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Flexibility for Who? Working Time, the Ontario *Employment Standards Act* and the Experiences of Workers in Low-Wage and Precarious Jobs

De la flexibilité pour qui? *Loi sur les normes du travail* de l'Ontario et temps de travail : expérience de travailleurs à bas salaire et occupant des emplois précaires

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Résumé de l'article

En Ontario, les normes minimales relatives à la durée du travail et aux heures supplémentaires sont régies par la *Loi sur les normes du travail (Employment Standards Act* en anglais, dorénavant la *Loi*). Cette dernière s'applique chez plusieurs employeurs et elle touche bien des employés de la province. Se situant dans un processus de réformes visant à promouvoir la flexibilité au travail et accroître la compétitivité, la *Loi* promulguée en 2000 par le gouvernement de l'Ontario permet une extension de 48 à 60 le maximum d'heures hebdomadaires et de rémunérer les heures supplémentaires en se fondant sur une moyenne des heures travaillées au cours des quatre dernières semaines.

Ayant pour contexte le virage vers davantage de flexibilité dans la gestion du temps de travail, cet article examine la dynamique de la réglementation de cette loi, notamment celle portant sur les heures excédentaires et supplémentaires. Notre étude examine ces processus en tenant compte de la réglementation généralisée du marché du travail qui accorde une plus grande flexibilité aux employeurs et étend celle des normes du travail aux négociations individuelles entre employés et employeurs, tendance présente dans la *Loi* de 2000 qui fut renforcée par les récentes réformes introduites en 2018 et 2019.

Cet article se fonde sur des entretiens avec des travailleurs occupant des emplois précaires et des agents des normes d'emploi du ministère du Travail de l'Ontario, ainsi que sur des données administratives de ce ministère et des dossiers d'archives. Dans le contexte général d'une croissance de la précarisation de l'emploi, il soutient que les dispositions de la *Loi* relatives aux heures de travail et aux heures supplémentaires qui visent une plus grande flexibilité du temps de travail contribuent, avec le temps, à augmenter le contrôle de l'employeur, à exacerber les contraintes de temps et à accroître l'incertitude vécue par les travailleurs occupant des emplois précaires, donc à entraîner une plus grande précarisation. L'article situe les dispositions de cette loi ontarienne sur le temps de travail dans le contexte d'une fragmentation continue de la réglementation, les normes légales conduisant à une privatisation et une individualisation du temps de travail, deux phénomènes qui rendent les travailleurs précaires plus vulnérables à l'exploitation des employeurs.

Flexibility for Who? Working Time, the Ontario *Employment Standards Act* and the Experiences of Workers in Low-Wage and Precarious Jobs

Mark P. Thomas, Shelley Condratto, Danielle Landry and Mercedes Steedman

Situated in a context of shifts towards working time flexibility, this article examines the regulation of working time in the Ontario *Employment Standards Act* (ESA), with a focus on excess and overtime hours. The article builds its analysis from interviews with both workers in precarious jobs and Employment Standards Officers from the Ontario Ministry of Labour (MOL), as well as administrative data from the MOL and archival records.

The article argues that ESA hours of work provisions premised upon creating flexible approaches to working time have contributed to the privatization and individualization of working time regulation in ways that enhance employer control over time, exacerbate time pressures and uncertainty experienced by workers in precarious jobs and, thereby, deepen conditions of precarious employment.

KEYWORDS: working time, employment standards, precarious work, Ontario.

Introduction

Changing patterns in working time, including shifts away from standard working hours, the growth in non-standard employment, increased employer control over working time, and changing public policy approaches to working time regulation figure centrally in broader transformations in the organization of

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work (Basso, 2003; Hermann, 2015). A key element of such transformations has been an emphasis on the need for working time flexibility for both employers and workers, which has been promoted through both employer practices and government policies (Thomas, 2008). Working time flexibility has been facilitated through amendments to employment standards (ES) legislation, which includes minimum standards to regulate hours of work and overtime. This article examines the dynamics of working time flexibility as regulated by the Ontario *Employment Standards Act* (ESA), with a specific focus on the experiences of workers in low-wage and precarious jobs.

The article is organized into three sections. The first section introduces the concept of working time flexibility, situating this concept within a wider context of labour market re-regulation undertaken in industrialized labour markets over the past several decades, and outlining findings from existing research in regards to the benefits of working time flexibility arrangements. Second, the article reviews the working time provisions of the Ontario ESA, with specific attention given to reforms designed to foster working time flexibility. This section also presents an analysis of data on employer applications to the Ministry of Labour (MOL) for excess hours and overtime averaging permits. Up until 2019, the permit system was a significant regulatory mechanism to facilitate working time flexibility as it enabled employers to avoid the hours of work limits established by the Ontario ESA. Third, based on data drawn from interviews with workers in low-wage and precarious jobs, the article illustrates workers' experiences with working time flexibility, drawing connections between the forms of working time flexibility supported by Ontario's ESA and the dynamics of precarious work. Overall, the article situates the working time provisions of Ontario's ESA in the context of an ongoing fragmentation and privatization/individualization of the regulation of working time. While working time flexibility may provide benefits for workers in some occupations, the focus on workers in low-wage and precarious jobs reveals that ESA hours of work provisions premised upon creating flexible approaches to working time have contributed to enhancing employer control over time, exacerbating time pressures and uncertainty, and thereby deepening conditions of precariousness for some groups of workers.

Data and Methods

This article draws on several sources of data collected as part of the *Closing the Employment Standards Enforcement Gap* project (see Vosko *et al.*, *forthcoming 2020*).[1] Semi-structured individual interviews were used to gain insight into the experiences of precariously employed workers with legislative workplace violations. Concept cards with possible workplace violations were

used to help prompt the worker's response while ensuring "respondent driven, yet bounded, discussion of employment conditions" (Mirchandani *et al.*, 2016: 142). Interview questions allowed workers to control the narratives they shared, while gaining insight into their work histories, experiences of ESA violations and actions taken by workers. A purposeful sample of 77 workers (35 females, 41 males, and 1 transgender) from three Ontario communities (19 Sudbury, 42 Toronto, 16 Windsor) were selected. All participants had experienced perceived violations under the ESA and were low-wage earners ($18/hour or less, not represented by a union and not a full-time student). Our sample included workers who both had and had not filed official complaints and it also reflected variation in terms of industry, age, gender, migration history and racial backgrounds. Workers' identities and identifying characteristics have been anonymized in order to maintain confidentiality.

Fifty-two interviews were conducted with Ontario Ministry of Labour Employment Standards Officers-ESO (12 ESO1s and 40 ESO2s[2]) from across the province. ESO participation was voluntary and facilitated through a collaborative research agreement between the project, the MOL and Ontario Public Service Employees Union (OPSEU), the union representing the ESOs. Structured interviews were used to gain insight into the ES complaints system, workplace inspections processes and the challenges faced when undertaking enforcement activities. The identity and work location of individual ESOs has been removed in order to maintain confidentiality.

The article builds its quantitative analysis from a dataset comprised of randomly selected applications (n = 600) for excess hours or overtime averaging made by employers to the MOL. The sample includes applications from both the public and private sector, although the majority came from the private sector. The dataset was divided into three time periods, with 200 applications each from 2010-2011, 2014-2015 and 2015-2016. Each application was catalogued according to whether the employer was applying for averaging or excess hours, whether the firm's employees were unionized, the firm's industry classification, and the specific occupations and number of employees affected by the application. A second dataset of refused applications (n = 32) was also catalogued using the same parameters. Employer rationales included with the applications were coded through NVivo software.[3]

Finally, the article draws historical details from archival records held in the Archives of Ontario's Ministry of Labour Record Group (RG-7). These files include Ministerial correspondence, background research papers, legislative records and communications from employers, employer associations, women's organizations and organized labour related to the development of Ontario's ESA and its enforcement, largely dating from the 1960s through to the 1990s.

Theoretically, the article builds its analysis from a political economy framework that situates the organization of working time in relation to both the commodity status of labour power and systems of labour control within capitalism, which directs attention to the unequal power relations that shape control over time in the capitalist workplace (Marx, 1976; Thompson, 1967). This framework also builds on feminist political economy scholarship that draws attention to the ways in which processes of labour market regulation (including the regulation of working time) exist in relation to the organization of social reproduction (Vosko, 2019), and are constructed through a nexus of relations existing between the state, the labour market, the workplace and the household (Clement, 2019).[4] This perspective both highlights that women workers may face increased time pressures through flexible working time arrangements (Boivin, 2016) and points to the need for a holistic response to working time re-regulation that could better address concerns arising in workplaces and households (Fudge, 2006).

Working Time Flexibility

Shifts towards working time flexibility are situated in the broader patterns of work reorganization that began in the 1970s (Harvey, 1990; Moody, 1997; Standing, 1999). In this context, scholars have differentiated between employer-oriented flexibility, which prioritizes the reduction of labour costs, the removal of legal regulations and the elimination of union-negotiated work rules and benefits, and employee-oriented flexibility, which seeks flexibility in work arrangements to better balance paid work with other, particularly household, responsibilities (Clement 2001; Standing 1992). Employer-oriented flexibility became widespread beginning in the 1980s and moving through the1990s, coinciding with a noted shift away from the Standard Employment Relationship (SER) as well as growth in non-standard and precarious forms of employment (Vosko, 2000). During the 2000s, labour flexibility became synonymous with employer practices that eroded stability and security for workers, including through outsourcing/contracting out and temporary employment contracts, and enhanced employer control over work and workers. Employer-oriented forms of time flexibility also demonstrated gendered effects, including exacerbating existing time pressures on women workers in the public sector (Fudge, 2011). These practices intensified in the years following the 2008 financial crisis, including for workers in the highly unionized public sector, who increasingly felt pressures for flexibility through government downsizing and privatization/contracting undertaken by austerity-driven governments (Ross and Thomas, 2019). Insofar as labour and employment law is concerned, workforce flexibility is often associated with an orientation towards what Standing (1999: 42) refers to as "market regulation", whereby labour and employment laws and policies increase the

exposure of workers to market forces. With respect to working time, this has involved an increasing individualization and privatization of working time regulation (Chatzitheochari and Arber, 2009; Williams *et al.*, 2008).

Such studies provide context for considering shifts towards working time flexibility, as the unravelling of the norm of the SER brought about significant change in the organization of working time across Western, capitalist labour markets (Basso, 2003; Hermann, 2015). Existing research has shown mixed results concerning the impacts of working time flexibility on employee experience (Allen and Shockley, 2009; Wessels *et al.*, 2019). By the 1990s, an increase in daily, weekly, and annual hours for many workers in full-time jobs, as well as a growing hours polarization between these workers and the increasing number of workers in part-time work was evident in Canada (Jackson and Thomas, 2017) and other national contexts (Bosch, 2004). Working time flexibility has also included the increasing prevalence of work being taken home after normal work hours, blurring the lines between paid and unpaid working time for some workers (Agger, 2011), as well as an increasing unpredictability of work schedules in some sectors (O'Carroll, 2015). The rise of precarious work further contributed to working time transformation, normalizing non-standard working time as well as flexible scheduling practices, and, also, reducing workers' capacities to control working time (Zeytinoglu and Cooke, 2006). Through the 1990s and into the early 2000s, workers reported working both longer and more non-standard hours, as well as declining job satisfaction (Smith *et al.*, 2011).

While working time flexibility strategies may often reflect employer rather than employee interests (Zeytinoglu *et al.*, 2009), such strategies may also respond to the needs of employees, particularly in ways that foster both a stronger work-life balance and greater employee control over working time, including through flexible work schedules, reduced working hours and time for paid and unpaid leaves (Hermann, 2015). Such practices may contribute to improvements in employee experiences, including through reduced stress and improvements to work-life balance, and may also contribute to improvements in employee commitment (Halpern, 2005; Hayman, 2009). In their study of professional workers in the United Kingdom, Kelliher and Anderson (2010) found an increase in job satisfaction as professionals with flexible schedules navigated a tradeoff between the work intensification that may result from a compressed schedule and the increased flexibility that such a schedule can provide. De Menezes and Kelliher (2017) indicate the complexity of the relationships between working time flexibility and employee experience, differentiating between the effects of formal and informal arrangements on job performance, though noting that both show tendencies to positively impact job satisfaction. Zeytinoglu *et al.* (2009) note differences in attitudes amongst different occupational groups in

terms of preferences for flextime with, for example, managers and professionals who tend to have more control over their work hours and schedules showing greater preference for flex hours. As noted by Jacobs and Padavic (2015), research on employee experiences with working time flexibility is often reflective of conditions experienced by or made available to professionals and those who hold positions in more highly skilled occupational categories. Such research has not tended to focus on workers in low-wage or precarious jobs, a question that this article seeks to address.

Research on the gendered dynamics of working time flexibility has noted in particular women's high rates of participation in part-time employment (Pupo *et al.*, 2017; Moen, 2003; Sirianni and Negrey, 2000). Moreover, while men are more likely to experience positive aspects of time flexibility, flextime for women often means part-time hours (Wheatley, 2017). Despite working time flexibility policies and practices that are often developed with the intent of addressing gender equity concerns, women continue to face gendered time pressures in the workplace (Peterson and Weins-Tuers, 2014; Tomlinson, 2007). Research has also documented how gendered patterns of work have included a rise in both paid and unpaid (household) work hours for women (Craig *et al.*, 2010).

Forms of government regulation have fostered working time flexibility. Existing legislative frameworks, including those that regulate overtime/excess hours, are often ineffective at providing workers with control over working time (McCann, 2007), with workers in many countries, including Canada, working hours in excess of statutory limits (Lee *et al.*, 2007). Such conditions have contributed to longstanding pressure to address working time strains through public policy reform (Pocock, 2005), including in the Canadian context (Thornthwaite, 2004). However, even countries that have instituted worker-friendly working time policies, such as France, have begun to shift away from such arrangements (Askenazy, 2013). In the case of Germany, collective bargaining agreements have constructed a middle ground, offering employers some flexibility, while providing workers with protection against absolute employer discretion (Seifert, 2008).

Working time flexibility strategies affect workers' health and the quality of work, contributing to both work intensification and work-related stress (Kelliher and Anderson, 2010), and may serve as a mechanism of managerial control (Wood, 2018). They also impact the quality of life outside work, as long work hours and a lack of predictability over scheduling make balancing the demands of work and home exceedingly difficult (Kleiner and Pavalko, 2010; Wooden *et al.*, 2009). Where time flexibility has reduced worker control over time, workers have experienced a reduction in job satisfaction and commitment to firms and, particularly for women, an increase in role overload (Lyness *et al.*, 2012).

Regulating Working Time Flexibility in Ontario

In Ontario, hours of work and overtime standards are regulated by the Ontario *Employment Standards Act* (ESA) for most employers and employees in the province. Prior to ESA reforms introduced in 2000 (discussed below), maximum hours were eight in a day and 48 in a week, with an overtime premium of time-and-a-half for hours worked in excess of 44 per week. While the discourse of working time flexibility rose to prominence through policy and legislative reforms in the 1990s, the need for flexibility to benefit both employees and employers was identified as a regulatory goal as far back as the early 1970s. For example, a Tripartite Committee on Employment Standards noted that, "young people and others in society today … are displaying a real desire for more rewarding jobs and more flexibility in their work life taking account of and giving meaning to personal aspirations and family circumstances" (AO, No Date). The committee further stated that, "[I]n the longer run, all industries should be looking to themselves to eliminate artificial work barriers, and to do the training to facilitate less costly systems of delivering goods and services, using more flexible work scheduling and improved systems of career planning." To promote working time flexibility, since its inception in 1969 the Ontario ESA has included a system of excess hours permits as well as various exemptions and special rules for particular occupational groups that enabled employers to exceed the weekly hours maximum (Thomas, 2009).

The general framework for contemporary working time regulation in Ontario was established through a reforms process that began in the late 1990s by the Progressive Conservative government that took office in 1995.[5] With promises to reform the Ontario ESA to make it flexible and responsive to the demands of the contemporary workplace, the government set up the Red Tape Review Commission (RTRC) to undertake a review of legislation and policies governing Ontario's businesses and economy. The RTRC (1997: 92) described the ESA as "outdated" and lacking the "flexibility required to meet the needs of the modern workplace". With respect to hours of work and overtime, the RTRC recommended that weekly maximum hours of work be increased from 48 to 50, or 200 to be averaged over four weeks, and that the excess hours permit system be streamlined or eliminated.

Following a short consultation period where the government stated its intentions to reform the ESA so that it would "improve workplace flexibility" (Ontario 2000: 3), new legislation was introduced in November 2000, coming into effect in September 2001. The new legislation increased weekly maximum hours of work from 48 to 60 and allowed for the averaging of overtime hours over a four-week period. Securing the consent of individual employees was required to schedule weekly excess hours (over 48, up to 60) and arrange overtime averaging, while the need for government-approved excess hours permits was eliminated.

While the government claimed that it sought to meet the needs of both employers and employees in its proposed legislation, the flexible working time reforms of the ESA 2000 reflected a highly employer-oriented form of labour flexibility (Fudge, 2001; Mitchell, 2003; Thomas, 2009). By extending maximum hours of work from 48 to 60 per week, the *Act* provided employers with the ability to increase the working hours of those workers already working long hours, thereby contributing to overwork and hours polarization. Overtime averaging arrangements permitted instances where employees could work over 44 hours without compensation at time-and-a-half for those hours, if the total hours of work for the four-week period were less than 176 hours. By shifting the regulation of excess hours onto individualized negotiations between employers and employees, the working time flexibility of the ESA 2000 created the means for employers to establish greater control over the scheduling of excess hours, particularly for workers in precarious jobs, who may face many pressures that inhibit their capacities to withhold consent to employer requests for extra time or overtime averaging (Thomas, 2008).

In the years following the reforms of 2000, Liberal governments in office from 2003-2018 did little to alter the general framework of working time regulation established in the ESA 2000. The only notable change came in 2005, at which point a requirement for MOL approval of excess hours (over 48) and overtime averaging agreements was re-introduced, which were then to operate in conjunction with the requirement for employers to obtain employee consent for such arrangements. In December 2018, the newly elected Progressive Conservative provincial government introduced legislation that once again removed the need for MOL approval for excess hours and overtime averaging agreements. Under *An Act to Restore Ontario's Competitiveness by Amending or Repealing Certain Acts* (*Bill 66*, 2018), the sole requirement for scheduling excess hours and overtime averaging would be written agreements between employers and individual employees, withdrawing the MOL from any oversight and returning the regulation of working time standards to those established by the ESA 2000.[6]

Excess Hours and Overtime Averaging Permits

As discussed above, the system of permits for excess hours and overtime averaging provides a key regulatory mechanism in the Ontario ESA to facilitate working time flexibility. A quantitative analysis was conducted of the excess hours and overtime averaging applications submitted by employers to the MOL from 2008 to 2016. Of the 600 randomly selected approved permit applications analyzed,[7] excess hours applications numbered 347 (58%), whereas averaging hours applications numbered at 253 (42%).[8] Most of the applicants were non-unionized

and in the following industries: Manufacturing (145); Food, Beverage and Hospitality (68); Retail Sales and Service (63); and Healthcare and Social Services (50).

In terms of the overtime averaging applications, the rationales in the permit applications frequently related to employer needs, despite the fact that these applications (42% of those reviewed) directly asked whether the averaging period requested benefitted the employees. The majority of applicants cited employer needs as rationales for overtime permits (four of the top six rationales). Employers were concerned about ensuring that production or services remained uninterrupted during particular periods in the business cycle, arguing that this justified applying for excess overtime hours. Nevertheless, applicants also stated concern for workers' needs, particularly their work schedules and pay periods, as illustrated by quotes that make reference to "work-life balance" below. When employers' needs are compared with workers' needs, however, the frequency of rationales that pertain to employers' needs outweighed those for workers.

Employers that primarily reported their own needs on their permit applications also cited "the need to be flexible or have the capacity for flexibility to remain competitive" in their respective markets. This was particularly acute in applications that were seasonal or contractual in nature, which often used terms like peak or peak seasons to rationalize flexibility. Furthermore, workplaces that relied on just-in-time production processes, such as Manufacturing or Transportation and Warehousing, required flexibility. This was demonstrated in applications covering larger groups of employees (50 and over), as illustrated in the following rationale:

> Due to increased production volumes we are returning to a 24/7 12-hours shift schedule. This provides increased capacity and greater flexibility to meet higher customer demand. It is also the most preferred work schedule of our production team. (ID 28966; Not unionized, 69 employees affected)

The rationale for flexibility was also present in applications covering smaller groups of employees (under 50), as the following application indicates:

> Our main business is automotive. Each job is unique and has a specific time frame for job completion. Some jobs have tight closing dates and excess hours are needed in order to complete the job on time. Without this flexibility, we will be limited ... (ID 8336; 30 employees affected, not unionized) (Text cut-off in record)

Employers from the private service sector also expressed the need for flexibility, as shown in this application for a small retail business: "As a retail store we have fluctuations in client traffic which results in a number of staff having to flex their hours to cover peak demands." (ID 86; Not unionized, averaging hours request, 12 employees affected).

Overall, employers in both manufacturing and services sought to maintain a flexible workforce by distributing working time in accordance with market needs and conditions. This can be seen in applications from employers covering both larger and smaller numbers of employees.

Employer-provided rationales in overtime permits frequently made reference to potential benefits to employees of "flexibility" and "work-life balance".[9] In the case of averaging hours, the discourse of flexibility was deployed when describing employee desires to accommodate family responsibilities. There was a marked increase in the frequency of work-life balance discourse in later applications (after 2011) from the pool of data we reviewed. For example, home life demands were often framed as a matter of employee lifestyle choice, or personal or family need: "Some employees need to work variable hours to meet personal needs or family responsibilities and then they want to work extra hours to make up for the time they requested off." (ID 28091[10])

Working excess hours or averaging hours was frequently positioned as both desirable to employees and beneficial for maintaining work-life balance:

> With this flexible work arrangement, employees are able to plan their work and personal commitments over a longer period of time. Days off between shifts allows the scheduling of personal appointments without having to take a leave. (ID 20148; Not unionized, 255 employees affected)

Further to this, reproductive labour was frequently positioned within the rationales as requiring "accommodations", effectively likening it to a disability or an anomaly, rather than the norm. Within this framing, flexibility "accommodates" home life's reproductive labour: "It accommodates the employee schedule around work/home life demands. It also allows for the employee to work some extra hours if they so choose." (ID 89; Not unionized, 50 employees affected).

Accommodation was also used to suggest that employees must accommodate business demands and scheduling unpredictability: "To accommodate the 24 hours nature of the business and schedules that are not fixed, also to allow for employees for employee availability due to home life." (ID 88; Not unionized, 100 employees affected). (Error in original text)

In response to the averaging hours application form question "Does the averaging period requested benefit the employees in the occupations listed?", employers frequently listed the benefits of this form of time flexibility to the company. One application stated: "Yes - it will give the company the flexibility to staff projects more economically allowing more success in acquiring projects and, thus, retaining employees." (ID 28310; Not unionized. 40 employees affected)

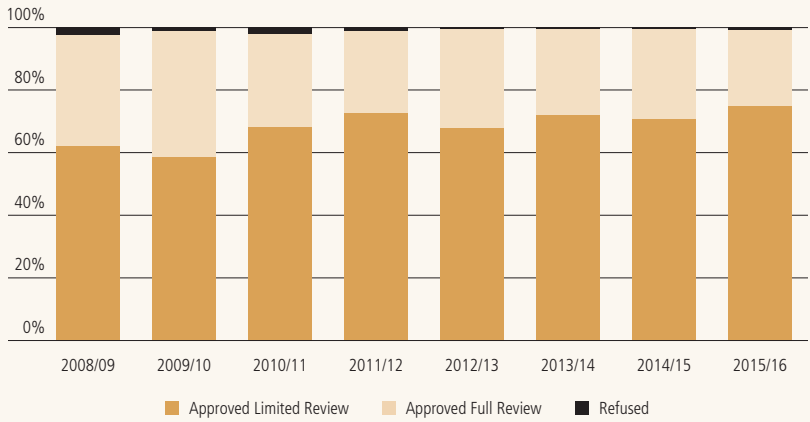
Some applicants also responded to this question by stating that the benefit to their employees was simply remaining employed: "… the averaging period will

increase job security for employees given that the Company may not be forced to place employees on lay off during periods where the work volume is low." (ID 13; Not unionized, 11 affected)

As stated above, the permit system was reintroduced in 2005 as a form of government oversight in the scheduling of excess hours and overtime averaging. However, the review of applications reveals a near perfect approval rating of permit applications, where refused applications represented less than 1% of all applications submitted (note that withdrawn applications were excluded from the dataset): 1.5% in 2010-2011; 0.4% in 2014-2015; and 0.2% in 2015-2016. This indicates that the re-introduction of the permit system largely supported flexible working time arrangements as per employer requests. Refused applications mirrored the accepted applications in our dataset. No significant differences were found between accepted applications and those that were refused with respect to the rationales offered, the number of employees affected, or whether or not workers were unionized. The only significant difference between accepted and refused applications was a greater number of Professional, Scientific, and Technical Services found in the sample of accepted applications. Figure 1 outlines the disposition of assessed applications between 2008-09 and 2015-16.

FIGURE 1

Disposition of Assessed Applications, 2008-09 to 2015-16



The high approval rate of applications demonstrates that employer use of excess hours is not effectively curtailed by the permits system. This echoes a long-standing critique of the previous version of the permits system existing prior to the ESA 2000 reforms, specifically that it was simply a rubber stamp (see Thomas, 2009). In other words, despite the formal existence of the excess hours and averaging hours application process, government oversight of work-

ing time provisions is quite limited, meaning that working time flexibility is largely established through privatized (and often individualized) negotiations between employers and employees.

Worker Experiences with Working Time Flexibility

While employers and governments often cite the benefits of working time flexibility for employees, interviews with workers in precarious jobs indicate that working time flexibility is often experienced as too many hours at work, a lack of time for family and friends, and a lack of control over working time, all of which contribute to overwork and stress. While the permit system is one way in which employers are able to secure flexible hours, interviews with workers and ESO's reveal that working time flexibility is also achieved through the evasion and avoidance of the ESA's hours of work and overtime provisions in a variety of ways.

Unstable schedules and pressure to work excessive overtime are contributing factors to the precariousness experienced by many workers. For these workers, working time flexibility was determined solely according to the employer's terms. Celeste, a restaurant worker, stated that her irregular schedule made it impossible to "have a life". Although she was classified as full-time, she only worked 25 hours per week. The scheduled hours and the days she worked varied from week to week, making it impossible for her to find a second job. Celeste stated:

> You basically don't have a life. You can't schedule anything. You can't meet friends. You can't go to doctor's appointments, like, like they are impossible to make. I have to make them 4 weeks in advance and it doesn't matter… [they sometimes schedule you even when you have] booked time off… You are powerless. You are literally powerless when it comes to scheduling. That is basically it. (WRK 120T).

Coming to Canada as part of the Live-in Caregiver Program (LICP), Wen was told by her employer that she "only needed to work about 9 hours a day" but was routinely pressured to work longer hours with little time off. She felt trapped: "I was under the live-in caregiving program. I couldn't leave this family before I finished two years of work." (WRK 119T)

Nayyar, an administrative assistant, also struggled with her employer constantly changing her work schedule:

> First my contract was from 8 to 4:30 … Then they asked me if I can switch from 7 to 3:30 … but when the new manager came in, … I switched to 8 to 4:30 back again, but after a while he asked me to come and work on Saturdays as well for 4 hours. While they didn't pay me … without pay. They required me to be there every other Saturday. (WKR 125T)

Workers felt that their health and work-life balance was negatively affected by their employer's drive for flexibility. Margaret, an office secretary, found that the irregularity of her schedule, which required her to work more than eight hours per day, six days a week, left her feeling stressed: "[I only got] one day off!... I could never get vacation... It was affecting my health and I was so exhausted." (WRK 112T).

Similarly, for Hanna working "somewhere between 12-16 hours a day… 70 plus, depending on how many hours [she] could stay awake" negatively affected her mental and physical well-being:

> I remember leaving at 11:30 at night, getting home at 1:30 in the morning, getting up at 6 the next day, leaving by 6:30 and being there at 8:30 again, and this was becoming a regular thing, … I was starting to suffer from chronic muscular back, eye, neck things… Whenever you work those sort of hours … you fall off the face of the earth. (WRK 101T)

Such forms of working time flexibility often involve hours of work that contravene the provisions of the ESA and may result in losses of income and reduced 'flexibility' for workers trying to balance home life and the demands of work. Jacobs and Padavic (2015: 77) note that practices of "time theft", whereby employers pressure workers to work without breaks or to perform unpaid labour, or do not provide legally mandated pay rates, are experienced by the most vulnerable workers, usually women and racialized workers. In interviews, ESOs noted that violations of the ESA's hours of work and overtime provisions are frequent. As one ESO stated: "You're just seeing that a lot of people are legitimately owed wages. They are not being paid overtime. That's a big one. People really want to work and to earn those wages. But they're not getting paid the overtime so they are working 50, 60, 70, 80, even 90 hours a week." (ESO2 228)

At times, such violations are due to a lack of employer or managerial knowledge of the legislated standards. As one ESO stated:

> I had an example [of a] retailer here in the mall. She was a brand-new manager. She is 21 years old and was put in charge of three retail stores. She had no idea on how to schedule people, what a supervisor is, what a manager is. She pays overtime when she pays overtime. She had no idea about anything… (ESO2 227)

Frequently, however, employers deliberately disregard the *Act*'s hours of work and overtime provisions, using a variety of strategies to avoid paying overtime hours. Alison, a restaurant worker, did not receive overtime pay as her supervisor would alter her schedule to avoid paying her overtime:

> If I worked too much time, he, uh, started cutting my hours. He only had me, like, work three hours a day. As soon as he came in, he would tell me to go home and he'd do my job". [Eventually Alison's supervisor fired her]: I was surprised he came in one day and

> said "[Alison], you're done, go home!" … I was too afraid to do anything back then but I've got my bravery now that I don't have to face that person anymore. (WRK 214W)

Nayyar's employer avoided paying her overtime by telling her "your contract is a fixed salary and we don't calculate the hours." (WRK125T). Nayyar felt she had no choice. She was expected to work these extra hours without pay if she wanted to keep her job. Salaried employees like Nayyer are often incorrectly paid their overtime pay. As stated by several ESOs:

> ... Employers and claimants think that overtime does not apply to salaried employees but it does… I had an employer tell me: "No, I did not pay him overtime. He is salaried. He got straight time." I said no. Over 44 hours, he needs to be paid time and a half. He said: "No, he is paid a salary: he gets paid more than other people." Genuinely, he didn't know... But most of the time, it is employers breaking the law and having to be held accountable for their actions. (ESO2 207)

Both workers and ESOs reported employer practices of improperly documenting hours of work in order to avoid paying overtime. Brent's employer would alter his work schedules to hide his overtime hours, meaning he always had to be mindful of how many hours he was working:

> If I worked 1-9 one day, [the boss's wife] would write down 8 hours above it. Except sometimes, she would write down a 6 or 7… Or, she would go back and say: "Oh, no, he didn't work 1-9 that day, he worked 1-6."... She would take the schedule home every Saturday, so I have no idea how many times I missed the fact that she manipulated it. (WRK 118W)

ESO's noted that a lack of proper documentation, such as time sheets or punch clock records, hides employer evasion of the ESA, making working time violations hard to determine. As one ESO stated:

> When there isn't that documentary evidence, that's when we have to rely on either the claimant's information if they have a personal record of hours worked or something like that…The lack of maintaining proper records is a major obstacle in terms of our investigation. (ESO2 224)

Even when there is documentation, as illustrated in Brent's case, it may not be reliable. According to one ESO:

> Overtime is loosey-goosey … sometimes an employer,… knows that 44 hours is his threshold and is trying to play a game... If it is someone whose duties might be let's say they might be managerial in character but were they entitled to it or not? Did anybody keep records and typically that industry doesn't pay [overtime] in that particular field. (ESO2 217)

Misclassification of employees as independent contractors is another method used by employers to avoid paying overtime. For example, one ESO stated:

"Some people try to scam the overtime. Exemptions. Calling everybody IT professionals. They can work them 60 hours one week. But most of it is unpaid wages." (ESO2 206)

Ronald, a restaurant worker, reported being misclassified as an independent contractor so his employer could avoid paying him for overtime. Ronald's employer disregarded the ESA in multiple ways, including unpaid training, misclassifying him and not paying him for all the hours he worked. The employer told him:

> You can work as many hours as you want,… and you can stay late no matter how late. ….They put me in the category as general labour and not as a company employee. So that's a very sad experience. I believe that's exploitation … they never hired [me], I don't think I am in their documentation. (WRK 116T)

Misuse of the ESA's overtime averaging provisions was also cited as a frequent occurrence. Jason often worked 50 hours or more per week. However, his boss would never pay him for the overtime and used an averaging arrangement to avoid paying overtime even though Jason had not given consent to this arrangement. His employer told him that: "…'they don't pay overtime until it's 200 hours in a month.' So they let me work 60 hours a week for like three weeks, not paying me zero overtime and then the last week, I'd only worked one or two days, to be less than that 200 hours a month." (WKR 229T)

Similar to Ronald, Jason felt that this practice was common in the food service industry. However, Jason had learned to document his hours and was able to successfully file a claim with the Ministry of Labour to regain some of the money he was owed for overtime hours. As an ESO noted: "A lot of times they don't have all of their agreements in writing or they don't have the proper approvals in place. And signed agreements with their staff. Those are most common." (ESO2 201)

Working time flexibility was experienced as higher levels of employer control over shift start and finish times, shift frequency and, ultimately, how much of one's life was spent at work, as well as loss of pay through working unpaid time or without compensation at an overtime rate. In the context of precarious work, this adds to workers' experiences of powerlessness. For some, working time flexibility even became part of a disciplinary process at work. Alison's supervisor used extra hours as a form of punishment: "To punish me, he would bring me in on a Sunday night to power wash because he knew how much I hated power washing there." (WRK 214W). Overall, workers in precarious low-wage jobs also experienced working time flexibility as too many hours, not enough time to balance responsibilities outside work and a lack of control over the scheduling of excess hours through individualized negotiations with employers.

Workers are not passive in this precarious environment, however. One way workers are able to respond to violations of their rights under the ESA is by filing an individual complaint with the MOL. Between 2008-09 and 2014-15, claims for unpaid wages, overtime pay, hours of work, rest periods and reprisals increased slightly (Vosko, Noack and Tucker, 2016). The insecure nature of precarious work creates a major barrier to complaining, however, meaning that many violations of ESA hours of work and overtime provisions are unreported. As one ESO stated:

> Reporting of noncompliance is a huge barrier. People are terrified of losing their jobs... I went into … a big name brand restaurant … [in] downtown Toronto…The employer was purposefully not paying overtime …The employer was tracking the overtime after 44 and choosing not pay it…. long story short, nobody in that workplace would say there was a violation…. They knew that if they did they would be replaced. (ESO2 222)

As discussed extensively elsewhere (see Vosko, Noack and Tucker, 2016), the overall effectiveness of addressing ESA violations through the complaints system is hampered by employee reluctance to complain, generally due to precarious employment conditions, as well as due to problems in securing a settlement that fully redresses the violation. In addition, individual complaints are registered in relation to the existing provisions of the ESA and do not resolve the issue of the deeper inadequacy of these provisions. A more fulsome discussion of potential reforms to the ESA is, however, beyond the scope of this article.[11]

Conclusion

The manifestation of working time flexibility provisions within the Ontario ESA have produced a regulatory framework that enhances employer control over working time. By largely individualizing the process of establishing excess hours, the capacity for workers to control their working day, particularly those in precarious jobs, is weakened due to the employer-employee power imbalance. In addition to a lack of control over negotiating working time, working time flexibility for workers in precarious jobs is experienced through feelings of exploitation and powerlessness, as well as a lack of time for family and friends, with negative impacts on workers' health.

The shift towards working time flexibility through Ontario's ESA favours employer-oriented flexibility, which is based on increasing workers' exposure to market forces, rather than offering workers greater flexibility over their time and greater capacities to balance work and non-work responsibilities. This employer-oriented flexibility is accomplished, for example, through provisions that increased maximum allowable hours to 60 hours per week and that allowed for overtime averaging, as well as through a state-regulated permits process that,

during its operation, maintained an extraordinarily high approval rating. Even with a high degree of flexibility built into the legislation, employers still evade the working time standards of the ESA, in particular the standard of overtime pay, through misclassification of workers, not documenting hours worked and simply not paying overtime. Addressing the implications of such forms of "working time flexibility" remains paramount to improving workplace protections for workers in low-wage and precarious work.

Notes

1 This article is based on data collected through the *Closing the Employment Standards Enforcement Gap: Improving Protections for People in Precarious Jobs* project, a five-year community-university research partnership funded by the Social Sciences and Humanities Research Council of Canada (SSHRC).

2 ESO1s provide the first stage investigation for workplace complaints for issues covered under the ESA. ESO1s gather information about the complaint and determine if there should be any compensation or settlement. They also determine if a more in-depth investigation should be completed or if the case involves reprisals on workers for filing the claim, retail business establishments, temporary agencies or equal pay for equal work. These cases are investigated by ESO2s.

3 We noted that a significant number of employers provided cursory details in their rationales, or none at all. This could be attributed to the brevity of the averaging and excess hours permit application form, as well as the 500-character limit in the response fields on the form.

4 For an extended discussion of the feminist political economy framework that informs this approach to the analysis of working time flexibility see Thomas and Vosko (2019) and Vosko (2019).

5 For a discussion of the history of working time regulation in Ontario, see Thomas (2009). See also the *Reports* of the Task Force on Hours of Work and Overtime (Ontario, 1987).

6 *Bill 66* was adopted on 3 April 2019.

7 The mean number of employees affected by each application to the MOL, by time period was as follows: 233 in 2010-2011, 158 in 2014-2015 and 146 in 2015-2016.

8 An even number of excess and averaging hours applications were selected for the first 400 cases but not for the last 200 cases. When looking at all applications from 2008 to 2016, excess and averaging hours permit applications were closer to 70% and 30% respectively.

9 The discourse of "flexibility" appeared in 137 of the applications reviewed, with 164 references made to flex/flexible/flexibility in total. "Work-life balance" was also a recurring keyword with 35 references.

10 A small number of the permit applications within the dataset, including this one, were missing information related to union status and the number of employees affected.

11 Research for this project has informed a more comprehensive discussion of potential ESA reforms in response to the existing limitations of ESA enforcement practices. See Vosko *et al.* (forthcoming 2020).

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SUMMARY

Flexibility for Who? Working Time, the *Ontario Employment Standards Act* and the Experiences of Workers in Low-Wage and Precarious Jobs

In Ontario, hours of work and overtime standards are regulated by the *Employment Standards Act* (ESA). This legislation covers most employers and employees in the province. As part of an ESA reforms process designed to promote workplace flexibility and enhance competitiveness, the Ontario ESA (2000) allowed for the extension of weekly maximum hours from 48 to 60, and the calculation of overtime pay entitlements to be based on an averaging of hours of work over up to a four-week period.

Situated in the context of shifts towards greater working time flexibility, this paper examines the dynamics of working time regulation in the Ontario ESA, with a specific focus on the regulation of excess and overtime hours. The paper considers these processes in relation to general trends towards forms of labour market regulation that support employer-oriented flexibility and that download the regulation of employment standards to privatized negotiations between individual employees and their employers, tendencies present in the ESA that were sustained through further reforms introduced in 2018 and 2019.

The paper draws its analysis from interviews with both workers in precarious jobs and Employment Standards Officers from the Ontario Ministry of Labour (MOL), as well as administrative data from the MOL and archival records. In the general context of the rise of precarious employment, the paper argues that ESA hours of work and overtime provisions premised upon creating working time flexibility enhance employer control over time, exacerbate time pressures and uncertainty experienced by workers in precarious jobs, and thereby intensify conditions of precariousness. The article situates the working time provisions of Ontario's ESA in the context of an ongoing fragmentation of the regulation of working time as legislated standards are eroded in ways that make workers in precarious jobs more vulnerable to employer exploitation.

KEYWORDS: working time, employment standards, precarious work, Ontario.

RÉSUMÉ

De la flexibilité pour qui? *Loi sur les normes du travail* de l'Ontario et temps de travail : expérience de travailleurs à bas salaire et occupant des emplois précaires

En Ontario, les normes minimales relatives à la durée du travail et aux heures supplémentaires sont régies par la *Loi sur les normes du travail (Employment Standards Act* en anglais, dorénavant la *Loi*). Cette dernière s'applique chez plusieurs employeurs et elle touche bien des employés de la province. Se situant dans un processus de réformes visant à promouvoir la flexibilité au travail et accroître la compétitivité, la *Loi* promulguée en 2000 par le gouvernement de l'Ontario permet une extension de 48 à 60 le maximum d'heures hebdomadaires et de rémunérer les heures supplémentaires en se fondant sur une moyenne des heures travaillées au cours des quatre dernières semaines.

Ayant pour contexte le virage vers davantage de flexibilité dans la gestion du temps de travail, cet article examine la dynamique de la réglementation de cette loi, notamment celle portant sur les heures excédentaires et supplémentaires. Notre étude examine ces processus en tenant compte de la réglementation généralisée du marché du travail qui accorde une plus grande flexibilité aux employeurs et étend celle des normes du travail aux négociations individuelles entre

employés et employeurs, tendance présente dans la *Loi* de 2000 qui fut renforcée par les récentes réformes introduites en 2018 et 2019.

Cet article se fonde sur des entretiens avec des travailleurs occupant des emplois précaires et des agents des normes d'emploi du ministère du Travail de l'Ontario, ainsi que sur des données administratives de ce ministère et des dossiers d'archives. Dans le contexte général d'une croissance de la précarisation de l'emploi, il soutient que les dispositions de la *Loi* relatives aux heures de travail et aux heures supplémentaires qui visent une plus grande flexibilité du temps de travail contribuent, avec le temps, à augmenter le contrôle de l'employeur, à exacerber les contraintes de temps et à accroître l'incertitude vécue par les travailleurs occupant des emplois précaires, donc à entraîner une plus grande précarisation. L'article situe les dispositions de cette loi ontarienne sur le temps de travail dans le contexte d'une fragmentation continue de la réglementation, les normes légales conduisant à une privatisation et une individualisation du temps de travail, deux phénomènes qui rendent les travailleurs précaires plus vulnérables à l'exploitation des employeurs.

MOTS-CLÉS : temps de travail, normes minimales de travail, travail précaire, Ontario.