

Submission to the Ministry of Labour

# Phase 1 Review of ESA and LRA Exemptions

By the Workers' Action Centre & Parkdale Community Legal Services  
December 7, 2017

**Workers' Action  
Centre**

720 Spadina Avenue,  
Suite 223  
Toronto ON M5S 2T9  
Tel 416-531-0778

[workersactioncentre.org](http://workersactioncentre.org)

**Parkdale Community  
Legal Services**

1266 Queen Street West  
Toronto ON M6K 1L3  
Tel 416-531-2411 ext 246  
gellatlm@lao.on.ca

## Table of Contents

<b>Introduction</b> .....	2
Recommendations.....	6
<b>Domestic Workers Exclusion from the LRA</b> .....	8
Recommendations.....	13
<b>Domestic Workers Exemption from the ESA</b> .....	15
Recommendations.....	16
<b>Homemakers Exemption from the ESA</b> .....	17
Recommendations.....	18
<b>Residential Care Worker Exemption from the ESA</b> .....	19
Recommendations.....	21
<b>Residential Building Superintendents, Janitors &amp; Caretakers Exemption from the ESA</b> .....	22
Recommendations.....	24
<b>Information Technology Professionals Exemption from the ESA</b> .....	25
Recommendations.....	26
<b>Managers and Supervisors Exemption from the ESA</b> .....	27
Recommendations.....	29

# Introduction

---

The government announced on May 30, 2017 that it would conduct a review of Employment Standards Act (ESA) exemptions and special rules. Phase 1 of the review was launched October 18, 2017, to review eight occupations with exemptions and special rules under the ESA and Labour Relations Act (LRA). The government has rightly followed the Changing Workplaces Review (CWR) recommendation to conduct a review of exemptions expeditiously.<sup>1</sup>

Workers and unions have long called for removal of exemptions and special rules because the ESA is supposed to provide a floor of minimum standards that are applicable to all. Exemptions are inconsistent with this objective. Moreover, exemptions disproportionately affect women, part time, temporary and young workers, and those who are more likely to be racialized workers. Limits on access to employment standards are a feature of precarious employment and compound existing labour market disadvantage.

This submission will address the principles, criteria and process for review of exemptions and special rules and will provide recommendations on particular exemptions under review.

## *Exemptions*

The Employment Standards Act (ESA) is supposed to provide basic minimum terms and conditions of work for all workers to establish a floor of socially acceptable employment standards. Over the years, however, governments have agreed to employers' requests for special treatment for certain industries, occupations, or sectors. The ESA now contains more than 85 complex exemptions and special rules that permit some employers or industries to not comply with minimum standards of minimum wage, vacation pay, public holiday pay, overtime and hours of work rules, severance pay and other provisions. Exemptions also open the door for employer misclassification of employees to avoid compliance with employment standards. Research demonstrates that exemptions to employment standards protection are a feature of precarious employment and one that magnifies enforcement problems.<sup>2</sup>

Currently, only 24 percent of Ontario employees are fully covered under the ESA. Part time, temporary, low wage, women and young workers are much less likely to be fully covered by the ESA. The cumulative cost of ESA exemptions and special rules to Ontario workers is

---

<sup>1</sup> C. Michael Mitchell and John C. Murray (2017) An Agenda for Workplace Rights. Final Report, Changing Workplaces Review. Ministry of Labour. 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) p 152

<sup>2</sup> Closing the Employment Standards Enforcement Gap, An Agenda for Change. June 2017. Online: <http://closeesgap.ca/> p 14

approximately \$2 billion per year.<sup>3</sup> In addition to the economic costs to workers and the economy, there are social costs for families, communities, and the health care system, due to lost wages and excessive overtime and hours of work.

### *Principles for Review*

The **Final Report** of the Changing Workplaces Review concluded that “exemptions have been granted too easily, too broadly, with little or no rationale, little transparency and too little consultation with employees.”<sup>4</sup> The effect of such an ad hoc process without guiding principles and criteria is that too many workers, particularly those made vulnerable in precarious work, are denied protections under the ESA that are essential for fair and decent treatment.

The review of ESA exemptions must be guided by principles consistent with the ESA. As remedial legislation, the ESA is intended to provide basic minimum terms and conditions of employment that are applicable to all. The ESA recognizes the power imbalance in the employer-employee relationship and establishes a floor of minimum standards that must be met. The ESA is intended to protect workers against exploitation and substandard working conditions and to protect employers against unfair competition due to lower standards.

Exemptions are contrary to the principles of universality, minimum standards and fairness and should be removed. Rather than a wholesale elimination of all exemptions, the government has decided to review each exemption separately to determine if it should be repealed, maintained or amended. The Special Advisor’s Interim Report from the Changing Workplaces Review concludes that exemptions normally reduce employment rights. “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>5</sup> As a matter of principle, therefore, exemptions should be eliminated unless they are justifiable under principled criteria.

### *Guiding Principles*

The Ministry has rightly outlined the following principles to guide the review process.

- All employees and employers, with limited exceptions, should be covered by the ESA.
- A strong rationale is needed to exempt employees from ESA protections because doing so results in particular groups of workers no longer having protections that are minimum standards.

---

<sup>3</sup> Vosko, Leah F., Andrea M. Noack and Mark P. Thomas (2016) “How Far Does the Employment Standards Act 2000 Extend, and What are the Gaps in Coverage? An Empirical Analysis of Archival and Statistical Data.” Online: <https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Vosko%20Noack%20Thomas-5-%20ESA%20Exemptions.pdf>

<sup>4</sup> C. Michael Mitchell and John C. Murray (2017) An Agenda for Workplace Rights. Final Report, Changing Workplaces Review. Ministry of Labour. 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) p 152

<sup>5</sup> C. Michael Mitchell and John C. Murray (2017) p 155

- There are situations where a standard cannot be applied to a particular industry or occupation for reasons that warrant an exemption, including optimal performance of the labour market, and economy, and contribute to social goals.
- A rigorous process based on criteria that must be met must be used to determine whether a reduction in fundamental employment protections is justified. Exemptions may be granted only in exceptional circumstances.

We support the principles that the government has set out to guide this review. Any exemption or special rule must be measured against these principles.

We recommend that one more principle be adopted by the government. Research has demonstrated that exemptions and special rules lower the floor of minimum standards for certain groups of workers that are more likely to be in precarious work and disadvantaged in the labour market.<sup>6</sup> As such, an additional guiding principle of the review should be that exemptions should not compound precarious work and existing labour market disadvantage.

### *Governing Conditions and Criteria*

The government has developed a set of conditions and criteria that will be used to review whether an exemption is eliminated, maintained, modified or added.

The Ministry of Labour's conditions and criteria effectively apply a test that must be met for an exemption to be maintained or added. The first part of the test requires that at least one of two conditions be met.

Condition A requires that the application of a standard would preclude a type of work from being done at all or would significantly alter its output. Additionally, the "nature" of the work relates to the characteristics of the work itself, not the quantity of work produced.

Condition B requires that employers in an industry do not control working conditions that are relevant to the standard.

We recommend that this first condition of the test must be met in its entirety; not either condition A or B. Enabling an exemption to pass the first step solely on the basis of Condition B is unjustifiable. Allowing employers to pass this step by demonstrating that they do not control working conditions is exceptionally vague, without jurisprudence, and creates a huge loophole. Rather, condition B further defines condition A by establishing that the employer does not control the conditions of work in which the application of a standard would preclude work from being done.

---

<sup>6</sup> Vosko, Noack and Thomas (2016)

Once Core Condition A and/or B are met, the Ministry proposes that a supplemental condition must also be met before further factors are considered to maintain or add an exemption. The supplemental condition states:

“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.”

The employers' economic cost of complying with the standard(s) should not be adequate for the consideration of “economic contribution”. There must be a broader consideration of economic cost. Consideration must be given to the economic costs borne by workers whose employers are exempted from compliance with minimum standards. Research conducted for the Changing Workplaces Review estimates that the “cumulative costs of ESA exemptions and special rules for minimum wage, overtime pay, holiday pay, and vacation pay are associated with a potential loss of approximately \$45 million to Ontario employees *each week*.”<sup>7</sup> That is over \$2 billion per year of lost earnings for workers and lost spending in local communities. In addition to the economic costs to individual employees and the economy, there are social costs for families, communities, and the health care system, due to lost income, excessive overtime, and long hours of work. The costs borne by employees and their communities need to be weighed against whatever economic contribution is being credited to employers who are seeking exemptions.

After the core condition and supplementary condition have been met, then consideration must be given to two other factors before an exemption is granted or maintained. The first factor considers whether 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. The second factor considers whether both employees and employers in the industry agree that a special rule or exemption is desirable.

While we discuss the process for review in further detail below, we believe that employee input should not just be a factor for consideration, but must be a requirement for exemptions from minimum standards to be justified. Accordingly, there must be specific procedural steps taken to determine whether there is “employer and employee agreement”. The government should provide information about what constitutes such agreement and how they will determine who is considered to represent employees in such agreement. Further, the government should make public both the nature of such an agreement and the parties to it (while protecting individual workers' confidentiality). As addressed below, the process for review must be transparent.

---

<sup>7</sup> Vosko, Leah F., Andrea M. Noack and Mark P. Thomas (2016) “How Far Does the Employment Standards Act 2000 Extend, and What Are the Gaps In Coverage? An Empirical Analysis of Archival and Statistical Data.”

Online: <https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Vosko%20Noack%20Thomas-5-%20ESA%20Exemptions.pdf>, 30.

### *Process for Exemptions Review*

While a press release was issued by the Ministry of Labour announcing Phase I of the Exemptions Review, there has been little other publicity promoting participation in the review process. Workers affected by the occupational exemptions were given 6 weeks to make written submissions (with an additional 4 weeks extension in the deadline). There is no indication of what further steps are available to workers wishing to participate in the consultation and review following submissions.

There is little chance that domestic workers, residential superintendents, janitors and caretakers, residential care workers, homeworkers, IT workers, or supervisors who are impacted by exemptions under review will even know about the review much less participate in it. This process does not meet the principles of the Ministry's Engagement Framework, a framework that calls for authentic engagement, inclusivity and balance.<sup>8</sup>

There must be procedural fairness in the review of exemptions that actively solicits the awareness and involvement of workers whose statutory rights are reduced or limited through exemptions and special rules. This means reaching out to unions, community organizations working with non-unionized workers affected by exemptions, workers in the sector and the public to actively solicit feedback and information from affected employees.

There must be substantive fairness that addresses the power imbalances between employers and employees. This requires an unbiased decision-maker and that people affected by the decision are heard. Further, employers may bring to the review substantial financial information concerning the costs of compliance with a standard. The government should ensure that the costs to workers and local economies from employers' non-compliance with a standard is also considered. When workers have not been adequately consulted, additional steps must be taken to actively engage workers in the process. Finally, we need to know what the next steps are in the review and what information will be made public.

## **Recommendations**

1) Add the following principle to the review:

The employees to whom the exemption or special rule would apply are not historically disadvantaged or precariously situated in the labour market. That is, such exemption should not compound existing labour market disadvantage.

2) Conditions and Criteria: Both Core Condition A and Core Condition B must be met as a first step in the test for exemptions.

---

<sup>8</sup> <https://www.labour.gov.on.ca/english/about/pubs/fw/index.php>

3) Ensure substantive fairness in the review process for exemptions and special rules. This must include addressing the power imbalances between employers and employees and soliciting employee feedback.



# Review of the exclusion of Domestic Workers from the *Labour Relations Act* (LRA)

---

Domestic workers<sup>9</sup> do necessary work without which other work in Ontario's economy would not be possible. They feed, care for, and serve this province daily. But domestic workers in Ontario are denied the most fundamental labour rights – the constitutionally protected right to unionize, to bargain collectively and to exercise the right to strike (or have access to an effective dispute resolution process that is a substitute for the right to strike).

The government is reviewing the LRA exclusion of domestic workers employed in a private home. This review is in response to the recommendations of the Changing Workplaces Review. For decades migrant caregivers have organized to demand the right to unionize.<sup>10</sup> We support removing the exclusion of domestic workers from the LRA and introducing reforms that will ensure that domestic workers' right to unionize is accessible in practice.

## *Context of migrant caregiving and domestic workers*

The persistent failure of governments to develop accessible and affordable public childcare, elder care, and care for persons with disabilities has sustained an enduring reality in which significant socially necessary caregiving labour is performed in private homes.

---

<sup>9</sup> "Domestic workers" is a term used to refer to domestic and caregiving work done by a worker employed in a private home. The International Labour Organization uses the term 'domestic workers' as do many other jurisdictions. In Canada, the Caregivers Program had previous iterations under the name of "domestic workers". Domestic and caregiver are often used inter-changeably. The Caregivers' Action Centre chooses to refer to the job as that of a 'caregiver' to better reflect the nature of the work and Temporary Foreign Worker Program (TFWP). We use domestic worker and caregiver interchangeably in this submission. We agree with the ESA definition of domestic workers as **a person who is employed by a householder to perform services in the household or to provide care, supervision or personal assistance to children, senior or disabled members of the household, but does not include a sitter who provides care, supervision or personal assistance to children on an occasional, short-term basis.**

<sup>10</sup> See Ontario District Council of the ILGWU and Intercede, *Meeting the Needs to Vulnerable Workers: Proposals for Improved Employment Legislation and Access to Collective Bargaining for Domestic Workers and Industrial Homeworkers* (ILGWU/INTERCEDE, February 1993); Migrant Workers Alliance for Change & Caregivers' Action Centre, *Stronger Together: Delivering on the Constitutionally Protected Right to Unionize for Migrant Workers*. Bill 148 Submission on Broader Based Bargaining, July 21, 2017. Online: <http://www.migrantworkersalliance.org/wp-content/uploads/2017/07/MWAC-and-CAC-Bill-148-Broader-Based-Bargaining-Submissions-21-July-2017.pdf>; and Caregivers' Action Centre, Submission to the Changing Workplaces Review Consultation, September 18, 2015. Online: <http://www.migrantworkersalliance.org/wp-content/uploads/2015/11/CAC-CRW-submissions.pdf>

Changes in care policy and public funding have shifted significant caregiving labour from public healthcare facilities into the private home, increasing the numbers of workers in this precarious sector. At the same time, care work is becoming more acute. As the Auditor General noted, the acuity of care has risen as caregivers are increasingly serving “a patient population with much more chronic and complex health issues.”<sup>11</sup>

Transnational labour migration policies<sup>12</sup> bring thousands of migrant caregivers into the province each year with precarious temporary immigration status. These migrant workers, almost exclusively racialized women from the global south, form a substantial portion of home-based caregivers and are the workers who face the most precarious and exploitative working conditions. For these domestic workers, the baseline precariousness that confronts all workers in the sector is exacerbated by the precariousness that is constructed through the transnational recruitment process and rules of the Temporary Foreign Worker Program (TFWP).<sup>13</sup> At the same time, the TFWP rules structure the work of domestic workers as highly precarious and exploitable whether they are working as caregivers through the program or not.

### *Conditions of work*

Tied work permits restrict migrant caregivers to a specific employer. Recruitment agencies charge migrant caregivers thousands of dollars in illegal fees (typically up to two years' wages or more in their home currency) to secure domestic jobs in Ontario. These practices create extremely exploitative work conditions in which migrant caregivers may be “released on arrival” and forced into undocumented status; work under conditions of debt bondage; work excess unpaid hours with little time off; perform duties outside their contracts; and/or are subject to sexual and racial harassment.<sup>14</sup> Demanding fair treatment and contract compliance typically results in termination.

The live-in employment arrangement gives employers substantial control over caregivers' food, space, sleep and social networks. This leaves many open to intimidation and reinforces the inequality of power between the employer and employee. There is often no clear boundary between being ‘on-duty’ and ‘off-duty’. Even for live-out workers, the long hours and isolation on the job can lead to similar effects. Despite the increased risk for

---

<sup>11</sup> Office of the Auditor General of Ontario, Special Report on Community Care Access Centres – Financial Operations and Service Delivery (September 2015) at p. 14.

<sup>12</sup> While migrant caregivers have entered Canada under the Live-in Caregiver Program and its predecessors since the 1950s, in the past decade the scope of work that they perform has expanded from childcare to encompass care of the elderly and persons with disabilities in private homes. Further policy changes in 2014, under the reconfigured Caregiver Program, now also permit healthcare facilities outside the private home to hire migrant caregivers to provide care to persons with high medical needs.

<sup>13</sup> See Fay Faraday, *Made in Canada: How the Law Constructs Migrant Worker Insecurity* (Metcalf Foundation, 2012); Fay Faraday, *Profiting from the Precarious: How recruitment practices exploit migrant workers* (Metcalf Foundation, 2014); and Fay Faraday, *Canada's Choice: Entrenched exploitation or decent work for Canada's migrant workers* (Metcalf Foundation, 2016).

<sup>14</sup> See Faraday, *Profiting from the Precarious*.

abuse, the traditional separation between the public and private sphere makes the Ministry of Labour unable to proactively enforce employment standards in private homes.

In a survey of 132 caregivers conducted by the Caregivers' Action Centre (CAC), 42 percent of caregivers reported working 11 hours a day or more. Of those working overtime, 74 percent did not get overtime pay. One in five workers did not even get one day off a week. Other problems cited by caregivers include: inadequate rest periods; poor or unhealthy accommodation; a lack of food or restrictions on the type of food they can eat in their employers' households; a lack of privacy; the inability to take sick leave; and, the inability to have a personal life. Further, many caregivers face a huge debt burden to recruitment agencies. Of those caregivers surveyed, 65 percent report paying fees to recruitment agencies for employment under the Live-in Caregiver Program in Ontario. Even after Ontario's prohibition of recruitment fees (*Employment Protection for Foreign Nationals Act*, 2010), two-thirds of caregivers arriving after the Act came into effect had paid recruitment fees averaging \$3,275.<sup>15</sup>

"They own our time". That is the view of many caregivers. As noted above, many caregivers work long days without pay for all hours worked. Living or working in an employer's house under a tied work permit leave workers with little power to refuse excessive hours of work. Often these excessive hours are not paid at overtime premium pay. In many cases, they are not paid at all.

Improving the rights of caregivers, as the *Fair Workplaces, Better Jobs Act* seeks to do, will do little if these rights are not enforced. But Ontario's current system relies on workers to enforce their individual rights once violations occur. This is especially the case for caregivers, as the Ministry of Labour does not do proactive enforcement in the employers' homes.

Under the federal Caregiver Program, workers are tied to their employer for a two year qualifying period before they can receive an open work permit and apply for citizenship in Canada. Due to these constraints caregivers are not able to enforce their rights while on the job. When a worker receives wages and working conditions that fall short of the terms set out in her employment contract or the ESA, it is the worker's participation in the Caregiver Program – and thus their access to future citizenship - that is put in jeopardy, not the employers'. With so much at stake, workers fear trying to enforce their employment standards rights before the two-year service requirement has been completed.

Given their isolation and vulnerability, the chronic employment standards violations in this industry, and current lack of enforcement in private homes, domestic workers need to be able to organize and work together to insure they have safe and decent working conditions. That is why it is crucial that they have the right to unionize.

---

<sup>15</sup> On file at Caregivers' Action Centre

### *Remove exclusion of domestic workers from the LRA*

The exclusion from the right to unionize limits what caregivers can do to assert their rights and it emboldens exploitative behaviour by employers. Domestic workers' exclusion also serves to reinforce the deeply racialized and gendered ideology of domestic work that devalues caregivers' labour as "not real work". Their labour is devalued because it is work that has always been done and continues to be done by women on an unpaid and unrecognized basis. Furthermore, domestic workers' exclusion from the LRA reinforces privileged cultural norms of family, service and class which marginalize the value of caregivers' labour *as employment*; which mask employers' power and responsibilities *as employers*;<sup>16</sup> and which obscure the fact that "the home" is in reality "a workplace".<sup>17</sup> This exclusion exacerbates the power imbalance between employers and domestic employees. It ultimately facilitates the isolation and marginalization which have enabled exploitative working conditions to flourish for decades.

The Supreme Court of Canada (SCC) has clearly ruled that the right to unionize, the right to bargain collectively and the right to strike are fundamental constitutionally protected rights. The SCC also recognized that the central purpose of freedom of association is to mitigate power imbalances in society. Clearly the domestic worker exclusion from the LRA must be repealed (s. 3(a)).

### *Meaningful access to unionization*<sup>18</sup>

Domestic workers do not just need the right to unionize; they also need effective access to collective bargaining. Yet the current LRA, even as amended by the *Fair Workplaces, Better Jobs Act*, is based on the 1940s *Wagner Act* model. Unless amended, the LRA is unable to respond to the changing labour market characterized by growing employment in small workplaces and non-standard work. For domestic workers, there is no practical way for collective bargaining to operate unless changes are made to other sections of the LRA as well.

The SCC has ruled that government has an obligation to take steps to ensure that those who are vulnerable have legislative support for effective and meaningful exercise of their rights to unionize and bargain collectively.<sup>19</sup> There was considerable discussion and submissions during the CWR on the need for broader based bargaining strategies. The Advisors considered many options for broader based bargaining in their Interim Report and made

---

<sup>16</sup> In public discourse, they are typically referred to as "the family" that is receiving the care rather than "the employer" that is hiring a worker to provide caregiving labour.

<sup>17</sup> See Claire Hobden, *Domestic workers organize – but can they bargain?* (ILO, February 2015) at p. 2

<sup>18</sup> The analysis and strategies for meaningful access to unionization are derived from the work of the Migrant Workers Alliance for Change and Caregivers' Action Centre and research by Fay Faraday, see *Profiting from the Precarious*.

<sup>19</sup> *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. at para. 20-22, 25-28, 40-48, 66-67; *BC Health Services*, *supra* at para. 34

recommendations for multiple location, single-employer enterprises and the operation of franchises as first steps to broaden the enterprise model of bargaining. The government chose not to take these steps. It is yet to be seen if the government will follow the CWR recommendations to continue the conversation on sectoral bargaining. We believe that the review of the LRA with respect to domestic workers provides such an opportunity.

The LRA definition of “bargaining unit” must be amended. As it currently stands, the LRA definition of “bargaining unit” requires the existence of more than one employee at a workplace. Most domestic workers are the only employee in a workplace. We recommend removing the requirement that a bargaining unit be more than one employee (s. 9(1)).

As caregivers are generally employed by an individual employer in the employers' homes, they cannot access the LRA's standard model of organizing. Caregivers need access to a sectoral platform for collective bargaining.

A broader based bargaining framework is needed that is responsive to migrant caregivers' reality and that will allow real access to effective freedom of association. Unlike many workers, migrant caregivers face two points of power imbalance. They face a power imbalance relative to their immediate employer. They also face a power imbalance relative to the recruiters who place them with their immediate employer and who may continue to exert ongoing pressure through the extraction of unlawful fees and other coercive behaviour. An effective broader based bargaining framework must give migrant caregivers a strong collective voice to counter both of those sources of workplace exploitation.

Migrant caregiving already operates under a labour migration framework that is, in effect, sectoral. While employers and recruiters have power in that sectoral system, workers do not. Establishing a broader based bargaining framework in this context is entirely feasible and is, in fact, necessary to rectify the profound power imbalance that exists.

The necessary elements of a broader based bargaining system would include:

- designation of the regions for bargaining (whether it is on a provincial basis or designated regions with the province);
- designation of an employer bargaining agent; and,
- recognition of workers' bargaining agents, including the ability of migrant workers' unions to operate union hiring halls.

This is a sector in which there is the structural capacity to organize on a broader basis for bargaining.

Currently, employers who wish to hire a migrant caregiver must apply for a Labour Market Impact Assessment (LMIA) authorizing them to hire a migrant worker. In order to receive an LMIA, an employer must prove that they are unable to hire or train a local worker (i.e. that there is a sectoral shortage of labour). Employers present workers with standard contracts

which are common throughout the sector and which provide the “prevailing wage rate” in the province.

In provinces such as Manitoba, Saskatchewan and Nova Scotia, employers must register with and be approved by the provincial employment standards branch before they can apply for an LMIA and hire a migrant worker. Those provinces also have statutory requirements for recruiters to be licensed and registered. As set out in *Make it Right*, Migrant Workers' Alliance for Change advocates for a robust system of provincial registration of employers of migrant workers and registration and licensing of recruiters.<sup>20</sup> That system is consistent with a sectoral bargaining framework.

In a system where employers must already apply for the authorization to hire migrant workers based on a sectoral labour shortage, and in which the global leading best practices require employers to be registered with the Ministry of Labour, requiring those employers to be part of a designated employer bargaining agency is not a difficult step.<sup>21</sup>

Meanwhile, migrant caregivers have been organizing through social and community networks for decades, in organizations like the Caregivers Action Centre to provide each other with support, advice and advocacy. They are simply being denied the right to unionize.

### ***Recommendations for Domestic Workers Unionization and Collective Bargaining:***

1. Repeal s. 3(a) of the *Labour Relations Act, 1995* so that domestic workers are not formally excluded from the right to unionize.
2. Remove the requirement that a bargaining unit be more than one employee (s. 9(1)).
3. Following active consultation with migrant caregivers, enact a model of broader based bargaining for domestic workers that includes:
  - a. designation of the region(s) for bargaining;
  - b. designation of an employer bargaining agent for the region(s); and

---

<sup>20</sup> MWAC, *Make it Right*; Response by Migrant Workers Alliance for Change to the Proposed *Fair Workplaces, Better Jobs Act* (Bill 148), July 7, 2017. See also, Faraday, *Profiting from the Precarious*.

<sup>21</sup> Broader based bargaining models for caregivers exist around the world and have taken a variety of approaches that have successfully designated or engaged employer collective entities. France, Italy, Belgium, Germany, Sweden, Switzerland, Argentina, Uruguay, and South Africa and the United States (i.e. California, Oregon) are just some jurisdictions that have adopted sectoral approaches to bargaining for caregivers. See for example, Claire Hobden, *Improving Working Conditions for Domestic Workers: Organizing, Coordinated Action and Bargaining* (ILO, 2015)

c. recognition of workers' bargaining agents for the region(s), including the ability of migrant workers' unions to operate union hiring halls.

# Review of the ESA exemption for Domestic Workers

---

Domestic workers are defined in the ESA regulation as “a person who is employed by a householder to perform services in the household or to provide care, supervision or personal assistance to children, senior or disabled members of the household, but does not include a sitter who provides care, supervision or personal assistance to children on an occasional, short-term basis.”

For decades, this work has been performed by an overwhelmingly female, racialized workforce that is poorly paid, highly precarious, and often faces exploitative working conditions that fail to provide minimum employment standards (see discussion under review of LRA exemption). Domestic workers include people with and without regularized immigration status and migrant workers employed through the TFWP.

Clearly domestic workers are employed in precarious work and the exemption compounds their labour market disadvantage. The exemption is not justifiable.

## *Core Conditions*

The special minimum wage rule for domestic workers does not meet condition A or B and should therefore be revoked.

The special rule enables employers to deem room and board as wages for the purposes of determining whether minimum wage has been paid. Further, the special rules set out the amount of room and board that can be deducted and the conditions that must be met for room and board to be deemed wages.

Deeming room and board to be wages is not required to ensure that caregiver work can be done. This out-dated special rule used to correspond to rules for the federal Live-in Caregiver (LIC) program that existed prior to November 30, 2014. Under the LIC, caregivers were required to live in an employer's home to be eligible for a work permit and a pathway to permanent residency.

Deeming room and board to be wages made payroll record keeping easier for employers. But for caregivers, the prevailing practice in this sector is that employers do not comply with the ESA requirement to provide wage statements. This creates confusion to employees



trying to figure out what are wages paid for hours worked and what are wages paid deemed as room and board.

The new Caregiver Program (CP) introduced on November 30, 2014 removed the live-in requirement for the CP. While employers and employees may both agree to a live-in arrangement, it is the policy of the TFWP that employers are **prohibited** from charging employees room and board.<sup>22</sup> Revoking the special rule for domestic/caregiver workers will bring the ESA in line with the federal government policy and practice over the past three years.

Many employers under the new CP have complied with the prohibition on charging live-in caregivers room and board without any impact on the work being done.

Even under the previous TFWP rules, we would argue that enabling room and board to be deemed wages was unjustifiable to Core Condition A or B. That is, room and board should be treated separately from wages paid.

### *Factors*

Domestic workers seek the removal of the special rule (factor 2). This out-dated rule that conflicts with the federal TFWP policy could be used by some employers to reduce workers' wages below minimum wage and must be revoked.

### *Recommendations*

Repeal the Domestic Worker exemption and special rules as set out in O. Reg. 285/01.

---

<sup>22</sup> Employers cannot require a caregiver to live in their home. However, if an employer and foreign caregiver decide that a live-in arrangement is the most suitable, for the needs of the person requiring care or to assist the TFW, there are certain criteria that must be met. Specifically, employers must ensure the foreign caregiver is **not charged room and board** for the accommodations, as per the policy, under the TFWP. <https://www.canada.ca/en/employment-social-development/services/foreign-workers/caregiver/requirements.html>

# Review of the ESA Exemption for Homemakers

---

The 1976 exemption for companies providing homemaker services are wide and sweeping. Employers only have to provide minimum wage for hours worked up to a maximum of 12 hours per day (regardless if more hours are worked). Homemakers are not entitled to daily and weekly hours of work limits, overtime, daily rest period, eating period, and time off between shifts or work weeks, among other standards. The rationale for such employer exemptions is that it is difficult for an employer to monitor an employee's hours of work. This exemption is totally unjustifiable and must be revoked.

There is no definition of "homemaking services" in the ESA. The Ministry of Labour Interpretation Manual draws from the *Homemakers and Nurses Service Act* (HNSA) for a definition.<sup>23</sup> Under Ministry of Labour policy, a "homemaker" means a person employed by an employer, other than a householder, to perform homemaking services for an individual in a private household.

Homemakers are most likely to be women and more likely to be racialized. Workers are isolated, often working alone in the client's home. Homemakers are, like temporary agency workers, employed through a triangular employment relationship. The employer and householder client determine fees, services to be provided, and conditions and timing of work to be done. Homeworkers have little control over hours of work and often bear the costs of client cancellations through lost wages. Despite the increased risk for abuse, the traditional separation between the public and private sphere makes the Ministry of Labour unable to proactively enforce employment standards in private homes. Clearly homeworkers are employed in precarious work and the exemption compounds their labour market disadvantage.

## *Core Conditions*

The core condition A of this review is not met by this exemption. The nature of private homemaking services in households is comparable to a multitude of industries in which employees work outside of the employer's establishment (e.g., mail and parcel delivery; photo copy repair, office cleaners and so on). Similarly, in proximate sectors that do not fall under this exemption, such as homecare services in which nurses and personal support

---

<sup>23</sup> This Act governs publically funded community health and social services in individual's homes. It prohibits companies from charging individuals a fee when individuals are receiving publically funded services provided through approved agencies.

workers travel to individual homes to deliver services funded by the government, the work can be done, and hours and overtime calculated without difficulty warranting an exemption.

Furthermore, the ESA regulation on Exemptions, Special Rules and Establishment of Minimum Wage, O.Reg. 285/01, already provides employers and employees with guidelines for determining when work is deemed to be performed for the purpose of calculating wages and overtime (s.6). The Homeworkers exemption only serves to complicate and undermines the system established in this regulation, making it even more difficult for workers classified as Homeworkers to know what wages they are owed.

Core Condition B is also not met by this exemption. The fact that the employer is not directly in the place of work does not prohibit employers from establishing record keeping procedures. Other similar home care services provided through publically funded community agencies are quite capable of determining hours of work.

### *Factors*

In addition to the Core Conditions not being met, Factor 1 is also not met. There are no clear boundaries for application of the exemption, leading to confusion and misclassification of employees as “homemakers”. A worker may perform homemaking or personal support services for an individual in his or her home that is approved for and funded by a local health integration unit and not fall under this exemption. That same worker could, through another employer, provide the same services yet be denied minimum wage and overtime under this exemption.

Parkdale Community Legal Services has represented domestic workers that are misclassified by their employer as a “homemaker” to avoid compliance with minimum standards under the ESA. In addition to misclassification, this exemption could incentivize household employers to shift employment of domestic workers to third party private agencies to avoid compliance with minimum standards.

### *Recommendation*

Repeal the Homemaker exemption and special rules as set out in O. Reg. 285/01.

# Review of the ESA Exemption for Residential Care Worker

---

Exemptions and special rules for “residential care workers” have been in ESA Regulation 285/01 since 1982. As the Ministry of Labour notes, this exemption was adopted during the initial period of deinstitutionalization of children and developmentally disabled adults from large institutions to community settings.

A residential care worker is defined as a person who is employed to supervise and care for children or developmentally disabled persons in a family-type residential dwelling or cottage. Employers of such employees under this regulation would be exempt from complying with hours of work and eating periods (daily and weekly limits on hours of work, mandatory rest periods and eating periods), overtime, and paying a worker for hours worked after 12 hours per day.

The Residential Care Worker exemptions and special rules are out-dated and should be revoked. Since the early 1980s, the Ministry of Community and Social Services has come to fund residential supports in the community for adults with developmental disabilities that range from supported independent living, host families in private households and group homes with staff from a service agency providing supports 24 hours a day, seven days a week. As of 2013/14, 76% of ministry funding for residential services went to group homes.<sup>24</sup> The Ministry requires that service agencies ensure that staffing is provided 24 hours a day, seven days a week and staff must receive training to work in group homes.<sup>25</sup> Work in facilities that require staff to be on-site must be deemed to be work and not unpaid labour.

The group home model has grown since the period of deinstitutionalization. Now a whole variety of community and social services are provided through group homes that serve not just children and adults with developmental disabilities: people with physical disabilities; children and youth in care; addictions recovery; survivors of domestic violence; children and adults with autism, and so on. These social services are provided by private and/or non-

---

<sup>24</sup> Auditor, “Residential Services for People with Development Disabilities”, Chapter 3, Section 3.10, <http://www.auditor.on.ca/en/content/annualreports/arreports/en14/310en14.pdf>

<sup>25</sup> A Guide to the Regulation on Quality Assurance Measures, Ministry of Community and Social Services, online: [http://www.mcsc.gov.on.ca/en/mcsc/publications/developmentalServices/guide\\_regulation\\_qualityassurance.aspx#measures\\_residential](http://www.mcsc.gov.on.ca/en/mcsc/publications/developmentalServices/guide_regulation_qualityassurance.aspx#measures_residential)

profit or community organizations. In some cases the government provides direct funding or income subsidies, in other cases group home residents pay with ODSP, and in other cases families pay direct fees (or a combination thereof).

### *Core Conditions*

The nature of the work in developmental disability group homes is no different than group homes for youth, people with autism, addictions or mental illness. The exemption for Residential Care Workers for children or developmentally disabled people in residential group homes does not meet the Core Conditions and must be revoked. The exemptions and special rules do not meet Core Conditions and are unjustifiable.

Similarly, employers clearly control working conditions in group homes in general, and in those for developmental disabilities in particular, or they would not be eligible for government funding. The Ministry of Community and Social Services has quality assurance measures requiring employer control of working conditions.

In terms of the Supplementary Condition, residential care for people with developmental disabilities clearly makes a social contribution. However, as the broader model of social services provided through group homes operating without the residential care exemption demonstrates, the exemption is not required for service delivery.

Residential care workers are more likely to be employed on a part-time and casual basis given the continuous operation of group homes. Such care work is most likely to be highly gendered and racialized. Residential care workers are employed in precarious work and the exemptions compounds their labour market disadvantage.

### *Factors*

This employee group is not readily identifiable. Community service workers employed in group homes may work in residential facilities with residents that are developmentally disabled, have autism, are physically disabled or have other mental health illnesses. There may be developmentally disabled adults or children under care in the same facility as persons with other disabilities or needs. Similarly, employers may have multiple group homes providing different services in each group home, e.g., physical disabilities, developmental disabilities, mental health etc. As such, the employer group is not easily identifiable.

Because the residential worker exemption is narrowly defined but easily open to misinterpretation, it creates ample opportunity for misclassification of employees in social and health programs delivered through residential group homes. From our work at WAC and PCLS, we have had cases in which this exemption has been used by employers to bypass the ESA. Companies misclassify their employees as residential care workers despite their services being outside the scope of the exemption. We have worked with people employed in group homes for youth, addictions and mental health services that have been

misclassified as Residential Care Workers. The lack of clarity makes workers more vulnerable to employer misclassification.

We have also worked with community service workers in group homes who are themselves undocumented or who observe employers seeking undocumented workers to work unpaid overnight shifts. Lack of regularized immigration status makes such workers more vulnerable to such violations of the ESA.

Residential Care Workers do very similar work to domestic workers and personal support workers. Residential Care Workers should also be paid for all hours worked, receive meal and rest breaks, and overtime pay.

***Recommendation:***

Repeal the Residential Care Worker exemption and special rules as set out in O. Reg. 285/01.

# Review of the ESA Exemption for Residential Building Superintendents, Janitors and Caretakers

---

Exemptions to hours of work, overtime pay, minimum wage and public holidays under ESA Reg 285/01 apply to residential building superintendents, janitors and caretakers that live in the building. This exemption was introduced in 1969 when many owners of a residential building hired superintendents to care for their property. This model of residential building management is out-dated and this exemption should be repealed.

The model of a superintendent living in a building for an independent building owner is almost obsolete; applying largely to smaller independently-owned residential buildings. The residential building sector has been largely taken over by investors who purchase buildings and contract property management corporations to run the buildings.

Residential property management companies have central offices and employ a wide array of staff that do cleaning, maintenance, and other duties once done by superintendents. Rather than knocking on the superintendent's apartment door when problems arise, tenants phone the central property management and/or submit a work order for apartment maintenance. The property management company then delegates staff or sub-contractors to do the work.

Property management staff may live in one of the buildings that they are responsible for. Working as superintendents, janitors or caretakers, these low wage employees live in fear of losing their job. Both their apartment and their job are in jeopardy if they are fired. These workers may have their homes turned into rental offices, when tenants or prospective tenants bring complaints or negotiate leases.

In the Parkdale community, most of these live-in employees of property managers are from historically disadvantaged communities. Residential building workers are employed in precarious work and the exemptions compounds their labour market disadvantage.

### *Core Conditions*

Property management services for residential buildings do not require that employees be available 24/7 without hours of work and minimum wage protections. The *Residential Tenancies Act* only requires that the owner or property manager respond to legitimate requests within a reasonable time. As the Advisors for the Changing Workplaces Review point out, this does not require 24-hour site service

Even under the out-dated model of property management with a traditional in-residence 'superintendent', the exemption does not meet the Core Condition A. The rationale that the work takes place away from the employer's supervision does not justify the expansive exemptions to minimum standards. There are many types of work that are done without direct employer supervision that are possible without exemptions to standards (e.g., route salespeople, parking lot attendants, and mail and parcel delivery). There are many forms of hours of work record keeping that could be adopted (log hours on computer, cell phone logs etc).

Commercial building janitors and caretakers are not covered by the exemption. Yet the work that is needed to be done by employees to take care of building tenants and emergencies takes place without employer exemptions from hours of work, overtime pay, minimum wage and public holidays. These buildings may or may not have 24 hour operations. Building owners and property management companies are able to deal with emergencies, taking care of tenants and the property without ESA exemptions. Many of these employers hire security staff for evenings and weekends and pay these employees in compliance with the ESA.

Core Condition B is not met in consideration of the nature of work in the industry. Property management companies control work schedules and delegation of work to be done when tenants submit work orders. New on-call provisions will benefit residential property employees when they are on-call to deal with any emergencies that may arise.

Core conditions A and B are not met for this exemption and it should be repealed.

### *Factors*

At WAC and PCLS we work with people who are exempted from the ESA because of their designation as residential building superintendents, janitors and caretakers. They come with experiences of working long hours, being on call 24-7 at low pay with incredible fear that their jobs and homes are at risk if they seek better working conditions. For live-in residential building employees, rent may often be deemed by employers to be wages. Employees experience considerable difficulty determining what wages they are being paid when a portion is deemed to be paid as rent reduction. These workers have said repeatedly that the exemptions are unfair and lead to their exploitation.



***Recommendation:***

Repeal the Residential Building Superintendents, Janitors and Caretakers' exemptions and special rules as set out in O. Reg. 285/01.

# Review of the ESA Exemptions for Information Technology Professionals

---

“Information technology professional” (IT professionals) is defined under ESA Regulation 285/01 as “an employee who is primarily engaged in the investigation, analysis, design, development, implementation, operation or management of information systems based on computer and related technologies through the objective application of specialized knowledge and professional judgment.” Employers of designated IT employees are exempt from compliance with all hours of work rules and overtime pay rules for such employees.

The IT industry was successful in obtaining this wide sweeping amendment after the 1999 “Y2K Crisis”. The software industry-fed hysteria of the late 90s was based on the fear that computer systems around the world would potentially crash as the year rolled over from 1999 to 2000. Hundreds of billions of dollars were spent on Y2K-compliant software as IT professionals updated computer systems. The IT industry used this “crisis” to gain control over IT workers’ hours of work and escape overtime pay obligations.

As the Y2K crisis faded from memory, IT workers have continued to face substandard hours of work and overtime protections relative to comparable jobs with similar skill requirements.

## *Core Conditions*

The nature of the work that IT professionals perform is not dependant on the industry’s exemption from overtime and hours of work standards. The massive growth of the IT industry is not due to employer control over work hours and unpaid overtime. From 2001 to 2011, there was a 29% increase in employment for information systems analysts and consultants and a 55% growth for systems managers, compared to a 14% increase in employment levels for occupations overall.<sup>26</sup> This growth demonstrates that the work of IT professionals would continue with the exemption removed.

At WAC we have worked with workers who would be deemed IT professionals that work excessive hours of work. In some areas of the industry, particularly start-ups, working 70 to 80 hours a week can be norm to meet deadlines. In a youth oriented industry, the exemptions have enabled a growth of particularly unhealthy, unsocial, excessive hours of work culture in some workplaces.

---

<sup>26</sup> Government of Ontario “Ontario Job Futures” Online: <http://www.tcu.gov.on.ca/eng/labourmarket/ojf>

Employers do control the work conditions of IT professionals. As the bubble burst on Y2K fears, information technologies have been proven to be as controllable as other areas of the economy that are not exempted from hours of work and overtime.

The core conditions for IT professional exemptions cannot be met and the exemption should be repealed.

### *Factors*

The IT professionals' exemption also suffers from being confusing and cannot be readily identifiable. Long ago, IT jobs may have been clustered into specialized firms. Now these jobs are embedded in a wide range of firms and across many industries making it almost impossible to identify work that the exemption would apply to.

Further, the definition of IT professionals is prone to be used to misclassify the ever-expanding job roles in the industry. For example at WAC, we have worked with workers who are misclassified as IT professionals when they are not. The gaming sector is one example where we have seen workers who are animators or reviewers who are misclassified as IT professionals and work excessive hours of work without pay or overtime.

### **Recommendation**

Repeal the IT professional exemption as set out in O. Reg. 285/01.

# Review of the ESA Exemptions for Managers and Supervisors

---

Employees who are classified as managerial or supervisory are exempt from overtime pay and hours of work rules (maximum daily and weekly hours of work, daily and weekly rest periods, and time off between shifts). Under the exemption, the term “managers and supervisors” is not defined. Instead the overtime pay and hours of work exemptions apply to a “person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis”.

We believe that the definition of managerial and supervisory exclusion has become overly broad, giving rise to misclassification and permission for employers to require unlimited hours and overtime. It should be limited to true managers (and not to those who merely supervise the work of others), and should be subject to an earnings threshold.

## *Core Conditions*

There may be some rationale for an exemption for managers, but it should be extremely limited to those managers that have the power in their position to control their own time and work, and the hours and workload of other employees. That is, an employee who is part of the core management of the enterprise. As stated in the CWR Final Report, the “issue is which employees should not have the protection of the Act because they are genuinely aligned with management to such an extent that they do not need protection or warrant protection, as they are expected as part of their higher remuneration to work longer and harder, as part of the arrangement wherein management is paid more generously.”<sup>27</sup>

As the Ministry of Labour Policy and Interpretation Manual observes, there is a difference between supervision and management. Supervision usually refers to the job role of supervising one or more employees. A supervisor may direct the work of employees but that is different than managerial functions which may or may not include supervision, but also includes functions such as hiring and firing employees, responsibility for making substantial purchases, financial control and budgeting and production planning, requiring the exercise of discretion and independent judgment in management affairs.

We do not believe that supervisors meet the core conditions required to maintain their exemption from overtime pay and hours of work. Supervisory functions can still be done in compliance with hours of work and overtime. Restoring these standards to supervisors would not preclude supervision from being done at all or significantly restrict the work from being done. Employers do control the work of supervisors and have the power to direct and

---

<sup>27</sup> C. Michael Mitchell and John C. Murray (2017) p 166

control working hours of supervisors (which is arguably not the case for managers). As supervisors do not meet the core conditions for an exemption, the exemption should be revised to remove supervisors.

Currently there is no definition of manager in the exemption. The exemption applies to a person whose work is “managerial in character”. The current definition is not clear. A definition of manager is required that identifies the core duties and functions of a manager so that the exemption can be more accurately applied.

A definition or test of duties for managers is not sufficient. It is inconsistent with the purposes of the ESA to deny a manager the protection of limits on working hours and entitlement to overtime and rest period protections if they are being paid low wages. Having management duties but without adequate income exposes too many employees to exploitation. As the CWR Advisors recommend, there should be both a duties and salary threshold before the exemption on hours of work and overtime pay can apply to managers.

To ensure that the salary threshold effectively includes overtime entitlements and hours of work, it has to be high enough. The Ministry of Labour suggests that a multiple of the general minimum wage for all hours worked is a good strategy, because the minimum wage is adjusted annually by the rate of inflation and poses less risk of becoming out of date. As such, we recommend that the salary threshold amounts to three (3) times the general minimum wage for all hours worked. While this is less than the Manitoba threshold of twice the industrial average wage (\$92,406 in 2017), as the Ontario minimum wage increases to \$15, it provides a reasonable basis for the threshold.

### **Recommendation**

- 1) Remove supervisors from the exemption
- 2) For the manager exemption of Part VIII of the ESA concerning overtime to apply, the manager employee must both:
  - (i) be doing work that is directly related to the management and general business operations of the employer or the employer's customers; and
  - (ii) earn a salary that amounts to at least three (3) times the general minimum wage for all hours worked.
- 3) Managers shall not be exempted from sections 17 (limits on hours of work), 18 (hours free from work) and 19 (exceptional circumstances) of Part VII of the ESA.