

WORKING PAPER 12: HOW TO ENFORCE EMPLOYMENT STANDARDS*†

1. Key challenge & overview

People in precarious employment have more difficulty having their rights under labour law enforced, including their employment standards rights. ‡

Employment standards are the regulations that govern working conditions. For those precarious workers who are covered by these standards,[§] enforcement of these standards is a challenge. The enforcement process covers compliance, pro-active enforcement, the claims process, and investigations. **Thus, policy options address improvements in the different parts of this process.** As this area pertains to legislation, many policy options are exceedingly detailed, and it may be useful to concentrate on the higher level areas of liability, compliance, pro-active enforcement, etc.

2. Evidence from PEPSO

Employment Standards regulate working conditions and specify the minimum levels of protection an employer must offer an employee. However, for workers to experience the benefits, the standards have to be enforced.

PEPSO's *It's More Than Poverty* report** found numerous cases where standards were breached. However, workers often found it difficult to exercise their rights due to their vulnerable status as workers in precarious employment. This difficulty was especially true for immigrants and marginalized workers. In the PEPSO report, 24% of workers in precarious employment reported that raising a health and safety concern or other issue related to employment rights would threaten their future employment, compared to no workers in secure employment.††

3. Context/current situation

Employment standards include a wide range of rights and responsibilities that govern different aspects of working conditions, such as:

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† This Policy Options Working Paper is one in a series of 16 working papers that explore the range of policy options that have been proposed to reduce or mitigate the impacts of precarious employment. Each of these papers must be read in tandem with the paper titled "PEPSO Policy Options Working Papers: Introduction". The full reference list is contained in a separate bibliography document.

‡ This paper is one in a series of three papers on employment standards. The other two working papers cover employment standards coverage & awareness and employment standards adequacy.

§ Some workers in precarious employment are not covered or are covered with limitations due to the form of their employment relationship. However, other workers cannot access certain standards due to length of time in their current job or due to the size of their workplace.

** PEPSO's *It's More than Poverty* report refers to the report that was published in February 2013 that was based on the main survey conducted by PEPSO. In these working papers this report will be called the PEPSO report or the PEPSO survey. This is only appropriate for these working papers as there are other PEPSO reports that will be published by the six case studies.

†† Note: raising employment rights is one component of the *Employment Precarity Index*. This means that this variable was used to define precarity.

- **Time** (hours of work, rest periods, vacation time and pay, public holidays, leaves of absence from work).
- **Income** (payment of wages, overtime pay, minimum wage, termination pay).
- **Record keeping** (payroll records).
- **Termination notice and pay.**^{††}

Part III of the Canada Labour Code (CLC) covers workers under federal jurisdiction. Only 6% of non-public administration jobs in Canada come under this category and more than 300,000 of these workers are in Ontario.¹ In general, these workers tend to have better working conditions than the Canadian norm.² Workers who are covered under these labour standards must be employees. The Code does not distinguish between full-time, part-time, and casual employees.³ However, self-employed workers and independent contractors are not covered.⁴ Dependent contractors such as owner-operators are deemed to be employees under the CLC.⁵

In Ontario, most other workers who are covered by employment standards legislation come under the *Employment Standards Act of 2000 (ESA)*. Workers covered under the *ESA* must be employees.^{§§} The following groups have limitations in their coverage:

- **Not covered:** Self-employed individuals, independent contractors, and employees who have been misclassified by their employers as independent contractors.
- **Covered with limitations/ exemptions:** Temporary workers, subcontracted workers, and part-time workers have limitations to their coverage. In part, this is due to a lack of clarity as to whether the employer is the agency/ contractor or the client business. In part, this is because some standards require a single employer, or a certain tenure, to be accessed, putting them out of the reach of many temporary, subcontracted and part-time workers.⁶ For example, vacation time can be taken after 12 consecutive months of work.⁷ In addition, there are some exemptions based on workplace size^{***} and occupation.

These rights and responsibilities are legally enforceable, giving workers covered under employment standards legal recourse if an employer is not respecting these rights. In essence, employment standards enforcement in Ontario is mostly reactive, with some element of complaints and pro-active measures.⁸ This means that the Ministry of Labour will mostly assume that all employers are respecting rights, unless given cause to think otherwise. The enforcement process generally includes the following steps:

- **Compliance:** Compliance includes the voluntary actions that employers take to comply with employment standards violations.^{†††}
- **Pro-active enforcement:** These are steps that are taken to supplement compliance. This includes **inspections**, which are part of the Ontario Ministry of Labour's strategic enforcement plan for 2013-2014.⁹ This also includes spot-checks, which the federal Labour Program indicates are occasionally used.¹⁰
- **Claims:** When compliance is insufficient, workers may lodge an employment standards complaint under the *ESA*, or the CLC. However, under the *ESA*, they must first approach their employer to try to resolve the issue.¹¹ If this does not work, the worker must file a claim with the Ministry of Labour.¹²
- **Investigations:** Employment standards officers carry out investigations if complaints are made. If an employer is found to have violated the *ESA*, or Part III of the CLC, options for recourse include **settlements, fines**, and in rare cases, **prosecution**.¹³

^{††} Issues regarding employment standards improvement will be taken up in a separate policy paper.

^{§§} For a full list of employees who are not covered or covered differently, see:

https://www.labour.gov.on.ca/english/es/pubs/factsheets/fs_general.php

^{***} For example, some standards are exempted for workplaces in which there are less than 50 workers, which means 1.7 million Ontarians cannot access these standards (Statistics Canada, 2014c).

^{†††} The federal Labour Program greatly emphasizes compliance and frames its entire enforcement policy as a compliance policy. (Labour Program, 2013c).

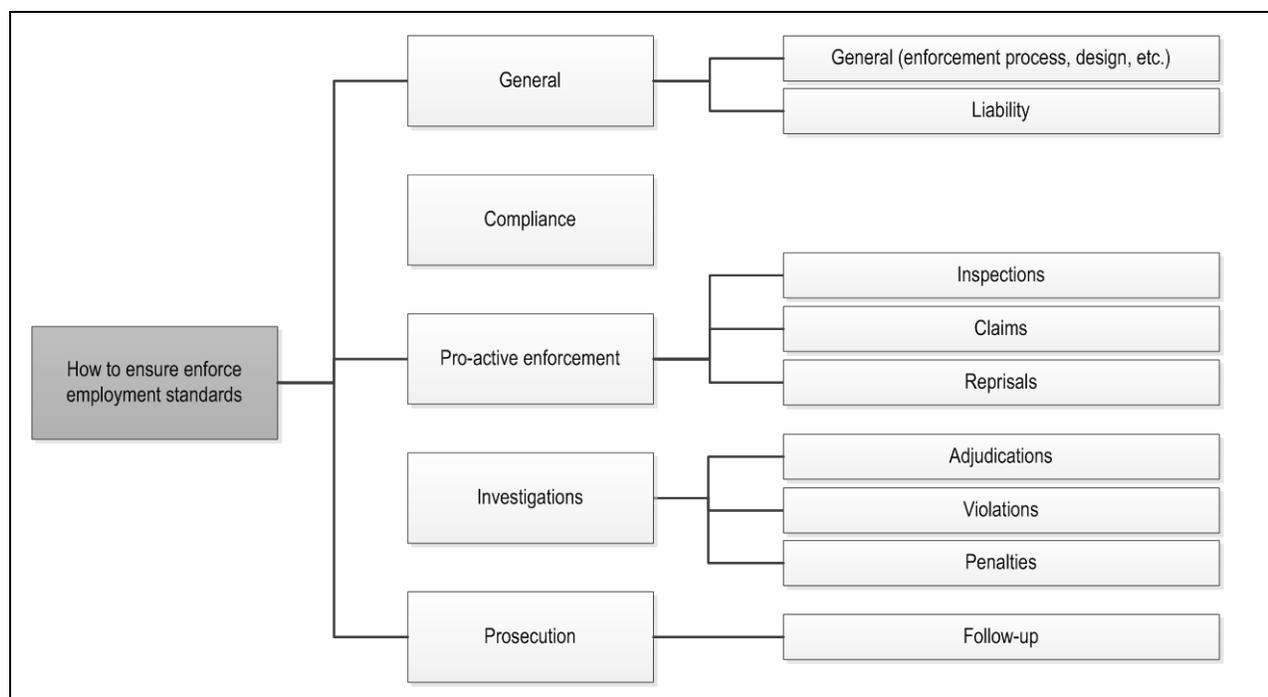
The CLC has mostly stayed the same for the past forty years. ^{††† 14} The federal government, through the Minister of Labour, commissioned a thorough review of Part III in 2004, which was published in 2006 as *Fairness at Work: Federal Labour Standards in the 21st Century*. In 2009, the federal Minister of Labour announced consultations based on this review. However, no information is available on the outcomes.

ESA legislation has been updated with regard to enforcement. Updates to ESA legislation include *The Employment Standards Amendment Act (Temporary Help Agencies), 2009*, which changed certain provisions regarding workers with temporary help agencies and included some discussion of enforcement. In December 2013, the Ontario Minister of Labour introduced Bill 146: *Stronger Workplaces for a Stronger Economy Act, 2013*, which is currently at second reading. Bill 146 is designed to increase the scope of some elements of the ESA, and also includes some reference to enforcement. ^{§§§}

The federal and provincial Ministries of Labour are responsible for education and training initiatives to build awareness. The federal Ministry of Labour's Labour Program is charged with creating voluntary compliance through education and awareness building. ¹⁵ In Ontario, the Education, Outreach, and Partnerships branch of the Ministry of Labour is responsible for creating an environment where both employers and employees understand the ESA, and encouraging compliance by developing resources and tools for employers. ¹⁶

4. Policy options

Most policy options that address enforcement are universal, and not specific to those in precarious employment. It should be noted that most workers in Ontario will be more impacted by the ESA than the CLC. However, recommendations that generally address employment standards, that address standards in other provinces and jurisdictions, and that address federal standards through the CLC are included as key sources for discussion on the ESA.



^{†††} Bill C-45, *the Jobs and Growth Act, 2012*, did make some amendments to the Canada Labour Code.

^{§§§} There are varying opinions on whether this bill goes far enough in the area of improving enforcement of employment standards.

4.1 General

There are **general** policy recommendations that deal with strengthening the enforcement process and making it more effective¹⁷ and strict¹⁸ in particular for the *ESA*.¹⁹ These include:

- **Expanding comprehensiveness of enforcement** to ensure workers in short-term positions, who are more vulnerable and reluctant to exercise their rights, are still protected.²⁰
- **Enforcing all workers' rights**, especially those in precarious employment,²¹ and temporary workers.²²
- **Developing partnerships between state agencies and worker organizations** to improve enforcement.²³
- **Reporting transparently** on enforcing employment standards.²⁴

Some of these options address **specific paths** to enhancing enforcement, such as **developing new measures to strengthen workplace inspection and compliance practices**.²⁵ These options include:

- **Improving the system of enforcement** by coordinating with other government agencies,²⁶ increasing funding²⁷ and staffing²⁸ for the *ESA* and *CLC*. These could be funded in part by money from fines and prosecutions.²⁹
- Pursuing **strategic enforcement**, such as mapping practices,³⁰ strategic plans for inspections, year-by-year targets, and evaluation of strategic enforcement.³¹ The latter is a policy used in the U.S. Department of Labor.

4.1.1 Liability

One challenge for enforcement is establishing **who the employer is and therefore who is liable for employment standards violations**. Policy options to address this issue include:

- **Holding client firms accountable in certain low-wage industries for the violation of subcontractors' wages and hours**, known as "brother's keepers laws," which are in place in California.³²
- **Holding employers (as opposed to contractors) accountable** for violations of subcontracted workers' rights,³³ as has been proposed in part for temp agencies through Bill 146.
- Developing ways for **client firms to hold temp agencies accountable**.³⁴
- Enforcing the **joint liability of temp agency and employer for wages**, (which is the case in Slovenia),³⁵ and proposed through Bill 146 in Ontario), and enforcing this for benefits.³⁶
- Adding dependent employer to the definition of employer to ensure **joint and several liability for minimum standards throughout the subcontracting chain** (present in some form in Quebec).³⁷
- **Establishing enforcement liability for temp agencies,**³⁸ **subcontractors,**³⁹ **the employer highest up the supply chain,**⁴⁰ **contractors and subcontractors.**⁴¹

4.2 Compliance

Compliance options are the policies that employers adopt to comply with employment standards voluntarily. Options to improve compliance include:

- **Redesigning enforcement procedures** under the *CLC*.⁴²
- **Recognizing and incentivizing those companies that lead** in extending employment standards and offering higher than the minimum.⁴³
- Tracking and evaluating employers' compliance by **conducting inspections over time**.⁴⁴
- **Targeting particular areas**, such as mandating compliance requirements for certain groups, such as cleaning contractors⁴⁵ and ensuring temp agencies comply with decent minimum standards.⁴⁶

- Establishing an **Innovative Solutions for Precarious Work Advisory Council** for advice and initiatives to expedite *ESA* enforcement and compliance.⁴⁷

Compliance options that have been proposed for the CLC include:

- **Introducing new Labour Program staff** to deal with inspections.⁴⁸
- **Ensuring all compliance payments have been made by employers.**⁴⁹

Other options focus on strategies to increase compliance through **self-regulation**. These include:

- Considering Australia's strategy of **focusing on partnerships to facilitate voluntary compliance.**⁵⁰
- Developing **voluntary codes of conduct for employers**⁵¹ while avoiding purely voluntary approaches to employment standards regulation.⁵² This is proposed for the CLC as voluntary codes of conduct that could be drawn up by industry associations,⁵³ or having employers voluntarily commit to compliance.⁵⁴
- Improving the **understanding of existing standards among employers who offer precarious work** and boosting their compliance.⁵⁵
- Considering the introduction of **private monitoring**, including internal monitoring and unannounced independent external monitoring.⁵⁶

4.3 Pro-active enforcement

One developing area of enforcement is **pro-active enforcement**,⁵⁷ which focuses on enforcing standards before violations are uncovered through the claims process. The current provincial model of pro-active inspections aims to educate and build awareness of employment standards for employers, promote self-reliance in the workplace, and take enforcement action when needed.⁵⁸ These options, which could disproportionately assist those in precarious employment, include:

- **Developing strategies that target** higher-risk industries,⁵⁹ temporary help agencies,⁶⁰ places with higher concentrations of vulnerable workers,⁶¹ and industries with high violations.⁶²
- Initiating pro-active and regular **inspections and spot-checks.**⁶³
- Introducing a **positive duty for employers to prevent violations** of the *ESA*,⁶⁴ and illegal workplace practices (variations of which exist in the UK and Australia).⁶⁵
- Introducing **contractual agreements** among governments, agencies, wage-subsidy employers, and workers that **prohibit employment standards violations.**⁶⁶
- Introducing new forms of **community-based enforcement**, such as making on the ground inspectors, such as union members, representatives for labour inspectors from the city. This system is in place in two US municipalities.⁶⁷
- **Closing gaps that leave workers without protection against wage theft.**⁶⁸ This could include **legislating wage theft bills**, which is the case in Florida's Miami-Dade county in the U.S.⁶⁹

4.3.1 Inspections

One element of pro-active enforcement is **inspections**. In general, these recommendations focus on:

- Increasing the **power of inspectors.**⁷⁰
- **Targeting** 'bad' employers,⁷¹ or sectoral and overall targets,⁷² for rates of inspections, which could be 10% of employees per year.⁷³ One option proposed for the CLC was setting year-by-year targets for inspections.⁷⁴
- Holding **multi-agency investigations.**⁷⁵
- **Removing exemptions** for inspections of all employees.⁷⁶

- **Inspecting up the chain** when doing investigations and inspections for subcontractors and temp agencies.⁷⁷
- **Building awareness** by posting results of inspections in the workplace.⁷⁸
- **Evaluating the effectiveness** of the inspection process.⁷⁹

4.3.2 Claims

The **claims reporting process** is how workers make an employment standards claim. Currently, under the *ESA*, the onus is on the worker to first try to resolve the issue before approaching the Ministry of Labour. This can be particularly problematic for precarious workers, who have less power than workers in standard employment relationships. Almost all individual complaints are filed after the employment relationship has been severed.⁸⁰ Options to improve the reporting process include:

- Ensuring all workers have **access to the complaints process**,⁸¹ and all workers are protected if they try to enforce their rights on the job.⁸²
- **Ensuring government staff who provide information and deal with complaints know the *ESA* well.**⁸³
- Making the **reporting process easier, faster, and simpler** in order to enforce rights that have been violated.⁸⁴
- **Shifting the onus off the employee** having to try to resolve the complaint first.⁸⁵
- **Extending time for wage claims in special circumstances**,⁸⁶ as has been recommended in Bill 146 to two years.
- **Establishing supports for workers**⁸⁷ who do not speak English or French,⁸⁸ which could include legal representation for non-unionized workers,⁸⁹ community legal supports;⁹⁰ or person-to-person assistance.⁹¹ This has been proposed for the CLC via developing resources to enable access to representation on Labour Code issues.⁹²

Another set of options addresses the possibility of introducing **third-party, or anonymous complaints**.

- **Allowing anonymous complaints**, which is permitted in six U.S. states,⁹³ and investigating workplaces after such complaints are made.⁹⁴ This could include developing well-communicated and accessible mechanisms, such as a hotline,⁹⁵ or mobile phones in a worker's own language to a recording,⁹⁶ which is offered by a California social enterprise.⁹⁷
- **Allowing third-party complaints**,⁹⁸ funding organizations assisting with third-party complaints, (which has been proposed for both the *ESA* and CLC),⁹⁹ and giving organizations assisting people the ability to pursue third-party complaints.¹⁰⁰
- **Launching mobile-worker surveys and analyzing data collected from the front lines**, which is a practice used by California-based Good World Solutions.¹⁰¹
- **Developing criteria to ensure that unfounded anonymous complaints do not trigger unwarranted inspections.**¹⁰²

4.3.3 Reprisals

Another set of policy options examines **reprisals** that may occur after a claim has been filed or after a worker asks to have their rights respected. These options include:

- **Preventing unfair dismissal of non-unionized workers** to address disguised reprisals.¹⁰³
- **Protecting workers from reprisals** by establishing interim reinstatement during claims and set reprisal fines,¹⁰⁴ which could be stiff penalties,¹⁰⁵ and sharing information on protection from reprisals.¹⁰⁶
- **Developing outreach and education campaigns about anti-reprisals** to show they work.¹⁰⁷
- **Including both temp agency and client company under anti-reprisals protections.**¹⁰⁸

4.4 Investigations

When a claim is made, inspectors and hearing officers conduct an investigation to ascertain whether employment standards were violated. Policy options to improve the investigative process include:

- **Supporting expanded investigations**,¹⁰⁹ which could include all employees,¹¹⁰ and could be in response to complaints in high-risk sectors, or about repeat violators.¹¹¹
- **Increasing the number of inspectors and hearing officers** for investigations.¹¹²
- **Increasing the policy direction for employment standards officers**.¹¹³ This could include allowing officers to issue orders (CLC and ESA)¹¹⁴ and basic determinations (CLC)¹¹⁵ to enable further penalties if necessary.

This has been proposed on the federal level for the CLC as:

- **Giving inspectors and hearing officers more power** to do things such as issue offending employers orders such as cease and desist orders from future violations.¹¹⁶
- **Clarifying the timelines for officers to collect orders in default**.¹¹⁷

4.4.1 Adjudication

If no settlement was decided, the claim can be taken to **adjudication**. The following options have been developed for the federal level, but may inspire thoughts on the provincial adjudication process. Options for improving this process include:

- Continuing to provide **adjudication assistance** to employees claiming to have been unjustly dismissed.¹¹⁸
- **Ensuring hearing officers have high knowledge and experience levels**.¹¹⁹
- Establishing a **Director of Adjudication Services**, who can develop strategies for assisting unrepresented workers and employers to secure representation.¹²⁰
- **Providing information about adjudicative processes and outcomes to individuals and groups**.¹²¹

4.4.2 Violations

If an investigation indicates employment standards were not respected, this is termed as a violation. Overall strategies that could help this process include:

- Making changes to the **system of enforcement in the area of violations** by enhancing cooperation amongst government agencies to detect violations, as in New York State;¹²² establishing multi-sectoral monitoring and enforcement teams;¹²³ tracking all confirmed violations,¹²⁴ publicizing and sharing information on violations,¹²⁵ and blacklisting violating employers.¹²⁶
- **Improving the way wages are recovered and paid** by having employers pay interest on wages owed,¹²⁷ increasing recoverable money to \$25,000 instead of \$10,000 under the *ESA*,¹²⁸ (Bill 146 recommends having no limit); expanding the time limit for wage recovery to two years,¹²⁹ (which is supported by Bill 146).
- **Targeting companies and industries where wages go unpaid**, identifying where violations are occurring and developing new strategies. This happens in the U.S. in California and NY.¹³⁰
- **Utilizing the arbitration and grievance path in unionized workplaces**, which is one option that has been proposed for the CLC that may also be useful for the *ESA*.¹³¹

4.4.3 Penalties

When violations have been discovered, the Ministry of Labour at the provincial or federal level can impose penalties on employers. One set of options suggests raising fines to improve enforcement. These options include:

- **Increasing or enforcing penalties**, especially for repeat offenders.¹³²
- **Introducing more substantial financial penalties for non-compliance**,¹³³ which could include raising fines from \$5,000 to \$50,000 for the first offence under the CLC, \$100,000 for the second, and \$250,000 for the third and above. This has been proposed on the federal level as violators being made liable to prosecution and imprisonment in extreme cases of fraudulent conduct, or threats or coercion.¹³⁴
- **Improving the system of fines**. This has been proposed for the *ESA* as establishing set fines for confirmed violations.¹³⁵ This has been proposed for the CLC as using a mix of strategies to collect fines and penalties such as third-party orders against banks, writs of seizure,¹³⁶ keeping collection in the public sector,¹³⁷ and requiring employers to pay fines regardless of settlement between parties.¹³⁸

Options to improve the **system of penalties**, outside of fines, include:

- **Increasing the cost to the employer**,¹³⁹ such as making violating employers pay the administrative costs of inspecting and enforcing.¹⁴⁰
- **Prosecuting repeat violations and non-payment of orders**.¹⁴¹
- **Expanding the power of administrative tribunals** called on to decide recourses for prohibited practices.¹⁴²
- **Instituting harsher penalties for temp agencies** that violate legal requirements.¹⁴³
- **Introducing “hot cargo” provisions that enable inspectors to impose embargos on goods manufactured in violation of the act**, which would spread the penalties to all parties in the chain of production, (which is in place in the U.S. garment industry).¹⁴⁴

These have been proposed on the **federal level** as:

- Developing a **points system for violations** that stay on record for three years.¹⁴⁵
- **Reinstating employees** in addition to any fines.¹⁴⁶
- **Requiring all people receiving federal grants or contracts to not use workers from agencies that have violated a proposed code of conduct**.¹⁴⁷
- **Denying repeat offenders access to workers**.¹⁴⁸

4.5 Prosecution

In rare instances of severe violations, prosecution can occur. Recommendations to improve this process include:

- **Simplifying and improving transparency** of this policy.¹⁴⁹
- **Mandating prosecution** under the CLC when collection strategies fail.¹⁵⁰
- **Publicizing CLC convictions** to increase compliance.¹⁵¹
- Amending Part III of the CLC to **ensure prosecutions remain a practical and effective option for the most serious unfair labour practices**.¹⁵²

4.5.1 Follow-up

Follow-up inspections after violations have been uncovered are often an overlooked component of the enforcement process. Policy options to resolve this include:

- **Making follow-ups mandatory** to reduce repeat violations.¹⁵³
- **Initiating a series of pre-emptive remedies that apply to violators to prevent future violations.** These could include a range of activities from filing reports to regular audits.¹⁵⁴ This has been proposed for the CLC.

5. Questions for discussion

1. Which policy options in this paper could have the most impact on the lives of those in precarious employment?
2. Which policy options in this paper can we realistically move forward on, given the current political, economic, and social climates?
3. Which policy options are missing from this paper, but require attention?

6. Endnotes

¹ Human Resources and Skills Development Canada, 2011

² Arthurs (Human Resources and Skills Development Canada), 2006

³ Labour Program, 2013a

⁴ Arthurs (Human Resources and Skills Development Canada), 2006

⁵ Arthurs (Human Resources and Skills Development Canada), 2006

⁶ Vosko, 2013

⁷ Ontario Ministry of Labour, 2011a

⁸ Vosko, 2014

⁹ Ontario Ministry of Labour, 2013e

¹⁰ Labour Program, 2013c

¹¹ Vosko, 2014

¹² Vosko, 2014

¹³ Vosko, 2014

¹⁴ Government of Canada, 2009a

¹⁵ Labour Program, 2013d

¹⁶ Ontario Ministry of Labour, 2013f

¹⁷ Global Union Research Network, 2009 citing International Labour Organization; Wellesley Institute, 2013b

¹⁸ Institute for Competitiveness and Prosperity & Martin Prosperity Institute, 2013

¹⁹ Ontario Campaign 2000, 2012; 25 in 5, 2010; Ontario NDP, 2013

²⁰ Lewchuk, Clarke, & De Wolff, 2011 citing Fudge Tucker & Vosko 2002, Quinlan 2003, Bernstein, Lippel, Tucker, & Vosko 2006, Bernstein 2006

²¹ Colour of Poverty, 2013; Access Alliance, 2013

²² Workers' Action Centre & Parkdale Community Legal Services, 2008; PEPSO, 2013

²³ Vosko, Tucker, Thomas, & Gellatly, 2011; Vosko, Tucker, Thomas, & Gellatly, 2011

²⁴ Social Planning Toronto, 2009

²⁵ Lewchuk, Clarke, & De Wolff, 2011

²⁶ Wellesley Institute, 2011a

²⁷ CivicAction – Income Security, 2011a; Workers' Action Centre & Parkdale Community Legal Services, 2008; Workers' Action Centre & Employment Standards Work Group, 2005; Workers' Action Centre, 2007

²⁸ Arthurs (Human Resources and Skills Development Canada), 2006; Workers' Action Centre & Employment Standards Work Group, 2005; Workers' Action Centre, 2007

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- ³³ European Federation of Food, Agriculture and Tourism Trade Unions, 2013a
- ³⁴ Canadian Policy Research Networks, 2006
- ³⁵ Workers' Action Centre & Employment Standards Work Group, 2005; Bernstein, 2006 quoting the Tapin report, 1993 from Vosko 2000; Lewchuk, Clarke, & De Wolff, 2011 (HRSDC 2008); IndustriALL Global Union, 2013; Bernier, Valee, & Jobin (Quebec Ministere du Travail), 2003
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- ⁴⁰ Law Commission of Ontario, 2012
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- ⁵⁰ Vosko, Tucker, Thomas, & Gellatly, 2011Vosko, Tucker, Thomas, & Gellatly, 2011
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- ⁵⁷ Law Commission of Ontario, 2012; Vosko, Tucker, Thomas, & Gellatly, 2011Vosko, Tucker, Thomas, & Gellatly, 2011; West Coast Domestic Workers' Association, 2013; Access Alliance, 2011
- ⁵⁸ Ontario Ministry of Labour, 2014b
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- ⁶³ Lewchuk, Clarke, & De Wolff, 2011; MISWAA, 2006
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- ⁷² Workers' Action Centre, 2007; Vosko, Tucker, Thomas, & Gellatly, 2011
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- ⁸⁰ Vosko, 2014
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- ⁸⁵ West Coast Domestic Workers' Association, 2013; Law Commission of Ontario, 2012
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- ⁹⁵ Law Commission of Ontario, 2012
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