

TEMPORARY HELP AGENCY CONSULTATION

MANDATORY LICENSING FOR IMPROVED COMPLIANCE WITH THE ESA

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Introduction

The Ontario government's inspections of workplaces to address COVID-19 exposed what temporary agency workers have known for a long time. Temporary agency workers do the most dangerous work with the least protection and with lower wages and benefits.¹

While early strategies to reduce the spread of COVID-19 in long-term care protected part-time and casual front-line health workers from working in multiple care homes, this protection did not extend to temporary agency workers.

The Temporary Help Agency Consultation Paper also notes that the use of temporary agencies may have contributed to the spread of COVID-19 on Ontario farms. While it is necessary to regulate recruiters and agencies of migrant workers² in agriculture, as well as migrant worker recruiters in other industries, it is crucial that recruiters and agencies not be decontextualized as individual bad apples. There were 33,850 work permits for temporary foreign workers issued in Ontario in 2019, of which 24,205 were in the agriculture stream (80% of the 24,205 are in the Seasonal Agricultural Workers Program - SAWP)³. The SAWP is the largest source of agricultural workers in Ontario, and is a bilateral agreement between Canada and Mexico and Canada and Caribbean countries. The vast majority of other temporary foreign workers in Ontario arrive in Canada through recruiters, and switch jobs in Canada through recruiters. In the majority of cases, agricultural workers were infected with COVID-19 through interaction with local community members or co-workers and not through transmission from workers being brought in through temporary help agencies (THA) or 'recruiters'. As research from Migrant Workers Alliance for Change found, the primary reason for infection and transmission in agricultural workers was poor housing and working conditions, which are controlled by agricultural employers (client companies)⁴. While some THAs do connect undocumented or non-migrant agricultural workers to farming operations, they remain a minority.

Ministry of Labour inspections have exposed persistent violations by temporary agencies that do not comply with the *Employment Standards Act* (ESA). There are little capital costs involved in setting up and operating temporary agencies. Increasingly,

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

² In this document, we use the term migrant worker to describe any worker in Ontario without permanent resident status. The term 'temporary foreign worker' is used where it is necessary to distinguish workers on employer specific work permits.

³ Temporary Foreign Worker Program (TFWP) and International Mobility Program (IMP) Work Permit Holders – Monthly IRCC Updates, [January 12, 2021 update](#).

⁴ Migrant Workers Alliance for Change, [Unheeded Warnings: COVID-19 & Migrant Workers in Canada, June 8, 2020](#)

agencies operate through the internet and do not necessarily require much infrastructure. Therefore, owners can easily shut down operations under one name and reopen under another name with or without incorporation. Larger agencies may subcontract to smaller agencies without the client company knowing about it.

The lack of a legislative licensing architecture enables the growth of noncompliance with Ontario's ESA and Occupational Health and Safety Act (OHSA). Ontario needs a proactive regime of mandatory licensing of temporary help agencies and recruiters of migrant workers. Mandatory licensing will better protect those made vulnerable through the triangular employment relationship and level the playing field for temporary help agencies and client companies.

Health and safety for temporary agency workers

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

“The primary challenges regarding the prevention of injury and disease affecting workers placed by temporary employment agencies arise because of disorganisation associated with triangular and cascading employment relationships, which makes it difficult to ensure the adequate training of workers, the provision of appropriate safety equipment and adequate representation in joint health and safety committees.”⁵

When a temporary agency worker gets hurt, the company is not fully responsible because the temporary agency assumes liability at the worker's compensation board — saving their clients' money on insurance premiums. This is a crucial financial incentive to use temporary agencies. This can and must be addressed. In 2014, the *Workplace Safety and Insurance Act (WSIA)* was amended through the *Stronger Workplaces for a Stronger Economy Act, 2014* (Bill 18).⁶ Schedule 5 amended the WSIA to make client companies of temporary help agencies liable for WSIB premiums

⁵ Katherine Lippel, MacEachen Ellen, Saunders Ron, Natalia Werhun, Kosny Agnieszka, Mansfield Liz, Christine Carrasco & Diana Pugliese (2011) Legal protections governing the occupational safety and health and workers' compensation of temporary employment agency workers in Canada: reflections on regulatory effectiveness, *Policy and Practice in Health and Safety*, 9:2, 69-90, DOI: [10.1080/14774003.2011.11667762](https://doi.org/10.1080/14774003.2011.11667762)

⁶ See [Schedule 5](#) Workplace Safety and Insurance Act

based on experience ratings of injuries, accidents and deaths of the company's temporary help agency workers (rather than the temp agency bearing that liability). These regulations have not yet been made by Order in Council or signed by the Lieutenant Governor.

Recommendation 1: We strongly recommend that the regulations set out under WSIA s 83(4) be immediately brought into effect.

Temporary Help Agencies

The government sought to improve protections for temporary agency workers in 2009 through Bill 139, the *Employment Standards Amendment Act* (Temporary Help Agencies) and in 2014 through Bill 18, the *Stronger Workplaces for a Stronger Economy Act*. In 2014 Bill 161 – the *Ontario Immigration Act* – made provisions for a very modest registry of some prescribed employers who hire migrant workers and some individual recruiters of migrant workers, however this Bill did not proceed. There is still much work to be done to protect temporary agency workers and migrant workers.

One key factor giving rise to noncompliance in the temporary help sector is that the ESA is largely enforced through individual complaints. As temporary help agency workers are most at risk of loss of income and employment given the nature of the work arrangement, these workers are least likely to assert their rights with either the client company or the temporary agency. The reactive compliance model is not capable of addressing the structural features of the triangular employment relationship that leaves assignment employees with the least power. Alberta, British Columbia and Quebec have all instituted mandatory licensing regimes for temporary help agencies. It is time for Ontario to close the gap in enforcement for temporary agency employees.

Migrant workers – recruitment and employment

In addition to temporary placements with a client company, temporary agencies also provide recruitment of workers for temporary contracts and permanent employment with client companies. While the consultation document does not explicitly address the recruiter function of THA, it is essential that any legislative or regulatory proposal explicitly provide for the registration of recruitment agencies, particularly as they relate

to migrant workers. Ontario lags behind the majority of provinces that do require licensing of recruiters and registering of employers of migrant workers.⁷

Recruitment agencies play a central role in the transnational recruitment of migrant workers for employment in Ontario's agriculture, fisheries and food supply, transportation, tourism, in-home care work for children, the elderly and people with disabilities, food services and much more. The exploitation of migrant workers by some recruiters who charge thousands of dollars in "recruitment fees" for jobs, including jobs that disappear or are substantially different than agreed to, has been well documented.⁸

While the illegal recruitment fees⁹ are expensive for minimum wage earners in Canada, they are even more so for workers coming from impoverished countries in the Global South. In some cases, the recruiters want all or part of the fees up front. When you convert that fee into a workers' home currency, the challenge is clear. These fees can represent between six months to two years' earnings in a worker's home currency.¹⁰ To pay these fees, entire families can go into debt. With families back home in debt, migrant workers are afraid to complain about ill treatment by agencies or employers here. This makes enforcement of labour laws more challenging as enforcement relies on individual workers making employment standards, health and safety and recruiter enforcement complaints.

In 2009, the Ontario government enacted the *Employment Protection for Foreign Nationals Act* (EPFNA).¹¹ The law initially applied only to live-in caregivers and prohibits recruiters from charging fees to workers, prohibits employers from recouping recruitment costs from workers, and prohibits recruiters and employers from holding workers' passports, work permits and other personal documents. In 2013, the Act was expanded to include all migrant workers under the Temporary Foreign Worker Program.

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

⁸ Caregivers' Action Centre (2020) [Behind Closed Doors](#); Caregivers' Action Centre (2018) [Care Worker Voices for Landed Status and Fairness](#); Fay Faraday (2014) [Profiting from the Precarious: How recruitment practices exploit migrant workers](#). Metcalf Foundation.; Jenna Hennebry, [Permanently Temporary? Agricultural Workers and Their Integration in Canada](#) (February 2012), IRPP Study, No. 26; Judy Fudge, ["Global care chains, employment agencies, and the conundrum of jurisdiction: Decent work for domestic workers in Canada,"](#)

⁹ fees are prohibited under Ontario's Employment Standards Act and Employee Protection for Foreign Nationals Act.

¹⁰ Fay Faraday (2014) p 33

¹¹ *Employment Protection for Foreign Nationals Act, 2009*, S.O. 2009, c. 32.

Violations under EPFNA rely on migrant workers to enforce their rights through individual claims. In her review of recruiter licensing, Faraday notes that while, “individual complaints are possible under WRAPA, in practice *all* of the enforcement that has been conducted has been as a result of proactive investigation. Even where there have been violations, individual workers have not filed complaints, highlighting the urgency for proactive enforcement.”¹²

The majority of provinces in Canada have developed more proactive enforcement of recruiters and employers of workers under the TFWP that rely, in part, on licensing recruiters and registering of employers of workers under the TFWP. As discussed further below, the more recently enacted legislative and regulatory regimes in BC (2018)¹³ and Quebec (2019)¹⁴ provide more robust models.

Mandatory Licensing

As demonstrated in Table 1, six provinces have already adopted mandatory licensing programs for proactive enforcement. Three provinces license only recruitment agencies, while three others, Quebec, British Columbia and Alberta license both recruitment agencies and temporary help agencies. All licensing programs require a registry of employers that hire migrant workers.

Table 1: Comparison of provincial legislation for licensing Temporary Help Agencies and Recruiters and registry of employers of migrant workers

	Quebec	British Columbia	Alberta	Saskatchewan	Manitoba	Nova Scotia
Mandatory license required to operate	✓ THA ✓ Recruiter	✓ THA ✓ Recruiter	✓ THA ✓ Recruiter	✓ Recruiter	✓ Recruiter restricted to lawyers & regulated consultants	✓ Recruiter restricted to lawyers & regulated consultants
Time limited license (requires renewal)	✓	✓	✓	✓	✓	✓
Public registry of agency / recruiter	✓	✓	✓	✓	✓	✓
Mandatory record keeping	✓	✓	✓	✓	✓	✓

¹² Faraday (2014) p 73.

¹³ [TEMPORARY FOREIGN WORKER PROTECTION ACT, 2018](#)

¹⁴ [Regulation respecting personnel placement agencies and recruitment agencies for temporary foreign workers. Act respecting labour standards](#) (chapter N-1.1, s. 92.7). O.C. 1148-2019, c. 1.

Security Deposit required	✓ \$15,000	✓ \$20,000	✓ \$25,000	✓ \$20,000	✓ \$10,000	✓ \$5,000
Reporting of financial information; financial security may be required	✓			✓		
Recruiters liable for partners, affiliates or agents		✓ Supply chain		✓		✓ Supply chain
Fines / penalties	✓	✓ \$10,000	Discretion of Director; forfeit security	Discretion of Director	Between \$5,000 to \$25,000 for unlicensed recruiter	Employment Standards fines & prosecution
Registry of employers that hire workers under the TFWP						
Mandatory employer registration	✓	✓ Public registry		✓ Public registry	✓	✓
Employer liable if uses unlicensed recruiter	✓ fines up to \$6,000				✓ fines up to \$50,000	✓
Mandatory filing of information on migrant workers hired and work to be performed	✓					

Recommendation 2: Ontario should follow Quebec, British Columbia and Alberta in requiring that both temporary agencies and agencies that recruit migrant workers be required to obtain a license from the Ministry of Labour, Training and Skills Development (MLTSD) to operate in Ontario. Licenses should be separate, require names of all individuals and corporate entities associated with the operation seeking licensing and be valid for one year.

A voluntary or limited registry of temporary agencies and recruiters, as proposed in the consultation paper, would not improve compliance with labour statutes and enforcement of minimum standards. The only real advantage of a registry would be to provide relevant Ministries with a list of agencies that chose to or were required to register. There would be no proactive incentive to comply and no consequence for

violation of labour laws.¹⁵ A robust mandatory licensing regime, on the other hand, provides effective tools to promote compliance and level the playing field while enforcing minimum standards for those workers made vulnerable through recruitment and temporary work assignments.

The requirement for temporary agencies and recruiters to meet the conditions of licensing and maintain a license to operate in the province of Ontario, provides a proactive incentive for companies to bring their operations into compliance with Ontario's labour laws. Mandatory licensing encourages companies to maintain their operations in compliance with the law as they could lose their license if they are found in violation.

Separate licenses

There should be separate licenses for THA and recruitment agencies. If one organization engages in both personnel placement and temporary foreign worker recruitment, then two different licenses should be required for each activity.

Information required

The license application should require all names and corporate entities associated with the operation seeking licensing. Quebec's Act contains an expansive scope of entities held responsible for compliance under the Act (s. 3). It also requires that the corporate structure and all parties be provided in the license application (s 7.(6)).¹⁶ Saskatchewan requires that every recruiter shall disclose all parties located or operating **inside** and **outside** of Saskatchewan when applying for a license.¹⁷ This requirement is important for enforcement. Nova Scotia requires a list of all countries from which the recruiter plans to recruit and the names of individuals, companies it will use as well as a list of all domestic and foreign bank accounts.¹⁸ As Faraday notes, uncovering the recruiter's supply chain seeks to ensure that the licensed recruiter or the employer can be held accountable for all actions in breach of the law at all stages or recruitment or, in the case of THS, through subcontracting.¹⁹

¹⁵ *Employment Standards Act; Labour Relations Act; Occupational Health and Safety Act; Workplace Safety and Insurance Act; Employment Protection for Foreign Nationals Act; Employment Insurance Act*

¹⁶ **Regulation respecting personnel placement agencies and recruitment agencies for temporary foreign workers, CQLR c N-1.1, r.0.1**

¹⁷ The Foreign Worker Recruitment and Immigration Services Act (FWRISA) s. 26

¹⁸ Labour Standards Code (NS) and General Labour Standards Code Regulations (NS)

¹⁹ Faraday (2014) p 78.

Licenses valid for one year

The THA license and the Recruiter license should be valid for one year. This term ensures ongoing government oversight.²⁰

Joint and several liability

Full disclosure of all parties reduces the risk of companies using corporate shells to avoid detection as individual officers would be held liable. Proactive enforcement must leverage the role that client companies have. It must be the client companies responsibility and liability to ensure that all recruiter agencies and temporary help agencies, and their subcontractors, are licensed.

Recommendation 3: We recommend that Ontario follow the lead of British Columbia and make agencies liable for any violations by partners, affiliates or agents of the recruiter²¹ and the temporary help agency.

All parties must be in full compliance and not have failed to comply with any labour laws in order to obtain a license or renew a license. An integrated database within the MLTSD will make it easy to confirm compliance when a license is being applied for or being renewed thereby incentivizing compliance.

The license should not be transferable or assignable. In the event of a change in ownership, a new license must be obtained.²²

Security Deposit

Recommendation 4: TFW and Recruitment Agencies must provide a security deposit in order to obtain a license.

Most jurisdictions with licensing regimes require a security deposit in order to obtain a license or may require a security. The amount of security deposit ranges from a low of \$5,000 in Nova Scotia to a high of \$20,000 in British Columbia and Saskatchewan. If an agency contravenes an Act, the security deposit should be forfeited and the proceeds used to reimburse any monetary entitlements owed to the temporary agency employee or migrant worker.

²⁰ While BC has a term of 3 years and Alberta a term of 2 years, all other provinces have a 1 year term.

²¹ Temporary Foreign Workers Protection Act [SBC2018] Chapter 45. S. 26

²² Worker Recruitment and Protection Act (WRAPA)

Public list of recruiters and temporary help agencies

Recommendation 5: A public list of recruiter and temporary agencies must be created.

The licensing regimes in other provinces all require a public listing of all licensed Temporary Help Agency and/or Recruiter. Public listing of license holders is essential for the licensing regime to work. Client Companies need to ensure that the temporary help agency they contract or subcontract is licensed as client companies will be liable for using unlicensed agencies. Similarly, employers seeking to hire a migrant worker must contract a licensed recruiter or face a penalty for failing to do so.

The public list should be easily searchable and include legal name, operating name, address of head office, telephone and email addresses, type of license (recruiter or temporary agency), and date license issued and expiry date.

Record keeping

Recommendation 6: Client companies should be required to maintain records of all temporary agencies and their assignment employees under contract for up to two years (ESA limitation period).

It is the client company's responsibility to ensure that the agency that provides services to them holds the relevant license. Similarly, THA must maintain records of all assignment employees and record of the companies employees are assigned to for up to two years.

Recruiters must publicly identify every partner, affiliate agent or entity that may be involved in the recruitment chain both in Canada and in the country of origin.²³ They must also maintain records of all migrant workers placed and the employer with which the worker was placed for three years and six months (EPFNA limitation date).

Recruiter license restricted

Recommendation 7: In addition to the general licensing requirements, Ontario should consider restricting the pool of people that can become licensed as recruiters of migrant workers as is the case in Manitoba.²⁴

To obtain a recruiter license in Manitoba, one must be a lawyer, paralegal, Quebec notary or registered immigration consultant and be in good standing of respective

²³ Faraday (2014) p 88

²⁴ [WRAP Regulations](#) s. 6.

professional regulatory bodies. In Saskatchewan, only people registered with the Immigration Consultants of Canada Regulatory Council can get a license to practice in the province. This best practice parallels the restrictions on who can be paid to provide advice under the federal Immigration and Refugee Protection Act (IRPA).²⁵

Registry of employers of workers with temporary work permits

Recommendation 8: There should be a mandatory registry of employers.

Almost all jurisdictions that license recruiters also require employers of workers with temporary work permits to be registered with the province.²⁶ Employers cannot recruit a worker on a temporary work permit unless they first register with a provincial labour ministry. Manitoba's registry requires that employers provide the government registry with information about the employer's businesses, who will be engaged in recruitment for the employer, and information about work to be done by the migrant worker. Registration is valid for one year to enable ongoing supervision of the employer's conduct and need to recruit migrant labour.

An employer registry can reduce the demand for unlicensed recruiters as employers would be liable for fines for using unlicensed recruiters. Through the registration process the MLTSD can provide education to employers about their legal responsibilities in the employment of migrant workers and contracting of recruiters. Registration can also provide the MLTSD with the opportunity to check its database on employment standards claims or health and safety orders to see if there are any unresolved orders to pay. An egregious record should result in the employer being prevented from registering and thereby employing workers on temporary work permits. A mandatory employer registry would particularly help migrant care workers. In our experience, we see employers who violate the ESA and continue to hire new care workers only to repeat the violations such as unpaid hours of work and overtime and illegal deductions. Mandatory employer registration also enables the ministry to conduct effective, targeted proactive inspections as it will have all the contact information necessary to do so.

Enforcement

Like other provinces, the Director of Employment Standards must be given broad power to investigate the history, financial status and key business relationships (e.g., supply chain relationships) before licenses are awarded.

²⁵ Under WRAPA, individuals that recruit directly on behalf of their employer to find employees are exempt from licensing requirements.

²⁶ Alberta is the lone province that does not require an employer registry.

Employment standards enforcement in Ontario relies, in the first instance, on employer's voluntary compliance and, where that does not work, on a reactive system that relies largely on individual workers to enforce their own statutory rights by reporting ESA violations through individual claims. While enforcing labour standards one complaint at a time is time consuming and costly, it is even more ineffective when dealing with employees of temporary help agencies and migrant workers. These workers face even greater barriers to enforcing their rights through individual claims.

Mandatory licensing and a registry of employers of migrant workers provides an important step in improving compliance among temporary help agencies, client companies and recruiters.

But there are some necessary components that are needed for effective enforcement.

Recommendation 9: Enforcement must include

- **Full disclosure along the recruitment process and subcontracting supply chain.**
- **Joint liability along that supply chain. Client companies and temporary help agencies are already jointly liable for reprisals and unpaid wages, overtime and holiday pay. This must be extended to include joint liability among subcontracted agencies for licensing. This is necessary to stop client companies and agencies from evading the licensing system by subcontracting to smaller and more informal temporary agencies that are not licensed and that operate under the radar. Similarly, recruiters must be liable for any illegal fees charged to workers along the supply chain whether that takes place in or outside of Canada.**
- **Temporary help agency employees and migrant workers must be able to make anonymous complaints of any violations of the new licensing system.**

Monetary penalties for effective deterrence

The primary economic incentives in a licensing regime are through the security required for licensing and any fines for violations. The surety provides an incentive to comply with labour laws as it will be liquidated to fulfil any unpaid orders to pay. The security deposit also ensures that employees of "fly by night" agencies will not be out of pocket if agencies disappear with wages owing.

Recommendation 10: We recommend that the security deposit be no less than \$25,000.

For fines to be effective they have to be sufficiently large to deter noncompliance and there has to be a real chance that noncompliance will result in a fine or penalty. Under the ESA, there are three financial deterrence measures. Employment Standards Officers can levy a Notice of Contravention fine an employer \$250 for a first offence or a \$295 ticket under Part I of the *Provincial Offences Act* (plus a \$75 victim surcharge). Under Part III of the *Provincial Offences Act* individuals can be prosecuted with fines up to \$50,000 while corporations can be fined up to \$100,000 for a first offence. Part III prosecutions are rarely used. For example in 2016/17 there were 12,808 confirmed ESA violations and only 175 Part III convictions with an average fine of \$3,642.²⁷ Ontario's ESA fines are not up to the task.

The Ontario government has recently adopted fines as incentives for compliance that give us guidance on appropriate amounts. For example, third party food delivery companies that do not comply with caps on delivery charges face fines up to \$50,000 and a term of imprisonment of no more than one year; corporations can be fined up to \$10 million.²⁸ In September, organizers of gatherings larger than 10 inside or 25 outside faced a **minimum** fine of \$10,000.²⁹ For individuals found trespassing on farms, the first offence is up to \$15,000 and the second offence is \$25,000.³⁰ Drawing from these recent decisions, the amount of fines must be substantial enough to encourage compliance.

Fines for failing to be licensed or to use a licensed agency should be automatic upon confirmation of violation and be set at a minimum \$15,000. Having widely publicized set fines for client companies that fail to use licensed agencies will incentivize compliance as will liability for licensing down the subcontracting chain. Together, these steps will reduce demand for fly by night unlicensed agencies by client companies thereby leveling the playing field. Other violations relating to record keeping could be based on existing provincial offences and Notice of Contravention.

Recommendation 11: There should be a minimum set (automatic) fine of \$15,000 for failing to use a licensed agency directly or indirectly.

²⁷ Vosko et al (2020) Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs. University of Toronto Press. P 151.

²⁸ <https://www.ontario.ca/page/report-unfair-delivery-service-fees-during-covid-19-coronavirus>

²⁹ <https://news.ontario.ca/en/release/58449/ontario-limits-the-size-of-unmonitored-and-private-social-gatherings-across-entire-province>

³⁰ <https://news.ontario.ca/en/release/59493/ontario-adopts-new-law-to-protect-public-safety-and-food-supply> we are showing the amount of fines; this does not reflect support for the statute.

Transition time to get license regime in place

Licensing regimes are fairly simple and can be done on-line. Other jurisdictions provide examples of best practices that could be easily implemented in Ontario.

Recommendation 12: We recommend that the mandatory licensing be brought into effect 6 months after enabling legislation has been passed.