Proposal for Compliance and Enforcement Measures under Part IV of the *Canada Labour Code*

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Labour Program Consultation, Government of Canada

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The Canadian Labour Congress (CLC) welcomes the opportunity to comment on the Labour Program's proposals with respect to Administrative Monetary Penalties (AMPs) to support compliance and enforcement with Part II (Occupational Health and Safety) and Part III (Labour Standards) of the *Canada Labour Code*.

The CLC recognizes the potential value of Administrative Monetary Penalties, forming part of a comprehensive enforcement program that strongly deters violators from breaching the law, as an instrument that can be quickly deployed without the delay of more time-consuming enforcement tools.

However, the CLC's general view of the Labour Program's current proposals is that they represent a missed opportunity to enforce the law and strongly deter employer violations of workers' rights. As proposed, the AMPs would send weak and perverse signals to employers with respect to obeying the law and respecting workers' rights under the Code.

In the last two decades, increasing numbers of employers have adopted business models utilizing outsourcing and sub-contracting that subject contractors and workers in the value chain to intensified competitive pressures, making cost minimization paramount.[1] In this context, a complaint-based system of enforcement, profound and deepening workplace power imbalances between employees and employer, and limited staffing and resources for labour inspections combine so that most infractions go unreported and unaddressed.[2]

The approach chosen by the Labour Program for the proposed AMP regime is consistent with an approach of graduated deterrence, rooted in a compliance model. This approach rests on the assumption that violations result from lack of awareness or capacity to comply, that employers are inclined to act within the confines of the law, and that violations are exceptions to the rule.[3] The differences between the two approaches are outlined in the following table:

[1] David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2017).
[2] Kevin Banks, *Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness*, Prepared for the Ontario Ministry of Labour, to support the Changing Workplaces Review of 2015 (Toronto: Queen's Printer for Ontario, 2016).
[3] L. Vosko et al, "The Compliance Model of Employment Standards Enforcement: An Evidence-based Assessment of its Efficacy in Instances of Wage Theft," *Industrial Relations Journal*, Volume 48, Issue 3 (May 2017), pp.256-273.

Table: Two Approaches to Enforcing Workers' Rights

	Compliance	Deterrence
Nature of the Harm Caused by Violations	Remedial Harms Incidental to Beneficial Activity	Serious Social Harms
Assumption about Regulated Party	Ignorant or Incompetent	Rational Calculator
Objective	Educate and Persuade	Alter Cost-Benefit Calculation
Means	Provide Information and Assistance with Compliance	Increase Risk of Detection and Increased Penalties for Violations
Effects	Promote Culture of Compliance	Specific and General Deterrence

Adapted from Vosko et al. 2017

Rather than beginning with the presumption that employers' interests lie first and foremost in obeying the law, the Labour Program should adopt a model of regulation rooted in deterrence, in which non-compliance with the law is understood as the outcome of behavior driven by a rational cost-benefit calculation.

Definition of small business is too broad

The definition of small business for the purposes of the AMPs is too broad. Defining "small business" as any business with fewer than 100 employees or less than $5 million in annual gross revenues fails to distinguish between micro-enterprises with half a dozen employees and a turnover of several hundred thousand dollars. It also fails to distinguish between small and medium-sized enterprises, relegating any enterprise other than "large business" to the category of "small business."

Low value assigned to monetary violations in Part III

The relatively low importance placed on monetary violations sends the wrong signal to employers, and is a far cry from an approach that views wage theft as a crime as opposed to a regulatory offense, an understanding which for a brief period was part of Canadian law.[4] This approach ignores the fact that wage theft can be a calculated decision that forms part of a rational business strategy. The low AMPs assigned to violations of this nature clearly define which violations are economical for employers,

[4] Eric Tucker, "When Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master's Tools against the Master," Law, Authority & History Symposium, York University, 2016.

and which are not. A business with almost $5 million in gross revenues would risk a baseline AMP of $1,500 for wage theft, equivalent to 0.03% of annual gross revenues. Even with the baseline amount and additional penalty of 150%, wage theft involving multiple employees could easily far outweigh a potential AMP, making wage theft not just economical but attractive. This is even more the case, given the Department's proposal to reduce the fine by half if paid within the first 15 days after the AMP has been served (p.10).

In this light, the presence of "aggravating factors" related to systemic violations must not result in a discount for the worst violators. Systemic violations (either applying to multiple workers, or multiple violations across the system) should be treated more seriously, not more lightly. By applying a single increase to the baseline penalty, repeat offenses are effectively rewarded with a discount, acting as an incentive to widespread violations.

Inappropriate penalty assigned to deficient Part II record keeping

The CLC was pleased to see that failing to keep or provide records will trigger an AMP when the violation is detected, and agrees with the Labour Program rationale, that an employer not keeping or providing records prevents the Labour Program from doing its job. This should also apply to regular reporting requirements under the *Canada Labour Code*. Employers are required to keep Hazardous Substances records in case workers become ill or injured as a result of exposure. The right of workers to know the chemical and environmental hazards in their workplace is fundamental, and cannot and must not be viewed as administrative red tape to be minimized for employers' sake. EAHOR reports provide critical data indicating which sectors may need special attention when it comes to ensuring a safe workplace. Significant AMPs for non-compliance with timely submission of EAHOR reports could strengthen enforcement efforts and reduce the delinquency rate. The AMPs contained in the current proposals fall short of this objective.

Public naming

The Labour Program's consultation document indicates that whereas the majority of government departments publish the names of all AMP recipients, in consideration of the potential impacts of naming, the Labour Program proposes to limit the use of the naming tool to specific circumstances. The CLC questions the rationale for treating violations under the *Canada Labour Code* differently, and with less seriousness than violations under of other Canadian laws. Where the proposed modest fines may not bring about compliance, the tangible consequence of being named publicly may be the more effective tool. It is unclear why the Labour Program would not follow the example set by other federal departments.

In particular, categorizing monetary violations in Part III as belonging to the same category as a low risk violation under Part II, means that even those employers that commit the most egregious, systemic, repeat wage-theft violations would not be named

under the public naming provisions of the regulations under this proposal. This is unacceptable, and must be changed. It has been demonstrated that wage-theft can be the result of a rational cost-benefit calculation by an employer. The deterrent effect of the public naming provisions in Part IV could serve as a powerful deterrent where other measures are ineffective. Workers and the public have a right to know about these violations when making decisions about where to work and which businesses to support.

AMPs issued to employees

The consultation document indicates that while employers and departments would typically be the regulated parties served with AMPs, employees could be issued AMPs in cases of reckless or deliberate behaviour endangering the health and safety of themselves or others in the workplace. The CLC is concerned to have the definitions of reckless and deliberate clearly spelled out in the departmental interpretations, policies and guidelines (IPGs), and that the department take into consideration the level, quality, and frequency of training made available to workers in these circumstances.

Conflicting objectives

It is well-established that employers tending to violate workplace standards in one area are more likely to violate workplace standards in other areas, and that past violations are a good predictor of future violations.[5] Indeed, this has been the justification for recommending a linked-up approach to enforcing Part II and Part III violations. However, the provisions for establishing a history of non-compliance under the proposed AMP regime carefully separate violations and enforcement actions under different Parts of the Code, and exclude enforcement actions that are older than 5 years.

Similarly, the proposed AMP regime would allow employers facing a penalty for non-compliance to reduce in half their penalty, provided they pay the amount within 15 days of the AMP being served. The intent of this proposal is unclear. Is the objective to maximize government revenue by incentivizing violators to pay their fines, and pay them promptly? Is the goal to reduce the risk to the employer that additional penalties for non-payment are imposed? How is this proposal connected to the overarching goal of effectively deterring violations?

In the CLC's view, any reduction in the penalty for early payment must apply solely to first-time, non-systemic violations. There cannot be a financial incentive extended to repeat offenders or those who systemically violate the rights of workers under the *Canada Labour Code*. Applying full penalties for employers with repeated and systemic violations not only protects workers, but levels the playing field for employers who obey

[5] Government of Canada, *Evaluation of Federal Labour Standards (Phase II): Final Report*, Evaluation and Data Development Strategic Policy, Human Resources Development Canada, December 1998; Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century*.

the law. If the option of a discount for early payment cannot be limited to first time offenders, it should be removed altogether.

AMP regime is intended to minimize burden on employers

Viewed as a whole, the Department's proposed AMP regime makes a priority of reducing the impact of monetary penalties when violations occur and minimizing the administrative burden of complying with the law.

- Regulations regarding the operation of internal audit orders are not being considered; instead, Labour Program policy will outline the way in which internal audit orders are issued in order to "minimize the administrative burden…avoid the transfer of costs to the employer…." (13).
- In violations where aggravating factors are found, the AMP regime proposes a single additional amount equivalent to 150% of the baseline penalty, in order to avoid the compounding of multiple AMPs where multiple violations are present (p.9).
- Violations where enforcement actions were taken under a different part of the Code, or where a direction was issued, or where an enforcement action occurred more than 5 years ago, do not count toward a history of non-compliance (p.9).
- Employers served with an AMP can have the penalty reduced by half if paid within 15 days of being served (p.10).
- Public naming of offenders is limited (12).

The goal of minimizing the administrative burden would seem to be directed first and foremost at small employers, who may have fewer financial and administrative resources available than large employers. However, the evidence indicates that small firms are more likely to violate legislated workplace standards as a business strategy to minimize costs.[6]

Summary

The CLC believes that the Labour Program's AMP regime, as currently proposed, will do little to rectify employer violations of workers' rights in the federal jurisdiction. In our view, the objectives implied in the proposals are occasionally unclear, and the methods chosen counter-productive. The CLC recommends a stronger and more consistent approach to enforcement under the Code, starting with a commitment to higher staff complement of Labour Program inspectors and officers to conduct pro-active inspections of targeted sectors and industries.

[6] H. Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Gatineau, QC: Government of Canada, 2006); Statistics Canada, *Federal Jurisdiction Workplace Survey*, 2015.