Protection for Every Worker

Establishing the Future of Decent Work in Ontario

Submission to the Ontario Workforce Recovery Advisory Committee, Ontario Ministry of Labour, Training and Skills Development

Ontario Federation of Labour

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Executive Summary

A. Inadequate Consultation Process

The Ontario Workforce Recovery Advisory Committee (the "OWRAC" or the "Committee") was quietly announced on June 15, 2021 and has been tasked to "provide recommendations to shape the future of work in our province".

Despite the sweeping nature of the OWRAC's mandate, the Committee is engaging in a rushed, reactive, and last-minute consultation process that has stifled meaningful participation and consideration of these important issues.

The OWRAC has also failed to provide adequate guidance to members of the public to structure their submissions as part of this process, not even producing a guide to consultations or consultation paper.

Even more problematic, the OWRAC has no worker or labour representatives, or those with significant labour and employment law expertise, in its membership.

The shortcomings of this process are particularly stark when contrasted with the Changing Workplaces Review conducted several years ago.

The Ontario Federation of Labour (the "OFL") is also deeply troubled by the fact that the launch of the OWRAC comes shortly after Uber publicized its lobbying and public relations campaign for so-called "Flexible Work+", a vaguely defined proposal modelled after Proposition 22, the California ballot initiative on which Uber and other gig employers spent upwards of $224 million USD to take away employment status from gig workers in California.

Given the rushed and deeply flawed nature of the OWRAC's consultation process, the OFL is very concerned that the Ford Government is using a sham process to rubber stamp the carve-outs from workers' rights for which Uber is lobbying.

Notwithstanding these many impediments to meaningful consultation, and with considerable reservations and healthy skepticism of this process, the OFL provides the following submissions to the OWRAC to help guide its recommendations on the future of work.

B. Key Policies to Ensure a World Class Labour Force and Talent Supply

To effectively realize the professed goal of ensuring that Ontario has a world-class workforce and talent supply, the Ontario government must make historic investments in public and accessible healthcare, education, childcare, and elder care services. It must invest in our healthcare system to fill the cracks exposed by COVID-19, and work with

the federal government to create a universal affordable childcare system. It must also ensure a safe reopening for our schools, and expand affordable, public, and non-profit long-term care and home care services while ensuring minimum care standards and decent work. At the same time, Ontario must place a moratorium on all for-profit care.

Ontario must also make unprecedented investments in public transit, affordable housing, and public infrastructure development to make Ontario a place that people want to live and work and raise families. When making these investments, Ontario must use procurement as a tool to support decent work and skills training. To this end, the Ontario government must establish minimum government contract rates under the *Government Contract Wages Act, 2018*, and work with stakeholders to establish apprenticeship requirements on public infrastructure projects. At the same time, Ontario must provide free, universal post-secondary education and reinvest in our colleges and universities to ensure our province has the best trained and most highly skilled workforce in the world.

Ontario must also repeal Bill 124. Ontario cannot be expected to attract and retain the best workers when their wages and overall compensation are capped by unconstitutional legislation which infringes upon their right to collectively bargain. This legislation is a slap in the face of the essential workers and front-line heroes who kept Ontarians safe during the pandemic, and flies in the face of the pressing need to address staffing shortages for personal support workers and other affected workers. It must also make temporary pandemic pay and Personal Support Worker ("PSW") wage enhancements permanent.

C. Strengthen Labour and Employment Laws to Recruit, Retain, and Reward Workers

If Ontario wants to be the best place to recruit, retain, and reward workers, then it must be a leader in protecting and supporting workers. Ontario must commit to progressive labour and employment law reform to support working people. It must strengthen health and safety laws to keep workers safe during the COVID-19 pandemic and beyond.

During the COVID-19 pandemic, marginalized groups, particularly racialized workers, disproportionately bore the brunt of job loss, hours lost, income loss, illness, and death. Any attempt at helping people and supporting workers must acknowledge who needs help most. Any strategies must be viewed with an intersectional equity-lens to ensure that these impacts are mitigated against moving forward, and in any future public health crisis. Tailored approaches to improving the living and working conditions of the communities most impacted during the COVID-19 pandemic must be paramount.

In many regards, there is no need to reinvent the wheel, and the ideas that came out of the Changing Workplaces Review process offer a shovel-ready approach to strengthen labour and employment standards under the *Labour Relations Act, 1995* (the "*LRA*") and the *Employment Standards Act, 2000* (the "*ESA*"). It should be noted however, that

not all recommendations emerging from the Changing Workplaces Review offered improved benefit and substantial protection for workers, and many other recommendations did not go far enough. Nonetheless, while lacking in some areas, the Changing Workplaces Review's recommendations do provide a useful baseline for any current review of the future of work in Ontario.

In other areas, the benefit of time and our experience during the COVID-19 pandemic have exposed further gaps in our workplace protections that need to be filled. Ontario's minimum wage must be increased to $20 per hour to ensure that a job is a path out of poverty. The *ESA* must mandate ten employer-paid sick days, with the option to use more sick days in pandemic conditions. The *ESA* should explicitly provide for the reimbursement to employees of any work-related expenses incurred in the performance of their duties.

In low union density and difficult to organize sectors, Ontario must also establish a regime for real, worker-led sectoral bargaining to promote fair competition based on innovation and quality, rather than cut-throat competition based on low wages and poor working conditions. In this respect, a sectoral bargaining regime modelled after New Zealand's "Fair Pay Agreement" system should be pursued. This would not include, for example, high union density sectors like most of the broader public sector and those with existing sectoral bargaining regimes like the construction industry.

D. App-Based Gig Workers Deserve the Same Rights as Other Employees

Ontario must ensure that app-based gig workers have the same rights as all other employees. App-based gig workers deserve full employment status with no carve-outs from the basic workplace protections available to employees under the *ESA*. Ontario must also urge the federal government to ensure these workers are guaranteed equal access to Employment Insurance and the Canada Pension Plan. Calls to carve these workers out of basic protections must be rejected.

The OFL firmly believes that app-based gig workers are *already* employees at law. Unfortunately, the multi-factoral tests currently used to determine employment status and the fact that it is incumbent upon the worker to challenge their misclassification means that these employers – like so many others in our economy – are able to misclassify their employees with near impunity, knowing that many workers will not have the ability to challenge their status, and knowing that government enforcement of the law is sorely lacking.

To ensure app-based gig workers, and indeed all other workers, enjoy the minimum rights guaranteed to them by the *ESA*, Ontario must commit to proactively enforcing the law, including through proactive inspections, expanded investigations, and sector blitzes focused on sectors and workplaces where misclassification is prevalent. This should extend to app-based gig work, as well as others like construction, cleaning and building

services, traditional courier and delivery services, the food and beverage and fitness industries, and others.

Ontario must also enshrine the “ABC test” as the test for determining employment status under the *ESA*. The strength of the ABC test is that it provides predictability and clarity to workplace parties. What is more, by shifting the onus on employers to establish that individuals are not employees, it removes some of the key barriers employees face in enforcing their rights. The enshrinement of this test in the *ESA* would make great strides towards ensuring that app-based gig workers and other misclassified workers are able to enjoy the minimum protections to which they are already entitled at law.

Taken together, these changes will help make good on Minister McNaughton’s promise to make Ontario the best place in North America to recruit, retain, and reward workers.

OFL SUBMISSION TO THE ONTARIO WORKFORCE RECOVERY ADVISORY COMMITTEE – JULY 2021

A. The Ontario Workforce Recovery Advisory Committee's Flawed 'Consultation' Process

The OWRAC was quietly announced on June 15, 2021 and has been tasked to "provide recommendations to shape the future of work in our province".

Despite the sweeping nature of the OWRAC's mandate, the Committee was given less than four weeks in the middle of the summer to complete its so-called 'consultation' process. To further compound these challenges, the OWRAC did not schedule or conduct any public meetings with respect to these consultations. Instead, the OWRAC web page on the Ontario government website simply asked members of the public to "Please share your comments, ideas, and suggestions with the committee by email at OWRAC@ontario.ca." This entirely reactive process all but ensures that the OWRAC will not engage in meaningful consultation with the very workers that will be impacted by its recommendations. This process also creates barriers for those workers who may prefer to give oral representations, and limits the opportunity for feedback from other stakeholders.

Providing meaningful written submissions to the OWRAC has been made difficult by the fact that there is no guide to consultations or background paper for stakeholders to use to frame their submissions, as one would normally expect in public consultations of this significance. Instead, members of the public have simply been advised of the following vague and loosely defined "pillars" to the recommendations:

> The Committee will lead recommendations on the future of work, focused on three pillars:
> 1. **Economic recovery:** How to make Ontario the top jurisdiction with a world-class workforce and talent supply?
> 2. **Strengthening Ontario's competitive position**: In an increasingly remote, global, and technologically advanced economy, how will we ensure that Ontario remains the best place in North America to recruit, retain, and reward workers?
> 3. **Supporting workers:** How to ensure Ontario's technology platform workers benefit from flexibility, control, and security?

Furthermore, while the OFL does not question the sincerity and integrity of the Committee members, we are deeply concerned that the Committee has no representation from labour, workers, or labour and employment law experts. Based on their listed biographies, it is apparent that the OWRAC's composition is predominantly comprised of individuals from corporate, tech, and non-employment public policy backgrounds, who are not likely to approach these issues from the perspective of promoting decent work. For instance, the OWRAC's Chair's biography describes her as "an experienced Corporate Director, venture capitalist, and investment banker". The

OFL has understandable concerns about the extent to which individuals from these sorts of class and professional backgrounds will approach these issues with the best interest of working people in mind.

The OFL is also troubled by the fact that the launch of the OWRAC comes shortly after Uber publicized its campaign for so-called "Flexible Work+", a vaguely defined proposal modelled after Proposition 22, the California ballot initiative on which Uber and other gig employers spent upwards of $224 million USD to take away employment status from gig workers in California. Uber's proposal calls for rules requiring it and other gig companies to provide "self-directed benefits" to their drivers based on their hours worked (presumably based only on "engaged time") and certain unspecified additional safety training and tools. These changes would deny gig workers core protections afforded to employees in Ontario like the minimum wage, overtime pay, and paid sick days, payment for *all* hours of work, as well as the reimbursement of expenses to ensure that their *real* wages meet the *ESA*'s minimum standards.

Given the rushed and deeply flawed nature of the consultation process, we are very concerned that the Ford Government is using this sham process to rubber stamp the carve-outs from workers' rights for which Uber is lobbying.

The OFL expressed these concerns to the Ontario government through a release issued on July 5, 2021, a copy of which is available here.

Shortly following the issuing of the OFL's release, the OWRAC quietly updated its web page to extend its deadline for submissions *ever so slightly* from July 12, 2021 to July 31, 2021. The other concerns raised by the OFL were not addressed.

The contrast between the OWRAC and other labour and employment law reform consultations such as the Changing Workplaces Review is stark. The Changing Workplaces Review issued a Guide to Consultations, conducted a dozen in-person consultations across the province which were scheduled with ample notice, commissioned ten background academic research papers on key issues to guide its recommendations, solicited written submissions from stakeholders with ample notice, issued an interim report and solicited further feedback from stakeholders on the interim report, again with ample notice, including one-on-one consultations, before ultimately issuing its final report.

By contrast, it was not until the OWRAC was referenced in the Ontario Ministry of Labour, Training and Skills Development's July 2021 newsletter distributed on July 14, 2021 – two days after the initial deadline for submissions and just over two weeks before the extended deadline – that many stakeholders in the labour relations community would even have heard about the Committee and its consultation process.

Presumably in response to broad labour and worker criticism of its consultation process, the OWRAC contacted certain academics and stakeholders commencing on Thursday July 15, 2021 for pre-scheduled, 90-minute, invite-only online group consultation

sessions scheduled for the following Monday, July 19, 2021 via Microsoft Teams. It is unclear how the invitees were selected, or allotted to different sessions and topics. Some participants who requested alternative time slots due to scheduling conflicts were told that there were no alternative dates scheduled for the sessions to which they were invited. One participant in one of the sessions reported that she was only invited to the consultation session that very same day. Many individuals invited to these sessions had difficulty attending given the extremely short notice and could not attend some or all of the sessions to which they were invited. Participation amongst those who attended was limited by the fact that it was a group discussion limited to a total of 90 minutes. The extremely rushed and last minute nature of these consultations undermined the ability for meaningful consultation and dialogue.

Inexplicably, these sessions were facilitated by the public relations firm Ipsos, which reinforced the impression that this entire process is little more than a public relations exercise to give the guise of consultation before rubber stamping the carve outs from workers' rights that Uber and other powerful interests are seeking.

Ensure that the voices of workers, the organizations that represent them, and their recommendations for the protection of every worker are understood, considered, and actioned when developing policy recommendations.

Notwithstanding these many impediments to meaningful consultation, and with considerable reservations and healthy skepticism of this process, the OFL provides the following submissions to the OWRAC to help guide its recommendations to the Ontario government on the future of work.

B. Ensure Ontario has a World-Class Workforce and Talent Supply by Investing in Public Services and Those Who Deliver Them

1. Repeal Bill 124

The OWRAC has been tasked with making recommendations on how to make Ontario the top jurisdiction with a world-class workforce and talent supply.

One answer to addressing this challenge is obvious: Ontario must repeal its unconstitutional wage restraint legislation, Bill 124. Ontario cannot attract and retain the best workers when their wages and overall compensation are capped by draconian and unconstitutional legislation infringing on their constitutional right to collectively bargain and capping their wages and overall compensation below what they would otherwise receive. Nor can it do so when they are sorely underpaid. Serious recruitment and retention problems exist, including in the healthcare sector, and cannot be remedied or redressed without permitting meaningful compensation increases in excess of those permitted by Bill 124.

The COVID-19 pandemic has exposed how undervalued so many of our front-line workers are, especially in the long-term care sector. The government's introduction of temporary pandemic pays for these "healthcare heroes" was a recognition of this reality.

Unfortunately, the very same front-line workers who have kept us safe and provided us public services throughout the COVID-19 pandemic are those whose wages and overall compensation are subject to three-year one percent caps under Bill 124.

Public sector workers have always provided vital services and now that everyone has seen the value of their work so clearly during the pandemic, the Ontario government would be wise to ensure that it pays them fairly for their service, instead of trampling on their rights. The Ontario government must repeal Bill 124.

2. Make Pandemic Pay and Wage Enhancements Permanent

The Ontario government must also make temporary pandemic pay and PSW wage enhancements permanent, and eliminate the unfair eligibility requirements that denied many front-line healthcare workers access to these benefits. These workers have long been undercompensated for their essential contributions to our society, and making pandemic pay and temporary wage enhancements permanent is the least that the Ontario government can do to recognize the invaluable contribution of these workers.

3. Build the Infrastructure: Necessary Investments in Health, Education, Transport, Housing, and Care

The Ontario government must also reinvest in our public healthcare, education, childcare, and elder care systems, as well as public transit, affordable housing, and public infrastructure development. It must be understood that actively expanding public services and infrastructure will be an engine of growth. Strategic public investment in these critical areas produce multiplier effects. These investments will create employment, support workers across all sectors as they return to work, reduce inequality, and ensure a broad and inclusive economic recovery.

The time for these investments is long past due. Before COVID-19, for instance, the long-term care sector was in crisis. It was characterized by decades of significant underfunding, the expansion of private ownership as well as relaxed regulations and standards (e.g., easing staff ratios, scaling back on annual comprehensive inspections).

These political choices are the direct cause of where Ontario finds itself now: COVID-19 has been deadliest among the long-term care sector, with both residents and workers losing their lives. The distribution, however, has not been equal. There is a significantly higher death rate due to COVID-19 in long-term care homes that are owned by for-profit corporations as compared to non-profit and public (municipal) homes.

While private long-term care facilities have been raking in staggering profits, these institutions have been plagued by many ailments – including ineffective inspections, infection controls, and accountability measures; inadequate staffing levels; indecent wages and working conditions for personal support workers; and no legislated minimum standard of care for residents, forcing staff to rush through daily care. The disproportionate power of the for-profit industry, and of providers in general, over advocates for residents and workers must end. Ontarians need a concrete commitment from the government to stop the for-profit privatization of long-term and chronic care in our province.

Ontario must invest in our healthcare system to fill the cracks exposed by COVID-19. It must also expand affordable, public long-term care and home care services and ensure minimum care standards and decent work. It must also place a moratorium on all for-profit care.

The Ontario government must invest in a safe reopening for our schools so that Ontario children can return to safe classrooms when school reopens. This requires the Ontario government to implement the health and safety measures called for by public health and education experts, including smaller class sizes to allow for proper physical distancing, improved ventilation and air filtration systems in schools, and robust tracing and testing protocols. The health and safety of our children and our educators depends on it. So too does the success of our economic recovery and our ability to attract and retain a skilled workforce.

The Ontario government must work with the federal government to use the federal money that is on the table to commit to a publicly funded and delivered, universal childcare system that ensures decent work for Early Childhood Educators, childcare staff, and providers. Children are one-third of our population and 100 per cent our future. There is no better way to safeguard our collective future and ensure meaningful participation by women in the workforce than knowing children have the best, safest care possible.

For Ontario families, high quality, affordable childcare is more than a convenience – it is a necessity. This is a matter of gender equity and ensuring women's full participation in the economy. This is also a matter of racial and gender equity for the highly racialized and female-dominated Early Childhood Educator ("ECE") workforce that cares for our children. Paying ECEs a fair and decent wage for their work is a matter of racial and gender equity that must be put front and centre in any childcare plan. Childcare needs to be safe, supported, and funded. Our children, families, and educators deserve no less. The pandemic has demonstrated that access to childcare is essential for women's labour force participation and for a full economic recovery.

Ontario must also make unprecedented investments in public transit, affordable housing, and public infrastructure development to make Ontario a place that people want to live and work. When making these investments, Ontario must use procurement as a tool to support decent work and skills training. To this end, the Ontario government must establish minimum government contract rates under the *Government Contract Wages Act, 2018*, and should work with stakeholders to establish apprenticeship requirements on public infrastructure projects.

Ontario must also make historic investments in post-secondary education. Ontario should provide free, universal post-secondary education to ensure this province has the best trained workforce in the world. Ontario must also ensure there is permanent, predictable, and meaningful funding for public schools that supports staffing models, staff/student ratios, class sizes, school supports, and infrastructure funding that supports student opportunities for success.

Strengthening these public institutions and making these investments are necessary to help Ontario build, attract, and retain the most talented workforce in Canada and the world. Increasing public investments will improve quality of life for Ontarians, but also will play a crucial role in post-pandemic economic growth. Quality of life, which relies on quality public services, plays an important role in investment decisions.

C. Protecting and Supporting Workers is Key to Recruiting, Retaining, and Rewarding them

The OWRAC has been tasked with providing recommendations regarding how, in an increasingly remote, global, and technologically advanced economy, Ontario can ensure that it remains the best place in North America to recruit, retain, and reward workers.

The answer to this question is simple. In order to be the best place to recruit, retain, and reward workers, Ontario must be a leader in protecting and supporting workers.

As a starting point, it must be noted that this question was the subject of a rigorous and intensive study conducted by the Ministry of Labour from 2015 to 2017. The mandate of that study, the Changing Workplaces Review, was to consider what employment and labour law reforms might be necessary in light of the changing nature of work and workplaces in the 21st century. The Review's first phase of public consultation involved 12 sessions held across Ontario that heard over 200 presentations and received over 300 written submissions. 10 academic research projects were also commissioned as background to the Review. An Interim Report was issued in July 2016 containing approximately 50 issues and over 225 options for further consultation. The Review's Special Advisors ultimately released a 419-page Final Report proposing 173 amendments to the *ESA* and the *LRA*. On the basis of those recommendations, the Ontario legislature enacted Bill 148, *Fair Workplaces, Better Jobs Act* which, despite its shortcomings, went a fair way towards modernizing Ontario's outdated labour and employment laws and would have assisted in reducing precarious employment in this province. Unfortunately, the majority of Bill 148 was hastily repealed by the Ford Government in October 2018 by Bill 47, *Making Ontario Open for Business Act.* That legislation plunged workers back in time by halting planned minimum wage increases and reversing course on paid sick days, equal pay for part-time and casual workers, and other important measures that had been recommended through the Changing Workplaces Review. Ontario's experience during the COVID-19 pandemic has shown the folly of this approach.

If the Ontario government is committed to recruiting, retaining, and rewarding workers, then in many regards there is no need to reinvent the wheel: we strongly urge you to review the Special Advisors' deeply considered Final Report and recommendations in the Changing Workplaces Review. While in many regards its recommendations did not go far enough, the final report of the Changing Workplaces Review and the recommendations contained therein provide a useful baseline for any current review of the future of work in Ontario. In certain other areas, the benefit of time and our experience during the COVID-19 pandemic have since exposed further gaps in our workplace protections that need to be filled. The OFL provides the following recommendations for the Ontario government to support and protect workers.

1. The Decent Work Agenda

As we emphasized in the OFL's extensive submissions to the Changing Workplaces Review, a job should be a pathway out of poverty. We strongly encourage the OWRAC to review the OFL's submission to the Changing Workplaces Review, which outlines a suite of required changes to both the *ESA* and the *LRA*. While some Ontarians are staying home, those keeping the province running – and facing a greater risk of infection – are people working in jobs that traditionally have been the lowest paid with few benefits and no access to unionization. And it is women workers, racialized and Indigenous workers, migrant and immigrant workers, and workers with disabilities that are overrepresented in these precarious but essential jobs. A full economic recovery will require the government to legislate increases to workers' wages and protections as well as to correct the inherent power imbalance between workers and employers.

It must also be acknowledged that marginalized groups, particularly racialized workers, disproportionately bore the brunt of job loss, hours lost, income loss, illness, and death during the COVID-19 pandemic. Any attempt at helping people and supporting workers must acknowledge who needs help most. Any strategies must be viewed with an intersectional equity-lens to ensure that these impacts are mitigated against moving forward, and in any future public health crisis. Tailored approaches to improving the living and working conditions of the communities most impacted during the COVID-19 pandemic must be paramount.

2. Increase the Minimum Wage

Minimum wage earners constitute an increasingly large proportion of Canada's working age population. These low wage workers are more likely to be women, racialized, and new immigrants.

The minimum wage constitutes the floor that all wage-earners bargain up from. When we raise the minimum wage, it creates a higher earning potential for all workers. Given the rising cost of living across this province, it is crucial that the minimum wage be set at a rate that actually allows workers to make ends meet. Indexing measures are also necessary to ensure that the minimum wage keeps pace with the cost of living in the province, or else we risk losing talent to jurisdictions with more competitive wage rates.

Though essential workers have been repeatedly thanked for their service during these trying times, there is bitter irony in the fact that many of our COVID-19 heroes work in precarious, low paying jobs. Now that there is widespread recognition of how valuable these workers are to the healthy functioning of our society, we need to ensure that their wage rates reflect their value both during and after the pandemic.

The OFL recommends that the Ontario government increase the minimum wage to $20 an hour, adjusted annually for inflation. The Ontario government must also end sub-

minimum wage rates and remove all exemptions to the general minimum wage for students, liquor servers, farmworkers, and others.

3. 10 Paid Sick Days and Additional Measures during Public Health Crises

It's been said by numerous public health experts, including Ontario's COVID-19 Science Table, by several Ontario Mayors, and by doctors and healthcare workers throughout this pandemic: paid sick days save lives.

Tragically, we've seen COVID-19 resurge, wave after wave, due to high rates of workplace exposure. Not unsurprisingly, many workplaces with high rates of exposure during the second wave of the pandemic offered no paid sick leave to their employees.

If we have learned anything from this challenging time, it's that healthy workers are the cornerstone of a healthy society. Indeed, cities with paid sick days saw a 40% reduction in influenza rates during flu waves compared to cities without. Yet approximately 58 percent of workers in Canada have no paid sick days and low-wage workers have the least access to paid sick days. These workers, many of whom work in sectors deemed essential during the pandemic, are faced with the impossible choice between losing wages - or worse, risking reprisal from their employer for taking a day off - and going to work sick, risking their own health, and the health of their co-workers.

In order to maintain their health and reduce the transmission of illnesses, workers need access to paid sick days that are:

- Universally available to workers regardless of their employment status, workplace, or immigrant status;
- Adequate enough to cover reasonable periods of illness without financially penalizing workers for following public health advice;
- Easily accessible, without the requirement of sick notes, which unnecessarily burden workers and our healthcare system, or unnecessary application requirements; and
- Flexible enough to reflect the reality of workers' lives, healthcare needs, and caregiving responsibilities.

The paid sick leave measures implemented by both the province and the federal government during the pandemic are cumbersome, inadequate, and will expire before the risks associated with COVID-19 have actually passed.

The OFL strongly recommends that Ontario follow public health recommendations by introducing 10 permanent employer-paid sick days, with an additional 14 days of paid leave during a public health outbreak.

4. Protect the Rights We Already Have

It is the government's role to enact and enforce the necessary legal guardrails to ensure that workers have fair wages, fair working conditions, and the right to health and safety in the workplace. As it stands loopholes in our legislative framework unjustly place some workers outside the scope of existing labour and employment law protections. Workers should not be denied access to important workplace rights and entitlements because of their employment status. Nor should employers be allowed to treat workers who do the same jobs differently, simply because of their age, immigration status, or because they are employed on a temporary, part-time, or casual basis.

The labour and employment laws that exist in this province provide some necessary protections for workers, but weak and under-resourced enforcement mechanisms incentivize employers to skirt around minimum standards requirements as much as possible. Ontario's current complaint-based system of enforcement relies on workers to police their own working conditions, with only nominal protection from reprisals. Because most workers fear making a complaint against an employer who they still actively work for, there is little risk of employers in violation being detected, relatively no cost to violation and, as a consequence, little incentive for employers to comply. Even if a worker is able to file a successful complaint, the "worst case scenario" for the employer is to pay back the wages that were already owing in the first place, plus a minimal fine.

Gaps in worker protections have long existed and needed closing, but this pandemic is highlighting their urgency. A generation ago, the shift to home work was a tactic employed to de-unionize and depress wages and working conditions, including in the garment industry in Toronto.[1] Today, while the shift to home work was hastened in response to *bona fide* public health concerns during the pandemic, the risk that employers take advantage of these trends to misclassify and underpay their workers over the near term is significant. To protect the rights of working people, the OFL recommends:

- Removing all exemptions in the *ESA* to ensure that all workers, regardless of their age, occupation, or employee status, have access to the same basic floor of employment standards;
- Increasing enforcement measures to deter employers from violating the law, such as proactive workplace inspections, expanded investigations, enforcement blitzes targeted at high-risk industries and sectors, treble damages for workers whose wages have been stolen, and greater fines when employers break the law;
- Developing an anonymous and third party complaint program with the goal of remedying unpaid wages and other *ESA* entitlements for employees while they are still in the workplace; and
- Providing meaningful protection for workers who stand up for their rights at work.

Wage theft and the misclassification of employees undercut high-road employers that play by the rules, starve our income tax, employment insurance, and public pension

systems of much-needed revenue, undermine the very integrity of the legal system and call into question the rule of law. These issues must be understood as broad social harms that impact us all, and not simply a matter of private disputes between workers and their employers. Robust enforcement effort is required to rectify these wrongs.

5. Improve Working Conditions for All Working People

Due in large part to the proliferation of non-standard work arrangements, precarious employment is on the rise. Even in sectors of the economy that have historically had high rates of unionization, workers are increasingly struggling to cobble together a living through part-time, temporary, and contract employment. Temp agency workers, for example, are routinely working side by side full-time permanent employees, doing the same work with no benefits and less pay. Where employers see flexibility and reduced labour costs, workers see greater risk, fewer guaranteed hours, lower wages, and less job security.

In a race to the bottom labour market, workers are forced to take what they can get: that often means working very few hours for multiple different employers, or working excessive overtime without extra pay. Workers who have no control or certainty in their scheduling struggle to organize their lives, maintain their health, and take care of their families.

In addition to raising the minimum standards for wages and working conditions, the *ESA* needs to be modernized to take into consideration the realities of precarious work and non-standard work arrangements so that it can actually guarantee decent working conditions to all workers.

Towards that end, the OFL recommends:

- Prohibiting differential treatment in pay, benefits, and working conditions for non-standard workers doing the same work as full-time workers (i.e., part-time, contract, temporary, and casual workers);
- Prohibiting differential treatment in pay, benefits, and working conditions on the basis of gender, racialization, and immigration status;
- Making companies liable for wages, working conditions, health and safety, and collective bargaining when they employ workers indirectly through temp agencies/labour supply subcontractors and franchise relationships;
- Protecting workers from losing wages, benefits, and union coverage when a business is sold or when a new service provider gets the contract (stop contract flipping);
- Removing overtime exemptions and special rules and ensuring that all workers receive overtime after working more than 8 hours per day and/or 40 hours per week;
- Requiring two weeks' posting of work schedules and establishing minimum hours for shifts;

- Requiring a guaranteed minimum number of hours of work each week, that is to say, no zero hour contracts; and
- Providing just cause protection to all workers.

6. Enshrine the ABC Test to Provide a Predictable and Purposive Test for Employment Status

The misclassification of employees as independent contractors is pervasive in our economy. By treating their workers in this fashion, employers are able to avoid paying the minimum wage, overtime, employment insurance premiums, Canada Pension Plan contributions, employer payroll taxes, and other taxes and benefits. The misclassification of employees drives down wages and working conditions, undermines our employment insurance and public pension systems, and our tax base, and undercuts high-road employers that play by the rules and treat their workers fairly.

Unfortunately, the existing tests for determining employment status involve complicated, multi-factoral tests which place the burden on workers themselves to challenge and prove their status. Unscrupulous employers know that most workers will not have the time or resources or power to be able to undertake this challenge. As a result, the improper misclassification of workers in our economy as so-called independent contractors is systematic and widespread.

One response to this problem has been to legislate a new, simpler test, known most commonly as the “ABC test”. This test is used for at least some purposes in a majority of jurisdictions across the United States. The “ABC test” provides that a worker is an employee unless the hiring entity can establish that:

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

The ABC test also typically contains a business-to-business exemption recognizing that *bona fide* business contracting relationships are not employment relationships. This preserves existing business to business relationships, and again provides clear criteria to meet.

How does this test work in practice? Imagine a hypothetical pizza shop. If the pizza shop contracted a plumber to fix its toilet that worker would properly be classified as an independent contractor. Similarly, the ABC test would not capture the pizza shop’s business contracts with its suppliers. However, if the pizza shop tried to (mis)classify its pizza chefs or delivery drivers as independent contractors, the ABC test would properly recognize that these workers are employees and entitled to basic protections. The

strength of the ABC test is that it provides predictability and clarity to workplace parties. What is more, by shifting the onus on employers to establish that individuals are not employees, it removes some of the barriers employees face in enforcing their rights.

The misclassification of employees is a broad social harm that impacts us all. The current approach to this problem is failing working people, government, and law-abiding employers. The Ontario government should codify the ABC test as the test for determining employment status under the *ESA*.

7. Enshrine Employer Responsibility for Work-Related Expenses in the *ESA*

The downloading of work-related expenses on vulnerable employees has long been part and parcel of misclassification and wage theft in food delivery and other industries. At the same time, the sudden shift to working from home during the COVID-19 pandemic has raised new and even broader-reaching concerns regarding the downloading of these expenses on employees. The federal government has addressed this issue to some extent for tax purposes in relation to working from home, but gaps in the *ESA* persist and have been made all the more clear by recent experience during the pandemic.

To the extent that incurring work-related expenses like gasoline or windshield washer fluid result in an employee's compensation falling below *ESA* minimum standards, Ontario Labour Relations Board case law establishes that this is a violation of the *ESA* and requires that the employee be compensated to be made whole.[2] Unfortunately, the *ESA* does not explicitly provide for the reimbursement of expenses by employers, and case law has interpreted employers as not liable for these expenses through the *ESA* complaint process unless it results in the employee earning less than the *ESA* minimums. In other jurisdictions such as British Columbia, employment standards legislation has clear language prohibiting employers from requiring their employees to pay for business costs.[3] Such strong language is currently lacking in the *ESA*, but is clearly needed.

The Ontario government should strengthen the *ESA* to clarify employer responsibility for *all* work-related expenses, even if incurring these expenses does not cause the employee's wages to fall below *ESA* minimums.

8. Protect Workers' Right to Unionize and Collectively Bargain

Historically, unions have played a powerful role in lifting people out of poverty. When workers form a union, they are able to join together to win better pay and benefits for themselves and for all those who come into the workplace after them. While many workers technically have legal access to the right to unionize and bargain collectively, they cannot actually exercise these rights, particularly in low wage sectors.

Some workers, such as farm workers and domestic workers, are fully excluded from the rights and protections of the *LRA.* While other workers, particularly those in small workplaces, and those who work under subcontractor or franchisee employers, face structural barriers to obtaining and keeping a union. For example, 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.

As the Supreme Court of Canada has itself recognized, "...the imbalance between the employer's economic power and the relative vulnerability of the individual worker informs virtually all aspects of the employment relationship." This power differential creates unjust barriers to unionization. Employers use intimidation and the threat of reprisal to discourage workers from organizing in the workplace.

We need to modernize our labour laws to ensure that the union certification and collective bargaining processes do not themselves hinder workers' constitutionally enshrined right to freedom of association. 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.

As it stands, workers – especially those 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. Precarious workers who are already living paycheck to paycheck will be even more susceptible to employer intimidation and coercion. 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. The province needs to take proactive steps to level the playing field.

Broader-based bargaining models, such as New Zealand's newly established "Fair Pay Agreement" sectoral bargaining model, could also provide tailored approaches to collective bargaining for workers in low-wage industries with historically low rates of unionization which have been historically difficult to organize. This would not include high union density sectors like most of the broader public sector and those with existing sectoral bargaining regimes like the construction industry. Sectoral bargaining permits union(s) to apply to represent all workers in a specific occupation or industry. If the union collects membership cards from a minimum number of employees in that sector,

they are then able to negotiate wages and working conditions on behalf of all the workers in that occupation or sector. Any agreement reached must then be ratified through a sector-wide voting process. The benefit of this approach is that it creates minimum standards that make sense for that specific industry, preventing employers from trying to gain an edge on their competitors by lowering wages and benefits below the collectively negotiated rates. The New Zealand model also requires ratification on the employer side, and provides weighted voting to ensure that small businesses are not drowned out by large corporations in the process.

The OFL recommends that the Ontario government take the following steps:

- Remove the exclusion of agricultural, silviculture, horticulture works, professionals, and domestic workers from the *LRA;*
- Reinstitute card-based certification for all workers (i.e., 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);
- Ensure that all votes take place in neutral locations, and that workers have a right to use telephone and online voting;
- Require employers to provide accurate employee lists to the neutral Ontario Labour Relations Board earlier in the union organizing process;
- Provide better protections from retribution for workers who engaged in a union organizing drive, including the immediate reinstatement of workers who are disciplined, discharged, or discriminated against because they were exercising their rights under the *LRA* pending the outcome of a hearing on the merits of the discipline imposed on such worker;
- Extend successor rights to contract service workers who are at risk of losing all collective agreement protections when contracts are rendered (i.e., end contract flipping);
- Prohibit the use of replacement workers during work stoppages; and
- Establish a system of real, worker-led sectoral bargaining for workers in low-wage and difficult to organize industries with historically low rates of unionization modelled after New Zealand's "Fair Pay Agreement" regime to improve industry-wide standards and provide meaningful access to collective bargaining for precarious workers.

Taken together, the above-described measures will help protect and support workers so that Ontario can live up to the goal of being the best place in North America to recruit, retain and reward workers.

D. Supporting App-Based Gig Workers

1. App-based gig workers are entitled to full employment protections

App-based gig workers have been on the frontlines of the COVID-19 pandemic, keeping our communities safe by providing essential services like grocery shopping, transportation, and food delivery.[4] Yet despite their vital contributions, these workers continue to be misclassified by their employers as independent contractors and denied basic protections under the *ESA*, *Employment Insurance Act*, *Canada Pension Plan*, and other protective legislation. This means that if a gig worker loses their job through no fault of their own, like when Foodora shuttered its doors and fled Canada in April 2020, they have no access to employment insurance benefits in order to hold themselves over. It also means that if a gig worker is sick or experiencing COVID-19 symptoms, they have no paid sick days so that they can stay home, get tested for COVID-19, and self-isolate, even after the Ontario government finally introduced limited paid sick days for other Ontarians. It also means that they are not able to enjoy the other basic protections that ought to have been afforded to them by the *ESA*, such as the minimum wage and overtime pay, payment for *all* hours of work and not just engaged time, and the reimbursement of work-related expenses to ensure that their *real* wages comply with the *ESA*'s minimums.

In his op-ed announcing the OWRAC, Minister McNaughton said that "We've seen over the past year how vital these workers are and I will always stand behind them." Unfortunately, app-based gig workers have not felt that support from this government or from their employers. According to a recent study by the World Economic Forum, over 70 percent of gig workers reported that they felt abandoned by their employers, and were unhappy with the supports and safety measures that were offered to them. Here in Ontario, app-based gig workers working for Foodora saw their employer flee the jurisdiction during the pandemic shortly on the heels of their successful union drive, and those working for Uber Eats experienced a significant pay cut when Uber Eats changed its system during the pandemic. All the while, the Ontario government has done nothing to protect the wages, working conditions, and labour rights of app-based gig workers in the face of ongoing misclassification and wage theft.

It is in this context that the OWRAC has been tasked with providing recommendations regarding how to ensure Ontario's so-called "technology platform workers" benefit from flexibility, control, and security. Unfortunately, the framing of this pillar, like much of the discourse around the so-called "platform-based" gig economy, implies a tension between flexibility and employment status, but this is a false dichotomy. As employees, app-based gig workers can continue to enjoy flexibility, while being afforded the same protections as other employees. There is no tension between workers enjoying the protections of employment status and continuing to enjoy flexibility. Potential future limits on the flexibility of app-based gig workers if they were properly classified as employees are not inherent to employment status; rather, they reflect potential future actions *on the part of gig employers* in response to employee classification. These

companies cannot hold their own potential future actions over the heads of their workers and the Ontario government in order to keep these workers precarious and without protections.

2. Carve-Outs and Third Categories are a Dead End for Gig Workers

The elephant in the OWRAC's consultation room is Uber's so-called "Flexible Work+" proposal and its lobbying efforts to enshrine this system, which we believe put in motion this 'consultation' process. Although the details of Uber's plan remain murky, it appears that it is lobbying to exempt its drivers and other app-based gig workers from the *ESA* and similar legislation across Canada. In exchange, Uber proposes rules requiring it and other gig companies to provide so-called "self-directed benefits" to their drivers based on their hours worked (presumably based only on "engaged time") and certain unspecified additional safety training and tools. These changes would deny app-based gig workers core protections afforded to employees in Ontario like the minimum wage, overtime pay, payment for *all* of their hours of work, the reimbursement of expenses to ensure their *real* wages exceed these minimums, and employment insurance. Uber's proposal is part of its campaign to export new rules around the world modelled after Proposition 22, the California ballot initiative on which Uber and other gig employers spent upwards of $224 million USD to take away employment status from gig workers in California.

Uber has suggested that it needs its requested exemptions in order to provide the benefits it proposes, but this insinuation is not correct. If Uber wanted to provide its drivers with benefits or enhanced training it could do so right now. Instead, Uber is using the promise of these modest benefits as a political trade-off for critical workplace rights and carving its drivers out of basic employment protections forever. It's a false choice that must be rejected.

It is also important to acknowledge that this consultation process arises in the context of an ongoing application for certification at the Ontario Labour Relations Board for its Uber Black limousine and SUV drivers working in and out of Toronto Pearson International Airport and downtown Toronto, and after the Supreme Court of Canada ruled last June that Uber's mandatory arbitration clause should be struck down and could not be used to prevent the plaintiff in a proposed $400 million employment class action from pursuing his case on behalf of its drivers across the Province of Ontario. The certification motion for the proposed class action was argued in mid-July 2021, and the parties are awaiting the court's decision.

Uber drivers and other app-based gig workers in Ontario are fighting for their right to unionize and to receive the same protections under the law as other employees. The OFL rejects Uber's attempts to circumvent and undermine these struggles with backroom deals to carve gig workers out of core protections.

App-based gig workers need the government to protect their rights as employees, not legislate them away. The Ontario government should enforce the laws already on the books to protect app-based gig workers, and should follow the lead of courts and governments around the world and confirm that gig workers are employees and entitled to basic employment protections.

For its part, the OWRAC should be loath to recommend anything approximating Uber's proposal. History will reflect poorly on those that entrench app-based gig workers' status as a sub-minimum wage underclass. With workers from racialized, working-class communities already overrepresented in the gig economy, legislative changes following the footsteps of Proposition 22 will only further entrench racial economic inequities. Legislated third categories for app-based gig workers have been described as the "new racial wage code"— reminiscent of historic discriminatory laws that excluded Black workers from minimum wage legislation and other worker protections in the United States.[5] The old racial wage codes were made up of differential minimum wage rates for majority Black workforces — often operating through geographic-based wage classifications, as well as sectoral carve-outs which excluded domestic workers and agricultural workers from worker protections altogether.[6] Today, the new racial wage code is being created through facially neutral laws which strip basic employment protections from a gig economy workforce largely made up of racialized and immigrant workers. The OWRAC must understand that if you recommend this approach in Ontario, you will go down in history as codifying a racist and exclusionary racial wage code that will entrench the status of a highly racialized workforce as a sub-minimum wage underclass.

3. A Fair Future for Gig Workers

Instead of undercutting gig workers in their struggles for rights at work, the Ontario government should be supporting them and ensuring that these rights are actualized. The OWRAC must provide the Ontario government with recommendations to help make this a reality.

Gig workers in Ontario deserve full employment rights with no carve-outs from minimum wage, sick leave, vacation and public holiday pay, rest periods, pregnancy and parental leave, and the other basic workplace protections available to employees under the *ESA*.

One of the most important and most basic rights at stake for app-based gig workers in this process is the right to be paid in accordance with the *ESA* and other minimum standards legislation for *all* of their hours of work. Industry-sponsored research suggests that app-based gig workers spend 33 percent of their time on the app as down time while they are waiting for work. Other estimates by app-based gig workers place this figure even higher.[7] This is to be distinguished with "engaged time", which is the time from when an app-based gig worker accepts an assignment to after it is completed (i.e., in the case of Uber drivers, from the time they accept a ride request to the time they drop their passenger off at their destination).

Under “third category” approaches like Proposition 22, and indeed under the gig companies’ current treatment of their misclassified workers in Ontario, app-based gig workers are only compensated for “engaged time”. This means that all of the time drivers and couriers spent working on the app and holding themselves out ready to accept a ride or delivery is not compensable time. This approach would not be acceptable treatment for any other worker in Ontario, and no less should be expected for gig workers. It would be untenable to suggest that a construction worker ought not be paid while they wait for a concrete pour, or that a grocery store cashier should not be paid for time when they wait at the register while they don’t have a customer at the till. By the same logic, app-based gig workers must be paid for all of their time spent logged on to the app while they hold themselves out ready, willing, and able to work.

Indeed, this issue is not controversial under current Ontario law. As employees, app-based gig workers are properly entitled to payment for *all* hours of work, including time on the app available and waiting for an assignment, and not just “engaged time”. Under Ontario law, the requirement to pay employees for all work permitted or suffered to be done by the employer or where the employee is waiting or holding themselves out ready for work is clearly enshrined in *O. Reg 285/01* under the *ESA*. Any carve-out that denies gig workers this basic right is entirely unacceptable.

App-based gig workers must also be provided with reimbursements for all necessary work related expenses, such as gasoline, insurance, and depreciation expenses. Under the current approach of app-based gig employers in Ontario, these costs are downloaded onto workers, and these hidden expenses decrease the real wages earned by employees. In California under Proposition 22, drivers are provided with a mileage-based expense reimbursement, but this is only at the rate of $0.30 per mile, and only for *engaged* time, in contrast with the $0.575 per mile for all miles worked that employees would be entitled to in California under the IRS guidelines.

Any proposal which downloads these expenses onto app-based gig workers is untenable and must be rejected by the OWRAC. As employees, these workers are properly entitled to reimbursement for all necessary work-related expenses to ensure that their *real* wages are not reduced below the minimum wage and other *ESA* minimum standards. As noted above, to the extent that work-related expenses result in an employee’s compensation falling below *ESA* minimum standards, this is a violation of the *ESA* and requires that they be compensated to be made whole.[8]

Unfortunately, given their misclassification as so-called “independent contractors” these and other basic rights are illusory for gig workers. There are two crucial steps that the Ontario government must take to make the enjoyment of these rights a reality for gig workers.

First, the Ontario government must proactively enforce the law to ensure gig workers are properly classified as employees and receive basic employment protections. The exploitation of app-based gig workers is perhaps the most discussed topic in the academic, media, and public debates in the world of work today and for many years.

Despite the dominance of this issue in the discourse surrounding the future of work, the Ontario government has inexplicably taken an entirely "hands-off" approach to the protection of gig workers. The ongoing failure to act is inexcusable. Ontario must commit to proactively enforcing the law to support app-based gig workers, including through proactive inspections, expanded investigations, and sector blitzes to ensure compliance. The ongoing misclassification of gig workers must be understood as a social harm that requires a robust, public response.[9] The misclassification of app-based gig workers and other precarious workers not only steals income from some of our most vulnerable friends and neighbours, but also undercuts high-road employers that play by the rules, erodes our income tax, employment insurance and public pension systems, and undermines the very integrity of legal system and calls into question the rule of law. These violations require a strong, robust, and swift action on the part of the Ontario government and other regulators.

Second, Ontario must clarify and simplify the test for employment status by enshrining the ABC test, as we have described above. Let us be clear: we are confident that Uber drivers and others app-based gig workers are properly classified as employees under current law. Unfortunately, the determination of employment status in Ontario involves complicated, multi-factoral tests which place the burden on workers to challenge their status. Employers like Uber know that most workers will not undertake this challenge. Codifying the ABC test as the test for employment status under the *ESA* would curb the unlawful misclassification of app-based gig workers and other workers, provide clarity to workplace parties, and avoid the need for drawn out litigation to resolve employment status.

4. Carve-Out for Gig Workers Would Undermine Decent Work Across the Entire Economy

It must be clearly understood by the OWRAC that the implications of any potential carve-out aimed at providing Uber the exemptions for which it is lobbying will not be contained to Uber and its competitors, but rather will undermine decent work across our entire economy. The downward pressure that this sort of legislative reform would have on wages and working conditions in this province would be profound.

The app-based gig economy as it currently exists in Ontario is not limited to food couriers and taxi drivers. Precarious, gig-based work is becoming increasingly ubiquitous, and can be found creeping into sectors such as long-term care, home care, the restaurant and food service industry, home cleaning, handyperson services, creative industries, and digital services. Many companies offering app-based gig-based work act as unregulated temporary help agencies, and misclassify their workers as independent contractors in order to circumvent the already tepid and inadequate regulation of temporary help agencies under the *ESA*. Legislative changes modelled after Uber's "Flexible Work+" that seek to exempt gig workers from basic protections under the *ESA* will have a ripple effect across the entire economy, incentivizing employers to displace decent work with sub-standard gig work. Indeed, this has already been the experience

since the passage of Proposition 22 in California, where some in-house grocery delivery employees have been laid off and replaced by gig workers from third-party delivery platforms.

As food courier and Gig Workers' United President Jennifer Scott has explained, gig workers are "holding the line for labour protections and workers' rights for literally everybody in Canada" in their fight against Uber's proposed carve outs. If Ontario codifies a "third category" with carve outs and lesser rights for app-based gig workers, it will incentivize the displacement of traditional employees with these workers, and hasten the Uberization of our economy. With these legal incentives in place, it will not be long for many Ontarians until their job is next. The calls for these carve-outs must be rejected.

5. Existing Minimum Standards are a Floor, not a Ceiling

The measures proposed above to ensure the fair and proper classification of app-based gig workers will go a long way to help ensure that they have the same floor of protections as other workers. However, this must only be the starting point and not the final result. These existing minimum standards are a floor, and not a ceiling, and app-based gig workers need and deserve so much more.

App-based gig workers deserve just cause protection against deactivation. As it currently stands, these workers are able to be terminated through "deactivation", often for dubious reasons, without any recourse. These workers, like all others, deserve due process and protection against unjust discipline at work.

App-based gig workers also deserve the right to join a union and have a collective voice at work, the same as any other employee. These rights must be protected and strengthened for app-based gig workers, the same as all other working people in Ontario.

Finally, in order to make collective bargaining a reality for these workers, the Ontario government should establish a system of real, worker-led sectoral bargaining that would give app-based gig workers and other workers in traditionally low-wage industries with low union density the opportunity to uplift their wages and working conditions. We believe that the New Zealand model described above offers an attractive option for Ontario. One of the key benefits of adopting a broader, sectoral approach is that it can help create a level playing field across these industries and sectors, and promote fair and positive competition based on skills and quality, rather than cut-throat competition based on driving down wages and working conditions.

E. Conclusion

As we emerge from the COVID-19 pandemic, Ontario has a unique opportunity to finally take action to correct the long-standing inequities and injustices in our society and in our economy. Ontario must seize upon this occasion to deliver for working people.

The Ontario government must reinvest in our public healthcare, education, childcare, and elder care systems, as well as public transit, affordable housing, and public infrastructure development to make Ontario a place that people want to live and work and raise families. In making these investments, Ontario must leverage procurement as a tool to support decent work and skills training. To this end, the Ontario government must establish minimum government contract rates under the *Government Contract Wages Act, 2018*, and work with stakeholders to establish apprenticeship requirements on public infrastructure projects. At the same time, Ontario must also provide free, universal post-secondary education to ensure our province has the best trained and most highly skilled workforce in the world, as well as ensure there is permanent, predictable, and meaningful funding for our public education system. The government must also repeal Bill 124. Taken together, these steps will ensure Ontario is a top jurisdiction with a world-class workforce and talent supply.

The Ontario government must also enact comprehensive labour and employment law reform to protect and support working people. Ontario cannot be the best place to recruit, retain, and reward workers if it does not support and protect workers.

The Ontario government must ensure that app-based gig workers have the same rights as all other workers. App-based gig workers deserve full employment status with no carve-outs from the basic workplace protections available to employees under the *ESA*. Ontario must also urge the federal government to ensure app-based gig workers are guaranteed access to Employment Insurance and the Canada Pension Plan. Calls to carve these workers out of basic protections must be rejected.

Taken together, these measures can help deliver a fairer and more prosperous Ontario as we emerge from the COVID-19 pandemic.

Appendix A: Summary of Recommendations to the OWRAC

A. Listen to Workers

1. Ensure that the voices of workers, the organizations that represent them, and their recommendations for the protection of every worker are understood, considered, and actioned when developing policy recommendations.

B. Invest in Public Services and Those Who Deliver Them

2. Repeal Bill 124.
3. Make temporary pandemic pay and PSW wage enhancements permanent, and eliminate the unfair eligibility requirements that denied many front-line healthcare workers access to these benefits.
4. Invest in our healthcare system to fill the cracks exposed by COVID-19.
5. Expand affordable, public long-term care and home care services and ensure minimum care standards and decent work.
6. Place a moratorium on all for-profit care.
7. Invest in a safe reopening for our schools so that Ontario children can return to safe classrooms when school reopens.
8. Work with the federal government to use the federal money that is on the table to commit to a publicly funded and delivered, universal childcare system that ensures decent work for Early Childhood Educators, childcare staff, and providers.
9. Invest in public transit, affordable housing, and public infrastructure development to make Ontario a place that people want to live and work.
10. Use procurement as a tool for supporting decent work and skills training by establishing minimum government contract rates under the *Government Contract Wages Act, 2018*, and working with stakeholders to establish apprenticeship requirements on public infrastructure projects.
11. Provide free, universal post-secondary education to ensure this province has the best trained workforce in the world.
12. Ensure there is permanent, predictable, and meaningful funding for public schools that supports staffing models, staff/student ratios, class sizes, school

supports, and infrastructure funding that supports student opportunities for success.

C. Protect and Support Workers

13. Pursue a decent work agenda to ensure that a job is a pathway out of poverty.
14. Increase the minimum wage to $20 an hour, adjusted annually for inflation.
15. End sub-minimum wage rates and remove all exemptions to the general minimum wage for students, liquor servers, farmworkers, and others.
16. Introduce 10 permanent employer-paid sick days, with an additional 14 days of paid leave during a public health outbreak.
17. Remove all exemptions in the *ESA* to ensure that all workers, regardless of their age, occupation, or employee status, have access to the same basic floor of employment standard.
18. Increase enforcement measures to deter employers from violating the law, such as proactive workplace inspections, expanded investigations, enforcement blitzes targeted at high-risk industries and sectors, treble damages for workers whose wages have been stolen, and greater fines when employers break the law.
19. Develop an anonymous and third party complaint program with the goal of remedying unpaid wages and other *ESA* entitlements for employees while they are still in the workplace.
20. Provide meaningful protection for workers who stand up for their rights at work.
21. Prohibit differential treatment in pay, benefits, and working conditions for non-standard workers doing the same work as full-time workers (i.e., part-time, contract, temporary, and casual workers).
22. Prohibit differential treatment in pay, benefits, and working conditions on the basis of gender, racialization, and immigration status.
23. Make companies liable for wages, working conditions, health and safety, and collective bargaining when they employ workers indirectly through temp agencies/labour supply subcontractors and franchise relationships.
24. Protect workers from losing wages, benefits, and union coverage when a business is sold or when a new service provider gets the contract (stop contract flipping).

25. Remove overtime exemptions and special rules and ensuring that all workers receive overtime after working more than 8 hours per day and/or 40 hours per week.
26. Require two weeks' posting of work schedules and establishing minimum hours for shifts.
27. Require a guaranteed minimum number of hours of work each week, that is to say, no zero hour contracts.
28. Provide just cause protection to all workers.
29. Enshrine the "ABC test" to provide a predictable and purposive test for employment status under the *ESA*.
30. Amend the *ESA* to clarify employer responsibility for *all* work-related expenses, even if incurring these expenses does not cause the employee's wages to fall below *ESA* minimums.
31. Remove the exclusion of agricultural, silviculture, horticulture works, professionals, and domestic workers from the LRA.
32. Reinstitute card-based certification for all workers (i.e., 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).
33. Ensure that all votes take place in neutral locations, and that workers have a right to use telephone and online voting.
34. Require employers to provide accurate employee lists to the neutral Ontario Labour Relations Board earlier in the union organizing process.
35. Provide better protections from retribution for workers who engaged in a union organizing drive, including the immediate reinstatement of workers who are disciplined, discharged, or discriminated against because they were exercising their rights under the LRA pending the outcome of a hearing on the merits of the discipline imposed on such worker.
36. Extend successor rights to contract service workers who are at risk of losing all collective agreement protections when contracts are rendered (i.e., end contract flipping).
37. Prohibit the use of replacement workers during work stoppages.
38. Establish a system of real, worker-led sectoral bargaining for workers in low-wage and difficult to organize industries with historically low rates of unionization

modelled after New Zealand's "Fair Pay Agreement" regime to improve industry-wide standards and provide meaningful access to collective bargaining for precarious workers.

D. Support App-Based Gig Workers

39. Ensure app-based gig workers have full employment rights with no carve-outs from minimum wage, sick leave, vacation and public holiday pay, rest periods, pregnancy and parental leave, and the other basic workplace protections available to employees under the *ESA*.

40. Reject any calls for carve-outs or exemptions from the *ESA* for app-based gig workers.

41. Proactively enforce the law to ensure gig workers are properly classified as employees and receive basic employment protections, including payment for *all* of their hours of work, rather than just engaged time, and payment of reimbursements for their work-related expenses so that *their* real earnings comply with *ESA* minimum standards.

42. Ensure app-based gig workers have just cause protection against deactivation.

43. Ensure that app-based gig workers have the right to join a union and have a collective voice at work, the same as any other employee.

44. Establish a system of real, worker-led sectoral bargaining modelled after New Zealand's "Fair Pay Agreement" regime that would give app-based gig workers and other workers in traditionally low-wage industries with low union density the opportunity to uplift their wages and working conditions.

45. Urge the federal government to ensure app-based gig workers are guaranteed equal access to Employment Insurance and the Canada Pension Plan.

Appendix B: Ontario Federation of Labour's Submissions to the Changing Workplaces Review

Below are links to the Ontario Federation of Labour's submissions to the Changing Workplaces Review, and subsequent Bill 148.

1. Preliminary Submission: The Changing Workplaces Review (June 2015)
2. OFL Submission to Ontario's Changing Workplaces Review (September 15)
3. Personal Emergency Leave Submission for the Changing Workplace Review (August 2016)
4. Submission In response to the 2016 Changing Workplaces Review: Special Advisors' Interim Report (October 2016)
5. MAKE IT FAIR: Amendments to Bill 148, Fair Workplaces, Better Jobs Act Submission (July 2017)

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[1] Roxana Ng, "Homeworking: dream realized or freedom constrained? The globalized reality of immigrant garment workers" (1999) 19:3 *Canadian Woman Studies* 110.
[2] *J.W. Ferguson Services Ltd. v. Kolyn*, 2005 CanLII 3612 (ON LRB), upheld on a request for reconsideration in *J.W. Ferguson Services Ltd. v. Kolyn*, 2005 CanLII 16125 (ON LRB), and again in *Kolyn v. J.W. Ferguson Services Limited (Bracebridge Taxi)*, 2008 CanLII 12291 (ON LRB).
[3] *Employment Standards Act*, RSBC 1996, c 113, s 21(2).
[4] Miriam A. Cherry, "Employment Status for 'Essential Workers': The Case for Gig Worker Parity" *Loyola of Los Angeles Law Review,* v. 55, no. 2, Forthcoming 2022 at 1.
[5] Veena B. Dubal, "The New Racial Wage Code" (2021). *Harvard Law and Policy Review*, Forthcoming. Preprint available at SSRN: https://ssrn.com/abstract=3855094
[6] Many of these facially neutral sectoral carve-outs, such as those for agricultural and domestic workers, exist in Canada to this day.
[7] *Dubal*, *supra* note 5 at 24.
[8] *J.W. Ferguson Services Ltd. v. Kolyn*, 2005 CanLII 3612 (ON LRB), upheld on a request for reconsideration in *J.W. Ferguson Services Ltd. v. Kolyn*, 2005 CanLII 16125 (ON LRB), and again in *Kolyn v. J.W. Ferguson Services Limited (Bracebridge Taxi)*, 2008 CanLII 12291 (ON LRB).
[9] Matthew Fritz-Mauer, "The Ragged Edge of Rugged Individualism: Wage Theft and the Personalization of Social Harm" (January 1, 2020). *University of Michigan Journal of Law Reform*, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3722155.