Consultation on Proposed Amendments to the *Employment Standards Act, 2000*

Submitted to: Ministry of Labour, Training, and Skills Development

Submitted by: Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
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Introduction

The Ontario Bar Association ("**OBA**") welcomes the opportunity to make this submission in response to the consultation on proposed amendments to the *Employment Standards Act, 2000* ("***ESA***" or "***Act***") that would be implemented if the *Working for Workers Four Act, 2023* passes (the "**Bill**").

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Labour and Employment Law section. Members of this section include barristers and solicitors in public and private practice in large, medium, and small firms, practicing across every region in Ontario.

Comments & Recommendations

The OBA provides the following comments and recommendations on the proposed amendments to the *ESA*. A significant number of details are relegated to future regulations, so our comments are based on the current language of the Bill without the benefit of these specifics. The OBA invites the government to engage with us in the consultation and development of those important regulations when the time comes.

Training and Trial Periods

The OBA is supportive of the amendment clarifying that employees must be paid for trial periods, by expanding the definition of "training" for the purposes of the definition of "employee" to explicitly include trial periods. This policy goal could be further strengthened by explicitly including working interviews that occur prior to employment. Further information should be included to define trial periods and training in the *Act*.

Requirement to Post Compensation Rate or Range in Job Postings

The OBA supports the goal of providing jobseekers with better information on salaries when applying for jobs. We are unable to comment on the criteria that will be prescribed by future regulations, and welcome future engagement on those particulars.

We provide the following comments for consideration to strengthen the *Act* and its future regulations. It is unclear if the reference to "expected compensation" and "the range of expected compensation" would hold an employer to those figures. As it stands, an employer could theoretically move outside of the posted expected compensation range for any reason. For example, an employer could, under the present proposed amendment, offer a jobseeker a lower salary than the posted compensation range, citing new budgetary constraints. To truly increase transparency and predictability for jobseekers, the compensation figures should be able to be relied on and jobseekers should have access to some recourse should an offer fall below the posted expected compensation. There is, therefore, a need to clarify how breaches of this section would be enforced, whether it is through initiating a Ministry complaint, or some other procedure.

The exception that excludes the application of this requirement for "publicly advertised job postings" is also ambiguous and subject to specification in future regulations. The intended scope of this reference is unclear and needs to be specified before we can provide fulsome comments.

Prohibiting Employers from Requiring Canadian Experience as a Pre-Screening Mechanism

The proposed amendment would disallow employers from including any requirements related to Canadian experience, except for a "publicly advertised job posting" that meets future prescribed criterion. The intent of this provision is laudable for trying to reduce the barriers newcomers face when looking for employment in Ontario. The issue is that there is no clear way to know if an employer will rely solely on an assessment of Canadian experience indirectly. This is a problem that is faced generally when litigating discrimination claims, as discriminatory considerations are often not made explicit. Consideration should be given to finding ways to strengthen this requirement through future regulations and outlining corresponding penalties and enforcement procedures, and we would be happy to discuss this further.

Requiring Employers to Disclose the use of AI in Job Postings

The requirement to disclose the use of AI in screening, assessing, or selecting applicants in job postings is another positive step towards increasing transparency in the application process. Further consultation is required with respect to:

(1) Whether specific information around the results of a candidate's AI screening would need to be part of meaningful disclosure; and
(2) The scope of artificial intelligence that would be captured by this requirement. It is important that the definition prescribed in future regulations is not overly broad.

Clarifying that Employers Cannot Deduct Employee Wages to Cover Stolen Goods

The OBA supports protecting employees from wage deductions in cases where there is a cash shortage or lost or stolen property that is not contributed to or the fault of the employee. It may be beneficial to add an exception if the loss was the result of an employee's willful misconduct, disobedience or willful neglect of duty that is not trivial and that has not been condoned by the employer.

Requirement to Post Employer Tip Sharing Policy

The requirement for employers to post a copy of any policy they have on employers, directors, or shareholders sharing in the redistribution of pooled tips is another positive step towards increased transparency. The form of the posting should be prescribed to ensure the necessary information is included in the policy. For example, there is already a restriction for employers sharing in the redistribution of pooled tips under section 14.4 (4) and (5) of the *ESA*. These subsections only permit employer sharing when the employer (sole proprietor, partner, director, and shareholder to be specific) regularly performs to a substantial degree the same work performed by (a) some or all employees who share in the redistribution, or (b) employees of other employers in the same industry who commonly receive or share tips. Employers should be required to include the above exception in their posted policy so that employees are aware and able to consider whether their employer's policy meets the exceptions in the *ESA*.

Clarifying Other Methods of Vacation Pay are Allowable if There is an Agreement in Writing

The provision outlining that methods other than lump-sum payments can be agreed to by employees and employers is beneficial to clarify. We note a discrepancy between the policy objectives in the regulatory registry posting and the draft language in the Bill. The policy objective states this section is to clarify that other methods of vacation pay are allowable if an employee "has made an agreement (*in writing*) with the employer" [*emphasis added*]. The draft language in the Bill only references an agreement with no requirement for this to be in writing. It would be helpful to specify this directly in the proposed language of the Bill to avoid potential future disputes about verbal agreements.

The OBA would welcome the opportunity to provide input into draft language of the regulations.