



**Ministry of Labour,
Training and Skills
Development**

Improving Compliance with the Employment Standards Act, 2000 in the Temporary Help Sector

Proposal Number:20-MLTSD 012

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Temporary Help Agency Consultations
Employment and Labour Policy Branch
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About

The **Durham Community Legal Clinic (DCLC)** is a Community Legal Clinic that provides legal services, information, education, and representation for historically marginalized and low-income residents of Durham Region. DCLC also engages in advocacy and law reform activities, in particular to ensure that our laws properly consider the perspectives of historically marginalized and low-income Ontarians. The main areas of services DCLC provides include employment law and related services, housing and tenancy issues, and social benefits.

The **Durham Access to Justice Hub**[®] (the “Hub”) was established by the clinic in 2019 with the assistance of LAO. This inter-agency and inter-disciplinary initiative intended to provide legal services beyond the income thresholds and subject matter of LAO, and other social, financial, and psychological services. These cooperative relationships seek to foster better client-centered services, reduce administrative barriers and silos, and improve efficiency of services that are funded or subsidized by taxpayer dollars. Some techniques used to achieve these goals include recruitment of volunteers to contribute towards improving access to justice, and by embedding students into workflows and innovative projects through experiential education. Through the Hub, DCLC provides even broader services to focus on the root causes of poverty, and engages in deeper forms of poverty alleviation.

Omar Ha-Redeye is a lawyer and the Executive Director of DCLC. He holds a JD from Western University, and an LLM from Osgoode Hall. He has received numerous awards for his efforts in law reform and advocacy on behalf of historically marginalized and low-income populations, including the Queen Elizabeth II Diamond Jubilee Medal, and the OBA Foundation Award.

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“Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person’s dignity and self-respect.”¹

A. Temporary Help Agency Registry:

In your opinion, what would be the advantages and disadvantages of a temporary help agency registry? How could the disadvantages be mitigated?

The Durham Community Legal Clinic (“DCLC”) is aware of the important role that Temporary Help Agencies (“Agencies”) play in connecting Ontarians with accessible and meaningful employment, and the prominent role they play in Ontario’s economy. An estimated 128,000 FTE were employed by such agencies in 2019, representing approximately 2.6% of employment in the province. This is a service we predict will become increasingly valuable as the provincial economy rebounds from the effects of the COVID-19 pandemic. We believe that if this proposal is implemented correctly, with its primary focus being on worker protections, it will have a meaningful impact on all Ontarians, especially the province’s most vulnerable and those living in poverty.

As the role that these Agencies play in Ontario’s economy becomes more pronounced it follows that oversight must increase accordingly, and the DCLC is in favour of the proposal to create an agency registry. While the proliferation of these agencies play an important role in connecting Ontarians with employment, they also reduce employer’s liability for workplace accidents and workers’ rights.² If not properly controlled, these agencies can do more harm than good, and can contribute to a cycle of desperation and poverty for their workers.

Employment standards enforcement can be difficult, despite many of these workers having many protections under the *Employment Standards Act*.³ This is often in part because violations often occur in the shadows, and enforcement often relies upon workers themselves to request remedies and drive the

¹ *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 SCR 313 at para 91.

² Sara Mojtehdzadeh, Brendan Kennedy, “Undercover in Temp Nation,” Sept. 8, 2017, Toronto Star, available at: <<https://projects.thestar.com/temp-employment-agencies/>>.

³ 2000, SO 2000, c 41.



process forward. While we recognize that this allows empowered workers to hold employers to account, the reality is that in many cases workers are not appraised of their rights or the responsibilities of their employers. Some agencies use this to their advantage in order to exploit workers who are new to the workforce, in some cases charging exorbitant fees to already vulnerable workers.⁴

It is our hope that at a minimum, the creation of a registry will allow workers to confirm that the agency they are engaging with is legitimate, and that it does not have a history of employment standards violations, or a poor health and safety record. As a result, we would anticipate a reduction in employment standards violations, and worker fatalities. We are also confident that implementing a registry will result in a decrease in labour trafficking in the agriculture, construction, automotive, and hospitality sectors, and particularly decrease in undocumented workers across many industries. We are optimistic that this change will see the conditions improve for these workers, who have been historically exploited, and disproportionately impacted by the COVID-19 pandemic.⁵ Accordingly, we would hope that any changes in this proposal contain provisions for the protection of these workers, many of whom may lose any precarious employment they currently possess as a result.

We would suggest that by educating workers about agencies we would also see an increase in the number of workers who are empowered to bring claims regarding their rights. By many metrics, workers who rely on temporary help agencies for employment represent the most vulnerable workers in our society and it is our position that any legislation or regulation which improves their circumstances will also improve the working conditions of all Ontarians.

When looking towards disadvantages of creating a registry, we should conduct a pragmatic review of previous attempts to control unsafe or unwanted industries via legislation. Canada's long history with sex work, though federal in jurisdiction, illustrate some of the challenges with regulating irregular work.⁶ Outlawing a profession does not cause it to disappear, and instead may drive practitioners underground, and in many cases further away from established standards and protections. Many of the workers who

⁴ Star Editorial Board, "Ontario must end abuses by temp agencies," Aug. 25, 2020, Toronto Star, available at: <<https://www.thestar.com/opinion/editorials/2020/08/25/ontario-must-end-abuses-by-temp-agencies.html>>; See, for example, *Saeid Nazemi v Groupe FDM Inc. operating as FDM Group Canada Inc. and Director of Employment Standards*, 2020 CanLII 33284 (ON LRB).

⁵ Jonathan Gatehouse, "How undocumented migrant workers are slipping through Ontario's COVID-19 net" CBC News, July 2, 2020, available at: <<https://www.cbc.ca/news/canada/leamington-migrant-workers-1.5633032>>.

⁶ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101; *R. v. Anwar*, 2020 ONCJ 103 (CanLII); Department of Justice, "Prostitution Criminal Law Reform: Bill C-36, the Protection of Communities and Exploited Persons Act," Dec. 6, 2014, available at: <https://www.justice.gc.ca/eng/rp-pr/other-autre/c36fs_fi/>.



rely on temporary help agencies are already vulnerable and may be reluctant to engage with the protections available to them. This proposal must take care not to drive these workers further away from the supports that are in place in our society.

We recognize that part of the stated purpose of this proposal is to deter unfair competition from underground agencies and ensure a level playing field. However, it is our position that it would be more effective to focus these proposed changes on worker protection, rather than on ensuring fair economic competition alone. Workers who are secure in their employment and earning a living wage will have a net positive effect on the economy over time. Communicating this message to stakeholders, especially the workers who would work for temporary help agencies, will promote greater compliance. It is our hope that by structuring any proposed changes in this way any potential disadvantages can be significantly mitigated.

2. What requirements should be in place for a temporary help agency to be included on a government administered registry (for example, that it has no violations of employment standards legislation)?

Requirements for any temporary help agency should include but not necessarily be limited to:

- No history of violations under *Employment Standards Act*;⁷
- No history of violations under the *Occupational Health and Safety Act*;⁸
- No history of violations under the *Workplace Safety and Insurance Act*;⁹
- No history of findings of discrimination under the *Human Rights Code*;¹⁰
- No history of violations under the *Employment Insurance Act*;¹¹ and,
- No history of violations of the *Criminal Code*.¹²

Applications for registration should also include information about ownership, to avoid the creation of multiple subsidiary organizations to avoid tracking of violations, or unscrupulous owners who will simply create a new shell corporation. Agencies who wish to register should be able to produce all relevant Health

⁷ *Supra* note 3.

⁸ RSO 1990, c O.1.

⁹ 1997, SO 1997, c 16, Sch A.

¹⁰ RSO 1990, c H.19.

¹¹ SC 1996, c 23.

¹² RSC 1985, c C-46.



and Safety certificates, such as WHMIS, AODA, workplace violence, and worker’s health and safety awareness training.

Working at heights training, where required, should be attained from an approved provider and maintained for the duration of registration. A business plan proposal structured to provide the temporary help agencies management, operational, and accounting practices, should also be a required component of registration. In addition, agencies should be required to maintain an injury frequency at or below 1.16, the average for Ontario in 2018, and a lost time claim percentage which is no more than 1% higher than the industry sector as a whole.¹³

3. How much transition time would be needed to ensure that temporary help agencies and clients of temporary help agencies are aware of their new obligations?

A transition time of one (1) year should be sufficient. This timeline considers the ongoing realities of the COVID-19 pandemic.

4. How should the government educate the public on any new requirements in order to best reach all those who may be affected, including vulnerable individuals?

As a clinic which frequently engages in public legal education outreach efforts with low-income and historically marginalized populations, we believe that information campaigns must take into account both the engagement and abilities of the audience they are intended to reach in a practical manner.

While the Internet has become the de-facto information distribution channel in Ontario, there are many Ontarians who are still not digitally engaged, and many Ontarians living in poverty still do not have affordable Internet access. It has been our experience that this lack of access is most pronounced among seniors, only 71% of whom use the Internet, and among those whose highest educational achievement is high-school or lower.¹⁴ For this reason, we would suggest supplementing any internet campaigns with informational displays in public libraries, job centres, community legal clinics, Ontario Works offices, Service Ontario, and Service Canada centres. We would also propose that a commitment be made to

¹³ Workplace Safety and Insurance Board, “Schedule 1 By the Numbers 2019 WSIB Statistical Report,” available at: <http://www.wsibstatistics.ca/S1/Claims%20_%20WSIB%20By%20The%20Numbers_P.php>.

¹⁴ Statistics Canada, “Health and social challenges associated with the COVID-19 situation in Canada,” April 6, 2020, available at: <<https://www150.statcan.gc.ca/n1/daily-quotidien/200406/dq200406a-eng.htm>>; Statistics Canada, “Canadian Internet Use Survey Data Visualization Tool,” Oct. 29, 2019, available at: <<https://www150.statcan.gc.ca/n1/pub/71-607-x/71-607-x2019017-eng.htm>>.

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partner with these agencies in order to disseminate information on these changes, and ensure that current, former, and future clients of these agencies have access to the supports they need.

We would note that while this very call for comment has been posted in a PDF format with the assumed intent of making it freely and readily available, we can attest that for many of our clients, and by extension many low-income Ontarians around the province, PDF documents are not accessible. Many low-income Ontarians lack access to a computer or phone with the required software in order to properly read them, and as a result the very workers who may benefit most from these proposed changes may not be able to make their voices heard in this call for comment.

B. Penalties for Non-Compliant Agencies and Client Employers:

5. If the government implements a temporary help agency registry, how could it ensure that all agencies register, and all clients of temporary help agencies only accept assignment employees from registered agencies?

Penalties for noncompliance should be significant, and tax incentives could be offered to all agencies who register within a certain timeframe. This could be implemented in a similar way as the Workplace Safety and Insurance Board offering rebates and premium rate reductions, as incentives for employers, so too could this proposal offer a rebate program to employers.¹⁵ Similar tax incentives could also be put in place for employees of temporary help agencies, which would provide an increased refund for workers who can demonstrate that any agency they have engaged with is registered. We would recommend that any such incentive for workers be ongoing, in the hopes that it would provide an added incentive for workers to avoid unregistered agencies, which would in turn reduce the viability of these agencies.

6. What monetary amount(s) would serve as an effective deterrent to temporary help agencies and clients of temporary help agencies seeking to avoid their legal obligations under the ESA by not complying with the temporary help agency registry requirements?

We believe that this is an instance where strong legal deterrents are warranted. In order to promote regulatory consistency, we would suggest that these fines match those already laid out in the *Occupational Health and Safety Act* which sets maximum fines up to \$100,000 for an individual person,

¹⁵ Ontario Government Newsroom "Ontario To Reward Safe Employers" Nov. 22, 2019, available at: <<https://news.ontario.ca/en/release/54706/ontario-to-reward-safe-employers>>.



and up to \$1,500,000 for a corporation.¹⁶ We would submit that these fines should apply equally to agencies themselves, and the clients who hire them.

We do not believe that it will ever be possible to ensure that workers only accept assignment from registered agencies. As we touched upon earlier in our submission, workers will continue to work in occupations, even when they are heavily sanctioned or unsafe. Rather than imposing any fines on workers who engage with rogue agencies out of economic desperation, we suggest instead that these changes focus on empowering and protecting workers rather than penalizing them. Any fines levelled against workers would ultimately be counterproductive, beyond the means of many to pay, and would have the effect of punishing poverty and vulnerability. Rather, we would encourage that any changes contain language which explicitly protects workers who bring claims against rogue agencies, even in cases where they are current or former workers. Doing so will allow workers of these agencies who are themselves victims to come forward and exercise their rights without fear of reprisal.

C. Alternatives to a Registry:

7. What would be the advantages and disadvantages of a licensing scheme as opposed to a registry?

The fundamental advantage of a licensing scheme in Ontario would be in the added enforcement and censure abilities inherent in licensing schemes. Guidelines set out by a regulatory body could ensure more precise methods of enforcement and would be an added incentive for temporary help agencies to adhere to required legislation described above. The requirements for the licensing process, obligations, duties, and sanctions could more effectively gain control of the underground economy, which could reduce the number of rogue agencies. The ability to revoke an agency's license at any time, if the temporary agency contravenes legislation or professional obligations, would also make enforcement more effective and potentially much faster. An additional benefit of a licensing scheme could shift the onus from the government and Ministry to a system which is at least partially self-regulating, which would have the added benefit of reducing government spending in this area.

The creation of a licensing scheme would in effect create a closed market, and could increase the barrier to entry for new firms significantly. As a community legal clinic which serves low-income workers, many of whom are in, or have experienced precarious entry level employment, we recognize the beneficial role that temporary help agencies can play in our economy. We believe that any proposed changes must walk a fine line between ensuring worker protections are enhanced, and ensuring that

¹⁶ *Supra* note 8, Part IX.



Ontarians who depend on agencies can still access meaningful employment and enter the workforce. Regulation of temporary agencies should not be implemented in a manner which would preclude workplace participation or discourage low-income workers from seeking additional work.

8. Are there other alternative models that the government should consider?

The best way to achieve the stated goals of empowering workers, encouraging compliance with legislation, and curtailing labour trafficking and underground agencies, is through a continued pattern of robust and worker-friendly legislation, which focuses on alleviating poverty and ensuring access to justice in Ontario. We are optimistic that these proposed changes can represent the first step towards a regulatory framework for not only temporary help agencies, but employers as a whole, to ensure that they provide not only easily accessible temporary employment and access to the Canadian workforce, but contribute to a society of workers who are engaged, dignified, and respected by all.

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