2018

Carrying Little Sticks: Is There a 'Deterrence Gap' in Employment Standards Enforcement in Ontario, Canada?

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Abstract: This article assesses whether a deterrence gap exists in the enforcement of the Ontario Employment Standards Act (ESA), which sets minimum conditions of employment in areas such as minimum wage, overtime pay and leaves. Drawing on a unique administrative data set, the paper measures the use of deterrence in Ontario's ESA enforcement regime against the role of deterrence within two influential models of enforcement: responsive regulation and strategic enforcement. The article finds that the use of deterrence is below its prescribed role in either model of enforcement. We conclude that there is a deterrence gap in Ontario.

I. Introduction: Employment Standards Enforcement

While the regulation of minimum terms and conditions of employment dates back to the master and servant regime created in the aftermath of the Black Death (Hay and Craven 2004; Palmer 1993), its contemporary form began to take shape with the rise of industrial capitalism in the nineteenth century. Child labour, health and safety, hours of work, wages, among others, all became the subject of legislation that stipulated minimum standards enforceable by the state. These statutes vested inspectors with the power to enter workplaces to determine whether employers were complying with minimum standards and to issue orders requiring employers to bring their practices into line with legal standards if they were not. Employers who violated the law also could be prosecuted and fined or imprisoned.

Studies of the enforcement of these workplace laws have overwhelmingly focused on occupational health and safety (OHS), where researchers found that employers were rarely prosecuted for violating the law (Carson 1979; Johnstone 2000; Tucker 1990, 2003). The

significance of this light touch approach to enforcement, however, has been fiercely debated. Speaking of the enforcement of early nineteenth-century factory act legislation, Carson (1979) characterized the non-prosecution of employers as part of a process that conventionalized factory crime, which was driven by the tension between the political demand for protective workplace law and the structural and ideological obstacles to criminalizing elites. Bartrip and Fenn (1980) rejected any explanation that linked enforcement to class structure and conflict, but rather saw the development of legislation and enforcement as a pragmatic search for efficiency.[1] This debate was followed a decade later by a bitter exchange between Pearce and Tombs (1990; 1991) and Hawkins (1990; 1991), in which Pearce and Tombs criticized what they characterized as the compliance school of enforcement, with its emphasis on persuasion at the expense of punishment, while Hawkins defended the importance of securing cooperation from the regulated and questioned the efficacy of a punitive enforcement model. Since that time, new models of enforcement have been developed that seek to overcome the 'punish or persuade' divide, but the debate over the role of deterrence and its limited use continues (e.g., Tombs and Whyte 2013).

The goal of this article is to document the enforcement practices of the Employment Standards Branch (ESB) of the Ontario Ministry of Labour (MOL) and to assess whether a deterrence gap exists. The answer to the question of whether a deterrence gap exists cannot be separated from role of deterrence theorized by a model of enforcement. In a pure compliance model, no deterrence is required and so the idea of a deterrence gap is meaningless. However, all enforcement theorists we know of insist that deterrence has some role to play, the crucial question being the frequency and severity of deterrence measures and the circumstances in which they should be used.[2] Although it is not possible to avoid the debate over enforcement models, we seek to reduce its salience by selecting two models against which to measure the use of

deterrence in Ontario's ESA enforcement regime, one of which, responsive regulation (Ayres and Braithwaite 1992), hypothesizes that deterrence will normally have a limited role to play, while the other, strategic enforcement (Weil 2008, 2010), sees a much greater role for deterrence measures. These models will be described in more detail in the second section of the article, which sets out the conceptual foundations of deterrence and how we might think about whether a deterrence gap exists. One important advantage of our two-model approach is that if a deterrence gap is found to exist in both, then a claim that the current approach to ESA enforcement in Ontario is flawed would be particularly powerful. If, on the other hand, a deterrence gap only exists in one enforcement model but not in the other, then we would need to return to a discussion of the strengths of the strategic and responsive regulation models themselves in order to assess the efficacy of Ontario's practice of ESA enforcement.

Part II of the article begins by putting the deterrence gap in historical context, focusing on proactive inspections, financial penalties, and prosecutions from the 1970s to the 1990s. The article then investigates the current practice of enforcement by the ESB, using publicly available policy documents and a unique and previously unavailable database, the Employment Standards Information System (ESIS), which contains, *inter alia*, information on all ES complaints submitted and their outcomes, violations detected, inspections conducted, and the use of enforcement mechanisms. A central feature of the ESIS is that it provides a nearly complete census of Ontario's ES enforcement activities and their outcomes that is not otherwise publically available.[3] As well, based on reported cases, we examine the role of deterrence in sentencing. We find that deterrence plays a minor role in ESA enforcement. Finally, by way of conclusion, we argue that whether or not a responsive regulation or a strategic enforcement approach is used,

there is a deterrence gap in Ontario, and thus that specific and general deterrence should have a larger role to play.

II. Conceptualizing a Deterrence Gap

The strategies adopted by governments to enforce laws and policies entail various forms of compliance and deterrence. There is a longstanding debate in the literature over compliance and deterrence approaches to regulatory enforcement whose foundations we discussed in a previous paper (Vosko et al 2017).

Since the early 1990s, regulatory theorists have sought ways to transcend the deterrence/compliance debate by finding effective means of combining these elements into a unified enforcement strategy. The most popular model of this kind is responsive regulation, developed by Ayres and Braithwaite (1992). The key idea is that the best way to combine deterrence and compliance measures in a manner that is responsive to the regulatory context is to start with persuasion and other compliance measures and only escalate to more coercive and deterrent measures if persuasion fails. Moreover, the regulator should have available a range of compliance and coercive tools and should start with the least coercive and only move to the next, more coercive measure if the lesser one failed to produce conformity with the law. This approach results in the famous enforcement pyramid, premised on the assumption that compliance measures will be effective most of the time and that deterrence measures will only be required in limited circumstances to deal with the minority of bad apples. The hammer of deterrence is necessary, but should largely remain hidden.

The second model, strategic enforcement, builds from an analysis of the changing context of enforcement. In particular, Weil (2008, 2010) points to a number of factors that make enforcement a challenge in the twenty-first century. While limited enforcement resources are not

a new phenomenon, in many jurisdictions neo-liberal policies have resulted in their reduction or the failure to increase resources in proportion to the growth in employment and the number of workplaces. Equally important is that enforcement has become more challenging as a result of significant changes to the contemporary workplace environment. This environment is characterized by fissuring of responsibility for employer obligations as a result of the growth of employment agencies, franchising, sub-contracting and independent contracting (Weil 2014; see also Vosko 2010).

Strategic enforcement is designed to maximize enforcement efficacy in this context. The theory does not build on general assumptions about the character of employers, but rather is concerned with the context in which employers operate and the systemic pressures that tempt employers to violate ES laws in order to make a profit. Weil (2008) identifies four principles that should guide strategic enforcement: prioritization; deterrence; sustainability; and systemic effects. Unlike Ayres and Braithwaite, Weil does not believe that deterrence should remain hidden. Quite the opposite, he argues deterrence measures should be carefully crafted and highly publicized so that employers will know in advance that the cost of violating employment standards are likely to be higher than its benefits. This strategic crafting is crucial in precisely those contexts where employers may be under pressure to violate the laws. To that end, Weil makes a number of concrete suggestions. For example, civil monetary penalties should be routinely assessed, especially for repeat offenders.[4] Weil also recommends increased use of liquidated damage orders, which both compensate workers for the additional losses they suffer when their ES rights are violated, but are likely to be experienced as deterrence measures by employers who are required to pay more than the amount they saved by violating the law. Other deterrence measures recommended by Weil (2010, 81-83) include hot cargo embargo orders that

prevent the resale of goods that have been produced in violation of ES, high profile prosecutions for ES violations and criminal prosecutions in the most egregious cases. The strategic enforcement model also counsels that deterrence measures should be used to reach lead firms in supply chains who have the capacity to police the activities of the subordinate entities (Weil 2008, 356; Hardy and Howe 2015, 567-68).

III. The Practice of ESA Enforcement in Ontario[5]

A. The Deterrence Gap in Historical Context, 1970s-1990s

From the inception of ESA implementation in 1969, the MOL adopted a complaints-driven enforcement regime, supplemented by a limited system of proactive workplace inspections. The Ministry also emphasized the importance of employer-employee 'self-reliance' as a means to ensure compliance (Archives of Ontario 1969). Even this limited proactive inspection program declined significantly through the 1980s and 1990s under Progressive Conservative (1980-85), Liberal (1985-1990) and New Democratic Party (1990-1995) governments, in part due to insufficient budgets (Adams 1987; Thomas 2009). Specifically, the number of proactive inspections went from 1304 in 1980-81 to a low of 10 in 1996-97. Ironically, the number of proactive inspections began to rebound beginning in 1997 under a right-leaning Progressive Conservative government.[6]

Financial penalties constitute another form of deterrence. The maximum fine for employers who violated the ESA increased significantly in the three decades following its enactment. In the 1968 Act, the maximum penalty was $1,000. It was increased over the years, reaching $10,000 in the 1980s, (Adams 1987), then rising to $50,000 in the early 1990s (Archives of Ontario 1990), and to $500,000 in 2000 (ESA 2000 SO 2000 c. 41). Yet the deterrent effect of sizeable maximum penalties depends on the risk of detection, the risk of

prosecuted, and the size of the actual penalty if convicted.[7] From the outset, employers were rarely prosecuted for ESA violations, even when they were detected, with a relatively low number of prosecutions were finalized each year through the 1980s. Prior to 2000, the only enforcement options were orders to pay or prosecutions. The Act did not at that time empower ESOs to issue notices of contravention or tickets (two currently available deterrence measures).

In summary, through the 1970s, 1980s, and 1990s, the MOL relied primarily on a complaints-driven system that was not only reactive, but also initially designed to mediate complaints so that they could first be resolved without a formal order or refereed hearing (Archives of Ontario nd). Thus, the marginalization of deterrence in ES enforcement in Ontario is longstanding.

B. Compliance and Deterrence Tools in Contemporary ESA Enforcement

There is a range of enforcement tools currently available to ES enforcement officials consisting of both compliance and deterrence measures. In principle, these could be presented as a pyramid, with compliance measures on the bottom and deterrence measures toward the top, but to do so would be problematic in two important ways. First, it might imply an acceptance of the assumptions and desirability of the enforcement pyramid advocated by responsive regulation and second it prejudges precisely what is to be investigated and that is the frequency of the use of compliance and deterrence measures. Therefore, Figure 1 below lists the available tools according to their category.

[insert Figure 1 here]

Education and publicity play a key role in ESA enforcement. The MOL adopted the Education, Outreach & Partnership (EOP) program in 2009 to:

- Create an environment where employers and employees understand their rights and obligations under the Employment Standards Act, 2000 (ESA).

- Increase employer awareness of responsibilities under the ESA by providing them with resources and tools to help them comply.
- Encourage compliance with the ESA (MOL 2015).

This is not a new initiative but has been a fundamental part of ESA enforcement since its inception (Thomas 2009). The MOL provides online guides and tools to assist employers and employees, produces a poster that must be posted in every workplace, and translates materials into twelve languages.

Of course, compliance assistance does not produce perfect compliance and when employees experience violations they are normally expected to engage in self-help by bringing the matter to the attention of their employer and seeking to have it resolved voluntarily, a pure compliance measure. This requirement is rather recent, introduced in 2010 by the *Open for Business Act,* (2010) (Gellatly et al 2011). Exceptions to the self-help requirement are made in a number of circumstances, including situations where employees state that they fear retaliation (Grundy et al 2017).

Where an employee is excused from self-help or where self-help fails to resolve the employee's concern, the employee may file a complaint with the ESB and the matter will normally be assigned to an employment standards officer (ESO) who will conduct an investigation. During the course of that investigation, the complaint may be settled, with or without the direct involvement of the ESO, or withdrawn by the worker. If a complaint is not settled or withdrawn by the complainant, the ESO will assess it to determine whether a violation has occurred. If the ESO determines that the employer has violated the Act, the employer may agree voluntarily to comply, failing which the ESO will issue a compliance order. A compliance order may require the employer to pay where there has been a monetary violation or it may involve an order to do something else, depending on the violation. For example, where an

employee has been discharged for seeking to enforce her or his ES rights, the ESO may order reinstatement and/or monetary damages. Where there are record-keeping or posting violations, the ESO may order that these be rectified. These are all compliance measures that do not involve deterrence.[8]

As primarily a complaints-based system, the MOL is relatively passive about detecting violations, leaving it to workers to bring violations to their attention. However, it is well recognized that there are numerous reasons why individuals do not complain (Weil & Pyles 2005) so that more active detection strategies are necessary. In Ontario, workplace inspections can be divided into three main types: expanded investigations arising out of an individual complaint; targeted or blitz inspections and regular inspections.[9] When inspections detect violations, they will apply compliance measures, including a settlement or a request for voluntary compliance or, failing that, a compliance order.

Regardless of whether violations are detected by complaint or inspection, ESOs have the power to invoke deterrence measures in addition to compliance measures and the key question for our research is the frequency of their use. Until fairly recently, the range of deterrence measures available to an ESO were quite limited, but new ones have been introduced to provide for lower level penalties that are easier to impose. The first is the Notice of Contravention (NOC), first introduced in 2000 and found in s. 113 of the ESA:

> 113. (1) If an employment standards officer believes that a person has contravened a provision of this Act, the officer may issue a notice to the person setting out the officer's belief and the prescribed penalty for that contravention.

Ontario Regulation 289/01 sets out the prescribed penalties. The penalty for a first contravention is $250, for a second $500 and a third or subsequent contravention $1,000. As well, if the contravention affects more than one employee and is not for a violation of a posting or record-

keeping requirement the fine can be multiplied by the number of employees. A person who is served with a NOC is deemed to be guilty and liable to pay the penalty unless she applies to the Ontario Labour Relations Board for a review within 30 days. If an application for review is filed, the board holds an adjudicative hearing and the onus is on the Director to prove the contravention on a balance of probabilities. If the Director is successful, the OLRB may still reduce the penalty (ESA, s. 122).

The second lower-level deterrence measure, introduced in 2004, is tickets, which can be issued pursuant to the *Provincial Offences Act* (R.S.O. 2000, c. P. 33), (POA), Part I. Regulation 950 made pursuant to the POA determines which violations of provincial statutes are ticketable. In 2004 the regulation was amended to create ticketable violations under the ESA (O.Reg. 162/04). As a result, ESOs are empowered to issue tickets when they detect violations of the specified provisions. There are currently a total of 59 ESA violations that are ticketable. The Chief Justice of the Ontario Court of Justice sets the fine. As of 2017, it is set at $295 for every violation. As well, there is a victim fine surcharge added to each fine, which is set at $60 for fines in the ESA range (O.Reg. 161/00). Money collected from the fines goes to the municipality in which the offence occurred, while the victim fine surcharge goes into a Victims' Justice Fund used to compensate the victims of crime.[10]

Prior to the creation of NOCs and ticketable violations, the principal deterrence tool was a regulatory offence prosecution. The ESA makes it an offence to contravene the act or its regulations, or to fail to comply with an order or direction issued by an ESO (s. 132). Individuals are liable to be fined up to $50,000 or imprisoned for up to 12 months. Corporations are liable to be fined up to $100,000 for a first offence, $250,000 for a second offence and $500,000 for a third or subsequent offence. Directors of corporations can also be charged if the

director fails to comply with an order to pay wages issued against the directors pursuant to ss. 106 and 107 (ESA, s. 136). Finally, where the employer is a corporation, an officer, director or agent of the corporation may be prosecuted for authorizing or permitting or acquiescing in the contravention (s. 137). These are POA Part III prosecutions.

The ultimate deterrence measure would be prosecution under the *Criminal Code* of Canada (1985). It is a little known fact that in 1935 the Code was amended to make it a crime to knowingly pay less than the minimum wage, although amendments made during the legislative process and narrow judicial interpretation after resulted in the provision being inoperable (Tucker 2017). However, there remains from that legislation a provision that makes it a criminal offence intentionally to falsify an employment record by any means, including the punching of a time clock (s. 398). As well, in principle an employer might commit criminal fraud (s. 380) in relation to a monetary violation.

1. Putting Deterrence Tools to Work: 2012/13 to 2014/15[11]Establishing Baselines: Detected Violations and Compliance Measures

To put the frequency of deterrence tool usage into perspective, it is necessary to establish some kind of baseline. We use detected and recorded violations from complaints and inspections, the two ways violations come to the attention of ESOs. But we do so with several caveats. As we noted earlier, researchers have established that particularly under a complaints-based system the number of detected violations represent a small proportion of the total number of violations. As well, the ESO may not record every violation he or she observes. ESOs exercise considerable discretion when conducting inspections (e.g., Hawkins 2002; Lipsky 1980) and may choose simply to let some go. The decision to use detected and recorded violations as opposed to violations is on the one hand a pragmatic response to the limitations of our data, but

is also justified because the focus of this analysis is on the behaviour of enforcement officials when a violation comes to their attention and they decide that some official action must be taken.

One additional caveat about our use of ESO-detected violations as the baseline is that the ESO's determination that a violation has or has not occurred may be subsequently reversed. ESO orders or failures to issue an order may be reviewed by the OLRB and employers who are charged with Part I or Part III offences under the POA may successfully defend themselves in court. ESO-detected violations are therefore not a completely accurate count of the number of actual violations the enforcement system ultimately substantiates. Nevertheless, we are confident that the overall the impact of these events on the actual number of detected violations is quite small. More importantly, any differences that do result are not terribly germane to our analysis, which is focused in the first instance on the use of deterrence tools by ESOs when they detect a violation, as well as on the decision to prosecute employers under Part III of the POA, which is made by the Legal Services Branch.

In what follows we examine ESO detected (and recorded) violations, looking first at complaints and then at inspections. These ways of detecting violations require separate analyses for two reasons. First, because complaints involve allegations of violations made by an employee, we must be attentive to the ways these complaints are processed in order to understand its impact on the detection of violations. As we shall see, the ESO may not assess some complaints even though violations actually occurred. The detection of violations on inspections involves a very different process, and is much more directly controlled by the ESO. ESOs exercise discretion about whether to record an observed violation, making it an officially detected violations. The second reason for treating complaints and inspections separately is that

we need to be attentive to the possibility that deterrence measures are used differently in these two contexts and thus separate baselines are required.

a. Complaints

When ES complaints enter the MOL's system and are recorded in the ESIS database, there are five possible outcomes: they may be withdrawn by the complainant; a complaint may be settled if the complainant and the employer agree to certain terms; they may be denied (no violation is found); the complaint may be validated (a violation is found) and resolved through voluntary compliance by the employer; or the complaint may be validated (a violation is found) and require the use of a compliance order against the employer. Of the total of 44,742 recorded complaints completed between 2012/13 and 2014/15, 24% were withdrawn, 13% resulted in settlements, 20% were denied, 22% were validated and the employer complied voluntarily, and 21% were validated and required that a compliance order be issued.

These outcomes, however, do not tell us the percentage of complaints in which there was an ES violation. Rather, ESIS provides us with information on detected violations only. For a violation to be detected the claim must be assessed by an ESO, but claims that are withdrawn or settled are not assessed. The fact that a claim is withdrawn or settled does not mean that there was not a violation, however, since there are many reasons why employees may settle or withdraw complaints before it is assessed even though they experienced a violation. These data do not show in what percentage of these cases violations occurred. Only 63% of complaints were assessed between 2012/13 and 2014/15. Examining when violations occur in more detail, violations were detected in a total of 19,260 of the 44,742 complaints or 43% of the time, but if we consider only assessed complaints (28,139), then violations are found 68% of the time. At least one monetary violation was detected in 18,930 complaints (67% of assessed complaints),

while at least one non-monetary violation was detected in 664 complaints (2% of assessed complaints). Monetary and non-monetary violations are occasionally found in the same complaint, which is why the sum of monetary and non-monetary violations is greater than the number of complaints with any violation.

When we turn to the number of violations, we see that in total 34,626 violations, both monetary and non-monetary, were detected by ESOs from complaints (Table 1), or on average 11,542 annually. There are more violations than there are complaints with violations because when a complaint has a violation, it is likely to have more than one violation. On average, each complaint with a violation had 1.8 violations. As expected, monetary violations constitute 98% of all detected violations.

[insert Table 1 here]

For every detected violation compliance is sought either through voluntary compliance by the employer, or an order for compliance is issued against the employer. Overall, employers voluntarily complied in rectifying 15,272 of the 34,626 detected violations from complaints, or 44% of the time. It was necessary to order employer compliance for the other 19,354 detected violations, or 56% of the time. If we disaggregate monetary and non-monetary violations, we find that voluntary compliance was achieved in 43% of monetary claims and 78% of non-monetary claims. The flipside is that compliance is ordered in 57% of monetary violations and 22% of non-monetary violations. The large difference between voluntary and ordered compliance for monetary and non-monetary violations presumably reflects the fact that correcting non-monetary violations costs employers little or nothing compared to monetary violations, which by definition require a monetary payment. The lower rate of voluntary compliance for detected monetary violations may suggest that, contrary to compliance theory, a

large number of these violations are not innocent employer errors (Vosko et al 2017). If that is the case, we might expect to see deterrence measures used more frequently for monetary violations detected by complaint.

b. Inspections

In Ontario, proactive inspections are a secondary means of detecting violations. However, the inspections data must be approached with some caution and cannot be taken as a complete record of all violations that are found during an ESO inspection. As discussed previously, ESOs exercise an enormous amount of discretion in how they respond to an observed violation. We can assume there is an under-reporting of violations detected by inspection, but we have no way to estimate its extent.

For the three years under examination (2012/13 to 2014/15) there were 5,998 inspections (Table 2). Over these three fiscal years, there was a steady decrease in the number of annual inspections completed. In 2012/13, 2,349 inspections were completed compared to 1,747 inspections in 2014/15. Among all inspections, one or more violations were detected on 3,968 occasions or 65% of the time. In 2012/13 the number of inspections with violations was 71% and then decreased to 56% in 2014/15. Because multiple violations are often detected, a total of 11,563 violations were found (Table 2), amounting to, on average, 2.9 violations per inspection with violations. Of these, 3,241, or 28% were for monetary violations, the remaining 8,322 (72%) being for non-monetary violations. The relatively low percentage of monetary violations recorded on inspections contrasts sharply with the results from complaints where monetary violations predominated (98%). The difference is explained by the fact that, while employees are significantly more likely to complain about monetary than non-monetary violations, in inspections ESOs are directed to evaluate employers' compliance with eleven specific

employment standards, many of which relate to non-monetary employment standards such as record-keeping and posting requirements. When monetary violations are detected by ESOs in workplace inspections, the amount of restitution to which employees are entitled is less than entitlements that result from complaints. The median amount of employee entitlements for violations of employment standards detected via complaints between 2012/13 and 2014/15 was $1,062, whereas the median amount of employee entitlements for violations of employment standards detected via workplace inspections during this same time period was $745.

[insert Table 2 here]

As is the case for violations detected from complaints, compliance is sought for every violation recorded during an inspection. For the purpose of this analysis, we categorize compliance in the following three ways: voluntary compliance by the employer in the absence of a compliance order; voluntary compliance by the employer in the presence of a compliance order[12]; and, no voluntary compliance by the employer leading to the issuance of a compliance order. Overall, for the 11,571 violations detected,[13] voluntary compliance by the employer in the absence of a compliance order was achieved in 1,008 instances, or 9% of the time. Voluntary compliance by the employer in the presence of a compliance order was achieved in 8,903 instances, or 77% of the time. Finally, voluntary compliance was not achieved (leading to the issuance of a compliance order) in 1,660 instances, or 14% of the time. If we disaggregate monetary and non-monetary violations, we find that voluntary compliance was achieved in 85% of monetary claims and 86% of non-monetary claims. The higher rate of voluntary compliance, including among employers issued compliance orders, on inspections compared to complaints, particularly in regard to monetary complaints, might suggest that violations detected on

inspections are more likely to be the result of inadvertence and therefore these employers are more inclined to comply forthwith when the violation is brought to their attention.

c. Combined Data on Violations[14]

If we combine the data on detected violations from complaints and inspections, we see that there were 46,189 total violations, or on average 15,396 per year. There is a noticeable decline in the total number of violations in each year from both complaints and inspections, but because of the frailties we noted earlier in the processes that result in violations being detected and recorded, we do not believe this data supports the claim that ESA violations are decreasing in Ontario.

[insert Table 3 here]

2. Use of Deterrence Measures: An Empirical Investigation

The use of compliance measure does not preclude the use of deterrence measures for the same violation. Every violation detected could result in the imposition of a deterrence measure notwithstanding that the employer has voluntarily agreed to comply or been ordered to do so. Recall that s. 113 of the ESA authorizes an ESO to issue a notice of contravention whenever the ESO "believes that a person has contravened a provision of this Act" and s. 132 provides that "a person who contravenes this Act or the regulations…under this Act or the regulations is guilty of an offence." Therefore, it is a matter of discretion and policy, not law, as to whether deterrence measures are used in addition to compliance measures when violations are detected. In fact, as we see below, deterrence measures are rarely used.

a. Low Level Deterrence Measures: Notices of Contravention and Part I Tickets

Notices of Contravention

Notwithstanding that NOCs can be issued for any violation of the ESA, over the three year period under discussion, ESOs issued a total of 207 NOCs for violations detected via complaints and 96 NOCs for violations detected via workplace inspections (Table 4).

[insert Table 4 here] [15]

Put differently, ESOs issue NOCs for less than 1% of all detected violations in both complaints and inspections (Table 4). Focusing on complaints, 67% of NOCs are issued for monetary violations, but monetary violations are far more frequent than non-monetary violations, so that NOCs are issued for only 0.4% of all detected monetary violations, compared to 9% of non-monetary violations (Table 4). It is not obvious why this should be the case since monetary violations are commonly viewed as more serious given their immediate impact on workers. NOCs are used to approximately the same degree for violations detected in inspections as they are in complaints (0.8% for inspections compared to 0.6% for complaints).

Part I Tickets

Between 2013/14 and 2014/15, during the complaints process ESOs issued 307 Part I tickets, 203 for monetary violations and 307 for non-monetary violations (Table 5). For complaints data, the information about tickets issued in 2012/13 has been suppressed due to the very infrequent use of tickets. More tickets were issued in inspections and therefore data are available for 2012/13 to 2014/15. During this period (2012/13 to 2014/15), ESOs issued 905 Part I tickets, 644 for monetary violations and 261 for non-monetary violations. Clearly, ESOs use tickets as a low-level deterrence measure more often than NOCs, which were issued a total of 303 times over the same period. The *Administrative Manual for Employment Standards* that was used by Ministry staff during the period under study explains why (AMES; Ministry of Labour

undated, ch. 7, 24). It directs ESOs to use tickets rather than NOCs whenever there is a choice so that NOCs are only used if the contravention is not a ticketable offence.

ESOs issued tickets for 1.4% of all ticketable violations. Oddly, they issued tickets for less than 1% of monetary ticketable violations and nearly 30% of non-monetary ticketable violations. The more frequent use of tickets for non-monetary violations is somewhat counter-intuitive given that monetary violations would seem to be more serious in their immediate consequences. Of course, it must be remembered that unlike NOCs, tickets cannot be issued for every violation of the ESA. However, it is fair to say that almost all monetary violations are ticketable violations.

Tickets were used more frequently for ticketable violations detected on inspections. As Table 5 shows, tickets were issue for 8% of all ticketable violations detected by inspection. However, when monetary and non-monetary ticketable violations detected on inspections are disaggregated, tickets are issued for 20% of the monetary violations while only 3% of non-monetary violations were ticketed. This is the reverse of the pattern we saw for the use of tickets in the context of complaints.

[insert Table 5 here]

Among complaints, the most common tickets issued for monetary violations in 2013/14 and 2014/15 relate to failure to pay wages (34%), vacation pay (24%), and overtime pay (15%). The most common ticket issued for non-monetary violations is for record-keeping (29%). Among inspections, the trend for most common tickets issued between 2012/13 to 2014/15 is slightly different. The most common tickets issued for monetary violations relate to holiday pay (42%) and overtime pay (27%). For non-monetary violations, the most common tickets are for record keeping (13%) and requiring employees to work excess hours (8%).[16]

Low-Level Deterrence Measures Combined

Despite the differences in the procedures for issuing, enforcing and challenging NOCs and tickets, they are similar in terms of the small size of the penalty (NOCs begin at $250 for the first violation increase to a maximum of $1,000 for a third or subsequent violation while Part I tickets are about $355, including the victim surcharge) and so it is useful to consider them in combination in order to appreciate the use of low-level deterrence measures.

[insert Table 6 here]

Overall low-level deterrence measures are used very infrequently when violations are detected and recorded.

b. Higher Level Deterrence Measures

In principle, there are two higher-level deterrence measures available, Part III prosecutions under the *Provincial Offences Act* and prosecutions under the *Criminal Code* for intentionally falsifying employment records or fraud. However, because to our knowledge no employer has ever been charged under the *Criminal Code* for wage theft, we restrict our analysis to the use of Part III prosecutions.

Unlike the deterrence measures we have discussed to this point, the ESO does not determine whether a Part III prosecution is launched. Rather, the ESO makes a recommendation to prosecute. That recommendation is reviewed with the Regional Program Coordinator (RPC) and Manager. If all agree to recommend prosecution, the ESO prepares a Crown Brief and after further review it is submitted to the Legal Services Branch (LSB) for consideration. If agreement is not reached among the ESO, RPC and Manager, the matter is referred to the Regional Program Director who decides whether to recommend prosecution to the LSB. If the LSB determines a prosecution is appropriate, it lays charges against the defendant or defendants.

The case will either be resolved by a plea deal between the defendant(s) and the Crown, or by trial (Ministry of Labour 2017a, ch. 7A, 12-17).

Ideally, we would like to have data on how often ESOs recommend prosecutions and on how often the ESB recommends prosecutions to the LSB. Unfortunately, we only have data for prosecutions launched and for convictions. The former are provided by the LSB by calendar year (note that our analysis above used fiscal year) and can be compared to convictions posted on the MOL's website. Table 7 provides data on the number of prosecutions, defendants and charges launched by the LSB and the number of prosecutions, defendants and charges for which there are convictions.[17]

[insert Table 7 here]

Table 7 shows that prosecutions rarely oocur. In the three years for which we have data, the LSB launched 34 prosecutions, involving 57 defendants and 167 charges. Because our data is for calendar years and not fiscal years, we cannot accurately calculate the percentage of violations that resulted in Part III prosecutions, but as we will see this number is not meaningful in any event. It is also interesting to note that while in general the LSB is relatively successful in obtaining convictions when it prosecutes (around 60% of prosecutions and defendants), around 75% of the charges are dropped or do not result in convictions.

While a detailed analysis of the role of prosecutions in the enforcement process is beyond the scope of this article, it is important to understand that the LSB never prosecutes employers and directors for violating employees' rights. Rather, the LSB only prosecutes in response to an employer's failure to comply with an order to pay wages or to reinstate and/or compensate in the case of a reprisal or leave of absence violation, or for interference with an ESO. In other words, the LSB prosecutes employers for defying the authority of the ESO, not the failure to pay wages

or compensation in the first instance. If we were to calculate the percentage of underlying violations that are prosecuted on the same basis as we calculated the frequency of NOCs and Part I tickets, the percentage would be zero.

One final issue is the question of penalty. When articulating sentencing principles, judges embrace the principle of deterrence. For example, in R v. Blondin (2012), discussed in more detail below, Justice of the Peace Bubrin extensively cited a decision of the Ontario Court of Appeal in occupational health and safety case, Regina v. Cotton Felts (1982), on the importance of deterrence in sentencing. In that case the court held, "Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence" and then talked about the role of specific and general deterrence. However, it is not obvious that the courts translate the principle into meaningful penalties. Over the three calendar years covered in this study, the total amount of the fines imposed was $1,085,651, or an average of $26,479 for each of the 41 charges with a conviction. This figure, however, is distorted by a single fine in one prosecution (with 7 charges) of $350,000. If we eliminate this anomalous instance, the average for the remaining 34 convictions is $21,637. In either case, this represents a relatively small fraction of the maximum first offence fine for an individual ($50,000) and especially for a corporation ($100,000).

However, there are some exceptions. In Blondin (2012) the court sentenced the defendant to three months imprisonment and a fine of $50,000. His corporations were further fined $300,000. This was in addition to an order to pay restitution to the employees whose rights were violated, and who collectively were owed $142,000. Courts sentenced two other violators to jail. One involved Peter Check, as the director of a (presumably) small corporation, which was the employer of record. He was convicted of permitting or acquiescing in the failure to comply with

an order to pay and was fined $18,750 and sentenced to 90 days in jail.[18] The other case involved Peter Sesek who owed 43 employees around $127,000 in wages dating back to 2014. The MOL issued an order to pay in March 2015 that Sesek ignored. In June of 2017, he was convicted for failing to comply with the order to pay and was sentenced to 30 days in jail, in addition to a $20,000 fine (MOL 2017b)

3. Discussion of Results

The data establish clearly that low-level deterrence measures are used very infrequently and that higher-level deterrence measures are extremely rare and only used when employers and other duty holders defy the authority of the ESO by refusing to comply with a compliance order.. But do these findings establish a deterrence gap? As indicated at the outset, the answer to that question depends on how one conceptualizes the role of deterrence in enforcing employment standards. While every theoretical approach identifies a role for deterrence, there are significant differences in their analysis of when and how sanctions are to be applied.

Responsive Regulation

Responsive regulation takes the view that compliance measures should be used first and that enforcement officials should only resort to deterrence when compliance measures have failed, beginning first with low-level sanctions and only escalating to higher-level sanctions if lower-level sanctions do not work. It could be argued that Ontario adheres to this model. Certainly it is true that compliance measures are always resorted when a violation is detected and recorded, although there are some instances in which low-level sanctions are also imposed.

The AMES advises ESOs that NOCs are appropriate “when the officer believes that the employer was aware of their responsibilities under the Act but was deliberately non-compliant" (Ministry of Labour 2017a, ch. 7, 25). With regard to tickets, the AMES broadly advises that:

"Part I prosecutions generally are used for first offenders of less serious offences" (Ministry of Labour 2017a, ch. 7A, 6). This advice is preceded by a lengthier discussion of the objectives of the prosecution policy (applying to Part I and Part III prosecutions), which states that general and specific deterrence are necessary to ensure compliance with the ESA. The AMES identifies a number of factors that the ESO should take into account in deciding whether a prosecution is warranted, including the seriousness or gravity of the offence, history of compliance, mitigating or aggravating circumstances, availability of effective alternatives to prosecution, program identification of targeted contraventions for general deterrence and the necessity of maintaining public confidence in the legislation (Ministry of Labour, ch. 7A, 3-5).

One could argue that based on the formal prosecution policy, Ontario embraces a pyramid model of enforcement. However, in practice, the enforcement pyramid looks something like Figure 2. Of course, one could still argue that there is no deterrence gap, but that would require making large and implausible assumptions that employer violations of the ESA are almost always the result of ignorance or incompetence and that once violations are detected Ontario employers become fully ESA-compliant (for arguments against making these assumptions, see Vosko et al 2017).

[insert Figure 2 here]

One indication that compliance is not achieved following the detection of a violation comes from a recent enforcement blitz conducted from September 1 to October 31, 2016 that targeted workplaces with past employment standards violations. During the blitz, which involved 104 inspections, the government found that 77 employers were not fully compliant with the ESA. The ESB does not provide a breakdown of the violations detected and recorded, but does report that it recovered $125,267 for employees, so clearly monetary violations were involved. These

results strongly indicate that employers who have been subject to compliance measures in the past show a significant propensity to re-offend.

Moreover, according to the theory of responsive regulation, employers who were caught re-offending should be subject to some kind of deterrence measure since they had not learned their lesson after being subject to compliance measures. Although the government announced before the blitz that is was adopting a zero tolerance policy, suggesting it would apply deterrence measures to repeat offenders, in fact, nothing like that occurred. Of the 103 employers inspected, ESOs found that 75 had re-offended. ESOs issued 227 compliance orders, and employers voluntarily complied with all orders. But these were repeat offenders who had already been given a chance to comply without penalty for their first violations. Therefore, a zero tolerance policy in the context of responsive regulation should have resulted in penalties for all repeat offenders. Yet ESOs only issued 15 NOCs and 27 tickets. Assuming no employer was subject to more than one low-level deterrence measure, only 55% of repeat offenders were punished (MOL 2017c). So even by the standards of responsive regulation, there is strong evidence of a deterrence gap.

Strategic Enforcement Model

It is arguable that the ESB has adopted some elements of strategic enforcement model. Targeted inspections have become more prominent and convictions are publicized on the Ministry's website. However, it is clearly the case that the Ministry does not use deterrence nearly as frequently as is called for by the strategic enforcement model calls for. To recall, the model called for the routine imposition of civil monetary penalties for violators and especially for repeat violators. Although strictly speaking Ontario does not have a system of civil monetary penalties, NOCs serve a very similar function: they involve the imposition of a small monetary

penalty, which can only be contested at the OLRB, an administrative agency. But, as we saw, NOCs are rarely used and it is the policy that tickets are preferred if the violation is ticketable. Of course, if ESOs routinely issued tickets for violations, they would be a functional equivalent of a civil monetary penalty, but they are not. As we saw, close to 97% of violations result in no penalty whatsoever. By this measure, the deterrence gap is immense.

The same conclusion holds true if we consider the role of higher-level sanctions. Weil (2014) recommends high profile prosecutions, yet these are rarely undertaken. Indeed, criminal prosecutions are seemingly off the table. With regard to Part III prosecutions, we have seen that the fines are generally quite low and there is little publicity beyond the posting of the conviction on the Ministry's website. There are, however, exceptions, as we saw in the Blondin, Check, and Sesek cases, which resulted in jail sentences and, at least in the Blondin case, the prosecution attracted a great amount of publicity in the media, which law firms amplified in client newsletters. But these cases are the exceptions that, so to speak, prove the rule that high profile prosecution activity is rare.

Finally, there is no evidence that Ontario has adopted a strategy of using deterrence measures against lead firms in order to secure their commitment to enforcing ESA compliance by their sub-contractors, franchisees and other subordinate entities in their supply chains.

IV. Conclusion

The purpose of this paper was to examine whether there is a deterrence gap in ESA enforcement in Ontario. The question is not answerable in the absence of a theory about the appropriate role of enforcement and so we began by outlining two influential enforcement theories, responsive regulation and strategic enforcement theory, with a particular emphasis on the role of deterrence in each. Although both recognize the need for deterrence, they reach

different conclusions about its frequency and level, thus providing us with two benchmarks against which to assess the use of deterrence in Ontario.

In order to examine the use of deterrence, we needed to establish a baseline against which to measure it. We selected the number of detected and recorded violations for both prudential and practical reasons.

We then examined the deterrence measures available, including low-level sanctions (NOCs, Part I tickets) and high-level sanctions (Part III prosecutions and criminal prosecutions). We saw that low-level sanctions are infrequently used (less than 3% of detected and recorded violations) and that high-level sanction are limited to Part III prosecutions. Moreover, employers are never prosecuted for violating workers' ESA rights in the first instance, but only for failing to comply with an ESO's order.

Based on these findings, we conclude that regardless of which benchmark is used, there is a deterrence gap in ES enforcement in Ontario. This gap erodes the province's ES enforcement regime. The infrequent use and typically low dollar amount of penalties mean that unscrupulous employers often have little incentive to refrain from violations. The penalties associated with deterrence measures are often sufficiently low enough for employers to regard them as a cost of doing business. Strengthening ES enforcement in Ontario requires a much more robust role for deterrence.

Funding Information: This work was supported by Social Sciences and Humanities Research Council of Canada.

NOTES

[1] Also, see Carson's response (1980).

[2] A secondary objective is to extend the discussion of deterrence into the field of employment standards enforcement where, with a few important exceptions (e.g., Weil 2010 and 2012; Bobo 2012; Bernhardt 2012), the role that deterrence has or should play is relatively neglected.

[3] For a discussion of several limitations of ESIS data, see Vosko et al (2017: 258).

[4] U.S. law only permits civil monetary penalties for repeat offenders.

[5] This description only applies to non-unionized employees. Unionized employees cannot use the public enforcement system but rather must seek a remedy for ES violations through the collective agreement grievance process (ESA, s. 99).

[6] We do not have detailed data about inspections conducted in the 1980s and 1990s.

[7] These concerns were noted in the 1980s by the Task Force on Hours of Work and Overtime, which determined that the probability of detection, the probability of assessment, and the expected penalty, all combined to create a low monetary cost for ESA violators (Ontario 1987). Similar concerns were raised by labour and community organizations when the maximum amount for a fine was raised to $500,000 (Employment Standards Working Group 2000).

[8] Where an order to pay is issued, the employer is subject to a small administrative fee, the greater of $100 or 10% of amount ordered. Although conceptually and in the view of the MOL the fee is not a punishment aimed at deterrence, arguably employers experience it as a sanction that can be avoided by voluntarily paying and so it might be thought of as a routinely applied but low-level deterrence measure.

[9] The Ministry of Labour divides inspections into eight main types and an 'other' category. The eight types are: expanded investigations, targeted inspections, previous violator inspections, regular inspections, re-inspections, Temporary Help Agency (THA) Blitz inspections, THA Blitz re-inspections, and compliance check investigations.

[10] There is also a provision in the POA for commencing a Part I prosecution by issuing a summons. This may be used where the violation is not ticketable. In such a case, the maximum penalty on conviction is $1,000. To our knowledge, summonses were not used in ESA enforcement during the period under examination, 2012/13 to 2014/15.

[11] The MOL's fiscal year runs from April 1st to March 31st. The fiscal year of a complaint is established by the day the MOL receives the complaint. The fiscal year of an inspection is the day of the ESOs first visit to the workplace. We have restricted our analysis to these three years because they are the only years for which ESIS has complete data on the outcomes of both complaints and inspections.

[12] The Ministry of Labour's current *Administrative Manual for Employment Standards* (AMES) indicates that compliance orders may be issued in situations where an employer has agreed to voluntarily comply. According to the manual, "[i]ssuing a Compliance Order when there has been voluntary compliance ensures that there is a record of enforcement activity resulting from the contravention" (MOL 2017a, Chapter 7, 24).

[13] Note that this number is slightly different from the total number of violations detected in Table 2. The discrepancy represents 22 inspections with violations that are missing information about which compliance measure was used.

[14] We note that combining the data in this way potentially conflates two units of analysis. In workplace inspections, violations are detected at the level of the employer. In complaints, violations are detected at the level of the employee. In some instances, multiple complaints are filed against a single employer and thus counted as multiple violations, whereas in an inspection this would be counted as a single violation.

[15] Due to small cell counts, we are unable to disaggregate NOCs into monetary and non-monetary violations.

[16] Similar data is described in Casey et al (2017). However, in that paper the analysis included an additional year of data (2012/13 to 2015/16).

[17] Within a prosecution there may be multiple defendants and a defendant may be charged with multiple violations. Multiple defendant cases typically involve situations in which the employer and directors have been charged together.

[18] Check and his corporations failed to pay students he had hired to work as lifeguards. Three orders to pay were issued for nearly $50,000. Check sought to have the orders reviewed but failed to pay the amount owing in trust to the Director of Employment Standards. As a result, the reviews were dismissed. When he did not pay the orders, a Part III prosecution was launched. Check unsuccessfully challenged the prosecution and was subsequently convicted. See All Pool Solutions (2009a and 2009b and) and R v. Check (2012). Check had pleaded bankruptcy and so perhaps the jail sentence was imposed in part because the likelihood of collecting the fine was low.

References

Adams, Roy J. 1987. "Employment Standards in Ontario: An Industrial Relations Systems Analysis," Relations Industrielles/Industrial Relations 42 (1): 46-64.

All Pool Solutions. 2009a. [2009] O.E.S.A.D. No. 67.

----. 2009b. [2009] O.E.S.A.D. No. 106.

Archives of Ontario. 1969. Record Group 7-1, File 7-1-0-1532.2, box 54. Letter, From Dalton Bales, Minister, August 8, 1969.

----. 1990. Record Group 7-186. Policy and Program Development, News Releases. Fines Increased for Workplace Violations. April 30, 1990.

----. no date. Record Group 7-78. Choosing a Tribunal to Adjudicate Unjust Dismissal Cases (1976-77).

Ayres, I., and Braithwaite, J. 1992. Responsive Regulation: Transcending the Deregulation Debate. Oxford: Oxford University Press.

Bartrip, P. W. J., and Fenn, P. T. 1980. "The Conventionalization of Factory Crime – A Re-assessment," International Journal of the Sociology of Law 8: 175-86.

Bernhardt, A., Boushey, H., Dresser, L., Tilly, C. (eds.). 2008. The Gloves off Economy: Problems and Possibilities at the Bottom of America's Labor Market. Ithaca, NY: Cornell University Press.

Bobo, K. 2011. Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid And What We Can Do About It. New York: The New Press.

Carson, W. G. 1979. "The Conventionalization of Early Factory Crime," International Journal of the Sociology of Law 7: 37-60.

---. 1980. "Early Factory Inspectors and the Viable Class Society – A Rejoinder," International Journal of the Sociology of Law 8: 187-191.

Casey, R., Tucker, E., Vosko, L.F. and Noack, A.M. (forthcoming) "Using Tickets in Employment Standards Inspections: Deterrence as Effective Enforcement in Ontario, Canada?" *Economic and Labour Relations Review*.

Criminal Code of Canada. 1985. R.S.C., 1985, c. C-46.

Employment Standards Act. 2000. S.O. 2000, c. 41.

Employment Standards Work Group. 2000. Time For Change: Tories Turn Back the Clock But Working People Want to Move Forward. A Response to Time For Change. Toronto: ESWG.

Gellatly, M., Grundy, J., Mirchandani, K., Perry, J.A., Thomas, M.P., Vosko, L.F. (2011) "Modernising' Employment Standards? Administrative Efficiency and the Production of the Illegitimate Claimant in Ontario, Canada." *The Economic and Labour Relations Review* 22(2): 81–106.

Grundy, J., Noack, A.M., Vosko, L.F., Casey, R., Hii, R. (2017) "Enforcement of Ontario's *Employment Standards Act:* The Impact of Reforms." *Canadian Public Policy* 43(3): 190-201.

Hardy, T and Howe, J. 2015. "Chain reaction: A strategic approach to addressing employment noncompliance in complex supply chains," Journal of Industrial Relations 57: 563-84.

Hay, D and Craven, P. 2004. Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955. Chapel Hill, NC: University of North Carolina Press.

Hawkins, K. 1990. "Compliance Policy, Prosecution Policy, and Aunt Sally: A Comment on Pearce and Tombs," *British Journal of Criminology* 30: 444-66.

----. 1991. "Enforcing Regulation: More of the Same from Pearce and Tombs," British Journal of Criminology 31: 427-30.

---- .2002. Law as a Last Resort. Oxford: Oxford University Press.

Ho, C. 2014. "Calgary Man Accused of Using Moving Company to Steal from Customers," Calgary Herald January 14.

Johnstone, R. 2000. "Occupational Health and Safety Prosecutions in Victoria: An Historical Study," Australian Journal of Labour Law 13: 113-43.

Lipsky, M. 1980. Street-Level Bureaucracy. New York: Russell Sage Foundation.

Ministry of Labour Fiscal Year Reports. 1980-81 to 2000-01. Employment Standards/Practices Branch. Toronto: Ministry of Labour.

Ministry of Labour. 2000. Time For Change: Ontario's Employment Standards Legislation, A Consultation Paper. Toronto: Ministry of Labour.

----. 2015. Education, Outreach and Partnership. Online: http://www.labour.gov.on.ca/english/es/eop/index.php

----. 2017a. Administrative Manual for Employment Standard (AMES). Ontario Government.

----. 2017b. Court Bulletin, Mississauga Employer Jailed, Fined For Failure to Obey Order to Pay $140,000 in Wages. Online: https://news.ontario.ca/mol/en/2017/06/mississauga-employer-jailed-fined-for-failure-to-obey-order-to-pay-140000-in-wages.html?_ga=2.172006371.1333587920.1501607158-958791402.1499197033.

----. 2017c. Blitz Results: Repeat Offenders/Zero Tolerance. Online: https://www.labour.gov.on.ca/english/es/inspections/blitzresults_rvzt2016.php.

----. Undated. Administrative Manual for Employment Standard (AMES). Ontario Government.

Open for Business Act. 2010. S.O. 2010, c. 16.

Ontario. 1987. Working Times: The Report of the Ontario Task Force on Hours of Work and Overtime. Toronto: Ministry of Labour.

Palmer, R. 1993. English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law. Chapel Hill, NC: University of North Carolina Press.

Pearce, F., and Tombs, S. 1990. "Ideology, Hegemony, and Empiricism: Compliance Theories of Regulation," British Journal of Criminology 30: 423-43.

----. 1991. "Policing Corporate 'Skid Rows': A Reply to Keith Hawkins," British Journal of Criminology 31: 415-26.

R. v. Blondin, 2012, ONCJ 826.

R. v. Check, 2012, O.J. 6410 (OCJ).

R. v. Cotton Felts, 1982, 2 C.C.C. (3d) 287.

Thomas, M.P. (2009) *Regulating Flexibility: The Political Economy of Employment Standards.* Kingston and Montreal: McGill-Queen's University Press.

Tombs, S. and Whyte, D. 2010. "A Deadly Consensus? Worker Safety and Regulatory Degradation under New Labour," British Journal of Criminology 50: 46-65.

Tombs, S. and Whyte, D. 2013. "The Myths and Realities of Deterrence in Workplace Regulation." British Journal of Criminology 53: 746-63.

Tucker, E. (1990) *Administering Danger in the Workplace*. Toronto: University of Toronto Press.

---- (2003) “The Politics of Occupational Health and Safety in a Cold Climate: Diverging Trends in Worker Protection and Participation in Canada, 1985-2000.” *Relations Industrielles/Industrial Relations* 58: 395-426.

Tucker, Eric (2017) "When Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master’s Tools Against the Master." Osgoode Hall Law Journal 54 (3): 933-958. http://digitalcommons.osgoode.yorku.ca/ohlj/vol54/iss3/9

Vosko, L.F. (2010) *Managing the Martins: Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford: Oxford University Press.

Vosko, L.F., Grundy, J., Tucker, E., Thomas, M.P., Noack, A.M., Casey, R., Gellatly, M., and Mussell, J. (2017) The Compliance Model of Employment Standards Enforcement: An Evidence-based Assessment of its Efficacy in Instances of Wage Theft” (2017) 48 *Industrial Relations Journal* 48(3): 256-273.

Weil, D. 2008. “A Strategic Approach to Labour Inspection,” International Labour Review 147: 349-75.

----. 2010. Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division. Boston, MA: Boston University.

----. 2012. “Broken Windows, Vulnerable Workers, and the Future of Worker Representation” (April 1, 2012). Boston U. School of Management Research Paper No. 2012-23. Available at SSRN: https://ssrn.com/abstract=2126729.

----. 2014. The Fissured Workplace. Cambridge, MA: Harvard University Press.

Weil, David and Amanda Pyles. 2005. “Why Complain? Complaints, Compliance, and the Problem of Enforcement in the US Workplace,” Comparative Labor Law and Policy Journal 27(1): 59-92.

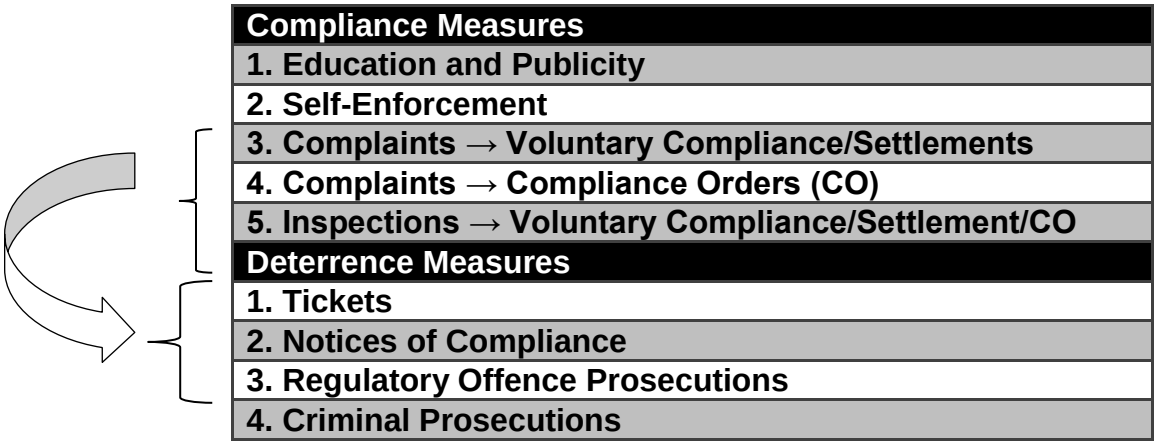

Figure 1. Compliance and Deterrence Measures

Figure 2. Ontario's Enforcement Pyramid

Table 1. Number of Violations Detected in Complaints and their Outcomes, by Fiscal Year

	2012/13	2013/14	2014/15	Total
Total Number of Violations	12,079	12,071	10,476	34,626
Monetary and Non-Monetary Violations				
Total Number of Monetary Violations	11,825	11,798	10,217	33,840
Total Number of Non-Monetary Violations	254	273	259	786
Outcomes of Complaints with Monetary Violations				
Voluntary Compliance	5,358	5,037	4,263	14,658
Compliance Ordered	6,467	6,761	5,954	19,182
Outcomes of Complaints with Non-Monetary Violations				
Voluntary Compliance	203	210	201	614
Compliance Ordered	51	63	58	172

Table 2. Number and Percentage of Violations Detected in Inspections and their Outcomes, by Fiscal Year

	2012/13	2013/14	2014/15	Total
Total Number of Inspections	**2,349**	**1,902**	**1,747**	**5,998**
Number of inspections without violations	672	602	756	2,030
% of Inspections without violations	28.6%	31.7%	43.3%	33.8%
Number of inspections with violations	1,677	1,300	991	3,968
% of Inspections with violations	71.4%	68.3%	56.7%	66.2%
Total Number of Violations	**4,958**	**3,786**	**2,849**	**11,593**
Number of monetary violations	1,355	1,127	793	3,275
% of Monetary violations	27.3%	29.8%	27.8%	28.2%
Number of non-monetary violations	3,603	2,659	2,056	8,318
% of Non-monetary violations	72.7%	70.2%	72.2%	71.8%
Outcomes of Inspections with Monetary Violations				
Voluntary Compliance, no compliance order	117	155	72	344
Voluntary Compliance, compliance order issued	993	786	657	2,436
Compliance Ordered	245	185	64	494
Outcomes of Inspections with Non-Monetary Violations				
Voluntary Compliance, no compliance order	245	289	130	664
Voluntary Compliance, compliance order issued	2,630	2,064	1,773	6,467
Compliance Ordered	723	293	150	1,166

Table 3. Violation Source and Types, by Fiscal Year

	2012/13	2013/14	2014/15	Total
How the violation was detected				
Complaint Violations	12,079	12,071	10,476	**34,626**
Inspection Violations	4,958	3,786	2,849	**11,593**
Type of violation				
Monetary Violations	13,180	12,925	11,010	**37,115**
Non-Monetary Violations	3,857	2,932	2,315	**9,104**
Total Violations	17,037	15,857	13,325	**46,219**

Table 4. The Use of Notices of Contravention, by Fiscal Year

		2012/13	2013/14	2014/15	Total
Complaints	Total Number of Violations	12,079	12,071	10,476	34,626
	Total Number of Notices of Contravention	60	79	68	207
	% of Violations with a NOC	**0.5%**	**0.7%**	**0.6%**	**0.6%**
	Monetary Violations	11,825	11,798	10,217	33,840
	Notices of Contravention for Monetary Violations	44	59	35	138
	% of Monetary Violations with a NOC	**0.4%**	**0.5%**	**0.3%**	**0.4%**
	Non-Monetary Violations	254	273	259	786
	Notices of Contravention for Non-Monetary Violations	16	20	33	69
	% of Non-Monetary Violations with a NOC	**6.3%**	**7.3%**	**12.7%**	**8.8%**
Inspections	Total Number of Violations	4,958	3,786	2,849	11,593
	Total Number of Notices of Contravention	42	20	34	96
	% of Violations with a NOC	**0.8%**	**0.5%**	**1.2%**	**0.8%**

Table 5. The Use of Part I Tickets, by Fiscal Year

Complaints	**2012/13**	**2013/14**	**2014/15**	**Total**
Ticketable Offenses	---	11,751	10,196	21,947
All Tickets	---	121	186	307
% of Complaints with Ticketable Offences	---	1.0%	1.8%	1.4%
Monetary Ticketable Offenses	---	11,573	10,021	21,594
Tickets Issued for Monetary Offences	---	78	125	203
% of Complaints with Monetary Ticketable Offences	---	0.7%	1.2%	0.9%
Non-Monetary Ticketable Offences	---	178	175	353
Tickets Issued for Non-Monetary Offences	---	43	61	104
% of Complaints with Non-Monetary Ticketable Offences	---	24.2%	34.9%	29.5%

Inspections	**2012/13**	**2013/14**	**2014/15**	**Total**
Ticketable Offenses	4,870	3,723	2,781	11,374
All Tickets	298	348	259	905
% of Inspections with Ticketable Offences	**6.1%**	**9.3%**	**9.3%**	**8.0%**
Monetary Ticketable Offenses	1,352	1,124	790	3,266
Tickets Issued for Monetary Offences	203	255	186	644
% of Inspections with Monetary Ticketable Offences	**15.0%**	**22.7%**	**23.5%**	**19.7%**
Non-Monetary Ticketable Offences	3,518	2,599	1,991	8,108
Tickets Issued for Non-Monetary Offences	95	93	73	261
% of Inspections with Non-Monetary Ticketable Offences	**2.7%**	**3.6%**	**3.7%**	**3.2%**

Note: We removed data from complaints for 2012/13 due to small cell counts for tickets, reflecting the extremely low level of their use by ESOs.

Table 6. The Use of Deterrence Measures (NOCs and Part I Tickets Combined), 2012/13 to 2014/15

	NOCs Issued	**Tickets Issued**	**Total**	**% of Violations with Deterrence Measure**
Monetary Violations	181	847	1,028	2.8%
Non-Monetary Violations	122	365	487	5.3%
Total	**303**	**1,212**	**1,515**	**3.3%**

Table 7. The Use of Part III Prosecutions and Convictions, by Year

	2012	2013	2014	Total
Prosecutions				
Launched	9	13	12	34
With Convictions	6	9	5	20
Defendants				
Charged	14	27	16	57
Convicted	6	10	5	21
Charges				
Laid	44	65	58	167
With Convictions	15	18	8	41