

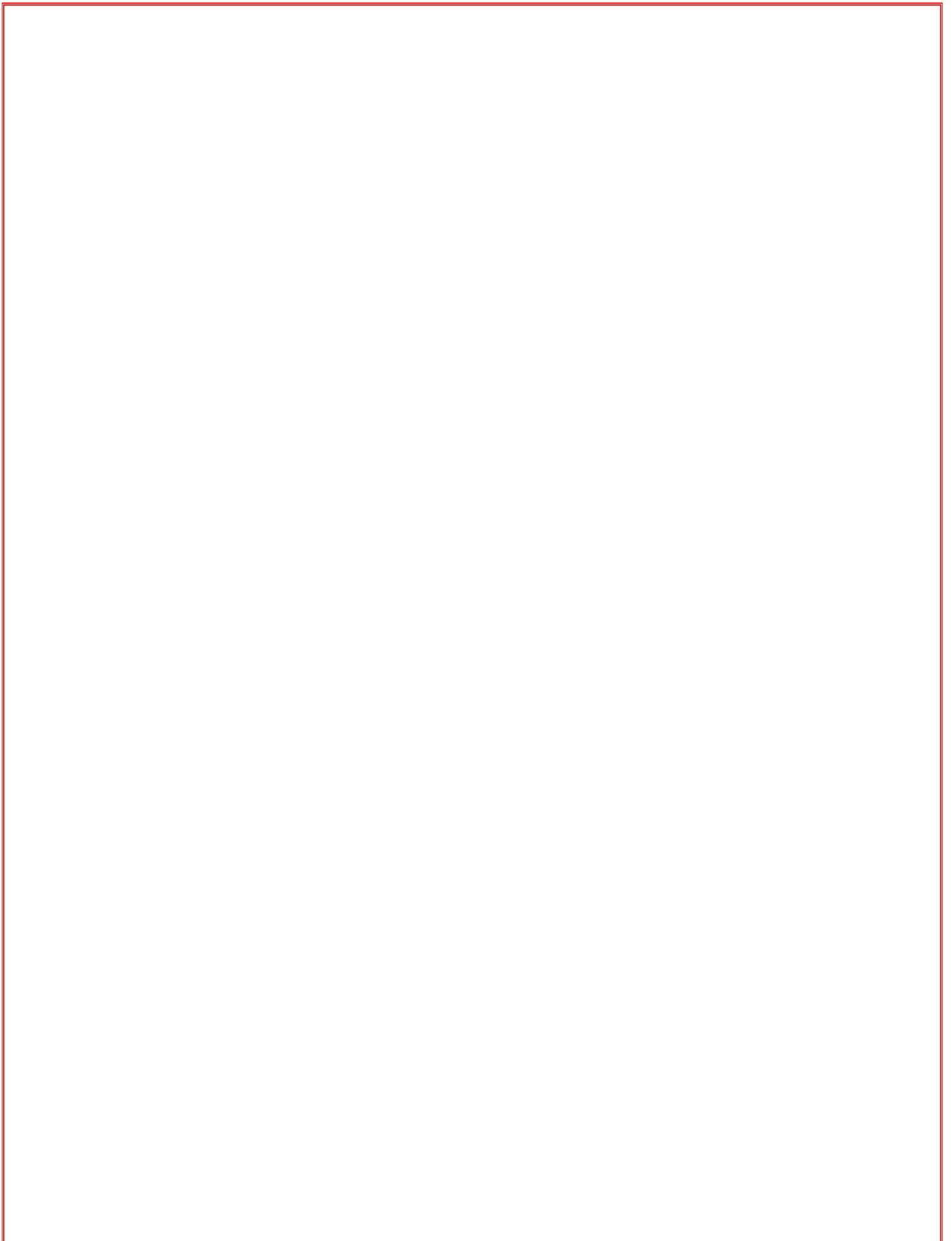
# *Equality and Fairness for Temporary Agency Workers*



Submission regarding Bill 139  
An Act to amend the Employment Standards Act, 2000  
in relation to temporary help agencies

CAW-Canada

April 1, 2009



## *Introduction*

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The CAW welcomes the opportunity to present its views to the Ontario Legislative Committee studying Bill 139, an Act to amend the *Employment Standards Act, 2000* in relation to temporary help agencies and certain other matters.

The CAW proudly represents 225,000 members across the country working in virtually every sector of the Canadian economy, from the auto and aerospace industries to food processors and hotels.

Most of our members live and work in Ontario. With the exception of those in federal jurisdiction workplaces who are covered by the Canada Labour Code, the vast majority are covered by the *Employment Standards Act, 2000* (ESA).

Employment standards are important to all workers, those covered by collective agreements as well as those more vulnerable to labour market forces. Every day we see fresh evidence that all workers are vulnerable at least some of the time.

Our members are conscious of the critical role of the Act in their workplace. It is:

- the safety net for working conditions not covered by the collective agreement
- the defining legislation where the collective agreement specifies only that the ESA minimum applies, as is often the case with notice of termination, severance pay and parental leave
- the floor from which organized workers try to negotiate better conditions.

The CAW believes that a strong, enforceable floor of employment rights is vital to ensuring that all workers enjoy a minimum level of dignity. In this way we also ensure that all employers share in common certain legal obligations to employees, removing substandard conditions from competition between them.

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### *A good first step - holiday pay extended to temporary agency workers*

Effective January 2, 2009, the provincial government enacted *Regulation 432/08* which extends public holiday pay to those not previously eligible as “elect to work” employees. This greatly benefits temporary help agency, casual, on-call, and contract workers. An “elect to work” classification is too often used to exclude such workers from provisions of the ESA on the grounds that they are not expected to be available for work on a full-time basis. The new regulation introduces a measure of equality for these workers, and levels the playing field between employers.

The CAW acknowledges this first step forward. Many more steps are needed.

## *Bill 139*

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Bill 139 proposes to introduce amendments to the ESA in order to bring about a greater measure of fairness and equality for temporary help agency workers. The CAW welcomes this. At the same time, we strongly urge the government to make improvements that would ensure that the Bill is more effective in achieving the overall stated goal. Our submission will address (1) the CAW experience and (2) the improvements needed in Bill 139.

### *The CAW Experience*

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Workers who are forced out of their jobs, through no fault of their own, are having great difficulty finding new employment. Like many other workers, laid-off CAW members find themselves confronted by a disturbing new reality, one they were not prepared for and one that many Ontarians are not yet aware of.

Many of these laid-off members simply can not find a new job now except by applying to temporary help agencies.

#### *Our Action Centres Report*

Action centres for laid-off CAW members are reporting as follows:

1. Between 70% and 90% of the advertised job postings are now through temporary help agencies.
2. Workers see jobs that they used to do for \$20 an hour now advertised at \$15 an hour with the difference presumably going to the temp agency.
3. Workers can't apply directly to firms with job openings: they are directed instead to apply to temporary agencies the firm has contracted with.
4. There's no end in sight to the worker's association with the agency because of the barriers erected by temporary agencies to permanent employment.
5. Once locked into this relationship with temporary agencies, some workers report they are not able to accumulate the required hours to qualify for a future EI claim; others report that they have a reduced number of EI benefit weeks as well as lower EI benefit rates.

The emergence of a new labour market that offers increasingly unstable employment and that encourages jobs that are low waged, with few health benefits, is a problem not only for the workers involved, and their families, but the province as a whole.

The Workers Action Centre's *Working on the Edge*, a major study of precarious employment in Ontario, reported that by 2007 close to *two in every five workers* fell outside traditional, full-time, permanent employment. The term "precarious employment" is an apt description for work that is part-time, temporary agency, casual, on-call, contract, or deemed self-employed.

Hundreds of thousands of Canadian workers, including thousands of CAW members, have lost their jobs since 2002. The job loss crisis, which had been largely confined to manufacturing and forestry, is now spreading across the economy to other sectors such as construction, resources, tourism, transportation, retail and hospitality.

*There is a significant wage gap between temporary workers and their permanent counterparts. Contract workers earn 8% less. Seasonal workers earn 28% less. Casual workers earn 24% less.*

*Those working for employment agencies earn 40% less than their permanent counterparts. The gaps persist even when hours of work are taken into account.*

(Galarneau. Statistics Canada LFS 2003 in Perspectives January 2005)

### *"Bad apples" – a problem but not the biggest problem*

There is a common perception that the only problem with temp agencies is that a few "bad apples" have spoiled it for the rest - the disreputable fly-by-night operations that take a worker's money one day, close up, and reopen under a new name the next, ready to exploit a new group of vulnerable people. They are, indeed, a problem and only tougher regulation will eliminate these practices.

But there is another bigger problem. As reported to the CAW 2008 Collective Bargaining & Political Action Convention:

*"Employers are developing a disturbing "relationship of convenience" with the temp job agencies that have popped up everywhere. These are*

*not the temp agencies of old. It's not about casual labour for limited time projects. It's about converting stable employment into agency work.*

*And it's big business. Manpower Inc. (not to be confused with Canada's former public employment service) is now ranked among Fortune 500's largest companies in the world, stretching from the USA to Australia. The company's Canadian services range from permanent, temporary and contract recruitment, to assessment, selection, training and "outsourcing". Sometimes they show up under their "Right Management" brand, striking a deal with employers on adjustment services before we've had an opportunity to negotiate a joint committee and action centre. This is especially true where the employer is already involved with the agency or consulted them earlier on the layoffs.*

*Some CAW adjustment centres now report that job vacancies are overwhelming placed by temp agencies. This was not the case a few years ago. Hiring through private temp agencies happens in many sectors across the economy. It is even transforming the auto industry. This is especially true of lower tier auto parts firms. Researchers estimate 10 to 20% of auto parts workers are now classed as "temporary".*

*A peer helper at a CAW worker action centre in Oshawa writes:*

*First of all, various agencies, and employers make it near impossible to become privately employed within companies with which they have contracted. It is not uncommon in a daily job search to hear the saying, "If you are looking for a job, apply at temp agency X, because we do not accept resumes."*

*Agencies will commonly secure a contract with a (client) company, locking out all outside hiring capabilities, ensuring contingency fees, and effectively forcing employees to work for deflated wages while charging a company a contracted or full rate.*

*Prospective employees submit to these terms based on the promise or hope of securing full time, permanent employment, only to find out at the end of their term (sometimes up to 3 years) the company cannot hire them without being released of a binding contract (with the temp agency). In some cases, temp workers remain permanently employed only to find themselves laundered through an agency to a business client...*

*...you may be forced to either work with an agency for a deflated rate or you remain unemployed.*

Peer helper: JP

## *Temp agencies transforming the auto industry*

There is another common misconception that temporary employment agencies are operating largely on the margins of the economy and not in the high valued-added sectors such as the auto industry. This perception is not supported by the facts.

The practice of filling job vacancies through temporary agencies has been quietly transforming the auto and auto parts industry.

It must be emphasized that temp agencies are not creating jobs; they are not a new pathway to employment. Rather, they are developing relationships with employers on a for-profit basis and then acting as the gatekeepers. This has very serious implications for the next generation of jobs in the auto sector as well as other sectors.

In “*Labour as a Competitive Advantage in the Canadian Automotive Parts Industry, a study of Canada and Four Local Labour Markets (Brantford, Stratford, Guelph, Windsor)*”, researchers Charlotte Yates and Sam Vrankulj of the Labour Studies Programme, McMaster University, reported on interviews with temporary staffing agencies in each of the four communities:

*“Auto parts workers employed in Brantford on a temporary basis tended to be paid between \$9 and \$12 per hour, compared to Windsor where temporary staffing agencies cited the starting wage at approximately \$12 an hour.”*

The CAW came into possession of a copy of an instructor’s guide for a first level interview for individual contracts of employment to be offered by Honda at its Alliston plant. The indicated response for workers asking how long they could expect to work:

*“Hired for a 3 month period – toward the end of 3 month contract is reviewed – business needs and job performance are evaluated – if both are favourable, contract could be extended another 7 months. Towards the end of that 10 months, contract reviewed (business needs/job performance) – contract could be extended another 10 months to a total of 20 months. After 20 months – no more possibility of extensions – contract is over – contract associates leave Honda and are encouraged to put Honda on resume and continue job search. **No guarantee of permanent employment after Contract.**” (emphasis in original)*

*Good public policy must favour what builds strong, stable communities*

The CAW supports legislative changes that enhance the conditions favourable to the stability and decent livelihoods that are so essential for communities to thrive.

The changes we support would not prevent temporary help agencies from providing a useful service to the extent that such services are actually needed, as may happen in some work places when regular employees are on leave or when short term projects are undertaken.

The Ontario Legislature must not lose sight of the fact that temporary help agencies do well enough to put one of them in the Fortune 500. Much of this wealth is created by shielding employers from the cost of paying a decent compensation package to its employees, including pensions and health benefits.

There is simply no justification for the argument that temporary agency workers should have less protection than other workers under the Employment Standards Act of Ontario.

Stronger, not weaker, enforcement of the ESA and the Ontario Human Rights Code is urgently needed.

A 1991 study "*Racial Discrimination and Employment Agencies*" by Tim Rees reported on the disturbing fact that of 15 surveyed employment agencies, only three were unwilling to screen applicants on the basis of colour.

Although that was 18 years ago, a 2002 study entitled "*No Hijab is Permitted Here*" by Judy Vashti Persad and Salome Lukas of *Women Working with Immigrant Women* found that an applicant named Mohammed did not get a call back after five weeks from any of the three employment agencies she contacted.

Cynthia Cranford and Leah Vosko's 2006 study, "*Precarious Employment; Understanding Labour Market Insecurity in Canada*", points to the over-representation of racialized workers in precarious employment. These workers are the most vulnerable to the discriminatory practices of temporary help agencies. This industry needs greater regulation and enforcement.



## *Improvements Needed in Bill 139*

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### **1. Remove More of the Barriers to Permanent Employment**

Bill 139 proposes to remove some of the barriers that temporary agency workers face when they try to get hired directly by the client company, including:

- a prohibition on the client company directly hiring a temp worker
- a fee or financial penalty to the worker
- a fee or financial penalty to the client company.

These practices are fundamentally unfair and unjustifiable restrictions on the freedom workers should have when seeking employment in the labour market.

The government's goal of removing these kinds of barriers is commendable. At the same time Bill 139 would still allow agencies to apply restrictions on companies hiring workers directly during the first six months of an assignment.

A six month exemption – a very large loop-hole – will undermine the stated objectives of Bill 139.

A six month loop-hole could have the unintended consequence of a revolving door of six month assignments. Perversely, it actually gives temporary help agencies an incentive to replace one temporary worker with another whenever they approach the sixth month of their assignment, potentially leading to more instability for workers. It could trap them in permanent insecurity.

That is not good social or economic policy. And it will delay economic recovery as instability becomes a permanent feature of a restructured labour market.

We urge the removal of the six month exemption from Bill 139.

### **2. Notice of Termination and Severance Pay: Equal Treatment**

Temporary employment agencies currently classify all agency workers as “elect to work”. They do this in large part to avoid paying termination and severance to temporary agency workers who would otherwise be entitled to these benefits.

In order to qualify for termination and severance benefits, a temporary agency worker would have to remain available for work every day for 35 weeks continuously without any right to an “excluded week” because of injury, illness or

family emergency. Moreover, the agency would only have to offer a one day assignment every 35 weeks to avoid the responsibility for termination and severance benefits. That could go on indefinitely.

When Bill 139 was introduced, the government stated temp agency workers would be treated no differently than other workers with respect to their right to public holidays, notice of termination and severance pay.

Consistent with the worthy objective, we urge the inclusion of a regulation that removes the “elect to work” exemption for notice of termination and severance pay. Removing the “elect to work” exemption is the most effective way of extending termination and severance benefits to temporary agency workers.

We also urge that temporary agency workers be allowed an “excluded week” for reasons of injury, illness or family emergency.

We note that the CAW is also pressing the Ontario government to enact a wage earner protection program which would protect all workers – including temporary agency workers – when their employers have not properly paid termination and severance pay entitlements, a burning issue in this current economic crisis and one inadequately addressed by the federal program.

### **3. “Joint and Several Liability” needed to ensure ESA protections**

Temporary agency workers are in a tri-angular employment relationship. They are assigned to work and paid by a temporary work agency. At the same time they work under the direction and control of the client employer.

We welcome the Ministry of Labour’s promise to more aggressively pursue unpaid wages by making third party orders on client companies and temp agencies.

At the same time, the CAW maintains that the Employment Standards rights of temporary agency workers – including those represented by a union – would be considerably strengthened if “joint and several liability” applied to both the client company and the agency.

The CAW maintains that temporary agency workers who are doing work in a bargaining unit under the direction and control of the client employer and subject to discipline or discharge at the hands of that employer, are part of that bargaining unit and protected by the terms and conditions of the collective agreement. We are supported in this position by several legal authorities including an arbitration

decision on the status of temporary workers “contracted in” by Bristol Myers from a “manpower” agency. The Ontario Labour Relations Board ruled similarly on an application for union certification of workers at Nichirin Inc. The Board relied on two of its earlier decisions: Kmart (1983) and York Condominium Corp (1977).

## **Conclusion**

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The CAW has chosen to focus on the three issues which speak most directly to our members’ lived experience:

- the barriers that stop temp workers from getting permanent employment
- the need for equal treatment on severance and termination pay
- the need for joint and several liability protection.

We commend the government for taking the initiative on holiday pay for temp agency workers, for committing to stronger enforcement and for tabling Bill 139.

We also strongly urge the government to remedy the serious flaws in Bill 139 which will undermine if not defeat its worthy objectives.

We stand in solidarity with and general support for the extensive proposals submitted by the Workers Action Centre on many other areas where Bill 139 can be improved, including:

- measures to address some of the emerging practices of temp agencies which exploit workers (for example, fees for placement services or training courses for jobs that never materialize)
- a more comprehensive definition of “employment agency”
- inclusion of home care workers under contract with CCAC
- stronger information requirements including written confirmation of the expected end date of an assignment. This would help stabilize workers’ lives and assist with enforcement action against any reprisals.

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