



**Proposed Amendments to Bill 139 –
An Act to amend the *Employment
Standards Act, 2000***

**Workers' Action Centre
Parkdale Community Legal Services**

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Workers Action Centre

The Workers' Action Centre is a worker-based organization committed to improving the lives and working conditions of people in low-wage and unstable employment. We work with thousands of workers, predominantly recent immigrants, racialized workers, women, and workers in precarious jobs that face problems at work. We want to make sure that workers have a voice at work and are treated with dignity and fairness. The Workers’ Action Centre provides information about workplace rights, strategies to enforce those rights and participates in campaigns to improve wages and working conditions in workplaces and in labour legislation.

Parkdale Community Legal Services

Parkdale Community Legal Service is a poverty law clinic providing assistance and legal representation concerning employment standards, employment insurance, human rights and occupational health and safety cases. In addition, we work with communities in low-wage and precarious work to improve labour standards.

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Workers' Action Centre and Parkdale Community Legal Services
Proposed Amendments to Bill 139, An Act to amend the *Employment Standards Act, 2000* in
relation to temporary help agencies and certain other matters

Section 1

1) Introduction

The way work is organized has changed drastically. More than 37 percent of jobs are part-time, temporary or contract. More than 700,000 people in Ontario have temporary jobs, many through temporary help agencies. As Labour Minister Fonseca has stated, “The nature of work may have changed, but our labour laws and regulations have lagged behind.”¹ People who work through temporary help agencies will work weeks, months, and sometimes years, alongside co-workers doing the same job but for 40% less pay,² fewer or no benefits, job and income insecurity and little protection against employment standards violations. The Ontario government is seeking to address the changing nature of work in this growing sector of the economy³ and improve protection and fairness for temporary agency employees with Bill 139, an act to amend the *Employment Standards Act, 2000* (ESA).

The government has said that the overall goal of Bill 139 is to ensure fairness and enhance protection for temporary help agency employees. The government seeks to protect temp agency workers by:

- making sure that they are not unfairly prevented from accessing permanent jobs when employers want to hire them from agencies;
- prohibiting temporary help agencies from charging fees to workers;
- guaranteeing that employees have the information they need about their assignments and access to information about their rights under the *Employment Standards Act*; and,
- ensuring that “elect to work” employees like temp agency workers have the same rights to public holiday and termination and severance pay that other workers have.⁴

We support these goals and purposes of the proposed legislation. As the employment and staffing industry has grown, practices have increasingly left workers receiving fewer minimum

¹ Statement to the Legislature by The Honourable Peter Fonseca, Minister of Labour Regarding: Temporary Employment Agencies. Queen’s Park, December 09, 2009.

² Statistics Canada, “Earnings of Temporary Versus Permanent Employees” **The Daily** (Wed., January 26, 2005).

³ Temporary staffing and employment agencies have grown from 1,300 agencies generating \$1.5 billion in the early 1990s to over 4,385 agencies generating over \$8 billion in revenues in Canada in 2007. Statistics Canada, “Employment services industry, **The Daily**, Wednesday May 7, 2008.

⁴ See the Minister of Labour’s news advisory, “Protecting Temporary Help Agency Employees”, “Fairness for Temporary Help Agency Employees” [Backgrounder] and Ministerial Statement to the Legislature, December, 9, 2009.

employment standards than other workers and little protection against violation of employment standards.⁵

We commend the government for taking leadership in addressing some of the critical issues facing temporary agency workers. Indeed, gaps in our labour laws and employment standards have created incentives for employers to move work beyond the protection of employment standards. Employers seek to hire people indirectly through intermediaries – temporary help agencies are only one way that employers are doing this. Disguising employment as independent contracting is another. Many of these practices seek to shift the costs and liabilities of the employment relationship on to intermediaries and workers who least can afford it. As such, the government should view the proposed legislation to improve protection for temp agency workers as a first step in updating and improving the ESA to protect people in precarious work.

What Bill 139 does put forward are some changes to the ESA that will extend coverage and protection of some minimum employment standards for temporary agency workers in the following areas:

- In connection with Bill 139, the government is providing access to public holiday pay and termination and severance provisions through repeal of “elect-to-work” regulatory exemptions;
- requiring information about employment standards rights and assignment information;
- extends temp agency workers’ anti-reprisals protections to include the client company (so client company will now be responsible for ESA reprisals on agency workers); and,
- making it illegal to charge temporary agency workers’ direct fees.

These are important improvements that will extend protection to temporary agency workers.

To meet the goal of fairness and protection for temporary agency workers, however, there are important amendments that must be made.

- The Bill fails to meet the government’s goal of “removing barriers to permanent employment” that temporary agency workers face. Bill 139 would prohibit agencies from imposing barriers on client companies’ hiring assignment workers **after** 6 months. However, Bill 139 introduces restrictions on labour market mobility by allowing agencies to restrict, through contracts and fees, a client company from hiring an assignment employee within six months of the worker starting at the client company. This could trap the majority of temporary agency workers in precarious temporary employment.
- The narrow scope of Bill 139 would still allow temporary staffing and employment agencies to charge workers’ fees for job placement.
- Special rules proposed for termination and severance in Bill 139 would substantially reduce temporary agency workers’ current entitlements. These changes would create potentially insurmountable barriers to accessing termination and severance rights.

The *Employment Standards Act* is remedial legislation meant to address the power imbalance inherent in the employment relationship and to protect vulnerable workers. Changes such as those put forward in Bill 139 should add to those protections and entitlements, not take away

⁵Please see discussion of the conditions facing temp agency workers in our “Submission to the Ministry of Labour Consultation on Work through Temporary Help Agencies” (2008) and **Working on the Edge**, (2007) <http://www.workersactioncentre.org>.

from those entitlements. Amendments must be made to Bill 139 to ensure that temporary agency workers do not see their employment standards entitlements reduced through the very Bill meant to improve their protection.

In Section 1, we will review the improvements that the proposed legislation could make for temporary agency workers. Then we will review the amendments that are necessary to achieve the goals of fairness and protection for temporary agency workers while avoiding unintentional consequences that would leave temp agency workers with fewer employment standards. In Section 2 we will provide a clause by clause analysis with more detailed recommended amendments.

2) Bill 139 -- steps to achieving fairness and protection for temporary agency workers

2(a) Elimination of “elect to work” exemptions for public holiday and termination and severance entitlements

With the introduction of Bill 139, the government updated the ESA and improved access to public holiday pay. It passed regulation 432/08 which eliminates the public holiday exemption for “elect to work” employees effective January 2, 2009. This change benefits many people in low-wage and precarious work (temporary agency, casual, on-call, and contract workers) in which employers classified them as “elect to work” in order to be exempt from paying public holiday pay.

“Elect to work” was intended to refer to those workers who can refuse work assignments without penalty. Under the Act, election can only be determined on a case-by-case basis, not on a sectoral basis.⁶ Yet most agencies in the temp industry classified all temporary agency workers as “elect to work” despite the reality that examination of many individual workers’ situation demonstrated that there was no real ability to “elect to work” without penalty.

“Elect to work” is based on the idea that certain workers “cannot be counted on to work regularly” and thus are not deserving of public holiday pay or termination and severance.⁷ The rise of temporary, part-time, contract work has supplanted the notion of “regular work” on which this notion is based. Eliminating the “elect to work” exemption for public holiday pay removes an outdated part of the Act that was used to deny public holiday pay to mainly low-waged workers in temporary, contract and irregular forms of work.

The government also announced its intention to pass a regulation that will remove the “elect to work” exemptions related to notice of termination and severance pay when Bill 139 is passed. Like the repeal of the “elect to work” exemption from public holiday pay, this move will benefit many workers, particularly those in low-wage non-standard forms of work – temporary agency workers, home care workers, on-call workers and casual workers. Workers that were previously

⁶ In 2004 the Ontario Labour Relations Board ruled in *Yardley v. Action Force* that “elect to work” exceptions must be considered in a contextual manner that is based on the facts of each case. *Yardley v. Action Force*, 2004 CanLII 22166 (ON L.R.B.). See also Employment Practices Branch, Employment Standards Act 2000 Policy and Interpretation Manual, Vol 2 (Toronto: Carswell).

⁷ Employment Practices Branch, Employment Standards Act 2000 Policy and Interpretation Manual, Vol 2 (Toronto: Carswell)

considered “elect to work” will be entitled to notice of termination (or pay in lieu of notice) and severance pay under the ESA.

We commend the government for moving decisively to remove the “elect to work” exemption for public holiday pay. This removes a long-standing inequality in the Act which denied workers with mainly low wages the potential of receiving nine days of public holiday pay per year. Further it removes the unfair advantage that employers who classified workers as “elect to work” had over other employers who did not and levels the playing field among employers.

There is no reason to wait until Bill 139 is passed to move forward on regulatory changes to remove the “elect to work” exemption for termination and severance. In the context of Ontario’s growing job loss -- 71,000 jobs lost in January, 2009 alone – it is critical that the government move immediately to expand access to termination and severance to those historically denied by the “elect to work” exemption. In the face of rising unemployment, workers need equal access to termination and severance entitlements now.

2 (b) Bill 139 reduces direct fees⁸ that can be charged to agency workers

Bill 139 will make it illegal for temporary help agencies to charge workers’ direct fees. This prohibition includes the process of registering with the agency, preparing for assignments (e.g., interviewing and resume writing), getting work assignments or any other services relating to a temporary assignment in a client company. Workers will be able to file claims to get any illegal fees back.

Prior to repeal of Ontario’s *Employment Agencies Act* in 2000, employment and staffing agencies could not charge any fees to workers for permanent or temporary work. In fact, most provinces prohibit such fees. However, without a statutory bar on fees, the practice of charging workers’ fees for permanent and temporary placement has grown since 2000.

The temporary agency workers that we work with face a variety of fees. One worker paid \$250 to register at an agency, while another had to pay the equivalent of his first week’s wages on an assignment to the agency. Another worker was charged \$15 for being late for work. The absence of clear rules making fees illegal opens up the space for agencies charge a variety of fees to workers and to pass on some of the costs of doing business to workers in the forms of fees. That is why Bill 139’s clear prohibition on temporary agencies charging assignment employee’s fees is important. But as will be discussed further below, Bill 139 only protects some workers from fees, leaving many others without protection (section 3 (a)).

2 (c) Information about the agency, client company and work assignments

Bill 139 requires agencies to provide employees with the legal and operating names of the agency and contact information.

Employment agencies have relatively low overhead costs as the bulk of the work is done by temp agency workers at the client companies’ locations. Workers experience “fly-by-night” agencies

⁸ An indirect fee is charged to the worker through the mark-up. That is the difference between what the company pays the agency per hour to lease or contract the agency worker and what the agency pays the worker per hour less statutory deductions and overhead costs. The markup is unregulated and can be anywhere from 30 to over 100%. A direct fee is charged directly to the worker for things like getting an assignment or training.

that close up shop only to reopen under a new name. Some agencies operate solely through the internet by recruiting and dispatching workers through a website. Requiring legal information about an agency is an important part of an effective employment standards enforcement strategy.

All too often temporary agency workers have insufficient details about the work and company that they are assigned to. Some workers report that they are only told by agencies where and when to show up for work. Bill 139 seeks to address this problem by requiring a temporary help agency to provide information when offering a work assignment that would include: name(s) of the client, address, contact names and information, wages, hours of work, general description of work to be done, and pay period.

The information requirement in the Bill is important for two reasons. First, temp agency workers need information about when and where they will work and what they are doing so that they can plan their working lives, as do workers in more standard forms of employment. Second, having information about the client company, wages and working conditions are important parts of an employment standards enforcement strategy. Should rights be violated or wages go unpaid, this information is important for workers to pursue redress.

There are, however, some important features of the information requirement that need amendment. These are addressed in 3(d) below.

2 (d) Information on employment standards rights

The Ministry of Labour will be developing information about the employment standards rights and responsibilities of temporary help agencies, client companies and agency workers and make translations of this information. Bill 139 requires agencies to provide all employees with a copy of this information, in an employee's language if available.

This is an important part of Bill 139. Getting information about employment standards rights and how to enforce those rights into workers' hands in workers' first language, where possible, is an crucial piece of a larger enforcement strategy.

2 (e) Extends some responsibility for employment standards to client companies

The proposed legislation would extend anti-reprisal protections under the ESA to include both the agency and the client company. The client company will be responsible for its reprisals on assignment employees. This change is important for temporary agency workers who are often left struggling to assert their rights in the triangular employment relationship that shapes temporary assignment arrangements. This change will allow workers who are penalized by the client company for trying to enforce their rights to make a claim against client companies that may be responsible for a reprisal recognized by the ESA and enable workers to seek compensation and reinstatement.

The Bill signals the Ministry of Labour's intent to pursue unpaid wages by making third party orders on the client company when the temp agency does not comply with orders to pay workers. We are hopeful that this will improve the government's ability to collect unpaid wages. However, what is needed to ensure access to employment standards is joint and several liability between the client company and the agency for all wages and employment standards entitlements.

2 (f) Reduces barriers to permanent jobs.

The proposed legislation will remove some of the barriers that those temporary agency workers on longer-term assignments face when trying to be hired directly by a client company. Bill 139 will prohibit an agency from restricting workers from being hired directly by the client company (for example through a non-competition contract or charging a fee of financial penalty to the worker). It would also stop an agency from restricting a client company from giving a reference for an assignment worker, hiring an assignment worker directly or charging a client company a fee for hiring an assignment worker directly.

We commend the government for recognizing the fundamentally unfair practice in the industry that restricts and bars workers from moving from one employer (the agency) to another (the client). However, the proposed legislation would allow agencies to erect barriers to client companies hiring agency employees directly within six months of the start date of the assignment. This barrier to employment must be removed, as discussed in 3(b) below, to ensure that the bill can meet the government's goals of fairness and to not limit workers mobility out of a labour market characterized by low wages and uncertainty.

3. Amendments required to achieve fairness and protection for temporary agency workers.

3(a) Bill 139 – Who's left out?

The government has chosen to narrowly define who and what work arrangements will be regulated through Bill 139. Section 74.1 defines the arrangement between a “temporary help agency,” “assignment employee” and “client” company.⁹ The definition of the three parties is clearly tripartite: a client company contracts with an agency to provide an employee of the agency to work for the client company on a temporary basis. Bill 139 would construct the agency as the employer of the assignment worker. The Bill also restricts liability of the client company for the person assigned to work on a temporary basis to issues of reprisals. It is unfortunate that the government did not recognize in Bill 139 the triangular or tripartite employment relationship that shapes the lives of workers hired indirectly by companies through agencies. However, the government can still seize this opportunity to amend Bill 139 to recognize the triangular employment relationship.

Bill 139 excludes any arrangement beyond a temporary work assignment for a client company. The proposed legislation therefore excludes almost one-third of the employment and temporary staffing service industry's practices.¹⁰ The industry generates 28 percent of revenues from services connected to permanent job placement and 70% from temporary staffing services (temp agency).

The definition of temporary help agency is too narrow in scope and excludes many emerging practices that exploit workers under the guise of “employment services”. These are just some of the experiences documented by the Workers' Action Centre that could be excluded:

⁹ See page 19 of this submission for section 74.1 interpretation

¹⁰ Statistics Canada, “Employment services industry”, The Daily, May 7, 2008.

- Employment agency that charges hundreds of dollars to sign up for job placement service (for permanent or temporary work) in which workers may or may not be placed in jobs or receive promised employment services;
- Security agency that promises applicants that they will be placed in a permanent or temporary security guard assignment once they complete a training course for a substantial fee – job rarely materializes;
- Cleaning company misclassifies workers as independent contractors then charges fees for work assignments at its clients; and,
- Live-in caregivers that face fees of thousands of dollars for placement in caregiver jobs (paid in Canada).¹¹

The Ontario *Employment Agencies Act* that was repealed in 2000 prohibited charging workers fees for any services provided by the temporary help and employment services industry; including services relating to permanent job placement as well as temporary job assignments. Other jurisdictions in Canada prohibit charging workers fees broadly for all employment agency services (see for example, British Columbia, Alberta, Manitoba, Nova Scotia, Nunavut, Yukon, Northwest Territories).

The proposed definition of “temporary help agency” and scope of Section 74.1 must be broadened to encompass temporary and permanent staffing placement and services. If this is not done, Bill 139 will have the effect, if not the intent, of creating loopholes that would threaten the overall goals of the legislation. The Bill in its current form would provide legislative incentives to companies to charge fees for temporary and permanent employment services outside the narrow confines of “temporary work assignment”. It would leave workers who are in the most desperate of straits, those that are unemployed and looking for work, to face new and growing fees for employment services and placement. We trust that this is not the intent of the government but it would be the effect. As such we recommend the following changes:

Recommended Amendment

- Change name of new Part XVIII.1 from Temporary Help Agencies to Employment Agencies*
- Change 74.1 (1) Interpretation for “temporary help agency” to read:*
“Employment agency” includes the business of providing services for the purpose of finding workers employment with employers or supplying employers with workers for employment by them or that employs persons for the purpose of assigning them to perform work on a temporary basis for clients of the employer.
- Reflect employment agency interpretation throughout Act.*

¹¹ As a recent investigative series in the Toronto Star concludes: “Once nannies arrive in Canada, it's up to provinces to enforce labour laws. All four western provinces ban agencies from charging nannies "placement fees" for Canadian jobs, but the practice is common in Ontario. Some fees here reach as high as \$10,000 for jobs that don't turn up, the *Star* found.” Robert Cribb, Dale Brazao, “Critics want crackdown as nannies exploited” **Toronto Star** March 17, 2009.

Exclusion of home care workers

Section 74.2 excludes a worker who is an “assignment employee” assigned to provide services under contract with the Community Care Access Centre (CCAC) or who is doing work governed by a contract with the CCAC.

There appears to be two reasons for this exemption. First, it is the government’s view that homecare agency assignments are different than temporary agency assignments. Second, the government has stated that those workers covered under section 74.2 would have to wait until October 1, 2012 before the repeal of the “elect to work” exemption would come in to effect. After that time, homecare provided under contract with CCAC would be governed by severance and termination provisions in the ESA.

There are several problems with the exclusion of homecare workers and section 74.2. First, the government should enable public debate of its intention to withhold termination and severance entitlements to CCAC-contracted homecare workers for three years longer than other workers who will benefit from the repeal of the “elect to work” exemption.

Presumably the intent of this exclusion is to shelter the Ministry of Health and home care agencies from liability for termination and severance costs that would arise from subcontracted homecare workers who will finally be getting the same minimum termination and severance benefits that other workers get. While the Ministry of Health has a fiscal responsibility to Ontario taxpayers, it also has a responsibility to the workers delivering public long-term health care services who have the lowest pay, least benefits and little job and income stability. As studies have shown temporary work and low income are often predictors of poor health which in turn adds costs to our health care system.¹² Rather than work to deny termination and severance entitlements to homecare workers in long-term care, surely the Ministry of Health should work to ensure employment and income stability to people in precarious work when subcontracting public health care services and would be in line with the government’s poverty reduction strategy.

Second, the government’s plan to place a three-year delay on termination and severance for homecare workers is done through regulatory changes. Such a regulatory change does not require an explicit exemption from coverage under the proposed Temporary Help Agency sections of the Act. The definitions of “assignment employee”, “client” and “temporary agency” would exclude homecare agency work arrangements that do not conform and would rightly allow those temporary assignments that do conform. The effect of the exemption of homecare workers may have the unintended consequence of denying protection against fees and other abuses to assignment employees that may get an assignment under a CCAC contract.

Recommended Amendment:

Delete Section 74.2 (exemption of home care agency workers under CCAC contract) in its entirety

¹² Marlea Clarke, Wayne Lewchuk, Alice deWolff, Andy King, “This Just Isn’t Sustainable: Precarious Employment, Stress and Workers’ Health” (Unpublished paper, McMaster University, October 2006).

Home care workers under contract with the CCAC should not have to wait three years to get termination and severance entitlements. Repeal of the “elect to work” exemption from termination and severance should come in to effect immediately for all workers.

3 (b) Unfair six-month barrier to jobs

The government is right to prevent agencies from restricting a client from directly hiring a worker that was on assignment at the company through this legislation. It recognizes that it is fundamentally unfair to restrict or bar workers from moving from one employer to another. This is especially the case when temporary agency workers make 40 percent less than their directly-hired co-workers, have few employment benefits and face higher health risks due to employment strain than do their permanent co-workers.¹³ That Bill 139 would allow agencies to apply restrictions on companies' directly hiring assignment workers within six months of starting an assignment sets dangerous precedents.

There is little Ontario research on the average duration of assignments. However, one survey of temporary agency workers in Toronto found that 66 percent of agency workers had assignments that lasted six months or less.¹⁴ This would be consistent with the experience of temporary agency workers that contact the Workers' Action Centre. As such, effectively allowing a six-month barrier on companies directly hiring assignment employees would significantly impact on the majority of workers that the government seeks to protect with this Bill. It would set the framework for employment practices that trap low-wage workers in a precarious temporary form of employment for six months. Temporary agency workers will go from one short-term assignment to the next; never reaching that six month period in which barriers will be prohibited. The majority of temp agency workers will face barriers to be directly hired in each assignment.

Bill 139 would institutionalize restraints on client companies and assignment employees' ability to enter into an employment relationship. Such a provision would establish a dangerous precedent in Ontario employment practices. Currently non-competition or restraint-of-trade clauses in employment contracts are largely unenforceable. Setting out in legislation that restraints on hiring employees can take place institutionalizes restraints on what was a free labour market.

Any exemption on prohibiting barriers to direct employment is going to create negative consequences for workers and client companies. Agencies will replace an assignment worker in a longer-term assignment with a client company just prior to the 6-month limit and replace them with another assignment worker. This will take place in manufacturing and other sectors with the lowest wages and workers in the most vulnerable situation.

¹³ *ibid*

¹⁴ The McMaster Work and Health survey was based on 1753 respondents from 60 census tracts in Toronto. 1995 was the last year that Statistics Canada collected job tenure by temporary agency workers. It found that almost 62% of temporary agency workers had jobs lasting 6 months or less. Cited in, Leah F. Vosko, (2000) **Temporary Work: The Gendered Rise of a Precarious Employment Relationship** (University of Toronto Press). 136.

The employment and staffing services industry will argue that limiting its ability to charge fees to client companies that directly hire assignment employees wrongly limits commercial transactions. But employment agencies are unique. Agencies do not sell widgets; they “sell or lease” human labour. The contractual or financial restraints being regulated are about establishing and terminating employment relationships and are within employment standards jurisdiction. It would set a dangerous precedent to regulate labour leasing through commercial rather than employment laws. The government should not, through Bill 139, cede regulation of labour market protections to the commercial realm.

The employment and staffing industry will also argue that it will financially hurt the industry if it cannot charge client companies fees for hiring assignment workers directly. Experiences from other jurisdictions where such restraints on temporary to permanent hire are prohibited demonstrate that this will not be the case. In European countries, where temporary help agencies are regulated, financial or contractual restraints on direct hiring by the client company are prohibited. Many temporary help agencies that operate in Ontario are part of multi-national temporary help agencies that operate in these countries where barriers to permanent hire are prohibited and do so quite profitably.

The argument that agencies will suffer financial hardship if they are not able to charge client companies a fee to cover recruitment neglects the fact that agencies spread the costs of recruitment in the overhead costs covered in the markup fee. Agencies receive a fee for recruiting and maintaining a pool of labour through the mark-up on hourly wages paid by the client company for an assignment employee. The very purpose of Bill 139 is to ensure that the costs of employer obligations under employment standards and the costs of doing business are born by the employer (and through the mark-up, the client company) not employees. Prohibition on barriers to hire without exception ensures that this underlying goal of the legislation will be met.

It would set a dangerous precedent to allow agencies to charge client companies an additional fee to compensate for future loss of earnings from a worker. In other forms of employment, employers bear any loss when a worker who it may have trained or given valuable experience on the job, terminates employment. These employers cannot get payment from future employers for any “value added” to a worker.

Recommended amendment

Remove the six month exception to prohibitions on barriers to employment

Delete section 74.8 (2) and 74.8 (3)

3 (c) Termination and Severance

Under the current ESA, temporary agency workers are entitled to the same termination and severance entitlements as other workers unless they are deemed “elect to work” which can only be determined on an individual case by case basis. Despite the legal requirement for determining election on an individual basis, the practice in agencies and the industry has been to misclassify all agency workers as “elect to work” to avoid termination and severance responsibilities.

As discussed in 2(a), eliminating the “elect to work” exemption for termination and severance will remove an outdated part of the Act that is used to deny termination and severance to mainly low-waged workers in temporary, contract and irregular forms of work. Further, removing the “elect to work” exemption is the most effective way of bringing fairness and protection of termination and severance benefits for temporary agency workers. **The government should proceed immediately with a regulation to remove the “elect to work” exemption for termination and severance (O.Reg. 288/01 2.(1) 10).**

3(c)(i) Temporary agencies proposed changes to termination and severance.

Temporary agencies and their industry representative, the Association of Canadian Search, Employment and Staffing Services (ACSESS), are trying to avoid or reduce liability for termination and severance through amendments to the Bill. The practice of misclassifying all temporary agency workers in the sector as “elect to work” to avoid termination and severance will no longer be possible once the “elect to work” exemption is removed through regulation.

Now the industry is seeking to reduce its liability for termination and severance by limiting its legal responsibility for employees. Currently agencies are responsible, as employers, for agency workers from the time they are registered at the agency to the time the employment relationship is terminated (including periods of active and inactive employment). Section 74.4(2)(b) of Bill 139 confirms this view of the Ministry of Labour. But the industry only wants to be responsible for its employees when they are on assignment and earning money and not when workers are laid off of an assignment and available for the next assignment. They take this position even though the industry is based on its ability to make available a pool of labour for client companies. By reducing its current responsibility, the industry hopes to reduce workers’ entitlement for termination and severance to reduce employment costs.

By removing the “elect to work” exemption and confirming the employment responsibility of agencies for employees throughout the employment relationship should make it harder for agencies to avoid termination and severance responsibilities. This will begin shifting some of the costs that agency workers have born for employment and income instability back on to employers (agencies and through the mark-up to client companies) as the ESA provides for. As stated above, the purpose of Bill 139 must be to ensure that employers bear the responsibility and costs for minimum employment standards – not workers.

ACSESS says that making the temp agency industry responsible for termination and severance similar to other employers in Ontario is a higher burden. In fact, by ensuring that temporary help agencies pay the same termination and severance that other Ontario employers pay, it levels the playing field among Ontario employers.

The temporary help industry will also argue that having to pay termination and severance to those workers that qualify will cause financial hardship for the industry. While it may be a period of adjustment, experience in other jurisdictions shows that it will not drive companies out of business. For example, agencies have long paid public holiday pay in some provinces but not

others because of different rules. The industry passes on the costs of statutory obligations to client companies in the overhead costs charged through the mark-up fee.

In many European countries, temporary help workers must receive the same wages and benefits that they would have received if directly hired by the client company. In these situations, agencies charge client companies on top of this equal wage rate to recoup overhead costs and their profits. Agencies operate in countries with different regulatory requirements yet still operate quite profitably. Many agencies operating in Ontario also operate in Europe. The reason why the industry can still thrive in jurisdictions with different agency employer costs is because the industry is not driven by cost factors. That is, the industry does not maintain its market by providing the cheapest labour source. Rather, it survives because it offers client companies many benefits such as buffering the client company from liability for employer sponsored benefits (like pensions and health), workers compensation, and flexibility in labour sourcing, just to name a few things.

The temporary help industry will also argue that it is too much of an administrative burden to track when workers reach 35 weeks without assignment. We would agree. That is why we recommend that temporary agencies follow the same rules as other Ontario employers when it comes to termination and severance. There are ample best practices in human resources for monitoring when a temporary layoff becomes permanent and termination and severance become owing.

3(c)(ii) Bill 139's special rules on termination and severance create lesser entitlements for temp agency workers

Bill 139 would create special rules for termination and severance that creates a new barrier for temporary agency workers to minimum employment standards. Current Ministry of Labour policy is to provide temporary agency employees with the same access to termination and severance upon lay-off (the "13 weeks out of 20" rule) that other workers get under the ESA.¹⁵ Section 74.11 of Bill 139 creates almost insurmountable barriers to this entitlement by making workers go 35 consecutive weeks on layoff before the layoff becomes permanent and a temp agency worker could access termination and severance. This is a significant step backwards and is inappropriate in remedial legislation such as the ESA.

The Bill would create a much higher and harder to achieve threshold before temporary agency workers' temporary lay-off would be deemed permanent and termination and severance would apply. The proposed legislation would require agency employees to be available for assignment every day for 35 consecutive weeks without any right to be unavailable due to illness or family emergency leave for example. Only after this would the layoff become permanent and termination and severance become owing. The agency, on the other hand, only has to offer a worker a one-day assignment in the 34th week to stop the clock and avoid termination and

¹⁵ Currently temporary agency workers with weeks of non-assignment (lay-off) that exceed a period of "temporary lay-off" would be eligible for termination or severance if that lay-off exceeded 13 weeks of lay-off in a period of 20 weeks or 35 weeks in a period of 52 weeks if substantial payments or benefits such as a supplementary unemployment plan from the employer continue.

severance. In such a case, the worker would have to go another 35 weeks without assignment. This could go on indefinitely. There is nothing in the Bill to stop this loophole.

The ESA is remedial legislation aimed at addressing the power imbalance inherent within the employment relationship. Statutory termination pay acts to “cushion employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment.”¹⁶ Adding an extra burden to assignment workers of an additional 22 week wait is not in accordance with the legislative intent for termination pay.

The Bill would add the same burden of a higher threshold for severance as it does for termination. Severance provides compensation for service and associated losses from termination of longer-term employment. Similarly the Courts have concluded that severance pay is intended to recognize the investment that a worker has made for a company.¹⁷

Temporary agencies and its employees have an expectation that their work assignments may be sporadic at times. The temporary lay-off provisions in Section 56 (2) are appropriate for this employment situation. It is reasonable that a lay-off of 13 weeks in any period of 20 consecutive weeks would constitute termination of the employment relationship for temporary assignment arrangements.

Bill 139 would disentitle temporary agency workers from termination or severance if unavailable to work due to illness or family emergency

Section 74.11 would exempt temporary agency workers from the ESA’s excluded week provision (ESA, 2000 s 56 (3 to 3.6)). The excluded week allows workers who are on lay-off to forego working for a week because they are unable or unavailable to do so without disentitling them to termination and severance. This would include situations where workers cannot work due to injury, illness, and family emergency.

Again, there is no clear reason for disentitling assignment workers to the excluded week. We would argue that the exemption of temporary agency workers to the excluded week is discriminatory under the Ontario Human Rights Code.¹⁸ The failure to provide assignment workers with an “excluded week” provision prevents them from being able to access termination and severance entitlements when they have been unable to work because of a temporary or long-term illness or disability or because of family responsibilities or other statutory leaves.

Bill 139 would significantly reduce the entitlements of assignment employees to termination and severance. As remedial legislation, amendments such as those in Bill 139 should augment, not restrict or claw back, employee entitlements. When introducing this Bill, the government said that it wanted to ensure “that “elect to work” employees like temp agency workers have the same

¹⁶ Rizzo & Rizzo Shoes Ltd. (Re, [1998] 1 S.C.R. 27 at paras 25 and 26.

¹⁷ Telegram Publishing Co. v Zwelling (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19; (endorsed by Rizzo Shoes, supra at para 26).

¹⁸ Please see submission to the Standing Committee of the Legislative Assembly hearing on Bill 139 from the Human Rights Legal Support Centre, March 18, 2009.

rights to public holiday and termination and severance pay that other workers have.”¹⁹ On the contrary, unless amended, Bill 139 will defeat that goal.

Recommended Amendment

The government should proceed immediately with a regulation to remove the “elect to work” exemption for termination and severance [O.Reg. 288/01 2.(1)10]

Temporary help agencies should have the same termination and severance rights as other employees. Remove special rules for temp agency workers that would reduce entitlements.

Delete Termination and Severance Section 74.11²⁰

3 (d) Information requirements

Minister Fonseca has stated that Bill 139 seeks to address the realities of today’s labour market. We support this laudable initiative. The information requirements in the proposed legislation’s Section 74.5 and 74.6 help address that reality by requiring that information about the agency, client company and assignment be provided to the temporary agency worker. However, to fully address the realities that temp agency workers face, workers need to know the expected duration of the assignment. Also, client companies need to be required to sign on to the information being provided to confirm details of the arrangement. This is essential if temp agency workers are to enforce their employment standards rights.

First, the expected term or duration of assignment must be added to the list of required information under section 74.6. Temporary agency workers need to plan their working lives like other workers. With the exception of leaves, vacation and approved sick time, assignment workers have a responsibility to be at work in the client company for the duration of the assignment. But Bill 139, as currently written, requires no responsibility on the client company and agency to inform the assignment worker about how long that assignment will be.

Bill 139 confirms the Ministry of Labour’s practice that the termination of an assignment does not mean termination of the employment relationship, but rather, commences a period of layoff. As such, there is no cost liability to enumerating the expected term of assignment in the information documents. Stating the term of assignment is important, however for workers to actually be able to enforce ESA reprisals protections. Workers report that reprisals often take place through termination of assignment. If the expected term of assignment is clearly outlined from the beginning of the assignment, workers are better able to enforce their ESA rights and protections in the case of reprisals.

¹⁹ Ministry of Labour “ Protection Temporary Help Agency Employees, News Advisory, December 9, 2008 ontario.ca/labour-news

²⁰ with the exception of subsection 74.11(5) which deals with posting requirements. Subsection 5 should remain in Bill 139 because it requires employers to provide notice to each employee, regardless of where they are assigned or on layoff, in the event of the agency terminating 50 or more employees within a four-week period.

Second, Bill 139 must be amended to require the client company to sign and date the information document required under section 74.6. The client company controls much of the work process – hiring and terminating the assignment worker, setting hours of work, overtime, breaks, assigning work to be done, training and supervising work, maintaining records of hours worked for wages to be paid to name a few. The agency cannot control these facets of work. When there is a dispute about ESA rights between the client and the assignment worker, the agency tends to take the side of the client because it is financially reliant on the client for its business. This leaves workers going back and forth between the client and agency when there are disputes about ESA entitlements. Requiring the client company to sign on to the information document will enable the worker to better enforce employment standards rights when the client company has taken reprisal action against the worker for trying to enforce their employment standards.

Recommended Amendment

Add new paragraphs under section 74.6(1):

7. The start date of the assignment and expected end date of assignment.

Insert new subsection:

The client company shall date and sign the information document provided under 74.6(1) and provide a copy of this form to the assignment worker and agency.

4) Framework of equality

While we believe that Bill 139 advances a framework that seeks to provide protection of minimum employment standards, it does not put forward a framework to provide a standard of equality in workplace standards for temp agency work. During the Ministry of Labour's consultation process, temp agency workers sought provisions for equality and non-discrimination in our workplaces. Specifically we called for equal treatment for agency workers (equal wages and employment conditions such as pay package, statutory and employer-sponsored benefits and conditions).

Legislators and policy makers in European countries, the European Union and the International Labour Organization²¹ recognize that regulating employment agencies, even within a framework protecting agency workers from abuse, serves to legitimize temporary work agencies in the process. That is why most of these bodies have tried to balance this legitimization of temp agency work by requiring equal treatment in wages and working conditions for workers hired indirectly through employment agencies.

The government still has the opportunity to ensure the temporary agency workers take real steps towards substantive equality in the labour market and enshrine the principle that people in precarious work are deserving of equality and non-discrimination. Temporary agency workers should receive the same working and employment conditions (pay package, statutory and

²¹ See for example, European Parliament and Council of the European Union Directive on Temporary Agency Work, 2008 and UK joint declaration on temp agency work, 2008.

employer-sponsored benefits and conditions) that the client company provides to other workers in all forms of comparable work.

5) Conclusion

Many of the provisions of Bill 139 do advance a framework to provide fair access to minimum employment standards (e.g., prohibition on some fees; information about ESA rights; information about the agency, client company and assignment; protection against client company reprisals). But to meet the goals of fairness and protection of temporary agency workers set by the government, the amendments outlined above are necessary (no barriers to direct hiring by the client company; broaden the scope of coverage; expand information required). The ESA is remedial legislation and as such Bill 139 should expand, not restrict or claw back employee entitlements. The substantive barriers to permanent hire by the client company and to access termination and severance for temporary agency workers contained in Bill 139 must be removed.

These broad amendments summarized above are necessary to ensure that temporary agency workers will receive full and equal protection under the ESA. Additional amendments to improve the effectiveness of Bill 139 in meeting the goals of fairness and protection may be found in the attached clause by clause review.