

6-2017

## **Closing the Employment Standards Enforcement Gap, An Agenda for Change**

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**CLOSING THE  
EMPLOYMENT  
STANDARDS  
ENFORCEMENT GAP**

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**AN AGENDA  
FOR CHANGE**

This report is an outcome of "Closing the Employment Standards Enforcement Gap: Improving Protections for People in Precarious Jobs," a multi-year community-university research partnership funded by the Social Sciences and Humanities Research Council of Canada, for which Leah F. Vosko serves as principal investigator and Mary Gellatly serves as lead community researcher. The report was prepared by Leah F. Vosko, John Grundy, Eric Tucker, Andrea M. Noack, Mary Gellatly, Rebecca Casey, Mark P. Thomas, Guliz Akkaymak, and Parvinder Hira-Friesen.



June 2017

# TABLE OF CONTENTS

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## **PREFACE** **1**

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## **INTRODUCTION** **2**

- 1. Why Employment Standards Matter 2
  - 2. How Has Employment in Ontario Changed? 3
- 

## **COVERAGE OF THE ESA** **9**

- 3. Scope of Coverage of the ESA 9
  - 4. Employer Liability 12
  - 5. Exemptions and Special Rules 14
- 

## **ENFORCEMENT** **20**

- 6. Individual Claims and Reprisals 20
  - 7. Recovery: Voluntary Compliance, Orders to Pay Wages, and Settlements 25
  - 8. Penalties 30
  - 9. Strategic and Proactive Enforcement 36
  - 10. Closing the Gap: An Agenda for Change 39
- 

## **APPENDIX 1**

- List of Partner Organizations 42
- 

## **APPENDIX 2**

- Possible Sectoral Structure for the Review of Exemptions (in alphabetical order) 43
- 

## **ENDNOTES** **46**

# PREFACE

This report presents research findings of “Closing the Employment Standards Enforcement Gap,” a multi-year project supported by the Social Sciences and Humanities Research Council of Canada. Although it covers many of the themes addressed in the final report of Ontario’s Changing Workplace Review (CWR), released on May 23, 2017, to which the Ontario government responded with proposed legislative amendments on May 30, 2017, the research informing this report was conducted over several years prior to the initiation of the CWR. “Closing the Employment Standards Enforcement Gap” is also slated to continue after any legislation currently under consideration is enacted.

# INTRODUCTION

## 1. Why Employment Standards Matter

Precarious employment is increasing in Ontario. A growing share of Ontario's private sector employees earns low wages while a shrinking portion belongs to unions. These trends are fueled by changes in the structure of Ontario's labour force. In many industries, including accommodation and food services, administrative services, and cleaning, workplaces are being transformed through greater use of contracting out, franchising, and extended supply chains.<sup>1</sup> These ways of structuring work contribute to driving working conditions downward.

The Employment Standards Act, 2000 (ESA), which sets minimum conditions of employment in areas such as wages, working time, and vacations and leaves, is a key source of workplace protection for a growing number of employees in the province. But its outdated provisions, spotty coverage, and inadequate enforcement leave too many people poorly protected at work. The ESA's scope of coverage is out of sync with the changing nature and organization of employment in the province. Its patchwork of exemptions and special rules mean that many employees fall between cracks in its protection. In addition, as the Government of Ontario recognizes, "...there is a serious problem with enforcement of ESA provisions... there are too many people in too many workplaces who do not receive their basic rights."<sup>2</sup>

The ESA's enforcement tends to rely primarily on a reactive complaints process that many employees are afraid to access. And too often even those employees who successfully access the system do not experience a timely and effective resolution of their complaints. The low rate of recovery of unpaid wages, and limited use of meaningful penalties for employers who violate the ESA, mean that there is limited incentive to comply with law. Without better understanding the factors that undermine the provision of employment standards in Ontario, efforts to maintain an effective floor of protections will continue to be compromised.

This report sets out a vision for strengthening the enforcement of the ESA. It advances recommendations for updating the provisions and enforcement of the Act so that it better protects people in precarious jobs. The report draws on research findings of "Closing the Employment Standards Enforcement Gap," a multi-year research partnership supported by the Social Sciences and Humanities Research Council of Canada, and involving researchers from eight universities, an international advisory team of academic experts drawn from Australia, the United States, and Europe, as well as workers' advocates from across Ontario.<sup>3</sup> The research project adopts a mixed-method approach, incorporating archival data, interviews with workers and with staff of the Ministry of Labour, and analyses of Statistics Canada data and administrative data relating to the enforcement of the ESA.<sup>4</sup> This report draws exclusively on interviews with workers<sup>5</sup> and analyses of Statistics Canada data and administrative data relating to the enforcement of the ESA.

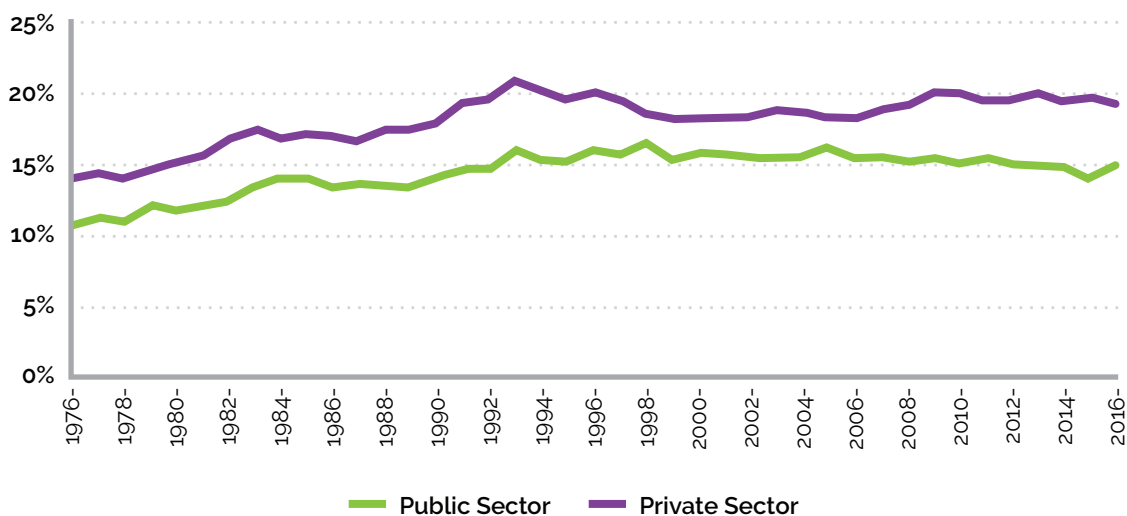
## 2. How Has Employment in Ontario Changed?

Developing appropriate, effective, and enforceable employment standards requires a sound understanding of the contours of precarious employment in Ontario, and the workplace practices that fuel its associated insecurities. Framing the sections that follow, this section provides a brief overview of major labour force trends that shape precarious employment, defined here as work for remuneration characterized by uncertainty (i.e., surrounding continuing employment), low income (e.g., low wages), and limited statutory entitlements as well as social benefits (i.e., constrained access to regulatory protection). Imbued with unequal power relations, precarious employment is shaped by the relationship between employment status (i.e., self or paid employment), form of employment (i.e., temporary or permanent, part-time or full-time), social location (or the interaction between social relations, such as gender and race, and legal and political categories, such as citizenship), as well as social context (occupation, industry, and geography).

### A. Forms of Employment Identified with Precariousness

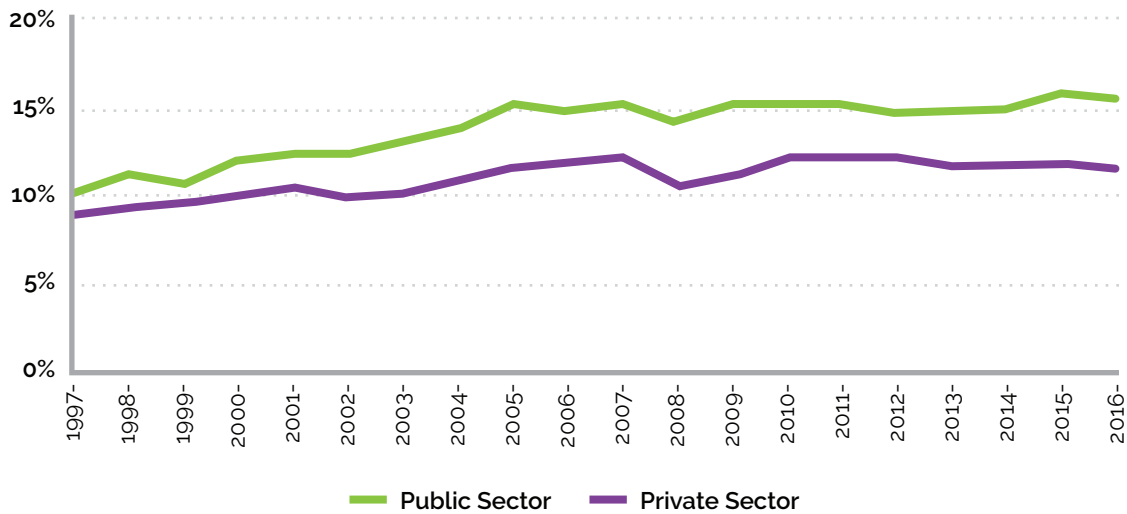
While precarious employment and “non-standard” forms of employment are not – and need not be – synonymous, there is a relationship between them because historically labour laws, such as the ESA and the Labour Relations Act (LRA), have taken the standard employment relationship, defined as a full-time permanent employment relationship where the worker has one employer, works on the employer’s premises, and has access to statutory entitlements and benefits, to be the norm. For this reason, forms of employment differing from this model have come to be linked with greater precariousness. For example, part-time employment may not provide workers with income sufficient to maintain themselves and dependents. Temporary employment is, by definition, uncertain. And a central characteristic of most self-employment is the absence of labour protections.

Graph 1: Part-Time Employees, Ontario<sup>6</sup>





**Graph 2: Non-Permanent Employees, Ontario<sup>7</sup>**



As Graph 1 shows, the number of Ontario employees involved in part-time employment, a form of employment particularly common among women,<sup>8</sup> increased considerably between 1976 and 1993, and has since stabilized at high levels. In addition, as many employers pursued flexibility-enhancing labour strategies in an attempt to reduce their labour costs, especially those associated with termination or severance pay, the share of non-permanent employment including contract/term, seasonal, casual, agency, and on-call employment more than doubled, from 5% in 1989 to 13% in 2016. From 1997 to 2005, there was a steady increase in the share of temporary employees, especially in the public sector, before it stabilized at relatively high levels (Graph 2).

## B. Dimensions of Precariousness

Trends in forms of employment tell only a partial story of the spread of precarious employment in Ontario. Dimensions of labour market insecurity, such as lack of control over the labour process, low income, the degree of certainty of continuing employment, and access to regulatory protection, are also a part of the experience of precarious employment. As well, a number of indicators of such dimensions are particularly relevant to employment standards and their enforcement.

Union status is a critical indicator of degree of control over the labour process. It affects the extent to which employees rely upon minimum employment standards because those who lack access to a collective agreement regulating workplace conditions and grievance processes (i.e., non-unionized employees) rely exclusively on the ESA. Such employees also generally have limited capacity to assert their voices in the workplace and tend to have more limited control over the pace and content of work than do employees covered by a collective agreement. As Table 1 shows, the share of Ontario's labour force that is non-unionized is increasing, particularly in the private sector where it stood at 81% in 1997 and fully 86% in 2016.

Low hourly wages are a clear indicator of low income, defined here as less than 2/3rds of the median hourly wage for full-time employees (e.g., less than \$16.49/hr in 2016).<sup>9</sup> Low-income employees are more likely to be reliant on minimum employment standards, such as those setting out minimum wages. The share of employees in Ontario's labour force earning low wages is increasing. Considering both public and private sector employees, it grew from 26% in 1997 to 31% in 2016. In the private sector, it grew from 31% to fully 38% in the same period (Table 1).

Job tenure provides a good indicator of both a worker's degree of certainty of continuing employment, as well as protection from job churn. In the ESA, access to benefits such as vacation time only accrues after 12 months of employment. In recent decades, the proportion of employees who had worked for an employer for less than a year has remained around 20%. More notable, however, is that the share of private sector employees with short job tenure is almost double that of the public sector, where (in contrast to the private sector) a much higher rate of unionization has helped to ensure that workers have the opportunity to apply for available positions, and develop their careers.

Finally, small firm size, an indicator of a lack of access to regulatory protection, is also a predictor of limited ES enforcement. Employees in small firms (of fewer than 20) are less likely to see their rights enforced as they are less likely to complain, and because it is difficult for an under-funded labour inspectorate to spread its resources across workplaces. And yet a sizeable share of employees in Ontario works in small firms: fully 22% of employees in the private sector in 2016 (Table 1).

**Table 1: Indicators of Dimensions of Precariousness**

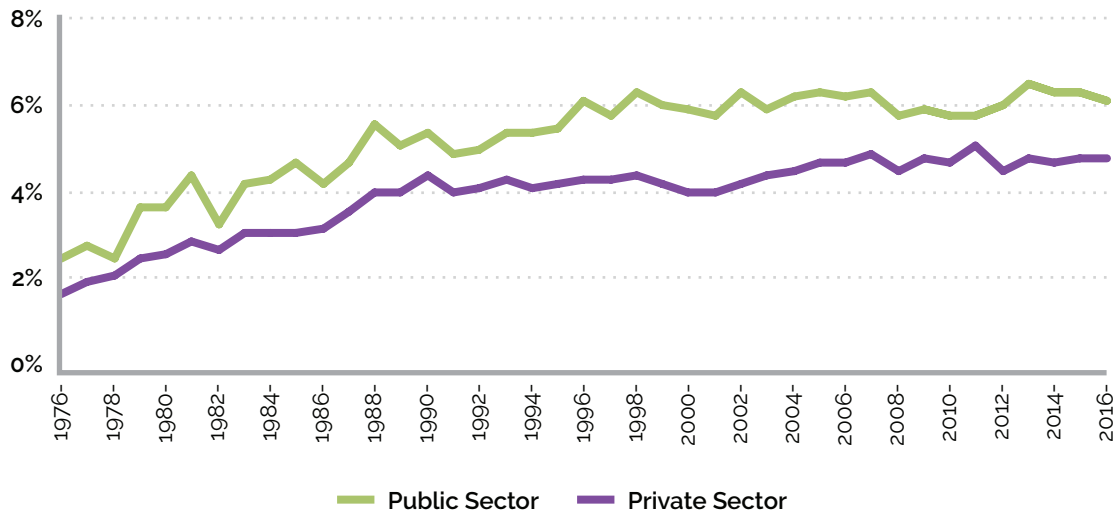
	1997	2006	2016
<b>NON-UNIONIZED</b>			
<b>All employees</b>	<b>70.1%</b>	<b>72.0%</b>	<b>73.3%</b>
Public sector employees	30.3%	29.2%	27.8%
Private sector employees	80.8%	83.4%	86.3%
<b>LOW WAGE</b>			
<b>All employees</b>	<b>26.3%</b>	<b>27.1%</b>	<b>31.3%</b>
Public sector employees	8.4%	8.7%	8.9%
Private sector employees	30.8%	31.8%	37.7%
<b>JOB TENURE LESS THAN ONE YEAR</b>			
<b>All employees</b>	<b>17.8%</b>	<b>18.2%</b>	<b>19.1%</b>
Public sector employees	9.2%	10.7%	10.5%
Private sector employees	20.0%	20.1%	21.5%
<b>SMALL FIRM</b>			
<b>All employees</b>	<b>18.6%*</b>	<b>17.3%</b>	<b>17.4%</b>
Public sector employees	4.2%	4.0%	2.5%
Private sector employees	22.3%	20.9%	21.6%

Source: Labour Force Survey, 1997 to 2016. Annual data weights applied. For the years 1997 and 2006 weights are based on 2006 census data. For 2016 weights are based on 2011 census data.

\*Data from 1998, since comparable 1997 data are not available.

Multiple job-holding provides another indicator of both poor quality employment and economic insecurity. Those employed in high quality jobs, with sufficient income, benefits, and job security, would presumably be unlikely to hold an additional job. In contrast, low income, few benefits, and insecurity may prompt employees to seek out additional employment. In the two decades between 1976 and 1996, the proportion of employees who simultaneously held an additional job (or jobs) more than doubled (Graph 3). In 2016, approximately one in every 20 employees worked an additional job.

**Graph 3: Multiple Job Holders, Ontario <sup>10</sup>**



### C. Who's Most Affected by Precarious Employment?

The prevalence of precarious employment is shaped by form of employment and also by sex, age, and immigration status. In other words, it affects workers belonging to certain social groups more than others. As Table 2 shows, employees in part-time temporary employment, a form of employment that is increasing in Ontario and that is defined by both uncertainty and a paucity of hours, experience extensive precariousness. Eighty-two percent of these employees are non-unionized, 70% earn low wages, and 47% have worked at the same employer for less than a year. In contrast, employees in full-time permanent employment are the least likely to experience precariousness. In particular, they are much less likely to earn low wages or to have short job-tenure than workers in all other forms of employment. Notably, part-time workers – both permanent and temporary – are more likely to report holding multiple jobs, suggesting that for some of these workers, their part-time status is involuntary and does not provide sufficient income.

**Table 2: The Relationship between Form of Employment and Indicators of Precarious Employment, Ontario 2016**

	Indicator of Precarious Employment				Economic Stability
	No union	Small firm	Low wage	Short-tenure	Multiple Jobs
<b>All employees</b>	<b>73.3%</b>	<b>17.4%</b>	<b>31.3%</b>	<b>19.1%</b>	<b>5.2%</b>
<b>FORM OF EMPLOYMENT</b>					
Full-time Permanent	72.0%	15.8%	21.5%	12.4%	3.8%
Full-time Temporary	74.2%	18.8%	45.0%	48.9%	6.2%
Part-time Permanent	76.8%	23.3%	65.1%	29.6%	10.9%
Part-time Temporary	82.4%	22.7%	69.8%	46.7%	10.6%

Source: 2016 Labour Force Survey weighted using annual weights

Given the rise of precarious employment, its tendency to affect certain social groups of employees more than others, and such groups' considerable reliance on employment standards as a source of protection, it is necessary to ensure that Ontario's ESA establishes a minimum floor of enforceable rights for all.

In terms of social location, young people aged 15 to 24 are far more likely to experience precariousness than older workers. In part, this experience is attributable to their tendency to hold part-time and temporary forms of employment, which are themselves often characterized by dimensions of labour market insecurity. Compared to their older counterparts, young people are more likely to hold non-unionized positions, work in small firms, earn low wages, and to have short job tenure. In addition, young people are more likely to report working multiple jobs.

Gender also shapes Ontario employees' experience of precariousness. Most notably, women are much more likely than men to earn low wages: in 2016, more than a third of women (36%) earned low wages, compared to only 27% of men.

Recent immigrants, that is, those who immigrated less than five years ago, also experience high rates of precarious employment in Ontario. They are more likely to hold temporary positions than are Canadian-born or settled immigrants in the province. Almost 20% of recent immigrants engage in temporary employment compared to 12% of Canadian-born or settled immigrants. Recent immigrants are also more likely to have jobs that are non-unionized and low waged and to have a job tenure of less than one year. However, a slightly higher percentage of Canadian-born or settled immigrants are employed in multiple jobs (5.3% to 3.7%).

The gendered nature of certain facets of precariousness is even more pronounced among recent immigrants than among those that are more settled or Canadian-born. For instance, recent immigrant women are more likely than their male counterparts to be employed in small firms, whereas no such gender disparity exists among more settled immigrants and the Canadian-born. At the same time, differences in the share of low-wage employment between recent immigrant men and recent immigrant women (a 5 percentage point difference) are smaller than those among settled immigrants and the Canadian-born (a 9 percentage point difference), due in part to the much higher proportion of recent immigrant men holding low wage jobs.

**Table 3: The Relationship between Socio-demographic Characteristics and Form of Employment/Indicators of Precarious Employment, Ontario 2016**

	Form of Employment		Indicator of Precarious Employment				Economic Stability
	Part-time	Temp.	No union	Small firm	Low wage	Short-tenure	Multiple Jobs
<b>All employees</b>	<b>18.1%</b>	<b>12.6%</b>	<b>73.3%</b>	<b>17.4%</b>	<b>31.3%</b>	<b>19.1%</b>	<b>5.2%</b>
<b>AGE GROUP</b>							
15 to 24	49.7%	32.3%	88.1%	21.8%	79.7%	51.0%	7.3%
25 to 54	10.5%	9.1%	71.1%	15.9%	21.5%	15.1%	5.0%
55+	19.3%	9.3%	69.3%	18.9%	26.7%	7.0%	4.1%
<b>GENDER</b>							
Men	12.1%	12.1%	74.7%	17.6%	27.1%	19.1%	4.1%
Women	24.0%	13.2%	72.0%	17.2%	35.5%	19.0%	6.3%
<b>IMMIGRATION</b>							
Recent immigrants	16.9%	19.7%	88.6%	18.6%	49.2%	38.1%	3.7%
Canadian-born / settled immigrants	18.1%	12.2%	72.7%	17.3%	30.7%	18.2%	5.3%
<b>GENDER &amp; IMMIGRATION</b>							
Recent immigrant men	9.7%	20.2%	89.4%	17.4%	46.6%	38.7%	3.8%
Recent immigrant women	24.9%	19.2%	87.7%	20.1%	52.2%	37.5%	3.6%
Canadian-born / settled immigrant men	12.1%	11.5%	74.0%	17.6%	26.4%	18.2%	4.2%
Canadian-born / settled immigrant women	24.0%	12.8%	71.5%	17.0%	34.9%	18.2%	6.3%

Source: 2016 Labour Force Survey weighted using annual weights

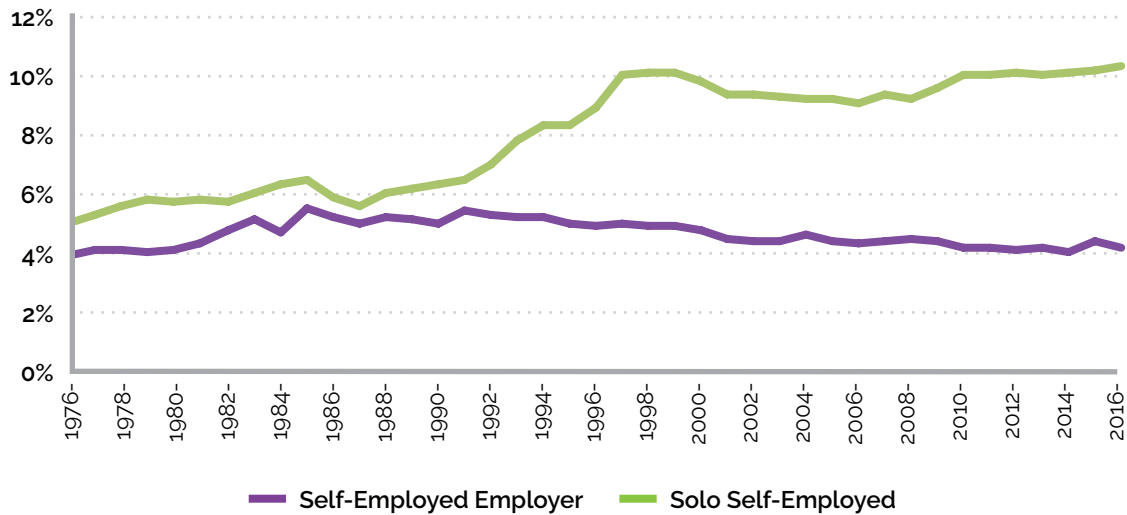
# COVERAGE OF THE ESA

A fundamental inadequacy of the ESA stems from its narrow definitions of 'employee', which establishes who is covered by the floor of workplace protections, and 'employer', which establishes who is responsible for meeting the conditions of the legislation. Changes to the organization of employment are placing more people who need workplace protections outside the scope of the ESA. At the same time, the increased use of sub-contracting and franchising mean that often more than one entity is directing or supervising work, and in control of conditions of work and employment, while bearing little if any responsibility for observing the ESA's provisions. In addition, the ESA's many exemptions and special rules have created a patchwork of standards that lack principled justification and that foster exploitative conditions. Employment conditions for many Ontarians are poised to worsen unless the scope of the ESA's coverage and liability are updated to reflect current workplace realities.

## 3. Scope of Coverage of the ESA

The ESA applies to "an employee and his or her employer" and thus excludes as "independent contractors" all persons engaged in work for remuneration who do not clearly fall within the traditional legal parameters of employment. In reality, however, 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.<sup>11</sup> Many firms are constructing work arrangements that are neither clearly employment nor independent contracting. As the current class action lawsuit of Uber drivers in Ontario seeking employee status makes clear, 'new' forms of work for remuneration are making it more and more difficult to determine who is covered by the ESA.<sup>12</sup> Although the proportion of self-employed workers who employ others has remained relatively stable over the last four decades, between 1990 and 2000, there was a substantial increase in the proportion of workers in Ontario who reported being self-employed with no additional employees (see Graph 4). Some of this self-employment likely reflects increased entrepreneurialism in the face of the recession of the early 1990s, as well as the rise of new technologies that enabled the growth of freelance work. However, some of this growth in solo self-employment might also be attributable to the fissuring of employment that occurred hand-in-hand with the adoption of employment policies oriented to global production chains, as workers previously defined as employees were converted to independent contractors, some of whom may be misclassified as such.

Graph 4: Self-Employment, Ontario <sup>13</sup>



Growing uncertainty around the ESA's coverage also fuels the misclassification of employees as independent contractors so that employers can evade their legal obligations under the Act. While reliable statistical data on the prevalence of misclassification in Canada does not yet exist, it is recognized as a frequent occurrence in Ontario.<sup>14</sup> 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>15</sup> Misclassification prevents workers from accessing workplace protections, as well as other employment-related benefits such as workers' compensation and employment insurance. Misclassification also deprives government of much-needed payroll and income taxes.

"I don't understand. I work for them. I'm not self-employed. But that's what they tell us."

*Rebecca, Personal Support Worker*

“I became an independent contractor, though ... I was required to be in a specific location, what I was doing was already delegated, and everything was really mapped and controlled for me, so it allowed them not to pay me overtime and justify not giving me breaks.”

*Hanna, Social Service Worker*

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>16</sup> or an inspection conducted by an Employment Standards Officer (ESO).<sup>17</sup> The status quo with regard to misclassification, therefore, is one in which the issue is only 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 the legislation.

## WHAT WE NEED

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### EXPAND THE ESA TO ENCOMPASS DEPENDENT CONTRACTORS

Expand the definition of employee to encompass dependent contractors. 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 or working conditions. The definition of dependent contractor must be broad enough to cover the growing number of workers engaged in so-called 'gig work'. The effect of such a measure would be to extend outwards the boundaries of workplace protections.

In addition, introducing regulatory power to deem particular groups of workers to be employees would enable the government to expand the scope of coverage without having to amend the ESA in the event that the adjudicative process fails to do so appropriately.

### MAKE MISCLASSIFICATION AN OFFENCE

Although legislative proposals are emerging, there is currently no provision in the ESA that makes employee misclassification an offence. The detection of misclassification depends on employee complaints under other employment standards or on proactive inspections. Amending the ESA to make employee misclassification a separate and



distinct offence is necessary to reduce its occurrence. Such provisions exist in other jurisdictions, such as in California's Employee Misclassification Act, which came into effect in 2012. In this instance, this state amended its labour code to levy substantial fines on employers found guilty of "willful" 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 Employee Misclassification 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>18</sup> Making misclassification an offence would also allow the Ministry of Labour to begin tracking the prevalence of misclassification complaints.

### **INTRODUCE A PRESUMPTION OF EMPLOYEE STATUS**

Create a legal presumption of employee status for workers performing or providing labour services for a fee. The effect of a legal presumption of employment status is to shift the burden of proving that a worker is **not** an employee onto employers. To strengthen the presumption, the law could also specify what the employer must demonstrate to overcome the presumption.

## **4. Employer Liability**

The scope of employer liability established under the ESA is increasingly outmoded. Traditionally, the direct employer was the entity liable for complying with the employment standards. But the increasing use of sub-contracting, franchising, supply chains, and temporary help agencies means that there is often more than one entity involved (directly or indirectly) in directing, controlling, or supervising the employee. These arrangements often result in financial benefits for the lead entity while also increasing the risk of employment standards violations and ineffective enforcement for employees.<sup>19</sup> Moreover, the lead entity often has the capacity to rectify the problem by insisting on contractual terms that hold the immediate employer responsible for complying with the ESA. For these reasons, it is no longer adequate to impose duties only on direct employers narrowly conceived. The current law permits liability to be imposed on parties that are found to be related employers; however, this extension of liability does not go far enough. As a result, the law creates incentives to enter into particular arrangements because they enable one party to avoid legal duties under the ESA. Employer liability should therefore be expanded so that other parties can be made jointly responsible for the duties imposed on the direct employer.<sup>20</sup>

### **WHAT WE NEED**

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The scope of the existing related employer provision should be expanded, as should provisions for joint and several liability.

## ENHANCE RELATED EMPLOYER PROVISIONS

The existing related employer liability provision that extends employer status to entities in addition to the direct employer should be expanded and be based on an economic realities test.

To achieve this result, it is necessary to repeal the "intent or effect" requirement that currently must be met to establish related employer liability – a legislative proposal currently under consideration in the province. In other provincial jurisdictions' employment standards legislation, related employer provisions simply require that the businesses are associated or related. Ontario is unique in further requiring that the "intent or effect" of the arrangement directly or indirectly defeats the purpose of the ESA. The Ontario Labour Relations Board has adopted a narrow interpretation of the "intent or effect" requirement that imposes a 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.

## EXPAND JOINT AND SEVERAL LIABILITY

Employers who enter into contracts with subcontractors and other intermediaries, either directly or indirectly, must be liable both separately and together for money owed and statutory entitlements under the ESA and its regulations.

There are precedents in the ESA for imposing duties more broadly, even absent a finding that two entities are related employers. For example, shareholder and subsequently director liability for unpaid wages dates back to the first general incorporation statutes.<sup>21</sup> Related employer provisions are also a longstanding feature of employment standards statutes and more recently client liability for non-payment by temporary help agencies (THAs) (the legal employer) were added.<sup>22</sup>

If more than one entity is directing, controlling, or supervising the work and is in control of the employment conditions, whether that control is exercised or not, then they should be held jointly and severally liable for complying with the ESA. Such measures are effective in fostering compliance at the bottom of supply chains.<sup>23</sup>

As a means of ensuring compliance with the ESA, joint and several liability should also be applied to franchisors. Franchisors have extensive power over franchisees. Franchise agreements impose detailed requirements on franchisees and control how they conduct their businesses to ensure that customers will have the same experience in every franchised location and to protect the brand. In this context, it would 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 of an ESA violation for which it is jointly liable.

## 5. Exemptions and Special Rules

“...They tried to twist my role into a management role, so I that I wouldn't be eligible for overtime.”

*Hanna, Social Service Worker*

“Public holiday pay, well ... we don't get that because we're cab drivers exempt from public holiday and overtime. I think that should change.”

*Walter, Taxi Driver*

Despite the fact that the ESA is intended to establish minimum working conditions and terms of employment in Ontario, exemptions and special rules have been adopted to allow for deviation or exemption from compliance with certain standards. Exemptions and special rules have been incorporated into the ESA largely on the basis of the perceived need for 'special treatment' for certain industries, occupations, or sectors.<sup>24</sup> As a result, the ESA and its regulations include a complex web of more than 85 exemptions, partial exemptions, and qualifying conditions, which limit the application of its protections.<sup>25</sup> Indeed, the majority of Ontario employees are affected by exemptions or special rules such that fewer than a quarter are estimated to be fully covered by the provisions of the ESA (only one in five are fully covered if eligibility for severance pay is not taken into account).<sup>26</sup> This is a point of great concern as, globally, research demonstrates that modified or curtailed access to ES protection is a feature of precarious employment – and one that magnifies enforcement problems.<sup>27</sup>

When assessing ES coverage and exemptions, it is crucial to do so in relation to the principles that guided the development of the ESA itself, these being social minima, universality, and fairness.<sup>28</sup> The wide range of exemptions and special rules that have evolved over time, often following industry lobbying, has had a demonstrably corrosive effect on the ESA's stated commitment to these principles. This corrosion calls for reconsidering existing exemptions with the aim of eliminating those that are unprincipled and/or that undermine the core principles of the Act.

The principle of social minima refers to standards that constitute minimum acceptable conditions of employment.<sup>29</sup> Exemptions and special rules undermine the principle of social minima as they lower the floor for certain groups of workers. Any assessment of exemptions should 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 positions itself as a jurisdiction that is committed and attentive to the promotion of 'decent work', as well as the maintenance of human rights

and Charter protections against discrimination.

The principle of universality refers to “extend[ing] the minimum benefits of the legislation to the greatest possible number of employees.”<sup>30</sup> The Special Advisor’s Interim Report for the Changing Workplaces Review acknowledges the importance of universality, asserting that, since exemptions normally reduce or curtail rights,<sup>31</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>32</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.

Finally, the principle of fairness involves protecting both workers against exploitation and employers against unfair competition due to lower standards.<sup>33</sup> As noted in the Special Advisors’ Interim Report, a core principle for justifying an exemption 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>34</sup> Stringently applying this principle ensures fairness for both employees and employers. That is, employers should not gain a competitive advantage by depriving employees of their rights.

The elimination of exemptions and special rules is thus necessary as a matter of principle. Given the role of industry lobbying in creating many exemptions, the lack of transparency surrounding their establishment,<sup>35</sup> and the piecemeal nature of prevailing rules, a review on a sectoral basis is not advisable. Specifically, a sectoral approach threatens to perpetuate the existing unprincipled patchwork.<sup>36</sup> Exemptions counter the fundamental role and effectiveness of the ESA and thereby serve to compromise many employees’ access to regulatory protection.

Certain groups are disproportionately affected by the ESA’s exemptions and special rules.<sup>37</sup> Non-unionized employees are more likely to be exempt from one or more ESA provision. Forty-two percent of non-unionized employees have at least one exemption, compared to only 26% of unionized employees, a group presumed to be protected by collective agreements. Young employees (aged 15 to 29) are less likely to be fully covered by the ESA, and more likely to be subject to special rules than older employees. For example, 27% of young employees have special rules relating to public holiday pay, compared to only 20% of employees overall. Women are more likely to be affected by special rules for minimum wage and personal emergency leave. Low-wage employees<sup>38</sup> are much less likely to be fully covered by all of the provisions of the ESA, and are more likely to have special rules relating to minimum wage, public holidays, and vacation time/pay compared to higher waged employees. Only slightly more than 23% of low-wage employees are fully covered by all of the provisions of the ESA, compared to 39% of employees overall (excluding severance pay coverage).<sup>39</sup>

As Table 4 demonstrates, the economic costs of employment standards exemptions and special rules are heavy for Ontario employees. In 2014, the exemptions and special rules for minimum wage, overtime pay, holiday pay, and vacation pay were associated with a loss of approximately \$45 million to Ontario employees each week.

**Table 4: Costs of ESA coverage, special rules, and exemptions, overall and by provision<sup>40</sup>**

	Weighted Population	Sum of Absolute Costs (\$)
<b>MINIMUM WAGE</b>		
Weekly cost for special rules	62,819	\$804,226
Weekly cost for exempt	14,077	\$567,788
Weekly cost for special rules and exemptions	76,529	\$1,368,628
<b>OVERTIME PAY</b>		
Weekly cost for special rules	30,320	\$1,782,048
Weekly cost for exempt	65,582	\$7,707,186
Weekly cost for special rules and exemptions	95,902	\$9,489,234
<b>PUBLIC HOLIDAYS</b>		
Weekly cost for exempt	426,811	\$18,006,295
<b>VACATION PAY</b>		
Weekly cost for exempt	289,048	\$16,151,239
<b>TERMINATION PAY</b>		
Lump sum cost for exempt	243,076	-
<b>SEVERANCE PAY</b>		
Lump sum cost for exempt	101,732	-
<b>TOTAL WEEKLY COSTS</b> (includes minimum wage, overtime pay, public holiday pay and vacation pay)	<b>556,523</b>	<b>\$45,015,395</b>

Some special rules provide for higher standards for certain types of employees. For example, the minimum wage for a homemaker is 110% of the general minimum wage rate. In principle, as they are compensatory, such provisions should be retained, as should future measures that seek to alleviate structural disadvantage.

## WHAT WE NEED

Given the extensive hardships faced by some groups, priorities for eliminating exemptions and special rules should include the following:

### ELIMINATE UNPRINCIPLED AND UNJUSTIFIED EXEMPTIONS

Exemptions that lack a principled justification should be a priority for elimination. Chief examples of such exemptions are:

- 1) The personal emergency leave exemption for workers employed in firms of fewer than 50 employees currently slated for elimination under the province's proposed

legislative amendments to the ESA.

- 2) Exemptions and special rules applicable to residential care workers and residential building superintendents, janitors and caretakers, and homecare/personal support employees who provide homemaking/personal support services, occupational groups in which women and recent immigrants are found in large numbers.
- 3) The special minimum wage rates for students under 18, and the student exemption from the “three-hour rule” (relying on a vague definition of student status unrelated to the nature of work being performed).
- 4) The special minimum wage rate for liquor servers (overwhelmingly a group of women and young people much more likely to live in low-income households and to hold multiple jobs).
- 5) Exemptions from overtime pay and all five of the standards relating to hours of work for IT professionals (since the nature of the work these occupations perform is not precluded by adherence to minimum employment standards and given the accelerated growth of these occupations in Ontario).
- 6) The broad exemption for managers and supervisors. To minimize the problem of misclassification of employees as managers for the purpose of evading employment standards, it is necessary to further define this category. This exemption should only be retained 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.<sup>41</sup>
- 7) Exemptions and special rules in the area of minimum wages, working time, vacations and leaves, and public holidays that apply to agricultural workers. Archival records indicate that in past reviews of agricultural exemptions, the Ministry of Labour has indicated that improving statutory protection of farm employees should eliminate the discriminatory status of farm employees under the legislation (created by exemptions), eliminate unfair wage competition in the industry, provide assurance of minimum earnings and working conditions, and improve the status of farm workers. We concur with the Ministry’s historic calls to remedy the occupational exclusions associated with agricultural work, broadly defined.<sup>42</sup>

## **ESTABLISH STRICT CRITERIA FOR RETAINING/ESTABLISHING EXEMPTIONS AND SPECIAL RULES**

In order for an employment standards exemption or special rule to be retained and/or created, **all** of the following criteria should be met:

- 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.<sup>43</sup> “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.

- 2) The work under consideration is considered to be “decent work,” as defined by the International Labour Organization.<sup>44</sup>
- 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.
- 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).
- 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.
- 6) Both employees and employers in the industry agree that a special rule or exemption is desirable.
- 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, employment standards exemptions and special rules should not compound existing labour market disadvantage.

## **ESTABLISH A PROCESS FOR RETAINING/ESTABLISHING EXEMPTIONS AND SPECIAL RULES**

- 1) In addition to immediately eliminating exemptions that are patently unjustified, the government should review the remaining exemptions to ensure that they meet the criteria specified above, in a timely way.
- 2) The review process should remain as centralized as possible; that is, in order to ensure equality across sectors and industries, there must be key actors who are involved in the review of multiple sectors, to provide context and promote consistency. Many exemptions, such as those for continuous operation businesses, are applicable to multiple sectors and/or are not sector specific, and should be addressed through a centralized process. While we retain the concerns about a sectoral approach outlined above, if sectoral committees are established, they should be as broad and inclusive as possible, in order to ensure that disparities do not occur between workers doing similar jobs within a sector, even though they may have a slightly different industrial classification. One proposed sectoral structure, defined in response to existing ESA exemptions and special rules, is set out in Appendix 2.
- 3) The process should prioritize the review of exemptions and special rules based on the degree of precariousness characterizing employment in a given industry, occupation, or grouping and the number of people affected by exemptions or special rules therein.

- 4) The review process should be tripartite, including an equal number of employee and employer representatives, as well as a neutral arbitrator as Chair. Employee representatives might be solicited from employee groups, professional associations, unions active in the sector, or workers' centres and legal clinics with experience in the sector. Employer representatives might be solicited from industry associations, lead companies, or franchisors in the sector, and include the perspectives of both large and small employers. The size of any review committee should be determined by the need to be able to have meaningful dialogue between the parties, as well as the number/complexity of the exemptions and special rules being considered.
- 5) The review process must involve soliciting feedback and information from affected employers and employees, as well as the public and any other interested parties (e.g., consumer groups). This might occur via online or mailed submissions and/or in-person sessions. Review committees would also have the flexibility to conduct surveys or votes among employees and/or employers, as appropriate. And they would seek, and the Ministry of Labour would fund, as appropriate, any needed independent expert advice, as well as provide administrative support.
- 6) Each review 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.



# ENFORCEMENT

In the face of persistent precariousness in Ontario's labour market, expanding the ESA's scope of coverage and eliminating its exemptions are necessary for the fullest range of people in Ontario to benefit from its protections. But these reforms will not fulfill their promise if they are not accompanied by changes to the ESA's enforcement regime. Without substantial improvements to enforcement, employment standards will remain beyond the reach of the precariously employed in Ontario.

## 6. Individual Claims and Reprisals

“When you are new in the country, you don't want to start to make problems or be a problem.”

*Jackie, Office Worker*

“When I started there, holidays came and I started wondering how come we didn't get a holiday pay? The manager at the time said that the company said they are not going to pay us... So I filed with the [Ministry of] Labour in August of 2013 and the claim ended up being settled ... so they had to pay all of us out ... Six months after the claim was settled I lost my job ... over the phone. No written warning, no notice, no nothing...”

*Carolina, Retail Worker*

The ESA is enforced primarily by investigating workers' individual claims of employer ESA violations.<sup>45</sup> Studies of other jurisdictions show that only a small fraction of violations will ever be redressed formally through the 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 estimate that for every

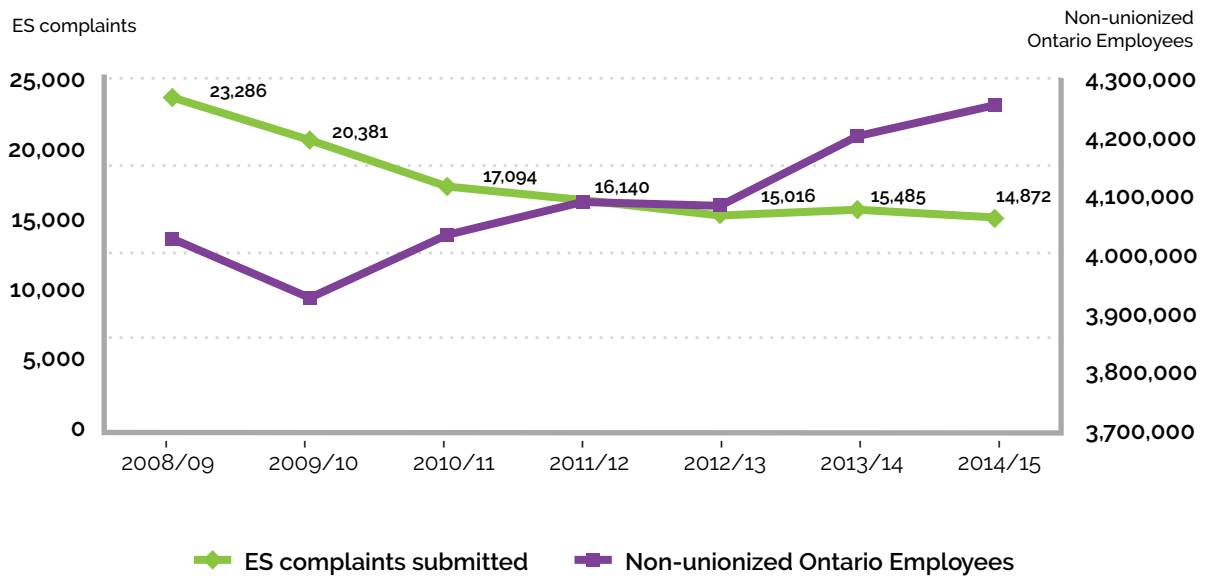
130 violations of the Fair Labor Standards Act's overtime provisions, only one complaint is received by the U.S. Department of Labor's Wage and Hour Division.<sup>46</sup>

The decision of an employee to file a complaint hinges on their perception of the effectiveness of the Ministry of Labour's investigation process, the assistance available throughout the complaint process, the likelihood of recovering what they are owed, and the risk of employer retaliation. Research shows, however, that only a small minority of employees attempt to access the legislative protections of employment standards while still employed in the job in which they experienced violations. Consistently fewer than 10% of complaints in each fiscal year<sup>47</sup> from 2007/08 to 2014/15 came from employees who were still working for the employer that they were filing a complaint against.<sup>48</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>49</sup> This problem makes visible the power imbalances in the employment relationship, which often make the exercise of employee voice via complaints about employment standards violations very risky, and that these risks are not offset by confidence in the ability of the Ministry of Labour to secure payment of what they are owed and to protect them against unlawful retaliation. While we address the issue of recovery below, our focus here is the fear of reprisals.

Amendments to the ESA in 2010 introduced the requirement that most employees must first attempt to resolve an ESA violation with their employer before filing a complaint for unpaid wages or other ESA entitlements with the Ministry of Labour. While there are some exceptions to this rule for certain categories of employees, it assumes that employees can and should seek resolution prior to filing a complaint.<sup>50</sup> There is evidence that the requirement is now an entrenched feature of the complaints system. Indeed, 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>51</sup> The most commonly cited reason complainants give for not contacting their employer is fear.<sup>52</sup>

Between 2008/09 and 2012/13, the number of employment standards complaints submitted annually dropped substantially, but levelled off starting in 2012/13.<sup>53</sup> Yet the number of non-unionized Ontario employees increased during that time period. In 2008/09, there was one complaint submitted for every 173 non-unionized employees in Ontario, while in 2014/15, there was one complaint submitted for every 285 non-unionized employees (see Graph 5).<sup>54</sup> Given the persistence of precarious employment over the past decade in Ontario,<sup>55</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 filing with the Ministry of Labour has served to further discourage employees from coming forward.

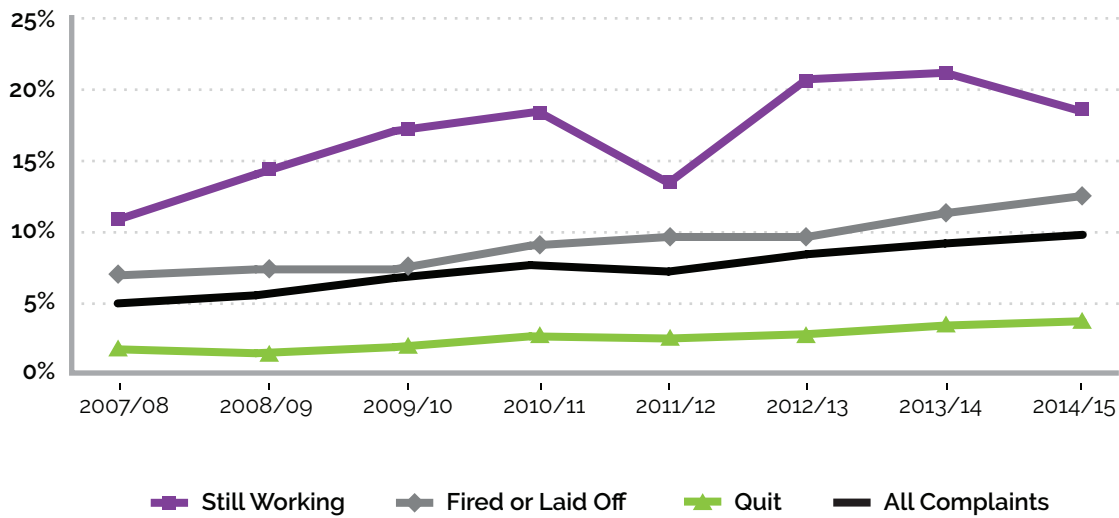
**Graph 5: Employment Standards Complaints Submitted to the Ministry of Labour, Relative to the Number of Non-Unionized Employees in Ontario, 2008/09 to 2014/15<sup>56</sup>**



The ESA prohibits employers from intimidating, dismissing, or penalizing employees who attempt to exercise their rights therein. Employer 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 employment standards complaints.<sup>57</sup> The onus of proof that an employer's action was not a reprisal is on the employer. If an ESO finds that a reprisal has taken place, he or she can order compensation and reinstatement. Yet, reprisal provisions on the books often fail to protect employees who are still employed with the employer against whom the complaint has been made.

Evidence suggests that fear of reprisals remains a significant deterrent to employees accessing the ESA complaints system. 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>58</sup> Put differently, the share of complaints that include a claim of reprisal almost doubled between 2007/08 and 2014/15. This increase in reprisal claims is not surprising given the new opportunities for reprisals flowing from the 2010 requirement that employees must disclose the nature of their grievance to their employer as a condition of filing a complaint.

**Graph 6: Reprisal Claims, by Complainant's Work Status, 2007/08 to 2014/15<sup>59</sup>**



Moreover, reprisal claims appear to be difficult to substantiate. Even though the onus is on employers to disprove reprisals, employees still have to prove their case, a requirement often necessitating extensive documentary evidence and quite complicated legal arguments. Only a fraction of reprisal claims filed by employees are validated by the Ministry of Labour. In addition, from 2008/09 to 2014/15, only 1.6% of complaints with an ES violation included financial restitution for a reprisal claim.<sup>60</sup>

## WHAT WE NEED

### ALLOW ANONYMOUS COMPLAINTS

Employees are currently unable to file anonymous complaints. Anonymous complaints would be helpful in encouraging reporting and in preventing reprisals. They provide the most protection for employees who are still on the job that they are complaining about. Available elsewhere in Canada,<sup>61</sup> anonymous complaints would allow for the concealment of the identity of the employee or party who originally made a complaint by investigating and 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 likely be less able to discern which employee(s) filed the original complaint. In cases where no other violations are found in the inspection, the 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.<sup>62</sup>

## **ALLOW THIRD PARTY COMPLAINTS**

Third party complaints that also preserve anonymity have a number of significant advantages. First, third party organizations, such as worker centres, legal clinics, 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>63</sup> Second, third party organizations typically have built up their own expertise and knowledge of the law and connections with the government inspectorate, which give them insights into the complaints-making and investigation process and which can be of considerable assistance to employees making complaints. Third, these organizations can also offer employees a collective mechanism through which they can jointly file complaints and arguably merit greater resources.<sup>64</sup>

Any system of anonymous, confidential, or third party complaints would require the elimination of the requirement for complainants to contact their employers introduced under the Open for Business Act (2010).

## **ELIMINATE THE EMPLOYEE CONTACT REQUIREMENT**

The requirement, introduced in the Open for Business Act, that an employee first directly confront their employer about a complaint may deter an employee from initiating a complaint. In the context of what are often already precarious employment relationships characterized by unequal power relations, it provides opportunity for an employer to pressure an employee not to go forward to the Ministry of Labour. As recognized by the Special Advisors to the Changing Workplaces Review and the current provincial government, this requirement should be removed.

## **EXPEDITE REPRISAL INVESTIGATIONS**

The investigation of reprisals should be expedited to address the current six months, on average, that it takes for a reprisal investigation to be completed.<sup>65</sup> This delay means that employees, many of whom have limited financial resources, are forced to deal with the economic and other consequences of reprisals for an extended period of time. In this context, even if a reprisal is found, there may be financial and reputational damage done to the individual, potentially exacerbating the spreading of fear among employees.<sup>66</sup> Monetary penalties for reprisals remain low in Ontario. While reinstatement and compensation for lost wages can be seen as costs by employers, these costs are relatively minimal for actions that have profound consequences both for individual employees and the rule of law in the employment context.

One specific issue surrounding the problem of reprisals in Ontario meriting special note concerns employees enrolled in the Seasonal Agricultural Workers Program, and other Temporary Foreign Worker Programs, who face additional barriers to making a complaint. Employees in these situations face increased risks of reprisals, particularly due to their precarious residency status in Canada, which is tied to their employment contract.<sup>67</sup> In this context, employers should be prohibited from forcing deportation of an employee who has filed an ESA complaint and those who are found to have engaged in unlawful

reprisals should face the possibility of being excluded from the program. In addition, Ministry of Labour officials 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.

## CONTINUE ESO INVESTIGATION OF INDIVIDUAL COMPLAINTS

The Final Report of the Changing Workplace Review recommends that the Director of Employment Standards should be given the discretion to decline to have a complaint investigated by an ESO and instead leave it for the complainant to pursue his or her claim before the Ontario Labour Relations Board (Final Report 2017, 75-83). However, the Final Report's Recommendation 14 specifically provides that claims alleging reprisals or that will likely lead to an expanded investigation should be given priority for investigation. We address the question of ending the general requirement for all claims to be investigated in Part 9 of this report. With regard to alleged reprisals, which are a crude manifestation of unequal power relations, there should be **no discretion** to decline to investigate. In such circumstances, employees should never be put in the position where they are responsible for pursuing a remedy against their employer in an adversarial forum.

## 7. Recovery: Voluntary Compliance, Orders to Pay Wages, and Settlements

"I haven't been paid... and I'm very upset about that part. There has been no penalty... She [the employer] hasn't responded and she's just letting it go. And I'm out of that money. I feel that I should get interest on the money."

*Sheila, Cleaner*

Recovering monies owed to complainants has traditionally been the central purpose of the ESA's complaints system. A number of tools can be used to recover back wages. 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 comes 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 from employers. If voluntary compliance does not appear possible, an ESO can issue an Order to Pay.<sup>68</sup> At any point in the process, the complainant and their employer can agree to settle.<sup>69</sup>

Despite the range of recovery mechanisms, the collection of back wages has long been a weak link in Ontario's employment standards enforcement system. The hardship of non-recovery can be substantial for workers given the often large amounts of money at stake. Between 2012/13 to 2014/15, the median total entitlement for complainants was \$895, a substantial share of low wage earners' weekly or monthly earnings.<sup>70</sup>

## Recovery of Orders to Pay

Data show that when employers agree to voluntary compliance, employees receive their entitlements. However, when employer behaviour calls for the use of Orders to Pay, the rate of recovery drops dramatically. When all complaints resulting in the issuance of an Order to Pay during the period between 2009/10 and 2014/15 are considered, only 38% were fully satisfied. The total assessment from Orders to Pay during this time period was \$43.5 million, of which only \$15.9 million was recovered for complainants.<sup>71</sup>

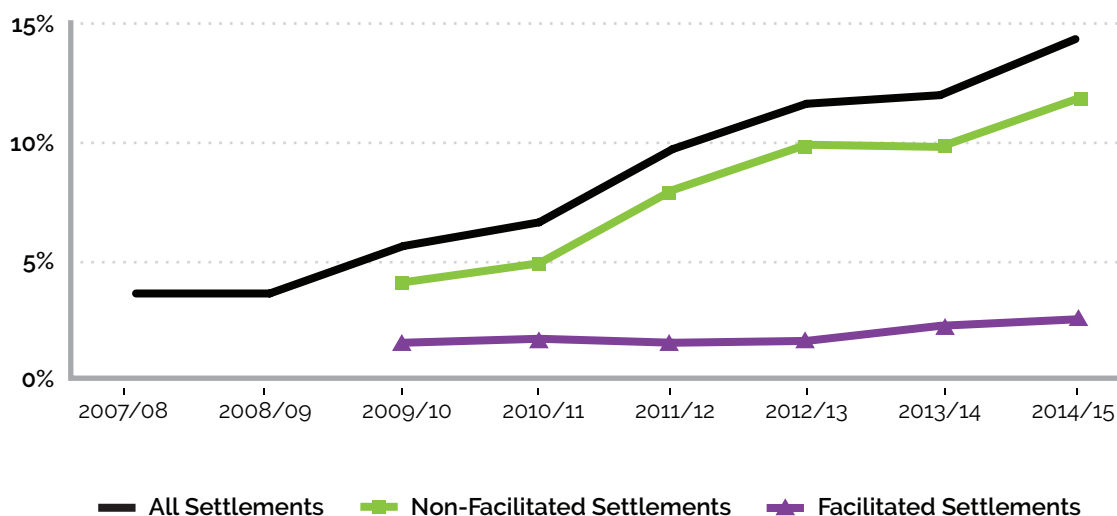
The challenges in recovering monetary orders represent a fundamental weakness in the enforcement system. Employees may choose not to file a complaint if they perceive that they will not recover their legal entitlements. An ineffective recovery system inadvertently incentivizes non-compliance with the law for recalcitrant employers. Employers who violate employment standards already face a very small chance of suffering adverse consequences for doing so.<sup>72</sup> Given the limited resources for proactive workplace inspections and the low rate of complaints among those who experience violations, non-compliant employers face little chance of being drawn into the enforcement system. In the event that employers are subject to enforcement measures, they face little likelihood of having to do much more than pay the wages that were already owed.

## Settlements

Settlements are another avenue for providing money to complainants under Ontario's ES enforcement system. Through settlements a complainant and his or her employer agree to certain terms, and the complaint is subsequently closed. A financial settlement reached between a complainant and an employer should not be considered recovered wages, however. This is because settlements do not involve a formal investigation and a determination that money is owed to a complainant. Nevertheless, as an increasingly prevalent outcome of complaints, settlements warrant discussion at this point.

Settlements are divided into two types: non-facilitated and facilitated. Non-facilitated<sup>73</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>74</sup> were introduced under the Open for Business Act in 2010. They involve the ESO as an agreement facilitator between the employee and the employer. The use of settlements in the complaints process has been increasing since 2008/09. The growing use of settlements is accounted for almost entirely by the increased use of non-facilitated settlements, which have almost tripled since 2009/10.<sup>75</sup> Complaints resolved through facilitated settlements have remained relatively steady since their introduction in 2010.

**Graph 7: Proportion of Complaints Closed via Settlements, by year of complaint<sup>76</sup>**



The use of settlements in employment standards enforcement regimes merits special consideration for several reasons. Settlements potentially involve the negotiation of minimum standards instead of their enforcement, which may lead employees to accept less than their legal entitlement.<sup>77</sup> More broadly, their use potentially allows for the contracting out of employment standards,<sup>78</sup> and can turn questions of law enforcement into matters of dispute resolution. The risk of employees accepting less than their entitlement is exacerbated in a system in which wait times to have claims assessed can be extended and the prospects of full recovery are highly uncertain.<sup>79</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. Not surprisingly, the larger the submitted total claim amount, the less likely that it will be settled for 100% or more of that amount. Facilitated settlements, which are generally used for higher-value claims, lead to inferior outcomes for workers compared to non-facilitated settlements. In 2014/2015, almost 26% of non-facilitated settlements were settled for less than half of an employee's total initial claim. In the same year, 36% of cases with facilitated settlements were settled for less than half of an employee's total initial claim.<sup>80</sup> What We Need

## WHAT WE NEED

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### ESTABLISH A WAGE PROTECTION FUND

A wage protection fund is needed to help compensate employees whose employers do not comply with Orders to Pay. Certain protections are already available to employees whose employer is formally bankrupt or insolvent. Under the Federal Government's Wage Earner Protection Program, employees who worked for a formally bankrupt or insolvent employer are eligible to receive up to nearly \$4,000 in unpaid wages earned six months prior to the date of the employer bankruptcy or receivership. Yet the federal Wage



Earned Protection Program does not provide money to employees whose employers are still operating or are informally bankrupt or insolvent. In this regard, it is important to note that only a small fraction of complaints involve situations of formal employer bankruptcy or insolvency. Of all complaints with monetary claims received by the Ministry of Labour between 2012/13 and 2014/15, only between 3 and 5 percent per year were related to employers who were formally bankrupt or insolvent.<sup>81</sup> The vast majority of Orders to Pay are issued to businesses that are still in business or informally insolvent or bankrupt. As a result, only a small fraction of employee claims are covered by the Wage Earners' Protection Program (WEPP) and, even when they are, its \$4,000 cap on payouts and six month time limit mean that some eligible employees recoup only a portion of their wages.

Given these limitations, a wage protection fund run by the government of Ontario, and covering all situations of non-payment not falling under the WEPP, is needed for employees in the province. Such a fund did exist in Ontario from 1991 to 1995. Under this program, if the employer did not pay an Order to Pay, the employee was entitled to receive up to a maximum of \$5,000 from the government, and the government would then attempt to recover money from the employer. Given that the fund used general revenue, it was heavily criticized as a public subsidy for failing or unscrupulous businesses,<sup>82</sup> and was terminated in 1995. Any future wage earner protection program should be funded through a payroll tax. This approach has the potential to shift the burden of wage recovery from workers specifically and the general public to those industries where non-compliance is more prominent, many of which are encouraging fissuring structures that often foster insolvency among businesses at the bottom of subcontracting chains.

The creation of a Wage Protection Fund would relieve employees from having to pursue extraordinary measures in order to secure the payment of what they are owed. However, in order to ensure to the extent possible that the employer or other responsible parties pay what they owe, a wide range of recovery mechanisms should be made available to the administrators of the Wage Protection Fund. The recommendations made in the Final Report of the Changing Workplaces Review (S.5.8) for creating a statutory charge in favour of the Director of Employment Standards to secure unpaid remuneration and for enhancing director liability should be considered first and foremost as mechanisms to reimburse the Wage Protection Fund, rather than as instruments that employees would have to avail themselves of in order to secure payment of monetary orders.

The same principle applies to the mechanisms discussed below. That is, if a wage fund is created, these proposals would be tools available to the administrators of the fund. However, in the absence of such a fund, these mechanisms would be needed to assist employees to secure payment of the monies they are owed.

## **ENHANCE JOINT AND SEVERAL LIABILITY FOR PAYMENT OF WAGES**

As indicated above in Section 4 on the need for employer liability in general, the imposition of liabilities on parties that are not the direct employer would also improve the recovery of entitlements. Expanded liability promises to be particularly effective in situations of sub-contracted or fissured employment, or in franchised employment, where liabilities can be imposed up the contracting chain. Currently, both director and

related employer liability are available under the ESA, but they do not necessarily yield higher rates of recovery. As discussed above, related employer liability is currently only available in a limited number of circumstances and certainly does not cover many arms-length relationships that typically exist in supply chains. Making joint and several liability apply to supply chain and contracting-out arrangements, and/or expanding the scope of employment standards entitlements that directors might be liable for would likely strengthen recovery.

## **STRENGTHEN COLLECTIONS MECHANISMS INCLUDING WAGE LIENS**

The ESA should include all of the recovery mechanisms available to the government in other legal contexts, such as the Retail Sales Tax Act. A post-judgment wage lien, of the order currently included in proposed legislative amendments, is a measure that would provide the Ministry of Labour or a complainant the ability to place a hold on an employer's property until an Order is paid. A post-judgment wage lien would likely improve the rates of recovery of Orders to Pay. However, in situations where an employer has hidden assets during the investigation, where an employer's assets are not easily identified, or in situations of bankruptcy, post-judgments are often not effective.<sup>83</sup> A few jurisdictions also allow for pre-judgment wage liens enabling a hold on an employer's property before a final judgment is made.<sup>84</sup> The chief benefit of pre-judgment liens over post-judgment 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>85</sup> The mere possibility of a wage lien serves to deter monetary violations among employers.

## **INTRODUCE LICENSE DEBARMENT**

License debarment is another potentially powerful tool to bring to bear on employers who have not complied with Orders to Pay. A growing number of jurisdictions in the United States are implementing this measure to combat monetary violations and to increase the recovery of judgments. In Jersey City, New Jersey, under the recently passed Wage Theft Ordinance, the City Department responsible for issuing a business license (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 license 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 license suspension. In Cook County, Illinois, an employer found to have engaged in repeated or willful 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 licenses 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 judgments potentially very costly for employers

## **INTRODUCE WAGE BONDS**

A wage bond is a mechanism that requires businesses to put money into a special fund as a condition of doing business, so that money is available to cover wage claims. The introduction of wage bonds would increase the recovery of back wages for employees in sectors where monetary violations are common.

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.

## **EXERCISE GREATER CAUTION WHEN FACILITATING SETTLEMENTS**

As noted above, settlements facilitated by an ESO can be problematic in situations where weaknesses in the formal complaints process, such as long processing times or poor recovery rates, result in pressure on complainants to settle their complaints so that they will receive something rather than nothing. Policies of the Ministry of Labour should require ESOs to exercise greater caution when facilitating settlements to ensure that complainants are not pressured to accept settlement that are likely to be below what they are owed. ESOs should also exercise caution when facilitating settlements with employers that have a record of previous violations and/or in situations where multiple employees are likely to be affected by the claims included in the complaint being settled.

## **PROVIDE MORE SUPPORT FOR COMPLAINANTS THROUGHOUT THE SETTLEMENT PROCESS**

Currently, low-wage employees have few options for obtaining legal support throughout the settlement process. Complainants need greater access to legal or paralegal assistance in order avoid making agreements that fall below minimum entitlements. 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.

# **8. Penalties**

The ESA enforcement system includes a range of penalties for employers demonstrated to have violated employment standards. Such penalties include Notices of Contravention (NOCs),<sup>86</sup> Part I tickets<sup>87</sup> or summonses, and Part III prosecutions under the Provincial Offences Act (POA). One central problem underlying Ontario's employment standards enforcement system is that these tools are only

available where there is a failure to voluntarily comply or settle a claim. Penalties are not used where claims are withdrawn due to an employer payout and/or settled via a facilitated or non-facilitated settlement. Another central problem, and our focus here, is that, even in the instances in which they are available, penalties are infrequently used.

The overwhelming emphasis of enforcement is on compensating the individual complainant for her or his loss, rather than using punishment to alter the behavior of employers.<sup>88</sup> Yet a growing body of research on the changing nature of employment points toward the need for meaningful punishment of violations.<sup>89</sup> Former administrator of the Wages and Hours Division of the United States Federal Department of Labor, David Weil, and others<sup>90</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 responsibility for employees through contracting out, franchising, and the use of extended supply chains. In this fissured context, employment is being pushed into increasingly competitive environments where employers are under enormous pressure to reduce costs. Since labour 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. The low risk of getting caught, coupled with the general weakness of penalties, mean that unscrupulous employers have little incentive to refrain from violations.

## A. Tickets

The penalties associated with Part I tickets are 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>91</sup> Even with their minor monetary penalty, tickets are used very infrequently when ticketable violations are detected and recorded. Proactive workplace inspections carried out between 2013/14 and 2014/15 resulted in ESOs issuing 607 Part I tickets for 6,408 detected ticketable offences, or 9.5% of all detected ticketable offenses (see Table 5). Among individual complaints investigated between 2013/14 and 2014/15, tickets were used even more infrequently: 332 tickets were issued from a total of 21,946 detected ticketable offenses.

**Table 5: Use of Tickets in Proactive Inspections and Individual Complaints, by Year<sup>92</sup>**

	2013/14	2014/15	Total
<b>PROACTIVE INSPECTIONS</b>			
Ticketable Violations	3,710	2,770	6,480
Part I Tickets	346	259	605
<b>% of Ticketable Violations with Tickets</b>	<b>9.3%</b>	<b>9.4%</b>	<b>9.3%</b>
<b>INDIVIDUAL COMPLAINTS</b>			
Ticketable Violations	11,751	10,196	21,947
Part I Tickets	122	186	308
<b>% of Ticketable Violations with Tickets</b>	<b>1.0%</b>	<b>1.8%</b>	<b>1.4%</b>

## B. Notices of Contravention

The dollar amounts associated with NOCs are also 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.<sup>93</sup> 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. Moreover, the preference among ESOs is to impose lower value NOCs. About three quarters of NOCs are for the lowest amount, \$250.<sup>94</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>95</sup>

Like tickets, NOCs are also used very infrequently. As Table 6 illustrates, for proactive inspections conducted between 2013/2014 and 2014/2015 resulting in 6,539 detected violations, NOCs were issued only 55 times, in other words, for only 0.8% of violations. NOCs have a similar rate of use during complaints investigations. Out of 22,547 detected violations, 148 NOCs were issued, only 0.7%.

**Table 6: Use of Notices of Contravention during Proactive Inspections and Individual Complaint investigations, by Year<sup>96</sup>**

	2013/14	2014/15	Total
<b>PROACTIVE INSPECTIONS</b>			
Total Number of Violations	3,742	2,797	6,539
Notices of Contravention	21	34	55
<b>% of Inspections with Notices of Contravention</b>	<b>0.6%</b>	<b>1.2%</b>	<b>0.8%</b>
<b>INDIVIDUAL COMPLAINTS</b>			
Total Number of Violations	12,071	10,476	22,547
Notices of Contravention	80	68	148
<b>% of Complaints with Notices of Contravention</b>	<b>0.7%</b>	<b>0.6%</b>	<b>0.7%</b>

## C. Part III Prosecutions

Part III prosecutions carry much heavier penalties. If convicted, employers are liable to be fined up to \$50,000 or imprisoned for up to 12 months. Corporations are liable to be fined up to \$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 and largely where employers or corporate directors fail to comply with Orders to Pay issued by the Ministry of Labour. Between 2012 and 2014, a total of 34 prosecutions involving 57 employers and directors and 167 charges were launched, resulting in 41 convictions.

**Table 7: Frequency of Prosecutions, by Year<sup>97</sup>**

	2012	2013	2014	Total
<b>PROSECUTIONS</b>				
Prosecutions Launched	9	13	12	34
Prosecutions with Convictions	6	9	5	20
<b>DEFENDANTS</b>				
Defendants Charged	14	27	16	57
Defendant Convicted	6	10	5	21
<b>CHARGES</b>				
Charges Laid	44	65	58	167
Charges with Convictions	15	18	8	41

Source: Ontario Ministry of Labour: Prosecution and Conviction Statistics and Legal Services Branch Data

In short, there is a very limited chance that employers engaged in employment standards violations will face a serious penalty. The low likelihood of meaningful punishment represents a fundamental weakness in Ontario's employment standards system.

## WHAT WE NEED

### INCREASE THE DOLLAR VALUE OF NOCS AND TICKETS

A substantial increase to the dollar value of Tickets and NOCs is necessary to strengthen employment standards enforcement in Ontario. Currently their dollar values are too low to represent meaningful penalties that will alter behavior. The low likelihood of detection and the low cost of either NOCs or tickets provide a substantial incentive for employers to evade ES. The cost of a ticket is substantially less than the potential savings associated with not paying employees their legal entitlements over an ongoing period of time. Current legislative proposals to increase their dollar value are too modest to provide genuinely deterrent penalties.

### INCREASE THE USE OF NOCS AND TICKETS

NOCs should be issued for all confirmed violations of listed ESA provisions. Tickets should also be used more frequently.

### AUGMENT THE USE OF PART III PROSECUTIONS

Part III prosecutions must be used more frequently as part of a broader effort to elevate the deterrence aspects of enforcement. They should also continue to be widely publicized to augment their general deterrence effect. The Ministry of Labour may

consider standardizing thresholds for sending a case to legal services to assess whether it is feasible for prosecution (i.e., violations involving a minimum amount of money, affected employees, or re-offenses).

## **INTRODUCE LIQUIDATED DAMAGES**

Liquidated damages should be introduced in recognition of how ES violations can impose severe financial hardship on employees, who often must resort to credit cards or loans from friends and family. 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>98</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 monetary violations from 25% of the back wages owed to 100% of the back wages owed, in addition to other civil penalties and interest.<sup>99</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>100</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>101</sup> As well, punitive damages are a common feature in wrongful dismissal cases in Ontario's small claims proceedings. Similar measures are necessary in Ontario's employment standards enforcement system.

## **POST NOTICES OF CONTRAVENTIONS, TICKETS, AND PART III CONVICTIONS THAT CLEARLY IDENTIFY ENTITIES THAT HAVE BEEN PENALIZED FOR VIOLATING THE ESA**

"I really believe with businesses ... they are very concerned about their reputations and appearances. You have to say that it will be posted somewhere, information will be known... If they are somehow exposed that would make them much more compliant all the time."

*Janet, Office Worker*

Although Ontario now posts Notices of Contravention, Tickets, and Part III Convictions, in many cases the common name of the employer is obscured, such that it is unclear to the public which entity has been penalized. Ontario should follow the lead of other jurisdictions and authorize the Ministry of Labour to post a summary of violations that is clear and in a place 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 employment standards. 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. They are powerful measures because they mobilize the threat of reputational damage through “naming and shaming”.

## WHAT WE DON'T NEED

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### REPLACEMENT OF PART III PROSECUTIONS WITH ADMINISTRATIVE MONETARY PENALTIES IMPOSED BY THE OLRB

In the Final Report of the Changing Workplace Review, the Special Advisors recommend the creation of a system of administrative monetary penalties (AMP) under the jurisdiction of the Ontario Labour Relations Board (OLRB), which is intended to replace the Part III prosecution process. This is a bad idea and, for the reasons we elaborate below, would degrade of the enforcement regime.

The choices we make about law enforcement both reflect and shape our views about the seriousness of the wrongdoing involved. We reserve the criminal law for the most serious wrongdoing, but it is a matter of political choice as to what acts are deserving of being treated as crimes. In the 1930s, in the midst of the Great Depression, the Conservative government of Canada amended the Criminal Code to make the intentional violation of minimum wages laws a crime. Although the provision was drafted in a manner that made it practically unenforceable, nevertheless the law reflected a judgment that wage theft was morally reprehensible and thus deserving of being treated as crime. The provision remained on the books until 1954.

When modern employment standards laws were enacted in the 1960s, violations were treated as regulatory offences rather than crimes. However, employers who were convicted of regulatory offences could be sentenced to terms of imprisonment, reflecting the seriousness with which flagrant, intentional or repeated violations of the law were viewed. While imprisonment is relatively rare, there have been occasions in recent years when judges determined that incarceration was the appropriate response given the seriousness of the employer's violation(s).

A move away from regulatory offence prosecutions to administrative penalties would signal a further degradation of the seriousness with which we view wage theft and other ES violations. Not only would we lose the stigmatization that accompanies a prosecution in court, but a scheme of administrative monetary penalties would remove the possibility that an employer could be jailed for even the most flagrant violations of the ESA.

In addition to our concern about regulatory degradation, the proposal to create a system of administrative monetary penalties fails to address the greatest problem with Part III prosecutions and that is the extreme reluctance to use this deterrence measure. Under the current law, the Legal Services Branch of the Ministry of Labour, acting as Crown Attorney, receives recommendations from the Employment Standards Branch to prosecute but determines whether the prosecution is in the public interest, taking



into account the likelihood of securing a conviction. The AMP proposal mimics this structure by requiring the appointment of a designated officer of the Crown to act as a Director of Enforcement, with specific responsibility to determine whether to initiate AMP proceedings before the OLRB. While the Special Advisors propose criteria that ought to be considered in determining whether or not it would be in the public interest to pursue an AMP, there is no recommendation that AMPs should be routinely or normally sought when those criteria are met. There is no reason to believe that Crown officers acting under an AMP scheme would exercise their discretion differently than they currently do with regard to Part III prosecutions.

In sum, while a case might be made for creating a system of AMPs in addition to Part III prosecutions, the proposal to substitute an AMP scheme for Part III prosecutions would constitute a degradation of the ESA and its enforcement regime, while failing to address the real problem of under-use of higher level deterrence measures.

## 9. Strategic and Proactive Enforcement

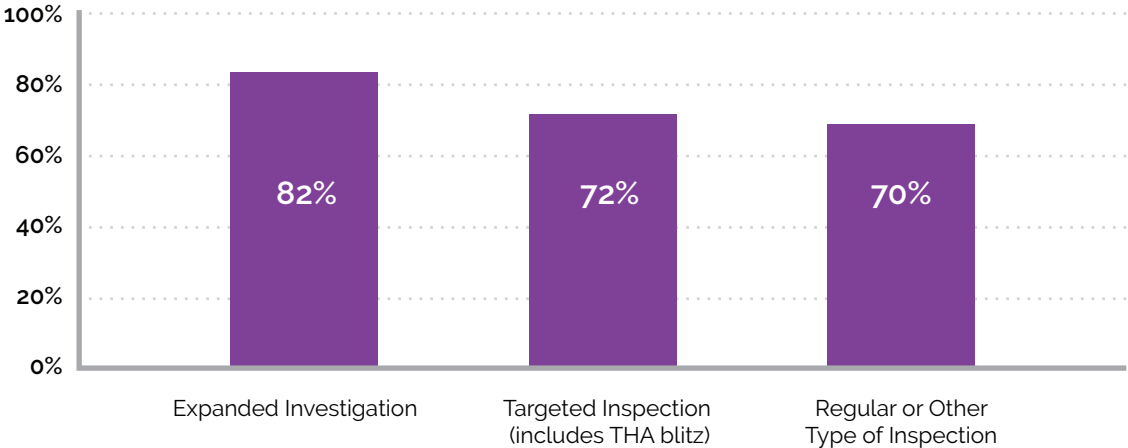
An increasingly influential paradigm in labour regulation, strategic enforcement is premised on the recognition that employment standards enforcement is becoming more challenging for two related reasons: first, because of changes in industry structure that create greater distance between employees and employing entities, such as growing recourse to sub-contracting; and, second, because, alongside such developments enforcement resources have not kept pace with the expanding regulatory responsibilities of labour inspectorates.<sup>102</sup> In attempt to counter these challenges, strategic enforcement is designed to maximize enforcement efficacy in this new and more challenging context. It calls for inspectorates to proactively target firms at the top of industry structures, as it is these firms whose policies and practices shape workplace practices down the supply chain by sub-contractors, franchisees, and subsidiary corporations. This approach aims to utilize the monitoring and compliance mechanisms that are already in place in these organizational arrangements and networks. It calls for inspectorates to develop a sophisticated understanding of business environments that may be conducive to labour standards violations, and to practice a kind of “regulatory jujitsu”, which uses compliance and deterrence measures in a variety of strategic combinations that are responsive to the context.

The overwhelming share of enforcement resources in Ontario have gone towards supporting a reactive complaints-based system.<sup>103</sup> Reports published by the Office of the Provincial Auditor General in both 1991 and 2004 found that proactive inspections were severely under-utilized, despite their effectiveness in detecting ESA violations. However, in recent years, between 2012/13 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. The percentage of inspections that detected violations ranged from 75% to 77% in the years between 2011/12 and 2013/14, dropped to 65% in 2014/15, and rose again to 70% in 2015/2016.<sup>104</sup>

The Ministry of Labour categorizes proactive workplace inspections into several distinct types. The three that are most commonly used are expanded investigations, targeted or blitz inspections, and regular inspections. Expanded inspections are triggered by an individual complaint and occur where an ESO detects a violation that is amongst the eleven standards evaluated in workplace inspections,

and has reason to believe that other employees are affected. Targeted or blitz inspections are pursued in sectors identified at the provincial level, and typically take the form of blitzes directed at a particular industry, occupational group, or form of employment. In contrast, regular inspections are largely determined either by individual ESO2s or regional or district offices on the basis of local conditions and are unconnected with blitzes. In addition to these three main types, the Ministry undertakes and tracks several other types of inspections, including re-inspections of previous violators, inspections as a result of participating in a self-assessment (known as a “compliance check”) and inspections prompted by other ESOs, regional and district program managers, and/or the staff of the Employment Practices Branch. Because these types of inspections are less common, below they are grouped together with regular inspections. 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.<sup>105</sup>

**Graph 9: Rates of Violation Detection by Type of Inspection, 2011/12 to 2014/15<sup>106</sup>**



## WHAT WE NEED

### AUGMENT PROACTIVE INSPECTIONS COUPLED WITH A ROBUST COMPLAINTS SYSTEM

“When you do a claim with them [the Ministry of Labour], for example, I hope they go in the company and resolve that problem. So that it doesn’t happen to others.”

*Eamon, Maintenance Worker, Retail*

Continued investment in proactive enforcement is necessary. But it should not come at the expense of the complaints intake system. Any reform to the complaint system must be oriented toward reducing the barriers workers face in raising complaints regardless of the nature and degree of their grievances. A means of processing complaints that is consistent with the strategic enforcement paradigm would involve building on the Ministry of Labour'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 Ministry of Labour practices. Additionally, special complaints handling measures could be adopted for complaints that come from employees in industries that are under represented among the complaints received by the Ministry of Labour, 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.

From this perspective, the recommendation in the Final Report of the Changing Workplaces Review to weaken the complaint system by permitting the Ministry of Labour to refuse to investigate complaints and instead direct complainants to take their complaints directly to the OLRB should be rejected.<sup>107</sup> Rather than reducing the barriers workers face in raising complaints, such a proposal would increase them by shifting the burden of investigating complaints onto workers' shoulders and by requiring them to pursue their claims through an adversarial adjudication system. Vulnerable workers are least likely to pursue their complaints through such a process.

Moreover, to the extent the recommendation is motivated by a desire to save scarce resources, the Special Advisors fail to consider the considerable resources that would be required to shift to an adjudication model. To begin with, the OLRB requires a significant infusion of additional resources to be able to handle the flow of complaints, especially if the specially appointed vice-chairs are also expected to consult with the parties prior to the hearing as part of the dispute resolution process. If the OLRB is not adequately resourced, the result would be lengthy delays and undue pressure on complainants to settle their cases. As well, as the Special Advisors recognize, to be credible the system would require resources be provided to assist complainants to prepare and present their case.<sup>108</sup> However, with the exception of their recommendation to expand the mandate and increase funding of the Office of the Worker Advisor, their recommendations by and large aim to limit costs by focusing on the provision of on-line assistance and written explanatory materials, legal charity (lawyers offering pro bono assistance), or dependence on worker advocacy groups, legal clinics, and trade unions providing legal assistance without additional funding for doing so.

## **CONTINUE PROACTIVE INSPECTIONS OF WORKPLACES WHERE VIOLATIONS ARE LIKELY**

Vulnerable employees in precarious jobs face heightened risks in exercising voice when faced with violations. Many such employees face the 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 necessary.

## **CEASE PROVIDING ADVANCE NOTICE TO EMPLOYERS OF INSPECTIONS**

Providing advance notice<sup>109</sup> 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 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 violation.

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 worker networks in communicating about the potential for inspection,<sup>110</sup> public notices of industry blitzes may motivate employers in a sector to bring themselves into compliance, thereby maximizing the benefit of the blitz.

## **DEVELOP OTHER STRATEGIC ENFORCEMENT MEASURES**

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 is necessary. This approach aims to utilize the monitoring and compliance mechanisms that are already in place in these organizational arrangements and networks.

The "hot goods" provisions of the US 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 US Wages and Hours Division 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>111</sup> Enforcement tools enabling the Ministry of Labour to embargo goods manufactured in violation of the ESA should similarly be adopted.

# **10. Closing the Gap: An Agenda for Change**

Employment standards are a key source of formal protection for many employees; however, Ontario's employment standards are not living up to their founding promise of providing a floor of minimum terms and conditions of employment – or set of social minima – based on the principles of fairness and universality, due partly to deficiencies in enforcement. Employment standards and their enforcement are not keeping up with workplace practices that fuel the spread of precarious employment and that increase the likelihood of employer non-compliance with the legislation. For too many employees, employment standards are paper rights not realized in practice. Yet there is nothing inevitable about the enforcement gap.

A wide range of practical measures holds much potential to strengthen the enforcement of employment standards in Ontario. The following is a list of measures, drawn from the proceeding evidence-based analysis, which would help to improve employment standards and their enforcement in Ontario. These measures are best pursued as a package. That is, there are links between them – for example, it is imperative to deal with employer liability alongside pursuing strategic enforcement measures that move from the bottom to the top of supply chains. Similarly, without applying sufficiently deterrent penalties to those that violate the ESA, the efficacy of improvements to wage recovery regimes will be muted. Closing the employment standards enforcement gap thereby requires a multi-pronged approach to bringing minimum standards and their enforcement into sync with the contemporary realities of Ontario's labour market.

### **SCOPE OF COVERAGE OF THE ESA:**

- › Expand the ESA to encompass dependent contractors
- › Make Misclassification an Offence
- › Introduce a Presumption of Employee Status

### **EMPLOYER LIABILITY:**

- › Enhance Related Employer Provisions
- › Expand Joint and Several Liability

### **EXEMPTIONS AND SPECIAL RULES:**

- › Eliminate Unprincipled and Unjustified Exemptions
- › Establish Strict Criteria for Retaining/Establishing Exemptions and Special Rules
- › Establish a Process for Retaining/Establishing Exemptions and Special Rules

### **INDIVIDUAL CLAIMS AND REPRISALS:**

- › Allow Anonymous and Third Party Complaints
- › Eliminate the Employee Contact Requirement
- › Expedite Reprisal Investigations
- › Continue ESO Investigation of Individual Complaints

### **RECOVERY OF WAGES:**

- › Establish a Wage Protection Fund for Ontario
- › Enhance Joint and Several Liability for Payment of Wages
- › Introduce Wage Liens and Business License Debarment
- › Introduce Wage Bonds
- › Exercise Greater Caution When Facilitating Settlements
- › Provide More Support for Complainants throughout the Settlement Process

## **PENALTIES:**

- › Increase the Dollar Value of NOCs and Tickets
- › Increase the Use of NOCs and Tickets
- › Augment the Use of Part III Prosecutions
- › Introduce Liquidated Damages
- › Post Notices of Contravention Clearly Identifying the Penalized Employer
- › Do Not Replace Part III Prosecutions with Administrative Monetary Penalties Imposed by the OLRB

## **STRATEGIC AND PROACTIVE ENFORCEMENT:**

- › Augment Proactive Inspections Coupled with a Robust Complaints System
- › Continue Proactive Inspections of Workplaces Where Violations Are Likely
- › Cease Providing Advance Notice to Employers of Inspections
- › Develop Other Strategic Enforcement Measures

# APPENDIX 1

## List of Partner Organizations

- › Cavalluzzo Hayes Shilton McIntyre & Cornish
- › Community Advocacy & Legal Centre (Belleville)
- › Human Rights Legal Support Centre
- › Law Commission of Ontario
- › Legal Assistance of Windsor
- › Ontario Ministry of Labour
- › Ontario Public Service Employees Union
- › Parkdale Community Legal Services
- › Sudbury Community Legal Clinic
- › Workers' Health & Safety Legal Clinic
- › York University (Lead)
- › Windsor Workers' Action Centre
- › Workers' Action Centre
- › Laurentian University
- › Ontario Institute for Studies in Education, University of Toronto
- › Ryerson University
- › University of Windsor

# APPENDIX 2

Possible Sectoral Structure for the Review of Exemptions (in alphabetical order)

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<b>AGRICULTURAL WORKERS</b>	Farm Employees (Other than Harvesting and Horse Breeding and Boarding) Fishers Harvesters of Fruit, Vegetables or Tobacco Flower Growing Growing, Transporting and Laying Sod Growing Trees and Shrubs Horse Boarding and Breeding Keeping of Furbearing Mammals Canning, Processing, Packing or Distribution of Fresh Fruit or Vegetables (seasonal) Employees of continuously operating agricultural operations
<b>CONSTRUCTION AND MAINTENANCE</b>	Road Construction Sewer and Watermain Construction Construction Employees (Other than Road Building and Sewer and Watermain Construction) Road Maintenance Sewer and Watermain Maintenance Maintenance (Other than Maintenance of Roads, Structures Related to Roads, Parking Lots and Sewers and Watermain) Road Construction Sites - Work that is not Construction Work Road Maintenance Sites - Work that is not Maintenance Work Sewer and Watermain Construction Site Guarding Employees of continuously operating construction sites
<b>EMERGENCY SERVICES</b>	Ambulance Drivers, Ambulance Driver's Helper or First-aid Attendant on an Ambulance Firefighters Employees of continuously operating hospitals
<b>HOSPITALITY INDUSTRY</b>	Hospitality Industry Employees (Hotels, restaurants, taverns, etc.) Liquor servers Employees of continuously operating hospitality establishments Hunting and Fishing Guides
<b>MANUFACTURING</b>	Ship Building and Repair Employees of continuously-operating manufacturing industries

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## MEDICAL PROFESSIONALS

Chiropodists  
Chiropractors  
Dentists  
Massage Therapists  
Naturopaths  
Optometrists  
Pharmacists  
Physicians and Surgeons  
Physiotherapists  
Psychologists

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## PERSONAL/RESIDENTIAL SERVICES

Residential Building Superintendents, Janitors and Caretakers who reside at place of work  
Homecare Employees Who Provide Homemaking or Personal Support Services  
Residential Care Workers  
Domestic Workers (Employed by the Householder)  
Embalmers and Funeral Directors  
Landscape Gardeners  
Swimming Pool Installation and Maintenance  
Employees of continuously operating residential services (excluding health care facilities)

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## PROFESSIONAL & SCIENTIFIC SERVICES

Architects  
Engineers  
Lawyers  
Public Accountants  
Surveyors  
Teachers  
Real Estate Salespersons and Brokers  
Information Technology Professionals  
Veterinarians  
Employees of continuously operating professional/scientific offices/facilities

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## PUBLIC ADMINISTRATION

Municipal Employees  
Ontario Government and Government Agency employees

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## RETAIL SALES

Retail Business Employees  
Employees of continuously operating retail businesses  
Travelling Salespersons (Commissioned)  
Commissioned Automobile Salesperson

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## STUDENTS

Students-in-training in Professions  
Student Employee in Recreational Program Operated by a Charity  
Student Employee Providing Instruction or Supervision of Children  
Student Employee at Children's Camp  
Student three-hour rule  
Student under 18 - minimum wage

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## TRANSPORTATION

Highway Transport Truck Drivers ("For Hire" Businesses)  
Local Cartage Drivers and Driver's Helpers  
Public Transit Employees  
Taxi Cab Drivers  
Employees of continuously operating transportation services

# ENDNOTES

1. Weil, David (2010) "Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division." Online: <https://www.dol.gov/whd/resources/strategicenforcement.pdf>; 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.
2. 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. 260.
3. See Appendix 1 for a list of partner organizations.
4. Access to data from the Employment Standards Information System (ESIS), which provides a near-complete census of employment standards activities in the province, was acquired under a unique data-sharing agreement with the Ministry of Labour. We are grateful to the Ministry and its staff for engaging in this agreement and for supporting the larger research partnership.
5. Quotations from worker interviews are interspersed in the analysis to follow. Pseudonyms are used.
6. Data Source: Labour Force Survey 1976-2016. Annual data weights applied. For the years 1976 to 1986 weights are based on 2001 census data. For the years 1987 to 2014 weights are based on 2006 census data. Finally, for the years 2015 and 2016 weights are based on 2011 census data.
7. Data Source: Labour Force Survey 1997-2016 (Data on permanent and non-permanent work is not available in the Labour Force Survey until 1997). Annual data weights applied. For the years 1986 to 1997 weights are based on 2001 census data. For the years 1987 to 2014 weights are based on 2006 census data. Finally, for the years 2015 and 2016 weights are based on 2011 census data.
8. In 2016, 24% of women compared to 12% of men were part-time employees.
9. This measure reflects the approach of the OECD, which defines low-wage work as that where remuneration is less than 2/3rds of the median wage for full-time employees. The OECD measure is typically calculated using annual income; given the absence of this information in the LFS, hourly wages are used instead.
10. Data Source: Labour Force Survey 1976-2016. Annual data weights applied. For the years 1976 to 1986 weights are based on 2001 census data. For the years 1987 to 2014 weights are based on 2006 census data. Finally, for the years 2015 and 2016 weights are based on 2011 census data.
11. Fudge, July, Eric Tucker and Leah F. Vosko (2002) "The Legal Concept of Employment: Marginalizing Workers." Online: [http://publications.gc.ca/collections/collection\\_2007/lcc-cdc/JL2-35-2002E.pdf](http://publications.gc.ca/collections/collection_2007/lcc-cdc/JL2-35-2002E.pdf); see also Cranford, Cynthia, Judy Fudge, Eric Tucker and Leah F. Vosko (2005) *Self-Employed Workers Organize*. Montreal and Kingston: McGill-Queen's University Press.
12. Tucker, Eric (2017) "Uber and the Unmaking and Remaking of Taxi Capitalisms: Technology, Law and Resistance in Historical Perspective," Paper presented at the annual meeting of the Canadian Association of Work and Labour Studies, May 31st – June 2nd, 2017, Ryerson University.
13. Data Source: Labour Force Survey 1976-2016. Annual data weights applied. For the years 1976 to 1986 weights were based on 2001 census data. For the years 1987 to 2014 weights were based on 2006 census data. Finally, for the years 2015 and 2016 weights were based on 2011 census data.
14. Mitchell and Murray (2016) "Changing Workplaces Review: Special Advisors Interim Report"; Law Commission of Ontario (2012) "Vulnerable Workers and Precarious Work: Final Report." Online: <http://www.lco-cdo.org/vulnerable-workers-final-report.pdf>; 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.

15. 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>.
16. 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.
17. ESOs are divided into two groups – ESO1s and ESO2s – in relation to their responsibilities. While ESO1s are stationed in Ontario's claims-processing office and responsible for conducting initial investigations of claims, ESO2s are responsible for both investigating all individual claims that are not resolved or withdrawn voluntarily at the ESO1 stage and for conducting workplace inspections.
18. 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).
19. Vosko, Leah F. (2010) "A New Approach to Regulating Temporary Agency Work in Ontario or Back to the Future?" *Relations Industrielles/Industrial Relations* 65(4): 632–653.
20. 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.
21. 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.
22. 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.
23. Locke, Richard M. (2013) *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*. Ithaca, NY: Cornell University Press; Weil (2015) *The Fissured Workplace*; 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.
24. Mark P. Thomas, Leah F. Vosko, Eric Tucker, Mercedes Steedman, Elliot Siemiatycki, Andrea M. Noack, John Grundy, Mary Gellatly and Elizabeth Leinveer (2015) "Tracing Overtime Exemptions and Special Rules in the Ontario Employment Standards Act", Paper presented at the Regulating for Decent Work Conference, International Labour Organization, Geneva, July 8th 2015.
25. Vosko, Leah F., Andrea M. Noack and Mark P. Thomas (2016) "How Far Does the Employment Standards Act 2000 Extend? 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>.
26. Vosko et al, "How Far Does the Employment Standards Act 2000 Extend?" p.4.

27. 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.
28. Thomas, Mark P. (2009) *Regulating Flexibility: The Political Economy of Employment Standards*. Montreal and Kingston: McGill-Queen's University Press.
29. Archives of Ontario (AO) (1978) Record Group 7-78, Initial Submission, Management By Results and Estimates, 1979/80, 12 July 1978, 6.
30. Archives of Ontario (AO) (1975) Record Group 7-78, Letter, John R. Scott, Director, Re: The Employment Standards Act, 1974 and The Automatic Car Wash Industry, 4 April 1975.
31. Mitchell and Murray (2016) "Changing Workplaces Review: Special Advisors Interim Report," p. 160.
32. Mitchell and Murray (2016), "Changing Workplaces Review: Special Advisors Interim Report," p. 155.
33. Archives of Ontario (AO) (1969) Record Group 7-1, File 7-1-0-1532.1, box 54, Notice to Employers and Employees, 1969.
34. Mitchell and Murray (2016), "Changing Workplaces Review: Special Advisors Interim Report," p. 158.
35. See Dewees, Donald N. (1987) *Special Treatment Under Ontario Hours of Work and Overtime Legislation: General Issues. A Report Prepared for the Ontario Task Force on Hours of Work and Overtime*. Toronto: Ontario Task Force on Hours of Work and Overtime; Kinley, John (1987) *Evolution of Legislated Standards on Hours of Work in Ontario. A Report Prepared for the Ontario Task Force on Hours of Work and Overtime*. Toronto: Ontario Task Force on Hours of Work and Overtime; Thomas, Mark P. (2009) "Regulating Flexibility."
36. See Appendix 2 for alternate recommendations if the provincial government decides to review exemptions and special rules on a sectoral basis.
37. Thomas, Mark P. et al, "Tracing Overtime Exemptions"; Vosko et al, "How Far Does the Employment Standards Act Extend?"
38. In this context, low-wage employees refers to those earning the general minimum wage or less.
39. Vosko et al, "How Far Does the Employment Standards Act Extend?"
40. Statistics Canada (2014) *Labour Force Survey*.
41. The salary threshold should be set as a reasonably high percentile of the annual earnings 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. The approach must also take into consideration the time period allowed for averaging wages/salaries to determine whether they meet the threshold. Here, the simplest option is to calculate whether an employer has met the wage/salary threshold by the week, meaning that in any given week someone who does not meet the wage/salary threshold but works overtime must be paid for the overtime at overtime rates.
42. Archives of Ontario (No Date/nd) Record Group 7-12, File RG 7-12-0-4373.3, *Employment Standards Coverage in Agriculture*.
43. These criteria build on the Ministry of Labour's internal policy on Special Industry Rules. For more information see Mitchell and Murray (2016), "Changing Workplaces Review: Special Advisors Interim Report," p. 157.

44. The ILO defines decent work as jobs that provide income and employment security, equity, and human dignity. See International Labour Organization (ILO) (2002) "Towards a Policy Framework for Decent Work." *International Labour Review* 141(1-2), 161.
45. In order for an employee to access the complaints system under the ESA, s/he must file a complaint with the Ministry of Labour. This process entails filling out a form that details the alleged violation(s), collecting supporting documents when possible, and submitting the material online or by mail. Once submitted, a claims processor verifies that the necessary information is provided and refers the complaint to a manager for a decision if it appears that the complaint does not fall under the jurisdiction of the ESA. Complaints, which may contain many claims, which fall under ESA jurisdiction are then forwarded to an ESO who determines if there are grounds for an investigation. An ESO can investigate a complaint based on written materials, by phone, by visiting the employer's premises, or by calling a meeting between the parties. On the basis of this investigation, the ESO assesses whether or not the complaint is substantiated in whole or in part and, if applicable, the amount of money owed to the complainant. An ESO can also assess entitlements that go beyond what was claimed in the original complaint.
46. Weil, David (2010) "Improving Workplace Conditions through Strategic Enforcement," p. 84.
47. This analysis uses the government fiscal year, which runs from April 1st to March 31st.
48. Vosko et al, "Employment Standards Enforcement," p. 91.
49. Office of the Provincial Auditor of Ontario (2004) Annual Report. Online: <http://www.auditor.on.ca/en/content/annualreports/arreports/en04/30gen04.pdf>.
50. There are several formal grounds for exemption from this requirement, such as if a complainant is a young worker, a live-in caregiver, or fears retaliation.
51. Vosko et al, "Employment Standards Enforcement," p. 23.
52. Grundy, John, Andrea M. Noack, Leah F. Vosko, Rebecca Casey and Rebecca Hii (2017) "The Enforcement of Ontario's Employment Standards Act." *Canadian Public Policy*.
53. Vosko et al, "Employment Standards Enforcement," p. 20.
54. Ibid.
55. Noack, Andrea M. and Leah F. Vosko (2011) "Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context." Online: <http://www.lco-cdo.org/wp-content/uploads/2012/01/vulnerable-workers-call-for-papers-noack-vosko.pdf>.
56. Figure adapted from Grundy et al, "The Enforcement of Ontario's Employment Standards Act," p. 13.
57. 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.
58. Grundy et al, "The Enforcement of Ontario's Employment Standards Act"; Vosko et al, "Employment Standards Enforcement," p. 91. See also Leah F. Vosko, John Grundy, Eric Tucker, Mark Thomas, Andrea M. Noack, Mary Gellatly, Rebecca Casey and Jennifer Mussell (forthcoming) "The Compliance Model of Employment Standards Enforcement: An Evidence-based Assessment of its Efficacy in Instances of Wage Theft." *Industrial Relations Journal*.
59. Grundy et al, "The Enforcement of Ontario's Employment Standards Act," p. 12.
60. Vosko et al, "Employment Standards Enforcement," p. 92.
61. The Government of Saskatchewan allows the employee or a third party to submit a written complaint against an employer. The Province's Compliance and Review Unit then investigates these complaints. 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. However, employees seeking wage recovery must file a formal complaint personally.

62. While confidential complaints are preferable to the status quo, they represent a weak alternative to anonymity. While confidentiality may allay some employees' concerns, and should be assured within the parameters disclosure requires, without anonymity, employees will likely still be reluctant to report. Notably, it has been the recent practice of the U.S Department of Labor's Wage and Hour division to initially maintain the confidentiality of complainants in workplace inspections prompted by a complaint. The Ministry of Labour should adopt a similar practice, although arguably alongside a suite of other complementary measures addressed above and below.
63. Fine, Janice and Jennifer Gordon (2010) "Strengthening Labor Standards Enforcement through Partnerships with Workers Organizations." *Politics and Society* 38(4): 552-585.
64. 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.
65. Mitchell and Murray (2016), "Changing Workplaces Review: Special Advisors Interim Report," p. 277.
66. 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. See Expert Advisory Panel on Occupational Health and Safety: Report and Recommendations to the Ministry of Labour. (2010) Toronto: Ministry of Labour, Online: [http://www.labour.gov.on.ca/english/hs/pdf/eap\\_report.pdf](http://www.labour.gov.on.ca/english/hs/pdf/eap_report.pdf) [last accessed: September 28, 2011].
67. 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.
68. This refers to Orders to Pay Wages (s. 103), Directors' Orders to Pay Wages (s. 81), and Related Employer Orders to Pay Wages (s. 103).
69. Facilitated and Non-facilitated Settlements are established in s. 101.1 and 112 of the ESA respectively.
70. Casey, Rebecca, John Grundy, Andrea M. Noack and Leah F. Vosko (2017) "Recovering Unpaid Wages: Mapping a Weak Link in the Enforcement of Employment Standards in Ontario, Canada" Paper delivered at the annual meeting of the Canadian Political Science Association, June 1st 2017, Ryerson University, p 4.
71. Vosko, Noack and Tucker (2016) "Employment Standards Enforcement," p. 121.
72. Tucker, Eric, Leah F. Vosko, John Grundy, Mark P. Thomas and Rebecca Casey (2014) "Carrying Little Sticks: Is there a 'Deterrence Gap' in Employment Standards Enforcement?" Paper presented at the panel "Closing the Enforcement Gap: Improving Employment Standards Enforcement for People in Precarious Jobs," hosted by the Global Labour Research Center, York University, March 19 2014.
73. ESA, s. 112.
74. Ibid s.101.1.
75. Vosko et al, "Employment Standards Enforcement," p. 36.
76. Grundy et al, "The Enforcement of Ontario's Employment Standards Act," p. 20. Note that facilitated settlements from 2009/10 reflect a pilot project in this area prior to the implementation of the Open for Business Act.
77. 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)
78. Ibid.
79. Vosko et al, "Employment Standards Enforcement," p. 35.
80. Grundy et al, "The Enforcement of Ontario's Employment Standards Act." p. 21.

81. Casey, Rebecca, John Grundy, Leah F. Vosko, Andrea M. Noack and Eric Tucker (2017) "Recovering Employees' Wages?"
82. Thomas, Mark (2003) *Regulating Flexibility: The Ontario Employment Standards Act and The Politics Of Flexible Production*. Doctoral Thesis. Graduate Programme in Sociology, York University.
83. 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.
84. National Employment Law Project (2011) *Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft*. Online: <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf>, p. 113.
85. Ibid.
86. The power to issue a Notice of Contravention (NOC) was first introduced in 2000 and the power to issue tickets in 2004. The power to issue NOCs is currently found in s. 113 of the ESA, which provides: 113. (1) If an employment standards officer believes that a person has contravened a provision of this Act, the officer may issue a notice to the person setting out the officer's belief and the prescribed penalty for that contravention. A person who is served with a NOC is deemed to be guilty and liable to pay the penalty unless she applies to the Ontario Labour Relations Board for a review within 30 days. If an application for review is filed, the Board holds an adjudicative hearing and the onus is on the Director to prove the contravention on a balance of probabilities. If the order is upheld, the Board has the power to reduce the penalty (ESA, s. 122).
87. R.R.O. 1990, Reg. 950. Tickets can be issued pursuant to the Provincial Offences Act (R.S.O. 2000, c. P. 33), (POA), Part I. Regulation 950 made pursuant to the POA determines which violations of provincial statutes are ticketable. In 2004 the regulation was amended to create ticketable offences under the ESA (O.Reg. 162/04). As a result, ESOs are empowered to issue tickets when they detect violations of the specified provisions.
88. Tucker et al, "Carrying Little Sticks."
89. 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; Vosko, Leah F., John Grundy and Mark P. Thomas (2016) "Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common-law Jurisdictions." *Economic and Industrial Democracy* 37(2): 373-398.
90. Weil, David (2014) *The Fissured Workplace*. See also Lewchuk, Wayne et al (2015) "The Precarity Penalty." Online: <http://www.unitedwaytyr.com/document.doc?id=307>.
91. Vosko et al, "Employment Standards Enforcement," p. 93.
92. Tucker, Eric, Leah F. Vosko, John Grundy, Mark Thomas, Rebecca Casey (2017) "Is There a Deterrence Gap in Employment Standards Enforcement in Ontario?" Paper presented at University of Melbourne Law School, 22 March 2017.
93. Ontario Regulation 289/01.
94. Vosko et al, "Employment Standards Enforcement," p. 52.
95. Ibid.
96. Tucker et al, "Is There a Deterrence Gap in Employment Standards Enforcement."
97. Ibid.
98. 29 U.S. Code, Chapter 9, S. 260.
99. New York State (n.d.) "Wage Theft Prevention Act." Online: <https://www.labor.ny.gov/formsdocs/wp/p715.pdf>
100. NELP, "Winning Wage Justice," p. 20.



101. Code of the District of Columbia S. 32-1012. Online: <https://beta.code.dccouncil.us/dc/council/code/sections/32-1012.html>
102. Weil, David (2014). *The Fissured Workplace*.
103. Law Commission of Ontario (2012) "Vulnerable Workers and Precarious Work," p. 63.
104. Vosko et al, "Employment Standards Enforcement," p. 41.
105. Vosko et al, "Employment Standards Enforcement," p. 42.
106. Vosko et al, "Employment Standards Enforcement," p. 107.
107. Mitchell, C Michael and John C. Murray (2017) "The Changing Workplaces Review - Final Report," p. 75-83. Online: [https://files.ontario.ca/books/mol\\_changing\\_workplace\\_report\\_eng\\_2\\_0.pdf](https://files.ontario.ca/books/mol_changing_workplace_report_eng_2_0.pdf)
108. Mitchell and Murray (2017) "The Changing Workplaces Review - Final Report," p. 102-104.
109. Employers typically receive a notice of inspection from an ESO in advance of a workplace visit. This advance notice is provided for two reasons, the latter of which arguably undermines the proactive intent of inspections: it streamlines the work of ESOs, and it gives employers an opportunity to prepare for the inspection and select which employees will be present and available for an ESO to speak with on the day of an inspection.
110. Weil, David (2010) "Improving Workplace Conditions through Strategic Enforcement."
111. Weil, David (2008) "A Strategic Approach to Labour Inspection." *International Labour Review* 147(4), 349-375.