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Submission to the Standing Committee on Social Policy Review of Bill 149: Working for Workers Act Four Act, 2023

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Introduction

These submissions are made on behalf of the Workers' Action Centre (WAC) and Parkdale Community Legal Services (PCLS). Each year, our organizations support thousands of workers in low wage and precarious employment. Through case work, law reform initiatives, and movement building, it is our mission to support workers in their struggle for dignity and decent work in Ontario.

Summary Remarks

Similar to the previous omnibus *Working for Workers Acts,* 2021, 2022, and 2023, Bill 149 makes many changes to Ontario's employment laws without meaningfully contributing to workers' rights and entitlements. In many respects, the proposed changes restate protections for workers which are already in the existing legislation, or create weak disclosure requirements for employers. It is our opinion that most of the new measures proposed in Bill 149 provide a veneer of transparency and protection, but do not actually make it easier for workers to access or enforce their rights in the workplace.

Our perspective is informed by the experience of WAC members and of PCLS' clients. What we have observed time and again is that in low-wage industries, such as the service industry, building services, and construction, employers know that they can get away with violating their employees' rights. Discriminatory practices and substandard employment conditions become the norm in these industries because employers know they will not be penalized for things like employee misclassification, illegal deductions, or wage theft.[1] Employees often know that they are not being given their full legal entitlements, but they cannot push back due to a legitimate fear of reprisals, including termination. These risks have only increased in recent years, due to

[1] Wage theft is a term which encompasses many different forms of unpaid wages and entitlements including unpaid hours of work, unpaid overtime, vacation pay, public holiday pay, as well as employee misclassification, subminimum wage payments, and illegal wage deductions.

the high cost of living in this province, and because for many of the workers we support, they are contending with precarious immigration status. That is why the current complaint-based enforcement system does not work.

The Minister has said that Bill 149 will "ensure workers keep their hard-earned money", but the more expedient way to do this, and to promote equity and diversity in the workplace, would be to enforce the labour standards that already exist. Without funding for proactive enforcement, robust collections and penalty mechanisms, employers will continue to breach minimum employment standards laws because they know they can get away with it.

The licensing regime for temporary help agencies and recruiters is another important accountability mechanism that this government could be using to curb workplace exploitation. The Labour Policy Branch conducted consultations on the proposed registry from December 2, 2020 to January 29, 2021. A licensing regime was then drafted into law through the *Working for Workers Act 2021* (Bill 27) and *Working for Workers Act 2023* (Bill 79), with an original implementation date of January 1, 2024.[2] In November 2023, however, the Minister quietly reversed course, halting the application process and delaying implementation to July 1, 2024. Minister Piccini has suggested that he is considering making changes to the licensing regime, including:

- changes to the fee requirement for companies who operate as both recruiters and THAs;
- narrowing the scope of recruiters required to provide a security to those who work with vulnerable people; and
- changing to acceptable forms of security.

[2] The regime would require all THAs and recruiters to apply for a license in order to lawfully operate in Ontario. As part of the application process, prospective licensees must disclose corporate information that would make it easier to track down the parties actually liable for any future unpaid wages, as well as information about their past compliance with Ontario's labour standards legislation. Licensees must also post a security of $25,000. All licensees would be searchable on a public registry.

It would be a real disservice to workers if the government now chooses to reverse course or water down the THA and recruiter licensing regime. The licensing regime which sits on the books was carefully considered and crafted based on input from all the relevant stakeholders, including staffing agencies and recruiters. It is a badly needed corrective to an industry rife with systemic problems. The government has wisely taken a broad approach, encompassing all recruiters and temp agencies. This eliminates loopholes and will help catch recruiters who lure migrant workers to Canada on false pretenses and charge illegal fees but do not pay workers directly. Many temp agencies and recruiters operate with little capital costs, they can easily shut down and pop-up under another name, making it very hard to push bad actors out of the industry. The new rules will give workers greater ability to recoup their stolen wages and illegal fees and should be implemented *without further amendments* as soon as possible.

Finally, new technologies are rapidly changing the world of work. Gig work and AI human resource tools are widely used already. Our regulatory apparatuses are playing catch up. Ontario should be listening to workers and relying on their input when shaping policy toward new technology and digital platform employment practices. However, that is not what we see from this legislation.

1) Workers in restaurant and food services need stronger Employment Standard enforcement

When Labour Minister Piccini tabled Bill 149, he said that his government was committed to ensuring service industry workers can keep their hard-earned money.[3] Indeed, the accommodations and food industry has the highest number of confirmed violations of

[3] Ministry of Labour, Immigration, Training and Skills Development, News Release: Ontario Strengthening Wage Protections for Restaurant Workers, November 14, 2023

employment standards.[4] Employers in this industry clearly feel confident that they can make illegal wage and tip deductions without facing repercussions.

Recommendation:

The government correctly identifies that food service workers face rampant violations in unpaid hours of work and illegal deductions from wages and tips. Simply reconfirming ESA requirements will not help workers. **What is needed is effective proactive enforcement of employment standards, real consequences for employer violations, and real protections for workers in the workplace.**

Ontario's system of ESA enforcement relies on individual workers to enforce their own rights. Without proactive enforcement in workplaces, workers have little protection when their employers violate employment standards. They also have little protection when they stand up to enforce their rights. Employers have become all too confident that they can violate the ESA without consequence as we see in the restaurant sector.

Non-unionized workers have little bargaining power to try and enforce their rights while in the workplace. Without protection from unjust dismissal, workers are too fearful to risk losing their job while seeking to enforce their rights. Non-union workers who collaborate to improve working conditions have no protections if their boss fires them for working collectively.

When workers do file claims for ESA violations, they will only, at best, get the wages and entitlements that they should have received in the first place. Although the Ministry of Labour has the power to impose some modest penalties,, they are rarely used. The

[4] Sara Mojtehedzadeh, "Popular restaurants, professional sports teams among the Ontario companies accused of unpaid wages during the pandemic" **Toronto Star** August 5, 2023.

number of fines levied by the Ministry of Labour against employers who violated the law fell dramatically from 2,575 in 2018 to 157 in 2022.

When Premier Ford took office in 2018, the Ministry of Labour instructed staff not to initiate any new proactive Employment Standards inspections, and all inspection and prosecution training for new staff were put on hold.[5] Though the Ministry of Labour also has the power to conduct proactive inspections of employers, over the past four years, the use of proactive inspections and expanded investigations has declined from 2,490 to 788.[6]

What do workers need?

- Protection from wrongful dismissal under the ESA;
- Job protection when workers collaborate and take action to enforce their ESA rights at work ("concerted activity protection");
- More proactive inspections of workplaces;
- Meaningful fines when employers violate the ESA; and
- Full compensation for workers for the costs of ESA violations.

a) The ESA definition of "employee" already covers work performed during a trial period

The government recognizes that even though employers are required to pay workers for all hours worked, including so-called trial-shifts, **unpaid** trial shifts are still a regular part of the

[5] Sara Mojtehedzadeh, Toronto Star, October 25, 2018 "Ministry of Labour puts hold on proactive workplace inspections, internal memo says"
[6] Employment standards enforcement statistics, Inspections: https://www.ontario.ca/document/your-guide-employment-standards-act-0/employment-standards-enforcement-statistics#section-2.

recruitment process in restaurant and services industries.[7] Bill 149 only proposes to clarify that employers are required to comply with the ESA for workers by paying them for the "trial period". In particular, Bill 149 would amend the definition of training for clause (c) of the definition of employee to include "work performed during a trial period."

Under the existing *Employment Standards Act, 2000* workers are required to be paid for training shifts. The Ministry of Labour's employment standards officers and the Ontario Labour Relations Board already adhere to this interpretation of the *Act*.[8] There is no substantive difference between a training shift and a trial shift.[9] As such, amending the definition of Employee in Section 1(1) to include work performed on a trial shift serves only to formalize an interpretation of the *Act* which adjudicators already recognize and adhere to.

We do not believe that simply restating the requirement will motivate employers to start following the law.

b) The ESA prohibition against illegal deductions already prohibits employers from recovering the cost of unpaid customer bills from employee's wages

Section 13 of the ESA currently prohibits employers from deducting wages for lost or stolen property.[10] That means employers cannot take the cost of "dine and dash" or "gas and dash" from employees' wages. This interpretation of the *ESA* is expressly spelt out in the current ESA Policy and Interpretation Manual, which Employment Standards Officers rely on when interpreting the *Act:*

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[7] Ministry of Labour, Immigration, Training and Skills Development, News Release: Ontario Strengthening Wage Protections for Restaurant Workers, November 14, 2023
[8] 1624972 Ontario Inc (Willy's Jerk Applicant) v Clive Bennett Leroy Wright, 2013 CanLII 26838 (ON LRB), t para 22.
[9] Tai Pan Vacation Ltd v Zhang, 2013 CanLII 82237 (ON LRB) at para 15. *Noramtec Consultants Inc.,* [1998] O.E.S.A.D. No. 299 at para 14; As such, The existing definition of Employee is not exhaustive, adjudicators have repeatedly found that this definition should be given a broad interpretation to deter employers from trying to avoid their ESA obligations: 1539058 Ontario Inc. v. Ohayon, 2007 CanLII 8453 (ON LRB) at para 31- 35.
[10] *Employment Standards Act, 200*0, SO 2000, c 41, section 13(5)(b)(ii).

> Under s. 13(5)(b)(ii), an employer is prohibited from withholding wages, making a deduction from wages or requiring an employee to return wages for cash shortages, loss of property or stolen property where any person other than the employee had access to the cash or property, even if the employee has authorized the deduction in writing. This could include situations where a customer leaves a restaurant without paying the bill or where a customer leaves a gas station without paying the bill after pumping gas for their car. The dine and dash or "gas and dash" can be considered a cash shortage and, in such cases, the customer, not the restaurant employee or gas station employee, had exclusive control over the cash in question.[11]

Bill 149 would merely add a new subsection that explicitly restates the existing interpretation that employers cannot deduct such costs from employee wages.

c) Tipped workers need greater transparency about all employer tip policies as well as recourse to recover unpaid tips

Part V.1 of the ESA currently prohibits employers from taking employee tips, with some exceptions. Those exceptions include when employers set up a tip pool to distribute tips to non-tipped employees or if the employer regularly does the same work as the tipped employees.[12] The ESA does not regulate the terms of the tip pool such as who gets how much in tips. Nor is the employer required to enter into a written agreement with employees with regard to any tip pooling arrangements. There is no set time period for when tips must be distributed to employees. Tipped employees often have the sense that they are not being paid their fair share of tips, or that their employer is illegally stealing from the tip pool, but it is very difficult for them to know if this is the case, even if they keep diligent records of all the tips they have earned in a given time period. Since tips are not considered wages, employers are not required to provide pay statements detailing how tip payouts or deductions are calculated, nor are they required to pay tips within a certain time period. And while employees technically can file an ESA complaint related to violations of s.14.1-14.5, they often do not have access to any

[11] Employment Standards Act, 2000 Policy and Interpretation Manual, Part V, s. 13.
[12] *Employment Standards Act, 2000*, SO 2000, c 41, s.14.4.

of the evidence (employee bills, customer credit card transaction reports, etc.) that would allow them to calculate what they are owed.

Rather than address all the gaps in the rules on tips, Bill 149 would only address the situation in which an employer takes money from the tip pool because the employer regularly does the same work as their tipped employees. If the employer has a policy to take tips for themselves for that work, then a new subsection 14.4(6) would require the employer to post that policy. Significantly the proposed subsection does not require an employer who takes tips for themselves to have a policy with regard to this practice. It only requires that they post such a policy if they decide to create one.

Some digital payment platforms that are used in the service industry to pay employees their tips may charge employees a fee to access those monies. Bill 149 proposes a new section 14.1 that would require employers who pay tips using direct deposit to only deposit into an account selected by the employee. We support this proposed amendment, though more extensive measures are necessary to increase accountability in digital platform based employment.

2) Job Posting Requirements will not protect workers against discrimination

Bill 149 would introduce a new Part III.1 on job postings to the ESA. Prior to tabling Bill 149, Minister Piccini held a series of press conferences promoting the upcoming Bill. Minister Piccini reported that the Bill would bring in new job posting requirements to address the gender wage gap, discrimination against recent immigrants and bias in hiring. Unfortunately the actual provisions of Bill 149 will do none of these things.

a) Ontario should enact the *Pay Transparency Act*

Bill 149 proposes a new subsection 8.2(1) that would require employers to include the expected pay rate or range in publicly advertised job postings for those jobs paying less than $100,000.

Mandating a simple posting requirement is a huge step backward from the robust *Pay Transparency Act* that received royal assent on May 7, 2018.[13] The *Pay Transparency Act* was supposed to come into effect on January 1, 2019 but was blocked by the Ford government in late 2018.[14]

The *Pay Transparency Act* is an existing law that has the following goals:

- promote gender equality;
- disclose employment and pay inequities that women and other groups face in the workplace;
- promote, among employers, the elimination of gender and other biases in hiring, promotion, employment status and pay practices; and,
- support economic growth through the advancement of equity for women and other groups.

The *Pay Transparency Act* accomplishes these goals by:

- Requiring employers to include wage rates or salary ranges in job postings;
- Prohibiting employers from asking job applicants about their pay rates in previous positions;
- Requiring employers with over 100 employees to produce yearly transparency reports which it must both file with the Ministry of Labour and post for employees. The reports must include information about the workforce composition and differences in compensation with respect to gender and other prescribed characteristics;

[13] *Pay Transparency Act, 2018*, S.O. 2018, c. 5 - Bill 3
[14] *Restoring Trust, Transparency and Accountability Act*, 2018, S.O. 2018, c 17 - Bill 57

- Employers will be prohibited from intimidating, dismissing or otherwise penalizing employees for making inquiries about the employee's compensation, disclosing their compensation to another employee, or asking the employer to comply with the requirements of the legislation. Employees facing such reprisal can make a complaint to the Ontario Labour Relations Board.

Unfortunately, the government continues to block the implementation of the *Pay Transparency Act*. Putting the law into practice is a simple matter of political will, since it only requires the Lieutenant Governor of Ontario to proclaim the day that the Act will come into effect (Schedule 32, *Restoring Trust, Transparency and Accountability Act, 2018*).[15] As it stands, Minister Piccini's legislation is a faint shadow of what is needed in Ontario to really begin to address gender and race inequality.

> **Recommendation**: We recommend that the government not proceed with the proposed job posting requirement on the compensation range and, instead, move immediately to bring the *Pay Transparency Act* into effect.

b) Job Posting - Canadian Experience

Minister Piccini said that "[F]or too long, too many people arriving in Canada have been funneled toward dead-end jobs they're overqualified for. We need to ensure these people can land well-paying and rewarding careers that help tackle the labour shortage."[16] To achieve this, Bill 149 would amend the ESA to prohibit employers from stating in public job postings that Canadian experience is a requirement for the job. This amendment would merely restate what has long been prohibited under Ontario's *Human Rights Code*.

[15] *Restoring Trust, Transparency and Accountability Act*, 2018, S.O. 2018, c 17 - Bill 57
[16] Ministry of Labour, Immigration, Training and Skills Development, News Release: Ontario to Ban Requirements for Canadian Work Experience in Job Postings, November 9, 2023.

Under the *Human Rights Code,* employers are already prohibited from unlawfully discriminating against a person in respect of employment, including at the recruitment phase. Ontario's Court of Appeal has also recently confirmed that, except where there are exceptions prescribed by law, hiring practices which give preference on the basis of Canadian citizenship or permanent residency status amount to discrimination under the *Code.*[17]In 2013, the Ontario Human Rights Commission set forth its "Policy on Removing the 'Canadian Experience' Barrier", which states that except in a few limited circumstances, strict requirements for "Canadian Experience" are *prima facie* discriminatory and a violation of the *Human Rights Code.*[18] Employers must not refer to Canadian experience at the application stage.

Widespread employer violations of this human rights protection for newcomers is a result of fundamental problems with our human rights system. As with employment standards, there is no proactive enforcement of human rights in Ontario. Employer violations of newcomer's human rights are only enforced by individual newcomers who file Human Rights complaints. But the Human Rights Tribunal of Ontario (HRTO) has a huge backlog of over 9,000 cases.[19] Workers wait 3 to 5 years to get a hearing on their case.

The backlog of cases at the HRTO began to increase significantly after the Ford government came into power and failed to reappoint or retain experienced adjudicators and then failed to make new appointments.[20] When the government did start to appoint new staff, those appointed had little or no expertise in human rights law. If the Ford government were serious about human rights in Ontario, they would act immediately to hire experienced human rights staff to address

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[17] *Imperial Oil Limited v. Haseeb,* 2023 ONCA 364 at para 107, 135-140.

[18] A distinction based on where a person acquired their work experience may indirectly discriminate based on Code grounds such as race, ancestry, colour, place of origin and ethnic origin. As stated in the policy, the onus would be on employers to show that any such requirement for prior work experience in Canada is a bona fide job requirement.

[19] Muriel Draaisma, "Backlogged tribunals creating 'distress' for Ontarians waiting months or years to be heard" **CBC News**, March 11, 2023.

[20] Tribunal Watch Ontario, The Human Rights Tribunal of Ontario: What Needs to Happen, January 2023.

the enormous backlog of cases and invest in the HRTO so that there is proactive enforcement and timely resolution of human rights complaints.

Recommendation:

- Increase funding to the Human Rights Tribunal of Ontario to speed up claim processing time and address the backlog of cases at the Tribunal;
- Create proactive enforcement mechanisms to enforce the Human Rights Code, particularly in relation to hiring and job application processes; and
- Create other deterrence mechanisms, such as reporting requirements and fines, instead of relying solely on complaints-based enforcement systems for the *Human Rights Code.*

c) What workers need is a more comprehensive review of the AI-assisted recruitment and hiring methods.

The government rightly recognizes that AI tools and algorithms are rapidly being adopted by Ontario businesses and collect high volumes of personal data about job applicants. Indeed, algorithmic bias has been shown to bring in discriminatory recruitment and hiring processes based on gender, race and personality traits.[21] Bill 149 would require employers to disclose in public job postings if they use AI to screen, assess or select applicants for the job. Presumably the intent is that applicants can then self-select in or out of the process to protect their data or avoid the biases in the hiring process. The proposed measures fail to address the current risks and instead put the responsibility on workers to decide what risks they can tolerate. As AI and algorithmic human resource tools become the norm in almost every industry and labour sector, this approach is untenable.

[21] De Stefano V, Taes S (2023) Algorithmic management and collective bargaining. Transfer: European Review of Labour and Research 29(1): 21–36;

Recommendation:

We need strong labour standards to curb discriminatory practices that new technologies risk bringing into the workplace. Workers, unions, and other worker organizations need to be given the opportunity to weigh in on the appropriate regulatory measures needed to address AI surveillance, data collection, and the appropriate uses of new technology in the workplace.

3) Schedule 1 - Digital Platform Workers' Rights Act, 2022

The government enacted the *Digital Platform Workers' Rights Act (DPWRA)* in April 2022 but, fortunately, has yet to bring it into effect. The Act requires platform companies to provide information on pay, tips, and removal of a worker from the company platform among other things. Platform workers have rightly condemned the Act because it carves workers out of protections under the *Employment Standards Act* for minimum wage, hours of work, and termination notice.[22]

The DPWRA currently requires platform companies to provide a minimum wage for time worked "on assignment". While "on assignment" has not yet been defined in regulation, it generally refers to the time a worker spends "engaged" in driving to or for one of the Digital Platform's customers (i.e., from when they accept an assignment to the completion of the assignment). Yet it is well documented that platform workers spend an average of 40% of their work time waiting for assignments – work time that companies would not be required to pay for if the DPWRA comes into effect. Bill 149 amends the DPWRA to allow the Minister to create regulations relating to how minimum wage requirements are met for gig workers.As opposed to having to go through the more onerous legislative amendment process, the Bill would allow for the creation of regulations, at some later time, prescribing that gig workers' minimum wage entitlements may

[22] Gig Workers United, Press Release: Second-Class Minimum Wage becomes Law in Ontario, April 7, 2022.

be calculated on something other than an "on assignment" basis. The government has not indicated how it plans to require platform companies to pay its workers at least minimum wage through regulation. In addition, the DPWRA does not protect platform workers wages from being further reduced below minimum wage by all the employment-related expenses which are paid by workers (e.g., provision of cars, bikes, gas, insurance).

Recognizing the gaps in the legislation gives the government the opportunity for sober second thought on the *Digital Platform Workers' Rights Act*. The Act is fundamentally flawed in taking platform workers' rights out of the ESA and enabling large platform companies to provide substandard work conditions. It also creates an uneven playing field for platform companies that routinely misclassify their employees as independent contractors.

Recommendation: Repeal the Digital Platform workers' Rights Act, 2022.

Schedule 4 - Workplace Safety and Insurance Act, 1997

While introducing Bill 149, Minister Piccini said that amendments to the *Workplace Safety and Insurance Act* (WSIA) would enable "super indexing" of WSIB benefits for injured workers. That is, that benefits could be increased in addition to annual indexing. This move is likely in response to the legal challenges by injured workers to have the Act's annual cost of living adjustments done properly so that workers benefits do actually rise based on the previous year's Consumer Price Index.[23]

After full indexation of benefits was reduced by the government in 1994, injured workers were finally successful in winning full indexation in 2018. Under section 49(1) of WSIA, the annual adjustment should be "equal to the amount of the percentage change in the Consumer Price Index for Canada for all items, for the 12-month period ending on October 31 of the previous

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[23] Ontario Network of Injured Workers Groups, ONIWG court challenge to WSIB Cost of Living Adjustment, **Injured Workers Online**, July 25, 2023.

year, as published by Statistics Canada." Injured workers were, therefore, expecting an annual adjustment of 4.7% in 2022 as this was the CPI as of October 31, 2021. However, workers only received 2.7% indexation by the WSIB. During judicial review of this matter, WSIB acknowledged that it does not use the CPI percentage change for the previous 12-month period. Rather, without public notice, it used a complicated formula looking back over the previous two years. As such, when there is a sharp rise in cost of living, as was the case in 2022, injured workers benefits do not keep up with the increased cost of living. The Ontario Network of Injured Workers Groups is still pursuing this matter through the Workplace Safety and Insurance Appeals Tribunal (WSIAT). Injured Workers need a predictable and full indexation based on the actual previous year's CPI, not one-off increases.

> **Recommendation**: WSIB should comply with section 49(1) of WSIA and annually index benefits based on the previous 12-month CPI, not averaging over a longer period.