MODERNIZING THE *EMPLOYMENT STANDARDS ACT*

Submission to: Ministry of Labour, Province of BC

March 2019

BCFED

Authority

This document is respectfully submitted on behalf of the Executive Officers of the BC Federation of Labour and represents the views of more than 500,000 affiliated members from across the province of British Columbia.

LAIRD CRONK
President
BC Federation of Labour

1510-19sub wlc bcfed submission to ministry of labour re employment standards act/km

Modernizing the *Employment Standards Act*

The BC Federation of Labour ("BCFED") represents over 500,000 members from affiliated unions across the province, working in every aspect of the BC economy. The Federation has a long and proud history of fighting for the rights of all working people for a safe workplace and fair wages.

Background

In 2001, the BC Liberal government made major changes to employment standards in BC that have significantly lowered the minimum protections for workers. Enforcement of minimum working conditions was also significantly slashed in 2001.

Staffing levels of the Employment Standards Branch ("ESB" "Branch") were severely reduced to just 70 ESB officers to cover about one million workers. Instead of effective, third-party enforcement, workers were told to download a "self-help kit' from the web to lodge their complaint. Random worksite inspections by ESB officers were eliminated. As a result, the few rights afforded to workers are nearly impossible to enforce.

The current *Employment Standards Act* ("ESA" "Act") fails to provide the growing body of vulnerable and precariously-employed workers with necessary rights and protections and contributes to the growth of precarious employment conditions.

Labour Minister Bains' mandate letter of July 17, 2018, contains the mandate to "update employment standards to reflect the changing nature of workplaces and ensure they are applied evenly and enforced."

Improvements are long-overdue, and the government should act quickly to protect workers. The ESA should be a universal floor that provides a fair and just level of protection to all workers in BC. Change is going to take more than new laws - it also requires a rethink on how the ESB operates.

We urge Minister Bains to act quickly and comprehensively on implementing reforms to the Act and the ESB.

Theme 1 – Increasing protection of child workers

The first question the government should be asking is why are we using the term "child workers" at all? Kids should be focused on their schooling and developing strong family and community relationships, not on employment.

Under current employment laws, children as young as 12 can legally work in BC. That means, 12-year-olds can work in most industries including food service, accommodation, farming, construction and even manufacturing. This is a serious health and safety risk for these young people. Commercial equipment is dangerous, not appropriately sized for children and safe operation requires extensive training and supervision. These are not conditions in which our kids should be working and doing this type of work has had real consequences. Kids are getting hurt.

Since 2003, over 2,000 children under the age of 15 have claimed work-related health care costs due to injuries. This number only reflects the number of reported injuries. We know that many injuries go unreported, especially where the employer is the child's own parents.

The government must do more to protect children by prioritizing their schooling and health and safety, not work. When youth are ready to go to work, there need to be rigorous rules in place to ensure they are protected from injury or death. We fully support the submission of First Call and its recommendations. The BC Federation of Labour calls on government to:

- The minimum age for formal employment of children be 16 (with exceptions for light work), consistent with the Government of Canada's ratification of International Labour Organization Convention 138 on the minimum age for employment, and Canada's commitment to a work age of 16 years and prohibition of hazardous work for those under the age of 18;

- A permit from the Director of Employment Standards be required for the employment of children under age 16;
- Prohibit the employment of children under the age of 12 with the exception of the entertainment industry and its current permit system;
- With respect to the employment of children and adolescents 12 to 15 years, the government must:
    - Develop lists of acceptable "light work" including tasks and workplaces that do not threaten the health and safety or hinder the education of children (12-13) or younger adolescents (14-15);
    - Place limits on the time-of-day for work, appropriate to age groups, e.g., prohibit late night and over-night work; and
    - Place limits on the length of worktime on a daily and weekly basis appropriate to age groups, e.g., no more than four hours per day on a school day for children;
- Ensure hazardous tasks and worksites are entirely off-limits to workers aged 16- 17; and
- Mandate adequately-resourced, government-led enforcement to ensure employer compliance and inform government's policy monitoring.

Theme 2 – Transforming the Employment Standards Branch

The current model of enforcement at the ESB is not working. Underfunding and a change of approach have left workers to fend for themselves. When the BC Liberal government slashed funding, the Branch abandoned workers and left them with a self-help kit. Given the power imbalance in the workplace, this meant that workers had little if no recourse when wronged by their employer.

To fix this broken system, a complete re-think of the current system is necessary. This should be accompanied by a significant funding increase, large enough to ensure that workers are supported by Branch staff and protected from retaliation throughout the complaint and investigation process. There should also be a change of approach in how complaints are resolved. Rather than aiming to get a mediated settlement that usually results in less than what

is owed, workers deserve full compensation for any loss. There must also be significant penalties for employers who break the law.

Formal anonymous and third-party complaint systems should be established. Because of the fear of reprisal, most complaints are only filed after a worker has severed employment. An anonymous or third-party complaints system would help to ensure a timely resolve of workplace issues.

The Branch should also be proactive in responding to problematic industries and changing work trends. Rather than allowing practices that break the law to become established and harder to reverse, they should clearly set out how the rules apply to these industries. For example, with the upcoming expansion of the passenger transportation industry, there is an opportunity to establish practice directives to ensure that workers know their rights and employers follow the law.

The Branch should conduct research that informs its work and ensures that it is responsive to changes in work patterns.

The BC Federation of Labour calls on government to:

- Get rid of the self-help kit immediately and provide direct support for workers who have a complaint;
- Allow anonymous third-party complaints or "tips" and investigate these complaints;
- Ensure that workers get full compensation for wage theft and other violations of the Act;
- Develop mandatory statutory timelines to ensure the expeditious resolve of complaints;
- Engage in proactive enforcement;
- Increase penalties to deter employers from breaking the law, and have escalating penalties for repeat and frequent offenders;
- Increase funding to the Branch significantly so that it can perform its function; and
- Conduct research on employment trends and compliance with the law.

Theme 3 – Supporting families with job-protected leaves of absence

Workers need better access to leaves to ensure an appropriate balance between personal and family obligations and work. BC lacks several job-protected leaves that are standard in other provinces including sick leave and leave for intimate, personal and relationship violence.

We believe that leaves should be standalone entitlements instead of being combined with other family leaves, so primary childcare providers, usually women, are not discriminated against by having a reduced access to leave. Workers without family responsibilities would have days to take for their own illness, while workers with family responsibilities (typically women) would have to carve out time to take care of their own illness while also caring for their families within the same (limited) time. If sick leave and family responsibility leave were to be combined, it would perpetuate the burden on female workers, particularly mothers, of juggling family responsibility and work. We also oppose the introduction of any qualifying period to become eligible for leaves under the Act.

We support the BC Law Institute recommendation to amend the definition of immediate family, but we think the recommendation does not go far enough to capture the reality of BC's families. The current and proposed definitions of immediate family prioritize traditional nuclear families above all--they do not recognize the diverse and flexible family relationships that workers in BC experience today. The BC Employment Standards Coalition submission highlights examples of families that would not meet the definition under the Act and recommends that the definition of "immediate family" be replaced with "a person in a close, family-like relationship with an employee."

The BC Federation of Labour calls on government to:

- Expand access to job-protected leaves including intimate, personal and relationship violence leave, sick leave and vacation and statutory holiday leave;
- Ensure that new leave entitlements stand alone and are not combined with any other leave; and

- Expand the definition of immediate family to include, “a person in a close, family-like relationship with an employee.”

Intimate, personal and relationship violence leave

Intimate, personal and relationship violence (formerly termed domestic violence) have a significant impact on the workplace. Workers should have access to leave for family and relationship violence so that they can keep themselves and their children safe. People who have experienced violence may need leave for many reasons including to seek support, counselling, legal advice and to find a safe place to live. Economic security provides critical stability for workers who need to leave a violent relationship. Other provinces are taking the lead – Manitoba, Newfoundland and Labrador, Prince Edward Island, New Brunswick and Ontario all provide paid leave.

The BC Federation of Labour calls on government to:

- Provide protected leave for individuals facing intimate, personal, and relationship violence;
- Include leave provisions for survivors of sexual assault;
- Ensure no less than ten days paid leave per year should be provided, with at least 17 weeks total leave time; and
- Ensure leave is available to all employees regardless of length of service with the employer.

Vacation and statutory holiday leave

The vacation with pay entitlements under the Act have not changed for over 30 years. The ESA provides two weeks paid vacation after 12 consecutive months of employment, or three weeks after five consecutive years of employment. Workers need improvement in paid vacation entitlement. The International Labour Organization recommends that the period of paid vacation should not be less than three weeks. Saskatchewan provides three weeks of paid

vacation after one year of service, and four weeks after nine years. European countries average more than five weeks of annual paid vacation.

The BC Federation of Labour calls on government to:

- Increase paid vacation entitlement to three weeks per year for the first five years, and four weeks after five years of employment; and
- Include federal and/or provincial statutory holidays in the ESA, namely: Easter Monday, Boxing Day, National Aboriginal Day/National Day of Truth and Reconciliation (currently contemplated by federal government)

Sick leave

BC is the only province that provides no protection for workers who are too sick to work. Currently under BC's employment standards you are entitled to a day off work to attend to a sick child but not for your own illness. This doesn't make sense. It is time for the BC government to provide workers with sick leave.

There are many good reasons why people shouldn't go to work sick. It stops the spread of contagious viruses to customers and colleagues; especially for those working with vulnerable populations (children, seniors, disabled) or in food services; it improves recovery time, and it reduces the inequity faced by low-wage workers who are least likely to have access to sick days. Sick days encourage employees to take the time they need to get better, instead of coming to work sick which decreases overall productivity.

The BC Federation of Labour calls on government to:

- Include sick leave as a job-protected leave;
- Include attending medical appointments as job-protected sick leave; and
- Restrict employer requirements for medical notes for short absences as requiring unnecessary notes puts a burden on our health care system and results in prohibitive fees for workers.

Theme 4 – Strengthening workers' ability to recover wages/monies owed

The ESA must be a universal set of standards that establishes the minimum set of rights upon which every worker can rely. There should be no exemptions to the Act, and this includes eliminating current exemptions for tech workers, farm workers and workers who have a collective agreement. Differential treatment should also be prohibited for casual, term, temporary and part-time workers.

Wage theft is a rampant problem that takes many forms including not paying wages owed for time worked, overtime and holidays; paying less than minimum wage; failing to provide breaks; stealing tips; refusing to pay for training and making improper deductions such as charging for breakage.

When workers have an employment issue, they must receive appropriate compensation. Under the current system, few workers can file complaints at the time they occur for fear of losing their job. That means most complaints are made when the employment relationship has been severed. We support extending the limitation period for filing a complaint at the ESB to two years. This two-year limitation period corresponds with the limitation period for general civil claims, giving workers equal access to legal remedies as other private litigants.

Further, we support a three-year wage recovery period. The current six-month timeframe is unfair to workers who were unaware of their rights or who have been in a precarious employment relationship for an extended period of time, such as for temporary foreign workers. We note that until 2002, the wage recovery period was two years. We support having a wage recovery period consistent with payroll record keeping requirements of the Act.

Finally, BC has failed to provide clear protection to tipped workers on ownership of tips and gratuities. The current system is open to abuse. The law should confirm that tips are the property of the employee to whom or for whom they were given. Managers and owners should not be entitled to take tips intended for their employees.

The BC Federation of Labour calls on government to:

- Eliminate all exemptions to the Act including exemptions for farm workers and high-tech workers;
- Establish the ESA as the floor for all workers including those covered by a collective agreement;
- Require equal treatment for all workers including casual, temporary, term and part-time workers;
- Extend the limitation period for filing a complaint at the ESB to two years;
- Re-extend the wage recovery period to three years; and
- Clarify that tips and gratuities belong to the worker to whom they were given.

Theme 5 – Clarifying hours of work and overtime standards

The BC Liberal government made major regressive changes to the Hours of Work & Overtime provisions of the Act in 2002. It is time to reverse those changes and provide more rights and protections which correspond to significant changes in the world of work over the past two decades.

All workers should be covered by the same minimum standards with respect to hours of work and overtime – no exceptions.

Workers need more certainty and notice about their work schedules. Many employers use on-demand scheduling systems that result in last-minute call outs and cancellations. The Act should clearly establish a shift notice period, and workers should be able to request changes to their schedule without fear of reprisal.

Overtime work should be voluntary except in emergency situations. Many workers have two jobs and/or childcare obligations. Forcing overtime puts these workers in an impossible situation. Overtime payouts were changed by the previous government. Superior payout provisions should be reinstated.

The former government also reduced minimum shift length provisions. The former provisions should be restored, i.e., four hours for work that has started and two hours if work has not started.

The BC Federation of Labour calls on government to:

- Ensure work schedules are given to employees with reasonable notice, and that shifts are not changed without 24 hours notice;
- Restore Section 34 (Minimum Daily Hours), which required a minimum of four hours pay to an employee if work had been started, and two hours pay if work had not been started;
- Restore Section 35 (Maximum Hours of Work) requiring overtime wages to be paid after eight hours per day or 40 hours per week and support the recommendation of the BC Employment Standards Coalition that a new higher standard based on seven hours per day and 35 hours per week be adopted;
- Implement a voluntary right to refuse overtime;
- Restore Section 36 (Hours Free from Work) requiring double time pay to be paid if an employee is required to work during the weekly 32-hour, free-from-work period; and
- Restore pre-2002 flexible work schedule provisions and repeal current overtime averaging provisions (Section 37).

Theme 6 – Improving fairness for terminated workers

The current termination provisions of the Act contribute to the precarity that many workers experience in BC's workplaces. Professor Harry Arthurs wrote in his 2006 Federal Labour Standards Review Report that rules for the termination of a worker's employment are critical to employment standards legislation because "...a job is often a worker's most important asset, the source of his or her personal and family security, and a defining attribute of social status and self-image. To lay down the substantive and procedural rules for termination is to establish the social and economic worth of that asset."

In other words, a job is critical to a person's personal and family security, and the Act must protect that relationship through a substantive and meaningful set of rules.

Current protections are insufficient to adequately protect workers. The Act requires notice only, not cause for termination. Employers should have "just cause" for terminating an employment relationship. Further, the three-month eligibility requirement for termination notice or pay-in-lieu should be eliminated. Employers should be required to provide notice of termination or pay-in-lieu of notice based on the total length of employment, including seasonal or other recurring breaks.

Workers lack sufficient avenues of recourse when an unfair termination has occurred. They must take their case through a costly and time-consuming common-law process. An expedited process is necessary to assist workers in cases of wrongful dismissal.

The BC Federation of Labour calls on government to:

- Eliminate the three-month eligibility requirement for termination notice or pay-in-lieu of notice;
- Require employers to have "just cause" for terminating an employee's employment to protect workers from unjust dismissal;
- Require employers to provide notice of termination, or pay-in-lieu of notice, where an employee is laid off, based on the total length of employment, including seasonal employees who have recurring periods of layoff beyond the 13-week layoff period; and
- Implement an expedited adjudication process for workers who have been unjustly dismissed.

Other areas to address:

One of the most common problems we hear from workers is that they aren't considered employees at all. The over application of the "independent contractor" classification has resulted in many employees losing access to important employment protections. Due to the

current lack of enforcement, this problem has been allowed to grow, especially in sectors like construction, delivery services and passenger transportation.

When employers intentionally misclassify a worker, they gain a significant financial advantage. They are relieved of many obligations including hours of work, vacation and statutory holiday pay, severance and the requirement to provide job-protected leave. For the worker, the cost of this misclassification is significant – not only do workers lose out on these important rights, they may also miss out on access to other entitlements like employment insurance, workers' compensation and the Canada Pension Plan.

To protect workers from unscrupulous employers, the onus of proof in the Act should be reversed so that all workers are considered employees unless an employer can prove otherwise.

Final Comments

Improvement to the ESA in BC is badly-needed. Many workers do not complain about violations of the Act due to lack of information, the self-help kit, poor enforcement, and the ability to be terminated without cause. As a result, statistical information about the extent and severity of violations captures only those who have the courage to come forward. We urge this government to listen to what people have been saying in communities across BC: that our employment standards are weak, promote vulnerability, and contribute to employment precarity that has an impact on families and communities. Workers deserve better. It's time to change the law.