

Temporary Help Agency Consultation

Ontario Ministry of Labour, Training and Skills Development



Ontario Federation of Labour

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SUMMARY

The creation of a mandatory registry for Temporary Help Agencies would be useful, with the potential for widespread positive effects on the health and safety of and treatment of Temporary Workers. However, further additional fundamental and systemic changes are required.

A structured, mandatory registration process for Temporary Help Agencies and the employers wishing to use them, designed to both keep agencies and employers accountable, will improve working conditions for those in precarious work as well as for the thousands of critical agricultural workers from overseas who have become an essential part of the farming / agricultural industry in this province.

A reliable inspection and enforcement protocol will make sure all workers get the benefit of a safe working environment. Additional regulations for the Temporary Foreign Worker Program will help maintain this vital part of Ontario's workforce.

This paper will outline what the Ontario Federation of Labour considers to be the most effective solutions for the most pressing issues, with a number of clear policy recommendations.

RECOMMENDATIONS

- 1. The regulations set out under the WSIA s. 83(4) immediately be brought into effect.**
- 2. The percentage of workers allowed to be from an agency should be limited to 20% of the total workforce.**
- 3. The site employer should only be permitted to fill a temporary role for a maximum of twelve (12) weeks, after which that role shall be deemed permanent, with the right of first refusal going to the worker already performing the role.**
- 4. The program should consist of three elements: a) a mandatory registry, b) mandatory licences, and c) a public list.**
- 5. Client companies (site employers) must be required to maintain records of all temporary agencies and their assignment employees under contract for at least two years (ESA limitation period). THA's must also maintain records of all assignment workers and of the companies workers are assigned to for two years.**
- 6. There should be a mandatory registry of employers.**
- 7. A valid Certificate of Registration must be provided by any employer seeking to hire a migrant worker.**
- 8. In addition to the general licensing requirements Ontario should consider restricting the pool of people that can become licensed as recruiters of migrant workers, as is the case in Manitoba.**
- 9. THA's and recruitment agencies must provide a \$25,000 security deposit in order to obtain a license.**

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10. Recruiters must maintain records of all migrant workers and the employers with which the workers are placed for three years and six months (limitation date under the Employment Protection for Foreign Nationals Act, 2009).
11. Migrant workers should have guaranteed union representation through the Temporary Foreign Workers Program.
12. Migrant workers should have access to Employment Insurance.
13. Full disclosure and joint liability along the supply chain of recruitment and subcontracting.
14. Temporary help agency employees and migrant workers and third parties must be able to make anonymous complaints of any violations of the new licensing system.
15. There should be a minimum set (automatic) fine of \$15,000 for failing to use a licensed agency directly or indirectly.
16. Whistleblower program to catch underground agencies.
17. We recommend that the mandatory licensing be brought into effect 6 months after enabling legislation has been passed, with mandatory fines for non-compliance beginning 1 year after registration begins.

INTRODUCTION

Temporary workers are unique under Canadian employment law because they exist in a triangular employment relationship. A temporary worker works for the temporary help agency who recruited them but reports to the client company who hired the agency.

The main problems with this set up are two-fold:

Because liability is deferred from the site employer to the temporary agency supplying the workers, there is less incentive for the site employer to maintain a safe workplace, and Because temporary agencies a) require very little infrastructure – “you can run one with a Blackberry”¹ - and b) remain untracked, it is easy for them to avoid accountability in the event of workplace injury.

Temporary workers suffer in greater numbers from unsafe work environments whether they are Canadians or Migrants. In a report by Dr. Ellen MacEachen, she interviews a construction site manager who describes that he would normally hire temporary workers to do exceptionally difficult or demanding work because, he says, “It’s just heavy-duty work that I’d rather not have *my* guys doing.”² In another example, the owner of a large temporary agency explains the common practice of employers hiring temporary workers for more dangerous work in order to keep their health and safety record in good standing. When temporary workers were injured, it does not reflect on the record of the

¹ MacEachen, E. (2012). [Temp agency workers falling through cracks in OHS system](#). At Work, Issue 69, Summer 2012: Institute for Work & Health, Toronto

² MacEachen

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employer because the injured worker doesn't technically work for them, *they work for the agency*.³

The agency may use any number of tactics to evade the costs of workplace injury, from making it very difficult to report an injury by requiring a burdensome amount of paperwork, to simply shutting down in the face of major fines and reopening under a different name. Because there is no way to track these agencies reliably, or to punish them for worker mistreatment, there is no effective enforcement mechanism.

Workers often fail to report violations out of fear, as they have no job security, no seniority, and no union representation.

RECOMMENDATIONS

WORKER HEALTH AND SAFETY AND LIABILITY

The Temporary Help Agency Consultation Paper acknowledges that under COVID-19, temporary assignments, across a variety of sectors and workplaces place agency workers and client company workers at risk of infection. Yet there are more fundamental challenges facing the health and safety of temporary agency workers. As research done for the Institute for Work and Health concludes:

“The primary challenges regarding the prevention of injury and disease affecting workers placed by temporary employment agencies arise because of disorganisation associated with triangular and cascading employment relationships, which makes it difficult to ensure the adequate training of workers, the provision of appropriate safety equipment and adequate representation in joint health and safety committees.”⁴

It is critical that we address the issue of the assignment of liability. There must be changes to the *Act* governing who is responsible for reporting injuries, and who should be held to account when temporary agency workers are injured, become ill, or die as result of their work.

Legislation to eliminate joint and several liability has already been written by Ontario and needs only be brought into effect. S.83(4) of the *Workplace Safety and Insurance Act* stipulates that liability for worker injuries remain with the site employer, as does

³ MacEachen

⁴ Katherine Lippel, MacEachen Ellen, Saunders Ron, Natalia Werhun, Kosny Agnieszka, Mansfield Liz, Christine Carrasco & Diana Pugliese (2011) Legal protections governing the occupational safety and health and workers' compensation of temporary employment agency workers in Canada: reflections on regulatory effectiveness, *Policy and Practice in Health and Safety*, 9:2, 69-90, DOI: 10.1080/14774003.2011.11667762

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injury attribution, responsibility for reporting the injury to the Workplace Safety and Insurance Board, certain payment obligations, and insurance ramifications.⁵

RECOMMENDATION 1: THE REGULATIONS SET OUT UNDER THE WSIA S. 83(4) IMMEDIATELY BE BROUGHT INTO EFFECT.

Further policy adjustments to reduce worker injury include ensuring that the site employer may only supply a small percentage of the workforce through temporary workers, ensuring that most of the workforce is familiar with the workflow, common hazards, and best practices for that particular work site. Additionally, in order to ensure that the site employer maintains a consistent staff with proper workplace safety training, they should only be allowed to fill a “temporary” position for a limited amount of time, after which they would be obligated to hire the worker for that role on a permanent, full-time basis.

RECOMMENDATION 2: THE PERCENTAGE OF WORKERS ALLOWED TO BE FROM AN AGENCY SHOULD BE LIMITED TO 20% OF THE TOTAL WORKFORCE.

RECOMMENDATION 3: THE SITE EMPLOYER SHOULD ONLY BE PERMITTED TO FILL A TEMPORARY ROLE FOR A MAXIMUM OF TWELVE (12) WEEKS, AFTER WHICH THAT ROLE SHALL BE DEEMED PERMANENT, WITH THE RIGHT OF FIRST REFUSAL GOING TO THE WORKER ALREADY PERFORMING THE ROLE.

MANDATORY REGISTRY

Much of the research and analysis on temporary help agencies concentrates on migrant workers under the Temporary Foreign Workers Program and its subsidiary, the Seasonal Agricultural Workers Program. However, as registry would apply to all temporary help agencies, there would have to be general regulations for all THAs, and additional regulations for those dealing with migrant workers.

The registry model itself has already been created. Quebec, British Columbia and Manitoba have implemented strategies for migrant worker agencies that can be modified and applied to all THAs with little adjustment. The *Worker Recruitment and Protection Act (2009) (WRAPA)* seeks to limit and monitor who can recruit and place

⁵ *Workplace Safety and Insurance Act (1997)*, s.83(4)

workers and has been called a model for other jurisdictions.⁶ To date, five other provinces have adopted similar legislation.⁷

The Manitoba model is premised on a three-pronged approach. First, they have created a registry for all temporary help agencies and the recruiters who may work with them with a great deal of detailed information kept on file so that the government knows where the workers are. Secondly, it has a robust enforcement protocol built in, to prevent exploitation by unscrupulous agencies. Thirdly, its proactive structure allows the province to analyse data on workers' conditions and their pay, living conditions, and expenses claimed by the employer can be used by the province to analyse conditions. There are also provisions in the *Act* giving the Director and a Special Investigations Team the ability to undertake proactive investigations of workplaces and employers.⁸ The federal government cooperates with the program and is critical to its effectiveness.

Based on the Quebec, British Columbia and Manitoba models, we recommend a protocol based on the following recommendations:

RECOMMENDATION 4: THE REGISTRY MUST BE MANDATORY, LICENCED, AND MADE PUBLIC.

That the registry must be mandatory is essential. Voluntary adherence to the *ESA* would be ideal, but too many unscrupulous employers have already proven the notion of voluntary compliance as insufficient and inadequate. Any THA found operating without a licence should be subject to automatic fines, and they should be substantial.

For fines to truly act as a deterrent, a fines efficacy must be sufficiently large enough to deter noncompliance. There has to be a real chance that noncompliance will result in a fine or penalty.

Current fines for contravention of the *ESA* are not sufficient.

Employment Standards Officers can levy a Notice of Contravention fine against an employer in the sum of \$250 for a first offence, or a \$295 ticket under Part I of the *Provincial Offences Act* (plus a \$75 victim surcharge).

Under Part III of the *Provincial Offences Act* individuals can be prosecuted with fines up to \$50,000 while corporations can be fined up to \$100,000 for a first offence. Part III prosecutions are rarely used. For example, in 2016/17 there were 12,808 confirmed *ESA* violations and only 175 Part III convictions with an average fine of \$3,642.⁹

⁶ Best Practices: Manitoba's Worker Recruitment and Protection Act. The Canadian Centre for Policy Alternatives, 2015, Winnipeg

⁷ Ontario, PEI, and Newfoundland and Labrador are the only provinces that do not regulate recruiters and employers of migrant workers

⁸Best Practices

⁹ Vosko et al (2020) Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs. University of Toronto Press. P 151.

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a) The registry will include all THAs and recruiters legally eligible to operate in Ontario.

Ontario should follow Quebec, British Columbia and Alberta in requiring that both temporary agencies and agencies that recruit migrant workers be required to obtain a license from the Ministry of Labour, Training and Skills Development (MLTSD) to operate, or to place workers in Ontario.

b) As a prerequisite to becoming registered, all temporary help agencies and agencies that recruit temporary workers must obtain a licence.

The Ministry of Labour, Training and Skills Development will grant the licences. These licences should be separate – one for THAs and one for Recruiters – and should include the names of all individuals and corporate entities associated with the operation seeking licensing. The licence should be valid for one year, and only be issuable if the application party has a record clear of *ESA* violations. This ensures ongoing government oversight.

c) A public list of THAs and Recruiters must be created, as well as a public list of site employers.

This list should be easily searchable and include the legal name, operating name, and office addresses, as well as contact information, type of licence, and the date of licence issue and of expiry.

RECOMMENDATION 5: CLIENT COMPANIES (SITE EMPLOYERS) MUST BE REQUIRED TO MAINTAIN RECORDS OF ALL TEMPORARY AGENCIES AND THEIR ASSIGNMENT EMPLOYEES UNDER CONTRACT FOR AT LEAST TWO YEARS (*ESA* LIMITATION PERIOD). THAs MUST ALSO MAINTAIN RECORDS OF ALL ASSIGNMENT WORKERS AND OF THE COMPANIES THEIR WORKERS ARE ASSIGNED TO FOR TWO YEARS.

The license application should require all names and corporate entities associated with the operation seeking licensing. Quebec's *Act* contains an expansive scope of entities held responsible for compliance under the Act (s. 3). It also requires that the corporate structure and all parties be provided in the license application (s 7. (6)).¹⁰

In Saskatchewan, every recruiter must disclose all parties located or operating inside and outside of Saskatchewan when applying for a license.¹¹ This requirement is critical for enforcement. Nova Scotia requires a list of all countries from which the recruiter plans to recruit and the names of individuals, companies it will use, as well as a

¹⁰ [Regulation respecting personnel placement agencies and recruitment agencies for temporary foreign workers](#), CQLR c N-1.1, r.0.1

¹¹ [The Foreign Worker Recruitment and Immigration Services Act](#). (FWRISA) s. 26

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list of all domestic and foreign bank accounts.¹² As Faraday notes, uncovering the recruiter's supply chain seeks to ensure that the licensed recruiter or the employer can be held accountable for all actions in breach of the law at all stages of recruitment or, in the case of THAs, through subcontracting.¹³

RECOMMENDATION 6: THERE SHOULD BE A MANDATORY REGISTRY OF EMPLOYERS.

Manitoba's registry program requires that employers provide the provincial labour ministry with detailed information about the employer's business. This enables the ongoing supervision of the employer's conduct and need to recruit temporary labour.

In this way, the ministry can also educate employers about their legal responsibilities. This would be a benefit to migrant agricultural and migrant care workers. Employers with *ESA* violations such as unpaid hours of work and overtime and illegal deductions would be prevented from registering.

MIGRANT WORKERS

Migrant workers face additional challenges that require special attention. There are many ways to ensure that migrant workers employed in Canada under the Temporary Foreign Worker Program (TFWP), or its subsidiary the Seasonal Agricultural Worker Program (SAWP), are given reliable workplace protection and humane living and working conditions.

RECOMMENDATION 7: A VALID CERTIFICATE OF REGISTRATION MUST BE PROVIDED BY ANY EMPLOYER SEEKING TO OBTAIN A LABOUR MARKET IMPACT ASSESSMENT.

This allows the federal government to act as the first gatekeeper, and work with the province to ensure that employers comply with the rules and regulations under the Registry Protocol.¹⁴

RECOMMENDATION 8: IN ADDITION TO THE GENERAL LICENSING REQUIREMENTS ONTARIO SHOULD CONSIDER RESTRICTING THE POOL OF PEOPLE THAT CAN BECOME LICENSED AS RECRUITERS OF MIGRANT WORKERS, AS IS THE CASE IN MANITOBA.

In Manitoba, one must be a member of the Law Society of Manitoba or of another province, or registered immigration consultant in good standing of their respective

¹² Labour Standards Code (NS) and [General Labour Standards Code Regulations](#) (NS)

¹³ Faraday, Fay (2014). [Profiting from the Precarious: How recruitment practices exploit migrant workers](#), Metcalf Foundation.

¹⁴ Best Practices

professional regulatory bodies in order to obtain a licence. This is to ensure that recruiters are bound by the professional standards of their respective governing bodies.¹⁵

RECOMMENDATION 9: THA'S AND RECRUITMENT AGENCIES MUST PROVIDE A \$25,000 SECURITY DEPOSIT IN ORDER TO OBTAIN A LICENSE.

The majority of jurisdictions with licensing regimes require a security deposit. In Manitoba the amount is \$10,000, but in other provinces it ranges from \$5000 in Nova Scotia to \$20,000 in British Columbia and Saskatchewan. A \$25,000 deposit in Ontario would meet the majority of needs in the event of non-payment of wages or other violations. In the event of violation of the Act, this security deposit would be forfeited, and the monies are used to reimburse any monetary entitlements owed to the temporary or migrant worker.

RECOMMENDATION 10: RECRUITERS MUST MAINTAIN RECORDS OF ALL MIGRANT WORKERS AND THE EMPLOYERS WITH WHICH THE WORKERS ARE PLACED FOR THREE YEARS AND SIX MONTHS (LIMITATION DATE UNDER *THE EMPLOYMENT PROTECTION FOR FOREIGN NATIONALS ACT, 2009*).

RECOMMENDATION 11: MIGRANT WORKERS SHOULD HAVE GUARANTEED UNION REPRESENTATION THROUGH THE TEMPORARY FOREIGN WORKERS PROGRAM.

While a registration scheme will result in enormous benefit to all temporary workers, a critical piece of labour infrastructure in this regime will be to allow agricultural workers to unionize.

It is essential to repeal Ontario's *Agricultural Employees Protection Act*. The *Ontario Labour Relations Act* must be amended to include agricultural workers, or the *Agricultural Labour Relations Act* should be revived to truly respect the collective bargaining rights of agricultural workers.

RECOMMENDATION 12: MIGRANT WORKERS SHOULD HAVE ACCESS TO EMPLOYMENT INSURANCE.

While workers under the TFWP have access to EI benefits, SAWP workers are effectively denied eligibility as they typically return to their country of origin soon after their labour is no longer needed, thereby failing to maintain residency in Canada. The special benefits of EI to which they were formerly entitled are now subject to the requirement of a valid work permit and a social insurance number.

¹⁵ Ibid.

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Therefore, they pay into a program which they cannot effectively access. This is unjust and must be remedied.¹⁶

ENFORCEMENT

RECOMMENDATION 13: Full disclosure and joint liability along the supply chain of recruitment and subcontracting.

THAs and site employers must be jointly liable along with subcontracted agencies for ensuring compliance with the licencing regime. This will prevent evasion of the system by successive subcontracting to smaller and more elusive companies that may operate under the radar. This liability must extend to any illegal recruitment fees charged to workers whether domestically or in their country of origin.

RECOMMENDATION 14: TEMPORARY HELP AGENCY EMPLOYEES AND MIGRANT WORKERS MUST BE ABLE TO MAKE ANONYMOUS COMPLAINTS OF ANY VIOLATIONS OF THE NEW LICENSING SYSTEM.

RECOMMENDATION 15: THERE SHOULD BE A MINIMUM SET (AUTOMATIC) FINE OF \$15,000 FOR FAILING TO USE A LICENSED AGENCY DIRECTLY OR INDIRECTLY.

These fines should be set to any employer found using an illegal THA or recruiter. It is important to reiterate. For fines to truly act as a deterrent, a fines efficacy must be sufficiently large enough to deter noncompliance. There has to be a real chance that noncompliance will result in a fine or penalty. Current fines for contravention of the ESA are not sufficient.

RECOMMENDATION 16: WHISTLEBLOWER PROGRAM TO CATCH UNDERGROUND AGENCIES

A reward system, much like the Canada Revenue Agency's Whistleblower program, will help bring illegal employment situations to the attention of the relevant authorities. Competing site employers, THAs, and recruiters who follow the rules will be encouraged to report those who do not, and operate at an unfair advantage.

RECOMMENDATION 17: MANDATORY LICENSING BE BROUGHT INTO EFFECT 6 MONTHS AFTER ENABLING LEGISLATION HAS BEEN PASSED, WITH MANDATORY FINES FOR NON-COMPLIANCE BEGINNING 1 YEAR AFTER REGISTRATION BEGINS.

¹⁶ The Status of Migrant Farm Workers in Canada, United Food and Commercial Workers. 2020

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These systems, once the infrastructure is in place, are straightforward. Most of the paperwork can be done online. Once those involved are aware of their new responsibilities, they should be granted a short grace period of adjustment.