

**April 3, 2020**

**A proposal for decisive action by Ontario's workers' compensation system to support workers affected by the COVID-19 pandemic**

**Context:**

- The COVID-19 pandemic is posing unprecedented challenges to the health and economic wellbeing of people all around the world, including Ontario. The response from civil society has been exemplary. It has been marked by a sense of social solidarity and a significant public sentiment that we must protect and support all people who are affected, especially the most vulnerable.
- At the same time, workers in specific occupations have stepped forward at risk to their own health, to provide healthcare, first response and other frontline service to the public (such as transit and retail). Other workers are in essential service jobs which puts them at risk even though they don't encounter the public (including many vital people behind the scenes such as delivery drivers and cleaners as well as construction workers on essential projects). We must always have their protection and wellbeing in mind. If they aren't healthy, they cannot keep the rest of us safe and healthy.
- Understandably, the main focus for worker supports in these early days has been on expanding the national social safety net, including Employment Insurance and various additional financial supports to individuals, families and businesses. Yet there is another vital part of our Canadian safety net which can play an important role – our workers' compensation system.
- Workers' compensation is under provincial jurisdiction and this proposal focuses on Ontario; however, there are likely many similar opportunities in other provinces, and we can learn from what they are doing.
- Workers' compensation across Canada is a public system founded on the principle of collective employer responsibility for health care, compensation and vocational rehabilitation for workers who suffer occupational injury or illness. In cases of occupational death, workers' compensation provides survivors' benefits to family members. Workers gave up their right to sue their employers in exchange for the right to workers' compensation.
- Ontario's WSIB has a strong workplace focus and collaborates with the organizations responsible for preventing occupational injury and illness. This means that WSIB is very well positioned to step in during this complex health crisis affecting our workplaces. It can also provide longterm benefits to workers who survive COVID-19 but take a long time to recover, or perhaps never fully recover. As well as physical disabilities, many workers will also suffer from post-traumatic stress disorder (PTSD) from what they have been through.

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- In most of Canada, the vast majority of economic sectors and workers are covered by workers' compensation. In Ontario, coverage is not so broad and around 30% of workers are not covered. This includes many workers who serve the public, for example in group homes, dental offices or private day cares. This proposal addresses this gap in the context of COVID-19.

### **The objectives of this proposal:**

- The objectives of this proposal are threefold.
- First, to identify the appropriate role for Ontario's workers' compensation system to support all workers affected by COVID-19 health conditions and related matters such as isolation and quarantine.
- Second, by doing this, to maximize the confidence of workers that if they put themselves in harm's way, we as a society will fully support them.
- Third, to provide a framework for the labour and injured worker community to work collaboratively with the Ministry of Labour, Training and Skills Development (MLTSD) and WSIB to ensure the full protection of all Ontario workers.

### **The approach taken in this proposal:**

- **This proposal addresses the following key issues:**
- Expanding the coverage and protective framework of workers' compensation to all workers in Ontario who must be at work during COVID-19 plus volunteers who put themselves in harm's way.
- Protecting not just workers with COVID-19 health conditions but also workers who must be quarantined or isolated because of work exposures.
- Streamlining the adjudication of COVID-19 workers' compensation claims, protecting appeal rights and ensuring supports to workers in the COVID-19 claims and appeal process.
- Taking into account the impact of COVID-19 on existing injured workers and occupational disease victims, including especially their access to healthcare and vocational rehabilitation.
- Proactive engagement by WSIB with the labour and injured worker communities to collaborate on these and other potential initiatives, especially as they affect the most vulnerable worker populations.
- Communication of these initiatives to the workplace parties and broader public.
- **Some proposals are within the current authority of WSIB, some would require action by Cabinet on recommendation of the Minister of Labour, Training and Skills Development.**

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### **1) Expanding coverage to all workers and volunteers who put themselves in harm's way**

- **Current gaps in coverage** – Currently, workers are covered if the sector within which they work is included in Schedules 1 or 2 of the WSIA. Workers may be excluded from coverage even if they are in a covered sector if WSIB determines that they are independent contractors and not “workers” as defined by the WSIA. Many economic sectors covered in other provinces are not covered in Ontario. And many workers in the gig economy are not covered either (e.g., Uber drivers who perform vital work in times like these). This means that many workers who may put themselves at risk by contact with the public may not have workers' compensation protection.
  - **Proposal to expand sectoral coverage:** Schedule 1 of the WSIA should be amended to include, for purposes of the COVID-19 outbreak, any sectors not currently covered but which have been deemed essential. This could be done by Cabinet in short order.
  - **Proposal to protect all workers who come in contact with the public:** To ensure that all workers who come in contact with the public are included, WSIB should use the broad language of the s. 2(1) definition of “worker”, paragraph 9, to deem all persons who come into contact with the public while performing their work duties during the COVID-19 outbreak to be “workers” for purposes of the WSIA. This would cover Uber drivers and others in the gig economy for example.
- **Volunteers** – As healthcare workers and emergency responders potentially become overwhelmed by the number of people needing care and attention, it is likely that community volunteers will step up to help their neighbours. Some of them may become ill or need to be isolated or quarantined as a result – e.g., someone who provides support to a quarantined neighbour or who takes a family member or neighbour to a health facility. We want to support and encourage such acts of human solidarity.
  - **Proposal:** Now that the Premier has declared a public emergency, WSIB can cover volunteers using the relevant part of the WSIA definition of “worker”:
  - Section 2(1):
  - “worker” means a person who has entered into or is employed under a contract of service or apprenticeship and includes the following:
    - 8. A person who assists in connection with an emergency that has been declared by the Lieutenant Governor in Council or the Premier under section 7.0.1 of the *Emergency Management and Civil Protection Act* or by the head of council of a municipality under section 4 of that Act.

**2) Protecting not just workers with COVID-19 health conditions but also workers who must be quarantined or isolated because of work exposures.**

- Many workers who have contact with the public may be exposed and recommended to self isolate or undergo quarantine. Other workers doing essential work may be exposed by a co-worker or by the presence of the virus in the work environment (just as one example, a cleaner working after hours on transit vehicles). Sometimes such a worker may have initial signs of COVID-19 infection and/or test positive. Sometimes not.
- It would be quite disastrous if workers in these situations lack income protection. At least some of them might feel compelled to keep working when it is best for all concerned that they be isolated.
  - **Proposal:** WSIB should address this situation by using a broad interpretation of the definition of “occupational disease” in s. 2(1) of the WSIA:
  - “occupational disease” includes,
    - (c) a medical condition that in the opinion of the Board requires a worker to be removed either temporarily or permanently from exposure to a substance because the condition may be a precursor to an occupational disease

**3) Streamlining the adjudication of COVID-19 workers' compensation claims and protecting appeal rights**

- Currently, the WSIB states on its website that **“While the nature of some people's work may put them at greater risk of contracting the virus, for example those treating someone with COVID-19, any claims received by the WSIB will need to be adjudicated on a case-by-case basis, taking into consideration the facts and circumstances.”** This is not sufficient to address the need for quick decisions that respond to a constantly developing situation. What is most important is that the affected workers should receive swift compensation and not to be worried about their incomes when they are putting themselves on the line for the rest of us.
  - **Proposal:** add to Schedule 4 of the WSIA an irrebuttable presumption of work-relatedness for health conditions related to Coronavirus/COVID-19, for all workers who come into contact with the public. This category should be broadly interpreted to include not just health care workers and first responders but all other workers who come into contact with the public, such as childcare workers, transit, retail and delivery workers and frontline public sector workers. In addition, a rebuttable presumption of work-relatedness should be added to Schedule 3 of the WSIA for workers in sectors deemed essential, who are required to be at work during the COVID-19 but who do not come into contact with the public (e.g., cleaners, essential construction workers).

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- **Implementation:** additions to Schedules 3 and 4 can be made by the Ontario Cabinet without legislation. This could be done within days if the Ontario government wished to do so. Then WSIB will need a dedicated adjudication team to ensure swift processing of these claims.
- **Streamlined adjudication of claims by other workers** – Workers not in categories covered by the additions to Schedules 3 and 4 may contract COVID-19 at work from co-workers or in some other way.
  - **Proposal:** Claims of this nature should receive expedited attention including proactive investigation by WSIB. Where necessary, appeals to the Workplace Safety and Insurance Appeals Tribunal should be expedited.
- **Protecting injured workers' appeal rights** – WSIB has a strict 6-month time limit on injured worker claims and appeals and an even shorter limit on certain specified issues. During the COVID-19 outbreak, there will be many barriers to registering claims and appeals in a timely fashion. Fortunately, many of these situations will be covered by recent government directives extending time limits in legal matters.
  - **Proposal:** WSIB should confirm that it will waive time limits of all types, including claim filing time limits, for the duration of the COVID-19 outbreak.
- **Removing COVID-19 claims costs from individual employer accounts** – Currently the WSIB is in the early stages of implementing a form of experience rating of employer claims costs. It's a very complex system but basically, similar to auto insurance, employers will receive a lower assessment rate in future if their claims costs are low. Meanwhile, employers with higher claims costs will see their future assessment rates rise. The worker community has opposed this new scheme because we believe that employer assessments should be based on their true health and safety performance versus using claims costs, which are easy to manipulate. However, we accept that a fundamental review of experience rating cannot be undertaken at this time.
- There are two reasons to remove COVID-19 claims costs from employer cost accounts. First, these claims will hit certain sectors (e.g., healthcare, first response) much harder than others, through no fault of the specific employers. Second, the worker community is concerned that charging the costs to individual employers will provide them with a financial incentive to challenge a worker's claim for COVID-19. Such challenges would distract all concerned from what they will need to be focusing on.
- As part of the overall financial relief for employers, consideration could be given to cost relief by the government to employers from COVID-19 claims costs. This would ensure that these costs would not be added to WSIB's claims liabilities, leading to pressures to reduce benefits and services to all injured workers.
  - **Proposal:** WSIB should exclude the cost of claims for COVID-19 from all calculations of future assessment rates for individual employers or employer classes.

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- 4) Taking into account the impact of COVID-19 on existing injured workers and occupational disease victims, including their access to healthcare and vocational rehabilitation.**
- **Interruptions in health care or vocational rehabilitation programs and supports for injured workers** - Many injured workers and occupational disease victims are currently receiving health care or vocational rehabilitation programs from WSIB or one of its providers. As the impact of the COVID-19 pandemic grows, it is likely that health care or vocational rehabilitation programs will be delayed to an unknown future date. There will also be significant barriers for injured workers who need to be reviewed or re-assessed in support of continued loss of earnings benefits.
    - **Proposal:** WSIB should continue loss of earnings benefits to injured workers whose health care or vocational rehabilitation programs have been cancelled or delayed, until the COVID-19 outbreak has receded, and these programs can start up again. Benefits should also continue to workers who are unable to access health professionals to review their medical status.
  - **Ensuring that injured workers can maintain social distance and receive necessary support** – many injured workers and occupational disease victims are already in a physically vulnerable state due to their disabilities. Just as one example, think about mesothelioma patients, in a weak state, who are at great risk of being taken from their families and communities by COVID-19. This means that some workers may need additional supports to maintain social distance and health. Circumstances will vary, but this could include taking taxis to medical appointments versus public transit; higher costs for food or paying someone to do shopping or other necessary supportive tasks.
    - **Proposal:** WSIB should take a broad and generous approach to supporting any special needs that injured workers and occupational disease victims might have as a result of COVID-19. This includes proactive outreach to severely injured workers and occupational cancer victims to help them get any additional supports that they might need.
  - **Loss of modified employment** – Many injured workers succeed in returning to modified employment that accommodates their disabilities. If the employer who has provided this employment has to shut down or reduce operations due to COVID-19, these injured workers will often not be eligible for Employment Insurance.
    - **Proposal:** WSIB should restore benefits and vocational rehabilitation supports to injured workers in these circumstances.
- 5) Proactive engagement by WSIB with the labour and injured worker communities to collaborate on these and other potential initiatives, especially as they affect the most vulnerable worker populations.**
- The worker community is particularly concerned about the most vulnerable and marginalized worker populations. For example, migrant farm workers will face major barriers accessing health care and being able to self isolate.

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- **Proposal:** WSIB and the MLTSD should engage with the labour and injured worker communities to identify populations most at risk and develop outreach and engagement to ensure that they are fully protected in terms of health and safety and accessing workers' compensation benefits and services. This should include resources for the Office of the Worker Adviser and for community legal clinics to advise and represent these vulnerable workers as needed.

### **6) Communication of these initiatives to the workplace parties and broader public.**

- Very little has been done by WSIB or the MLTSD to publicize the availability of workers' compensation and other related supports to Ontario workers.
  - **Proposal:** WSIB and the MLTSD should develop a communications strategy to broadly disseminate information about the benefits and services available from WSIB and how to access these. The communications should be multilingual and delivered in partnership with organizations which can help WSIB reach the most vulnerable workers, such as migrant farm workers and temporary foreign workers.

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