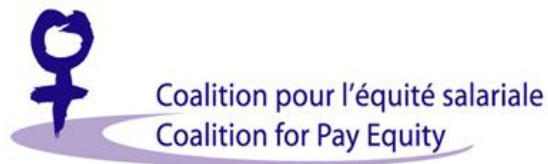


Protecting Employees' Rights

Brief presented to the
**New Brunswick Department of
Post-Secondary Education, Training and Labour**

On the
Employment Standards Act and Regulations
And the Minimum Wage

By the
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Coalition for Pay Equity Inc.**



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Introduction

The New Brunswick Coalition for Pay Equity is pleased to submit a brief to the Department of Post-Secondary Education, Training and Labour (PETL).

The New Brunswick Coalition for Pay Equity is a group of 800 individual members and 91 organizations that educates and advocates for the adoption and the implementation of adequate legislation in order to achieve pay equity for all workers in both the public and private sectors. Pay equity is equal pay for work of equal value. It is about recognizing the value of work predominantly done by women and ensuring that this work is paid the same as work predominantly done by men. By extension, the Coalition is interested in women's participation in the labour force.

We welcome the government's decision to modernize the *Employment Standards Act* and *Regulations* and to improve the way increases to the minimum wage are determined. As mentioned in PETL's discussion paper, Coverage under the *Employment Standards Act*, particularly applies to non-unionized, low income workers. Many women, partly due to pay inequity, fall in that category.

In this brief, we are using a gender-based analysis to make recommendations on pay equity and the establishment of the minimum wage as well as a series of change to the *Employment Standards Act* and *Regulations* including changing the definition of employers so that the act will protect all domestic and agricultural workers, moving toward a proactive approach to the application of the Act and Regulations in order to protect vulnerable workers. Our recommendations are reiterated in the last section of our brief. The proposed changes aim at protecting employees' rights and increasing gender equality.

Our perspective

1. Pay Equity

Currently, the section entitled "Equal pay for equal work" in the Employment Standards Act stipulates that:

37.1(1) No employer shall pay an employee of one sex at a different rate of pay from that which he pays to an employee of the other sex for work that

- (a) is performed in the same establishment,
- (b) is substantially the same in nature,
- (c) requires substantially the same skill, effort and responsibility,
- (d) is performed under similar working conditions

We recommend expanding this section and adding the concept of pay equity, i.e. "equal pay for work of equal or comparable value", in conformity with

Canada's international human rights' obligations. In order to ensure pay equity, the *Employment Standards Act* should require that employers evaluate predominantly female jobs and pay them according to their relative value when compared to predominantly male jobs, based on the required qualifications, responsibilities, effort and working conditions.

2. Minimum Wage

Vulnerable workers do not always benefit from pay equity legislation because they are often not organized to defend their rights. This is particularly true of women, who constitute the majority of the minimum wage earners (56 per cent, according to PETL's discussion paper on the minimum wage). Contrary to common perception, the majority of them are 20 years old and over.

Minimum wage should make work competitive with social assistance rates and most importantly, should elevate workers above the poverty level. Therefore we recommend to increase the minimum wage to \$15 an hour by April 2021, as promoted by the Common Front for Social Justice with its "\$15 = Justice" campaign.

After April 2021, the minimum wage should allow workers to maintain a constant and predictable purchasing power in the province. Therefore we recommend adjusting the minimum wage to the Consumer Price Index for New Brunswick on a yearly basis from 2022 onward. In the case of deflation, we should maintain the minimum wage rate at its most recent level (i.e. not reduce it).

This would align New Brunswick with the other five jurisdictions that index their minimum wage on a yearly basis (British Columbia, Nova Scotia, Ontario, Saskatchewan, and Yukon).

3. Taking a proactive approach to the *Employment Standards Act* and Regulations

The discussion paper Coverage under the Employment Standards Act states that "[e]mployees who are covered by the Act may access complaints and enforcement processes if they believe that their rights under the Act may have been violated."

However, our experience with vulnerable workers shows that they often do not have the means to secure proper legal services to ensure their rights. Moreover, if they sue or file a complaint against their employer, they are afraid to experience retribution in their workplace.

This is particularly important to consider in a context where "[b]usinesses and entrepreneurs are experimenting with non-standard work arrangements" such "temporary, contract, part-time, and irregularly scheduled" employment, as highlighted in PETL's discussion paper.

Again, it is essential to use a gender-based analysis. Time and time again, research has shown that women are disproportionately affected by the growth in precarious work arrangements, which keep their overall income down.

Therefore, we recommend that the Act take a proactive approach and allow for sample auditing of employers to ensure their compliance to the Act, even in the absence of complaints. We also recommend an obligation on the part of the employer to post the Act's section 28 - Unjust dismissal and related unfair employer action. We believe that the government should ensure a vigorous enforcement of this article.

4. Coverage for domestic workers and persons who work in a private home

We commend PETL for highlighting in its discussion paper that the exclusion of domestic workers from the protection of the *Employment Standard Act* is "fundamentally an issue of gender equality: they are primarily female workers who are denied basic labour rights on the basis that their work is done in the private home."

We strongly support ending this form of discrimination by repealing the exclusion of employers of "persons in or about his private home" in the definition of "employer."

Furthermore, as mentioned in the discussion paper, "caregiving is increasingly being professionalized based on standards of care for persons with disabilities and chronically ill". Therefore while minimum wages will help many domestic workers, caregiving work should be evaluated and paid according to pay equity standards, i.e. evaluated and paid fairly compared to predominantly male jobs of the same value.

Finally, we oppose the exclusion of "occasional community-based work" such as babysitting or snow clearing from the *Employment Standards Act*. In our opinion, this proposal is based on a presumption that teenagers do not have the same economic needs as adults. It supports the idea of an age-based form of discrimination. Moreover, the reality is that babysitting – a service mostly provided by teenage girls and women – is often paid less than minimum wage while services mostly provided by teenage boys and men are paid at minimum wage or more. Excluding occasional community-based work would therefore perpetuate this type of discrimination as well.

5. Clarifying the employment relationship

We are concerned by the vulnerability of workers who may be misclassified as independent contractors. We agree that the current definition of an "employee" as "a person who performs work for or supplies services to an

employer for wages, but does not include an independent contractor” does not offer enough clarity.

Therefore, we support PETL’s proposal “to amend the definition of “employee” in the *Employment Standards Act*, to clarify how to determine whether an employment relationship exists (...) based on the common law tests (e.g., control, organization, ownership of tools, chance of profit or loss), and best practices in other Canadian jurisdictions”. While no definition can suit all situations, it seems that Yukon and Quebec allow a broad understanding of what constitutes an employee-employer relationship¹.

We particularly recommend expanding the definition of “employee” to include “dependent contractors” - (i.e., those who are economically dependent on an employer).

We also recommend taking a proactive approach by establishing a presumption of employee status. In other words, a worker would be presumed to be an employee unless the employer demonstrates otherwise.

6. Hours of work and wage requirements: working overnight

We support the PETL Department’s proposal to amend the *Employment Standards Act* to provide a definition of “hours of work” clarifying that periods during which an employee must remain at the disposal of the employer, including night-time shifts and times during which the employee may be sleeping, shall be regarded as hours of work. As highlighted in PETL’s discussion paper, this is particularly important for care-givers who are required to stay overnight and be available for their clients when needed during that time.

7. Minimum standards for employer-provided accommodations

We also support the department’s proposals regarding the establishment of minimum standards for employer-provided accommodations, i.e.:

¹ According to the Discussion paper, “[t]he best practice for reflecting the common law in providing clarity on the employment relationship is Yukon’s definition of an “employee,” which includes a “contractor worker” and is defined as: “a worker, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the worker, who performs work or services for another person for compensation or reward on such terms and conditions that (a) the worker is in a position of economic dependence on, and under an obligation to perform duties for, that person, and (b) the relationship between the worker and that person more closely resembles the relationship of employee to employer than the relationship of an independent contractor to a principal or of one independent contractor to another independent contractor. (...) Quebec’s definition echoes the common law definitions by including a worker who is “a party to a contract, under which he or she (i) undertakes to perform specified work for a person within the scope and in accordance with the methods and means determined by that person; (ii) undertakes to furnish, for the carrying out of the contract, the material, equipment, raw materials or merchandise chosen by that person and to use them in the manner indicated by him or her; and (iii) keeps, as remuneration, the amount remaining to him or her from the sum he has received in conformity with the contract, after deducting the expenses entailed in the performances of that contract.” (p. 11)

- The cost of employer-provided accommodations may not reduce an employee's wages below the minimum wage rate.
- Employees would be free to reach agreement with their employer or potential employer on whether to reside in the household.
- Employees who reside in the household would not be obliged to remain in the household or with household members during periods of daily and weekly rest or vacations or leaves.
- Provide basic standards by adopting Quebec and Ontario's definitions of "room" and "dwelling":
 - "room" means a room in a dwelling unit that is reasonably furnished and reasonably fit for human habitation, has a bed and a chest of drawers for each employee that is accommodated, is supplied with clean linen and towels, allows reasonable access to proper toilet, wash basin and bathing or showering facilities, and access to laundry facilities; and
 - "dwelling" means a dwelling that has at least one room as described above and has kitchen facilities, including a refrigerator and stove.

8. Agricultural Workers

We support PETL's proposal and recommend amending the *Employment Standards Act* by repealing section 5 to bring all agricultural employees under the Act.

However, we strongly disagree with the exclusion of workers who are in a close family relationship with the employer, especially for the many women who are likely to be excluded as the employer's wife when the farm is not jointly owned. Their exclusion may considerably limit their financial autonomy and have lasting negative economic consequences throughout their lives.

9. Broadening the scope of the review of the *Employment Standards Act* and *Regulations*.

We are of the opinion that the review of the *Employment Standards Act* and *Regulations* should be broader than the suggested changes. The New Brunswick Coalition for Pay Equity endorsed the "\$15 + Justice" campaign led by the New Brunswick Common Front for Social Justice. This campaign supported the inclusion of pay equity in the Act and proposed the following important changes in order to improve the working conditions of vulnerable workers.

Sick Leave

Currently, there are no compulsory paid sick leave days. Many low-income workers in predominantly female jobs have told us that this leads to hardships and forces them to make difficult decisions between going to work

when they are sick or seeing a significant gap in their next pay cheque. This is particularly difficult for women, especially single mothers, who are known for not taking enough care of their health while often being responsible for the care of their sick children or other family members.

We recommend that after 90 paid days of employment with the same employer, employees be granted half a day of paid sick leave per month, up to five (5) paid sick leave days per year. The sick leave days would not be cumulative.

Overtime

Currently, the minimum rate for overtime is \$15.45 per hour. We recommend that for all hours exceeding the standard work week, the employee receive the hourly wage plus an additional premium pay of 50% of regular wage. Overtime hours could also be compensated in time rather than money at a rate of 1.5 hours per accrued overtime hour when stipulated in a written agreement made prior to getting work done overtime. Hours from the overtime bank are to be taken when the employee would normally work and within three (3) months after the work done overtime or within 12 months according to the agreement.

Salary deduction for uniforms

Some employers require employees to partly or fully assume the cost of specific uniforms for work as well as specific cleaning requirements. This is often the case for low-paid, female-dominated jobs in the restaurant industry or in the food processing industry (fish plants, for ex.).

We recommend:

- That uniforms required by the employer be supplied for free to employees who work at the minimum wage.
- That cleaning charges may not reduce an employee's wages below the minimum wage rate.
- That employers assume the cost of buying and cleaning uniforms with a logo.

Layoff without notice of termination

According to subsection 34(1) of the Act, "Notwithstanding sections 30 and 32 an employer may terminate or layoff an employee without notice upon payment in lieu of notice of an amount equal to the pay the employee would have earned during the notice period provided under section 30 as though he were entitled to notice under that section."

We recommend that the employer pay an amount equal to the pay *and benefits* the employee would have earned during the notice period.

Transition measures for group terminations

We recommend that the employer give the Minister of Post-Secondary Education, Training and Labour a 30-day notice before terminating a group of employees. The Minister must establish a joint planning committee of employer, employee representatives and union representatives (if applicable) to develop an adjustment program for the workers.

Severance pay

There are currently no regulations for severance pay. We recommend that an employee who has worked for at least 12 consecutive months be eligible for severance pay of 2 days wages per year of employment, or 5 days wages, whichever is greater.

Statutory holidays

We recommend adding one extra statutory holiday in February.

Conclusion

We applaud the Post-Secondary Education, Training and Labour Department's effort to identify ways to tie the minimum wage to employees' evolving economic reality, to improve the Employment Standards Act, and to increase gender equality and workers' rights.

That is why we support most of the proposals made in the discussion paper Coverage under the *Employment Standards Act*. We are proposing other changes to the Act and Regulations in order to further the objectives of gender equality and the protection of workers' rights.

Among those changes, we strongly recommend to include pay equity, to increase the minimum wage to 15\$ by 2021 and to adjust it to the Consumer Price Index afterward, to adopt a proactive approach to the monitoring of compliance to the Act, and to implement a series of other changes that will support vulnerable workers, especially women who are disproportionately affected by the growth in precarious work arrangements and low wages.

For easier reference, all our recommendations are listed on the two following pages. We will follow with interest the government's decisions on all of these issues.

Our recommendations

1. To add the concept of pay equity to the Act, i.e. “equal pay for work of equal or comparable value”, and to require that employers evaluate predominantly female jobs and pay them according to their relative value when compared to predominantly male jobs, based on the required qualifications, responsibilities, effort and working conditions.
2. To increase the minimum wage to \$15 an hour by April 2021, to adjust it to the Consumer Price Index for New Brunswick in the following years, and to maintain it at its most recent level in the case of deflation.
3. To take a proactive approach to ensure compliance to the Act by i) allowing for sample auditing of employers, even in the absence of complaints; ii) by requiring employers to post the Act’s section 28 on unjust dismissal and related unfair employer action; iii) and by enforcing vigorously this article.
4. To repeal the exclusion of employers of “persons in or about his private home” in the definition of “employer” so that domestic workers are protected by the *Employment Standards Act*.
5. To amend the definition of “employee” in the *Employment Standards Act*, to clarify how to determine whether an employment relationship exists based on the common law tests and best practices in other Canadian jurisdictions, to expand the definition of “employee” to include “dependent contractors”, to take a proactive approach by establishing a presumption of employee status.
6. To include “occasional community-based work” in the *Employment Standards Act*.
7. To require that care-giving workers be evaluated and paid according to pay equity standards.
8. To amend the *Employment Standards Act* to provide a definition of “hours of work” clarifying that periods during which an employee must remain at the disposal of the employer, including night-time shifts and times during which the employee may be sleeping, shall be regarded as hours of work.
9. To establish minimal standards for employer–provided accommodations as highlighted in the Discussion Paper on the Coverage under the Employment Standards Act.
10. To repeal section 5 to bring all agricultural employees under the Act, *including* (rather than excluding) workers who are in a close family relationship with the employer, as defined under the Act.
11. To grant half a day of paid sick leave per month, up to five (5) paid sick leave days per year, after 90 paid days of employment with the same employer. The sick leave days would not be cumulative.

12. For all hours exceeding the standard work week, to grant employees the hourly wage plus an additional premium pay of 50% of regular wage.
13. To allow compensation of overtime hours in time rather than money at a rate of 1.5 hours per accrued overtime hour when stipulated in a written agreement made prior to getting work done overtime.
14. That uniforms required by the employer be supplied for free to employees who work at the minimum wage, that cleaning charges may not reduce an employee's wages below the minimum wage rate, and that employers assume the cost of buying and cleaning uniforms with a logo.
15. That in cases where no layoff notice is issued in advance, the employer pay an amount equal to the pay *and benefits* the employee would have earned during the notice period.
16. That the employer give the Minister of Post-Secondary Education, Training and Labour a 30-day notice before terminating a group of employees, and that the Minister establish a joint planning committee of employer, employee representatives and union representatives (if applicable) to develop an adjustment program for the workers.
17. That an employee who has worked for at least 12 consecutive months be eligible for severance pay of 2 days wages per year of employment, or 5 days wages, whichever is greater.
18. To add one extra statutory holiday in February.