

Enforcing Employment Standards for Temporary Migrant Agricultural Workers in Ontario, Canada: Exposing Underexplored Layers of Vulnerability

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Over 50,000 migrant agricultural workers are employed in Canada each year, almost half of whom are destined for the Province of Ontario. These workers are among the most vulnerable in the country and therefore most in need of labour and employment law protection. One important source of employment rights in Ontario is the Employment Standards Act (ESA), which establishes basic minimum entitlements in areas such as wages, working time, and vacations and leaves. Drawing on an analysis of the Ontario Ministry of Labour's (MOL's) Employment Standards Information System (ESIS), a previously untapped administrative data source containing information on all of Ontario's employment standards (ES) enforcement activities and their outcomes, this article investigates the enforcement of ES among migrant agricultural workers. After offering a few methodological caveats, the analysis unfolds in three parts beginning, in Part I, by setting the stage with a discussion of the layers of vulnerability that combine to construct migrant agricultural workers as an extreme case. Against this backdrop, Part II describes agricultural workers' limited entitlements under the ESA and the Act's complaint-based enforcement regime, which produces, for workers in general, a gap between rights on the books and in practice. Part III then looks more specifically at ES enforcement among agricultural workers, focusing, where possible, on the situation of those that are migrants and illustrating how a complaint-based enforcement regime and an under resourced and poorly targeted inspectorate is ill-suited to the realization of rights among this group.

1 INTRODUCTION

Over 53,000 temporary migrant agricultural workers (hereinafter referred to simply as migrant workers)¹ are employed in Canada each year, almost 27,000

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¹ The large majority of these migrant workers enter Canada through the Seasonal Agricultural Worker Program (SAWP). The next largest group enter through the Agricultural Stream, which provides visas

of whom are destined for Ontario.² These workers are among the most vulnerable in the country and therefore most in need of labour and employment law protection. While the Federal government has jurisdiction over the admission of foreign nationals to Canada, the provinces and territories have the power to enact and enforce labour standards.³ As a result, one important source of labour rights for migrant workers in Ontario is the *Employment Standards Act* (ESA), which establishes basic minimum entitlements in areas such as wages, working time, and vacations and leaves. In principle, these standards are intended to be universal and accessible, but many workers are exempt from some protections and face an enforcement regime that fails to make their rights real.⁴ Drawing on an analysis of a previously untapped administrative data source containing information on all of Ontario's employment standards (ES) enforcement activities and their outcomes that is not otherwise available publicly – the Ministry of Labour's (MOL's) Employment Standards Information System (ESIS) – accessed through a data-sharing agreement between the researchers' institutions and the MOL, this article investigates the enforcement of ES among migrant agricultural workers.⁵ After offering a few methodological caveats, the analysis unfolds in three parts beginning, in Part I, by setting the stage with a discussion of the layers of vulnerability that combine to construct migrant agricultural workers as an extreme case. Against this backdrop, Part II describes agricultural workers' limited entitlements under the ESA and the Act's complaint-based

for up to 24 months. A small smattering of agricultural workers enter through the low and high skill Temporary Foreign Workers Program (TFWP). See *infra*.

² These numbers are derived from the Federal government's website: Government of Canada, *Annual Labour Market Impact Assessment Statistics 2008–2015: Primary Agriculture Stream*, <https://www.canada.ca/en/employment-social-development/services/foreign-workers/reports/2014/lmia-annual-statistics/agricultural.html> (accessed 14 Mar. 2018).

³ The federal government has the power to set the terms and conditions under which employers will be permitted to employ migrant workers. However, until the mid-2010s, the federal government did not specifically make compliance with local labour standards a condition that employers had to meet to stay in the program. Because of widespread criticism that employers were engaging in abusive practices, the federal government amended the regulations to link compliance with labour standards to the immigration regime and introduced an inspection regime to monitor compliance. The operation of that regime and its relation to provincial enforcement is the subject of a future research project.

⁴ C. R. Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (University of Chicago Press 2009).

⁵ Although there is a vast literature on migrant agricultural workers, few studies examine specifically their experience with ES laws. On Australia, see M. Crock et al., *Conflicted Priorities? Enforcing Fairness for Temporary Migrant Workers in Australia* Ch. 22 (C. Costello & M. Freedland eds, Oxford University Press 2014) and E. Underhill & M. Rimmer, *Layered Vulnerability: Temporary Migrants in Australian Agriculture*, 58 *J. Ind. Relat.* 608 (2016). On the UK, see ACL Davies, *Migrant Workers in Agriculture: A Legal Perspective* Ch. 5 (C. Costello & M. Freedland eds, Oxford University Press 2014). On Quebec, see D. Gesualdi-Fecteau & G. Vallée, *Labor Inspection and Labor Standards Enforcement in Quebec: Contingencies and Intervention Strategies*, 37 *Comp. Lab. Law & Pol. J.* 339, 361–73 (2016).

enforcement regime more broadly, as well as the enforcement gap between rights on the books and in practice that our studies reveal writ large. Part III then looks more specifically at ES enforcement among agricultural workers, focusing, where possible, on the situation of those that are migrants. Based on an analysis of the enforcement data, interpreted through the lens of layers of vulnerability, we show that a complaint-based enforcement regime and an under-resourced and poorly targeted inspectorate is ill-suited to the realization of rights among this group.

Before proceeding, a few methodological preliminaries: first, the primary source of our empirical analysis – ESIS – is the chief administrative data set retained under Ontario’s ESA and, as such, is characterized by both strengths and limitations. On the one hand, ESIS is comprehensive. It contains information on all ES complaints submitted and their outcomes, violations detected, inspections conducted, and settlements reached, as well as the use of enforcement mechanisms, wage recovery, and Ontario Labour Relations Board (OLRB) Reviews (commonly known as Appeals). Some data in ESIS are inputted by the complainant through the online complaints system, whereas other data are inputted by claims processors, ES officers, and other MOL officials during the lifecycle of a complaint. A central feature of ESIS is that it provides a nearly complete census of Ontario’s ES enforcement activities and their outcomes that is not otherwise publicly available.⁶ On the other hand, since ESIS was designed for administrative rather than research purposes, it has not undergone the same quality control and data verification processes as survey data from large statistical agencies.⁷

Second, since ES enforcement in Ontario is largely reactive, ESIS primarily captures the experiences of those complainants who are successful in entering the administrative system. While proactive enforcement detects some violations experienced by employees who have not complained, there is still a large but unknowable body of violations that is not captured in administrative data.⁸ Research on the magnitude of violations without complaints in the US⁹ estimates conservatively that for every complaint lodged, there are about 130 ES violations, and this ratio fluctuates across industries; many sectors that are

⁶ To facilitate statistical analyses, in preparing this paper, data were exported from ESIS and merged into SPSS 24 for analysis, using a process that maintains the complex relational structure of the data tables. The resulting data files allow for finely grained analyses that provide insights into the MOL’s enforcement processes.

⁷ For a discussion of similar problems of data integrity in the US Department of Labour’s Wage and Hour Division administrative database, as well as potential solutions, see A. D. Morantz, *Putting Data to Work for Workers: The Role of Information Technology in U.S. Worker Protection Agencies*, 67 I.L.R. Rev. 675 (2014).

⁸ D. Weil & A. Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol’y J. 59 (2006); A. Noack et al., *Measuring Employment Standards Violations, Evasion and Erosion – Using a Telephone Survey*, 70 Ind. Relat. 86 (2015).

⁹ Weil & Pyles, *supra* n. 8.

characterized by high rates of ES violations may also generate few complaints compared to sectors characterized by lower violation rates.¹⁰ The decision of workers to file a complaint hinges on a range of factors. Reprisal, which can entail receiving undesirable assignments and schedules, being subject to harassment from management or co-workers, or being terminated, has been a longstanding factor in discouraging employees from initiating ES complaints with the MOL.¹¹ Moreover, the risk of reprisal is arguably amplified for workers holding temporary or otherwise tenuous citizenship/residency status.¹² For example, as elaborated below, employees enrolled in Canada's Temporary Foreign Worker and the Seasonal Agricultural Workers Programs hold employer-specific work permits, and may face non-renewal of their employment or potentially deportation if they seek to access the ES complaints system, let alone exercise their rights to organize and bargain collectively.¹³ Many such individuals have financial obligations to households abroad and cannot risk debarment from future employment in Canada. Others remain invisible within administrative data on complaints because they tolerate ES violations due to the normalization of violations in the workplace.¹⁴ As Pollert and Charlwood point out, the threshold points 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'.¹⁵ Even workers with good knowledge of their ES rights may not seek to establish whether or not they have experienced a verifiable ES violation by comparing their own situation to social norms established by their previous work experience and the experiences of others in their workplace and social network.

¹⁰ *Ibid.*; A. Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*. Center for Urban Economic Development, the National Employment Law Project, and the UCLA Institute for Research on Labor and Employment (2009), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf> (accessed 18 June 2018).

¹¹ J. Fudge, *Labour Law's Little Sister: The Employment Standards Act and the Feminization of Labour*, 7 J.L. & S.P. 73 (1991); Employment Standards Working Group (ESWG). *Bad Boss Stories: Workers Whose Bosses Break the Law* (Toronto 1996).

¹² L. F. Vosko, *National Sovereignty and Transnational Labour: the Case of Mexican Seasonal Agricultural Workers in British Columbia, Canada*, 56 J. Indus. Rel. 514, 515 n. 2–3 (2013).

¹³ L. F. Vosko, *Blacklisting as a Modality of Deportability: Mexico's Response to Circular Migrant Agricultural Workers' Pursuit of Collective Bargaining Rights in British Columbia, Canada*, 42 J. Ethnic Migr. Stud. 1371 (2016); F. Faraday, *Profiting from the Precarious: How Recruitment Practices Exploit Migrant Workers* (Metcalf Foundation 2014); Vosko, *supra* n. 12.

¹⁴ L. F. Vosko et al. (forthcoming), *Closing the Employment Standards Enforcement Gap: Improving Protections for People in Precarious Jobs*, Toronto: University of Toronto Press: Chs 1, 2 & 7.

¹⁵ A. Pollert & A. Charlwood, *The Vulnerable Worker in Britain and Problems at Work*, 23 Work Employ. Soc. 343, 347 (2009).

Third, also related to the parameters of ESIS, astute readers may observe that while our focus is on *migrant* agricultural workers to Canada, with the exception of data on certain types of inspections, such as blitzes targeting sectors encompassing temporary migrant workers, administrative data largely report on agricultural workers as a whole. Due to the type of data collected during the administrative process, in most cases it is impossible to distinguish between migrant and non-migrant workers using the information available in ESIS. Nevertheless, agricultural workers as a whole are generally a precariously employed group who face multiple exclusions from coverage and are vulnerable to ES violations with limited capacity to access protections. Thus, the baseline is low to begin with, which only underscores the salience of the additional layers of vulnerability that the significant share of migrants among agricultural workers experience.

2 LAYERS OF VULNERABILITY: THE EXTREME CASE OF MIGRANT AGRICULTURAL WORKERS

The concept of layered vulnerability is concerned with the range of factors that influence the risks workers face of being exploited in the labour market and is premised on the understanding that those factors will affect groups of workers differentially.¹⁶ While the concept was originally deployed to assess the occupational health and safety risk of migrant agricultural workers,¹⁷ it can be readily adapted to an analysis of the risk of ES violations and the difficulty of enforcing ESA entitlements. Sargeant and Tucker (2009) originally identified three layers of vulnerability – layers flowing from migration itself, from the sending country and migrant worker characteristics, and from receiving countries. However, we rename and alter the second layer to focus on global system factors that are the underlying causes of the aforementioned characteristics. These factors frame our discussion of migrant workers' vulnerability to ES violations and enforcement gaps.

¹⁶ L. Berg, *Migrant Rights at Work*, 287–89 (Routledge 2016); M. Sargeant & E. Tucker, *Layers of Vulnerability in Occupational Health and Safety for Migrant Workers: Case Studies from Canada and the UK*, 7 *Pol'y & P. H. & S.* 51 (2012); E. Underhill & M. Rimmer, *Layered Vulnerability: Temporary Migrants in Australian Agriculture*, 58 *J. Indus. Rel.* 608 (2016).

¹⁷ S. Toh & M. Quinlan, *Safeguarding the Global Contingent Workforce? Guest Workers in Australia*, 30 *Int'l J. Manpower* 453 (2009); K. Preibisch & G. Otero, *Does Citizenship Status Matter in Canadian Agriculture? Workplace Health and Safety for Migrant and Immigrant Laborers*, 79 *Rural Soc.* 174 (2014); J. McLaughlin et al., *Paper Versus Practice: Occupational Health and Safety Protections and Realities for Temporary Agricultural Workers in Ontario*, 16(1) *Perspectives interdisciplinaires sur le travail et la santé* 20 (2014); J. Hennebray & J. McLaughlin, *The Exception that Proves the Rule: Structural Vulnerability, Health Risks and Consequences for Temporary Migrant Farmworkers in Canada* Ch. 5 (C. Hughes & P. Lenard eds, McGill-Queens University Press 2012).

With regard to the first layer of vulnerability, the key factor is security of presence in Canada, which for migrant workers is particularly low.¹⁸ Migrant agricultural workers in Canada enter in four ways: first, an unknown number have no legal status in Canada, potentially entering through visitors' visas, remaining after temporary work permits have expired¹⁹ and/or through other means. These undocumented workers are the most vulnerable since they face the risk of deportation if their presence in the Canada is detected by immigration authorities. Employers may take advantage of this vulnerability to pay migrant workers less than the legal minimum, or to exploit them in other ways, especially since this group of workers are unlikely to formally complain.

The second group and by far the largest group of temporary migrant workers are those who enter under the Seasonal Agricultural Worker Program (SAWP), which was created in 1966 to meet agricultural employers' need for low-wage, flexible labour on a seasonal basis. Providing for circular or rotational migration, the SAWP operates through agreements between the Canadian government and the Mexican and various Caribbean governments, which set out the terms and conditions under which agricultural workers from those countries enter Canada on temporary (i.e. specifically, seasonal) bases. Over 40,000 permits are issued annually for workers in this temporary migrant work program, which limits them to a maximum eight-month stay. The work permit is tied to a single employer/farmer who may repatriate workers prior to the maximum duration of their stay if there is shortage of work or for other reasons, heightening their deportability as well.²⁰ Although the SAWP makes provision for the transfer of participants from one employer/farmer to another, this cannot be done at the worker's insistence, although the worker must consent. As a result, participant-workers lack meaningful opportunities to change their employer.

Employers participating in this program can name employees who they wish to rehire, thus permitting circular migration, which gives employers additional power over workers who, given the limited opportunities available to them, greatly value the opportunity to work in Canada.²¹ Inter-governmental agreements

¹⁸ D. Rajkumar et al., *At the Temporary-Permanent Divide: How Canada Produces Temporariness and Makes Citizens Through its Security, Work, and Settlement Policies*, 16 *Citizen. Stud.* 483 (2012).

¹⁹ Recent research concluded that most temporary migrant workers stayed in Canada temporarily, but noted that no data are available to estimate how many TFWs who have no pathway to permanent residence stayed in Canada as undocumented persons. See E. Prokopenko & F. Hou, *How Temporary Were Canada's Temporary Foreign Workers?* Statistics Canada, Analytical Studies Branch Research Paper Series (2018), <https://www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2018402-eng.pdf?st=CAYCYJpt> (accessed 18 June 2018).

²⁰ Vosko, *supra* n. 12.

²¹ K. Preibisch, *Pick-Your-Own Labor: Migrant Workers and Flexibility in Canadian Agriculture*, 44 *Int'l Migr. Rev.* 404, 416-22 (2010).

also provide agricultural workers with certain rights in regard to hours of work, lodging, meals, rest periods and wages (e.g. Canada – Mexico Agreement 2017). However, until recently, the federal government did not endeavour to enforce these rights. Notwithstanding these latter protections, researchers characterize SAWP workers as being extremely vulnerable because of their insecure immigration statuses.²²

The third, and second largest, group of documented migrant agricultural workers enter Canada through the Agricultural Stream. This program grew out of the Stream for Lower-Skilled Occupations, created in 2002, which was opened to agricultural workers in 2011. As in the SAWP, employers must obtain a favourable Labour Market Impact Assessment (LMIA) in order to obtain work permits, but unlike under the SAWP, workers from any country can participate and there is no set limit in place on the length of their stay.²³ The program is only open to primary agricultural work in listed commodities.²⁴ The stream is designed for non-seasonal agricultural work and a little under 10,000 permits were approved across Canada in 2015, just over 2,000 of which were destined for Ontario. Despite the longer maximum duration of their stay, workers in this group also share an extremely insecure immigration status since their permits are also tied to particular employers. Although unlike SAWP participants, they are able to seek employment with other employers who hold favourable LMIA's for agricultural work, but the likelihood of finding new employment is low, which creates extreme dependence on their current employer.²⁵

Finally, there is a small group of migrant agricultural workers who enter Canada through the lower-skilled TFWP and an even smaller group who enter through the higher-skilled program. In either case, employers must obtain a favourable LMIA and permits are issued for a maximum of four years. Migrant workers in this stream must remain out of the country for a minimum of four years before applying to re-enter.

²² M. Thomas, *Producing and Contesting 'Unfree Labour' through the Seasonal Agricultural Worker Program*, Ch. 2 (A. Choudry & A. Smith eds, PM Press 2016); J. McLaughlin & J. Hennebery, *Managed into the Margins: Examining Citizenship and Human Rights of Migrant Workers in Canada*, Ch. 11 (R. E. Howard & M. W. Roberts eds, University of Pennsylvania Press 2015).

²³ Prior to 2016, the workers in this stream were subject to a four-year cumulative limit after which they could not re-apply until they had spent four years in their home country. Although this rule remains on the books, it is no longer applied. Government of Canada, *Temporary Foreign Worker Program: Cumulative Duration (Four-Year Maximum Eliminated)*, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/cumulative-duration-four-year-maximum-eliminated.html> (accessed 24 Apr. 2018).

²⁴ For a description, see Government of Canada, *supra* n. 2.

²⁵ Faraday, *supra* n. 13; J. Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, 34 Comp. Lab. L. & Pol'y J. 95 (2012).

Overall, regardless of the particular way in which migrant agricultural workers enter Canada, they all have precarious migration statuses,²⁶ which mediate their access to the labour market and to regulatory protections. Migrant agricultural workers enter Canada as unfree labour in the sense that they are deprived of the freedom to circulate in the labour market and are subject to the coercive authority of growers through their repatriation authority, their freedom not to rehire and their extreme power to terminate in a context in which loss of employment effectively deprives workers of access to legal paid employment.²⁷ This extreme vulnerability both exposes migrant agricultural workers to the risk of ESA violations and deters them from seeking to enforce their rights.

The second layer of vulnerability focuses on factors that arise out of the global system within which migration occurs. Specifically, we refer to a global system of racialized capitalism that structurally embeds the under-development and dependence of the 'periphery' or global south, through what David Harvey has labelled 'accumulation by dispossession',²⁸ whose forms have varied from direct colonial confiscations to more recent expropriation through debt and discipline.²⁹ These processes were accompanied by the racialized subjugation of expropriated populations that marked them as less worthy and less equal.³⁰ One result was to create a pool of expropriated and racialized workers from the periphery keen to find employment in Canada and other 'core' countries of the global north, even on terms and conditions that exploited workers in those countries are loath to accept.

In the context of migrant agricultural workers, the most important point is that the immigration system is built on and embeds this system of racialized global capitalism. It is not coincidental that Canada recruits a racialized workforce from the global south to participate in its migratory work programs, while severely limiting if not eliminating their ability to obtain permanent residence.³¹ The SAWP initially incorporated Caribbean workers and then in the 1970s it was extended to Mexico, which is now the largest source

²⁶ S. Marsden, *Enforcing Exclusion: Precarious Migrants and the Law in Canada* (University of British Columbia Press 2018); L. Goldring et al., *Institutionalizing Precarious Migratory Status in Canada*, 13 *Citizen. S.* 239 (2009).

²⁷ R. Miles, *Capitalism and Unfree Labour: Anomaly or Necessity?* (Tavistock 1987); N. Sharma, *Birds of Prey and Birds of Passage: The Movement of Capital and Migration of Labour*, 30 *Lab. Cap. & Soc.* 8 (1997); A. Smith, *Racialized in Justice: The Legal and Extra-Legal Struggles of Migrant Agricultural Workers in Canada*, Windsor Y.B. Access Just. 15 (2013).

²⁸ D. Harvey, *The New Imperialism* (Oxford University Press 2003).

²⁹ D. McNally, *Global Slump: The Economics and Politics of Crisis and Resistance* (Fernwood 2011).

³⁰ N. Fraser, *Roepke Lecture in Economic Geography – From Exploitation to Expropriation: Historic Geographies of Racialized Capitalism*, 94(1) *Econ. Geog.* (2018).

³¹ V. Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada Since 1945* (Routledge 1991); A. Choudry & A. Smith *Introduction: Struggling Against Unfree Labour*, Ch. 1 (PM Press 2016); Thomas, *supra* n. 22.

of migrant agricultural workers.³² Since the early 2000s workers from Guatemala, the Philippines, Thailand and elsewhere have been recruited under the Agricultural Stream.

Apart from the vulnerability of precarious migration status, this regime also produces a migrant agricultural worker population that invariably comes from low-income countries, where they are often struggling to escape deep poverty and debt.³³ Therefore, such migrants are compelled to maximize their earnings while present in Canada and are loath to risk repatriation or debarment from future employment in Canada.³⁴ Moreover, where their home states are involved in the migration system, as is the case for the SAWP, policies that aim to encourage the export of labour and generate foreign remittances undermine the willingness of sending governments to insist on better conditions or even to enforce existing rights.³⁵ It also means that many migrant agricultural workers have low levels of education and limited English language skills, which can reduce their ability to understand their rights and communicate with local activists or government officials through whom they might be able to secure their rights.³⁶

The third layer of vulnerability addresses receiving country conditions. Most notable in this regard, is that migrant agricultural workers are incorporated into the agricultural labour force, which is itself highly vulnerable. Historically and contemporaneously, agricultural workers have been excluded from legal protections enjoyed by most other workers. For example, in Ontario, until recently, farm worker exceptionalism applied to occupational health and safety laws, and it still operates to deprive farm workers of access to a statutory collective bargaining scheme through which they can become unionized and bargain collectively.³⁷ In

³² Satzewich, *supra* n. 31.

³³ M. Budworth et al., *Report on the Seasonal Agricultural Worker Program*. Inter-American Institute for Cooperation on Agriculture – Delegation in Canada (2017), <http://repositorio.iica.int/bitstream/11324/2679/1/BVE17038753i.pdf> (accessed 18 June 2018); D. Wells, *Sustaining Precarious Transnational Families: The Significance of Remittances from Canada's Seasonal Agricultural Workers Program*, 22 J. Lab. 144 (2014).

³⁴ Vosko, *supra* n. 13; Faraday, *supra* n. 13 .

³⁵ Vosko, *supra* n. 12.

³⁶ K. Cohl & G. Thomson, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services*, 13 (The Law Foundation of Ontario 2008), http://www.lawfoundation.on.ca/pdf/linguistic_rural_report_dec2008_final.pdf (accessed 18 June 2018).

³⁷ E. Tucker, *Will the Vicious Circle of Precariousness Be Unbroken? The Exclusion of Ontario Farm Workers from the Occupational Health and Safety Act*, Ch. 12 (L. F. Vosko ed., McGill-Queens University Press 2006); E. Tucker, *Farm Worker Exceptionalism: Past, Present, and the post-Fraser Future*, Ch. 2 (F. Faraday et al. eds, Irwin Law 2012); F. Faraday et al. eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Law 2012). Even where farm workers are covered, their deportability severely limits their ability to unionize and bargain collectively. See L. F. Vosko, *Legal but Deportable: Institutionalized Deportability and the Limits of Collective Bargaining Among Participants in Canada's Seasonal Agricultural Workers Program*, I.L.R. Rev. (2018), <https://doi.org/10.1177%2F0019793918756055> (accessed 18 June 2018).

Ontario, employees in agriculture are also exempt from many of the protections of the ESA, which we describe in greater detail below.

In addition to formal exclusion from regulatory protections, migrant agricultural workers' access to the protections to which they are entitled is limited by other factors, not all of which are unique to workers that are migrants. An ES enforcement gap affects all workers in Ontario,³⁸ the magnitude of which is likely to be particularly great for migrants in agriculture because of their location in this industry. Indeed, based on figures for 2016, in agriculture, 97% of employees are non-unionized, 58% work in small firms (of fewer than twenty), 61% earn low-wages,³⁹ and 26% have short job tenure (i.e. have worked for an employer for less than a year). Considering these indicators of labour market insecurity cumulatively (i.e. based on a measure whereby precariousness is defined by the presence of three or more of such dimensions or two dimensions including low wages), agriculture also has the second largest concentration of precarious employment (fully 62% of employees in agriculture hold precarious jobs by this metric) among all industries in Ontario.⁴⁰ The extremely insecure immigration status of migrants in agriculture, moreover, amplifies the ever-present threat of reprisal, a longstanding factor in discouraging employees from initiating ES complaints with the MOL,⁴¹ which, for this group, can not only include receiving undesirable assignments and schedules and being subject to harassment from management or co-workers, but, emblematic of their deportability, being terminated and repatriated prematurely with the potential effect of being dismissed from future employment in the host state.⁴²

Migrants in agriculture face higher levels of social exclusion than most workers. Not only are they located in rural areas, but most are also housed on their employers' premises, where they reside with other migrants in an isolated setting, often some distance from the closest town.⁴³ In addition, migrant agricultural workers are predominantly racialized men who are often met by xenophobic responses in the local community that further exacerbates their social

³⁸ Vosko et al., *supra* n. 14.

³⁹ Low-wages are defined here as less than two-thirds of the median hourly wage for full-time employees (e.g. less than CDN 16.49/hr in 2016). This measure reflects the approach of the Organization for Economic Co-operation and Development (OECD), which defines low-wage work as that where remuneration is less than two-thirds of the median wage for full-time employees. The OECD measure is typically calculated using annual income; given the absence of this information in the Labour Force Survey, hourly wages are used instead.

⁴⁰ Vosko et al., *supra* n. 14.

⁴¹ Fudge, *supra* n. 11; Employment Standards Working Group (ESWG), *supra* n. 11.

⁴² Vosko, *supra* n. 12.

⁴³ M. Horgan & S. Liinamaa, *The Social Quarantining of Migrant Labour: Everyday Effects of Temporary Foreign Worker Regulation in Canada*, 43 J.E. & M.S 713 (2017).

marginalization.⁴⁴ That said, it would be inaccurate to portray them simply as victims without agency or to ignore the efforts of some unions, such as the United Food and Commercial Workers, and social activists, such as Justice for Migrant Workers, that in their diverse ways try to support access to rights among migrant agricultural workers and resist and challenge the structural and political conditions that produce their vulnerability.⁴⁵

The overall picture, however, is that the layers of vulnerability interact to produce a migrant agricultural workforce that is likely among the most vulnerable in Ontario and Canada more broadly and therefore at high risk of exploitation that includes violations of the ES entitlements from which they are not exempt. We turn next to consider what those entitlements are and the general scheme of ES enforcement in Ontario, before looking more specifically at the actual experience of migrant workers with ES as revealed in the administrative record to the extent possible.

3 AGRICULTURAL WORKERS, ES EXEMPTIONS AND SPECIAL RULES, AND ENFORCEMENT

The history of agricultural worker exclusion from protective labour and employment law is so longstanding and pervasive that the term ‘farmworker exceptionalism’⁴⁶ has been coined to describe their situation. Since we have explored its history in Ontario elsewhere,⁴⁷ here we briefly identify the various exemptions and special rules that apply, which are set out in Table 1. The exemptions and special rules refer only to exemptions where the employee is owed money or time. Provisions governing social minima in these areas differ from the eleven inspectable standards normally evaluated in a workplace inspection (see Table 2), which are principally non-monetary.⁴⁸

⁴⁴ A. Smith, *The Bunk House Rules: A Materialist Approach to Legal Consciousness in the Context of Migrant Workers’ Housing in Ontario*, 52 O.H. L.J. 863 (2015).

⁴⁵ Smith, *supra* n. 27.

⁴⁶ G. Schell, *Farmworker Exceptionalism under Law*, Ch. 5 (C. D. Thompson Jr. & M. F. Wiggins eds, University of Texas Press 2002).

⁴⁷ L. F. Vosko et al., *How Far Does the Employment Standards Act, 2000, Extend and What Are the Gaps in Coverage? An Empirical Analysis of Archival and Statistical Data*. Prepared for the Ontario Ministry of Labour to support the Changing Workplace Review of 2015 (2016), <https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Vosko%20Noack%20Thomas-5-%20ESA%20Exemptions.pdf> (accessed 18 June 2018); M. Thomas et al., *The Employment Standards Enforcement Gap and the Overtime Pay Exemption in Ontario* (forthcoming, Labour/Le Travail); L. F. Vosko et al., *Tattered Quilt? An Analysis of Exemptions and Special Rules Directed at Homecare Workers, Liquor Servers and Agricultural Workers Under Ontario’s Employment Standards Act, 2000*, Can. L. & Empl. L.J. (forthcoming).

⁴⁸ While all standards are within the scope of an inspection, the MOL’s s. 4.1 of the Administrative Manual on Employment Standards (AMES) indicates that ‘the scope of an inspection (for determining compliance with the ESA) is limited to ... eleven standards’. It also notes that ‘a Proactive inspection and an Expanded Investigation inspection can either be a full inspection (of all inspectable standards) or a limited inspection (of one or more inspectable standards, but less than all inspectable standards)’ and gives the ESO discretion over whether to conduct a full or partial inspection except in cases of

Table 1 Exemptions and Special Rules Applicable to Agricultural Workers under the ESA, by Occupational Group

	Minimum Wage	Hours of Work	Daily Rest Periods	Time Off Between Shifts	Weekly/ Bi-Weekly Rest Periods	Eating Periods	Public Holidays	Vacation With Pay	Notice of Termination/ Termination Pay	Severance Pay
Farm Employees (Other than Harvesters and Horse Breeding/Boarding)	Exempt	Exempt	Exempt	Exempt	Exempt	Exempt	Exempt	Exempt	Covered	Covered
Harvesters of Fruit, Vegetables, or Tobacco	Special Rule Applies	Exempt	Exempt	Exempt	Exempt	Exempt	Special Rule Applies	Special Rule Applies	Covered	Covered
Flower Growing	Covered	Exempt	Exempt	Exempt	Exempt	Exempt	Exempt	Covered	Covered	Covered
Frowing, Transporting and Laying Sod	Covered	Exempt	Exempt	Exempt	Exempt	Exempt	Exempt	Covered	Covered	Covered
Horse Boarding and Breeding	Covered	Exempt	Exempt	Exempt	Exempt	Exempt	Exempt	Covered	Covered	Covered

Source: Employment Standards Special Rules Tool, Queen's Printer for Ontario, 2018b <https://www.ontario.ca/document/industries-and-jobs-exemptions-or-special-rules>

Table 2 The Eleven Inspectable Standards Evaluated During a Workplace Inspection

1. ESA Poster Requirement
2. Wage Statements
3. Unauthorized Deductions
4. Record Keeping
5. Hours of Work
6. Eating Periods
7. Overtime Pay
8. Minimum Wage
9. Public Holidays
10. Vacation with Pay
11. Temporary help agencies charging employees fees & providing information

Source: AMES, s. 4.1

As indicated in Table 1, agricultural workers are not a single legal category for the purposes of the ESA and its regulations, but rather are divided into five distinct groups of employees⁴⁹ based loosely on their occupational location. While migrant workers

provincial blitzes which are typically limited and focussed and full audits. Ontario Ministry of Labour, *Administrative Manual for Employment Standards* (updated Mar. 2016) (AMES).

⁴⁹ To this point, we use the common terms 'agricultural workers' and 'migrant agricultural workers' as descriptors of the groups whose situation is under investigation. However, in the empirical analysis of

engaged (as employees) under the SAWP are arguably heavily concentrated in the harvester category given its seasonal nature, undocumented workers and workers in the low-skill program could be found in any category. There are, however, certain common features among all agricultural workers: they are exempt from the regulations regarding hours of work, rest and eating periods and overtime, while they are covered by the notice of termination and severance pay entitlements. SAWP agreements provide workers with entitlements that may exceed their ESA entitlements, although it is unlikely that many workers are able to qualify for termination and severance pay in practice because they are hired on fixed-term contracts.⁵⁰ General farm workers are exempt from the minimum wage, while harvesters are subject to a special rule, which entitles them to the minimum wage but enables farmers to meet this requirement by setting a 'piece work rate that is customarily and generally recognized in the area as having been set so that an employee exercising reasonable effort would, if paid such a rate, earn at least the minimum wage'.⁵¹ Whatever else this provision accomplishes, it complicates enforcement by opening up an inquiry into the fairness of the piece rate and whether the worker was exercising reasonable efforts. Harvesters employed for thirteen weeks or more are entitled to public holiday and vacation pay. Other farm workers are exempt from public holiday pay, while only general farm workers are completely exempt from vacation pay.

Exclusions and special rules under the ESA are one way in which Ontario, as other provinces, such as British Columbia, limits or denies rights for migrant workers.⁵² The other way in which rights are denied is through the failure to provide the necessary means to make those rights real. As Burns noted in 1926, 'a law which is not enforced in practice ceases to exist. A law which is badly administered leads to confusion and inequity'.⁵³ However, before we turn to the specific case of migrant agricultural workers in Ontario, it is first necessary to set that against the background of general weakness in the enforcement regime.

As we discuss in detail elsewhere,⁵⁴ Ontario embraces a compliance model of enforcement that has two dimensions. First, it is heavily reactive, relying primarily on worker complaints to initiate enforcement activity. Currently, the Employment Standards Branch (ESB) receives about 15,000 complaints annually and about 70% of assessed complaints detect violations.⁵⁵ The number of complaints, however, are

administrative data developed below, we adopt the term 'employees' as the ESA applies principally to, and hence the administrative data capture, 'employees'.

⁵⁰ *Termination and Severance of Employment*, O. Reg. 288/01, s. 2(1).

⁵¹ *When Work Deemed to be Performed, Exemptions and Special Rules*, O. Reg. 285/01, s. 25(2).

⁵² McLaughlin & Hennebray, *supra* n. 22; D. Fairey et al., *Cultivating Farmworker Rights* 18–26 (Vancouver: Canadian Centre for Policy Alternatives – BC Office 2009).

⁵³ E. M. Burns, *Wages and the State: A Comparative Study of the Problem of State Wage Regulation* (P.S. King 1926).

⁵⁴ J. Grundy et al., *Enforcement of Ontario's Employment Standards Act: The Impact of Reforms*, 43 C. P. Pol'y/Analyse de Politiques 190 (2017).

⁵⁵ Some complaints are not assessed because they are settled or withdrawn.

unlikely to reflect the true extent of violations. An unknown but substantial number of workers do not complain when they experience ES violations. There are numerous potential reasons for not complaining, including that workers may lack knowledge of their rights or may fear retaliation. Indeed, our research found that less than one in ten complainants were currently working for the employer about whom they were complaining.⁵⁶ Not surprisingly, as noted above, US-based research find that industries that have the highest rates of complaints are not the industries with the highest rates of violation.⁵⁷

There is some empirical evidence supporting the fear-of-retaliation hypothesis. Between 2010 and 2018, under the ESA, there was a requirement that employees contact their employers before launching a formal complaint; although there were exceptions to this rule that attempted to protect so-called vulnerable workers, data show that in the period under study (2011/12–2014/15), on account of this requirement, approximately 16% of agricultural workers launching complaints did not contact their employer before filing. Moreover, among agricultural workers who did not contact their employer, over 60% reported that they did not do so because they were afraid, an appreciably higher percentage than among other industries where only 46% of those who did not contact their employer reported they did not do so due to fear. For these reasons, we hypothesize that migrant agricultural workers are likely to be highly averse to launch complaints against their current employers and therefore are especially dependent on proactive enforcement to detect violations.

However, in Ontario, proactive inspections, in which Employment Standards Officers (ESOs) inspect workplaces, either as part of general or targeted inspection plans, have historically played a decidedly secondary role in the enforcement regime. Proactive inspections had virtually ceased by the turn of the twenty-first century but then resumed in response to criticism from Ontario's Auditor General.⁵⁸ Despite this change, the number of proactive inspections remain quite low, even though when inspections are conducted, they are very effective at detecting violations, finding them nearly 75% of the time. Nevertheless, just prior to the publication of this article, in which we look retrospectively at the enforcement regime until mid-2018, the current Ontario government announced it was cancelling proactive inspections.

The second dimension of Ontario's compliance enforcement regime relates to its strong preference for compliance measures over deterrence. Compliance measures involve orders that require the employer to take steps to comply with the law. Where workers have experienced monetary violations or suffered other losses,

⁵⁶ Vosko et al., *supra* n. 47.

⁵⁷ Weil & Pyles, *supra* n. 8.

⁵⁸ Auditor General of Ontario, *Annual report of the Provincial Auditor of Ontario: Employment Rights and Responsibilities Program*. VFM s. 3.09 (2004), <http://www.auditor.on.ca/en/content/annualreports/reports/en04/309en04.pdf> (accessed 18 June 2018).

employers are ordered to pay or make restitution. However, unless deterrence measures are used, they suffer no penalty for violating the law in first place. Available deterrence measures include low-level sanctions, tickets for specified offences and Notices of Contravention for any violation, and more serious prosecutions that could result in substantial fines or imprisonment. Overwhelmingly, the government relies on compliance measures, even for monetary violations. Overall, only about 3% of detected violations (in inspections and complaints combined) resulted in the use of low-level deterrence measures while more serious prosecutions were never used for the initial violation of a worker's right but only for defiance of the state's authority when employers failed to comply with an inspector's order or interfered with an inspector, and, even then, prosecutions were exceedingly rare.⁵⁹

Because the government has chosen a compliance-oriented regime, employers can be confident that if they violate the ESA, there is a strong likelihood that the violation will never come to the attention of enforcement officials. Moreover, even if ES violations are detected, employers can also assume that the most likely result is that they will be ordered to comply with the law and pay workers what they were owed. The result is an enforcement gap that negatively affects all workers dependent on the ESA for their conditions of employment. Against this background, we turn to examine ES enforcement among agricultural workers, attempting where possible to highlight the situation of the many migrants comprising this occupational group, many of whom are farm employees and harvesters, occupational groups that are subject to more exemptions and special rules than other types of agricultural employees.

4 ESA ENFORCEMENT AMONG EMPLOYEES IN AGRICULTURE: ACCENTING MIGRANT WORKERS' SITUATION

Documenting ESA enforcement among migrant agricultural workers is no easy task due to data limitations. It is impossible to identify employees that are migrants in the ESIS complaint data⁶⁰ and it is only possible to identify them in a limited way in inspection data. As such, in examining complaints, we focus on all agricultural employees with the knowledge that nearly half (46% in 2015) of all such employees in Ontario are migrants.⁶¹ Simultaneously, we acknowledge that, together with the fact that many

⁵⁹ Vosko et al., *supra* n. 47; E. Tucker et al., *Carrying Little Sticks: Is there a 'Deterrence Gap' in Employment Standards Enforcement in Ontario, Canada*, Int'l J. Comp. Lab. L. & Indus. Rel. (forthcoming).

⁶⁰ Henceforth, we use the term 'complaints' to refer to the entire submission made by an employee to the MOL. Each complaint may include one or more 'claims,' a term that refers to alleged violations of particular standards. We also characterize those that complain as 'complainants'.

⁶¹ To estimate the size of the migrant agricultural workforce, we sum data from Statistics Canada's Labour Force Survey (LFS) (2015) (weighted using annual weights) and data on entries through TMWPs encompassing agriculture provided by Citizenship and Immigration Canada (CIC) for the same year – our denominator – and use the number of entries through TMWPs as our numerator. Whereas the LFS

leave the country when they are no longer engaged in employment, the foremost limitation of the administrative data on complaints is the propensity *not* to complain, motivated often by fear of reprisal, which is particularly acute among migrants who may be faced with threats and acts of termination prompting repatriation and blacklisting from future participation in TMWPs described above.⁶² For this reason, the administrative data on complaints are unlikely to capture the experiences of migrants engaged in agriculture directly. As we demonstrate below, this hypothesis is, moreover, supported by the fact that, among those agricultural employees who make formal complaints, a significant share make claims and ultimately secure entitlements for severance pay, which applies only to workers with five or more years of seniority,⁶³ suggesting that a great many complainants are domestic agricultural workers who have been employed on the same farms on continuous bases for years. This limitation underlines the importance of proactive inspections, where administrative data on blitzes allow for identifying migrants more confidently, an analysis to which we turn subsequently.

4.1 A PROFILE OF COMPLAINTS IN AGRICULTURE

Even when considering complaints in agriculture as a whole, the absolute numbers are low. Complaints from agricultural employees represent 0.7% (371) of all ES complaints submitted to the MOL between 2011/12 and 2014/15. This proportion is similar to the proportion of (likely domestic) agricultural employees in the Ontario labour force (per the 2015 Labour Force Survey). The ES exemptions faced by employees in agriculture may also shape this low number of complaints. Recall that all employees in agriculture are exempt from the regulations regarding hours of work, rest and eating periods and overtime pay, yet covered by notice of termination and severance pay entitlements. Consequently, unless they are not being paid for their hours or have not received termination pay or severance pay, few other monetary violations are applicable to them.

In exploring complaints, to provide for a baseline of comparison, the only approach available involves comparing claims relating to the agricultural industry⁶⁴ to claims

indicates that there are approximately 31,680 employees in agriculture in Ontario (representing 0.6% of all employees), a figure capturing domestic (i.e. non-migrant) employees in agriculture almost exclusively. CIC data suggest that there are 26,943 migrant workers participating in the SAWP, the Agricultural Stream, and Higher- and Lower-skilled Agricultural Programs in the province, fully 24,223 of whom migrate under the SAWP. Overall, then, there are 58,623 employees in agriculture, 26,943 of whom are migrants. Statistics Canada (2015) LFS. (public-use microdata file).

⁶² On deportability, see also Vosko, *supra* n. 13.

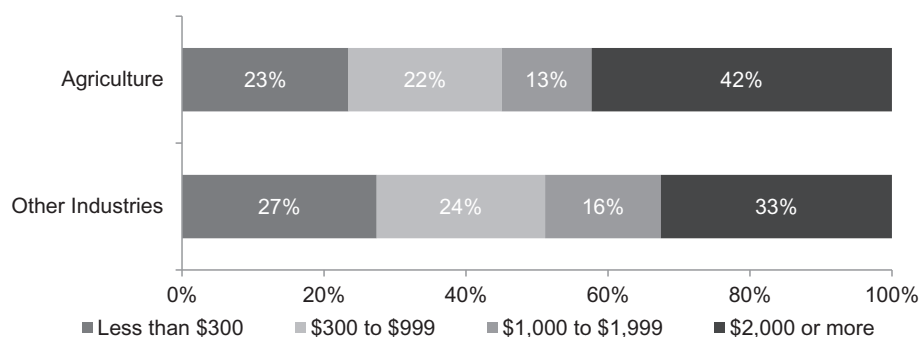
⁶³ *Employment Standards Act*, 2000 S.O. 2000, c – 41, s. 64 (1), <https://www.ontario.ca/laws/statute/00e41> (accessed 18 June 2018).

⁶⁴ ESIS does not provide any information on occupation. ESOs use the North American Industrial Classification System but it is unlikely that they receive training on how to assign industrial codes accurately beyond the sub-sector level (i.e. level 2, three-digit codes). The coding for industry in the

relating to all other industries.⁶⁵ The most common claims submitted by employees in agriculture are for unpaid wages (46%), termination pay (44%), and vacation pay (28%). Although the trends for unpaid wages and termination pay are similar to those in other industries, complaints from agricultural employees have slightly lower levels of vacation pay claims than complaints from employees in other industries (36%). This last finding likely reflects the fact that farm employees are exempt from vacation pay while a special rule applies to harvesters. Finally, fully 18% of complaints submitted by agricultural employees included a claim for severance pay, a slightly higher percentage than complaints from employees in other industries (14%).⁶⁶

Indicative of the degree of enforcement problems in this industry, the total amount claimed by agricultural employees (i.e. the sum of all claims comprising a complaint) tends to be larger than the total amount claimed by employees in all other industries. Among agricultural employees who filed a complaint, the median total amount claimed is CAD (Canadian dollars) 2,025 compared to CAD 1,320 for employees in other industries. Considering agricultural employees, over 40% of complaints have a total claim amount that is at least CAD 2,000 in comparison to only 33% of complaints from employees in other industries.

Figure 1 Total Amount Claimed by Complainant, by Industry, 2011/12–2014/15 (Pooled)



Source: Employment Standards Information System (ESIS) data 2011/2012 to 2014/2015

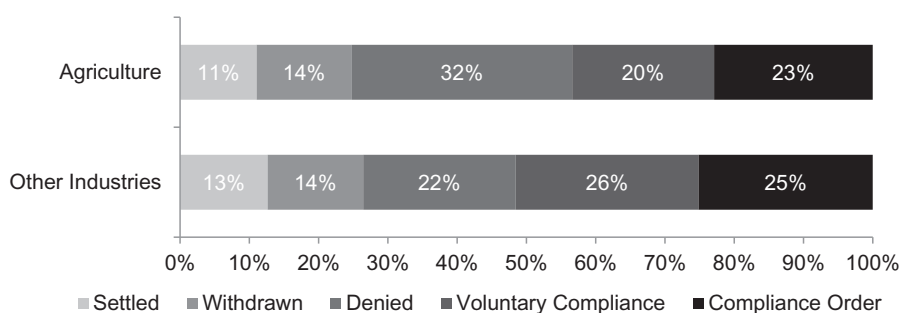
administrative data allow us to determine which complainants are in agricultural industries but not to differentiate between those working as harvesters and those who are farm employees.

⁶⁵ We exclude claims that do not have industry information (nearly 20% of the claim); notably, over 60% of complaints without industry information were withdrawn and 10% were settled and the remaining 30% were assessed.

⁶⁶ As noted above, this finding lends support to the idea that migrants are likely under-represented in the complaint data, since, in agriculture, they are unlikely to be entitled to severance pay due to the five year qualifying requirement *Employment Standards Act, supra* n. 63.

Complaints from employees in agriculture are also denied more often than complaints from employees in other industries. This pattern, however, is not surprising as most agricultural employees are exempt from the ES provisions which relate to minimum wage, hours of work, daily rest periods, time-off between shifts, weekly and biweekly rest periods, eating periods, overtime, and vacations with pay. More notably, underlining the depth of enforcement challenges, only 20% of complaints from agricultural employees are resolved by the employer voluntarily complying with the ESOs finding, compared to 26% of complaints from employees in other industries.

Figure 2 Complaint Outcomes by Industry, 2011/12–2014/15 (Pooled)



Source: Employment Standards Information System (ESIS) data 2011/2012 to 2014/2015

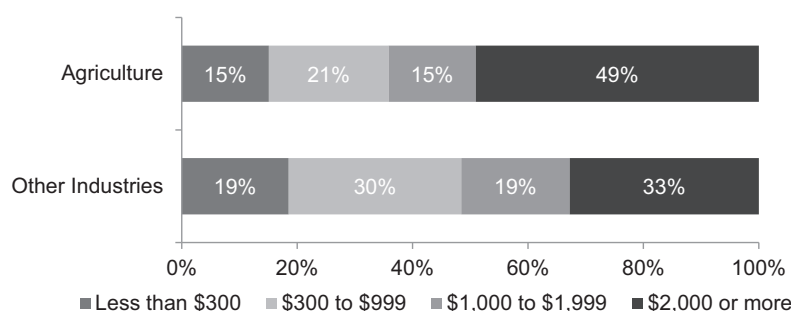
Among complaints submitted by agricultural employees that were assessed by an ESO,⁶⁷ the most common validated violations are for unpaid wages (50% of assessed agricultural complaints include a validated unpaid wage violation) and for termination pay (41% include a validated termination pay violation). These results are similar to complaints submitted by employees in other industries. Other common violations that ESOs detected in complaints submitted by agricultural employees were those for public holiday pay (in 19% of assessed complaints), and illegal deductions from wages (in 17% of assessed complaints). Complaints from employees in other industries were more likely to include a validated claim for vacation pay (45% compared to 39% for agricultural employees) and slightly less likely to include a validated claim for public holiday pay

⁶⁷ Assessed complaints are those that have been adjudicated by the MOL and have a final outcome of voluntary compliance, compliance ordered, or denial. Assessed complaints with a final outcome of voluntary compliance or compliance ordered have been determined by an ESO to have violations. ESOs deny complaints when no violations are assessed. Complaints that are not assessed are closed either through settlements or are withdrawn by the complainant.

(14% compared to 19% of agricultural employees). However, among the assessed complaints from agricultural employees, 13% include validated violations related to severance pay – more than twice as common as among complaints from employees in other industries (6%). Furthermore, validated violations for illegal deductions from wages are more than three times higher among assessed complaints from agricultural employees: fully 17% of all assessed complaints include a validated violation for illegal deductions, compared to 5% among assessed complaints from other industries.

Among complaints with validated monetary ES violations, the median entitlements for termination pay (CDN 1,431) and unpaid wages (CDN 1,070) are also much higher for agricultural employees compared to employees in other industries (CDN 1,040 for termination pay and CDN 700 for unpaid wages). Comparing all complainants in agriculture to complainants in other industries, the median total entitlement for the former is also CDN 1,940 as opposed to CDN 1,055 for the latter. Put another way, almost 50% of complainants in agriculture with validated monetary ES violations have entitlements of CDN 2,000 or more. In comparison, only 33% of complainants in other industries are in this situation. Although the number of employees in agriculture that complain is quite low, those that file complaints are often found to be owed large sums of money. These large entitlement sizes among agricultural employees lend credence to the idea that those who complain might do so as a result of considerable economic pressure and that those who do not, such as migrants, on account of fear of reprisal prompting repatriation, may endure significant hardship.

Figure 3 Total Complaint Entitlement Size by Industry, 2011/12–2014/15 (Pooled)

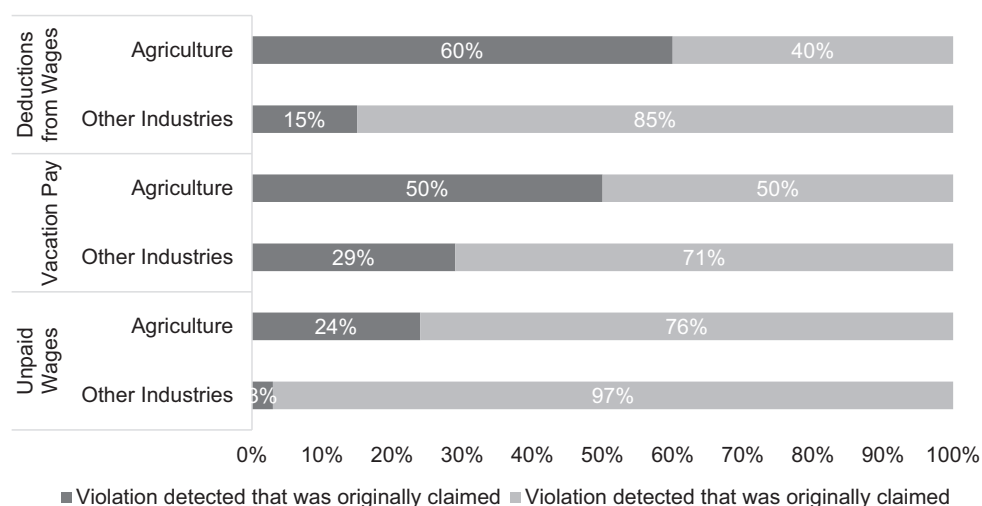


Source: Employment Standards Information System (ESIS) data 2011/2012 to 2014/2015

In addition, ESIS data reveal numerous instances in which ESOs find violations pertaining to standards for which complainants have not directly submitted claims. Among assessed complaints from employees in agriculture, nearly 24% of validated violations relating to unpaid wages were not originally claimed by the employee. In comparison, only 3% of validated violations relating to unpaid wages were not originally claimed by employees in other industries. Even more surprising, nearly 60% of validated violations for illegal deductions from wages were not originally claimed by agricultural employees, whereas only 15% of the validated violations for illegal deductions from wages were not originally claimed by employees working in other industries. Furthermore, fully 50% of validated violations for vacation pay were not originally claimed by agricultural employees, compared to 29% for employees working in other industries. These discrepancies might indicate a lack of awareness of ES entitlements among agricultural employees as compared to employees in other industries. If all employees in agriculture, as a group, are unsure about their potential entitlements and only receive them after filing a complaint (and so very few file complaints to begin with), there is every reason to believe that similar, and likely more marked, patterns may occur among those that are migrants.

In revealing violations otherwise obscured from view, collectively, these findings point to the importance of proactive inspections in agricultural workplaces, especially those comprised of employees with acute vulnerabilities beyond their industrial location, such as migrant workers who may not be fully aware of the ESA's scope of coverage and substantive provisions or who may be too afraid to access them. Indeed, as illustrated by the preceding analysis of layers of vulnerability related to the migration process, exemptions and special rules under the ESA and the ES enforcement regime more generally, migrants located in agriculture are unlikely to complain in the first instance due to the vulnerabilities they confront – a heightened fear of reprisal due to their tied work permits, insecure immigration status and, for SAWP participants, concern about adversely affecting the prospect of return and the dependence of their immediate families and communities on the wages they secure in the host state. Moreover, if they do complain, migrants in agriculture (along with many other employees in this sector) face a complex web of exemptions and special rules, which are also confusing, making it difficult to ascertain what type of claims are valid under the ESA.

Figure 4 Violations Detected that Were Not Originally Claimed by Employees, 2011/12–2014/15 (Pooled)



Source: Employment Standards Information System (ESIS) data 2011/2012 to 2014/2015

4.2 A PROFILE OF WORKPLACE INSPECTIONS TARGETING MIGRANT AGRICULTURAL WORKERS

Given the significant threat of reprisal among migrants, which could lead to immediate repatriation or blacklisting (i.e. not being recalled often with the effect of TMWP debarment),⁶⁸ a complaint-based enforcement system is particularly inappropriate, making proactive workplace inspections even more crucial to protect their rights. However, our analysis reveals that proactive inspections of farms generally and of farms employing migrant agricultural workers specifically are exceedingly rare and that even when inspections are conducted, they are poorly designed to detect violations likely to be experienced by migrant agricultural workers. Proactive inspections can be effective tools for discovering multiple violations within a workplace. During an inspection, the ESO examines the situation of all employees in a workplace rather than focusing on a single complainant and focuses primarily on eleven inspectable standards listed previously in Table 2.

⁶⁸ Vosko, *supra* n. 13.

As mentioned previously, despite a temporary revival of proactive inspections, the numbers remained exceedingly low. From 2012/13 to 2015/16 there were a total of 8,546 inspections, an average of 2,136 per year. In December 2015, there were 449,541 Ontario businesses with employees, so we estimate less than half a percent of these businesses were inspected annually.⁶⁹ Turning specifically to agriculture, during that same time period, 172 agricultural workplaces were inspected, or on average forty-three a year. In 2016, 12,305 farms reported having hired labour⁷⁰ so we estimate that about one-third of a percent of these farms were inspected annually, a lower percentage than for other businesses in Ontario with employees.

It is impossible to know for sure how many of the 172 agricultural inspections took place on farms when migrant agricultural workers were employed there. However, some inspections conducted by ESOs are targeted/blitz inspections that focus on particular industries or types of workers who are believed to be at an elevated risk of experiencing ES violations.⁷¹ Considering the three-year period between 2013 and 2015, the MOL conducted three blitzes related to migrants in agriculture: the 'vulnerable worker blitz' (2013) and two 'temporary foreign worker blitzes' (2014 & 2015).

During the vulnerable worker blitz, 306 inspections were completed; of these, only 15 were of agricultural workplaces (the number of these workplaces with migrant workers is unknown). Between 1 September and 30 November 2014, a temporary foreign worker blitz, which included 50 inspections, was conducted. This blitz targeted workplaces within horticulture and agriculture. The majority of these inspections, fully 36, were completed in agricultural workplaces. Between 1 May and 31 July 2015, another temporary foreign workers' blitz that included 64 inspections took place; of these inspections, only eleven were of agricultural workplaces.⁷² In total, the MOL completed only 47 blitz inspections on farms where migrants were definitely employed between 2013 and 2015, and 15 on farms where there was a reasonable likelihood that they were employed, an exceedingly low number given that in 2016 over thousand Ontario employers had received positive LMIA's for

⁶⁹ Calculated from ESIS and Statistics Canada, *Canadian Business Counts, with employees*, Table: 33-10-0039-01 (formerly CANSIM 552-0003), <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3310003901> (accessed 18 June 2018).

⁷⁰ Ontario Ministry of Agriculture, Food and Rural Affairs, *Statistical Summary of Ontario Agriculture*, http://www.omafr.gov.on.ca/english/stats/agriculture_summary.htm#labour (accessed 19 June 2018).

⁷¹ Targeted and/or blitz inspections are grouped together in this analysis, since they are conceptually congruent with one another and because it is difficult to identify definitively inspections of each type in the administrative data.

⁷² Queen's Printer for Ontario, *Proactive employment Standards Inspections* (2018), <https://www.labour.gov.on.ca/english/es/topics/proactiveinspections.php> (accessed 19 June 2018).

agricultural workers.⁷³ The likelihood of a migrant agricultural worker being employed on a farm subject to a proactive inspection is thus exceedingly low.

Table 3 Three Blitzes with a Focus on Agricultural Businesses

	<i>Vulnerable Worker Blitz (1 May–31 Aug. 2013)</i>	<i>Temporary Foreign Worker Blitz (1 Sept.–30 Nov. 2014)</i>	<i>Temporary Foreign Worker Blitz (1 May–31 July 2015)</i>
Agricultural Workplaces	15 (5%)	36 (72%)	11 (17%)
All Other Workplaces	291 (95%)	14 (28%)	53 (83%)
Total Number of Inspections	306	50	64

Source: Employment Standards Information System (ESIS) data May 2013 to July 2015

Not only is the likelihood of a proactive inspection low, but they are poorly designed to detect most violations likely to be experienced by migrant agricultural workers. There are several reasons for this shortcoming. First and foremost, ESOs are mandated to focus primarily on 11 inspectable standards when conducting inspections, enumerated in Table 2. If we compare the inspectable standards with the agricultural worker exemptions in Table 1 we can see that all agricultural workers are exempt from standards 5–7 and that most are either exempt from, or covered by a special rule, with regard to standards 8–10. Of those remaining, ESA requirements regarding posters, wage statements, and record keeping (standards 1, 2 and 4) are clearly non-monetary, whereas temporary help agencies charging employees fees and providing information (standard 11) is inapplicable to migrant agricultural workers since they are not hired through temporary help agencies. The most applicable standard is with respect to unauthorized deductions, to which we will return when we discuss the results of inspections. Although ESOs have the discretion to inspect for standards other than the eleven inspectable standards, the narrow scope of inspections hampers ESOs' ability to address non-compliance with the ESA among agricultural employers.⁷⁴ Indeed, as corroborated by one ESO in reflecting on a blitz directed at enforcement among migrant workers: 'we

⁷³ See Government of Canada, *Temporary Foreign Worker Program (TFWP): Positive Labour Market Impact Assessment (LMIA) Employers List*, https://open.canada.ca/data/en/dataset/90fed587-1364-4f33-a9ee-208181dc0b97?_ga=2.89408539.1860597541.1521034416-433442949.1517598818 (accessed 19 June 2018).

⁷⁴ AMES, s. 4.1.

looked at temporary foreign workers and most of them are agricultural workers. They are exempt from everything except record-keeping and deductions from wages. So, really, [we] are only looking for two things. You can be done an inspection in an hour’.

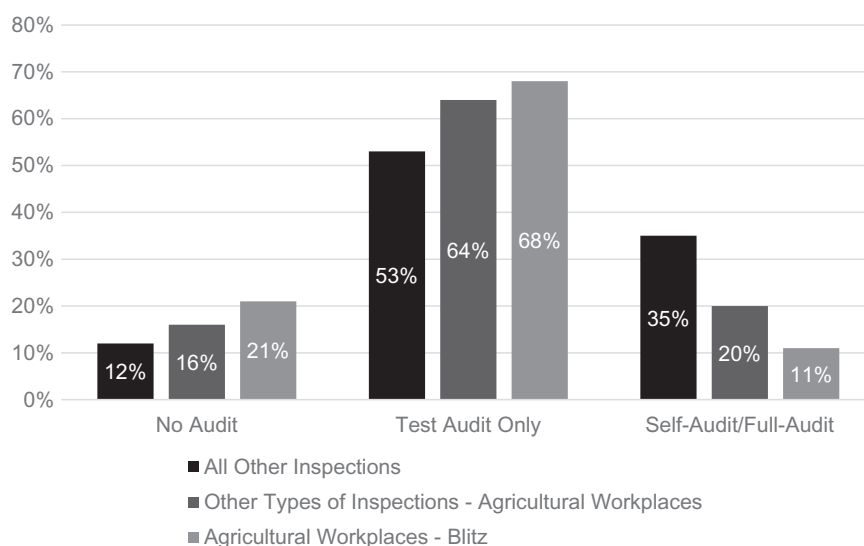
Another reason why agricultural inspections are less effective is the limited use of audits, which are undertaken by ESOs to review records and are supposed to be conducted during all inspections, including blitzes. In the context of workplace inspections, three types of audits may be completed: a test audit, a full audit, and a self-audit. Test audits are the most common type of audits completed during an inspection. During a test audit, the ESO will review the employer’s records to ensure compliance with the eleven standards.⁷⁵ Such audits cover a period of between six weeks and three months. If the test audit reveals contraventions, the ESO is directed to take appropriate action to remedy the contravention(s), ensure compliance is achieved, and deter future contraventions. Such action may include a self-audit request, a Compliance Order or a ticket. However, the normal practice is to request a self-audit, which must cover a period of at least six months and which the employer is expected to complete. A full audit is only conducted by the ESO if the employer does not complete the self-audit.⁷⁶

Interestingly, 21% of the blitz inspections that in some way targeted migrant agricultural workers did not involve any type of audit. It is unclear why an audit would not be used and why this percentage is higher than among other types of inspections in agricultural workplaces (16%) and all other workplace inspections (12%). It is also noteworthy that when audits were conducted during an agricultural workplace inspection, ESOs were more likely to accept the results of test audits compared to other inspections. This pattern was even more pronounced for blitz inspections focused on migrant agricultural workers. Finally, it is not common for self-audits or full-audits to be required in the context of a blitz inspection at agricultural workplaces. In comparison, 35% of all other inspections included a full-audit or a self-audit, a percentage over three times higher compared to the blitz inspections at agricultural workplaces (11%). The less frequent use of audits generally, and of more complete audits in particular, during blitz inspections that target migrant workers likely makes them less effective at detecting violations.

⁷⁵ AMES, s. 4.7.4.

⁷⁶ AMES, s. 4.7.5. On the subject of ticketing under the ESA, see R. Casey et al., *Using Tickets in Employment Standards Inspections: Deterrence as Effective Enforcement in Ontario, Canada?*, 29 *Econ. & Lab. Rel. Rev.* 228 (2018), <https://doi.org/10.1177/1035304618769772> (accessed 19 June 2018).

Figure 5 The Use of Audits in Workplace Inspections, 2012/13–2014/15 (Pooled)



Source: Employment Standards Information System (ESIS) data 2011/2012 to 2014/2015

When we look at the results of these blitz inspections, we find that only 42% of them detected a violation, a percentage appreciably lower than the overall percentage of violations found among non-blitz inspections of workplaces in agriculture (where 58% yielded a violation) and among all other inspections (where 65% yielded a violation). This result is not surprising, given the mismatch between the focus of proactive inspections and the standards that apply to agricultural workers and the limited use of audits.

Nearly all of the violations assessed during the agricultural blitzes were for non-monetary violations, despite the fact that individual complaints from employees in agriculture included validated violations for unpaid wages, termination pay, and vacation pay or time. This finding reflects both the fact that agricultural employees are exempt from the types of violations found typically in workplace inspections and the fact that unpaid wages are not one of the 11 inspectable standards assessed in inspections. Considering that 50% of assessed agricultural complaints included a violation relating to unpaid wages, the exclusion of unpaid wages from the inspectable standards evaluated in workplace inspections – which is problematic across all inspections – is also notably problematic in this industry. This problem is, moreover, amplified by the fact

that nearly a quarter of the validated violations for unpaid wages were not originally claimed by agricultural employees, implying either that many aggrieved employees in this sector are not aware of such violations, that such violations are normalized in agricultural workplaces or that employees are afraid to come forward with claims of this nature.

The complaints data also suggest that agricultural employees are less aware that they are owed money for illegal deductions from wages and vacation pay. These two standards are part of the eleven inspectable standards evaluated during a workplace inspection, and not surprisingly, illegal deductions from wages was the most common violation assessed among the blitz inspections in agriculture.⁷⁷ Fully 62% of the blitz inspections of agricultural workplaces included violations for deductions from wages, whereas other types of inspections of agricultural workplaces found unlawful deductions in only 16%, and in all other types of workplace inspections found just 7%.

Despite the proactive potential for workplace inspections to detect and even pre-empt ES violations among migrants in agriculture, as it functions currently, this arm of the ES enforcement regime is reactive at best and relatively ineffective at worst. As unpaid wage violations are not included in the list of 11 standards assessed during inspections, it is likely that ESOs are not capturing these violations, especially when inspectors assume that inspections of agricultural workplaces are quick to complete and when audits are so rarely undertaken. Also, if proactive blitzes continue to be less common than other inspections, migrants will be left even more vulnerable, given the structural conditions that make them unlikely to submit an individual complaint. Finally, even when blitzes do occur, and only 11 were conducted in the six-year period between 2012 and 2018, they typically each only include between 100 and 300 inspections. This blitz structure results in these inspections having only limited short-term effects (i.e. few employers with LMIA for migrant workers are inspected and few employees in agriculture ever encounter a field officer) and almost no long-term effects given the lack of deterrence measures (i.e. employers presume that their likelihood of being inspected is low and there are virtually no consequences for being found in violation, making it attractive to cut corners).

The empirical analysis offered above reveals the pressing need to augment the number of blitzes encompassing migrants in agriculture alongside expanding the list of inspectable standards investigated during workplace inspections to include, at a minimum, unpaid wages. Moreover, given the infrequent contact between ESOs

⁷⁷ Interestingly, however, ESOs code these violations as non-monetary, despite their clear association to money.

and employers in agriculture hiring migrants, arguably the use of deterrence measures should be greatly increased. Only measures of this order and magnitude, coupled with the removal of other obstacles to effective workplace inspections, can peel away a critical layer of vulnerability which is directly under the control of the host state albeit embedded within a larger set of global processes or global system.

5 CONCLUSION

The foregoing analysis has sought to demonstrate that migrant agricultural workers are subject to multiple layers of vulnerability arising from their precarious migration status, the dependence of their families and communities on the incomes they earn while in Canada, and their social and geographic isolation and limited protection as employees in agriculture under an ES enforcement regime dependent upon individual employee complaints. Although it is impossible to isolate migrants from non-migrants employed in agriculture in the ESIS complaint data, both the layers of vulnerability analysis and the complaint data themselves suggest that it is highly likely that migrants in agriculture complain less frequently than other employees in this industry. However, the examination of complaints from agricultural employees more generally reveals that employees in agriculture suffer substantial wage theft and that they are often unaware of the extent of that theft. It is fair to assume that this problem is more pronounced among those that are migrants, most of whom are racialized non-native English speakers and who are less likely to be knowledgeable about their rights in the host state than agricultural employees with permanent status. Additionally, migrant agricultural workers experience the effects of a racialized global system embedding the underdevelopment and dependence of the global south through ‘accumulation by dispossession’⁷⁸ due to debt and poverty and processes of expropriation.⁷⁹

Some of these problems could be ameliorated by removing the exemptions and special rules that complicate and restrict the entitlements of agricultural employees. Public support for groups providing assistance to migrants and enabling third parties to make complaints could also improve the efficacy of the complaint process. But we are sceptical that the individual complaint process can ever become a foundation on which to build an effective ES enforcement regime for migrants in agriculture.⁸⁰ We are also sceptical that private enforcement models, best represented by the Florida-based Coalition

⁷⁸ Harvey, *supra* n. 28.

⁷⁹ Fraser, *supra* n. 30.

⁸⁰ On the challenges faced by migrant workers in Australia accessing the Fair Work Ombudsman (roughly the equivalent of ESOs), despite innovative attempts to reduce barriers, see B. Farbenblum

of Immokalee Workers (CIW), can be broadly reproduced to protect agricultural workers generally.⁸¹ Rather, given the multiple layers of vulnerability that inhibit complaints in the first instance, emphasis must be placed on building a proactive public ES enforcement regime that targets agricultural employers who hire migrants – at present, this means restarting and renewing inspections. While there have been a few modest steps in this direction in recent years, these steps only touched the surface of what needs to be done. Only a small number of farms employing migrants were inspected in the period under study and these inspections were both limited in their scope and fail to use deterrence measures when violations are detected.⁸² In order to ensure that migrants in agriculture enjoy the protections the ESA promises, inspecting farms that employ migrants and imposing penalties when monetary violations or administrative violations that increase the risk of monetary violations are detected must become priorities.

Finally, it is important to acknowledge that the point of departure for these proposals is that the current structure of migrant agricultural worker programs will remain unchanged. This should not be taken as an indication that, as analysts, we endorse these programs. Rather, it is our view that more fundamental reforms to reduce the layers of vulnerability experienced by migrants in agriculture are urgently needed.

& L. Berg, *Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman*, 23 Aust. J. H. R. 285 (2017).

⁸¹ The CIW works closely with the Fair Food Standards Council (FFSC), which acts as its enforcement arm. Addressing working conditions in the tomato industry, the CIW reached an agreement with local food retailers and several large restaurant chains, such as Taco Bell, that included the provision of a wage premium and improved working conditions and provided for intensive enforcement. In its early years, the CIW, in conjunction with the FFSC, successfully supported the mobilization of workers to make complaints, partly through the creation of a hotline, which could trigger inspection by the FFSC. Under this model, enforcement depends on market consequences. Growers found in violation of the Fair Food Code of Conduct are suspended from selling tomatoes to buyers party to it, a group constituting approximately 30% of the sector.

While innovative in a number of ways, this example of civil society led enforcement emerged in a context in which government inspection and enforcement was virtually non-existent leaving a vacuum that community coalitions sought to fill. In Ontario, in contrast, while the resources of the provincial labour inspectorate are constrained, the MOL remains a central institution in the creation and implementation of labour standards across sectors, including agriculture. (For an incisive case study evaluating the efficacy of the Coalition Immokalee Workers upon which the foregoing analysis draws, see especially J. Fine & T. Bartley, *Raising the Floor: New Directions in Public and Private Enforcement of Labor Standards in the United States*, J. Indus. Rel., DOI: 10.1117/0022185618784100 (2018)); see also J. Brudney, *Decent Labour Standards in Corporate Supply Chains: The Immokalee Workers Model*, in *Temporary Labour Migration in a Global Era: The Regulatory Challenge* 351–76 (R. Owens J. Howe eds, London: Hart Publishing 2016).

⁸² As noted earlier in *supra* n. 3, the federal government has also recently taken a more proactive approach to enforcing labour standards. Its effectiveness is the subject of a future research project.