

Submission

by the

Ontario Federation of Labour

in response to the

**“Ending the 60-Hour
Work Week”**

Discussion Paper

February, 2004

TABLE OF CONTENTS

Introduction	1
1. Hours of Work and Power Relations	1
2. Excessive Overtime	3
3. Hours of Work, Overtime Pay and Related Issues	5
4. Models 1 and 2: A Critical Look	6
5. Model 3: An Alternative	7
Conclusion	10
Endnotes	12

Introduction

The Ontario Federation of Labour (OFL) is a province-wide federation of affiliated unions encompassing approximately 650,000 members. Our members include public sector employees, construction workers, teachers and manufacturing workers plus a growing number of private service sector employees.

We applaud the Government's initiative to begin a debate concerning hours of work as it is our belief that the major amendments and rewrite of the *Employment Standards Act, 2000 (ESA, 2000)*, resulted in unbalanced legislation. The reformulated *Act* provided, with the exception of the emergency leave provisions, increased flexibility for employers, but further restrictions for employees. It is our opinion that this imbalance must now be addressed.

1. Hours of Work and Power Relations

We concur with the Government's commitment to end the 60-hour work week, "protect an employee's right to refuse", "allow for more balance" between their work life and home life, give employees as well as employers some flexibility in decisions concerning hours of work and to "protect health and safety."

The Government's commitment is laudable, yet we remain unconvinced that the two models offered will fulfil the proposed goals. As the Discussion Paper suggests both models propose that:

1. Individual employees would need to sign written agreements to work more than 48 hours in a week, even if the Ministry of Labour issues a permit for longer hours.
2. An employee could revoke an agreement with two weeks notice.
3. Employers could revoke an agreement with reasonable notice (what constitutes reasonable?)

4. If there is a union in the workplace, it could agree to longer hours on behalf of its members.
5. Employers could ask the Ministry of Labour to vary the permit during the year to allow for more hours of work, if needed. (Couldn't permit allocation also be used to curtail excessive overtime?)
6. The Ministry of Labour would spot check some of the agreements to find out whether employees have voluntarily signed agreements to work longer hours. Appropriate enforcement action would be taken where needed.

There are definitely some changes proposed here from those of the previous administration. Yet the issue of employees signing individual written agreements to work beyond 48 hours per week, while giving the impression of fairness, neglects to account for the inequality of power in the workplace. It is this inequality that formed the basis of labour's criticisms of the provision initiated by the previous Tory government. It is our view that spot checks, while necessary, are not sufficient to correct inequitable power relations that constitute the work reality of so many.

We are also aware that not only many employers, but also many employees, want to work overtime. Yet even a cursory examination of hours of work suggests that while some are working more and more hours over the last several decades, many others are employed on an irregular part-time, contract or casual basis and lack the hours of work they need to pay their bills and raise their children comfortably. In part, such contingent workers make up for this by working two part-time jobs. The perspective that full-time workers need to work excessive overtime while thousands more employees need full-time hours or are without work, is hardly compelling. The time has come in Ontario's increasingly polarized labour market to design labour market policies and legislation to distribute work more equitably.

2. Excessive Overtime

In seeking to formulate labour market policies that distribute hours of work in a more equitable manner, we are fully aware that many full-time workers, both union members and those who lack a union, desire some overtime. Primarily this is due to the need to maintain or improve their standard of living in the face of rising costs. Spouses and older children are often out of work or under-employed and paid at or close to the minimum wage, hence the desire to earn extra money. At the same time, post-secondary education costs have skyrocketed and there has been a delisting of services under Medicare providing another pressure for workers to take what overtime one can get. We are aware of these pressures yet, as indicated above, there are other needs such as opportunities for substantive new job creation with enforceable limits on excessive overtime. Such job creation measures, along with reinvestment in public services, would alleviate some of the financial pressures faced by full-time workers and in doing so would assist in promoting popular support for limits on excessive overtime.

At the same time, we realize that some overtime is necessary for both employers and employees. We favour limits on excessive overtime, while at the same time, support measures to promote full-time work at the level of a “living wage” (even with the 30 cent increase to the minimum wage it is far below the poverty level). Such moves would begin to reverse the direction of increased inequality in the workforce that has mushroomed in recent years.

Yet, the Ministry of Labour’s Discussion Paper seems blithely unaware that excessive time constitutes a social issue, indeed a social problem. Currently, a number of countries see that one of the goals of social policy in this area is to reduce unemployment and under-employment. Hence, beginning in France, experiments with a thirty-five hour work week have spread across Western Europe. There remain promoters and detractors of these experiments, yet despite concerns governments have maintained, albeit with modifications, the shorter work week and have created considerable employment for others.

In our opinion, it is time the Ministry of Labour showed some recognition of the value of redistributing work on this side of the Atlantic. Statistics Canada's Labour Force Survey reports that the number of people working overtime has doubled over the last 18 years. Ontario's official unemployment rate hovers around 7% while the real figure, similar to the real under-employment rate, is much higher. The gross inequality of hours of work is such that it is no longer sufficient to leave the issue to articles in *Perspectives on Labour and Income* (see D. Duchesne).¹ The time has come to act.

Overtime is also a health issue. We now know that fatigue from long hours of work is a serious workplace health and safety concern. Researchers have found that those working 60 hours or more a week were 60% more likely to be involved in an accident.² In 1996, Transport Canada prepared a report on driver fatigue which examined studies from around the world. One of the key conclusions from this investigation was that "Case studies suggest that it (fatigue) plays a significant role in accidents that resulted in fatalities and injuries."³

Researchers at Stanford University have documented how fatigued individuals have a reduced ability to react, similar to that of someone impaired by alcohol.⁴ This research is supported by a study carried out in Australia appropriately entitled "*Moderate Sleep Deprivation Produces Impairments in Cognitive and Motor Performance Equivalent to Legally Prescribed Levels of Alcohol Intoxication.*"⁵

Further research studies confirm that fatigue results in reduced alertness, a decreased decision-making ability and an increase in the time it takes to react. Such occupational safety concerns thus become a public safety issue, whether driving for a living over long hours (truckers) or driving home on the highway following a long work day, employees are too fatigued to drive safely and thereby put others in danger. ⁶

3. Hours of Work, Overtime Pay and Related Issues

Hours of work are part of a package of changes introduced by the previous government and while they are separated out for this consultation, they remain integrally linked in people's work lives.

Along with the previous government's promotion and attempted legitimization of longer work hours came the averaging of overtime. Consequently, unorganized workers have faced both longer hours and less pay. Expressed another way, under the old system, if a person worked 56 hours in one week they would have been paid 12 hours at the overtime rate. Under the current system, providing the hours of work over the next three weeks were 40 hours each or less, the employee would not receive any payment at time and one half. Thus, in the old system, 56 hours = 12 hours overtime while in the current system 56 hours in one week and then, in each of the next three weeks, 40 hours, 40 hours and 40 hours or less = 0 overtime hours. This is a formula providing cheap labour for some and a lowered standard of living for many others. Freezing the minimum wage for eight to nine years drove home the reality of the previous government's low wage strategy.

Enabling vacations to be taken one day at a time was also to facilitate scheduling "flexibility" for the employer not the employee. While continental Europe commonly has a legislated five week vacation period and Britain has moved up to four weeks, Ontario sticks to a miserly two weeks. The jurisdictions of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nunavut, North West Territories, Quebec, Saskatchewan and the Federal Labour Code are more generous, enabling three or four week vacations, typically after five years. The Ontario Federation of Labour has long asked for the *Employment Standards Act* to be amended, enabling a very modest three weeks vacation after five years (see OFL Submission, Appendix 1, pp.4-5).

The *Employment Standards Act* provides a floor of workplace rights, but only if it is complied with. Models of maximum hours will remain largely meaningless however, without compliance and our experience strongly suggests compliance only comes with enforcement. Currently the system is almost entirely reactive, not proactive. The onus is on the individual worker to complain about perceived violations of the *Act* and they generally do so after they have found another job, rather than enable their employer to terminate them leaving them without a pay cheque. The power imbalance in the workplace remains such that the reactive system is totally inadequate to deal with the volume and severity of problems. Even when workers do come forward in an attempt to enforce their rights, nearly 70% of the monies ordered paid by the Ministry of Labour and handed over to private collection agencies, goes unpaid.

The amount of phone calls coming into the OFL and the various legal clinics across the province also strongly suggest that the new anti-reprisal measures are not being enforced. As the submission of the Employment Standards Work Group (ESWG) puts it: “As with any other type of illegal behaviour, the most powerful deterrent is not the severity of the penalty, but the likelihood that the perpetrator will be apprehended and convicted.” As can be seen from the facts noted above, enforcement is far from complete. It should also be obvious that so-called “self compliance” doesn’t work. Good enforcement is a must if Ontario is to have fair workplaces for non-union workers.

4. Models 1 and 2: A Critical Look

Noted above are the similarities of the two models proposed in the Discussion Paper. Essentially they combine a new, hopefully simplified, permit system for work beyond 48 hours per week with the requirement of written agreements between the employer and employee that was initiated by the previous government in *Employment Standards Act, 2000*.

Model 1 is overly similar to the permit system in place before *ESA 2000*, inclusive of block permits for up to 120, 240 and 360 extra hours of work per

annum. Indeed, under this proposal, work hours could extend beyond 60 per week. Like the old permit system, employers would not be obliged to provide any rationale as to the necessity of extra work hours (beyond 48 hours). Nor would there be any transparency in the process, no public reporting, no controls on the number of permits, no end point of permits and presumably little enforcement. These problems, and more, were documented in the *Ontario Task Force on Hours of Work and Overtime*. 7. We would suggest that such a system is far from attractive to workers forced to rely on it and not one that could be supported by the Ontario Federation of Labour.

Model 2 enables employers to apply for permits after obtaining written agreement from employees. As we noted earlier, this may not be difficult for an employer given that they hold the upper hand in the power relations of the workplace. Including just cause protection would go a considerable distance to protect employees under these circumstances. The permit system may be the most appropriate although “customized” permits have the potential danger of a myriad of inconsistent permits and “block” permits are open to abuse and excessive hours of work. Again in Model 2 there is no maximum hours. Many of the 1987 Task Force on Hours of Work and Overtime criticisms of the proposed permit system would again seem to apply.

5. Model 3: An Alternative

Models 1 and 2 are far too problematic to proceed with. Instead of relying on employee/employer agreements as if the two were equal partners in the workplace rather than recognizing that only one party can hire and fire and then adding a permit system without any transparency, we have tried to be constructive by designing a third model.

The aim of Model 3 is to enable both flexibility and worker protections. We have allowed overtime while at the same time suggesting limits on such with the desire of a more equal distribution of work hours.

Model 3 is laid out on the following page in a similar format to Models 1 and 2:

Model 3	
When a Permit Would NOT be Required	If hours never exceed 44 in one week.
When a Ministry of Labour Permit Would be Required	<p>A permit would be needed for any employee to work more than 44 hours in a week.</p> <p>Overtime paid at time and a half (time off or premium pay) after 40 hours in one week.</p> <p>No excessive overtime.</p> <p>Permits in exceptional circumstances only.</p>
Types of Permits	<p>Permits, based on employer / employee agreements or, where unionized, a union agreement for hours beyond 44 in a week.</p> <p>Company written rationale as to the reason for overtime and hence why a permit is needed.</p> <p>Public reporting of all permits.</p> <p>Employee right to refuse work after 44 hours. Right included in legislation.</p> <p>No averaging of overtime.</p> <p>Permits valid for a one year period only.</p> <p>Permits must be open to public scrutiny and posted in the workplace.</p>
Possible special rules for specific industries	<p>Full review of industry and occupation exemptions.</p> <p>Design and publicize new rules for overtime permits in exceptional circumstances.</p> <p>Unionized and non-unionized worker representatives participation in review process.</p> <p>Transparency of new rules, processes and allocation of permits.</p> <p>Establish structure and hire staff for enforcement purposes.</p>

In Model 3 a company would have to provide the Ministry with a written rationale as to the reason they need a permit. Permits should only be issued following demonstrated efforts to recall employees on layoff and offer more hours to part-time employees. This provision alone would mark a dramatic break from the current practice wherein some employees can be working overtime, indeed excessive overtime, while many others are on layoff.

There would need to be an employee/employer written agreement where there was no union. Given unequal relations in the workplace the *Employment Standards Act* would, of necessity, need to include just cause protection and explicit language as to the voluntary nature of work after 44 hours. Where a union exists an agreement with the union in question would be mandatory. In our experience, unions remain the best defence of employee work hours.

There would also need to be public reporting of all permits. Permits should be posted in the workplace and where the workforce is unionized include both employer and union officer signatures. Permits in both union and non-union workplaces should contain a termination date (one year). Where the employee is faced with a reprisal for exercising their rights under the *Act* the anti-reprisal provisions of Part XVIII in the *Act* should be enforced in an expedited manner. Increased enforcement of such provision should include penalties and such should be available on public record.

An employee would have the right to refuse to work beyond 44 hours (plus just cause protection). There would be no averaging of overtime and as in a number of other provinces, overtime would begin after 40 hours, not 44 hours. Ontario's neighbour, the province of Quebec, along with seven other provinces and territories plus the federal government, have already legislated a 40 hour work week with overtime provisions immediately thereafter.

Such measures would constitute a necessary step toward bringing some balance into work and family life by encouraging employers to hire new employees looking for more work instead of working current employees

excessive overtime hours. It would also bring Ontario back into line with International Labour Organization (ILO) Convention No. 1, the *Hours of Work (Industry) Convention*, signed by Canada back in 1935 (see OFL/CLC Submission, Appendix 2).

In the section of Model 3, entitled “Possible special rules for specific industries,” we are suggesting a full review of industry and occupational exemptions and the design of new rules and processes for the allocation of permits. It is our view that a representative and inclusive committee looking into these matters is best suited to produce a workable new approach. Following this a regulatory system should be established such that all parties are assured of proper monitoring of the permit system.

Conclusion

We acknowledge that to implement our suggestions would entail a challenge for the new Liberal Government as well as a significant improvement for workers and at least a workable alternative for employers, if not a favoured one.

There are many other changes that could be advocated, not the least of which are staged in increases to the minimum wage that would take the working poor out of poverty. This could be accomplished by fast-tracking the already approved phased-in increase of \$8.00 and then moving to a \$10.00 minimum wage. Currently, under the *Employment Standards Act*, one either has a one half-hour break for lunch, or two fifteen minute breaks and no lunch period. Surely Ontario could legislate more humane provisions providing a half-hour break for lunch plus two fifteen minute breaks. Shift scheduling and posting are two further avenues that need attention among many. Hopefully, future consultations will address such issues.

Finally, there is a further issue that we feel strongly about and wish to take this opportunity to raise with you. Workers are now eligible for six weeks of Companionate Care Benefits under Employment Insurance. This is for purposes of care for a family member who is at risk of death in a twenty-six week period. While

workers who qualify are entitled to EI benefits, they need their jobs protected by amendments to the *Employment Standards Act*. These provisions go beyond the Emergency Leave provisions brought into *Employment Standards Act, 2000*. Most provinces have modelled their amendments on those in the federal labour code. In our view the definition of family should be expanded and cover leave for abused women to attend court, find new housing, child care and healing time. Workers paying EI premiums need 600 hours in the last fifty-two weeks to qualify for EI Companionate Care Benefits. This is the same hours needed to claim EI maternity, parental and sickness benefits and therefore should be carefully examined as thousands of workers are excluded from qualifying. We would support a uniform 360 hours, for **all** EI programs.

Respectfully submitted,

Ontario Federation of Labour

CS/jm
opeiu343

f:\Submissions\Hours of Work Feb 2004

ENDNOTES

1. Duchesne, D., "Working Overtime in Today's Labour Market." *Perspectives on Labour and Income* 9, (1997) Ottawa: Statistics Canada.
2. Canadians for Responsible and Safe Highways (CRASH) February/March 2000 newsletter. <http://www.web.net/~crash/newsletter/feb-mar2000.html>. Based on a study funded and prepared for the AAA Foundation for Traffic Safety in November 1999. <http://www.aaafoundation.org/pdf/sleep.pdf>.

Later published formally as "Driver Risk Factors for Sleep-related Crashes." J.C. Stutts, J.W. Wilkins, J.S. Osberg and B.V. Vaughn. *Accident Analysis and Prevention*, Vol 35, No. 3, 2003; p. 321-331
3. *Commerical Motor Vehicle Driver Fatigue and Alertness Study* - Transport Canada November 1996.
4. *The Road to Danger: The Comparative Risks of Driving While Sleepy*. Nelson B. Powell et al *Laryngoscope* May 2001.
5. *Moderate Sleep Deprivation Produces Impairments in Cognitive and Motor Performance Equivalent to Legally Prescribed Levels of Alcohol Intoxication* A. M. Williamson, Anne-Marie Feyer - *Occupational & Environmental Medicine* October 2000.
6. For further documentation on the effects of fatigue see evidence reported in: Submission by the Ontario Federation of Labour to the Ministry of Labour on the *Employment Standards Act: Ministry of Labour Consultation on Trucking Industry Concerns*, March 2002.
7. Ontario Task Force on Hours of Work and Overtime, *Working Times: The Report of the Ontario Task Force on Hours of Work and Overtime*. Toronto: Ministry of Labour, May 1987, pp. 27-50.

APPENDIX 2