Modernizing Part III of the CLC

This informal submission draws on research findings of “Closing the Employment Standards Enforcement Gap: Improving Protections for People in Precarious Jobs,” a research partnership funded by the Social Sciences and Humanities Research Council of Canada based at York University.

General Topics (by number assigned by Labour Program)

1. New Data (October)

Given that we are concerned with precarious employment and vulnerable workers in the federal jurisdiction, it is necessary to consider carefully the way we approach capturing precariousness statistically.

The snapshot of the federally regulated private sector and the comparison of federal and Canadian private sectors posted to the website provides important data regarding employment status (paid vs. self-employment) and forms of employment (i.e., full time vs. part-time, permanent vs. temporary). Obviously, it is critical to understand trends in different employment statuses and forms of employment, and especially “non-standard” forms as they tend to more precarious.

However, trends in forms of employment provide an incomplete picture of the spread of precarious employment.¹ This is because precarious employment and non-standard employment are not synonymous; indeed, some “non-standard” employment may not be precarious, and some “standard” employment may in fact be highly precarious.² For this reason, it is important to capture other dimensions of labour market insecurity, such as uncertainty in continuing employment, low income, a lack of control over the labour process, and limited access to regulatory protection, in relation to form of employment, as these are central to the experience of precarious employment and vulnerability, including among federally-regulated employees.

With respect to degree of certainty of continuing employment, including protection from job churn, job tenure provides a good indicator. Under Part III of the *Canada Labour Code* (CLC), access to statutory and social benefits, such as vacation time and certain leaves, only accrues after a certain period. In recent decades, considering the case of Ontario, the jurisdiction in which we have conducted the most recent data analysis, the proportion of employees who had worked for an employer for less than a year has remained around 20% \(^3\). More notable, however, is that the share of private sector employees in the province with short job tenure is almost double that of the public sector, where (in contrast to the private sector) much higher rates of unionization have helped to ensure that workers have the opportunity to apply for available positions and develop a career.

Regarding low-income, low hourly wages - defined as less than 2/3rds of the median hourly wage for full-time employees – are a clear indicator of low income. \(^4\) Low-income employees are more likely to be reliant on minimum labour standards, such as those setting out minimum wages.

With respect to degree of control over the labour process, union status is a critical indicator. It affects the extent to which employees rely upon minimum labour standards since those who lack access to a collective agreement regulating workplace conditions and grievance processes (i.e., non-unionized employees) rely on the Part III of the CLC. Such employees also generally have limited capacity to assert their voices in the workplace, tend to have more limited control over the pace and content of work, and generally have lower wages than do employees covered by a collective agreement.

Finally, another good indicator of limited access to regulatory protection, and a predictor of limited labour standards enforcement, is small firm size. Previous research demonstrates how precarious employment is more prevalent in small firms, \(^5\) due to such firms’ vulnerability to instabilities generated by rapid fluctuations in demand. Employees in small firms (of fewer than 20) are less likely to see their rights enforced because it is difficult for an under-funded labour inspectorate to spread its resources across workplaces. Based on our recent research conducted in Ontario, ES complaints received by the Ministry of Labour (MOL) are filed disproportionately by employees of small businesses that employ fewer than twenty people. Compared to medium or large firms, small firms are also least likely to engage in voluntary restitution when found to have

---


\(^4\) This measure reflects the approach of the OECD, which defines low-wage work as that where remuneration is less than 2/3rds of the median wage for full-time employees. The OECD measure is typically calculated using annual income; given the absence of this information in the LFS, hourly wages are used instead.

violated ES; in addition, they are least likely to pay what is owed when ordered to do so by the MOL.\textsuperscript{6}

The prevalence of precarious employment is indeed shaped both by employment status and form of employment. For example, in Ontario, employees in part-time temporary employment, a form of employment increasing in the province and elsewhere in Canada, and defined by both uncertainty and a paucity of hours, experience extensive precariousness. Eighty-two percent of these employees are non-unionized, 70\% earn low wages, and 47\% have worked at the same employer for less than a year.\textsuperscript{7} In contrast, employees in full-time permanent employment are the least likely to experience precariousness. In particular, they are much less likely to earn low wages than workers in all other forms of employment. Notably, part-time employees – both permanent and temporary – are more likely to report holding multiple jobs, suggesting that for some of these workers, their part-time status is involuntary and does not provide sufficient income.

In exploring the nature and magnitude of precarious employment and vulnerability among federally-regulated workers, we suggest that the Labour Program adopt a multi-dimensional conception of precarious employment and thus an approach to measurement that takes into consideration indicators of dimensions of labour market insecurity in relation to form of employment.

Precarious employment is also shaped by sex, age, immigration status, and racialization. In other words, it affects workers belonging to certain social groups more than others. For example, our research on Ontario likewise shows that young people aged 15 to 24 are far more likely to hold part-time and temporary forms of employment. Compared to their older counterparts, young people are more likely to hold non-unionized positions, work in small firms, earn low wages, and have short job tenure. In addition, young people are more likely to report working multiple jobs.

Gender also shapes employees’ experience of precariousness. Most notably, once again considering Ontario, women are much more likely than men to earn low wages: in 2016, more than a third of women (36\%) earned low wages, compared to only 27\% of men.\textsuperscript{8}

Recent immigrants, that is, those who immigrated less than five years ago, a group comprised of many people of colour, also experience high rates of precarious employment.\textsuperscript{9} In Ontario, they are more likely to hold temporary positions than are

\begin{footnotesize}
\begin{itemize}
\end{itemize}
\end{footnotesize}
Canadian-born or settled immigrants in the province. Almost 20% of recent immigrants are engaged in temporary employment compared to 12% of Canadian-born or settled immigrants. Recent immigrants in Ontario are also more likely to have jobs that are non-unionized and low-waged and to have a job tenure of less than one year.10

The gendered nature of certain facets of precariousness is even more pronounced among recent immigrants than among those that are more settled or Canadian born. For instance, in Ontario, and presumably elsewhere in Canada, recent immigrant women are more likely than their male counterparts to be employed in small firms, whereas no such gender disparity exists among settled immigrants and the Canadian-born.11

While neither time nor resources permitted us to conduct a similar analysis of federally-regulated employees for this exercise, we would urge the Labour Program to undertake this type of multi-dimensional portrait, which would also be invaluable in addressing Topic 14 on vulnerable workers (December 18).

2. Business Case (October) (What evidence is there that stronger labour standards have a negative or positive impact on employers (e.g. costs, recruitment and retention, productivity and profitability)? Is there a business case which demonstrates that increasing labour standards protections benefit employers– in the short-term, in the long-term? Do certain protections provide relatively more positive impacts for employers than others? Which ones? Are there employer compliance requirements that could be streamlined or otherwise changed to reduce administrative costs on employers, without negatively affecting workers?)

We would like to underline the business case for the Labour Program’s continued efforts to enhance the enforcement of Part III of the CLC. Effective enforcement helps to create a level playing field for businesses, and fosters certainty among employers. As a growing cross-national literature on labour standards demonstrates,12 by allowing violations to go unaddressed, ineffective enforcement fuels downward pressure on working conditions in a given labour market, rewards unscrupulous employers and puts law-abiding ones at a competitive disadvantage.

3. Non-Unionized Workers (October) (We want to learn more about the lived realities of non-unionized workers and others who are more at risk of being in lower quality jobs. Are you aware of any recent research, studies or reports that focus on this issue?)

11 At the same time, in Ontario, differences in the share of low-wage employment between recent immigrant men and recent immigrant women (a 5 percentage point difference) are smaller than those among settled immigrants and the Canadian born (a 9 percentage point difference), due in part to the much higher proportion of recent immigrant men holding low wage jobs. See Vosko, L.F. et al (2017) “Agenda for Change,” p. 8.
Many studies of labour standards enforcement point to barriers that non-unionized workers face in exercising voice in the workplace.13 A chief barrier, pronounced among workers who lack access to collective representation, is the risk of reprisal, which often takes the form of job loss. The literature on labour standards violations points consistently to reprisals as a core problem underlying the effectiveness of complaints-based systems of enforcement. Reprisal provisions on the books often fail to protect employees who are still employed by the employer against whom the complaint has been made.14

Our research on Ontario’s ES complaints system, administered by its MOL, indicates that only a small minority of employees attempt to access the legislative protections of ES while still on the job. Consistently fewer than 10% of complaints in each fiscal year from 2007/08 to 2014/15 come from employees who are working for the employer they are filing a complaint against.15 At the federal level, research undertaken in preparation of the Fairness at Work report indicated that 92% of complainants had already left their job before complaining.16 As Arthurs noted, “[t]his striking statistic suggests that some workers are so concerned that they will be fired that they abandon their statutory rights.”17

Other obstacles can be particularly acute among workers in precarious jobs, such as the difficulty of getting by on Employment Insurance benefits of 55 per cent (the current replacement rate) of often already meagre earnings if they lose their jobs due to retaliation (and if they qualify).18

Barriers to the complaints system for those lacking collective representation can also be exacerbated by other forms labour market disadvantage related to employees’ social location. For example, those with precarious immigration status, such as migrant workers, recent immigrants, and refugees may be more hesitant to engage in the formal complaints process. As will be discussed below, under Topic 4 on “Modernizing Enforcement,” Labour Program officials may wish to consider additional measures that

would make the Program’s complaint intake system more supportive for non-unionized employees facing barriers to speaking out.

4.3 Priority Areas for Labour Standards Modernization (October) *(What do you think are the top three provisions in Part III of the Code that need to be modernized? Why?)*

Three areas should take priority in modernizing Part III of the CLC. They relate to 1) Scope of Coverage; 2) Employer Liability; and, 3) Enforcement. The matters of scope of coverage and employer liability are addressed under Topics 5 and 10 respectively, and hence they are not elaborated at length here.

4.1 Scope of Coverage

Part III of the CLC could be augmented with respect to its scope of coverage to better protect many individuals who work for remuneration under conditions that are neither clearly employment nor self-employment. Like all protective labour and employment statues, the CLC defines to whom it applies and to whom it does not. However, workers sell their services in the labour market under a variety of contractual forms, including as employees and as self-employed workers or independent contractors. Historically and contemporaneously, governments have chosen to limit the scope of coverage under the CLC to a sub-set of employees rather than to almost all workers as does labour law such as the Ontario *Occupational Health and Safety Act*.

Changes to the organization of employment are placing more people who need workplace protections outside the scope of Part III. Employment conditions for many in the federal jurisdiction will be undermined unless the scope of Part III’s coverage is updated to reflect current workplace realities. Options for doing so are outlined under topic five on coverage.

4.2 Employer Liability

Just as labour and employment laws create rights for employees, they also impose correlative duties and therefore must identify who is responsible for their fulfillment. Traditionally, the answer was obvious: the direct employer owed the duty to comply with the minimum standards and could be held liable for failing to do so. However, the changing workplace has resulted in a fissuring of what were formally integrated employing entities through sub-contracting, franchising, supply-chains, and use of temporary help agencies, among other mechanisms. These arrangements often create conditions that are conducive to labour standards violations and also pose challenges to effective enforcement. For these reasons, how Part III allocates responsibility, and how, in fissured contexts, other entities can be made jointly responsible for the duties imposed on the direct employer is a key area of modernization. Options for enhancing Part III’s employer liability provisions are outlined in detail under Topic 10 below.

4.3 Modernizing Enforcement
4.3(a) Proactive and Strategic Enforcement

Part III is enforced primarily by investigating workers’ individual claims of employer violations. Studies of other jurisdictions show that only a small fraction of violations will ever be redressed formally through the complaints system since the vast majority of employees who experience a workplace violation do not complain. Reporting on the U.S. case, for example, researchers estimate that for every 130 violations of the Fair Labor Standards Act’s overtime provisions, only one complaint is received by the U.S. Department of Labor’s Wage and Hour Division (WHD). Similarly, in Ontario, the decision of an employee to file a complaint hinges on their perception of the effectiveness of the MOL’s investigation process, the assistance available throughout the complaint process, the likelihood of recovering what they are owed, and the risk of employer retaliation. As the Fairness at Work report likewise indicates, complaints under Part III of the CLC likely reflect only the tip of the iceberg of workplace violations.

Given the inherent limitations of the complaints system, albeit a necessary and central component of the enforcement regime in ensuring compliance among federal jurisdiction employers, Labour Program officials may wish to consider investing further in proactive and strategic enforcement. Proactive enforcement strategies attempt to allocate enforcement resources in accordance with established priorities. This allocation process often involves the identification of sectors or particular employers where enforcement officials have reasonable grounds for believing that violations are more prevalent and/or that workers are more reluctant to raise complaints. In recent years, the Ontario MOL has sought to expand its proactive enforcement practices. Proactive inspections are effective in finding otherwise hidden violations, evidenced by the fact that such inspections tend to result in high rates of discovered violations. Broadly, the percentage of inspections that detected violations in Ontario ranged from 65% to 77% in the years between 2011/12 and 2014/15. Inspectorates in other jurisdictions have also sought to enhance their proactive approaches. For example, the WHD under the Obama administration sought to increase the number of proactive inspections, while also reducing the number of such inspections that result in no violations being detected, and it achieved considerable success.

Proactive measures can be usefully combined with a strategic enforcement orientation. Strategic enforcement is premised on the recognition that labour standards enforcement is becoming more challenging for two related reasons: first, because of changes in industry structure that create greater distance between employees and employing entities, such as growing recourse to sub-contracting; and, second, because, alongside such developments enforcement resources have not kept pace with the expanding regulatory responsibilities of labour inspectorates. To counter these challenges, strategic enforcement is designed to

---

maximize enforcement efficacy in this new and more challenging context. It calls for inspectorates to proactively target firms at the top of industry structures, as it is these firms whose policies and practices shape workplace practices down the supply chain by sub-contractors, franchisees, and subsidiary corporations. A strategic approach aims to utilize the monitoring and compliance mechanisms that are already in place in these organizational arrangements and networks. It requires inspectorates to develop a sophisticated understanding of business environments that may be conducive to labour standards violations, and to practice a kind of “regulatory jujitsu,” which uses compliance and deterrence measures in a variety of strategic combinations that are responsive to the context.

As recognized in the Fairness at Work report, investing in proactive and strategic enforcement, while maintaining the complaints intake system, requires expanding the Labour Program’s staff compliment. It also entails continued investment in the Program’s analytical capacity through in-house initiatives and collaborations such as the Canadian Labour Code Data Access Initiative.

4.3(b) Accessible Complaints System

Federal Labour Program officials may also wish to consider options for improving the accessibility of the complaints system.

As mentioned above, the risk of reprisal confronting aggrieved employees is a significant barrier to complaint making. While Part III provides a right to complain, as well as protection against unjust dismissal for employees with one year of employment, the legislation falls short of providing robust protections against the range of adverse consequences that can be suffered by complainants. As Arthurs observed, “while Part III protects whistle-blowers from reprisal by their employer, it does not do so clearly or effectively. The absence of effective protection may mean that some egregious offenders are able to continue to violate the law long after they might otherwise have been apprehended.”

A number of jurisdictions in the US have sought to strengthen the reprisal provisions of their respective labour laws. For example, in 2011, New York State strengthened its law prohibiting retaliation against employees who complained about a possible violation to their employer or to the State Labour Department (about their employer). For engaging in retaliation, employers can be assessed a penalty from $1,000 to $20,000 (increased from $10,000) among other measures. Additionally, New York State defines retaliation broadly to include any unfavorable action against an employee for complaining about labor law violations or reporting them to the authorities, potentially including dismissal, a cut in hours, assignment of the employee to less desired hours or location, a cut in pay, a failure to give the employee customary raises, more intensive supervision, a disciplinary

---

action, a demotion or transfer, withdrawal of previously enjoyed privileges, assignment to more difficult tasks, and demanding increased production.

Other U.S. states are adopting stronger language relating to the presumption of retaliation. For example, the State of Arizona and the District of Columbia both specify that adverse action against a person within 90 days of asserting a right under labour law “...shall raise a presumption that such action was retaliation, which may be rebutted by clear and convincing evidence that such action was taken for other permissible reasons.”24 The State of California’s anti-retaliation measures are noteworthy for the protection they offer workers with insecure residency status. Recently passed laws prevent an employer from threatening to report an employee’s immigration status, or engaging in immigration related acts such as requesting further proof of an employee’s authorization to work (beyond that required by federal law), or contacting immigration authorities to report an employee suspected of being undocumented. If an employer takes these actions within 90 days of an employee filing a claim, employees can seek damages and the employer faces the potential suspension or revocation of their business license.25 Strengthening the anti-reprisal protections of Part III would help to make the Labour Program’s complaints system more accessible. As part of such measures, the Labour Program may wish to consider eliminating the 1-year requirement for filing unjust dismissal complaints since the lack of protections for many employees with less than one year weakens the accessibility of the complaints system.

While the Labour Program has procedures in place for handing confidential complaints, officials may wish to consider making greater allowance for third party complaints that trigger a full inspection of the workplace. The Fairness at Work report notes that, while it is administrative practice to discourage third party complaints, doing so “impairs the ability of advocacy centres and legal clinics to carry claims forward and, as a side effect, prevents them from carrying some of the burdens that now fall entirely on the Inspectorate.”26 To develop more robust enforcement machinery, which strategically uses the complaints process to identify and correct multiple violations allowing for complaints by third parties is required. Research suggests that while some violations may be isolated to a single worker, many are being repeated across the firm and involve multiple employees, especially in certain industries.27

Finally, the time limit of Part III complaints is six months for both monetary and non-monetary violations. This time limit is far shorter than the 2-year limitation on

complaints in Ontario, and should be extended in light of the fact that most complainants come forward only after leaving the employer they are complaining about. While LSOs have the discretion to accept complaints filed after the six-month limit, prospective complainants with valid complaints may be discouraged from coming forward if they are aware of common practice.

4.3(c) Sufficient Deterrence

Labour standards enforcement emphasizes compensating the individual complainant for her or his loss, rather than using punishment to alter the behavior of employers. Yet a growing body of research on the changing nature of employment points toward the need for meaningful punishment of violations. In many sectors of the economy, employment is being pushed into increasingly competitive environments where employers are under enormous pressure to reduce costs. Since labour costs often comprise a considerable portion of total costs in these industries, the incentive to violate the law grows, resulting in a greater propensity to engage in reckless or intentional violations. The low risk of getting caught, coupled with the general weakness, and limited use of meaningful penalties in many jurisdictions, mean that unscrupulous employers have little incentive to refrain from violations.

In recognition of this problem, in 2014 the federal government increased the fines for non-compliance with Part III. Additional penalties were included in the Budget Implementation Act, 2017. These are positive developments in line with actions undertaken in many jurisdictions that are augmenting deterrence measures in ways that inject genuine risk into labour standards violations. In addition to increased fines, a number of U.S. jurisdictions have implemented other penalties such as licence debarment (Cook County, Illinois, Jersey City, among others), and liquidated damages (New York State) including treble damages (District of Columbia). In Ontario, the Fair Workplaces, Better Jobs Act, 2017 also allows for interest to be awarded on employees’ unpaid wages. Labour Program officials may thus consider the Program’s use of deterrence measures and explore options for increasing their use. On the basis of a growing body of scholarly evidence, we strongly support continued efforts to “…ratchet up the price of non-compliance.”

4.3(d) Strengthened Recovery

28 In 2014, the Government of Ontario increased the time limit for filing claims for unpaid wages from six months to two years. Simultaneously, it also increased the period for which unpaid wages are recoverable from six months to two years.


31 Arthurs, “Fairness at Work,” p. 196.
Recovery of unpaid wages can be a challenge for all labour inspectorates, and there is no reason to assume that the Labour Program is exceptional in this regard. The few studies that take wage recovery as their focus point to poor recovery rates among enforcement agencies. For example, in a study of wage recovery in California, Cho et al found that, between 2008 and 2011, only 17 per cent of employees who received a judgment in their favour received any payment. Our research on Ontario’s Employment Standards Act (ESA) indicates that only a minority of employers comply with Orders to Pay. The rate of full payment of such Orders was 40 percent in 2012/13, but has since declined to 37 percent in 2014/15. A series of interrelated problems appear to fuel deficiencies in the collection of wages. These problems include outmoded legislative and administrative arrangements that are ill-equipped to protect employees in the event of employer bankruptcy or in the face of other strategies adopted by employers to evade payment, including by dissolving their business or transferring assets to other parties, as well as a lack of effective mechanisms available to government officials responsible for ES enforcement, especially compared to other arenas where collection of payment is an issue, such as in tax collection. A key lesson to be drawn from studies of wage recovery is that the limited capacity of inspectorates to collect back wages for employees erodes all other aspects of labour standards legislation and enforcement.

The Federal Labour program may wish to consider policy developments in other jurisdictions. For example, Ontario’s Fair Workplaces Better Jobs Act strengthens recovery provisions of the province’s Employment Standards Act. Specifically, its provisions allow a collector authorized by the Director of Employment Standards to issue warrants, place wage liens on the property of employers, thus making creditors remedies immediately available upon the issuing of an Order to Pay rather than requiring filing the order with the court. By contrast, as we understand it, a more laborious process is in place at the federal level. An order may be registered in a federal court following a request by a party to the order to the Minister, and following court proceedings, the order may be upheld as a court judgement. Recent developments in Ontario suggest ways of expediting this process.

Additionally, in the United States, several jurisdictions are implementing licence debarment to improve wage recovery. While licence debarment does not directly augment collections capacity, it makes non-compliance with judgments costly and risky for employers. For example, in Jersey City, New Jersey, under the recently passed Wage Theft Ordinance, the City Department responsible for issuing a business licence (for example the Department of Health and Human Services in the case of a food service establishment) sends a request to the State’s Department of Labor and Workforce Development for any wage complaint forms filed against a licence applicant. Businesses with outstanding orders have 30 days to prove payment, or that they have appealed the

---

order. Failure to pay will result in business licence suspension. In Ontario, the Interim Report of the Changing Workplaces Review set out the option of granting the MOL the power to suspend “operating licences, liquor licences, permits and driver’s licences of those who do not comply with orders to pay.” While licence debarment was not included in the Fair Workplaces, Better Jobs Act, 2017, despite the conclusions of the province’s independent Changing Workplaces Review, the measure warrants consideration by Labour Program officials given its best-practice status.

5. Labour Standards Coverage (November 20th) (How could Part III be updated to help address the misclassification of ‘employees’ as ‘independent contractors’ and to better protect workers that fall somewhere in between these two categories, such as gig workers and dependent contractors? Should the current binary approach be updated, for example by introducing a modern definition of ‘employee’ that would capture the workers who fall in between, or by introducing a new intermediary category of worker?)

In order for provisions of Part III the CLC to apply, there must be an employment relationship, although the meaning of ‘employee’ and employer are left undefined. Part III thus excludes as “independent contractors” all persons engaged in work for remuneration who do not clearly fall within the traditional legal parameters of employment. In reality, however, a large body of literature demonstrates that employment and independent contracting do not exist as discrete categories separated by a bright line, but rather are endpoints on a spectrum of work arrangements. Employers therefore have the power to substitute work arrangements outside of the definition of employment. Many firms are constructing work arrangements that are neither clearly employment nor independent contracting. For example, one Chatham car dealership recently told its employees that they will no longer be paid by the hour for their driving services. Instead, drivers will be independent contractors and paid on a “per trip” basis. The employer took this action to avoid compliance with the Fair Workplaces, Better Jobs Act, 2017. As the current class action lawsuit of Uber drivers in Ontario also makes clear, ‘new’ forms of work for remuneration are making it more and more difficult to determine who is covered by labour standards legislation. Several legislative measures hold potential to improve and clarify the scope of Part III of the CLC’s coverage and liability, and they are discussed below.

5.1 Expanding the Coverage of Part III of the CLC

One such measure is to expand the scope of Part III of the CLC to include all workers dependent upon their capacity to sell their labour power. Ultimately, despite its complexities, given the changing nature of employment, arguably, the definition should be broadened along the lines of Ontario’s Occupational Health and Safety Act, which

defines a worker as a “person who is paid to perform work or supply services for monetary compensation.”

A modest step in this direction would be to expand the definition of employee to include dependent contractors. As recognized in the final report of Ontario’s Changing Workplaces Review, such a provision would be a positive step that responds to the reality that work arrangements exist on a continuum and that the traditional category of employee may not adequately capture the full range of workers who are in need of statutory protection against unacceptable forms of work or working conditions. The effect of such a measure would be to extend outwards the boundaries of workplace protections.

5.2 Make Misclassification an Offence

Uncertainty around the CLC’s boundaries of coverage also fuel the misclassification of employees as independent contractors so that employers can evade their legal obligations under the Code. While reliable statistical data on the prevalence of misclassification among federally-regulated workers in Canada does not yet exist, it is recognized as a frequent occurrence in various jurisdictions across the country, such as in Ontario. In the United States, recent studies estimate that between 10% and 20% of employers misclassify at least one of their employees as an independent contractor, and that misclassification is likely increasing. Misclassification prevents workers from accessing workplace protections, as well as other employment-related benefits such as workers’ compensation and employment insurance. Misclassification also deprives government of much-needed payroll and income taxes.

There is currently no provision in Part III of the CLC that makes employee misclassification an offence. The detection of misclassification depends on employee complaints under other employment standards or on proactive inspections. Amending the CLC to make employee misclassification a separate and distinct offence holds potential to reduce its occurrence. Such a provision was added to the Ontario Employment Standards Act with the passage of the Fair Workplaces, Better Jobs Act, 2017. Such provisions exist in other jurisdictions. For example, California’s Employee Misclassification Act, which came into effect in 2012, amended the state’s labour code to levy substantial fines on employers found guilty of “willful” misclassification of

35 Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 1.
employees as independent contractors. These include a civil penalty between $5,000 and $15,000 USD for each violation, which can be increased to $10,000 and to $25,000 USD if the activity is deemed to be repeated. California’s Employee Misclassification Act also mobilizes the threat of reputational loss: it requires employers found to have misclassified workers to display a notice on the company website, or in another prominent space, which indicates that “the Labor and Workforce Development Agency or a court…has found that the person or employer has committed a serious violation of the law by engaging in the willful misclassification of employees.”

Making misclassification an offence would also allow the Labour Program to better track the prevalence of misclassification complaints.

5.3 Introduce a Presumption of Employee Status

There is also a need to create a legal presumption of employee status for workers performing or providing labour services for a fee. The effect of a legal presumption of employment status is to shift the burden of proving that a worker is not an employee onto employers. The Fairness at Work report advances a similar recommendation: “if an employer fails to provide a worker with a notice of his or her employment status, subject to written evidence to the contrary, the worker should be presumed to be an employee under Part III”.

To strengthen the presumption, the law could also specify what the employer must demonstrate to overcome the presumption. As of 2016, twenty-seven American states have what is called the “ABC” test, which requires employers to show:

(a) an individual is free from control or direction over performance of the work, both under contract and in fact;
(b) the service provided is outside the usual course of the business for which it is performed; and,
(c) an individual is customarily engaged in an independently established trade, occupation, or business.

In sum, expanding the definition of employee to include dependent contractors, making misclassification an offense, and establishing a presumption of employee status all hold promise in efforts to modernize the CLC in light of contemporary workplace practices.

7. Leaves (November 27th) (What do recent studies reveal about patterns of use by employees? Is there evidence that these entitlements, whether paid or unpaid, are not used for their intended purpose?)

---

38 California Labor Code S. 226.8(1). In addition, the legislation allows for fines to be levied against any third party advisors such as an accountant or human resource professional (but not attorneys) who “knowingly advises an employer to misclassify an individual as an independent contractor to avoid employee status” (California Labor Code S. 2753).

39 Arthur’s, “Fairness at Work,” p. 65.

At present, beyond the 3 paid days for bereavement leave after 3 months of employment, all leaves provided for under Part III of the CLC are unpaid job protected leaves. Workers, particularly those that are low–waged, can rarely afford to take leave without pay.

**7.1 Family Responsibility Leave**

Although unlike Ontario and many other jurisdictions outside Canada, where several days of personal emergency leave is now paid, the establishment of a family responsibility leave in the federal jurisdiction is a welcome development. The absence of such a leave has been an obstacle to improved work-life balance given trends in leave taking among employees. Data from Statistics Canada’s Labour Force Survey indicate that Ontario employees’ reasons for leave taking have changed over the past thirty years. Considering, for example, absences for personal emergency reasons among Ontario employees, illness/disability accounts for a shrinking share of lost hours (indeed, it declined from 84% in 1976 to 54% in 2015), whereas personal/family responsibilities account for a growing share of lost hours (from 16% in 1976 to 46% in 2015).

Further, there is a clear differentiation between how men and women in Ontario make use of leaves. In 2015, among men with absences for personal emergency reasons, only 26% of lost hours were for personal/family responsibilities and 74% of lost hours were for own illness/disability. Amongst the comparable group of women, 56% of lost hours were for personal/family responsibilities and only 44% were for own illness/disability.

**Note:** Ontario employees only; Labour Force Survey data from CANSIM Table 282-0213

Such findings reflect the unequal distribution of caregiving responsibilities between men and women. Changing workforce demographics, such women’s increasing participation in employment and the aging workforce, suggest that the reasons behind employees’ use of leave will continue to change.

**7.3 Sick Leave**

Part III of the CLC prohibits dismissal, lay-off, suspension, demotion or discipline for employees with more than three months job tenure who are absent from work due to
illness or injury, for a period of up to 17 weeks. Unlike ES legislation in Ontario, as well as 8 states and 29 cities in the United States, Part III does not provide for paid sick leave. This omission means that many employees will continue to face heightened pressure to work when they are sick. A growing body of research on the problem of presenteeism, or working when ill, demonstrates that its costs are potentially greater than those associated with absenteeism. When employees who are sick go to work instead of rest, individual recovery is delayed, productivity suffers, and co-workers’ and the broader public health can be put at risk. A meta-analysis of existing research on employees who work when they are sick demonstrates that employees’ decisions to do so are shaped by both their employment and financial insecurity and the existence of strict workplace-based absence policies. This evidence supports the addition of at least 7 paid sick days per 12 month period. This amount of paid sick leave is in line with numerous jurisdictions in the U.S. For example, Connecticut, Massachusetts, Oregon and Arizona allow for 40 hours of paid sick leave per year (although some states graduate access to sick leave based on firm size).

9. New Types of Workers (December 4th) (Should Part III be updated to better address non-traditional working arrangements, such as those involving temporary help agencies and the gig economy? Why? If so, with what type of provisions?)

9.1 Temporary Agency Employees

While temporary agency work is not new, it is a persistent phenomenon in Canada’s labour market. Certain features of temporary agency work are the source of growing concern because they depart from basic principles of fairness and decency in employment. These features include the problem of temporary agency workers earning less than client employees who perform substantially the same work; barriers such as high buy-out fees that prevent assignment workers from moving into direct employment with the client firm; and the problem of open-ended placements, commonly referred to as perma temps, among others. To limit the insecurities confronting temporary agency employees, Labour Program officials may wish to consider adding a section to Part III of the CLC that establishes rights for temporary agency employees (with all other relevant parts of the Code pertaining to these workers as well).

To bring the CLC into line with other comparable jurisdictions, the section of Part III pertaining to temporary agency employees would, at a minimum, 1) establish joint and several liability for all monetary and non-monetary violations; 2) provide for equal pay for equal work (equivalent pay and benefits for similar jobs); 3) ensure that temporary agency workers be converted to employees of the client company after a total of three months of assignment at the company; 4) make the client company and temporary help agency provide just cause if, at the end of the assignment period, another worker is hired to do the work previously done by the previous temporary agency worker; 5) establish a cap of 20 percent of the proportion of a client’s workforce that can be temporary agency workers; 6) ensure that agency workers placed in federally regulated industries fall within federal jurisdiction of the CLC to avoid jurisdictional splintering; 7) prevent fees or illegal deductions from wages; 8) prevent agencies from charging a direct or indirect fee for applying for work; 9) publicize mark-ups charged to client companies (the difference between temp workers hourly wage and the hourly fee charged to client company); 10) prevent agencies from limiting a temporary agency worker’s access to direct employment in the client firm, or in a group or industry serviced by the agency (such a measure would include prohibitions such as anti-competition clauses barring workers from seeking employment with client firms and 'buy-out fees' charged to client companies).

9.2 Gig Workers

Extending the coverage of Part III of the CLC to encompass workers defined as those paid to perform work or supply services for monetary compensation would include gig workers. As a start, incorporating a new category of dependent contractor would be helpful in extending protections to gig workers. Yet, if the meaning of dependent contractors is defined too narrowly, so as to only encompass those most resembling employees, it will be of limited value for a growing population of gig workers who may not approximate the norm of dependent contractor (e.g., being dependent on one client) but who warrant protection nonetheless. Labour Program officials may thereby wish to give careful consideration to how to expand the coverage of Part III to include gig-workers.

10. Contracting and Outsourcing through supply chains (December 4th) (What evidence is there about the impact of contracting and outsourcing on the application of labour standards in the federal private sector? What are the potential outcomes of shifts in the boundaries between federal and provincial jurisdictions?)

As with labour standards legislation in many jurisdictions, the scope of employer liability established under the CLC is increasingly outmoded. Traditionally, the direct employer was the entity liable for complying with employment standards. But the increasing use of sub-contracting, franchising, supply chains, and temporary help agencies means that there is often more than one entity involved (directly or indirectly) in directing, controlling, or supervising the employee. These arrangements often result in financial benefits for the lead entity while also increasing the risk of employment standards violations and ineffective enforcement for employees. Moreover, the lead entity often has the capacity to rectify the problem by insisting on contractual terms that hold the immediate employer...
responsible for complying with the CLC. For these reasons, it is no longer adequate to impose duties only on direct employers narrowly conceived. The current law permits liability to be imposed upon parties that are found to be “a single employer” for the purpose of Part III of the CLC; however, this extension of liability is limited because, as underlined in Chapter Five of Fairness at Work, of the procedures for its establishment. As a result, the law fails to sufficiently reduce incentives to enter into particular arrangements for the purpose of avoiding legal duties under Part III of the CLC. The employer liability provisions of Part III of the CLC could thus be improved in several ways that are discussed below.

10.1 A Strengthened Provision on Joint and Several Liability

One option is the creation of a statutory provision that directly establishes in legislation joint and several liability for multi- or related employer situations. Establishing joint and several liability need not require a determination that two or more employers are “a single employer.” Labour Program officials might give consideration to crafting a provision that captures employers who may be related or unrelated, but who have control, directly or indirectly, whether exercised or not. In Ontario’s ES, the definition of employer includes related employer (S.4) and the MOL’s interpretation of the Employment Standards Act potentially allows for joint and several liability to be extended to unrelated employers. A 2015 decision of the NLRB, Browning-Ferris Industries 362 NLRB No. 186, now reversed, also allowed for joint and several liability to be extended to multiple employers regardless of whether they exercised direct or indirect control, only that they possess the power to exercise such control.

The current Part III provision is inadequate not only because it may not be capturing situations in which multiple but unrelated employers can exercise control over a given employee, but because the determination of “single employer” status requires an order of the Minister. The Fairness at Work report notes that requiring such an order is unjustified given the discretion already afforded inspectors over similarly complex determinations such as whether or not an individual is an employee, and that requiring the Minister’s involvement will result in undue delays. For this reason, the Fairness at Work report calls for amendments to Part III of the CLC to empower any person or body with decision-making power under Part III, subject to review, to determine if multiple employers constitute a single employer for purposes of the legislation. We concur with this recommendation, which as our research investigating the situation of Ontario indicates, has only become more pressing the decade since the previous review of Part III of the CLC.

10.2 Expand Joint and Several Liability

---

48 Arthurs, “Fairness at Work,” p. 87.
As a means of ensuring compliance with Part III of the CLC, joint and several liability could also be applied to franchisors. Franchisors have extensive power over franchisees. Franchise agreements impose detailed requirements on franchisees and control how they conduct their businesses to ensure that customers will have the same experience in every franchised location and to protect the brand. In this context, it would not be difficult for franchisors to include requirements regarding adherence to Part III of the CLC in their franchise agreements as well as to provide franchisors with remedies against the franchisees in the event of a labour standards violation for which it is jointly liable.

11. **Scheduling Practices and Hours of Work (December 11)** *(What modifications to Part III would help balance the objectives of predictability, fairness, and flexibility in the workplace?)*

Under the Canada Labour Standards Regulations, employees are entitled to at least three hours of wages when they report to work at the request of the employer, even if they don’t work all three hours.\(^{49}\) Several additional scheduling regulations, such as a new requirement for employers to provide 24 hours notice of shift changes, were passed as part of Bill C-63 (2017). Additional options exist for strengthening provisions around scheduling. Examples found in Ontario’s *Fair Workplaces, Better Jobs Act, 2017* include a right to refuse shifts without repercussion if their employer asks them to work with less than four days' notice; providing employees with three hours of regular pay if a shift is cancelled within 48 hours of its start; and, ensuring that on-call employees are paid three hours of their regular pay rate each 24 hour period they are on call, whether they report to work or not. Labour Program officials may also wish to introduce a requirement for employers to provide employees two weeks notice of their schedule, and to provide new employees a good-faith estimate of the minimum hours of work per month and the days and hours of those shifts.

13. **Equal Pay for Equal Work (Dec 18th)** *(Given employer discretion in determining rates of pay according to diverse criteria (e.g. merit, seniority, output), how can equal pay for equal work provisions ensure that non-standard workers are treated fairly?)*

The principle that workers who do the same or similar work should be paid the same is grounded in equality of treatment. Ending differential treatment in pay would assist women, youth, racialized workers, migrant workers and recent immigrants who are more likely to be in low-waged and in part-time, temporary, seasonal, casual and contract work. Ontario has a long-standing requirement for equal pay for equal work for women. Additionally, Ontario’s *Fair Workplaces, Better Jobs Act, 2017* modestly updated equal pay on basis of sex and added new requirements for employers to provide equal pay on the basis of employment status and temporary assignment status.

14. **Addressing Vulnerability (Dec 18th)** *(What other changes to Part III could better protect particularly vulnerable workers, such as women, youth and members of visible minorities?)*

---

\(^{49}\) Canada Labour Standards Regulations C.R.C., c. 986, s. 11.1.
To address vulnerability, Labour Program officials may consider developing a statistical portrait of the federal jurisdiction that is better equipped to capture dimensions of labour market insecurity (like the statistical approach outlined in section 1). Many of the recommendations made in pervious sections would help alleviate precariousness confronting vulnerable workers, especially modernizing enforcement, expanding Part III coverage and employer liability in fissured workplaces, providing for paid family responsibility and sick leaves, and establishing equal pay across employment status and temporary assignment status.

15. Sectoral Approaches (December 18th) (Labour standards are sometimes tailored to a specific sector (e.g. trucking). In what sectors do you think such an approach would be beneficial? What standards should be adapted?)

In Ontario, the call for different standards based on industry or occupation has tended to mean lower standards. This situation has led to a complex patchwork of exemptions and special rules that greatly weaken protections for many Ontario employees. Unless the goal is to augment protections among particularly vulnerable groups and/or industries, sectional approaches should therefore be avoided at the federal level.