Presentation to The Standing Committee on The Legislative Assembly on Bill 139, an Act to Amend the *Employment Standards Act, 2000* in relation to Temporary Help Agencies

by the Ontario Federation of Labour
March 25, 2009

ONTARIO FEDERATION OF LABOUR (CLC) • FÉDÉRATION DU TRAVAIL DE L'ONTARIO
15 Gervais Drive, Suite 202, North York, Ontario M3C 1Y8 Telephone: (416) 441-2731 Fax: (416) 441-1893 Web http://www.ofl-fto.on.ca

Introduction

The Ontario Federation of Labour (OFL) represents over 700,000 workers who belong to 1,500 affiliated local unions in Ontario. Our members work in hundreds of occupations -- from government employees to construction workers; from nurses to industrial mechanics.

The OFL is the collective voice of union members on issues relevant to working people – from labour relations to health care to economic policy.

On behalf of our members, the OFL is pleased to be providing this response to the Standing Committee of the Legislative Assembly on Bill 139 *Employment Standards Amendment Act* (Temporary Help Agencies).

Employment Standards Act Needs Updating

Legislation to update the *Employment Standards Act* is needed. Many employers have moved work beyond the protection of employment standards – hiring people indirectly through intermediaries, disguising employment as independent contracting, and shifting more business costs onto workers who have little power to refuse.[1]

Even before the economic crisis, working more hours for less money had become a feature of a segment of the labour market. Low-wage workers especially women, immigrant, and racialized workers, are increasingly working in temporary, contract and part-time work. These workers are often juggling two or three jobs without employment benefits or workplace protections.[2] The impact of this labour market experience is evident from the double digit income gap between racialized and new immigrant workers and non-racialized workers. The median gap is 14.6 percent for those with post-secondary education, and is even wider, at 20.6 percent for those without post-secondary education.[3]

An important facet of precarious work is temporary employment through agencies. As the employment and staffing industry has grown, practices have increasingly resulted in temporary agency workers being denied minimum employment standards and receiving little protection against violation of employment standards.[4]

Support the Introduction of the Bill

We support Bill 139 as an important first step in updating and improving the *Employment Standards Act* to protect people in precarious work. The Bill makes some important improvements in extending protection to temporary agency workers:

- 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;
- Bill 139 will require employers to provide information about employment standards rights and assignment information; and
- Bill 139 will make it illegal to charge temporary agency workers direct fees.

However, amendments should be made to the Bill to strengthen fairness and protection for temporary agency workers:

- Bill 139 allows agencies to restrict, through contracts and fees, a client company from hiring an assignment employee within six months of the worker starting at the 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.
- Home care agency workers under contract through Community Care Access Centres would be exempted from the protections under Bill 139.
- Special rules proposed for termination and severance in Bill 139 would substantially reduce temporary agency workers’ current entitlements.

As s result, 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.

Regulation 432/08 - Elimination of Elect to Work Exemptions for Public Holiday Pay and Termination and Severance Entitlements

We support the elimination of elect to work exemptions for public holiday pay and termination and severance entitlements. We support the access to public holiday pay for workers who are designated as ‘elect to work’ in all sectors, including home care.

However, a two-tier phase out of these exemptions is not acceptable. The government has indicated that for workers in home care the elect to work exemption for termination and severance pay will not be eliminated until October 1, 2012 while it would be eliminated for workers outside home care

when Bill 139 is passed. There is no justification for this differential treatment, and it flies in the face of the advice the government received from the Caplan Report. In 2005, the Caplan Report recommended the Elimination of Elect to Work status in home care at the end of the contracts for home care services that were in force at that time.[5]

Section 74.1 - Interpretation

The proposed definition of temporary help agency and the scope of section 74.1 should be broadened to encompass temporary and permanent staffing and placement services. As drafted, Bill 139 would provide incentives to companies to charge fees for temporary and permanent employment services outside the narrow confines of "temporary work assignment".

Proposed Amendment

- *Change the name of Part XVIII.1 from Temporary Help Agencies to:*

  Employment Agencies

- *Change 74.1(1) interpretation of "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 for clients of the agency.

- *Reflect employment agency interpretation through the Act.*

Section 74.2 - Application

Exemption for Home Care Workers

Section 74.2 of Bill 139 excludes workers who are providing professional, personal support and homemaking services under contract with the Community Care Access Centre (CCAC) from coverage under the Bill and the proposed Temporary Help Agencies section of the *Employment Standards Act.*

The effect of the exemption of home care workers would deny protection against fees and other abuses to assignment employees that may get an assignment under a CCAC contract. The definitions of "assignment employee", "client" and

“temporary agency” would not apply to home care work arrangements in existing home care agencies. Home care workers who are employed by employment agencies should, however, also have access to the protections under this Bill.

Home care workers should have access equal to the protections in this Bill, including access to termination and severance pay.

Proposed Amendment

- *Delete Section 74.2*

Sections 74.3 and 74.4 – Employment Relationship

Section 74.3 does not appropriately recognize the triangular employment relationship between the “assignment employee”, the “temporary help agency”, and the “client” company. Additionally, the current drafting could reduce workers’ access to rights provided by other statutes**.**

Under the Ontario Human Rights Code and the *Occupational Health and Safety Act*, both the agency and client company have been held jointly liable for “assignment employees”.

Recognizing joint and several liability among “Joint Employers” will update the Act to recognize the triangular employment relationship. It will assist “assignment employees” in accessing their rights and remedies when employment standards have been violated. It will also provide a stronger disincentive for client companies to violate employment standards rights of assignment employees.

Proposed Amendment

- *Add subsection:*

  The temporary agency and client company are held jointly liable for wages and other obligations under the ESA as well as benefits outlined in the contract.

Further, as currently drafted, it appears that section 74.3 does not reflect the legislative intent to clarify the temporary help agency employment relationship solely for the *Employment Standards Act* and not other regulatory regimes such as the *Labour Relations Act*, *Occupational Health and Safety Act*, the Human Rights Code or common law. As currently drafted, Bill 139 could be interpreted to reduce temporary workers’ existing rights and protections under

other labour laws such as the *Labour Relations Act*, the Human Rights Code and the *Occupational Health and Safety Act*. If the above proposed amendment is not adopted, the following amendment should be made:

Proposed Amendment

- *Add:* For the purposes of the *Employment Standards Act, 2000*,

Sections 74.5 to 74.7 - Obligations and Prohibitions

Sections 74.5 to 74.7 provide temporary agency employees with important rights to information about their employers and their rights under the *Employment Standards Act*. Too many workers have little information about the agency that they are signed up with. This creates significant problems in enforcing employment standards rights when violations occur. Section 74.5(1) correctly addresses this problem.

The information requirements set out in section 74.6 are important for temporary agency workers. Temporary agency workers often do not know the name of the company, hours of work, overtime provisions, job description or expectations, or term of assignment. The provisions set out in section 74.6 will address these practices.

However, three amendments should be made to section 74.6. Specifically, these amendments need to address the duration of work assignments; require client companies to sign-off on placement arrangements; and inform workers of the difference, in dollars, between their wages and what client companies are charged by agencies for their services.

Firstly, the expected term or duration of assignment should be added to the list of required information. Assignment workers need to plan their working lives. Bill 139, as currently written, does not require the client company and agency to inform the assignment worker about how long the 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, it is a layoff. As a result, there is no cost to the employer that results from stating the expected term of assignment in the information documents. Stating the term of assignment is important for workers to actually be able to enforce the *Employment Standards Act's* reprisals protections, as workers are often terminated when they try to enforce their rights.

Secondly, section 74.6 should be amended to require the client company to sign and date the information document required under section 74.6(1). The client company controls much of the work process and not the agency. As a result, it is important for all three parties to have the same understanding of the work assignment and conditions of work. Further, requiring the client company to sign on to the information document will enable the worker to better enforce employment standards rights.

Finally, the mark-up fee should be transparent and set out in the information document required under section 74.6(1). To do this, we recommend requiring the agency to disclose the hourly fee charged to the client company.

Proposed Amendments

- *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.

- *Add new paragraphs in section 74.6(1):*

  8. The hourly fee charged to the client.

Section 74.7 requires that information about temporary workers' rights be produced, translated and distributed. This is an important step in protecting temporary workers' rights.

Section 74.8 - Prohibitions

We support the restrictions on temporary help agencies charging fees to workers in sections 74.8(1) to (3). This is an important step in increasing the protection of temporary workers. However, to be effective, this must be complemented with a widening of the definition of "temporary help agency" in section 74.1 of the Bill. If Bill 139 proceeds without amendment, employers will be able to operate outside the definition of "temporary help agency" to avoid this section's prohibition on fees.

We also support the prohibition on agencies restricting a client from directly hiring a worker. However, the six-month limitation in 74.8(2) should be

removed. Any exemption on prohibiting barriers to direct employment will have a negative impact on workers and client companies. It will provide an incentive for agencies to replace an assignment worker in a longer-term assignment with a client company just prior to the six-month limit.

Proposed Amendment

- *Remove the six-month exception to prohibitions on barriers to employment*
- *Delete section 74.8 (2) and 74.8 (3)*

Section 74.11 - Termination and Severance

Currently, temporary agency workers are entitled to the same termination and severance entitlements as other workers unless they are deemed "elect to work". Bill 139 would create special rules for termination and severance that creates a higher burden for assignment workers.

Section 74.11 would create a much higher and harder to achieve threshold before assignment employees would be eligible for termination and severance pay. Section 74.11 requires that notice of termination or severance pay be paid only if the employer does not assign the employee to perform work for a client of the agency for a period of 35 consecutive weeks.

In order to avoid the provisions of the Act, the agency only has to make an offer of assignment once in a 35 week period and would not be liable for termination and severance for another 8 months.

In addition, the employer may avoid paying severance pay by reducing assignments in the 12 week period prior to their termination since the formula for termination pay and severance pay is based upon the amount earned in the 12 week period prior to termination.

Proposed 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)*
- *Delete Termination and Severance Section 74.11*

Section 74.12 - Reprisals by Client

The new reprisals provisions under section 74.12 of the Bill makes client companies liable for any reprisals it takes against an assignment employee on

the same grounds as employees under section 74 of the ESA. This is a step forward in assisting workers to enforce their employment standards rights. However, as set out above client companies should be jointly liable for all employer obligations under the *Employment Standards Act*.

Conclusion

Bill 139 is an important first step in updating the *Employment Standards Act*, and protecting workers. With the above-mentioned amendments, this Bill will make important progress in increasing access to protections for vulnerable workers; and updating the Act to reflect the current labour market.

WS/SB/cc/cope343

[1] Workers' Action Centre. (2007). Working on the Edge. Retrieved from http://www.workersactioncentre.org/Documents/pdfs%20policy/Working%20on%20the%20Edge-May%202007.pdf. Author: Toronto.

[2] Workers' Action Centre. (2007). Working on the Edge. Author: Toronto

[3] Teelucksingh, Cheryl and Galabuzi, Grace-Edward. (2005). Working Precariously: The Impact of Race and Immigration Status on Employment Opportunities and Outcomes in Canada, Directions (Canadian Race Relations Foundation), Vol. 2, No. 1.

[4] Workers' Action Centre. (2008, June 6). Submission to the Ministry of Labour Consultation on Work through Temporary Help Agencies. Retrieved from http://www.workersactioncentre.org/Documents/pdfs%20policy/Submission%20Temp%20Consult-May%202008.pdf. Author: Toronto.
Workers' Action Centre. (2007). Working on the Edge. Author: Toronto.

[5] Caplan, Hon. Elinor. (2005). Realizing the Potential of Home Care: Competing for Excellence by Rewarding Results. Retrieved from http://www.health.gov.on.ca/english/public/pub/ministry_reports/ccac_05/ccac_05.pdf