

**SUBMISSIONS REGARDING JOB POSTINGS RULES IN THE *EMPLOYMENT STANDARDS ACT, 2000***



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## Introduction

These submissions are made on behalf of the Workers' Action Centre (WAC), Parkdale Community Legal Services (PCLS), and the Income Security Advocacy Centre (ISAC). 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.

The proposed job posting rules are intended to increase equity and fairness in the hiring process, and provide workers with greater certainty and transparency while on the job hunt. These are important goals. However, as mentioned throughout these submissions, more substantive protections are needed to ensure that workers, particularly newcomers and those from equity-seeking groups, have access to decent work in today's job market. Our many recommendations throughout these submissions center three core needs which we urge the provincial government to consider:

1. Prioritize minimum standards enforcement by proactively investigating and auditing employer practices;
2. Take a more robust approach to pay equity and fairness by instituting anti-retaliation and reporting mechanisms, similar to the *Pay Transparency Act, 2018*<sup>1</sup>; and
3. Reduce loopholes and exemptions which would allow employers to meet the requirements of the law without engaging in meaningful equity practices.

Workers who are looking for work are at their most vulnerable and are very unlikely to make complaints about prospective employers who violate their rights during the hiring process. They simply do not have the luxury of time, nor can they risk retaliation, particularly when faced with the high cost of living in today's job market. As outlined in more detail below, job seekers need to be given enough information to understand the basic terms of the job they are applying for, including pay and scheduling information.

Without a more substantive approach to equity - not just at the hiring stage but also during the employment relationship - as well as robust enforcement, the new job posting measures proposed 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.

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<sup>1</sup> S.O. 2018, c. 5

**A. Working For Workers Act, 2024 Job Posting Amendments (creates new Part III.1 of the ESA)**

**COMPENSATION RANGE INFORMATION**

Requiring employers to include salary or salary range information in publicly available job postings is a good first step to promoting pay transparency. But this measure will not, on its own, promote gender and race equality and rectify pay inequities faced by women and other equity seeking groups. Pay transparency legislation in other Canadian jurisdictions includes other necessary measures, which work in lockstep to promote equity at, but also beyond the hiring stage. Such measures include:

- Prohibiting employers from asking job applicants about their pay rates in previous positions;<sup>2</sup>
- Requiring employers to produce yearly transparency reports which include information about the workforce composition and differences in compensation with respect to gender and other prescribed characteristics, and are made available to the relevant government authority and the firm's own employees;<sup>3</sup>
- Prohibiting employers 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.<sup>4</sup>

All these measures were included in the robust *Pay Transparency Act* that received royal assent in Ontario on May 7, 2018.<sup>5</sup> The *Pay Transparency Act* was supposed to come into effect on January 1, 2019 but was blocked by the Ontario Government in late 2018.<sup>6</sup> Mandating a simple posting requirement is a huge step backward from that legislation, which took a systemic approach to pay transparency and pay equality, and provided a blueprint for pay transparency legislation that has been adopted across Canada.

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<sup>2</sup> *Pay Transparency Act*, SBC 2023, c 18 at s3; *Labour Standards Code*, RSNS 1989, c 246, s57A; *Pay Equity and Pay Transparency Act*, SNL 2022, c P-3.02 at 11(1); *Employment Standards Act*, RSPEI 1988, c E-6.2 at 5.8(2);

<sup>3</sup> *Pay Transparency Act*, SBC 2023, c 18 at s5-8; *Employment Equity Act*, SC 1995, c 44 a s17-21.

<sup>4</sup> *Pay Transparency Act*, SBC 2023, c 18 at s4; *Pay Equity and Pay Transparency Act*, SNL 2022, c P-3.02 at s2(1); *Labour Standards Code*, RSNS 1989, c 246 at s75B; *Employment Standards Act*, RSPEI 1988, c E-6.2 at s5.10.

<sup>5</sup> *Pay Transparency Act, 2018*, S.O. 2018, c. 5 (Bill 3).

<sup>6</sup> *Restoring Trust, Transparency and Accountability Act, 2018*, S.O. 2018, c 17 (Bill 57).

Additionally, pay transparency, like other remedial employment legislation, needs to be adequately enforced to effect any change. Workers who are looking for work are often at their most vulnerable and are unlikely to make complaints about employers who violate job posting requirements. British Columbia's *Pay Transparency Act* requires the Minister of Labour to appoint a Director of Pay Transparency responsible for, among other things, overseeing employer compliance, receiving complaints of non-compliance, and preparing annual reports on the state of pay transparency and pay equity in the province.<sup>7</sup>

Ontario's as-yet uninstituted *Pay Transparency Act, 2018* similarly provided for the appointment of compliance officers to conduct audits and issue penalties for contravention.<sup>8</sup> Without such enforcement mechanisms, any pay transparency measures instituted will be ineffective.

**1. Proposed definition of “publicly advertised job posting”:**

- **“Publicly advertised job posting” means an external job posting that an employer advertises to the general public in any manner.**
- **This definition does not include recruitment campaigns, general help wanted signs or positions that are only advertised to existing employees of the employer.**

**Do you agree with the proposed definition? Why or why not? Should the definition be narrowed to electronic forums only?**

This is an acceptable definition. It is substantially the same definition used in the *Pay Transparency Act, 2018* and in some other Canadian jurisdictions' pay transparency legislation.<sup>9</sup>

**2. Should postings that are for positions with higher compensation not be required to include expected compensation or a range of**

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<sup>7</sup> SBC 2023, c 18 at s10.

<sup>8</sup> 2018, S.O. 2018, c. 5 at s 9-16.

<sup>9</sup> Note that British Columbia's pay transparency legislation (*Pay Transparency Act*, SBC 2023, c 18 at s1(1)) does not explicitly exempt recruitment campaigns, general help wanted signs or positions that are only advertised to existing employees but [the Guidance](#) published to accompany the Act does indicate that such postings would be exempt. See also: *Pay Transparency Act, 2018*, SO 2018, c 5 at s1; *Pay Equity and Pay Transparency Act*, SNL 2022, c P-3.02 at s2(1); *Employment Standards Act*, RSPEI 1988, c E-6.2 at s5.9;

**expected compensation? If so, is \$200,000 a reasonable threshold for an exemption?**

There should be no exemptions for higher compensated positions. Gendered and racial pay gaps may disproportionately affect lower income earners, but discriminatory employment and compensation practices are persistent in every type of employment. A recent comprehensive analysis of publicly available salary information showed that in the top one percentile of earners, men outnumbered women by more than three to one, and racialized women made up only three percent of earners in that category.<sup>10</sup> In some of Ontario's top private law firms, the gender pay gap between equity partners was found to be about 25 percent.<sup>11</sup> Among Ontario's physicians the gender pay gap was 13.5%.

One of the government's stated goals for this job posting requirement is to tackle the gender pay gap and Ontario's labour shortage by ensuring that newcomers, women, and other equity seeking groups can enter and remain in the labour market. Creating a ceiling on disclosure requirements runs counter to these aims.

**3. Is a limit of \$40,000 on the expected range of compensation reasonable? If not, what should the limit on the range be?**

\$40,000 is not a reasonable limit for the allowable compensation range in publicly available job postings. A job posting which advertises a salary range of \$40,000 to \$80,000 per year provides applicants with virtually no indication of what their actual compensation rate will be and provides no helpful guideposts for salary negotiations. Nor does it help applicants discern if the employer is looking for someone with a lot of experience, or if it is a more entry level position.

As human resource professionals recognize, posting wide salary ranges can actually worsen pay equity outcomes because candidates from equity-seeking groups are likely to accept salaries that do not meet their needs or reflect their experience just to land the job.<sup>12</sup> Such applicants are also less likely to negotiate for higher salaries.

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<sup>10</sup> Robyn Doolittle and Chen Wang, "[The Power Gap](#)" January 21, 2021: The Globe and Mail.

<sup>11</sup> Robyn Doolittle, "[Wage gap between male, female equity partners at top law firm averages \\$371,596](#)" September 30, 2021: The Globe and Mail.

<sup>12</sup> Brandie Weikle, "[Pay Transparency in job listings is less transparent than you think](#)" April 29, 2024: CBC.

Given that Ontario has chosen not to implement a more comprehensive approach to pay transparency, such as the measures mentioned above, it is important to ensure that transparency in the hiring process actually achieves some of the stated purposes of this legislation by reducing pay inequality.

The Ministry should consider prescribing a narrower range that limits employers to posting a range where the top end of the salary range is no more than 25 percent greater than the bottom end of the pay range. For example, where the bottom end of the range is \$40,000, the top end could be no greater than \$50,000. Expressing the range limitation as a percentage rather than a set dollar amount makes the limit scaleable for both lower and higher salary positions.

### **CANADIAN EXPERIENCE**

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*.<sup>13</sup> 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*.<sup>14</sup>

Employers must not require Canadian experience at the application stage and in the hiring process. The proposed changes would bring one element of the *Human Rights Code* protections against discrimination into the *ESA*; that is, prohibiting employers from stating in public job postings that Canadian experience is a requirement of the job. In drafting proposed regulations, we must ensure that they do not undermine *Human Rights Code* protections.

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<sup>13</sup> *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364 at para 107, 135-140.

<sup>14</sup> 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.

#### 4. Should there be any exceptions to the prohibition against including Canadian experience requirements in job postings or application forms?

No. The prohibition against job posting requirements related to Canadian experience is an important addition to the *ESA*. Canadian experience requirements are a real barrier to newcomers and immigrants, and compound the many other barriers they already face to employment, income security and building their lives in Ontario. Recruitment, selection and hiring decisions should not be based on negative stereotypes and assumptions about the quality of work experience outside of Canada. Rather, they should be based on meeting actual job-related qualifications.

We therefore recommend that the *ESA* include no exceptions to the prohibition against requiring Canadian experience in job postings. This approach is consistent with the *Human Rights Code*, which prohibits employers from discriminating against a person in respect of employment on the basis of their citizenship or country of origin. Canadian experience requirements can constitute such discrimination.<sup>15</sup>

Exceptions under the *Human Rights Code* can only be made where an employer is able to establish that such a requirement is a “bona fide occupational requirement”. As noted by the Ontario Human Rights Commission in its *Policy on Removing the “Canadian experience” barrier*:

For an employment or accreditation requirement, such as having Canadian experience, to be found to be legitimate or “bona fide,” an organization must show that they have made the requirement as inclusive as possible and that they have taken steps to accommodate applicants covered by the *Code*. This would mean assessing people on an individual basis, and would include considering non-Canadian experience and other qualifications.<sup>16</sup>

Legislated exceptions to the prohibition against requiring Canadian experience could have the unintended effect of undermining the *Human Rights Code*. A clear prohibition against requiring Canadian experience would encourage employers to ensure that their job requirements are as inclusive as possible and assess individuals on an individual basis.

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<sup>15</sup> Ontario Human Rights Commission, “Policy on Removing the “Canadian experience” barrier” (2013), <<https://www.ohrc.on.ca/en/policy-removing-%E2%80%9Ccanadian-experience%E2%80%9D-barrier/3-legitimate-employment-requirements.>>

<sup>16</sup> Ontario Human Rights Commission, “Policy on Removing the “Canadian experience” barrier” (2013), <<https://www.ohrc.on.ca/en/policy-removing-%E2%80%9Ccanadian-experience%E2%80%9D-barrier/3-legitimate-employment-requirements.>>

**5. Do you think that a prohibition on requirements related to Canadian experience in job postings and application forms would help to make Ontario a more attractive place for newcomers by lowering barriers to entry? Why or why not?**

The prohibition on Canadian experience requirements in job postings can help remove some barriers to labour market entry for newcomers. But it is not enough, for several reasons:

- Even if employers are prohibited from requiring Canadian experience in job postings, many will still discriminate against immigrants in the hiring process, for example by placing more value on candidates who do have Canadian experience.
- Newcomers and immigrants face numerous persistent and pervasive barriers to employment beyond Canadian experience requirements. This includes language and communication difficulties, employers not helping them integrate into the workplace and not providing job-related learning opportunities, being rejected for positions because they are thought to be “overqualified”, and outright discrimination contrary to the *Human Rights Code*.<sup>17</sup>

As a result, while the prohibition against Canadian experience requirements in job postings is a first step, it will not on its own lower barriers to labour market entry (or progression) for newcomers and immigrants. And as discussed further below, without meaningful enforcement and training, many employers will fail to comply with such requirements.

**6. Education and outreach would be important to raise awareness and understanding about this prohibition across newcomer communities and employers. Do you have any comments to provide about the approach that should be taken and where the ministry should focus its outreach?**

We recommend that the Ministry’s education and outreach efforts situate the new job posting requirements within the broader context of employer’s obligations under the *Human Rights Code* so that employers and newcomers alike understand that employers must not discriminate against immigrants on the basis of their status and Canadian experience.

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<sup>17</sup> Ontario Human Rights Commission, “Policy on Removing the “Canadian experience” barrier” (2013), <<https://www.ohrc.on.ca/en/policy-removing-%E2%80%9Ccanadian-experience%E2%80%9D-barrier/3-legitimate-employment-requirements.>>



Furthermore, as mentioned above with regard to the pay transparency requirements, the measures outlined in the newly created Part III.1 of the *ESA* will have no meaningful effect without adequate enforcement measures. Remedial legislation such as the *Human Rights Code* and the *ESA* acknowledge that there is a fundamental power imbalance between employers and employees, yet the enforcement of these minimum standard regimes rely, by and large, on employee complaints. Due to language barriers, fear, and the economic urgency exacerbated by the high cost of living in Ontario, newcomers looking for work in Canada are very unlikely to make complaints against an employer who infringes their rights during the hiring process.

We also know that given the current backlog of cases at the Human Rights Tribunal, such complaints, if ever made, are unlikely to be heard in a time period that would actually allow for meaningful redress of any harm done.<sup>18</sup> For these reasons, the Ministry should consider implementing enforcement measures such as the appointment of compliance officers to conduct audits and issue penalties for contravention.

## **USE OF ARTIFICIAL INTELLIGENCE**

### **7. Should there be exceptions to the requirement to disclose use of AI? If so, for what criteria?**

Mandatory disclosure of the use of AI in public job postings is a welcome addition to the *ESA*. There should be no exceptions to this requirement. This is because using AI in hiring processes introduces significant risk of discrimination against marginalized groups, particularly in the absence of any other guidelines or legislation governing the use of AI by employers. As a result, disclosure of the use of AI is the bare minimum of obligations that all employers should be required to comply with - and this obligation alone is not sufficient to address the risk of discrimination.

Research has confirmed that AI algorithms can be programmed with biases that perpetuate discrimination against certain groups of individuals. For example, if the algorithm was trained based on biased data or criteria, such as past hiring decisions that favoured a particular gender

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<sup>18</sup> [“The Human Rights Tribunal of Ontario: A Continuing Crisis”](#) May 21, 2024: Tribunal Watch Ontario.

or ethnicity, the algorithm may replicate these biases when screening, assessing or selecting candidates for interviews or hiring.<sup>19</sup>

In other words, AI may interpret “strong candidate” to mean someone who shares certain characteristics with other people historically hired by the organization, but in many cases those other hires may have been selected as a result of (intentional or unintentional) discrimination. Women, racialized and Indigenous persons, persons with disabilities, and members of other equity-seeking groups are most likely to be harmed by discriminatory AI hiring processes. This seriously undermines the prohibitions against discrimination in hiring and employment enshrined in Ontario’s *Human Rights Code*.

**8. Would an employer’s use of AI for recruitment affect your decision to apply for a job advertised by that employer? Why or why not?**

The disclosure requirement adds some transparency to the process, but nothing more. There is very little that employees can do with this information. The provision offers them no protections from the potential harms of AI, nor a choice to “opt out” of AI screening processes.

As a result, employees who have a strong need to secure employment will likely apply to jobs where the employer uses AI to recruit, regardless of their personal views or fears. Mandatory disclosure of the use of AI is unlikely on its own to incentivize employers to use AI in a safer or more ethical way. For that, Ontario must legislate much more comprehensive protections against the risks of AI.

**B. Working For Workers Five Act, 2024 (Bill 190)**

**JOB POSTING AMENDMENTS**

*i) Disclosure if there is an actual job opening*

**9. Should employers be required to also disclose the approximate timeframe of when a vacancy is expected?**

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<sup>19</sup> Albassam, Wael Abdulrahman, “The Power of Artificial Intelligence in Recruitment: An Analytical Review of Current AI-based Recruitment Strategies” *International Journal of Professional Business Review* (2023) v. 8, no. 6 at 11-12. Available at <[View of The Power of Artificial Intelligence in Recruitment: An Analytical Review of Current AI-Based Recruitment Strategies \(openaccess.ojs.com\)](https://openaccess.ojs.com)>.

Yes, this will empower workers to decide if the job is appropriate for them and give them enough information to negotiate regarding transitions from their previous job, if any, and to plan around family or other obligations.

**10. Should there be an exception to the requirement to disclose if a vacancy exists or not for employers with less than 25 employees?**

We submit that there should be no exception to the requirement to disclose if a vacancy exists or not. Even for small employers, including this information in a job posting comes with very little cost or administrative burden.

*ii) Duty to inform applicants interviewed*

**11. Is 30 calendar days a reasonable amount of time for an employer to be required to follow up with an interviewee? If not, how long does it typically take after interviews are completed for a hiring decision to be made?**

- Proposed information to be provided to interviewees could include:
  - Result of recruitment process, i.e.:
    - a. Hiring decision has been made; or
    - b. Hiring decision has not been made.

We submit that 30 calendar days is a reasonable amount of time for an employer to be required to follow up with an interviewee. While waiting to hear back after an interview, prospective employees may be wary of applying for other positions or accepting alternative offers. It is not particularly onerous for employers to briefly communicate with all interviewees about whether a hiring decision has been made.

**12. The bill would allow for the manner the information is to be provided to be prescribed. Should the manner be prescribed in regulation?**

- Potential methods for communication of information could include:
  - Telephone call
  - Email message
  - Text message

- **Email message including a link to the status of the recruitment process.**

**Are there any other methods that should be captured?**

These are all appropriate methods of communication. Employers may also want to communicate hiring decisions by regular mail, particularly where a candidate does not have phone or internet access.

**13. Should there be an exception to the requirement to respond to interviewees for employers with less than 25 employees?**

We submit that there should be no exception. Even for small employers, providing this information to job applicants who were interviewed comes with minimal cost or administrative burden.

***C. Working for Workers Act, 2023* - information to be provided to employees in writing**

**14. The government is considering making a regulation that would require an employer to provide the following information in writing to employees prior to their start date: work location, salary/wage, and expected hours of work. Is this appropriate information and is there any other information that should be included?**

We support this proposal and believe it will help achieve the Minister's stated goals of increasing equity and fairness in the hiring process. In order to provide workers with the certainty they deserve when starting a new job, employers should also be required to provide the following information in writing:

- Legal name and contact information of their employer;
- Salary and/or Wage Rate (including any bonus, commission, or other relevant pay structures)
- Manner of Pay and Length of Pay Period;
- Expected work hours (including both scheduling expectations and expected number of hours per week)

In our experience, workers in low wage and precarious work are often hired on the basis of an oral agreement and have very little information about their employers. Being provided with the correct legal name and contact information for the entity and/or individual who employs them will assist workers in seeking redress for unpaid wages or other minimum standards violations. This is particularly important for workers in low wage and precarious work who may be employed through a temporary help agency or subcontractor without even realizing it.

When starting a job, workers should have clear expectations of what to expect so they can plan their lives to accommodate family and other responsibilities. This includes knowing how much they will be paid, when they will be paid, when they will work, and for how many hours. The schedules of part-time and casual workers may vary from week to week, but such workers can still be given some assurances about the minimum number of hours they may be expected to work. For such measures to be effective they need to be applied, without exemptions, to all employers. Many employers already provide this information to employees through employment contracts or collective agreements. Even for small employers, there would be very little cost or administrative burden associated with requiring employers to provide this basic employment information to their employees in writing.