

Measuring Employment Standards Violations, Evasion and Erosion - Using a Telephone Survey

Mesurer les infractions aux normes du travail ainsi que leur érosion et leur contournement par le biais d'un sondage téléphonique

Medida de las infracciones, evasiones y erosiones de las normas de empleo mediante un sondeo telefónico

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Résumé de l'article

Pour plusieurs travailleurs ontariens, la *Loi sur les normes du travail* (LNT, en anglais la *Employment Standards Act*), constitue leur seule mesure de protection. Par ailleurs, le système de contrôle des plaintes utilisé par le Ministère du travail de l'Ontario rend difficile toute évaluation de la prévalence de ces normes dans le marché de l'emploi. En plus de souligner les évidentes violations des dispositions de la LNT, des recherches antérieures ont mis en évidence l'importance de l'érosion des normes du travail, voire même leur contournement et leur abandon par certains employeurs, cela grâce à des pratiques telles que la sous-classification des travailleurs ou encore la sous-estimation du travail accompli. Dans cet article, nous présentons les efforts investis dans le développement d'un questionnaire téléphonique permettant de mesurer la prévalence globale des infractions, ainsi que les moyens de contournement et d'érosion des normes du travail dans les emplois à faible salaire en Ontario, et ce, sans que les répondants n'aient besoin, au préalable, de connaissances juridiques. Certains défis furent relevés au niveau de la méthodologie : notamment, la nécessité de développer des stratégies permettant l'identification d'erreurs de classification des entrepreneurs indépendants; le développement d'indicateurs afin de déterminer si les travailleurs étaient exemptés de la LNT; et afin, également, de traduire les nuances des règlements propres à la législation de la LNT dans un format de questions plus facile à répondre. Le résultat donne un questionnaire sondage unique dans le contexte canadien. Ce dernier reflète les préoccupations des chercheurs universitaires et les droits des travailleurs activistes. En général, les résultats du projet pilote démontrent que les travailleurs ontariens ne distinguent pas nécessairement les violations au NT des autres formes de griefs et de plaintes en milieu de travail. Toutefois, par le biais d'une élaboration plus poussée de ce questionnaire, il serait possible de mieux mesurer la prévalence des violations aux normes du travail, ainsi que leurs contournements et leur érosion. Nous concluons en insistant sur l'importance d'établir des mesures de base et des outils de mesures de données standardisés qui permettront de mieux surveiller les effets des politiques de la LNT.

Measuring Employment Standards Violations, Evasion and Erosion - Using a Telephone Survey

Andrea M. Noack, Leah F. Vosko and John Grundy

This article reports on efforts to develop a telephone survey that measures the overall prevalence of employment standards (ES) violations as well as their evasion and erosion in low-wage jobs in Ontario, without requiring that respondents have any pre-existing legal knowledge. The result is a survey instrument that is unique in the Canadian context and reflects the concerns of both academic researchers and workers' rights activists. Pilot survey results show that Ontario workers do not necessarily distinguish between ES violations and other workplace grievances and complaints. With careful questionnaire design, it is nevertheless possible to measure the prevalence of ES violations, evasion and erosion. In order to track the effects of ES policies and their implementation, it will be crucial to establish baseline measures and standardized reporting tools.

KEYWORDS: employment standards; enforcement; violations; telephone survey; survey methodology; Ontario.

Introduction

Employment standards (ES) set minimum terms and conditions in areas such as wages, working time, vacations and leaves, and termination and severance of employment. Along with occupational health and safety regulations, ES shape the structure and conditions of work in Ontario. For the 73% of Ontario's 5.7 million workers who are not unionized (Statistics Canada, 2013), ES establish social minima designed to protect workers from exploitative, detrimental or unfair employment practices. For unionized workers, ES provide a 'floor' or baseline below which certain terms and conditions should not fall; additional standards

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above this floor may be negotiated via collective agreements and other means. A dearth of empirical evidence on ES compliance and enforcement makes it difficult to assess the effectiveness of ES in protecting workers in Ontario. This data gap emanates partly from the reliance on reactive or complaints-based enforcement on the part of a cash-strapped Ministry of Labour (MOL) and partly from the methodological challenges posed by complex patterns of ES violation and related practices of evasion, erosion and abandonment.

In this article, we report on an effort by a group of academic and community researchers to overcome some of the challenges associated with measuring ES compliance using a telephone survey administered to a random-digit dial (RDD) sample. Two pilot survey tests were conducted by a large, academic telephone survey organization: the first collected data from 20 respondents in July 2010 and the second collected data from 229 respondents from March-August 2012. In the sections below, we report on the methodological lessons we learned from these two pilot survey tests, which have prepared us to administer a survey on ES compliance to a larger sample scheduled for 2016. We proceed in four parts, beginning in section one with a critical assessment of the current practices of measurement adopted by the MOL and a description of the alternative understanding of the ES enforcement gap upon which our conceptual model of measurement is based. Against this backdrop, section two reviews the few existing empirical studies of ES compliance, identifying some of the persistent methodological challenges associated with measuring ES compliance in population surveys. In section three, we describe the design of our two pilot telephone surveys on ES compliance in Ontario. By way of conclusion, we summarize key lessons from our pilot surveys, and argue for the development of improved instruments for tracking ES compliance in order to better evaluate the effect of ES policy reforms underway in many jurisdictions.

Assessing Prevailing Measures of ES Compliance in Ontario: Towards an Alternative Model

Administrative data collected by the MOL record the number of ES complaints filed, claims investigated, and entitlements recovered for workers for annual reporting purposes. For example, in fiscal year 2009-2010, 20,365 new claims were filed with the Ministry and 20,762 outstanding investigations were completed, resulting in \$14.8 million in unpaid wages and other entitlements recovered for workers (Gellatly *et al.*, 2011: 86). In 2010-2011, 15,598 complaints were received and 25,135 were completed (Ontario MOL, 2011: 09). These administrative data suggest widespread ES non-compliance, yet they likely underestimate the prevalence of ES violations. This is because data collection relies on individual workers to make a complaint, which rarely occurs while

workers remain on the job (Vosko *et al.*, 2012). Indeed, reporting on the situation in the U.S., Weil and Pyles conservatively estimate that for every one complaint lodged, there are about 130 ES violations, and this ratio fluctuates across industries (Weil and Pyles as cited by Weil, 2010: 83; see also Bernhardt *et al.*, 2009: 11). Weil and Pyles (2005) also indicate that there is no neat correspondence between the rate of complaints that emerge from a given sector and the frequency of ES violations. Many sectors that are characterized by high rates of ES violations may also generate few complaints compared to other sectors. The decision of workers to file a complaint hinges on their perceptions of the efficacy of the complaint process, the assistance available to them throughout the complaint process, and the risk of employer retaliation. This risk may be amplified for workers in temporary or otherwise tenuous citizenship/residency status (Vosko, 2013).

Reflecting Lipsky's (1980) insights into street-level bureaucracy as a site of de facto policy making, the discretionary judgments of Employment Standards Officers (ESOs) also shape what makes it onto the administrative record of claims investigated and enforcement decisions. In a study of the discretionary power of MOL ESOs, Hall *et al.* (2014) argue that, while not unconstrained, ESO decisions inevitably exert influence over the different stages of the complaint process. The way ESOs determine which claims can proceed to the investigation stage, and once there, what constitutes valid evidence of an ES violation, can be shaped by social and economic factors. For example, a given claimant's difficulty acquiring the necessary employment records to substantiate a claim—a difficulty more common among the precariously employed—may lead an ESO to deny the complaint on insufficient grounds, potentially even in the case of probable ES violation (see Parker and Nielsen, 2009 for a discussion of the general case of measuring regulatory compliance). For all of these reasons, administrative data on complaints tends to be an unreliable source of information on the prevalence of ES violations in a given jurisdiction.

The measurement of formal violations represents only one aspect of establishing the degree of compliance with ES. Another approach, directed at capturing the full range of ways in which ES are compromised, entails conceptualizing the enforcement gap as a series of linked processes involving the evasion, erosion, and abandonment of legislative standards in addition to formal violations.¹ Evasion involves the adoption by employers of "strategies to evade core workplace laws" by, for example, limiting the law's application by misclassifying employees as self-employed contractors (Bernhardt *et al.*, 2008: 6). Many firms are reorganizing their labour processes so that workers once classified as employees are now deemed to be independent contractors.² While these firms may not technically be violating existing laws by engaging in 'misclassification' narrowly defined,

such practices represent instances in which ES are evaded, as workers no longer fall under the umbrella of the Employment Standards Act (ESA). Erosion entails the weakening of normative goals (e.g., social minima, universality, and fairness) and workplace policy objectives (e.g., assuring basic labour standards, protecting against major downside risks of employment, and mitigating against power imbalances and resulting abuses); if left unchecked, it may also lead to their abandonment. The abandonment of ES, resulting in the divergence of growing segments of the labour market “from the legal and normative bounds put into place decades ago” (Bernhardt *et al.*, 2008: 2), is most likely to occur where workers are conditioned to accept working conditions which fall below legally established minima, and thus do not see their workplace conditions as legally redressable. Widespread workplace violations and evasion of ES can lead to their erosion and abandonment; however, it is also the case that broader political, economic, and social processes can promote erosion and abandonment of norms and objectives, which not only weaken protective laws, but create conditions conducive to evasion and violation. These processes are well documented not only in Canada, but also in the United States, Europe, Australia and elsewhere (Tucker, 2006; Bernhardt *et al.*, 2008; Sargeant and Tucker, 2009; Gautié and Schmitt, 2010; Kalleberg, 2011; Emmenegger *et al.*, 2012; Fudge, McCrystal and Sankaran (eds.), 2012; Weil, 2012).

These processes are also linked to, and amplified by, disparities in treatment on the basis of workers’ social location. As numerous studies demonstrate, workers in a temporary or otherwise insecure residency status, recent immigrants, women, racialized workers, and people with disabilities are all over-represented in precarious forms of employment characterized by low wages, lack of control over the labour process and other forms of insecurity (Wilton, 2005; Galabuzi, 2006; Vosko and Noack, 2011; Lenard and Straehle, 2012). These workers are not only more prone to experience various employment standards violations as a characteristic of precarious employment. They are also often unable to access protective measures more readily available to other workers (Weil, 2010; Gellatly *et al.*, 2011; Sharma, 2012). Considering how the erosion and abandonment of norms intersects with processes of social differentiation and subordination is therefore critical to understanding how workers are deprived of protection.

In recognition of this complex understanding of the enforcement gap, our pilot surveys seek to capture not only outright ES violations, but also processes of evasion and erosion that often precede or occur alongside violations, and facilitate the abandonment of ES. Drawing a textured picture of ES compliance via survey research is a challenging undertaking, given the few existing population surveys of ES as well as the methodological challenges to measurement, broadly speaking, that survey researchers routinely encounter.

Existing Empirical Studies of Employment Standards Compliance

There are few empirical studies of ES compliance, both in Canada and internationally. The vast majority of investigations into ES have been conducted by academic researchers, sometimes working in conjunction with (or on contract to) government agencies. Notable examples of large-scale population surveys that include information about ES awareness and compliance in an international context include the *'Australia at Work' Survey* (2006-11), the *'Employees' Awareness, Knowledge and Exercise of Employment Rights' Survey* (conducted in the UK, 2000 and 2005), the *'Unrepresented Worker' Survey* (conducted in the UK, 2004), the *'Broken Laws, Unprotected Workers' Survey* (conducted in the US, 2008), and the *Enquête évaluation de l'application de certaines dispositions de la Loi sur les normes du travail* carried out in 2004 and 2010 by Québec's *Commission des normes du travail* (*Commission des normes du travail*, 2011). In addition, several small-scale surveys run by community organizations capture information about ES, but non-probability sampling methods limit the generalizability of their findings (JobWatch, 2004; Workers Action Centre, 2011).

Persistent methodological challenges associated with measuring ES compliance in such population surveys are threefold: they relate to finding hard-to-reach workers, to workers' discomfort with disclosing workplace problems and limited knowledge of ES provisions, and to the normalization of workplace problems. Together, these persistent problems highlight the importance of developing a survey instrument designed to reach the precariously employed that does not rely on workers' pre-existing legal knowledge and that is attentive to normative goals and policy objectives underlying ES and their potential erosion, evasion and abandonment.

The Challenge of Engaging Hard-to-Reach Respondents

For obvious reasons, employers are unlikely to be willing to disclose their own illegal (or verging on illegal) workplace practices, and those most likely to violate ES through evasive behaviour are the most difficult to find (Spiller *et al.*, 2010: 1). Thus, ES researchers must rely primarily on workers' reports of ES compliance in their workplaces. The limited data available show that low-wage workers are more likely to experience ES violations than those with higher levels of pay (Bernhardt *et al.*, 2009). These workers can be difficult to locate and survey using probability-based sampling. One of the main methodological difficulties concerns reaching workers through households, which are the sampling units typically used in mail or telephone surveys. Many low-wage workers do not have their own homes with land line telephones, opting instead to use only cell phones.

In addition, low-wage workers are more likely to live in rental housing, shared housing or to move often, features which can make them difficult to capture in household surveys.

The US *'Broken Laws' Survey*, a landmark study of 4387 unorganized workers in New York, Chicago and Los Angeles for six months in 2008 (Bernhardt *et al.*, 2009), sought to overcome these limitations by using the Respondent Driven Sampling (RDS) method, developed by Douglas Heckathorn (1997). RDS methodology involves using snowball sampling to recruit survey respondents, a 'ticket' system to determine the social network that each respondent was recruited through, and then estimating each respondent's probability of selection based on the size of their social networks. This method proved effective in recruiting workers typically not captured in such surveys, and revealed extensive levels of ES violations. For example, nearly 70 percent of workers experienced pay violations in the previous week (Bernhardt *et al.*, 2013: 13). But, while this survey has many strengths, particularly with regard to its commitment to reach hard-to-reach workers in precarious employment, its methodology is costly, time consuming, difficult to replicate, and its estimation procedures have yet to be fully validated statistically. These factors prevented its replication in our survey while informing our approach to sampling.

In our research, we specifically sampled non-unionized employees who are earning low wages (less than \$16/hr), because this group is most likely to experience ES violations and does not have other forms of protection available to them. This group comprises 30% of the Ontario labour force, and 15% of the province's overall population (Statistics Canada, 2012). The challenge of reaching these low-wage workers using a RDD sample is evident in our response rates: in the first pilot survey, 9% of households reported that there was someone in the household earning less than \$16/hr, and only 4% overall completed the survey. We hypothesized that the low proportion of households reporting the presence of a low-wage worker might be the result of telephone-answerers reporting that 'no one in the household' fit the criteria because they did not want to complete a survey. As a result, in the second pilot survey we identified potential respondents using a screening question inserted into an omnibus telephone survey administered by a separate survey firm. In this context, 13% of households reported an eligible respondent, but only 5% overall completed the survey. Without more detailed information about non-respondents, it is difficult to know how these relatively low response rates influenced the survey-based estimates of ES violation, evasion and erosion. Responders may be more likely to be aware of wage/labour issues, as they were willing to complete a survey on this topic. Some low-wage workers may be difficult to reach in RDD telephone surveys because they are more likely to rely exclusively on cell phones. Thirteen percent (13%)

of Canadian households report only using cell phones, and the people in these households are more likely to be young (aged 18-34) and to rent their homes (Statistics Canada, 2010). US studies show that people who rely exclusively on cell phones have lower levels of both education and income than those who do not, though these findings are inconsistent across samples (Ansolabehere and Schaffner, 2010; Christian *et al.*, 2010; Lee *et al.*, 2010;). Although the exclusion of cell-phone only populations can be partially compensated for through the careful use of post-stratification and weighting methods, these results suggest the need to include a 'top-up' sample of cell-phone only respondents in future surveys. Little is known about how the work experiences of Canadians who use cell-phones only are different from those who do not, beyond what we know about how young people's work experiences differ from their older counterparts (Mills, 2004; Tailby and Pollert, 2011).

Workers' Discomfort with Disclosure and Limited Knowledge of ES

Even when sample surveys successfully reach workers in precarious jobs, social pressures can make some people reluctant to disclose information about their employer or ES compliance in their workplace, even when they are assured of anonymity. Surveyors may be perceived as authority figures who are potentially related to the employer or the state. As U.S.-based survey research demonstrates, workers who are immigrants, engaged under temporary work permits, or undocumented, may perceive greater risks of employer retaliation as a result of disclosing information about their work experiences (see Bernhardt, 2009: 12). Unfortunately, the very characteristics that make workers hesitant to report on ES compliance in their workplace also make them more likely to experience ES violations or erosions. That is, those workers who are the most likely to have experienced ES violations —such as workers with insecure residency status— are also the most likely to refuse to speak with surveyors for fear that they will lose their source of income and, in some instances, face investigations from immigration or labour authorities (Smith and Ruckelshaus, 2007; Gomberg-Munoz and Nussbaum-Barberena, 2011).

For workers who are willing to disclose their employment experiences, a major barrier for many is their limited knowledge of ES provisions. Many workers are not knowledgeable about how complex ES legislation applies to their particular situation, especially those with low levels of literacy and newcomers to Canada (Gellatly *et al.*, 2011; Vosko *et al.*, 2012). Moreover, unlike employees in Québec who have formal recourse against psychological harassment under s.81-18 of the *Loi sur les normes du travail*, employees in Ontario may face forms of bullying and harassment which are not prohibited under the *ESA*.³ Distinguishing

between these workplace problems and ES violations as defined by the *ESA* also presents substantial difficulties, as many workers do not necessarily understand the legal distinction between *ESA* and non-*ESA* related issues.

This problem is reflected in many of the existing surveys on ES compliance. For instance, in the 2000 UK *Survey of Individuals' Awareness, Knowledge and Exercise of Employment Rights*, respondents were asked "Have you personally experienced any problems at work over the last 5 years in relation to your rights at work?" (Meager *et al.*, 2002: 176). Researchers thus assumed that respondents are aware of ES legislation and how it applies to their situation (see Pollert and Charlwood, 2009: 346). In the 2004 UK *'Unrepresented Worker' Survey*, the questions posed to workers were deliberately broad to include not only ES violations but also a more general sense of rights as 'fairness', and to allow workers to report on a range of problems that are not technically ES violations. The Québec *Survey on Working and Employment Conditions and Occupational Health and Safety* (EQCOTESST), carried out in 2007 and 2008, surveyed 5,000 workers to collect information on a similarly broad range of issues including ES awareness among employees, work-life balance, workplace psychological and sexual harassment, and occupational health and safety (Vézina *et al.*, 2011). As a result, while these surveys provide valuable insights into the experience of workers, they do not provide reliable estimates of ES violations. A review of empirical studies of ES compliance to date thereby calls for the application of methods that neither rely on workers' knowledge of what constitutes a formal violation nor what evasive behaviour entails. At the same time, workers' broader perceptions of what constitutes fairness, as well as other principles (e.g., universality) are pivotal to addressing the extent to which employer behaviour conforms to normative goals and policy objectives linked to ES as well as to identifying common workplace problems that should fall within their ambit.

Problems of Perception

The measurement of ES violations is further complicated by the fact that many workers may not perceive the violations that they experience as a problem, especially when such violations are normalized in the workplace. As Pollert and Charlwood (2009: 347) point out, the threshold point at which workers register ES violations as a problem may be quite high, "especially at the lower end of the labour market, where habituation to experiences such as work intensification, insecurity, low pay and coercion lower expectations of working life." Even workers with good knowledge of their ES rights may assess whether they have experienced an ES violation by comparing their situation to social norms established by their previous work experience and the experiences of others in their workplace and social milieu. In cases where workers acknowledge that they have experienced

an ES violation, they may still be hesitant to self-identify because they fear being perceived as a victim (Rayburn *et al.*, 2003). Differences in respondents' naming practices, the inconsistent threshold at which ES violations become identified as a problem, and respondents' hesitance to formally acknowledge the infringement of their personal rights likely introduce bias into survey measurements of ES violations.

Taken together, these three methodological challenges make the task of measuring ES compliance a formidable one. Workers who experience ES violations are often difficult to reach, calling for non-standard sampling methods. Furthermore, when surveyors do reach them, these workers may be less willing to speak about their experiences on account of their social location. Emphasizing worker anonymity and collaborating closely with community-based agencies in survey design help to mitigate this problem. Even if workers are willing to speak, a lack of knowledge about the ES that apply to their workplace or a reluctance to identify violations as workplace problems may introduce bias into the survey results, necessitating an approach that does not rely on workers' knowledge of ES violations, let alone their evasion. At the same time, it remains important to listen to workers' voices in order to understand their views of appropriate workplace norms and policy objectives.

The Design and Administration of the “Closing the Enforcement Gap” Survey

Survey Development

This survey was developed by a team of academic and community researchers in the context of a larger research project on ES enforcement and regulation. This larger project incorporates multiple methodological approaches to understand the complexity of ES enforcement in Ontario, including the analysis of archival documents, in-depth interviews with workers who have experienced ES violations, in-depth interviews with community advocates and legal case workers, in-depth interviews with MOL Employment Standards Officers, call centre operators, district managers and policy staff, thematic focus groups with workers and community legal advocates together, and a comparative cross-jurisdictional analysis of existing employment standards policies and enforcement models in addition to this survey. The research team includes academics trained and working in political science, sociology, and law, as well as staff from community legal clinics and workers' centres. Our multidisciplinary, collaborative approach to survey design ensures that the survey instrument is comprehensive and accessible to respondents, and also captures the complexity of workers' experiences of not only ES violations, but also their evasion and erosion.

A central challenge of survey design lies in translating research concepts into clear questions that all respondents can answer. The specific task of measuring compliance with legal provisions introduces several unique challenges to the process of operationalization. First, many regulatory provisions are expressed as broad principles instead of clear prohibitions, and it is left to regulatory agents to interpret and apply each provision (Parker and Nielsen, 2009). This feature is apparent in those sections of the *ESA*, and its administrative manual, which rely on notions of 'ordinariness' or 'reasonableness', a value-judgement which ultimately becomes assessed by an ESO.⁴ Second, when assessing compliance with regulatory provisions it is important to clearly distinguish between, and measure, both the number and the severity of breaches (Parker and Nielsen, 2009; Murdoch and McGovern, 1998). Additional complexity is introduced into the measurement of breaches by decisions around how to delimit a single 'event'; if the same violation occurs repeatedly, should it be considered a single, severe incident, or multiple minor incidents? Finally, in this project the research team is committed to assessing both formal violations of the law, as well as how ES are evaded and eroded through workplace practices. Informed by qualitative evidence of such practices (Gellatly *et al.*, 2011), we took this approach because the measurement of ES violations strictly defined does not capture the full complexity and multi-dimensionality of the ways in which workers' recourse to protective regulations is declining. Given that many workers are not familiar with Ontario's *ESA* and its associated protections, the research team focussed on developing a questionnaire that assesses ES compliance without requiring the respondent to have any pre-existing knowledge of employment standards provisions. Each of the main sections of the *ESA* is translated into a series of survey questions. This approach allows us to estimate the prevalence of specific ES violations separate from other types of workplace problems. It also eliminates the need for respondents to name their situation as a 'problem' and avoids any indication of judgement on the part of the researchers.

Translating the *ESA* into Survey Questions

Although the process of translating between legislative statutes and a questionnaire is complex, it is possible to develop a survey instrument that generally reflects the content and organization of the *ESA*. In general, the survey method is well-suited to measuring behaviours, and as legislation, the *ESA* ultimately sets out requirements for how employers are to behave in relation to their employees. The main body of the questionnaire consists of six main sections: namely, on hours of work, rate and regularity of pay, overtime pay, holiday pay, complaints and enforcement and a general job profile (positioned first in the questionnaire). The first four of these sections correspond closely to the respective sections in the *ESA* on payment of wages (Part V), hours of work and eating periods (Part

VII), overtime pay (Part VIII), and public holidays (Part X).⁵ The first pilot survey questionnaire included a section on termination and severance pay, but these questions were eliminated from the second pilot survey because they only applied to a single respondent (5%). Although the survey team is also interested in compliance with the *ESA* provisions on leaves of absence, we expected that too few respondents have experienced these events for the data to be useful for making population estimates. As with all surveys, the questionnaire design necessarily makes a trade-off between depth of coverage and survey length. The first pilot survey ranged in length from 11 to 26 minutes, with an average of 16 minutes (s.d.=4 minutes). The second pilot survey ranged in length from 11 to 27 minutes, with an average of 18 minutes (s.d.=6 minutes).

A key challenge in terms of balancing survey length and depth of coverage is the number of specifications and exemptions within the *ESA*. The text of the *ESA* often identifies particular situations in which its provisions can be modified or do not apply. The legislation is further augmented by a series of regulations, administrative guidelines and Ontario Labour Relations Board decisions around how the *ESA* should be interpreted and implemented. Some groups of workers are completely or partially exempt from the *ESA*; the companion guide to the *ESA* lists 60 pages of job categories that have at least a partial exemption. The surveys collect information about people's occupation and employer in the same way as Statistics Canada's other labour surveys: by asking questions about the "type of work" the respondent does in their job, their "most important activities or duties" and "the main business or services" provided by their employer. The answers to these three questions allow us to assign respondents to industries and occupations consistent with the two classification schemes used in Canadian labour statistics: the National Occupational Classification (NOC) and the North American Industry Classification System (NAICS). This job classification information does not necessarily provide enough detail for the researchers to identify conclusively which respondents have full or partial exemptions from the *ESA*, mainly because it is infeasible to collect the detailed information needed to make such a determination in the time-limited context of this survey. Further, the inclusion of all workers as respondents helps us to assess the erosion of normative workplace standards, even for those who are technically exempt from the *ESA*.

A second key decision relates to whether respondents should be asked to report on their own personal experiences or that of workers in their workplace more generally. In general, self-reports are presumed to be more accurate than reports made by others, because individuals are perceived to be the authority on their own behaviours and motivations. Our decision to rely primarily on self-reports precludes assessing whether ES violations are clustered within workplaces, or whether each respondent is in a unique situation within their workplace.

A final survey design decision relates to the temporal reference period established for the respondents. We expect many ES violations to occur infrequently: for instance, holiday pay violations may only occur once every few months. As a result, the questionnaire utilizes two consistent reference periods: the past four weeks for frequent events, and 'since January 1' for infrequent events. January 1st is a useful reference point, since the New Year is a notable event for many people. The drawback to this approach is that for the second pilot survey, administered from March-August 2012, the length of respondents' temporal reference period ranges from three to eight months, making it difficult to effectively estimate the overall frequency of ES violations in Ontario workplaces.

Measuring ES Violations, Evasion and Erosion in Survey Questions

Overall, ES violations are the most straightforward to measure in the survey questionnaire. The questions on eligibility for holiday pay provide a good illustration of how the survey team translates the *ESA's* provisions into a series of specific, easy-to-answer questions that do not require any pre-existing knowledge from respondents nor impose any normative judgements. The *ESA* (2000) makes the following statement on who is eligible for holiday pay:

Public holiday ordinarily a working day

26. (1) If a public holiday falls on a day that would ordinarily be a working day for an employee and the employee is not on vacation that day, the employer shall give the employee the day off work and pay him or her public holiday pay for that day. 2000, c. 41, s. 26 (1).

Exception

(2) The employee has no entitlement under subsection (1) if he or she fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before the public holiday or all of his or her first regularly scheduled day of work after the public holiday. 2000, c. 41, s. 26 (2).

Agreement to work, ordinarily a working day

27. (1) An employee and employer may agree that the employee will work on a public holiday that would ordinarily be a working day for that employee, and if they do, section 26 does not apply to the employee. 2000, c. 41, s. 27 (1).

The corresponding section of the survey questionnaire asks the following seven questions to determine whether the respondent is eligible to receive public holiday pay (or time in *lieu*):

- We are interested in learning a bit more about how public holidays are treated at your job. The last public holiday was [date and name of last holiday]. Were you asked to work on [date and name of last holiday]?

- Did you have the option not to work on [date and name of last holiday]?
- Did you actually work on [date and name of last holiday]?
- Did you work your regularly scheduled shift before [date and name of last holiday]?
- What was the reason you did not work your regularly scheduled shift before [date and name of last holiday]?
- Did you work your regularly scheduled shift after [date and name of last holiday]?
- What was the reason you did not work your regularly scheduled shift after [date and name of last holiday]?

This sequence of questions illustrates the strategies we use to capture ES exceptions as well as the challenges associated with capturing broad legal provisions expressed in terms such as ‘reasonable’ and ‘ordinarily’. In the sequence above, workers are asked why they missed shifts before or after a public holiday in order to determine whether they missed their shift for ‘reasonable cause’. Notably, this sequence of questions does not capture whether an employee and employer have an agreement to work on a public holiday (as specified in *ESA 27(1)*). This specification is omitted because it is relatively rare, and difficult to effectively measure. This omission, and others like it, will necessarily influence our estimates of ES violations, but we anticipate that they will have less effect on estimates of ES violations than we would ordinarily expect as a result of sampling error.

ES evasion—situations where employers seek to limit the application of ES—is more challenging to measure in a survey format. The most prominent form of ES evasion that we capture in the survey questionnaire is the misclassification of employees as ‘independent contractors’ who are exempt from ES provisions. Although the *ESA* itself defines the characteristics of an employee, it does not clearly distinguish between employees and independent contractors. Nor does it make reference to the existence of ‘dependent contractor’, a legal category defined in the *Ontario Labour Relations Act* as a contractor who resembles an employee because he/she typically has only one client and is in a relation of economic dependence (Fudge *et al.*, 2002). In practice, the MOL relies on a four-fold test, which reflects common law tests in general, to determine whether a worker is either an employee or an independent contractor. The four elements of the test assess whether a worker has i) control over work; ii) ownership of tools; iii) chance of profit; and, iv) risk of loss. The survey questionnaire entails a similar three-fold test, incorporating control over work and risk of loss, and adding questions related to the number of persons/entities for whom an individual performs work for remuneration. It omits the

MOL test referring to ownership of tools since not all workers use tools in their job and the concept of a 'tool' varies across occupations. It is thus difficult to translate this test relating to ownership of tools into survey questions that all independent contractors would interpret in a similar way. The MOL test for a chance of profit is implicitly captured in the survey question about the risk of loss, since most contractors who have a risk of loss also have a chance of profit. As another measure of misclassification, the survey includes questions related to the number of clients, and the percentage of work done for the main client. These measures are used as indicators of employee status; when a contractor works exclusively for a single client, or has one main client for whom they do the vast majority of their work, s/he more closely resembles an employee of that client. Thus, the sequence of survey questions that assess the evasion of ES through misclassification practices is as follows:

Number of Clients:

- Since July 1st 2011, approximately how many companies, organizations or people have you been paid by?
- And since July 1st 2011, approximately what percentage of your work time did you spend working for the main company, organization or person who pays you?
 - If respondent has only one client or spends more than 75% of time working for their main client, they fail this test of being an independent contractor.

Control over Work:

- When you are working for a client, how much control do you have over WHERE you perform that work?
- How much control do you have WHEN you perform your work for a client?
- And how much control do you have over HOW you do your work for each client?
 - All questions have the responses: Complete control (score 1), a lot of control (score 2), some control (score 3), a little control (score 4), or almost no control (score 5)? If the sum of the respondents' answers to all three questions is 9 or higher, they fail this test of being an independent contractor.

Risk of Loss

- Is it possible for you to lose money in your business or as a contractor?
 - If the person cannot lose money, they fail this test of being an independent contractor.

Respondents who fail two or more of these tests are considered to be misclassified independent contractors. The pilot test results appear to successfully capture misclassified employees using this relatively short sequence of questions; some of the jobs reported by respondents who initially indicated that they were independent contractors but who were subsequently identified as misclassified employees are: a salesperson in a clothing store, a retail clerk in a DVD rental company, a security guard at a financial institution, a receptionist for a roofing company, a cook in a restaurant, a cleaner for a cleaning company, and a maintenance worker in a rental property management company. These job descriptions conform to both work that is usually done by employees, and represent industries where worker advocates report that misclassification practices are widespread. Ultimately, these results give us confidence in the ability of this survey instrument to begin to identify the evasion of ES through workplace practices such as misclassification, and to estimate how prevalent some evasive practices are in Ontario.

The erosion of normative standards for work is more challenging to measure than violations and evasions of the *ESA*. Though the erosion of ES signals an important shift in employers' and workers' perceptions of minimum standards for work, this cultural shift can be difficult to quantify. In this survey, we seek to capture both workers' changing expectations and workplace practices via a series of questions related to working 'off the clock' - starting work early or staying late without pay. While the *ESA* sets out clear guidelines about remuneration for time worked and the breaks that employees are entitled to, we go beyond measuring work time violations, strictly defined, in order to try and capture the more general erosion of ES minima in this area. A key element of our assessment is whether workers are *expected* by their employer or manager to work this additional time without pay. The following questions from the pilot survey section on 'hours of work' are designed to capture how employer expectations may signal the erosion of ES provisions (emphases in original questionnaire):

- Sometimes people start work early. In the past four weeks, how often were you EXPECTED to start working at your job before you were scheduled to begin: most of the time, some of the time, only a few times, or never?
- On the days when you were EXPECTED to start early, how many minutes or hours early were you EXPECTED to start?
- Sometimes people work late at their job. In the past four weeks, how often were you EXPECTED to keep working after your shift was over: most of the time, some of the time, only a few times, or never?
- On the days when you were EXPECTED to stay late, how many minutes or hours were you normally EXPECTED to stay?

- In a regular shift or a regular workday, do you have scheduled breaks?
- In the past four weeks, have you ever been EXPECTED to work through your scheduled break time?

Follow-up questions ask respondents about how many minutes early/late they are normally expected to work, and whether they are compensated for this extra working time (with extra pay, time in lieu or some other form of compensation). The pilot test results show that many workers are expected to start early and/or to stay late at their jobs. Although some workers are compensated for this extra time, in general these results suggest that the notion of distinctly scheduled working hours is being eroded in the Ontario workforce. In part, this erosion may reflect the discursive construction of 'good workers' under neoliberalism, the development of 'just-in-time' delivery systems, as well as increasing employee workload and work speed-up as companies strive to maximize profits. These practices encourage the development of an increasingly flexible workforce, and prompt managers and supervisors to encourage and expect workers to come in early, stay late, and/or work through their breaks. Workers' willingness to participate in this erosion of employment standards can signal to employers that they are a 'team player' and a 'good worker', and is potentially motivated by a hope of receiving preferential treatment or improved job security.

Overall, the pilot test results make us optimistic about the potential for measuring not only ES violations, but also the more complex and nuanced processes of evasion and erosion that often precede or occur alongside clear violations, and together result in the abandonment of ES. It seems feasible to capture many forms of ES non-compliance using a telephone survey, without requiring that respondents have any pre-existing legal knowledge or must name violations as a specific problem in their workplace. Listening-in on the pilot survey interviews, and thus having access to the extra information each respondent provides but is not captured in the final dataset, reveals that many workplace ES violations are being effectively captured by the survey instrument. Consistent with previous research, our pilot survey results also indicate that the vast majority of workers do not distinguish between ES violations and other forms of workplace problems. For some workers, other workplace problems are more salient and bothersome than the relatively constrained list of issues covered under the *ESA*. For instance, in response to an open-ended question about what they like least about their jobs, many pilot survey respondents report experiences and incidents that reflect precarious employment status (inconsistent scheduling and shifts), physical and mental stressors (lifting, temperatures, poisoned workplace culture) and violations of personal dignity (verbal abuse), none of which are ES violations per se. Although ES compliance is the primary focus of our inquiry, the second pilot survey includes a series of questions on psychological harassment in order to

formally acknowledge and capture these respondents' real workplace concerns. These questions also provide a benchmark for understanding how ES compliance is related to other workplace problems. As part of a broader program of multi-method research, this survey offers considerable promise in assessing the ES enforcement gap as well as identifying mechanisms for improving workplace protections.

Conclusions

Declining rates of unionization are making more and more workers reliant on the minimum floor of protections established in ES legislation. Yet a simultaneous weakening of ES enforcement undermines workers' access to these workplace protections, both in Canada and internationally (Bernstein, 2006; Fudge and Vosko, 2001; Langille, 2002; Thomas, 2009; Vosko, 2002 and 2006). The erosion of ES occurs actively through legislative reform and, in particular, the establishment of a multitude of exemptions, and passively, through inadequate funding for enforcement. As Bernhardt *et al.*'s (2008) metaphor of the "gloves-off economy" suggests, economic restructuring is also driving employer non-compliance with ES. In increasingly competitive labour markets, non-compliance is becoming a key strategy of labour cost reduction for employers (Kalleberg, 2011; Weil, 2014).

In an effort to mitigate the erosion of ES, a number of jurisdictions are experimenting with new enforcement models. Many of the models being implemented place more onus on individual workers for the enforcement of their rights and rely heavily on the voluntary compliance of employers (Vosko *et al.*, 2013). Such changes are evident in Ontario. The provincial government's *Open for Business Act* (2010) contains provisions which make workers responsible for attempting to resolve ES violations with their employers prior to filing a complaint and for reducing the administrative burdens placed on ESOs during the complaint process. It also gives ESOs new powers to negotiate voluntary settlements between workers and employers.

Processes of labour market restructuring as well as experimentation with new enforcement practices on the part of labour inspectorates call for the establishment of improved measures for tracking ES compliance at a population level. Such measures are crucial for understanding and evaluating the effects of both policy and procedural reforms. In recognition of the need for better tracking, the government of Québec has made perhaps the most substantial commitment to such research among North American jurisdictions. Section 11 of the *Act respecting the ministère du Travail* (R.S.Q., c. M-32.2) formally requires the Ministry to "conduct or commission studies on changes in conditions of employment in Québec and make such studies available every five years" (see also Vézina, 2011: 1). Through collaboration with legal experts and advocates,

and based on an assessment of publicly available administrative data, we have had substantial success in developing a survey questionnaire measuring ES compliance which could inform the development of a similar program of ongoing policy research in Ontario. The result of these pilot surveys foster optimism about the potential to capture not only outright ES violations, but also the evasion and erosion of workplace standards.

Notes

- 1 In developing this conceptualization, members of the research partnership were influenced by the work of Bernhardt *et al.* in the *Gloves Off Economy* (2008), which uses a typology of violation, evasion, erosion and abandonment but understands some of these categories in different ways. Our understanding of these concepts is also informed by Weil's (2012) discussion of ES erosion.
- 2 While the extent of the practice has not been formally measured in Canada, misclassification of employees as independent contractors has been identified as a key regulatory problem in Canada (Law Commission of Ontario, 2012). Misclassification has been measured in the United States. One prominent study commissioned by the U.S. DOL in 2000 determined that between 10 to 30 percent of investigated firms across nine states had engaged in employee misclassification (US GAO, 2009). A subsequent study of employers in New York State based on employers audited by the NYS Department of Labor Unemployment Insurance Division between 2002 and 2005 found that between 10 to 14 percent of audited employers misclassified employees (Donahue *et al.*, 2007). It is important to note, however, that misclassification of employees as independent contractors is part of a larger problem of poor working conditions for a large subsection of the self-employed (Fudge, Tucker and Vosko, 2002).
- 3 For an analysis of the complaints filed with the *Commission des normes du travail* under the anti-psychological harassment provision of the *Loi sur les normes du travail*, see Brun and Kedl (2006).
- 4 ESA provisions around public holiday pay illustrate this point. To qualify for public holiday pay, employees must work their last regularly scheduled shift before the holiday and their first regularly scheduled shift after the holiday. Employees who miss either of these shifts, and cannot demonstrate reasonable cause for doing so, forfeit public holiday pay. Generally, reasonable cause refers to circumstances beyond the employee's control such as a medical emergency, but it is intentionally broad and subject to interpretation.
- 5 Some questions related to the ESA section on minimum wage (Part IX) are incorporated into the survey section on rate and regularity of pay, and some questions related to the ESA section on vacations with pay (Part XI) are incorporated into the survey section on complaints and enforcement.

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SUMMARY

Measuring Employment Standards Violations, Evasion and Erosion - Using a Telephone Survey

For many workers in Ontario, the *Employment Standards Act (ESA)* provides the only formal measures of workplace protection. The complaints-based monitoring system utilized by the Ontario Ministry of Labour, however, makes it difficult to assess the overall prevalence of employment standards (ES) compliance in the labour force. In addition to outright *ESA* violations, prevailing research highlights the significance of the erosion, evasion, and outright abandonment of ES for workers' access to protection through practices such as the misclassification of workers and types of work. In this article, we report on efforts to develop a telephone-survey questionnaire that measures the overall prevalence of ES violations, as well as evasion and erosion in low-wage jobs in Ontario, without requiring respondents to have any pre-existing legal knowledge. Key methodological challenges included developing strategies for identifying 'misclassified' independent contractors, establishing measures for determining whether workers were exempt from the *ESA*, and translating the regulatory nuances embedded in the legislation into easy-to-answer questions. The result is a survey questionnaire unique in the Canadian context. Our questionnaire reflects the concerns of both academic researchers and workers' rights activists. Pilot survey results show that Ontario workers do

not necessarily distinguish between ES violations and other workplace grievances and complaints. With careful questionnaire design, it is nevertheless possible to measure the prevalence of ES violations, evasion and erosion. In order to track the effects of ES policies, particularly those on enforcement, we conclude by calling for the establishment of baseline measures and standardized reporting tools.

KEYWORDS: employment standards, enforcement, violations, telephone survey, survey methodology, Ontario.

RÉSUMÉ

Mesurer les infractions aux normes du travail ainsi que leur érosion et leur contournement par le biais d'un sondage téléphonique.

Pour plusieurs travailleurs ontariens, la *Loi sur les normes du travail (LNT, en anglais la Employment Standards Act)*, constitue leur seule mesure de protection. Par ailleurs, le système de contrôle des plaintes utilisé par le Ministère du travail de l'Ontario rend difficile toute évaluation de la prévalence de ces normes dans le marché de l'emploi. En plus de souligner les évidentes violations des dispositions de la *LNT*, des recherches antérieures ont mis en évidence l'importance de l'érosion des normes du travail, voire même leur contournement et leur abandon par certains employeurs, cela grâce à des pratiques telles que la sous-classification des travailleurs ou encore la sous-estimation du travail accompli. Dans cet article, nous présentons les efforts investis dans le développement d'un questionnaire téléphonique permettant de mesurer la prévalence globale des infractions, ainsi que les moyens de contournement et d'érosion des normes du travail dans les emplois à faible salaire en Ontario, et ce, sans que les répondants n'aient besoin, au préalable, de connaissances juridiques. Certains défis furent relevés au niveau de la méthodologie : notamment, la nécessité de développer des stratégies permettant l'identification d'erreurs de classification des entrepreneurs indépendants; le développement d'indicateurs afin de déterminer si les travailleurs étaient exemptés de la *LNT*; et afin, également, de traduire les nuances des règlements propres à la législation de la *LNT* dans un format de questions plus facile à répondre. Le résultat donne un questionnaire sondage unique dans le contexte canadien. Ce dernier reflète les préoccupations des chercheurs universitaires et les droits des travailleurs activistes. En général, les résultats du projet pilote démontrent que les travailleurs ontariens ne distinguent pas nécessairement les violations au NT des autres formes de griefs et de plaintes en milieu de travail. Toutefois, par le biais d'une élaboration plus poussée de ce questionnaire, il serait possible de mieux mesurer la prévalence des violations aux normes du travail, ainsi que leurs contournements et leur érosion. Nous concluons en insistant sur l'importance d'établir des mesures de base et des outils de mesures de données standardisés qui permettront de mieux surveiller les effets des politiques de la *LNT*.

MOTS-CLÉS: normes du travail, mise en application, violations, sondage téléphonique, méthodologie, Ontario.

RESUMEN

Medida de las infracciones, evasiones y erosiones de las normas de empleo mediante un sondeo telefónico

Para muchos trabajadores del Ontario, la Ley de normas de empleo (LNE) constituye la única medida formal de protección del lugar de trabajo. Sin embargo, el sistema de monitoreo de reclamos utilizado por el Ministerio del trabajo de Ontario hace difícil de evaluar la prevalencia del respeto de las normas de empleo (NE) en la fuerza de trabajo. Además de las infracciones mayores a la LNE, la investigación preponderante resalta el impacto de la erosión, evasión y abandono completo de las NE para el acceso de los trabajadores a la protección a través de prácticas como la clasificación errónea de trabajadores y de los tipos de trabajo. En este artículo, se presentan los esfuerzos desplegados para desarrollar un cuestionario de sondeo telefónico que permitirá medir la prevalencia general de las infracciones a las NE, así como las evasiones y erosiones en los empleos a bajo salario en Ontario, sin necesidad de conocimiento legal previo de parte de los participantes. Los desafíos metodológicos claves incluyeron el desarrollo de estrategias para identificar los contratistas independientes mal clasificados, establecer medidas para determinar si los trabajadores estaban exceptuados de la LNE, y traducir las sutilidades de regulación de la legislación en preguntas fáciles a responder. El resultado es un cuestionario de encuesta único en el contexto canadiense. Nuestro cuestionario refleja las preocupaciones de los investigadores académicos y de los activistas de los derechos laborales. Los resultados del sondeo preliminar muestran que los trabajadores del Ontario no distinguen necesariamente las infracciones a las NE de las otras quejas y reclamaciones laborales. Sin embargo, con el diseño cuidadoso del cuestionario, se hace posible medir la prevalencia de infracciones, evasiones y erosiones a las NE. Con el fin de realizar un seguimiento de los efectos de la políticas de NE, particularmente aquellas relativas a su aplicación, se hace un llamado por el establecimiento de medidas de referencia y de útiles estandarizados de elaboración de informes.

PALABRAS CLAVES: normas de empleo; aplicación, infracciones; sondeo telefónico; metodología de encuesta; Ontario.