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Submission to the Ministry of Labour by Migrant Workers Alliance for Change

Consultation on *Employment Standards Act* and *Labour Relations Act* Exclusions: Domestic Workers, Homemakers and Residential Care Workers

December 30, 2017

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I. Overview

a. Introduction

In this phase of Ontario's exemption review, only eight occupations are being considered: architects, homemakers, domestic workers, residential care workers, IT professionals, managers and supervisors, pharmacists, and superintendents. Migrant Workers Alliance for Change endorses the submissions made by the Workers' Action Centre and Parkdale Community Legal Services. These submissions will focus on Domestic Workers, Homemakers and Residential Care Workers, as these sectors impact most upon migrant worker labour.

Domestic Workers do the critical work of caring for children, persons with disabilities and older persons. The caregiving sector is reliant on the work of migrant workers, primarily women, who risk their jobs and their hopes of permanent residence in Canada if they complain about violations of their rights. This workforce is overwhelmingly female, racialized, poorly paid and highly precarious. Domestic workers include people with and without regularized immigration status and migrant workers employed through the Temporary Foreign Worker Program.

The caregiving sector is rife with abuses ranging from unpaid overtime to sexual abuse and racial discrimination. Often working alone in their employer's home, caregivers need robust employment standards protections, support for collective action to improve their conditions of work, and effective rights enforcement. Ontario's employment and labour law regimes currently accomplish none of these things.

Domestic Workers are subject to a special minimum wage rule that allows employers to deduct room and board from wages for the purposes of determining whether minimum wage has been paid. This special minimum wage rule is inconsistent with the federal Caregiver Program policies that prohibit employers from charging room and board to live-in caregivers.

When it comes to protections for unionization, Domestic Workers working in private homes are explicitly excluded from the *Labour Relations Act* and collective bargaining units made up of one person are not permitted.

Caregiver work is in practice very fluid, with movement between residential care homes and live-in caregiving situations. Some are recruited into other types of care work when they experience problems in the federal Caregiver Program, for example when they fall out of status for leaving an abusive workplace and must find a way to support themselves and their families. Because of this fluidity, migrant caregivers are also impacted by two other sectors under review: homemakers and residential care workers.

Caregivers who are considered "homemakers" are exempt from a litany of employment standards including daily and weekly hours of work limits, overtime, daily rest periods, eating periods and time off between shifts or work weeks. They are entitled to wages to

a maximum of 12 hours per day of pay, even when they work more. A residential care worker, who cares for children or disabled persons in family-type residential dwellings, does not enjoy minimum protections for hours of work and eating periods (daily and weekly limits on hours of work, mandatory rest periods and eating periods), overtime, and the right to payment for hours worked after 12 hours per day.

None of these exemptions can be justified and we urge Ontario to eliminate them. Instead, Ontario must take the necessary steps to ensure that caregiving work is free of exploitation and abuse, including by implementing the kinds of "broader based bargaining" strategies that would make collective action and worker power a reality for caregivers.

In the next phases of this exemption review, Ontario must prioritize those industries where workers are most vulnerable, including sectors that rely heavily on migrant labour. In particular, we urge Ontario to ensure that the agricultural sector is included in the next phase of the review.

b. Migrant Workers Alliance for Change

The Migrant Workers Alliance for Change (MWAC) is a migrant workers' rights coalition headquartered in Ontario.[1] Established in 2007, MWAC is led by migrant worker groups and supported by community, provincial and national organizations. Member organizations of MWAC work primarily with racialized and low-waged migrant workers doing organizing and advocacy work as well as providing legal, employment and health related services.

II. Context of Migrant Caregiving Labour

The persistent failure of federal and provincial governments to adopt policies that support accessible and affordable public childcare, elder care and care for persons with disabilities has created and sustained a need for caregiving labour to be performed in private homes.

For decades, this work has been performed by an overwhelmingly female, racialized workforce that is poorly paid, highly precarious, and often faces exploitative working

[1] The Migrant Workers Alliance for Change includes individuals as well as Alliance for South Asian AIDS Prevention, Butterfly (Asian and Migrant Sex Workers Support), Caregiver Connections Education and Support Organization, Caregivers Action Centre, FCJ Refugee House, Fuerza Puwersa, GABRIELA Ontario, IAVGO Community Legal Clinic, Income Security Advocacy Centre, Justice for Migrant Workers, Migrante Ontario, No One is Illegal – Toronto, Northumberland Community Legal Centre, OHIP For All, Parkdale Community Legal Services, South Asian Legal Clinic of Ontario , Students Against Migrant Exploitation, Social Planning Toronto, UFCS, UNIFOR, Workers Action Centre and Workers United.

conditions that fail to accord with minimum employment standards. Austerity measures over the past two decades have shifted significant caregiving labour from public healthcare facilities. As a result, the numbers of workers in this precarious sector has grown significantly. At the same time, these caregivers are increasingly serving a "patient population with more chronic and complex health issues."[2]

Expanded transnational labour migration policies bring thousands of migrant caregivers into Ontario each year with temporary immigration status. These migrant workers, almost exclusively racialized women from the global south, form a significant constituency of home-based caregivers and are the workers who face the most exploitative working conditions.

The structure of the Temporary Foreign Worker Program itself contributes to the already precarious situation of caregivers. Even though it violates the *Employment Protection for Foreign Nationals Act*, recruitment agencies continue to charge migrant caregivers thousands of dollars in illegal fees to secure jobs in Ontario. Workers in the federal Caregiver Program are given permits that tie them to one employer for two years. They must complete two years of caregiving labour on tied work permits before they can apply for permanent residence and receive an open work permit.

These practices create extremely exploitative work conditions. Often working and living in the same workplace, caregivers are isolated and vulnerable to abuses ranging from unpaid overtime to physical and sexual abuse and racial harassment. The live-in employment arrangement gives employers substantial control over every aspect of caregivers' lives, often with no clear boundary between being "on-duty" and "off-duty", and unpaid overtime is common.

To complain or leave abusive employment will delay or even eliminate the opportunity to complete the two years of work that is required to apply for permanent residence and to be reunited with their families.

The migrant caregiver workforce must have robust employment and labour law rights, including effective enforcement, in order to prevent exploitation.

III. The *Employment Standards Act* and Domestic Workers

a. Principles that should govern the exemption review

The *Employment Standards Act* contains more than 85 complex exemptions and special rules that permit some employers to avoid compliance with minimum wage, vacation pay, public holiday pay, overtime and hours of work rules, severance and other

[2] Office of the Auditor General of Ontario (September 2015), "Special Report on Community Care Access Centres – Financial Operations and Service Delivery" at p. 14.

provisions. Only 24% of Ontario employees are fully covered under the *Employment Standards Act*.[3]

Over the years, exemptions and special rules have been introduced in response to industry or business requests with little or no involvement of the workers affected by such exemptions.[4] These exemptions strongly favour employers, with the cumulative costs of exemptions from minimum wage, overtime pay, holiday pay, and vacation pay potentially taking as much as $45 million out of the pay cheques of workers each week.[5] The social costs of increased stress, poor health, poverty and insecurity are incalculable.

The review of *Employment Standards Act* exemptions must be guided by the purpose of the *Act*: universality, minimum standards and fairness. The *Act* is intended to provide basic minimum terms and conditions of employment that protect all workers, to address the power imbalance between employers and workers and to protect against exploitation and substandard working conditions.

Ontario has identified a number of important principles that will serve as the foundation for its exemption review:

- All employees and employers, with limited exceptions, should be covered by the *Employment Standards Act*.

- A strong rationale is needed to exempt employees from *Employment Standards Act* protections because doing so results in particular groups of workers no longer having protections that are minimum standards.

- There are situations where a standard cannot be applied to a particular industry or occupation for reasons that warrant an exemption, including optimal performance of the labour market, and economy, and contributing to social goals.

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[3] Vosko, Leah F., Andrea M. Noack and Mark P. Thomas (2016), "How Far Does the *Employment Standards Act 2000* Extend, and What are the Gaps in Coverage? An Empirical Analysis of Archival and Statistical Data." Online: https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Vosko%20Noack%20Thomas-5-%20ESA%20Exemptions.pdf.

[4] C. Michael Mitchell and John C. Murray (2017), "An Agenda for Workplace Rights: Final Report of the Changing Workplaces Review" (Ontario Ministry of Labour) at p. 152.

[5] Vosko, Leah F., Andrea M. Noack and Mark P. Thomas (2016), "How Far Does the Employment Standards Act 2000 Extend, and What Are the Gaps in Coverage? An Empirical Analysis of Archival and Statistical Data" at p. 30.

- A rigorous process based on criteria that must be met must be used to determine whether a reduction in fundamental employment protections is justified. Exemptions may be granted only in exceptional circumstances.

Migrant Workers Alliance for Change supports these principles. We endorse the proposal by the Workers' Action Centre and Parkdale Community Legal Services to add one additional criteria: exemptions should not compound precarious work and existing labour market disadvantage.

> ***Recommendation 1: The following principle should be added to the exemption review: "The employees to whom the exemption or special rule would apply are not historically disadvantaged or precariously situated in the labour market. That is, such exemption should not compound existing labour market disadvantage."***

b. The test that should be used to maintain or add *Employment Standards Act* exemptions

Ontario has proposed to use the following test in determining whether an employment standards exemption should be maintained or added:

1. The occupation or industry must meet Core Condition A and/or Core Condition B.

    a) Core Condition A: The nature of work in an industry is such that it is impractical for a minimum standard to apply. Applying the standard would preclude the work from being done at all or would significantly alter its output. The work could not continue to exist in anything close to its present form.

    "Nature" of the work relates to the characteristics of the work itself. It does not relate to the quantity of work produced by a given number of employees. The relevant question is whether applying a minimum standard would hamper the viability of the tasks being performed?

    b) Core Condition B: Employers in an industry do not control working conditions that are relevant to the standard.

2. Supplemental Condition: if one or both of the Core Conditions is met, the work provides a social, labour market or economic contribution that argues for its continued existence in its present form, even in the absence of one or more minimum standards applying to it.

3. Consideration must be given to two other factors before an exemption is granted or maintained:

a) The employee group to whom the exemption or special rule would apply must be identifiable, to prevent confusion and misapplication of the exemption/special rule.

b) Both employees and employers in the industry agree that a special rule or exemption is desirable.

Migrant Workers Alliance for Change adopts the recommendations made by the Workers' Action Center and Parkdale Community Legal Services to strengthen this test.

First, Core Conditions A & B must both be met in order to permit an exemption. Allowing employers to pass the first step by demonstrating that they do not control working conditions is far too vague and would provide an easy loophole for employers seeking to avoid minimum standards of employment.

Second, the "Supplemental Condition" permits a consideration of the "economic contribution" of the work as a potential justification for an exemption. The costs borne by workers must be part of this calculation. The current exemptions result in over $2 billion per year of lost earnings for workers, with substantial cumulative losses for families, communities and the health care system. These losses weigh heavily against exemptions.

Finally, with respect to the final step of the test, worker input should not just be a factor for consideration. It must be requirement for exemptions to be justified. The process used to determine whether workers have agreed to an exemption must be transparent and fully informed.

Recommendation 2: The test for determining whether an exemption should be maintained or added must require that both Core Condition A and Core Condition B are met.

Recommendation 3: Ensure substantive fairness in the review process for exemptions and special rules. This must include addressing the power imbalances between employers and employees and soliciting employee feedback.

c. *Employment Standards Act* exemptions affecting Domestic Workers, Homemakers and Residential Care Workers should be eliminated

The *Employment Standards Act* has a number of special rules and exemptions for workers who provide homemaking/personal support services. None of these exemptions would meet Ontario's criteria for maintaining or justifying employment standards exemptions, even absent the amendments that we proposed above:

- Special minimum wage rule for Domestic Workers: This special rule deems room and board as wages for the purposes of determining whether minimum wage has been paid. However, the federal Caregiver Program prohibits employers from charging room and board to live-in caregivers. In light of this prohibition, it should be clear that deeming room and board to be wages is not required to ensure that caregiver work can be done. Therefore, neither Condition A nor Condition B are met. Revoking the special rule for domestic workers would ensure that the *Employment Standards Act* is consistent with federal government policy and practice.

- Homemaker exemptions for persons employed by an employer, other than a householder, to do homemaking services for an individual in a private household: Employers are only required to pay "homemakers" the minimum wage for hours worked up to a maximum of 12 hours per day, even if more hours are worked. Homemakers are not entitled to daily and weekly hours of work limits, overtime, daily rest periods, eating periods or time off between shifts or work weeks. Other, similar sectors – such as nurses and personal support workers – are not subject to such exemptions. Neither Condition A nor Condition B are met, as these exemptions are not required to ensure that the work can be done and employers in other sectors have shown that they can control the conditions of work. In addition, Factor 1 is not met, as there are no clear boundaries for application of the exemption, which results in confusion and misapplication of the rule (see 3(a) above).

- Residential care exemptions for persons employed to supervise and care for children or developmentally disabled persons in a family-type residential dwelling or cottage: Employers of such workers are exempt from complying with hours of work and eating periods (daily and weekly limits on hours of work, mandatory rest periods and eating periods), overtime, and paying a worker for hours worked after 12 hours per day. This sector is known to misclassify employees in order to take advantage of the exemptions and to employ undocumented workers who are at risk if they report violations. Many residential care workers are employed in groups homes that are no different than group homes for youth, people with autism, addictions or mental illness – yet workers in these other types of homes are not subject to these exemptions. Furthermore, employers clearly control working conditions in residential care homes. As neither Condition A nor Condition B are met, these exemptions should be removed.

Recommendation 4: Repeal the Domestic Worker, Homemaker and Residential Care exemptions and special rules as set out in O. Reg. 285/01.

IV. Provide legal protections for the unionization rights of Domestic Workers in the *Labour Relations Act*

Ultimately, enhancing the working conditions of Domestic Workers will require moving beyond individual employment standards and reforming the *Labour Relations Act* to allow collective action, organizing, representation and bargaining led by migrant workers themselves. Their isolation and vulnerability, chronic employment standards violations and lack of enforcement in private homes can best be addressed by Domestic Workers organizing and working together to ensure they have safe and decent working conditions.

That means ensuring access to the most fundamental labour rights – the constitutionally protected right to unionize, to bargain collectively and to exercise the right to strike.

a. The *Labour Relations Act* must protect the right of caregivers to unionize

Most caregivers working in private homes are not unionized because the work structure differs from the standard employment relationship for which our current labour relations laws were designed. While caregivers typically work one-on-one in private homes, bargaining units are workplace-specific and s. 9(1) of the *Labour Relations Act* prohibits single-member bargaining units. More fundamentally, s. 3(1) of the *Labour Relations Act, 1995* expressly states that "This Act does not apply to … a domestic employed in a private home."

The lack of unionization in this sector, therefore, does not reflect workers' active choice to remain non-union; it reflects under-inclusive laws that fail to account for the structures of female-dominated care work. In fact, for decades migrant caregivers have organized through social/community networks and have been demanding the right to unionize. In particular, since at least 1993, migrant caregivers in Ontario have been demanding law reform to grant them access to the right to unionize through broader based bargaining structures.[6] Their continued exclusion raises serious concerns in light of the *Charter*'s guarantees for freedom of association and equality.

The Supreme Court of Canada has clearly ruled that the right to unionize, the right to bargain collectively and the right to strike are fundamental constitutionally protected rights. These rights achieve a central purpose behind the constitutional protection for freedom of association: rectifying power imbalances.[7]

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[6] Ontario District Council of the ILGWU and Intercede (February 1993), *Meeting the Needs of Vulnerable Workers: Proposals for Improved Employment Legislation and Access to Collective Bargaining for Domestic Workers and Industrial Homeworkers* (ILGWU/INTERCEDE).

[7] *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 SCR 3 at para. 70.

Absent legislative support, workers generally are unable to unionize. As a result, the Supreme Court has ruled that government has a positive obligation to take active steps to ensure that those who are vulnerable have legislative support for effective and meaningful exercise of their rights to unionize and bargain collectively.[8] Instead, Ontario has explicitly denied those rights. Ontario's law is out of sync with its constitutional obligations.

In the Changing Workplaces Review, the Special Advisors concluded that there is "no valid policy reason to deny this group of workers their constitutional rights to freedom of association" and noted the distinct characteristics that made their lack of protections so troubling:[9]

- They are a largely female and racialized workforce;
- They are in Canada on temporary work permits;
- Many live under the same roof as their employer, leading to social and work isolation and a high degree of dependency on their employer. They are under constant surveillance and lack personal privacy;
- Many experience language restrictions;
- They are politically invisible;
- They may have little knowledge to or access to information about their rights;
- Caregivers have only minimal input into negotiating the terms and conditions of their employment and are often reluctant to challenge an employer's decision that contravenes their contract;
- They have little effective recourse when violations occur;
- There is a trend to working longer hours than stipulated in their contracts or under employment standards legislation, with a persistent lack of boundaries between work and personal hours.

The very fact that the law excludes domestic workers has a chilling effect and sends the signal that caregiver organizing is illegitimate. It emboldens exploitative behaviour by

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[8] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at paras. 20-22, 25-28, 40-48, 66-67; *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 SCR 391 at para. 34.

[9] C. Michael Mitchell & John C. Murray (May 2017), "The Changing Workplaces Review: An Agenda for Workplace Rights" at p. 286 (Accessed June 26, 2017 at: https://files.ontario.ca/books/mol_changing_workplace_report_eng_2_0.pdf).

employers. It reinforces the deeply racialized and gendered ideology of servitude that devalues caregivers' labour as "not real work". Their labour is devalued because it is work that has also been done and continues to be done by women on an unpaid and unrecognized basis. It reinforces privileged cultural norms of family, service and class that marginalize the value of caregiver labour as labour. These norms also mask employers' power and responsibilities as employers and obscure the fact that "the home" is a "workplace."

This erasure from labour law exacerbates the power imbalance between employers and caregivers. It ultimately facilitates the isolation and marginalization that have enabled exploitative working conditions to flourish for decades.

We urge Ontario to remove those aspects of the *Labour Relations Act* that deny Domestic Workers the legal protections for unionization.

> ***Recommendation 5: Repeal s. 3(a) of the Labour Relations Act, 1995 so that domestic workers are not formally excluded from the right to unionize.***
>
> ***Recommendation 6: Remove the requirement in s. 9(1) of the Labour Relations Act, 1995 that a bargaining unit be more than one employee.***

b. Reform the *Labour Relations Act* to establish broader-based bargaining

The practical reality is that the possibility of unionization is very small under current labour relations regimes because many caregivers are the only persons employed in a private home. Such isolation in small workplaces makes collective action extremely difficult. As a result, not only must explicit exclusions from legal protections be rectified, but there must also be other statutory reforms that will ensure that Domestic Workers' right to unionize is accessible in practice.

The Special Advisors recognized this structural problem and noted that "sector specific regulation under the [*Employment Standards Act*] is likely to become more necessary and important to ensure that working conditions meet the test of decency, and that certain issues contributing to vulnerability and precariousness are addressed."[10] However, sector specific standards under the *Employment Standards Act* are not enough.

First, sectoral standards would not provide a right to unionize, to collective representation, to collective bargaining and to dispute resolution mechanisms. The right to unionize, to collectively bargain, and to engage in other forms of collective action are critical to giving caregivers an effective voice in the workplace, to allowing them to

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[10] C. Michael Mitchell & John C. Murray (May 2017), "The Changing Workplaces Review: An Agenda for Workplace Rights" at p. 148 (Accessed June 26, 2017 at: https://files.ontario.ca/books/mol_changing_workplace_report_eng_2_0.pdf).

enforce their rights, and to participate in the political forum to shape the terms and conditions of their work.

Second, migrant caregivers' terms and conditions of work are already effectively subject to a sectoral standard that has depressed their terms and conditions of work, not augmented them. Migrant caregivers do not "negotiate" their contracts. They are typically presented with standard contracts to sign before they arrive in Canada with wages that are set at the "prevailing rate" (typically minimum wage). A strong floor of substantive rights is a necessary platform from which bargaining in the care sector must operate, but reforms cannot be restricted to minimum standards.

What is ultimately needed is a broader based bargaining framework that is responsive to migrant caregivers' reality and that will allow access to effective freedom of association. Unlike many workers, migrant caregivers face two points of power imbalance. They face a power imbalance relative to their immediate employer. They also face a power imbalance relative to the recruiters who place them with their immediate employer and who may continue to exert ongoing pressure through the extraction of unlawful fees and other coercive behaviour. An effective broader based bargaining framework must give migrant caregivers a strong collective voice to counter both of those sources of workplace exploitation.

Migrant caregiving already operates under a labour migration framework that is effectively sectoral. But while employers and recruiters have power in that sectoral system, workers do not. Establishing a broader based bargaining framework in this context is entirely feasible and is in fact necessary to rectify the profound power imbalance that exists.

The structural capacity is in place to organize on a broader basis for bargaining. Currently, employers who wish to hire a migrant caregiver must apply for a Labour Market Impact Assessment authorizing them to hire a migrant worker. In order to receive this Assessment, an employer must prove that they are unable to hire or train a local worker (i.e. that there is a sectoral shortage of labour). Again, as identified above, employers present workers with standard contracts which are common throughout the sector and which provide the "prevailing wage rate" in the province.

In provinces such as Manitoba, Saskatchewan and Nova Scotia, employers must register with and be approved by the provincial employment standards branch before they can apply for an Assessment and hire a migrant worker. Those provinces also have a statutory requirement for recruiters to be licensed and registered. Ontario should implement similar systems, which are consistent with a sectoral bargaining framework.

In a system where employers must already apply for the authorization to hire migrant workers based on a sectoral labour shortage, and in which the global leading best practices require employers to be registered with the Ministry of Labour, requiring those employers to be part of a designated employer bargaining agency is not a difficult step.

Broader based bargaining would redress the sharp power imbalance in the sector and bring accountability to employer and recruiter practices.

Migrant caregivers must play an active role in developing the broader based bargaining model that applies to their sector. Meaningful models of collective bargaining require the participation of migrant workers in their development. Without such participation, any broader-based bargaining models would lack both legitimacy and effectiveness.

Caregivers need access to a sectoral platform for collective bargaining with the goal of enabling workers to organize and bargain collectively from multiple locations with the same employer/franchisor. For sectoral bargaining, there must be a process for designating an employer entity that is the counterpart in bargaining and to recognize the triangular relationship involved in some employment relationships involving recruitment agencies and employment agencies.

Recommendation 7: Following active consultation with migrant caregivers, enact a model of broader based bargaining for domestic workers that includes:

- ***a) Designation of region(s) for bargaining;***
- ***b) Designation of an employer bargaining agent for the region(s); and***
- ***c) Recognition of workers' bargaining agents for the region(s), including the ability of migrant workers' unions to operate union hiring halls.***

V. Summary of Recommendations

Recommendation 1: The following principle should be added to the exemption review: "The employees to whom the exemption or special rule would apply are not historically disadvantaged or precariously situated in the labour market. That is, such exemption should not compound existing labour market disadvantage."

Recommendation 2: The test for determining whether an exemption should be maintained or added must require that both Core Condition A and Core Condition B are met.

Recommendation 3: Ensure substantive fairness in the review process for exemptions and special rules. This must include addressing the power imbalances between employers and employees and soliciting employee feedback.

Recommendation 4: Repeal the Domestic Worker, Homemaker and Residential Care exemptions and special rules as set out in O. Reg. 285/01.

Recommendation 5: Repeal s. 3(a) of the *Labour Relations Act, 1995* so that domestic workers are not formally excluded from the right to unionize.

Recommendation 6: Remove the requirement in s. 9(1) of the *Labour Relations Act, 1995* that a bargaining unit be more than one employee.

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