



Preliminary Submission

The Changing Workplaces Review

Ontario Federation of Labour

June 16, 2015

About this brief

The Ontario Ministry of Labour has released its Guide to Consultations for The Changing Workplaces Review which includes: a letter of introduction from the Special Advisors, information on the scope of the review, brief commentary on the issues and 16 questions, information on making your submission, and privacy information.

Changing Workplaces Review GUIDE TO CONSULTATIONS
http://www.labour.gov.on.ca/english/about/pdf/cwr_consultation.pdf

What follows is information developed through the OFL and extensive work in consultation with affiliates and partners.

These consensus positions described in this brief represent many of our priorities for this process, and we continue in discussions with affiliates on other issues where a new consensus can be built.

It is essential that labour voices be heard in the process, and we hope that this brief provides essential information and recommendations to assist in the Changing Workplaces Review.

Acknowledgements

This brief was prepared by the Ontario Federation of Labour in collaboration with affiliates through the OFL Labour Law committee. We'd like to acknowledge the special contribution made by the Canadian Labour Congress and the Workers' Action Centre.

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The Ontario Federation of Labour (OFL)
15 Gervais Drive, Suite 202, Toronto, Ontario M3C 1Y8
416-441-2731 • 1-800-668-9138 • info@ofl.ca
TDD: 416-443-6305 • FAX: 416-441-1893

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The Changing Workplaces Review

The Ontario government has appointed two Special Advisors to lead a review of Ontario's labour laws and employment standards. The Changing Workplaces Review will focus on how the Employment Standards Act (2000) and the Labour Relations Act (1995) could be reformed to "better protect workers while supporting businesses in our changing economy."¹

The Ontario Federation of Labour is working with members, labour councils, workers' centres and activists to share our analysis, proposals, and our stories, with the Special Advisors, the government, journalists, and the public.

If you are interested in responding to this review with your comments, ideas and suggestions, please contact the Ontario Ministry of Labour by:

E-mail: CWR.SpecialAdvisors@ontario.ca

Fax: 416-326-7650

Mail: Changing Workplaces Review
Employment Labour and Corporate Policy Branch
Ministry of Labour
400 University Ave., 12th Floor
Toronto, ON M7A 1T7

Comments are encouraged throughout the consultation period. Comments will be accepted until September 18, 2015.

This is a once-in-a-generation opportunity to change the laws that directly impact the ability of workers to form unions, and to make important gains in the workplace.

¹ Ontario Ministry of Labour. The Changing Workplaces Review. May 2015. See: <http://www.labour.gov.on.ca/english/about/workplace>

Introduction

When the Liberal government announced the much-anticipated review of Ontario's employment standards and labour law on February 17, 2015, the OFL called the news "a once in a generation opportunity to modernize Ontario's out-dated labour laws."

For the nearly one million Ontarians earning at or around the minimum wage, who do precarious work and lack union representation, an improved and enforced Employment Standards Act could raise the floor for every worker, improve job security and provide dignity in their work. Meanwhile, overhauling Ontario's Labour Relations Act has the potential to extend union protection to more workers and provide a clear pathway out of poverty.

The labour movement has been calling for such a review for over a decade and Premier Wynne made known her intentions to respond earlier this winter when she posted her mandate letter to the Minister of Labour, Kevin Flynn, on the government's website. However, the outcome of the review is anything but certain and it is up to labour activists – unionized and non-unionized – to work together to push a progressive agenda of reform past the aggressive opposition from the business community.

The Premier's mandate letter to her Labour Minister said that this review needs to address the realities of the modern economy, such as the rise of nonstandard employment – or what we would call "precarious work." This lens provides an important opportunity to address reform for both the Employment Standards Act and the Labour Relations Act. The decline in manufacturing in Ontario over the past 20 years has seen many good, unionized jobs replaced by low-paying and part-time jobs in the ever expanding retail and service sectors.

The task facing the labour movement is to present a dual solution to this problem; advocating for improved protections for vulnerable workers and expanding opportunities for them to benefit from union security.

The government appointed two Special Advisors to head up a review, C. Michael Mitchell and the Honourable John C. Murray. Mitchell and Murray will be leading public consultations in about 10 communities around the province this summer, holding stakeholder consultations, and conducting their own research before presenting final recommendations in 18 months.

Among the OFL's top priorities for union security will be card-based certification, successor rights in the contract sector, access to first contract arbitration and reinstatement during organizing drives.

However, the labour movement won't just limit its attention to labour laws, we are also working with the Workers' Action Centre and the Campaign to Raise the Minimum Wage to champion changes to employment standards that would raise the floor for every worker in Ontario.

Under the banner of "Fight for \$15 and Fairness," we will advocate for paid sick days, an end to split shifts, and preventing employers from classifying employees as contract workers in order to escape their obligations for fair treatment. While minimum wage and equal pay issues have been explicitly excluded from the review, we won't be deterred from demanding gender pay equity and a \$15 an hour minimum wage, so that no worker is forced to toil for sub-poverty wages.

Context: Changing workplaces

From the Guide to Consultations:

Q 1: How has work changed for you?

Q 2: What type of workplace changes do we need to both improve economic security for workers, especially vulnerable workers, and to succeed and prosper in the 21st century?

Q 3: As workplaces change, new types of employment relationships emerge, and if the long term decline in union representation continues, are new models of worker representation, including potentially other forms of union representation, needed beyond what is currently provided in the LRA?

Q 4: Are these the key objectives or are there others? How do we balance these objectives or others where they may conflict? What are the goals and values regarding work that should guide reform of employment and labour laws? What should the goals of this review be?

OFL response:

Inequality and precarious work are on the rise, and joining a union is a key path out of poverty for Ontario workers. Unions tend to improve working conditions and wages and thus help to turn poorly paid jobs into decent jobs. Consequently, workers must be able to assert their right to join a union.

But the changing economy and unfair government policies have resulted in a growing power imbalance between management and organized workers, while leaving millions more workers labouring without the power of a union to represent them. For non-unionized workers, they must rely on inadequate and poorly enforced employment standards to protect their interests.

Union density in Canada has fallen from a rate of 42.1 percent in 1981, to a rate of 30.4 percent in 2014. While historically, a smaller proportion of women were unionized, by 2006, this trend had shifted and now a greater proportion of women are unionized.

In 2014, 31.9 percent of unionized workers were women, compared to 28.9 percent who were men. This phenomenon is a product both of the high levels of unionization within the public sector, especially in health care and education where women are concentrated, and the loss of manufacturing and forestry sector jobs that tended to be dominated by men.

In 2014, Ontario had the second lowest rate of union density among provinces at 27.0 percent. Only Alberta ranked lower, with a unionization rate of 22.1 percent. At 39.3 percent, Quebec had the highest rate of union density.

While Ontario's unionization rate was 27.0 percent, the rate of private sector unionization has fallen to 14.4 percent, much of it during the first decade of the new millennium as Ontario was hard hit by

manufacturing and forestry sector job losses. The 2008 global economic crisis took an even sharper toll on unionized workers in the private sector.

Figure 1: Ontario Union Density

Ontario Union Members:	2000	2014	% Change
Public & Private Sector	1,391,100	1,572,400	+ 13
Private Sector	711,100	650,300	- 8.6
Public Sector	680,000	922,000	+ 35.6

Figure 1 above shows that as recently as the year 2000, private sector union members outnumbered public sector union members by over 30,000. However, by 2014, public sector union members outnumbered private sector members by over 250,000.

But it would be a mistake to assume that union density is a concern only for private sector unions.

In a 2009 report on pensions, the Ontario government noted that in 1985 almost 40 percent of Ontario workers had a pension plan, including 32 percent of private sector workers. By 2005, the proportion of private sector workers with a workplace pension dropped to 25 percent, while for public sector workers, the proportion was 78 percent.

This trend helps explain both employers' confidence in attacking pensions—especially in the public sector—and the challenges in maintaining existing pensions, especially defined benefit plans. (It also speaks to the need for building community labour partnerships to strengthen the Canada Pension Plan.)

Falling union density has created the conditions in which right wing politicians and employers feel more confident in attempting to pit non-union workers against union members in everything from wages and benefits to pensions.

Yet evidence is overwhelming that Ontario's rising inequality is a product of declining levels of unionization, and the lack of decent jobs. Indeed, the greater the number of people forced to work for low wages with few benefits, the greater the downward pressure on workers who belong to unions to accept cuts in wages, benefits and pensions.

The changing labour market

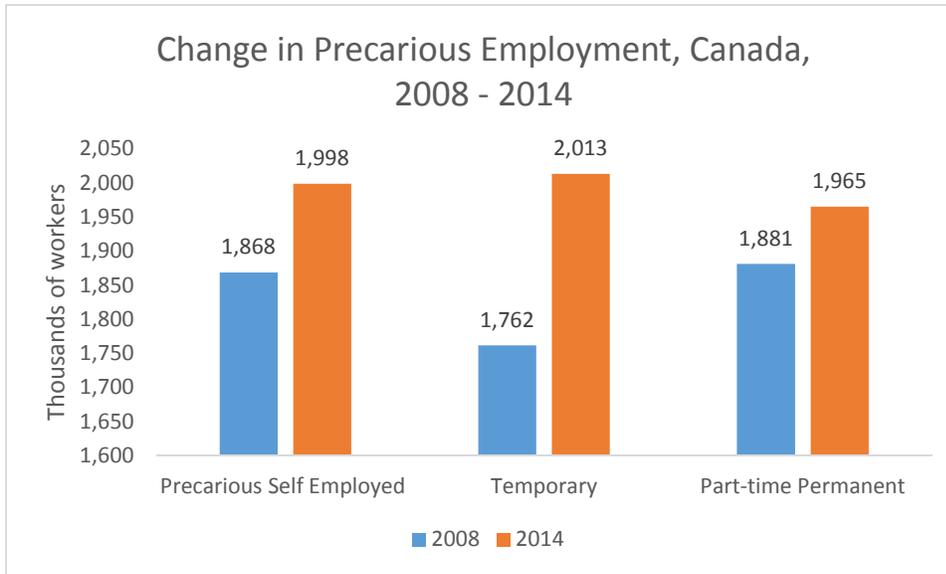
Evidence shows that the labour market has changed over the past 20 years, and the proportion of workers who do not work in large, single site workplaces are growing. Since the 1970s, there has been a documented shift away from what has been considered standard work to non-standard work.

Many Canadians engage in non-standard work – that is, employment situations that differ from the traditional model of a stable, full-time job. Under the standard employment model, a worker has one

employer, works full year, full time on the employer's premises, enjoys extensive statutory benefits and entitlements and expects to be employed indefinitely.²

Non-standard work can be considered as temporary, part-time, low-wage, less protected by regulation and where workers themselves have less control or influence over their circumstances. By 2008, fewer than two-thirds of the Canadian workforce could be considered to be in standard employment.³

Figure 2. Change in Precarious Employment, 2008-2014



Source: Statistics Canada microdata, 2014

The experience of the global recession is telling. Part-time and temporary workers were the first to be laid off. While this resulted in a dramatic drop in the proportion of part-time and temporary workers in the labour market, such a phenomenon is not a sign of health. It merely demonstrates the precarious nature of these kinds of jobs. However, as the effects of the recession ebbed, employment growth tended toward part-time, temporary, and self-employment.

These trends suggest that even where new employment has taken the form of full-time employment, many of these new jobs pay less than previously held jobs and are based in smaller and more disparate workplaces where it is more difficult for workers to cooperate to effect change without inviting reprisals from employers.

These trends underscore the need to ensure that workers can freely exercise their rights to form unions as a critical pathway out of poverty. Traditionally, the bigger workplaces with large and homogenous workforces, where employees share similar working conditions, similar shifts and where workers had much more interaction with their co-workers, have lent themselves to better cooperation among

² Vosko, Leah; Zukewich, Nancy; and Cranford, Cynthia. Statistics Canada, Perspectives on Labour and Income, "Precarious jobs: A new typology of employment." October 2003. See: <http://www.statcan.gc.ca/pub/75-001-x/01003/6642-eng.html>

³ CAW Fact Sheet 2009, Sources Statistics Canada, Labour Force Survey 2008, chart supplied by Professor Leah Vosko, York University. See: <http://www.caw.ca/en/7688.htm>

workers. Even when Ontario's workforce in the resource and industrial sectors was expanding, those people in more precarious, non-standard jobs were often at a disadvantage. Working at multiple job sites creates a more disparate workforce, resulting in less interaction among employees, and the potential for reprisals against workers who contemplate collective workplace action. The structure of existing legislation fails to adequately curtail these implicit or explicit threats.

While most will take for granted the reality that the employer holds the ultimate power and authority in the workplace, this reality is felt far more acutely in smaller workplaces where many of the employees already face labour market barriers to employment. They are objectively far more vulnerable than others to the implicit or explicit threat of job loss or other reprisals merely for asking that existing laws be enforced.

Modernizing labour law reform is long overdue. It's time to bring in measures that better reflect the realities of today's workplaces. Workers need better access to unionization as a means of making Ontario fair for everyone.

From the minimum wage to the union wage

Between 2002 and 2013, the proportion of workers earning minimum wage in Ontario increased from 3.9 percent to 8.9 percent respectively. While this can be partially explained by an increase in the minimum wage implemented by this government in response to collective action by union and non-union workers, it remains the case that nearly one in ten workers still subsist on a wage that is well below the Low Income Cut Off (LICO).⁴

In Ontario, the proportion of workers earning \$12.10 per hour or less (the minimum wage plus 10 percent) has reached more than 19 percent of the workforce. In 2015, the Canadian Centre for Policy Alternatives estimated that a living wage for a Toronto family with two children and two adults working full-time would be \$18.52 per hour.⁵

Across Canada, the incidence of employees earning minimum wage increased for three consecutive years between 2007 and 2009, with the highest jump, taking place between 2008 and 2009. According to Statistics Canada:

Women are more likely to work for minimum wage than men. In 2009, they represented just over 60 percent of minimum-wage workers, although they made up one-half of employees.

⁴ Statistics Canada, Perspectives on Labour and Income, "Minimum Wage." March 2010. See: <http://www.statcan.gc.ca/pub/75-001-x/topics-sujets/pdf/topics-sujets/minimumwage-salaireminimum-2009-eng.pdf>

⁵ Mackenzie, Hugh and Stanford, Jim. Canadian Centre for Policy Alternatives, A Living Wage for Toronto. November 2008. See: https://www.policyalternatives.ca/sites/default/files/uploads/publications/Ontario_Office_Pubs/2008/A_Living_Wage_for_Toronto.pdf

The overrepresentation of women in this category of workers earning minimum wage is observable among all age groups, but more significantly for women 25 years of age and over, whose rate was twice as high as that of men the same age.⁶

The situation facing newcomer workers has also been more difficult since the onset of the global recession:

In 2008, the proportion of immigrants earning less than \$10 per hour was 1.8 times higher than the Canadian-born. At the other end of the spectrum, there was a lower share of immigrants earning \$35 or more per hour than the Canadian-born.

In 2008, for example, the share of these immigrants earning less than \$10 per hour was nearly three times higher than Canadian-born employees, and the share of these immigrant employees who landed more recently earning \$35 or more per hour was much lower than the Canadian-born.

In 2008, even the shares of immigrant employees who landed in Canada more than 10 years earlier and were earning less than \$10 per hour was greater than the Canadian-born, and the share earning \$35 or more per hour was less than Canadian-born employees.

It should be noted that between 2008 and 2009, the proportion of minimum wage earners who were between the ages of 25 and 54 grew from 29 percent across Canada to 32 percent across Canada.⁷

Union membership: a pathway out of poverty

Workers' ability to join unions and organize to improve pay and benefits is a critical pathway out of poverty. According to the Canadian Labour Congress, union members in Ontario earn nearly \$7.00 more per hour than non-union workers (\$6.57 for 2014).

For women, the union advantage is nearly \$8.00 per hour (\$7.96 for women in Ontario). The Ontario office of the Canadian Centre for Policy Alternatives reports that using average annual earnings of Ontario men and women, we find the gap has grown to 31.5%—on average, women made 68.5 cents for every man's dollar in 2011. Women having access to a union is a key tool to close the gender wage gap.

In addition, the process of collective action and collective bargaining serves to mitigate wage and benefit differentials among workers. For instance, more than half of all non-union women workers earn less than \$13.33 per hour. By contrast just over 6 percent of unionized women workers earn less than \$13.33 per hour (about one in 20). Workers of colour who are union members receive nearly 30 percent more in wages than non-union members.

There is nothing mysterious about why union jobs generally pay better. When workers form a union, they are better able to fight together to win better pay and benefits for themselves and for all those who come into the workplace after them. By joining unions, women and workers of colour have united

⁶ Statistics Canada, The Daily, "Inside the labour market downturn." February 23, 2011. See: <http://www.statcan.gc.ca/daily-quotidien/110223/dq110223b-eng.htm>

⁷ Statistics Canada, The Daily, "Inside the labour market downturn." February 23, 2011. See: <http://www.statcan.gc.ca/daily-quotidien/110223/dq110223b-eng.htm>

with other workers to challenge pay differentials and fight for pay and employment equity in the workplace. This kind of union organizing has helped increase the proportion of women and men who receive work-related benefits such as drug and dental plans, and pensions. In fact, nearly 90 percent (88.5) of workers who belong to a union have succeeded in winning these kinds of benefits.

Beyond wages and benefits, collective bargaining has led to break-through provisions that make life better for workers, their families and society as a whole. For instance, before employers were legally compelled to extend benefits to same-sex couples, unionized workers challenged homophobia and forced employers to provide same sex benefits via workplace contracts. Provisions for emergency leave in situations of domestic violence, anti-harassment measures and other workplace provisions that make life better for women workers, were typically won first by union members and then extended more broadly to non-union workers via legislation or industry practice.

Perhaps the best example is paid parental leave. While commonplace today, it wasn't in the 1970s and early 1980s when public sector workers in Quebec and then postal workers across Canada had to take strike action to win paid maternity leave for women union members. As a result of these victories for women, the provisions were extended to men and today paid parental leave is an industry standard for both men and women.

Workplace health and safety – and by extension safer communities and a better environment – has been a key issue for the labour movement. Being organized in the workplace means demanding better health and safety standards in collective agreements. For example, union members have exposed and protected themselves against the unsafe use of toxic chemicals, resisted the use of unsafe equipment and pushed to accommodate all workers in the workplace. Of course, union members cannot eliminate all workplace hazards, but by insisting upon high quality health and safety training, and by forcing employers to abide by their legal health and safety obligations, our workplaces and our communities are safer and healthier. In fact, government has acknowledged that because union members enforce existing contracts, they reduce the burden on general taxpayers of the cost of enforcing the minimum standards set out in provincial regulations.

The Employment Standards Act, 2000 (ESA)

From the Guide to Consultations:

Q 5: In light of the changes in workplaces, how do you feel about the employment standards that are currently in the ESA? Can you recommend any changes to better protect workers? Do the particular concerns of part-time, casual and temporary workers need to be addressed, and if so, how?

Q 6: Are changes needed to support businesses in the modern economy? How could the Act be simplified while remaining fair and comprehensive? Are there standards in the ESA that you find too complex? If so, what are they and how could they be simplified?

Q 7: Should this leave be revised in any way? Should there be a number of job-protected sick days and personal emergency days for every employee? Are there other types of leaves that are not addressed that should be?

Q 8: In the context of the changing nature of employment, what do you think about who is and is not covered by the ESA? What specific changes would you like to see? Are there changes to definitions of employees and employers or to existing exclusions and exemptions that should be considered? Are there new exemptions that should be considered?

Q 9: Are there specific employment relationships (e.g., those arising from franchising or subcontracting or agencies) that may require special attention in the ESA?

Q 10: Do the current enforcement provisions of the Act work well? In your experience, what problems, if any, exist with the current system, and what changes, if any, should be made? In your experience, what changes could help increase compliance with the ESA?

OFL response:

Temporary agencies

On the heels of the last recession, the temporary staffing industry is developing new practices that promise, as one firm boasts, “Just-in-time staffing [that] enables you to produce maximum results without the overhead of a full-time employee.”⁸

For instance, an agency classifies an employee as an independent contractor and assigns her to work at a group home. The agency deducts 7 percent from her \$11 hourly wage. Because she is misclassified as an independent contractor, she receives no employment standards entitlements from the agency. She works 48 hours in 3 days.

⁸ Gellatly, M. Still Working on the Edge: Rebuilding Decent Jobs from the Ground Up. Workers’ Actions Centre. March, 2015. See: http://www.workersactioncentre.org/wp-content/uploads/dlm_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf

Industry sources say contract staffing is lucrative because the contracts offer a recurring revenue stream. Demand for this kind of staffing is projected to grow.

According to Statistics Canada, the temporary staffing industry generates \$11.5 billion in revenue in 2012, up from \$8.3 billion in 2009. Over 50 percent of revenues are generated in Ontario.

Recommendation 1: Changes to the ESA should ensure that temporary agency workers receive the same wages, benefits, and working conditions as permanent workers doing the same work as temporary workers.

Misclassification

More workers are being misclassified as independent contractors. Misclassification practices dominate sectors such as cleaning, trucking, food delivery, construction, courier, and other business services. Misclassification also reaches into many other sectors, such as information technology, copy editing, and nail salons.⁹

When workers are misclassified, they get cheated out of vital benefits and protections. Workers lose out on decent wages, overtime pay, paid leave, employer-provided benefits, and pensions. Workers face problems trying to enforce their rights under the ESA when they have been misclassified, or in accessing workers' compensation when necessary.

Certain employers are motivated misclassify workers to save on payroll deductions, avoid complying with the ESA and other labour laws, and to shift liability and risk onto workers.

Recommendation 2: A more inclusive definition of an "employee" should be applied within the ESA to prevent the misclassification of workers. The ESA should establish a reverse onus on employee status; a worker must be presumed to be an employee unless the employer demonstrates otherwise.

Hours of work, vacation and sick leave

The ESA gives employers substantial control over hours of work and scheduling. Some people work too many hours and some workers do not get enough hours. Violations of overtime and hours of work standards cut a wide swath across many industries.¹⁰

According to Statistics Canada, over one million Ontario workers worked overtime in 2014 and 59 percent of these workers did so without overtime pay.

Ontario's hours of work standards allow for longer work days and work weeks than many other jurisdictions and need to be updated to support job development. There is also a confusing myriad of industry and occupational exemptions and special rules for hours of work and overtime – there is no real ceiling on maximum work hours.

⁹ Gellatly, M. Still Working on the Edge: Rebuilding Decent Jobs from the Ground Up. Workers' Actions Centre. March, 2015. See: http://www.workersactioncentre.org/wp-content/uploads/dlm_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf

¹⁰ Ibid

Recommendation 3: The ESA should provide for an eight-hour day and a 40-hour workweek. Employees should have the right to refuse work beyond 40 hours. Overtime at time and a half should be paid (or taken as paid time off in lieu) after 40 hours. No overtime exemptions or special rules.

Exemptions and special rules

Exemptions and special rules have eroded the floor of minimum standards. Some workers are exempted because of age—students under 18 are paid a lower minimum wage than all other workers. Some workers are exempted because of occupation. For example, farm workers are exempt from minimum wage, hours of work, daily rest periods, time-off between shifts, weekly/bi-weekly rest periods, eating periods, overtime, public holidays, and vacation with pay.¹¹

Another type of exemption is based on a worker’s status in their workplace (for example, managers who are not covered by hours of work and overtime provisions). Exemptions are also based on how long you work for a company.

Workers employed for less than five years are not able to get severance pay. A final type of exemption is based on the size of employer. Workers are only entitled to ten days of personal emergency leave (sick leave) if the company has 50 or more employees.

Recommendation 4: The ESA should have all exemptions removed.

Domestic violence and work

According to the Canadian Labour Congress, Canadian employers lose \$77.9 million annually due to the direct and indirect impacts of domestic violence, and the costs, to individuals, families and society, go far beyond that. However, we know very little about the scope and impacts of this problem in Canada.¹²

The Canadian Labour Congress partnered with researchers at the University of Western Ontario and conducted the first ever Canadian survey on domestic violence in the workplace. There is almost no data on this issue in Canada and we know that women with a history of domestic violence have a more disrupted work history, are consequently on lower personal incomes, have had to change jobs more often, and more often work in casual and part time roles than women without violence experiences.

Recommendation 5: The ESA should provide domestic violence leave for victims and family members.

Migrant workers

Many migrant workers who find themselves working in Canada encounter a new and unfamiliar country, where they don’t know the laws and often don’t speak the language. In many cases, they have travelled

¹¹ Gellatly, M. Still Working on the Edge: Rebuilding Decent Jobs from the Ground Up. Workers’ Actions Centre. March, 2015. See: http://www.workersactioncentre.org/wp-content/uploads/dlm_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf

¹² Canadian Labour Congress. Domestic Violence at Work. February, 2015. See: <http://canadianlabour.ca/issues-research/domestic-violence-work>

from some of the world's most economically depressed conditions to strive for a better life for their families.

The Office of the Parliamentary Budget Officer found that between 2002 and 2012, the number of foreign workers in Canada increased more than three-fold from just over 100,000 to 338,000, with a pause only in 2009 during the recession.¹³

The circumstances that make migrant workers so deserving of protection, also make them vulnerable to exploitation.

While major changes to the Temporary Foreign Worker Program fall to the federal government, the Ontario government should pursue comprehensive reforms to ensure migrant workers are protected from exploitation, including a Migrant Workers' Bill of Rights.¹⁴

Recommendation 6: The Ontario government should introduce an Ontario Migrant Workers' Bill of Rights and legislative changes that would establish a registration and licensing system for employers and recruiters, provide the financial and human resources needed for proactive enforcement, and ensure that human and labour rights are protected.

Fair wages

Many Ontario workers are struggling to get by. More and more decent jobs are being replaced by low-wage work. The fastest growing jobs in Ontario are in the service sector, where wages are the lowest. Even before the recession, our economy was shifting to lower-wage work. In 2014, 33 percent of workers had low wages, compared to only 22 percent in 2004, the *Toronto Star* reports.¹⁵

In 2014, the Ontario government took the encouraging step of increasing the provincial minimum wage to \$11 an hour and introducing the province's first annual inflation adjustments. However, the fact remains that any worker earning less than \$15 an hour is living below the poverty line. Employment and hard work should lift people out of poverty, not entrench them in it. Studies show that when workers can provide for their families, they also contribute to the local economy and have a net positive impact on the economy.

Recommendation 7: The Ontario government should raise the provincial minimum wage to \$15 an hour, adjusted annually for inflation.

¹³ Lemieux, T and Nadeau, J. Temporary Foreign Workers in Canada: A look at regions and occupational skill. Office of the Parliamentary Budget Officer. March, 2015. See: http://www.pbo-dpb.gc.ca/files/files/TFW_EN.pdf

¹⁴ OFL. Labour Without Borders: Towards A Migrant Workers' Bill Of Rights. Ontario Federation of Labour. 2013. See: <http://ofl.ca/wp-content/uploads/2013.08-MigrantWorkers-Report.pdf>

¹⁵ Gellatly, M. Still Working on the Edge: Rebuilding Decent Jobs from the Ground Up. Workers' Actions Centre. March, 2015. See: http://www.workersactioncentre.org/wp-content/uploads/dlm_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf

The Labour Relations Act, 1995 (LRA)

From the Guide to Consultations:

Q 11: In the context of the changing nature of employment, what do you think about who is and is not covered by the LRA? What specific changes would you like to see?

Q 12: In the context of changing workplaces, are changes required to the manner in which workers choose union representation under the LRA? Are changes needed in the way that bargaining units are defined, both at the time of certification and afterwards? Are broader bargaining structures required either generally or for certain industries? Are changes needed in regard to protecting bargaining rights?

Q 13: Are changes required to the LRA with regard to the ground rules for collective bargaining? Are new tools needed in the LRA with respect to industrial disputes or to deal with protracted labour disputes?

Q 14: In light of the changing workplace and the needs of workers and employers in the modern economy, are changes needed regarding the unfair labour practices set out in the LRA, or to the OLRB's power to provide remedies in response to unfair labour practices?

Q 15: Are there changes that could be made to the LRA that would enable the parties to deal with the challenges of the modern economy?

Q 16: Are there any other issues related to this topic that you feel need to be addressed? Are there additional changes, falling within the mandate of this review, that should be considered?

OFL response:

Card-based union certification (Card-Check)

A troubling fact of life in 2015 is that growing numbers of Ontario workers, particularly many women, workers of colour and new Canadians whose first language is neither French nor English, are not keeping up.

Because of Mike Harris's changing the rules of democracy and technology's changing the nature of the work and of the workplace, one of the most basic and traditional means historically available to Ontario workers to improve their own circumstance, access to unionization, though technically legally accessible, is in reality not attainable by hundreds of thousands of low paid, "sectorally stuck" workers.

There is evidence to show that employer intimidation results in less union certification than there would be if card based certification had not been removed from workers in Canada's largest province.

Existing academic research (Slinn et al) demonstrates that without card based certification, the current means of non-construction union certification in Ontario simply cannot avoid undue employer intimidation (some would argue is an incentive for it) and effectively bars unionization of many workers who need it most and otherwise would achieve it. It may also be the case that as a result of the reduced chances of success, unions with finite resources are less likely to initiate organizing drives.

Although Canada's Charter of Rights and Freedom states that workers have the right to join unions, there are far more barriers to forming a union than most would believe possible in Canada.

When workers seek to organize a union, the pressure from employers intensifies. In fact those workers most in need of forming a union often face intimidation and threats of reprisals, from employers hostile to unions. In fact, according to Osgoode Hall Law School professor Sara Slinn:

"A survey of managers at Canadian workplaces where union organizing had recently occurred found 94 percent used anti-union tactics, and 12 percent admitted to using what they believed to be illegal, unfair labour practices to discourage employees from unionizing."¹⁶

Professor Slinn's evidence corroborates the experience of workers trying to join a union:

"Ignacio is a hotel worker who has been organizing for a union in his workplace. He was reprimanded for distributing information about unionizing, even though he was on break. Ignacio explained: "I feel like management is targeting me. My co-workers feel the same way. It makes people very afraid to participate in union activities. Many of my co-workers are too afraid to express their support for the union openly. This isn't right."

In this context, we need to modernize labour law to ensure that workers can freely discuss, deliberate and decide on union membership free of employer intimidation. This means knowing who else in the workplace should be consulted on the decision to unionize (employers should cooperate in providing accurate employee lists to the neutral Ontario Labour Relations Board), better protection from retribution if they discuss unionizing. At a minimum, if their terms and conditions of work change, workers should be reinstated to their original terms and conditions, pending the outcome of a proper process. Critically, workers should have the right to express union membership by signing a union membership card (card-based certification).

As it stands, workers – especially in smaller workplaces or workplaces that are spread out over multiple locations – can be targeted for even contemplating joining a union. Many workers don't have a chance to discuss the issue with their co-workers, either because they don't work together (in the same shift or geographic location) or because they are too fearful to do so. The legislative requirement to have a balloted vote – in the context of a workplace where democracy is, for all intents and purposes suspended, serves as little more than a provocation to employers to do everything in their considerable power to undermine workers' confidence in workplace organizing.

At one time, a worker's signature on a union membership card was legal proof of that individual's desire to join a union (card-based certification). Now a worker must sign a card and also participate in a balloted vote before they have the protection of a union, so the employer has multiple opportunities to target them. This was a measure imposed by Progressive Conservative Premier Mike Harris in the mid-1990s. It's time to do away with the Mike Harris era and restore card-based union certification.

There is broad-based consensus among both public and private sector unions that card-based certification must be a key focus for statutory change. Card-check levels the playing field by providing

¹⁶ Slinn, Sara. "Anti-union intimidation is real," National Post. December 7, 2007. See: http://www.labourwatch.com/docs/press/pdf/anti-union_intimidation_is_real.pdf

fewer opportunities for employers to exert undue influence on the certification process. The mandatory secret ballot required under current law (for workers outside the construction sector) serves as a public announcement to the employer of workers' balloting preferences – before a union is even certified. This additional requirement gives the employer an extended period of time in which to intimidate, coerce and otherwise dissuade workers from joining a union. Since the Mike Harris government imposed the mandatory ballot, the number of successful certifications has declined.

Recommendation 8: The Labour Relations Act should be reformed so that workers vote only once to join a union by signing a union card. When a majority of workers have done so, the union should be certified.

Early disclosure of employee lists

As the Labour Relations Act currently stands, when workers want to bargain collectively, they must work hard to determine who else in their workplaces should be involved in these discussions. Under existing legislation, such lists are provided only two days before the vote.

We believe that, in keeping with democratic principles that apply to voting procedures in other spheres of society, such as municipal, provincial, and federal elections, genuine democracy must be predicated on a real dialogue with those affected by and participating in the determination of the outcome. Similar principles should be applied to the workforce in giving a voice to workers.

For instance, in municipal elections, voters' lists – including names, addresses and the school board they support – are published in advance. Any legitimate candidate may request the relevant voters' lists so that she has ample time to engage voters in a meaningful dialogue during a provincial election. Any qualified candidate, having filed and received official acceptance of the appropriate nomination papers and fees, may request and receive access to the voters list without a list of nominators. Of course, candidates are bound by all relevant legislation, including the Municipal Elections Act, and the Freedom of Information and Protection of Privacy Act.

Provincially, if a candidate is running with a registered political party, then a mere 25 signatures of the many thousands who live in an electoral district is a sufficient threshold for the release of the voters list for that riding. Again, the political party and its candidates are responsible for the appropriate use of the lists in accordance with all relevant legislation.¹⁷

Federally, a candidate must be nominated by between 50 and 100 eligible voters, with the lower threshold applying to larger or rural geographical areas as recognition of the challenges associated with meeting and communicating with electors over a large geographic area. Again, once the appropriate paper work is filed and accepted, candidates receive the relevant voters list so the candidate may engage the appropriate audience. Again, candidates are expected to comply with all relevant legislation concerning freedom of information and protection of privacy.¹⁸

Recommendation 9: Advocates for labour law reform suggest a much more modest proposal that would establish a threshold of 20 percent of employees expressing interest in joining a union when employers

¹⁷ Elections Ontario, Candidate's Guide, 2011. Provincial General Election. 2011. See: <http://www.elections.on.ca/NR/rdonlyres/32508606-E4AE-4BFC-9FB9-41EA94CECC09/0/CandidateGuideF0405ENG072011.pdf>

¹⁸ Elections Canada, Election Handbook for Candidates, Their Official Agents and Auditor. 2015. See: <http://www.elections.ca/content.aspx?section=pol&dir=can/bck&document=index&lang=e>

would disclose voters/employee list to the neutral Ontario Labour Relations Board. Of course all such disclosure must be in keeping with existing legislation regarding freedom of information and protection of privacy.

Reinstatement following an organizing drive

In order to capture workers' genuine desires, there must be meaningful and free deliberation between employees on workplace issues—both at work and away from work, though not on work time. Such communication should not be penalized or punished by employers, but should rightly be facilitated without undue influence.

We believe that when a critical threshold of employees have expressed a desire to work collectively to improve their working conditions, they should be allowed, without retribution, to freely discuss their working conditions with their co-workers, including union representatives.

Certainly, the employer already has this ability, but while workers may have this right in law, they do not always have it in practice.

Studies show that employers who learn their employees may be discussing collective workplace activities undertake significant measures to dissuade employees from doing so, up to and including measures that push the limits – or – in too many cases – break statutory limitations.

While employers are free to utilize legal and strategic advice to intervene in the workplace debate, employees who seek similar advice and expertise are at permanent risk of reprisals. For workers who are already employed in precarious work, and for workers who already face labour market barriers to employment more generally, this implicit employer threat is ominous and ever-present. Employees in precarious employment, who face labour market barriers, are extremely vulnerable to employer intimidation and threats of job loss because of their financial situation and need for continued employment.

When a person disappears from the workplace who was known to support, or thought to support collective bargaining, the chill on other workers inside and outside the workplace is obvious. Protection under the law cannot be delayed in these circumstances. For many workers living on the edge, merely the suggestion of reprisals such as reduced hours or termination is enough to undermine their confidence in taking action. Few people today – in whatever occupations they hold – can afford to lose hours, shifts or even a single pay cheque, never mind the cost in time and energy to engage in protracted legal disputes. To freely exercise their rights, workers need to see not only that the law exists but also that it will protect them. Under existing legislation, this is all too often not the case.

Advocates for labour law reform agree that workers who are disciplined, discharged or discriminated against because they were exercising their rights under the Labour Relations Act during an organizing drive, must be immediately reinstated to their original terms and conditions pending the outcome of a hearing on the merits of the discipline imposed on such workers, as requested by the union.

This is in keeping with the notion that people should be innocent until proven guilty; this is especially needed in workplaces during an organizing drive when employers are actively resisting union organization.

As is often stated: “justice delayed is justice denied”. Even if workers are reinstated to the workplace after a hearing that may have involved days, weeks, or months, many workers simply cannot even contemplate the consequences for themselves and their families of any reduction of already modest pay or any delay in receiving their pay. Unless workers are absolutely confident that they can exercise their rights without worsening their own and their families’ material well-being, too many will be forced to forgo their basic legal rights.

The Labour Relations Act should be amended to better protect employees who are terminated or have their hours of work changed during an organizing campaign.

Recommendation 10: Workers who are disciplined, discharged or discriminated against because they were exercising their rights under the Labour Relations Act during an organizing drive, must be immediately reinstated to their original terms and conditions pending the outcome of a hearing on the merits of the discipline imposed on such workers, as requested by the union.

Neutral and off-site voting, including telephone and electronic voting

Under existing legislation, a representation vote is required of workers before becoming a formally certified bargaining unit. Proponents of union certification via representation votes place significant emphasis on the notion of a “secret ballot” as imagined in liberal democratic election processes. But such processes are fundamentally different. In municipal, provincial or federal elections, the voting booths are situated in convenient sites, in neutral locations, and are not controlled by any particular candidate.

By contrast, the vast majority of union representation votes take place in workplaces that are, by definition, controlled by the employer.

The mere fact that a given workforce is smaller than the populations engaged in liberal democratic processes reduces the anonymity and secrecy that come when large numbers of people cast ballots.

A ballot box placed outside a supervisor’s office, or in a location that is not sufficiently neutral, can have the effect of discouraging employees from freely expressing their will. More generally, but particularly in smaller workplaces, it is quite possible for the employer to deduce – or believe themselves to have deduced – who is sympathetic to collective bargaining and who is not and treat such employees accordingly. This leads to perceived exposure and increased vulnerability.

If we are to agree we want a representation mechanism that best reflects workers’ genuine choices, it is self-evident that if a vote is to take place, then it should take place in a manner that maximizes participation. This must mean voting stations are as conveniently located as possible—even among a workforce that may be disbursed geographically—and that ballots are cast in as neutral a fashion as possible.

Recommendation 11: The Labour Relations Act should help achieve these goals by ensuring that the vote takes place in neutral locations and that there is a legal right to use telephone or online voting as determined by the employees and their union representatives.

Interest arbitration for a first contract

When workers have democratically decided for collective representation to improve their working conditions, they should rightly expect such a process to end with a contract, not another hurdle to overcome. Far too often, workers who have finally certified with a union find themselves bargaining with an employer who is still resisting the process. Delay tactics in contract negotiations that push the statutory limits cause unnecessary delays in concluding a contract for workers who already had to overcome enormous obstacles just to secure the right to bargain collectively.

Measures exist in other jurisdictions where either party may apply for arbitration if, after a set period of time, a collective agreement has not been settled. This equally protects employers and employees from bargaining tactics that do not comply with the spirit of good-faith bargaining. It helps to send a message to workers and employers that, once a collective bargaining unit has been certified, both parties are expected to conclude a contract in a timely and efficient manner.

A recent survey of the impact of first contract arbitration in a variety of Canadian provinces concluded that first contract arbitration (FCA) “reduces the incidence of work stoppages associated with the negotiation of first agreements by a substantial, statistically significant amount.” It also noted:

“... there is no evidence to suggest that the parties involved in the negotiation of a first agreement rely on arbitration to settle their differences—application rates and imposition rates are low across all jurisdictions. It appears the presence of first contract arbitration legislation creates an incentive for the parties to reach agreement without resorting to work stoppages or arbitration.”¹⁹

Finally, the study stated: “Concern that FCA undermines the collective bargaining process seems to be unwarranted; on the contrary, FCA appears to support and encourage collective bargaining.”²⁰

While in principle, most workers in Ontario have the right to associate for the purposes of collective bargaining, this is not always the case in practice due to barriers to reaching a first agreement. Across Canadian jurisdictions, first contract arbitration has been shown to create an incentive for the parties to reach a first agreement without resorting to work stoppages. Although existing legislation in Ontario provides for the settlement of a first contract through a process of arbitration, the threshold for accessing this route is still too high and workers can find themselves locked out or on strike because the employer has fulfilled only the most minimal technical requirements of the law, having not complied with the spirit of it – which is to bargain fairly and in good faith.

Recommendation 12: Ontario should adopt measures that provide additional routes to binding arbitration.

Successor rights for the contract services sector

Currently, legislation provides successor rights when a business is sold or transferred. Since the 1950s, Ontario legislation has recognized that employees who have democratically decided to form a union

¹⁹ Johnson, Susan J. T. “First Contract Arbitration: Effects on Bargaining and Work Stoppages,” *Industrial and Labor Relations Review* 63 (4), pp 602-603

²⁰ *Ibid.*

should not lose their collective bargaining rights – and employers should not be able to circumvent their obligations – when a business is sold or transferred. Such provisions were strengthened in the 1960s. In the early 1990s these provisions were extended, not just to the sale or transfer of a business, but also to the contract services sector. Unfortunately, during the previous Conservative government, these and other critical improvements to the Labour Relations Act were dismantled, including those provisions that protected some of the most vulnerable workers in society.

While we applaud the current Liberal government for restoring some measures of fairness for workers – and we acknowledge that restoring successor rights for public and private sector workers has been a crucial improvement – we note that workers employed in some of the most precarious employment like food services, cleaning, security, home care and personal support services were excluded from such protection, even though these are workers most in need of supportive legislation.

Today, as it stands, businesses or companies that use contractors for the provision of services, like security, cleaning, homecare and personal support work, have little obligation to the employees of those contractors. During the competitive bidding process – when the company puts its service requirements out to tender – those contractors who pay their employees fairly and responsibly may lose contracts because their non-union competitors pay their employees much less. The result in most cases is that the very same employees who worked for the unionized company are called back to work for a new company. They do the same job, but for less pay and security.

In the current environment then, responsible contract service employers are at a disadvantage in the market place. Employers and employees both lose out in this race to the bottom.

The loophole that allows contract service workers to suddenly lose their modest improvements in wages and working conditions to a non-union competitor on the basis of under-paying its employees is a legislative gap that must be corrected in the interests of both responsible employers and their employees. Simply put, the Labour Relations Act must be modernized to protect the rights of the growing number of workers employed in the contract services sector.

The Act should extend the same successor rights that exist for other private and public sector employees, to those in the contract services sector. By doing so, it will ensure that when a collective agreement has been established, the provisions of this agreement are not lost just because the uniform changes.

This modest measure will have a threefold positive impact:

- It will ensure that if a different service contractor employer wins the contract, it must honour the existing collective agreement and allow the workers to keep their modest improvements in pay and benefits.
- It will help ensure that competition takes place – not on the backs of the lowest paid workers – but on other meaningful factors like quality. It will help create a floor on wages and benefits in the contract services sector.
- It will level the playing field between employers who treat their employees fairly and those who do not.

In 2003, Premier Dalton McGuinty made an important promise to public sector employees stating:

Public employees should have the same rights as employees in the private sector, and, as Premier, I will restore successor rights for Ontario government employees.²¹

In 2007, the McGuinty government implemented these changes for Crown employees. We applauded those measures and we applauded the motivation for them. Fairness for all employees is an important principle. Extending successor rights to the contract services sector must be seen as the logical extension of the government's own aspiration to ensure that all employees are treated fairly, whether in the private sector, the public sector, or the contract services sector.

Recommendation 13: The Labour Relations Act should be modernized to extend successor rights to the growing number of vulnerable workers in the contract services sector who are at risk of losing all collective agreement protections when contracts are retendered.

Anti-scab rules

By far, the majority of collective agreements are renewed with conflict or labour disruptions. However, the actions of some employers result in strikes by unionized workers in order to achieve a fair contract. The use of replacement workers, or "scabs" undermines the collective bargaining process and unfairly weakens unions' ability to bring about a negotiated resolution.

Over 120 members of USW Local 9176 in Toronto were forced on strike over 21 months ago because they would not accept a demand by Crown Holdings, one of the largest can manufacturers in the world, that new workers be paid up to 42% less for doing the same job. Crown responded by bussing in replacement workers, who waved their paycheques and taunted striking workers on picket lines.

Just a few months before being pushed out on the street, the company doubled its profits and gave these workers an award for having the best plant in North America. Now Crown has said that even if all the workers take wage cuts of up to 33%, most of them won't even get their jobs back.

Backed by some of labour's most prominent figures, the striking Crown workers held a press conference at Queen's Park on Monday to demand that Ontario Premier Kathleen Wynne and Minister of Labour Kevin Flynn enact binding arbitration legislation to settle the dispute.

As the Crown Holdings case demonstrates, the government's permissiveness when it comes to employers' use of replacement workers (or "scabs") increases the likelihood that strikes and lockouts may occur more frequently and last longer.

Recommendation 14: Prohibit the use of replacement workers during work stoppages.

²¹ National Union of Public and General Employees, "OPSEU says McGuinty must honour successor rights pledge." April 26, 2006. http://www.nupge.ca/news_2006/n26ap06a.htm

Conclusion

This brief, prepared by the Ontario Federation of Labour for The Changing Workplaces Review, offers modest but necessary steps to modernize the Labour Relations Act to better reflect the realities of today's labour force and workplaces. It offers paths to better engage workers and assess their genuine aspirations when it comes to collective bargaining. Most importantly, it offers modest protection for those who begin the process of improving their wages and working conditions.

This latter point is critical. For Ontario's economy and communities to thrive, workers need to be able to exercise all aspects of their rights under the law. They must be allowed to work together to help raise the wages of all workers both union and non-union. Collective action has always been a critical pathway out of poverty for working people, which is why the right to join a union is fundamental and meaningful. In today's challenging economic climate, legislators have a special responsibility to ensure that these pathways remain open to all workers, especially those in precarious employment.

Recommended Reading

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