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## Temp industry given more than passing glance

*Ontario looking into practices of \$8 billion staffing industry*

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Their sad stories are heard often temporary workers unfairly treated by unscrupulous employers but are their dire circumstances the result of an uncaring industry or just a few rotten apples, and do the rules need to change?

In Ontario, the provincial government is looking into the industry and its practices and several interested parties have submitted papers detailing their opinions. In an open letter earlier this year, Minister of Labour Brad Duguid said there is concern certain practices of some temporary agencies may be negatively impacting Ontario workers. Through a *Consultation Paper on Work Through Temporary Help Agencies*, Duguid said he wants to ensure legislation reflects the realities of today's workplaces and labour market in a balanced way.

There are several issues being explored, such as fees charged in exchange for a promise or offer of employment, barriers to permanent employment (such as fees or contracts), exemptions for elect-to-work workers who can accept or refuse an agency assignment but are partly exempt from holiday entitlements and completely exempt from termination and severance requirements and liability.

More than 700,000 people in Ontario have temporary jobs and much of this employment is through temporary help agencies, of which there are about 1,000 in Ontario. The staffing industry in Canada is an \$8 billion industry, according to Statistics Canada, and Ontario represents more than one-half (57 per cent) of that business.

But the industry has changed through the years, largely from short-term, clerical jobs to a wide range of occupations in manufacturing, construction, service and information technology where employees can be assigned for several months or years and often work side-by-side with full-time staff.

This situation has raised questions about whether temporary help agency workers are being treated fairly, compared to permanent or regular employees, said the government. Under the Employment Standards Act (ESA) in Ontario, there are no special provisions for temporary employees.

But the rules need updating because they are based on a standard employment relationship developed after the Second World War, said the Workers Action Centre in Toronto in its submission, and increasingly gaps in our labour laws and practices have created incentives for employers to move work beyond the protection of employment standards.

While employers are looking for more flexible employees and work arrangements, that drive shouldn't be allowed to create a tier of second-class workers essentially created by a gap in protection, said Sonia Singh, an organizer with the centre.

Everyone has the same objectives, to ensure there's good legislation, that people follow the laws, that people who need to be protected are protected, said Steve Jones, president of the Toronto-based Association of Canadian Search, Employment and Staffing Services (ACSESS), which also submitted a response to the government.

### **Elect to work in question**

One of the biggest areas of contention is the elect-to-work exemption, which the centre said is outdated and does not conform to current labour market practices, and only two other provinces, New Brunswick and Prince Edward Island, have similar exemptions.

It's a really widespread practice, from the big temporary agencies to small, fly-by-night operations, said Singh. It's too much of a grey area and is unfortunately open to misuse.

These employees are often needed to fulfill certain work requirements, said James Heeney, a Toronto-based employment lawyer with Rubin Thomlinson.

Long-term employees are required to work when dictated, but being categorized as elect-to-work employees, they are not entitled to statutory holiday pay, termination pay or severance pay, he says. From the employees perspective there appears to be a gap in the legislation.

Some staffing services probably, for a matter of convenience, over-generalize whether or not a worker is really in an elect-to-work arrangement, said Jones. Most people when they arrive at a temporary staffing service for the first time are likely entering into an elect-to-work arrangement. However, it doesn't always remain that way.

And since true elect-to-work employees can only be determined on a case-by-case basis, the exceptions in the ESA must be maintained, according to ACSESS, which would support greater enforcement, but any attempt by the Ministry to revoke the exemptions would have serious financial implications on our members.

When a temporary employee has been on a continuous assignment for several months, ACSESS recommends members create a company policy recognizing the employee as eligible for a statutory holiday or an equivalent, said Jones.

But even if many agencies provide holiday pay after a certain number of hours or weeks of consecutive work, no minimum period is required under the ESA to be eligible for holiday pay, said Singh.

### **Combating fees**

Agencies should not be able to charge workers or companies fees for directly hiring workers, the Workers Action Centre also said in its submission.

Conversion of a worker from indirect to direct hire after placement through a temp agency is not the same as a fee for permanent placement charged to the company.

People should not be punished because of a contract between an agency and client company the employee knows nothing about, said Singh.

The agency is already making a profit on the markup of wages its charging to the client company.

In addition, Ontario should join jurisdictions such as British Columbia, Alberta, Saskatchewan and Manitoba that prohibit requiring payment for any service as a condition for being placed in a job, said the centre.

Charging fees to a candidate is wrong, said Jones, as the staffing firm earns income from the client, not from an employee or worker or candidate. And an agency contract should not state an employee cannot take a permanent job with its client business, unless there are bona fide reasons (such as a confidentiality agreement or a non-compete clause).

However, if a company hires a temporary person for permanent work, it has to pay a fee to the agency, he said, since this is an efficient and effective way, other than running your own ads, hiring your own HR department or going to a specialist to help you find these people and paying a fee.

It can be paid in a one-time lump sum or over time, so if a client chooses to hire a worker directly and the agency has received its money over several months, the client can go ahead.

But if you hire them sooner than that, you have to pay the balance of the fee, said Jones. So the employee should know, if they try to go around that, the company would end up having to pay for her. Thats the deal.

## **Liability**

When it comes to liability, the staffing agency and the client company must share responsibility for violations of the ESA, said the Workers Action Centre, because the agency essentially functions in an HR and payroll capacity while the client company has a day-to-day work relationship with the worker.

The issue of unpaid wages is the direct result of two employers and its very easy for workers to get lost in the shuffle, said Singh, adding it can also have health and safety consequences. Any company benefiting from the work of temporary workers has a share of responsibility to make sure theyre getting paid according to the law.

But staffing firms exercise absolute control in the process of recruitment, selection, offers of employment, wage determination and assignment of work and determine how, when and where the work is to be performed, said ACSESS.

There is a clear employer-employee relationship between a staffing company and a worker and no employer relationship between a worker and a temporary assignment, said Jones.

Workers should understand their rights or contractual terms and not be confused with other companies employees and their terms, said Jones, and the industry and government could do a better job in communicating the rights and privileges of employees and obligations of employers, so those confusions dont occur.

Temporary workers are often the employees with the least bargaining power to negotiate a better contract, said employment lawyer Heeney.

Often, for budgetary reasons, employers use temporary employees but the concern is with long-term arrangements, he said.

Often times the client dictates the temporary employees hours of work, tasks and even does performance reviews. During this time, the employment agency often does little but pay the employee, he said. The question becomes whether this employee was really employed by the client, who controlled all aspects of the relationship, or the temporary agency, who was simply a conduit for the agreement.