

STANDING COMMITTEE ON FINANCE AND ECONOMIC AFFAIRS
Consideration Of Bill 148 (*Fair Workplaces, Better Jobs Act, 2017*)

**Submissions of the Association of Canadian Search, Employment & Staffing
Services (ACSESS)**

Summary of Recommendations

ACSESS supports the Government's implementation of stricter enforcement mechanisms and the hiring of additional employment standards officers to act as inspectors and enforcers of the statute. However, ACSESS is concerned about provisions in Bill 148 that go beyond what the Special Advisors who undertook the Changing Workplaces Review recommended in their Final Report or, in some cases, were not even considered during the Review.

ACSESS makes the following recommendations to the Committee on Bill 148:

1. ACSESS opposes the introduction of card-based certification in the temporary help agency industry, and recommends that section 5 of Schedule 2 of Bill 148 be amended to delete all references to temporary help agencies and the temporary help agency industry from the proposed new section 15.3 of the *Labour Relations Act, 1995*.
2. The proposed "Equal Pay for Equal Work" provisions for assignment employees placed by temporary help agencies [section 23 of Schedule 1 of Bill 148] should be amended to:
 - (a) include a six-month qualifying period as recommended by the Special Advisors in their Final Report under the Changing Workplaces Review; and
 - (b) address how temporary help agencies may obtain pay rate information about employees of clients of the agency to ensure compliance with the proposed new obligation.
3. The government should prepare guidelines to assist temporary help agencies to determine what is "substantially similar" work within the context of the placement of assignment employees at a client's workplace and to determine what objective factors could support pay rate differentials.
4. ACSESS is seeking an exemption for the temporary help agency industry from the new scheduling rules to be implemented in the *Employment Standards Act, 2000* as set out in sections 11 and 12 of Schedule 1 of Bill 148.
5. ACSESS recommends that the Government reconsider the application of its proposed changes to the calculation of public holiday pay [section 15 of Schedule 1 of Bill 148] and to the structure of personal emergency leave [section 29 of Schedule 1 of Bill 148], in light of the unintended consequences those changes would have on employees who have multiple jobs with different employers.

As a member of the Keeping Ontario Working Alliance, ACSESS endorses the submissions of the Ontario Chamber of Commerce.

An Introduction to ACSESS

ACSESS is the voice of the employment, recruitment and staffing services industry in Canada. Our mission is to advance the interests of the industry and the people it employs through a wide range of education and professional certification programs, promotion of ethical best practices, and compliance with applicable employment laws and regulations. An essential part of the mission is to advocate for appropriate regulation of the industry and the efficient and effective enforcement of such regulations.

ACSESS promotes advancement and growth of the industry by:

- providing services to, and communicating with, members of the employment, recruitment and staffing services industry;
- assuming a leadership role in industry licensing and regulation;
- coordinating educational programs and conferences, assisting in the development of required standards of professional performance;
- promoting best business practices, and adherence to both the spirit and letter of all applicable employment legislation and regulations; and
- developing pertinent statistics for the purpose of identifying economic and socio-economic trends.

ACSESS member organizations pledge to uphold a Code of Ethics, and must meet strict membership requirements including at least two years of operations in good standing and demonstrated compliance with legal requirements. Members are committed to an industry which gives clients the ability to respond to business realities and changing technologies, and to give workers – at all levels – an ever-increasing range of employment opportunities.

A primary objective of ACSESS is to actively represent the industry and our membership before governments by providing input on employment legislation and regulations at the national and provincial levels. At the same time, ACSESS assumes a leadership role in ensuring that industry members are aware of legislation and regulatory changes that may affect their businesses and responsibilities as employers.

ACSESS Participation in the Changing Workplaces Review

As members of this Committee are aware, the Ontario Government appointed two Special Advisors to conduct the Changing Workplaces Review, with a specific mandate to consider changes to the *Employment Standards Act, 2000* (ESA) and *Labour Relations Act, 1995* (LRA) in light of the changing nature of the workplace, the workforce and the economy more generally.

ACSESS participated on behalf of its members at all stages of the Changing Workplaces Review, filing written submissions and making an oral presentation during the initial consultation phase, meeting with the Special Advisors, and filing written submissions in response to the Interim Report. Copies of ACSESS's written submissions to the Special Advisors are appended to these submissions for the Committee's reference.

The primary goal of ACSESS's participation in the Changing Workplaces Review was to ensure that the Special Advisors had a proper understanding of the important role that the temporary help agency industry plays in Ontario's economy, and to ensure that the industry in Ontario, which is already the most highly regulated in Canada, was not made subject to further, unnecessary regulation. Rather than engage in further regulation, ACSESS has advocated throughout the Review process that the Government should focus its efforts and available resources on compliance initiatives and enforcement of the current provisions of the ESA.

As ACSESS demonstrated to the Special Advisors, temporary help agencies provide a vital service in the modern economy both by supporting business needs for a flexible workforce to adapt to a rapidly changing business environment and by providing a wide range of employment opportunities and other benefits to assignment employees. All sectors of the Ontario economy – private, not-for-profit, broader public sector and government – use the services of temporary help agencies and assignment employees.

ACSESS has reviewed Bill 148 in detail to consider its impact, both intended and unintended, on the temporary help agency industry. ACSESS is particularly concerned with elements of Bill 148 that were either not part of the Changing Workplaces Review at all (and which have therefore not been studied or been subjected to any form of economic impact analysis) or which stray in significant ways from what the Special Advisors recommended in their Final Report after considering input from all workplace parties.

A. Card-based Certification

ACSESS strongly opposes the introduction of card-based certification in the temporary help agency industry. ACSESS recommends that section 5 of Schedule 2 of Bill 148 be amended to delete all references to temporary help agencies and the temporary help agency industry from the proposed new section 15.3 of the LRA.

There are two primary reasons for ACSESS's position – (1) the Special Advisors themselves recommended against a return to card-based certification more generally, and (2) at no time during the Changing Workplaces Review was there any indication that card-based certification focused only on certain industries was being considered, with the result that ACSESS and its members had no opportunity to assess and be heard on such an important issue.

(1) During the Changing Workplaces Review, the Special Advisors considered whether Ontario should return to a card-based certification process. They received extensive submissions on this issue from all workplace parties, and developed recommendations based on what they heard. Notwithstanding numerous submissions in support of a return to card-based certification, the Special Advisors recommended against returning to such a process, citing four key reasons:

- First, the secret ballot vote is the norm for the expression of democratic outcomes, at least in elections, and should not be discarded without greater proof that it cannot be made to work effectively.
- Second, the secret ballot vote has been the norm in labour relations in Ontario for over 21 years now, and the clock is not easily set back...
- Third, the results of a secret ballot vote have greater credibility with everyone, including employees, employers and the public. Legitimacy and credibility are important and are undermined by not having secret ballot votes as the norm.
- Fourth, and, perhaps most importantly, we have not had a secret ballot process where illegal employer conduct in the certification process, which makes the true wishes of employees unlikely to be known, would lead to certification without a vote and to first contract arbitration, if necessary. [This last point references a range of other changes recommended by the Special Advisors to limit the potential abuse of the secret ballot vote, some of which have been adopted in Bill 148.]

[Final Report of the Changing Workplaces Review, Section 11.2, page 323.]

ACSESS submits that the reasoning of the Special Advisors is compelling, and should be adopted by this Committee and by the Government.

(2) ACSESS recognizes that the Special Advisors considered whether there should be a return to card-based certification more generally, and considered a range of possible forms of sector-based certification and bargaining. However, at no point in the Changing Workplaces Review was there any indication that the Advisors were considering a recommendation to create a card-based certification process for certain industries, including the temporary help agency industry. In fact, this was never under consideration, and ACSESS was never asked about the possibility of singling out the temporary help agency industry for special certification rules. Moreover, the Special Advisors did not make any recommendations of this nature, either in the Interim Report or in the Final Report.

By proposing to include card-based certification rules for the temporary help agency industry in Bill 148 notwithstanding the complete lack of consultation on this issue, the Government has deprived ACSESS and its members of any chance to consider the

issue, what impact it might have on the temporary help agency industry, or whether the measure would even help achieve the Government's goals. Moreover, these provisions of Bill 148 are impossible to reconcile with the recommendations of the Special Advisors, and ACSESS submits that they should not be enacted until such time as a proper consultation with all affected stakeholders has been conducted.

Recommendation on Card-based Certification

1. ACSESS opposes the introduction of card-based certification in the temporary help agency industry, and recommends that section 5 of Schedule 2 of Bill 148 be amended to delete all references to temporary help agencies and the temporary help agency industry from the proposed new section 15.3 of the *Labour Relations Act, 1995*.

B. Equal Pay for Equal Work

Bill 148 proposes to amend the ESA by creating a new "equal pay for equal work" provision that applies to assignment employees. The proposed provision is found in section 23 of Schedule 1 of the Bill.

The proposed provision would require a temporary help agency to pay an assignment employee the same rate of pay as employees of the client where the assignment employee is placed if three conditions are met:

- (a) the employees perform substantially the same kind of work in the same establishment;
- (b) the performance of the work requires substantially the same skills, effort and responsibility; and
- (c) the work is performed under similar working conditions.

ACSESS understands in principle the importance of equal pay for equal work and would not oppose including such a requirement in the ESA provided that the requirement properly reflects the context in which temporary help agencies operate and is established in a manner that is workable for the agencies. ACSESS has significant concerns with how the proposed provision is currently drafted, and submits that it should be amended in two ways to better reflect the unique nature of the temporary help agency industry.

First, the section should be amended to include a six-month qualifying period – that is, the obligation to provide equal pay for equal work should not apply until an assignment employee has been placed with a client for a period of six months.

The issue of equal pay for equal work was studied extensively by the Special Advisors and was specifically addressed in their Final Report. The Special Advisors

recommended that a qualifying period should be included in the ESA for assignment employees, reasoning as follows:

In this regard, the Europeans who accept the fundamental principle that assignment workers should be paid the same as the client's direct employees also have a number of exceptions, one of which, as in the UK, is a qualifying period during which the assignment employee does not need to be paid equally. In the UK, the qualifying period is three months. We are attracted to the concept of a qualifying period, because it is an accepted practice in a jurisdiction which accepts the principle of equality, and because it broadly accords with notions of a starter or a probationary rate, which is quite common in workplaces generally.

[Final Report of the Changing Workplaces Review, Section 7.3.2, page 205, emphasis added.]

The Special Advisors recommended a six-month qualifying period for a variety of reasons:

- that period of time corresponds to a reasonable probationary period for unskilled workers;
- a six-month period would provide clients of the agency with a longer period of time to assess assignment employees for possible permanent hiring; and
- this period corresponds to the six-month period during which clients may be required to pay a conversion fee for hiring an assignment worker, which would reinforce the ability of clients of the agency to assess assignment employees.

[Final Report of the Changing Workplaces Review, Section 7.3.2, pages 207-208.]

In addition to the reasons articulated by the Committee, ACSESS submits that a six-month qualifying period would alleviate a significant portion of the administrative difficulties that will make the current proposed provision very difficult to implement in practice by a range of its member agencies.

ACSESS submits that there is no plausible rationale for Bill 148 to depart from the recommendation of the Special Advisors on this point. Rather, the recommendation was well-considered and would have established a rule consistent with sound business and industry practice. If the Government has concerns about the potential abuse of a six-month qualifying period, the Special Advisors made recommendations to address those concerns as well.

Second, the proposed new provision would establish a rule that would require a comparison between the pay rate of assignment employees who are employed by a

temporary help agency and the pay rate of employees who are employed by the client of the agency. Yet, the Bill does not address how an agency can obtain the relevant pay rate information from the client to ensure compliance with the obligation. Therefore, ACSESS further submits that the proposed provision should be amended to address this rather substantial gap in the proposed equal pay for equal work scheme.

In addition to these two recommended amendments to the new provision, ACSESS submits that the new equal pay for equal work provisions of the ESA would cause significant uncertainty about their application in relation to the temporary help agency industry. How would the notion of “substantially similar” be applied in circumstances where assignment employees often perform some, but not all, of the work performed by employees of the client of the agency? Similarly, what objective factors could be engaged to justify a differential in pay rates, especially where assignment employees often do not have the full range of skill sets or experience of the client’s employees?

In order to better ensure compliance with the new provisions and avoid the need for costly litigation before the Ontario Labour Relations Board, ACSESS recommends that the Government prepare guidelines to assist temporary help agencies to determine what is “substantially similar” work and to determine what objective factors could support pay rate differentials. ACSESS would be pleased to work with the Government in the development of such guidelines, and can provide valuable insight on the temporary help agency industry.

Recommendations on Equal Pay for Equal Work

2. The proposed “Equal Pay for Equal Work” provisions for assignment employees placed by temporary help agencies [section 23 of Schedule 1 of Bill 148] should be amended to:
 - (a) include a six-month qualifying period as recommended by the Special Advisors in their Final Report under the Changing Workplaces Review; and
 - (b) address how temporary help agencies may obtain pay rate information about employees of clients of the agency to ensure compliance with the proposed new obligation.
3. The Government should prepare guidelines to assist temporary help agencies to determine what is “substantially similar” work within the context of the placement of assignment employees at a client’s workplace and to determine what objective factors could support pay rate differentials.

C. Scheduling Rules

Bill 148 contains a range of new scheduling rules that would be added to the ESA. The new rules are found in sections 11 and 12 of Schedule 1 of the Bill. These rules would include:

- a right to request changes to a work schedule and location;
- minimum “on call” pay where the employee is not called into work;
- a right to refuse work or being placed on call if not provided at least 96 hours notice; and
- minimum “cancellation” pay if a scheduled work shift or on-call period is cancelled with less than 48 hours’ notice.

After extensively considering the issue of scheduling rules during the Changing Workplaces Review, the Special Advisors came to the following conclusion in their Final Report:

Our experience and the approach taken in other jurisdictions reflect the fact that scheduling cannot be the same for all employees employed in all businesses. Scheduling can be a very complex and difficult subject. Trade unions and employers in collective bargaining often spend very significant amounts of time negotiating workable and fair scheduling arrangements. In sum, one size does not fit all.

[Final Report of the Changing Workplaces Review, Section 7.2.1, page 192, emphasis added.]

Rather than a “one size fits all” approach, the Special Advisors recommended that the Government develop sectoral-specific scheduling regulations, and recommended a process by which participants in the relevant sectors could be consulted so that the scheduling rules would work within the regulated sectors. By proposing the rules in Bill 148, the Government appears to have rejected these considered and well-articulated recommendations outright.

ACSESS submits that the temporary help agency industry will be particularly hard hit by the “one size fits all” approach of Bill 148. This will especially be the case for those agencies that supply assignment employees on an “as needed” basis (such as, for example, agencies that support Ontario’s health sector, where needs can vary significantly day-to-day or hour-to-hour), or that arrange for day labourers to obtain assignments. For example, will these types of arrangements be considered to be forms of “on call” status? These sectors of our industry support unique employer and employee needs, and could be impacted in a very negative manner by rules developed for very different work environments. The potential increased costs resulting from the new scheduling rules may significantly impact staffing levels in these sectors of Ontario’s economy.

Therefore, ACSESS is requesting an exemption from the new scheduling rules that would be established by Bill 148, at least until such time as the Government can consult with the temporary help agency industry and can develop rules that are more consistent with how the industry operates and is utilized by organizations throughout Ontario.

Recommendation on Scheduling

4. ACSESS is seeking an exemption for the temporary help agency industry from the new scheduling rules to be implemented in the *Employment Standards Act, 2000* as set out in sections 11 and 12 of Schedule 1 of Bill 148.

D. Multiple Job-Holders – Public Holiday Pay and Personal Emergency Leave

Over the course of the Changing Workplaces Review, it was observed that a number of Ontario employees are “multiple job-holders” – i.e. employees who hold two or more jobs at the same time. Within the temporary help agency industry, it is not uncommon for assignment employees to be registered with more than one agency simultaneously. This may be done for a range of reasons, including to better position the assignment employees to maintain a steadier employment and income stream.

ACSESS submits that certain of the proposed Bill 148 amendments may have unintended consequences by creating a potential windfall for multiple job-holders. These consequences will be particularly felt by the temporary help agency industry. There are two consequences in particular to which ACSESS would like to draw the Committee’s attention.

(i) Public Holiday Pay

The first derives from the proposed new definition of “public holiday pay”, which is found in section 15 of Schedule 1 of Bill 148. In its Background to Bill 148, the Ministry of Labour described the purpose of the changes as follows:

The proposed changes would simplify the formula for calculating public holiday pay so that employees are entitled to their average regular daily wage.

ACSESS accepts that this is a laudable goal and does not oppose the principle being expressed. However, in practice, the new formula can apply to allow an individual who holds multiple jobs to receive more than one payment of public holiday pay for the same holiday.

The problem arises because the new calculation divides an employee’s regular wages during the pay period preceding the holiday by the number of days worked during that pay period:

Public holiday pay

24. (1) An employee's public holiday pay for a given public holiday shall be equal to,

- (a) the total amount of regular wages earned in the pay period immediately preceding the public holiday, divided by the number of days the employee worked in that period; or
- (b) if some other manner of calculation is prescribed, the amount determined using that manner of calculation. [Emphasis added.]

As a result, an employee who works a single shift during the relevant pay period will be entitled to as much holiday pay as an employee who works ten shifts during that same period of time.

For example, if employee X earns \$100 per day and works ten days during the pay period, her public holiday pay will be $\$1000 \div 10 = \100 . If employee Y also earns \$100 per day but only works one day during the same pay period, his public holiday pay will be $\$100 \div 1 = \100 . On its face, this result is in accord with the Government's stated purpose set out above (although ACSESS observes that it will result in a significant increase in public holiday costs for any employers that employ part-time and casual employees).

If employee Y holds another job with a different employer and works one shift during the same pay period for that other employer, employee Y will have a separate entitlement to public holiday pay from that other employer. Thus, employee Y could be entitled to receive two days' pay as public holiday pay for a single holiday. If employee Y worked for three (or more) employers, as can be the case in some segments of the temporary help agency industry, this effect could be magnified, and employee Y could be entitled to multiple days' pay as public holiday for the same holiday. [This consequence is not a concern under the existing formula for calculating holiday pay, which averages out the regular wages over twenty days, regardless of how many days are actually worked.]

ACSESS submits that this very real potential consequence is not consistent with the Government's stated intention, and recommends that the Committee consider amendments to Bill 148 to address this situation. For example, since there are a significant number of multiple job-holders employed in the temporary help agency industry, Bill 148 could be amended to allow the existing formula for calculating public holiday pay to continue to apply to the industry. Alternatively, the Bill could be amended to ensure that multiple job-holders cannot claim public holiday pay from more than one employer for the same holiday.

(ii) Personal Emergency Leave

A similar circumstance could arise in relation to the new entitlement to two days of paid personal emergency leave, as provided for in section 29 of Schedule 1 of Bill 148. As currently structured in Bill 148, all employees would have an entitlement to personal

emergency leave, with the first two days being paid (under the Bill, the employee would be entitled to the wages he or she would have received but for the leave).

For multiple job-holders, the new provisions will create an entitlement to two days' paid personal emergency leave that could be claimed from each of their employers. An employee with two jobs could claim up to four days' paid personal emergency leave, while an employee with three or more jobs could claim six or more days of paid personal emergency leave. This consequence would be magnified in the temporary help agency industry which employs a significant number of multiple job-holders.

ACSESS again submits that this consequence does not appear to be consistent with the purpose of the proposed changes, which is presumably to ensure that all employees have access to ten days of personal emergency leave each year, two of which must be paid.

ACSESS recommends that the Committee consider amendments to Bill 148 to address this situation. ACSESS is not seeking an exemption for the temporary help agency industry from the new requirement to provide paid personal emergency leave days to assignment employees. However, ACSESS does recommend that the Bill be amended to clarify that an employee's ESA entitlement is limited to two paid personal emergency leave days per year, regardless of how many employers that the individual may work for.

Recommendation on Public Holiday Pay and Personal Emergency Leave

5. ACSESS recommends that the Government reconsider the application of its proposed changes to the calculation of public holiday pay [section 15 of Schedule 1 of Bill 148] and to the structure of personal emergency leave [section 29 of Schedule 1 of Bill 148], in light of the unintended consequences those changes would have on employees who have multiple jobs with different employers

Conclusion

ACSESS supports the implementation of stricter enforcement mechanisms and the hiring of additional employment standards officers to act as inspectors and enforcers of the statute. However, ACSESS has identified a number of areas where Bill 148 will have unintended consequences, and where the general rules being proposed would have a particularly negative impact on the temporary help agency industry and the businesses, public sector organizations and government departments and agencies that rely on the industry.

ACSESS would be pleased to continue its longstanding role of working cooperatively with the Government to develop appropriate regulation for the industry in a manner that reflects its unique features and that can be implemented in an effective manner.