



**CCPA**  
CANADIAN CENTRE  
for POLICY ALTERNATIVES  
BC Office

# CCPA–BC response to the BC Ministry of Labour consultation paper on modernizing the Employment Standards Act

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## Introduction

Thank you for this opportunity to share our recommendations for modernizing the Employment Standards Act (ESA) in response to the BC Ministry of Labour Consultation Paper on this topic. This brief specifically addresses the six themes presented in the Consultation Paper and highlights several other key areas for reform to strengthen workplace rights based on findings from our research.

Established over 20 years ago, the BC Office of the Canadian Centre for Policy Alternatives (CCPA–BC) investigates key challenges facing our province—the high rate of poverty, economic insecurity, extreme concentration of wealth and threats to our environment and climate—providing independent research, analysis and expertise. We work with a team of over 50 staff and volunteer research associates to develop workable solutions and share our findings as widely as possible to advance social, economic and environmental justice in BC.

We have a long track record of producing research and policy recommendations on the importance of strong workplace rights, in particular for vulnerable workers. Our research shows that the status quo is failing many vulnerable workers and that stronger workplace rights and protections—both under Employment Standards and the Labour Relations Code—can be a key policy lever to reduce income inequality, improve quality of life for working families and reduce

poverty among workers, in particular among low-wage immigrant and migrant workers, and women.<sup>1</sup>

We are encouraged to see that the Ministry of Labour is moving forward with plans to modernize workers' rights and protections, as well as the Employment Standards Branch, the body tasked with enforcing them.

As outlined in our August 2018 submission to the Ministry in response to the BC Law Institute Consultation Paper, we believe that major reforms to BC's employment standards and their enforcement are needed to establish a strong foundation of basic workplace rights and protections that meaningfully apply to everyone, and address the particular needs of vulnerable workers.

This submission begins with a brief discussion of the context for the current round of reforms to workplace rights, including an overview of labour market changes since the last major round of reforms to the ESA in the early 2000s. Before addressing the six themes of the Consultation Paper in detail, the brief presents the case for eliminating exclusions from the Act unless there is a clear public policy rationale for them, so that more workers can benefit from modernizing the ESA. The brief then provides specific recommendations on each of the six themes of the Consultation Paper, followed by an overview of six other key areas of the ESA that are urgently in need of reform. Finally, the brief concludes with a summary of the case for acting quickly to modernize and strengthen workplace rights in BC.

## **Context: modernizing employment standards is long overdue**

The last independent review of BC's employment standards legislation—the laws that set out basic workplace rights and protections for workers in the province—was the Thompson Commission in 1993/94. Since then, a number of significant changes have been made to employment standards, including sweeping reductions in protections for workers and changes to enforcement mechanisms between 2001 and 2004. However, there has been no subsequent effort by successive BC governments to systematically review workplace rights.

In 2014, the BC Law Institute, a not-for-profit law reform agency, embarked on a project to review the current employment standard legislation. The project received some government funding (among other sources) but was not initiated by government, unlike the Thompson Commission or the recent Ontario Changing Workplaces Review.

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<sup>1</sup> For a more detailed discussion of CCPA research on the topic, see Ivanova, Iglia. 2018. *Building a Stronger Foundation of Basic Workplace Rights for BC Workers: CCPA-BC Response to the BC Law Institute Consultation Paper on the Employment Standards Act*. Vancouver: CCPA-BC. <https://www.policyalternatives.ca/publications/reports/building-stronger-foundation-basic-workplace-rights-bc-workers>

BC's current ESA was written at a time when it was the norm for workers to spend their entire careers in a permanent full-time job with one or two employers. However, today younger workers increasingly face project-based or term-limited employment options and the very structure of what a job looks like is changing. Technology is redefining work by unbundling traditional jobs into smaller tasks, many of which can be performed by workers located anywhere in the world. As a result, we've seen a rise of project-based contract work and the so-called "gig economy"—a business model that uses online platforms to match buyers of on-demand services with individuals who are seeking to sell their labour.

Advances in digital technology have enabled new structures of organizing work that the existing employment standards framework in BC (and globally) was not designed to deal with. What is worse, it appears that the owners of online platforms derive much of their profit, and gain a competitive advantage over traditional service providers, by exploiting gaps in the existing employment standards regulation and enforcement, specifically by classifying their workers as independent contractors and avoiding the responsibilities (and costs) that come with more traditional employment relationships.<sup>2</sup>

This has created a growing group of workers who lack basic workplace rights and protections that the ESA is designed to provide, and goes against the principle of "decent work" put forward in the Arthurs Report, which states that our legislation "should ensure that, no matter how limited his or her bargaining power, no worker...is offered, accepts or works under conditions that Canadians would not regard as 'decent'."<sup>3</sup>

The size of the on-demand service economy and the number of workers involved in BC is not known at this time but it is likely significant judging by the results of a recent CCPA-Ontario study of gig-economy workers and consumers in the Greater Toronto Area.<sup>4</sup> The study found that this new way of doing business exacerbates existing inequalities as lower-income earners are more likely to provide services through online platforms, while higher-income earners are more likely to be consumers of services. Similarly, the majority of on-demand service providers are racialized workers, while the majority of consumers are non-racialized.

Aside from the gig economy, there are signs of eroding employment security and "a slow but steady deterioration" in job quality across the broader labour market as measured by the CIBC

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<sup>2</sup> See Clark, Liat, 2017, "The gig economy threatens to take us back to pre-Industrial Revolution times," *Wired Magazine*, June 23, 2017. <https://www.wired.co.uk/article/gig-economy-bank-of-england-worker-rights> and Temperton, James, "The gig economy is being fuelled by exploitation, not innovation," *Wired Magazine*, February 8, 2018. <https://www.wired.co.uk/article/gig-economy-dpd-courier-taylor-review>

<sup>3</sup> Arthurs, Harry W., 2006, *Fairness At Work: Federal Labour Standards for the 21<sup>st</sup> Century*, Government of Canada. <http://publications.gc.ca/site/eng/324676/publication.html>

<sup>4</sup> Block, Sheila and Trish Hennesy, 2017, "Sharing economy" or on-demand service economy? A survey of workers and consumers in the Greater Toronto Area, CCPA-ON. <https://www.policyalternatives.ca/sharingeconomy>

index of job quality.<sup>5</sup> Anecdotal evidence suggests that millennials are facing increasingly insecure work arrangements with few, if any, benefits, unpredictable hours of work and highly variable earnings.<sup>6</sup>

Since most working-age British Columbians rely on employment earnings as their main source of income, changes in the labour market have significant implications for family incomes and well-being. The anecdotal evidence of workers finding it harder to make ends meet despite working harder is corroborated by a 2015 study documenting increasing rates of working poverty in Canada's big cities.<sup>7</sup> Moreover, a lack of access to work-related benefits like pensions and extended health benefits, or even the most basic benefits like paid sick time, can compound the challenges created by low pay and insecure work.

In a recent original data collection project, the SSHRC-funded Poverty and Employment Precarity in Southern Ontario (PEPSO) research team found that 40% of workers in the Greater Toronto and Hamilton areas are now working in jobs with some degree of precarity. The study documented in detail the harmful impacts of precarious employment on the health and well-being of the affected workers and their families, and the costs that precarious work imposes on society more broadly.<sup>8</sup> The researchers found that workers from racialized communities and, in particular racialized women, were disproportionately affected by precarious work.

Further, increased reliance on temporary foreign workers through migrant worker programs in a number of sectors has created unique challenges and jurisdictional grey zones. Migrant worker programs are federal initiatives; however, enforcement of workplace rights and health and safety regulations are left to each province.

The current BC government has made welcome commitments to increase the general minimum wage, if a little slower than what the CCPA recommended. However, to successfully tackle the thorny issues of employment insecurity and eroding job quality, and the accompanying large personal and social costs, we need to do more. The next step to building a fairer and more inclusive economy for all workers in BC is to strengthen the workplace rights and protections offered by the ESA, and to ensure they are proactively enforced.

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<sup>5</sup> Tal, Benjamin, 2016, "On the quality of Employment in Canada." *In Focus*, Nov. 28, 2016. [https://economics.cibccm.com/economicsweb/cds?ID=1974&TYPE=EC\\_PDF](https://economics.cibccm.com/economicsweb/cds?ID=1974&TYPE=EC_PDF)

<sup>6</sup> See, for example, a recent article by Geoff Johnson in the *Times Colonist*, "'Precarious work' is reality for the young." Jan 16, 2018. <http://www.timescolonist.com/opinion/columnists/geoff-johnson-precarious-work-is-reality-for-the-young-1.23145197>

<sup>7</sup> Stapleton, John and Jasmine Kay, 2015, *The Working Poor in the Toronto Region: Mapping working poverty in Canada's richest city*. Metcalf Foundation. <https://metcalfoundation.com/stories/publications/the-working-poor-in-the-toronto-region-mapping-working-poverty-in-canadas-richest-city/>

<sup>8</sup> PEPSO, 2015, *The Precarity Penalty: The Impact of Precarious Employment on Individuals, Households and Communities—And What to Do About It*. PEPSO, McMaster University and United Way Toronto. <https://pepso.ca/documents/precarity-penalty.pdf>

## The need to eliminate exclusions for which no objective justification exists

Before addressing the six themes of the Consultation Paper in detail, it is important to acknowledge that no matter how strong the package of reforms to the ESA and its enforcement ends up being, the Ministry risks leaving a large segment of the BC workforce behind by virtue of excluding them from the protections of parts or all of the Act.

Exclusions from the ESA run counter to the basic principle of equality before the law (or universality). As the BC Law Institute Report notes, the current exclusions are “bewildering in their number and complexity” and “no readily discernible principle explains why some occupations and job situations are excluded from the Act entirely (e.g., some professions, sitters, students employed by their schools, registered investment dealers), others from specific parts of the Act (e.g., managers, resident caretakers), others from parts of the Act except certain provisions (e.g., fishers, farm workers, election workers), others from specific sections (e.g., taxi drivers, livestock brand inspectors, loggers)”.<sup>9</sup> The Ontario Changing Workplaces Review came to a similar conclusion, highlighting the lack of transparency and questioning whether the existing exclusions are objectively justifiable.

It seems that over the past two decades, business lobby groups in BC (and across Canada) have won a wide range of exemptions without presenting much evidence for the need for them to exist. In virtually all cases, the exemptions have been granted without any consultation with workers or their representatives. These exemptions must be curtailed and the minimum basic standards must apply to everyone unless there is a transparent, evidence-based policy rationale for excluding a particular group from particular provisions of the ESA. Where feasible, when exemptions from certain provisions are granted, the workers affected should receive compensatory benefits.

We were pleased to see the BC government has already taken steps in this direction by announcing the phasing out the lower minimum wage for liquor servers (although we maintain that the timeline for this should have been faster) and adopting the recommendations of the Fair Wages Commission with respect to minimum wages for resident caretakers, live-in camp leaders and live-in home support workers. However, the BC government failed to adopt the Commission’s recommendation with respect to farmworkers paid piece rates and continues to permit some farmworkers to be paid less than the general minimum wage.

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<sup>9</sup> BCLI. 2018. *Report of the Employment Standards Act: A Report Prepared for the British Columbia Law Institute by the Members of the Employment Standards Act Reform Project Committee*. Vancouver: BCLI. pp. xviii and pp. 43. <https://www.bcli.org/wordpress/wp-content/uploads/2018/12/Employment-Standards-Act.pdf>

We recommend:

1. All workers, without exception, should earn at least the general minimum wage. This would require replacing piece rates for hand-harvesting crops with an hourly wage system (as is already the case under the Seasonal Agricultural Workers' Program) or at a minimum, setting piece rates at a level that allows all farmworkers to earn, with reasonable effort, at least the general minimum wage for the hours they work.<sup>10</sup>
2. A systematically review of all other existing exclusions from the ESA and eliminate the ones for which a clear, evidence-based policy rationale does not exist. Do not grant any further exclusions without compelling, evidence-based justification (in line with the BC Law Institute's recommendations 5 and 6).

We already know that certain exclusions lack objective justification from research done in BC and in other jurisdictions. Those exclusions should be immediately discontinued. Specifically, we recommend:

3. Extend the fundamental protections of the ESA to unionized workers by ensuring that collective agreements supersede the ESA only if they set out equal or better employment conditions than those in the ESA (i.e., return to the "meet or exceed" provisions contained in the 1994–2001 ESA).<sup>11</sup>
4. Reintroduce the entitlements to statutory holidays, annual vacation, hours of work and overtime pay for farmworkers.
5. Reintroduce the entitlements to hours of work and overtime pay for high technology professionals.

Differential treatment should also be prohibited for casual, term, temporary and part-time workers. Specifically:

6. Mandate equal rates of pay and benefits for part-time, casual, temporary and seasonal employees, as well as for temporary agency employees, relative to full-time, permanent employees performing the same work for the same employer.
7. Extend eligibility for statutory holiday pay to every employee, regardless of their length of employment or hours of work. The current requirement to have been employed for at least 30 days and earned wages for 15 out of the last 30 days in order to qualify leaves many part-time, temporary or casual workers ineligible for statutory holiday pay.

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<sup>10</sup> See Klein, Seth and Iglia Ivanova, 2017, *Charting a Path to \$15/Hour for all Workers—and the Road Beyond: CCPA–BC Submission to the BC Fair Wages Commission*, CCPA–BC. <https://www.policyalternatives.ca/publications/reports/charting-path-15hour-all-workers%E2%80%94and-road-beyond>

<sup>11</sup> For a history of employment standards exclusion for unionized workers and more details on why reform in this area is important, see Fairey, David with Simore McCallum, 2007, *Negotiating Without a Floor: Unionized Worker Exclusion From BC Employment Standards*, CCPA–BC. <https://www.policyalternatives.ca/publications/reports/negotiating-without-floor>

Notably, the BC Law Institute recommendation on statutory holiday eligibility (recommendation 28) is in some ways more restrictive than the current provisions, which is puzzling and must be rejected. Given the large increase in temporary, casual and part-time work arrangements in BC's labour market, the ESA needs to ensure these workers are also able to access the same basic workplace rights and protections as workers in more stable, permanent, full-time jobs enjoy.

## Theme 1: Increasing protection of child workers

It is our assessment that BC must immediately increase protections for children who are employed. Presently, BC provides significantly less protection to child workers than other Canadian jurisdictions, a fact recognized by the BC Law Institute Report (p. 213). In particular, allowing children as young as 12 to work with the permission of only one parent and without direct government oversight is unusual.

Since BC's workplace protections for children were weakened in 2003, there has been a documented increase in workplace injuries among children under 15 reported to WorkSafeBC.<sup>12</sup> We know that many injuries go unreported.

To adequately protect all BC children and ensure that their employment does not compromise their health, education or psycho-social development, we support the submission and policy recommendations of First Call: BC Child and Youth Advocacy Coalition. In addition to a call for adequately resourced, proactive enforcement (more on this later), these recommendations include:

8. Raise the minimum age at which children can start working without special government oversight to 16—the age of completing compulsory schooling—with exceptions for appropriate light work, to be specified in regulations. This will bring BC in line with Canada's commitments under the International Labour Organization's Convention 138 on the minimum age of employment.
9. Reinstigate direct government oversight over the employment of children under 16 through a permit system.
10. Strengthen workplace protections for children under 16, including developing age-appropriate criteria for acceptable work, placing age-appropriate restrictions on the length of time and time of day children can work (e.g., prohibit night work) and restricting potentially hazardous activities and industries.

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<sup>12</sup> Luke, Helesia. 2009. *What's Happening to Our Children? A Look at Child Work-Related Injury Claims in BC Over the Past 10 Years*. Vancouver: First Call: BC Child and Youth Advocacy Coalition. <https://firstcallbc.org/wordpress/wp-content/uploads/2015/06/Whats-Happening-to-our-Children-FirstCall-2009-10.pdf>

11. Categorize some work as hazardous/unsuitable for children and prohibit potentially hazardous tasks and worksites for 16- and 17-year-old workers.
12. Introduce additional record-keeping and reporting requirements for workplaces employing children under 18, as recommended by First Call.
13. Create an Advisory Committee including the voices of young workers to assist the Ministry of Labour in developing the regulations needed to implement these changes, such as deciding on the types of hazards that make a workplace unsafe for young people.

## Theme 2: Transforming the Employment Standards Branch

There is an inherent power imbalance in employer-employee relationships. To level the playing field, societies have established minimum workplace rights to which workers are entitled. Employment standards exist to protect individual employees from exploitation but also aim to ensure reasonable conditions of work and a decent standard of living for all workers. Employment standards also protect employers by eliminating unfair competition from unscrupulous businesses.

The basic workplace rights enshrined under the ESA are particularly important for vulnerable workers such as new immigrants, young workers, low-wage workers, women, racialized workers and those employed in more precarious sectors—all of whom are less likely to be represented by a union and less able to secure workplace conditions better than the minimum requirements laid out in the ESA.

Unfortunately, for too many vulnerable workers in our province today, workplace rights exist only on paper. The key enforcement bodies for provincial workplace rights, the Employment Standards Branch of the Ministry of Labour and the Labour Relations Board have been underfunded to a point where they cannot adequately administer and enforce the law.<sup>13</sup> This has tilted the playing field too far in favour of the employer and severely undermined access to justice for vulnerable workers.

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<sup>13</sup> See Fairey, David. 2005. *Eroding Worker Protections: British Columbia's New 'Flexible' Employment Standards*. Vancouver: CCPA-BC. <https://www.policyalternatives.ca/publications/reports/eroding-worker-protections>. Research commissioned by the Ontario Changing Workplaces Review similarly finds that fear of employer reprisal deters workers from using self-help kits to seek redress when their rights are violated (Vosko, Leah, Andrea Noack, and Eric Tucker. 2016. *Employment Standards Enforcement: A Scan of Employment Standards Complaints and Workplace Inspections and Their Resolution under the Employment Standards Act, 2000*. Toronto: Ontario Ministry of Labour. Report prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review).



We are encouraged to see that the Ministry of Labour is contemplating a transformation of the Employment Standards Branch because a significant overhaul of the current enforcement is needed to meaningfully protect the workplace rights of British Columbians.

The reality is that, even if fully funded, the current enforcement model based on individual workers' complaints is simply not effective in ensuring broad-based compliance with employment standards. Our review of the research suggests that the only way for BC to ensure that workplace rights and protections are meaningful for all workers is to proactively enforce the law, using as a model the Ontario Changing Workplaces Review's recommendations for a strategic enforcement regime. As explained in their Final Report, "strategic enforcement involves a set of policies and practices that have the goal of changing employer conduct so that breaches of the Act do not occur. It is designed to address non-compliance at a systemic level and not only on the basis of complaints."<sup>14</sup>

Adopting a proactive strategic enforcement model will require considerable additional resources to be dedicated to enforcement, including increased staffing in the Employment Standards Branch of the Ministry of Labour, hiring more enforcement officers, and a return to regular, random and unannounced visits of workplaces (particularly in sectors that employ large numbers of vulnerable workers or sectors where widespread non-compliance with the ESA has been documented).

While there is little hard data available on compliance with employment standards laws in Canada, a 2016 Ontario Ministry of Labour inspection blitz focusing on precarious employment found that 78 per cent of workplaces were in violation of the Employment Standards Act.<sup>15</sup> There is no reason to believe BC employers are better informed about their responsibilities or more compliant with the law than their Ontario counterparts. However, BC no longer proactively inspects workplaces despite successfully utilizing this enforcement technique prior to 2001. The Ontario evidence suggests that sectors that are more likely to employ vulnerable and precarious workers, such as security services, recreation facilities, personal services, retail and food service establishments and temporary employment agencies, require targeted enforcement mechanisms.

Enforcement efforts must be supported by improved education and outreach so that both workers and employers are aware of basic workplace rights. This is particularly important for new immigrants, especially those who come from countries where employment standards are

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<sup>14</sup>Special Advisors C. Michael Murray and John C. Murray. 2017. *The Changing Workplaces Review: An Agenda for Workplace Rights*, Final Report. pp. 59. [https://files.ontario.ca/books/mol\\_changing\\_workplace\\_report\\_eng\\_2\\_0.pdf](https://files.ontario.ca/books/mol_changing_workplace_report_eng_2_0.pdf)

<sup>15</sup>Mojtehdzadeh, Sara. 2016. "Inspection blitz finds three-quarters of bosses breaking law" *The Toronto Star*. Jan 20. <https://www.thestar.com/news/gta/2016/01/20/inspection-blitz-finds-three-quarters-of-bosses-breaking-law.html>

significantly weaker and/or not enforced, which leaves them susceptible to exploitation in Canada.

We offer the following recommendations for transforming the Branch:

14. Eliminate the policy requirement for workers to use the Self-Help Kit before being allowed to make a formal complaint about violations of their workplace rights (as per BC Law Institute recommendation 54). The Self-Help Kit poses a significant barrier for vulnerable workers to demand that their rights be respected, and fails to recognize the current reality that most complaints are filed by former employees.
15. Proper investigation of individual complaints should replace the current model of handling complaints through mediation designed to get to a settlement, often under terms that are less favourable for the employees than would they would be entitled to under the law. The goal of enforcement should be that employees receive the full remedy and/or compensation to which the law entitles them, not a lesser amount acceptable to an offending employer.
16. Improve procedural fairness of the Employment Standards Branch's handling of complaints, as per BC Law Institute recommendations 56 through 58, and minority recommendation 59a.
17. Increase the penalties for contraventions, and introduce escalating penalties for repeat offenders.
18. Adopt a proactive enforcement model and address non-compliance at a systematic level across the province, with a particular focus on specific industries and types of workplaces that are known for their non-compliance. In addition, the Ministry of Labour should reconstitute the Agricultural Compliance Team, a highly successful program that proactively enforced workplace rights for farmworkers that was eliminated in 2001.<sup>16</sup>
19. Mandate that the workplace rights and protections provided by the ESA be posted in all workplaces, ideally in multiple languages.
20. Create a hotline for the Employment Standards Branch to provide information to workers and employers, and to accept anonymous third-party complaints.

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<sup>16</sup> As the authors of the 2008 CCPA-BC report *Cultivating Farmworkers Rights* wrote, "Although agricultural employment constitutes about 1 per cent of total provincial employment, 15 to 20 per cent of ESB staff resources had been focused on enforcement activity in the agricultural sector in the years prior to 2002. This concentration reflected the high level of employer non-compliance with the Act identified in the 1993-1994 review of the ESA, especially in the seasonal hand-harvesting sector." See Fairey, David et al. 2008. *Cultivating Farmworker Rights: Ending the Exploitation of Immigrant and Migrant Farmworkers in BC*. Vancouver: CCPA-BC. <https://www.policyalternatives.ca/publications/reports/cultivating-farmworker-rights>

21. Translate all public information about workplace rights and complaints filing instructions on the Ministry of Labour website into multiple languages to make them more accessible to new immigrants to BC.
22. Report all ESA violations and penalties on the Ministry of Labour website similarly to the way Health Authorities report on the health inspections of restaurants and other facilities.

Under Theme 2, the Consultation Paper also requested input about concerns received by the Ministry about “the lack of oversight for workers in temporary help arrangements.” This is an area of concern for CCPA–BC as well.

Workers placed by temporary employment agencies are engaged in a triangular employment relationship where they are recruited by the employment agency and offered a temporary assignment in the client firm’s workplace, which workers may accept or decline. The employment agency is the employer of record even though the client firm supervises the worker.

Our 2014 report *Precarious: Temporary Agency Work in British Columbia* documented that temporary agency workers are some of the most vulnerable and precariously employed workers because of the limited duration of employment, high risk of termination, lack of control over working conditions, unequal treatment under the law, and typically low incomes.<sup>17</sup> It also found evidence of a large number of employment agencies in the Lower Mainland operating without being licensed in violation of the ESA.

The research indicates that reform is needed to adequately regulate temporary employment agencies and improve the economic security of their workers. Priority recommendations include:

23. Increase penalties for temporary employment agencies operating without a license and introduce penalties for client firms contracting with unlicensed agencies, similar to existing penalties for clients contracting with unlicensed farm labour contractors.
24. Require temporary employment agencies to provide new employees with information about the workplace rights and responsibilities of employment agencies, client firms and workers under the ESA, as well as detailed information about the temporary employment agency that is their employer.
25. Improve termination and severance pay provisions for temporary employment agency workers, as recommended by the Ontario Changing Workplaces Review. The current practice of exempting temporary agency workers from these basic protections under the

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<sup>17</sup> Longhurst, Andrew. 2014. *Precarious: Temporary Agency Work in British Columbia*. Vancouver: CCPA–BC. <https://www.policyalternatives.ca/publications/reports/precarius>

ESA places a high degree of income insecurity on workers and allows employers to use temporary agency workers to avoid minimum workplace rights that direct employees have under the ESA.

26. Prohibit clauses that restrict temporary agency workers' ability to move to direct employment, including "buy-out clauses" in contracts between employment agencies and client firms that impose a fee on client firms that wish to offer direct employment to temporary employment agency workers.
27. Extend ESA protection against employer reprisal to client firms, as is the case in Ontario.

### **Theme 3: Supporting families with job-protected leaves of absence**

In our view, the Ministry should expand job-protected leaves of absence to better support families.

Currently, BC is the only province in Canada that does not guarantee workers a right to sick leave, paid or unpaid. This omission should be immediately remedied. Paid sick time benefits not only workers who fall ill, but the workplace in general, by reducing the risk of employees coming to work while ill and spreading illness to their colleagues, clients and the public. Further, the Canadian Medical Association has concluded that requiring sick notes for short-term illness "represents an inefficient use of the scarce health care resources."<sup>18</sup>

We recommend:

28. Introduce paid sick leave. We support the recommendation made by the BC Employment Standards Coalition that employees should accrue a minimum of one hour paid sick leave for every 35 hours worked. Unused paid sick leave may be carried over for use in the year after they were accrued, up to at least 52 hours.
29. Prohibit employers from requiring evidence of short-term absences for personal illness. Employers should be obligated to pay for the doctor's note if one is required for a longer-term illness.
30. Introduce new special leave for employees experiencing domestic or sexual violence to access safety and any support services needed. A number of other provinces provide paid leave for this purpose, and make available additional unpaid leave. We support the recommendation of the BC Federation of Labour for a minimum of 10 days of paid leave with a total of 17 weeks of leave.

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<sup>18</sup> Canadian Medical Association. 2017. *CMA Policy: Third Party Forms (Update 2017)*. [https://www.cma.ca/sites/default/files/pdf/Advocacy/Policy-Research/cma\\_policy\\_third\\_party\\_forms\\_update\\_2017\\_pd17-02-e.pdf](https://www.cma.ca/sites/default/files/pdf/Advocacy/Policy-Research/cma_policy_third_party_forms_update_2017_pd17-02-e.pdf)

31. Harmonize special leave entitlements with the federal *Employment Insurance Act* so that the appropriate unpaid leave is granted for the range of circumstances in which federal employment benefits would normally apply.
32. Harmonize special leave entitlements with the federal *Employment Insurance Act* so that the appropriate unpaid leave is granted for the range of circumstances in which federal employment benefits would normally apply.
33. Increase the annual paid vacation entitlement to three weeks after the first year of service of and four weeks after ten years of service. The International Labour Organization recommends a minimum three-week paid vacation.
34. Modernize the ESA definition of “immediate family,” which doesn’t reflect 21<sup>st</sup> century realities as flagged by the BC Law Institute Report. We encourage the Province to adopt a definition that reflects the diversity of families in BC today, in particular the types of close-knit family-like relationships common in the LGBTQ2S community, the strong mutual support networks in migrant worker communities, traditional Indigenous kinship networks and the types of family relationships formed in the foster care system.
35. Because the special leaves provided under the ESA are non-discretionary, that is, workers do not choose when they get sick or when their family members need care or pass away, there should be no qualifying period for unpaid special leaves as per BC Law Institute minority recommendation 41c.

Combining personal sick leave with family responsibility leave, as recommended by the BC Law Institute Report recommendation 39, would unfairly penalize employees with dependents, particularly women who continue to be responsible for the majority of unpaid family caregiving work in Canada. Workers with dependents should have the same right to time off for personal illness as enjoyed by workers without dependents or unpaid caregiving responsibilities. Therefore, we recommend that all special leaves be standalone and not combined with other special leaves.

## **Theme 4: Strengthening workers’ ability to recover wages/monies owed**

The current six-month limitation period for complaints is too short and puts workers at a disadvantage compared to other private litigants who have a two-year limitation period for general civil claims. The problem is particularly acute for workers whose rights are violated before the start of the employment relationship (under the sections related to misrepresentation during hiring, requiring a payment from job seekers to find employment, etc). For those violations, the current limitation period is six months from the date of the contravention not from the end of employment, and many workers affected, particularly those who are employed

under the temporary foreign worker program, do not have a realistic opportunity to file a complaint within that time frame.

The BC Law Institute minority recommendation 60a would extend the limitation period to two years from the date of the contravention under the sections related to misrepresentation in hiring. This is a step in the right direction but we believe it would be fairer for workers—and simpler to administer—if the limitation period for all ESA violations is extended to two years from the termination of employment. Such an extension would provide workers similar rights to seek justice and enforce their legal rights as those granted to other individuals filing general civil claims.

We recommend that the Ministry extend the limitation period for wage recovery and filing a complaint to strengthen workers' ability to recover monies owed by the employer. This would be particularly beneficial to workers who do not have adequate knowledge of their workplace rights at the time of employment, and those who may be unable to file a complaint within the shorter time frame due to illness, disability, immigration status or other reasons. Specifically, we recommend:

36. Extend the retroactive liability for wages required to be paid by an employer from the current six months to three years as recommended in the Arthurs Report on Federal Labour Standards.<sup>19</sup>
37. Allow workers to file a complaint about any ESA violation for up to two years after termination of employment.
38. Make tips and gratuities the property of the employee who receives it and make tip pooling voluntary for employees, and free of employer control, to protect employees who receive tips and gratuities from wage theft.

The BC Law Institute recommends following the Ontario legislation on tip pooling but there are concerns that the Ontario model does not go far enough in ensuring no employer control over tip pooling. The tip-pooling provisions in the employment standards legislation in Newfoundland and Labrador and Quebec stand out as models that better protect workers who receive tips and gratuities and should be considered in BC.

## **Theme 5: Clarifying hours of work and overtime standards**

We believe that workplace flexibility should enable workers to balance employment (sometimes in multiple jobs), family responsibilities and life events in the changing world of work. Setting

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<sup>19</sup> Arthurs, Harry W.. 2006, *Fairness At Work: Federal Labour Standards for the 21<sup>st</sup> Century*. Ottawa: Government of Canada. <http://publications.gc.ca/site/eng/324676/publication.html>

limits on employment arrangements' ability to encroach of the worker's personal life would particularly benefit women, who continue to bear a disproportionate share of caregiving responsibility in the family. Employment standards that encourage a culture of overtime work and/or long working hours will necessarily make it more difficult for women to advance in their careers or even to retain jobs at the same time as meeting their family obligations.

We recommend the following:

39. Require a minimum of 24 hours' notice of work schedules and changes to work schedules to allow workers to plan their home lives or other employment, meet their family obligations and participate in their communities. Workers should be able to request changes in their schedules without fear of retaliation.
40. Impose a minimum shift time and minimum call-out pay of four hours so workers can arrange child care and transportation without losing money by reporting to work. The current minimum shift length of two hours is inadequate, particularly when workers must commute long distances to get to the worksite.
41. Introduce a right to refuse overtime except in cases of emergency.
42. Give workers a right (after a year of service) to request an increase or decrease in hours of work, to be given a more flexible schedule, or to alter the location of work, putting the onus on the employer to provide written reasons if the request is denied.

Further to the question posed in the Consultation Paper about potential reforms to improve workplace flexibility, it is worth noting that exempting groups of workers, be it farmworkers or high technology professionals, from maximum daily and weekly hours after which higher overtime rates must be paid represents a significant wage subsidy to their employers. The cost is born not just by these workers and their families, but also by society as whole because workers' health and safety can be compromised after long hours of work, leading to higher public medical costs. There are additional social costs of burnout and stress for workers who have to contend with excessively long work hours. While the work of farms or high technology firms may well require long daily hours during certain periods of time, these demands must be balanced against the rights of their workers, who—just like any other worker—have to reconcile work with family obligations and have a right to enjoy rest and recreation and to fully participate in their communities.

As already mentioned above, we recommend reintroducing the entitlements to statutory holidays, annual vacation, hours of work and overtime pay for farmworkers, as well as reintroducing the entitlements to hours of work and overtime pay for high technology professionals.

## **Theme 6: Improving fairness for terminated workers**

To improve fairness and enhance job security for workers, we recommend:

43. Eliminate the three-month eligibility requirement for notice of termination or pay in lieu of notice.
44. Implement unjust dismissal protections similar to those in Nova Scotia, Quebec and under federal labour standards (in line with the BC Law Institute minority recommendation 4a).

As stated earlier in this submission, we also recommend reforms to improve termination and severance pay provisions for temporary employment agency workers, as recommended by the Ontario Changing Workplaces Review Final Report (p. 212). The current practice of exempting temporary agency workers from these basic protections under the ESA places a high degree of income insecurity on workers and allows employers to use temporary agency workers to avoid minimum workplace rights that direct employees have under the ESA.

## **Other key areas of the Employment Standards Act in need of reform**

### **1. ENSURE THAT WORKPLACE RIGHTS AND PROTECTIONS KEEP PACE WITH EMERGING LABOUR MARKET TRENDS**

The BC Law Institute report makes a passing reference to the profound transformations that technology has made in the workplace, “leading to decentralization, the emergence of telecommuting, and the “gig economy,” in which widely dispersed workforces interact with their employers or nominal employers only through an electronic platform” (p.1). However, the report makes no attempt to consider how these changes are affecting workers nor makes any recommendations to address these changes. This is highly problematic because changes in the organization of work have created significant gaps in coverage and protection under the ESA.

One of the big challenges of adapting the ESA for the 21<sup>st</sup> century is that new technologies are disrupting the traditional employer-employee relationship and, as a result, the old definitions of employer and employee in the *Act* do not address the complexity of the current labour market reality. It is essential that new provisions be included to ensure workers in these new employment arrangements are entitled to rights and protections comparable to workers in more traditional employment relationships.

In particular, workers in the gig economy—or the on-demand services economy—have few protections under the current BC employment standards framework. Gig economy workers use online platforms to connect to potential clients but they are not considered employees of the platform. Instead, they are typically characterized as independent contractors and therefore



excluded from basic protections, such as minimum wage, maximum hours of work, paid vacation or sick time, termination and severance pay or employment insurance.

Gig economy workers, however, are rarely true entrepreneurs who set their own hours and rates. On the contrary, they typically have little control over their labour and pay rates—which are set by the platform—may not average above minimum wage after expenses. Workers can also be penalized for rejecting work assignments, hardly fitting the independent contractor label.

The current legislation requires workers to prove they are employees and therefore entitled to protections under the ESA. Some gig economy workers in the U.S. and Europe have won court cases proving they are misclassified as independent contractors and should be entitled to workplace protections afforded employees.

Challenging misclassification in court is technically an option for Canadian gig-economy workers, but few have the resources or time to pursue long, drawn-out court cases to assert their basic workplace rights. Nor should they have to. Putting the onus on workers to prove they are employees and not independent contractors is an unduly heavy burden.

Misclassification of employees was already a widespread problem when the Thompson Commission produced its report 24 years ago, and advances in digital technology have only made it worse. It's long past time to proactively address misclassification and prioritize its enforcement.

Further, gig-economy workers are part of the growing army of people in employment arrangements with some degree of precarity, which could include not knowing one's schedule in advance, frequent on-call work, short-term contracts, large variability in income week to week, and few, if any, benefits. Some of these workers may not fit the traditional definition of employee, but they deserve protection from exploitation, statutory rights to vacation and holidays, a mechanism to recover unpaid wages, compensation for unjust dismissal, advance notice of scheduling, equal pay for equal work and a guarantee to earn at least the minimum wage.

To provide these protections, 21<sup>st</sup> century employment standards legislation needs to go further than simply addressing misclassification. It must broaden the definition of "employee" covered by the Act to include the complex employment relationships we are seeing emerge, while keeping true independent contractors outside the legislation as they are now.

This may require a new require a separate new classification for gig economy workers, and perhaps multiple variations adapted for specific sectors and industries. As an immediate first step while new classifications are developed, the onus to prove that a worker is an independent

contractor and not an employee, which currently falls on the worker, should be shifted to the employer.

The ongoing review of BC's workplace rights is the perfect opportunity to commission new research and engage in a fulsome consultation to develop policies that better serve the needs of workers in the 21<sup>st</sup> century.

To protect the rights of all workers and keep pace with emerging labour market trends, we recommend:

45. Reform the ESA to specifically address the increasingly complex employment relationships arising in the 21<sup>st</sup> century economy and develop a framework to guarantee basic workplace rights for all workers regardless of their employment arrangement. Given that the BC Law Institute Consultation Paper is completely silent on these fundamental issues, this would require commissioning independent research to develop appropriate recommendations as well as consultation with workers in the affected sectors and their advocates.
46. Shift to the employer the onus to prove that a worker is an independent contractor and not an employee. This should be done immediately as a first step to extending workplace rights and protections to precarious workers in the changing workplace while new solutions are being developed (such as the ones proposed under recommendation 44 above).
47. Make the misclassification of employees as independent contractors a priority enforcement issue.

## 2. IMPROVE THE WORKING CONDITIONS OF FARMWORKERS

As documented in CCPA-BC's 2008 report *Cultivating Farmworker Rights*, farmworkers "are at the mercy of a complex, confusing and controlling system that exploits, threatens and silences them while it places their lives in danger and excludes them from a range of employment standards." Further, as our 2015 report *Citizenship and Precarious Labour in Canadian Agriculture* concludes, "farmworkers' fear of losing hours or jeopardizing their employment leads them to accept unsafe work or transportation, work long hours, work while ill or injured and, in the case of migrants, acquiesce to poor housing. Meanwhile, regulations and enforcement for this sector are very weak."

Subsequent to the reductions in employment standards for farmworkers in the early 2000s, employers have hired thousands of temporary foreign workers. While in 2003 almost all BC agricultural workers were South Asian immigrants as of 2012 half were Mexican migrants

employed under the Seasonal Agricultural Workers' Program.<sup>20</sup> Migrant workers are even more vulnerable to exploitation because of their employer-specific work permits, which essentially give employers the power to deport them.

In addition to the recommendations already made above for targeted proactive enforcement in the agricultural sector, and reintroducing the entitlements to statutory holidays, annual vacation, hours of work and overtime pay for farmworkers, BC employment standards must be strengthened as follows:

48. Mandate that workplace rights are posted in the workplaces of all farmworkers in appropriate languages, including the native language of all migrant farmworkers employed under the Seasonal Agricultural Workers' Program.
49. Establish an independent review of the ESA in relation to farmworkers, including representation from workers and their advocates. The review would make recommendations for improving working conditions of farmworkers and develop coordinating mechanisms with other agencies that oversee migrant agricultural programs to fill the jurisdictional void that exists in enforcing the rights of migrant workers. It would include a review of the farm labour contracting system, notorious for its violations of employment standards, safety regulations and for shoddy record-keeping practices, which make it virtually impossible for workers to seek redress when their rights are violated.

### 3. IMPROVE THE WORKING CONDITIONS OF CAREGIVERS IN PRIVATE RESIDENCES

The work of caregiving for children, elders or people with disabilities in private residences is largely invisible and traditionally undervalued. The majority of caregivers are women, often immigrant or migrant racialized women, or members of disadvantage communities. This combination of factors makes caregivers in private residences particularly vulnerable to discrimination and exploitation.

Researchers have identified a number of gaps in the BC ESA with respect to protecting caregivers in private residences.<sup>21</sup> For example, as the BC Law Institute Consultation Report notes there is significant overlap between the five current classifications for caregiver jobs in the ESA. This creates the potential for confusion and misclassification and makes it more difficult for

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<sup>20</sup> Otero, Gerardo and Kerry Preibish, 2015, *Citizenship and Precarious Labour in Canadian Agriculture*, CCPA-BC. <https://www.policyalternatives.ca/publications/reports/citizenship-and-precarious-labour-canadian-agriculture>

<sup>21</sup> Drolet, Natalie and Theresa Etmanski, 2015, "Caregivers and Labour Rights in British Columbia: Barriers to Decent Work", paper prepared for the Conference on Temporary Migrant Workers, Simon Fraser University by the West Coast Domestic Workers' Association. <http://mwcbc.ca/downloads/CaregiversandLabourRightsinBC-BarrierstoDecentWork.pdf>

employers (typically private individuals) to understand their responsibilities and ensure they are in compliance with the law. More concerningly, this means that workers who perform nearly identical work are entitled to different minimum workplace rights under the law, which is clearly unjust. We recommend that the BC government:

50. Reform the ESA to ensure caregivers working in private residences have access to minimum workplace rights and protections similar to those enjoyed by other BC workers, including hours of work, overtime and on-call compensation, and that these rights are meaningfully enforced.
51. Change the definition of “domestic” to remove the requirement for the worker to reside in the employer’s residence (BC Law Institute recommendation 50).

The latter is necessary to harmonize the ESA with recent changes in the federal legislation governing the employment of migrant workers in private residences.

#### 4. ADDRESS THE SPECIFIC CHALLENGES FACED BY TEMPORARY FOREIGN WORKERS

In our August 2018 submission to the Ministry of Labour, we called for a new regulatory scheme for all employers of migrant workers to address the specific vulnerabilities that workers without citizenship status experience in the workplace, as is done in Saskatchewan, Manitoba, Nova Scotia and Ontario. The new BC Temporary Foreign Worker Protection Act, which sets a new framework for regulating recruiters and employers of migrant workers in BC, is a welcome first step to protecting migrant workers.

The Act is not yet in force because regulations are still being developed. Whether or not the Act effectively protects migrant workers from exploitation by unscrupulous employers will crucially depend on these regulations and on the capacity of the Employment Standards Branch to proactively enforce the new rules. As outlined in the discussion of Theme 2 above, an immediate and substantial transformation of the Branch is required to ensure that vulnerable workers' rights and protections don't only exist on paper.

In addition to the recommendations made earlier in this submission about transforming the Employment Standards Branch, we recommend:

52. Expedite the investigation of complaints by temporary foreign workers to address potential reprisals and unjust dismissal that would force the worker to leave Canada before their complaint is handled.

## 5. ESTABLISH A PERMANENT COMMISSION TO ADVISE ON SETTING THE MINIMUM WAGE

BC has a history of long periods of minimum wage freezes during which the real value of the minimum wage is eroded over time. To end this practice, we recommend:

53. Establish a permanent commission to examine issues related to wages in BC through research and public consultation, and to advise government on appropriate increases of the minimum wage as recommended in the Fair Wages Commission's first report. The Commission must be resourced to undertake research and consult with the public, including with workers earning low wages and their advocates.

The BC Law Institute Project Committee was divided on the question of how the minimum wage should be set. The majority recommended a combination of regular indexation (without specifying how frequently or to what indicator or indicators) and residual government discretion to set the minimum wage at a different rate. As their report points out, the most common method of indexing the minimum wage in Canada is to inflation as measured by the consumer price index (CPI). However, we have found such indexation to be problematic due to CPI being held down by falling prices for some non-essentials (such as electronics) while the costs of core essentials that families cannot avoid—rent, electricity, child care and food—have been increasing by two-to-four times the rate of inflation since the mid 2000s.<sup>22</sup>

## 6. MAKE IT EASIER TO APPEAL DECISIONS BY THE EMPLOYMENT STANDARDS TRIBUNAL

54. Expand the current narrow grounds for appeal.

## Conclusion

All BC workers deserve certain basic workplace rights and protections. The basic rights enshrined under the ESA are particularly important for vulnerable workers, such as new immigrants, young workers, low-wage workers, women and workers of colour—all of whom are less likely to be represented by a union and are less able to secure workplace conditions better than the minimum requirements.

The extensive research CCPA-BC has published on workplace rights in BC reveals significant gaps in the current Employment Standards Act and serious problems with the existing enforcement practices that leave many workers unprotected. Major reforms to BC's employment

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<sup>22</sup> For more detail on recommendations for the setting of BC's minimum wage, see Klein, Seth and Iglia Ivanova, 2017, *Charting a Path to \$15/Hour for all Workers—and the Road Beyond: CCPA-BC Submission to the BC Fair Wages Commission*. <https://www.policyalternatives.ca/publications/reports/charting-path-15hour-all-workers%E2%80%94and-road-beyond>

standards and their enforcement are needed to establish a strong foundation of basic workplace rights and protections that meaningfully apply to everyone

In addition, BC's ESA has not kept up with changes in the labour market, and in particular, with advances in digital technology that have enabled new structures of organizing work. This has opened the door to business models designed to make money by exploiting gaps in the existing legislation and its lax enforcement, models that reduce operating costs by transferring much of the business risk to a low-paid, casual and increasingly precarious workforce. Modernizing BC's workplace protections to fit the new job market realities is long overdue.

The recommendations outlined in this submission will establish a basic standard of workplace rights and protections for all workers in BC and ensure that these rights are meaningfully enforced. We hope they prove useful to your deliberations.

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