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Restoring Ontario's Competitiveness Act (Bill 66): Submission to the Standing Committee on General Government

The Workers' Action Centre and Parkdale Community Legal Services work every day with non-unionized, low-wage workers. We see first-hand how the increase in part-time, temporary and contract work, due to contracting out, extended supply chains and outdated labour laws, create precarious conditions for Ontario workers. The long-standing gaps in labour market regulation have left far too many workers in low-waged and precarious work with little protection of wages and working conditions. Bill 47, *Making Ontario Open for Business Act*, was passed last fall and removed modest measures to update and modernize the *Employment Standards Act* (ESA). Now Bill 66, *Restoring Ontario's Competitiveness Act*, seeks to further reduce protections for workers from excessive hours of work and unpaid overtime.

The omnibus Bill 66 would amend several important pieces of legislation including childcare ratios and licensing, pensions, long-term care licensing, municipal planning and more. Proceeding with the omnibus Bill makes it almost impossible for public review and consultation. While the provision on development of the Greenbelt was rightly removed due to considerable public pressure, the other omnibus provisions have not had the opportunity for such public review. Bill 66 needs to be withdrawn until the specific schedules are adequately consulted on.

We will focus our comments on schedules affecting Ontario's employment standards and labour relations acts (Schedule 9 and Schedule 1). Contrary to the government's stated goal of creating "good jobs", the proposed amendments would increase precarious employment and eliminate protections for thousands of workers.

In past decades, changes in labour market practices have realigned the distribution of risks, costs, benefits, and power between employers and employees. Employer goals of flexibility became paramount in shaping the employment relationship and labour laws. Bill 66 continues in this tradition and must be withdrawn.

A) PROPOSED AMENDMENTS TO THE EMPLOYMENT STANDARDS ACT, 2000

1. Remove approval required for excessive weekly hours of work

Ontario has had a maximum of 48 hours per week for almost 75 years. While exceptions could be made for hours in excess of 48, this required an agreement between an employer and employee **and** an approval by the Ministry of Labour. **Bill 66 would remove the requirement for Ministry of Labour oversight and approval of excessive hours of work.**¹

The longstanding requirement for government approval is based on the very purposes of the Act. The purpose of the *Employment Standards Act* is to address the power imbalance between employers and employees and set a floor of socially acceptable standards that employers should not fall below and to prevent an uneven playing field for employers. The requirement for Ministry of Labour approval is necessary to ensure that employees are not forced to enter into “agreements” that are not in their interests.

The Ministry of Labour outlines the factors under consideration when reviewing employer’s applications for excessive hours of work permits as:

- Past and present compliance with the ESA
- Past and present compliance with health and safety legislation and any health and safety concerns that may result from excess weekly hours or from the averaging of overtime.
- Whether or not the employer co-operates with Ministry requests for further information during the approval process (e.g. if the employer responds to a request to provide work schedules or other information).
- Has the employer clearly identified a business requirement that demonstrates a need for excessive weekly hours of work?
- Has the employer explored other ways of getting the work done without having employees work excess weekly hours?
- Will the employer use excessive weekly hours routinely or only occasionally?
- What step(s) is the employer taking to reduce excess weekly hours of work in the future?²

The Ministry of Labour reports that an application for excess weekly hours would be more likely to be approved under the following conditions:

- The employer, **prior** to asking an employee to work excess weekly hours, has given the employee the [Information Sheet: Information for Employees about Hours of Work and Overtime Pay.](#)

¹ Schedule 9, s. 3-6 [amending s. 17 and repealing ss. 17.1 and 17.3 of the ESA].

² **Ontario Ministry of Labour**, Applications for Excess Weekly Hours of Work or for Averaging Hours of Work for Overtime Pay Purposes, Online: <https://www.labour.gov.on.ca/english/es/forms/hours.php>

- The employer can demonstrate awareness of and compliance with the hours of work rules under the ESA including eating period(s), daily rest and weekly/biweekly hours free from work.
- An application is made for a specific short-term period or periods only.
- The employer can identify a clear business requirement for excess weekly hours of work, and has explored other ways of getting the work done without having employees work excess weekly hours.
- The employer has measures in place to protect employees' health and safety while working excess hours.³

Bill 66 would remove this regulatory oversight of hours of work that has been part of the employment law landscape for nearly three quarters of a century. The proposed amendments would disregard the power imbalances that the ESA is designed to address by allowing excessive hours of work in Ontario workplaces if an “agreement” has been obtained from employees. There will be no broader oversight to ferret out disregard of employees' voice in the matter or trends upward in excessive hours of work practices. If excessive hours of work become normalized in Ontario, workers' health, safety, and work-life balance will be negatively affected and potentially deter employers from creating “good jobs” when excessive overtime can be used instead of job creation.

2. Remove approval required for overtime averaging

The ESA currently requires an employer to pay employees overtime premium pay for each hour worked in excess of 44 hours per week. The purpose of overtime pay is to compensate employees for excessive hours of work and to “discourage employers from requiring overtime by imposing an economic cost on them when overtime is demanded.”⁴

The ESA allows an employer to enter into an agreement with an employee to average hours worked over two or more consecutive weeks, provided that the Director of Employment Standards grants approval for such an arrangement. Bill 66 would remove the requirement for approval by the Director of Employment Standards.

An example of overtime averaging over four weeks, for the purpose of calculating overtime entitlement, is as follows:

The employee works 48 hours in the first week, 44 hours in the second week, 40 hours in the third week and 50 hours in the fourth week. The employee's overtime hours will be determined on the basis of the average number of hours worked per week. In this example the employee worked an average of 45.5 hours per week (48 + 44 + 40 + 50, divided by 4). Accordingly, the employee would be entitled to overtime pay for six hours based on an average of 1.5 hours of overtime per week in the four-week period. In the absence of averaging, the employee would

³ ibid

⁴ Ministry of Labour, ESA 2000 Policy and Interpretation Manual. **Version: 2018 Release 3**

have been entitled to 10 hours of overtime premium pay (four hours of overtime pay in the first week and six hours of overtime pay in the fourth week).⁵

The function of overtime averaging is to reduce employers' costs for using overtime for their business. That is why the Director of Employment Standards requires that employers show clear benefit(s) to employees for overtime averaging applications to be approved. For example, acceptable benefits to employees may be demonstrated in the following situations:

- Past and present compliance with the ESA
- Past and present compliance with health and safety legislation and any health and safety concerns that may result from excess weekly hours or from the averaging of overtime.
- Whether or not the employer co-operates with Ministry requests for further information during the approval process (e.g. if the employer responds to a request to provide work schedules or other information).
- Full-time employees who have set, reoccurring schedules (usually made up of compressed work weeks or continental shifts) receive more scheduled days off during the averaging period than would be typical. Under a continental shift schedule, for example, an employee may receive 7 days off in a 2-week period, instead of the typical 4 days most workers would receive.
- Scheduling flexibility exists, which permits employees (through a clear policy) to trade or exchange shifts within an averaging period for their own benefit.
- The employer provides employees, in weather dependent industries, the opportunity to make up for missed scheduled work due to bad weather.⁶

The Ministry of Labour reports that an application for an overtime averaging would be more likely to be approved under the following conditions:

- The employees are full-time and have a set, recurring schedule;
- Overtime averaging is requested over a shorter number of weeks;
- The employer offers a lower threshold (generally less than 44 hours) for overtime pay than what is required in the ESA;
- The employer provides a shift premium or extra compensation for working weekends, evenings or for working during unscheduled hours;
- The proposed scheme provides for more flexible work arrangements such as additional scheduled days off;
 - For example, in a situation where an employee has a four-week work schedule that provides for more hours in the first two weeks of the schedule (e.g. 48 hours of

⁵ Ministry of Labour, ESA 2000 Policy and Interpretation Manual Version: 2018 Release 3. P. 234

⁶ **Ontario Ministry of Labour**, Applications for Excess Weekly Hours of Work or for Averaging Hours of Work for Overtime Pay Purposes, Online: <https://www.labour.gov.on.ca/english/es/forms/hours.php>

work per week) and fewer hours in the second two weeks of the schedule (e.g. 36 hours of work per week);

- A policy is in place that allows employees to trade or exchange shifts to accommodate their own needs;
- The employer has a policy that allows employees to make up lost scheduled work due to bad weather or other unpredictable circumstances. For example, where scheduled work cannot be performed due to rain, the employer permits employees to make up time in a subsequent week(s);
- A union or bargaining agent has agreed in writing to overtime averaging;
- The employer has provided an otherwise compelling reason for overtime averaging that is acceptable to the Director of Employment Standards.⁷

Bill 66 would remove the requirement for employers to apply for and receive approval from the Director of Employment Standards for overtime averaging agreements.⁸ If Bill 66 is passed, the only limitation on overtime averaging is that such an “agreement” could not exceed a four-week averaging period.

There would be no broader oversight to investigate disregard of employees’ voice in the matter or trends upward in excessive hours of work practices due to lower employer costs for overtime premium pay. The current criteria for obtaining Director approval serves to protect workers in precarious work. If excessive hours of work become normalized in Ontario, workers’ health, safety, and work-life balance will be negatively affected and potentially deter employers from creating “good jobs” when excessive overtime can be used instead of job creation.

3. ESA poster not required to be posted in the workplace

For the last 15 years, the ESA has required employers to post a copy of the Ministry of Labour’s poster that describes employee rights and employer requirements under the ESA. This requirement is part of the government’s Employment Standards Compliance Strategy.⁹ Bill 66 would eliminate the requirement to post the poster in the workplace.¹⁰

The poster must be displayed in a conspicuous location where employees would be likely to see it. The poster must be displayed in English and the majority language of the workplace. The Ministry of Labour provides the poster in 14 languages to improve access to justice.¹¹

⁷ Ontario Ministry of Labour, Applications for Excess Weekly Hours of Work or for Averaging Hours of Work for Overtime Pay Purposes, Online: <https://www.labour.gov.on.ca/english/es/forms/hours.php>

⁸ Schedule 9, s. 8 [amending s. 22(2) and (2.1) of the ESA].

⁹ Ministry of Labour, 2018-19 Employment Standards Compliance Strategy. Online: https://www.ontario.ca/page/2018-19-employment-standards-compliance-strategy?_ga=2.228931871.2076234368.1552345190-722343877.1539958441

¹⁰ Schedule 9, s.2(2) [repealing ss. 2(3) and (4) of the ESA].

¹¹ English, French, Arabic, Chinese (Traditional and Simplified), Hindi, Portuguese, Punjabi, Spanish, Tagalog, Tamil, Thai, Urdu and Vietnamese.

The poster not only provides workers with general information about their statutory rights, but it informs workers that they have a job-protected right to exercise those rights and provides Ministry of Labour contact information to do so.

The backgrounder on Bill 66 explains that the requirement to post the poster is redundant because employers are also required to give a poster to each employee within 30 days of starting work.¹² Quite frankly, if the employer fails to post the Ministry of Labour's information, then the employer is likely not distributing the poster to employees or in their first language. The most likely reason that the government is removing this modest compliance requirement is because employers did not like being found in violation of the posting requirement rather than the 'burden' of affixing a poster to a wall.

B) PROPOSED AMENDMENTS TO THE LABOUR RELATIONS ACT

1. Construction

Ontario's Labour Relations Act (LRA) lets employers apply to the Ontario Labour Relations Board to be defined as a "non-construction" employer. This designation results in any construction workers covered by a construction collective agreement to lose their rights under that collective agreement, and all obligations under the construction industry collective agreement would cease to apply to the employer.

Bill 66 would do away with the OLRB oversight on preservation of collective bargaining rights for certain employers. Bill 66 would amend the LRA to deem several public organizations, including municipalities, school boards, hospitals, universities and colleges among others, to be "non-construction employers". Construction workers in these organizations would lose their union and collective agreement.

Sweeping away construction workers' union and collective agreement is a dangerous precedent. The Canadian Charter of Rights and Freedoms guarantees workers' right to freedom of association and to collectively bargain.

Another negative impact of this provision of Bill 66 is that the effect of extending non-construction employer status to public organizations will remove these bodies from contracting construction work in accordance with the construction industry collective agreements (to which they are currently bound). This will result in a move away from "good jobs" to lower waged, more precarious work.

2. Ornamental horticultural workers

Ornamental horticultural farmers and their employees are currently excluded from coverage

¹² Backgrounder: Proposed Changes to Create Jobs and Reduce Regulatory Burden in Specific Sectors. Online: <https://news.ontario.ca/medg/en/2018/12/proposed-changes-to-create-jobs-and-reduce-regulatory-burden-in-specific-sectors.html>

under the Labour Relations Act. Similarly, agricultural workers are also excluded from the LRA. For the most part, most other Canadian jurisdictions include agricultural and horticultural workers under their general labour relations statutes. Ontario, on the other hand, has either excluded these workers or limited their rights to collective representation and bargaining. Bill 66 would amend the *Agricultural Employees Protection Act* (AEPA) to extend coverage to ornamental horticultural workers. These workers would remain excluded from the LRA.

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

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

This provision of Bill 66 fails to comply with horticultural workers', and other agricultural workers', fundamental charter right to freedom of association and to bargain collectively.