



# *Fair Workplaces, Better Jobs Act, 2017*

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*Submission to the Standing Committee on  
Finance and Economic Affairs, October 30,  
2017*

**Workers' Action Centre  
Parkdale Community Legal Services  
Fight for \$15 and Fairness**

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# Introduction

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Workers across Ontario have made it crystal clear that too many of us are working for low wages in part-time, temporary or contract jobs without employment benefits, workplace protection or the right to form, and keep, a union. For too many Ontario workers, full-time work does not bring us above the poverty line. Income and job insecurity make it hard to make ends meet. The *Fair Workplaces, Better Jobs Act, 2017* (Bill 148) proposes many important changes to address Ontario's outdated labour laws.

The proposed changes in Bill 148 to the *Employment Standards Act (ESA)* and the *Labour Relations Act (LRA)* provide a good start to addressing precarious work and updating labour laws to reflect changing workplace practices.

## *Fairer Wages*

Bill 148 rightly recognizes that workers need to earn above the poverty line. In 2016, nearly 30 percent of Ontario workers earned less than \$15 an hour. Bringing the minimum wage to \$15 an hour by January 1, 2019 with annual adjustments by the rate of inflation on October 1<sup>st</sup> of each year is the right thing to do. The next step must be to remove sub-minimum wage rates for students, liquor servers and other workers exempted from the minimum wage.

## *Paid Leave*

Bill 148 begins to address the inadequacy of illness and emergency leaves and protections in Ontario. Bill 148 rightly extends Personal Emergency Leave (PEL) to all workers in Ontario by removing the exemption for employers with less than 50 employees. This will extend job protected emergency leave to 1.7 million workers who had previously been excluded.

Not only do workers need the right to take time off when sick, but workers need to have paid leave to make time off a viable option. We are not immune from illness and emergencies and two paid leave days are not enough. Workers still need seven (7) paid PEL days.

## *Enforcement*

The government has committed to hiring up to 175 employment standards officers to expand enforcement by 2020-21. It also commits to inspecting one in ten Ontario workplaces. We must ensure that these promises are kept so that the improved protections in Bill 148 become a reality for workers. More steps are still needed to ensure employers in violation of the ESA are detected, that unpaid wages are recovered, and that workers are protected from unjust dismissal. For the ESA to be a meaningful deterrent, there must be a real cost for employers who violate minimum employment standards.

## *Rules that Protect Everyone*

The ESA is supposed to provide a floor of minimum standards that are universally available to all

Ontario workers and maintain a fair and level playing field for employers. The old definitions of employer and employee are no longer suited to the modern workplace in which employers misclassify workers as independent contractors and shift employer liability for employment through subcontracting, temporary agencies and onto workers themselves. Bill 148 takes some steps to address this by making employee misclassification a violation under the ESA and improving related employer rules. The next step must be to expand the scope of the definition of employer and employee to cover new forms of contracting, contract flipping, and work.

Exemptions to the ESA currently leave 76 percent of the labour force without full protection under the ESA. Part-time, temporary, low wage, women and young workers are much less likely to be fully covered by the ESA. The cumulative cost of ESA exemptions and special rules to Ontario workers is approximately \$2 billion per year.<sup>1</sup>

The government started a review of exemptions this fall. Unfortunately, the process of review is not accessible to the workers affected by the exemptions. Nor will the criteria used by the Ministry of Labour to review exemptions protect workers who are disadvantaged or precariously situated in the labour market. The process for review and criteria to maintain, amend or remove exemptions and special rules must be improved before the exemption review proceeds.

### *Make it easier to join a union*

One of the best ways to help workers made vulnerable in precarious jobs is to expand collective organizing, representation, and bargaining. But there are many barriers to unionization in workplaces and sectors where precarious work dominates.

Bill 148 would amend the Labour Relations Act to take some steps to make it easier to unionize. The package of amendments will place some limits on employers' ability to undermine workers constitutional right to freedom of association. However amendments are needed to ensure all workers can exercise their right to collective representation.

More steps are needed to address the changing labour market with its growth in small workplaces and non-standard work. We must expand the LRA to include joint employers such as franchisors, lead employers in contracting relationships and emerging on-demand work arrangements. More changes are necessary for broader-based collective bargaining to address changing workplaces.

### *Fix Equal Pay Now*

Bill 148 recognizes and reinforces the fundamental principle that workers who are doing similar work should be paid the same. In the absence of such regulation, employer practices have developed whereby part-time, contract, seasonal and temporary agency workers doing similar jobs to full-time workers get paid less thereby creating more precarious work.

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<sup>1</sup> Vosko, Leah F., Andrea M. Noack and Mark P. Thomas (2016) "How Far Does the Employment Standards Act 2000 Extend, and What are the Gaps in Coverage? An Empirical Analysis of Archival and Statistical Data." Online: <https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Vosko%20Noack%20Thomas-5-%20ESA%20Exemptions.pdf>

Bill 148 relies on the ESA's outdated language for equal pay on the basis of gender. This long-standing section of the Act has proved largely ineffective in addressing gender discrimination in pay due to limitations in the language of the section.

A number of changes are necessary to ensure this new protection will succeed in meeting its purpose. First, the scope of what is considered comparable jobs must be expanded to ensure that employers cannot evade compliance.

Second, the exceptions to equal pay are so broad and ambiguous that they provide huge loopholes that employers can use to avoid compliance with the equal pay provision; these loopholes must be closed.

Third, employers must be required to provide employees with pay structures and pay scales proactively so that employees and temporary help agency workers can have the information necessary to enforce their rights.

Fourth, a new seniority exclusion based on hours of work accumulated was adopted after the first reading of Bill 148. Protecting pay differentiation based on hours accumulated – rather than date of hire – encourages and drives the creation of more precarious work. It directly undermines the intent of the equal pay provisions. It preserves systemic inequalities between those in standard employment and those in precarious employment. The seniority on the basis of accumulated hours of work must be revoked.

The Ontario Equal Pay Coalition has recommended changes to remedy the problems in the proposed equal pay provisions which we have included in this brief and endorse. Amendments must be made to equal pay prior passage of Bill 148.

### *Fix Protections for Temp Agency Workers*

As the Special Advisors conclude in the Changing Workplaces Review Final Report, the triangular relationship between the employee, agency and client, and the temporary nature of employment results in agency employees being among the most vulnerable and precariously employed of all workers.<sup>2</sup>

Bill 148 should work to limit the use of temporary agencies to exceptional circumstances rather than support the growth of this business practice that creates precarious work and insecurity for workers.

We need to expand regulation by:

- Requiring assignment workers be converted to employees of the client company after three months;
- Capping the proportion of assignment workers at 20 percent; and

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<sup>2</sup> Mitchell and Murray (2017) The Changing Workplaces Review: An Agenda for Workplaces Rights. Final Report to the Ministry of Labour. p 198

- Making client companies liable for accidents and illness of temp agency workers (among other measures).

Bill 148 takes two steps to better protect temporary agency workers from inequality of wages and insecurity of work. But amendments are needed.

The equal pay for temporary agency workers provision in Bill 148 must be amended to ensure that temp agency workers can access equal pay protections. The termination of assignment provision in Bill 148 must be amended to close the gap and prevent unintended consequences. We have provided proposed amendments on both of these provisions.

### *Fix Scheduling Now*

Bill 148 is addressing a long standing gap in the ESA on scheduling. For too long, many low wage workers have faced unpredictable and unstable schedules. The uncertainty in scheduling practices contributes to making work and incomes unstable.

Bill 148 takes some steps to address the gap. New scheduling provisions include a minimum of three hours' pay for shifts that are under three hours; minimum pay for being on call; a right to refuse requests or demands to work on an unscheduled day with insufficient notice; and, pay for three hours of work in the event of cancellation with insufficient notice.

Unfortunately, the right to refuse and pay for shift cancellation have been effectively rendered unenforceable by employer exceptions. Workers would lose their right to refuse an unscheduled shift if their employer says it is an "emergency". This undefined exception leaves it wide open for employers to force employees to work unscheduled shifts. Workers would also lose their right to pay for cancellation of shifts with insufficient notice if their employer says that weather is the cause of shift cancellation.

Such employer exemptions contravene the purposes of the ESA which is to redress the power imbalances between employers and employees. It is totally unacceptable for the ESA to require that the business costs of an "emergency" or unfavourable "weather" be born entirely by employees through their loss of earnings; the weather and emergency exceptions should be revoked.

In addition to these exemptions that benefit employers at the cost of employees, another loophole allows the government to provide additional exemptions for employers through regulation. Any further exceptions would only allow more employers to avoid scheduling rules and must be prevented. This clause for further exceptions must be revoked.

# Proposed Amendments

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## 1) Labour Relations Act

One of the best ways to help workers made vulnerable in precarious jobs is to expand collective organizing, representation, and bargaining. Bill 148 would amend the *Labour Relations Act* to take some steps to make it easier to unionize. The package of amendments will place some limits on employers' ability to undermine workers constitutional right to freedom of association. However amendments are needed to ensure all workers can exercise their right to collective representation.

### *Proposed Amendments*

We support and endorse the Ontario Federation of Labour's recommendations to amend the *Labour Relations Act*.

## 2) New Scheduling Rules

Many workers receive their schedules at the last minute, just days or hours before they are to work. Such workers have little input into their schedules and the timing of their shifts fluctuates from week to week. Consequently, the number of hours – and amount of income – they receive rise and fall precariously. Workers face last minute call-ins to work or cancellation of shifts. Some employers expect that workers will remain available for work as required by the employer. But there is no reciprocal requirement on employers to provide workers with a guarantee of hours of work.

Bill 148 takes some important steps to address the gap in the ESA on scheduling. These new rules include a minimum of three hours' pay for shifts that are under three hours; minimum pay for being on call; a right to refuse requests or demands to work on a day that an employee is not scheduled to work with insufficient notice; and, entitlement to pay for three hours of work in the event of cancellation with insufficient notice. These provisions provide the initial steps to building a sound framework for fairer scheduling.

Unfortunately, Bill 148 was amended after first reading to give employers exemptions in certain situations from some scheduling rules. A worker would lose their right to refuse a shift with insufficient notice if the employer says the person has to work because of an emergency; public safety threat or other reasons that may be put into regulation. Similarly, a worker would lose their right to on-call pay or shift cancellation pay with insufficient notice due to emergency; weather conditions; or other reasons that may be put into regulation.

These new exemptions create huge loopholes for employers to avoid fair scheduling rules.

## Remove Employer Exceptions for s. 21.5 Right to Refuse and s. 21.6 Cancellation

### **21.5 Right to refuse**

Bill 148 provides workers with the right to refuse an employer's request to work or be on-call if the employer makes the demand less than 96 hours (4 days) prior to the time the employee would work or be on-call. When introduced, Bill 148 did not allow employers to be exempted from this requirement. Disappointingly, employer exceptions were subsequently adopted after first reading.

#### *Existing provision:*

##### **Exception**

(1.1) Subsection (1) does not apply if the employer's request or demand to work or be on call is,

- (a) to deal with an emergency;
- (b) to remedy or reduce a threat to public safety; or
- (c) made for such other reasons as may be prescribed.

#### *Proposed amendment:*

Revoke any exceptions from the right to refuse unscheduled shifts. In the alternative, amend s. 21.5 **Exception** to define emergency and remove (c) as follows.

##### **Exception**

(1.1) Subsection (1) does not apply if the employer's request or demand to work or be on call is,

- (a) to deal with an emergency that is fire, lightening, power failure, storms or similar causes beyond the employer's control; or,
- (b) to remedy or reduce a threat to public safety.

#### *Rationale*

The term "emergency" is not clear in s. 21.5 **Exception**. What might be considered to be an emergency is wide open. An employer may believe that a new product order is an emergency requiring everyone to work without advance notice. That would not be consistent with the purposes of the right to refuse work being introduced through Bill 148. But on the shop or retail floor, the employer has the power to define what an emergency is if it is not clearly defined in the ESA.

As practices of broad and varied interpretations of what an "emergency" is under this exception become common among workplaces across the province, it is hard to stop this erosion of the purposes of the scheduling rules. In effect, the practice becomes normalized and employers and

workers will not even know that the employer is in violation of the Act. Very few employees whose rights under the ESA are compromised actually come forward to enforce their rights through employment standards claims. That is why it is essential we get it right in the first place by clearly defining any exceptions that may be given to employers.

We also recommend removing 21.5 (1.1)(c) that allows for other reasons to exempt employers that may be prescribed. We are concerned that the government is signalling at the outset that it intends to provide employers with even more exemptions from complying with the scheduling rule. The best way to prevent further erosions from scheduling protections is to remove this clause for further regulatory employer exceptions.

## **21.6 (1) Cancellation**

Bill 148 adds a new requirement that an employer pay an employee for at least three hours of work if the employer cancels a shift or on-call period with less than 48 hours' notice. Pay for shift cancellation is a small step in shifting the damages from lost wages faced by workers when employers cancel shifts with insufficient notice to employers who financially benefit from the cancelled shift.

Bill 148 had originally ensured that employers did not have to comply in the case of fire, lightening, power failure, storms or similar causes beyond the employer's control. These conditions for exemptions were expanded to include weather conditions and other reasons that may be prescribed.

### *Existing Provision*

#### **Exception**

(1.1) Subsection (1) does not apply if,

- (a) the employer is unable to provide work for the employee because of fire, lightening, power failure, storms or similar causes beyond the employer's control that result in the stopping of work;
- b) the nature of the employee's work is weather-dependent and the employer is unable to provide work for the employee for weather-related reasons; or
- c) the employer is unable to provide work for the employee for such other reasons as may be prescribed.

### *Proposed Amendment*

The proposed exceptions should be revoked. In the alternative, amend s. 21.6 **Exception** to define remove (b) and (c) as follows.

#### **Exception**

(1.1) Subsection (1) does not apply if the employer's request or demand to work or be on call is,

- (a) to deal with an emergency that is fire, lightening, power failure, storms or similar causes beyond the employer's control.

## *Rationale*

Fundamentally, the ESA should not be enshrining in statute that the employer cost of staffing in the case an emergency or bad weather should be born entirely by workers through loss of earnings from scheduled work.

The term “weather-dependent” is not clear. What might be considered “weather –dependent” is wide open. With such an expansive exception, a large retailer may use this exception to cancel shifts if a rainy weekend is in the forecast that may affect customer numbers.

Employers and employees have to effectively enforce the ESA in the workplace. That is why the ESA language needs to be as clear as possible to ensure that the purposes of protections such as scheduling will be met in all workplaces. When exceptions to complying with scheduling rules are considered, we must ensure that who or what the exemption applies to is clear.

Enshrining in statute that employers shall entirely shift the financial burden of lower customers due to weather or rain affecting outdoor work on to workers contravenes the purposes of the Act which is to redress the power imbalance in the employer-employee relationship. Given that those sectors that may be affected by weather (agriculture, restaurants, recreation facilities etc.,) are also consistent with low wages and precarious work, this weather-based exception would impact migrant workers, women, young workers and low wage workers the most. Cancellation pay is an extremely modest step reducing the financial burden that workers bare when employers shift the business costs of bad weather or emergencies on to workers. There should be no exceptions.

We also recommend removing 21.6 (1.1)(c) that allows for other reasons to be prescribed to exempt employers from cancellation pay. Employer exemptions to complying with minimum employment standards create a patchwork rather than a floor of minimum standards. Research shows that part time, temporary, low wage, women and young workers are much less likely to be fully covered by the ESA. The cumulative cost of ESA exemptions and special rules to Ontario workers is approximately \$2 billion per year.<sup>3</sup>

## **Record Keeping – schedules and hours worked**

The Bill was amended to add a new employer record-keeping requirement for new scheduling provisions (s. 15(1)3). Employers will be required to keep records of employee’s scheduled hours of work, changes to schedule, dates and time an employee worked, and date and time of cancellation of a scheduled day of work or on-call period. The amendment failed to require employers to provide employees with this information.

The purpose of this provision is to give the Ministry of Labour the information it requires to conduct a proactive inspection or investigation of an individual claim. However, enforcement of

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<sup>3</sup> Vosko, Leah F., Andrea M. Noack and Mark P. Thomas (2016) “How Far Does the Employment Standards Act 2000 Extend, and What are the Gaps in Coverage? An Empirical Analysis of Archival and Statistical Data.” Online: <https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Vosko%20Noack%20Thomas-5-%20ESA%20Exemptions.pdf>

ESA provisions does not just happen by individual claims to the Ministry or proactive inspections. In fact the majority of ESA compliance takes place by workers and employers in the workplace talking about ESA entitlements and obligations. If workers do not have records of schedules of work, changes in schedules, date of schedule changes, then the worker cannot seek employer compliance nor have the records necessary to file an ESA claim.

### *Proposed Amendment:*

Require employers to provide those records outlined in s 15(1) 3.1 to 3.4 to employees in advance or, in the alternative, on their wage statement.

Section 12 (1), **statement re wages**, is amended by adding the following:

- h) The dates and times that the employee was scheduled to work or to be on call for work, and any changes made to the on call schedule.
- i) The dates and times that the employee worked.
- j) If the employee has two or more regular rates of pay for work performed for the employer and, in a work week, the employee performed work for the employer in excess of the overtime threshold, the dates and times that the employee worked in excess of the overtime threshold at each rate of pay.
- k) Any cancellations of a scheduled day of work or scheduled on call period of the employee, as described in subsection 21.6 (2), and the date and time of the cancellation.

As Bill 148 already requires record keeping under the scheduling provision, simply requiring that that required information be provided to workers on wage statements is reasonable. In fact, such requirements would improve efficiency and effectiveness in enforcement should any violations take place.

## **3) Difference in Employment Status – equal pay for equal work**

The principle that workers who do the same or similar work should be paid the same is grounded in equality of treatment. Ending differential treatment in pay will assist women, youth, racialized workers, migrant workers and recent immigrants who are more likely to be in low-waged and in part-time, temporary, seasonal, casual and contract work.

Bill 148 introduces important steps to better ensure equal pay for equal work performed by casual, part-time, temporary, contract, seasonal workers and full-time employees [s. 1(1), ss. 42.1, 42.2]. It also extends equal pay for temporary agency workers.

The two new sections that guarantee equal pay for equal work without distinction based on “**difference in employment status**” (s. 42.1) or “**temporary help agency status**” (s. 42.2) are based on the ESA’s equal pay for equal work based on “**sex**” (s. 42). Unfortunately, this long-standing equal pay provision has provided very little protection for women.

### *Existing provision*

As the Ontario Equal Pay Coalition argues in their Bill 148 submission, simply replicating the

language of s. 42, as Bill 148 does, undermines current Ministry of Labour policy and current jurisprudence which is much larger in scope. Under the existing language, in workplaces throughout Ontario, employers manipulate job duties to tell workers that they are not “substantially the same” to evade the equal pay for equal work obligations. The effect of the language is that employers interpret it to mean that the jobs have to be the “same.” This allows employers to create minor differences between women’s and men’s jobs in order to evade the requirement for equal pay and maintain pay differences.

Unless the statutory language is updated, the promise of equal pay for equal work, particularly for non-union workers, will be hard to attain.

Moreover, s. 42 has a broad range of exceptions that allows employers to avoid compliance with the section. Under the equal pay provisions in Bill 148, exceptions to the requirement for equal pay include seniority and merit systems, a system that measures earnings by quantity or quality, or any other factor other than sex or employment status. The Bill was amended to clarify the meaning of seniority to include a system that provides for different pay based on accumulated number of hours worked. The amendment that was adopted August 21, 2017 to purposively define seniority as “including on the basis of hours worked” will further weaken the ability of those people in part-time and casual work to access equal pay protections and must be revoked.

### *Proposed amendments<sup>4</sup>*

#### **Equal pay for equal work: Employment status**

42.1 (1) No employer shall pay an employee at a rate of pay less than the rate paid to another employee of the employer because of a difference in employment status when they perform similar or substantially similar work in the same establishment.

(1.1) “Similar” or “substantially similar” in subsection (1) does not mean “identical”.

(1.2) For the purpose of subsection (1), work will be considered similar or substantially similar if:

- (a) the core functions of the work are similar or substantially similar; or
- (b) the performance of the work requires similar but not identical skill, effort and responsibility and is performed under similar working conditions.

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of

- (a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or

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<sup>4</sup> The proposed amendments to equal pay were developed by the Equal Pay Coalition, October 24, 2017. <http://equalpaycoalition.org/>

- (b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*.

(3) No employer shall reduce the rate of pay of an employee in order to comply with subsection (1).

(4) No trade union or other organization shall cause or attempt to cause an employer to contravene subsection (1).

(5) If an employment standards officer finds that an employer has contravened subsection (1), the officer may determine the amount owing to an employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that employee.

(6) An employee who believes that their rate of pay does not comply with subsection (1) may request a review of their rate of pay from the employee's employer, and the employer shall,

- (a) adjust the employee's pay accordingly; or
- (b) if the employer disagrees with the employee's belief, provide a written response to the employee setting out the reasons for the disagreement.

**Equal pay for equal work: Difference in assignment employee status**

42.2 (1) No temporary help agency shall pay an assignment employee who is assigned to perform work for a client at a rate of pay less than the rate paid to an employee of the client when they perform similar or substantially similar work in the same establishment.

(1.1) "Similar" or "substantially similar" in subsection (1) does not mean "identical".

(1.2) For the purpose of subsection (1), work will be considered similar or substantially similar if:

- (a) the core functions of the work are similar or substantially similar; or
- (b) the performance of the work requires similar but not identical skill, effort and responsibility and is performed under similar working conditions.

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of

- (a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or
- (b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*.

(3) No client of a temporary help agency shall reduce the rate of pay of an employee in order to assist a temporary help agency in complying with subsection (1).

(4) No trade union or other organization shall cause or attempt to cause a temporary help agency to contravene subsection (1).

(5) If an employment standards officer finds that a temporary help agency has contravened subsection (1), the officer may determine the amount owing to an assignment employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that assignment employee.

(6) An assignment employee who believes that their rate of pay does not comply with subsection (1) may request a review of their rate of pay from the temporary help agency, and the temporary help agency shall,

- (a) adjust the assignment employee's pay accordingly; or
- (b) if the temporary help agency disagrees with the assignment employee's belief, provide a written response to the assignment employee setting out the reasons for the disagreement.

#### **Equal pay for equal work: Pay transparency**

42.3 (1) Every employee has the right to pay transparency about their employer's compensation structure by sex, employment status and assignment employee status.

(2) Each employer shall post an annual Pay Transparency Report in the workplace including such information as may be directed by regulation.

(3) The employer shall post the Pay Transparency Report in prominent places in each workplace for the establishment to which the document relates in such a manner that it may be read by all of the employees in the workplace.

(4) No employer or temporary help agency may do any of the following:

- (a) require, as a condition of employment, that an employee refrain from disclosing the amount of their wages; or

- (b) require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of their wages.

The Ontario Equal Pay Coalition recommends that section 42(1), equal pay for equal work on the basis of sex, also be amended to reflect the above language. We support this recommendation.

### *Rationale*

In general, our proposed amendments for equal pay will better secure the government's objective of requiring equal pay for equal work regardless of employment status or temporary agency status. Our proposed amendments will proactively address employer practices that have been used to avoid equal pay requirements.

#### ***Why do we need to change the language from substantially the "same" to substantially "similar"?***

The problem with the existing ESA language of "substantially the same" is that, in practice, employers rely on the word "same" and require that jobs be "identical" before complying with equal pay requirements.

The old ESA language for equal pay on the basis of sex, which relies on work that is substantially the "same", is out of date. The jurisprudence, which is cases of equal pay that have had decisions made, has evolved to clearly apply a legal standard that is, in fact, based on work being substantially "similar" and "not identical". This is also the case for the policy that the Ministry of Labour currently uses to investigate claims for equal pay.

Updating the ESA equal pay language to "substantially similar" work brings the Act in line with jurisprudence and Ministry of Labour policy. It does not create a new legal standard. Rather it explicitly defines in statute what is applied in decision making bodies.

However well equal pay may be addressed in the Ministry of Labour policy manual really does not matter as most employers and employees do not read the policy manual. What they will look at is the Act. Having clear language in the ESA is important to ensure that employers and employees will consider equal pay when the work is "substantially similar" and that does not mean the jobs are "identical". Clear language in the Act will tell employers and employees that equal pay applies when jobs have similar core functions or require similar skill, effort responsibility and working conditions.

Clear language in the ESA is particularly important for non-unionized workers who rarely have the capacity or security to enforce their rights through employment standards claims or other adjudication while they are still on the job.

#### ***Why do we need to limit and clearly define exemptions from the equal pay requirement?***

Bill 148 currently sets out four exceptions to the requirement for equal pay (ss. 42.1(2) and 42.2(2)). These broad exceptions allow employers to pay differential rates on the basis of a

seniority or merit system, a system that measures earnings by quantity or quality of production, or any other factor other than sex, employment status or assignment employee status.

These wide exemptions have, in the case of equal pay on the basis of sex, been proven fatal over the years to women workers that have challenged that they were paid less than men doing similar work in the same workplace. The “any other factor” exception has allowed for differential wages to exist. Further, this exception creates an incentive to develop other, more precarious forms of work to evade compliance with equal pay (for example, how part-time and temporary agency work has been used historically to evade equal pay on the basis of sex).

We propose that exclusions to equal pay must be restricted to seniority and merit pay systems that are compliant with the Human Rights Code. The Changing Workplace Review explicitly concluded that any exceptions or exemptions from equal pay must be based on objective criteria, such as a seniority or merit system. No further exemptions should be allowed.

***Why the exclusion clause for seniority systems that allow for differential pay “based on the accumulated number of hours worked” must be repealed (ss. 42(2.1), 42.1(2.1) and 42.2(2.1)).***

First, employee entitlements and employer obligations under the ESA are, where appropriate, based on days worked from date of hire. Introducing seniority based on accumulated hours worked in the ESA is a dangerous precedent. Seniority on the basis of hours worked is a key driver of precarious work, structuring in inequality between full-time and part-time workers. An exclusion based on accumulated hours of work totally contravenes the purposes of equal pay and must be revoked.

Second, this exclusion would incentivize practices that keep part-time workers at lower wages than similar full-time workers. It would preserve existing wage grids under which part-time workers would not achieve equal pay with full-time workers. This provision enables and protects employers who already cap part-time workers’ hours when they are close to accumulating hours that would move them into a pay level that approaches full-timers.

Third, this exclusion clause would encourage and protect employers to hire more part-time workers but distribute the existing hours over an ever greater number of workers so that none of them are able to reach an hours accumulation that would enable them to move up in pay. This also leaves workers with too few hours to secure sustainable hours of work and income.

Under the ESA in which workers have no guarantee of hours, protecting pay differentiation based on hours accumulated – rather than date of hire – encourages and drives the creation of more precarious work. It directly undermines the intent of the equal pay provisions. It preserves systemic inequalities between those in standard employment and those in precarious employment.

The seniority on the basis of accumulated hours of work must be revoked.

#### 4) Termination Pay or Notice for early termination of assignment

The Bill 148 amendment (s. 74.10.1) is intended to add protection for assignment workers whose assignment is terminated early without notice. Unfortunately, there are two unintentional consequences that not only undermine the government's intent with the proposed change, but may reduce current termination protections under the ESA for temporary assignment employees. We recommend amendments to s. 74.10.1 as outlined below to avoid such unintentional consequences.

##### *Existing provision*

Under Bill 148, if a temporary help agency worker is put on an assignment estimated to last for three months or more, but is terminated early, the agency would be required to provide one week's notice or pay in lieu of notice [s. 74.10.1]. Where an agency provides an assignment within the notice period that is reasonable and has an estimated term of at least one week, then this provision does not apply.

##### *Proposed amendment*

- 1) Bring notice or pay in lieu of notice into compliance with provisions of section 54 of the ESA; and,
- 2) Delete the requirement for an assignment to have an estimated term of three months or more at the time it was offered to the employee.

**74.10.1** (1) A temporary help agency shall provide an assignment employee with ~~one week's~~ written notice or pay in lieu of notice according to section 54 if,  
(a) the assignment employee is assigned to perform work for a client;  
~~(b) the assignment had an estimated term of three months or more at the time it was offered to the employee; and~~  
(c) the assignment is terminated before the end of its estimated term.

##### **Amount of pay in lieu**

(2) For the purposes of subsection (1), the amount of the pay in lieu of notice shall be equal to the wages the assignment employee would have been entitled to receive had ~~one week's~~ notice been given in accordance with that subsection.

##### **Exception**

(3) Subsection (1) does not apply if the temporary help agency offers the assignment employee a work assignment with a client during the notice period that is reasonable in the circumstances. ~~and that has an estimated term of one week or more.~~

##### *Rationale*

To be eligible for termination notice or pay in lieu of notice for termination of an assignment, the assignment must have "an estimated term of three months or more at the time it was

offered to the employee”.

The consequence of this language is that Temporary Help Agencies will adopt employment practices that ensure that assignments are for less than 3 months or open-ended assignments without fixed end date to avoid liability under s. 74.10.1. Either workers will face a new assignment with their client employer every three months or they will lose their assignment prior to reaching 3 months of work with the client company. The unintentional consequence is that there will be more precarious employment and income insecurity for temporary agency workers, not less.

The new termination of assignment provision limits temporary agency workers to only one week of notice or pay in lieu of notice regardless of how long the worker was employed on assignment (after the 3 month requirement).

The consequence of this language is that any assignment employee working longer than one year on the assignment would not be eligible for the stepped increase provided by s. 54, notice or pay in lieu of notice (Part XV, Termination and Severance of Employment of the Act). Given the purposes of Bill 148 is to better protect those made vulnerable, such as temporary agency workers, new provisions should provide equal, not lesser rights.

## 5) Commencement

### *Existing Provision*

All the ESA amendments would come into force on January 1, 2018 with the following exceptions:

- Provisions respecting misclassification of employees would come into effect upon Royal Assent;
- Equal pay for equal work rules would come into effect April 1, 2018;
- Expanded definition of employee to cover those receiving job training – January 1, 2019; and,
- Scheduling protections would come into effect January 1, 2019.

### *Proposed Amendment*

**Recommendation: Amend s. 60, Commencement, of the *Fair Workplaces, Better Jobs Act* so that the expanded definition of employee [1(3)], all equal pay and scheduling provisions [ss. 11, 12 and subsection 58(3)] come into effect April 1, 2018.**

### *Rationale*

Bill 148 rightly addresses the need to revoke exclusions for some trainees from protection under the ESA. This is a simple and straightforward amendment and should not be delayed. Similarly, the new scheduling provisions are clear and limited. To delay implementation of scheduling

protections implies that it is a far more substantive provision than it is and may lead to employer non-compliance.