Submission to the Ministry of Labour Consultation on Work through Temporary Help Agencies

By the Workers' Action Centre and 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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1) Introduction

Sage Joehill, member of the Workers' Action Centre

I worked in a hospital for 23 years before I got phased out. When I got an assignment through an agency to work for a well-known government institution, I was so happy to work at all that I took the job.

In my experience, the abuses I faced began on day one. When the agency gave me a contract I was so anxious to work I signed it right away. Even though I was an employee, the contract stated that I was independent contractor. The agency did that to avoid paying me overtime and holiday pay.

I never dreamed I would end up having to fight for overtime and holiday pay and against unfair practices. I had the skills to offer and I was promised that working through an agency would be my foot in the door to a permanent job. As a result I was willing to sacrifice, and worked long hours, including weekends and holidays, on short notice. But the reality was I was treated as a second-class employee. I was denied basic wages and faced unfair barriers to permanent work.

When I asked the agency about my pay, they said it was the company's fault. When I asked the company, they said it was the agency's problem. So I was left in limbo and no one took responsibility for the violations. I didn't want to risk my job, so I stopped asking questions.

Although the client company was actively hiring (and I was even helping them to train new people), no permanent job materialized for me. When I asked the company for permanent work, they said no because they would have to pay the agency a big fee to hire me. So I offered to pay the fee myself to secure a permanent job, but no luck. After that, the company ended my contract.

Sage's experience highlights many of the issues raised in the **Consultation Paper on Work through Temporary Help Agencies.** Like all too many temp workers, having been misclassified as an elect to work employee, Sage was denied public holiday and termination pay. At 53 and with over two decades of experience in her field, she faced the barriers to permanent employment that agencies erect which trap people like Sage in precarious work. Fees, such as the financial barrier to permanent employment Sage faced, are just one of the myriad of ways that direct and indirect fees are charged in temp work.

The issue of liability for *Employment Standards Act* (ESA) violations in the consultation paper only hints at the enormity of problems arising for temp agency workers. People working indirectly for a company through a temp agency effectively have two employers. As Sage aptly describes it, all too many times temp workers are left in limbo.

As Sage's experience demonstrates, the issues facing temp agency workers cannot be hived off in to a neat package. The issues raised in the Consultation Paper are only some of the issues facing temp agency workers.

The Consultation Paper on Work through Temporary Help Agencies states that the "McGuinty Government is committed to ensuring that employees working through temporary help agencies are properly protected under the law." To accomplish this there are additional issues that must be addressed in the review of the *Employment Standards Act* with a focus on temporary work.

First, when we look at the reality of what happens in the labour market, it is impossible to separate out one form of employment, such as temporary agency work, from other forms of employment, such as employment disguised as independent contracting. In Sage's experience she was hired indirectly by the company through a temp agency and she was misclassified as an independent contractor. Both practices are strategies used by employers to shift costs and liabilities of employment. Regulating temp agency work alone may act as an incentive for employers to shift practices to other more unregulated forms. We need to embed the review of temp work in a strategy to comprehensively update employment standards to protect all workers.

Second, protecting temp workers through improving employment standards is just one side of the coin. Workers need to be able to enforce their employment rights while they are on the job. With no protection in the workplace, Sage was denied minimum standards such as overtime pay. When violations of minimum standards occur, workers must absorb the lost earnings until they can find a new job, as Sage did for many months, or be fired, as Sage was when she tried to get permanent work. That is why any review must include improving employment standards enforcement.

Third, the ESA has an important role to play in establishing a framework for equality. The government should not enable employers to impose inferior conditions on workers because of the form of employment or employment status. Equality and non-discrimination for temp agency workers is central to policy reviews of temporary agency work in European countries, the European Union and the International Labour Organisation. So too must Ontario address equality of working conditions for temp agency workers.

We will briefly touch upon these wider themes before addressing the issues raised in the Consultation Paper.

2) Key issues not addressed in the Consultation Paper

2 a) Comprehensive updating of employment standards are required

The way work is organized has changed drastically over the past 30 years. More than 37 percent of jobs are part-time, temporary or own-account self employed.[1] Characterized by work and income instability, more people are juggling two or three jobs, without employment benefits or workplace protection.

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[1] Cynthia Cranford, Leah F. Vosko and Nancy Zukewich, "Precarious Employment in the Canadian Labour Market: A statistical Portrait," **Just Labour** 3, 2003.

Yet our labour laws and employment benefits are still based on a standard employment relationship developed after World War II. Increasingly gaps in our labour laws and practices have created incentives for employers to move work beyond the protection of employment standards. Work that used to be done in-house is now outsourced by companies. Employers seek to hire people indirectly through intermediaries -- temporary help agencies are only one way employers are doing this. Employment is also being disguised as independent contracting or franchising as employers seek to bypass labour laws. 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.

Employers rationalize these practices as necessities to improve flexibility in an increasingly globalized world. But workers' experiences show that outsourcing, indirect hiring and misclassifying workers takes place in sectors with distinctly local markets: business services, construction, retail, warehousing, transportation, healthcare and manufacture of goods consumed locally.

Ontario lags behind European policymakers on both a national and European Union level. There policymakers have developed a range of strategies to extend protections and rights to economically dependent workers in new forms of work organization.[2] In 2006, the International Labour Organisation (ILO) called for national policies that "at least" include measures that "ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protection they are due".[3]

History demonstrates that employers create new, unforeseen and unprotected work arrangements. That is why an essential first step must be to expand the scope of the Employment Standards Act to include all who work and all work arrangements. In this way we remove the incentives and statutory mechanisms allowing employers to move some forms of work beyond the reach of employment standards. By requiring all work to meet basic minimum employment standards, we can finally establish a level playing field for employers and a minimum floor of rights and standards for workers and society.

Labour Minister Duguid tells us in the discussion paper that he wants to "ensure that Ontario's employment legislation reflects the realties of today's workplace and labour market in a balanced way." Individual steps that update and improve the gaps in

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[2] This is largely being done through measures to expand the boundaries of the scope of employment and bring (some) legal protection to workers previously excluded. Italy has extended the definition of employee to include 'parasubordination'. Other countries have also expanded the scope of employment standards to address atypical or non-standard work (for example, New Zealand and Finland). Germany expanded its definition of employee to reduce the opportunity to disguise the employment relationship. See discussion in Jean Bernier's submission to the federal Labour Standards Review, "The Scope of Federal Labour Standards and Non-traditional Work Situations" October 31, 2005. Legislators are also bringing in some benefits and protections for types of atypical employment. For example, the International Labour Organization developed conventions on homework, part-time work and employment agencies. The Economic Union has established directives on part-time and fixed-term contracts to bring equity between atypical or non-standard work and permanent employees and it is currently working on a temporary agency work directive.

[3] International Labour Organisation, Recommendation on Employment Relationships, S. 4c. 2006

legislation to address the labour market run the risk of plugging one hole while expanding others. Improving protections for temp agency workers is a critical piece of what is necessary to improve labour market regulation. But it must be done within a plan and commitment to plug all the holes.

<u>Recommendation</u>

The Ontario government must embed changes to protect temp agency workers in a much larger strategy to update and improve employment standards to address new forms of work. Expanding the scope of the ESA to protect all workers is an essential step in this process.

2 b) Employment Standards Enforcement

The *Employment Standards Act* (ESA) has become increasingly unable to address substandard conditions in today's economy. The failure of governments over the past 30 years to adequately fund and staff employment standards' regulation, and the shift from enforcement in workplaces to enforcement through individual claims resolution by former employees has essentially shifted the onus for enforcement onto workers who have the least power.[4] As former Ontario Labour Minister Bentley correctly states, "(R)ights without remedies will not be rights for long. Remedies that are not used are not remedies at all.... a more effective approach to ESA enforcement is long overdue."[5] This statement accompanied the promise of more inspections of Ontario workplaces and prosecutions of employers who violate the law. But under-funding of proactive enforcement hampers any real improvements.

With unequal power between workers and employers and no real protections against reprisals, workers can do little to enforce their rights while they are on the job. People working through temporary agencies are particularly vulnerable. The nature of the triangular employment relationship enables both the client company and the agency to avoid their employment standards responsibilities. It is all too easy to terminate work or simply not provide new assignments to workers who try and assert their rights. As Sage's experience shows, unless we have effective enforcement of minimum standards, new improvements to protect temp agency workers will have little real benefit because workers will still have no protection while they are working.

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[4] There is a less than 1% chance that an Ontario workplace will be inspected by the Ministry of Labour to determine if minimum employment standards are being complied with. When violations are detected through individual claims by largely former employees, there is no protection for current employees. There is little consequence for violating employment standards. For example, in 2005-06, the Ministry found that employers violated workers rights in 11,358 claims totaling almost $37 million in unpaid wages and entitlements, yet it only prosecuted four companies and two directors. See WAC's **Working on the Edge** for a fuller discussion.

[5] The Honorable Chris Bentley, Statement to the Legislature Regarding 60-hour Work Week, Queen's Park, April 26, 2004

Recommendation

The Ontario government must dedicate the resources necessary to improve enforcement. Start with the hiring of 100 new officers to conduct proactive inspections and extended investigations of claims. Increase the costs of employer violations to improve compliance[6].

Experience demonstrates that the most effective enforcement of employment standards legislation occurs through grievance and arbitration when workers are covered by a collective agreement. However, people in precarious forms of work face substantial barriers in exercising their right to unionize. For example, temp agency workers are only really considered to be employed when on assignment at a client company. The agency does not consider them to be employees when they are not assigned. The Labour Relations Act does not address how temp agency workers in this triangular relationship can exercise their right to unionize. So in addition to more effective enforcement of employment standards, we must also address the statutory and practical barriers people in precarious work face trying to exercise collective rights.

Recommendation

The Ontario government must commit to a comprehensive updating of the Labour Relations Act to address new forms of work organization in order to remove barriers to workers' collective rights.

2 c) Equality and non-discrimination for temporary agency workers

Temp workers will work months, sometimes years, alongside co-workers doing the same job but for less pay, fewer or no benefits, little protection against violation of employment standards and no protection against termination. Temp workers earn 40 percent less than their co-workers hired directly by the company.[7] Temp workers will not receive the health or other benefits that their permanent co-workers will receive. Working under the constant threat of their work being terminated, temp workers have no protection against violations of their employment standards. Temp workers are less able to take sick days, family emergency leave or vacation than their directly hired co-workers.

It is women, immigrant and racialized workers who are relegated to precarious employment in low-wage sectors and low-end occupations. This is due to race and gender barriers in our economy that do not recognize credentials, experience and that deny workers the opportunity to get jobs and wages appropriate to their training, experience and expertise.[8] Preventing discrimination against temp agency workers by ensuring equality in wages and working conditions between workers hired directly

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[6] Please see the Workers' Action Centre's report, **Working on the Edge** (2007) for a comprehensive set of recommendations to improve enforcement.

[7] Statistics Canada, "Earnings of Temporary Versus Permanent Employees" **The Daily** (Wednesday, January 26, 2005).

[8] Cheryl Teelucksing and Grace-Edward Galabuzi, **Working Precariously: The Impact of Race and Immigrant Status on Employment Opportunities and Outcomes in Canada** (The Canadian Race Relations Foundation, May 2005)

by companies and those hired indirectly through temp agencies is one step in bringing the ESA in compliance with the *Human Rights Code*.

Many other jurisdictions have made significant strides to provide equal treatment for people doing similar work but under different employment forms. Eurociett, which represents temp agencies in the European Union (EU) and UNI-Europa, which represents unions, released a joint declaration on working conditions for temporary agency workers on May 29, 2008. Central to this agreement is the principle of non-discrimination. They are calling on the EU Commission and Parliament to, among other things, "agree that the non-discrimination principle should apply to temporary agency workers' basic working and employment conditions… and will apply from day 1 of an assignment…" Basic working and employment conditions of temporary workers shall be at least equal to those of a comparable worker doing the same or similar job in the user company and that would apply if they had been recruited directly by that enterprise to occupy the same job.[9] The UK government has finally recognized the need for regulating temp agency work and for providing for equal treatment. This is notable since the UK has one of the largest temp industries in the EU. The UK government agreed to a deal on May 20, 2008 between unions and employers that will see agency workers in the UK receive equal treatment.[10] Many other countries in Europe have adopted provisions for equal treatment for temporary agency workers (Austria, Belgium, Finland, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, and Sweden).[11] Quebec's labour code prohibits employers from paying lower wages for workers doing the same tasks because the person usually works less hours. There is no principled reason why temporary agency workers should not have the same type of protection.

Equality and non-discrimination for temporary agency workers is conspicuously absent from issues raised in the discussion paper on temporary help agencies. This must be remedied. Not only must we begin discussion of this principle for employment policy, but we need to begin making strides like our European counterparts. To that end, we recommend the following.

Recommendation

Indirect and temporary agency workers should receive the same working and employment conditions (pay package, statutory and employer-sponsored benefits and conditions) that the client company provides to other workers in all forms of comparable work.

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[9] Eurociett/UNI-Europa Joint Declaration on the Directive on working conditions for temporary agency workers, Brussels, May 28, 2008.

[10] Although it is a problem that equal treatment would only apply after 12 weeks. Department for Business, Enterprise and Regulatory Reform, United Kingdom "Government agrees fair deal on Agency Work" press release, Tuesday May 20, 2008

[11] Vosko, Leah F. (2008). "Temporary Work in Transnational Labour Regulation: SER Centrism and the Risk of Exacerbating Gendered Precariousness." *Social Indicators Research*.

3) Issues addressed in the Consultation Paper

The Consultation Paper states that this review came about because of the practices of temp agencies that may be negatively impacting Ontario workers. In order to adequately address these practices, however, we must ensure that we are broadly framing the discussion to cover all the industry's practices that may negatively impact on workers. The employment and staffing industry generates most of its revenue from temporary staffing services (70%). It also has substantial revenues coming from permanent placement and contract staffing services (28%).[12] It is not only the situation of workers hired indirectly through intermediaries such as temp agencies that must be addressed. We must also address practices loosely grouped under the industries' other practices – permanent placement, contract staffing or otherwise being placed to provide services. The repeal of Ontario's Employment Agencies Act in 2000 left a regulatory vacuum that has enabled the industry to create a variety of practices, including charging workers fees.

We need the broadest definition of employer practices and relationships to ensure that we are protecting Ontario workers. **We must address the contractual relationships that involve multiple parties (such as client companies, temp agencies and other intermediaries, workers) in the placement in temporary and permanent work**.

3) Issues addressed in the Consultation Paper

(a) ESA "Elect to Work" Exemptions

People working through temporary agencies work along side permanent workers, doing the same work but they do not receive public holiday pay. One WAC member worked almost three years at a steel plant through two agencies. His directly-hired co-workers got public holiday pay but he did not. He filed claims at the Ministry of Labour against each agency and won his public holiday pay but none of his temporary co-workers at the plant got public holiday pay. The time has come to repeal this outdated exemption that the temp agency industry is using to discriminate against temp workers and avoid paying public holiday pay.

The elect to work provision of the ESA is outdated. It is based on the notion that there is a type of worker that "cannot be counted on to work regularly"[13] and because of this they should receive fewer statutory benefits like public holiday pay or termination and severance provisions. Crafted when the regular, full-time employment model was the norm, this notion of "regular" work has been supplanted by new forms of temporary, part-time, contract, own-account work that are increasingly dominating Ontario's labour market (more than 37 percent of jobs).

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[12] Statistics Canada, "Employment services industry," The Daily, Wednesday May 7, 2008.

[13] See Referee Haladner's comments in *Batcher & Associates*, 1977. Cited in Employment Practices Branch, Employment Standards Act 2000 Policy and Interpretation Manual, Vol. 2 (Toronto: Thomson Carswell) 31-39.

Moreover, the concept on which "elect to work" is based is on an idea of a kind of temporary work that no longer exists (if it ever did). In the last 15 years the number of agencies in Canada has grown from 1,300 temporary staffing and employment agencies generating $1.5 billion to 4,385 agencies generating over $8 billion.[14] As the government observes in the Consultation Paper, temporary workers have gone from filling in when a worker is sick or on holidays in clerical and business services to providing temporary and longer term work in many sectors of the economy. Indirect staffing through temporary agencies has become a feature of our economy. We doubt that temporary workers 30 and 40 years ago could ever really elect not to work without some penalty. But even so, the temp industry has not grown so dramatically using just workers "that cannot be counted on to work'.

Under the Act, election can only be determined on a case by case basis. However, the temporary help industry in Ontario has effectively misclassified all temp agency workers as elect to work to avoid paying public holiday pay and following termination provisions. Workers routinely are given contracts which state that they are elect to work; this is in contravention to the Act. Elect to work status cannot be predetermined.

Employers need clear rules. As we have seen in the case of public holidays, in the absence of regulatory clarity, employers become confident in developing practices that contravene or fall outside the ESA.

Some agencies establish special benefits that will pay a set amount in lieu of public holiday pay to those people who have worked a set number of hours, generally 480 hours but in some cases up to 850 hours. This is still taking place even though the ESA 2000 changed public holiday pay provisions so that the payout is based on the wages earned in the previous four weeks divided by 20. Workers are only entitled to holiday pay if they have done work for the agency. Importantly, the amount of holiday pay they are entitled to is directly proportional to the amount of work they have done for the agency.

The Government wants to know:	**Our Response**
1) Should the exemptions be maintained?	**No Elect to Work Exemptions** • Elect to work exemptions for public holiday pay and termination are outdated and do not conform to current labour market practices. Only two other provinces, New Brunswick and Prince Edward Island, contain elect to work exemptions. All other provinces and territories do not have elect to work exemptions. • In her government-appointed review of home health care, former Ontario Health Minister

[14] Leah F. Vosko, Temporary Work: the Gendered Rise of a Precarious Employment Relationship (Toronto, University of Toronto Press, 2000) 128 and Statistics Canada "Employment services industry, The Daily Wednesday May 7, 2008.

	Elinor Caplan recommended changes for temporary agency home care workers that included: "eliminate elect-to-work as described in the Employment Standards Act in home care so that all workers receive full coverage under the Employment Standards Act related to paid statutory holidays, notice of termination and severance pay."[15]
2) Are there any situations where the elect-to-work exemptions make sense because of differences in the way work is done by an elect-to-work employee and a "regular" employee?	**No Exceptions. Stop discrimination on public holiday pay and termination for temp workers** • Especially in the context of many jurisdictions in Europe moving to ensure equal conditions between indirect / temporary agency workers and "regular" workers, it is time for Ontario to remove the outdated elect to work provision which is used to maintain inequality for temporary workers.
3) What would be the impact of revoking the exemptions on employees, temporary help agencies and client businesses of agencies?	**Fairness** • Revoking elect to work exemptions will level the playing field between employers, particularly those employing workers on a temporary, casual, or indirect basis, if temporary agencies are no longer using the exemption to avoid compliance with public holiday and termination provisions. • The main impact on agencies and client companies will be financial in that they will have to pay public holiday and adhere to termination requirements, like other employers. Most of the large agencies are used to paying public holiday pay and following termination provisions because they have to do so in most of the other provinces and territories across the country that do not have elect to work exemptions. Like practices in other jurisdictions, agencies and client companies must take responsibility for paying public holiday pay and providing notice of termination. • The impact for temporary agency workers will be significant. Workers will be able to join co-

[15] Hon. Elinor Caplan, "Realizing the Potential of Home Care: Competing for Excellence by Rewarding Results" Report of the Ontario government's review of the competitive bidding process used by Ontario's Community Care Access Centres (CCACs) to select providers of goods and services. p 29.

	workers, families and the community in enjoying public holidays as a day of rest, not economic hardship. Temp agency workers would potentially gain nine public holiday pays per year. Requiring temporary agency and client companies to adhere to termination notice will not necessarily increase job and income stability, but it will provide workers with notice that will provide workers with a bit of time to help them find new employment.

3) Issues addressed in the Consultation Paper

b) Barriers to Permanent Employment

There are a variety of ways in which agencies and client companies erect barriers to agency workers being hired directly by client companies. Temp agencies generally sign contracts with client companies that require a fee to be paid by the company if a temp agency worker is hired directly. The terms of this vary. In most cases, client companies must pay a fee to the agency. For example, one clerical worker reported that the client company would have to pay the equivalent of one year's salary if he was hired directly. Because temp agency workers never see the contract between the temp agency and the client company, most do not know the terms of agreements preventing them from being hired.

One member of the Workers' Action Centre applied for a permanent job in a company that he had never worked for before. He was told he would have been hired, but the company had a contract with a temp agency that he had worked for almost two years prior. The client company-agency contract prevented any person that had worked through the agency in the previous two years from being hired by the company.

Some agencies erect barriers to permanent work directly on workers. For example some workers coming to the Workers' Action Centre report being charged fees of $500 or two weeks' pay if they are hired directly by the client company. In other cases, agencies require workers to sign contracts with non-competition clauses which say that a worker will not work directly for any companies that are clients of the agencies.

Workers report less direct ways that temp agencies erect barriers to employment. Some workers have reported being fired by the agency when the client company reports to the agency that the worker has asked if permanent work is available. Less formal agreements restrict workers moving from one agency to another. For example, in cases where a client company hires workers indirectly through two or more agencies, workers are prevented from moving from one agency to another to secure higher pay rates.

Barriers to client companies providing references for workers hired indirectly through temp agencies further restricts workers' labour market mobility and movement from temporary to permanent work. It is the company that supervises and has direct knowledge of a worker's performance yet it is barred, either formally or informally, from providing references for its indirect workers. These practices maintain a pool of temporary workers for agencies (and client companies) to draw from.

Some large companies have temporary agencies housed within the company and only hire workers through the in-house temp agency. In some cases, people work years for a client company indirectly through a temp agency with no hope of permanent work.

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Position on Barriers to Permanent Employment
It is fundamentally unfair to restrict or bar workers from moving from one employer to another or from indirect to direct employment. Workers have very little real power in the workplace. In fact the one power that workers do have is to withdraw their labour through terminating employment and getting another job. To allow temp agencies and client companies to restrict the movement of temp agency workers because of the form of employment (indirect temp agency) discriminates against people working indirectly through agencies.

Temporary workers make 40% less than their permanent counterparts,[16] have few employment benefits and face higher health risks due to employment strain than do their permanent co-workers.[17] Employment Standards must not enable employers to establish direct or indirect barriers out of such types of employment.

Changes are needed to Employment Standards that prohibit direct and indirect barriers to direct employment in the client firm, or group of firms or industry serviced by an agency. This would include prohibitions such as anti-competition clauses barring workers from seeking employment, fees or contractual restrictions on client companies and fees charged to workers.

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<tr><th>The government wants to know:</th><th>Our Response</th></tr>
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1) Should an agency be able to charge a fee to a client business or agency employee if the client wants to hire an agency employee on permanently?
• If so, should there be a limit on how much such a fee could be?
• If so, should there be a limit on how long an agency can charge such a fee? (For example, the fee cannot be charged after the employee has worked for the client for 12 months or more.)

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No. Agencies should not be able to charge workers or companies fees (direct or indirect) for directly hiring workers.
• Through the mark-up on hourly wages paid for indirect agency workers, agencies already receive payment for the services they provide recruiting and maintaining a pool of labour. For each hour a temp agency worker works, the agency gets a fee.
• 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 (by, for example, a head hunter). The agency has already received a fee via temporary placement. Conversion of job status does not constitute a whole new employment placement service.
• There is no reason to enable agencies to get a payment to compensate for future loss of earnings from a worker. In other forms of employment, employers bear any loss when a worker who may have been trained or received

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[16] Statistics Canada, "Earnings of Temporary Versus Permanent Employees" The Daily (Wednesday, January 26, 2005).
[17] Marlea Clarke, Wayne Lewchuk, Alice deWolff, Andy King, "This Just Isn't Sustainable: Precarious Employment Stress and Workers' Health (Unpublished paper, October 2006) 36.

	valuable experience on the job terminates employment. These employers cannot get payment from future employers for any "value added" to a worker. • This industry has over $8 billion in revenues across the country, demonstrating profit rates of 3 to 4% year after year. The industry is driven by the demand of companies to hire workers indirectly on a temporary basis, not on a permanent basis. Prohibiting barriers to permanent hire will not threaten the agencies' ability to operate.
2) Should an agency be able to state in its contract with a client business that the client cannot hire its employees on permanently? • If so, should there be a limit to how long such a restriction could apply? (For example, the clause could not apply after the employee has worked for the client for 12 months or more.)	**No agency should be able to state in a contract with a client business that the client cannot hire its employees on directly.** • See above discussion on prohibiting barriers to hire • Allowing restrictions with limits will create unintended negative consequences for workers and companies. For example, 12-month time limits may mean that workers are prolonged in indirect employment at lower wages, with fewer benefits and protections. This discriminates against temp workers. Other possible unintended consequences would be that client companies or agencies would terminate a worker's assignment just prior to the 12-month limit to avoid pressure to convert the job to a direct hire. We witnessed some of these practices in contexts where employers are obligated to convert contract or term employment to permanent employment.
3) Should an agency be able to state in its contract with an employee that the employee cannot take a permanent job with its client business(es)? • If so, should there be a limit to how long such a restriction could apply? (For example, the restriction could not apply for more than 12 months after the employee first started working for a client through the agency.) • If so, should the restriction be limited to a client business (or businesses) where the employee was assigned by the agency, and	**No agency should be able to state in its contract with an employee that the employee cannot take a permanent job with its client business(es)?** Please see above discussions.

not extend to other clients of the agency?	
4) Should an agency be able to prohibit a client business from giving an agency employee a reference?	**No. Prohibiting references serves as an unfair barrier to employment for temporary agency workers.** Unfortunately this happens all too often for temp agency workers. Trying desperately to get more stable employment, they are trapped in temp work because they cannot get a reference. Often this happens when the temp worker is no longer on assignment and therefore not an employee of the agency or client company. As discussed in the Liability section, the employment relationship is triangular. The client company is the one that directs, supervises and disciplines the person working indirectly through a temp agency. The client company is the only party to effectively provide a reference.

3) Issues addressed in the Consultation Paper

c) Fees Charged to Workers by Agencies

The temporary staffing industry generates 70% of revenues from temporary staffing services and 28% from permanent placement and contract staffing.[18] It makes its money through temporary staffing services by charging companies a fee or mark-up -- that is the difference between what the company pays on an hourly basis for the worker and what the agency pays the worker. For permanent placement, more commonly known as "head hunting", the agency charges the company a fee for finding appropriate workers for direct hire.

Prior to the repeal of Ontario's *Employment Agencies Act* in 2000, agencies could not charge any fees to workers. The general practice was for agencies to charge companies for the service of providing temporary or permanent workers. However, since prohibition against fees for workers was repealed in 2000, agencies have begun charging workers fees in a variety of ways.

- Fee charged to register at temporary placement agency (for example, worker was charged $250 just to register at an agency for temporary assignments).
- Fee charged to a worker for temporary assignment (for example, a worker was charged the equivalent of his first week's wages on a temporary assignment at a bakery).
- Fees charged for permanent placement services in which permanent work never happens. In addition to charging companies for "head hunting" services, a new practice has emerged where some agencies charge workers a fee, promising to place them permanent employment but employment rarely happens. This practice is prohibited in many provinces including British Columbia, Alberta, Saskatchewan and Manitoba.

By charging workers fees when they are hired by the agency or placed on temporary assignment, the agency is passing some of the costs of doing business, that is, recruiting and selling labour as a business service, onto workers. This goes against the practice of Employment Standards which prohibits charging any costs of doing business to employees (such as faulty work; see provisions that prohibit against deductions from wages; ESA Section 13).

Employment agencies' overhead costs are low. They dispatch workers to client companies, so the agency only has to pay for office staff, rent, computers and advertising. Now some agencies are operating solely through the internet, recruiting and dispatching workers through a website, further reducing costs. With fees not explicitly prohibited the space has opened up for fly-by-night operators and agencies that take advantage of the legislative silence on fees to exploit workers:

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[18] Statistics Canada, "Employment services industry" *The Daily*, Wednesday May 7, 2008.

- Illegal deductions from wages – for example one agency charges $15 fee if you are late and $30 if you cannot come to work (such as when you are ill).
- Fees are charged for work that never materializes. For example, one worker was told she was hired and would be given cleaning assignments. She paid more than $700 for training that was required by the agency but she never received any work.

Position on Fees:

There should be no direct or indirect fees charged to workers.

Our Employment Standards regime should not discriminate against workers on the basis of form or type of work. Allowing temp agencies to make workers pay fees for work while workers in other forms of employment are protected from fees is unfair and discriminatory.

The *Employment Standards Act* must be amended to clearly prohibit fees. Employers must not be able to request, charge or receive, directly or indirectly, from workers or prospective workers any payment (fee) for employing or obtaining employment for the person seeking employment, or for providing information about employers seeking employees. Further any payment received under these provisions should be deemed to be wages owing.

A clear legislative prohibition is necessary. Without it, companies will continue to expand practices of charging workers fees, most likely in new and unforeseen ways. One way to curtail the spread of employment agencies that lure unsuspecting workers into disguised job scams is through a prohibition of false representations of availability of work and conditions of work. Section 8 of British Columbia's *Employment Standards Act* says that an employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following: (a) the availability of a position; (b) the type of work; (c) the wages; (d) the conditions of employment.

The government wants to know:	**Our Response:**
1) Should a temporary help agency be able to charge a worker an upfront "registration" fee before trying to find him or her an assignment with a client business?	**No, an agency should not be able to charge a worker an upfront registration fee.** • Recruiting and having available a pool of workers for temporary work or permanent placement in a company is the service provided to the client companies. Any and all fees for this service should be paid by the client company not the worker.
2) Should a temporary help agency be	**No an agency should not charge a placement fee**

able to charge a one-time "placement" fee when a worker is first assigned to a client business?	**to a work for temporary or permanent assignment.** • We do not allow employers who hire workers directly to charge them a fee for being hired.[19] Neither should we contemplate allowing agencies to charge a fee for employing its workers.
3) Are there other services, e.g., résumé writing assistance, job interview preparation, that a temporary help agency should be able to charge for? Should an agency be able to make such services mandatory?	**No an agency should not be able to charge a fee for such services**. • Ontario should join jurisdictions like British Columbia, Alberta, Saskatchewan and Manitoba that prohibit requiring use or payment for any service as a condition for being placed in a job. • Client companies often require resumes, interviews and other things from agency workers and the agency as part of its processing of "hiring" workers from the temp agency. These are part of the agency's costs in securing contracts for labour services from the client. These business costs must not be passed on to workers in the form of fees. • Agencies should not be allowed to make such services mandatory. Temp agency workers report that they are expected to put in time with the agency, registering, providing resumes and documentation about previous training, having employment skills measured or assessed (such as typing tests), health and safety training and son on -- all of which workers do not get paid wages for. Not only should such "services" not be mandatory, but workers participating in required registration, assessment and training should be paid an hourly wage by the agency.
4) What would be the impact on workers, temporary help agencies and client businesses of agencies if some or all of these types of fees were prohibited or restricted?	• Prohibition of fees would protect workers from facing fees that are not contemplated under the ESA for any other form of employment. • It would ensure that the costs of doing business are paid by the entities benefiting, namely the company and agency. • It would protect temporary agency workers who already earn 40% less than their permanent counterparts, from further economic hardship. • In terms of agencies and companies, there

[19] This would be an illegal deduction from wages under the ESA 2000 S **13**

	should be no significant hardship. Ontario businesses operated for years under a prohibition of fees and Ontario continues to account for the majority of industry operating revenues. • Other provincial jurisdictions such as British Columbia, Alberta, Saskatchewan, Manitoba prohibit fees and this has not hurt the industry. Indeed, as Statistics Canada notes, Manitoba, Saskatchewan, Alberta and British Columbia posted double digit increases in operating revenues in 2006.[20]

[20] 2006 is the latest year for which such data is available. Employment services industry, *The Daily*, Statistics Canada, Wednesday May 7, 2008.

3) Issues addressed in the Consultation Paper

3 d) Liability For *Employment Standards Act, 2000* Violations

The realities of temp work challenge our understanding of what an "employer" is. When temp workers describe their daily working lives it is clear that temp workers have two employers, creating a triangular employment relationship. Addressing the liability of the client company and the agency in legislation is one of the most important steps to provide real protections for temp workers who are in one of the most vulnerable forms of work in our labour market today.

The agency essentially functions in a human resources capacity such as recruiting, assessing and offering workers to be hired indirectly by a company for a temporary, term or indeterminate period. The agency also does the payroll functions for the temporary workers. A temp worker is only considered to be in an employment relationship when he or she is working at a client company.

The day-to-day work relationship is with the client company. The company decides whether to hire the person on assignment or not and generally terminates the working relationship. The company determines the job duties, trains the worker, supervises the work on a daily basis, and sets hours of work, breaks and leaves. The client company determines overtime hours and maintains records of hours worked. The work done by the temp worker is integral to the company. Both the company and agency profit (or suffer losses) from work done by the temp worker tt the company through the product or service made by the labour and the agency through the service of providing that labour.

The temp agency has generally been considered to be the employer for purposes of employment standards. This appears to be the case more because of historic policy and practice than a common law understanding of the employment relationship. But that is not the case for other labour laws. For example, both the agency and company are jointly liable under the Ontario Human Rights Code and Occupational Health and Safety Act. Under the Labour Relations Act, it is determined on a case by case basis whether workers are employees of the agency or client company.[21]

The impacts of the triangular employment relationship are felt most by temp workers when they face violations of employment rights. Like Sage's experience, most workers are left in limbo. Here are some examples of issues faced by temp agency workers that we work with:

- When the company does not properly record and pay the agency for all hours worked or neglects to submit hours, the agency often passes this on to the worker in form of unpaid wages or delayed pay cheques.
- Client companies may require overtime hours of work. In some cases, client companies have reported paying the agency overtime premium pay but the agency does not pay the worker the overtime pay owed. In other cases, the agency tells workers it cannot pay overtime premium pay because the client

[21] see for example, Pointe-Claire City v. Quebec Labour Court [1977] 1 S.C.R

company only paid straight time for hours worked. Neither agency nor client company bear the responsibility for these violations and workers go without wages.
- Some client companies terminate agency workers when vacation is taken and the client company then replaces the discharged worker with another agency worker. The client company takes no responsibility for this violation of the ESA. The agency does not take responsibility for the worker's right to take vacation without penalty either because it too considers the employment terminated when the assignment is terminated. The impact of this is that many temp workers cannot take vacation without losing their job.
- Unpaid emergency leave is often the only option for agency workers to take time off when sick. Yet many temp agency workers who would be eligible for job protected emergency leave cannot take this leave because the client company terminates their assignment and replaces them with other agency workers. The agency considers their assignment, and their employment, to be terminated. Neither party takes responsibility for violating this provision of the ESA.
- It is usually the client company that decides to terminate an assignment. Sometimes client companies provide an end date to the assignment, sometimes they do not. Sometimes an assignment is terminated before the end date without notice.

The current practice of considering the agency as employer of record makes it difficult for agency workers to pursue remedies when terminated without proper notice. As one member of the Workers' Action Centre concludes, "There is no recourse. You cannot talk to your agency .. I've tried. What they do is they pull you out of the contract and then they just don't give you another one. .. They're scared that their client is not going to call them and is going to go to the competition ... they don't [care] about you … because it is the client that is paying them."[22]

What the government wants to know:	**Our Response**
1) Should both temporary help agencies and their client businesses be liable for violations of the *Employment Standards Act, 2000*, such as unpaid wages?	**Yes, the temporary agencies and their client businesses must be jointly and severally liable for all violations of the ESA, 2000.** • Minister Duguid says that the government wants to ensure the legislation reflects the realities of today's workplaces in a balanced way. Recognizing the triangular employment relationship for temp agency work through joint and several liability is the central way that changes to the ESA can address the realities of temp work. • Both the company that hires the worker indirectly through the agency and the agency itself have employer functions, some separate and some

[22] Workers' Action Centre, **Working on the Edge**, 2006 p 19

	overlapping. Joint and several liability for all employment standards violations is the way to recognize this. • The Human Rights Code and Occupational Health and Safety Act recognize the joint and several liability of the client company and agency. • Joint liability is also used in other jurisdictions to protect workers in multiple employer situations.[23] • Recently some of the largest temp agencies in Ontario have called on the government to establish joint liability with client companies under the Workplace Safety and Insurance Board. As a VP of Staffing Edge, one of Ontario's largest temp agencies, said in a Toronto Star article, "Companies push off those jobs to the staffing companies because they know there will be accidents and therefore their safety rate is kept clean and ours is not."[24] This recognizes that client companies have control over the working conditions of temp workers and that temp agencies see joint liability as necessary at least for workplace accident and injury.
2) What would be the impact of joint liability on employees, temporary help agencies and client businesses of agencies?	**It would protect workers in vulnerable situations by recognizing reality of triangular employment relationship.** • It would improve compliance with employment standards • It would finally enable workers to enforce many employment standards rights that they cannot currently enforce. • It would balance the cost and liabilities of compliance and violations of the ESA among client companies and temp agencies and thereby promote fairness
3) Are there standards of the *Employment Standards Act, 2000* that client businesses should not be liable for, such as	**No. There should be no exemptions in joint and several liability. Both the client company and agency must be responsible for all provisions of the ESA.** • There are well established mechanisms to

[23] For example Quebec's Labour Standards requires the employer-contractor to be jointly and severally responsible for obligations under the Act towards the employees of the subcontractor or intermediary who have been assigned to work in the performance of the contract for services, when these obligations are not met by the latter. British Columbia requires that a Producer and farm labour contractor are jointly and separately liable for wages earned by an employee of the farm labour contractor for work done on behalf of the producer.
[24] Moira Welsh, "Board shields unsafe job sites" Toronto Star, February 16, 2008.

parental leave?	allocate liability where it may not be shared equally on a particular provision. The Ministry of Labour's Health and Safety Branch does this when prosecuting companies and their subcontractors for health and safety violations. • The ESA has a well-established principle that there should be no contracting out of the ESA obligations. Employers in temp work should not be able to opt out of provisions of the ESA through the triangular employment relationship. • There should be no discrimination between workers simply because some are hired indirectly through temp agencies. Temp workers should have access to all the same minimum employment standards as other workers. Joint liability is essential to enable temp workers to have access to all minimum standards including vacation, hours of work, emergency and other leaves and so on.

3) Issues addressed in the Consultation Paper

e) Information to Agency Employees About Assignments

There are two or more contracts shaping workers hired indirectly through temporary agencies. Employment agencies enter into contracts with companies that outline the terms and conditions under which the agency provides the company with workers on a temporary or permanent basis. These agreements include information such as the payment which is based on a wage paid to the agency for each hour that a person works at the company, fees and penalties for hiring workers directly, and other arrangements relating to the assignment. The worker is not a party to this agreement and does not get a copy of this agreement that shapes his or her working conditions.

All people working through a temporary agency face an invisible fee called a mark-up. This is the difference between what the company pays on an hourly or weekly basis for a person to work indirectly for them and what the agency pays the worker for that work. The agency uses this cut from each hour worked for its operating costs and profit. The mark-up is not regulated. Most workers do not know what the mark up rate is for their work. But in some cases where workers have been able to obtain this information, it is clear that it varies widely from 20 percent to 100 percent or more.

People can work for a client company through different agencies and receive different hourly wages because one agency is taking a higher markup. Even workers in the same agency can get differently hourly wages for the same work. Temp workers report to WAC that it is people with the most labour market barriers (racialized workers, recent immigrants, and people with disabilities) who receive lower wages because of unregulated markups. In one case, two non-racialized workers made $2 more an hour than racialized workers doing the same job through the same temp agency.

The agency enters into a contract with a worker that addresses the terms and conditions of employment when the worker is on assignment. Many workers registered with temporary help agencies report that they do not get copies of the agreement that they sign with the agencies.

Sometimes agencies subcontract through another agency when they cannot meet a client company's needs. In this case, a temp worker's employment will be shaped by:

- the agreement between the worker and his or her direct agency;
- an agreement between his or her agency and the intermediary agency (subcontractor); and,
- the agreement between the intermediary agency and the client company that the person works at.

Most people working through temporary employment agencies do not know the terms and conditions of contracts determining the work they do for a company. Further, the nature of the work means that workers often have few details about the

work and company that they are assigned to. Workers report to WAC that they will receive a call about an assignment with just the address and time they are to show up to work. They often do not know the name of the company, hours of work, overtime, job description or expectations, or term of assignment. In some cases, workers have been told to show up at a subway stop at a particular time and are driven by the agency to a factory or worksite. In these cases, workers are told even less about their work.

There is a particular need to provide information in the area of Occupational Health and Safety. The agency worker should be provided with copies of the client company's health and safety policies as well as description of any health and safety risks that may be encountered at the client company's work-site.

The Government wants to know:	**Our response:**
1) Should temporary help agencies be required to provide employees the following types of written information about an assignment: • The client business's name, address and phone number; • What wages and benefits will be received; • Pay schedules; and, • Hours of work?	**A signed contract and copy between client company, agency and worker should be required for each assignment.** • A contract between the client company, agency and worker should be signed for each work assignment and should include: 1) name of the client company; 2) place of work; 3) duration of the contract; 5) required qualification / skills and a description of the job; 6) average daily and weekly work times; 7) the scheduled work time and working time arrangement; 8) gross wages; 9) any other benefits and premium the worker is entitled to; 10) how wages will be paid; and 11) the mark-up fee. A copy should be given to each party. • A contract between the temp agency and the worker should be signed upon hiring or registration with the agency that outlines all terms and conditions of work and notice requirements. A copy should be given to each party. • Occupational health and safety information: the agency worker should be provided with copies of the client company's health and safety policies as well as description of any health and safety risks that may be encountered at the client company's work-site.

2) Are there any other types of information that should be provided by an agency to its employees at the start of assignments?	**Mark-Up** • The priority to address discrimination in wage rates and work conditions is through ensuring equality in wages and working conditions between indirect and direct workers as addressed in 2(c). However, to assist in bringing the *Employment Standards Act* in line with the *Human Rights Code* and prevent discrimination in wage rates and other conditions, the mark up should be regulated according to real costs incurred. Criteria should be developed to outlien what constitutes costs for the mark-up. • At the very least, we need to bring transparency to the mark-up. The mark-up between the client company and agency(ies) should be listed in the contract between the client company, agency and worker. • Transparency would ensure that the client company knows what conditions indirect temporary workers receive and would allow comparison to fulfill its duties under the labour laws to ensure a discrimination free workplace. Further it would enable workers to enforce human rights and make informed choices about their employment.

4) Conclusion

The Consultation Paper on Work through Temporary Help Agencies states that the "McGuinty Government is committed to ensuring that employees working through temporary help agencies are properly protected under the law." To that end we would like the government to take steps quickly to incorporate the recommendations in this brief through amendments to the *Employment Standards Act*.

Addressing the liability of the client company and the agency in legislation is one of the most important steps towards providing real protections for temp workers who are in one of the most vulnerable forms of work in our labour market today.

We should avoid plugging some gaps in the Act in a way that creates incentives for employers to shift even more work beyond the reach of regulation. Thus we must move forward to expand the scope of employment standards to protect all workers.

We must also ensure that temporary workers will benefit from any improvements brought forward. That means we need to see a commitment by this government to effectively fund and enforce employment standards.