

Justice for Truck Drivers



Submission on Canada Labour Code enforcement

August 1, 2023

Trucking only makes up 17% of the federally regulated employment. Yet 85% of all confirmed Part III Canada Labour Code violations between 2017-28 and 2021-22 have been against trucking employers.¹ Wage theft, which includes misclassification, unpaid wages, unpaid overtime, illegal deductions and more, is rampant in the trucking sector. In this submission, we propose policy and legislative changes to improve protections for federally regulated truck drivers.

The clear overrepresentation of trucking across all labour standards violations reflects, in part, the dominance of small and medium sized businesses and widespread subcontracting in the sector. As truck drivers attest, however, the primary reason for widespread violations of labour standards in the sector is ineffective enforcement and gaps in the labour code that embolden employers to violate labour standards.

Misclassification

In its fall economic statement, the federal government acknowledges that there is a long history of employers in the road transport sector misclassifying its employees as independent contractors. When workers are misclassified, they are cheated out of vital benefits and labour protections. These truck drivers are denied access to Employment Insurance and the Canada Pension Plan, and provincial or territorial workplace injury compensation. Workers are denied protections under the Canada Labour Code for illegal deductions, wage theft, overtime, paid sick leave and health and safety standards. Employers misclassify workers to save on payroll, avoid complying with the Labour Code and shift liability and risks on to workers. A pilot enforcement project to educate transportation employers about the prohibition on misclassification found that more than 60% of employers misclassified their employees.

In January 2021, the federal government made “intentional” misclassification illegal. Unfortunately for workers, proving intentionality is extremely difficult to do in the complaints process. For more proactive enforcement measures, the Labour Program has to take a two step approach. First, they must provide education to the employer about the prohibition on misclassification. Then they have to return and do an inspection to determine if the employer is still misclassifying employees in order to demonstrate intentionality. This doubles the resources needed for proactive enforcement.

¹ ATIP-A-2022-01434. Data extracted August 11, 2022

Recommendation:

Amend s. 167.1 of the Canada Labour Code to remove intentionality from the prohibition on misclassification.

The test to determine if a worker is an employee or an independent contractor is a complicated multifactorial test which places the burden on workers themselves to challenge and prove their status with their employer or when they file a complaint at the Labour Program. Given the power imbalance between employers and employees, workers have little choice but to accept what employers tell them. When problems arise with wage theft, workers believe they have no rights because they signed a contract with their employer.

Simplifying and clarifying the employment status of truck drivers in a proactive way is quite easy. First, the Code should be amended to establish a reverse onus regarding employee status. A worker should be presumed to be an employee unless the hiring entity can demonstrate otherwise. Second, there needs to be a simple and clear test for the presence of an employer-employee relationship. The ABC test provides such a test.

Recommendation

Amend the Employment Insurance Act, Canada Pension Plan and Canada Labour Code to adopt a presumption of employee status that provides that a worker is an employee unless the hiring entity can establish that:

- A) The worker is free from its control, both factually, and under the terms of contract for performing the work;
- B) The worker performs work outside the usual course of its business; and,
- C) The worker is customarily engaged in an independently established trade, occupation or business of the same nature as that involved in the work performed.

Joint and several liability

Deregulation of the trucking industry in the 1980's led, in part, to vertical restructuring which saw the rise of smaller firms in networks with larger companies. Cost containment pressures by large companies are imposed on smaller companies in trucking, shipping and logistics which are passed on to drivers, thereby contributing to endemic labour code violations. Truckers are seeing a proliferation of related corporate entities (e.g., logistics, dispatch, trucking) controlling their work - effectively joint and related employers. Similarly, when companies experience financial difficulties, they use these corporate entities to veil themselves from legal liability. In light of this growing fissuring, it is inadequate to impose liabilities on only one direct employer narrowly conceived.

Recommendation

Establish joint and several liability to supply chain and contracting-out arrangements. Employers who enter into contracts with subcontractors and other intermediaries, either directly or indirectly, must be liable both separately and together for money owed and statutory entitlements under the Canada Labour Code and its regulations.

Barriers to filing a complaint

The 6 month time limit on filing federal labour code complaints create huge barriers to truck drivers in recovering their unpaid wages. Truck drivers face common practices of wage theft in the trucking sector. Employers take the first two weeks of wages as a security deposit against possible future damage to their truck. Then pay cheques are short or held back a week or two. Partial payments and bounced cheques are common. All the while, employees are asking for their wages only to be met with excuses and empty promises.

Truck drivers can be owed \$10,000 to \$30,000 in unpaid wages by the time they leave or are fired for asking for their wages. By this time, most workers are in debt because of unpaid wages and must focus on getting a new job as soon as possible. Time and energy is also spent continuing to try and get their unpaid wages from their former employer. This can take months before a worker seeks help in recovering their wages. By that time, the 6 month deadline for filing a federal labour code complaint has passed.

Increasingly the shortage of truck drivers is being met by recent migrants to Canada. The lack of easily available and accessible information about how to file a complaint creates barriers in access to justice for truck drivers. This is exacerbated by the 6 month time limit to file complaints. Many workers do not find out about the federal complaint process until well after the deadline has passed.

Half of Canadian provinces and territories have longer time limits on filing claims than federally regulated workers, ranging from 12 months to 24 months in Ontario.

Recommendation:

Establish a two year time limit for filing complaints under the Canada Labour Code

Many truck drivers face reprisals when they try to enforce their right to receive their wages on time from employers. Employers simply fire workers that ask for their unpaid wages because there is no real consequence for doing so. While the Canada Labour Code prohibits such reprisals, employees must file their claims within 90 days of the reprisal. Further, the complaint process for reprisals is separate from the complaint process for unpaid wages and other monetary entitlements. While unpaid wage complaints go through the Labour Program investigation process, reprisal complaints are argued by workers at the Canada Industrial Relations Board which is a much more onerous and complex process, especially for low wage workers that cannot afford legal representation. Together, these features of the reprisal claim process creates substantial barriers for truck drivers facing wage theft and reprisals.

Recommendation

- Establish a two year time limit for filing complaints of reprisals
- As is the case in Ontario, have one complaint form and process for reprisals and monetary and non-monetary complaints.

Complaints Process

As discussed above, the general pattern of wage theft in the trucking sector results in workers being owed substantial amounts of unpaid wages by the time they are fired or leave the job. Workers are in need of their unpaid wages, yet the complaint processing time takes close to a year before an order to pay is issued to the employer and, if the employer does not pay, another year for the order to pay to be filed in federal court. Truck drivers report that it takes at least 3 months for the Early Resolution Officer (ERO) to process their complaint. Then the complaint is assigned to a Labour Affairs Officer (LAO) who will investigate the complaint which takes another 6 to 8 months. The complaints process must be faster to ensure timely restitution.

In the trucking sector, employers know that the Labour program cannot compel them to provide records (e.g., information such as hours of work, proof of payment of wages). Truck drivers are at a distinct disadvantage in this process. With the move to electronic log books, employees are locked out of employer log book accounts after termination and consequently will not have access to evidence they need for their complaint. Even though the Code requires employers to maintain records, some employers destroy the records, will not respond to LAO requests to provide records to delay the process, or will evade service from the labour program all together. In these cases, the truck driver's complaint may not proceed. There are no consequences for the employer.

Recommendations

- The labour program needs legislative tools to compel employers to provide documents for the investigation. For example, LAO could be given the power to suspend an employer's operating license if employers do not comply with LAO requests and orders to pay.
- Where the employer fails to comply with LAO requirements, s. 251(1.2) of the Code does permit inspectors to use other available forms of evidence; this should include the testimony of employees as to the facts of the case.

Multiple complaints against an employer must trigger expanded inspections

LAOs have the power to expand their investigation if they suspect that the issue they are investigating affects employees other than the complainant. They do not use this power.

In the case of Sondh Freight Systems Inc, individual truck drivers began filing complaints for unpaid wages in the spring of 2022. During this period of time, the company continued to hire new truck drivers. LAOs working on the complaints kept giving the employer more time to respond to their requests. Still more drivers filed complaints for unpaid wages. By the end of that year, 20 drivers had filed complaints for over \$124,600 in unpaid wages. The employer has since closed Sondh Freight Systems, but nothing stops him from opening up a new trucking company while the workers go without their wages.

Recommendation

The Labour Program must adopt a policy whereby multiple complaints trigger an expanded inspection immediately. Expanded inspections should involve investigating compliance with the Labour Code for all employees.

Collections of unpaid wages and Canada Labour Code entitlements

The labour program relies on voluntary compliance and where employers do not comply voluntarily, LAOs issue an order to pay to the employer. If the employer does not pay the order, then the LAO can issue an order to the debtor (such as the employer's bank branch). If the LAO does not have debtor information then an order can be issued to the Director of the company or their debtor (bank). With the exception of guaranteeing a company's bank if the information is known to the LAO, there really are no measures compelling employers to comply with payment orders. All too many truck drivers report going through the complaint process only to have their employer ignore the order to pay. As the Labour Program's collection tools have been exhausted, it is up to the worker to pursue payment on their own through federal court.

Recommendation

- Legislate expanded collection powers for the labour program that include warrants issued on personal property, liens on property, and filing orders in federal court and enforcing such orders.
- Measures to deter non-payment of orders to pay should also be adopted including powers to suspend operating licenses, and to apply interest to orders to pay and to apply penalties for non-payment.

Remedy for victims of wage theft

Work in the trucking industry is hard. Drivers work excessive hours and are away from family and community for long periods of time. The pattern of wage theft in the trucking industry leaves workers and their families in economic hardship. While employers withhold pay or provide partial pay, workers must still pay the rent and feed their families. By the time the job ends, substantial wages are owed. The economic insecurity arising from wage theft may have depleted savings and pushed workers into debt. Low income workers face high debt servicing costs such as credit card interest rates. The harm born by truck drivers facing violations of their basic employment standards is huge. Yet there is currently no remedy for these damages.

Recommendation

- Amend the Code to require that interest be paid on all wages owing, both pre- and post-judgement.
- Require employers to pay a financial penalty to employees whose rights have been violated. This would compensate for the costs incurred by employees due to the employer's failure to pay wages/entitlements. The amount of damages paid to the employee could be specified as a set amount or an amount equal to or double the amount of unpaid wages.

Penalties for labour code violations and effective deterrence

Given the persistently high rate of violations in the trucking sector, effective penalties and deterrence are needed immediately. Truck drivers believe that wage theft and misclassification that is rampant in the sector is due, in part, because there is no penalty, no cost for breaking the law.

Administrative Monetary Penalties (AMP) were brought into effect on January 1, 2021 (Part VI) to deter non-compliance and to penalize on-going non-compliance. In theory, LAO could use AMPs when employers fail to provide documents in a timely way during an investigation. AMPs could also be used when employers fail to comply with orders to pay wages. Unfortunately, over the past two and a half years that AMPs have been in effect, they have not been used to deter non-compliance. Only one AMP of \$3,000 has been issued against a trucking company for misclassification since the AMPs came into effect.

Companies can be prosecuted for violations of labour standards and, if convicted, be liable for fines for a first offense of not more than \$50,000, second offense not more than \$100,000 and subsequent offenses not more than \$250,000. While the labour program has prosecuted some employers for health and safety violations, it has not prosecuted any employers for violations of labour standards under Part III of the Code. This enforcement tool does not deter employers from wage theft and other violations if it is not used.

Recommendations

- To deter employers in the trucking sector from violating the law, there must be a penalty to breaking the law. There should be set fines for confirmed monetary violations.
- AMPs should be consistently used to move investigations along to expeditiously ensure restitution for employees.
- The Labour Program must use prosecutions in all cases of unpaid orders to pay and misclassification.

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