

WORKING PAPER 10: HOW TO EXTEND AND RAISE AWARENESS OF EMPLOYMENT STANDARDS RIGHTS*†

1. Key challenge & overview

People in precarious employment are often not covered by employment standards legislation, and when they are, they are often unaware of their rights.‡

Employment standards are the regulations that govern working conditions. The current employment standards legislation covers employees, but does not cover many of those in precarious employment, including the self-employed, independent contractors, and those who have been misclassified as independent contractors. Furthermore, those workers who are covered by employment standards may not be aware of their coverage or aware of what this means. **Thus, policy options focus on extending coverage to more workers and raising awareness of employment standards.**

2. Evidence from PEPSO

Employment Standards, the minimum standards by which employers and employees have to abide, are used to protect employees by regulating working conditions.§ Two main challenges with the current state of employment standards legislation include:

- **Scope:** precarious employment has grown by 50% in the past 20 years.¹ Employment standards have not kept pace, or been responsive to these changes in the labour market.² Thus, many workers in precarious employment are left with reduced or non-existent employment standards coverage.
- **Awareness:** employment standards comprise a wide variety of rules and regulations that are not always clear and/ or accessible. In order to be effective, employees and employers must be aware of the standards and understand which apply to them.

PEPSO's *It's More than Poverty* report** found that precarious employment is rising, which means that an increasing number of workers will be impacted by inadequate coverage or awareness issues.

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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 adequacy and employment standards enforcement.

§ Employment standards also include protections for employers. This paper will focus on protections for workers.

** 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.

3. Context/current situation

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

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

These rights and responsibilities are legally enforceable, and workers covered under employment standards legislation have legal recourse if an employer does not respect them.

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

The CLC has mostly stayed the same in the past 40 years.⁷ 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.

In Ontario, most other workers who are covered by employment standards legislation are covered by the *Employment Standards Act of 2000 (ESA)*, which was designed to primarily serve the needs of employees. Workers who are 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.⁸ For example, vacation time can be taken after 12 consecutive months of work.⁹ In addition, there are some exemptions based on workplace size^{††} and occupation.

Updates to *ESA* legislation include *The Employment Standards Amendment Act (Temporary Help Agencies), 2009*,⁹ which changed certain provisions regarding workers with temporary help agencies. 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 includes measures to increase the scope of some elements of the *ESA*.

The federal and provincial Ministries of Labour are responsible for education and training initiatives that are intended to build awareness. The federal Ministry of Labour's Labour Program is charged with creating voluntary compliance through education and awareness building.¹⁰ In Ontario, the Education, Outreach, and Partnerships branch of the

^{††} 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).

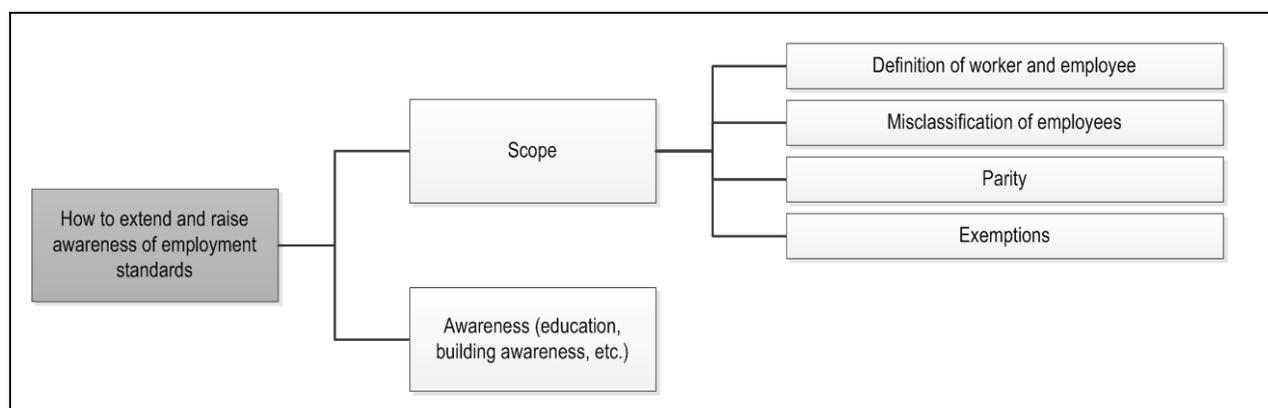
Ministry of Labour is responsible for fostering an environment wherein both employers and employees understand the *ESA*, and encouraging compliance by developing resources and tools for employers.¹¹

4. Policy options

The policy options listed below are associated with **three streams of recommendations**:

- **CLC Part III** improvements.
- **ESA** improvements.
- **General** improvements, which include general references to employment standards as well as recommendations from other jurisdictions.

While certain recommendations apply specifically to the CLC or *ESA*, the policy options have been intentionally organized to stimulate thinking on how to improve employment standards across different spheres. For example, some recommendations for the CLC could be beneficially applied to the *ESA*, and vice versa.



4.1 Scope

This area of policy changes relates to issues surrounding employment standards coverage. Workers in precarious employment are substantially less likely to have access to some, or all, employment standard coverage under both the CLC and *ESA*. **Recommendations in this section deal with different options for expanding the scope of the *ESA* to address changing employment relationships and forms of work organization.**

General policy options regarding **expanding scope** of employment standards to individuals in different **forms of employment** include:

- Treating all workers equally in terms of standards, regardless of sector, employment type, relationship, size of company, etc.¹²
- Ensuring more precarious workers¹³ or workers in atypical forms of employment¹⁴ are covered. This can include extending coverage to temporary,¹⁵ contract,¹⁶ self-employed,¹⁷ self-employed in dependent working relationships,¹⁸ and home care workers.¹⁹

Another option is to expand coverage by developing regulations that are specific to non-standard work.²⁰

4.1.1 Definition of worker and employee

One set of policy options aims to expand coverage by clarifying the definition of worker²¹ in general or in the ESA. These options include:

- **Redefining the term “worker”**, which could align the ESA definition with *Ontario’s Health and Safety Act*,²² or could be a person “economically dependent on the sale of their working capacity”.²³
- **Aligning provincial and federal definitions of employee.**²⁴

Another set refers to the **definition of worker or employee in the CLC**. These options include:

- **Redefining the term “employee”** as a person who regularly performs functions substantially similar to those performed by employees,²⁵ or a person who works for another for remuneration and who is dependent on the other economically.²⁶
- Introducing a new **“autonomous workers”** category in the CLC to cover people who perform services comparable to employees, but whose contractual arrangements differ.²⁷

Some policy options aim to **maintain the definition of workers as employees to ensure continuity of coverage of employment standards when conditions of employment change.**²⁸ These include:

- Challenging the employment relationship status choice given by employers.²⁹
- Extending coverage to federal workers beyond Canada, if they work partly in Canada and partly outside.³⁰
- Continuing to define workers as employees, even after administrative or operational reorganization of the firms have occurred that would otherwise define their status as independent contractors – a scenario that exists, but is not enforced, in Quebec.³¹
- Ensuring that trustees in receivership still have the same employment standards obligations under the CLC.³²

4.1.2 Misclassification of employees

In some cases, employers will intentionally or unintentionally misclassify employees as independent contractors, thus attempting to put them outside the scope of employment standards. The following set of policy options looks at **reducing misclassification to expand the number and type of workers covered under employment standards**. These include:

- **Addressing misclassification** by developing legislation (as in some U.S. states),³³ coordinating with other government agencies and stakeholders,³⁴ or enacting proactive enforcement, public education, and training of employment standards officers on this issue.³⁵
- **Discouraging employers from coercing workers into accepting an incorrect status,**³⁶ which could include identifying and holding employers to account for misclassification,³⁷ and developing forms of recourse.³⁸
- **Reducing instances of misclassification** by introducing the presumption of an employee-employer relationship,³⁹ or placing the legal onus on employers to prove the employment relationship.⁴⁰

Some challenges surround a worker’s understanding of whether they are misclassified and whether or not they are covered by employment standards. A workers’ misclassification can have major repercussions on their ability to access programs and the taxes they must pay. Policy options to address this issue **involve clarifying the employment relationship in the legislation**⁴¹ and include:

- **Establishing measures to assess the employment relationship.**⁴²

- Clarifying the **definition of an “independent contractor”** and clarifying that independent contractors are not covered under Part III of the CLC.⁴³
- **Using written publications** to publicize the difference between contractors and employees, as is practiced in Alberta.⁴⁴
- Requiring employers to provide employees and other workers with **simple notice of their status** under the CLC.⁴⁵

4.1.3 Parity

Another issue focuses on the different treatment of forms of work under employment standards. **These options aim to achieve parity of treatment between non-standard and standard forms of employment.** For example, this could include implementing parity of conditions for part-time and full-time workers.⁴⁶ Other strategies include:

- Banning differential treatment through individual or collective agreements based on **hiring date** by employers for workers in the same workplace.⁴⁷
- Implementing parity for **specific types of workers**, such as fixed-term contract workers and⁴⁸ non-standard workers.⁴⁹

4.1.4 Exemptions

There are currently exemptions to employment standards based on workplace size, occupation, age, type of work, and term of employment. These exemptions limit the scope of employment standards. Thus, one set of policy options examines common exemptions to employment standards, to check that such exemptions do not compromise coverage. These options include **prohibiting any exemptions**,⁵⁰ **updating, reviewing and streamlining each exemption**;⁵¹ or **removing occupational-specific exemptions**.⁵²

4.2 Awareness

A third area focuses on awareness of employment standards. Overall, these options aim to address the issue of workers being unaware of which rights if any cover them. **This is particularly important as the employment standards enforcement system relies on workers to be aware of their rights and to initiate complaints when their rights are not respected.**

One set of policy options focuses on **generally improving awareness** of employment standards through education. These options include:

- Ensuring that **educational materials reflect changing practices**.⁵³
- Developing a **strategic plan** to build awareness,⁵⁴ such as a public awareness campaign,⁵⁵ to target new labour market entrants.⁵⁶
- **Targeting** employers,⁵⁷ employees,⁵⁸ or specific groups such as those most in need,⁵⁹ high-risk individuals,⁶⁰ informal businesses,⁶¹ SMEs⁶² and healthcare professionals.⁶³
- **Integrating** education into provincial inspections,⁶⁴ or establishing a specific unit in the federal Labour program to deal with improving education.⁶⁵
- **Improving funding and resources** available for education and information through the Labour Program.⁶⁶

Another set of options entails building on networks of individuals and organizations to help with education. These options include:

- Funding,⁶⁷ or using community organizations, workers’ organizations,⁶⁸ and industry organizations⁶⁹ to build awareness of standards.

- Developing partnerships to enhance awareness and effectiveness of standards,⁷⁰ which could include employers,⁷¹ employees,⁷² community organizations⁷³ employer associations,⁷⁴ unions,⁷⁵ legal clinics,⁷⁶ advocacy groups,⁷⁷ the Ministry of Labour with community organizations,⁷⁸ and the federal Labour Program with organizations representing non-union workers.⁷⁹

A final set of options focuses on the type of educational materials and tools. These options suggest:

- Summaries of standards, common problems, and the claims process.⁸⁰
- Materials in handout format,⁸¹ in the worker's first language.⁸²
- An 800 number and a website for federal labour standards.⁸³

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 PEPSO, 2013

² Vosko, 2013

³ Human Resources and Skills Development Canada, 2011

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

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

⁶ Labour Program, 2013a

⁷ Government of Canada, 2009a

⁸ Vosko, 2013

⁹ Ontario Ministry of Labour, 2011a

¹⁰ Labour Program, 2013b

¹¹ Ontario Ministry of Labour, 2013d

¹² ILO, 2011

¹³ Workers' Action Centre, 2007; Metcalf Foundation; Metcalf Foundation, 2012; Law Commission of Ontario, 2012; ILO (Global Union Research Network), 2009; Social Planning Toronto, 2009; Workers' Action Centre & Parkdale Community Legal Services, 2008; MISWAA, 2006; Global Union Research Network, 2009 citing International Labour Organization

¹⁴ Solidar, 2010

¹⁵ MISWAA, 2006; Workers' Action Centre & Employment Standards Work Group, 2005

¹⁶ Canadian Policy Research Networks, 2006; Workers' Action Centre & Employment Standards Work Group, 2005

¹⁷ Access Alliance, 2011

¹⁸ Law Commission of Ontario, 2012

¹⁹ Workers' Action Centre & Parkdale Community Legal Services, 2009

²⁰ Institute for Competitiveness and Prosperity & Martin Prosperity Institute, 2013

²¹ Global Union Research Network, 2009 citing International Labour Organization

²² Workers' Action Centre, 2007; Wellesley Institute, 2011a

²³ Lewchuk, Clarke, & De Wolff, 2011 (Fudge, Tucker and Vosko, 2002; ILO 2006); Fudge, 2003

²⁴ Bernier, Valee, & Jobin (Quebec Ministere du Travail), 2003

²⁵ Arthurs (Human Resources and Skills Development Canada), 2006

²⁶ Bernier, Valee, & Jobin (Quebec Ministere du Travail), 2003

²⁷ Arthurs (Human Resources and Skills Development Canada), 2006

²⁸ Arthurs (Human Resources and Skills Development Canada), 2006

²⁹ Global Union Research Network, 2009

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- ³⁰ Arthurs (Human Resources and Skills Development Canada), 2006
- ³¹ Bernstein, 2006; Workers' Action Centre & Parkdale Legal Community Services, 2012
- ³² Arthurs (Human Resources and Skills Development Canada), 2006
- ³³ International Labour Organization, 2013c
- ³⁴ Wellesley Institute, 2011a
- ³⁵ Law Commission of Ontario, 2012
- ³⁶ Arthurs (Human Resources and Skills Development Canada), 2006
- ³⁷ Wellesley Institute, 2011a
- ³⁸ Bernstein, 2006
- ³⁹ Bernier, Valee, & Jobin (Quebec Ministere du Travail), 2003
- ⁴⁰ Wilson, 2013; Wellesley Institute, 2011a
- ⁴¹ Global Union Research Network, 2009
- ⁴² ILO, 2011
- ⁴³ Arthurs (Human Resources and Skills Development Canada), 2006
- ⁴⁴ Alberta Employment and Immigration, 2008
- ⁴⁵ Arthurs (Human Resources and Skills Development Canada), 2006
- ⁴⁶ ILO, 2011
- ⁴⁷ Bernstein, 2006
- ⁴⁸ Vosko, 2010
- ⁴⁹ Bernier, Valee, & Jobin (Quebec Ministere du Travail), 2003
- ⁵⁰ Wellesley Institute, 2011a
- ⁵¹ Law Commission of Ontario, 2012
- ⁵² Workers' Action Centre & Employment Standards Work Group, 2005
- ⁵³ Workers' Action Centre, 2007
- ⁵⁴ Workers' Action Centre & Employment Standards Work Group, 2005
- ⁵⁵ Law Commission of Ontario, 2012; Workers' Action Centre, 2007
- ⁵⁶ Canadian Policy Research Networks, 2006
- ⁵⁷ Workers' Action Centre & Employment Standards Work Group, 2005; Arthurs (Human Resources and Skills Development Canada), 2006
- ⁵⁸ Workers' Action Centre, 2007; Workers' Action Centre & Employment Standards Work Group, 2005; Arthurs (Human Resources and Skills Development Canada), 2006
- ⁵⁹ Workers' Action Centre, 2007
- ⁶⁰ Law Commission of Ontario, 2012
- ⁶¹ Small Business Council, 2005
- ⁶² Arthurs (Human Resources and Skills Development Canada), 2006
- ⁶³ Healthy Debate, 2013
- ⁶⁴ Workers' Action Centre, 2007
- ⁶⁵ Arthurs (Human Resources and Skills Development Canada), 2006
- ⁶⁶ Arthurs (Human Resources and Skills Development Canada), 2006
- ⁶⁷ Workers' Action Centre & Employment Standards Work Group, 2005
- ⁶⁸ Workers' Action Centre, 2007
- ⁶⁹ Workers' Action Centre & Employment Standards Work Group, 2005; Workers' Action Centre, 2007
- ⁷⁰ Arthurs (Human Resources and Skills Development Canada), 2006; CivicAction, 2011c
- ⁷¹ Law Commission of Ontario, 2012
- ⁷² Law Commission of Ontario, 2012; Access Alliance, 2011
- ⁷³ Law Commission of Ontario, 2012
- ⁷⁴ Arthurs (Human Resources and Skills Development Canada), 2006
- ⁷⁵ Arthurs (Human Resources and Skills Development Canada), 2006
- ⁷⁶ Arthurs (Human Resources and Skills Development Canada), 2006
- ⁷⁷ Arthurs (Human Resources and Skills Development Canada), 2006
- ⁷⁸ Vosko, Tucker, Thomas, & Gellatly, 2011
- ⁷⁹ Arthurs (Human Resources and Skills Development Canada), 2006
- ⁸⁰ Workers' Action Centre & Employment Standards Work Group, 2005
- ⁸¹ Law Commission of Ontario, 2012

⁸² Workers' Action Centre, 2007; Workers' Action Centre & Employment Standards Work Group, 2005; Workers' Action Centre & Parkdale Community Legal Services, 2009

⁸³ Arthurs (Human Resources and Skills Development Canada), 2006