



**Proposed Amendments to Bill 210, *An Act to protect
foreign nationals employed as live-in caregivers and in
other prescribed employment***

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Background

Caregivers' Action Centre

The Caregivers' Action Centre (CAC) is an organization of current and former workers under the Live-in Caregiver Program. The CAC is committed to improving the lives and working conditions of caregivers who work under the federal Temporary Foreign Worker Program and improve policies and legislation governing temporary foreign workers.

Workers' Action Centre

The Workers' Action Centre (WAC) is a worker-based organization that strives to improve wages, working conditions and labour legislation for people in low-wage and precarious work. WAC works with thousands of workers a year that are predominantly recent immigrants, racialized workers and women workers in precarious jobs that face problems at work. The Workers' Action Centre provides information about workplace rights, and strategies to enforce those rights.

Parkdale Community Legal Services

Parkdale Community Legal Services (PCLS) is a poverty law clinic providing assistance and legal representation concerning employment standards, employment insurance, human rights, and occupational health and safety matters. In addition, PCLS works with communities in low-wage and precarious work to improve labour standards.

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1) Introduction

Maria¹, a worker under the Live-in Caregiver Program

Maria was told that she would have to pay an agency a fee of \$3,000 (CDN) in order to be placed in a job under the Canadian Live-in Caregiver Program. She paid the equivalent of \$2,000 (CDN) to a person working on behalf of an Ontario agency in her home country. When she landed in Toronto, the agency told her there was no job lined up, but that she would still have to pay \$1,000 when she did get a job.

Maria obtained a caregiver job looking after an elderly woman that was approved under the Live-in Caregiver Program. The woman's son paid Maria only half the wages that were promised to her under the employment contract, telling Maria that this was the cost of being provided with a job that would allow her to apply for permanent residency after two years. Maria was owed over \$21,000 in unpaid wages and entitlements by the time she was able to leave that job..

Hiten and Suresh work under the Temporary Foreign Worker Program

Hiten and Suresh were offered jobs in Ontario, working for a caterer under the TFWP. The workers were told that they would have standard working conditions and that they would be provided with living quarters. Hiten and Suresh understood that the employer would pay each of their families in India the equivalent of \$350 CDN per month and that they would personally receive \$67 per month (about \$2.60 an hour).

When Hiten and Suresh arrived in Toronto, their passports and work permits were seized and held by the employer. Hiten and Suresh joined other temporary foreign workers of the caterer sleeping 8 to a room and working over 70 hours a week. After working long days in the kitchen, workers returned to the sleeping room only to find packages of food that had to be labelled for the employer's store. The families of both Hiten and Suresh received only \$700 each. These workers were owed well over the \$10,000 maximum amount recoverable under the Employment Standards Act (ESA) by the time they could leave their jobs.

The number of temporary foreign workers (TFW) in Ontario has increased by 55 percent in the past five years.² At the same time, the growing gap in protection for these workers has become all too evident. As the experiences of Maria, Hiten, Suresh and countless other people that we work with demonstrate, regulating recruitment practices and employment of foreign workers is essential.

¹ All the workers names in this paper are pseudonyms. The vulnerability created by federal immigration provisions and provincial labour laws makes pseudonyms necessary to protect the workers involved.

² Citizenship and Immigration Canada, "Canada – December 1 stock of temporary foreign workers by province or territory and urban area, 2004-2008" www.cic.gc.ca/english/resources/statistics/facts2009/temporary/02.asp

Labour Minister Fonseca states that Bill 210 will “ensure that foreign nationals who are live-in caregivers will have appropriate protections while working in the province of Ontario.”³ The proposed legislation seeks to protect live-in caregivers by:

- Prohibiting recruiters from charging any fees to these workers either directly or indirectly;
- Prohibiting the charging of recruitment fees and fees for related services (e.g., resume writing);
- Preventing employers from recovering recruitment and placement costs from live-in caregivers;
- Prohibiting employers and recruiters from taking and keeping a caregiver's passport, work permit or other personal documents; and,
- Allowing live-in caregivers up to three and a half years to make a complaint; authorizing the Ministry of Labour to proactively enforce new protections; and requiring recruiters to provide information to caregivers on caregivers' rights.

We support these goals and the purposes of the proposed legislation. The Ontario government recognizes that agencies and employers are able to exploit conditions created by the federal Live-In Caregiver Program (LCP) under the Temporary Foreign Worker Program (TFWP). Bill 210 seeks to address some of the gaps in employment standards that allow agencies and employers to exploit live-in caregivers in Ontario.

Bill 210 provides some important steps forward for caregivers; however we believe that the government should extend the application of Bill 210 to include all temporary foreign workers. Failure to do so would not only exclude from protection tens of thousands of workers in Ontario like Hiten and Suresh, but it would also create incentives for recruitment agencies to expand fee charging practices for these unprotected workers. Employment standard rights and the fee prohibitions contemplated under Bill 210 rely on workers making individual complaints. The system of work permits under the TFWP significantly reduces a worker's capacity to make complaints out of a fear deportation, future work and immigration.

The government should return to the broad scope outlined in its consultation paper: that is, “foreign and resident employment recruitment in Ontario.”⁴ A comprehensive approach must be taken to accomplish the government's goal of protecting workers in vulnerable employment. As such, there are important amendments that must be made to Bill 210.

- Bill 210 must be amended to ensure that no worker – temporary foreign worker, live-in caregiver or resident worker – faces recruitment or employment placement fees. **Expand the application of the Act to include temporary foreign workers (including seasonal agricultural workers) and resident workers.** As the International Labour Organization Multilateral Framework on Migration make clear, a whole range of categories of temporary foreign workers require protection.⁵

³ Peter Fonseca, Minister of Labour, McGuinty Government's Legislation Would Protect Vulnerable Employees Press Release, October 21, 2009. <http://news.ontario.ca/mol/en/2009/10/ontario-helping-live-in-caregivers.html>

⁴ Ontario Ministry of Labour, “A Consultation Paper on Foreign and Resident Employment Recruitment in Ontario,” July 2009.

⁵ International Labour Organization, ILO Multilateral Framework on Labour Migration – Non-binding principles and guidelines for a rights-based approach to labour migration, Geneva, ILO, 2006. Further the 1975 ILO

- A comprehensive approach to enforcing new protections is essential, otherwise recruiters will simply move fee charging practices offshore. **Employers and agencies must be jointly liable for any prohibited direct or indirect fee charged to a worker. Liability for non-compliance with the prohibited fee would be born by the agency and employer who benefit, not the worker.** The anti-reprisals provision of the Bill should explicitly prohibit an employer or other party from forcing “repatriation” on an employee who has filed a complaint under this Act or the ESA.
- Regulating recruitment practices is essential; however, there are many more gaps in employment standards that must be addressed to ensure caregivers and temporary foreign workers have access to the same employment standards as other workers. **Extend Bill 210's three and a half year time limit on complaints about contraventions of the Act to include complaints respecting unpaid wages and ESA entitlements.**

We also believe that protections for caregivers and temporary foreign workers should be embedded in the *Employment Standards Act* and not be contained in a separate Act. As we experienced with the repeal of Ontario's *Employment Agencies Act* after 2000, it is easier for a future government to dispose of a separate act regulating employment than to alter or revoke *ESA* provisions for substantive entitlements and protections. Further, embedding changes to protect foreign workers in the *ESA* integrates such protections into the ongoing administration and enforcement of employment standards in the province.

2) Caregivers and Temporary Foreign Workers in Ontario

The federal government uses the term “Temporary Foreign Worker”. We prefer the term “migrant worker” because it more accurately reflects the reality of workers’ experiences. Most workers are not temporary; many seasonal agricultural workers return for contracts of up eight months a year, year after year. Many caregivers become landed residents and stay working in Canada after completing the LCP. Moreover, the term “foreign” serves to further separate and marginalize migrant workers, characterizing them as “alien”.⁶ Throughout this submission we will use the term “TFW” to relate to migrant workers under the federal program.

The federally administered Temporary Foreign Worker Program (TFWP) imposes specific conditions on the employment relationships of TFW. Often these conditions structure the work relationship in ways that are ripe for exploitation and that create barriers to workers’ access to employment rights.

The LCP program requires caregivers to work 24 months within a 36 month period under the program. When a worker faces wages and working conditions that fall short of the terms set out in her employment contract or LCP program requirements, it is the worker’s participation in the LCP program that is put in jeopardy, not the employers. Workers fear trying to enforce their employment standards rights before the two year period has been completed. The current federal

Convention calls for equal treatment for TFW, ILO, Convention 143 Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Women Workers, Geneva, ILO, 1975.

⁶ Ontario Federation of Labour and Canadian Labour Congress, Submission to the Ministry of Labour Consultation on Foreign and Resident Employment Recruitment in Ontario, August 21, 2009

TFWP effectively sets up systems of indentured labour where workers are prevented from enforcing their rights until their immigration status has become regularized.

Both seasonal agricultural workers and temporary foreign workers have work permits that are tied to individual employers, not sectors of employment. That means that an individual can only work for the employer who has been approved under the respective program to hire him or her. These workers are “repatriated”, that is returned to their country by the employer, when the contract has been completed or when their employment relationship has been terminated. Seasonal agricultural workers generally hold work permits that are valid for less than one year, requiring them to reapply each year. For TFW, the permit is for a maximum two-year period.

Accommodation requirements under the various work programs present another systemic barrier to accessing workplace rights. Agricultural workers live on the employer's farm. Caregivers are required to live in the employer's home. Caregivers cannot make applications for landed status until they complete the LCP; other TFW cannot even apply for landed status, and face repatriation upon completion or severance of the work contract.

Workers are generally provided with an employment contract that sets out wages, hours of work and other matters. The reality is that many TFW contribute countless hours of unpaid labour in their jobs caring for children and elderly parents, or working in kitchens, hotels, factories and agricultural fields. In our experience with TFW who face such violations, these workers are owed well over the \$10,000 cap that the *ESA* places on recovery of unpaid wages and entitlements. Moreover, the *ESA* only allows workers to recover wages owing in the six months prior to the claim being filed (or a year in some cases), but live-in caregivers and TFW can realistically file claims only after meeting TFWP requirements. Consequently, all too many unpaid wages remain unrecoverable. Seasonal agricultural workers may not risk filing an employment standards claim until they find out whether or not they will be recalled or able to work under the SAWP for fear of being denied work after the employer is notified of their claim. One way to address these issues is to bring the *ESA* into conformity with the new limits under the small claims process.

Recruiting agencies may continue to play a role in assisting employers through federal immigration processes well after the worker has begun working. There are a variety of ways that recruiters and employers may continue their relationship. For example, some workers report that large employers of TFW contract with recruiters to provide “in-house” services. Some workers report that the employer may use the recruiting agency to enforce the contract or deny worker's ability to exercise their basic rights. Workers have reported that recruiter's tell them not to talk about their rights with employers and not to talk to advocates. If a recruiter is involved in getting work permit extensions, workers feel under their control. In some senses workers feel tied to both one employer and one recruiter.

Changes clearly need to be made to the federal TFWP. The Caregivers Action Centre, Workers' Action Centre and PCLS have joined with TFW and labour and community advocates to call for fundamental reforms to the TFWP. These reforms include permanent status for TFW on arrival, an end to employer-specific permits, a right to equal access to social programs, and a fair appeals process for repatriations. However, without waiting until these changes are made, there is a

decisive role for the provincial government to play with Bill 210 and by updating the *ESA* to enable workers under the TFWP to access basic employment rights while employed in Ontario.

3) Bill 210 – steps to protecting live-in caregivers and necessary amendments

3 (a) Bill 210 – Who's left out? Application to live-in caregivers or other prescribed workers

Bill 210 applies to live-in caregivers under the Temporary Foreign Worker Program. The government is right to recognize that live-in caregivers face horrendous conditions created by the federal live-in caregiver program (LCP); conditions that are exploited by agencies and employers. These are just some of the conditions that caregivers face:⁷

- Caregivers are being charged thousands of dollars in fees for promised placement in caregiver jobs in Ontario;
- Caregivers are “released upon arrival” by agencies that do not have employment under the LCP program;
- Kept in the homes or apartments of recruitment agencies, caregivers are pressed to take substandard work that is not under the LCP program, placing worker's immigration aspirations in jeopardy; and,
- Caregivers' passports, work permits and other personal documents are seized and held by agencies and employers to control workers.

Bill 210 is right to address these problems faced by caregivers by regulating recruitment agencies and employers. However, the application of Bill 210 must be expanded to include all temporary foreign workers and resident workers. Other classes of workers who are employed under a TFWP are regularly subject to both direct and indirect fees for work and are also extremely vulnerable to violations of their rights because of conditions created by the TFWP.⁸ Practices with regards to charging fees are quite variable. Below are just some of the ways in which TFW are being charged fees for work:

- A TFW paid an agency \$10,000 to be placed in a food processing plant. More than a third of the workers at the factory were also TFW who had paid similar fees. The employer seized and held workers' passports.
- An employer charged a worker almost \$4,000 to work under the TFWP in his restaurant in Toronto. The worker was also charged an indirect fee: despite being required to provide airfare under the TFWP, the employer made him pay for airfare. The employer confiscated the workers' passport and the worker required police assistance to obtain his passport.
- A TFW in a food packaging company paid a recruiter \$5,000 to find work under the TFWP. The recruiter continued to be involved in the employment relationship, handling the extension of work permits, but delaying these extensions
- The International Organization for Migrants acts as a recruiter for workers from Guatemala charging workers \$500 for jobs.⁹

⁷ Caregivers experiences have been documented in the Toronto Star series over the past year called “Investigation: Nanny Abuse” <http://www.thestar.com/topic/News-Investigations-Nannies>

⁸ A The Toronto Star investigation into the TFWP in November 2009 outlines abuses faced by TFW.

⁹ The Toronto Star reports that the International Organization for Migrants recruits workers in Guatemala, and that workers are told if they don't return home, their family members and others in their community will be banned from

- TFW working as agricultural workers were charged \$500 to \$1000 in recruitment fees from an in-house recruiter of the company.
- TFW working in the hospitality industry reported paying \$1,000 each to recruiters to get their positions.
- TFW hired to work in the healthcare sector paid close to \$5000 for work, but were not informed by the recruiter that their licenses would only be valid for 6 months.

Workers who are not under the TFWP also face fees charged directly and indirectly for recruitment and job placement:

- Workers are charged fees by agencies that promise to place them in permanent work which rarely materializes. One agency charged workers \$250 for training which it told workers was a prerequisite for placement in a security job. These workers never heard back from the agency after undergoing this job training. We have heard similar complaints of at least eight companies that charge worker's fees with the false promise of placing a worker in a security job. This practice is also common in the cleaning industry. One company told workers they would have to pay \$750 for training to get assignments cleaning.

Bill 210 has the flexibility to expand the Act's application through regulation to include other temporary foreign workers and resident workers. Without an expansive scope enumerated in legislation to include all workers, agencies and employers will continue to develop largely unpredictable practices of charging fees to workers. Failing to include other classes of temporary foreign workers and resident workers under this legislation will create loopholes for agencies to bypass the remedial purpose of prohibiting fees.

Prior to the repeal of Ontario's *Employment Agencies Act* in 2000, employment and staffing agencies could not charge any fees to workers for permanent or temporary work. Since this Act was repealed, the practice of charging workers fees for recruitment and placement has become commonplace. Ontario's employment and staffing industry generates 28 percent of its revenue from recruitment and placement services.¹⁰ In the words of one caregiver recruitment agency, a "wild west" environment has been created by the repeal of Ontario's *Employment Agencies Act* and with the absence of clear regulatory standards.¹¹ Deregulation of the employment and staffing agency industry has opened up the space for "fly-by-night" operators and agencies to exploit workers by taking advantage of the legislative silence.

Restoring regulatory prohibition of fees on all recruitment and employment placement services would reduce the inequalities that workers in Ontario face. Most other Canadian jurisdictions in Canada prohibit any fees for individuals, temporary foreign workers or resident workers, for recruitment and placement in employment (e.g., Nova Scotia, Manitoba, Saskatchewan, Alberta, British Columbia, Northwest Territories, Nunavut, and Yukon).¹² Bill 210's narrow scope on

accessing the TFWP. Sandro Contenta, "Star Investigation: A temporary worker's Catch 22" **Toronto Star** November 2, 2009.

¹⁰ Statistics Canada, "Employment services industry" *The Daily*, Wednesday May 7 2008.

¹¹ Robert Cribb and Dale Brazao, "Nanny 'blacklist proposed'" **Toronto Star** March 22, 2009 A1

¹² *The Worker Recruitment and Protection Act*, C.C.S.M., c.W197, *Employment Services Act*, C.C.S.M. c. E100, *Employment Agencies Act*, R.S.Y. 2002, c.71, *Employment Standards Act*, S.N.W.T. 2007, c.13, *Employment Agencies Act*, R.S.N.S. 1989, c.146, *Fair Trading Act*, R.S.A. 2000, c. F-2

caregivers and other prescribed workers is not only out of sync with Canadian jurisdictions, but it also goes against the ILO Convention on Private Employment agencies that support an expansive prohibition of fees for all workers (foreign and resident) in temporary and permanent job placement.¹³ Many other community and labour organizations and immigration consultant organizations support taking an expansive scope to prohibiting recruitment and placement fees charged to workers.¹⁴

It is in the public interest to ensure that all recruiters (foreign and resident workers) and employers are equally prohibited from charging fees for work. This creates a level playing field for agencies and employers and reduces discrimination against workers because of their form of employment (e.g., temporary foreign worker).

Recommended Amendment

Expand the application of the Act to include all temporary foreign workers (including seasonal agricultural workers) and resident workers.

At the same time, the government must retain the flexibility to add other classes of workers through regulation because federal immigration policies will change as will employer and recruiter practices change to avoid compliance with the provisions of Bill 210.

3 (b) Prohibition against charging fees

Bill 210 will make it illegal for recruitment agencies to charge live-in caregivers or workers that may be prescribed a fee for any service, good or benefit.

We commend the government for recognizing the importance of prohibiting fees charged to live-in caregivers. However, Ontario needs an expansive prohibition on direct and indirect fees for all workers to avoid creating unintentional loopholes that allow companies to bypass the intent of prohibiting fees for work. The charging of fees should be prohibited for *all* workers – whether the worker is hired under one of the federal Temporary Foreign Worker Programs or not. All who work or seek work in Ontario should be protected from fees for recruitment and employment.

Section 7 (2) of Bill 210 allows that exceptions may be prescribed. This section should be deleted. Removing the section would not prevent governments in the future from making regulatory exemptions. However, including this section may be interpreted as signalling intent to make exemptions. There are specific power relations in the employment process of recruiting workers for jobs under the TFWP. Agencies are not providing services to workers with mobility in an open labour market. Rather agencies are contracting with employers to recruit workers to fill approved TFW jobs. Any exemptions to a prohibition of fees in this form of employment would create loopholes to allow indirect fees on workers. As the experience of many people that

¹³ International Labour Organization, Convention 180 on Private Employment Agencies, Geneva, ILO 1997.

¹⁴ See for example, submissions to the Ministry of Labour Consultation on Foreign and Resident Employment Recruitment by: Canadian Migration Institute, “Temporary Foreign Workers: Our social responsibility”, August 6, 2009; Canadian Society of Immigration Consultants, “CSIC: Protecting Vulnerable Employees Working in Ontario” July 20, 2009; Ontario Federation of Labour and the Canadian Labour Congress, Submission the Ministry of Labour Consultation, August 21, 2009.

we work with demonstrates, it is exceedingly difficult to prove reprisals when a worker is penalized for refusing to pay for a so-called optional service.

3(c) Prohibit employers from recovering recruitment costs from live-in caregivers or other prescribed workers

The *ESA* does not allow employers who hire workers directly to charge workers a fee for being hired.¹⁵ The costs of recruiting workers (job ad, interview, reference check etc.) are costs of doing business. Whether these costs of doing business are paid by the employer or are externalized to an agency, it is in the public interest to maintain the remedial purpose of the *ESA* by ensuring that these costs are not subsequently transferred to employees (fees charged by agency or employer for work placement).

Bill 210's provisions to prohibit employers from directly or indirectly recovering or attempting to recover recruitment costs from live-in caregivers are important steps forward in protecting caregivers. However, as discussed above, these protections must be extended immediately to all temporary foreign workers. Further, **section 8 (2) should be removed as it would allow exceptions to this prohibition to be prescribed (see 3 b).**

Employers should also be prohibited from reducing the terms and conditions of employment. Caregivers and TFW uproot their lives and move to another country to work under the reasonable expectation that they will receive the wages and working conditions that have been agreed to under the employment contract. The *ESA* sets out that workers are entitled to higher wages and benefits than the statutory minimums in the *ESA* where provided for in an employment contract or other statutory right. Adjudicators treat non-payment of wages or substantial reduction in wages and conditions as constructive dismissal. However, workers under the TFWP are effectively prevented from leaving such a job when "constructively dismissed" because of federal TFWP rules. As such, a prohibition on the reduction of terms and conditions of employment would strengthen TFW right to higher wages and benefits by explicitly requiring employers to adhere to the terms of employment that were originally agreed to. Workers should be able to recover the difference between the amount of wages that were originally promised and the amount that were actually paid, as well as the monetary value of those benefits or conditions of employment that were decreased. A penalty must be assigned to employers who reduce wages and working conditions provided in an employment contract or other statutory provisions.¹⁶

3 (d) Prohibitions against taking and retaining property

Bill 210 prohibits employers, recruiters and their agents from seizing and holding property belonging to a caregiver or other prescribed worker, including passports, work permits and other personal documents. This is an important provision of the proposed legislation. It recognizes the experiences of some TFW who have had their passports seized by their employers and agencies to keep them in exploitative and substandard working situations.

¹⁵ This would be an illegal deduction from wages under the *ESA* 2000 S. 13.

¹⁶ Currently Employment standards officers can only issue fines for violation of the Act if the specific offence is listed in regulations.

As demonstrated in examples above, it is not just caregivers who have passports confiscated by employers or recruiters; other classes of TFW also report this practice.¹⁷ TFW also report recruiter's involvement in finding housing, extending work permits and other practices that allow recruiters to continue to exert control over TFW.

The prohibition against taking and retaining property should be extended to all temporary foreign workers by expanding the application of Bill 210.

4) Enforcement

The conditions of the TFWP that limit or deny access to landed immigration status and remove labour market mobility by tying workers to one employer or sector create substantial barriers to workers' access to *ESA* rights and any new prohibition on fees.

4 (a) Complaints

Experience demonstrates that effective enforcement tools are essential to ensuring agency and employer compliance. In Alberta, for example, where recruitment fees are prohibited, worker advocates have found that TFW still pay "exorbitant and illegal fees to brokers for finding employment."¹⁸ Alberta agencies have "shifted their strategy and are now often demanding payment in the originating country before the worker ever gets to Canada."¹⁹

While Bill 210 brings in many enforcement tools provided for in the *ESA*, the system still relies on individual caregivers to make complaints to the Ministry of Labour to recover prohibited fees or recruitment costs. Workers under the TFWP are unlikely to file a complaint because they fear reprisals, loss of income and employment and are apprehensive of how it may affect their immigration status now or in the future.

From our experience, the terms and conditions of federal TFWP work permits preclude caregivers and other temporary foreign workers from filing claims for unpaid wages and other *ESA* entitlements within the six month time limit for filing claims. That is why the extended time limit for filing a claim to recover prohibited fees under Bill 210 is so important. The government rightly recognizes that the rules of the federal TFWP prevent workers from filing claims. The government must now extend this recognition and this principle to ensure that caregivers and other prescribed workers are able to access employment standards rights.

Recommended Amendment

Extend Bill 210's three and a half year time limit on complaints about contraventions of the Act to include complaints of unpaid wages and *ESA* entitlements.

In addition to this specific amendment, we believe that the time limits on *ESA* complaints should be updated to bring the *ESA* in line with Ontario's Small Claims Court. The *ESA* time limit for filing a claim should be extended to two years and workers should be able to recover

¹⁷ See also: Sandro Contenta, "I know I can't bring my family here" **Toronto Star** November 1, 2009.

¹⁸ Alberta Federation of Labour, "Entrenching Exploitation" April 2009: 12

¹⁹ Ibid 13

entitlements for the two years prior to the claim being filed for resident workers and 3 and a half years for TFW. Moreover, Bill 210 does not provide a cap on the amount of orders under the Act. This recognizes the substantial amount of fees, unpaid wages, overtime and other entitlements that caregivers may be owed after working the required 24 months under the LCP. The current ESA cap of \$10,000 on unpaid wages recoverable does not allow for the reality of current labour markets in general and the conditions of caregivers and TFW in particular. At the very least, the government should update the *ESA*'s cap on orders to \$25,000 which is the limit in Ontario's small claims process (as of January 1, 2010).

4 (b) Recovering prohibited fees

The experience of caregivers and temporary foreign workers is that some of the fees are paid to the recruiter directly or indirectly outside of Canada. Bill 210 must be amended to ensure that all fees can be recovered, whether the fees were paid in Canada or offshore. Joint and several liability for prohibited fees is an important tool in a comprehensive enforcement strategy. If a caregiver pays a fee prohibited under this Act, then she or he should be able to seek recovery from the agency and, if unsuccessful, from the employer who used the recruiter to hire the worker. The employer can, through its contract with the recruiter, make provisions for the recovery of prohibited fees.²⁰

Such provisions are necessary to reduce statutory loopholes that would enable recruiters and employers to shift practices beyond the reach of Bill 210's protections. Further, these provisions would shift liabilities for the prohibited fees and their recovery from workers who have the least power and resources to agencies and employers who benefit from the employment of migrant workers.

Employer and agency joint and several liability for the recovery of prohibited fees may not apply to agency scams where migrant workers are brought over under Labour Market Opinion and Work Permits for "ghost employers" (employer does not exist or never intended to hire worker). However, joint and several liability will assist in bringing the industry's practice into better compliance with the prohibition of fees.

Recommended Amendment

Employers and agencies must be jointly liable for any prohibited direct or indirect fee charged to a worker. In this way, employers will have to compel agencies to comply with the prohibition of fees charged to workers as a condition of their arrangement. Liability for non-compliance with the prohibited fee would be born by the agency, not the worker.

²⁰ For example, employers can withhold payment of any fees to recruiters for services rendered until it is established that no prohibited fees have been received by the recruiter from the employee.

4 (c) Information on recruitment and employment of live-in caregivers and other prescribed workers

Bill 210 requires recruitment agencies to provide workers with information about their rights under this Act and rights under the *Employment Standards Act*. Such documents will be developed by the Ministry of Labour. If a live-in caregiver is hired without the use of a recruitment agency, then the duty to provide information lies with the employer. If the worker speaks a language other than English, then it is the duty of both the agency and employer to see if the Ministry of Labour has the required information in the worker's language.

This is an important part of Bill 210. Getting the information about employment standards rights, the prohibition of fees and document seizure into the worker's hands in worker's first language, where possible, is a crucial piece of a larger enforcement strategy. The government should also require recruiters and employers to undergo training, approved by the Ministry of Labour, on their legal obligations under this Act and the *ESA*.

4 (d) Information about the recruitment agency and employer

Bill 210 requires the recruitment agency to maintain records of all caregivers, fees paid and employers that the agency found or attempted to find caregivers for placement. Employers are required to maintain records of all recruiters that were paid for finding caregivers for the employer.

Recruitment agencies have relatively low overhead costs. Workers experience "fly-by-night" recruiters that close up shop only to reopen under a new name. Some agencies operate solely through the internet or by phone. This record keeping requirement may assist workers in pursuing complaints against agencies and employers for violations of the Act.

4 (e) No Reprisals

Bill 210 provides that employers and recruiters of live-in caregivers and other prescribed workers cannot intimidate or penalize workers for attempting to enforce their rights under this Act and the *ESA*. Anti-reprisals provide important protection to assist live-in caregivers in enforcing their rights.

Under the LCP, caregivers may be "repatriated" (deported) if they fail to meet the federal requirement of working 24 months in a 36 month period in LCP-approved employment. Other migrant workers under the TFWP may also face immediate deportation when they try to enforce their rights. While we argue elsewhere that the Act should apply to these workers, TFW would be classes of workers contemplated under the Bill's "other prescribed workers". The anti-reprisals provision of the Bill (and the *ESA* for that matter) should explicitly prohibit an employer or other party from forcing "repatriation" on an employee who has filed a complaint under this Act or the *ESA*.

Recommended Amendment:

The anti-reprisals provision of the Bill should explicitly prohibit an employer or other party from forcing “repatriation” on an employee who has filed a complaint under this Act or the ESA.

Bill 210 brings in many enforcement measures contained in the *ESA*. For example, under the Act, Employment Standards Officers (ESO) will be able to undertake the same kind of proactive inspection and investigation of claims that the officer is able to do under the *ESA*. The ESO would be able to enter the premises of a recruitment agency or the home of an employer of a live-in caregiver. Just like the *ESA*, a warrant can be sought should such access be barred. In the case of Bill 210, these *ESA* provisions are important to enable enforcement of section 9, prohibition of taking and retaining a caregiver’s property (e.g., passport).

4 (f) Penalties

Bill 210 incorporates the *ESA*’s provisions for offences and prosecutions. So for example, a party convicted of an offence under the Act may have the name, date and description of the offence publicized. Recruiters, employers and their directors would be liable for offences and prosecutions outlined in the *ESA*.

As mentioned above, other jurisdictions that prohibit recruitment and placement fees observe substantial violations against migrant workers. The current complaints and enforcement mechanisms in Bill 210 are the same as those in the *ESA*. The outcome of a complaint would be that the recruiter would only be ordered to reimburse the worker for the illegal fee that she or he paid with no interest and little or no penalty.²¹ The Ministry of Labour should establish a practice that automatically levies fines or Part I tickets against recruiters in all instances of confirmed violation of the prohibition on fees. Only a consistent penalty for violations would create real incentives for recruiters to comply.

4 (g) Additional Enforcement Measures

In addition to the above enforcement measures, the government must allocate adequate resources for proactive enforcement of recruiters and employers. Expand the new “hotline” for caregivers to include all TFW and provide first language support to these workers. The Ministry of Labour should conduct proactive (surprise) inspections of employers of caregivers and TFW and of recruitment agencies. Targeted proactive inspections of industries where TFW are being placed and recruiters should be informed by workers’ experiences of industry practices that violate this Act and the *ESA* to maximise effectiveness. Such enforcement measures require the authority to inspect all workplaces including employers of live-in caregivers. The Ontario government should work with the federal government to prohibit employers from having the right to hire workers under the TFWP if the employer is in violation of this Act or the *ESA*.

²¹ While the Ministry of Labour has stepped up prosecutions in recent years, the majority of prosecutions take the form of Part I tickets (approximately \$340 ticket). Such prosecutions are optional. With close to 20,000 complaints of *ESA* violations, in 2008, 480 prosecutions were initiated, most of those were Part I tickets. The reality is that there is still very little risk of penalty or cost.

5) Conclusion

We commend the Ministry of Labour for taking steps to provide increased protection to caregivers and other prescribed workers in Ontario. However, caregivers and other TFW may be posted in different provinces year to year. The Ministry of Labour, therefore, has a role to play in coordinating with its provincial counterparts, and with Citizenship and Immigration Canada (CIC) and Human Resources and Skills Development Canada (HRSDC) at the federal level.

Recommendations

- The Ministry of Labour should work with the federal government to recommend changes to the various TFWP that would address workers' precarious immigration status and permit workers to access their labour rights. Examples of these changes are permanent status for TFW on arrival, an end to employer-specific permits, a right to equal access to social programs and a fair appeals process for repatriations.
- The Ministry of Labour should work with the federal government to ensure that there are no repatriations of TFW who have filed *ESA* claims with the Ministry of Labour.
- The Ministry of Labour should encourage provincial counterparts to adopt similar legislation protecting TFW to harmonize the current patchwork of regulations.

Updating employment standards is just one step in the process of protecting temporary foreign workers. Having the right to collective representation and real access to human rights, health and safety protection, and workers' compensation must also be addressed. We encourage the Ministry of Labour to initiate consultations with stakeholders to begin a process of legislative change to address these gaps in protection for TFW.