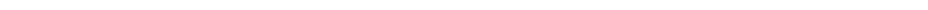

Fair Workplaces, Better Jobs Act, 2017

Submission to the
Standing Committee on Finance and Economic Affairs

July 4, 2017



Workers' Action Centre
\$15 and Fairness
Parkdale Community Legal Services



Contents

Summary	1
Fairer Wages	1
Decent Hours	2
Paid Personal Emergency Leave	3
Rules that Protect Everyone	4
Right to Organize	7
Review of Bill 148 changes to the Employment Standards Act	9
ESA Coverage	9
Exemptions and Exceptions to the ESA	11
Employer Liability	13
New Scheduling Rules	16
Overtime Pay	19
Minimum Wage	20
Public Holiday Pay	21
Right to Vacation	22
Equal Pay for Equal Work – Employment Status	23
Personal Emergency Leave and Paid Leave	27
Temporary Help Agencies	29
Enforcement	34
Commencement	40
Review of Bill 148 changes to the Labour Relations Act	41

Workers' Action Centre

The Workers' Action Centre is a worker-based organization committed to improving the lives and working conditions of people in low-wage and unstable employment.

\$15 and Fairness

The alliance of labour and community organizations organizes the \$15 and Fairness campaign across the province.

Parkdale Community Legal Services

Parkdale Community Legal Services is a poverty law clinic providing workers' rights assistance and legal representation.

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

720 Spadina Avenue, Suite 223
Toronto ON M5S 2T9
Tel 416-531-0778 Fax 416-533-0107

workersactioncentre.org
workersactioncentre
WorkersAC

Summary

Introduction

Workers across Ontario have made it loud and clear that too many of us are working for low wages in part-time, temporary or contract jobs without employment benefits, workplace protection or the right to form, and keep, a union. For too many Ontario workers, full time work does not bring us above the poverty line. Income and job insecurity make it hard to make ends meet. The *Fair Workplaces, Better Jobs Act, 2017* (Bill 148) proposes many important changes to address Ontario's outdated labour laws and to reduce precarious work.

The proposed changes in Bill 148 to the *Employment Standards Act* (ESA) and *Labour Relations Act* (LRA) provide a good start to addressing precarious work and updating labour laws to deal with changing workplace practices. However, we have provided amendments to Bill 148 to ensure it can close the gaps and raise the floor of minimum standards to improve job and income security.

An overview of our key recommendations is contained in this summary and our full recommendations are outlined in the brief.

Fairer Wages

Bill 148 rightly recognizes that workers need to earn above the poverty line. In 2016, nearly 30 percent of Ontario workers earned less than \$15 an hour.

Bringing the minimum wage to \$15 an hour by January 1, 2019 with annual adjustments by the rate of inflation on October 1st of each year is the right thing to do. It will raise the floor of minimum wage for workers who have little bargaining power. This will reduce inequality and poverty among low-wage workers, increase spending power for low income workers and boost the economy. As 53 leading Canadian economists recently stated, raising the minimum wage makes for better, more productive workplaces.¹

We support Bill 148's amendment to embed the \$15 general minimum wage phased in through January 1 2019 in the Employment Standards Act (ESA).

However not all Ontario workers will benefit from the increase to a \$15 minimum wage. Exemptions and special rules mean that 11 percent of Ontario employees are not covered by

¹ Economists support \$15 minimum wage in Ontario, online: <http://www.progressive-economics.ca/2017/06/29/economists-support-15-minimum-wage-in-ontario/>

minimum wage. It is workers who are low-income, women, youth and recent immigrant and migrant workers who are most likely to be fully or partially exempt.

Bill 148 does not remove the subminimum wage for liquor servers leaving Ontario in the minority of Canadian jurisdictions that have subminimum wages for tipped workers. Employers argue that tips make up the difference in workers' hourly wages. But tips are notoriously erratic, varying from shift to shift and season to season. Similarly Bill 148 would leave Ontario as the only province with a subminimum wage for students.

We recommend removing the subminimum wages for students and liquor servers and to prioritize review of minimum wage exemptions in the Ministry of Labour's promised fall, 2017 review of exemptions.

Decent Hours

Bill 148 is addressing a long standing gap in the ESA on scheduling. For too long, many low wage workers have faced unpredictable and unstable schedules. Many workers receive their schedules at the last minute, days or hours before they are to work; have little input into their schedules; the timing of their shifts fluctuate from week to week; and the number of hours they receive (and income) rise and fall precariously. The uncertainty in scheduling practices contributes to making work and incomes unstable.

Bill 148 takes some important steps in regulating scheduling. These steps include:

- Employees will get three hours of pay if the employer cancels their shift within 48 hours of its start time
- Employees will have the right to refuse a shift that is scheduled within four days of that shift. Employees will also have the right to request a schedule or location change after three months of employment without fear of reprisal
- When an employee is "on-call" and not called in to work then they must be paid three hours at regular pay (per 24 hour on-call period).

We support these new scheduling rules with some suggested amendments.

Surprisingly, Bill 148 fails to require that schedules be provided in the first place. This undermines the purpose of the new scheduling protections which is to provide better certainty in scheduling. It will be hard for employees to enforce their new scheduling rights without the requirement for a schedule to base their case on.

We recommend that an amendment be made to require an employer to provide its employees with a least two weeks' notice of their work schedules.

Bill 148 proposes that collective agreements are not required to comply with the new rules. That is, the collective agreement does not have to include the new rules to compensate workers "on-call" or shift cancellation and right to refusal of work. This is a dangerous departure from the

purposes of the ESA which is to provide statutory minimum entitlements to all workers, unionized or not.

We recommend that employers with unionized employees should also be required to comply with the new scheduling minimum standards.

Paid Personal Emergency Leave

Adequate paid illness and emergency leave are important for the province's healthcare and workplace public policy. Bill 148 begins to address the inadequacy of illness and emergency leaves and protections in Ontario. Bill 148 rightly extends Personal Emergency Leave to all workers in Ontario by removing the exemption for employers with less than 50 employees.

Personal Emergency Leave (PEL) provides 10 days of job-protected leave that can be used by a worker for their own personal illness, injury, medical emergency or for the death, illness, injury, medical emergency or urgent matter concerning the worker's family.² Bill 148 will extend this leave to the 1.7 million workers who have previously been excluded and were forced to work while sick or facing family emergencies.

We support extending Personal Emergency Leave to all workers.

Not only do workers need the right to take time off when sick, but workers need to have paid sick leave to make time off a viable option. For the majority of Ontario workers, taking a sick day means losing wages. When earning low wages, few can afford to lose a day's pay. The majority of workers do not have access to employer-based paid sick leave. Bill 148 takes a small step in addressing this gap.

If passed, Bill 148 requires that two PEL days be paid. Providing paid leave speeds up recovery, deters further illness, and reduces health care costs. It enables workers to address health needs without putting their economic security at risk. Paid leave helps prevent the spread of contagious illnesses to coworkers and customers, and curbs expensive hospital visits by allowing workers to see a health practitioner when needed. We are not immune from illness and emergencies and two paid leave days are not enough.

We support paid PEL leave and recommend that Bill 148 be amended to provide for 7 paid PEL days.

² Family is defined as a spouse; parent, step-parent or foster child of the employee or their spouse; grandparent; brother or sister; spouse of the employee's child; and, a relative of the employee who is dependent on the employee for care or assistance.

Bill 148 further clarifies that employers cannot require employees to provide medical notes as evidence when PEL is used by employees. We support this amendment as it removes a barrier to workers taking leave when needed and reduces cost to our health care system.

Rules that Protect Everyone

The ESA is supposed to provide a floor of minimum standards that are universally available to all Ontario workers and maintain a level playing field for employers. But changes in the organization of work have created gaps in coverage and protection under the ESA. Bill 148 takes a couple steps in addressing the gaps in the ESA.

Definition of Employee

The employment relationship between workers and their employers has evolved, ranging from a standard employment relationship at one end of the spectrum to independent contracting relationships on the other end. Old definitions of employer and employee do not address the current realities in the labour market.

We have witnessed a huge growth in the practice of employers' misclassifying employees as independent contractors. Businesses do this to avoid the direct financial costs of compliance with the ESA and employer contributions to Employment Insurance, Canadian Pension Plan as well as Workers Safety and Insurance premiums.

Bill 148 would prohibit employers from misclassifying workers as "not employees" under the ESA. We support this step; however, it will largely rest on workers to enforce the rights as an employee through individual claims at the Ministry of Labour. Bill 148 did not amend the definition of employee and so it will still be difficult for workers to prove they are employees. Bill 148 has not clarified that those workers who are in an economically dependent relationship and not independent contractors should be employees under the ESA.

The practice of the Ministry of Labour has been to exclude workers in an economically dependent contractor relationship with employers. But this leaves some dependent contractors with ESA protection and some without. Common law has long recognized that dependent contractors should be entitled to common law protections for employees. The Labour Relations Act clearly defines and includes dependent contractors. So unionized dependent contractors have rights under the ESA but non-unionized dependent contractors do not. Homeworkers who are dependent contractors are employees under the ESA but non-homeworker dependent contractors are not. The lack of a clear recognition that dependent contractors are employees under the ESA is a key factor in misclassification of employees and must be addressed.

We recommend that the ESA definition of employee be amended to include dependent contractor as defined in the Labour Relations Act.

Equal pay for Equal Work

Bill 148 recognizes and reinforces the fundamental principle that workers who are doing similar work should be paid the same. In the absence of such regulation, employer practices have developed whereby part-time, contract, seasonal and temporary agency workers doing similar jobs to full-time workers get paid less thereby creating more precarious work.

Historically the ESA only provided protection from discrimination in pay based on gender. Bill 148 introduces two new sections that require equal pay on the basis of employment status. Employers will be required to pay workers doing substantially the same work the same rate of pay as full-time employees regardless of their employment status (i.e., part-time, temporary, seasonal or casual status) or if they work through a temporary help agency. This is an important step in the right direction. Not only do the equal pay requirements reduce discrimination on the basis of a workers' employment status, but equal pay requirements have potential to address precarious work. We say potential because amendments are essential to ensure workers, particularly non-unionized workers can access equal pay provisions.

Unfortunately Bill 148 relies on the ESA's language for equal pay on the basis of gender. This long-standing section of the Act has proved largely ineffective in addressing gender discrimination in pay due to limitations in the language of the section and jurisprudence that has interpreted this right in an extremely narrow way. The Ontario Equal Pay Coalition has recommended changes to remedy the problems in the proposed equal pay provisions which we have included in this brief and endorse.

In short, a number of changes are necessary to ensure this new protection will succeed in meeting its purpose. First, the scope of what is considered comparable work must be expanded to ensure that employers can't evade compliance. Second, the exceptions to equal pay are so broad and ambiguous that they provide huge loopholes that employers can use to avoid compliance with the equal pay provision; these loopholes must be closed. Third, employers must be required to provide employees with pay structures and pay scales proactively so that employees and temporary help agency workers can have the information necessary to enforce their rights.

Bill 148 includes a transition provision that will allow employers with collective agreements signed prior to April 1, 2018 that do not comply with the new equal pay for equal work rights to remain in effect. That is, employers would not have to comply with the ESA equal pay standard until the end of the term of the agreement. This could leave many unionized part time, contract, casual and temporary help agency workers waiting for years for the term of the agreement to run out in order to obtain their equal pay rights. The transition provision should be removed.

We recommend the equal pay for equal work provisions be amended to expand the scope of comparable work, limit the exceptions, provide pay transparency and remove the transition provision as outlined in this brief.

Temporary Agencies

As the Special Advisors conclude in the CWR Final Report, the triangular relationship between the employee, agency and client, and the temporary nature of employment results in agency employees being among the most vulnerable and precariously employed of all workers.³ Bill 148 should work to limit the use of temporary agencies to exceptional circumstances rather than support the growth of this business practice that creates such precarious work and vulnerability of workers.

Bill 148 takes two steps to better protect temporary agency workers from inequality of wages and insecurity of work. But more is needed.

We have addressed above the amendments required to ensure that the equal pay for equal work for temporary agency workers will be enforceable. Bill 148 would provide temporary help agency workers with better protections when assignments are terminated. We support this amendment.

Bill 148 needs to be amended to ensure that temporary assignments are indeed temporary. The ESA allows companies to assign work for temporary agency employees on a *temporary basis*, but does not limit the duration of assignment. This leaves workers open to abuse; kept as assignment workers for many months or years. These workers are treated in an inferior and discriminatory fashion with no benefits, lower pay, and little protection of their rights or job security. We recommend the following amendments be made to require temporary assignments actually be “temporary”:

- **Assignment workers will be converted to permanent employees of the client company after a total of three months of assignment at the company.**
- **The client company and temporary help agency would have to provide just cause if, at the end of the assignment period, another worker is hired to do the work previously done by the assignment worker.**
- **There shall be a cap of 20 percent of the proportion of a client’s workforce that can temporary agency workers.**
- **Eliminate barriers to client companies hiring temporary agency workers directly during the first six months (eliminate provision that allows agencies to charge fees to client companies that hire assignment workers).**

³ Mitchell and Murray (2017) p 198

Right to Organize

One of the best ways to help workers made vulnerable in precarious jobs is to expand collective organizing, representation, and bargaining. But there are many barriers to unionization in workplaces and sectors where precarious work dominates.

Bill 148 would amend the Labour Relations Act to take some steps to make it easier to unionize. The package of amendments will place some limits on employers' ability to undermine workers' constitutional right to freedom of association. However amendments are needed to ensure all workers can exercise their right to collective representation.

We support and endorse the Ontario Federation of Labour's recommendations to amend the Labour Relations Act.

Bill 148 fails to address those workers' most in need of collective representation and bargaining that are currently excluded from the LRA; domestic workers (caregivers) and agricultural and horticultural workers. Many of these workers are employed through the Temporary Foreign Worker Program that makes it virtually impossible for workers to enforce their rights through the employment standards process.

We recommend removing the exemptions to domestic, agricultural and horticultural workers to the Labour Relations Act and repeal of the Agricultural Employees Protection Act.

In amending the LRA through Bill 148, the government missed the opportunity to address the changing labour market with its growth in small workplaces and non-standard work. Bill 148 largely retains the old industrial relations model based on the Wagner Act that severely limits access to collective representation and bargaining for many workers because there is no practical way for unionization to take place.

For example, Bill 148 does not expand the LRA to include joint employers such as franchisors, lead employers in contracting relationships and new, on-demand platform arrangements. It does not address organizing and collective bargaining on a multi-employer or sectoral basis which domestic (caregiver) workers and agricultural workers would need to be protected. While Bill 148 reduces some barriers to unionization, more changes are necessary for broader based bargaining to address changing workplaces.

Conclusion

Moving quickly to amend Bill 148 as recommended in our submission and passing the *Fair Workplaces, Better Jobs Act, 2017* into law is an important step to improve wages and working conditions in Ontario.

As new provisions of Bill 148 come into force, we will need to ensure new rights are enforced. The effectiveness of legislative changes will have to be monitored as experience tells us that

some employers develop new strategies to evade or avoid labour standards. The changing organization of work will continue to test the effectiveness of legislative changes.

Even with our amendments, Bill 148 will leave many features of precarious work unaddressed. Bill 148 does not address many employer practices that have realigned the distribution of risks, costs, benefits and power in employment. Many companies are moving away from direct employment through a variety of organisational strategies such as subcontracting, outsourcing, franchising, and platform-based labour sourcing. These practices drive down wages, working conditions and the ability for collective representation and bargaining, thereby contributing to precarious work.

There is still much work to be done to ensure decent wages and work in Ontario.

Review of Bill 148 changes to the *Employment Standards Act, 2000*

Employment Standards Act (ESA) Coverage

The ESA is supposed to provide a floor of minimum standards that are universally available to Ontario workers. However changes in the organization of work have created gaps in coverage under the ESA.

Narrow definitions of employer and employee do not address current realities in the labour market. Changing practices mean that there is often more than one employer entity directly or indirectly controlling conditions of employment. The changing organization of work is also pushing workers who need ESA protection beyond its scope.

Definition of Employee

The Changing Workplaces Review (CWR) Final Report concluded that the old definitions of employee are not well suited to the modern workplace and that “there are those whose relationship is more like a traditional employment relationship than that of an independent contractor and who are deprived of the protection of the ESA.”⁴ The Final Report goes on to recommend that the definition of employee in the ESA should be expanded to include dependent contractors as defined in the Labour Relations Act (LRA). We support this recommendation.

Bill 148 does not amend the definition of employee. The Employment Standards Program which administers the ESA purports that the definition of “employee” under the ESA used by the Program captures the types of relationships that would fall into the “dependent contractor” category under the LRA.⁵ However, according to the Ministry of Labour ESA Policy and Interpretation manual, “it is Program policy that dependent contractors are not to be considered employees for the purpose of the *Employment Standards Act, 2000*, except in the case of homeworkers” (who may be dependent contractors but are employees under the Act).⁶

⁴ C. Michael Mitchell and John Murray (2017) *The Changing Workplaces Review: An Agenda for Workplace Rights*. Final Report to the Ministry of Labour online: https://www.ontario.ca/document/changing-workplaces-review-final-report?_ga=2.11919028.1658989163.1497297326-1233222670.1432230688

⁵ *ibid*

⁶ A homeworker is a person who performs work for compensation in a place that is primarily used as the person’s home. The Ministry of Labour policy is that a homeworker may be a dependent contractor but is an employee under

Workers who are in economically dependent relationships are clearly covered by the ESA if they are unionized but are not necessarily covered if they are not unionized. Similarly, a homemaker who is a dependent contractor is covered under the ESA definition of employee but a non-homemaker may not. Employers and employees have little clarity of how workers in dependent contractors or economic dependent relationships will be treated under the ESA.

The *ESA* defines employees in reference to the employee-employer relationship. Both Employment Standards Officers and the Ontario Labour Relations Board use the common law tests to determine if an individual is an employee or an independent contractor. While recognizing that there is no universal test, the Ministry of Labour's Policy and Interpretation Manual lists four tests for its Employment Standards Officers' consideration: control test, four-fold test, organization test, and enterprise test. Accordingly, the tests used by Employment Standards Officers, and indeed the Ontario Labour Relations Board, are essentially the same as the common law.

The common law has long recognized that there is a category of workers who are not independent contractors but are outside of the traditional definition of employee but are entitled to common law protections. Under common law, however, when the Courts engage in an analysis of whether a worker is an employee or contractor, it does not end with the determination that the worker is a contractor. It will also examine whether the worker was nevertheless economically dependent to determine if the worker is an independent contractor or a dependent contractor. If so, the Court may determine the worker to be a dependent contractor, which attracts certain common law protections.

The *Employment Standards Act* is a benefits-conferring legislation which creates basic standards and rights for Ontario workers. Yet, the *Employment Standards Act* provides less coverage or protection to workers than the common law and the *Labour Relations Act*, precisely because it does not clearly include dependent contractors in the definition of employee.

As the CWR Final Report concludes, "the ESA should communicate to employers and employees with as much clarity as is reasonable the scope of coverage of the ESA."⁷ As employers seek out new ways to contract work to be done, expanding the scope of the definition of employee is critical. This is even more important as the issue of dependent contractor is, in some senses, in front of the legislature given the recommendation to the government by the Special Advisors of the CWR. The failure of Bill 148 to be amended to expand the definition of employees to include dependent contractors may have the unintended consequence of adjudicators and courts determining that dependent contractors were not intended by the legislature to be "read in" to the definition of employee in the ESA.

Recommendation: Amend s. 1, definition of employee to include dependent contractor as defined in the Labour Relations Act.

the Act. Employment Practices Branch, Ministry of Labour. *Employment Standards Act 2000: Policy and Interpretation Manual*, Vol 1. (Toronto: Thomson Reuters) p 5-32.

⁷ C. Michael Mitchell and John Murray (2017) p 267

“dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing opened by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

Amend subsection 1 (3) of the Fair Workplaces, Better Jobs Act to reflect the following:

(3) Clause (c) of the definition of “employee” in subsection 1 (1) of the Act is repealed and the following substituted:

(c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer’s employees,

(c. 1) a dependent contractor, or

Exemptions and Exceptions to the ESA

Exceptions to who the Act applies to

The definition of employee would be amended to ensure that people who receive training from an employer, and the skill for which training is being received is used by the employer’s employees, are an employee under the ESA [s. 1(1) “employee” clause (c)]. This amendment removes s. 1 (2) which contains an exception based on meeting six conditions. This change will assist workers in ensuring they receive wages and other entitlements while being trained by their employer. In particular, it provides additional clarification for those considered “interns” who are often misclassified as not employees under the Act.

Recommendation: accept this amendment.

Crown employees

Currently, employees of the Government of Ontario have only certain protections under the Act (e.g., benefit plans, leaves of absence, termination and severance). The exception under s. 3(4) includes direct employees of the government and its agencies, boards or commissions. Bill 148 would remove s. 3(4) and bind the Crown to comply with the ESA for all its employees (except where other exemptions may apply).

Recommendation: accept this amendment.

Private Career Colleges

Bill 148 would add an exclusion from ESA protections for an individual who performs work under a private career college registered under the *Private Career Colleges Act, 2005* [s. 3(5) 2]. This would expand the exclusion from ESA coverage for students in experiential education programs currently in place for high school students, university and community colleges.

We do not believe the exemption to the ESA for students in public institutions with some accountability and service to the public good should be extended to private career colleges that operate for profit with little oversight. There are over 500 private career colleges in Ontario. The Ontario Ombudsman reviewed private career colleges and their regulation by the Ministry of Training Colleges and Universities and found ongoing violations.⁸ Private businesses should not be allowed to send individuals to other private businesses to work for less than the minimum wage or for no pay at all.

Recommendation: revoke the amendment s. 3(5)2

Exemptions and Special Rules

The ESA now contains more than 85 complex exemptions and special rules that permit some employers to not comply with minimum standards to minimum wage, vacation pay, public holiday pay, overtime and hours of work rules, severance and other provisions. 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 approximately \$2 billion per year.⁹

The government announced on May 30, 2017 that it will start a review of ESA exemptions and special rules in the fall 2017, including consultation with affected stakeholders. Given the haphazard history of adoption of regulatory and legislative exemptions and special rules, we recommend that the ESA be amended to establish conditions that must be met for retaining and establishing exemptions, exceptions and special rules.

Recommendation: (1) To retain or establish exemptions, exceptions and special rules for the ESA, the following conditions shall be met,

(a) The nature of work in the occupation or sector is such that it is impractical for a minimum standard to apply and would preclude work from being done

⁸ Ontario Ombudsman, Private Career Colleges: Too Cool for School. Online:

<https://www.ombudsman.on.ca/Investigations/SORT-Investigations/Completed/Private-career-colleges--em-Too-Cool-for-School--.aspx>

⁹ 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>

at all or significantly alter its output. “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. Nor does it relate to the nature of the employer and how they have organized work.

(b) Employers do not directly or indirectly control the working conditions that are relevant to the employment standard under consideration.

(c) The occupation or sector that would be receiving an exemption or special rule provides some benefit to society or the economy.

(d) 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.

(e) The employees of the occupation or sector agree to the exemption.

(f) 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.¹⁰

Employer Liability

Related Employers

The ESA recognizes that there may be more than one employer with employer status for the same employee. Section 4 of the ESA provides that persons (i.e., employers) who are treated as one employer are jointly and severally liable for any contravention of the Act and for any wages owing to an employee of any of them.

Related employers include businesses that carry on or have carried on associated or related activities or businesses with the principal employer. This includes a relationship over time, e.g., where a business closes and opens again under another name. However, the effectiveness of the joint liability provisions has been severely limited by s. 4(1)(b) that requires proof of “intent or effect” to defeat the purpose of the ESA when determining whether businesses should be treated as one employer.

Bill 148 would remove the requirement under Section 4 to prove that related employers had the “intent of effect” to defeat the purpose of the ESA when determining whether related

¹⁰ Closing the Employment Standards Enforcement Gap, Improving Employment Standards and their enforcement in Ontario: a Research Brief Addressing Options Identified in the Interim Report of the Changing Workplaces Review, October 2016. Online: [file:///C:/Users/m_gellatly/Downloads/Improving-Employment-Standards-and-Their-Enforcement-in-Ontario October-14-2016 FINAL-SUBMISSION%20\(2\).pdf](file:///C:/Users/m_gellatly/Downloads/Improving-Employment-Standards-and-Their-Enforcement-in-Ontario%20October-14-2016%20FINAL-SUBMISSION%20(2).pdf)

businesses can be treated as one employer and held jointly and severally liable for monies owing under the Act [s.4(1)].

Recommendation: accept this amendment.

Joint and Several Liability

The scope of employer liability established under the ESA is increasingly out of date. Employers use contracting as a key strategy to reduce labour costs, increase profits and shift liability for indirect employees down the chain. The legislature has taken some steps to address this by enshrining joint and several liability between client companies and temporary help agencies for wages, vacation pay, public holiday pay and reprisals. While Bill 148 makes important amendments to address related employers, it has not taken the steps necessary to remedy joint but unrelated employers that directly or indirectly control conditions in which workers face violations.

Recommendation: new amendment that employers who enter into contracts with subcontractors or other intermediaries, either directly or indirectly, are jointly and severally liable for wages owed and statutory entitlements under the ESA.

Crown Exemption

Bill 148 proposes an exemption to the related employer provision [s. 4(1)]. Crown corporations and agencies would be exempt from being held jointly liable as a related employer.

Crown corporations are a mix between private enterprise and a government body that are generally considered to be instruments of public policy. As such, the crown nor its agencies, boards, commissions or corporations should be exempted from the related employer provision. Rather, the government should use its authority under these bodies to ensure compliance with employment standards when it is a related employer.

Recommendation: revoke amendment

Employee Misclassification

Bill 148 would enact a new provision that would prohibit employers from misclassifying employees as non-employees (e.g., as independent contractors). This amendment would make it an offence under the Act when employers are found through claims investigation or proactive inspection to have misclassified employees [s. 5.1]. Such employees would be subject to monetary penalties and public disclosure of a conviction.

Section 5.1(1)'s true usefulness will be that it will allow the Ministry of Labour to conduct proactive investigation on the misclassification issue alone and, in theory, make it somewhat easier for workers to win the employee-independent contractor argument. This will be

contingent, however, on expanding the ESA definition of employee to include economic dependence (dependant contractor).

Recommendation: accept this amendment.

Onus on Employer

Bill 148 also proposes placing the onus of proof of employee status under this provision on the employer. During the course of an employment standards officer's investigation or inspection, the employer is responsible for proving that a person *is not* an employee [5.1(2)].

Recommendation: accept this amendment.

Placing the burden of proof on employers to demonstrate employment status is a small step. Unfortunately, this provision will largely rely on workers to file claims for misclassification at the Ministry of Labour. Despite anti-reprisals protection in the ESA, most workers are afraid to make a complaint of employer violations while they are on the job. In the alternative, a more proactive step to enforcing the new prohibition on misclassification would be to create a legal presumption of employee status for workers performing or providing labour services to the employer for a fee.

Proposed amendment: To strengthen this provision, we recommend the establishment of a legal presumption of employee status for workers performing labour services for a fee. That is, a worker must be presumed to be an employee unless the employer demonstrates otherwise.

Building Services Providers and continuity of employment

The ESA has long recognized that in the building services sector the contractor for services may change, while the provision and, in many cases staffing, of the service continues. Since the early 1990s, the ESA has sought to protect employment security when the service provider or contractor changes.

Changes to the Act in 1995 maintained the deemed continuity of employment when a building services provider changed, with obligations for vacation pay attributed to the replaced provider and obligations for termination and severance for the new provider. The intent was to encourage continuity of employment by requiring the new provider to be liable for termination and severance.

Unfortunately, contract flipping, as it has come to be known, has developed into a strategy for business owners and providers to suppress wages. Workers must re-apply for their jobs, often losing any wage increases and benefits earned under their previous contractor. Companies can use the re-hiring process to purge elderly, injured, or pro-union workers. To close the gaps in the building services sector, continuity of employment must be ensured for all provisions of the ESA.

Recommendation: Amend s. 75(3) of the ESA as follows,

75(3) The new provider shall be deemed to have been the employee's employer for the purpose of all entitlements under the ESA and its regulations.

New Scheduling Rules

For low wage workers, unpredictable and unstable schedules have become the norm. Many workers receive their schedules at the last minute, days or hours before they are to work; have little input into their schedules; the timing of their shifts fluctuates from week-to-week; and the number of hours they receive (along with wages) rise and fall unpredictably.

The current absence of rules in the ESA on scheduling practices make maintaining an already delicate balance of work, family, education, and more, nearly impossible. Subsequent challenges have ripple effects, negatively impacting children, family life, communities, and the economy.

Currently, employers are not required to provide advance notice of shift schedules, last minute changes in shifts or guaranteed minimum hours of work per week. The only requirement under the ESA is the "3 hour rule". When workers who normally work longer than 3 hours are given less than 3 hours of work, then the employer must pay the worker 3 hours at the minimum wage, or the employee's regular wage for the time worked, whichever is greater. Bill 148 introduces important new protections for workers on scheduling.

New Part VII.1 – Requests for Changes to schedule or work allocation

Bill 148 sets out steps that would provide employees, after 3 months of employment, with the right to request location or schedule changes without fear of reprisal [s. 21.2].

Under this provision, an employee would be required to submit their request in writing, the employer would have to discuss the request with the employee and notify the employee of the employer's decision within "a reasonable time". If the request is accepted, the employer must specify the date the change will take place or, if denied, the reasons for the denial.

There is nothing in this provision to require the employer to seriously address or comply with the employee's request. As such, we propose a new amendment.

Recommendation: accept amendment [s. 21.2].

Recommendation: new s. 21.2(5) The employer shall grant the request unless it would cause the employer undue hardship.

New Part VII.2 Scheduling

Bill 148 introduces important new scheduling requirements. However, it fails to require that schedules be provided in the first place. This defeats the purpose of the new Part VII.2 which is to provide certainty in scheduling. In addition, it undermines the ability of workers to enforce new provisions without the requirement of a schedule to base their case on (e.g., cancellation or right to refuse a shift). As such, we recommend the following amendments.

Recommendation: new ss. 21.2 (1.1, 1.2) *Advance Notice of work schedules*

New 22.2(1.1) *Initial Estimate of Minimum Hours.* – Prior to the start of employment:

An employer shall provide a new employee with a good-faith estimate in writing of the employee's expected minimum number of scheduled shifts per month and the days and hours of those shifts. The estimate shall not include on-call shifts. The estimate shall not constitute a contractual offer, and the employer shall not be bound by the estimate.

New 22.2(1.2) *Two-Week Notice of Work Schedules.* – An employer shall provide its employees with at least two weeks' notice of their work schedules by doing one of the following at least every 14 days (on a "biweekly schedule"):

- (1) Posting the work schedule in a conspicuous place at the workplace that is readily accessible and visible to all employees.**
- (2) Transmitting the work schedule by electronic means, so long as all employees are given access to the electronic schedule at the workplace. For new employees, an employer shall provide the new employee on his or her first day of employment with an initial work schedule that runs through the date that the next biweekly schedule for existing employees is scheduled to be posted or distributed; thereafter, the employer shall include the new employee in an existing biweekly schedule with other employees. For all employees, the work schedule shall include any on-call shifts, where applicable. If the employer changes the work schedule after it is posted or transmitted, the changes shall be subject to the notice and compensation requirements set forth in section 21.4 and 21.6.**

Three hour rule

Currently, the "three hour" rule exists in Regulation 285/01. Bill 148 would place this rule in the *ESA* itself [s. 21.3].

The amendment is superior to the current Regulation in two ways. First, the current Regulation only dictates that the employee shall be paid the minimum wage for the three hours. The amendment requires that the employee be paid the "employee's regular rate". Second, the

Regulation exempts students from the three hour rule. The amendment does not contain a student exemption.

Recommendation: accept this amendment [s 21.3]

Minimum pay for being on call

Bill 148 adds a new entitlement by requiring employers to pay on-call employees at least three hours of pay if they are not called in, or are called in for less than 3 hours. [s.21.4]. The employer is only required to pay the three hour minimum every 24 hours. Beyond the three hour pay minimum, the employer is only required to pay the employee for the time the employee is actively working or holding him or herself ready to work at the workplace (not stipulated in s. 21.4 , but in the existing Regulation 285/01). The amendment is superior to the existing *ESA* as it currently requires no compensation for on-call employees

Recommendation: accept this amendment [21.4]

Right to refuse shift

Section 21.5 would provide an employee the right to refuse an employer's request to work or be on-call if the employer makes the request less than 96 hours (4 days) prior to the time the employee would commence work or be on-call. An employee who refuses an employer's request to work or be on call under this section would be required to notify the employer as soon as possible.

Recommendation: accept this amendment [21.5]

Cancellation of shift

Bill 148 adds a new entitlement by requiring an employer to pay an employee for at least three hours of work if the employer cancels a shift with less than 48 hours' notice [s. 21.6]. However, the Bill specifies that a shift is not cancelled if the shift is merely shortened or extended. In which case, we could presume that the employee would only receive three hours' pay even he or she works less than three hours, per the proposed section 21.3.

Recommendation: accept this amendment [21.6]

Collective agreement prevails

The rights relating to notice of cancellation, refusal of work and to being on call would be subordinate to any conflicting provision in an applicable collective agreement [ss. 21. 4(3), 21. 5(3), 21. 6(4)]. This amendment therefore does not prohibit the contracting out of the *ESA* even if the contract provides a lesser right than the *ESA*. This is a dangerous departure from the purposes of the *ESA* which is to provide statutory minimum entitlements.

Recommendation: revoke amendments [ss. 21. 4(3), 21. 5(3), 21. 6(4)].

Access to hours for existing employees – proposal for a new amendment

Some employees work excessive hours of overtime, while others do not have enough hours to make ends meet. Bill 148 intends to amend the ESA to create decent jobs with decent hours. To further this goal, we propose a new Part to the Scheduling section to require employers to offer additional hours of work to existing employees before hiring additional employees.

New Part VII.3 Access to hours for existing employees

21.7 (1) An employer shall offer additional hours of work to an existing employee who, in the employer’s reasonable judgment, has the skills and experience to perform the work before hiring any additional employees or subcontractors, including hiring an additional employee or subcontractor through the use of a temporary employment agency, staffing agency, or similar entity.

(2) An employer shall use a transparent and non-discriminatory process to distribute the additional hours of work among existing employees.

(3) An employer shall not be required to offer an employee additional work hours if the employer would be required to compensate the employee with overtime compensation under any law or under a collective bargaining agreement. This section shall not be construed to prohibit an employer from offering additional work hours to an employee that would result in the employer being required to compensate the employee with overtime compensation.

Overtime Pay

Rates

Where an employee holds two or more positions with one employer and works overtime, the current ESA has a complicated blended system to determine overtime pay. Bill 148 provides simplified steps for calculating overtime pay [s. 22. (1.1)]. Overtime pay would be calculated based on the rate of pay for the job being performed during that overtime hour.

Recommendation: accept this amendment.

Overtime averaging

Bill 148 does not address other hours of work or overtime provisions. The ESA allows employers to avoid paying overtime premium pay through agreements with employees to average overtime over more than one week. Overtime averaging undermines the principles of universality and fairness that minimum standards legislation is based upon.

Proposed amendment: Eliminate overtime averaging arrangements completely [ESA ss. 22 (2) through (6)]

Minimum Wage

Bill 148 will bring in a significant gain in minimum wage for Ontario workers. The new section 23.1 sets out the steps to bring the general minimum wage to \$15 an hour with

annual adjustments by the rate of inflation (Consumer Price Index) on October 1st of each year thereafter.

Bringing the minimum wage to \$15 an hour by January 1, 2019 is the right thing to do. It will raise the floor of minimum wage for workers who have little bargaining power. This will reduce inequality and poverty among low-wage workers.

Minimum wages	January 1, 2018	January 1, 2019
Regular Minimum Wage	\$14.00	\$15.00
Student Wage (18 years old or younger)	\$13.15	\$14.10
Liquor Servers Wage	\$12.20	\$13.05

The proposed amendment also moves the rules concerning the minimum wage from the ESA regulations into the statute itself. Therefore, in the future the provincial government will have to introduce legislation to raise the minimum wage. This will make it more difficult for future governments to reduce the minimum wage. By that same token, it will make it more onerous for governments to increase the minimum wage in the future.

Recommendation: accept this amendment to the general minimum wage.

Bill 148 does not remove the subminimum wage for liquor servers leaving Ontario in the minority of Canadian jurisdictions that have subminimum wages for tipped workers. Bill 148 would increase these subminimum wages in proportion to the phase-in for the \$15 general minimum wage. Employers argue that tips make up the difference in workers' hourly wages. But tips are notoriously erratic, varying from shift to shift and season to season. Similarly Bill 148 would leave Ontario as the only province with a subminimum wage for students.

Proposed amendment: eliminate the sub-minimum wage to students and liquor servers.

In the alternative, commit to review these exceptions in fall 2017, along with all other exceptions remaining in the ESA.

Public Holiday Pay

Family Day

Bill 148 makes Family Day a statutory public holiday on the third Monday of February [2.1(1) clause 1.1]. This amendment brings the Family Day provision from O. Reg. 285/01 into the Act.

Recommendation: accept this amendment.

Public Holiday pay

Public holiday violations are the most common violations found in proactive inspections and the fourth most common violation confirmed through individual claims investigations. In our experience, the main public holiday violation is that employers do not comply with any of the public holiday provisions. In some cases, employers may not properly calculate public holiday pay. Employers have said that they find the current method of calculating public holiday pay too complicated.

Bill 148 proposes a more simplified method for calculating public holiday pay that is based on the average daily wage of days worked from the employee's immediate pay period prior to the statutory holiday [s. 24(1)]. We support this amendment as it more accurately calculates the regular work day for those working irregular shifts or part time. The current method of calculating public holiday pay (previous 4 weeks' regular wages and vacation pay divided by 20), pro-rates public holiday pay based on a 5 day work week. This disadvantages those not working a regular work week. The proposed amendment is based on the pay period rather than work weeks, which will make it easier for employers to calculate public holiday owing.

The proposed amendment would, however, remove vacation pay from the calculation of public holiday pay [s. 24(1)(a)]. Currently public holiday pay is based on the regular wages earned and vacation pay on those regular wages to ensure the employee remains "whole", that is, receives full entitlements for vacation pay under the ESA. Employers may find this confusing. Rather than reduce employees entitlements to vacation pay under the ESA, the Ministry of Labour should provide information to employers about this provision.

Recommendation: Accept new method of calculating public holiday pay. Amend section 24(1)(a) to maintain vacation pay in the calculation of public holiday pay.

Substitute day off

Bill 148 would also remove the right for employees who agree to or are required to work on a public holiday to choose to receive premium pay and take an alternative day off with public holiday pay [ss. 27-28, 30]. The proposed amendment would remove the right to choose to take a substitute day off with public holiday pay. Instead, those employees would only get public holiday pay and premium pay for each hour worked on the public holiday pay.

Where a public holiday falls on an employee's non-working day, an employer is currently required to provide a substitute day off within 3 months (or 12 months with the agreement of the employee). Section 29 of Bill 148 would restrict the substitute day off to be either the first ordinary working day immediately before or after the public holiday.

Public holidays have been enshrined in legislation because society recognizes the need and social benefit for employees to have respite from employment and time to partake in community events. By removing the right to such respite for workers who agree to or are required to work on a public holiday contravenes the intent of public holidays.

Recommendations: Revoke sections 27 to 30 and maintain the current provisions remain.

Right to vacation

Bill 148 would increase vacation to 3 weeks for those employees working longer than five years with the same employer. Currently, the only entitlement is two weeks of vacation.

The proposed amendments to Part XI of the *ESA* introduce a greater vacation time and vacation pay entitlement for workers who have been with their employer for more than five years [ss. 33 – 35]. Under the proposed amendments, if you have worked for your employer for less than 5 years, you are entitled to at least 2 weeks of time off and 4% vacation pay on your base wages. If you worked for your employer for 5 years or more, you are entitled to at least 3 weeks of time off and 6 percent vacation pay on your base wages.

This amendment will benefit workers who have stable, long-term employment, but it will not really improve the quality of life for many precarious workers, who may never work for one employer long enough to be entitled to the greater vacation benefit. In this way, the proposed amendments are out of step with the changing labour market trend toward precarious employment (e.g., temporary, contract, part-time job growth rising faster than full-time permanent work).

Recommendation: amend new sections 33-35 to provide a minimum 3 weeks paid vacation for all employees.

Timing of Vacation

Bill 148 maintains the employers right to determine when a worker takes their vacation. However, unless a worker asks in writing to take vacation in smaller increments of time, all workers are entitled to take their vacation time all at once or in week-long increments [s. 35].

Recommendation: accept amendment

Difference in Employment Status – equal pay for equal work

The principle that workers who do the same or similar work should be paid the same is grounded in equality of treatment. Ending differential treatment in pay will assist women, youth, racialized workers, migrant workers and recent immigrants who are more likely to be in low-waged and in part-time, temporary, seasonal, casual and contract work. Bill 148 introduces important steps to better ensure equal pay for equal work performed by casual, part-time, temporary, contract, seasonal workers and full-time employees [s. 1(1), ss. 42.1, 42.2]. It also extends equal pay for temporary agency workers (discussed further below).

The two new sections to guarantee equal pay for equal work without distinction based on “**difference in employment status**” (s. 42.1) or “**temporary help agency status**” (s. 42.2) are based on the ESA’s equal pay for equal work based on “**sex**” (s. 42). Unfortunately, this long-standing equal pay provision has provided very limited protection for women because the language and jurisprudence has construed the right very narrowly. The requirement under s. 42 that a woman and a man must be doing “substantially the same” work has allowed employers to create minor differences between women’s and men’s jobs in order to evade the requirement for equal pay and maintain pay differences. Moreover, s. 42 has a broad range of exceptions that allows employers to avoid compliance with the section.

As the Ontario Equal Pay Coalition argues in their Bill 148 submission, simply replicating the language of s. 42, as Bill 148 does, is insufficient. Under the existing language, employers have been able to manipulate job duties to evade the equal pay for equal work obligations. Unless the statutory language is tightened, the promise of equal pay for equal work, particularly for non-union workers, will be hard to attain.

Amendments are necessary to ensure that the new equal pay for equal work protections can meet their intended purpose. First, section 42(1) requires work that is “substantially the same” which has been interpreted in a narrow way, thereby maintaining unequal pay. The words “substantially the same” should be replaced by “similar”. A new provision should be added to emphasize that minor differences in duties will not prevent work from being considered similar. The term “similar” avoids the narrow focus on “same” duties to ensure the principle of equal pay for equal work is broadly achieved in practice. Also, the term “similar” is consistent

with the definition in the *Pay Equity Act* (PEA) and maintains a consistent approach between the ESA and PEA.

Even with the language of "similar", employees will face a struggle proving to an ESA adjudicator that the work is indeed similar. Employers may again seek to manipulate job duties to evade the equal pay standard. To pre-empt this, the legislature should clearly spell out that the intent of the legislation to ensure that such subjective and minor changes to duties and responsibilities cannot be used as a mechanism to avoid paying precariously employed workers the same pay.

Second, section 42(2) sets out 4 exceptions to the right to equal pay for equal work. These broad exceptions allow employers to pay differential wages between men and women on the basis of a seniority or merit system, a system that measures earnings by quantity or quality of production, or any other factor other than sex.

These exemptions have proved fatal to precariously employed women workers who have challenged that they were paid less as a result of gender discrimination. It is clear that different seniority systems and merit systems themselves have been structured or applied in ways which perpetuate systemic gender discrimination. The "any other factor" exception has allowed for differential wages to exist if the factor is proven to be something other than gender. Adjudicators and arbitrators examined whether a *bona fide* employment or wage policy accounted for the separate wage rate. If such a policy existed, it was deemed to be "any other factor" that created a permissible exception to the equal pay standard. That expansive loophole must be closed.

Recommendation: Amend Bill 148 s. 42.1 to read as follows:

Difference in employment status

42.1 (1) No employer shall pay an employee at a rate of pay less than the rate paid to another employee of the employer because of a difference in employment status when,

- (a) they perform similar work in the same establishment;**
- (b) their performance requires similar skill, effort and responsibility; and**
- (c) their work is performed under similar working conditions.**

(1.1) For the purposes of s. 42.1(1), work will be considered similar despite minor variations or differences in duties, responsibilities or work assignments.

(1.2) Where there is no comparable position in the establishment, similar work shall be determined by appropriate collective agreement or by similar work for that occupation or sector.

Exception

2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of

(a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*.

The Ontario Equal Pay Coalition recommends that section 42(1), equal pay for equal work on the basis of sex also be amended to reflect the above language. We support their recommendation.

Reduction prohibited and deemed wages

An employer cannot bring itself into compliance with these rules by reducing the pay of any employees [s. 42.1 (3)]. Where workplace wage rates violate these rules, the employer would be required to adjust the wages of lower paid employees upwards. If such violation is detected by an employment standards officer, the amount of the differential wage will be deemed to be unpaid wages for the employee [s 42.1(5)].

Recommendation: accept amendments

Written response

Section 42.1(6) would enable an employee to make inquiries about wages rates and request a review of their rate of pay to determine if their employer is complying with this provision. The employer would be required to either adjust the employee's pay or give reasons for not doing so [s. 42.1(6)]. In non-unionized workplaces, the enforcement of this provision therefore rests on employees. Experience has taught us that even with reprisals protection under the ESA, workers rarely file claims at the Ministry of Labour. The real risk of job and income loss is too great for most workers.

To enforce this provision, employees need to know in advance what the pay structure is in their workplace. However most non-unionized workers, and in particular temporary help agency workers, do not have access to this information. Workers can be disciplined for discussing wages or telling coworkers what their wages are.

Bill 148 gives employees a right to request a review of their own rate of pay, but it does not provide a means to ensure employees have the information needed to determine if they are receiving equal pay.

Therefore s 42.1 and 42.2 need an additional provision that will ensure that employers have the proactive obligation to report wage information about job classifications to identify wage gaps relating to gender, employment status or temporary assignment. The Equal Pay Coalition recommends a pay transparency amendment to Bill 148 that is consistent with language in the *Pay Equity Act* and requires the employer's proactive obligation to disclose wage information in the workplace. We support the Equal Pay Coalition proposal.

NEW PROPOSED LANGUAGE Section 42.3

Section 42.3 Equal pay for Equal Work: Pay transparency

42.3 (1) No later than May 15 of every year, each employer shall file an annual Pay Transparency Report with the Minister.

(2) The employer's annual Pay Transparency Report in subsection (1) shall disclose the following information relating to the prior 12-month period ending on March 31 of each year:

- (a) annual individual compensation of male employees, categorized by each classification and job status within the establishment,**
- (b) annual individual compensation of female employees categorized by each classification and job status within the establishment,**
- (c) if an employee's compensation is expressed as an hourly rate, the hourly wage rate and the annual compensation of male employees categorized by each classification and job status within the establishment,**
- (d) if an employee's compensation is expressed as an hourly rate, the hourly wage rate and the annual compensation of female employees categorized by each classification and job status within the establishment,**
- (e) the number of steps in a pay range by each classification and job status within the establishment,**
- (f) the rate of progression through a pay range by each classification and job status within the establishment.**

(3) The employer shall post the Pay Transparency Report in prominent places in each workplace for the establishment to which the document relates in such a manner that it may be read by all of the employees in the workplace.

(4) No employer or temporary help agency may do any of the following:

- (a) require, as a condition of employment, that an employee refrain from disclosing the amount of their wages;**
- (b) require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of their wages.**

(5) Section 74 applies to this Part with no exceptions.

Organizations

Unions would be prohibited from attempting to cause employers to contravene these equal pay rules [s.42.1(4)].

Recommendation: accept amendment

Transition

Bill 148 introduces a transition clause for unionized workplaces [s. 42.1(7) – (9)]. There would be a temporary exemption to equal pay provisions where a collective agreement is in effect as of April 1, 2018, allowing different wages rates on the basis of employment status. Any new or renewed collective agreement would, after April 1, 2018, comply with the equal pay rules.

We reject this transition provision as it would allow employers to contract out of this important equal pay provision. This is contrary to the fundamental principle of the ESA that no employer or union may contract out of its basic provisions (s. 4).

In lower waged sectors where people in precarious work dominate, some unions are forced to sign 4 and 5 year collective agreements to avoid lengthy strikes or lock-outs. In such cases lower paid part time, temporary, casual employees would have to wait years to transition to the equal wage rate. This creates inequality and undue hardship for unionized workers and is not justifiable.

Recommendation: revoke amendment 42.1(7)(8) and (9).

Leaves

Family medical leave

Bill 148 would extend family medical leave to bring Ontario's unpaid job-protected leave in line with the federal Employment Insurance program. Leave would be extended from the current 8 weeks in a 26-week period to 27 weeks in a 52 week period [s. 49.1 (2)].

Recommendation: accept amendment

Leaves relating to a child's death or crime-related disappearance

Two new leaves would be introduced for tragedies involving an employee's child. The new leaves replace the existing leave for crime-related child death or disappearance.

Under the new proposed Child Death Leave [s. 49.5], employees would be entitled to a single leave of up to 2 years following the death of their child. Employees would have to be employed for at least six months to be entitled to this leave.

Bill 148 would amend the current Crime-related Child Death or Disappearance Leave to provide leave where an employee's child disappears as a probable result of a crime [s. 49.6]. The provisions of this leave are similar to the current provisions.

The amendments to these leave provisions provide important clarifications and a new benefit for employees in the unfortunate circumstance of a child's death.

Recommendation: accept sections 49.5 and 49.6 with the following amendment.

Revoke part of the exemption for employees if their child was "a party to a crime in relation to his or her death" [49.5(3)] or crime-related disappearance [49.6(3)]. To deny a parent access to a leave during such a tragic circumstance because of the potential conduct of their child is unreasonable.

Personal Emergency Leave and New Paid Leave

Since 2001, the *Employment Standards Act* (ESA) has entitled workers to take up to 10 days of unpaid Personal Emergency Leave (PEL) per year. This job-protected leave can be used by a worker for their own personal illness, injury, and medical emergency or for the death, illness, injury, medical emergency or urgent matter concerning the worker's family.¹¹ PEL is currently an *unpaid* leave which limits access to it for people in low-wage and precarious work.

Domestic or sexual violence

Bill 148 creates a new entitlement to emergency leave for employees experiencing domestic or sexual violence. The scope of this entitlement is rightly expansive and includes sexual or domestic violence or the threat of such violence experienced by the employee or the employee's family as outlined in 50. (2).

Recommendation: accept amendment 50 (1) 4].

Remove exemption

Bill 148 rightly amends the ESA to remove the exemption for workplaces with fewer than 50 employees. Removing the exemption for employers with fewer than 50 employees will extend

¹¹ spouse; parent, step-parent or foster child of the employee or their spouse; grandparent; brother or sister, spouse of the employee's child; and a relative of the employee who is dependent on the employee for care or assistance.

this important leave to one in every three Ontario workers denied basic job protection in the event of a family or personal emergency. If passed, this amendment will extend leave to over 1.7 million Ontario workers¹² who do not currently have access to this job-protected leave.

Recommendation: accept amendment

Paid PEL leave

Not only do people need the right to take time off when they or their family are sick, but workers need to have paid leave to make time off a viable option. Fewer than half of all Canadians are covered by employer-paid sick leave. Low-wage workers are least likely to have paid sick days. Bill 148 takes an important step in this direction.

Bill 148 would require an employer to pay for the first two days of personal emergency leave [ss. 50(5), (7)]. Providing paid leave has been shown to speed up recovery, deter further illness, and, reduce health care costs. It enables workers to address health and family needs without putting their economic security at risk. We support two paid PEL days as a start.

Recommendation: accept establishment of paid PEL days, but increase to 7 paid days

Amend subsections 50 (5) of the ESA to reflect the following:

(5) An employee is entitled to take a total of seven days of paid leave and three days of unpaid leave under this section in each calendar year.

Medical Evidence

Employers are entitled to require an employee who takes a leave under PEL to give reasonable evidence about why the leave is being taken. Bill 148 clarifies, however, that employers cannot require employees to provide a certificate from a qualified health practitioner as evidence [50(9)]. This step reduces the barriers workers face taking sick days (cost of medical notes, time and transit to a doctor) and reduces costs to the Ontario health care system.

Recommendation: accept amendment

Temporary Help Agencies

As the Special Advisors conclude in the CWR Final Report, the triangular relationship between the employee, agency and client, and the temporary nature of employment results in agency

¹² In 2015, 1,723,576 people worked in firms with 49 or fewer employees. **Source:** Statistics Canada, CANSIM, table [281-0042](http://www5.statcan.gc.ca/cansim/a26). <http://www5.statcan.gc.ca/cansim/a26>

employees being among the most vulnerable and precariously employed of all workers.¹³ When the government regulates temporary help agencies, even within a framework of protecting agency workers from abuse and precarity, it serves to legitimize this precarious employment practice. The government should be guided by the principle of decency when enacting laws governing workplaces. Bill 148 should work to limit the use of temporary agencies to exceptional circumstances rather than support the growth of this business practice that creates such precarious work and vulnerability of workers.

Bill 148 takes two steps to better protect temporary agency workers from inequality in wages and insecurity of work. But more is needed. The equal pay amendment rightly shifts some of the economic costs of temporary staffing strategies to clients and temporary help agencies from agency workers who typically pay these costs through substantially lower pay than directly hired coworkers. Similarly, the new termination provision will shift some of the costs of flexibility from workers whose employment is severed to client companies and agencies. However without additional amendments, Bill 148 will miss the opportunity to address a key feature of precariousness; “perma-temping” in which workers are kept in temporary assignments for long periods of time. We make recommendations to address perma-temping below.

Equal pay

Bill 148 takes important steps to limit discrimination between the pay rates of temporary agency workers and their directly hired coworkers. A temporary help agency would be prevented from paying its employees a lower wage than that paid to its client’s employees doing substantially the same work. [s. 42.2(1)]. This equal pay requirement requires immediate wage parity, subject to some exceptions.

We support the intent of the prohibition on differential pay for temp agency workers. However, as discussed above in relation to equal pay under s 42.1, we are concerned that replicating the equal pay language on the basis of sex (s. 42) will make this provision largely unenforceable. For the reasons addressed in above, we recommend the following amendment.

Recommendation: Amend Bill 148 s. 42.2 to read as follows:

Equal pay for equal work: Difference in assignment employee status

42.2 (1) No temporary help agency shall pay an assignment employee who is assigned to perform work for a client at a rate of pay less than the rate paid to an employee of the client when,

- (a) they perform similar work in the same establishment;**
- (b) their performance requires similar skill, effort and responsibility; and**
- (c) their work is performed under similar working conditions.**

¹³ Mitchell and Murray (2017) p 198

(1.1) For the purposes of s. 42.2(1), work will be considered similar despite minor variations or differences in duties, responsibilities or work assignments.

(1.2) Where there is no comparable position in the establishment, similar work shall be determined by appropriate collective agreement or by similar work for that occupation or sector.

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of

(a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*.

Reduction prohibited and deemed wages

An employer cannot bring itself into compliance with these rules by reducing the pay of any employees [ss. 42.1, 42.2(3)]. Where workplace wage rates violate these rules, the employer would be required to adjust the wages of lower paid employees upwards. If such violation is detected by an employment standards officer with respect to a client's employee whose wages have been lowered, the amount of the differential wage will be deemed to be unpaid wages not only for the employee of the client company but also for the affected temporary help agency assignment employee.

Recommendation: accept amendment

Written response

To assist the enforcement of this provision, employees would be protected from reprisal where they make inquiries about wages rates [ss. 74(1)(a)(v.1)(v.2)] and requests a review of their rate of pay to determine if their employer is complying with this provision. The employer would be required to either adjust the employee's pay or give reasons for not doing so [s. 42.1(6), 42.2(6)].

To enforce this provision, employees need to know in advance what the pay structure is in their workplace. Bill 148 gives employees a right to request a review of their own rate of pay, but it does not provide a means to ensure employees have the information needed to determine if they are receiving equal pay. Without such a provision, temporary assignment employees would find it extremely difficult to access their equal pay rights.

As discussed above, ss. 42.1 and 42.2 need an additional provision that will ensure that employers have the proactive obligation to report wage information about job classifications to identify wage gaps relating to gender, employment status or temporary assignment. See our recommended amendment for pay transparency in a new section 42.3 above.

Organizations

Unions would be prohibited from attempting to cause employers to contravene these equal pay rules [s.42.2(4)].

Recommendation: accept amendment

Transition

Bill 148 introduces a transition clause for unionized workplaces [s. 42.2(7) – (9)]. There would be a temporary exemption to equal pay provisions where a collective agreement is in effect as of April 1, 2018, allow different wages rates on the basis of employment status. Any new or renewed collective agreement would, after April 1, 2018, comply with the equal pay rules.

We reject this transition provision as it would allow employers to contract out of this important equal pay provision. Particularly in lower waged sectors where people in precarious work dominate, some unions are forced to sign 4 and 5 year collective agreements. In such cases lower paid temporary agency employees would have to wait years to transition to the equal wage rate. This creates inequality and undue hardship for unionized workers and is not justifiable.

Recommendation: revoke amendment 42.2(7)(8) and (9).

Termination Pay

Bill 148 would provide temporary help agency workers with better protections when assignments are terminated.

Under the proposed new rules, if a temporary help agency worker is put on an assignment estimated to last for three months or more, but is terminated early, the agency would be required to provide one week's notice or pay in lieu of notice [s. 74.10.1]. Where an agency provides an assignment within the notice period that is reasonable and has an estimated term of at least one week, then this provision does not apply.

These protections do not apply if the early termination is caused by the employee's own misconduct, a strike or lockout at the location of the assignment or the assignment has become impossible to perform or has been frustrated by unforeseeable event or circumstance [s. 74.10.1(4)]. While it is reasonable that this provision not be applied in circumstances beyond the company's control, however a lockout is foreseeable and under the company's control. A lockout at the location of the assignment should be removed from this amendment.

Recommendation: accept amendment new section 74.10 with the following change: delete “or lock-out” in 74.10.(4)(c).

Keeping temporary assignments “temporary”

The ESA currently enables client companies to assign work for temporary agency employees on a *temporary basis*. However the Act fails to limit the duration of assignment, thereby leaving the Act open to abuse. Some client companies keep workers in these positions for such long periods of time, sometimes for years, that they become perma-temps. These workers are treated in an inferior and discriminatory fashion with no benefits, lower pay, and little protection of their rights or job security.

While the proposed equal pay provision will reduce some of the cost incentive for perma-temps, there are other monetary and non-monetary drivers of perma-temping that need to be addressed. Other monetary incentives for long term assignments are client company savings in health, dental and retirement benefits paid to directly-hired employees but not agency workers. Client companies are not required to pay the WSIB costs for agency workers or other statutory employer contributions (e.g., EI, CPP). Non-monetary advantages include the opportunity to use assignment workers for night shifts or to do the worst jobs in the company. The use of temporary assignment workers can also serve to discipline permanent employees who fear replacement by assignment workers. We propose the following amendments to address long-term assignments.

New amendments:

Assignment workers will be converted to permanent employees of the client company after a total of three months of assignment at the company.

The client company and temporary help agency would have to provide just cause if, at the end of the assignment period, another worker is hired to do the work previously done by the assignment worker.

There shall be a cap of 20 percent of the proportion of a client’s workforce that can be temporary agency workers.

Eliminate barriers to client companies hiring temporary agency workers directly during the first six months (repeal Section 74.8(1)8 of the ESA which allows agencies to charge fees to client companies that hire assignment workers during the first six months of assignment).

Enforcement

The government announced on May 30, 2017 non-legislative steps to improve enforcement including:

- Hire up to 175 employment standards officers by 2020-21 and once that is in place, resolve all claims filed within 90 days and inspect 1 in 10 Ontario workplaces
- Launch a program to educate both employees about their rights and small and medium-sized businesses about their obligations under the ESA
- Focus enforcement on employers who compete unfairly by breaking the law

Bill 148 introduces some measures to improve enforcement and assist victims of ESA violations.

Claims process

Bill 148 would eliminate the ‘self-help’ requirement. Under section 96.1, workers are currently required, with some exceptions, to first attempt enforcement of their ESA rights with their employer before they are allowed to make a claim for violations under the ESA. This created a significant barrier for many workers. Bill 148 rightly repeals Section 96.1 of the Act.

Eliminating section 96.1 also removes the ability of the government to refuse to assign an officer to investigate an ESA claim due to insufficient information from the employee. This is an important amendment as the Act requires employers to maintain and provide records, however, in some cases they do not. Workers’ are left to file claims with little documentation due to the employers’ violations of the Act and should not be penalized for this by being denied access to a remedy.

Recommendation: accept amendment

New Amendment to the ESA - Anonymous Individual Complaints, Reprisals and Protection against Unjust Dismissal

ESA enforcement relies largely on individual workers to enforce their statutory rights by reporting ESA violations through individual claims filed at the Ministry of Labour. The majority of claims (91 percent) are filed after their work is terminated due to workers’ widespread fear of reprisals. Anonymous complaints would provide an effective and efficient way of targeting inspections and bring enforcement into workplaces where violations are taking place.

Recommendation: a new amendment to establish a formal anonymous complaints process that includes the following:

Workers shall be able to file a claim confidentially (where the worker’s name is known to the Ministry, but not to the employer).

Where it is only the individual facing violations, an investigation will commence. If it is necessary to reveal a complainant's name to the employer, in order to pursue an investigation, then the Ministry must seek the permission of the worker to do so.

Where complaints refer to violations that affect more than one employee, then the complaint shall be reviewed for inspection of the workplace (not individual claim).

The complainant must be informed of the outcomes of their claim.

Reprisals

The ESA's anti-reprisal provision (s. 74) prohibits employers from intimidating, dismissing, penalizing, or threatening workers who ask about their ESA rights. However, workers have little confidence in the ESA anti-reprisal provisions. Currently it takes many months for the Ministry of Labour to investigate claims of reprisals by employers when a worker has attempted to enforce their ESA rights. Seasonal agricultural workers in particular often face repatriation or deportation when they try to enforce their ESA rights. This creates a disincentive for people to speak up about ESA violations. Further, the long wait for reprisals claims to be processed, with possible reinstatement of the worker, serves to discipline coworkers to refrain from talking about their rights under the ESA.

Recommendation: make an amendment to require an expedited anti-reprisal process with interim reinstatement while the reprisal claim is investigated.

Protection from Unjust Dismissal

The ESA has no protection for employees who have been unjustly dismissed. Workers, especially those in low-wage and precarious work, have little real ability to sue employers in court for unjust or wrongful dismissal, due to the cost of legal representation and the risk of costs associated with civil proceedings.

The federal Labour Code has long ensured protection from unjust dismissal in which those wrongfully dismissed can receive effective remedies, including reinstatement. Having a clear process for progressive discipline and protection from wrongful dismissal is necessary to support job and income security and strengthen the voice of workers in the workplace. We recommend that the ESA be amended to include protection from wrongful dismissal based on the federal Canadian Labour code with the exception being such protection comes into effect for workers after 3 months of employment.

Recommendation: amend the ESA to provide protection from wrongful dismissal after 3 months of employment. See Appendix for amendment.

Interest

The *ESA* allows the Ministry of Labour to determine the rate of interest and the manner of calculating interest “for the purpose of this Act”. Currently, the Act permits the Ministry of Labour to apply interests in two types of circumstances:

- (1) on the portion of unpaid wages for which a director of a corporation is personally liable (only the director is liable for the interests, not the corporation), and,
- (2) if the Ministry of Labour holds money owing to an employee in trust, then the Ministry of Labour is to pay to the employee any interest that accrued while the Ministry held the funds.

The Bill proposes a third situation where the Ministry of Labour may also decide to apply interests to include any amount owing to the employee, and not just to the portion for which the director of a corporation is liable [s. 88(5)]. This is a positive amendment. However, the Bill does not require the Ministry of Labour to assess interests on all orders to pay or wages owing. The current *ESA* allows the Director to apply interest rates [*ESA* s 88(5)] but the Director has not done so. The Bill gives the Ministry discretion when to apply interest. Meaning, whether to apply interest or not, will be a policy decision. We recommend that discretion be revoked and the requirement to apply interest on pre and post-decisions on monies owing under the Act be mandatory.

Proposed amendment to new subsection 88(5)

(5) The Director *shall*, with the approval of the Minister, determine the rates of interest and *require* that interest be paid for,

- (a) amounts owing under different provisions of this Act or the regulations, and**
- (b) money held by the Director in trust.**

Recognition of Employers

Bill 148 introduces a new provision to ‘recognize’ employers [ss. 88.2, 88.3]. The purpose of this amendment is unclear. The Ministry of Labour may be paving the way for an employer recognition, accreditation, or reward system, possibly for complying with the Act as is the case under the *Occupational Health and Safety Act*.

The new section states that “the Director may give recognition to an employer, upon the employer’s application, if the employer satisfies the Director that it meets the prescribed criteria.” It further states that the prescribed criteria may be different for different classes of employer. The amendment is completely silent on what are the prescribed criteria or even the nature of the criteria.

The ESA should not be amended to enable some employers from being recognized for simply meeting minimum standards, something that is expected of all employers. Better wages and working conditions are not only beneficial to employees and the economy; employers also benefit by helping them to draw and retain employees for their businesses.

Recommendation: revoke the Recognition of employers sections 88.2 and 88.3 in Bill 148.

Order to pay wages

When an employer has been found in violation of the ESA, an employment standards officer may make an order for the employer to pay wages to an employee. Currently the ESA requires enables officers to either “arrange” with the employer to pay wages directly to the employee or “order” the employer to pay the amount of wages to the Director in trust. Bill 148 amends the ESA to enable officers to “order” employers (rather than just arrange) to pay compensation to the employee [ss. 74.14(1)(a.1), 74.16(2)(b), 74.17(2)(b), 103(1)(a.1), 104(3)(b), 105(1)].

These amendments would enable officers to order the employer to pay employees directly. This would streamline the process so that employees do not have to wait while their wages are sent to, then processed by, the Ministry of Labour. Such orders become binding and final against the employer (after the 30 day period in which either the employer or employee can file for review of the decision).

We support these amendments with one addition. The ESA should require demonstrated proof that the order against the employer has been paid and the employee has received all unpaid wages. Where the order has not been paid, the Ministry of Labour will use its power to enforce the order. Otherwise, the unintentional consequence of these changes may be to shift, in effect if not intent, collection responsibility to employees whose rights have been violated.

Recommendation: accept amendment with the following addition.

104(3) (b) pay the amount of the compensation to the employee *and provide evidence of such payment to employment standards officer*

Settlements

Settlements between employers and employees during the claims process has tripled since 2008-09 to almost 15 percent of complaints in 2014/15. More than 65 percent of these settlements are for less than the worker claimed for. Not only can settlements disadvantage workers, they also erode the ESA and create incentives for employers to violate the act.

Recommendation: Section 112(7) of the ESA should be amended so that an attempt to reach a settlement is only permitted where an ESO or, on appeal, a Labour Relations Officer, determines that the facts are so unclear that there is considerable uncertainty about whether a contravention of the Act has or has not taken place.

Penalties

Bill 148 introduces increased flexibility for employment standard officers to issue Notices of Contravention (NOC). Officers will be authorized to determine the appropriate penalty as set out in regulation [ss. 113(1), 141(1)16.1, 141(3.1)].

The government announced on May 30, 2017 its intention to amend regulation under the ESA to increase the maximum administrative monetary penalties from \$250, \$500 and \$1,000 to \$350, \$700 and \$1,500 respectively.

The Ministry of Labour currently issues Notices of Contravention in less than 1 percent of all confirmed violations. Bill 148 proposes an exceedingly modest step in establishing effective deterrence to ESA violations. We sought a substantial increase in monetary penalties and a clear and transparent requirement that fines are issued in all cases of confirmed violation. Simply requiring an employer to pay what is already owed to an employee is not enough of a disincentive to stop employers from violating the law. There must be a penalty imposed as well.

Recommendation: New 113(1) Notice of Contravention – If an employment standards officer believes that a person has contravened a provision of this Act, the officer shall issue a notice to the person setting out the officer’s belief and specifying the amount of the penalty for the contravention.

Unlike other monetary penalties available to the Ministry of Labour (e.g., Provincial Offices Act Part I and Part III prosecutions), Section 122(4) of the ESA requires a reverse onus on the Ministry of Labour to establish that a contravention has occurred. NOCs should be brought in line with other measures under the Act by repealing section 122(4) and removing the reverse onus.

Recommendation: revoke subsection 122(4) of the ESA.

Delete “subject to subsection 122(4)” in Schedule 1, section 5.1 (2) of Bill 148.

Publication notice of contraventions

Bill 148 proposes a new section that would enable the Ministry of Labour to publish on-line those employers that have been issued a Notice of Contravention [ss. 113(6.2)-(6.4)]. The Director may publish the name of the person or company, a description of the deemed contravention, the date, and penalty.

This amendment extends the Ministry of Labour’s current practice of posting information on its website of companies that have been convicted under Part I or Part III of the *Provincial Offences Act*. Part I tickets are \$360 and Part III prosecutions include fines up to \$50,000 for employers and \$100,000 for corporations for a first offence.

Recommendation: accept amendment

Collection

Bill 148 introduces new powers for the Director of Employment Standards to improve collection of unpaid wages and other debts. Unless employers voluntarily comply, the Ministry of Labour has significant difficulty collecting on Orders to Pay – only 38 percent are fully collected on.

The new section 125.1 would enable the Director to accept security for payment of any amounts owing under the ESA. That is, the Director could accept something from the employer other than money to ensure that the employer does pay the money later.

Recommendation: accept amendment

The new section 125.2 would allow the Ministry of Labour to issue warrants, which would have the same effect as a writ of execution issued by the Superior Court of Justice.

Recommendation: accept amendment

The new section 125.3 would enable the Ministry of Labour to issue liens on company property or personal property of employers. This would include a lien and charge on any interest on personal property in Ontario owned or held at the time of registration or acquired afterwards by the employer, director or other person liable to make a payment. Such liens would have priority over any security or other claims against the property issued after the Ministry of Labour lien on the property has been issued. Further, these liens (and writs) would remain in effect for 5 years. The Ministry can renew them for a further 5 years.

Recommendation: accept amendment

Method of Paying Wages

Bill 148 would create a regulation-making power to prescribe additional methods by which employees could pay wages [ss. 11(2)(d)].

Recommendation: accept amendment

Written Agreements

Where the ESA requires agreements to be made in writing, an electronic agreement is sufficient [s. 1(3.1)].

Recommendation: accept amendment

Employment Protections for Foreign Nationals Act (EPFNA) Amendments

Bill 148 amends the EPFNA to carry forward proposed changes to the ESA on matters of related employers for joint and several liability; new power to allow orders to pay to be paid directly to migrant workers; and, Notice of Contraventions and their public disclosure.

Recommendation: accept amendment

Commencement

All the ESA amendments would come into force on January 1, 2018 with the following exceptions:

- Provisions respecting misclassification of employees would come into effect upon Royal Assent;
- Equal pay for equal work rules would come into effect April 1, 2018;
- Expanded definition of employee to cover those receiving job training – January 1, 2019; and,
- Scheduling protections would come into effect January 1, 2019.

Bill 148 rightly addresses the need to revoke exclusions for some trainees from protection under the ESA. This is a simple and straightforward amendment and should not be delayed. Similarly, the new scheduling provisions are clear and limited. To delay implementation of scheduling protections implies that it is a far more substantive provision than it is and may lead to employer non-compliance.

Recommendation: Amend s. 60, Commencement, of the *Fair Workplaces, Better Jobs Act* so that the expanded definition of employee [1(3)] and scheduling provisions [ss. 11, 12 and subsection 58(3)] comes into effect April 1, 2018.

Review of Bill 148 changes to the Labour Relations Act

One of the best ways to help workers made vulnerable in precarious jobs is to expand collective organizing, representation, and bargaining. But there are many barriers to unionization in workplaces and sectors where precarious work dominates.

Bill 148 would amend the Labour Relations Act to take some steps to make it easier to unionize. The package of amendments will reduce some barriers to the process of unionization including greater access to workplace information and better remedial protection when employers violate the LRA.

Currently most workers must go through two separate votes to form a union. This enables employer opposition and misconduct to undermine workers' constitutional right to freely choose collective representation. Bill 148 proposes a modest step to address this problem by extending card-based certification (one-step vote process) to sectors of precarious work including the temporary agency industry, building services sector and home care and community services sector.

Bill 148 would rightly extend successor rights to building services with regulatory power to extend successor rights to publically funded services such as homecare. This will help protect workers from losing their union and working conditions when the service contract covering their worksite changes hands.

However amendments are needed to Bill 148 provisions to ensure all workers can exercise their right to collective representation.

We support and endorse the Ontario Federation of Labour's recommendations to amend the Labour Relations Act.

Bill 148 fails to address those workers' most in need of collective representation and bargaining that are currently excluded from the LRA; domestic workers (caregivers) and agricultural and horticultural workers. Many of these workers are employed through the Temporary Foreign Worker Program that makes it virtually impossible for workers to enforce their rights through the employment standards process.

We recommend removing the exemptions to domestic, agricultural and horticultural workers to the Labour Relations Act and repeal of the Agricultural Employees Protection Act.

In amending the LRA through Bill 148, the government missed the opportunity to address the changing labour market with its growth in small workplaces and non-standard work. Bill 148 largely retains the old industrial relations model based on the Wagner Act that severely limits access to collective representation and bargaining for many workers because there is no practical way for unionization to take place.

For example, Bill 148 does not expand the LRA to include joint employers such as franchisors, lead employers in contracting relationships and new, on-demand platform arrangements. It does not address organizing and collective bargaining on a multi-employer or sectoral basis which domestic (caregiver) workers and agricultural workers would need to be protected. While Bill 148 reduces some barriers to unionization, more changes are necessary for broader based bargaining to address changing workplaces.

Appendix

Extend just cause protection for all workers.

Recommendation(s):

Amend section 62.1 of the ESA by adding the following:

Termination without just cause

62.1 (1) Where the period of employment of an employee with an employer is three months or more, an employer shall not discharge that employee without just cause.

Complaint

(2) An employee who is discharged without just cause may make a complaint to the Ministry in accordance with section 96(1) within • days from the date on which the employee was dismissed.

Reasons for dismissal

(3) Where an employer dismisses a person described in subsection (1), the person who was dismissed or an employment standards officer may make a request in writing to the employer to provide a written statement giving the reasons for the dismissal, and any employer who receives such a request shall provide the person who made the request with such a statement within fifteen days after the request is made.

Officer to assist parties

(4) On receipt of a complaint under subsection (2), an employment standards officer assigned to investigate the complaint shall endeavour to assist the parties to the complaint to settle the complaint, and any settlement reached shall be governed by section 101.1.

Where complaint not settled within reasonable time

(5) Where a complaint is not settled under subsection (4) within such period as the employment standards officer endeavouring to assist the parties pursuant to that subsection considers to be reasonable in the circumstances, the employment standards officer shall, on the written request of the person who made the complaint request that the complaint be referred to an adjudicator under subsection (6),

(a) report to the Minister that the endeavour to assist the parties to settle the complaint has not succeeded; and

(b) deliver to the Minister the complaint made under subsection (2), any written statement giving the reasons for dismissal provided pursuant to subsection (3) and any other statements or documents the employment standards officer has that relate to the complaint.

Reference to adjudicator

(6) The Minister shall, on receipt of a report pursuant to subsection (5), appoint a Chair or Vice-Chair of the Ontario Labour Relations Board or an arbitrator on the Minister of Labour approved list of arbitrators as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection (3).

Hearing to be held

(7) An adjudicator to whom a complaint has been referred under subsection (6) [shall consider the complaint within 30 days of his or her appointment.

Powers of adjudicator

(8) An adjudicator to whom a complaint has been referred under subsection (6) shall determine the procedure to be followed, and has all of the powers of an arbitrator under section 48(12) of the Labour Relations Act, 1995.

Decision of adjudicator

(9) An adjudicator to whom a complaint has been referred under subsection (6) shall,

(a) determine whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and

(b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

Where unjust dismissal

(10) Where an adjudicator decides pursuant to subsection (9) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to,

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his or her employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal

Exception

(11) This section does not apply to a person who is a member of a bargaining unit governed by a collective agreement which provides protection against unjust dismissal.