

What Are Your Liabilities to Temporary Employees?



Ordinary employees who think they've been stiffed on pay can sue their employer under their province's employment standards ("ESA") law. But if the employee is a "temp," it's not so simple. Assuming they even qualify as "employees" under ESA laws, temps with wage claims have to chase down 2 parties—the temporary employment agency and the host employer. This sets up a legal shell game that makes it hard for temps, who typically have limited financial resources to begin with, to pursue wage claims.

But in recent years, several provinces have changed their ESA laws to help out temps. The most recent and dramatic example comes from Ontario as part of a broader new law called the *Stronger Workplaces for a Stronger Economy Act of 2014* (which we'll refer to by its former name of "Bill 18"). Here's a look at the Ontario law and the state of temp wage protections in all parts of Canada.

Defining Our Terms

This article is about *Canadian* temps who contract with an agency like Kelly Services or Manpower to work at a company that hired the agency to supply it temporary labour, as opposed to *immigrants* subject to special rules under the Temporary Foreign Worker Program.

The Temp Conundrum

The temp has become a key part of the national economy. According to Statistics Canada, in 2012, 13.6% of all employees were temps. That percentage continues to rise. Although the temp phenomenon is great for employers, it also blows a hole in the current regulatory system. That's because the ESA laws are tailored to traditional employment relationships in which a single employer hires, controls and pays the employee.

Temporary employment doesn't follow this pattern. Temps are employed as a result of a contractual collaboration between the agency and host employer, neither of whom fits the classic definition of an "employer" with ESA duties. Result: Temps fall between the cracks and don't enjoy the same ESA protections as other employees.

WHAT ARE A HOST EMPLOYER'S LIABILITIES TO TEMPS?

But what obligations does your company, as a host employer, owe to temps with regard to wages and other ESA-related matters? Here are the Rules you need to assess your temp liability risks:

Rule 1: Agency, Not Host Employer, Is Responsible for Temp's Payroll

Provincial ESA law recognizes the agency as the "employer of record." That's because the agency exercises control in the process of recruitment, selection, offers of employment, wage determination, assignment of work and both directly and indirectly determine how, when and where the work is to be performed. Consequently, the agency is responsible for payroll-related obligations including the:

- Withholding and remitting income tax, EI and CPP;
- Issuing the temp's T4;
- Keeping the temp's time and other employment records;
- Issuing the ROE to the temp when his/her earnings are interrupted.

Insider Says: Agencies may try to avoid their payroll obligations by including language in the contract purporting to make the temp an "independent contractor" rather than an employee of the agency. But contract language alone doesn't define the temp's status. CRA, courts and tax tribunals look at the entire relationship including control over work, financial risk, ownership of tools, etc., to determine if the temp is the agency's "employee."

Rule 2: Host Employer Is Generally Not Liable for Temp's Wages

The fact that the agency is responsible for doing payroll on the temp and that ESA laws don't generally apply to temps suggests that the host employer is **not** on the hook for a temp's wages. But there are some important exceptions:

Exception 1: Host Employers in Provinces with ESA Temp Protections May Be Liable

Ontario, Québec and Saskatchewan have changed their ESA laws to include new wage and other protections for temps:

Joint and Several Liability (ON & QC): Bill 18, which takes effect in May 2015, adds new Part XVIII.1 to the Ontario ESA to make agencies and host employers jointly and

severally liable for a temp's wages. Joint and several liability means the temp can recover some or all of his unpaid wages from either party or both. Result: Temps can now pick a target and don't have to chase after both the agency and host employer.

Ontario is now the second province that provides for joint and several liability. Québec (Sec. 95 of the *Act regarding labour standards*) makes employers that hire a "subcontractor," (i.e., agency)" directly or through an intermediary, responsible jointly and severally with that subcontractor and intermediary for pecuniary obligations" under the law.

Insider Says: In BC, agricultural "producers" that use farm workers supplied by a "farm labour contractor" are jointly and severally liable with the contractor for the farm worker's wages (ESA, Sec. 30(1)).

Contractual Wage Protections (SK): Saskatchewan provides similar wage protections. Under Sec. 53 of the *Labour Standards Code*, when an employer contracts with another person to work for the employer and that other person has a subcontractor do the work, the contract between the employer and other person must state that the employer will pay the subcontractor's wages if the other person doesn't. In other words, a contract between the client company (the "employer") and agency (the "other person") must make the client responsible for wages that the agency fails to pay the temp (the "subcontractor" who does the work). Of course, this responsibility applies only to the work the temp does for the client, not to work performed for other clients of the agency.

Insider Says: This October, Manitoba adopted a new provision (Sec. 24.2) to its ESA Regulations making temps eligible for employment notice, provided that they're regularly assigned to perform temporary work for one or more clients for at least 12 hours a week.

Licensing Protections for Temps: Most provinces, including Alberta, BC, Manitoba, Nova Scotia, Ontario, Quebec and Saskatchewan have also adopted licensing requirements to ensure proper regulation of agencies. Licensing laws typically include provisions capping fees and requiring agencies to:

Disclose information to temps about their rights;

- Keep detailed records relating to placement of temps; and
- Refrain from barring the temp from joining the host employer on a permanent basis.

Bottom Line: Although they help temps, licensing requirements have little to no effect on a host employer's liability to a temp under the province's ESA laws.

Exception 2: Host Employers May Be Liable If They're Deemed the Temp's "Employer"

Even if you're not from Ontario, Québec or Saskatchewan, there's a remote chance you could be liable for a temp's wages. Explanation: The risk stems from a 1997 case from the Supreme Court of Canada involving a temp who worked as a receptionist in City Hall. The union representing City employees wanted to include the temp in its bargaining unit. So it argued that the City was her "employer." The City argued that the agency was the temp's "employer" because it paid her wages and did her source

withholdings. The Court brushed aside the argument and said the City was the employer [*Pointe-Claire (City) v. Québec (Labour Court)*].

The *Pointe-Claire* ruling establishes the precedent that a host employer *can be* a temp's "employer" even if the agency pays her wages. The Court used what it called a "comprehensive approach" to identify "the real employer in a tripartite relationship." The question it asked was which interpretation would better advance the "public purpose" of the law. The purpose of the labour code, the Court explained, is to promote collective bargaining over work conditions. Interpreting the City rather than the agency as the "employer" would do more to advance this purpose because the City controlled the temp's work conditions, it concluded.

The same principles could apply to host employers in other situations, especially in provinces where the ESA act defines the term "employer" broadly to include control over the work performed, rather than on the existence of an employment contract between the employee and employer.

- **The 6 Higher Risk Jurisdictions:** BC, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Yukon base the definition of "employer" not on the existence of an employment contract or employment but on the ability to control or direct work; and
- **The 5 Low Risk Jurisdictions:** ESA laws in Alberta, Newfoundland, Northwest Territories, Nunavut and Federal define "employer" narrowly as a person who contracts or "employs" somebody to do work for compensation. Under this definition, the agency and only the agency would likely be considered the employer because it contracts with the temp and pays his wages.