Ensuring Employment Standards Reflect the Reality of Small Business

Samantha Howard, Director for BC and the North
Western Canada Team Lead, Business Resources

On behalf of our 10,000 member businesses in British Columbia, the Canadian Federation of Independent Business (CFIB) welcomes the opportunity to share our insights on changes to the *Employment Standards Act (ESA)*. While is it prudent to ensure the Act reflects a modern workplace environment, it is also essential that our employment standards are sensitive to the needs of both employees and employers. It is our concern that some of the proposed recommendations by the British Columbia Law Institute do not reflect this objective.

In addition to a joint submission filed with 10 other associations on BC Law Institute's Employment Standards Review to the labour code, we wanted to submit some additional information and insights. The following submission draws from two CFIB data sources. The first source is a public opinion poll conducted for CFIB by IPSOS between August 23 to August 28, 2017 with a sample size of 2,001 employed Canadians, including self-employed and working students. Secondly, data is also drawn from a national CFIB survey conducted August 22 to October 10, 2017, with data specific to British Columbia analyzed and presented.

The submission is structured as follows:

- Employer and Employee Relationships;
- Benefits of Flexible Workplace Practices;
- Our response to the BC Law Institute Consultation on Employment Standards;
- Recommendations.

Employer and Employee Relationships

Employment Standards were created primarily to protect the interest of employees, but the world of work has changed dramatically since they were originally drafted. Changing population and industry demographics coupled with BC's low unemployment rate and increased demands for better work-life balance, means that the world of work in BC today is very different than what it was even five years ago.

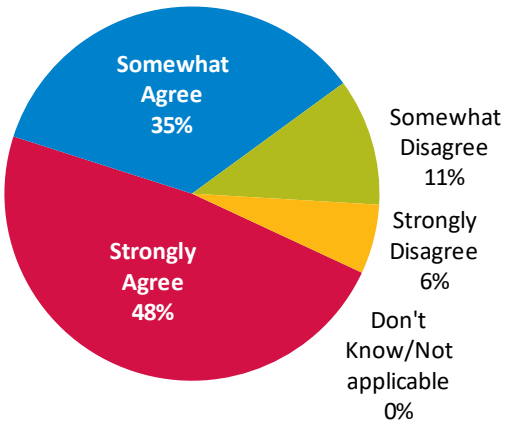
Ensuring that BC's Employment Standards are equitable to both employers and employees is critical going forward. More importantly, employers and employees are seeking more flexibility in their workplace arrangements, and BC's legislation needs to reflect these workplace realities in 21st century workplaces.

Advances in technology have revolutionized workplace relationships, giving employees and employers' a growing number of opportunities to structure their workplace to best suit their unique needs. A successful Act is one that promotes flexibility. Flexible workplace arrangements allow employees and employers to create agreements that best suit their individual needs, and produce optimal outcomes.

In fact, the majority of current workplace arrangements are the personal choice of employees (see Figure 1). In a public opinion poll conducted in August 2017, 83 per cent of employees indicated that their current work arrangements were their personal choice. This is an ideal outcome, and one that should be achievable through Employment Standards that promote flexible workplace arrangements. As the provincial government looks to reform the *Employment Standards Act*, it is essential that any new policies or proposed adjustments reflect this principle of flexible arrangements.

Figure 1

My current work arrangement is my personal choice



Note: Totals may not add up to 100% due to rounding.
Source: IPSOS Public Opinion Poll conducted on behalf of the CFIB, August 23rd to August 28th, 2017. n=2001 employed Canadians, including self-employed and working students

Benefits of Flexible Workplace Practices

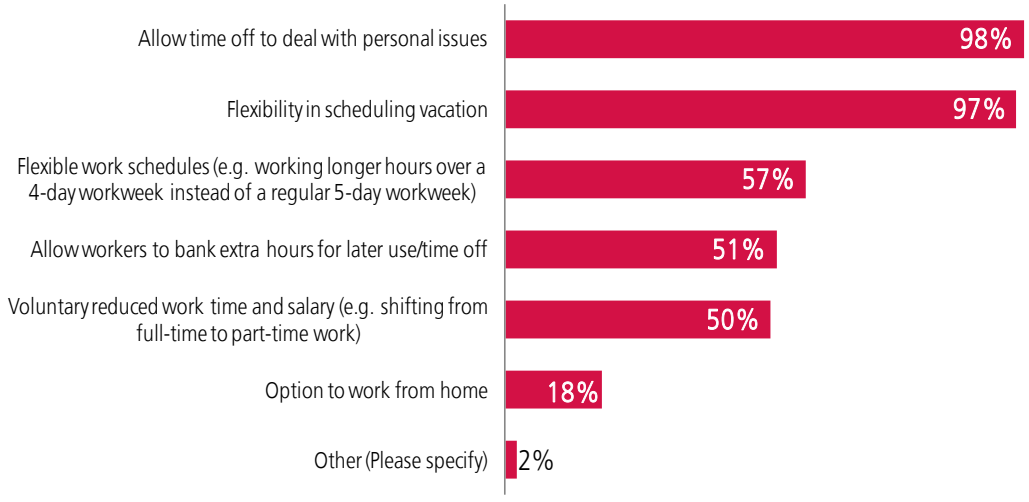
BC firms recognize the importance of supporting employees with balancing their work and family responsibilities.

Moving forward, it is essential that the *Employment Standards Act* takes into account the value of healthy employer and employee relationships. Not only is it evident that the vast majority of employees benefit and are satisfied with their current work arrangements, access to flexible working schedules seem to be a driving part of that satisfaction. Employers feel the same way. Flexible working environments not only benefit employees, but they contribute positively to employers too. Currently, small businesses in BC offer their employees a variety of flexibility; for example, 98 per cent allow time off to deal with personal issues, 97 per cent offer flexibility in scheduling vacation, and 57 per cent offer flexible work schedules (see Figure 2).

Flexible working environments benefit businesses, and subsequently employees. They help build meaningful relationships between employees and employers and help overall satisfaction of both parties. Ninety per cent of employers report better relationships with their employees, 79 per cent have higher employee job satisfaction, and 75 per cent have higher employee retention as a result of flexible workplace practices (see Figure 3).

Figure 2

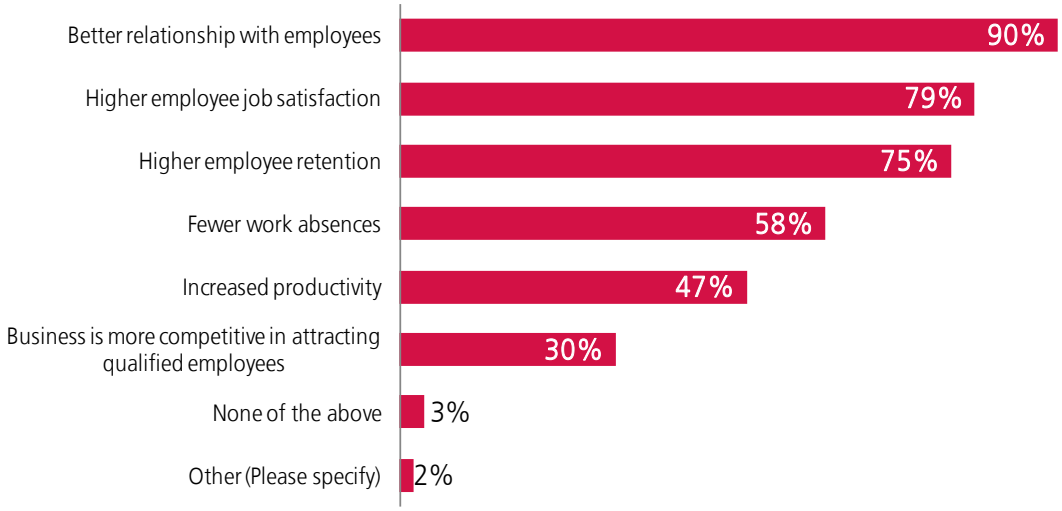
Which of the following flexible workplace practices does your business offer employees? (Select as many as apply)



Source: CFIB Changing World of Work Survey, Aug 22 to Oct 10, 2017. n=391 for BC breakdown

Figure 3

How has your business benefited from these flexible workplace practices? (Select as many as apply)



Source: CFIB Changing World of Work Survey, Aug 22 to Oct 10, 2017. n=390 for BC breakdown

While SME employers do provide flexibility in their workplace to assist their employees with balancing their work and family, there is usually little thought given to how SME owners themselves are balancing their work and family life. In fact, it is often the SME owners that are the ones that have to fill in when employees are not able to work or do not show up for their shift. This is often in addition to the 50 hours(+) that the majority of entrepreneurs work every week[1]. CFIB research found that less than half of business owners (46 per cent) had taken a one-week vacation more than twice in the last three years and about one-in-seven (16 per cent) had not taken any vacation within the last three years. These results clearly show that government needs to recognize that many SME owners are already under a tremendous amount of strain. Most employers provide as much flexibility as they can to their employees within the limitations of the business operations and their own work/family balance.

Being overly prescriptive with Employment Standards can actually reduce the flexibility that benefits both employees and employers. The government has to recognize the added strain being imposed on SME owners and help them by allowing employers and employees to come to mutual agreement on the workplace practices that work best for them, without dictating the outcome of every unique employee-employer circumstance. Without this level of flexibility, we fear that the burden will continue to fall entirely on business owners and could result in fewer people wanting to make the leap into starting their own business.

[1] BC Government, Ministry of Jobs, Trade and Technology. Small Business Profile 2017, BC Stats

BC Law Institute Consultation on Employment Standards

We appreciate the amount of time dedicated by the BC Law Institute's Project Committee that reviewed the *Employment Standards Act*. The tabled document for consultation is 450 pages long. That in its self would be a deterrent to participate for most small business owners. So we were pleased to see individuals could participate through an online survey. After taking the survey ourselves, we found the agree/disagree questions to be leading at times. Admittedly, respondents do not have to select any of the options (if you do not agree with them) as each question is accompanied with a comment box. In addition, respondents do not have to answer every question – they can just answer the ones that are important to them. We did hear back from members who were upset that their answers were capped and some said it took too long to complete the survey, some reporting over two hours, while others quit after 45 minutes. The reality is that most small business owners do not have that much time to dedicate to filling out a survey.

On behalf of our 10,000 members in BC, the following are our responses to all 70 recommendations by the Project Committee:

Recommendation 1 - The Employment Standards Act (ESA) should not be extended to apply to independent contractors.

CFIB supports this recommendation.

Recommendation 2 - The ESA should not contain a definition of dependent contractor or distinguish between employees and dependent contractors.

CFIB supports this recommendation.

Recommendation 3 - The ESA should continue to specifically address vulnerable categories of employees.

CFIB supports this recommendation.

Recommendation 4 - The ESA should not supplant or supplement the common law regarding wrongful dismissal, or provide for the administrative adjudication of wrongful dismissal claims, except as now provided in relation to contraventions of section 83(1).

CFIB supports this recommendation.

Section G - Unionized worker exclusion

CFIB feels that a level playing field for all employers and collective bargaining should not allow opting out of minimum standards. The concept that a collective agreement should meet the minimum standards of the law is something CFIB supports.

Recommendation 5 - Principles should be developed to govern future applications for exclusion of an industry, activity, occupational group, or class of workers from all or part of the ESA in order to ensure that the interests of employers and employees are fully taken into account.

CFIB agrees that any clarification of the categories would be welcome with the provision that this is done in consultation from stakeholders, with plenty of time allowed for feedback before any decisions are made.

Recommendation 6 - Existing exclusions from ESA standards should undergo a systematic review by government to determine whether they continue to be justified.

CFIB agrees with this recommendation, again with the provision that this is done in consultation with stakeholders and lots of time provided for feedback before any decisions are made.

Written Contracts of Employment

CFIB agrees with the majority on the Committee and submit it would be unworkable to require all employment relationships to be documented in writing. CFIB agrees that having an employment contract in place is optimal practice, however, many small business owners are not versed in Employment Standards regulations and manage, as best they can, under a verbal agreement. We advise to implement a contract, where possible, however small business owners should not be unfairly penalized for a lack of understanding in this context.

Prohibition on Excessive Hours of Work:
Section 39 is unique in Canadian employment legislation in its generality. "Excessive" is not defined in the ESA and is left to interpretation. **Section 39 prohibits employers from requiring an employee covered by the Act to work excessive hours or hours detrimental to the employee's health or safety: Despite any provision of this Part, an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee's health or safety**
****The Project Committee does not propose any change to section 39.**

CFIB disagrees with the Committee and would like to see a clear definition of what would be considered excessive hours. Ambiguity leaves employers vulnerable to complaints for which they have no defence and no guideline to follow.

Majority recommendation 7 - The ESA should allow one or more alternate standard patterns of working hours within the 40-hour week in addition to the standard of 8 hours per day, and require a notice period for a change from one standard alternate pattern to another.

CFIB supports the majority position on the Committee that the Act should allow one or more alternate standard patterns of working hours within the 40-hour week and require a notice period for a change from one pattern to another.

We do not support the minority recommendation 7a that a pattern of working hours different than 8 hours per day, 40 hours per week, should require worker consent by means of an averaging agreement in every case. This would be too inflexible and burdensome for both employers and workers.

Recommendation 8 - The definition of "week" in section 1 of the ESA should be amended to allow an employer to designate the day on which the period of 7 consecutive days begins for the purpose of wage calculation and employee benefits under the Act, provided that the employer must
(a) follow a consistent practice following the designation; and
(b) provide adequate notice to affected employees of any subsequent re-designation of the beginning day of the 7-day period.

CFIB supports this recommendation.

Section 40 (1) hours of work and overtime

CFIB supports overtime pay in the case of an employee working more than 40 hours in a week, with the exception that an averaging agreement is already in place. The averaging agreement should override this obligation.

Recommendation 9 – Overtime Sections 42 and 17(2)(a) of the ESA should be repealed. There is a consensus within the Project Committee that time banks are excessively complicated and costly to administer, and that the concept of the time bank is also abused to avoid paying employees for earned overtime. After consideration, the Project Committee decided they should be abolished by repealing section 42 and the paragraph in section 17(2) referring to time banks.

CFIB disagrees with the Committee. These sections refer to the ability of employees to bank earned overtime in exchange for the time off at later time. Despite the fact that it can add red tape during record keeping, we believe repealing would result in less flexibility for the employee and employer. Repealing these Sections would put many benign and mutually beneficial agreements outside of the law.

Recommendation 10 - The Project Committee considers that a provision allowing averaging of hours of work, together with proper safeguards against misuse of the provision and exploitation of employees, should be retained in the ESA.

CFIB agrees with this recommendation.

Recommendation 11 - The current section 37(2)(a)(iv), requiring an averaging agreement to specify the work schedule for each day covered by the agreement, should not be carried forward into an averaging provision replacing the present section 37.

CFIB agrees with this recommendation.

Recommendation 12 - An averaging provision replacing the present section 37 should provide that:
(a) an averaging agreement may have a term of up to 2 years, subject to renewal within the term;
(b) the period over which hours of work may be averaged for purposes of overtime must not exceed 8 weeks;
(c) the number of working hours per day within an averaging period must not exceed 12 unless overtime is paid for hours worked in excess of 12 in any one day;
(d) the number of working hours per week within an averaging period must not exceed 48 unless overtime is paid for hours worked in excess of 48 in any one week;
(e) if a layoff occurs during an averaging period, the laid-off employee is entitled to be paid overtime for hours worked in excess of 8 on any day in that period, rather than on an averaged basis over the length of the averaging period in which the layoff occurs;
(f) the Director may terminate an averaging agreement on application by the employer or affected employees if the Director is satisfied that hardship would otherwise result.

CFIB has no objection to this recommendation, however, we still believe that averaging needs to be simplified to encourage more businesses to utilize this. We suggest employers could have the option of a 40 hour work week, broken up and scheduled in a manner that suits the ebbs and flows of their business and suits the employee's work/life balance, as well as the more formal averaging agreement process.

Recommendation 13 - The threshold of employee approval for an averaging agreement should be a 60 per cent affirmative vote, with a minimum of 50 per cent of the affected employees having voted.

CFIB disagrees with the Committee as this is very onerous for a small business. Often there may only be one employee or two. We would like to see a threshold of where this takes place - perhaps using the definition of a small business from BC Stats (50 employees or less).

Recommendation 14 - A method used for a vote by employees on whether to approve an hours of work averaging agreement must be capable of assuring confidentiality (voting anonymity) and fairness.

CFIB disagrees with the Committee. As per our response to Recommendation 13 - CFIB feels that this is very onerous for a small business. It should follow the same number of employees as above.

If this becomes a requirement, the Employment Standards Branch should publish a plain language guide to conducting a vote.

Recommendation 15 - The ESA should be amended to provide that:

(a) an employee may decline to work outside the employee's regularly scheduled hours of work if doing so would
(i) conflict with significant family-related commitments that the employee cannot reasonably be expected to alter or avoid;
(ii) interfere with scheduled educational commitments;
(iii) create a scheduling conflict with other employment; or conflict with another significant obligation;

(b) an employee may decline to work more than 12 hours in a day or 48 hours in a week except in the event of an emergency, or as otherwise provided in an applicable regulation, variance, or averaging agreement.

CFIB does not support this recommendation as the reasons for refusing mandatory overtime are too broad and do not allow employers sufficient flexibility, which is increasingly important in the current competitive and time-sensitive work environment. We recommend further consultation in regards to this recommendation.

Recommendation 16 - The ESA should be amended to contain a definition of "emergency" or " emergency circumstances" that would justify exceeding statutory limits on hours of work to the extent necessary to prevent serious interference with the ordinary operations of the employer, in cases of
(a) accident to machinery, equipment, plant or persons;
(b) urgent and essential work to be done to machinery, equipment or plant;
(c) significant and immediate threat to human life, health, or safety, or extensive or irreparable damage to property;
(d) urgent and essential work needed to assist customers of the employer facing circumstances described in paragraphs (a) to (c); or
(e) other unforeseen or unpreventable circumstances.

CFIB would consider accepting the recommendation but only after recommendation 15 is revised after further consultation.

Recommendation 16 proposes definitions of "emergency" or "emergency circumstances" that would justify exceeding statutory limits on hours of work. We support this "emergency" exception definition found in recommendation 16 (referring to recommendation 15), but only when recommendation 15 is revised. More particularly, when recommendation 15 is more precisely drafted, we would support that an employer can require work of more than 12 hours in a day or 48 hours in a week in an emergency, along with the definition of emergency as set out in recommendation

Recommendation 17 - The ESA should be amended to require that if an employee is required to report for work, and the employee is scheduled to work
(a) more than four hours on the day in question, the employee must receive a minimum of four hours' pay if work starts, and a minimum of two hours' pay if it does not;
(b) less than four hours on the day in question, the employee must receive a minimum of two hours' pay, regardless of whether work starts or not;
unless the employee is unfit to work or fails to comply with Part 3 of the Workers Compensation Act, or a regulation under Part 3 of that Act.

CFIB does not support this recommendation. Current Employment Standards legislation provides for 2 hours of minimum pay when an employee reports for work and none if they are given advanced notice and do not report. Recommendation 17 does not take into account scenarios where work is weather dependent, like landscaping, for example. Landscaping often requires a large team, but is extremely weather dependent. Industries such as this will be punished for nothing more than being a victim of circumstance.

Recommendation 18 - If a provision is enacted in the ESA that authorizes an employee to make, and an employer to grant, a request for a flexible work schedule to accommodate a need of the employee, the provision should extend only to hours of work and scheduling of work, but not to the location of work.

CFIB agrees with this recommendation as long as the location exemption remains. We would like to see it be legally acceptable for the employer to initiate the discussion about flexible scheduling with employees. Employees should be permitted to agree to work longer hours in a single day in exchange for longer periods off to pursue other interests. Employers should be permitted to put this offer to employees.

Recommendation 19 - The ESA should be amended to allow an employee to voluntarily work up to a total of three hours spread over one or more days in the same pay period without the employer being required to pay an overtime rate for those hours, in order to make up for time which the employee has taken off in that pay period.

CFIB agrees with the recommendation. The ability of allowing employees time off for and making up the time later is common place, even though it often results in the employee working overtime hours without overtime pay. This recommendation enhances flexibility in workplace relationships, a goal CFIB strongly endorses.

Recommendation 20 - Section 32 should be amended to clarify that section 32(2) does not relieve an employer of the obligation to ensure meals breaks are provided as required by section 32(1), and applies when it is necessary to interrupt a meal break because of an emergency or other exceptional circumstance.

We support recommendation 20, which is a clarification amendment to address meal breaks.

Recommendation 21 - The ESA should be amended to restore a provision requiring 24 hours' notice to employees of a change to a shift or work schedule unless the change:
(a) will entitle the employees to overtime pay;
(b) is an extension of a shift prior to the end of the shift; or
(c) must be made with less than 24 hours' notice because of unforeseen circumstances.

CFIB disagrees with the majority on this recommendation. Smaller businesses need to have a flexible schedule; it can be difficult for an employee to give 24 hours' notice if they can't make a shift, and the same is true if the employer doesn't need an employee for shift. Some jobs by their nature require response to unforeseen circumstances, the committee should consider providing extra flexibility.

Recommendation 22 - The ESA should be amended to provide that an employee who does not receive a minimum of 24 hours' notice as required by Tentative Recommendation 21 may refuse to report for work at the time the change in shift or work schedule takes effect.

CFIB disagrees with this recommendation – as mentioned previously it can be very difficult for smaller businesses who may only have one or two employees to provide notice of 24 hours, it would be a near impossible obligation for many businesses to provide 48 hours.

Recommendation 23 - The ESA should be amended:
(a) by deleting the words "if authorized by the employee in writing or by a collective agreement" from section 20(c); and
(b) to authorize an employer, notwithstanding the Personal Information Protection Act and the Freedom of Information and Protection of Privacy Act, to collect, use and disclose personal information of the employee concerning banking arrangements without having to first obtain the employee's consent for the purpose of the direct deposit of the employee's wages into the employee's account in a savings institution.

CFIB supports this recommendation.

Recommendation 24 - Section 22(1)(d) of the ESA should be amended by deleting "insurance company" and substituting "insurance provider."

CFIB supports this recommendation.

Recommendation 25 – The ESA should be amended to permit an employee to make an irrevocable written assignment of wages for the purpose of repaying an advance from the employer.

CFIB supports this recommendations and the clarification of the employers' rights to recover these advances and prepayments.

Recommendation 26 - Section 22(4) of the ESA should be repealed.

This Section allowed creditors of the employee to take payments, at source, from an employee's wages. We agree employers should not have to be involved in the administration of the employee's finances and have no objection to this recommendation.

Recommendation 27 - Provisions on tips and gratuities corresponding in substance to Part V.1 of the Ontario Employment Standards Act, 2000 should be added to the ESA.

Prohibition re tips or other gratuities

This Section of the Ontario Employment Standards Act states

14.2 (1) An employer shall not withhold tips or other gratuities from an employee, make a deduction from an employee's tips or other gratuities or cause the employee to return or give his or her tips or other gratuities to the employer unless authorized to do so under this Part. 20 Enforcement

(2) If an employer contravenes subsection (1), the amount withheld, deducted, returned or given is a debt owing to the employee and is enforceable under this Act as if it were wages owing to the employee.

Statute or court order

14.3 (1) An employer may withhold or make a deduction from an employee's tips or other gratuities or cause the employee to return or give them to the employer if a statute of Ontario or Canada or a court order authorizes it.

Exception

(2) Subsection (1) does not apply if the statute or order requires the employer to remit the withheld, deducted, returned or given tips or other gratuities to a third person and the employer fails to do so.

Pooling of tips or other gratuities

14.4 (1) An employer may withhold or make a deduction from an employee's tips or other gratuities or cause the employee to return or give them to the employer if the employer collects and redistributes tips or other gratuities among some or all of the employer's employees.

Exception

(2) An employer shall not redistribute tips or other gratuities under subsection (1) to such employees as may be prescribed. 2015, c. 32, s. 1.

Employer, etc. not to share in tips or other gratuities

(3) Subject to subsections (4) and (5), an employer or a director or shareholder of an employer may not share in tips or other gratuities redistributed under subsection (1)

Exception — sole proprietor, partner

(4) An employer who is a sole proprietor or a partner in a partnership may share in tips or other gratuities redistributed under subsection (1) if he or she regularly performs to a substantial degree the same work performed by,

(a) some or all of the employees who share in the redistribution; or

(b) employees of other employers in the same industry who commonly receive or share tips or 11other gratuities.

Exception — director, shareholder

(5) A director or shareholder of an employer may share in tips or other gratuities redistributed under subsection (1) if he or she regularly performs to a substantial degree the same work performed by,

(a) some or all of the employees who share in the redistribution; or

(b) employees of other employers in the same industry who commonly receive or share tips or other gratuities.

Transition — collective agreements

14.5 (1) If a collective agreement that is in effect on the day section 1 of the Protecting Employees' Tips Act, 2015 comes into force contains a provision that addresses the treatment of employee tips or other gratuities and there is a conflict between the provision of the collective agreement and this Part, the provision of the collective agreement prevails.

(2) Following the expiry of a collective agreement described in subsection (1), if the provision that addresses the treatment of employee tips or other gratuities remains in effect, subsection (1) continues to apply to that provision, with necessary modifications, until a new or renewal agreement comes into effect..
(3) Subsection (1) does not apply to a collective agreement that is made or renewed on or after the day section 1 of the Protecting Employees' Tips Act, 2015 comes into force

CFIB agrees with the recommended that legislation clarify circumstances where owners or operators may share in tip pools, however before this is introduced a full consultation with stakeholders should be held first.

Recommendation 28 - Section 58(2) of the ESA should be amended to permit employers to select one of the following methods of paying vacation pay:

(a) paying the employee's salary throughout the vacation period;
(b) adding 4 per cent or 6 per cent vacation pay, as applicable, to each paycheque or direct deposit of wages subject to later adjustment if necessary to ensure that the aggregate of instalments of vacation pay equate to 4 per cent or 6 per cent of an employee's total wages, as applicable;311

(c) paying vacation pay in a lump sum a week before the employee's vacation begins.

CFIB has no objection to this recommendation.

Recommendation 29 - The ESA should be amended to provide that
(a) in order to be eligible to receive statutory holiday pay, an employee must have worked or earned wages on 16 of the 60 days preceding the statutory holiday, including
(i) the last day before the holiday, and
(ii) the first day after the holiday
on which the employee was scheduled to work;

Allowing employees who have only worked 16 out of the 60 days prior to a statutory holiday opens this benefit to casual employees working part time. The proposed changes will impose a new, large cost on employers. When costs increase in one area, business owners must make hard decisions to decrease costs in other areas to stay afloat. CFIB recommends this proposal be rejected, as the increased cost could lead to misuse of the system by employees, or decreased hiring by employers to cut back on costs.

Recommendation 30, 30a and 30b
30. The ESA should be amended to:
(a) provide a formula for indexation of the minimum wage at regular, fixed intervals, and
(b) require the Lieutenant Governor in Council to determine, on each occasion when the ESA requires the formula to be applied, whether to amend the regulation prescribing the minimum wage to prescribe the rate as indexed according to the formula or a different rate chosen by the Lieutenant Governor in Council.
A minority of the members of the Project Committee endorse Tentative Recommendation 30 and tentatively recommend in addition:
30a. The ESA should be amended to provide for a review at five-year intervals of the provisions governing how the minimum wage is set.
A further minority of the members of the Project Committee do not endorse either of Tentative Recommendations 30 and 30a, and instead would tentatively recommend:
[30b.] The ESA should be amended to require the Lieutenant Governor in Council to review the minimum wage at two-year intervals and determine whether it should be changed or left unchanged. No other amendments should be made to the minimum wage provisions of the ESA.

CFIB disagrees with as this recommendation as the minimum wage should not be set out in the ESA.

However, CFIB does believe minimum wage increases should be determined based on a specific, accountable metric (e.g. CPI) at a specified time during each year. This should be legislated, but not included in the ESA. Once legislated, there should be no changes to the minimum wage outside of the prescribed increases.

Recommendation 31 - (a) The ESA should be amended to require that workers who may be paid on a piece rate basis must receive at least the equivalent of the general hourly minimum wage.
(b) Implementation of paragraph (a) of this recommendation should be suspended until an expert committee appointed by the minister responsible for the administration of the ESA has reported on appropriate measures for its implementation.

Seeing as it is states on page 134 of the consultation paper that "The Project Committee decided that it did not have sufficient expertise to make recommendations on an implementation strategy, and that this should be left to an expert body." CFIB agrees with this recommendation as long as section b is done with consultation from stakeholders.

Recommendation 32 - The initial amount of security that a farm labour contractor must provide to the Director under section 5(3)(c) of the Employment Standards Regulation should be increased to the amount obtained by multiplying the minimum hourly wage by 120, and multiplying the result by the number of employees specified in the licence. The decreasing multipliers applicable in respect of subsequent periods of non-contravention should be adjusted correspondingly.
33. The ESA should be amended to enable the Director to prohibit anyone whose farm contractor licence has been cancelled for non-compliance with the ESA and regulations from re-applying for a licence for a specific period, or permanently.
A majority of the members of the Project Committee tentatively recommend: 34. No change to section 30(2) is necessary.

CFIB does not support recommendation 32. A 50% increase in the cost of an initial bond may be too much for some farms to produce up front. Additionally, it decreases necessary working capital that may help a farm to survive unforeseen circumstances which affect their crop year, such as wildfires, drought or disease. Specifically, regarding the minority recommendation 34a, we do not support joint and separate liability for a producer and a farm labour contractor where the farm labour contractor is licensed under the Act and the producer satisfies the Director of Employment Standards (the "Director") that the producer paid the farm labour contractor for wages earned by each employee of the farm labour contractor for work done on behalf of the producer. As such, we do not support repealing Section 30(2) of the Act.

Recommendation 35 - Annual vacation entitlements under section 57(1) of the ESA should remain unchanged.
A minority of the members of the Project Committee tentatively recommend:
35a. Section 57(1) of the ESA should be amended to provide that an employee becomes entitled to an annual vacation of four weeks after 10 consecutive years of employment.

CFIB agrees with this recommendation.

Recommendation 36 - The ESA should be amended to clarify that section 54(4) does not entitle non-unionized employees whose leaves end during a period when the employer's operations are suspended to be recalled in preference to other non-unionized employees.

CFIB agrees with this clarification.

Recommendation 37 - The definition of "immediate family" in the ESA should be amended to include a parent or a child of the employee's spouse.

A minority of the members of the Project Committee tentatively recommend:
37a. In addition to the classes of persons referred to in Tentative Recommendation 37, a grandparent of the employee's spouse should be included in the definition of "immediate family."

Another minority of the members of the Project Committee tentatively recommend:
37c. The definition of "immediate family" in the ESA should remain unchanged.

CFIB agrees with this recommendation with the exception of 37c as it must be clearly defined in the ESA to avoid confusion.

Recommendation 38 - The ESA should be amended to include a provision stating that an employer may require an employee to provide evidence, reasonable in the circumstances, of the employee's entitlement to take a non-discretionary form of leave provided under the ESA. This provision should be expressly subject to other provisions concerning justification for a non-discretionary leave.

CFIB supports this recommendation as it will help to eliminate abuse of the leave entitlements of the *Act*.

Recommendation 39 - The ESA should not be amended to add new non-discretionary leave entitlements (majority). A minority of the members of the Project Committee tentatively recommend:
39a. The ESA should be amended to harmonize non-discretionary leave entitlements under Part 6 of the ESA with the range of circumstances in which special unemployment benefits are payable under the Employment Insurance Act (Canada) for care to a critically ill family member.

CFIB agrees with the majority.

A majority of the members of the Project Committee tentatively recommend:
40. The ESA should be amended to supplant the present section 52 (family responsibility leave) with a provision allowing a total of up to 7 days of unpaid leave per calendar year which could be taken by reason of
(a) the employee's own illness or injury, or
(b) a family responsibility, namely a need to attend to the care, health, or education of a child in the employee's care, or the care or health of a member of the employee's immediate family.
A minority of the members of the Project Committee tentatively recommend:

40a. The number of unpaid leave days per calendar year in Tentative Recommendation 41 should be 10.
Another minority of the members of the Project Committee tentatively recommend:

40b. The number of leave days per year in Tentative Recommendation 41 should be 10, and days of leave taken because of the employee's own illness or injury should be paid at the employee's regular wage.
A further minority of the members of the Project Committee tentatively recommend:

40c. The ESA should not be amended to introduce sick leave, but if Tentative Recommendation

41 is implemented, the number of unpaid leave days per year should be 7.

CFIB does not agree with 40 a or b, but agrees with 40c, with the exception that the days should remain at 5.

Recommendation 41 - A reasoned dialogue involving the health professions, major employers' organizations, and major organizations representing organized and unorganized labour should take place regarding medical certificates to justify absence from work due to illness ("sick notes"), with a view to developing mutually acceptable guidelines.
(c) Incorporating a disincentive to misuse of sick leave into the ESA

CFIB agrees with this recommendation. A dialogue and proper guidelines is long overdue.

The majority of the members of the Project Committee tentatively recommend: 42. The ESA should be amended to provide that voluntary absence from work on a false pretext of illness disentitles the employee to the benefit of statutory leave by reason of illness or injury. A minority of the members of the Project Committee take the following position concerning Tentative Recommendation the amendment proposed in Tentative Recommendation 42 is unwarranted, as employers already possess adequate power to discipline an employee for absence on a false pretext of illness.

CFIB agrees with the majority in order for clarity to be given. If this is not done well, the result will be an enforcement nightmare. It is critical that the legislation is clear.

Recommendation 43 - Three months' continuous employment with the same employer should be a minimum requirement of eligibility for any form of statutory leave of absence other than annual vacation, leave for jury duty, or reservist leave (majority)
The members of the Project Committee holding this minority view tentatively recommend: 43b. An employer should be entitled to restrict paid sick leave to employees who have been continuously employed for at least three months, but unpaid personal illness or family responsibility leave as contemplated by Tentative Recommendation 43 should be available to employees regardless of length of employment. A further minority of the Project Committee takes this position: 43c. There should be no qualifying period of employment for a non-discretionary statutory leave of absence. E. Other Categories of Leave of Absence in Canadian

CFIB agrees with the majority.

Other Categories of Leave of Absence in Canadian Employment Legislation
Other job-protected leaves of absence found in the employment legislation of one or more Canadian jurisdictions are:

- **critically ill child care leave;**
- **critical or serious illness or injury leave;**
- **domestic or sexual violence leave;**
- **organ donation leave;**
- **citizenship ceremony leave;**
- **nomination, candidate and public office leave.**

A private member's bill to amend the ESA to introduce domestic or sexual violence leave was introduced in the autumn 2016 and spring 2017 sessions of the British Columbia Legislative Assembly, but progressed only to first reading in each session.611

These leave provisions undoubtedly relate to significant life events, but not ones that will occur to as broad a cross-section of the working population as do pregnancy, parenthood, or bereavement. In weighing the merits of adding further leave entitlements, it is important not to lose sight of their cumulative effect on the operation of smaller enterprises. The Project Committee is disinclined to recommend adding new leave entitlements to the ESA that will increase the complexity of the Act and potentially impose significant burdens on small businesses, without being of benefit to the greater part of the workforce.

CFIB agrees with this consideration.

Recommendation 44 -A notice of termination validly given to an employee should not be rendered invalid by reason only that the employee is allowed to work for up to one month after the end of the notice period.
A minority of the members of the Project Committee take the position that:
44a. A notice of termination should continue to be void under section 67(1)(b), as it now stands, if an employee is allowed to work beyond the end of the notice period.

CFIB supports this recommendation as it is beneficial to those businesses who do seasonal work.

Recommendation 45 - The ESA should be amended to expressly clarify that if an employer terminates an employee following a notice of intention to quit given by the employee, the employer is required to pay the employee the lesser of
(a) the amount of wages the employee would have earned during the rest of the period of notice the employee gave to the employer; and
(b) the full amount that would be payable to the employee as compensation for length of service if the employee had been terminated without notice.

CFIB agrees with this recommendation as it provides clarity to this situation.

Recommendation 46 - The group termination provisions of the ESA should be amended to allow an employer's obligations to affected employees to be satisfied through a combination of notice and termination pay, whether or not the employer has given the required notice to the Minister within the required timeframe.

CFIB agrees with this recommendation as it reduces red tape.

This Section and recommendation refers to construction workers. At present, single site construction workers are exempt from the group termination requirements of the Act A majority of the members of the Project Committee tentatively recommend: 47. No change or review is required in relation to section 65(1)(e) of the ESA.
A minority of the members of the Project Committee tentatively recommend: 47a. Section 65(1)(e) of the ESA should be repealed.

CFIB has no issue with this remaining as is.

Recommendation 48 - Employment of persons under 16 in industries or occupations prescribed by regulation as being likely to be injurious to their health, safety, or morals should be prohibited.
49. The ESA should be
amended to confer authority to
(a) designate by regulation industries and occupations likely to endanger the health, safety, or morals of persons under 16; and

(b) set a minimum age between 16 and 19 for employment in any one or more of the said industries and occupations.
50. The special regime for employment of children in recorded and live entertainment under Part 7.1, Divisions 2 and 3 of the Employment Standards Regulation should be retained.
A majority of the members of the Project Committee tentatively recommend:
51. The ESA should be amended to:
(a) require a permit from the Director to employ a child below the age of 14, except for employment with parental consent in recorded and live entertainment;
(b) allow employment at age 14 and 15
(i) with parental consent in
(A) an artistic endeavour (including recorded and live entertainment); or (B) forms of "light work" designated by the Director and listed on the Employment Standards Branch website;
(ii) with a permit from the Director, in cases other than those mentioned in subparagraph (i).
A minority of the Project committee tentatively recommend:
51a. The ESA should be amended to prohibit the employment of anyone under 15 years of age without a permit from the Director, except as allowed by the regulations applicable to employment of children in recorded and live entertainment.

Recommendations 48 to 51 relate to the employment of children and anticipates creating a list of hazardous industries in which children under 16 cannot work.

CFIB recognizes the importance of child safety, however there needs to be recognition of parental supervision and exceptions should be allowed after consultation with the Director. We also strongly recommend that proper stakeholder engagement is conducted before a list of "hazardous" industries is established.

Recommendation 52 - Section 12 of the ESA should be amended to clarify that anyone engaged on behalf of employers in recruiting employees who are not Canadian citizens or permanent residents for employment in British Columbia is subject to the license requirement for employment agencies.

CFIB agrees with this recommendation.

Recommendation 53 -The policy rationale for the licensing exception in section 12(2) of the ESA for employment agencies acting for only one employer should be re-examined, taking into account the interests and special circumstances of migrant workers recruited from their home countries.

CFIB supports this recommendation.

Recommendation 54 - The ESA should be amended to provide legislative authority for the responsible minister to enter into an information-sharing agreement with the federal agencies concerned with the administration of immigration programs relating to migrant workers for the purpose of facilitating the enforcement of the ESA in relation to migrant workers.

CFIB supports this recommendation as it helps harmonize the processes between the provincial and federal governments.

Recommendation 55 - The definition of "domestic" in the ESA should be amended by repealing the requirement to reside at the employer's residence.

CFIB is not a stakeholder in this issue.

Recommendation 56. The definition of "residential care worker" in the Employment Standards Regulation should be amended by deleting the words "or family type residential dwelling" in paragraph (a) of the definition.

CFIB is not a stakeholder in this issue.

Recommendation 57. The definition of "sitter" in the Employment Standards Regulation should be amended to read as follows:
"sitter" means a person employed in a private residence solely to provide the service of attending to a child or adult for an average of not more than 15 hours per week in any period of 4 weeks, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of (a) a business that is engaged in providing that service, or (b) a day care facility;
A minority of the members of the Project Committee tentatively recommend:
57a. The definition of "sitter" in the Employment Standards Regulation should be amended to read
"sitter" means a person employed in a private residence solely to provide the service of attending to a child or adult for not more than 15 hours per week, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of (a) a business that is engaged in providing that service, or
(b) a day care facility;

CFIB is not a stakeholder in this issue.

Recommendation 58 - The ESA should continue to confer authority on the Director to carry out investigations to ensure compliance with the Act, whether or not a complaint of a contravention has been made.

CFIB supports this recommendation.

Recommendation 59 - Use of the self-help kit by an employee should not be a prerequisite to the receipt, review, investigation, mediation or adjudication of a complaint by or on behalf of the employee that the ESA has been contravened.

CFIB has no objection to this recommendation as it reduces a lot of red tape.

Recommendation 60 - The relationship between sections 76(1) and 76(3) should be clarified by restoring language that imposes a requirement to conduct a threshold investigation on intake, without limiting the discretion of the Director contemplated by Tentative Recommendation 62 over the procedure subsequent to the threshold investigation.
Recommendation 61 - The ESA should:
(a) specify a full range of procedural alternatives available to the Director to re- solve complaints, including investigation, informal dispute resolution, and adjudication;
(b) set out the procedural steps associated with each alternative; and
(c) allow a complaint to be transferred from one alternative procedure to another in the course of being resolved, as the Director considers appropriate.

CFIB supports the Director having a full range of tools at his/her disposal as we believe it will result in a fairer and more just process for both employers and employees.

Recommendation 62 - The ESA should require that:

(a) the findings made in the investigation of a complaint be summarized in a re- port to the Director;
(b) copies of the report referred to in paragraph (a) must be provided to the employer and the complainant;
(c) each party must be given an opportunity to respond to the investigation report within a specified time; and
(d) the responses of the parties must be considered together with the investigation report in making a determination.
63. A determination should be a decision of the Director, or a delegate of the Director other than the investigator on whose findings the determination is based.

CFIB supports these recommendations.

A majority of the members of the Project Committee tentatively recommend:
Recommendation 64. The ESA should clearly permit a complaint to be filed on behalf of another person with the written authorization of the person who is the subject of the complaint.

A minority of the members of the Project Committee tentatively recommend:
64a. Under Tentative Recommendation 64, the Director should have the discretion to dispense with the requirement for written authorization for the complaint by the employee on whose behalf it is made.

CFIB does not support recommendation 64. This recommendation is in response to a desire to clarify the circumstances under which a third party complaint will be accepted by the Director. This could invite third party complaints which may be inappropriate or vindictive reasons. We echo that concern and would be more supportive if this recommendation also gave the Director authority to refuse a complaint from a third party if he/she is not satisfied the complaint was made in good faith or there was no reasonable evidence to suggest a contravention had occurred.

Recommendation 65 - The ESA should be amended to provide that a complaint based on a contravention of section 10 must be delivered within the shorter of six months from the last day of employment and two years from the date of the contravention.
A minority of the members of the Project Committee tentatively recommend:
65a. Section 74(4) of the ESA should be amended to provide that a complaint based on a contravention of sections 8, 10, or 11 must be delivered within two years of the date of the contravention.
Section 10 prohibits the practice of charging a job seeker a fee for finding employment for them. The most frequent victims of this are TFWs. Due to their precarious residency, most are unlikely to complain about this behaviour - behaviour which often occurs outside Canada. We support this recommendation as we deplore any recruiting which is less than honest and in compliance with law. Extending the time these people can file complaints respects their precarious position and is a disincentive to recruiters and contractors who break the law.

Sections 8 and 11 refer, respectively to misrepresenting the availability, type and conditions of work and paying a third party a fee for obtaining employment. We have no objection to increasing the recovery period of these sections

A majority of the members of the Project Committee recommend:
66. The maximum amount of wages that a determination may require an employer to pay under section 80(1) of the ESA should remain unchanged, except with regard to contraventions of section 10, as stated in Tentative Recommendation 67.

A minority of the members of the Project Committee tentatively recommend:
66a. The maximum amount of wages a determination may require an employer to pay should be the amount that became payable in a period beginning
(a) 12 months before the earlier of the date of a complaint or the termination of employment, if the determination is made in respect of a complaint; and
(b) in other cases, 12 months before the director first informed the employer of the investigation resulting in the determination.
plus interest on the amount, in either case.

Wage contravention can occur due to a clerical error, misclassification of a worker or lack of knowledge about the requirements of the Act. We support the majority recommendation. An employee who believes they are not being paid correctly has a wealth of resources to read about their statutory rights and make their complaint in a timely manner.

With regard to the recovery of illegally extracted payments, the Project Committee tentatively recommends: 67. The ESA should be amended to provide that payments collected in contravention of section 10 may be recovered as deemed wages if they were paid not more than two years
(a) before a complaint concerning the contravention is filed, or
(b) in other cases, before the Director first informed the employer or other person alleged to have contravened section 10 of the investigation resulting in the determination.

CFIB agrees with the two-year limit to prevent stopping recovery of payments illegally removed from lower paid workers before they were admitted to Canada or lower paid workers who have work permits that are valid only with a single authorized employer.

Recommendation 68 - While divided on the issue of whether the imposition of administrative penalties should be mandatory or partly discretionary, the Project Committee is in agreement that the amount of a penalty should depend on the gravity of the contravention as well as on the number of previous contraventions of the same provision. G
A majority of the members of the Project Committee tentatively recommend: 68. The ESA and the regulations should be amended to: (a) confer discretion on the Director to waive an administrative penalty following a determination that a requirement of the Act or a regulation has been contravened, and to set out criteria for exercise of the discretion; (b) expressly recognize payment in full by an employer of a wage claim, as quantified by the Employment Standards Branch, as: (i) a ground for concluding a complaint based on the wage claim; and (ii) a sufficient ground for waiver of an administrative penalty in respect of the wage claim; and (c) provide that a rational basis for contesting a complaint should be a sufficient ground for exercise of the discretion not to impose an administrative penalty

CFIB agrees with the majority recommendation, which allows discretion on the Director to waive an administrative penalty based on set out criteria for the exercise of this discretion.

Recommendation 69 - The amount of an administrative penalty should be subject to being increased, subject to a specified maximum, on a discretionary basis by reason of the gravity of the contravention, according to criteria which should be set out in the ESA.

CFIB agrees with this recommendation

Recommendation 70 - The Project Committee tentatively recommends that model of workers' and employers' advisers under the workers' compensation scheme should be examined with a view to its possible adaptation for the representation of otherwise unrepresented parties in appeals to the Employment Standards Tribunal.

CFIB agrees with this recommendation. The model used by WorksafeBC works well and does not increase red tape. The model, if followed should be closely examined and implemented with the same rigor.

CHAPTER 11. ENFORCEMENT MECHANISMS UNDER THE ESA
Overview of Part 11 Part 11 of the ESA contains a number of mechanisms for enforcing wage entitlements and the terms of determinations made by the Director or a delegate, settlement agreements, and orders of the Employment Standards Tribunal. These mechanisms include:

- **the ability to file a determination, settlement agreement or order in the registry of the British Columbia Supreme Court and enforce it like a judgment in favour of the Director for recovery of a debt in the amount payable under it;**
- **interest on unpaid wages or other amounts payable to an employee, running from the earlier of the date employment terminates and the date on which a complaint concerning the unpaid wages or other amounts is delivered;**
- **a lien for unpaid wages against the property of the employer or other person named in a determination, settlement agreement, or an order;**
- **a power to demand that a third party pay to the director all or part of any debt owed to a person who is required to pay money under a determination, settlement agreement or order;07 seizure of assets to satisfy an amount unpaid under a determination, settlement agreement, or order;**
- **a power to treat businesses under common control and direction as a single employer for the purposes of the ESA;**
- **ability to collect up to two months' unpaid wages for each employee of a corporation from the directors and officers of the corporation;**
- **ability to treat a purchaser of a business or a substantial part of its assets as a successor employer, with the consequence that the purchaser is liable for unpaid wage obligations of employees of the business whom the purchaser has continued to employ;**
- **administrative monetary penalties (discussed in the previous chapter)**

Part B of this chapter discusses some issues relating to reform of the Part 11 provisions.

CFIB has no concerns with this recommendation.

Recommendations

Workplaces continue to change rapidly as technology and new generations of employees demand flexibility, choice, and innovative workplaces. Employment Standards need to be formulated to recognize this new reality. Any changes to regulations should support the philosophy of supporting more flexibility in the workplace. Creating new regulations and/or adding new provisions around how BC workplaces should be structured risks making them even more rigid – completely contrary to enhancing flexibility in the workplace

Any changes to the *Employment Standards Act* need to reflect this change and ensure that opportunities for BC's economy to attract investment, talent, and jobs are not compromised in the process. It is important that the province support BC's small businesses with an environment that allows them to provide valued, flexible work opportunities for employees. In addition, it is vital the Act does not stifle such opportunities through government regulation and payroll taxes, as this functions as a disincentive for businesses to hire people.

We request you please consider CFIB's overall recommendations as we firmly believe they will benefit small businesses and employees across the province. We encourage the Committee to reach out; we would be pleased to further explain our recommendations or answer any questions.

1. Do not increase the regulatory burden that small businesses face with respect to Employment Standards requirements.

2. Ensure that any changes to the Employment Standards legislation allow employers to have flexibility so that they can respond and negotiate directly with their employees.

4. Use simple, clear and transparent language in all external communications addressing the requirements under the *Employment Standards Act*.

5. Ensure further consultation is conducted with stakeholders to ensure the implications are well considered before implementation.