

**Submission to the
Standing Committee on Finance & Economic Affairs
regarding Schedule 9, Bill 68,
An Act to promote Ontario as open for business by
amending or repealing certain Acts**



Ontario Federation of Labour
August 4, 2010

INTRODUCTION

The Ontario Federation of Labour (OFL) represents over a million workers in Ontario. Our members work in hundreds of occupations -- from government employees to construction workers; from nurses to manufacturing workers. The combined strength of all members of all the affiliated unions stands behind each of our members. The OFL is the collective voice of union members on issues relevant to working people – from labour relations to health care to economic policy.

The OFL is pleased to be making this submission on Bill 68 to the Standing Committee on Finance and Economic Affairs. We have had long-standing concerns about the impact of the government's Open for Business program.¹ This program included an arbitrary reduction in the number of regulations in every Ministry.

Ontarians continue to suffer from the impact of insufficient regulation of financial markets that led to the economic meltdown of 2008. As a result, precarious employment is increasing and Ontario's union density in the private sector has dropped to a new low. More workers are relying solely on the *Employment Standards Act (ESA)* for their rights in the workplace. This increases the importance of effective and accessible enforcement of these rights for all Ontarians.

The consequences of inadequate regulation or inadequate enforcement of regulation is not limited to labour standards. The environmental impact of the BP and Enbridge oils spills will have untold environmental consequences. But we don't have to look too far afield to see the impact, they include: listeriosis, Walkerton, and deaths of elderly people in nursing homes that don't have sprinkler systems.

While we have widespread concerns about "Open Ontario", we will limit our comments to Schedule 9.

Importance of Effective Employment Standards Enforcement

Work is leaving all too many workers and their families struggling with job insecurity and poverty. More people are working part time or on contract, often juggling two or three jobs. Workers in low-wage and precarious jobs that are least able to negotiate fair wages and working conditions are most in need of accessible, effective and enforced employment standards.

The table below shows increases in precarious employment in 2009. While total employment sank, the quality of the remaining jobs also declined. Part-time, temporary employment and self-employment rose. At the same time, secure forms of employment fell.

Increase in Precarious Employment: Ontario	
Change 2008 to 2009 (000s)	
Full-time jobs	-176.2
Part-time jobs	+10.7
Employees	-181.0
Permanent Employees	-201.3
Temp Employees	+20.5
Self-employed, unincorp; no paid help	+25.0
Source: Statistics Canada, Labour Force Survey	

The combination of the recession and outdated labour legislation has resulted in the private sector unionization rate dropping to 15 per cent in 2009.² Workers, who have been deprived of the protections of a trade union, must rely on the ESA. Employment standards establish a floor for those who have the least ability to negotiate fair wages and working conditions. However, these standards are meaningless without out effective enforcement. Vulnerable workers must rely on the Ministry of Labour to protect and enforce the minimum standards that have been established in the legislation.

However, the evidence shows that violations are widespread. Unpaid wages, overtime and other violations are not just from a few “bad apples.” The few studies that have been done confirm substantial formal ESA violations.³ Furthermore, Ontario governments have failed to adequately fund enforcement over the past 30 years. Resources and staffing of employment standards regulation has not kept pace with increases in workers, workplaces, and complexity of working relationships. Even recent increases to the Program in

the 2009/10 budget leave the Program over 10 percent below 1997 funding levels.⁴

A number of the strategies being proposed in Bill 68 would add additional burdens and barriers to workers accessing their rights. These barriers would add to the substantial burden that workers already bear. Currently, workers must identify when their ESA rights have been violated. Workers generally start by requesting their employment standards rights from employers and, in all too many cases, face reprisals up to and including termination, for doing so. Workers who fail to obtain minimum entitlements then bear the responsibility of determining how much they are owed under the Act, how to make a complaint about violations, and, how to submit a complaint for investigation. These burdens are even greater for people with language and literacy barriers.

We support the government's commitment to address the backlog in claims and to improve the process. The Ministry of Labour is launching an "Employment Standards Modernization Strategy" to create a temporary task force to resolve 14,000 claims in backlog over a two year period. Changes will also be made to the Employment Standards program's intake and investigation process to prevent recurrence of a backlog. The changes contemplated in Schedule 9 of Bill 68, *Open for Business*, would provide the legislative framework for the Employment Standards Modernization Strategy.

However, the amendments in Bill 68 and some of the changes proposed under the Employment Standards Modernization Strategy will not address the causes of the backlog nor meet the goals of addressing and preventing future backlogs.

Recommendations for Schedule 9 - Bill 68

1) Remove Schedule 9 (Ministry of Labour - Employment Standards Act) from Bill 68

Bill 68 amends 100 regulations affecting 10 Ministries, including the Ministries of Labour, Environment and Natural Resources. There are substantial changes to the ESA in Schedule 9 of Bill 68 that would profoundly restructure ESA enforcement in this province. Such fundamental restructuring of the Employment Standards Branch investigation of complaints of employer violations requires broader consultation than is possible in the Committee's review of this omnibus bill. As such, we recommend that Schedule 9, Ministry of Labour and the ESA, be removed from Bill 68. More comprehensive consultation is required on such substantial changes to Ontario's employment standards enforcement.

2) Do not create additional barriers to employment standards complaints

Bill 68 would amend Section 96 of the ESA and require workers to take the following steps prior to filing a complaint:

- a) Inform their employer about employment standards violations and the amount of wages or other entitlements that the employer owes the worker. If the employer does not comply with the worker's request, then a worker may file a complaint. For the complaint to be accepted, the worker will be required to indicate in the claim form what information was given to the employer, how it was given and the response, if any, from the employer. There may be exceptions for this requirement.
- b) Provide, in writing, specified information and evidence for their complaint before the claim will be accepted for investigation.

Complaints for unpaid wages and employment standards rights will not proceed unless these steps are taken (with some exceptions).

Section 96.1 of the Schedule 9 (Bill 68) does not provide any right to appeal for claimants who are denied investigation of their complaint. Workers face increased barriers to filing a claim, **and** they will have no right to appeal being denied access to filing a complaint.

These requirements will create significant barriers for workers accessing their employment standards rights and should be rejected. The experience in British Columbia with a similar system resulted in a sharp drop off in complaints due to these barriers.⁵

A requirement to seek compliance from employers effectively requires workers to have access to the internet to learn about rights; knowledge about how to apply abstract legal rights to their specific conditions; the ability to gather evidence to prove their case; and the opportunity and facilities to assemble, package, and deliver it to former employers. Most significantly, mandatory self-enforcement requires that workers will have the skill set and confidence to confront their employer about violations.

Most claims are filed after the employment relationship has broken down. The employer often treats employees very poorly in the process of termination and this has a huge psychological impact on the worker. Going back and asking an employer for wages can be a traumatic process. Job and income loss are recognized as some of the most significant life changes causing stress for

workers and their families. Requiring workers in this situation to enforce their own rights may cause further stress.

Research shows that requiring workers to assess entitlements on their own, outside of the ESA claims process during a mandatory self enforcement step, will understate amount of wages owing and the range of violations detected.⁶

Exceptions

The draft amendments to the legislation provide for exemptions to these requirements. Such exemptions rightly recognize that workers face barriers in seeking employment standards compliance from their employer. At the same time however, the exemptions may create further complexity and confusion for workers about how to access their rights. Further, section 96.1 does not provide any appeal rights for workers whose claims are not accepted if there are disputes about who qualifies for the exemption.

Requiring workers to first attempt to enforce their employment standards rights with their employer before being allowed to pursue a complaint at the Ministry of Labour (with some exceptions) will have unintended negative consequences. The number of claims may be reduced, but not because more workers will be able to obtain unpaid wages from their employer. Rather, fewer workers will seek enforcement of their employment standards rights.

3) Provide assistance to workers filing claims for employment standards rights

Proposed section 96.1.3(c) provides the basis for the Ministry of Labour to require certain information be provided in writing on the claim form before a worker's complaint will be allowed to proceed.

Currently, workers are left to learn how to make a complaint on their own. Workers have to navigate between three forms on the Ministry of Labour website. Adding a further requirement for documentation will require workers to have legal information about employment standards, how to apply that information to their particular situations; determine entitlements; and prepare the narrative of what happened and identifying supporting documentation. This is too large of a burden. To ensure that claim forms contain sufficient information for investigation, workers need direct assistance to prepare their claims.

Employment standards stand alone in the regulation of employment rights in having no government or quasi-government funded assistance for workers who believe their rights have been violated. The government provides direct and indirect funding for information, education and legal support in areas of Health

and Safety, Workplace Safety and Insurance and Human Rights, (e.g., Occupational Health Clinics for Ontario Workers, Office of the Workers Advisor, Human Rights Legal Support Centre).

A requirement that certain information be on the claim form prior to acceptance of the complaint will create barriers to workers, in particular for workers who face language and literacy barriers, and in general for workers unable to meet the requirement.

Instead, one of the most effective strategies to streamline the process and reduce the backlog would be to provide, as a first step in the claims process, assistance to workers to prepare their claim so that investigators can expeditiously adjudicate the matter.

Do not make specified information a requirement before a claim is accepted for investigation. Provide assistance to workers filing claims.

4) Facilitated Settlement by the ESO

Proposed amendments to section 101.1 of ESA in Bill 68 will give employment standards officers new powers to “attempt to effect a settlement.” Under the current section 112 of the ESA, the employer and employee may enter into a settlement, but “it is not the role of the Officer to attempt to negotiate, promote or ‘broker’ settlement agreements between employers and employees.”⁷ The proposed changes would allow Officers to “facilitate settlements.” Employers and employees would be given the option of discussing settlement with the Officer playing a mediator role. Should settlement not be reached, the Officer would resume investigation and decision making.

ESA claims investigations involve unequal parties. Facilitating settlement is contrary to the remedial purpose of the legislation to address the power imbalance between employers and employees.

Mediation is usually used to avoid lengthy and resource-intensive proceedings. Facilitating settlements may not provide time and resource savings in comparison to decision making. Arguably, it could take the same time as it would to hold a decision making meeting and render a decision. Rather than offering the employer a carrot of settlement at less than minimum standards, this legislation should institute a stick approach with enforceable penalties for non-compliance that would ensure workers get the wages owed to them.

Such settlements would generally be below minimum standards. Establishing a role for ESOs to facilitate settlements institutionalizes dropping below

minimum standards which is contrary to the Act. Moreover, institutionalizing a role for ESO facilitated settlement risks leading to general lowering of floor. Employers will come to expect that they can settle for less than minimum employment standards through the claims process. It would pay repeat offenders to settle claims to avoid detection and penalties.

No facilitated settlements. Maintain current rules on settlement.

5) Set clear and transparent time limits for employers

Proposed amendments to section 102 of the ESA would enable Officers to require employers and employees to provide evidence within time limits set by the Officer. Furthermore, officers are empowered to make decisions on claims when either employers or employees fail to attend a decision making meeting or provide evidence on time.

The Ministry of Labour had the opportunity to set clear and transparent time limits for employers to respond to complaints of ESA contraventions and, where no response is provided, render a decision on the basis of the complaint. This is the approach in small claims and human rights. Unfortunately, Bill 68 does not take this approach. Clear time limits for employers to respond to complaints would have contributed to expediting claims and reducing backlogs.

Employers will likely possess greater access to human resource professionals and legal services in preparing written submissions, while employees generally do not. The different legal responsibilities of employers and employees with respect to employment records make it more difficult for employees to provide documentary evidence.

Complainants should be exempted from time limits on submitting evidence.

Establish clear and transparent time limits for employers. Give employers 20 days to either resolve the matter with the employee or provide submissions contesting the claim. Where an employer fails to respond or provide submissions, ESOs should render decisions on available information provided by employees. Employers will be given the required impetus to participate in complaints of violations.

7) Conclusion

The ES Modernization Strategy shifts the model of ESA enforcement from detection of ESA violations and enforcement of minimum standards among unequal parties to dispute resolution between employers and workers. The goal of the strategy is to encourage “workplace self-reliance.”⁸ This is not good social or economic policy.

Shifting to even greater self regulation by employers will result in more violations going unreported and unenforced. This will create downward pressure on employers who **do** comply with employment standards as they compete against employers that do not. Compliant companies will get priced out of the market by substandard employment conditions. Practices of non-compliance will spread and become permanent features of a restructured labour market.

The proposed requirements for claims information, time limits and self-enforcement by employees create barriers to workers seeking unpaid wages while doing little to increase employer compliance.

The Ministry of Labour’s Employment Standards Modernization Strategy and Schedule 9 of Bill 68 will make substantial changes to the employment standards complaints process. To meet the goals of addressing the claims’ backlog and improving the claims process, we recommend the following:

- **Do not require workers to attempt self-enforcement before filing an ESA claim.**
- **Do not require workers to provide information on claims before the claim will be accepted.**
- **Set clear and transparent time limits for employers.**
- **Do not change the legislation to have employment standards officers facilitate settlements.**

¹ Talaga, Tanya “Red Tape Cuts Raise Fears.” *Toronto Star* February 3, 2009.

² Canadian Labour Congress/ 2010.Detailed Unionization Data by Province, 1999 – 2009 and for Major Cities in 2007 Union membership and unionization rates for Canada and each province — by gender, by age, by public and private sector, and by industry.

³ Workers’ Action Centre and Parkdale Community Legal Services July 26, 2010 Submission to the Standing Committee on Finance and Economic Affairs regarding Schedule 9, Bill 68, An Act to promote Ontario as open for business by amending or repealing certain Acts http://www.workersactioncentre.org/l/docs/sb_Bill68_eng.pdf

⁴ IBID, p5.

⁵ IBID, p7.

⁶ IBID, p8.

⁷ IBID, p11.

⁸ IBID, p13.