

## 1. WORKING FOR A PLACEMENT AGENCY

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### 1.1 IDENTIFYING THE EMPLOYER

Workers employed by temporary placement agencies (hereinafter referred to as agencies) are not excluded from the application of labour standards. In practice however, labor laws are much more difficult to apply and enforce with agencies. The main problem has to do with the fact that workers employed by agencies are involved in a three-party relationship. This is in contrast to the traditional two-party relationship, where the employer remunerates the employee directly for his or her services. When an agency plays an intermediary role between the two parties, the rights and obligations that tie the parties together are more complex, which makes the situation more complicated.

Generally speaking,

- a. The agency hires workers, pays their salary, and sometimes offers training.
- b. The client company pays the agency for the work performed by agency workers, for the hiring services and sometimes for the training given to employees.
- c. Agency workers offer their services to client companies, who in turn supervise, direct, evaluate and terminate the employment contracts at will.

In a three-party relationship, it is often the agency that is considered to be the employer, even if the worker offers his or her services to the client company. This, however, is not always the case.

Determining the employer often depends on a number of variables and should be done on a case-by-case basis. It is wise to adopt a global approach and to consider a number of factors, such as:

- Legal subordination: who supervises the employee in his or her daily tasks? Who exercises direct authority? Who issues the directives? Who controls the quantity and quality of the work performed?
- Human resources and management issues: The selection and hiring process, training, evaluation and supervision of employees, assignment of duties and remuneration.
- The duration of the contract: The longer the assignment, the more likely the client company is regarded as the employer. This is especially the case if the subordinate relationship between the worker and the agency is decreased and if the client company becomes the predominant overseer.
- Integration into the company or the sense of belonging: Does the individual participate in meetings along the other employees of the company? Does he or she attend training seminars? Company events? This criteria, however, is of secondary importance.

In order to determine who should be regarded as the employer, it is central to identify the party (the agency or the client company) that possesses the most control over work-related issues. It is important to determine the employer because of the numerous advantages and rights associated to the employee-employer relationship, as discussed further below.

It should be noted that either the agency or the client company could be considered the employer with regards to *An Act respecting labour standards*, without necessarily being considered as such with regards to other laws. Laws will apply different definitions of a same word to adapt the concept to their specific purposes. As a result, the agency could be the employer under one law, while the client company could be under another.

The example below clearly demonstrates the challenging issues that arise from an agency worker's inability to clearly identify his or her employer. In the following sections, we will refer to the case of Samia to better illustrate the rights and solutions available to agency workers.

EXAMPLE: Samia was hired by a placement agency two years ago. She was working for a client company for over six months when the latter abruptly put an end to her contract, seemingly without any valid cause. Two weeks earlier, Samia had told the client company that she was pregnant. When Sami informed the agency of her situation, the agency promised to find her a more suitable type of employment as soon as possible. Samia believes that she was let go because of being pregnant.

To which rights is Samia entitled? Can she challenge the end of her assignment? Is she entitled to severance pay? If so, what should be the amount and

when should she receive it? What other options are available to Samia? Against whom should the complaints be filed?

## 1.2 CONTINUOUS SERVICE

All standards that depend on the notion of continuous service are affected by the three-party relationship (see Section 1.2, “Continuous service”). For example, the length of continuous service largely determines vacation time and payment related to it, the number of weeks notice required by the employer prior to the termination of employment and access to protection against unjust dismissals.

An employee accumulates continuous service while working for his or her employer. Agency workers can therefore accumulate continuous service with either the agency or with the client company, depending which is considered to be the employer. In the case of Samia, since she has not accumulated the same amount of service with the agency as with the client employer, she may be entitled to either one or two weeks of severance pay, depending on who is believed to be the employer.

## 1.3 THE TERMINATION OF EMPLOYMENT AND DISMISSAL PAY

Norms and standards relating to matters of termination of employment are also particularly difficult to apply when it comes to agency workers. Some of these issues include notice of termination of employment, safeguards against prohibited practices and unfair dismissals. As illustrated by Samia’s example, the rights and the protection that agency workers are entitled to are often undermined by the the confusion surrounding the identification of the employer.

Since Samia believes that her employment was ended because of her pregnancy, she can file a complaint with the *Commission des normes du travail* (CNT). The grievance would be filed against the agency and against the client company and would denounce the prohibited practice she was subject to (see Section 11.4). The CNT will try to determine Samia’s true employer. If they are unable to do so, the task will be delegated to the courts.

If the client company is deemed to be the employer, and if Samia’s claims are substantiated, she will be entitled to the lost wages and benefits, and will be reinstated to her position if it still exists. If the complaint is judged to be invalid, the client company will be obliged (at the least) to compensate Samia for the one-week notice that she failed to receive prior to being fired (see section 9.4).

On the other hand, if the agency is found to be her employer, Samia can only hope that the agency finds her another assignment as soon as possible and without discrimination (as it promised). If the agency doesn’t do so, she could be left without work, and therefore, without pay for several weeks while waiting for a new position. In addition, seeing that the end of the temporary assignment may be considered as a layoff, the agency (which did not give notice) should pay Samia

severance pay only if it fails to find her work in the next six months (see Section 9.4, “notice of termination or layoff”). If this is the case, the agency should then remunerate her for the two weeks notice.

#### 1.4 NON-COMPETE CLAUSE

Often, the contract of employment existing between the agency and the worker limits the worker’s ability to get hired either directly by the client company, by another agency or by a company that is in competition with the agency. One should be careful of these limitations because, even though they may be common, some terms are unfair and even illegal (see subsection “Obligations of the employee” in Section 2.2 of Chapter II).

Furthermore, the contract signed between the agency and the client company contains, in most cases, a clause that pre sees what it would cost to hire the worker on a permanent basis. This clause negatively affects one’s chances of being hired by the client company. However, if the client company does decide to pay the necessary fees to the agency, the non-competition clause would no longer apply, leaving the worker free to work for the client company.

#### 1.5 THE PAYMENT OF WAGES, OVERTIME AND HOLIDAY PAY

Because of their peculiar employment relationship (which consists of three parties rather than only two), it is more difficult to determine and manage the working conditions of agency workers. For example, it is often the client company that is in charge of the time sheet, which is in turn relayed to the agency. Having the client company act as an intermediary drastically increases the likelihood of errors and delays ~~occurring~~, which negatively impact the payment of wages.

Beware if the client company is trying to negotiate some of your working conditions, by asking you to work overtime for example. Keeping in mind that it’s the agency that is responsible for remuneration, it may refuse to pay the amount due because it has not agreed to certain conditions. In addition, the agency may not appreciate the fact that you have negotiated agreements behind its back with the client company...

It is also important to obtain permission from the employer prior to being absent the business day preceding or following a Statutory holiday to be entitled to compensation (see “holiday pay” in section 4.1). This often leads to confusion in the case of agency workers. Who should you ask permission from in order to be absent: the agency that pays your salary, or the client employer for whom you work? To avoid confusion, first ask permission from the client company, and if permission is granted, then contact the agency.

## 1.6 THE USE OF PLACEMENT AGENCIES TO CIRCUMVENT LABOUR LAWS

As if the situation was not problematic enough, some companies use agencies to circumvent labour laws. They thus use “two-headed agencies” or “screen agencies” to reduce the cost of labour or to dismiss workers at will, without being subject to repercussions.

Companies are also using employment agencies to undermine unions or to circumvent collective agreements. However, it is important to know that in some cases, workers placed by agencies can be recognized as being part of the bargaining unit. Agency workers can therefore be subject to the same conditions of employment as those hired directly by the client company (see Chapter IV, “Unionization”). One should always check with the local union if this is the case.

The CNT tries its best to resolve these issues by involving all the parties (the employee, the agency and the client company) in finding solutions when necessary.

### AN EXAMPLE OF A “TWO-HEADED AGENCY”:

George is a driver employed by an agency at a trucking company. His job often requires him to work long hours. He receives two pay slips: one from the agency that hired him, and one from another agency that he has never heard of before. The main agency pays him his regular hours while the second one pays his overtime. As a result, George never receives the increase in pay for the hours that exceed 40 as required by law (see Section 3.2).

After getting informed of his rights, George decides to file a complaint with the CNT. The subsequent investigation discovers that both agencies are in fact the same employer: both have the same address, the same office and the same administrator. The CNT then takes the necessary steps to obtain the payment that was due for all the hours worked beyond 40 in the same week.

### AN EXAMPLE OF A “SCREEN AGENCY”:

Lin works as a secretary in a toy-manufacturing company, a position she has held for over five years. Shortly before going on vacation, she realizes that her employer has not granted her the three weeks vacation that she is entitled to for that summer. She speaks about it with her employer, who tells her to take it up with her “real employer” whose name appears on her paycheck. Lin had noticed the various company names on her paycheck but did not think much of it, presuming they were companies offering payroll services. In fact, these names had changed several times since she began work at the company. After inquiring about her situation with her supposed “real employer”, she learns that it is an agency and that she has been working for them for only two years!

Unsatisfied with the explanation, she files a complaint with the CNT who judges that the client company is her true employer and that she is entitled to her three weeks of vacation. If the client company refuses to pay, the courts will be asked to make a ruling.

Unfortunately, the complexities of such cases make the investigative process long and arduous, discouraging many from filing complaints. The sole act of trying to figure out who is the real employer can be a headache by itself, as in George's case. Furthermore, the legal loopholes and ambiguities make finding lasting solutions very difficult.

## 1.7 HOW TO EXERCISE ONE'S RIGHTS WHEN WORKING FOR AN AGENCY

After reading the above information, it is easy to understand how the three-party relationship makes it more difficult for financial standards, as well as those relating to the termination of the employment, to be respected. Regardless, a number of recourses exist that can help workers enforce their rights. Here are some tips that might help you:

- Request a copy of the contract you sign with the agency.
- Mark down the name and address of the agency, along with all the client companies you worked for.
- Also note the names of those responsible for the agency and those in charge of the client companies.
- Ask the agency to inform you of your official job title, the tasks you will have to perform and the duration of the assignment. Try to get this information in writing or by email. You may find it useful, especially if your assignment is terminated prematurely.
- If you file a complaint with the CNT, clearly indicate that you work for an agency. Mention all the names of the client companies for whom you worked for in recent months. Also be sure to give details about the nature of your employment, the duration of your assignments, your integration into the client company, as well as who (in the client company or the agency) is responsible for controlling and managing your work (see the criteria for the identification of the employer, section 7.1). This information will help the CNT to process your claim and determine whether the agency or the client company should be regarded as your employer.