Workers' Health & Safety Legal Clinic

SUBMISSION TO THE STANDING COMMITTEE ON FINANCE AND ECONOMIC AFFAIRS

The Fair Workplaces, Better Jobs Act, 2017 (Bill 148)

July 21, 2017

WORKERS' HEALTH AND SAFETY LEGAL CLINIC
2000 - 180 Dundas Street West, Box 4
Toronto, Ontario
M5G1Z8

Table of Contents

Who We Are **4**

Introduction **5**

History of Employment Standards **6**

Issues **8**

Definition of an Employee 8

Recommendation: Amend Bill 148 in a manner that adds a definition of a dependant contractor and amend the definition of an employee to include a person who is a "dependant contractor". 8

Recommendation: Accept this amendment 8

Personal Emergency Leave 8

Recommendation: We support and recommend the proposed amendments related to PEL, however, we respectfully suggest that paid PEL days be increased from 2 to at least 5. 10

Temporary Help Agencies 10

Recommendation: Accept this amendment 10

Filing an *ESA* Claim 10

Recommendation: Accept this amendment 10

Employee Misclassification and the Employer's Onus of disproving employment 12

Recommendation: Accept this amendment 12

Exemptions and Special Rules 11

Recommendation: Bill 148 should be amended in a manner that defines the specific circumstances in which an exception or special rule is permitted. Furthermore, the exemptions and special rules should be clear and drafted in a way that leaves little to no room for interpretation by employees or employers. The exemptions and special rules should cease in 5 years to force a review by the government. 11

Scheduling Provisions 12

Recommendation: Accept this amendment, with the following changes: 12

21.2(2)(b) - notify the employee in writing of the employer's decision within 14 days after receiving it. 12

Right to 3 hours of pay 13

Recommendation: Accept this amendment 13

Right to on-call pay 13

Recommendation: Accept this amendment 13

Right to Refuse requests or demands to work 13

Recommendation: Accept this amendment and write in a requirement for

requests/demands/responses to be in writing 13
Shift Cancellation Pay.... 14
Recommendation: Accept this amendment 14
Vacation Pay 14
Recommendation: Accept the changes to vacation pay, but amend s. 33(1) as found in Bill 148 to state that an employer shall give an employee a vacation of at least three weeks after each vacation entitlement year that the employee completes. 14
Protection from Unjust Dismissal 15
Recommendation: Bill 148 should rectify this immediately by creating new provisions that provides protection from dismissal without cause. The new provision should replicate the unjust dismissal provisions found in the Canada Labour Code. 15
Publication of Employers who receive Notice of Contravention.... 14
Recommendation: Accept this amendment 14
Improving Collection of ESA orders 15
Recommendation: Accept this amendment 15
Settlement.... 15
Recommendation: We suggest creating policy directives to prevent Employment Standards Officers and Labour Relations Officers from pressuring/convincing workers to accept settlements. 16
Minimum Wage.... 16
Recommendation: To protect injured workers, we suggest that the Workplace Safety and Insurance Act be amended to exempt prohibit the WSIB from deeming workers at the new minimum wage in situations where the worker was injured before the minimum wage increase comes in to force. 16
Conclusion: 17

Who We Are

The Workers' Health and Safety Legal Clinic (referred to herein as the "WHSLC" and "the Clinic") is a community legal clinic funded by Legal Aid Ontario. There are nearly eighty clinics throughout Ontario, however, unlike the neighbourhood clinics that are geared towards a specific local community, we are a "Specialty Clinic". Our mandate is province-wide and we have a very specific purpose - to provide legal advice and representation to non-unionized low wage workers who face health and safety problems at work. For over twenty five years, we have appeared before the Ontario Labour Relations Board on behalf of workers who were fired for raising occupational health and safety concerns. Additionally, we represent workers who are injured on the job with respect to their workers compensation claims, and workers who have claims under the *Employment Standards Act* ("the *ESA*"). We have found through our experience that often, the employers who breach Ontario's *Occupational Health and Safety Act*[1] are the same employers who breach the *ESA*.[2]

In addition to advocacy, we conduct community education and outreach programs to inform vulnerable workers of their rights and entitlements in the workplace. Where we feel the law is deficient, we engage in law reform initiatives. The Clinic also provides information about health and safety hazards that workers face in their place of employment, and advice about the rights that employees have under the law. Our activities are controlled by a Board of Directors that is composed of volunteers from the community.

The clients that we serve vary in many ways. We have served new Canadians who work in small non-unionized workplaces. We also serve employees who are assigned to larger workplaces through temporary staffing agencies. Additionally, we respond to inquiries from young employees who are not aware of their rights and entitlements. To qualify for our services, clients must meet the legal aid eligibility criteria of being non-unionized and relatively low wage earners. In other words, we represent and seek justice for people who have no resources and no recourse of their own.

---

[1] *Occupational Health and Safety Act*, RSO 1990, c O1.
[2] *Employment Standards Act*, 2000, SO 2000, c 41.

Introduction

Low wage, non-unionized employees are vulnerable workers because they do not receive adequate protection under the *ESA*.[3] They do not have a union to stand up for their rights, and they do not have the money to retain legal counsel. Bill 148 proposes many changes to the *ESA*. While we certainly believe that many of the changes are beneficial to Ontario's workers, our review of Bill 148 has also identified several areas in which the proposed changes are insufficient. Our submission herein will highlight the changes that we support and identify potential areas for improvement. Before getting in to the substance of our submissions, we wish to remind the Committee that Bill 148 emerged as a result of the Changing Workplaces Review. As the Committee knows, the Changing Workplaces Review entailed oral and written submissions from employers and employees which served to identify many different areas of the *ESA* that require change. As such, we submit that the Committee ought to use these public hearings as an opportunity to determine where and how Bill 148 can be improved to improve the lives and working conditions of Ontario's workers, taxpayers, and voters.

We wish to endorse to the submissions of Parkdale Community Legal Services, the Workers' Action Centre, and $15 and Fairness, except in regards the issues for which we have put forward a different position herein.

[3] *Employment Standards Act*, 2000, SO 2000, c 41.

History of Employment Standards

Minimum employment standards exist as a result of the underlying development of Canada's labour laws. The *ESA* was the Ontario government's response to the social view that there are groups in the labour market that need protection.[4] Minimum standards are intended to mitigate, to some degree, the inherent unequal bargaining power between employers and workers, and to promote social justice in the workplace. Ontario is an example of a jurisdiction in which the creation of minimum standards was an effort to address the vulnerability of employees in the workforce.[5]

It is useful to look at the evolution of employment standards in Ontario. The first statutes enacted established employment standards for the protection of women and children, who were considered more vulnerable against unreasonable working hours. The *Ontario Factories Act* was introduced in 1884, and set minimums and maximums for both the age of employees and the hours of work allowed for women, girls and boys.[6] The *Minimum Wage Act* was passed in Ontario in 1920 to regulate the minimum wage for women, and the *Industrial Standards Act* was passed in 1935 to establish maximum hours of work for specific industries.[7]

The changes to Ontario's employment standards that occurred from 1940 to 1968 arose as a result of "war-time social legislation."[8] Working conditions and legislation for additional benefits, such as paid vacations, were central in union demands and this was apparent in collective agreements.[9] Subsequently, there was an increase in the demands for such benefits to be secured by legislation, and Ontario was the first province to legislate these

---

[4] Paul Malles, *Canadian Labour Standards in Law, Agreement, and Practice* (Ottawa: Economic Council of Canada 1976) at 4.
[5] Mark P Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (Montreal: McGill-Queen's University Press 2009) at 6. Thomas is an Associate Professor of Sociology at York University.
[6] Ontario's Work Laws, online: WorkSmartOntario <http://www.worksmartontario.gov.on.ca/scripts/default.asp?contentID=5-1-1-1>. [also see this link for info about the age. Actually, it is this link page 13 for hours of work, and then a prior page for age of children].
[7] Archived - Setting and Administration of Sectoral Employment Standards, online: Human Resources and Skills Development Canada <http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/research/research10/page04.shtml>. { also see the http://lawofwork.ca/?p=7245}.
[8] *Supra,* note 4 at 10.
[9] *Ibid* at 11.

benefits with the creation of the *Hours of Work and Vacations with Pay Act*[10] in 1944. There were other statutes that came into force before the *ESA* was implemented, and "by 1950 the groundwork had been laid for [the establishment of] a comprehensive labour standards system"[11] to replace the existing workplace standards legislation.

Starting in the late 1960s, the global economy faced recessions, increased unemployment, and growing inflation.[12] According to the business community, these downturns were due to increased labour costs and labour market inflexibility.[13] While minimum standards served to protect the vulnerable non-unionized workforce, there was a desire from businesses to have more flexible labour standards. Organized labour responded by advocating for improvements to the minimum standards to address the increase in unemployment.[14] As a result, while there were reforms that did provide businesses with a more flexible labour market, workers gained the right to be provided with notice prior to termination in 1972.[15] In 1981, provisions were added to the *ESA* to provide an entitlement to severance pay for those who worked for an employer for at least five years.[16] Today, the *ESA* covers many of the areas of the individual contract of employment including the amount of notice required for the termination of an employee and severance pay.

---

[10] *Hours of Work and Vacations with Pay Act,* SO 1944, c 26.
[11] *Ibid*.
[12] *Supra,* note 4 at 72.
[13] *Ibid* at 73.
[14] *Ibid*.
[15] *Supra,* note 3 at 10.
[16] *Supra,* note 4 at 81.

Issues

Definition of an Employee

Bill 148 does not amend the definition of an employee. This is very problematic because of the ever evolving nature of the employer-employee relationship and of work. As the notion of work changes, so should the definition of an employee. The common law has recognized that dependent contractors are entitled to similar rights of employees. By not amending the definition of an employee to explicitly recognize dependent contractors, Bill 148 fails to protect a growing and economically dependent segment of the workforce. In light of the history of employment legislation and the remedial purpose of the *ESA,* the Government must act to protect vulnerable workers. Therefore, we submit that the *ESA*'s definition of an employee should be amended to include dependant contractors.

Recommendation: Amend Bill 148 in a manner that adds a definition of a dependant contractor and amend the definition of an employee to include a person who is a "dependant contractor".

We support the substitution of clause (c) in subsection 1(1) as this amendment amends the definition of an employee to include those who receive training from an employer if the skills covered in the training are skills that are used by the employer's workers. This amendment is important because it will prevent the misclassification of employees and protect workers from unpaid training schemes and students from predatory unpaid internships.

Recommendation: Accept this amendment

Personal Emergency Leave

Personal Emergency Leave (PEL) currently provides workers with 10 unpaid days of leave that can be used for illnesses, injuries, and medical emergencies related to the worker or the worker's family, but only if the worker is employed in a workplace with 50 or more employees. The current PEL provisions do not offer any protection to workers in workplaces with less than 50 workers, and unpaid leave often leaves low-income workers unable to afford to take a day off.

Bill 148 amends the PEL provisions in a manner that makes PEL accessible for all workers. Bill 148 extends PEL to all workers, regardless of the size of the workplace. This is important because it allows everyone to have some form of job-protected leave. The size of the employer should not be a determinative factor. It seems fair to assume that everyone will be unable to attend work at some point due to a personal illness or injury, or due to an illness or injury of a family member. Bill 148 will give Ontarians 10 days to tend to themselves or their families without fear of losing their job and income.

Bill 148 also amends the PEL provisions in a manner that provides workers with 2 paid days of PEL. While this is certainly a welcome change, it is important to note that 2 paid days is not enough. For low income workers, an unpaid day off work may prevent the worker from paying rent on time or providing a meal to his or her family.

The Workers' Health and Safety Legal Clinic supports the amendment because it gives all Ontarians the right to take 2 paid days off work due to PEL, but we must unequivocally and respectfully recommend that the entitlement to paid PEL days as found in Bill 148 be amended to provide workers more unpaid time off work for PEL. Specifically, we submit that 7 days is appropriate given that the leave is to be used for injuries or illnesses related to the worker and to his or her family. That said, we alternatively suggest Bill 148 be amended to provide 5 days of PEL. We applaud the government for deciding that everyone should get 2 paid sick days in Ontario, but we respectfully must dispel any notions that 2 paid sick days is sufficient.

Bill 148 would prevent employers from requiring an employee who uses PEL to provide a certificate from a qualified health practitioner. This amendment is appropriate because obtaining a medical certificate takes time and money and consumes health care resources.

Bill 148 also mandates that the 2 paid PEL days must be taken before any of the unpaid PEL days. We support this amendment because it will prevent employers from trying to avoid paying for PEL days. In other words, this amendment makes PEL meaningful, accessible, and truly useable.

Recommendation: We support and recommend the proposed amendments related to PEL, however, we respectfully suggest that paid PEL days be increased from 2 to at least 5.

Temporary Help Agencies

Bill 148 proposes to improve the situation for Temporary Help Agency (THA) workers by providing these workers with the right to the same pay as the direct employees of the client business who do substantially the same work as the THA worker (s. 42.2(1)). Companies use THA workers to avoid liability, pay lower wages and to shift the risks and costs associated with workplace accidents. We support this amendment because it will prevent wage discrimination and remove the incentive for companies to use THA workers. Legitimate temporary work requirements should be used as a pretext to create a second, lower class or set of workers.

We also support s. 42.2(3) as this provision will prevent employers from reducing wages in order to bring themselves into compliance with the new provisions. Furthermore, we support the requirement of a written response from employers following a rate of pay review request from a THA worker as found in s. 42.2(6). Furthermore, we support the amendments to the reprisal provisions because these amendments provide protection to THA workers who request a review of their rate of pay.

Recommendation: Accept this amendment

Filing an *ESA* Claim

With some exceptions, the *ESA* currently requires workers to contact their employers and attempt to resolve their dispute directly before filing an *ESA* claim. In our experience, this requirement is a waste of time and an unnecessary barrier for those who believe they have been wronged. We have never resolved matters in recent memory with this cumbersome step. Bill 148 would eliminate this requirement. As a result, we support the proposed elimination of s. 96.1 of the *ESA*.

Recommendation: Accept this amendment

Exemptions and Special Rules

Our office has been a long critic of the exemptions and special rules that are found in the *ESA*. These exemptions allow employers to bypass the remedial provisions found in the *ESA* that relate to minimum wage, public holiday pay, termination pay, severance pay, hours of work, and many other basic employment standards. This is problematic because many of the exemptions and special rules were created decades ago when work was far different than what it is today. While a review of the *ESA* exemptions and special rules has been announced by the government for fall 2017, we are nevertheless of the view that any special rules and exemptions to the remedial provisions of the *ESA* must be allowed to exist only if certain conditions found in the *ESA* are met. As such, Bill 148 should be amended in a manner that clearly outlines criteria for the existence of exemptions and special rules.

Further, the danger is that employers may attempt to re-characterize their businesses to fit the exemptions. The unchanged definition of an employee is an apt analogy. The failure to change the definition of an employee has left dependant contractors without protection under the *ESA*.

The safest approach for both employers and employees is to allow this section to exist for a limited time, for example, 5 years. This would force the Ministry of Labour to review and determine that the exemptions and special rules are being used in manner that is consistent with the government's legislative intent.

Recommendation: Bill 148 should be amended in a manner that defines the specific circumstances in which an exception or special rule is permitted. Furthermore, the exemptions and special rules should be clear and drafted in a way that leaves little to no room for interpretation by employees or employers. The exemptions and special rules should cease in 5 years to force a review by the government.

Employee Misclassification and the Employer's Onus of disproving employment

Bill 148 adds section 5.1 to the *ESA*. Section 5.1(1) makes it an offence to engage in the widespread practice of misclassifying employees as non-employees. We support this new provision because it would allow the Ministry of Labour (MOL) to investige allegations of misclassification and hold accountable those employers who engage in misclassification. Section 5.1(2) places the burden on employers to prove that an individual is not an employee.

Recommendation: Accept this amendment

Scheduling Provisions

Many workers in Ontario have unpredictable and varying work schedules. Workers are scheduled with little to no advanced notice and little to no input into what their schedule is. Their hours of work fluctuate from week-to-week, as do the number of hours that they actually work. The *ESA* gives employers free-rein in terms of scheduling, so much so that workers are simply at the whim of their employer's scheduling demands. Workers fear that refusing a last minute scheduling assignment or requesting a scheduling change will result in the termination of their employment.

Bill 148 will provide employees who have at least 3 months of service with the right to request a location or schedule change (s. 21.2(1)). We support this amendment because it will give employees the right to try and have some control over their hours and place of work.

Bill 148 will require that employers respond to the employee's request within a reasonable time. If the request is granted, the employer must specify when the changes will take place. If the request is denied, the employer must provide reasons. We support this amendment in principle, however, we submit that the *ESA* ought to mandate that the employer's response be in writing. Additionally, we submit that the MOL ought to specify a timeframe for the employer's response and suggest that 14 days is appropriate.

Recommendation: Accept this amendment, with the following changes:

> *21.2(2)(b) - notify the employee in writing of the employer's decision within 14 days after receiving it.*

Right to 3 hours of pay

Bill 148 will also provide employees with an entitlement to three hours of regular pay if the employee regularly works more than three hours per day, if the employee is required to present themselves for work, and if the employee works for less than three hours. We support this amendment.

Recommendation: Accept this amendment

Right to on-call pay

Bill 148 will require employees to be paid three hours of pay in situations where the worker is on call and is either not called in to work or called in to work less than three hours. We support this amendment.

Recommendation: Accept this amendment

Right to Refuse requests or demands to work

Bill 148 will create s. 21.5(1). This provision gives employees the right to refuse an employer's request or demand to work or to be on call on a day that the employee is not scheduled to work or be on call if the request or demand is made less than 96 hours before the time he or she would commence work or commence being on call. Section 21.5(2) states that an employee who refuses such a request or demand shall notify the employer as soon as possible. While we support this amendment, we suggest an amendment that requires that requests or demands from employers to be in writing, and that also requires an employee's response to be in writing. This will formalize this process and create a paper trail to support any MOL investigations and or *ESA* claims.

Recommendation: Accept this amendment and write in a requirement for requests/demands/responses to be in writing

Shift Cancellation Pay

Bill 148 adds section 21.6 to the *ESA*. Section 21.6 provides workers with an entitlement to three hours of pay if the employer cancels a shift within 48 hours of the start of the shift.

Recommendation: Accept this amendment

Vacation Pay

Bill 148 increases the current 2 week paid vacation entitlement to 3 weeks for workers who have at least 5 years of service. While we support this amendment because it improves the vacation pay entitlement for workers with at least 5 years of service, we must point out that this amendment does nothing for workers who have less than 5 years of service with their employer. Given how work and the workforce have changed, we cannot ignore the fact that workers are no longer spending their entire working years with the same employer. We also cannot ignore the growing shift to temporary work, contract work, part time jobs, and precarious work. Therefore, we submit that all workers should be entitled to 3 weeks of paid vacation in Ontario. Bill 148 must acknowledge that working for the same employer for 5 years or more is no longer the norm.

Recommendation: Accept the changes to vacation pay, but amend s. 33(1) as found in Bill 148 to state that an employer shall give an employee a vacation of at least three weeks after each vacation entitlement year that the employee completes.

Publication of Employers who receive Notice of Contravention

Bill 148 proposes to give the MOL the ability to publish the names of employers who have been issued a Notice of Contravention. We support this amendment because the possibility of being "named" will deter employers from contravening the *ESA*.

Recommendation: Accept this amendment

Improving Collection of ESA orders

Bill 148 proposes to give the MOL several new methods to collect on the orders that are issued by the *ESA*. Section 125.1 allows the Director of Employment Standards to accept security for payment of monies owed. Section 125.2 enables the MOL to issue warrants. This would allow the MOL to seek enforcement through the court system. Section 125.3 enables the MOL to issue liens on the employer's property. We submit that these changes improve the MOL's ability to collect on the orders that it issues.

Recommendation: Accept this amendment

Protection from Unjust Dismissal

In Ontario, employers of provincially regulated workplaces are able to terminate workers without cause at any time. This ultimately leads to an insecure workforce, a decline in long term employment, and overall, precarious employment. The *ESA* should be amended by creating a provision to prevent employers from dismissing workers in situations where just cause is not present. The Supreme Court of Canada has ruled that non-unionized workers in federally regulated workplaces with 1 year of service are protected from unjust dismissal by federal employment laws. We respectfully submit that workers in Ontario deserve and need similar protection from unjust dismissal.

The government would be able to carve out specific exemptions for the protection from unjust dismissal. While we understand that limiting the protection from dismissal without cause may be necessary, we submit that generally, Ontario should protect as many workers as possible from being dismissed without cause. The MOL would have to determine how long a worker would have to work for an employer before the protection from unjust dismissal becomes applicable. We submit that Ontario's workers do not have protection from dismissal without cause because the MOL and the Ontario government have willingly chosen not to provide such protection.

Recommendation: Bill 148 should rectify this immediately by creating new provisions that provides protection from dismissal without cause. The new provision should replicate the unjust dismissal provisions found in the Canada Labour Code.

Settlement

We are of the view that it would be inappropriate for legislation to limit the right of the worker to make his or her own decisions regarding settlement. We understand that settlements may have the effect of allowing employers to pay their way out of accountability, but we nevertheless assert that creating conditions for permitting settlements is not appropriate. There are many reasons behind why and how settlements are reached.

Recommendation: We suggest creating policy directives to prevent Employment Standards Officers and Labour Relations Officers from pressuring/convincing workers to accept settlements.

Minimum Wage

While we support the proposed increases to Ontario's minimum wage, we must point out that increasing the minimum wage will have a negative effect on injured workers who are "deemed" to be able to earn a certain wage. For example, an injured worker with pre-injury earnings of $20/hour may be deemed by WSIB to be able to earn a minimum wage of $11.40/hour. This worker will have a wage loss of $8.60/hour and this loss will be compensated by WSIB. When the minimum wage goes up to $14/hour, this same worker will have a wage loss of only $6/hour because they will be deemed to earn $14/hour. We submit that this is problematic because the injured worker will receive less compensation from WSIB as a direct result of the minimum wage.

If WSIB came up with a pretext, no matter how fictitious, to review every injured worker's file, the WSIB would see a financial gain to the detriment of injured workers. Protection must be put into place to secure Loss of Earnings benefits based on the legislated minimum wage at the time they were locked in.

Recommendation: To protect injured workers, we suggest that the Workplace Safety and Insurance Act be amended to exempt prohibit the WSIB from deeming workers at the new minimum wage in situations where the worker was injured before the minimum wage increase comes in to force.

Conclusion:

Bill 148 certainly contains some positive improvements to the *ESA*. The changes proposed will improve working conditions and compensation for workers, and will give workers new rights to inquire about scheduling. The changes will give workers the right refuse to work in certain circumstances, and will give workers an entitlement to 3 hours of pay when then are required to be on call even if they do not end up working. Workers with over 5 years of service will be entitled to 3 weeks of paid vacations. That said, Bill 148 does not do enough for Ontario's workers and voters.

Bill 148 does not provide protection from unjust dismissal. Bill 148 does not enhance the right to paid vacation for workers with less than 5 years of service. Bill 148 only provides 2 paid sick days to workers, and fails to repeal the problematic exemptions and special rules found in the ESA. Bill 148 does not protect injured workers receiving Loss of Earnings Benefits from WSIB. We urge this Committee to consider these submissions carefully and recommend that Bill 148 be amended in accordance with our recommendations herein.