs are now embedded in a wide range of firms and across many industries. IT employees deserve ES protection similar to their co-workers in other occupations.

Finally, for *managers and supervisors*, we recommend the option to further define the category by retaining the exemption only for managers (not supervisors), whose primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and who earn more than a certain amount in wages/ salary. Managerial misclassification is a growing problem in the U.S.,<sup>45</sup> a trend that prompted the *Fair Labor Standards Act's (FLSA)* adoption of more stringent evaluation criteria. Although Canadian data on managerial misclassification is not available, it is likely that trends are similar here; in part, because many of the firms identified in U.S. misclassification lawsuits also operate in Canada. These more stringent criteria would help to ensure that only managers who truly have some control over their scheduling and working time, and who are highly compensated, are covered by this exemption. Much like the updated *FLSA*, the salary threshold should be set as a reasonably high percentile of the annual earnings

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<sup>43</sup> Ibid.

<sup>44</sup> Government of Ontario (n.d.) "Ontario Job Futures." Online: <http://www.tcu.gov.on.ca/eng/labourmarket/ojf/>

<sup>45</sup> Levine, David and David Lewin (2006) "The New 'Managerial Misclassification' Challenge to Old Wage & Hour Law or What is Managerial Work?" In David Lewin (ed.) *Contemporary Issues in Employment Relations*. Labor and Employment Relations Association Series. Champaign, IL: Labor and Employment Relations Association, University of Illinois at Urbana-Champaign, pp. 189-222.



for full-time salaried employees and be regularly updated. The application of a “salary-plus-duties” approach in Ontario’s managerial exemptions would bring the province into line with international best practices.

***Category 2: Exemptions that we do not currently think warrant review and which should be maintained***

The Special Advisors identify six groups with exemptions established in 2005 or 2006 via the SIRs process. Little information about the SIRs process is publicly available beyond that which is described in the Interim Report. Several of the groups involved in the SIRs process are large industrial sectors, with a wide diversity of employees and working conditions that can substantially vary across employers and locations (e.g., automobile manufacturing, film and television industries). It is not clear how the diversity of employees and employee groups was consulted via this process. The outcome of the SIRs process seems to mainly generate exemptions and special rules relating to working time.

With regards to working time, our recommendations pertaining to the review of existing exemptions with the aim to promote universality, or near-universality, in *ESA* coverage are premised, at a minimum, on bringing affected workers under the current working time regime. Though this research brief does not present a comprehensive response to the Hours of Work and Overtime Pay options posed in the Interim Report (5.3.1), we note many of these options hold real potential to *seriously degrade* the quality of work in Ontario, particularly those that involve a lengthening of the working day or working week, and those that undermine the right to refuse excess and overtime hours. Many of the options related to Hours of Work and Overtime Pay also have the potential to make the exemptions negotiated in the SIRs process irrelevant, effectively extending these exemptions to all workers. Research has well established the negative effects of long working hours on physical and mental health, as well as on household divisions of labour.<sup>46</sup> Moreover, loosening regulations around working time fosters an inequitable distribution of work hours, promoting a polarization between those who work part-time, and those who work full-time hours beyond the norm.<sup>47</sup> Additional research on the negative implications of “working time flexibility” is discussed in Section 5.3.2, Scheduling, below. With the exception of option 11 in Section 5.3.1, which suggests reducing the weekly threshold for overtime pay from 44 hours to 40 hours, the proposed Hours of Work and

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<sup>46</sup> Lowe, Graham (2007) *21st Century Job Quality. Achieving What Canadians Want*. Ottawa: Canadian Policy Research Networks; Jackson, Andrew, and Mark P. Thomas (forthcoming 2017) *Work and Labour in Canada: Critical Issues*. 3<sup>rd</sup> Edition. Toronto: Canadian Scholars Press.

<sup>47</sup> Basso, Pietro (2003) *Modern Times, Ancient Hours: Working Lives in the Twenty-First Century*. London: Verso; Hermann, Christoph (2015) *Capitalism and the Political Economy of Work Time*. London; New York: Routledge.

Overtime Pay options proposed in the Interim Report will further erode the social minima set by the *ESA*. For the purpose of evaluating exemptions and special rules in the areas of Hours of Work and Overtime Pay, we therefore recommend the adoption of option 11 in Section 5.3.1 as a new standard for the overtime threshold for all employees. Based on available evidence, we cannot recommend adoption of any of the other working time options.

The Interim Report acknowledges the fact that the labour market is dynamic and continually changing. Below, we recommend that all ES exemptions should be routinely reviewed every 10 years in order to assess whether the industrial conditions that prompted the creation of the exemption still exist. Given that the exemptions stemming from the SIRs process are now a decade old, we recommend their review using the new process described below, following the review of the exemptions listed in Category 3.

***Category 3: Exemptions that should be reviewed in a new process***

For this category, the Special Advisors have requested feedback on three options that outline the proper process to be implemented for the review and assessment of the current exemptions, as well as any new exemptions proposed in the future. In what follows, option 2 is recommended, and some additional suggestions for the process and evaluation criteria are offered.

*Option 1: Use the policy framework developed by the Ministry for the SIRs process described above and use the criteria developed by the Ministry in the SIRs process to evaluate the exemptions*

As noted above, little public information is available about the SIRs process or its implementation. In the absence of such information, we do not recommend this option. Further, the core and supplementary conditions established by the SIRs would benefit from further clarification and extension.

*Option 2: Create a new statutory process to review exemptions with a view to making recommendations to the Minister for maintaining, amending or eliminating exemptions/special rules*

As established by the Interim Report, there are currently roughly 60 groups of exemptions that have been carried forward throughout the history of ES legislation in Ontario, and which have not ever been reviewed for their appropriateness or continuing relevance. These might be thought of as a “backlog” of exemptions requiring review, and thus it is appropriate to establish

a statutory process to clear this backlog, and then to establish a system of regular review moving forward.

The goal of the review process is to establish procedural and substantive fairness in relation to labour regulations. We elaborate on the criterion of substantive fairness below, but here we want to emphasize the importance of *procedural fairness*, which at a minimum requires an unbiased decision-maker and that people affected by the decision be given an opportunity to be heard. As a general matter, fair procedures are important because they improve the quality of the decision-making by providing the decision-maker with a better factual predicate and understanding of the concerns of those affected and by providing those affected with confidence that the decision has taken their evidence and views into account.<sup>48</sup> In the labour and employment context, the importance of providing workers with a right to be heard is further enhanced by the principle of voice, which the Special Advisors define as “the right to participate in decision-making...because ‘participation in decision making is an end in itself for rational human beings in a democratic society.’”<sup>49</sup>

In order to clear the backlog of exemptions requiring review:

- A review process would be initiated by the MOL, with strict timelines for each group of occupations.
- Exemptions and special rules would be addressed in sector- or industry-wide groups, to avoid inconsistencies within an industrial group, as is currently the case.
- A sector- or industry- specific tripartite committee would be established, with an equal number of representatives from employers and employees, and a neutral arbitrator (as Chair). The size of the committee would vary in relation to the size/complexity of the exemptions being considered, and range from three to seven members, with a preference for smaller committees. This committee would advise the Minister, consistent with the current practice that regulations under the *ESA* are made by Cabinet on the advice of the Ministry.
- The statute establishing the review process would contain the criteria under which exemptions and special rules would be evaluated. The statute should provide that there

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<sup>48</sup> David J. Mullan (2001) *Administrative Law*. Toronto: Irwin Law, pp. 147-149.

<sup>49</sup> Mitchell and Murray, “Changing Workplaces Review,” p. 126. Also, see p. 160 where the Special Advisors state, “we see it as essential that worker representatives participate fully in this process so that employee interests can be heard and taken into account.” On voice in ES regulation, see also Vosko, Leah F. (2013) “Rights without Remedies’: Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs.” *Osgoode Hall Law Journal* 50(4): 845-873.

is a presumption in favour of universality – that all Ontario employees should be covered by ES as a set of minimum conditions for employment in the province – a sentiment expressed by the Special Advisors, who note that “the burden of persuasion to maintain, extend or modify an exemption is high and ought to lie with those seeking to maintain the exemption.”<sup>50</sup> The onus would be on those seeking to maintain the exemption/special rule to justify its retention, by establishing that all of the criteria listed in the section below are met.

- The committee would be required to solicit feedback and information from affected employers and employees, as well as the public and any other interested parties (e.g., consumer groups) via online or mailed submissions and/or in-person sessions. There could be participation by unions in the sector, if any, and/or persons or groups designated to represent employee interests. Representatives of affected or related industries and interests could also be invited to participate.
- The committee would have the flexibility to conduct surveys or votes among employees and or employers, if appropriate;
- The committee would seek and the MOL fund, if appropriate, any needed independent expert advice as in the case of complex hours of work issues, as well as provide administrative support.

The committee would aim to fashion unanimous recommendations for the revision of the relevant statutes. If the committee is unable to come to a unanimous decision, the Chair will provide a report of majority and dissenting recommendations to the Minister, who will be the final arbitrator. In all instances, the reports of the committee would be made public at the same time they are submitted to the MOL. Exemptions/special rules that are retained in the regulations (including those established in the SIRs process) will undergo a review process every 10 years, following the same procedures described above. Regular review and the use of consistent criteria would ensure that ES exemptions and special rules keep pace with changing working conditions, and do not revert back to the current patchwork of coverage.

Requests for new exemptions or special rules would undergo a similar process of review, with the addition of one additional criterion for evaluation as described below.

#### *Criteria for Retaining/Establishing Exemptions and Special Rules*

Based on the criteria developed as part of the SIRs process, as well as the government’s international and social obligations, we recommend the following expanded list of criteria for

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<sup>50</sup> Mitchell and Murray, “Changing Workplaces Review,” p. 160.

evaluating ES exemptions and special rules. In order for an ES exemption or special rule to be retained and/or created, *all* criteria would need to be met. This approach is consistent with the Special Advisors comment that “the review process we will likely recommend would use fixed criteria for evaluation of exemptions and one that will invite the participation of workers and worker representatives as well as employers and other interested stakeholders. In any review of exemptions, a consistent policy framework informing such review is essential.”<sup>51</sup>

- 1) The nature of work in an industry is such that it is impractical for a minimum standard to apply. Applying the standard would preclude a particular type of work from being done at all or would significantly alter its output; the work could not continue to exist in anything close to its present form. “Nature” of the work relates to the characteristics of the work itself. It does not relate to the quantity or cost of work produced by a given number of employees, as all employment standards affect work output and costs. Nor does it relate to the nature of the employer and how they have organized work.

This criterion is based on Core Condition A established in the SIRs process. The definition of the “nature” of work is further specified to make it explicit both the quantity and cost of work is not a rationale for exemption, since all ES entail costs. Given the emergence of new forms of employers and employment over the past decade,<sup>52</sup> and the likelihood that new forms of employment will continue to emerge, the criterion also specifies that the nature of the employer and their organization of work does not provide sufficient justification for ES exemptions and special rules.

- 2) The work under consideration is considered to be “decent work,” as defined by the International Labour Organization.
- 3) The work provides a social, labour market or economic contribution that argues for its continued existence in its present form, even in the absence of one or more minimum standards applying to it.

These two criteria speak to establishing the quality and importance of the work that is being exempted. In order to ensure that Canada meets its international commitments to establishing

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<sup>51</sup> Ibid.

<sup>52</sup> Companies such as UBER and Taskrabbit, based on peer to peer platforms, are gaining extensive media attention, see “The ‘Gig Economy’ is Coming. What Will it Mean for Work?” The Guardian (July 26, 2015). Online: <https://www.theguardian.com/commentisfree/2015/jul/26/will-we-get-by-gig-economy>; see also Friedman, Gerald (2014) “Workers Without Employers: Shadow Corporations and the Rise of the Gig Economy.” *Review of Keynesian Economics*. doi: 10.4337/roke.2014.02.03.

decent work, in pursuit of the UN Sustainable Development Goals (SDGs) and other global efforts, Ontario should not provide exceptional treatment for work that does not meet these minimum standards. Criteria 3 replicates the supplementary condition used in the SIRs process.

- 4) Employers in an industry do not directly or indirectly control the working conditions that are relevant to the employment standard under consideration. “Employers” is to be interpreted broadly, referring to companies both up and down the contracting/sub-contracting chain (i.e. parent and/or subsidiary companies and subcontractors).

This criterion is based on Core Condition B in the SIRs process. It is extended in order to specify an intentionally broad conception of employers, in order to address growing fissuring in the labour market, globally interconnected corporations, and practices of contracting out and sub-contracting.<sup>53</sup> In the context of the globalization of labour, this criterion also ensures that Ontario workers will be protected from demands stemming from the labour laws of other jurisdictions, via parent and/or subsidiary employers.

- 5) The employee group to whom the exemption or special rule would apply be readily identifiable, to prevent confusion and misapplication of the exemption/special rule.

This criterion is based on the supplementary consideration established in the SIRs process. The potential for misclassification threatens to reduce *fairness* in ES by making it possible for employers to evade provisions of the *ESA* by misclassifying workers, and for employees to be deprived of their rights as a result of being misclassified. The presence of substantial misclassification in the labour force suggests that this is an important criterion.<sup>54</sup>

- 6) Both employees and employers in the industry agree that a special rule or exemption is desirable.

This criterion is based on the supplementary consideration established in the SIRs process. It acknowledges the power relationship inherent in the employer-employee relationship, and establishes that both parties must agree that the suspension of a *minimum acceptable standard* is desirable. This criterion also speaks to the importance of requiring open consultations as part

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<sup>53</sup> Rawlings, Michael (2015) “Legislative regulation of global value chains to protect workers: A preliminary assessment.” *The Economic and Labour Relations Review* 26(4): 660-677; Vosko, *Managing the Margins*, chapter 3; Weil, *The Fissured Workplace*.

<sup>54</sup> Levine and Lewin, “The New ‘Managerial Misclassification’ Challenge to Old Wage & Hour Law or What is Managerial Work?”

of the process of reviewing and/or establishing exemptions. As the Special Advisors put it, it is “essential that worker representatives participate fully in this process so that employee interests can be heard and taken into account.”<sup>55</sup>

- 7) Based on the current composition of the labour force, the employees to whom the exemption or special rule would apply are not historically disadvantaged or precariously situated in the labour market. That is, ES exemptions and special rules should not compound existing labour market disadvantage.

This criterion ensures that ES promote *fairness* and do not perpetuate discrimination. Currently, ES exemptions and special rules disproportionately affect workers from historically disadvantaged groups; for instance, young people, recent immigrants, Aboriginal people, and people from low-income families are less likely to be fully covered by the *ESA* than other employees.<sup>56</sup> Further, ES exemptions and special rules appear to compound other forms of labour force precariousness: temporary employees, part-time employees, low-wage employees, and non-unionized employees are less likely to be fully covered by the *ESA* than other employees.<sup>57</sup> In the absence of complete time-series data, it is not possible to assess whether or not ES exemptions and special rules are more likely to have been created for jobs that are held by employees from historically disadvantaged groups, or whether the presence of ES exemptions and special rules lead to jobs being perceived as less desirable, and thus filled by workers who have difficulty securing other employment. *Nonetheless, moving forward, ensuring that ES exemptions and special rules do not compound labour market disadvantage would fulfil Ontario’s commitment to non-discrimination and obligations under the human rights code.*

One additional criterion is recommended for establishing new exemptions and/or special rules:

- 8) The exemption and/or special rule should be consistent with those in an industrial group or sector.

Since new exemptions or special rules could potentially be requested for a single occupational group, they would also need to be evaluated to ensure consistency with the larger industrial group or sector. The application of this criterion will help to avoid the inconsistencies that currently exist between similar occupations, often employees working on the same project, at the same location, with different levels of ES coverage. The application of this criterion also

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<sup>55</sup> Mitchell and Murray, “Changing Workplaces Review,” p. 160.

<sup>56</sup> Vosko et al, “How Far Does the Employment Standards Act 2000 Extend?”

<sup>57</sup> Ibid.

reduces the potential for misclassification of workers in similar occupations for the purpose of evading ES.

*Option 3: Create a new statutory process where the OLRB would have the authority to extend terms and conditions in a collective agreement to a sector*

This option is not recommended for two reasons. First, collective agreements are bargained so as to provide a greater benefit than the floor established by the *ESA*. Contracting out of ES coverage via collective agreements is typically only done in exchange for gains in other areas. In addition, collective agreements are specific to local working conditions, remuneration, and labour market pressures. In order for the terms and conditions in a single collective agreement to be extended fairly to a sector, the entirety of the agreement would need to be extended, including compensation and benefit packages. This mode of extension might entail establishing sector-wide standards above the minima specified in the *ESA*, which does not seem to be a feasible means of establishing and reviewing exemptions. Further, and more practicably, the OLRB has limited resources that already result in long timelines for review: in 2014-15 more than half of OLRB applications took more than 100 days to dispose of.<sup>58</sup> Extending OLRB authority to adjudicate ES exemptions and special rules would potentially strain their resources further.

*Supplement: List of ESA Exemptions That Should be Reviewed Under a New Process (Category 3)*

We note that the list of *ESA* exemptions for review has several omissions, and two confusing entries.

The following groups with ES exemptions and special rules have been omitted from the list:

- Optometrists
- Homeworkers
- Homecare Employees Who Provide Homemaking or Personal Support Services

The list includes an entry for “Homemakers” (#22), even though these are not an exempt occupational group.

The list includes a duplicate entry for seasonal Canning, Processing, Packing or Distribution of Fresh Fruit or Vegetables. This group should rightly be considered along with the agricultural occupations, given the seasonal nature of much agricultural work.

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<sup>58</sup> Ontario Labour Relations Board (n.d.) “Annual Report 2014/2015.” Online:  
<http://www.olrb.gov.on.ca/english/AnnualReports/OLRB-AnnualReport-2014-15.pdf>



### 5.3.2 Scheduling

#### **Background:**

The *ESA* has no provisions regarding scheduling. The *Act* does not require employers to provide employees with advance notice of work hours, or to provide notice for changes to established schedules. There is, however, a “three-hour rule,” which applies in cases where an employee who regularly works more than three hours is required to report to work but then works less than three hours. In such cases, the affected employee must be paid the higher of three hours at the minimum wage, or the employee’s regular wage for the time worked. In canvassing potential reforms to the scheduling provisions of the *ESA*, the Interim Report sets out five options.

#### *Option 1: Maintain the status quo*

The first option set out in the Interim Report is to maintain the status quo, which would mean no employer requirements for advance notice or notice of scheduling changes, and no employee rights to request scheduling changes. Yet research conducted through the “Closing the Enforcement Gap” research partnership has found that many employees have schedules that are either unpredictable or inflexible. A recent survey of Ontario employees found that over 30% reported at least one scheduling problem in their job.<sup>59</sup> Scheduling problems were even more pronounced among low-wage earners, with over 50% of those earning less than \$15 an hour reporting a scheduling problem. The most common problems include not knowing the schedule in advance and experiencing last minute scheduling changes.<sup>60</sup> Another study of 400 employees in precarious jobs found that more than half did not know their schedule at least one week in advance and “40% didn’t get much more than a day’s notice half of the time.”<sup>61</sup> For these reasons, as well as those outlined below, we do not recommend option 1. It would leave the *ESA* inadequate in an area of workplace regulation that requires significant attention.

#### *Option 2: Expand or amend existing reporting pay rights in the ESA*

Option 2 offers several possible changes to reporting pay rights, all of which involve an increase to the current minimum hours of reporting pay (the “three-hour rule”): (a) to three hours at

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<sup>59</sup> Data from 2011 Ontario employees who completed the Local Parliament Survey, administered in September-October 2015. Data are weighted to reflect the composition of the Ontario population.

<sup>60</sup> Ibid.

<sup>61</sup> Lewchuk, Wayne et al, (2003) “From Job Strain to Employment Strain: Health Effects of Precarious Employment.” *Just Labour: A Canadian Journal of Work and Society* 3: 24-35, p. 32.

regular pay; (b) to four hours at regular pay; or, (c) to the lesser of three or four hours at the regular rate or the length of the cancelled shift. Providing a minimum of three hours of compensation to employees when a shift is canceled is the norm among other provinces. An exception is BC, where employees who are scheduled to work eight hours or less are compensated for a minimum of two hours, and employees who are scheduled to work for more than eight hours are paid for a minimum of four hours. In this jurisdiction, both of these criteria apply even when the employee works less than two or four hours. In Ontario, the current policy does not provide protection for employees who work less than three-hour shifts, or for students, who are exempt from the “three-hour rule.” Employers can avoid paying the reporting pay by scheduling split shifts that are less than three hours long. While there is no specific data available on employees who work three hours or less in a shift, they are likely to be part-time and/or non-permanent employees. Creating a three-hour minimum duration requirement for shifts would improve the working conditions for employees, and ensure that all employees would be eligible for the “three-hour rule.” More discussion of these exemptions can be found in the discussion of Category 1 under Section 5.2.3 Exemptions, Special Rules, and General Process of this brief.

Providing a fair compensation for employees who have their shift cancelled or shortened is important as there are personal and financial costs associated with working that will still occur regardless of the shortened work shift. For employees who have caregiving responsibilities, they must find alternative caregivers while they are at work. Many will likely have to pay for childcare services for the entire duration they would have been at work regardless of when their shift ends. Additionally, the cost of transportation to work, as well as regional differences in transportation costs, must also be considered. As transportation costs and commuting times continue to increase, it is important that employees receive sufficient compensation for their transportation to and from work. While this amount can be justified when the employee is working a full shift, it can become a financial hardship if employees are not compensated fairly for their shortened shift.

*Option 2a: Increase minimum hours of reporting pay from current 3 hours at minimum wage to 3 hours at regular pay*

Although this option marginally improves the current situation, it provides a) insufficient financial compensation for employees who have their shifts shortened and b) less compensation than option 2b.

*Option 2b: Increase minimum hours of reporting pay from 3 hours at minimum wage to 4 hours at regular pay*

This option represents marginal improvement, as it provides employees with more financial compensation to recover the transportation costs and to potentially lessen the impact of paying for childcare services that might not be needed if the shift is shortened. Employees require more compensation for shorter shifts, as it is likely that many budget on the expected income they will earn based on their scheduled hours. Financial hardships can occur when shifts are shortened and the employee is not fairly compensated. Providing four hours at regular rate or, more preferably, for the length of the cancelled shift if it is longer than four hours would improve the situation for low-wage employees. Similarly, although this option improves the current situation and would provide more financial compensation than option 2a, it still does not provide sufficient compensation for employees who have their shifts shortened.

*Option 2c: Increase minimum hours of reporting pay from 3 hours at minimum wage to lesser of 3 or 4 hours at regular rate or length of cancelled shift*

Although this option represents a modest improvement over the current *ESA* provision, it provides insufficient compensation for unexpected shorter shifts given the above evidence, and is qualitatively inferior to option 2a, and thus is not recommended over option 2b.

*Option 3: Provide employees with the job-protected right to request changes to schedules at certain intervals*

Option 3 suggests that the right to request scheduling changes could be provided at specified intervals (e.g., twice per year) and that employers would be obligated to consider requests for scheduling changes. This option arises from a concern that is shared by many employees; namely, the need to exert some control over work hours.

Research on working time notes that tendencies for “work-life conflict” have grown markedly over the past two decades, with many employees reporting increasing difficulties in balancing work time with responsibilities outside work.<sup>62</sup> In addition, research identifies the lack of

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<sup>62</sup> Jacobs, Jerry and Kathleen Gerson (2005) *The Time Divide: Work, Family and Gender Inequality*. Cambridge: Harvard University Press; Menzies, Heather (2005) *No Time: Stress and the Crisis of Modern Life*. Vancouver: Douglas and McIntyre.

control over work hours to be a major cause of work-related stress.<sup>63</sup> Such stress can stem from short notice for extra overtime, the uncertainty associated with not receiving sufficient notice of a work schedule, or the inability to balance the responsibilities of work with obligations and responsibilities outside the workplace due to inflexible scheduling practices. Finally, there are gender-equity implications related to the scheduling of working time, as women remain primarily responsible for reproductive labour.<sup>64</sup> This can involve caring for family members at times that may overlap with work hours, which can also be a factor contributing to work-related stress.<sup>65</sup> The ability to exert some control over work scheduling could provide some means to accommodate the competing demands between work and home that are experienced by many women employees.

Due to power imbalances in the workplace, many employees are in a position where they are unable to exercise any control over their schedules. It must be noted that the right to request scheduling changes as outlined in option 3 offers no guarantee that such requests would be accepted, ensuring that employers retain the discretion to ignore such requests. Yet, providing employees with a job-protected right to request scheduling changes would constitute a first, small step towards addressing a major concern related to the scheduling of working time. For these reasons, this option represents a largely symbolic, marginal improvement over the status quo.

*Option 4: Require all employers to provide advance notice in setting and changing work schedules*

Option 4 offers a number of possible strategies related to advance notice, specifically: requiring employers to post schedules in advance within a specified time frame (e.g., two weeks); requiring employers to pay employees more if a schedule is changed last-minute; requiring that existing part-time employees be offered additional hours of work before new employees are hired; requiring that part-time and full-time employees be given equal access

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<sup>63</sup> Jackson and Thomas, *Work and Labour in Canada*; Lewchuk, Wayne, Marlea Clarke, and Alice de Wolff (2011) *Working Without Commitments: The Health Effects of Precarious Employment*. Kingston and Montreal: McGill-Queen's University Press.

<sup>64</sup> Armstrong, Pat and Hugh Armstrong (2010) *The Double Ghetto: Canadian Women and Their Segregated Work*. 3<sup>rd</sup> Edition. Toronto: Oxford University Press; Luxton, Meg and June Corman (2001) *Getting By in Hard Times: Gendered Labour at Home and On the Job*. Toronto: University of Toronto Press.

<sup>65</sup> Marshall, Katherine (April, 2009) "The Family Work Week." *Perspectives on Labour and Income*. (Statistics Canada Catalogue No. 75-001-X) pp. 5-13. Online: <http://www.statcan.gc.ca/pub/75-001-x/2009104/pdf/10837-eng.pdf>

to scheduling and time-off requests; and requiring that employers secure employee consent in order to add hours or shifts once a schedule has been posted.

Employer strategies of “time flexibility” have become commonplace over the past several decades, particularly as employers seek to adjust the scheduling of working time in relation to consumer demand, and also to adopt “lean” scheduling practices that have shrunk core full-time workforces, prompted the growth of part-time work, and relied on short-notice overtime hours as a means to respond to increased demand for products and services.<sup>66</sup> For many employees, “time flexibility” has contributed to a growing uncertainty with regards to work schedules, as with no obligations for advance notice, employers often make scheduling decisions on very short notice. For low-wage employees, scheduling uncertainty makes it very difficult to hold a much-needed second job. These changing approaches to work time scheduling have potentially negative implications for job quality, work-life balance, and the provision of reproductive labour in the household.

In relation to working time change, establishing employer responsibilities to provide advance notice has emerged as a central concern amongst many groups of employees, particularly those in service economy jobs and amongst part-time employees where regular hours of work are less the norm, and work schedules less predictable. Just as with lack of control over working time, research has noted that a lack of certainty over work scheduling contributes to both work-related stress and work-life conflict.<sup>67</sup> This lack of certainty flows from both the stress that arises out of the inability to plan ahead of time to address all of one’s obligations outside of work, as well as the inevitable conflicts that may arise between such obligations and a variable and unpredictable work schedule.

The problems associated with scheduling uncertainty are captured in ongoing interviews with employees conducted under the auspices of “Closing the Enforcement Gap”. For example, one respondent stated:

*You basically don’t have a life, you can’t schedule anything, you can’t meet friends. You can’t go to doctor’s appointments ... You are literally powerless when it comes to scheduling.*<sup>68</sup>

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<sup>66</sup> Basso, *Modern Times, Ancient Hours*; Thomas, Mark P. (2006) “Union Strategies to Re-Regulate Work Time.” *Just Labour: A Canadian Journal of Work and Society* 9: 1-15.

<sup>67</sup> Thomas, Mark P. (2009) *Regulating Flexibility: The Political Economy of Employment Standards*. Montreal and Kingston: McGill-Queen’s University Press.

<sup>68</sup> Data from worker interviews conducted by the Closing the Enforcement Gap Research Partnership.

In recent times, a range of strategies to address these concerns has arisen. In the grocery store sector in Canada, unions that represent part-time grocery employees have recently begun to negotiate collective agreement provisions that provide some scheduling certainty, as well as guaranteed hours.<sup>69</sup> The San Francisco *Retail Workers Bill of Rights*, which is discussed in the Interim Report, is a widely noted example.<sup>70</sup> The primary aims of these strategies are to provide employees with some measure of predictability over work hours and to also promote greater stability for part-time employees, who are most often affected by flexible scheduling practices.

In order to address the very real and growing concerns about scheduling uncertainty, and to keep pace with the emerging scheduling practices that aim to promote some measure of predictability for employees, we recommend option 4. As outlined in the Interim Report, pursuing this option should include (but not be limited to) the full range of conditions specified.

#### *Option 5: Allow for sectoral regulation of scheduling*

Option 5 suggests that sectors be encouraged to develop their own scheduling arrangements. Such arrangements would be based on overall policy guidelines for best practices developed by a government-appointed advisory committee consisting of representatives of employers, employees, scheduling and other experts (including academics and representatives from community service agencies). Sectoral committees would also be struck to advise the Minister of Labour on sector-specific scheduling committees. The *Industrial Standards Act (ISA)*, which was repealed in September 2001, allowed industries to have different wages and scheduling hours and days.<sup>71</sup> One of the weaknesses of the *ISA* was that it reinforced gendered divisions of wages and working conditions, and women were often determined to be in the bottom of the skill hierarchy.<sup>72</sup> Going back to this structure could thereby reduce some of the advancements made in this area after the *Act's* repeal. Additionally, allowing for sectoral regulation may create an inconsistent patchwork of rules that make it difficult to administer. For example, Australia currently has 122 industries and occupations that have different scheduling rules. For these reasons, we do not recommend option 5.

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<sup>69</sup> Jackson and Thomas, *Work and Labour in Canada*.

<sup>70</sup> Luce, Stephanie (2015) "Time Is Political: The Fight to Control the Working Day Remains One of Our Most Important Labor Struggles." *Jacobin*. 20 July. Online: <https://www.jacobinmag.com/2015/07/luce-eight-hour-day-obama-overtime/>

<sup>71</sup> *Industrial Standards Act*, s. 10(2).

<sup>72</sup> Fudge, Judy and Eric Tucker (2000) "Pluralism or Fragmentation? The Twentieth-Century Employment Law Regime in Canada" *Labour/ Le Travail* 46: 251-306; Steedman, Mercedes (1998) "Canada's New Deal in the Needle Trades." *Relations Industrielles/ Industrial Relations* 53: 535-61.

### 5.3.4 Personal Emergency Leave

**Background:**

Since September 2001, the *ESA* has provided unpaid Personal Emergency Leave (PEL) not exceeding 10 days each calendar year to employees who work in establishments that regularly employ 50 or more people. Reasons for PEL can include personal illness, or the death, illness or other emergencies concerning an immediate family member or other dependent relatives. The legislative intent behind the PEL standard is to allow employees in firms employing 50 or more people time off to deal with emergencies without penalty.<sup>73</sup> The Interim Report sets out four options for reforming the PEL provisions of the *ESA*, which we respond to below.

*Option 1: Maintain the current exemption for workplaces with fewer than 50 employees*

The first option set out in the Interim Report is to maintain the status quo, including the current exemption for workplaces with fewer than 50 employees.

Research shows that maintaining the firm size exemption for PEL provisions will perpetuate what is recognized as an arbitrary and poorly justified exclusion of employees from full protection of the *ESA*.<sup>74</sup> It is widely acknowledged that this exemption results in different workplace standards for employees in firms of nearly identical sizes. If adopted, the option would also perpetuate legislative inconsistencies, as the *ESA*'s other leave provisions are not restricted only to employees in larger firms.<sup>75</sup> Additionally, the PEL firm-size threshold may promote contracting out and the use of agency employees in order to avoid "regularly" employing 50 or more employees since research shows that labour legislation that varies depending on firm size can trigger threshold effects. Although detailed Canadian data are not available, Gourio and Roys, for example, demonstrate how firm size-dependent labour regulations in France have led to a larger-than-expected proportion of firms of a size just below the legislative threshold.<sup>76</sup>

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<sup>73</sup> *Employment Standards Act 2000: Policy and Interpretation Manual*, s. 18.1.2 (October, 2014) Scarborough: Carswell.

<sup>74</sup> Law Commission of Ontario, "Vulnerable Workers and Precarious Work."

<sup>75</sup> *Ibid.*

<sup>76</sup> Gourio, Francois and Nicholas Roys (2014) "Size-Dependent Regulations, Firm Size Distribution, and Reallocation." *Quantitative Economics* 5: 377-416.

Furthermore, as a study of exemptions and special rules commissioned for the Interim Report using data from Statistics Canada’s Labour Force Survey demonstrates, the firm-size exemption for PEL exacerbates inequities in Ontario’s labour market. The approximately 30% of Ontario employees who work in small firms (of fewer than 20 employees)<sup>77</sup> are more likely to be precariously employed – specifically, they are more likely to earn low wages and to belong to low-income families, to lack control over the labour process, and to experience high levels of uncertainty. Indeed, fully 44% of employees in small firms earn \$15 per hour or less, and 26% are members of an economic family with earnings in the bottom quintile.<sup>78</sup> Employees in small firms are also less likely to be unionized. Whereas about 25% of Ontario employees not employed in federally regulated industries are unionized, this is so for only about 5% of employees in small firms.<sup>79</sup> Compared to other Ontario employees subject to the *ESA*, a larger percentage of employees in small firms are employed part-time (25%) or on a temporary basis (17%).<sup>80</sup> And young employees (ages 15-29) are also concentrated in small firms.<sup>81</sup> In short, the current exemption for PEL exacerbates labour market insecurity for employees already experiencing social disadvantages and precariousness in employment. It is especially detrimental to women in small firms, given the assumption (and statistical reality) that they are responsible for the majority of unpaid care giving, and are therefore more likely to need to access leaves. The PEL exemption is out of sync with growing recognition that demographic shifts, including the dramatic rise in labour force participation among women, the increasing number of single parent families, and population aging heighten the need for leave policies that better enable employees to manage paid work and care giving.<sup>82</sup>

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<sup>77</sup> CANSIM Table 282-0076 Labour Force Survey estimates, employees by establishment size, North American Industry Classification System, sex and age group. Labour Force Survey data demonstrate that the share of Ontario employees who work in small businesses (fewer than 20 employees) has remained steady at approximately 30% between 2011 and 2015. Data limitations do not allow us to identify the exact share of Ontario employees who are subject to the PEL exemption because they work in firms with fewer than 50 workers.

<sup>78</sup> Vosko et al “How Far Does the Employment Standards Act 2000 Extend?” p. 61.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Vosko, Leah F. and Andrea M. Noack (2011) “Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers’ Social Location and Context.” Online: <http://www.lco-cdo.org/vulnerable-workers-call-for-papers-noack-vosko.pdf>

<sup>82</sup> Arthurs, “Fairness at Work,” p. 109; Fudge, Judy (2011) “Working-Time Regimes, Flexibility, and Work-Life Balance: Gender Equality and Families.” In Catherine Krull and Justyna Sempruch (eds.) *Demystifying the Family/Work Conflict: Challenges and Possibilities*. Vancouver: University of British Columbia Press, pp 170-193; Government of Canada (2016) “Flexible Work Arrangements: A Discussion Paper.” Online: [http://www.esdc.gc.ca/en/consultations/labour/flexible\\_work\\_arrangements/discussion\\_paper.page](http://www.esdc.gc.ca/en/consultations/labour/flexible_work_arrangements/discussion_paper.page)



The negative consequences of this option for the health and well-being of all employees, employers and the broader public in Ontario should also be emphasized. The current exemption means that many employees in smaller workplaces will continue to face heightened pressure to work when they are sick or are confronting distressing situations affecting their immediate family members outside the workplace (e.g., emergencies, illness, death, etc.). A growing body of research on the problem of presenteeism, or working when ill or under distress, demonstrates that its costs are potentially greater than those associated with absenteeism.<sup>83</sup> When employees who are sick go to work instead of rest, individual recovery is delayed, productivity suffers, and co-employees' and the broader public health can be put at risk.<sup>84</sup> A meta-analysis of existing research on employees who work when they are sick demonstrates that employees' decisions to do so are shaped by both their employment and financial insecurity and the existence of strict workplace-based absence policies.<sup>85</sup>

*Option 2: Remove the exemption for workplaces that employ fewer than 50 employees*

The second option for PEL entails the removal of the exemption for workplaces that employ fewer than 50 employees.

This is a relatively straightforward measure to implement that would contribute greatly to employee well-being, serve the public good, and mitigate unprincipled inequities in the ESA's scope of coverage. Implementing this option would also eliminate Ontario's anomalous status as the only jurisdiction in Canada that allows for exemptions to leaves on the basis of workplace size.<sup>86</sup> For these reasons, and since cost-based arguments for exempting employees in small firms from PEL are not justifiable given that all standards entail costs, we recommend option 2.

*Option 3: Replace the general 10-day entitlement to PEL with a number of separate leave categories (illness, bereavement, dependent illness/injury)*

The Interim Report outlines a third option for reforming PEL that would involve replacing the general 10-day entitlement with a number of separate leave categories (i.e. illness,

<sup>83</sup> Gary, Johns (2015) "Presenteeism." In David E. Guest and David J. Needle (eds.) *Wiley Encyclopedia of Management: Volume 5: Human Resource Management*. London: Wiley, p. 233.

<sup>84</sup> Carpenter, L. Rand et al (2013) "Food Worker Experiences With and Beliefs about Working While Ill." *Journal of Food Protection* 76(12): 2146-2154; Rousculp, M.D. et al (2010) "Attending Work While Sick: Implications of Flexible Sick Leave Policies." *Journal of Occupational Environmental Medicine* 52(10): 1009-13

<sup>85</sup> Miraglia, Mariella and Gary Johns (2016) "Going to Work Ill: A Meta Analysis of the Correlates of Presenteeism and a Dual-Path Model." *Journal of Occupational Health Psychology* 21(3): 261-283.

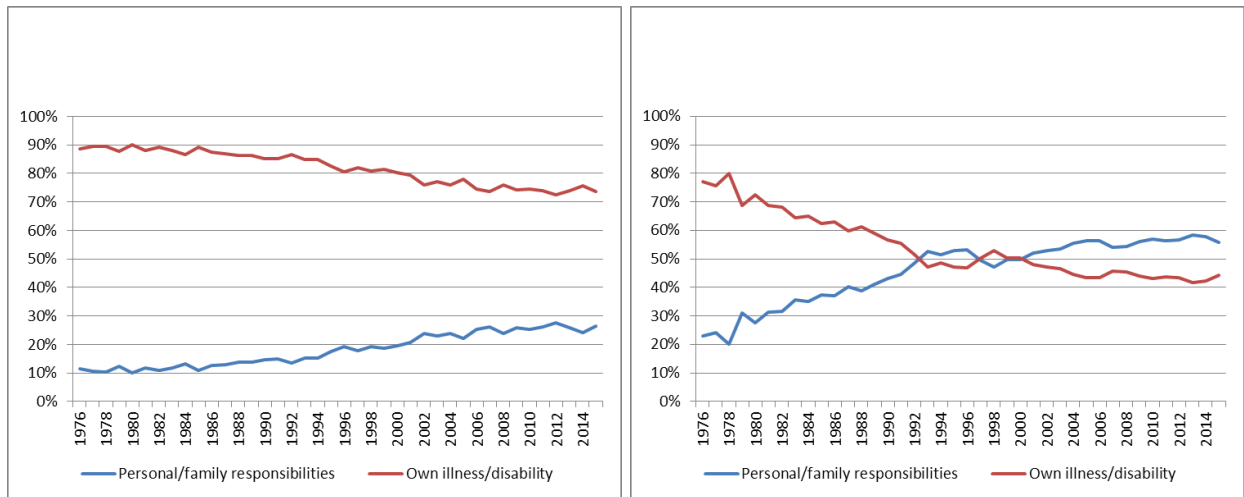
<sup>86</sup> Mitchell and Murray, "Changing Workplaces Review."

bereavement, dependent illness/injury). Under this option, each leave category would entail a set number of days not exceeding 10 in total.

This option runs counter to employees' growing need for flexible leave provisions directed explicitly at enabling employees to manage paid work and unpaid care-giving responsibilities.<sup>87</sup> Data from Statistics Canada's Labour Force Survey indicate that Ontario employees' reasons for personal-emergency absences have changed over the past thirty years; these changes are likely to continue as a result of shifting demographics, social pressures and policy enactments. Considering Ontario employees' absences for personal emergency reasons, we see that own illness/ disability accounts for a shrinking share of lost hours (from 84% in 1976 to 54% in 2015), whereas personal/family responsibilities account for a growing share of lost hours (from 16% in 1976 to 46% in 2015). These changes suggest that the adoption of discrete leave categories based on the current distribution of employee absences is likely to become rapidly outdated. Further, there is a clear differentiation between how men and women use personal emergency leave. In 2015, among men with absences for personal emergency reasons, only 26% of lost hours were for personal/family responsibilities and 74% of lost hours were for own illness/disability. Amongst the comparable group of women, 56% of lost hours were for personal/family responsibilities and only 44% were for own illness/disability. Given the differing needs of men and women, the imposition of separate leave categories is likely to exacerbate gender inequalities in the labour force, whereas a more flexible and inclusive PEL entitlement serves men and women equally well.

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<sup>87</sup> Employer Panel for Caregivers (2015) "When Work and Caregiving Collide: How Employers Can Support Their Employees Who Are Caregivers." Online: <http://www.esdc.gc.ca/eng/seniors/reports/cec.shtml>; Government of Canada "Flexible Work Arrangements."



*Note: Ontario employees only; Labour Force Survey data from CANSIM Table 282-0213*

Dispensing with the flexibility built into current PEL provisions in favour of more rigidly defined and shorter leave sub-categories is thus not recommended on several grounds. Doing so would disproportionately burden women employees who are more likely than men to be primary caregivers for dependents. Changing workforce demographics, such as women’s increasing participation in employment and the aging workforce, suggest that the reasons behind employees’ use of PEL will continue to change in ways that are difficult to predict, and that more rather than less flexibility in PEL provisions is required to accommodate these changes. Option 3 also risks embroiling employees and employers in potentially contentious disagreements over the exact nature of employees’ emergencies for the purpose of determining leave entitlements. These costs are more serious than the issue of some employees who may lay claim to both employer-provided paid sick leave and the PEL entitlements of the *ESA*. This concern could be easily resolved if employers bring their paid leave policies into alignment with the scope of the *ESA*’s PEL provision (i.e. allowing for 10 days of paid personal emergency leave rather than sick leave only).

**Option 4: Combining Options 2 & 3**

A fourth option involves combining options 2 and 3. This option entails the consequences of option 3.

### 5.5.3 Creating a Culture of Compliance

#### **Background:**

The MOL in Ontario has long held the view that improved *ESA* compliance can be achieved through education and self-help support resources.<sup>88</sup> Over the last decade, the commitment to this idea has been intensified through an expanded effort to provide employers and employees with more accessible information and on-line tools which are aimed at helping employers to exercise their responsibilities under the law and ensuring that employees know their rights while being confident enough to contest when they are violated.<sup>89</sup> Although the MOL has traditionally characterized these efforts as educational, the Interim Report correctly recognizes that compliance and education are not just about knowledge but are also about culture – that is, whether the rule of ES law is valued by employers and employees in ways that lead to compliance and quick correction of violations when they do occur without reprisals for employees. In its discussion of the creation of compliance culture, the Interim Report introduces the concept of the “internal responsibility system” (IRS) which is borrowed from the Occupational Health and Safety (OHS) side of the MOL. The OHS division of the MOL has been using the term since the 1970s to refer to a governance orientation in which the workplace parties take joint responsibility for preventing hazards and resolving conflicts over health and safety issues. The core elements of the IRS system are joint health and safety committees comprised of employee and management health and safety representatives, the employee’s right to refuse unsafe work and the employee’s right to information on workplaces hazards. Government inspectors intervene in workplaces when the IRS system is not functioning effectively. The Interim Report claims that the IRS has “proven generally effective in strengthening the health and safety culture than would otherwise be the case. They have raised employee and employer awareness of health and safety issues and in many workplaces have contributed to the identification and elimination of hazardous conditions and to a safer workplace.”<sup>90</sup>

The Interim Report presents a number of options which involve an effort to reproduce the OHS IRS in the employment standards domain. We discuss each option in turn.

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<sup>88</sup> Thomas, *Regulating Flexibility*.

<sup>89</sup> Hall, Alan et al (2015) “The ‘Vulnerable Worker’ in Ontario’s Employment Standards Regime: Beyond Neoliberal Governance?” Paper presented at the CRIMT International Conference, May 21-23, HEC, Montreal, QC; Vosko, Leah F., John Grundy and Mark P. Thomas (2014) “Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common-law Jurisdictions.” *Economic and Industrial Democracy*. doi: 10.1177/0143831X14546237.

<sup>90</sup> Mitchell and Murray, “Changing Workplaces Review,” p. 269.

***Options for an Internal Responsibility System in Employment Standards***

*Option 1a: Implement an ESA Committee, as an expansion of the existing Joint Health and Safety Committee or,*

*Option 1b: Have other committees/representatives appointed in the workplace with jurisdiction to deal with ESA compliance*

The Interim Report recommends that under option 1a, the fundamental obligations of the employer would be: to conduct a simplified self-audit developed and prescribed by the MOL, to check that the employer is complying with the *ESA*; and to meet with the committee/representative and review the employer's compliance audit. A copy of the compliance and confirmation of the meeting with the committee/representative may be required to be sent to the MOL.

Two possible models for the *ESA* Committee are also proposed as options:

A basic model where the "requirement of the committee/representative would be to meet with the employer to receive and review the employer's compliance audit...if the employee committee members/representative requested that the employer address *ESA* issues or complaints, the employer would be obligated to do so, but the committee would have no on-going duty to monitor compliance or to investigate any alleged violations discovered by them or brought to their attention."<sup>91</sup>

An enhanced model where "in addition to the requirement to review with the employer its compliance audit, the committee/representatives would have an on-going responsibility to promote awareness of – and compliance with – the *ESA*. Committees/representatives would be authorized under the Act to look into any *ESA* matter identified by them, the employer or by any employee(s) and have the right to be provided by the employer with all information necessary to establish whether there is compliance with the *ESA*. The committees/representatives would have an on-going duty to monitor compliance, to meet regularly with the employer, to communicate to employees and to look into any alleged violations discovered by them or brought to their attention."<sup>92</sup>

We do not recommend any effort to duplicate the IRS in the ES domain, especially as a strategy for addressing precarious forms of employment and vulnerable employees. While there is

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<sup>91</sup> Ibid., p. 271.

<sup>92</sup> Ibid.

evidence that health and safety committees and employee representatives have positive impacts in some workplaces,<sup>93</sup> there is very little evidence of their effectiveness in the kinds of precarious workplaces and industries where ES violations are more prominent. Indeed, the evidence that is available, including the results of a recent MOL sponsored study of the OHS IRS,<sup>94</sup> suggests that small workplaces and certain industries which make a significant use of contingent labour and vulnerable employee populations, are less likely to provide health and safety training to employees, less likely to use health and safety services, and most importantly, less likely to have health and safety committees, employee representatives, and regular health and safety inspections as prescribed by law.<sup>95</sup> Many studies suggest that non-unionized and insecure employees are also less likely to report workplace injuries or seek changes in hazardous work conditions or procedures whether to management or employee representatives.<sup>96</sup> A number of researchers have suggested not only that employee representatives and joint committees in unionized workplaces are more effective in preventing injuries<sup>97</sup> but also that the effectiveness of unionized employee representatives has been

<sup>93</sup> Gunningham, Neil (2008) "Occupational Health and Safety: Worker Participation and the Mining Industry in a Changing World." *Economic and Industrial Democracy* 29(3): 336–361; Hall, Alan et al (2006) "Making a Difference: Knowledge Activism and the Workplace Politics of Occupational Health." *Relations Industrielles/ Industrial Relations* 61(3): 408–436; Hall, Alan et al (2016) "Identifying Knowledge Activism in Worker Health and Safety Representation." *American Journal of Industrial Medicine* 59(1): 42–56; Lewchuk, Wayne, A. Leslie Robb, and Vivienne Walters (1996) "The Effectiveness of Bill 70 and Joint Health and Safety Committees in Reducing Injuries in the Workplace." *Canadian Public Policy* 22: 225–243; Shannon, Harry (2000) "Firm Level Organizational Practices and Work Injury." In: Terrence Sullivan (ed.) *Injury and the New World of Work*. Vancouver: UBC Press, pp. 140–161.

<sup>94</sup> Ontario Ministry of Labour (OMOL). (2015) *Market Metrics and Service Delivery. Research Report and Recommendations*. Prepared for Prevention Office. Toronto, pp. 5-6.

<sup>95</sup> See also Advisory Council on Occupational Health and Safety (1986) *An Evaluation of Joint Health and Safety Committees in Ontario*. Eighth Annual Report, vol. 2. Toronto: Queen's Printer; Frick, Kaj and David Walters (1998) "Worker Representation on Health and Safety in Small Enterprises: Lessons from a Swedish Approach." *International Labour Review* 137(3): 367-389; O'Grady, John (2000) "Joint Health and Safety Committees: Finding a Balance." In Terrence Sullivan (ed.) *Injury and the New World of Work*. Vancouver: UBC Press, pp. 162-197.

<sup>96</sup> See Basok, Tanya, Alan Hall and Eloy Rivas (2014) "Claiming Rights to Workplace Safety: Latin American Immigrant Workers in Southwestern Ontario." *Canadian Ethnic Studies* 46(3): 35-53; Lewchuk, Wayne, Marlea Clarke and Alice de Wolfe (2005) "Precarious Employment and the Internal Responsibility System: Some Canadian Experiences." In David Walters and Theo Nichols (eds.) *Workplace Health and Safety: International Perspectives on Worker Representation*. London: Palgrave-McMillan, pp. 109-133; Quinlan, Michael and Claire Mayhew (1999) "Precarious Employment and Workers' Compensation." *International Journal of Law and Psychiatry*, 22(5-6): 491-520; Pollert, Anna and Andy Charlwood (2009) "The Vulnerable Worker in Britain and Problems at Work." *Work, Employment and Society* 23(2): 343-361.

<sup>97</sup> Eaton, Adrienne E. and Thomas Nocerino (1992) "The Effectiveness of Health and Safety Committees: Results of a Survey of Public Sector Workplaces." *Industrial Relations* 39(2): 265-289; Grunberg, Leon (1985) "The Effects of the Social Relations of Production on Productivity and Workers' Safety." *International Journal of Health Studies*

declining for decades as union power has been eroded.<sup>98</sup> For example, in a study of the mining industry in Australia, Gunningham<sup>99</sup> examines how the legislated introduction of individual contracts and the industry use of contractors and sub-contractors broke the unions' capacity to challenge hazardous conditions. Hall,<sup>100</sup> Novek et al<sup>101</sup> and Russell<sup>102</sup> have documented similar impacts of global competition and restructuring in the Canadian mining and meat-packing industries on employee and union capacity to affect change in the workplace through committees and employee representation. Furthermore, even within unionized contexts, external enforcement is important in supporting and protecting the work of committees and employee representatives.<sup>103</sup> If these challenges are facing unionized employee representatives and committees, where there is at least some protection against arbitrary dismissal, there is little basis for arguing that employee representatives can effectively contest employment conditions in contexts where employees have no meaningful protection.

Research also shows that the effectiveness of health and safety committees is often strongly related to management attitudes and commitment to health and safety or, in other words, a management safety culture.<sup>104</sup> The problem is that there is no evidence showing that the forced introduction of an IRS acts to create a management culture of cooperation and

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13(4): 621-634; Nichols, Theo, David Walters, and Ali C. Tasiran (2007) "Trade Unions, Institutional Mediation and Industrial Safety: Evidence from the UK." *Journal of Industrial Relations* 49(2): 211-225; Reilly, Barry, Pierella Paci, and Peter Holl (1995) "Unions, Safety Committees and Workplace Injuries." *British Journal of Industrial Relations* 33(2): 275-288; Walters, David (1997) "Trade Unions and the Training of Health and Safety Representatives: Challenges of the 1990s." *Personnel Review* 26(5): 357-376; Weil, David (1991) "Enforcing OSHA: The Role of Labor Unions." *Industrial Relations* 30(1): 20-36.

<sup>98</sup> Hall, Alan (1993) "The Corporate Construction of Occupational Health and Safety: A Labour Process Analysis." *Canadian Journal of Sociology* 18(1): 1-20; Storey, Robert and Eric Tucker (2006) "All That Is Solid Melts Into Air: Worker Participation and Occupational Health and Safety Regulations in Ontario, 1970-2000." In Vernon Morgenson (ed.) *Worker Safety under Siege: Labor, Capital and Workplace Safety in a Deregulated World*. Armonk, NY: M.E. Sharpe, pp. 157-185; Tombs, Steve (1990) "Industrial Injuries in British Manufacturing." *The Sociological Review* 38(2): 324-343.

<sup>99</sup> Gunningham, "Occupational Health and Safety."

<sup>100</sup> Hall, "The Corporate Construction of Occupational Health and Safety."

<sup>101</sup> Novek, Joel, Annalee Yassi and Jerry Spiegel (1990) "Mechanization, the Labor process and Injury Risks in the Meat-packing Industry." *International Journal of Health Services* 20: 281-296.

<sup>102</sup> Russell, Bob (1999) *More with Less: Work Reorganization in the Canadian Mining Industry*. Toronto: University of Toronto Press.

<sup>103</sup> Hall, "The Corporate Construction of Occupational Health and Safety;" Hall et al, "Making a Difference;" O'Grady, "Joint Health and Safety Committees;" Walters, David (2006) "One Step Forward, Two Steps Back: Worker Representation and Health and Safety in the United Kingdom." *International Journal of Health Services* 36(1): 87-111.

<sup>104</sup> Lewchuk et al, "The effectiveness of Bill 70."

commitment. But there is evidence suggesting that costs, concerns about enforcement penalties and other liabilities are key factors in encouraging employers to commit to health and safety committees and safety more generally.<sup>105</sup>

Employee representatives in precarious employment contexts will suffer from the same problems that employees in general have in these workplaces; they have little or no employment security and the power to contest conditions that comes with security. They will be subject to same complex of reprisal pressures and persuasion that most insecure employees face, which means that the committees and the representation will be readily co-opted by employers. Committees can then be exploited by the employer to rubber stamp audits which will serve largely to conceal rather than reveal violations.<sup>106</sup> Employees will consequently not trust these representatives or the committees and, as such, will be no more likely to report violations than they would to the MOL. A major enhancement of reprisal protections for employee representatives along the lines outlined for reprisals in general would likely help. But the fact remains that employee representatives would still be subject to substantial pressures and/or inducements to accept and conceal violations.

Additionally, while it is arguable that cultural change can be crucial to the rule of law in employment contexts, the focus on a cultural solution obscures the political and economic factors shaping the cultural orientations and commitments of employers in many high-risk industries. In contexts of ever-increasing competition and limited state regulation and enforcement, employment violations are increasingly construed as a necessary part of business strategy, whether in terms of growth or simply survival.<sup>107</sup> And while there may be some financial incentive in allaying employee compensation costs for employers to embrace prevention through the IRS, there is no such incentive in the case of the *ESA*. Establishing a joint committee of powerless employees is not going to change these dynamics. If 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 ...,”<sup>108</sup> an IRS, as conceptualized, does not address or provide non-unionized employees with any protection from this power imbalance and reprisals. While it is worth remembering that one of the central criticisms of the OHS IRS is

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<sup>105</sup> Hall et al, “Making a Difference;” O’Grady, “Joint Health and Safety Committees;” Quinlan, Michael and Richard Johnstone (2009) “The Implications of De-Collectivist Industrial Relations Laws and Associated Developments for Worker Health and Safety in Australia, 1996-2007.” *Industrial Relations Journal* 40(5): 426-443; Walters, *One Step Forward, Two Steps Back*.

<sup>106</sup> Hall, Alan (1999) “Understanding the Impact of Mine Health and Safety Programs.” *Labor Studies Journal* 23(4): 51-76.

<sup>107</sup> Bernhardt, Annette, Michael W. Spiller, and Nik Theodore (2013) “Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws.” *International Labour Relations Review* 66(4): 808-832.

<sup>108</sup> Mitchell and Murray, “Changing Workplaces Review,” p. 11.



that the committees are only advisory, and hence the Special Advisors' proposal would replicate this problem, ultimately the core problem is that insecure employee representatives are not in a political position to make much of a difference even if the committees had real powers. In this context, we have to ask what the value of a self-audit report is to employees who have no power to do anything about *ESA* violations.

This said, requiring employers to conduct annual self-audits on compliance with the *ESA* is a sensible proposal. Such an audit should, however, address all standards as a clear indication of the MOL's commitment to the law as a whole rather than just selected aspects. The MOL could provide self-audit tools for employers and the employer should be required to provide the results of such audits to all employees. To provide employees with a real option of taking action, a robust model of anonymous and third party complaints (discussed in S. 5.5.4) and effective anti-reprisals and protection against unjust dismissal nevertheless remains essential.

#### 5.5.4 Reducing Barriers to Making Claims

##### 5.5.4.1 Initiating the Claim

###### **Background:**

*ESA* enforcement relies substantially on individual employees filing complaints regarding violations of their rights with the MOL. This centrality of complaints means that only a small fraction of violations will ever be redressed formally through the MOL's enforcement system since the vast majority of employees who experience a workplace violation do not complain. Reporting on the U.S. case, for example, researchers conservatively estimate that for every 130 violations of the *FLSA*'s overtime provisions, only one complaint is received by the WHD.<sup>109</sup> The decision of employees to file a complaint hinges on their perceptions of the efficacy of the complaint process, the assistance available to them throughout the complaint process, and the risk of employer retaliation. This risk may be amplified for employees with temporary or otherwise tenuous citizenship/residency status.<sup>110</sup> Many employees may also not perceive the violations that they experience to be a problem that could be solved, especially when such violations are normalized in the workplace and/or when they do not possess or cannot acquire

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<sup>109</sup> Weil, David (2010) "Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division." Online: <https://www.dol.gov/whd/resources/strategiceenforcement.pdf>, p. 84.

<sup>110</sup> Vosko "Rights without Remedies."

the documentary evidence normally required to validate their complaint.<sup>111</sup> Additionally, employees may not understand the different legislative frameworks governing the workplace (ES, OHS, human rights) and which one is relevant in a particular situation.<sup>112</sup>

Exacerbating barriers to the complaints system, amendments to the *ESA* in 2010 also introduced the requirement that employees must first attempt to resolve the issue with the employer before filing a complaint. While there are some exceptions to this rule, the provision establishes the broader principle that employees can and should seek resolution prior to involving the MOL and assumes that there are no possible employment implications except for those employees, such as young employees, who are exempt via the policy exceptions. Employees are currently unable to file anonymous complaints and third parties are also not allowed to file anonymous complaints on behalf of employees.

In addressing the issue of complaint making, the Interim Report sets out five options.

*Option 1: Maintain the status quo with a general requirement to first raise the issue with employers but at the same time maintain the existing policy exceptions and maintain current approach of accepting anonymous information that is assessed and potentially triggers a proactive inspection*

Given that the MOL's complaints system appears to be becoming less accessible to Ontario employees, we do not recommend option 1. Between 2008/09 and 2012/13, the number of ES complaints submitted annually dropped substantially, but leveled off starting in 2012/13.<sup>113</sup> Notably, the absolute number of non-unionized Ontario employees increased during that time period; thus, whereas in 2008/09, there was one complaint submitted for every 173 non-unionized employees in Ontario, in 2014/15, there was one complaint submitted for every 285 non-unionized employees (see graph below).<sup>114</sup> Given the persistence of precarious

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<sup>111</sup> Noack, Andrea M., Leah F. Vosko, and John Grundy (2015) "Measuring Employment Standards Violations, Evasion and Erosion Using a Telephone Survey." *Relations Industrielles/ Industrial Relations*, 70(1), 78-101. As Pollert and Charlwood, "The Vulnerable Worker in Britain," point out, the threshold point at which employees register ES violations as a problem may be quite high, "especially at the lower end of the labour market, where habituation to experiences such as work intensification, insecurity, low pay and coercion lower expectations of working life," p. 347.

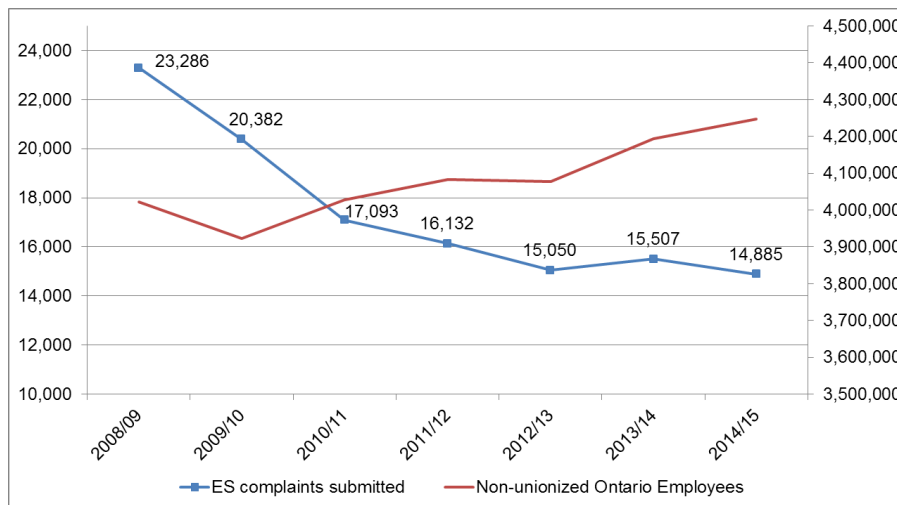
<sup>112</sup> Qualitative research, including interviews with employees and legal case workers, conducted as part of Closing the Enforcement Gap underscore the difficulties employees face acquiring the necessary documentation for a complaint.

<sup>113</sup> Vosko et al, "Employment Standards Enforcement: A Scan of Employment Standards Complaints," p. 20.

<sup>114</sup> Ibid.

employment over the past decade in Ontario,<sup>115</sup> it is highly unlikely that the reduction in complaints received reflects lower rates of employer non-compliance. A more likely explanation is that the requirement for employees to attempt to resolve their complaint with their employers prior to approaching the MOL, introduced under the *Open for Business Act (OBA)*, has served to further discourage employees from coming forward.

**Graph 3: ES Complaints Submitted to the Ministry of Labour, Relative to the Number of Non-Unionized Employees in Ontario, 2008/09 to 2014/15<sup>116</sup>**



Despite the exemptions to the self-help requirement for certain categories of complainants, there is evidence that the requirement is now an entrenched feature of the complaints system. Between 2011/12 and 2014/15, more than 4 out of 5 complainants reported that they had either contacted or attempted to contact their employer.<sup>117</sup> The most commonly cited reason complainants give for not contacting their employer is fear.<sup>118</sup> Research shows that this fear is particularly pronounced amongst complainants who are still working for their employer at the time that they file a complaint.<sup>119</sup>

<sup>115</sup> Vosko and Noack, “Precarious Jobs in Ontario.”

<sup>116</sup> Figure from Vosko et al, “Employment Standards Enforcement: A Scan of Employment Standards Complaints,” p. 21.

<sup>117</sup> Ibid., p. 23.

<sup>118</sup> Grundy, John et al (2015) “Access to and Remedies in the Enforcement of Ontario’s Employment Standards Act: The Impact of Reforms.” Paper presented to the Labour Law Research Network Conference, University of Amsterdam, June 27, p. 12.

<sup>119</sup> Ibid.

The requirement that an employee first directly confront their employer may deter an employee from initiating a complaint concerning monetary violations. In the context of what is often an already precarious employment relationship characterized by unequal power relations, it provides opportunity for an employer to pressure an employee not to go forward to the MOL by mobilizing multiple forms of power. Reprisal, which can entail receiving undesirable assignments and schedules, being subject to harassment from management or co-employees, or being terminated, has been a longstanding factor in discouraging employees from initiating ES complaints with the MOL.<sup>120</sup> A number of measures that would mitigate the risk of filing a complaint are missing in Ontario. Ontario does not allow third party complaints. Nor does it provide fulsome supports to employees in social locations where the risks associated with making a complaint are particularly high, such as employees holding temporary or insecure residency statuses. For example, employees in the Temporary Foreign Worker Program or the Seasonal Agricultural Workers Program are tied to a single employer, and can face non-renewal of their employment or potentially deportation if they seek to access the ES complaints system.<sup>121</sup> Many have financial obligations to households abroad, and cannot risk debarment from future employment. If complaints to the government during employment are restricted by these factors, any measure which requires employees to further expose themselves to these risks without state involvement constitutes a potentially important barrier to filing a complaint.

Another element of the requirement that employees raise issues first with their employer is the assumption that employees have the capacity to accurately identify *ESA* violations and, in particular, calculate the amounts of money that may be owed to them. While the MOL has provided more information to employees along with online self-help tools and translated materials, the complexity of the law and its various exclusions and conditions are an acknowledged problem as indicated in the Interim Report and papers commissioned for the review.<sup>122</sup> Moreover, some employees not currently recognized in the policy exclusions may not have the numeracy or literacy skills necessary to fully identify and understand the violations of their rights, and the computer skills or resource to find the necessary information. Education, language and basic communication skills are all potentially significant barriers to being able to express concerns to employers and, indeed, to determine whether and to what extent their

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<sup>120</sup> Fudge, Judy (1991) "Reconceiving Employment Standards Legislation: Labour Law's Little Sister and the Feminization of Labour." *Journal of Law and Social Policy* 7: 73-89.

<sup>121</sup> Vosko, "Rights without Remedies;" Faraday, Fay (April, 2014) "Profiting from the Precarious: How Recruitment Practices Exploit Migrant Workers." Metcalf Foundation. Online: <http://metcalffoundation.com/wp-content/uploads/2014/04/Profiting-from-the-Precarious.pdf>

<sup>122</sup> See Vosko et al, "How Far Does the Employment Standards Act 2000 Extend?"

rights are being violated.<sup>123</sup> There is also the problem of identifying the employer which research suggests is often not straightforward in a labour market context involving temporary help agencies and complex supply chains of contractors and sub-contractors.<sup>124</sup>

One additional questionable assumption underlying the self-help provision is important to recognize. When the government introduced the *OBA* in 2010, the logic of the new requirement for employees to talk to their employer first was that the assumption that too many employees were going to the MOL when the issues could have been easily resolved internally. Along with neglecting the risk of reprisals to employees, there is considerable evidence that if employees feel comfortable in raising a concern with an employer, that is in particular, if there is trust in the employer-employee relationship, employees tend to first raise concerns with managers and supervisors, in part because the trust means that they are not concerned about a possible reprisal<sup>125</sup> but also partly because they do not want to undermine the relationship of trust that they have.<sup>126</sup> Loyalty and commitment are also two factors that often play a role in whether employees complain and to whom.<sup>127</sup> The key issue then in terms of encouraging reporting to employers is whether employees have the trust and respect in management to raise the issues. As such, the employees who would go to their employer on their own will do so regardless of any requirement because there is trust. However, for all those employees who do not trust their employer, and in particular, those who feel insecure in their employment relationship,<sup>128</sup> an MOL requirement to go to the employer simply means that they will not bring a complaint forward.<sup>129</sup> In other words, employees who feel they can complain to their employer without risk will complain and those who do not will not. As a policy

<sup>123</sup> According to one study, as many as half a million people in Ontario may need an interpreter in pursuing legal matters. Yet no language interpretation services are provided to workers who require them in the ES claims process. See Cohl, Karen and George Thomson (December, 2008) "Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services" The Law Foundation of Ontario Linguistic and Rural Access to Justice Project

<http://www.lawfoundation.on.ca/wp-content/uploads/The-Connecting-Report.pdf>

<sup>124</sup> Weil, "Improving Workplace Conditions through Strategic Enforcement."

<sup>125</sup> Lewis, David, Alessio D'Angelo, and Lisa Clarke (2015) "Industrial relations and the management of whistleblowing after the Francis report: what can be learned from the evidence?" *Industrial Relations Journal* 46(4): 312-327.

<sup>126</sup> Basok et al "Claiming Rights to Workplace Safety;" Pollert and Charlwood, "The Vulnerable Worker in Britain."

<sup>127</sup> Lewis et al., "Industrial relations and the management of whistleblowing after the Francis report."

<sup>128</sup> Vosko, Leah F. (2006) "Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity." In Leah F. Vosko (ed.) *Precarious Employment: Understanding Labour Market Insecurity in Canada*. Montreal and Kingston: McGill-Queen's University Press, pp. 3-42.

<sup>129</sup> Lewis et al., "Industrial relations and the management of whistleblowing after the Francis report."

tool, the requirement is thus seemingly having the effect of increasing barriers to reporting rather than encouraging internal resolution, for the latter group, in particular.

*Option 2: Remove the ESA provision allowing the Director to require that an employee must first contact the employer before being permitted to make a complaint to the Ministry*

For the reasons outlined above under option 1, this is a necessary measure to improve employee' access to the complaints system, which we recommend adopting. It communicates to all employees that they have the right to report violations to the Ministry of Labour and can rely on it to accurately identify the violations and the monies owed and to protect their right to file complaints on these matters. Removing this provision would also clearly signal that the government is concerned about the challenges facing employees in precarious employment while recognizing that power is a central dynamic constraining the capacity of all employees to approach their employer with complaints.<sup>130</sup>

*Option 3: Allow anonymous claims, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response*

We recommend adopting this option. Anonymous complaints are helpful in encouraging reporting and preventing reprisals and, as such, our research supports this option. Anonymous complaints provide the most protection for employees who are still on the job they are complaining about. Such complaints are available in Canada. The Government of Saskatchewan allows “the employee or a third party such as a parent, friend or a member of the community” to submit a written complaint against an employer. The Province’s Compliance and Review Unit then investigates these complaints.<sup>131</sup> The anonymous complaint option is available if the individual is still employed at the workplace, believes that provisions of the province’s *Labour Standards Act* are not being followed, and wants to seek redress but is not in a position to file a formal complaint.<sup>132</sup> Only written complaints with supporting evidence are reviewed. Adoption of a similar procedure in Ontario would allow the MOL to conceal the identity of the employee who originally made a complaint by pursuing orders for multiple employees if violations involving other employees are found. The complainant would still have her or his complaint addressed while the employer would be less likely to discern which employee(s) filed the original complaint. In cases where no other violations are found in the inspection, the

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<sup>130</sup> Vosko et al, “Challenging New Governance.”

<sup>131</sup> See the Saskatchewan Ministry of Labour Relations and Workplace Safety, Labour Standards Division, Anonymous Complaint Form at 1. Online: <https://www.saskatchewan.ca/business/employment-standards/complaints-investigations-enforcement-and-fines/file-an-employment-standards-complaint>

<sup>132</sup> However, employees seeking wage recovery must file a formal complaint personally.

complainant(s) could then be informed that the completion of the complaint will require that the facts of their particular case will need to be revealed to the employer and the complainant could then have the option of withdrawing the complaint. This approach would also help to develop more robust enforcement machinery, which strategically uses the complaints process to identify and correct multiple violations. Research suggests that while some violations may be isolated to a single worker, most violations are being repeated across the firm and involve multiple employees, especially in certain industry sectors.<sup>133</sup>

*Option 4: Do not allow anonymous complaints, but protect confidentiality of the complainant, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response*

While this option is preferable to the status quo,<sup>134</sup> particularly the current practice of requiring employee self-resolution with the employer, it represents a weak alternative to anonymity. While confidentiality may allay some employees' concerns, and should be assured within the parameters that disclosure requires, without anonymity, employees will likely still be reluctant to report. Therefore, we do not recommend option 4.

*Option 5: Allow third parties to file claims on behalf of an employee or group of employees, it being understood that the facts of the alleged violation must be disclosed to the employer by an ESO in order to permit an informed response*

Third party complaints that also preserve anonymity have a number of significant advantages—we therefore recommend this option in conjunction with option 3. First, third party organizations, such as worker centres or unions, may have a better understanding of the employees' situation given common background, knowledge and experiences which can be important in building enough trust to overcome barriers of suspicion and fear.<sup>135</sup> Second, third party organization have also built up their own expertise and knowledge of the law while developing connections with the government inspectorate which gives them insights into the complaints-making and investigation process which can be of considerable assistance to

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<sup>133</sup> Bernhardt, Annette et al (2009) "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities." Online: <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf>

<sup>134</sup> Notably, it is the current practice of the U.S DOL's Wage and Hour division to initially maintain the confidentiality of complainants in workplace inspections prompted by a complaint. And there is every reason that the MOL should adopt a similar practice, although arguably alongside a suite of other complementary measures addressed above and below.

<sup>135</sup> Fine, Janice and Jennifer Gordon (2010) "Strengthening Labor Standards Enforcement through Partnerships with Workers Organizations." *Politics and Society* 38(4): 552-585.

employees making complaints. Third, these organizations can also offer employees a collective mechanism through which they can get together and file complaints.<sup>136</sup> The existence of this type of mechanism could help employees overcome the isolation and fear they often experience, especially those engaged in temporary forms of employment. Multiple complaints through a third party organization can also better protect the anonymity of the employees involved. Although much of the research supporting these points has been focused on the use of third party organizations in the U.S. and Australia to assist with extending the capacity to conduct inspections,<sup>137</sup> Weil and Pyles<sup>138</sup> point out that, overall, the use of third party collective workplace agents helps to reduce the risk to individual employees and lowers the cost of gathering and disseminating the information and knowledge necessary to identify and respond to violations.

Although we support the option of allowing third party complaints on behalf of employees, we emphasize the importance of continued state involvement in the complaints investigation and enforcement process. Even with third party complaints, employees who are fearful of reprisals will still have such concerns, especially if the third party advocates and the employees themselves do not have robust state protection to prevent reprisals. Organizations advocating for employees in employment situations thus need to have the same authority as those representing employers which means “the relations must be formalized, sustained and vigorous.”<sup>139</sup> Research on existing third-party engagement initiatives raise some concerns about the effectiveness of third-parties and their ability to respond to worker concerns given the limited organizational capacity of employees’ organizations.<sup>140</sup> For example, a review of the evidence on a British system of Citizen Advisory Bureaux (CAB) which offers employment advice and assistance through largely volunteer organization notes:

surveys of employees who accessed CAB services have found dissatisfaction due to delays in obtaining advice, poor communication of case information from advisors,

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<sup>136</sup> Weil, David and Amanda Pyles (2005) “Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace.” *Comparative Labor Law and Policy Journal* 27(1): 59-92.

<sup>137</sup> See Fine, Janice (2013) “Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States.” *Osgoode Hall Law Journal* 50(4): 813-843; Fine and Gordon, “Strengthening Labor Standards Enforcement;” Hardy, Tess (2011) “Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards.” *The Economic and Labour Relations Review* 22(3): 117-140.

<sup>138</sup> Weil and Pyles, “Why Complain?” p. 59.

<sup>139</sup> Vosko et al, “Challenging New Governance,” p. 8. See also Fine and Gordon, “Strengthening Labor Standards Enforcement.”

<sup>140</sup> Fine, Janice “Solving the Problem from Hell;” Hardy, “Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards;” Vosko, “Precarious Employment;” Vosko et al, “Challenging New Governance.”



and a lack of continuity between advisors...Moreover, surveys of employment advisors within the CAB themselves document concern about insufficient numbers of employment specialists....<sup>141</sup>

This finding points to the limitations of a passive system of third party advice, where advisers simply assist employees with the complaints process, and suggests that the involvement of third party advocates for employees should be viewed as a supplement to, not a replacement of, robust MOL enforcement of the law through both complaints investigation and proactive inspections.

#### 5.5.4.2 Reprisals

##### **Background:**

The *ESA* prohibits employers from intimidating, dismissing or penalizing employees who attempt to exercise their rights therein. The onus of proof that an employer's action was not a reprisal is on the employer, and if an ESO finds that a reprisal has taken place, the MOL can order compensation and reinstatement. Yet, as a growing body of literature on ES enforcement demonstrates, reprisal provisions on the books often fail to protect employees who are still employed with the employer against whom the complaint has been made. The literature on employment violations points consistently to reprisals as a core problem underlying the effectiveness of complaints-based systems of enforcement. There is, moreover, ample evidence that the current system in Ontario is not providing sufficient protection and reassurance for employees.<sup>142</sup> This problem only intensifies as rates of unionization decline, since collective agreements have long served as a buffer against such action, and as labour market insecurity intensifies, leaving greater proportions of the employed population more vulnerable to arbitrary and sudden dismissal.<sup>143</sup> Employee vulnerability to reprisal thus serves as a major impediment to the exercise of employee voice, and undermines any regulatory arrangement premised on such voice. The Interim Report presents a number of options for reforming the *ESA*'s anti-reprisal provision.

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<sup>141</sup> Vosko et al, "Challenging New Governance," p. 15.

<sup>142</sup> Perry, Adam, Urvashi Soni-Sinha, and Ayesha Mian Akram (2016) "Not Good Enough For Minimum Wage: Workplace Harassment and Precarious Work in Ontario, Canada." Paper presented at the annual meeting of the Canadian Association for Work and Labour Studies Conference, University of Calgary, June 1-2, 2016.

<sup>143</sup> Bernhardt et al, "Employers Gone Rogue;" Pollert and Charlwood, "The Vulnerable Worker in Britain;" Vosko, "Precarious Employment."

*Option 1: Maintain the status quo*

We do not recommend this option in light of growing awareness of the problem of reprisals. Evidence suggests that fear of reprisals remains a significant deterrent to employees accessing the MOL's ES complaints system. Only a small minority of employees attempt to access the legislative protections of ES while still employed in the job they are complaining about. Consistently fewer than 10% of complaints in each fiscal year from 2007/08 to 2014/15 come from employees who are working for the employer they are filing a complaint against.<sup>144</sup> The extremely low proportion of employees who file complaints against their employers while still on the job has remained relatively constant across time. The Auditor General of Ontario reported a similarly low level of complaints from employees on the job over a decade ago.<sup>145</sup>

There is also evidence to suggest that reprisals are being claimed more often than before. Whereas in 2007/08, reprisal claims were included in 6% of all complaints, the proportion of complaints that have a reprisal claim have grown steadily each year, increasing to 9% in 2010/11 and 10% in 2014/15.<sup>146</sup> Put differently, the share of complaints that include a claim of reprisal almost doubled between 2007/08 and 2014/15. Reprisal claims are also more common among complainants still working for their employer at the time that they make a complaint. For instance, in 2012/13, more than one in five complainants who were still working for their employer included a reprisal claim as part of their complaint. Most notably, the proportion of complaints that include a reprisal claim appears to be rising the fastest among this group of employees<sup>147</sup> (see graph below). This increase in reprisal claims is not surprising given the new opportunities for retaliatory behaviour flowing from the 2010 requirement, under the *OBA*, that employees must disclose the nature of their grievance to their employer as a condition of filing a complaint. The recent growth in reprisal claims is all the more troublesome for the MOL given that such claims are very often difficult and time consuming for ESOs to investigate, especially when the reprisal is subtle or not well-documented.

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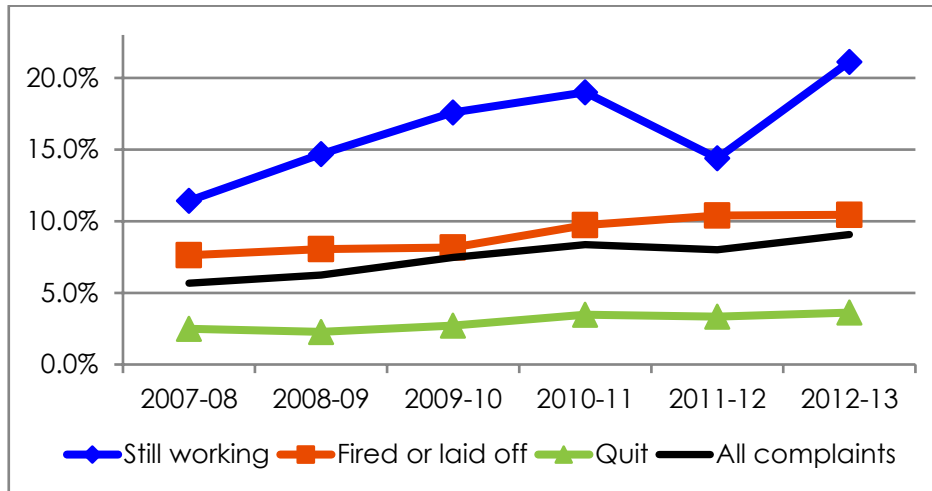
<sup>144</sup> Vosko et al, "Employment Standards Enforcement: A Scan of Employment Standards Complaints," p. 91.

<sup>145</sup> Office of the Provincial Auditor of Ontario (2004) Annual Report. Online:  
<http://www.auditor.on.ca/en/content/annualreports/arreports/en04/309en04.pdf>.

<sup>146</sup> Vosko et al, "Employment Standards Enforcement: A Scan of Employment Standards Complaints," p. 91.

<sup>147</sup> Grundy et al, "Access to and Remedies in the Enforcement of Ontario's Employment Standards Act," p. 6.

**Graph 4: Share of Complaints that Include Reprisal Claims, by Complainant's Work Status, 2007/08-2012/13<sup>148</sup>**



Currently, the Ministry does not expedite investigating reprisals, as reflected in the average six months that it takes for an ESO reprisal assignment and investigation to be completed.<sup>149</sup> This time lapse means that employees, many of whom have limited financial resources, are forced to deal with the economic and other consequences of reprisals independently for an extended period of time. In this context, even if the Ministry finds that there was a reprisal, the damage is done to the individual, contributing, potentially, to the spreading of fear among employees.<sup>150</sup> Monetary penalties for reprisal remain low in Ontario. While reinstatement and compensation for lost wages can be seen as costs by employers, these are relatively minimal costs for actions that have profound consequences both for individual employees and the rule of law in the employment context. Considering all entitlements related to reprisal claims, between 2008/09 and 2014/15, the median entitlement cost to the employer was less than \$3,000.<sup>151</sup> Moreover, only a fraction of reprisal claims filed by employees were validated. Even though there is an onus on employers to disprove reprisals, employees still have to prove their case, a

<sup>148</sup> Chart reproduced from Ibid.

<sup>149</sup> Mitchell and Murray, "Changing Workplaces Review," p. 277.

<sup>150</sup> It is noteworthy that reprisals were also identified in the Ministry of Labour's Expert Advisory Panel Report as a central problem affecting the reporting of health and safety violations in Ontario, especially among vulnerable employees in precarious employment. This finding led to recommendations for expedited investigations and third party representation resources for the employees.

<sup>151</sup> Vosko et al, "Employment Standards Enforcement: A Scan of Employment Standards Complaints," Table 1.1c.

requirement often necessitating extensive documentary evidence and quite complicated legal arguments.

One specific reprisal problem in Ontario concerns those employees in the Seasonal Agricultural Workers Program, and other temporary foreign worker programs, who face additional barriers to making a complaint. Research on employees in these situations indicates substantial fear of reprisals.<sup>152</sup> In this context, employers should be prohibited from forcing deportation of an employee who has filed an *ESA* complaint. In addition, the Ministry should work with the federal government to ensure that migrant employees who have filed complaints are granted open work permits so that they may continue to work while their complaint is investigated.

Maintaining the status quo will position the province of Ontario further behind other jurisdictions with stronger anti-reprisal protections for employees. For example, in recognition of the likelihood of employer retaliation, the U.S. WHD does not disclose the identity of the complainant when conducting an investigation based on an employee complaint. The State of California's anti-retaliation measures are also noteworthy for the protection they offer employees with insecure residency status. Recently passed laws prevent an employer from threatening to report an employee's immigration status, or engaging in immigration related acts such as requesting further proof of an employee's authorization to work (beyond that required by federal law), or contacting immigration authorities to report an employee suspected of being undocumented. If an employer takes these actions within 90 days of an employee filing a complaint, employees can seek damages and the employer faces the potential suspension or revocation of their business license.<sup>153</sup>

Along with increasing the probability of enforcement rulings against employers, the corporate crime literature points to the importance of significant penalties for employers as critical to effective deterrence.<sup>154</sup> Tougher enforcement, either through the adoption of a policy of

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<sup>152</sup> Basok, Tanya (2004) "Post-National Citizenship, Social Exclusion and Migrants' Rights: Mexican Seasonal Workers in Canada." *Citizenship Studies* 8(1): 47-64; Brown, Marianne P. (2005). "Immigrant Workers: Do They Fear Workplace Injuries More Than They Fear Their Employers." In Amy J. Schulz and Leith Mullings (eds.) *Gender, Race, Class and Health: Intersectional Approaches*, San Francisco: Jossey-Bass, pp. 228-258.

<sup>153</sup> National Employment Law Project (NELP) (2013) *California's New Worker Protections Against Retaliation*. Online: <http://www.nelp.org/page/-/Justice/2013/ca-immigration-retaliationv3.pdf>

<sup>154</sup> Gray, Garry C. (2006). "The Regulation of Corporate Violations: Punishment, Compliance and the Blurring of Responsibility." *British Journal of Criminology* 46: 375-892; Payne, Brian K. and Randy R. Gainey (2004) "Social and Governmental Altruism, Deterrence Theory and Nursing Home Regulatory Violations: A State-Level Analysis." *Journal of Crime and Justice* 27: 2, 59-78; Russell, Steve and Michael J. Gilbert (1999). "Truman's Revenge: Social Control and Corporate Crime." *Crime, Law and Social Change* 32: 59-82.

pursuing Part 3 prosecutions for reprisals, levying significant fines or even imprisonment or, a consideration of tougher new penalties such as the suspension of business licenses, would clearly and unambiguously indicate that reprisals are not legally or culturally acceptable. Public pronouncements ensuring that these actions are widely known is also essential to this approach, while also adding to deterrence through both embarrassing and augmenting employer fear of business client reactions.<sup>155</sup>

*Option 2: Require ESOs to investigate and decide reprisal claims expeditiously where there has been a termination of employment (and other urgent cases such as those involving an alleged failure to reinstate an employee after a leave)*

Option 2 would require that ESOs quickly investigate and decide on reprisal claims involving termination. An expedited process on all reprisal claims is crucial both from a fairness and justice perspective and in terms of encouraging employees to come forward with their complaints. Research demonstrates that the fear of reprisal is often based on personal experiences and the stories that employees tell other employees about their experiences or the experiences of others who have faced reprisals.<sup>156</sup> If the narratives can be shifted so that employees can begin telling stories of more positive outcomes, the impact of reprisal fears on complaints-making may be significantly reduced. To minimize the costs to employees, this process should provide interim reinstatement, if requested by the employee, pending a ruling on cases of dismissal due to reprisals. This point is supported by research on injury reporting which shows that the fear of job loss due to reporting is rooted not only in the loss of the job but also the immediate economic and housing implications as many employees and their families have very limited financial resources.<sup>157</sup>

<sup>155</sup> Braithwaite, John (1989) *Crime, Shame and Reintegration* Cambridge: Cambridge University Press.

<sup>156</sup> Alexander, Charlotte S. (2013) "Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce." *American Business Law Journal* 50(4): 779-834; Basok et al, "Claiming Rights to Workplace Safety;" Gleeson, Shannon (2012) *Conflicting Commitments: The Politics of Enforcing Immigrant Worker Rights in San Jose and Houston*. Ithaca, NY: ILR Press; Griffith, Kati (2015) "Worker Centers and Labor Law Protections: Why Aren't They Having Their Cake?" *Berkeley Journal of Employment and Labor Law* 36(2): 331-349; Hall, "Understanding the Impact of Mine Health and Safety Programs;" Ruckelshaus, Catherine (2008) "Labor's Wage War." *Fordham Urban Law Journal* 35(2): 373-407.

<sup>157</sup> Basok et al, "Claiming Rights to Workplace Safety;" Boyer, Jon et al (2009) "Ergonomic and socioeconomic risk factors for hospital workers' compensation injury claims." *American Journal of Industrial Medicine* 52(7): 551-562; Pransky, Glenn et al (1999) "Under-Reporting of Work Related Disorders in the Workplace: A Case Study and Review of the Literature." *Ergonomics* 42(1): 171-182; Underhill, Elsa M. and Michael Quinlan (2011) "How Precarious Employment Affects Health and Safety at Work: The Case of Temporary Agency Workers." *Relations Industrielle / Industrial Relations* 66(3): 397-421.

If reprisal claims involving termination are to be given priority, such priority should not occur at the expense of other complaints.

*Option 3: Require the OLRB to hear applications for review of decisions in reprisal on an expedited basis if the employee seeks reinstatement*

Option 3 is related to option 2. Accordingly, we recommend an expedited process at the OLRB given the research-based rationale outlined above in response to option 2.

### 5.5.5 Strategic Enforcement

#### **Background:**

After acknowledging, based on public consultations as well as discussions with Ministerial staff and commissioned studies, that “there is a serious problem with enforcement of ESA provisions,” resulting in “too many people in too many workplaces who do not receive their basic rights,” the Interim Report highlights the importance of strategic enforcement. The Special Advisors underscore that in a context of growing complexity in workplaces, governments with limited resources face considerable challenges and therefore canvass a variety of strategies for enforcing the Act. These strategies relate principally to the balance between reactive enforcement in response to complaints and proactive enforcement, targeting particular industries, geographic regions etc. where the failure to comply with provisions of the *ESA* is well-known. Historically, the overwhelming share of enforcement resources has gone towards supporting a reactive complaints-based system, where even expanded investigations that emanate from a single verified complaint, have been rarely utilized.<sup>158</sup>

In addressing the issue of enforcement of *ESA* provisions, the Interim Report sets out seven options.

#### *Option 1: Maintain the status quo*

As the Interim Report demonstrates, inspections can be of two general sorts – those following-up on complaints (i.e. reactive investigations) and those that target problem industries, geographic regions etc. (i.e. proactive). Traditionally, however, the overwhelming share of enforcement resources has gone towards supporting a reactive complaints-based system.

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<sup>158</sup> Law Commission of Ontario, “Vulnerable Workers and Precarious Work,” p. 63.

Existing evidence does not support maintaining the status quo since only a small minority of violations result in complaints to the Ministry. Indeed, the scholarly literature clearly establishes that complaints do not accurately reflect the number or source of violations.<sup>159</sup> Rather, proactive inspections, which reports published by the Office of the Provincial Auditor General in both 1991 and 2004 indicate were severely under-utilized,<sup>160</sup> are critical to any enforcement scheme due to their effectiveness in detecting *ESA* violations.

While the number of proactive inspections has increased over the past decade, it remains the case that only a tiny fraction of employers will ever be subject to inspection. The low probability of proactive inspection likely factors into employers' judgements over whether or not to comply with the *ESA*.

In recent years, between 2011/12 and 2014/15 specifically, the number of proactive inspections conducted by the Ministry of Labour has increased. This is a positive development because such inspections are effective in finding otherwise hidden violations, evidenced by the fact that such inspections tend to result in high rates of discovered violations. Broadly, the percentage of inspections that detected violations ranged from 75% to 77% in the years between 2011/12 and 2013/14, but dropped to 65% in 2014/15.<sup>161</sup> Of the different types of inspections carried out, expanded investigations turn up the most violations; 82% of such investigations revealed violations between the years 2011/12 to 2014/15. For targeted and regular inspections, the rate across these years is 72% and 70% respectively.<sup>162</sup> Such high rates of violations indicate that greater investment in increasing proactively oriented inspections is a good use of limited resources.

The importance of inspections also extends beyond uncovering violations. Inspections have a substantial deterrent effect, especially among businesses in the same region and industry of the inspected workplace. Furthermore, the deterrence effect is more pronounced for proactive inspections than it is for investigations triggered by a single complaint.<sup>163</sup> As Weil shows, employers are sensitive to proactive inspections because they represent "a bolt from the blue,"<sup>164</sup> news of which is conveyed through employer and employee networks, thereby encouraging greater compliance with minimum standards.

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<sup>159</sup> See Weil and Pyles, "Why Complain?"

<sup>160</sup> Office of the Provincial Auditor of Ontario, "Annual Report."

<sup>161</sup> Vosko et al, "Employment Standards Enforcement: A Scan of Employment Standards Complaints," p. 41.

<sup>162</sup> *Ibid.*, p. 42.

<sup>163</sup> Weil, "Improving Workplace Conditions through Strategic Enforcement," p. 54.

<sup>164</sup> *Ibid.*, p. 56.

More generally, to adopt the status quo is to rest on one's laurels while workplace practices continue to evolve in ways that evade regulation. Inspectorates in other jurisdictions continue to experiment and enhance their proactive approaches. For example, as part of the model of Strategic Enforcement 2.0, the WHD is striving to bring down the number of proactive inspections that result in no violations being detected, and is achieving considerable success. Traditionally, it has been the case in the United States, and remains the case in Ontario, that complaint-initiated investigations are more likely to turn up violations than targeted inspections. Improvements in the effectiveness of the WHD's proactive inspections mean that these inspections are approaching complaint-based investigations in terms of rate at which they detect non-compliance.<sup>165</sup>

Rather than maintaining the status quo, therefore, the overall orientation of the MOL should reflect continual innovation and improvement, characterized by ongoing assessment of which measures work best and which measures are less effective in light of evolving workplace practices – at the present time, this strategy necessitates embracing more fully proactive enforcement measures.

*Option 2: Focus inspections in workplaces where “misclassification” issues are present, and include that issue as part of the inspection*

Despite the prevalence of misclassification, prevailing approaches to conducting inspections do not focus on identifying instances of employee misclassification. Making such misclassification a focus of inspections would therefore be a positive development, which we recommend. However, doing so presents challenges since the *ESA* contains no provisions on employee misclassification, and there is no administrative data providing information about workplaces and industries where such misclassification is likely to be found. For this reason, as recommended in our response to options posed under 5.2.1 Misclassification of Employees, it may be necessary to establish a provision that makes misclassification a violation, subject to stringent penalties, under the *ESA*. Eventually, such a provision would also generate data that would point to common patterns of misclassification.

It is also necessary to address the multiple forms of employee misclassification used by employers to evade the application of the *ESA*. Addressing this issue means looking not only for situations where employees are classified as independent contractors, but also situations where employees are misclassified as managers for the purpose of limiting overtime pay and

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<sup>165</sup> Weil, David (2015) “Strategic Enforcement in the Fissured Workplace.” John T. Dunlop Memorial Forum, Harvard Law School. Online: [http://www.law.harvard.edu/programs/lwp/dunlop\\_forum/2015\\_Weil.pdf](http://www.law.harvard.edu/programs/lwp/dunlop_forum/2015_Weil.pdf)



working time provisions of the *ESA* (a form of misclassification we address in our responses to options posed under Section 5.2.3 Exemptions, Special Rules, and General Process).<sup>166</sup> The problem of managerial misclassification has been established by previous research. Two surveys of nursing homes in the United States conducted by its Department of Labour in the late 1990s established a compliance level of 70% in 1997 and 40% in 1999, with overtime violations stemming from misapplied managerial and professional exemptions cited as key factors in such low compliance rates.<sup>167</sup> Inspectors should take account of other possible ways employees may be being misclassified as certain types of employees for the purpose of limiting the *ESA* (for example employees involved in the maintenance of structures being classified as employees involved in construction so that a number of *ESA* provisions on working time no longer apply).

While research supports efforts to address the problem of misclassification through inspections, it by no means supports making misclassification a singular focus of investigations. Rather, misclassification should be approached as one among many different employer practices aimed at the evasion or violation of the *ESA*.

*Option 3: Increase inspections in workplaces where migrant and other vulnerable and precarious workers are employed*

There is now a large literature that details the barriers that migrant employees and other vulnerable employees in precarious jobs face in exercising voice when faced with violations.<sup>168</sup> Many such employees face heightened threat of retaliation if they come forward, especially those with an insecure residency status, thereby reducing their likelihood to do so. Increased proactive inspections of workplaces where such employees are concentrated is recommended.

*Option 4: Cease giving advance notice of targeted blitz inspections*

Providing advanced notice to an employer for any inspection is not mandated in the *ESA*. It is reasonable to assume that advance notice provides a given employer a chance to hide evidence of violations, and to select which employees will be present and available for an ESO to speak

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<sup>166</sup> Levine, David and David Lewin (2006) "The New 'Managerial Misclassification' Challenge to the Old Wage and Hour Law, or What is Managerial Work?" In David Lewin (ed.) *Contemporary Issues in Employment Relations*. Ithaca: Cornell University Press, 189-222.

<sup>167</sup> United States Department of Labour (2001) '1999-2000 Report on Initiatives'. Online: [http://nelp.3cdn.net/a5c00e8d7415a905dd\\_o4m6ikkkt.pdf](http://nelp.3cdn.net/a5c00e8d7415a905dd_o4m6ikkkt.pdf), p. 20.

<sup>168</sup> On Canada, see Vosko, "Rights without Remedies." On the U.S., see Bernhardt et al, "Broken Laws, Unprotected Workers;" Gleeson, *Conflicting Commitments*; Weil and Pyles, "Why Complain?"

with on the day of an inspection. This opportunity may thereby reduce the number of violations identified during an inspection, or increase the number of investigations that result in findings of no investigation. This practice therefore likely represents a sub-optimal use of enforcement resources. Partly for this reason, advanced warnings are not the policy of the WHD. We recommend that the MOL also cease providing them.

In the case of targeted inspections or blitzes, the practice of issuing a public announcement should however continue. Given evidence of the importance of employer and employee networks in communicating the potential of inspections,<sup>169</sup> public notices of industry blitzes may motivate employers in a sector to bring themselves into compliance, maximizing the benefit of the blitz.

*Option 5: Adopt systems that prioritize complaints and investigate accordingly*

We do not recommend this option. The *ESA*, since its inception, has sought to establish a set of social minima aimed at achieving decency at work as well as universality and fairness. Therefore, any reform to the complaint system must be oriented toward reducing the barriers complainants face in voicing workplace violations regardless of the nature and degree of their grievances. Cost savings to the MOL should not be achieved by limiting the access of employees to the complaints system. Unlike in the United States, where the federal DOL can rely on state governments to address individual complaints, there is no such fall-back in Ontario.<sup>170</sup> Moreover, there are serious concerns, which are addressed below, about leaving individuals who have experienced violations to seek remedies in the civil justice system or directly with the OLRB.

The adoption of a system that prioritizes some complaints for investigation, particularly those of a significant monetary magnitude, while streaming others away from the complaints intake process into institutions such as the small claims court, is not consistent with maximizing accessibility and employee voice. Research shows that only a small percentage of complaints reach the system already. As mentioned previously, in the United States, it has been estimated that for every one complaint lodged, there are about 130 ES violations, and this ratio fluctuates across industries.<sup>171</sup> An arrangement prioritizing complaints on the basis of the amount of the monetary claim owed would result in further limits on the complaints that are investigated.

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<sup>169</sup> Weil, "Improving Workplace Conditions through Strategic Enforcement."

<sup>170</sup> Vosko et al., "Employment Standards Enforcement: A Scan of Employment Standards Complaints," p. 13.

<sup>171</sup> Weil, "Improving Workplace Conditions through Strategic Enforcement," p. 83.

Should criteria for triaging complaints in some ways be adopted, they need to be well-thought out to avoid unintended consequences. The use of a monetary threshold for investigating complaints is problematic for several reasons. First, there is often wide variation between the initial complaints of complainants and their actual entitlements. Complainants often underestimate their experience of ES violation, and upon an ESO's investigations additional entitlement are often found to be owing. In short, the actual monetary value of a complaint can only be determined through investigation. Moreover, if the MOL were to only investigate complaints with claims of monetary violations above a certain dollar value, many employers would likely receive the message that only very large violations are considered serious by the MOL. It would also risk penalizing vulnerable employees in precarious jobs characterized by low wages who may be less able to navigate the small claims court or OLRB systems without support.

A means of processing complaints that is consistent with the strategic enforcement paradigm would be building on the MOL's high level of success with expanded investigations, and improving the use of complaints as a resource that can provide information about violations and inform MOL practices.

Additionally, special handling measures could be adopted for complaints that come from complainants in industries that are under represented among the complaints received by the MOL, or known to be industries in which employees experience difficulties exercising voice. Using complaints in this way is a key plank of the strategic enforcement paradigm.<sup>172</sup>

*Option 6: Adopt other options for expediting investigation and/or resolution of complaints*

The timely resolution of ES violations is critical for employees who come forward with complaints. Delays in assessing ES complaints serve as a powerful disincentive to exercising voice, especially for vulnerable employees in precarious jobs. Without further detail on what such options for expediting complaints would be, it is not possible for us to provide any recommendation. Nevertheless, in general, recent efficiency-based reforms to complaints handling and resolution have had a number of consequences. For example, the requirement for complainants to first contact their employer introduced under the *OBA* was intended to lighten the administrative burden on the MOL by encouraging early resolution between employees and employers. But there is evidence (albeit largely associative) to suggest that this reform may be preventing aggrieved employees from reaching out to the MOL given the new opportunities for reprisal created by the self-resolution requirement, and possibly be resulting in an increase in

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<sup>172</sup> Ibid.

the share of complaints that contain a reprisal claim.<sup>173</sup> Such claims are often difficult and time-consuming to investigate, a fact reflected in the practice, adopted by MOL officials, of automatically escalating complaints with a reprisal component to ESO 2s.

Another recent initiative aiming to expedite complaint resolution is the increasing use of settlements. As the following Section 5.5.5.2 discusses in more detail, they too tend to entail several problematic trade-offs including often substandard outcomes for employees.

The MOL's experience with efficiency-based reforms to complaints handling and resolution suggests that they can have problematic effects, especially for vulnerable employees in precarious employment. Careful consideration should thus be given to the possible effects flowing from attempts to expedite claims handling and resolution.

#### *Option 7: Develop other strategic enforcement options*

We recommend the development of other strategic enforcement practices that target firms at the top of industry structures whose policies and practices shape workplace practices down the supply chain by sub-contractors, franchisees, subsidiary corporations etc. This approach aims to utilize the monitoring and compliance mechanisms that are already in place in these organizational arrangements and networks. We have addressed the issue of expanding the scope of liability in our responses to the options posed in Section 5.2.2 and reiterate that it is an essential precondition for improving strategic enforcement.

The “hot goods” provisions of the *FLSA* (s. 15(a)(1) and 12(a)) exemplifies another strategic enforcement option. Under these provisions, it is illegal for goods to be shipped in interstate commerce if they were produced under conditions that violate the overtime or minimum wage provisions of the *Act*. With the rise of just-in-time production, the potential costs imposed on manufacturers through these provisions have increased. For this reason, in recent years, the WHD has revived their use, and now enters into monitoring agreements with manufacturers that have faced an embargo of their goods due to the non-compliance of sub-contractors.<sup>174</sup> Enforcement tools enabling the MOL to embargo goods manufactured in violation of the *ESA* should similarly be adopted.

Strong and appropriate deterrence tools, as discussed below, are also central to effective proactive enforcement strategies.

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<sup>173</sup> Vosko, et al, *Employment Standards Enforcement: A Scan of Employment Standards Complaints*,” p. 91.

<sup>174</sup> Weil, David (2008) “A Strategic Approach to Labour Inspection.” *International Labour Review* 147(4), 349-375.

### 5.5.5.2 Use of Settlements

#### **Background:**

The *ESA* allows complainants to settle their complaints or to settle during a review by the OLRB.

As noted above, the use of settlements in the complaints process has been increasing since 2008/09. Settlements are divided into two types: non-facilitated and facilitated settlements. Non-facilitated<sup>175</sup> settlements can occur at any point after the complaint is filed and a written agreement must be provided to the ESO outlining the agreement. Facilitated settlements<sup>176</sup> were introduced under the *OBA* in 2010. Facilitated settlements involve the ESO as an agreement facilitator between the employee and the employer. The growing use of settlements can be explained by the increased use of non-facilitated settlements which have almost doubled since 2008/09.<sup>177</sup> Complaints resolved through facilitated settlements have remained relatively steady since their introduction in 2010.

The use of settlements in minimum standards enforcement regimes merits special consideration for several reasons. Some scholars have raised concerns about their use because settlements potentially involve the negotiation of minimum standards instead of their enforcement, which may lead employees to accept less than their legal entitlement.<sup>178</sup> The use of settlements potentially allows for the contracting out of ES,<sup>179</sup> and can turn questions of law enforcement into matters of dispute resolution.<sup>180</sup> Furthermore, research investigating developments in ES in other Canadian jurisdictions shows that settlements can reproduce the power imbalances of the employment relationship, with employees subject to pressure to “agree” to substandard terms from employers who often have legal and human resources representation throughout the settlement process. Commenting on the formalization of the ES settlement process in British Columbia, Fairey concludes that, “[b]ecause of imbalance in the power relationship between employees and their employers the new formalized mediation and

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<sup>175</sup> *ESA*, s. 112.

<sup>176</sup> *Ibid* s. 101.1.

<sup>177</sup> Vosko et al, “Employment Standards Enforcement: A Scan of Employment Standards Complaints,” p. 36.

<sup>178</sup> Fairey, David (2005) “Eroding Worker Protections: British Columbia’s New ‘Flexible’ Employment Standards.” British Columbia: Canadian Centre for Policy Alternatives. Online:  
[http://www.policyalternatives.ca/documents/BC\\_Office\\_Pubs/bc\\_2005/employment\\_standards.pdf](http://www.policyalternatives.ca/documents/BC_Office_Pubs/bc_2005/employment_standards.pdf)

<sup>179</sup> *Ibid*.

<sup>180</sup> Vosko et al, “Employment Standards Enforcement: A Scan of Employment Standards Complaints,” p. 35.

settlement agreement process effectively places employees in a more vulnerable position, receiving less protection than was previously the case.”<sup>181</sup>

Overall, settlements tend to be used for complaints with slightly higher value claims, particularly those between \$2,000 and \$10,000. In terms of the standards claimed, settlements are used disproportionately to resolve complaints with a claim for overtime pay, public holiday pay, and reprisals. Not surprisingly, settlements are more prominent in relation to employers who are still in operation.<sup>182</sup>

There is no assessment of the complainant’s legal entitlement when settlements occur. As a result, settlement outcomes can only be assessed in relation to the total claim amount, and compared to the validated entitlement in assessed cases. For employees overall, settlements yield a smaller percentage of the total initial claim amount compared to those assessed by an ESO (this analysis does not take into account complaints denied by an ESO, presumably some complaints that were settled may have been denied if they were assessed). Furthermore, in almost 40% of cases, facilitated settlements are settled for less than half of an employee’s total initial claim, while fewer than 30% of non-facilitated settlements are settled for less than half of an employee’s total initial claim.<sup>183</sup>

As alluded to previously, another area where settlements occur is at the OLRB when complaints are reviewed. Settlements are an important dispute resolution mechanism to manage case load, but the settlement process must be designed to limit the opportunity for strategic behaviour that allows one party to gain unfair leverage over the other. Not counting withdrawn applications, almost 80% of reviews are resolved through settlement.<sup>184</sup> Employers and employees are more likely to settle than directors. With respect to employer-initiated reviews of monetary orders, settlements produce far worse outcomes for employees than when these reviews are adjudicated. Almost 30% of employees receive no money when employer-initiated reviews are reviewed, compared to 14% for adjudicated reviews.<sup>185</sup> Only 6% of employees receive full reimbursement when employer-initiated reviews are settled. However, when these reviews are adjudicated, 56% of employees receive 100% of what was ordered. Problematically, for employees, adjudicated reviews typically uphold an ESO’s decision 56% of the time which means employees are frequently foregoing some part of their entitlement as a cost of getting a

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<sup>181</sup> Fairey, “*Eroding Worker Protections*” p. 22.

<sup>182</sup> Vosko et al, “*Employment Standards Enforcement: A Scan of Employment Standards Complaints*,” p. 37.

<sup>183</sup> *Ibid.*, p. 38.

<sup>184</sup> *Ibid.*, p. 63.

<sup>185</sup> *Ibid.*, p. 64.

settlement.<sup>186</sup> Employees fare better when employee applications for review of denials are settled. In these situations, employees are more likely to receive some money compared to adjudicated reviews.

The Interim Report sets out three options for reforming the settlement process under the *ESA*.

*Option 1: Maintain the status quo*

Should the status quo be maintained, the use of settlements would likely continue to increase and employees would continue to settle for less money than they might otherwise be entitled. At the OLRB level, settlements would likely continue to be encouraged as they represent a cost-effective way to manage the applications and reduce pressure on scarce adjudicatory resources. Research by “Closing the Enforcement Gap” shows that the best interest of employees is not being addressed by the current settlement process, at both the complaints and the OLRB review levels. For these reasons, we do not recommend option 1.

*Option 2: In addition to the current requirement that all settlements be in writing, provide that they be subsequently validated by the employee in order to be binding. For example, provide that a settlement is binding only if, within a defined period after entering into the settlement, the employee provides written confirmation of her or his willingness to settle on the terms agreed to and acknowledges having had an opportunity to seek independent advice*

While this option would move to ensure that employees are not forced or pressured into settling, a worthy objective, it assumes that employees have access to independent advice. The MOL currently does not provide government or quasi-government funded assistance for employees who have had their rights violated.<sup>187</sup> There are few options available for low income earners to access legal support. Many employees who are reliant on the MOL for enforcing minimum labour standards are already disadvantaged compared to unionized employees. Non-unionized employees who must file their complaints with the MOL are also often disadvantaged due to gender relations, gendered divisions of labour, immigration status, and non-permanent employment status.<sup>188</sup> For these reasons, we do not recommend option 2 as this option would *only* be viable if employees had meaningful access to the support and advice of workers’ centres and workers’ advocates in navigating the MOL complaints process, especially those who are earning low wages and cannot afford adequate legal support.<sup>189</sup>

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<sup>186</sup> Ibid., p. 65.

<sup>187</sup> Vosko, “Rights without Remedies.”

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

*Option 3: Have more legal or paralegal assistance for employees in the settlement process at the OLRB as set out below in Section 5.5.6*

We recommend option 3 as access to legal assistance would help rectify considerable power imbalances between employers and employees by augmenting supports for the latter to more closely approximate those accessed by the former. Currently, low wage employees have few options for obtaining legal support. As settlements typically produce less favourable outcomes for employees, having access to legal or paralegal assistance would be beneficial. Complainants who have more support, or who are better informed, or who are stronger willed and therefore better able to persist in the process may do better in settlements. Employees need to be protected in the settlement process so as to avoid arrangements that fall below minimum entitlements. As such, there needs to be more legal or paralegal assistance for employees in the settlement process. Access to legal or paralegal assistance during the OLRB review process would be beneficial as almost 80% of reviews that are not withdrawn are settled and employees rarely recover their full entitlement amount when settling.<sup>190</sup> When employer-initiated reviews of monetary orders are settled, only 6% of employees receive their full entitlement amount. However, when these reviews are adjudicated, almost 60% receive their full entitlement amount.<sup>191</sup> Improving and creating more access to legal support through either the Office of the Worker Advisor or through Pro Bono Assistance is desirable, especially for vulnerable employees in precarious jobs who have no other access to legal support.

### 5.5.5.3 Penalties and Remedies

#### **Background:**

The MOL's enforcement system uses remedies and penalties as compliance and deterrence measures.<sup>192</sup> Compliance measures include Compliance Orders,<sup>193</sup> Orders to Pay Wages<sup>194</sup> (for employers, directors, and related employers), and Orders to Compensate and/or Reinstate.<sup>195</sup>

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<sup>190</sup> Vosko et al, "Employment Standards Enforcement: A Scan of Employment Standards Complaints," p. 63.

<sup>191</sup> Ibid., p. 65.

<sup>192</sup> The Interim Report categorizes the MOL's enforcement tools as serving either a restitution, compliance or deterrence purpose. In contrast, we do not distinguish between restitution and compliance oriented tools since restitution is the primary way in which compliance is achieved.

<sup>193</sup> ESA s. 108

<sup>194</sup> Ibid. s. 103

<sup>195</sup> Ibid. s. 104



Deterrence tools include Notices of Contravention,<sup>196</sup> Part I tickets<sup>197</sup> or summonses and Part III prosecutions under the *Provincial Offences Act (POA)*. It is useful to categorize the MOL's range of remedies and penalties in this way, because compliance and deterrence theories are based on fundamentally different assumptions about the causes of legal violations and their normative significance.<sup>198</sup> Applied to questions of workplace regulation, deterrence theory is premised on the idea that a substantial proportion of ES violations, including non-payment of wages, are caused by the intentional or reckless actions of employers who have determined they are better off not complying with their legal obligations or are not motivated to take reasonable steps to understand their *ESA* obligations and make sure they are *ESA* compliant. Therefore, the goal of the law should be to alter employers' behavior by raising the risk of being caught and/or increasing the penalties for breaching the law. An emphasis on this goal will generate specific and general deterrence thereby shaping the future behavior of both the employer found to be in violation and of employers generally.<sup>199</sup> From the perspective of deterrence theory, wage violations should not be treated as a private problem resolved by compensating the individual for her or his loss, but rather should be viewed as a serious social hazard that not only harms individual employees and their dependents but that also contributes to a climate in which processes of evasion, erosion and abandonment could lead to a gloves-off labor market in which public decency is sacrificed to the drive to maximize profits at any cost.

In contrast, compliance theory is premised on the idea that violations are the result of employer ignorance and incompetence rather than intentional behavior.<sup>200</sup> The primary strategy for improving employers' performance of their legal obligations, therefore, is to provide information and compliance assistance on the assumption that most employers will respond by becoming law abiding citizens.<sup>201</sup> Indeed, in particularly optimistic versions of compliance theory, employers will go beyond the minimum that is required and a culture of

<sup>196</sup> Ibid. s. 113.

<sup>197</sup> R.R.O. 1990, Reg. 950

<sup>198</sup> Gunningham, Neil (2010) "Enforcement and Compliance Strategies." In Robert Baldwin, Martin Cave, and Martin Lodge (eds) *The Oxford Handbook of Regulation*. Oxford, UK: Oxford University Press, pp. 120-145.

<sup>199</sup> Purse, Kevin and Jillian Dorrian (2011), "Deterrence and Enforcement of Occupational Health and Safety Law." *The International Journal of Comparative Labour Law and Industrial Relations* 27(1): 23-39.

<sup>200</sup> Davidov, Guy (2010) "The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions." *International Journal of Comparative Labour Law and Industrial Relations* 26(1): 61-82.

<sup>201</sup> Estlund, Cynthia C. (2005) "Rebuilding the Law of the Workplace in an era of Self-Regulation." *Columbia Law Review* 105(2): 319-404; Lobel, Orly O (2005) Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety." *Administrative Law Review* 57(4): 1071-1152; Vosko et al, "Challenging New Governance."

compliance will foster even higher standards of behavior.<sup>202</sup> The few bad apples that do not respond to compliance measures will then be isolated and subject to deterrence measures. This approach is seen to be particularly appropriate in the employment context, where regulations apply to individuals and corporations engaged in beneficial economic activities.

A central problem underlying Ontario's ES enforcement system is that it privileges compliance (and its account of violations and appropriate remedies) while evidence suggests that reckless, wilful and egregious ES violations are much more prevalent than compliance logic admits. A growing body of research on the changing nature of employment provides grounds to question the salience of the compliance model.<sup>203</sup> Weil and others<sup>204</sup> demonstrate that, in many sectors of the economy, employment relations have been transformed through a process of fissuring which leads businesses to avoid having employees through contracting out, franchising and the use of extended supply chains. Employment is being pushed into increasingly competitive environments where employers are under enormous pressure to reduce costs, and since labor costs often comprise a considerable portion of total costs in these industries the incentive to violate the law grows, resulting in a greater propensity to engage in reckless or intentional violations.

MOL administrative data further underscores the inadequacy of compliance approaches, and the need to augment deterrence. The fact that complainants with claims for monetary ES violations are concentrated in highly fissured industries as well as in small firms suggests that ignorance may not be the driving factor behind many violations. Moreover, what we know about the features of validated monetary claims indicate further that intentional, even egregious violations are much more common than the compliance framework acknowledges. Unpaid wages are the most common claim type filed by complainants. Their significance is notable because the claim of unpaid wages is arguably less likely than other standards (i.e. vacation pay or public holiday pay) to be caused by a mistake on the part of the employer. Furthermore, the median amount of validated entitlements are for high dollar amounts that represent a substantial portion of weekly or monthly earnings for low income earners. Pointing toward employer recalcitrance in the enforcement process, employers are more likely to voluntarily comply with lower dollar value complaints than high ones, and only a minority of monetary orders is ever fully satisfied.

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<sup>202</sup> Sabel, Charles et al (2000) "Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace." Online: <http://www.archonfung.net/papers/rls21.pdf>

<sup>203</sup> Davidov, "The Enforcement Crisis in Labour Law;" Vosko et al, "Challenging New Governance."

<sup>204</sup> Weil, *The Fissured Workplace*. See also Lewchuk, Wayne et al, (2015) "The Precarity Penalty." Online: <http://www.unitedwaytyr.com/document.doc?id=307>.

In short, there is a disjuncture between the MOL's compliance-oriented enforcement framework and both employees' experience of violations and of employer behavior in the complaints process. The following discussion of options set forth by the Special Advisors proceeds on the premise that deterrence measures need to be strengthened to rebalance the MOL's range of remedies and penalties.

*Option 1: Maintain the status quo*

We do not recommend option 1 because deterrence measures are used too infrequently, and because the penalties typically imposed from their use is sufficiently low enough for employers to regard them as a cost of doing business. We know that only a tiny fraction of violations are brought to the MOL's attention, and that the vast majority of employers will not be subject to a proactive inspection. The lack of risk of getting caught, coupled with the general weakness of deterrence measures, mean that unscrupulous employers have little incentive to refrain from ES violations.

The first levels of deterrence, NOCs and Part I tickets, are rarely used. Assuming that they are not being issued in the same cases, adding together the number of NOCs and tickets issued each year, these low-level deterrence measures were used in 4.6% of all cases with violations and 5.1% of all cases with monetary violations between 2012/13 and 2014/15.<sup>205</sup>

The dollar amounts associated with NOCs are low. The penalty for a first contravention is \$250, for a second contravention in a three-year period it is \$500, and for a third or subsequent contravention in a three-year period it is \$1,000 (set out in Ontario Regulation 289/01). If the contravention affects more than one employee, and is not for a violation of a posting or record-keeping requirement, the fine is multiplied by the number of employees.

The penalty associated with Part I tickets is also low. Currently, it is \$295 for every violation, with a victim fine surcharge and an administrative fee bringing the total to \$360. Such low dollar values do not provide enough of a monetary penalty to substantially dis-incentivize non-compliance among many employers. Their inadequacy is especially evident given that the median total entitlement owed to complainants across the years from 2008/09 and 2014/15 was \$1,109.<sup>206</sup>

Part III prosecutions carry much heavier penalties. If convicted, defendants are liable to be fined up to \$50,000 or imprisoned for up to 12 months. Corporations are liable to be fined up to

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<sup>205</sup> Vosko et al, "Employment Standards Enforcement: A Scan of Employment Standards Complaints," p. 54.

<sup>206</sup> Ibid., p. 34.

\$100,000 for a first offence, \$250,000 for a second offence and \$500,000 for a third or subsequent offence. However, Part III prosecutions are used extremely infrequently. In the period between 2008/09 and 2014/15, there were 92 businesses prosecuted for ES violations under the POA, involving 292 charges.<sup>207</sup> For the three years for which complete data are available (2012/13 to 2014/15), 41 prosecutions were launched, comprising roughly 0.18% of cases with violations detected by complaints and inspections (0.20% of cases with detected monetary violations).<sup>208</sup> Moreover, the average fine per business was \$20,388, while the average penalty per charge was \$7,740.<sup>209</sup> This average penalty per charge is only 15% of the \$50,000 maximum penalty for individuals, and 8% of the maximum of \$100,000 for corporations (for a first offence).<sup>210</sup>

The status quo also implies that Ontario will fall further behind other jurisdictions that are ramping up deterrence measures in ways that inject genuine risk into ES violations. A number of U.S. jurisdictions have implemented penalties such as licence debarment (California, Cook County Illinois, Seattle, Jersey City, and Philadelphia, among others) and increased fines (New York State, California).

*Option 2: Increase the use of Part III prosecutions under the POA particularly for repeat or intentional violators and where there is non-payment of an Order*

We recommend an increase in the use of Part III prosecutions as part of a broader effort to elevate the deterrence aspects of enforcement. As shown above, Part III prosecutions are used very infrequently. They should also continue to be widely publicized to augment their general deterrence effect.

As evidence of pervasive non-compliance with Ministry Orders, between 2009/10 and 2014/15, only 39%<sup>211</sup> of monetary orders (Orders to Pay Wages, Orders to Compensate/Reinstate) were satisfied fully. For this reason, option 2 would need to be accompanied by other measures greatly increasing compliance with Orders so that the pool of employers in violation of Orders and potentially subject to Part III prosecution is reduced.

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<sup>207</sup> Ibid., p. 56.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid., p. 70.

The MOL recently initiated a Repeat Offenders/Zero-tolerance' blitz, in force between September 1 and October 31, 2016. The MOL's announcement of the initiative indicates that "repeat violations are one indicator of intentional or wilful non-compliance."<sup>212</sup> The MOL does not indicate what deterrent penalties, if any, would be levied against employers with repeat violations. However, consideration could be given to how the Repeat Offenders/Zero-tolerance blitz could identify employers for Part III Prosecution.

*Option 3: Increase the frequency of use of NOCs by the ES Program. This could be supported by:*

- 1. requiring employers to pay an amount equal to the administrative monetary penalty into trust in order to have a NOC reviewed by the OLRB;*
- 2. removing the "reverse onus" provision that applies to the Director of Employment Standards when a NOC is being reviewed at the OLRB.*

As mentioned above, NOCs are under-utilized by the MOL. Between 2009/10 and 2014/15, there were almost 46,000 complaints which detected a violation. In about half of those cases (48%), the employer did not voluntarily comply, but in only 392 instances, or 1% of all complaints with violations, were NOCs issued.<sup>213</sup>

Sub-options 1 and 2 aim to make the issuance of NOCs easier by limiting or streamlining their review at the OLRB. Yet, it should be noted that employers infrequently seek to have NOCs reviewed by the OLRB (only 10% of NOCs stemming from complaints, 4% of NOCs stemming from inspections; perhaps reflecting the small stakes generally involved).<sup>214</sup> A high percentage of employers apparently do not pay the NOC penalty. Only 51% of complaint NOCs and 68% of inspection NOCs are satisfied. Between 2012/13 and 2014/15 only 50% of \$125,000 in NOC penalties assessed in relation to complaints and investigations have been recovered.<sup>215</sup>

A better way of streamlining the use of NOCs is to require that they be issued for all confirmed violations of listed ESA provisions, such as those involving monetary issues.

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<sup>212</sup> OMOL (2016) "Repeat Violators / Zero Tolerance Blitz." Online:  
[https://www.labour.gov.on.ca/english/es/pubs/is\\_repeat.php](https://www.labour.gov.on.ca/english/es/pubs/is_repeat.php)

<sup>213</sup> Vosko et al, "Employment Standards Enforcement: A Scan of Employment Standards Complaints," p. 52.

<sup>214</sup> Ibid., p. 53.

<sup>215</sup> Ibid.

*Option 4: Require employers to pay a financial penalty as liquidated damages to the employee whose rights it has contravened, designed to compensate for costs incurred because of the failure to pay (i.e. borrowing costs), in a specified amount or an amount that is equal to or double the amount of unpaid wages and a set amount for non-monetary contraventions*

Liquidated damages are expressly intended to be compensatory rather than deterrent. They reflect the fact that monetary violations can impose severe hardship on employees, who often must resort to credit cards, or loans from friends and family. However, the secondary deterrent effect of liquidated damages has also been recognized by the courts.<sup>216</sup> For this reason, they are a useful measure that should be adopted as part of the MOL's enforcement system. The need for liquidated damages to be set at a rate that provides meaningful compensation for the complainant is recognized in the U.S. context. The *FLSA* allows a court to assess liquidated damages in the amount equal to the unpaid wages or unpaid overtime pay.<sup>217</sup> The *New York State Wage Theft Prevention Act*, which took effect in 2011, increased the amount of liquidated damages available to employees who prevail in pursuing a complaint involving claims of monetary violations from 25% of the back wages owed to 100% in addition to other civil penalties and interest.<sup>218</sup> Treble damages allowing for three times the amount of actual financial loss to employees are available to aggrieved employees in a number of U.S. States.<sup>219</sup> Under the District of Columbia's *Wage Theft Prevention Amendment Act* of 2014 employees can be awarded damages that are three times the back wages owed, in addition to the back wages, so that total restitution is essentially quadruple damages.<sup>220</sup> Such measures reflect growing awareness that liquidated damages should be enough to make the complaint process worthwhile for complainants and deterrent for employers.

*Option 5: Increase the dollar value of NOCs*

Increasing the dollar value of NOCs is another measure that would augment the deterrent effect of NOCs. Currently set at \$250 for the first contravention, \$500 for a second, and \$1000 for a third, the dollar value of NOCS are too low to be sufficiently deterrent. Moreover, the preference among ESOs is to impose lower value NOCs. About three quarters of NOCs are for

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<sup>216</sup> See *Boucher v. Wal-Mart Canada Corp.* [2014] (ONCA 419) (CanLII). Online: <http://www.canlii.org/en/on/onca/doc/2014/2014onca419/2014onca419.html>

<sup>217</sup> 29 U.S. Code, Chapter 9, S. 260.

<sup>218</sup> New York State (n.d.) "Wage Theft Prevention Act." Online: <https://www.labor.ny.gov/formsdocs/wp/p715.pdf>

<sup>219</sup> NELP (January, 2011) "Winning Wage Justice." Online: <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf>, p. 20.

<sup>220</sup> Code of the District of Columbia S. 32-1012. Online: <https://beta.code.dccouncil.us/dc/council/code/sections/32-1012.html>

the lowest amount, \$250.<sup>221</sup> In about a quarter of cases, the fine is for more than \$250, either because multiple employees were affected or it was a second or subsequent offence.<sup>222</sup> Therefore, we recommend greater dollar value penalties for NOCs.

*Option 6: Increase the administrative fee payable when a restitution order is made, to include the costs of investigation and inspections*

In principle, we recommend option 6 because it shifts costs related to *ESA* enforcement from tax payers to those who have violated the *ESA*. The option should be considered along with other measures that create new revenue streams to support strengthened enforcement. However, if it is adopted, precautions should be taken to ensure that it does not place ESOs under increased pressure to issue Compliance Orders when restitution orders are warranted.

*Option 7: Use the existing authority of officers to require employers to post notices in the workplace where contraventions are found in claim investigations*

The posting of notices of violations in workplaces is an important way of raising awareness among employees of potential violations. However, other jurisdictions are going further; specifically, they are authorizing inspectorates to post a summary of violations in a place that is visible to the public. For example, the New York State *Wage Theft Prevention Act* allows the state's Department of Labor to post a notice of violation for up to 90 days in a public place in the case of employers found to have engaged in willful violations of ES.<sup>223</sup> In California, the *Employee Misclassification Act (SB 459)*, passed in 2011, requires that any employer found to have willfully misclassified employees post a notice on their website or another prominent place if there is no website, indicating the employer has engaged in employee misclassification and that the employer has changed its workplace practice to comply with the law.<sup>224</sup> Such transparency-based measures have been adopted successfully in other realms of regulation; for example, public health inspectorates often post restaurant hygiene grades that warn the public of restaurant infractions.<sup>225</sup> Indeed, they are powerful measures because they mobilize pressure on brand reputation through "naming and shaming."<sup>226</sup>

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<sup>221</sup> Vosko et al, "Employment Standards Enforcement: A Scan of Employment Standards Complaints," p. 52.

<sup>222</sup> Ibid.

<sup>223</sup> New York State, *Wage Theft Prevention Act*. <https://labor.ny.gov/formsdocs/wp/p715.pdf>

<sup>224</sup> *California Labour Code* S. 226.8 and 2753.

<sup>225</sup> Blasi, Jeremy (2012) "Using Compliance Transparency to Combat Wage-Theft." *Georgetown Journal on Poverty Law & Policy* 20(1): 95-140.

<sup>226</sup> Tess Hardy and John Howe (2015) "Chain Reaction: A Strategic Approach to Addressing Employment;" Weil, "Improving Workplace Conditions through Strategic Enforcement."

*Option 8: Have the Director of Employment Standards set interest rates pursuant to the authority to do so in section 88(5) so that interest can be awarded in the circumstances currently allowed for*

In principle, this option has merit, but a mandatory requirement for employers to pay interest on unpaid wages (option 9) is preferable from the perspective of augmenting deterrence measures in the *ESA* (see justification under response to option 9 below).

*Option 9: Amend the Act to allow employers to be required to pay interest on unpaid wages*

Many jurisdictions require interest to be paid on unpaid wages along with other civil penalties. In Ontario, as elsewhere, pre-judgement and post-judgement interest is routinely included in remedies issued in small claim court judgements. Such a measure is justified in light of the substantial time and resources complainants must spend trying to obtain the wages and entitlements they have earned.<sup>227</sup> Requiring interest also reduces the chance that employers gain financial advantages from withholding what are often large sums of money for long periods of time. For these reasons, we recommend option 9.

*Option 10: Make access to government procurement contracts conditional on a clean *ESA* record*

Incorporating ES compliance provisions into public procurement policy is a well-established means of promoting enforcement, and one of growing popularity.<sup>228</sup> Indeed, the incorporation of ES clauses in procurement contracts reflects a belief that ES are a public good and their enforcement is a fundamental public policy goal and, hence, that government should not be rewarding unscrupulous employer with its business.<sup>229</sup> One prominent example is the embrace of such mechanisms in the umbrella group “the Sweatfree Purchasing Consortium,” an organization comprised of state and local governments in the United States who help other cities, states, counties, towns, and school districts to develop and implement policies and rules towards the goal of avoiding sweatshop products. The Consortium works to assist governments

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<sup>227</sup> Vosko, Leah F. et al, “New Approaches to Enforcement and Compliance with Labour Regulatory Standards,” p. 37.

<sup>228</sup> Banks, Kevin (2016) “Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness.” Online: <https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Banks-6B-ESA%20Enforcement.pdf>, p. 85; Vosko et al, “New Approaches to Enforcement and Compliance with Labour Regulatory Standards.”

<sup>229</sup> Banks, “Employment Standards Complaint Resolution, Compliance and Enforcement,” p. 85.



in creating codes of conduct, applicable to the contracts in which they engage, requiring that their contractors abide by “standards that enjoy international consensus and the will of the people of the nation and region of production,” specifically, the core conventions of the International Labour Organization and its *Declaration on Fundamental Principles and Rights at Work* and its implementation and monitoring.<sup>230</sup> Another example is Cook County’s “wage theft ordinance,” which renders any employer found to have willfully or repeatedly violated any federal or state laws governing the payment of wages in the previous five years ineligible for county contracts. Applicants for contracts must submit an affidavit confirming compliance, and a procurement officer can issue a notice of default if an existing contractor is found to have violated ES.<sup>231</sup> For these reasons, we recommend option 10.

*Option 11: Grant the OLRB jurisdiction to impose administrative monetary penalties*

We recommend this option only if it is adopted as a supplement to, rather than a substitute for, existing deterrence measures. Establishing a new type of sanction does not address the fundamental problem of the underutilization of existing deterrence measures.

### 5.5.7 Recovery/Collections

**Background:**

A key component of ES enforcement is recovering any monies that are owed. Such activities have traditionally been the central purpose of the MOL’s complaints system. To collect monetary entitlements for employees, the MOL has a number of tools at its disposal. First, employees are encouraged to attempt to resolve complaints with their employer. If self-resolution is not possible and an employee files a complaint, another set of measures come into play. In the case of employers with no history of violations, or with previous violations of different standards, ESOs are generally encouraged to seek voluntary compliance. If voluntary compliance is not achieved, an ESO can issue monetary orders.<sup>232</sup> At any point in the process, the complainant and their employer can agree to settle.<sup>233</sup>

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<sup>230</sup> Sweatfree Purchasing Consortium (2011) “Sweatfree Purchasing Guide.” Version 1. Online: <http://buysweatfree.org/image/File/Guide%20to%20Sweatfree%20Procurement.pdf>, p. 7.

<sup>231</sup> Cook County Wage Theft Ordinance. Online: <https://cook-county.legistar.com/LegislationDetail.aspx?ID=2129131&GUID=147181E9-9697-4894-97EA-76A413D5CE1F&Options=&Search=&FullText=1>

<sup>232</sup> This order can take the form of an Order to Pay Wages (s. 103), Directors’ Order to Pay Wages (s. 81), Related Order to Pay Wages (s. 103), Order for Compensation (s. 104, 74.16, 74.17), and/or an Order to Pay Fees (s. 74.14).

<sup>233</sup> Facilitated and Non-facilitated Settlements are established in s. 101.1 and 112 of the *ESA* respectively.

Data show that when employers agree to voluntary compliance, employees receive their entitlements. However, when the MOL resorts to monetary orders, the rate of recovery drops dramatically since only a minority of employers comply with orders to pay. The MOL's challenges in recovering monetary orders represent a fundamental weakness in its enforcement system, one that erodes all other aspects of enforcement. Enhancements to the accessibility of the complaints processes, or efforts to increase employees' awareness of their workplace rights, are of limited value if those employees who assume the risk of coming forward wind up with little more than paper victories. Such low rates of recovery of monetary orders implicitly suggest to employers that they will not face severe consequences if they choose to ignore the MOL.

In the following, we provide an assessment of the options set forth in the Interim Report.

*Option 1: Maintain the status quo*

The recovery rates of monetary orders are far too low to accept as the status quo that ought to be maintained. When all complaints with a monetary order during the period between 2009/10 and 2014/15 are considered, only 39% were fully satisfied.<sup>234</sup> The median total entitlement of unpaid monetary orders during these years was \$1,597,<sup>235</sup> a large amount of money for low-income earners.

Trends in complaints point to other dimensions of the recovery challenge. The most common claim included in complaints are unpaid wages,<sup>236</sup> and these are also the least likely to be recovered through monetary orders.<sup>237</sup> Employees who work in small firms (fewer than 20 employees) are vastly over-represented among complainants. From 2012/13 to 2014/2015, they accounted for 48.5% of complaints received by the Ministry.<sup>238</sup> Yet employees in small firms are much less likely than employees in large firms to recover monetary entitlements through orders to pay. Firms employing 19 or fewer employees accounted for 76% of unsatisfied orders to pay between 2009/10 and 2014/15.<sup>239</sup>

Moreover, the status quo does not appear to be a static situation. There is evidence that

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<sup>234</sup> Vosko et al, "Employment Standards Enforcement: A Scan of Employment Standards Complaints," p. 70.

<sup>235</sup> Ibid., p. 123.

<sup>236</sup> Ibid., p. 91.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid., p. 123.

recovery difficulties are getting worse for the MOL. The data show that rates of full recovery deteriorated between 2010/11 and 2014/15. Whereas in 2010/11, 50.5% of complaints with any order to pay wages resulted in an unpaid order, in 2014/15 that figure stood at 63.6%.<sup>240</sup>

For these reasons, we do not recommend option 1.

*Option 2: Amend the ESA to allow collection processes to be streamlined and to provide additional collection powers in order to increase the speed and rate of recovery of unpaid orders. This measure could include incorporating some of the collections-related provisions in the Retail Sales Tax Act – which is another statute under which the MOF collects debts – into the ESA, such as:*

- 1. removing the administrative requirement to file a copy of the Order in court in order for creditors' remedies to be made available;*
- 2. creating authority for warrants to be issued and/or liens to be placed on real and personal property;*
- 3. providing the authority to consider someone liable for a debtor's debt if he/she is the recipient of the debtor's assets, in order to prevent debtors from avoiding their ESA debt by transferring assets to a family member.*

Each of these measures represents an improvement on the current situation as each would increase the recovery of unpaid wages, and they are therefore recommended. There is no justification for why the *ESA* lacks the recovery mechanisms available to the government in other legal contexts such as the *Retail Sales Tax Act*. Numerous states allow for post-judgement wage liens.<sup>241</sup> For example, changes to the *California Labor Code* that took effect in January 2016 allow the state's Labor Commissioner to place a lien on an employer's property, including bank accounts or accounts receivable, if a final judgement against that employer is not paid.<sup>242</sup> Studies point to a number of limits of post-judgement liens, however. In situations where an

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<sup>240</sup> Ibid., p. 121.

<sup>241</sup> States that have wage liens are Alaska, Idaho, Indiana, New Hampshire, Ohio, Tennessee, and Texas, and Washington. See Colodny, David et al (2015) "Empty Judgements: The Wage Collections Crisis in New York." Online: <http://nclj.org/wp-content/uploads/2015/11/Empty-Judgments-The-Wage-Collection-Crisis-in-New-York.pdf>

<sup>242</sup> California (2015) "B-588 Employment: Nonpayment of Wages: Legislative Council Digest." Online: [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160SB588](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB588)

employer has hidden assets during the investigation, where an employer's assets are not easily identified, or in situations of bankruptcy, post-judgements are often not effective.<sup>243</sup>

*Option 3: Amend the ESA to allow the Ministry to impose a wage lien on an employer's property upon the filing of an employment standards claim for unpaid wages*

A pre-judgement wage lien would provide a powerful mechanism for reducing the non-payment of monetary orders – we therefore recommend this option. In the United States, the states of Wisconsin and Maryland allow for pre-judgement wage liens to be filed against employers. The chief benefit of pre-judgement liens over post-judgement liens is that they prevent employers from disposing or hiding assets during the time a complaint is being investigated. For example, if the Wisconsin Department of Workforce Development believes that an employer's assets are at risk of being liquidated while a wage complaint is being investigated, it has the ability to file a lien against the employer's property. One study determined that, between 2005 and 2015, 79 of the 98 cases (80%) in which the Department brought suit to enforce the lien resulted in full or partial payment (a very high percentage given that these were all cases in which assets were determined to be at risk).<sup>244</sup> Additionally, the study's authors suggest that the mere possibility of a wage lien serves to deter monetary violations among employers.

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

Wage bonds are another option that would increase the recovery of back wages for employees in sectors where monetary violations are common and are, therefore, recommended. Such measures have a long history in industries such as construction and agriculture, but they are increasingly being proposed as a mechanism to combat monetary violations in other sectors. A recent example of their use is the new wage bond requirement for the nail salon industry in New York City. Effective July 2015, every salon must secure a wage bond or an insurance policy to cover wages as a condition of licencing. The coverage required varies by the number of individuals employed: between \$25 000 USD for salons that employ 2 to 5 individuals to \$75 000 USD if a salon employs 26 or more. The premium charged to employers is roughly 2% to 3% of the amount of the bond. Department of State investigators may inspect salons and require

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<sup>243</sup> Cho, Eunice Hyunhye, Tia Koonse and Anthony Mischel (2013) "Hollow Victories: The Crisis in Collecting Unpaid Wages for California Workers." Online: <http://www.labor.ucla.edu/publication/hollow-victories-the-crisis-in-collecting-unpaid-wages-for-californias-workers/>, pp. 8-9.

<sup>244</sup> Ibid.

proof of coverage, and levy fines between \$500 and \$2500 USD for employers with no coverage.<sup>245</sup>

Option 4 is also consistent with the zero tolerance inspection blitz that the MOL introduced in Fall 2016 – for all these reasons, we recommend its adoption.

*Option 5: Establish a provincial wage protection plan*

The establishment of a provincially-based fund to make up for any shortfalls in wages that result from non-recovery would be the most certain way to insure that employees are paid their monetary entitlements under the *ESA*. A fund of this sort existed briefly in Ontario in the early 1990s but, as it used public revenue to compensate employees for lost wages, its source of funding was criticized for allowing employers “to socialize the costs of business failure.”<sup>246</sup> At the federal level, the *Wage Earner Protection Act* compensates employees up to nearly \$4,000 for unpaid wages, vacation, severance and termination pay in the event of their employer’s bankruptcy or entry into receivership.

While the design of a wage protection fund would require careful consideration, such a fund would complement other efforts to strengthen recovery. We therefore recommend the adoption of option 5.

*Option 6: Provide the Ministry with authority to revoke the operating licences, liquor licences, permits and driver’s licences of those who do not comply with orders to pay*

This is another potentially powerful tool to bring to bear on employers who have not complied with orders to pay, and is recommended. A growing number of jurisdictions in the United States are implementing licensure debarment to combat monetary violations and to increase the recovery of judgements. While not directly augmenting collections capacity, such measures do serve to make non-compliance with judgments costly and risky for employers. In Jersey City, New Jersey, under the recently passed Wage Theft Ordinance, the City Department responsible for issuing a business licence (for example the Department of Health and Human Services in the case of a food service establishment) sends a request to the state’s Department of Labor and Workforce Development for any wage complaint forms filed against a licence applicant. Businesses with outstanding complaint forms will have 30 days to prove payment, or that they have appealed the order. Failure to pay will result in business licence suspension.

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<sup>245</sup> New York State Enforcement Task Force (2016) “Nail Salon Wage Bond Coverage FAQs.” Online: <http://www.dos.ny.gov/licensing/appearance/Wage%20Bond%20FAQs.pdf>

<sup>246</sup> Fudge, “Reconceiving Employment Standards Legislation,” p. 92.

In Cook County, Illinois, an employer found to have engaged in repeated or wilful violation of state and federal wage laws in the past five years faces a number of penalties. Such employers are ineligible to contract with Cook County, face business licensure revocation, are ineligible to receive property tax incentives from the County, and may be required to pay back previous incentives. When applying for business licences or tax incentives, the applicant must submit an affidavit indicating that they have not violated federal or state wage-payment laws, including the *Illinois Wage Payment and Collection Act*, the *Illinois Minimum Wage Act*, the *Illinois Worker Adjustment and Retraining Notification Act*, the *Employee Classification Act*, the *FLSA* or statutes or regulation of any state which governs the payment of wages. What is important about these measures is that they make monetary violations and non-payment of judgements potentially very costly for employers.

It bears mentioning, at this point, that any set of measures that aim to improve the recovery of wages must include expanding the scope of liability for monetary orders (see Section 5.2.2 of this brief). Wage recovery improvement efforts should entail the establishment of joint and several liability for companies so that they are responsible for the *ESA* obligations of their sub-contractors. Directors' liability could also be expanded beyond unpaid wages and vacation pay.

## Part II: Responses to Options Posed in Chapter 4 on Labour Relations Pertinent to Employment Standards

While “Closing the Enforcement Gap” project is concerned primarily with the *ESA*, reforms to the *LRA* can have an impact not only on enforcement issues but also on standard-setting itself. With regard to enforcement, unionized employees are required to use the arbitration process to secure their ES entitlements. The scope of the unionized workforce, therefore, has an impact on the level of state resources required for ES enforcement. Because our research is not examining issues around the establishment of collective bargaining relationships, however, we have chosen not to comment on those aspects of the Interim Report. Rather, we have limited ourselves to commenting on options posed under the headings broader-based bargaining since many of them would effectively set new minimum standards that would be applicable across industries within a geographic region, supplanting lower ES entitlements. We also consider briefly the issue of employee voice – the capacity to speak and be heard as a member of the community of workers served by formal legal protections<sup>247</sup> – as it pertains to the most vulnerable employees in precarious employment.

### 4.6.1 Broader-Based Bargaining

#### **Background:**

In the face of the changing nature of employment, there is widespread recognition that the current Wagner Act Model (WAM) of collective bargaining works poorly in the private sector. A chief indicator of the inadequacy of the WAM is the declining rate of union density in the private sector. As the Interim Report indicates, in Ontario the rate of unionization in the private sector was 19.2% in 1997 but stood at 14.3% in 2015, a downward trend consistent across all provinces and even more pronounced in other jurisdictions such as the U.S.<sup>248</sup> There is also growing understanding that, even if it is tweaked in some of the ways that are under consideration in a variety of jurisdictions, including Ontario, it is unlikely that private sector union density will increase particularly in sectors characterized by small workplaces and highly competitive conditions. The *Charter of Rights and Freedoms* protects freedom of association

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<sup>247</sup> Vosko “Rights without Remedies,” p. 848.

<sup>248</sup> Mitchell and Murray, “Changing Workplaces Review,” p. 31; See also Statistics Canada, CANSIM. Table 282-0078: Labour Force Survey Estimates (LFS), Employees by Union Status, Sex and Age Group, Canada and Provinces. Online: <http://www5.statcan.gc.ca/cansim/a05> (Version current at September 20, 2016).

which the Supreme Court of Canada has nevertheless interpreted as protecting the right to collective bargaining.<sup>249</sup> Statutory collective bargaining regimes that do not provide employees with a realistic opportunity to establish collective bargaining relationships with their employers are thus constitutionally suspect.

In light of this recognition, in their Interim Report pose nine options for consideration, eight of which are not mutually exclusive.

*Option 1: Maintain the status quo*

Given the proceeding rationale for the eight other options offered, we do not recommend the option of maintaining the status quo.

That said, we do not think the WAM should be abandoned or repealed. Rather, we think it should be reformed and remain generally available to employees who are able to organize under its provisions. However, other models need to be introduced that can operate alongside the WAM in those areas where WAM works poorly. We emphasize the necessity for pluralism here.<sup>250</sup> Because of the multiplicity of industry structures and work arrangements, it will be necessary to adopt a multi-pronged approach. We therefore support the comment made in the Interim Report<sup>251</sup> that the options presented are not meant to be pursued in isolation and that specialized regimes may need to be designed to work in specific contexts in which a large number of vulnerable employees and precarious jobs are concentrated.

We also recognize that each of the options describes an ideal-typical model only and that much would depend on its design details. We do not anticipate that the Special Advisors will be able to address detailed design questions, but rather will consider the merits of the models. In that spirit, our comments focus on the broad parameters of the models. However, the Special Advisors may wish to consider making further suggestions about the process the government should follow in further developing proposals to insure that the voice of those employees most affected will be heard and taken into account.

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<sup>249</sup> Most recently, see *Mounted Police Association of Ontario v. Canada (Attorney General)* [2015] SCC1 1 S.C.R. 3.

<sup>250</sup> This point was made earlier in a study of collective bargaining for self-employed workers. See Cranford, Cynthia et al (2005) *Self-Employed Workers Organize: Law, Policy, and Unions*. Montreal: McGill-Queen's University Press.

<sup>251</sup> Mitchell and Murray, "Changing Workplaces Review," p. 123.



### *Option 2: Collective Agreement Extension*

The collective agreement extension model was originally adopted in several Canadian provinces during the Great Depression when excess competition was seen to be damaging to the economy as a whole as well as to employers and employees. It was connected to a view that the Depression was in part caused by an economic system in which there was under-consumption resulting from employees' lack of bargaining power. Collective agreement extension provided a system for reducing competition with an industry in a geographic sector and enhancing employees' bargaining power by allowing a leading employer and a union to negotiate a collective agreement that would be binding on the entire sector. The scheme also facilitated unionization insofar as it reduced the concern that a unionized firm would be at an economic disadvantage vis a vis its non-unionized competitors since they would be required to pay the negotiated wage whether they were organized or not, but it also posed a challenge to unions to demonstrate that employees would gain additional benefits by becoming members.<sup>252</sup>

We recommend the revival of this model as part a multi-pronged initiative to provide employees, otherwise subject only to minimum ES, with access to collective bargaining. It is a sad irony that the organization of work in many industries has been restructured to push it out from lead companies to small businesses with low barriers to entry that face intense competition and rely on deskilled low-wage employees, precisely the conditions that collective bargaining extension was designed to address.

### *Option 3: Franchise Bargaining*

We also recommend this option, again as another arrangement that sits alongside others, to address the specific problem of collective bargaining in franchise businesses. Under our current model, it is possible that a franchisor might be found to be a related employer of its franchisees but it would depend on the facts of each arrangement and franchise agreements could be restructured slightly to avoid this result if a related employer application was successful. As a result, under our current model, unions are required to organize and bargain with each franchise or at best a group of franchisees in a local area. Under these conditions, unionization is unlikely to occur and even if a bargaining unit was certified it would have so little bargaining power that it would be unlikely to achieve improved terms that would make the effort and cost of being unionized worthwhile. There is clearly a need for a different model.

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<sup>252</sup> Judy Fudge, Judy and Eric Tucker (2001) *Labour Before the Law: Workers' Collective Action and the Canadian State, 1900-1948*. Toronto: Oxford University Press.

The proposed model, involving location by location organizing but multi-location bargaining, presumably with the franchisor, begins to move in the right direction, but more would need to be done. For example, at the very least, it should be combined with the BC proposal<sup>253</sup> (or a variant thereof<sup>254</sup>), discussed in option 4, to provide that once one agreement was reached with the franchisor, newly organized locations of that franchisor would be attached to the agreement. As well, more would need to be done to facilitate organizing since the task of obtaining certifications for each location under the WAM would continue to be daunting if the franchised business had many franchisees. Collective agreement extension, particularly with regard to monetary terms, might be a particularly good solution in this context. Franchise agreements could be revised to take into account standardized wage costs, while employees in all locations would immediately get the benefit of the agreement. As well, the opposition of franchisees to local unionization might be reduced.

#### *Option 4: Sectoral Bargaining (BC Model)*

We recommend the option of sectoral bargaining, but only on the understanding that the details of any such scheme need to be carefully considered. In that spirit, we offer some suggestions.

<sup>253</sup> Government of British Columbia, Ministry of Labour (1992) "Recommendations for Labour Law Reform: A Report to the Honourable Moe Sihota, Minister of Labour." Queen's Printer for British Columbia; MacDonald, Diane (1997) "Sectoral Certification: A Case Study of British Columbia." *Canadian Labour & Employment Law Journal* 5: 243-286; Slinn, Sara (2016) "Changing Workplaces Review Research Projects: Collective Bargaining." Online: <https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Slinn-9-Access%20to%20Collective%20Bargaining.pdf>, p. 84.

<sup>254</sup> One example of a similar model is the National Labor Relations Board expanded Joint Employer Standard. Adopted in the case of *Browning-Ferris Industries of California, INC*, (32 NLRB No. 186 (2015) the standard expands the criteria for determining joint employer status among firms for the purposes of collective bargaining. Whereas the NLRB's previous test of joint employer emphasized a firm's direct and immediate control over conditions of employment as key to joint employer status, the new test assesses the extent to which firms may share or co-determine employment conditions directly or indirectly. This broadens the range of scenarios in which joint-employment can be found, allowing unions to bargain more effectively with firms up the supply chain that hold the power to shape working conditions. The expanded standard holds far-reaching implications for collective bargaining efforts in highly fissured industries workplaces including hotels, fast-food establishments, janitorial services, among others. See NELP (2015) *The NLRB's Browning-Ferris Decision Explained: Myths and Realities for Workers and Small Business Owners*. Online: <http://www.nelp.org/content/uploads/NLRB-Browning-Ferris-Decision-Explained.pdf>; see also Garcia, Ruben Alan (2016) "Modern Accountability for a Modern Workplace: Re-evaluating the National Labor Relations Board's Joint Employer Standard." *George Washington Law Review* 84(3): 741-775.

The BC model would be limited to designated sectors where employees have been historically underrepresented by trade unions. It is questionable whether such a restriction is justified at the present time, given that private sector union density in Ontario has dropped significantly and stood at 14% in 2015.<sup>255</sup> As a result, a focus on sectors that historically have been underrepresented is no longer appropriate; the concern is with sectors that are currently at low levels of unionization; in short, most of the private sector.

The model provides that the first union to organize in the sector would be eligible to apply for a sectoral certificate and negotiate a standard agreement that would apply to bargaining units subsequently certified in the sector. It seems to presuppose that the sector is currently union free, which may not be the case, so that provision should be made for unions that may already have bargaining units within the sector to act in a coordinated fashion, perhaps through a council of unions. As well, the model provides that the sectoral agreement only applies to other employers in the sector is their employees become certified bargaining units under the normal provisions of WAM. While the existence of a sectoral agreement may make it easier for unions to appeal to unorganized employees by pointing to what they will get, it still leaves employers with a strong incentive to resist unionization if the current terms and conditions of employment are lower than those in the sectoral agreement, thereby giving them a competitive advantage. Collective agreement extension arguably provides a better model for getting employees collective bargaining coverage than bargaining unit by bargaining unit accretion.

#### *Option 5: Sectoral Bargaining: Multi-Employer Certification*

We recommend the goal of achieving collective bargaining coverage for an entire sector, but are concerned that the requirement that a union or council of unions demonstrate majority support of all employees in that sector through an election creates an impossible barrier. Employers already enjoy significant advantages over unions in certification elections and the research has shown that elections significantly reduce the likelihood of union success compared to card count certifications. Even in single workplace elections, unions face significant barriers in identifying the eligible voters and in getting access to them, whereas the employers have this information at their fingertips and can have easy access to employees at work and influence over them by virtue of the unequal power relations that the Supreme Court of Canada recognizes are inherent in employment.<sup>256</sup> The difficulty of conducting a successful election campaign among all employees in a defined sector, many of whom may be in workplaces where there are no inside organizers, is likely to make this model unworkable.

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<sup>255</sup> Mitchell and Murray, "Changing Workplaces Review," p. 21.

<sup>256</sup> *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313.

*Option 6: Employer Initiated Broader-Based Bargaining*

Frankly, we doubt there will be any demand from employers to compel the negotiation of sectoral agreements. As the Interim Report recognizes, employers have pressed for increasingly decentralized bargaining and have withdrawn from voluntary sectoral bargaining where it existed and broken pattern bargaining.

*Option 7: Create Unique Models of Bargaining for Specific Industries*

In general, we recommend this option. As we noted in the introduction to our comments, a plurality of arrangements is needed to address the diverse industry structures that have been created. However, the need for unique regimes could be lessened by the adoption of sectoral bargaining models such as collective agreement extension that could operate in a wide range of circumstances.

*Option 8: Bargaining Models for Freelancers based on the Status of the Artist Act (SAA)*

There are many positive features of the federal SAA, but if the province is going to move in that direction it should also address its limitations.<sup>257</sup>

On the positive side, the SAA model enables groups of workers who are otherwise excluded from collective bargaining because they are independent contractors by any legal definition. Therefore, not only are they not covered by other statutory collective bargaining schemes, but it may also be a violation of the *Competition Act* for them to act collectively in the market. Second, the negotiation of scale agreements effectively establishes a minimum standard for those covered, but does not preclude the ability of individuals to negotiate for higher compensation. Third, artists' associations gain bargaining rights by showing they are the most representative; they need not demonstrate majority support.

On the negative side, the SAA model is narrowly limited to professional artists, so that any new legislation would have to have broader application if it were to provide freelancers more generally with access to collective bargaining. Second, the federal legislation permits producers to form associations and have them accredited for the purposes of representing the industry in collective bargaining with artist association, but it does not require them to do so. As a result, it does not generally operate as a model of sectoral bargaining. Rather, artists associations must

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<sup>257</sup> MacPherson, Elizabeth (1999) "Collective bargaining for independent contractors: Is the status of the artist act a model for other industrial sectors?" *Canadian Labour & Employment Law Journal* 7(3): 335–389; Cranford et al, *Self-Employed Workers Organize*, Chapter 4.

negotiate a separate scale agreement with each producer. To create a sectoral model of collective bargaining, it would be necessary to follow the precedent of Quebec and require producers to form associations to represent them in negotiations for the industry.

*Option 9: Apply the LRA to the Media Industry*

It is unclear what is entailed by this option, but to the extent that *LRA* provisions would overcome rather than compound difficulties in the *SAA*, we recommend the adoption of this option.

#### 4.6.2 Employee Voice

***Background:***

Broader-based bargaining models, if adopted, should greatly extend collective bargaining coverage and will likely increase trade union density. However, barring the enactment of a model of compulsory union representation for all employees, there will remain a segment of the labour force that does not have access to voice and unless strong measures are taken it is likely going to be the case that this segment will be large, especially among the most vulnerable employees in precarious employment. The Interim Report explores a number of options to address this “voice gap” but the challenges are great.

*Option 1: Maintain the status quo*

The guiding principles of the review embrace the objective of providing workers with voice and the Interim Report articulates the reasons for its importance. The status quo leaves most private sector employees without an institutionalized or protected channel for the expression of voice. Therefore, we do not recommend the option of maintaining the status quo.

*Option 2: Minority Unionism*

As Gomez’s research report for the CWR notes, one problem with any discussion of minority unionism is that it does not have a clear definition. The core idea is that a minority union represents its members only rather than all employees at a workplace or in a bargaining unit within a workplace, but the meaning of that representation could vary from a requirement that employers consult with minority unions to one in which they are obliged to bargain in good faith over the terms of a collective agreement. Discussions of minority unionism are also

hampered by the fact that we do not have experience with this model in the North American context and so there is an absence of empirical data on its potential impact. Instead, there have been numerous efforts at model building based on normative principles.

This situation makes it challenging to comment on this option but we would like to raise some concerns particularly around how minority unionism might operate for the most vulnerable employees in the labour market, a central focus of the Interim Report. The fundamental questions are whether these employees are likely to form minority unions and whether minority unions of the most vulnerable are likely to be able to provide for worker voice in a meaningful way.

With regard to the first question, we suspect there will be very little minority union formation by vulnerable employees in precarious employment for many of the same reasons that such workers they are not incorporated into majority unions under the WAM. The population of employees that the Special Advisors define as vulnerable are likely to be particularly fearful of retaliation for engaging in trade union activity of any kind, notwithstanding that the law protects the right to organize. Such workers are also disproportionately employed in small workplaces<sup>258</sup> where minority unionism would seem to be particularly unrealistic (e.g., are we going to have a union representing 10 employees in a workplace with 25?).

The second question goes to the effectiveness of a minority union representing workers at the bottom of the labour market. If the mandate of a minority union is to negotiate a members' only contract, it seems unlikely that such a union would have enough bargaining power to achieve significantly improved terms and conditions of employment. Alternatively, if the role of the minority union is more limited to having access to information and right to be consulted, it may provide an avenue for employers to communicate but we do not anticipate that it will provide for effective voice that will not only enable employees to express a view but also have their views taken into account.

In sum, we are very dubious that minority unionism, in any of its variants, has much to offer for vulnerable employees and therefore do not recommend the adoption of option 2.

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<sup>258</sup> As discussed in Section 5.3.4, whereas about 25% of Ontario employees not employed in federally regulated industries are unionized, this is so for only about 5% of employees in small firms. See Vosko et al, "How Far Does the Employment Standards Act 2000 Extend?" p. 61.

*Option 3: Adopt an Institutional Mechanism for the Expression of Employee Interests in the Plans and Policies of Employers*

As is the case with minority unionism, the ambiguous nature of the option makes it difficult to address except in a speculative way. The central question is whether a scheme of legislated employee participation, such as a works council or a joint health and safety committee, can be an effective vehicle for providing vulnerable employees with voice. Here again, we are pessimistic and do not recommend investing time and energy in this option.

Employee participation schemes are designed to operate in larger workplaces, typically with twenty or more employees, and require that worker representative have access to education, training and institutional support (typically a union) in order for them to be effective protagonists.<sup>259</sup> Vulnerable employees in precarious employment are unlikely to be in this situation. As a result, there is a substantial likelihood that these arrangements are more likely to provide for employer voice than as vehicles for employees to voice their interests and have them taken into account.

*Option 4: Enact some variant of the models set out in the research report*

This option is too ambiguous and open-ended for us to comment on.

*Option 5: Protect concerted activity*

Canadian labour law currently protects employees against retaliation for engaging in trade union organizing and activity but does not protect employees from engaging in concerted activity more generally.<sup>260</sup> Thus, non-union employees who collectively approach their employer to ask for an increase outside of any trade union organizing activity could be terminated by being given notice. Similarly, non-unionized employees who participated in a demonstration outside their employer's premises to demand "\$15 for fairness" outside of the context of a union organizing drive would not be protected. While legal protection alone may

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<sup>259</sup> Hall et al, "Making a Difference," p. 408; Yassi, Annalee et al (2013) "The Effectiveness of Joint Health and Safety Committees: A Systematic Review." *American Journal of Industrial Medicine* 56(4): 424-438.

<sup>260</sup> In contrast, in the United States, section 7 of the National Labor Relations Act (29 U.S.C. S. 151-169) provides for concerted activity protections: "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities...'

An informative website developed by the NLRB that documents its rulings relevant to the issue of concerted activity can be found here at: <https://www.nlr.gov/rights-we-protect/protected-concerted-activity>.

not result in a significant increase in concerted activity by vulnerable employees who may lack the institutional supports often needed for employees to feel confident they can make their rights real, it is an aspect of freedom of association that ought to be protected by a statutory right. We therefore recommend the adoption of option 5.



## List of Contributors

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