

The Changing Workplaces Review

September 2015

A Discussion Paper Presented By:



The Association of Canadian Search, Employment & Staffing Services

Executive Summary

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 temporary employees. In 2014, the Government passed Bill 18, the *Stronger Workplace for a Stronger Economy Act, 2014*, which added further protections to the *ESA* for temporary employees. With these recent amendments, temporary employees in Ontario enjoy legislative protections that significantly exceed those found in any other Canadian jurisdiction.

Therefore, it is the position of the Association of Canadian Search, Employment and Staffing Services (“ACSESS”) that no changes are needed to the *Employment Standards Act, 2000* (the “*ESA*”) to enhance the protections afforded to temporary employees. As employers of record, Temporary Help Agencies are required to comply with all provisions of the *ESA*. Rather than engage in any further legislative reform, the Government should focus its efforts on compliance and enforcement of the current provisions of the *ESA*.

In its submissions, ACSESS seeks to clarify some misconceptions about the staffing industry and to educate on the benefits that staffing agencies afford both the general economy and temporary employees themselves.

Finally, ACSESS is strongly opposed to the four recommendations found in the Worker’s Action Centre (“Centre”) Summary Report, entitled “Still Working on the Edge”. In this report, the Centre is advocating for a series of additional changes to the *ESA* to remedy what it perceives as shortcomings in the current regulatory regime. It is ACSESS’s position that these recommendations are unnecessary, unsubstantiated and would cause undue hardship to the staffing industry.

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Submissions 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 temporary employees. In 2014, the Government passed Bill 18, the *Stronger Workplace for a Stronger Economy Act, 2014*, which added further protections to the *ESA* for temporary employees. With these recent amendments, temporary employees in Ontario enjoy legislative protections that significantly exceed those found in any other Canadian jurisdiction.

Therefore, it is the position of ACSESS that no changes are needed to the *Employment Standards Act, 2000* (the “*ESA*”) to enhance the protections afforded to temporary employees. As employers of record, Temporary Help Agencies are required to comply with all provisions of the *ESA*. Rather than engage in any further legislative reform, the Government should focus its efforts on compliance and enforcement of the current provisions of the *ESA*.

1. An Introduction to ACSESS

ACSESS is the single voice for the employment, recruitment and staffing services industry in Canada. ACSESS promotes Advancement & Growth of the Industry by:

- Providing services to, and communicating with, members of the employment, recruitment and staffing services industry;
- Assuming a leadership role in industry licensing and regulation;
- Coordinating educational programs and conferences, assisting in the development of required standards of professional performance;
- Promoting best business practices, and adherence to both the spirit and letter of all applicable employment legislation and regulations;
- Developing pertinent statistics for the purpose of identifying economic and socio-economic trends.

A primary objective of ACSESS is to actively represent the industry and our membership before governments by providing input on employment legislation and regulations at the national and provincial levels. At the same time, ACSESS assumes a leadership role in ensuring that industry members are aware of legislation and regulatory changes which may affect their businesses and responsibilities as employers.

Professional development and certification are core services delivered through ACSESS. ACSESS provides and administers the CPC Certification Program. Practitioners must meet core requirements which include post-secondary education, length of service in the industry, compliance with the Code of Ethics, complete a series of specialty courses and then successfully complete CPC exams. On successful completion, these professionals may use the designation CPC (Certified Personnel Consultant).

ACSESS promotes regular educational events, including our annual conference, training and seminars, and district programs, which are held across Canada.

ACSESS member companies pledge to uphold the Association's Code of Ethics & Standards. They are committed to an industry which gives clients the ability to respond to business realities and changing technologies; and to giving workers – at all levels – an ever-increasing range of employment opportunities.

2. ACSESS Supports Meaningful and Effective Regulation

ACSESS has always taken a leadership role in industry licensing and regulation.

The membership of the Canadian staffing industry will support any improvements to existing legislation, improved enforcement or any form of meaningful and effective new legislation or regulations that will:

- Promote the principles of integrity, professionalism and fair practice in dealing with clients, candidates, employees and all regulatory authorities;
- Protect and respect confidentiality of records in accordance with law and good business practices;
- Promote and enhance the effectiveness of all applicable human rights and employment laws and regulations including the abolishment of discriminatory ordering and hiring practices;
- Require any person or company (agent) to have express authorization of representation from a job seeker before the agent may represent their application for employment;
- Require any person or company (agent) to have express authorization of representation from a company or employer before the agent may advertise or make representation on behalf of the employer;
- Require all employers and agents to provide complete and accurate information prior to employment, regarding terms of employment, job descriptions and workplace conditions;

- Restrict any employer or Employer's Agent from making direct or indirect charges of fees to employment candidates or employees unless specified by a license;
- Promote free enterprise and restrict acts of unfair competition;
- Simplify or improve administrative compliance requirements to existing laws;
- Improve enforcement of laws;
- Impose appropriate fines penalties and restrictions upon those who violate existing laws.

3. Understanding the Temporary Help Agency Industry

In undertaking the Changing Workplaces Review, it is important to have a more complete understanding of the Temporary Help Agency industry and the important role that it plays in the Ontario and wider Canadian economy. This short review will show that the services of Temporary Help Agencies play an important role in the modern economy where flexibility and the means to respond to rapidly changing developments are crucial.

Statistics Canada tracks a number of statistics related to the "Employment Services" industry, which is comprised of organizations engaged in permanent placement, executive search, contract staffing, temporary staffing and co-employment staffing services. The most recent Service Bulletin published by Statistics Canada relates to 2012.¹

Operating revenue for 2012 for the entire Employment Services industry was just under \$11.5 billion. Most of the operating revenue is generated in 3 provinces – Ontario (50%), Alberta (26.7%) and Quebec (13.4%). In 2012, Alberta had the greatest gain in revenue.

Of the operating revenue for 2012, approximately 60.7% was attributable to temporary staffing services, 32.4% attributable to permanent placement and contract staffing services, and the remaining 6.9% to other goods and services. More than 90% of the industry's operating revenue is spent on two main classes of expenditures – salaries, wages and benefits (65.3%) and other labour costs (25.4%).

The amount of operating revenue varies from year to year, and tends to track the broader economic cycles. A review of Statistics Canada information shows a decrease

¹ Statistics Canada, Service Bulletin: Employment Services 2012, Catalogue No. 63-252-X, released March 4, 2014.

in operating revenue between 2008 and 2009 a time during which the Canadian economy was in recession, and then an increase year over year since that time.²

While the overall operating revenue for the Employment Services industry has increased year over year since 2009, it is notable that the percentage of revenues spent on wages has remained consistently in the 90% range. Moreover, the operating profit margin for the industry has remained relatively constant and quite low – ranging from 2.1% to 4.3%.³

Of the services provided by the Employment Services industry, in 2012 approximately 87.8% were sold to businesses in the private sector, and about 10.3% sold to government and public institutions.

It is also notable to compare the penetration rate of the Temporary Help Agency business in the Canadian economy to the penetration rates in other markets. In 2012, the penetration rate in the Canadian economy was approximately 0.75% as compared to penetration rates of just under 1.5% in Japan, just over 1.5% in Europe, and nearly 2% in the United States.⁴

While recent media reports have suggested that there has been a significant increase in the size of the contingent work force in the very recent past, research has shown that the most significant upward trends occurred during the 1980s, ending at various points in the 1990s.⁵ Since that time, the size of the contingent work force has generally tracked the economic cycles that impact Canada's economy as a whole. In his research paper, "The Recession's Impact on Canada's Labour Market", Philip Cross also states that there was no overall shift to contingent positions during the 2008 recession.

Since 2008, ACSESS has produced the Canadian Staffing Index, which measures the hours of work performed by temporary and contract employees employed by the staffing industry. The Index is based on a sampling of information provided by Canadian staffing companies that represent approximately one third of total staffing industry sales in Canada. A review of the Index shows that the hours of work performed has varied over the years, and has largely tracked the broader economic cycle (including reduced hours during the recent recession). Notably, while hours have varied, they have not

² Statistics Canada, Table 361-001, Employment services, summary statistics by North American Industry Classification System (NAICS). Last modified 2014-03-04.

³ Statistics Canada, Table 361-001, *supra*, note 2.

⁴ International Confederation of Private Employment Agencies (CIETT), Staffing Industry Analysis, excerpted from the presentation, "A Snapshot of the Canadian Staffing Market", presented on May 29, 2014.

⁵ Philip Cross, "The Recession's Impact on Canada's Labour Market", University of Calgary, The School of Public Policy SPP Research Papers, Volume 8, Issue 28, July 2015, pp. 4-7. The upward trend in part-time employment continued to 1992, while the upward trend in self-employment continued until 1997. Statistics Canada began tracking temporary employment in about 2000, and the paper notes that there has been a small increase in overall numbers of persons holding temporary positions since that time, but that has not significantly impacted the overall size of the contingent workforce in Canada.

deviated significantly from the 2008 levels, and the most recent report (for June 2015) shows a measurement of 103, approximately 3% higher than the July 2008 baseline measurement of 100.

Polls of American employers cite a range of reasons that they utilize the services of Temporary Help Agencies. For example, in a paper entitled “The Advantages of a Flexible Labour Market”, Youri Chassin of the Montreal Economic Institute cites the following reasons: unexpected business growth (52%); unexpected and long-term absences (47%); to bridge to a permanent replacement (47%), special projects (36%); seasonal rushes (28%); and preselection of candidates (21%).⁶

The American Staffing Association cites similar reasons in one of its Fact Sheets: assessing fit before hiring (47%); access to more candidates (44%); filling of positions more quickly (38%); flexibility to change workforce size (32%); access to specialized skills (26%).⁷

It is very likely that Canadian businesses use the services of Temporary Help Agencies for similar reasons, and it is clear that these services play an important role in the modern economy where flexibility and the means to respond to rapidly changing developments are crucial.

4. The Benefit to Employees

It is important to clarify some common misconceptions regarding temporary employees. A significant majority of employees who work in the contingent workforce do so on a voluntary basis. Chassin cites a 2002 Léger Marketing study undertaken for the ministère du travail du Québec which found that 77% of workers in “non-traditional” employment chose to work in that capacity.⁸ Similarly, Cross cites Statistics Canada sources that show that 76% of part-time workers in Canada voluntarily choose part-time work.⁹

In Statistics Canada Cansim Table 282-0014 (cited by Cross), respondents identified a variety of reasons for taking part-time employment. It is notable that the two most common reasons provided, and accounting for more than 50% of the responses, were “Going to school” and “personal preference”.¹⁰

As outlined in studies by both Cross and Chassin, and as revealed in statistics from the American Staffing Association, there are a number of reasons why employment in various forms of contingent work is of benefit to employees.

⁶ Youri Chassin, “The Advantages of a Flexible Labour Market”, Montreal Economic Institute, Labour Law Series, November 2013.

⁷ American Staffing Association Fact Sheet, “Staffing Firms Offer Flexible Workforce Solutions to U.S. Businesses for a Competitive Edge”, April 1, 2015.

⁸ Chassin, *supra*, note 6, page 4.

⁹ Cross, *supra*, note 5, page 5, citing Statistics Canada Cansim Table 282-0014.

¹⁰ Statistics Canada Cansim Table 282-0014, “Labour force survey estimates (LFS), part-time employment by reason for part-time work, sex and age group”.

Chassin notes that previous studies showed that 60% of unemployed workers who found employment within 2 years had first found employment in non-standard work – a factor that is particularly important for groups with higher levels of unemployment. For example, Chassin highlights 3 advantages that staffing agencies provide to immigrants, a group within Canada that experiences heightened levels of unemployment:

- the temporary work allows employers to evaluate the employee whose credentials may be otherwise difficult to validate;
- the employee develops experience in the Canadian job market; and
- the employee is able to form contacts with employers.

Cross focuses his discussion more on part-time employment and self-employment, and notes that the majority of workers in this category are there voluntarily, and do so precisely because of the flexibility it offers.

The American Staffing Association has gathered statistics on the temporary workforce in the United States, which statistics should roughly correspond to the situation in Canada:

- Most (76%) staffing employees work full time, comparable to the overall workforce (82%).
- Half (49%) of staffing employees say it's a way to get a permanent job.
- 9 out of 10 said staffing work made them more employable.
- One-third (35%) were offered a permanent job by a client where they worked on an assignment, and two-thirds (66%) of those accepted the offers of permanent employment.¹¹

Finally, temporary employment can offer some protection to employees from the full impact of downturns in the economy. While temporary employment is not immune from economic factors and does follow the general economic cycle, employees of Temporary Help Agencies have the benefit of greater access to alternative positions when an assignment ends.

5. The *ESA* has Sufficient Protections

The Ontario Government has recently undertaken significant consultations related to Temporary Help Agencies, and has implemented changes to the *ESA* to address issues specific to the industry.

¹¹ American Staffing Association, Staffing Industry Statistics, accessed online on August 6, 2015: <https://americanstaffing.net/staffing-research-data/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/>

In 2009, the Government passed Bill 139, the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, which added a range of legislative protections for temporary employees, including an entirely new Part dedicated to the regulation of Temporary Help Agencies. At the same time, the Government repealed the “elect to work” exemptions from the *ESA* regulations, which significantly increased the range of employees entitled to public holidays, notice of termination and severance pay.

In 2014, the Government passed Bill 18, the *Stronger Workplace for a Stronger Economy Act, 2014*, which added further protections to the *ESA* for temporary employees, and introduced joint and several liability as between agencies and their clients for a range of wages owing to temporary employees notwithstanding that the Bill 139 amendments made the agencies the employer of record.

ACSESS submits that no further changes are needed to the *ESA* to enhance the protections afforded to temporary employees, and offers several reasons for this submission:

- **First, with 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.**

It is important to note in this regard that the most significant increases in the contingent workforce occurred decades ago. There is no evidence of any recent changes within the industry or the wider economy since 2009 that would justify any more changes to the *ESA*.

- **Second, temporary employees in Ontario already enjoy legislative protections that significantly exceed those found in any other Canadian jurisdiction.** The situation in Ontario can be contrasted with other provinces, most of which have no provisions related specifically to employees of Temporary Help Agencies.

The situation in Ontario can be most usefully contrasted with that in Quebec and Manitoba. In approximately 2012-13, the Quebec government undertook a detailed study of the temporary staffing industry, soliciting input from a range of stakeholders.¹² ACSESS participated in those consultations. Notwithstanding its detailed study, the Quebec government chose not to implement the types of changes to the temporary employment relationship implemented in Ontario under Bills 139 and 18.

¹² The Quebec government engaged Léger Marketing to prepare a detailed report on the industry in Quebec, available online (in French only) at: http://www.cnt.gouv.qc.ca/fileadmin/pdf/enquetes-et-recherches/Rapport-CNT79083-024_nov_2012_VF.pdf

The Quebec government's report was released on October 29, 2013, and is available online (in French only) at: http://www.cnt.gouv.qc.ca/fileadmin/pdf/enquetes-et-recherches/2013/Rapport_CNT29_octobre_2013_LB.pdf

In Manitoba, following consultations in which ACSESS participated, the government passed Bill 50, the *Protection for Temporary Help Workers Act*, which came into effect on October 1, 2014. Bill 50 made two basic types of changes, similar to those made in Ontario under Bill 139, but not as far-reaching.

The Manitoba *Worker Recruitment and Protection Act* was amended to require the licensing of Temporary Help Agencies, to place a variety of restrictions on fees that can be charged (both with respect to employees and clients), and related to record keeping. It is notable that the regulations permit fees to be charged where clients hire temporary workers within 8 months of their first placement.

The Manitoba *Employment Standards Code* was amended in several ways that parallel some of the Bill 139 changes. For example, the *Code* was amended to contain a provision similar to section 74.3 of the *ESA* (defining the employment relationship with respect to an agreement to assign or attempt to assign the individual with a client) and section 74.4(3) (providing that the end of an assignment or a failure to assign is not a termination of employment). Similarly, the *Code* was amended to eliminate the “elect to work” exemption for notice of termination for most employees, though the exemption was retained for temporary employees who work less than 12 hours a week on an elect-to-work basis.

However, even with these changes, the Manitoba legislature did not choose to implement the full range of amendments adopted in Ontario, and did not implement any form of joint and several liability, for example.

- **Third, ACSESS is strongly opposed to the four recommended changes that are being advocated by employee groups.**

ACSESS is strongly opposed to the four recommendations found in the Worker’s Action Centre (“Centre”) Summary Report, entitled “Still Working on the Edge”. In this report, the Centre is advocating for a series of additional changes to the *ESA* to remedy what it perceives as shortcomings in the current regulatory regime. It is ACSESS’s position that these recommendations are unnecessary, unsubstantiated and would cause undue hardship to the staffing industry.

There is no evidence to support a need for these four recommended changes. While the Centre is able to cite individual anecdotes that seem to support their recommendations, ACSESS submits that there is no objective evidence to support the view that these individual anecdotes reflect systemic issues that require further changes to the *ESA*. Rather, they can be better addressed through better enforcement and compliance initiatives related to the current rules.

Wage Parity – As discussed earlier in these submissions, temporary employees are engaged for a wide variety of reasons. Like all employers, Temporary Help Agencies take into account numerous factors in setting wages, including

experience and individual qualifications, which is reflected in a wide range of wages paid to temporary employees. There is no guarantee that temporary employees will be equally qualified to those they are replacing or working alongside, and the government should not legislate wage parity as it would be an overreaching response to a situation that reflects a complex range of factors.

Joint and several liability – With the passage of Bill 18, Ontario has introduced a degree of joint and several liability for certain wages under the *ESA* to come into effect on November 20, 2015 – regular wages, overtime pay, public holiday pay and premium pay. ACSESS submits that there is no basis to expand the scope of joint and several liability under the *ESA*. First, despite significant study and consideration of the concept, it was rejected by both Manitoba and Quebec, and appears in no other statute in Canada. Second, the concept of joint and several liability is inconsistent with and undermines the Bill 139 amendments (and the policy underlying those amendments) designating Temporary Help Agencies as employers of record. Third, the Bill 18 amendments have not even come into effect yet, so there is no evidence that they will not achieve the Government's objectives.

Elimination of Client Fees – The Bill 139 amendments permit a small window during which a Temporary Help Agency may recover fees from a client that hires an assignment employee. The 6-month window in Ontario is shorter than the 8-month window in Manitoba. Given the costs involved in recruitment, training and database administration, it is important that Agencies have some ability to recover those costs, and the Bill 139 amendments preserve some balance in this area. Moreover, for some staffing activities (e.g. permanent recruitment), fees are necessary to permit the businesses to operate. Finally, there is no evidence that this limited ability to charge a fee to clients during the 6-month window is a barrier to permanent employment, so it is not a problem that needs to be addressed.

Ban on long-term assignments – ACSESS submits that there is no evidence that would support the need for a ban on long-term assignments, especially now that assignment employees are entitled to notice of termination and severance pay in the same manner as most other employees in Ontario.

6. Compliance and Enforcement

Rather than engage in any further legislative reform, ACSESS submits that the Government should focus its efforts on compliance and enforcement of the current provisions of the *ESA*.

Enforcement – Review the existing enforcement process and penalties with a view to improve appropriateness of penalties, fines and ramifications for breaches or violation of the existing provisions of the *ESA*. ACSESS would fully support stricter enforcement mechanisms.

Inspections – Continue to support and increase the presence of Ministry of Labour inspectors. Also, provide additional training to inspectors to improve the effectiveness and consistency of inspections and enforcement of the existing provisions of the *ESA*.