

ACSESS Response: Changing Workplaces Review

October 2016



The Association of Canadian Search, Employment & Staffing Services

Executive Summary

As a result of its recent Bill 139 and Bill 18 amendments to the *Employment Standards Act, 2000* (ESA), Ontario is already at the leading edge of providing legislative protections to assignment employees who are employed and placed by temporary help agencies. There is no other jurisdiction in Canada that provides similar protections to assignment employees nor such far-reaching regulation of temporary help agencies and their clients.

Temporary help agencies provide a vital service in the modern economy both by supporting business needs for a flexible workforce to adapt to a rapidly changing business environment and by providing a wide range of employment opportunities and other benefits to assignment employees. In the absence of a comprehensive economic impact analysis, the government should not implement changes that could significantly impact a business model relied upon by all sectors of the economy.

Therefore, the Association of Canadian Search, Employment and Staffing Services (ACSESS) submits that no new changes are needed to the ESA to enhance the protections already afforded to assignment employees who enjoy the full range of entitlements, benefits and protections of the ESA.

The government should focus its efforts and available resources on compliance initiatives and enforcement of the current ESA provisions. ACSESS is prepared to support a licensing regime provided that the government is committed to investing the resources needed to ensure that the licensing regime is meaningful and effective.

Role of ACSESS

ACSESS is the voice of the employment, recruitment and staffing services industry in Canada. Our mission is to advance the interests of the industry and the people it employs through a wide range of education and professional certification programs; promotion of ethical best practices; and compliance with applicable employment laws and regulations. An essential part of the mission is to advocate for appropriate regulation of the industry and the efficient and effective enforcement of such regulations.

ACSESS member organizations pledge to uphold a Code of Ethics, and must meet strict membership requirements including at least two years of operations in good standing and demonstrated compliance with legal requirements. Members are committed to an industry which gives clients the ability to respond to business realities and changing technologies, and to give workers – at all levels – an ever-increasing range of employment opportunities.

As a member of the Keeping Ontario Working Alliance, ACSESS endorses the submissions of the Ontario Chamber of Commerce, “Reform that Works – A Call for Evidence-Based Labour Reform in Ontario”. ACSESS also endorses the submissions of the National Association Of Canadian Consulting Businesses (NACCB).

Changing Workplaces Review

October 2016

Submissions in Response to the Interim Report of the Special Advisors

Presented by:

ACSESS

The Association of Canadian Search, Employment & Staffing Agencies

In 2009, after extensive consultations and recommendations, the Ontario Government passed Bill 139, the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, which added a range of legislative protections for assignment employees. In 2014, the Government passed Bill 18, the *Stronger Workplaces for a Stronger Economy Act, 2014*, which added further protections to the ESA for assignment employees. With these recent amendments, assignment employees in Ontario enjoy legislative protections that significantly exceed those found in any other Canadian jurisdiction.

ACSESS submits that there is insufficient objective evidence cited in the Interim Report that would justify the need for further legislative reform at this time. Nor is there any evidence suggesting that temporary help agencies have lower rates of compliance with the ESA than any other industry sector.

Temporary help agencies provide a vital service in the modern economy both by supporting business needs for a flexible workforce to adapt to a rapidly changing business environment and by providing a wide range of employment opportunities and other benefits to assignment employees. Moreover, in the absence of a comprehensive economic impact analysis, the government should not implement changes that could significantly impact a business model relied upon by all sectors of the economy, including the government and broader public sector.

Therefore, ACSESS reiterates the position that it presented in its September 2015 submissions to the Special Advisors that no new changes are needed to the ESA to enhance the protections already afforded to assignment employees who enjoy the full range of entitlements, benefits and protections of the ESA.

ACSESS submits that, rather than impose additional obligations on employers, the government should focus its efforts and available resources on compliance initiatives and enforcement of the current ESA provisions. Nevertheless, ACSESS is prepared to support a licensing regime provided that the government is committed to investing the resources needed to ensure that the licensing regime is meaningful and effective.

1. Supporting the Economy and Employees

The evidence is clear that temporary help agencies fulfil a necessary role in today's economy, with its emphasis on flexibility and adaptability and the need to compete with businesses in other jurisdictions with significantly less regulation than already exists in Ontario.¹ This competitive reality has implications for Ontario's economy that must be taken into account in determining whether to impose even more regulation.

This vital role is performed not only in the private sector as data shows that government and broader public sector organizations use the services of temporary help agencies and employees engaged in non-standard employment on an increasing basis. Data provided previously by ACSESS shows that approximately 10% of the services provided by the Employment Services industry are provided to the public sector. In its submissions, the Ontario Chamber of Commerce highlights that the greatest increase in the use of non-standard employment since 2003 has occurred in the public sector.

The evidence provided by ACSESS also establishes that temporary help agencies provide significant benefits to assignment employees, notwithstanding anecdotal evidence that some employees are unhappy with their jobs, which of course is not unique to assignment employees or temporary help agencies. Isolated anecdotal evidence does not justify sweeping new regulation

In its 2016 Economic Report, the International Confederation of Private Employment Services (CIETT) confirms the integral and beneficial role played by temporary help agencies and related recruitment and human resources services companies:

- enabling work through the employment, worldwide, of more than 71 million people each year;
- enabling adaptation for over 5 million companies each year who utilize the services offered;
- providing training to nearly 5 million employees each year;
- increasing employment security for employees who were unemployed before commencing work through an agency; and
- employing significant numbers of office and administrative staff to support the work of agencies.²

The CIETT report confirms that a significant majority of assignment employees report being satisfied or very satisfied with their work through an agency, and that many would recommend agency work to their families and friends.

¹ Please refer to the supporting data originally provided by ACSESS in section 3 of its September 2015 submissions, "Understanding the Temporary Help Industry".

² "Economic Report 2016 Edition", International Confederation of Private Employment Services, available online at: <http://www.wecglobal.org/economicreport2016/>. Please note that, as of September 21, 2016, CIETT is now called The World Employment Confederation.

2. Economic Impact Analysis

In the introduction to his paper, “Changing Pressures Affecting the Workplace and Implications for Employment Standards and Labour Relations Legislation”, Professor Gunderson highlights the need to have a “*causal* (i.e., cause-and-effect) understanding of the theoretical mechanisms through which these pressures affect ES and LR”.³ That is, it is important to properly understand the root causes of the problems that legislative reform is intended to address, to understand how causal relationships might change in the future, and to understand how stakeholders may respond to the changes being made.

Furthermore, in discussing non-standard employment, Professor Gunderson cautions against a “one-size fits all” legislative and regulatory policy, that may have unintended consequences for workers engaged in non-standard employment. This is especially true where the work performed by non-standard workers is highly mobile and can be relocated outside of Ontario to a jurisdiction with more favourable regulation.

In its submissions, the Ontario Chamber of Commerce reviews a range of economic and other factors that the Special Advisors should consider when preparing their final report. These include recognizing the fragility of Ontario’s ongoing economic recovery, having a more complete understanding of the limited extent of precarious work, and acknowledging the increasing reliance of the public sector on non-standard employment to deliver critical public services in a cost-effective manner.

ACSESS emphasizes the Chamber’s primary submission that the government adopt a robustly evidence-based approach to policy reform, and strongly encourages the government to subject each policy recommendation resulting from the Changing Workplaces Review to a structured and publicly reported economic impact analysis. ACSESS agrees with the Chamber that the government must avoid “change for change’s sake”, but must undertake a proper study to understand the potential impacts of any reforms undertaken.

3. Focus on Compliance and Enforcement

ACSESS continues to advocate several key positions on behalf of its members:

- With the passage of Bills 139 and 18, temporary help agencies are already subject to the full obligations of the ESA, and there is no basis for adding further levels of regulation.
- Assignment employees in Ontario already enjoy legislative protections that significantly exceed those found in any other Canadian jurisdiction, including Manitoba which is the only other Canadian jurisdiction to have passed legislation

³ “Changing Pressures Affecting the Workplace and Implications for Employment Standards and Labour Relations Legislation”, M. Gunderson, Prepared for the Ontario Ministry of Labour, to support the Changing Workplaces Review of 2015, Project #3, September 30, 2015, pp. 9-10.

similar to some (but not all) of the Bill 139 changes (and none of the Bill 18 changes).

- Much of the regulation of temporary help agencies is very recent in origin – the Bill 139 amendments being made in 2009, and the Bill 18 amendments being made in 2014, but with key changes (such as joint and several liability) only coming into force on November 20, 2015, less than one year ago.
- There is no objective evidence that the Bill 139 and Bill 18 amendments have not been effective in achieving the government’s goals. In the case of the Bill 18 amendments, insufficient time has passed to properly assess its effects.
- The government should focus its efforts and resources on compliance initiatives and enforcement of the current provisions of the ESA, including using its resources to hire additional inspectors and to improve training of inspectors to increase the effectiveness and consistency of inspections and enforcement measures.⁴

Subject to its specific submissions below related to the Interim Report, ACSESS reiterates these primary submissions and continues to recommend that the government’s resources would be better spent on steps to achieve compliance with the current regulations. Nevertheless, ACSESS would support a meaningful and effective licensing regime, as addressed in more detail below.

4. Response to Issues Raised in the Interim Report

Section 5.3.9 of the Interim Report addresses options for recommendations specific to temporary help agencies. As will be apparent from the preceding section, ACSESS submits that the status quo should be maintained, subject to increased compliance and enforcement initiatives and subject to the implementation of a meaningful and effective licensing regime.

In this section, ACSESS will provide more specific submissions in response to the options identified in the Interim Report. Before considering the options, ACSESS will first address the Interim Report’s reliance on developments in other jurisdictions, and the need to ensure that those are placed in proper context.

(a) Other Jurisdictions

The Interim Report contains a lengthy discussion of the regulation of temporary help agencies in the United States, the European Union and (to a lesser degree) Australia. ACSESS submits that great care must be taken in considering the experience in other jurisdictions, and where that is to be done, it is important that it be based on an accurate understanding of the context.

⁴ Refer to ACSESS’ September 2015 submissions for details.

In his paper, “Changing Pressures Affecting the Workplace and Implications for Employment Standards and Labour Relations Legislation”, Professor Gunderson identifies one key pressure facing businesses is the development of a North-South orientation for business,⁵ which suggests that a more appropriate point of comparison is what occurs in the United States and Mexico, which are key trading partners and that compete with Canadian business for investment and expansion opportunities.

In terms of Australia and the European Union, neither have been historic comparators for Ontario, and neither is particularly appropriate in this context given the predominant North-South orientation and overwhelming level of trade and competition for Ontario businesses with the United States and Mexico.

Therefore, ACSESS submits that the United States is a more appropriate comparator. While this does not mean that Ontario should necessarily replicate the regulatory approaches of the U.S., it does suggest that greater consideration of how temporary help agencies operate within the United States is imperative to determining whether the level of regulation in Ontario is appropriate.

However, if comparisons are to be made to the U.S. experience, it is important that the context be accurately described. Some aspects of the Interim Report, and its reliance on the work of Erin Hatton,⁶ create an inaccurate picture of the level of regulation of temporary help agencies in the United States. For example, on page 244 of the Interim Report, the following statement is made:

The ubiquity of temporary help workers has also led to significant criticism of the industry, much greater regulation by the US federal government, and new legislation in some states where THAs are very prevalent.

ACSESS respectfully submits that this statement, and the general approach that it suggests, do not accurately reflect the U.S. experience.

Just as in Canada, U.S. federal law does not directly regulate temporary help agencies or assignment employees in any manner analogous to the existing regulation under Ontario’s ESA. The federal *Fair Labor Standards Act* is a statute of general application that potentially applies to temporary help agencies as employers, in the same manner as any other law applicable to employers generally. Similarly, the Interim Report identifies only three (3) states that have passed industry-specific laws – Illinois, Massachusetts and California. With respect, this is not evidence of widespread regulation of temporary help agencies in the United States; rather, it demonstrates precisely the opposite. In fact, California is an inapt example because the state has not singled out temporary help agencies for special regulation. Rather, provisions of California law or regulations applicable to employers generally have been modified or

⁵ Gunderson, *supra*, note 3, pp. 24-26.

⁶ ACSESS notes that Ms. Hatton is a sociologist by training, and is not a specialist in labour economics. Other U.S. academics specializing in economics, such as Lawrence Katz of Harvard University and Alan Krueger of Princeton University, have extensively studied and published significant academic works on temporary help agencies and their role in the modern US economy.

clarified over the years, often at the behest of the industry, to take into account the unique operating characteristics of those agencies.

That is, much as in Canada, temporary help agencies in the U.S. are subject to statutes of general application, just as any other employer would be. Only a very small number of jurisdictions have developed sector-specific regulation to any degree, which means that Ontario is already more regulated than most U.S. jurisdictions. Thus, the U.S. experience does not support the proposition that Ontario requires any further regulation at this time.

(b) Joint Employment

The one area in the United States which has seen recent development is joint employment, which is also addressed in the Interim Report. This is exemplified in the 2015 decision of the National Labor Relations Board (NLRB) in *Browning-Ferris*, and the subsequent “Administrator’s Interpretation No. 2016-1”, issued by the U.S. Department of Labor on January 20, 2016.

However, these developments must be put into some context.

First, while there can be little doubt that the *Browning-Ferris* decision expanded the application of the “joint employer” test under the *National Labor Relations Act*, it is a decision of the NLRB interpreting statutory provisions that have existed for decades. This is not an example of new law or regulation, but represents a potential expansion or redirection of existing law.

Second, the decision has generated significant controversy in the U.S., and is currently under appeal to the U.S. Court of Appeals, District of Columbia Circuit. Numerous business organizations have joined the appeal as intervenors given the potential implications of the decision. Included with these submissions is a Briefing Note highlighting some of the key arguments made by the appellants and intervening parties in that case.

Third, and most important, the *Browning-Ferris* ruling made no substantive change in the law of joint employment insofar as temporary staffing firms are concerned. The reason is that those firms and their clients had often been viewed as joint employers under the much more restrictive NLRB definition of joint employment that had long prevailed prior to the new ruling. See, e.g., *Continental Winding Company*, 305 NLRB 122 (1991).

Lastly, in regard to the US DOL Administrator’s Interpretation, that was a statement of government policy, not law. On reviewing the document, it is clear that not all courts have historically applied the broad test for joint employment supported in the policy, and the policy document itself recognizes that the *Browning-Ferris* approach would not automatically capture all temporary help agency/client relationships.

Given this context, ACSESS submits that it would not be good government policy to amend Ontario laws based on a single decision of the NLRB that is currently under

appeal. The ESA already contains provisions to address the mischief caused by related employers, and ACSESS submits that those provisions are sufficient in their current form.

(c) Option 2: Expanding Client Responsibility

ACSESS submits that there is no evidence supporting either of the options identified under this heading in the Interim Report. Most importantly, there has been no evidence presented that suggests temporary help agencies have lower rates of ESA compliance than any other sector in Ontario. In the absence of such evidence, these options are entirely unnecessary to achieve the Review's goals.

ACSESS opposes and further expansion of joint and several liability, and similarly opposes any notion of identifying the client as "employer of record". These options would entirely undermine the 2009 Bill 139 amendments that establish the temporary help agency as employer of record, and are not necessary in light of the 2015 Bill 18 amendments that have already established joint and several liability for certain wage entitlements.

(d) Option 3: Same wages for same/similar work

ACSESS submits that wages are primarily determined by the market, by what clients are willing to pay for the services in question, and reflect a range of other factors, including the basis of the engagement, and the experience and qualifications of the employees. The government should not legislate wage parity as it would be an overreaching response to a situation that reflects a complex range of factors.

(e) Option 4: Mark-up

ACSESS strongly opposes any recommendation that would require temporary help agencies to disclose the mark-up charged by an agency to its clients, or that would limit the amount of mark-up that an agency may charge its clients. No other jurisdiction in the world requires disclosure of mark-up or places limits on the mark-up that may be charged.

ACSESS has attached a legal memorandum provided by Davies Ward Phillips & Vineberg LLP that establishes that both proposals are anti-competitive in nature, and are contrary to competition principles that animate Canadian competition law:

"Pricing information can be shared by THAs in a disaggregated form through a trade association or another similar medium, but to require individual disclosure of pricing information to competitors is anti-competitive and contrary to Canadian competition law principles.

...

Limiting the amount of the mark-up (particularly in parallel to a required disclosure of the mark-up) is akin to maintaining and controlling the price

for the supply of assignment workers, and contrary to Canadian competition law principles.”

Moreover, neither proposal would serve any useful purpose to the assignment employees, since they appear to be premised on a mistaken notion that mark-up is nearly all profit, such that assignment employees, if they knew what the mark-up was, would be in a position to negotiate higher wages.

To the contrary, the mark-up charged by agencies to clients reflects a range of factors and circumstances, including the nature of the placement, the work performed, and the terms negotiated between the agency and client. The revenue generated by mark-up is primarily used for the operation of the temporary help agencies and reflect legitimate business costs and the risk undertaken by agencies in providing their services. Most revenues are paid out in the form of employee wages, payroll taxes, and other operating costs.⁷ Notwithstanding the unsubstantiated assertions that mark-up ranges from 40% to 100% of an employee’s hourly range, ACSESS reminds the Special Advisors that the evidence confirms that industry net profits are very low – ranging from 2.1% to 4.3%.⁸

Finally, ACSESS submits that it is improper to use the ESA to effect measures that would have such a profound impact on the commercial operations of temporary help agencies, and the valuable services that they provide to the modern economy and to the significant majority of employees who voluntarily use their services.

(f) Option 5: Further restrictions on fees

ACSESS opposes any further restrictions on fees that temporary help agencies may charge to clients. Ontario already has a very short window on when fees can be charged. Fees are a legitimate tool to recover the significant costs associated with recruiting and training assignment employees, all of which are borne by the agencies. Finally, the Interim Report does not establish that the limited ability to charge a fee to clients during the 6-month window acts as a barrier to permanent employment. Rather, evidence gathered by the American Staffing Association confirms that employment with a temporary help agency provides a bridge to permanent employment for many assignment employees.⁹

⁷ See, for example, Statistics Canada, Table 361-001, Employment services, summary statistics by North American Industry Classification System (NAICS) (last modified 2014-03-04), cited in ACSESS’ September 2015 submissions, which illustrate that approximately 90% of revenues are spent on wages.

⁸ Statistics Canada, Table 361-001, *supra*, note 2.

⁹ See “The Bridge that Works: The 2014 ASA Staffing Employee Survey”, published by the American Staffing Association. (Available online at: <https://americanstaffing.net/staffing-research-data/asa-staffing-industry-data/staffing-employee-survey/>). While reflective of the U.S. experience, ACSESS submits that it very likely reflects the experience of assignment employees in Canada as well.

(g) Options 6 and 7: Limiting client use of assignment employees and Promoting transition to employment with client

ACSESS does not support the creation of limits on the use of temporary workers by clients of temporary help agencies, whether that be in the form of limiting how many assignment employees a client can hire, limiting the length of placements or deeming assignment employees to be permanent employees of the agency's client after a defined period of time.

ACSESS submits that there is no objective evidence establishing that there is a widespread use of long-term assignments or other measures by employers to avoid hiring permanent employees. Moreover, ACSESS submits that these options do not sufficiently recognize that employers hire permanent employees when economic and business factors support that decision. In the absence of a properly conducted economic impact analysis, there is no reason to assume that any of these measures would achieve "permanent" employment for assignment employees.

(h) Option 8: Expansion of termination and severance obligations

ACSESS strongly opposes any proposal that would expand notice and severance obligations to the assignment level. Not only do the proposals stand in direct opposition to the Bill 139 amendments that provide that assignment employees remain employed between assignments, but there is no reasonably apparent justification or rationale for either proposal.

Like all other non-exempt employees, assignment employees are entitled to notice of termination and, in applicable cases, severance pay when their employment comes to an end. Requiring notice and severance at the assignment level would put assignment employees in a better position than other employees, as they would both retain their employment status, yet be potentially owed notice and severance. Structuring these proposals to avoid the overpayments inherent in them would be administratively complex for agencies to administer and for the government to oversee.

These proposals also ignore the reality that many assignment employees are provided training opportunities through their agencies, which they can undertake during periods between work assignments. This is a clear benefit to assignment employees that is not necessarily available to other employees in Ontario.

(i) Option 9: Licensing of agencies/Standards of Conduct

As noted earlier in these submissions, ACSESS would be prepared to support a licensing regime provided that the government is committed to investing the resources needed to ensure that the licensing regime is meaningful and effective. To be clear, ACSESS would not support a return to Ontario's previous licensing regime, nor would it support a regime similar to what has been implemented in various western provinces as these regimes increase the cost and complexity of doing business without providing additional protections to assignment employees.

In a prior consultation process related to Foreign and Resident Employment Recruitment in Ontario (2009), ACSESS proposed a licensing regime for recruiters, and provided a detailed description of what an effective licensing regime would entail. ACSESS has attached a copy of its prior submissions to this response for the consideration of the Special Advisors. The licensing regime discussion begins on page 16.

(j) WSIA and OHSA

A portion section 5.3.9 of the Interim Report was dedicated to matters relating to temporary help agencies under the *Workplace Safety and Insurance Act, 1997* (WSIA) and the *Occupational Health and Safety Act* (OHSA). ACSESS notes that the scope of the Changing Workplaces Review extends to the ESA and the *Labour Relations Act, 1995*, but not to the WSIA nor OHSA. Therefore, ACSESS expects that the government would conduct appropriate consultations before considering any changes to either of these statutes that could impact temporary help agencies or other employers in Ontario.

ACSESS reminds the Special Advisors that the question of WSIB coverage was addressed in hearings conducted by the Standing Committee on General Government, when it was considering Bill 18, *An Act to amend various statutes with respect to employment and labour*. ACSESS provided submissions to the Standing Committee on this issue, and has attached a copy of those submissions to this response for the consideration of the Special Advisors.