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A New Approach to Regulating Temporary Agency Work in Ontario or Back to the Future?

Leah F. Vosko

In 2009, Ontario adopted the Employment Standards Amendment Act (Temporary Help Agencies) partly in response to public concern over temporary agency workers' lack of protection. Analyzing consequent changes to the Employment Standards Act in historical and international context, this article argues that while the Act now contains a section extending protections to temporary agency workers, several of its features take the province back to the future: specifically, its focus on temporary help agencies to the neglect of an overlapping group of private employment agencies and its exclusion of a key occupational group resemble unprincipled omissions and exclusions permitted previously. Limits on workers' politico-legal freedoms sanctioned under the new section also mirror precarious labour market conditions in early 20th century Ontario – conditions prompting state intervention in the first place.

Keywords: temporary agency work, employment standards, precarious employment, Ontario

In 2009, the provincial government of Ontario adopted the Employment Standards Amendment Act (Temporary Help Agencies) on the heels of efforts to regulate temporary agency work at multiple levels (e.g., ILO, 1997; EU, 2008). The official motivation for this Act was to maintain a role for temporary help agencies in the labour market while responding to public concern over temporary agency workers' limited access to labour protection. For the then Minister of Labour, the goal was "to enhance protections for employees working for temporary help agencies and help create opportunities for more temp employees to move to sustainable employment" (Fonseca, 2008). Accordingly, the resulting new section of the Employment Standards Act (ESA) introduces modest protections for temporary agency workers such as the requirement for information in writing about assignments and the prohibition of fees to workers for registration, placement, and other forms of assistance or for entering into an employment relationship with a client. Yet several of its features reflect continuity through change, and thereby threaten to perpetuate the precarious character of temporary agency work in Ontario. Specifically, the section's exclusive focus on temporary help

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agencies to the neglect of an overlapping group of private employment agencies with which they comprise the employment services industry and its denial of access to protection to workers from a key occupational group resemble the sorts of unprincipled omissions and exclusions permitted in previous eras. The ESA also now sanctions limits on temporary agency workers' politico-legal freedoms (e.g., a qualifier permitting direct fee-charging to clients for entering into an employment relationship with workers in some cases) that mirror labour market conditions confronting workers in early 20th century Ontario – conditions prompting state intervention in the first place.

Developing this argument, the ensuing analysis proceeds in three parts, beginning in the first part by defining temporary agency work and describing its significance, explaining how it exemplifies precarious employment, partly by virtue of the triangular employment relationship at its heart. The second part charts approaches to regulating temporary agency work, and the three parties to it, from the early 20th to the early 21st centuries in Ontario in international context. Documenting developments in Ontario occurring in tandem with shifts internationally, it sketches three eras of regulation characterized, first, by the strict regulation of private employment agencies, allowing for their prohibition in response partly to abusive practices of a small group placing immigrants, second, by the loosening of restrictions on certain types of private employment agencies, and, third, by the legitimization of temporary help agencies and, subsequently, agencies identified with the employment services industry as a whole. Finally, after highlighting governmental policy interventions at various levels in Canada and elsewhere in the early 2000s, succeeded by efforts to foster policy reform by workers' organizations in Ontario, the third part analyzes the new section of the ESA, probing how it takes worker protection back to the future. Drawing on historical lessons, the article concludes by delineating elements of a more promising alternative for re-regulation.

Defining Concepts

Temporary agency work is defined by a relationship between a worker, an agency, and a client firm. It involves an employment agreement between an agency and a worker stipulating terms and conditions of employment and a commercial agreement governing the sale of employment services between an agency and a client firm. The essence of the arrangement is that agencies place workers on assignment with client firms. In a legal sense, temporary agency work is an example of a "triangular employment relationship" (Vosko, 1997; Davidov, 2004). This relationship, specifically the commercial exchange between a client firm and an agency over the sale of workers' labour power, shapes the quality and character of temporary agency work profoundly; by virtue of its existence, temporary agency workers are highly susceptible to practices constraining workers' politico-legal freedoms present to varying degrees in all forms of work for remuneration. In registering with an agency, workers waive their right to choose freely their worksite and their direct employer. In signing an employment agreement with an agency, they also generally forfeit their ability to select their preferred type of work; agencies not only assign workers to specific

worksites but to particular locations within the occupational division of labour, often with limited regard to the skill set claimed by workers.

On account of such features, temporary agency work is a model example of the “temporary employment relationship,” which I identify elsewhere (Vosko, 2000) with the gendered rise of precarious employment, and especially the feminization of employment norms, in contrast to the “standard employment relationship” long associated with security and durability, organizing many labour and social policies in industrialized contexts in the Fordist-Keynesian period and tailored to adult male citizens with dependents. The product of efforts to de-commodify workers’ labour power to the largest extent possible in welfare states, the standard employment relationship is defined by a full-time continuous employment relationship where the worker has one employer, works on the employer’s premises under direct supervision, usually in a unionized sector, and has access to comprehensive benefits and entitlements (Mückenberger, 1989: 167; Büchtemann and Quack, 1990: 315). The temporary employment relationship, in contrast, diverges from all three structural features of this employment model, resulting in a high degree of commodification: the worker establishes occupational connections with several entities rather than one, is rarely party to an indefinite contract of employment, and often may be dismissed with little or no notice.

Defining temporary agency work, these features mean that workers tend to have low levels of unionization and/or coverage under a collective agreement, relatively low wages, a product of the mark-up or the “invisible fee” that the agency charges the client firm for its services, and limited access to social benefits and entitlements. Indeed, in Canada as a whole, temporary agency workers earn low wages vis-à-vis their permanent counterparts and have the lowest levels of union coverage among the different types of temporary employment (i.e., contract, seasonal, and casual employment) (Fuller and Vosko, 2008: Tables 2 and 3). Perhaps predictably, given the historical link between jobs characterized by such insecurities and workers’ social location, women predominate in temporary agency work, as is common elsewhere (e.g., in the United States). Furthermore, among women, “visible minorities”¹ who are recent immigrants have 4.5 times higher odds of engaging in this form of employment than other women (Fuller and Vosko, 2008: 44).² Age also distinguishes temporary agency workers from permanent workers, 36% of whom are 25-34 years of age (as opposed to 24% of permanent workers) followed by workers under the age of 24 (24%) (Fuller and Vosko, 2008: Table 2).

Approaches to Regulating Temporary Agency Work in Ontario in Comparative Context: A Brief History

The prehistory of the temporary employment relationship in Canada lies with private fee-charging employment agents brokering employment relationships in the late 19th and early 20th centuries, early precursors to temporary help agencies, many of whom recruited workers for employment across borders. At that time, two types of agents predominated: the general labour agency, which operated for a fee and confined its business to the exchange of labour, and padrones, who made their business furnishing-

ing gangs of workmen for a set fee. In exchange for fees, direct or indirect (e.g., room and board, assisted passage, etc.), such entities often promised workers jobs that were non-existent, inaccurately described, or short-lived. Responding to such abuses, and growing concern expressed by immigrant communities in particular, around the turn-of-the 20th century, the federal government sought to limit the unscrupulous practices of these agents initially through immigration policy.³ It also encouraged the creation and coordination of public employment offices, initiating a cost- and responsibility-shared public employment service constitutionally, and establishing a central role for provinces in monitoring and regulating the conduct of private employment agencies. Simultaneously, even though labour had not yet formally become a provincial matter, Ontario started to regulate the conduct of private employment agencies building on pre-existing municipal by-laws. Thus began the province's 20th century forays into addressing a subgroup of entities later encompassing temporary help agencies, proceeding subsequently in three phases operating in tandem with developments elsewhere: strict regulation; modest regulation; and, legitimization.⁴

Strict Regulation

Marking the first phase of strict regulation, Ontario enacted its initial Employment Agencies Act in 1914 (see Table 1). Instituting checks, via licensing, on the degree to which these entities could commodify temporary agency workers' labour power, this legislation was designed to regulate two types of private placement: one geared to placing the worker for a fee and the other aimed at satisfying the labour needs of employers for a fee. The Act was precedent-setting in Ontario (as Québec introduced strict regulation in 1910) in identifying, as "employment agencies," businesses whose activities focussed exclusively on securing workers on the basis of employer demand. In giving the government in power the ability to regulate fees to workers and employers, it also defined "fees" broadly to extend beyond monetary forms of remuneration and distinguished between direct and indirect fees, a distinction which later became crucial to differentiating between temporary and permanent placement. The Act was modified several times in the next two decades. However, the most fundamental changes occurred in 1927, when the province provided for the prohibition of the "granting of licenses to any class of employment agency" and for limitations on "the class of business which may be carried out by any employment agency" by regulation (Ontario, 1927: 431). Regulators never invoked their powers to ban employment agencies. Yet their ability to do so contributed to curbing abuses by certain disreputable agencies, such as those rejected in early immigration policy. It cultivated the strict regulation of fees to workers – that is, it led agencies to shift away from charging workers fees for placement to charging employers fees for furnishing workers to fulfil their labour needs – and the close oversight of licensing and the detailed record-keeping mandated under the Act. By classifying business relationships whereby employment agents provided their own workers for a fee as part of the private employment agency business, this Act also began to recognize implicitly triangular employment relationships. In these ways, the Employment Agencies Act of 1927 represented Ontario's most extensive effort to limit practices curtailing the politico-legal freedoms of workers placed by private employment agencies in the 20th century.

TABLE 1
Eras of Regulation: Key Features of Select Provincial Laws in Ontario, ILO Conventions and Recommendations, and EU Directives

	Strict Regulation (Early-Mid 20 th Century)	Modest Regulation (Mid-Late 20 th Century)	Legitimization (Late 20 th - Early 21 st Century)
Ontario	<p><i>Employment-Agencies Act, 1914</i></p> <ul style="list-style-type: none"> • Licensing • Regulated fees to workers and to client firms • Broad definition of fees (direct & indirect) <p><i>Employment-Agencies Act, 1927</i></p> <ul style="list-style-type: none"> • Provided for prohibition of licenses and for restricting employment agencies' activities 	<p><i>Employment-Agencies Acts of 1937 and 1950</i></p> <ul style="list-style-type: none"> • Mandated licensing, detailed recordkeeping, and strict regulation of fees <p><i>Employment-Agencies Acts of 1970 and 1980</i></p> <ul style="list-style-type: none"> • Altered procedures surrounding the revocation of licenses for permanent placement agencies 	<p><i>Employment Standards Act, 2000</i></p> <ul style="list-style-type: none"> • Repealed Employment-Agencies Act
International	<p><i>Treaty of Versailles (Part XIII)</i> <i>(ILO Labour Charter), 1919</i></p> <ul style="list-style-type: none"> • Introduced maxim "labour should not be regarded merely as a commodity of article of commerce" <p><i>Recommendation on Unemployment, 1919</i></p> <ul style="list-style-type: none"> • Recommended prohibition <p><i>Convention and Recommendation on Fee-Charging Employment-Agencies, 1933</i></p> <ul style="list-style-type: none"> • Called for prohibition 	<p><i>Convention and Recommendation on the Organization of the Employment Service, 1948</i></p> <ul style="list-style-type: none"> • Introduced framework for coordinating national public employment services <p><i>Convention and Recommendation on Fee-Charging Employment-Agencies (Revised), 1949</i></p> <ul style="list-style-type: none"> • Provided for either progressive abolition of regulation 	<p><i>Convention and Recommendation on Private Employment-Agencies, 1997</i></p> <ul style="list-style-type: none"> • Eliminated option of prohibition • Defined private employment agencies as employers • Recognized range of "new" activities of private employment agencies • Provided for non-discrimination, equal opportunity in employment and occupation, and adequate worker protections <p><i>EU Directive on Temporary Agency Work, 2008</i></p> <ul style="list-style-type: none"> • Legitimized temporary agency work • Defined private employment agencies as employers • Extended qualified version of equal treatment for workers

The period in which Ontario moved towards stricter regulation was also characterized by mounting action at the international level on the part of the ILO. After having called for prohibition in one of its founding standards, the Recommendation on Unemployment (1919), in 1933 the ILO adopted a Convention on Fee-Charging Employment Agencies. This convention included within its definition of fee-charging employment agencies all commercial establishments charging fees to employers. It did so partly in attempt to regulate private employment agencies carrying on recruitment and placement activities between nations and to cover all profit-driven intermediaries involved in every stage of the recruitment and placement process. In recognition of the ILO's founding maxim, "labour should not be regarded merely as a commodity or article of commerce" (and thus workers should not have to pay for work), the convention called for the gradual prohibition of private employment agencies to encourage states to replace private employment agencies with public employment services (League of Nations, 1919: art. 427).

Even in this period characterized by strict regulation, there were, however, spaces of exception, especially for social groups assumed to have access to support outside wage labour, and thus not to require the protections and benefits associated with the standard employment relationship, or for workers in occupations ill-suited to this employment model. In Ontario, for example, private employment agencies run by typewriter companies and placing largely unmarried women in clerical work, ostensibly to sell their equipment, operated essentially without restriction in the 1910s, thriving on account of the unique character of their assumedly secondary workforce. Similarly, despite the overarching goal of prohibiting private employment agencies in favour of public employment services, ILO standards of 1933 viewed agencies recruiting and placing artists, musicians and other professionals requiring representation as legitimate entities. Such exceptions enabled certain private employment agencies to maintain a toehold in the labour market.

Modest Regulation

The second phase of regulation began mid-20th century. It was characterized by loosening restrictions on private employment agencies. In this instance, international developments prefigured those in Ontario. In 1949, the ILO adopted the Convention on Fee-Charging Employment Agencies (Revised), preserving the basic features of its precursor but encouraging ratification by offering countries the options of either progressive abolition or regulation. The latter option provided for mandatory yearly licenses, supervision, fixed fee-scales, and special rules for recruitment and placement. Still, as the ILO moderated its restrictive approach to private employment agencies, it adopted the Convention on the Organization of the Employment Service (1948) to cultivate national public employment services and "obviate the need for private employment agencies" (ILO, 1948: para. 26).

In Ontario, there was limited government action in these years. Nor did those modifications introduced address temporary help agencies, whose growth was spurred, in North America, in the immediate post-war period, by women's displacement

from wartime industries, leading temporary help agencies to describe themselves as a “halfway houses” for housewives uncertain about their employability and their commitment to paid employment (Fromstein, 1978). Rather, Ontario’s Employment Agencies Act continued to mandate licensing and record-keeping and to provide for the strict regulation of fees (Ontario, 1950). Until the late 20th century, when provisions of the Act were relaxed, it also gave the government in power the authority to prohibit, by regulation, specific types of private employment agencies as well as agencies of undesirable character, although this power was never invoked.

Meanwhile, temporary help agencies gained a foothold in Ontario and elsewhere. Attesting to their growing significance, in the early 1960s, Sweden sought clarification from the ILO as to whether “ambulatory typing agencies,” resembling agencies run by typewriter companies in Ontario in the 1910s, fell within the scope of its revised Convention. In issuing a response, the ILO Director General indicated that they did since the Convention included “indirect employment operations” carried out for profit (ILO, 1966: 394). At the same time, he familiarly noted that the Convention provided that exceptions could be made for the operation of such categories of agency, suggesting that the part-time and casual workers that they place might not be best served by public employment services. The reason: their perceived weak labour force attachment could make “public employment services... hesita[nt] to undertake additional work – testing, taking up references, assuming responsibility for handling questions of remuneration, taxation, social security, employment permits for foreign applicants”... (ILO, 1966: 395-396). The ILO thus authorized the range of “new” activities, extending beyond recruitment and placement, undertaken by some private employment agencies. In the process, it opened space for temporary help agencies to distinguish themselves from other private employment agencies and to claim employer status, obscuring the triangular employment relationship and its centrality to the inherent precariousness of temporary agency work.

Legitimization

On the basis of their newly sanctioned activities, such as testing, organizing references, addressing questions of remuneration, taxation, and social security as well as employment permits for foreign applicants, temporary help agencies carved out a niche in labour markets in many countries in Western and Northern Europe as well as in North America beginning in the late 1960s and early 1970s (Gonos, 1994; Vosko, 2000; Arrowsmith, 2006). Thus began the third phase of legitimization in Ontario.

Passive legitimization describes developments in the early part of this phase, as these decades were characterized by provincial inaction. Active legitimization grew prominent in the latter part of this phase when a review of the Employment Agencies Act conducted in the mid-1990s in which the two bodies comprising the emergent employment services industry (the Employment Staffing Services Association of Canada (ESSAC) and the Association of Professional Placement Agencies (APPC)) called for a joint government-industry body to oversee its terms. Yet, in 2000 the province went even further, taking the decisive step of repealing the Act in the process of a sweeping

reform of its employment standards legislation. By this point, the Employment Agencies Act only mandated licensing; with the exception of prohibiting direct fees to workers, it had few implications for temporary agency workers' conditions of work and employment. Consequently, there was little public response to the government's action (for an exception, see ESWG, 2000). Even so, the repeal left a vacuum where statutory regulation was concerned, creating a situation reminiscent of the early years of the 20th century.

In repealing the Employment Agencies Act and failing to replace it, Ontario's approach to regulation at the turn of the 21st century differed from those adopted in Western Europe, where most countries belonging to the EU 15 loosened restrictions on the operation of temporary help agencies but developed regulations surrounding the triangular employment relationship, responding to the demands of strong labour movements (e.g., France, Sweden) and/or of corporatist or cooperative structures of bargaining (e.g., the Netherlands).⁵ Still, by the late 1990s, most of the EU 15 had come to define temporary agency workers as employees of the temporary agency who work under the supervision of the client firm (except in the United Kingdom and Ireland in which these workers fell into a grey zone).⁶ Some also maintained restrictions on temporary agency work, which usually supplemented protections such as the prohibition of direct fee-charging and the requirement that the worker agree to be placed on assignment, as well as prohibitions on no-hiring clauses (i.e., preventing the user from hiring the worker directly) (Vosko, 1997, 2010; Davidov, 2004; Arrowsmith, 2006).⁷ Many of the EU 15 also began to mandate equal treatment to temporary agency workers in the areas of pay and occupational benefits.

Alongside such developments, the ILO adopted a new Convention on Private Employment Agencies (1997) accommodating regulatory approaches either focusing principally on agencies' activities (dominant in Canada) or on their associated employment relationship (more common among the EU 15). This Convention extended unprecedented legitimacy to private employment agencies, especially temporary help agencies, by including so called "[employment] service providers" under its terms, by addressing an expanded range of activities related to recruitment, placement and employment, and by defining workers in triangular employment relationships as employees of private employment agencies whose services consist of making workers available to a third party responsible for assigning specific tasks and for direct supervision (ILO, 1997: art. 1.1b). It thereby constructed an employment relationship between a worker and an intermediary and, at the same time, called on national governments to allocate responsibility between the agency and the user firm (ILO, 1997: art. 12). In exchange, the convention required private employment agencies to "treat workers without discrimination" and to promote "equality of opportunity" in employment and occupation (ILO, 1997: art. 5.1). However, it called only for "adequate protections" for workers employed by private employment agencies rather than for equal treatment (ILO, 1997: arts. 11, 12).

By 2000, regulations at multiple levels recognized temporary help agencies as legitimate business entities. However, there was variation in the degree to which

formal laws and policies addressed the precariousness of temporary agency work and recognized its link to the triangular employment relationship. Meanwhile, under these regulatory conditions, as temporary agencies installed themselves in the labour market, there was growing evidence of the significance of temporary agency work and especially of the employment services industry, the modern moniker for the private employment agency business.

It is difficult to estimate the size of temporary agency work using labour force statistics. Labour force statistics typically underestimate its significance since they rely on workers' self-identification⁸ and, as I illustrate elsewhere, since the triangular employment relationship fosters uncertainty among workers over "who is the boss?" and can even make it difficult for workers to identify whether their employment is temporary or permanent, especially workers on lengthy assignments or who have received assignments from a single agency over a long period.⁹ Still, one useful measure of the significance of temporary agency work is the revenues and expenses of the "temporary help services industry" (Vosko, 2000: 128-137). However, while Statistics Canada formerly provided detailed data measuring revenues of the subsector long known as "personnel suppliers" / "temporary help services," since 2005 data have only been publicly available for the larger employment services industry. This industry nevertheless offers a rough proxy for the latter as it generates 62% of its operating revenues from temporary staffing services (Statistics Canada, 2007: Cat. No. 63-252-XWE). Based on this measure, the temporary help industry is sizeable and it grew significantly over the last decade in both Canada and Ontario. Considering Canada as a whole, revenues for it reached \$8.9 billion in 2007, up from just over \$4 billion in 1998, an increase of 45% in a nine-year period. Considering Ontario, which accounts for 60% of the employment services industry's operating revenues and is home to almost half (2343) of all (4698) private employment agencies, they rose from just over \$3.1 billion in 2000 to over \$5.3 billion in 2007, an increase of 58% in seven years (Statistics Canada, 2007: CANSIM Table 361-0001).¹⁰ Furthermore, 63% of employment services' provincial operating expenses are devoted to the salaries, wages, and benefits of workers.¹¹

A "New" Approach to Regulating Temporary Agency Work in Ontario?

Against this backdrop of the growing legitimacy of the employment services industry of which temporary help agencies comprise a central part, public awareness of the precarious character of temporary agency work grew in the early 2000s, prompting the introduction of Bill 139 resulting in the new section of Ontario's ESA. This awareness was shaped partly by what Bartkiw (2009: 185) helpfully refers to as three "key moments in policy cycles" that did not bring about law reform but influenced the course of discussion by legitimizing temporary help agencies while calling for enhanced worker protection: a Québec government-sponsored inquiry into non-traditional forms of employment, resulting in the report "Les besoins des personnes en situation de travail non traditionnelle" documenting the precarious

character of temporary agency work and recommending legislative reforms focussed principally on the triangular employment relationship (Bernier, Vallée et Jobin, 2003: Recommendations 31-44);¹² a federal government initiated review of Part III of the Canada Labour Code resulting in the report "Fairness at Work: Federal Labour Standards for the 21st Century" (Arthurs, 2006: 66), which cast temporary agency workers as "vulnerable workers";¹³ and, an unsuccessful Private Member's Bill in Ontario seeking to introduce regulations governing the activities of temporary help agencies outside the ESA in place of the Private Employment Agencies Act repealed in 2000 (for an in-depth review of these three interventions as they relate to temporary agency work, see Bartkiw, 2009).¹⁴

Less well-acknowledged but equally pivotal to shaping public awareness and spurring subsequent government action in Ontario were workers' organizations stepped up efforts to encourage policy reforms. Leading this process, the Toronto-based Workers' Action Centre (WAC) made a comprehensive set of proposals regarding temporary agency work (WAC, 2007: 67-68). In an attempt to move Ontario's emphasis towards acknowledging and regulating the triangular employment relationship, it called for a new section in the ESA addressed to workers engaged by agencies broadly defined. The WAC's vision entailed a section prohibiting fees or illegal deductions from workers' wages for applying for work and/or placement on assignment; publicizing mark-ups charged to client companies; preventing agencies and client firms from limiting workers' access to employment in the client firm; mandating equal or "equivalent" pay and benefits for workers engaged by private employment agencies and comparable workers in the client firm; introducing precarity pay; including the time workers hired directly by a client firm worked for the same firm through an agency in calculating the length of continuous service; and, finally, providing that workers must receive signed copies of both the employment and commercial agreements defining the parameters of their engagement.

Several of the WAC's recommendations echoed those advanced in the preceding three governmental policy interventions in Ontario and Québec as well as at the federal level. Those calling for equal pay and benefits also took their cue from revived negotiations towards an EU Directive on Temporary Agency Work. Adopted subsequently, this directive extended a qualified version of equal treatment to workers by mandating that temporary agency workers receive basic working and employment conditions (i.e., working time and pay) that are at least those that would be applicable if the worker were recruited directly by the client firm to hold the same job (Vosko, 2009).

The Lead-Up to Bill 139

In 2008, Ontario's Ministry of Labour responded with a "Consultation Paper on Work through Temporary Help Agencies" (2008a). The issues of concern to the government: the legitimacy of provisions permitting agencies not to provide temporary agency workers with public holiday pay (i.e., "elect to work" exemptions), barriers to permanent employment, direct fees, and joint and several liability for

employment standards violations, as well as the information workers should receive about assignments.

In their responses to the consultation paper, workers' organizations drew attention to key omissions, many of which related to the triangular employment relationship, calling, once again, for a broader emphasis on private employment agencies and equalizing working and employment conditions between agency workers and workers hired directly by client firms. They advocated defining the employment practices associated with temporary agency work in the consultation paper in a manner encompassing all contractual relationships affecting workers; removing elect-to-work exemptions in the ESA; eliminating all barriers to direct and permanent employment; prohibiting all fees to workers; introducing joint and several liability for all violations of the ESA; and, requiring agencies to provide workers with copies of the employment contract and the commercial agreement governing their conditions of work and employment on assignment (see for e.g., ACTEW, 2008; Federation House, 2008; WAC, 2008).

In contrast, the Association of Canadian Search, Employment and Staffing Services (ACSESS) (2008: 6-9), the employer federation representing the private employment agency industry, produced by a merger between the APPC and ESSAC, supported retaining elect-to-work provisions in the ESA but adding two conditions: first, for a positive determination, it sought to require that an arrangement exist between an employer and an employee (formal or informal) giving the employer complete discretion over whether to require the worker to work or not. Second, it aimed to ensure that no negative consequences are attached to employees' refusal to accept an offer to work. In its brief, ACSESS supported prohibiting direct and indirect placement fees to candidates or employees (i.e., only permitting fees for separate employment services, such as résumé writing assistance). However, it affirmed its commitment to agencies' ability to derive income from their clients. For ACSESS, fees to clients were acceptable but barriers interfering with the principle of freedom of contract were not; for example, it opposed contractual terms prohibiting clients from hiring employees permanently. It also opposed the introduction of joint and several liability for agencies and clients in all instances on the basis that the temporary help agency is the employer.

After these consultations, Bill 139, introducing the Employment Standards Amendment Act (Temporary Help Agencies), 2009 moved through three readings, over which time its substance changed very little.¹⁵

The Employment Standards Amendment Act (Temporary Help Agencies), 2009

The resulting new section of the ESA preserves a role for temporary help agencies in the labour market while responding to public concern over temporary agency workers' lack of access to labour protection. It achieves the former by constructing an employment relationship between an "assignment employee," the term used to denote temporary agency worker, and a "temporary help agency" and by naming

the “client” as “a person or entity that enters into an arrangement with the agency under which the latter agrees to assign or attempt to assign one or more of its assignment employees to perform work for the person or entity on a temporary basis” (Ontario, 2009b: s. 74.1 (1) and s. 74.3). And it addresses the latter goal by introducing a series of modest protections for temporary agency workers. However, several of its omissions and exclusions, as well as limits that the ESA places on temporary agency workers’ politico-legal freedoms, take Ontario back to the future, underscoring the danger that the precariousness of temporary agency work, linked especially to its associated triangular employment relationship, will remain.

Modest “New” Worker Protections

Through its new section, the ESA now contains a number of important provisions for worker protection. Under its terms, temporary help agencies are to provide certain information in writing to workers as soon as they become assignment employees, including the legal name of the agency and contact information (Ontario, 2009b: s. 74.5). When they offer workers assignments, they are also obliged to provide the legal name of the client, contact information, hourly or other wage rates or commissions, hours of work, a general description of the work to be performed, the pay period and pay day established by the agency and, if the information is available, an estimated term of the assignment (Ontario, 2009b: s. 74.6).

In a move attempting to limit the commodification of temporary agency workers’ labour power, the new section also re-establishes familiar prohibitions: agencies are not permitted to charge assignment employees fees for registration, placement, assistance or instruction in the preparation of résumés or in preparing for job interviews, or for entering into an employment relationship with a client (Ontario, 2009b: s. 74.8 (1) 1-3, 5). They are prohibited, in addition, from restricting assignment employees, through employment agreements, from entering into an employment relationship with the client and from preventing clients, through commercial agreements, from both providing references for assignment employees and entering into an employment relationship with them (Ontario, 2009b: s. 74.8 (1) 4, 6-7). There is, as well, a related prohibition on agencies charging fees to clients in connection with entering into an employment relationship with an assignment employee (Ontario, 2009b: s. 74.8 (1) 8).

Furthermore, the new segment of the ESA extends public holiday pay and termination and severance to temporary agency workers on essentially equivalent bases to other employees (Ontario, 2009b: s. 74.10-11). It explicitly prohibits clients from taking reprisals against assignment employees on various grounds and places the burden of proof on clients where they are accused of violations (Ontario, 2009b: s. 74.12). In a rare acknowledgement of the need to address the triangular employment relationship, anti-reprisals provisions prohibit tactics such as intimidation and termination (or threatened termination) “because the client or temporary help agency is or may be required, because of a court order or garnishment, to pay to a third party an amount owing to the assignment

employee” (Ontario, 2009b: s. 74.12 (1) b). And new measures on enforcement reinforce such provisions by expanding employment standards officers’ power to issue orders against the client with respect to violations of the reprisals section (Ontario, 2009b: s. 74.13).¹⁶

Omissions and Exclusions

Despite introducing select protections, the new section contains several key omissions and exclusions both in its scope and coverage and in its substance. On account of the section’s definitional parameters, its obligations and prohibitions apply exclusively to the activity of temporary agency work. By defining the “assignment employee” as “an employee employed by a temporary help agency for the purpose of being assigned to perform work on a temporary basis for clients of the agency” and the “temporary help agency” as “an agency that employs persons for the purpose of assigning them to perform work on a temporary basis for the clients of the employer” (Ontario, 2009b: s. 74.1 (1)), it does not cover a sizeable and overlapping segment of agencies comprising the employment services industry – those devoted to permanent placement, providing 40% of its revenues, and placing workers for a fee with similar implications (e.g., reduced wages for workers in the short or long term on account of direct fees to clients). Even the relatively weak Employment Agencies Act repealed in 2000 covered a broad range of private employment agencies, principally in attempt to limit practices requiring workers to pay (directly or indirectly) for securing employment, consistent with the approach of its precursors. Under the new section of the ESA, in contrast, there are increased incentives for agencies to blur the boundaries between permanent and temporary placement and to delineate the latter narrowly (e.g., to encourage workers to register for both types of placement and expand requirements for fees associated with permanent placement so that intended beneficiaries of new provisions of the ESA are, once again, subject to a range of unregulated practices).

Reminiscent of the provincial government’s acceptance of private employment agencies run by reputable typewriter companies placing unmarried women in clerical work, the section also includes a blanket exclusion for certain “assignment employees”: homecare workers subcontracted by the provincial government through what are known as Community Care Access Centres (Ontario, 2009b: s. 74.2). The rationale for this exclusion stems from the government’s concern to protect Ontario’s Ministry of Health from liability for termination and severance costs arising from the new legislation and thereby exemplifies the practice of using statutory instruments to maximize reliance on market forces (see especially CUPE, 2009; see also Ontario, 2009d: M-177). In this case, the effect is to deny workers from a particular occupational group otherwise falling within the narrow definition of “assignment employees” access to protection – workers placed with a homecare agency, a group, once again, comprised of many women and immigrants.

For those it covers, the section’s prohibition on agencies charging fees to clients in connection with entering into an employment relationship with an assignment employee is also circumscribed by an exception: “the agency *may charge a fee* to the

client” where the client enters into an employment relationship with an assignment employee “during the six-month period beginning on the day which the employee first began to perform work for the client of the agency” (Ontario, 2009b: s. 74.8 (1), italics added). This qualifier sanctions restrictive practices formerly regulated by the market and permits formal restraints on workers’ mobility in the labour force in the process, albeit subject to modest limits. It also encourages temporary help agencies to cycle workers from short assignment to short assignment in order to retain the mark-up on their wages. In these ways, temporary agency workers and clients may be compelled to pay a time-limited debt to agencies resembling debts immigrants paid to general labour agents acting abroad deemed unacceptable in Canada’s earliest immigration policy.

The inclusion of this six-month rule in Bill 139 prompted intense debate in hearings preceding its adoption. Workers’ organizations contended that it establishes “a dangerous precedent in Ontario and Canadian employment practices... [which largely make] non-competition or restraint-of-trade clauses in employment contracts unenforceable” (WAC and PCLS, 2009: 30; see also CAW, 2009; CUPE, 2009; Skills for Change, 2009). In contrast, the ACSESS opposed any measure “controlling financial business terms between a staffing service and a client,” suggesting that it “represents a misapplication of Employment Standards legislation in the area of Consumer and Commercial transactions” and noting further that “[t]emporary help services incur significant advertising, recruitment, background/screening, risk and other overhead costs and should be permitted to offer... services to clients without the government’s arbitrary interventions, limitations and restrictions upon legitimate business terms” (Ontario, 2009c: M-148). Signalling a tacit agreement between temporary help agencies and clients to normalize the mark-up for a specified period, a practice that Gonos (1994) helpfully labels fee-splitting, as a means of legitimizing temporary help agencies as employers and thereby obscuring the triangular employment relationship, client firms supported ACSESS in its argument. For example, an auto-parts manufacturer gave a brief highlighting “success stories” of its “partnership” with temporary help agencies, noting, in a manner resembling efforts to cast temporary help agencies as “halfway houses,” that temporary agency work has “helped many unskilled and vulnerable individuals access the job market and transition to full-time employment”; to bolster its claim, this manufacturer indicated that the average length of an assignment at its plants is four- to six-months and noted that over 3,500 (or 24% of its workforce) started their careers as temporary agency workers (Ontario, 2009c: M-155).

Several other terms that the new section fails to incorporate are also noteworthy. Absent are provisions for holding client firms and temporary help agencies jointly and severally liable for most violations of the ESA. Beyond gesturing in this direction through its anti-reprisal provisions, the only other movement towards joint and several liability is contained in provisions governing enforcement: the section addressing “third party demand” gives the Director of the Employment Standards Branch the option of demanding that a client pay money otherwise owed to the temporary help agency if s/he has reason to believe that the client is owing or holding money for that agency (Ontario, 2009b: s. 22). However, this move only affirms the Director’s pre-existing

authority to make such orders. Still other omissions include the lack of provision for precarity pay and equal treatment in any measure, as well as the failure to address, in calculating the length of continuous service, the time temporary agency workers hired subsequently by a client firm worked for the same firm through an agency.

Conclusion: Towards an Alternative Approach

The historical record and contemporary interventions show that the shape and content of the Employment Standards Amendment Act (Temporary Help Agencies) (2009) was not predestined. Future government action could thereby improve worker protection by taking inspiration from the proposals of various actors in the lead-up to its adoption and address its central shortcomings.

Many such deficiencies, and the risks of perpetuating precariousness that they pose, could be resolved by adopting an approach focussing more squarely on the triangular employment relationship. On account partly of this relationship, temporary agency work is by definition highly precarious. Without expansive statutory regulations (i.e., regulations broader in both their scope and their range) focussed on worker protection, temporary agency workers, as well as workers in triangular relationships falling outside the new section of the ESA, are highly susceptible not only to uncertainty but to low income and a lack of coverage under collective agreements.

Taking the triangular employment relationship as a central object of regulation would necessitate broader definitions of both the agencies and workers of concern, a strategy that would, among other things, eliminate incentives for distinguishing between the often overlapping activities of permanent and temporary placement that previous regulations addressed. It would also give visibility to unprincipled exemptions for categories of workers, such as homecare workers. Placing greater emphasis on the triangular employment relationship would also make it incontestable that the six-month rule, even if it represents a limited infringement on workers' mobility, amounts to sanctioning non-competition or restraint-of-trade clauses in employment contracts, and is therefore illegitimate. More broadly, shifting the emphasis in this direction would make possible a systematic approach to regulating employment relationships involving multiple parties taking into account client firms' responsibilities (Davidov, 2004). It would allow, for example, for a carefully crafted approach to joint and several liability rather than piecemeal strategies applicable in select areas. And it would open space for addressing questions and issues brought into view by the legitimization of temporary help agencies but of larger relevance to the changing nature of employment, including the need for creating new types of bargaining units to enable unionization, benefits beyond job tenure, precarity pay, and parity of treatment for workers regardless of the forms of employment in which they engage. Persistent precariousness among temporary agency workers and other workers enmeshed in triangular employment relationships is not inevitable but rather exacerbated by policies which, while they may have ameliorative aims, fail to look back in establishing future directions.

Notes

- 1 While recognizing that racial and ethnic categories are socially constructed, the term “visible minority” is used here as Statistics Canada uses it, that is, to denote persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour designated under federal Employment Equity legislation.
- 2 Such patterns in the social location of temporary agency workers resemble those in the EU 15, where temporary agency work is especially prevalent among migrants. Eleven percent of all temporary agency workers in the EU 15 are “non-national citizens” (the category used in the EU LFS) of the countries in which they were employed as opposed to 5% of permanent workers and 7% of all temporary workers (Vosko, 2010: 146).
- 3 The earliest example was the 1897 Alien Labour Act, which made it illegal to “pre-pay the transportation of, or in any other way to assist or solicit the importation or immigration of any alien or foreigner into Canada under contract or agreement” (Canada, 1897: 60-61).
- 4 The following two subsections on strict and modest regulation synthesize my previous research on the history and evolution of temporary agency work and its regulation in Canada and internationally (see especially, Vosko, 1997, 2000, 2009 and 2010).
- 5 In such contexts, the form of regulations varied, depending on the legal status of temporary agency work – that is, whether the client firm or agency was considered the employer and, if employment-related responsibilities were divided, which responsibilities rested with the respective parties.
- 6 In a majority, temporary agency workers were hired for the duration of a given assignment or posting. Simultaneously, most of the EU 15 continued to operate licensing schemes.
- 7 The restrictions took three forms: rules governing sectors and occupations in which temporary agency work was permissible; measures limiting the duration of a given assignment and/or successive assignments; and reasons and circumstances under which user firms could resort to temporary agency workers (e.g., in instances of finite increases in demand).
- 8 Normally, labour force statistics estimate the size of the temporary agency work labour force on the basis of whether or not the worker identifies his/her employment contract as temporary or permanent and whether or not s/he names the agency her/his employer, counting only those workers answering in the affirmative to both questions. As a result, labour force statistics tend to underestimate its magnitude.
- 9 I initially documented this confusion over “who’s the boss?” in my book *Temporary Work* (2000: 176-177), where I also linked this problem to deficiencies of survey instruments used in the 1990s; there, I found that the Survey of Work Arrangements, the best data source available at that time, asked respondents to name only one employer and instructed interviewers to select the agency as the employer in cases where respondents named more than one (312, n. 15). Since then, questionnaires have improved; for example, the current Survey of Labour and Income Dynamics first asks respondents “is your job permanent, or is there some way that it is not permanent?;” if the response is “no”, they are asked “in what ways is your job not permanent?” and offered the option of indicating “work done through temporary help agency” (SLID, 2006: Qs 040 and 04). Still, underestimation remains a problem due to confusion over who is the boss, one that is also common to surveys used elsewhere (e.g., the EU Labour Force Survey (Vosko, 2010: 241; for another recent study coming to this conclusion, see also Bartkiw, 2009: 165-66).

With these qualifiers, official labour force data suggest that temporary agency workers represent just over 1% of all employees in Canada, a disproportionate percentage of whom are found in Ontario (60%) (SLID 2006: Custom tabulation). These estimates are almost identical to those available for the United States. They are also consistent with those estimates for the EU 15 (Vosko, 2010: 144).

- 10 For an account of the growth of revenues of the employment services industry and the temporary help services industry reaching back to the early 1990s, see Vosko (2000), especially Tables 8a, 8b, 9, 10, 11 and 13. For an account considering the period between 1998 and 2005, see Bartkiw (2009), especially Tables 1 and 2.
- 11 Considering the temporary agency workforce, and consistent with historical trends, this sizeable percentage of operating expenses devoted to labour costs translates into a high concentration of workers in the private sector (84% in 2004) and in a narrow band of industries (i.e., management, administrative, and other support industries) and occupations (i.e., occupations unique to processing, manufacturing and utilities) (Fuller and Vosko, 2008: Table 1).
- 12 For example, after taking the position that the agency should be the employer of record of temporary agency workers, it called for mandatory written contracts between the agency and the worker, making the agency and the client firm jointly-responsible for health and safety and work related injuries, and prohibiting contractual clauses restricting workers' access to permanent employment. It also recommended extending the same conditions, regarding remuneration and holiday pay, to temporary agency workers and comparable workers hired by the client, providing for a premium on top of temporary agency workers' wages, counting a temporary agency worker's service from a previous assignment towards continuous service requirements where s/he is hired subsequently by the client firm, and empowering the Labour Relations Board to enable temporary agency workers to unionize.
- 13 To address temporary agency workers' vulnerability, Fairness at Work (2006) made two noteworthy proposals: first, to create an industry-created code of conduct mandatory for agencies doing business with institutions receiving federal grants or contracts (Recommendation 10.1); and, second, to make client firms and agencies jointly and severally liable for the non-payment of workers' wages or benefits (Recommendation 10.2).
- 14 Bill 161, An Act Respecting Temporary Help Agencies, 2007, aimed to reintroduce a licensing scheme for temporary help agencies, linking it to their records of complying with the ESA, and to make client firms and agencies jointly and severally liable for unpaid wages, excluding termination pay, severance pay, and related benefits from the definition of the latter (Ontario, 2007: s. 6 and 14).
- 15 One exception is that the initial version sought to establish a scheme governing termination and severance for temporary agency workers distinct from (and inferior to) that applied to other workers covered by the ESA (Ontario, 2008b: s. 74.11). However, the amended Bill withdrew this proposal, opting, instead, to adapt the existing scheme modifying its provisions to reflect the nature of temporary agency work (Ontario, 2009a: s. 74.11). It also included a provision requiring agencies to inform workers of the estimated length of assignment if it is known (Ontario, 2009a: s. 74.6).
- 16 Still, although the new section of the ESA contains several provisions on enforcement, it establishes few mechanisms for compliance (Ontario, 2009b: s. 74.13-74.17).

References

- ACSESS. 2008. "Submission to the Ministry of Labour Consultation on Work through Temporary Help Agencies." July 7.
- ACSESS. 2009. "Submission to the Standing Committee on the Legislative Assembly Hearing—Bill 139: An Act to amend the Employment Standards Act, 2000 in relation to temporary help agencies." February.
- ACTEW (A Commitment to Training and Employment for Women). 2008. "Submission to the Ministry of Labour Consultation on Work through Temporary Help Agencies." July.

- Arrowsmith, J. 2006. *Temporary Agency Work in an Enlarged European Union*. Luxembourg: Eurofound.
- Arthurs, Harry. 2006. *Fairness at Work: Federal Labour Standards for the 21st Century*. Ottawa: Human Resources and Skills Development Canada.
- Bartkiw, Timothy. 2009. "Baby Steps? Toward the Regulation of Temporary Help Agency Employment in Canada." *Contemporary Labour Law and Policy Journal*, 31, 163-206.
- Bernier, Jean, Guylaine Vallée and Carol Jobin. 2003. *Les besoins de protection sociale des personnes en situation de travail non traditionnelle*. Quebec: Ministère du travail.
- Büchtemann, C., and S. Quack. 1990. "How Precarious is Non-Standard Employment? Evidence from West Germany." *Cambridge Journal of Economics*, 14, 315-329.
- Canada. 1897. Alien Labour Act.
- Canada. 1910. Immigration Act.
- Canada. 1927. Local Improvement Act.
- CAW (Canadian Auto Workers Union). 2009. "Submission to the Standing Committee on the Legislative Assembly Hearing—Bill 139: An Act to amend the Employment Standards Act, 2000 in relation to temporary help agencies." April 1.
- CUPE (Canadian Union of Public Employees). 2009. "Brief Submission to the Standing Committee on the Legislative Assembly Hearing—Bill 139: An Act to amend the Employment Standards Act, 2000 In relation to temporary help agencies." March 25.
- Davidov, Guy. 2004. "Joint Employer Status in Triangular Employment Relationships." *British Journal of Industrial Relations*, 42, 727-746.
- ESWG (Employment Standards Working Group). 2000. "Time for Change: Tories Turn Back the Clock but Working People Want to Move Forward." Submission to Ministry of Labour's Report "Time for Change." September.
- EU (European Union). 2008. "Directive 2008/104/EC of the European Parliament and of the Council of 22 October 2008 on Temporary Agency Work."
- Federation House. 2008. "Response to Ministry of Labour Consultation Paper on Temp Agencies." Belleville: Quinte Labour Council.
- Fonseca, Peter. 2008. "[Temporary Employment Agencies]." In Ontario. Legislative Assembly. *Debates*. 39th Parliament, 1st Session, No. 101 (December 9, 2008) p. 4585. Ontario: Legislative Assembly of Ontario, 2009.
- Fromstein, Mitchell. 1978. "The Socio-Economic Roles of the Temporary Help Services in the United States Labour Market." *Labour Market Intermediaries*. Conference Proceedings, E. Ginzberg, ed. Washington: National Committee for Manpower Policy, 170.
- Fuller, Sylvia, and Leah F. Vosko. 2008. "Temporary Employment and Social Inequality in Canada: Exploring Intersections of Gender, Race and Migration." *Social Indicators Research*, 88, 31-50.
- Gonos, George. 1994. "A Sociology of Temporary Employment Relationship." Ph D dissertation, Department of Sociology, New Brunswick, NJ, Rutgers University.
- ILO (International Labour Organization). 1919. Recommendation on Unemployment.
- ILO. 1933. Fee-Charging Employment Agencies (Shelved).
- ILO. 1948. Convention on the Organization of the Employment Service.
- ILO. 1949. Fee-Charging Employment Agencies (Revised).
- ILO. 1966. "Memorandum Sent by the ILO to the Ministry of Health and Social Affairs of Sweden." *Official Bulletin*, 49 (3).
- ILO. 1997. Convention and Recommendation on Private Employment Agencies.
- League of Nations. 1919. *The Versailles Treaty*, June 28 (Labour Charter, art. 427).

- Mückenberger, Ulrich. 1989. "Non-Standard Forms of Employment in the Federal Republic of Germany: The Role and Effectiveness of the State." *Precarious Jobs in Labour Market Regulation*. G. and J. Rogers, eds. Geneva: International Institute for Labour Studies, 167-186.
- Ontario. 1884. Factories Act.
- Ontario. 1914. Employment Agencies Act.
- Ontario. 1927. An Act Respecting Employment Agencies Act.
- Ontario. 1937. Employment Agencies Act.
- Ontario. 1950. Employment Agencies Act.
- Ontario. 1970. Employment Agencies Act.
- Ontario. 1980. Employment Agencies Act.
- Ontario. 2000. Employment Standard Act.
- Ontario. 2007. Bill 161. An Act Respecting Temporary Help Agencies.
- Ontario. 2008a. "Consultation Paper on Work through Temporary Help Agencies." Toronto: Ministry of Labour.
- Ontario. 2008b. Bill 139. An Act to Amend the Employment Standards Act (ESA), 2000 in relation to temporary help agencies (first reading).
- Ontario. 2009a. Bill 139. An Act to Amend the Employment Standards Act (ESA), 2000 in relation to temporary help agencies (third reading).
- Ontario. 2009b. Employment Standard Act (Temporary Help Agencies) (final text).
- Ontario. 2009c. Standing Committee on the Legislative Assembly. April 1, 2009.
- Ontario. 2009d. Standing Committee on the Legislative Assembly. April 8, 2009.
- Skills for Change. 2009. "Submission to the Standing Committee on the Legislative Assembly Hearing—Bill 139: An Act to amend the Employment Standards Act, 2000 in relation to temporary help agencies." March.
- Statistics Canada. 2007. *Employment Services Bulletin*. Cat. No. 63-252-X.
- Statistics Canada. 2007. "Employment Services, Summary Statistics, Annual Survey of Industries: Employment." Table 361-0001.
- Statistics Canada. 2007. LFS (Labour Force Survey), 2007. CANSIM, Tables Nos.: V1540489, V1540508, V13682073.
- Statistics Canada. 2007. SLID (Survey of Labour and Income Dynamics).
- Vosko, Leah F. 1997. "Legitimizing the Triangular Employment Relationship: Emerging International Labour Standards from a Comparative Perspective." *Comparative Labor Law and Policy Journal*, 19, 43-77.
- Vosko, Leah F. 2000. *Temporary Work: The Gendered Rise of a Precarious Employment Relationship*. Toronto: University of Toronto Press.
- Vosko, Leah F. 2009. "Less than Adequate: Regulating Temporary Agency Work in the EU in the Face of an Internal Market in Services." *Cambridge Journal of Regions, Economy, and Society*. April, 1-17.
- Vosko, Leah F. 2010. *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment*. Oxford, UK: Oxford University Press.
- WAC and PCLS (Parkdale Community Legal Services). 2009. "Submission to the Standing Committee on the Legislative Assembly Hearing – Bill 139: An Act to amend the Employment Standards Act, 2000 in relation to temporary help agencies." March 24.
- WAC. 2007. *Working on the Edge*. Toronto: WAC.
- WAC. 2008. "Submission to the Ministry of Labour Consultation on Work through Temporary Help Agencies." June 6.

SUMMARY

A New Approach to Regulating Temporary Agency Work in Ontario or Back to the Future?

In 2009, the province of Ontario, Canada adopted the Employment Standards Amendment Act (Temporary Help Agencies) partly in response to public concern over temporary agency workers' limited access to labour protection. This article examines its "new" approach in historical and international context, illustrating that the resulting section of the Employment Standards Act (ESA) reflects continuity through change in its continued omissions and exclusions.

The article begins by defining temporary agency work and describing its significance, explaining how it exemplifies precarious employment, partly by virtue of the triangular employment relationship at its heart. Next it traces three eras of regulation, from the early 20th to the early 21st centuries: in the first era, against the backdrop of the federal government's forays into regulation through the Immigration Act, Ontario responded to abusive practices of private employment agencies, with strict regulations, directed especially at those placing recent immigrants in employment. In the second era, restrictions on private employment agencies were gradually loosened, resulting in modest regulation; in this era, there was growing space for the emergence of "new" types of agencies providing "employment services," including temporary help agencies, which carved out a niche for themselves by targeting marginalized social groups, such as women. The third era was characterized by the legitimization of private employment agencies and, in particular, temporary help agencies, both in a passive sense by government inaction in response to growing complexities surrounding their operation, and in an active sense by the repeal of Ontario's Employment Agencies Act in 2000.

Despite a consultative process aimed, in the words of Ontario's then Minister of Labour, at "enhanc [ing] protections for employees working for temporary help agencies," the new section of the ESA adopted in 2009 reproduces outdated approaches to regulation through its omissions and exclusions; specifically, it focuses narrowly on temporary help agencies rather than including an overlapping group of private employment agencies with which they comprise the employment services industry and its denial of access to protection to workers from a particular occupational group (i.e., workers placed by a subset of homecare agencies otherwise falling within the definition of "assignment employees"). Highlighting the importance of looking back in devising new regulations, the article concludes by advancing a more promising approach for the future that would address more squarely the triangular employment relationship as the basis for extending greater protection to workers.

KEYWORDS: temporary agency work, employment standards, precarious employment, Ontario

RÉSUMÉ

Une nouvelle approche pour encadrer les agences de placement temporaires en Ontario ou retour vers le futur ?

En 2009, l'Ontario a adopté la *Loi modifiant la Loi sur les normes d'emploi en ce qui concerne les agences temporaires de placement et certaines autres questions* afin de répondre, du moins en partie, à la préoccupation publique à l'égard de l'accès limité en matière de protection des conditions de travail des travailleurs de ces agences. Le présent article examine cette « nouvelle » approche dans une perspective historique et internationale, ce qui permet d'observer que cette nouvelle section de la *Loi sur les normes d'emploi* (LNE) s'inscrit, à travers le changement, dans une continuité en ce qui concerne les exclusions et les omissions de la LNE.

L'article débute par une définition de l'expression « agence temporaire de placement » (ATP), tout en faisant ressortir sa signification en termes de précarité d'emploi grâce à la relation d'emploi triangulaire qui est au cœur de celle-ci. Puis il retrace trois périodes de régulation. Première période du début du 20^e siècle au début du 21^e siècle, avec en toile de fond les incursions du gouvernement fédéral en matière de réglementation via la *Loi sur l'immigration*, la province d'Ontario a répondu aux pratiques abusives des agences de placement privées par des règles strictes s'adressant directement aux agences faisant le placement des nouveaux immigrants. Durant la seconde période, les restrictions envers les agences de placement temporaires ont été graduellement relâchées, donnant lieu à une régulation plus modeste; c'est aussi la période d'émergence de « nouveaux » types d'agences procurant des « services d'emploi », incluant des agences temporaires d'aide qui se découvraient une niche en ciblant des groupes sociaux marginalisés, comme les femmes. La troisième période est caractérisée par la légitimation des agences privées de placement, en particulier des agences temporaires d'aide, de façon passive via l'inaction du gouvernement en réponse à la complexité croissante de leurs opérations, et de façon active par l'abolition la *Loi sur les agences de placement* de l'Ontario en 2000.

En dépit de la tenue d'un processus de consultation dont le but, selon les dires du Ministre du travail, était d'« élargir les protections pour les employés travaillant pour des agences temporaires d'aide », cette nouvelle section de la LNE adoptée en 2009 ne fait que reproduire les approches dépassées de régulations à travers ses exclusions et ses omissions. Plus spécifiquement, on vise de façon étroite les agences temporaires d'aide plutôt que le groupe plus large des agences privées d'emploi qui englobent l'industrie des services d'emploi et son dénie d'accès à la protection des travailleurs d'un groupe professionnel particulier (soit les travailleurs placés en emploi par un sous-ensemble d'agences de soins à domicile qui seraient autrement considérés légalement comme travailleurs de l'agence, i.e. selon une relation « employeur-employé »). Mettant en lumière l'importance de jeter un regard sur le passé pour développer de nouvelles régulations, l'article conclut en proposant une approche plus prometteuse pour l'avenir et qui s'adresserait plus carrément au problème de la relation d'emploi triangulaire comme support à une protection plus étendue des travailleurs.

MOTS CLÉS : agence de placement temporaire, normes d'emploi, emploi précaire, Ontario

RESUMEN

¿Un nuevo enfoque para regular el trabajo temporario de las agencias en Ontario o regreso al futuro?

En 2009, la provincia de Ontario en Canadá adoptó la revisión de la ley de normas de empleo (Agencias de ayuda temporaria) parcialmente en respuesta a la preocupación pública sobre el acceso limitado a la protección laboral de los trabajadores temporales de agencias. Este artículo analiza su “nuevo” enfoque en un contexto histórico e internacional, ilustrando que dicha sección de la Ley de normas de empleo refleja una continuidad a través del cambio en omisiones y exclusiones persistentes.

Este artículo comienza definiendo el trabajo temporario de agencias y describe su significado, explica cómo esto ilustra el empleo precario, parcialmente en virtud de la relación triangular de empleo que constituye su esencia. Luego, se esbozan tres eras de regulación, desde el comienzo del siglo XX hasta el comienzo del siglo XXI: en la primera era, frente a las incursiones del gobierno federal en la regulación mediante la Ley de inmigración, Ontario respondía a las prácticas abusivas de las empresas privadas de empleo con estrictas regulaciones, dirigidas en particular contra aquellas que ofrecían servicios de empleo a inmigrantes recientes.

En la segunda era, las restricciones respecto a las agencias de empleo privado fueron relajadas gradualmente, resultando en una regulación modesta; en esta era, hubo un espacio creciente para la emergencia de “nuevos” tipos de agencias proveedoras de servicios de empleo, incluyendo las agencias de ayuda temporal que se abrieron un espacio propio focalizando los grupos sociales marginalizados, como las mujeres. La tercera era fue caracterizada por la legitimación de las agencias privadas de empleo y, en particular, de las agencias de ayuda temporal, legitimación en sentido pasivo mediante la inacción del gobierno en respuesta a las crecientes complejidades que rodean el funcionamiento de dichas agencias, y en un legitimación en sentido activo mediante la revocación de la Ley de las agencias de empleo de Ontario en el año 2000.

A pesar de un proceso consultativo orientado, según las palabras del entonces Ministro de trabajo de Ontario, a “ampliar las protecciones para los empleados que trabajan para las agencias de ayuda temporal”, la nueva sección de la Ley de normas de empleo adoptada en 2009, con sus omisiones y exclusiones, reproduce los enfoques obsoletos de regulación; en particular, la ley se centra casi exclusivamente en las agencias de ayuda temporal en vez de incluir un amplio grupo de agencias privadas de empleo que comprenden la industria de servicios de empleo y la negativa de acceso a la protección de los trabajadores de un grupo ocupacional particular (es decir, los trabajadores colocados por un subconjunto de agencias de servicios a domicilio que de otra manera caen en la definición de “empleados por asignación”).

Destacando la importancia de ver retrospectivamente el diseño de nuevas regulaciones, este artículo concluye con la propuesta de un enfoque más prometedor para el futuro que se dirigiría más directamente a la relación de empleo triangular como base para lograr una más amplia protección para los trabajadores.

PALABRAS CLAVES: trabajo de agencias temporales, normas de empleo, empleo precario, Ontario