

## **Vulnerable Workers -- The Legal Challenge**

### **1. Introduction**

The eighties, nineties and beyond saw an explosion of workers whose attachment to the workforce is precarious and vulnerable. It is especially challenging to meet their legal needs because our laws were originally designed to deal with workers whose attachment to the workforce was generally full-time and permanent. The laws that provide protection to workers in the areas of collective bargaining, occupational health and safety, minimum decent working conditions, workers' compensation and human rights have generally done a very poor job of adjusting to this fundamental change in the composition of the workforce.

### **2. Who are "Vulnerable Workers?"**

Vulnerable workers are traditionally defined to include workers whose work patterns deviate from the traditional definition of a permanent and full time worker. Vulnerable workers work: through a temporary agency, as "independent contractors", in sequential short term employment, in multiple jobs, in non-permanent part-time work, in self-employment when the worker does not hire anyone else. In many cases these workers do the same tasks as permanent workers, have the same workload, and work side by side permanent workers.

Definitions of vulnerable workers usually assume some form of pay to the worker. Usually there is no reference to "workfare participants" as part of the class of vulnerable workers. This would seem to be a shortcoming of current descriptive portraits of vulnerable workers.

### **3. Demographics of Vulnerable Workers**

*Generally*

- Approximately one-third of Canadians are involved in some form of non-standard work (Marginal by Design: Inside the Contingent Economy, 1996, prepared for the Minister of Education and Training).
- In Toronto, it is estimated that there are approximately 1.24 million people who are vulnerable workers. (de Wolff, 2000, *Breaking the Myth of Flexible Work*)
- There appears to be no systematic evaluation by the government of workfare projects.

### *Temporary workers*

Temporary workers:

- rose in number from 514,000 in 1991 to 3,674,400 in 2000
- receive about 50% of the pay of permanent employees in all of the clerical, manufacturing and high tech fields
- constitute the 5<sup>th</sup> highest incidence of injury on the job;
- have less than a 10% chance of getting extended health care benefits and about a 2% chance of getting dental benefits.

OFL *Temporary Work in Ontario* (2002))

Temporary work agencies:

- more than doubled in number between 1993 (1,191) and 1998 (2,503)
- more than doubled their revenues between 1993 (\$1.5 mil) and 1998 (4.04 mil)

OFL *Temporary Work in Ontario* (2002)

### *Self-Employed Workers*

- Close to half the jobs (42.8%) created between 1989 and 1998 were for people who were "self-employed" and whose businesses were not incorporated and did not employ others (de Wolff, 2000)

## **4. Economic forces behind the rise in the types and numbers of vulnerable workers?**

- The traditional model of economic growth by permanent jobs has been replaced by a "jobless recovery" in a period of massive restructuring of employers and government;
- Era of downsizing, fluctuating economic performance, desire to cut overhead, globalization, destruction of the social safety net;
- The "shortest route to employment" model of social assistance;
- Myth of economic parties who have equal footing in the labour market and in the workplace;
- Myth that employees, as a class, benefit from "flexible" workplace arrangements;
- Myth that workplace adjustments happen only by the force of economics and that regulation of the labour force therefore inhibits economic growth--labour force dynamics are questions of economic policy and not decisions about rights.

**5. How has government (or other public authorities) responded to the challenges of workplace vulnerability, by statute, regulation or policy? Are there opportunities for advocacy?**

Being vulnerable is not just a characteristic of the worker, or of our social and economic milieu. What follows are some examples of how our law contributes to vulnerability or makes workers less vulnerable. It is not exhaustive, but is simply a starting point for discussion.

(a) Regulation that leads *directly* to workers' vulnerability or decreases vulnerability examples:

*Employment Standards Act, 2000*

- Part IV ; raising number of hours employees are permitted to work each week
- s.22; permitting the averaging of overtime hours;
- protections to pregnant workers and people on pregnancy leaves or parental leaves;
- emergency leave provisions

*Human Rights Act*

- Duty to accommodate policy

*Labour Relations Act*

- inability of collective bargaining to serve vulnerable workers
- changes in rules relating to certification process
- restricting unionized workers' rights to enforce rights in absence of union representation

*Bill C-45 (Westray Bill)*

- criminal liability on individuals, including corporate executives and directors, for harm caused at work

*Occupational Health and Safety Act*

- widespread application of Act to workplaces, not to workers
- protections for workers who refuse unsuitable work

(b) Regulation that leads *indirectly* to workers' vulnerability or decreases vulnerability

### *Employment Insurance Act*

- change to hours of insurable employment compared to weeks of insurable employment
- disqualification for quitting unless "no reasonable alternative"; or termination for cause

### *Workplace Safety and Insurance Act*

- benefit rate calculations reward employers who structure employment that is non-permanent, and encourages contracting out of labour;
- labour market re-entry services given to vulnerable workers usually minimal;
- employers obligation to reemploy often rendered meaningless by use of temporary employment agencies

### *Ontario Works Act*

- STEP reductions
- exclusions of OW placements from bargaining units or from minimum employment standards;
- quit/fired regulations and policy

### (c) Judicial/ Quasi Judicial regulation

- Reprisal remedies almost always based on length of service;
- historical judicial interpretation of "employee" vs. "independent contractor";
- lack of mechanisms to enforce human rights; wide discretion to Commission in deciding whether to deal with a complaint or whether to refer it to hearing;

### (d) Passively regulating vulnerability

- Lack of enforcement of health and safety regulations;
- Minimum wage not tied to inflation;
- Lack of regulation about who is an employee
- Lack of regulation of "equal pay for equal work" except on gender differences

## **6. Background Reading**

[www.lcc.gov.ca](http://www.lcc.gov.ca) Law Commission of Canada--Projects--Vulnerable Worker--Publications. Good background reading on this website includes *The Legal Concept of Employment: Marginalizing Workers* (Fudge, Tucker, Vosko) and *Vulnerability at*

*Work: Legal and Policy Issues in the New Economy* (Rittich) (see Executive Summary and Parts III and IV).

[www.contingentwork.on.ca](http://www.contingentwork.on.ca) This web site has been created to support workers in the contingent economy. Good background reading includes: Weblinks---#9 Marginal by Design: Inside the Contingent Economy (Sobel, 1996) ; and #10 Breaking the Myth of Flexible Work: Contingent Work in Ontario (de Wolff, 2000)

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