Submission to the Ontario Workforce Recovery Advisory Committee

By the Workers' Action Centre and Parkdale Community Legal Services

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The Workers' Action Centre is a worker-based organization committed to improving the lives and working conditions of people in low-wage and unstable employment. We work with thousands of workers, predominantly recent immigrants, racialized workers, women, and workers in precarious jobs that face problems at work.

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Parkdale Community Legal Service is a poverty law clinic providing assistance and legal representation concerning employment standards, employment insurance, human rights and occupational health and safety cases. In addition, we work with communities in low wage and precarious work to improve labour standards.

Introduction

The Ontario government has struck the Ontario Workforce Recovery Advisory Committee (OWRAC) on the future of work to propose labour and employment law reforms and advance employment and training programs. The previous government undertook a substantial review of Ontario's changing workplaces and, after significant public consultation, the Special Advisors of the Changing Workplaces Review (CWR) tabled a final report with over 170 recommendations. The proposed Advisory Committee on the future of work and consultation process fails in comparison to the CWR. There is a complete lack of employee voices and representation on the OWRAC. The absence of any kind of balance in employer-employee perspectives will not produce credible recommendations. The short timelines and lack of meaningful public consultation further undermines any outcomes of this process. As such, we recommend that the committee membership be revised to have an equal number of workers and their organizational representatives, and the timelines of the process be extended to enable full and transparent public consultation.

We will focus our comments on Pillar 3, app-based workers, and Pillar 2, economic recovery.

1. Support Technology Platform[1] Workers

We have all come to rely more on app-based workers during the Covid-19 pandemic - to deliver our meals, provide safe transportation, even to provide desperately needed labour in our overburdened healthcare system. These workers are disproportionately racialized and migrant workers. A recent study of ride hailing and delivery workers in San Francisco found that at least 78% of the workforce are people of color, and 56% are immigrants, coming from dozens of different countries. App-based workers in Ontario report that the same trends occur here.

[1] We use the term app-based workers to denote those employers who use a technology application in their work process to assign work.

Yet while providing essential services, app workers receive none of the legal rights or protections owed to standard employees. While workers may be "free" to work as much or as little as they want, app-based work is low paying, precarious, and often dangerous. Because they are misclassified as independent contractors, app-based employees are excluded from minimum wage guarantees, overtime payments, paid sick leave, unemployment insurance in case of layoff or termination, compensation for occupational illness or injuries and the right to form a union and collectively bargain.[2]

On demand app workers earn very low wages. The San Francisco study of ride hailing and delivery workers found that when "expenses and both unpaid and paid work time are fully accounted for, a substantial portion of this workforce are estimated to make less than the equivalent of San Francisco's minimum wage". Income derived from app-based employment can vary wildly depending on customer demand and on the worker's operating costs. For example, delivery drivers are paid only for the time they are engaged in executing a delivery, even though they sign up to work block shifts. Because they are misclassified as independent contractors, app based workers are also saddled with all the costs of doing business, even though they have very little control over their working conditions or their rate of earnings. This means that on a slow day, delivery workers may actually lose money when earnings are set off against work costs, such as gas, mileage, and other tools of the trade.

When a gig worker's car or bike breaks down or they get a ticket, it could spell the end of profitability for that shift. More severe work interruptions, such as an occupational injury or illness, can be economically ruinous. Without access to worker's compensation, paid sick days, or employer-funded benefit plans, app-based workers have little to no financial security to help weather unanticipated setbacks.

App workers also have no job security. The companies control access to work; they set the terms of use, which often include maintaining certain customer rating scores, and volume of use. Health and safety gets compromised when workers must maintain good rating scores to keep their job. A few weeks off work due to a bike accident, or a few negative customer reviews could spell the end of employment with little to no recourse. Racialized workers and women are more likely to receive poor ratings, fewer

[2] Gig Workers United, Submission to the Federal Consultation on Gig Work.

tips, and more cancellations when working in the technology-based gig economy, which ultimately leads to lower overall earnings.

Businesses argue that workers' support for flexibility means that they do not want protection of their employment law rights. This is not supported in Ontario where app-based workers have been organizing to access their employment rights. Foodora workers voted almost 90 percent in favour of unionizing in 2019 only to have it challenged at the labour board by Foodora. The Ontario Labour Relations Board ruled in 2020 that Foodora workers were not independent contractors and were able to unionize.[3] A class action is currently before the courts in Ontario to challenge Uber's misclassification of employees as independent contractors.

There have been similar efforts by app-based workers to assert their employment rights against business misclassification models in other jurisdictions as well. App-based workers successfully unionized in Norway in 2019. In other jurisdictions, employees successfully sought their employment rights through the courts -- California in 2018, France in 2020 and Netherlands, U.K. and Spain in 2021. These cases tackle the main problem of the business model -- that is, misclassification of employees as independent contractors. In each case, workers were found by the courts to not be independent contractors and thereby were entitled to associated employment standards and labour laws. Indeed, companies, including Uber and Deliveroo, have faced at least 40 major legal challenges around the world as delivery workers try to enforce their rights. An analysis of 39 employment cases covering legal action in 20 countries, including Canada, highlights a string of court rulings in favour of app-based workers.

Companies using the misclassification business model seek to avoid the overwhelming evidence of misclassification cases in multiple jurisdictions by lobbying for legislative changes to exempt app-based workers. Indeed, following the $200 million dollar campaign in California by Uber, Lyft and Instacart, Proposition 22 carved out app-based delivery workers from protection under State labour laws. Already, Uber and Lyft have said they believe this approach—treating their workers as a new, third category of worker, carved out of century-old protections—can be "replicated" and

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[3] Foodora subsequently declared bankruptcy in Ontario and withdrew from the Canadian market altogether.

"scaled up." The chief executive of Uber has said the company would "more loudly advocate for laws like Prop 22."

A "third way" classification for app-based workers cannot offer a solution because it gets the problem wrong. App-based companies are denying their workers the legal rights to which they already are entitled as employees.

Principles for regulating app-based work

The Ontario Government should enforce the laws already on the books to protect gig workers, and should follow the lead of courts and governments around the world and confirm that app-based workers are employees and entitled to basic employment protections. Regulating app-based work should enshrine the following principles.

- No app-based worker should be misclassified as an independent contractor.
- There must be no separate category of employee or worker with lesser rights. To do so would be to legislatively incentivize substandard wages and working conditions.
- Universal access to employment rights! Full access to all employment standards and health and safety. App-based workers should have the same rights to minimum wage, hours of work and overtime, and termination as other workers do.
- Universal access to EI, CPP and health benefits where the company provides them.
- Equal right to unionize and collectively bargain that other workers have. Make that right meaningful by addressing barriers to unionization. Companies try to avoid unionization by misclassifying workers as independent contractors.
- Eliminate discrimination in app-based work.
- Seamless access to pay records and transparency of pay systems.

- Employer responsibility for all work-related expenses, even if incurring these expenses does not cause the employee's wages to fall below ESA minimums.

- Workers must be paid for all time worked.

Presumption of Employee status and the ABC test

Currently the classification of employee status rests on a multi-factoral test which places the burden on workers to challenge and prove their status. Individual workers must make employment standards claims, making complex legal arguments, to access their ESA rights when they have been misclassified. The test for determining employer-employee relationships must be clarified and purposive in protecting the remedial purposes of the ESA. Secondly, the onus must be on the employer or hiring entity to prove that a worker is not an employee.

The presumption of employee status and the ABC test have long been used in over 25 American States to determine who is an employee to access employment rights such as workers' compensation, unemployment insurance and labour standards protections. This robust test provides clear, equally weighted, cumulative factors that must be met for a person to be deemed an independent contractor and not an employee.

The " ABC test" provides that a worker is presumed to be an employee unless the hiring entity can establish each of the following three factors:

a) The worker is free from control and direction of the hiring entity in connection , both under the contract and in fact, for the performance of the work;
b) The worker performs work that is outside the usual course of the hiring entity's business; and,
c) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

By enacting a presumption of employee status and the ABC test, the government will be able to address the huge costs of misclassification. Employees are denied minimum wage, pay for time worked and other ESA minimum standards. The public faces billions of dollars of loss of taxes and revenues to Employment Insurance, Canada Pension Plans and workers compensation. Employers face unfair competition when up

against companies that flagrantly flout the law. This drives down wages and working conditions more generally which has a negative impact on the economy.

The Ontario government must also committee to proactively enforce the law, including through proactive inspections and expanded investigations where misclassification prevails.

2. Economic Recovery and Strengthening Ontario's Competitive Position

The pandemic has exposed the essential work that is provided by workers in low-waged precarious work. The disproportionately racialized and gendered essential workforce were unable to work from home and faced risks to their and their family's health and safety. For others, working from home has meant long hours, in some cases without overtime pay. The inequalities revealed and aggravated by the pandemic underscore the need to improve the regulation of wages and working conditions as outlined below.

RACISM, DISCRIMINATION AND WORKPLACE BULLYING

- Eliminate all forms of racism and discrimination
- Legislate effective and enforceable protection from workplace harassment and bullying
- Fund and support more effective and accessible human rights complaints processes

PAID SICK DAYS

- at least 10 employer-paid emergency leave days per year
- plus an 14 additional paid days during public health outbreaks
- Prevent employers from asking for doctors' notes to access paid sick days

DECENT WAGES

- Legislate a $20 minimum wage for all
- Protect and extend legislated annual wage adjustments so wages keep up with rising prices
- End sub-minimum wage rates and remove all exemptions to the general minimum wage for students, liquor servers, farmworkers and others

DECENT HOURS

- Employers must be required to provide a guaranteed minimum number of hours of work each week
- Employers should be required to offer additional hours to existing workers before hiring new employees
- Provide work schedules two weeks in advance

EQUAL PAY FOR EQUAL WORK

- Legislate equal pay and benefits for equal work regardless of employment status as part-time, contract or temporary workers
- Ensure equal pay and benefits for equal work regardless of gender, racialization and immigration status
- Require employers to provide pay transparency in workplaces in order to enforce equal pay

LAWS THAT PROTECT ALL WORKERS

- Protection from unjust dismissal
- Ensure migrant and undocumented workers can assert labour rights
- Expand the *Employment Standards Act* to include all workers, close loopholes and end exemptions to the law
- Enact a presumption of employee status and the ABC test to stop misclassification of employees as independent contractors
- Make companies fully responsible for wages, working conditions and collective bargaining, when they use temp agencies, franchises and/or subcontractors
- Protection of wages, benefits and union coverage when a business is sold or when a new service provider gets the contract (stop contract flipping)

REAL PROTECTIONS FOR TEMP AGENCY WORKERS

- Make companies financially responsible under WSIB for the death and injuries of temporary agency workers
- Ensure all temporary agency workers earn the same wages as directly-hired workers when they do the same work
- Ensure all temporary agency workers are hired directly by the client company after three months on assignment. To protect temp agency workers from being fired before the deadline to be hired directly, the law must require employers to provide just cause for terminating the assignment if they bring in another temp agency worker to do the job.

MAKE IT EASIER TO JOIN A UNION

- A right to join unions by signing cards

- Enable workers to form unions across franchises and subcontractors
- Enable unions to bargain across regions or sectors of work (broader-based bargaining)

MAKE EMPLOYERS FOLLOW THE LAW

Government must implement:

- more surprise inspections of workplaces
- bigger fines when employers break the law
- meaningful compensation for workers when employers violate employment standards
- job protection for collective activity to enforce their rights at work