

Article

"Regulating Precariousness? The Temporary Employment Relationship Under the NAFTA and the EC Treaty / Réglementer la précarité ? : L'emploi, l'ALENA et le Traité de la Communauté européenne / Regulando la precariedad ? : La relación del empleo temporal dentro del ALENA y la Comunidad Europea"

Leah F. Vosko

Relations industrielles / Industrial Relations, vol. 53, n° 1, 1998, p. 123-153.

Pour citer cet article, utiliser l'information suivante :

URI: <http://id.erudit.org/iderudit/005309ar>

DOI: 10.7202/005309ar

Note : les règles d'écriture des références bibliographiques peuvent varier selon les différents domaines du savoir.

Ce document est protégé par la loi sur le droit d'auteur. L'utilisation des services d'Érudit (y compris la reproduction) est assujettie à sa politique d'utilisation que vous pouvez consulter à l'URI <https://apropos.erudit.org/fr/usagers/politique-dutilisation/>

Érudit est un consortium interuniversitaire sans but lucratif composé de l'Université de Montréal, l'Université Laval et l'Université du Québec à Montréal. Il a pour mission la promotion et la valorisation de la recherche. Érudit offre des services d'édition numérique de documents scientifiques depuis 1998.

Pour communiquer avec les responsables d'Érudit : info@erudit.org

Regulating Precariousness?

The Temporary Employment Relationship Under the NAFTA and the EC Treaty

LEAH F. VOSKO
York University, Ontario.

This article examines regulatory responses to the spread of non-standard forms of employment in North America and Europe, particularly those measures directed at the temporary employment relationship associated with the temporary help services industry. Through an analysis of international labour conventions, country-specific regulations and supranational initiatives, the article demonstrates that countries party to the NAFTA and the European Community both endorse strategies aimed at numerical flexibility yet they take divergent regulatory approaches in response to the growth of temporary employment. While North American countries opt for non-regulation, the European Community is attempting to establish basic protections for workers engaged in temporary employment.

Few scholars would deny that non-standard forms of employment, such as part-time work, self-employment, contract work and temporary work, are on the rise in both Europe and North America (Akyeampong 1997; Krahn 1995; OECD 1993; Lipsett and Reesor 1997; U.S. Department of Labor 1995a). Naturally, there is considerable debate over the magnitude, direction and character of these employment trends leading scholars to offer wide-ranging, and often conflicting, interpretations. Some associate the rise of non-standard forms of employment with growing contingency in the economy as a whole (Belous 1989; Polivka

— The author gratefully acknowledges the generous financial support of the Social Sciences and Humanities Research Council of Canada. She also thanks Richard Chaykowski, Judy Fudge, Anthony Giles, Gerald Kernerman, Ester Reiter and two anonymous reviewers for their helpful comments on earlier drafts of this paper.

and Nardone 1989), others correlate shifting employment norms with the spread of precarious employment (Fudge 1997; Rogers 1989), and still others highlight growing income and occupational polarization in many advanced welfare states characterizing emerging forms of employment as “atypical” rather than “contingent” or “precarious” (Cordova 1985; Bronstein 1991). Although these debates are important, this article takes them as its point of departure and focuses instead on comparing regulatory responses to the spread of non-standard forms of employment in the North American Free Trade Agreement (NAFTA) and the European Community (EC) Treaty. More specifically, it examines measures designed to regulate one of the most highly “feminized” types of non-standard employment, the temporary employment relationship, which involves a temporary worker, a temporary help firm and a client firm and is conventionally associated with the temporary help services industry (THI).¹

The EC and countries party to the NAFTA take very different routes in response to the spread of temporary employment. While NAFTA countries have opted for non-regulation altogether, the EC Commission, following the lead of France and Germany, has devised several directives that aim to regulate temporary employment within the entire Community. Despite these divergent regulatory responses, neither the EC Treaty nor the NAFTA aims to curtail the growth of temporary employment. Indeed, both regulatory responses signify an endorsement of corporate strategies aimed at achieving so-called “numerical flexibility.” However, while the EC Treaty abandons the standard employment relationship² as the normative model of employment in Europe, it still attempts to preserve some of its related protections by establishing a minimum floor of rights for workers engaged in various types of temporary employment. Unlike its North American counterpart, therefore, the EC Commission is attempting upward harmonization by formally addressing the challenge to regulate

-
1. The THI consists of private firms that are in the business of recruiting labour to work on a temporary basis for another firm. Normally, the temporary help firm is considered the legal employer of the workers placed with outside firms, which pay a fee for services related to recruitment and placement (Hamdani 1996). The THI is regulated through legislation on temporary employment, especially in Europe, as well as legislation governing private employment agencies. Thus, this paper occasionally treats the wider issue of temporary employment alongside the narrower issue of the THI.
 2. The “standard employment relationship” is characterized by an open-ended employment contract for full-time work, performed for a single employer and protected against arbitrary dismissal. Social insurance benefits, such as unemployment insurance and pensions, are usually attached to it (Bronstein 1991; Muckenberger 1989; Schellenberg and Clark 1995).

non-standard forms of employment. Still, a comprehensive regulatory regime surrounding the temporary employment relationship, akin to the package of protections and entitlements associated with the standard employment relationship in the post-World War II period, has yet to emerge in Europe, to say nothing of North America.

The following examination of North American and European regulatory measures in the field of temporary employment is divided into six sections. Surveying various scholarly perspectives, the first section describes practices aimed at achieving flexibility at the level of the firm and links the spread of temporary employment relationships, and the rise of the THI, to demands for numerical flexibility. The next section sets the stage for a comparison of emergent supranational initiatives by presenting a historical overview of international labour standards that pre-figured national regulatory regimes operating in Europe and North America. The two following sections provide a profile of temporary employment in North America³ and European countries respectively, examining the historical process through which national and supranational regulatory regimes emerged on both continents and placing particular emphasis on the NAFTA and the EC Treaty. The fifth section briefly describes the newest international labour standard pertaining to the THI, indicating that it closely mirrors the new European model of regulation and, thus, signals a sharp shift in direction within the International Labour Organization (ILO). Returning to the initial overview of numerical flexibility, the last section critically compares the regulatory regimes emerging in North America and Europe. While it suggests that the European model of economic integration is preferable to the North American model, this section calls into question the presumed compatibility between enhancing numerical flexibility and increasing social protections for workers engaged in non-standard forms of employment.

*“LABOUR FLEXIBILITY”: WORK REORGANIZATION,
DEREGULATION OR RESEGMENTATION?*

John Atkinson (1984) was one of the first scholars to use the expression “labour flexibility” to designate a now widespread group of human resource practices deployed at the level of the firm. In delineating these practices, Atkinson refers to numerical flexibility, functional flexibility, distancing strategies and pay flexibility.⁴ According to Atkinson,

3. This article does not address the Mexican case.

4. Although Atkinson’s emphasis is descriptive rather than prescriptive, the forms of flexibility to which he refers are all integral to the labour force reorganization strategy

numerical flexibility involves enhancing firms' ability to adjust the level of labour supply to meet fluctuating demand (Atkinson 1988: 136). Firms often achieve numerical flexibility by resorting to non-standard workers such as part-time, temporary, contract and casual workers. However, they may also adjust working-time patterns to enhance numerical flexibility.⁵ Unlike numerical flexibility, functional flexibility does not involve altering the size of a given firm's work force. Rather, based on an artisanal model, it involves training "core" workers to do a range of tasks; the worker who is functionally flexible is the "flexible specialist" (Atkinson 1988: 136-37). Firms normally use two other human resource practices to deepen both numerical and functional flexibility. They use distancing strategies, which involve shrinking the "core" work force in exchange for commercial relationships such as subcontracting, to enable them to hire specialized workers on a fixed-term basis (Atkinson 1988: 137). Similarly, pay flexibility allows firms to adjust reward structures so as to maintain income polarization between numerically and functionally flexible workers.

While Atkinson presents a rich descriptive typology, he neglects to evaluate these sorts of labour practices aimed at achieving labour flexibility except to suggest that they enhance efficiency and competitiveness at the level of the firm. In stark contrast, scholars preoccupied with understanding recent shifts in the global economy are more critical in their analysis of the effects of these practices (Pollert 1988; Stanford 1996; Jenson 1989; Walby 1989). Many question whether practices associated with labour flexibility are really "new," arguing instead that they resemble age-old legitimation tools that target the "apparently manageable 'problem' of labour" (Pollert 1988: 43). Critics view the human resource practices that Atkinson associates with "labour flexibility" as demarcating a complex material and ideological strategy that has strong prescriptive elements. For example, Jim Stanford (1996) argues that the deregulation of the labour market represents an intended effect of strategies aimed towards achieving flexibility at the level of the firm. Examining the Canadian case, he illustrates how the discourse of

called "flexible specialization" first advocated by Michael Piore and Charles Sabel (1984). Piore and Sabel offered this strategy, which partly involves combining production techniques derived from both artisanal and mass production systems, as an alternative for halting the "deterioration in economic performance" in Western industrialized countries originating in the early seventies (Piore and Sabel 1984: 6).

5. Following Atkinson's distinction between numerical flexibility and functional flexibility, other scholars divide numerical flexibility into "external flexibility," relating to the number of workers employed, and "internal flexibility," relating the number of hours a given number of workers work (Casey et al. 1989: 460).

flexibility disguises firms' efforts to promote deregulation in an already hyper-flexible labour market (Stanford 1996: 5-6). Similarly, citing the example of persistent occupational segregation by sex in Britain, Sylvia Walby (1989) questions the widespread assumption that strategies geared at achieving labour flexibility actually reduce labour market rigidities. She notes: "The objective of the flexible firm might be considered to contradict aims for the removal of labour market rigidities" (Walby 1989: 137). This observation isolates the paradox of the package of practices designed to create labour flexibility: the tension between numerical flexibility, which amounts to a segmentation strategy, and functional flexibility, which resembles a crafted-based model of production due to the absence of task demarcations in the labour process.

Critics also question the supposedly gender-neutral character of managerial practices which encourage numerical flexibility. Again, Walby poses two questions regarding the internal logic of labour flexibility strategies: (1) Is the 'core' masculine and the 'periphery' feminine? (2) Is 'flexibilization' a form of feminization? (Walby 1989: 129).⁶ While they warn against characterizing specific human resource practices in an essentialist manner, feminist scholars demonstrate that many labour reorganization strategies designed to achieve labour flexibility are indeed gendered (Jenson 1989; Pollert 1988; Walby 1989). For example, pointing to the one-sided increase in job security for men under Fordism, Walby argues that women represent a more attractive pool of numerically flexible workers because of their disadvantaged location within the labour market and the family (Walby 1989: 136). Thus, a growing number of scholars liken the emergent package of managerial practices designed to achieve labour flexibility to a gendered resegmentation strategy, one that divides workers based on the nature of their employment contracts, involving a small, functionally-flexible core and a rapidly expanding, numerically-flexible periphery.

Temporary Employment: A Route to Numerical Flexibility?

Regardless of one's perspective on the merits and shortcomings of managerial strategies aimed at labour flexibility, the rise of the THI, and the type of employment relationships that it engenders, clearly reflects the renewed drive towards numerical flexibility and the decline of the

6. Feminization does not simply involve women's mass entry into the labour market, nor does it involve women appropriating jobs formerly held by men (Cohen 1994; Macredie 1996). Rather, at least in the North American and the European context, it largely refers to the gendering of jobs so that new forms of employment comprise characteristics conventionally associated with "women's work" (Armstrong 1996: 30).

standard employment relationship (Abraham 1990; Carre 1992; Casey et al. 1989).⁷ Moreover, the demographic characteristics of this industry in North America and Europe substantiate the claim that numerical flexibility is a gendered phenomenon since women constitute the majority of its workers on both continents (Krahn 1995; OECD 1993).

The THI generates triangular employment relationships involving a temporary help firm, which usually acts as the employer from a legal point of view,⁸ a temporary help worker who receives assignments from the temporary help firm, and a third-party or client who is responsible for overseeing work performed by a temporary worker on-site.⁹ Thus, the employment relationship, characteristic of the THI, is neither analogous to subcontracting nor self-employment since the client directly supervises and controls the temporary help worker and the temporary help firm pays the worker for the duration of an assignment.

Clients tend to use the THI for three central reasons, mirroring the central objectives of numerical flexibility. First, using temporary help workers enables them to meet fluctuating product demands. For example, in the case of seasonal demand variation, temporary help workers serve as a cost-efficient buffer between core workers and subcontracted workers that enables firms to manage in a climate of economic uncertainty (Casey et al. 1989; Meager 1985). Second, some firms hire

-
7. Thus, the growth in temporary help work mirrors recent increases in casual forms of employment, independent and dependent contracting, and out-sourcing: firms use all these strategies to cushion fluctuations in demand.
 8. In most countries, temporary help firms are considered employers. However, there are three conflicting legal characterizations of the status of the temporary help firm. Some argue that temporary help firms are labour market intermediaries and, hence, should be governed according to regulations pertaining to fee-charging employment agencies. Others believe that temporary help firms are simply employers and should therefore only be subject to labour regulations governing the standard employment relationship. Still others suggest that legal responsibility must rest jointly with the temporary help firm and the client firm (Ricca 1982; Vosko 1998).
 9. Notably, the EC Commission defines temporary employment as follows: (1) employment governed by a fixed-duration contract concluded directly between the employer and the employee and; (2) temporary employment covering any relationship between the temporary employment business which is the employer and its employee, where the latter has no contract with the undertaking where s/he is placed on assignment (EC 1990a: Preamble). Thus, several EC Directives cover temporary help workers and direct temporary workers. While this article accepts this definition of temporary employment, it focuses on the second type. It is critical to distinguish between these two types of temporary employment since individuals engaged in the first type are involved in bilateral employment relationships while individuals engaged in the second are usually involved in triangular employment relationships.

temporary help workers as a means of finding suitable permanent employees. For example, in Germany, where apprenticeships are still quite prevalent, “a period of temporary employment is increasingly seen as a form of probationary hiring after an apprenticeship” (Dombois 1989: 365). Third, firms increasingly use temporary help workers to avoid labour-related “fringe costs” including paying benefits such as unemployment insurance or contributing to group dental or pension plans (Akyeampong 1989: 43).¹⁰ In some instances, however, the use of temporary help workers may be disadvantageous to employers because a shrinking core workforce may reduce employee loyalty and versatility and increase turnover (U.S. Department of Labor 1995a: 18-19; Akyeampong 1993: 18). As well, due to the fees owed to the temporary help firm, engaging temporary help workers is not always cost-effective. Furthermore, depending on the type of regulatory measures surrounding the temporary employment relationship in a given country or region, client firms may actually be held legally responsible for core employment-related responsibilities even if they hold a commercial contract with a temporary help firm.¹¹

When temporary help workers are asked to list the advantages of working for a temporary help firm, they generally mention variety in work assignments and flexible work schedules (Schellenberg and Clark 1995; OECD 1993). Many women cite the ability to participate in the labour force without sacrificing family responsibilities (Akyeampong 1989: 44; Marshall 1994: 26). Similarly, students and early retirees emphasize flexibility as the most positive feature of this form of employment (Lipsett and Reesor 1997: 28). However, since the temporary employment relationship is an extreme form of employment-at-will, there are also serious difficulties associated with working in the THI. While temporary help firms can provide a “modicum of security and mobility for workers in the secondary labour market,” especially where they are regulated, temporary help workers usually lack extended health benefits, life insurance, pension plans and access to employee-sponsored training programs (Mangum, Mayall and Nelson 1985: 616; Lipsett and Reesor 1997: 28–29). Between assignments, many also endure extended bouts without pay. Furthermore, unless temporary help workers are protected

10. Prior to the 1980-1982 recession, many North American and European firms engaged temporary help workers through the THI primarily as a “stop gap” measure (Carre 1992: 49). However, after this recession, firms began to draw on temporary help workers as part of a standard staffing strategy across the business cycle.

11. See for example the recent Supreme Court of Canada decision: *Pointe-Claire v. Quebec* (S.C.C.), 1997: File No. 24845.

by a special external labour market device, such as a union hiring hall or an occupational license, as is the case under some collective agreements in Canada, they have very little job security. Thus, for many temporary help workers, a standard employment relationship may be preferable to a string of short-term assignments, particularly in jurisdictions where regulatory measures aimed at protecting non-standard forms of employment are underdeveloped. In the face of a weak labour market, many workers indicate that are often forced to accept temporary help work when they would prefer to find a permanent job (Lipsett and Reesor 1997: 28).

INTERNATIONAL LABOUR STANDARDS AND THE TEMPORARY EMPLOYMENT RELATIONSHIP

In order to compare North American and European regulatory responses to the rise of temporary employment, it is instructive to first provide a brief history of the international struggle over the regulation of private employment agencies.

International labour standards governing the conduct of private employment agencies may be traced to the founding of the ILO in 1919 when Member States entrenched the dictum “labour is not a commodity” in its original charter (ILO 1994, 1997a: 6). However, international labour standards that directly shaped national regulations governing the THI, and, thus, the temporary employment relationship, did not come into being until the early thirties. The Convention Concerning Fee-Charging Employment Agencies (No. 34) was the first international labour standard that dealt exclusively with the role and function of private employment agencies in the labour market.¹² While it was only ratified by eleven Member States, this instrument created a framework that many countries used, at least initially, as a guide to develop national legislation (ILO 1996: 52). It set the course for future regulations at an international level by establishing a formal definition of “fee-charging employment agencies,” identifying criteria governing special exemptions and, most notably, creating a regulatory climate where the prohibition of fee-charging employment agencies was the ultimate objective. Convention No. 34 stated that fee-charging employment agencies included: “any person, company, institution, agency or other organization which acts as an intermediary for the purpose of procuring employment for a worker or *supplying a worker for an employer* with a view to deriving either directly

12. The THI was not regarded as a distinct industry when Convention No. 34 was in full force.

or indirectly any pecuniary or other material advantages from either employer or worker” (ILO 1992: 145, emphasis added). Hence, the Convention covered a broad range of actors who could be involved at all stages of the recruitment and placement process, and as future debates would illustrate, possibly within the employment relationship itself. While it offered exemptions for specific categories of workers, such as musicians, artists and other professionals requiring employment agents, its overriding goal was the prohibition of private employment agencies and the establishment of free public employment services.

Due to its rigid stand on prohibition, Convention No. 34 had a relatively short life. After World War II, the ILO re-examined the role of private employment agencies in the labour market and created a new instrument in 1949. Convention No. 96 (Revised) aimed at a higher level of ratification by offering ratifying States two options: progressive abolition or regulation (ILO 1996: 52). While the option of prohibition remained virtually unchanged from Convention No. 34, the option of regulation set out a framework which assumed that both public and private employment agencies could contribute to the smooth functioning of the labour market. The framework for fee-charging employment agencies included provisions mandating yearly licensing, supervision, fixed-fee scales, and special rules for recruitment and placement.

Since it offered countries a fair degree of flexibility, the level of ratification of Convention No. 96 far exceeded Convention No. 34 (ILO 1996). However, by the time it came into force, the labour market was in transition. New types of private employment agencies were entering the labour market. Emerging in the 1950s, temporary help firms represented the largest category of new private employment agencies and, rather than acting purely as labour market intermediaries involved in recruitment and placement, these new agencies also functioned as the formal employers of temporary help workers, assuming many employment-related opportunities (ILO 1994). In their early years, temporary help firms operated primarily in Europe and North America catering mainly to the office sector (Golden and Applebaum 1990: 473).

Responding to the growth of the THI, in the early sixties, Sweden requested clarification from the ILO over whether so-called “ambulatory typing agencies” were covered under Convention No. 96. Under Swedish labour law of the day, these agencies were characterized as being involved in the “hiring out of labour”; their main purpose was to “supply labour” and they only employed temporary help workers so long as they were engaged by an outside party (ILO 1966: 391; ILO 1987). Therefore, since they were not engaged in permanent placement, Sweden expected that these agencies would be excluded from coverage. But, the then

Director General of the ILO asserted that these agencies did indeed fall with the scope of Convention No. 96. He defined ambulatory typing agencies as “intermediaries,” stating that “the agency which places the worker at the disposal of the third party, ‘acts as an intermediary for procuring employment for a worker or supplying a worker for an employer’” (ILO 1966: 396). While he suggested that special exemptions could be made for these categories of private employment agencies under the terms of Convention No. 96, he indicated that private firms engaged in part-time, casual and temporary placement were covered under its scope.

In the ensuing years, several Member States objected strongly to the Director General's characterization of ambulatory typing agencies as intermediaries and his remarks that private firms engaged in part-time, casual and temporary placement were covered under Convention No. 96 (Revised). As the THI began to thrive, many also became acutely concerned about implications of his interpretation for temporary help firms (ILO 1994). Consequently, some Member States renounced Convention No. 96 (Revised), others ignored the Director General's interpretation by placing temporary help firms outside the scope of Convention No. 96 (Revised), and still others used the Convention to develop regulations geared at either progressive abolition or the regulation of temporary help firms. At the international level, this ruling led to a stalemate over establishing regulations governing the role and function of temporary help firms, and private employment agencies more generally, that lasted over two decades. Nevertheless, Convention Nos. 34 and 96 (Revised) and the Director General's ruling contributed to the evolution of three dominant models of regulation: prohibition, regulation and non-regulation. The current status of the THI in European and North American countries and the supranational regulations operating in both regions reflect these three models, although attempts at prohibition are now quite rare.

THE REGULATION OF TEMPORARY EMPLOYMENT IN CANADA AND THE UNITED STATES

The THI first emerged as a significant actor in the North American economy in the 1950s. By the early 1990s, the industry employed just short of 100,000 workers in Canada and revenues reached \$1.4 billion, while in the United States employment in the THI reached 1.12 million in

1994 (Statistics Canada 1996; U.S. Department of Labor 1995b: 1).¹³ In Canada, the THI is concentrated in Ontario, Quebec and Alberta respectively and, in the United States, the industry has a particularly high concentration of employment in metropolitan areas in states such as New York, California and South Carolina. Since the THI first emerged to cater to the demand for temporary clerical workers,¹⁴ it has always been dominated by women in both Canada and the United States. However, the Canadian THI has a higher concentration of women despite the fact that the percentage of women employed in the industry has declined since the mid-1980s. In Canada, women constituted approximately 61.5 percent of all workers in this industry in 1995, a decline of 11.2 percent since 1985 (Statistics Canada 1996). In comparison, in the United States, women constituted 54.2 percent of all workers in 1995, a decline of 6.6 percent since 1985 (U.S. Department of Labor 1996). The declining concentration of women in the industry may be attributed to two interrelated trends, namely, the decline of clerical work largely precipitated by technological change and, more centrally, the growing demand for temporary help workers in a broad range of blue collar industries and other high-waged occupational groups which tend to be male-dominated. However, even in the face of a declining concentration of women, the THI retains a rigid gendered division of labour internally, with women remaining concentrated in clerical work and men in light industrial and other technical work; and the character of the temporary employment relationship remains highly feminized due to the lack of stability in the employment relationship.

The THI plays an active role in the United States economy. In every American state, temporary help firms are now formally treated as employers rather than private employment agencies or labour market intermediaries. However, temporary help firms only gained employer status nation-wide after a long and protracted struggle between business, labour and the state, a struggle which grew out of international efforts to curb abuses perpetrated by labour market intermediaries in the depression era (Gonos 1994). Prompted by developments within the ILO,

13. The client base for the THI is dominated by the business sector in both Canada and the United States. However, institutions such as health and education have recently come to represent a larger client base for the industry, especially in Canada (Statistics Canada 1996; U.S. Department of Labour 1995a).

14. While the THI originally catered largely to the office sector, some scholars argue that modern temporary help businesses are modeled on age-old forms of work such as day labour and guest work dominant in the construction industry and the agricultural sector (see, for example, Parker 1994: 2–6; Gonos 1994).

this struggle originally centred on whether or not temporary help firms should be treated as private fee-charging employment agencies.

Historically, most American states advocated the regulation of fee-charging employment agencies, yet they generally disapproved of prohibition. Hence, the United States failed to ratify Convention No. 34 after its introduction. This development gave the American THI some time and space to negotiate its position (Gonos 1994: 228-229). Its initial efforts to gain legitimacy primarily involved lobbying at the state level to have temporary help firms treated as legal employers so that they would be exempted from existing legislation pertaining to fee-charging employment agencies. According to Gonos, the THI then decided to provide, "a crucial extra service for its business clients, i.e. taking the role of the legal 'employer'" (Gonos 1994: 241). Selling "employment services" to client firms became its strategy for gaining legitimacy in the United States, and elsewhere, from the mid-1940s onward. This development crystallized its strategy for gaining employer status in the United States, and elsewhere, from the early 1950s onward. While it was difficult for the THI to defend the argument that temporary help firms are "employers" on legal grounds, since client firms normally exercise direct control over temporary help workers, its campaign ultimately proved successful when the United States government vehemently opposed the more lenient ILO Convention No. 96 (Revised).

By 1949, when the ILO introduced Convention No. 96 (Revised) to accommodate nations like the United States, the American THI had shifted the substance of debate, from a debate over the prohibition of fee-charging employment agencies versus their regulation to a debate over whether temporary help firms should be treated as employers or labour market intermediaries (Ricca 1988: 141-42). Thus, the United States did not ratify Convention No. 96 (Revised) primarily because it objected to the definition of fee-charging employment agencies implicit in this revised convention. Indeed, after this Convention was introduced, and as a result of the successful campaign launched by the American THI, the United States took issue with the ILO's definition of fee-charging employment agencies because it included temporary help firms.

In the context of numerous international deliberations over the definition of fee-charging employment agencies, temporary help firms began to gain employer status across the United States. New York and California were the first states to grant temporary help firms employer status, in 1958 and 1961 respectively, and New Jersey was the last in 1981 (Gonos 1995: 15, 23). Consequently, in every American state, temporary help firms are now subject to the same legal treatment as other employers. In other words, so long as there are no fees charged to the

employee, no state applies regulations pertaining to fee-charging employment agencies to the THI. Furthermore, there is no federal legislation explicitly governing social protections or working conditions for temporary help workers.

In Canada, the implications of legislation pertaining to the THI are remarkably similar to those in the United States. Canadian temporary help firms are normally viewed as the legal employers of temporary help workers; hence, like their American counterparts, they are subject to basic employment standards legislation. Unlike in the United States, however, temporary help firms are also covered by provincial legislation specifically directed at employment agencies.

Since provincial guidelines are central in Canada, it is instructive to provide a history of legislative developments in Ontario where the THI is most concentrated. The first Employment Agencies Act was adopted in Ontario before the ILO introduced its controversial convention prohibiting fee-charging employment agencies. Aimed at regulating the conduct of private employment agencies, the first version of the Ontario Employment Agencies Act (1914) defined employment agencies as businesses devoted to “procuring for a fee or reward workmen, artificers, labourers, domestic servants and other persons for the performance of skilled or unskilled labour” and to “procuring for a fee or reward employment for any class of workmen, artificers, labourers, domestic servants and other persons” (R.S.O. 1914, c. 38 (2): 231). The Act was designed to regulate two types of private placement service, one geared at placing the worker for a fee, the other at satisfying the demands of employers for a fee. This act was precedent-setting in two ways. First, it defined businesses whose activities focused exclusively on securing workers on the basis of employer demand as employment agencies. Second, it defined “fees” very broadly to extend beyond monetary forms of remuneration. In 1917, when the provincial government first revised the Employment Agencies Act, both of these precedents remained. The only substantive change was that the Act now governed the activities of public and voluntary employment services well as private employment agencies (R.S.O. 1917, c. 37 (2): 219). This amendment, which seemed rather benign at the time, set the stage for important changes that were introduced with the next set of revisions.

In 1927, at the height of international debate over this issue, the province introduced legislation that enabled the lieutenant governor to both prohibit “the granting of licenses to any class of employment agency” and to “limit the class of business which may be carried out by any employment agency” (R.S.O. 1927, c. 56 (2): 431). Signaling concern on the part of the province about abuses perpetuated by labour market

intermediaries, these measures had symbolic importance even though the lieutenant governor never invoked his power to ban employment agencies (Avery 1979). They remained in force until 1960 when Ontario altered the Employment Agencies Act once again, making amendments that set the course for legislative change to the present. At this juncture, the province enacted legislation whose tone and substance was reminiscent of the Employment Agency Act of 1914; it removed the option of prohibition and, once again, directed itself to regulating the activities of private employment agencies (R.S.O. 1960, c. 29).

To this day, the Employment Agency Act of Ontario still covers temporary help firms. They fall into the category of Class A employment agencies since their “service” involves providing persons for employment (R.R.O. 1990, c. E.13 (1): 967). However, regulations pertaining to this subgroup of employment agencies are quite limited because they refer primarily to permanent placement. While Ontario prohibits Class A employment agencies from charging direct fees to workers, it neither bans nor monitors indirect fees, rewards, or other forms of remuneration (R.R.O. 1990, Reg. 320 (11): 486). Regulations set relatively stringent licensing and record-keeping procedures regarding fee levels and information on employers and clients, yet enforcement is limited to the reporting of this data. So as to maintain temporary help firms within the scope of the Employment Agencies Act, the language surrounding “fees” remains quite broad. Ironically, the province still borrows some language from the ILO, yet it departs from most ILO principles since regulatory guidelines fail to address social protections and working conditions among temporary help workers.

Thus, like its American counterpart, Canada and the province of Ontario have a history of allowing fee-charging employment agencies to operate in the labour market alongside free public employment services. While provincial legislation was indeed swayed by international debate, Canada never ratified either of the ILO Conventions pertaining to fee-charging employment agencies. In provinces like Ontario, the Employment Agencies Act (1990) still formally groups temporary help firms with fee-charging employment agencies. However, provincial legislation treats them with a similar degree of leniency as in most American states. Canada has neither taken an interventionist approach to the spread of temporary employment relationships nor to the rise of the THI. Hence, it is not surprising that Canada's stand on the status of the THI, like the position of its American counterpart, discourages continent-wide regulation of the temporary employment relationship through the NAFTA.

Continental Regulation: The NAFTA

As a consequence of the limited scope of the NAFTA, specifically its lack of any strong mechanism that establishes minimum social protections for workers, no regulatory mechanisms that directly pertain to temporary workers of any sort exist within it. The closest the NAFTA comes to creating a minimum floor of rights for workers is in its supplemental agreement on labour, the North American Accord on Labour Cooperation (NAALC). Crafted after the initial NAFTA text, this parallel accord aims to “create new employment opportunities and improve working conditions and living standards” and to “protect, enhance and enforce basic worker rights” within the NAFTA region (NAFTA, Preamble: 775). However, as Roy Adams and Parbudyal Singh (1997: 165) note: “The dominant theme of the accord is cooperation rather than adversarialism. It does not require any of the parties to pass new legislation to bring their policies into alignment with the principles. Nor does it prohibit them from amending pre-existing laws in ways that may contradict their commitments.” Thus, the labour accord is limited in scope and weak on enforcement despite its stated objectives.

In crafting the NAALC, Canada, the United States and Mexico examined three models of protection. The first model involved the establishment of an unobtrusive labour cooperation commission whose role would be to promote a limited Social Charter; this Charter would include only worker rights already incorporated in domestic trade law, such as freedom of association, freedom to organize and bargain collectively, a ban on forced child labour, standards for minimum wage and working hours and health and safety regulations. Under this model, enforcement was to be left to national institutions. The second model, based on social elements of the failed Charlottetown Constitutional Accord of 1992, Article 123 of the Mexican Constitution and the EC Social Charter, involved creating a commission with greater independence, more staff, and a more ambitious social charter linked to promoting high productivity and preventing downward harmonization. The aim of this model was to foster trilateral dialogue on labour standards in the apparel, auto and electronics sectors and it proposed remedies ranging from weak moral pressure to negotiated economic settlements. Finally, while its scope was identical to model two, the third model involved establishing stronger enforcement mechanisms including a tripartite dispute settlement panel with the power to levy trade sanctions (Grayson 1995: 145–146; Personal Communication, Lance Compa, National Administrative Office of NAALC, U.S.A.).

The Accord that was eventually endorsed by Canada, Mexico and the United States was closest to the first model. It seeks to complement “economic opportunities created by the NAFTA” and to strengthen trilateral cooperation on labour matters (NAFTA, Preamble: 775). While it mandates the creation of a tripartite commission on labour cooperation and details its functions, which include establishing “cooperative” arrangements with the ILO, this body is only responsible for ensuring that countries respect their own domestic labour laws and regulations (Adams and Singh 1997: 165; Befort and Cornett 1997: 270; NAFTA, Article 2: 777). It can only use dispute resolution procedures if a dispute between countries is “trade related” (i.e., when workers produce goods traded between the three countries) and/or “covered by mutually recognized labor laws” (NAFTA, Annex 23: 797). The tripartite commission operating under NAFTA is not mandated to develop directives aimed at improving working conditions in specific industries or occupations within the NAFTA region. Thus, while NAALC lists several guiding principles that Member States are committed to promoting, it unequivocally states that these principles, “do not establish minimum standards for their domestic law” (NAFTA, Annex 1: 796).

In sum, the NAALC establishes some weak, yet virtually unenforceable, guidelines. Since it only obliges member nations to enforce domestic labour laws, the Accord makes no effort to harmonize existing domestic labour laws upwards. Hence, it is an extremely weak vehicle with regard to improving social protections and working conditions for all types of temporary workers in the NAFTA region. Ironically, while its supposed aim is to protect and enhance basic worker rights, the absence of enforcement mechanisms implies an acceptance of numerical flexibility without regulation on the part of NAFTA countries.

THE REGULATION OF TEMPORARY EMPLOYMENT IN EUROPE

Mirroring the rise of the THI in North America, temporary employment is an increasingly important phenomenon in the European labour market. In 1991, 18 million workers engaged in temporary employment in Europe, five million of whom worked through the THI (Blanpain 1993: 41). While so-called “travail intérimaire” (i.e., temporary help work), where a temporary worker is put at the disposal of client firm by a temporary help firm, remains less numerically significant than fixed-duration contracts, it is growing rapidly in Britain, France, Germany and Spain (Carre 1994; Dombois 1989; Hepple 1993; OECD 1993). With high unemployment, an expanding number of people are turning to the THI as a last resort in a lengthy search for employment. According to the

Organization for Economic Cooperation and Development (OECD), temporary help workers are, compared to those with permanent employment, more likely to have been unemployed or totally absent from the labour force in the year prior to working through the THI (OECD 1993: 26). Across Europe, women are also over-represented in temporary help work, especially in countries where they constitute a relatively low percentage of the labour force (OECD 1993: 23).

In contrast to North America, a broad spectrum of approaches to regulating the THI in particular, and temporary employment in general, exist in Europe. These approaches fall into the three broad categories of prohibition, non-regulation and regulation. In Europe, as in North America, a given country's approach to regulating the temporary employment relationship tends to reflect the type of stand it originally took in 1933 when the ILO first introduced its convention prohibiting fee-charging employment agencies. However, given that the spirit of this convention, as well Convention No. 96 (Revised), was met with far less opposition in Europe than in North America, most European nations regulate all types of fee-charging employment agencies, including temporary help firms, to some degree.

While there is a trend towards relaxing the most stringent restrictions on the THI across Europe, Italy, Spain and Greece still prohibit “travail intérimaire” or temporary help work (Koniaris 1993; Treu 1993; Rodrigues-Sanudo 1993). In all three cases, the reasons behind prohibition go back to the need to control the labour supply in labour markets with a history of high unemployment as well as records of significant abuses on the part of labour market intermediaries (Treu 1993: 201). However, as legal scholars acknowledge, prohibition often exists in these countries because legislation requires updating. Hence, it is likely that countries prohibiting “travail intérimaire” will eventually follow the lead of the EC with respect to regulation (Treu 1993: 202; Rodrigues-Sanudo 1993: 258).

A second group of countries opt, like Canada and the United States, for non-regulation. In Denmark, Ireland and the United Kingdom, there is no specific legislation governing either the conduct of temporary help firms or employment standards in the THI. However, the absence of legislation pertaining to temporary help work has different consequences for the three countries. In Denmark, temporary help work was strictly regulated under the Act on the Placing of Workers until 1990. This Act stipulated that only temporary help firms specifically geared to serving the retail and office sectors could be licensed. It formally prohibited temporary help firms in other sectors. With the abolition of the Act, temporary help firms are now free to operate in all fields of the Danish labour market (Jacobsen 1993: 77). However, temporary help workers

continue to enjoy the full protection of labour and social legislation since they are considered to be engaged in a standard employment contract.

Conversely, in Ireland and the United Kingdom, a temporary help worker is held to be engaged in a contract *sui generis*. In Ireland, there is no consistent legal code governing the temporary employment relationship, nor are there any collective agreements applicable to temporary help workers. However, client firms are responsible for the health and safety of on-site temporary help workers. Similarly, in the United Kingdom, temporary help workers are not separately identified as a category of workers in the law. Rather, they are characterized as either self-employed or, more frequently, casual workers. In British Common Law, according to Hepple, both these categories of workers are, "linked to their employer not by a contract of employment or a contract of service but rather by a contract *for services*, so are outside the coverage of dependent employees" (Hepple 1993: 452). In Britain, where the drive towards numerical flexibility is particularly acute, the only legislation that pertains to temporary help workers is the Employment Agencies Act (1973) which regulates fee-charging employment agencies. While this Act prohibits direct fees to workers and makes licenses mandatory, it also prohibits any regulation of fees charged to clients. Furthermore, it permits temporary help workers to be simultaneously viewed as self-employed, with regard to employment standards protections, and dependent employees, for the tax purposes of client firms (Hepple 1993: 453; Deakin 1986: 230).

Belgium, Germany, France, the Netherlands and Portugal represent the core group of European countries actively committed to regulating the temporary employment relationship associated with the THI. While these countries take distinct approaches to regulation, guidelines in each country complement the general aim of the EC Commission, that is, creating a community-wide system of equivalent social protections for all types of temporary and permanent workers. The regulations in these countries set the highest standards in the EC and they serve as the model for the EC Directives to be examined below. However, since EC directives most closely resemble guidelines set out in France and Germany, it is instructive to highlight features of the legislation operating in these two countries.

With the accelerated growth of the THI, France began to regulate the temporary employment relationship (OECD 1993: 22-23). Since French labour law is governed by a contract of indeterminate employment and, hence, is ill-suited to regulating a triangular employment relationship, regulating this relationship initially involved overcoming key legal obstacles (Rojot 1993: 91). In the 1970s, when a range of different forms of

temporary employment proliferated, the French government faced a dilemma: it felt obliged to regulate the temporary employment relationship, yet it neither wanted to undermine the primacy of the contract of indeterminate employment in principle nor to erode the standard employment relationship in practice. Consequently, regulatory interventions reflect two primary goals focused on limiting abuses on the part of the temporary help firm and the client firm. First, they aim to restrict the substitution of contracts of fixed-term and temporary help work for permanent jobs (Carre 1994: III). Second, they aim to provide guarantees to workers in temporary employment relationships that preserve some protections associated with the standard employment relationship.

Several aspects of French regulation, directly related to the rights of temporary help workers, contribute to France's status as the country with the most comprehensive legislation in Europe. Many regulatory provisions, including portable seniority across the THI and access to benefits beyond job tenure, emerged out of government-initiated sectoral bargaining in 1985. However, one aspect of French regulation, introduced under the Auroux Laws in 1982, is especially unique. Precarity pay, whereby temporary help workers receive a fixed sum of money at the end of every assignment, is now standard in France (Veldkamp and Raesten 1973: 126). Calculated according to a formula based on duration and wage levels, temporary help workers must receive end-of-assignment pay equaling 10 percent of their earnings after every assignment they complete. If they are not immediately offered another assignment, they must receive end-of-assignment pay equivalent to 15 percent of their previous earnings (Rojot 1993: 109-110). This measure represents an attempt to formally acknowledge the often precarious nature of the temporary employment relationship characteristic of the THI.

In Germany, where there is also a strong commitment to establishing a system of equivalent social protections for all workers, the state takes a different approach to protecting temporary help workers, although it leads to similar outcomes. Here, the temporary employment relationship is governed by a *normal* unlimited contractual relationship between the temporary help firm and the temporary help worker (Weiss and Schmidt 1993: 114). The temporary help worker also receives many benefits customarily associated with the standard employment relationship; for example, temporary help workers are guaranteed vacation pay of at least 2 percent and 28 to 30 working days paid leave annually (Weiss and Schmidt 1993: 129). Thus, temporary help work is only *temporary* insofar as workers are only permitted to work for a limited duration on the site of a client firm. However, in legal terms, the employment relationship

between the temporary help firm and the temporary help worker is long-lasting. As in France, the legal status of the temporary employment relationship in Germany signals a qualified acceptance of strategies aimed at numerical flexibility, but with an attempt to minimize the negative effects of this strategy on workers.

Continent-Specific Regulation: The EC Directives

The EC Commission advocates regulating the temporary employment relationship, along with a range of other non-standard forms of employment, by formulating directives that reflect the tenor of French and German legislation. The Commission justifies its stance on two grounds — on the basis of promoting improved living and working conditions for workers, as set out in the Social Charter, and on the basis of eliminating “competitive distortions” that inhibit the creation of an internal labour market within the EC (EC 1990a: Preamble). The scope of three EC directives, pertaining to working conditions, the distortion of competition and supplementary health and safety measures, illustrates the extent of its commitment (EC 1990a-c: 4–8). These directives seek to encourage collective bargaining at the EC level, freedom of movement, equal treatment for men and women and comparable treatment for temporary and full-time permanent workers with regard to training, health and safety, and social services. They also aim to eliminate distortions in competition caused by different social clauses within country-specific regulation. Taken as a group, the overriding goal of the directives is to “increase legal certainty in the case of trans-border temporary work relationships by coordinating the laws of Member States” (Blanpain 1993: 28). Formally sanctioning the growth of non-standard forms of employment, the EC Commission considers temporary work indispensable to a coherent employment growth strategy. Hence, it rejects outright prohibition and attempts to negotiate a balance between firms' demands for numerical flexibility and adequate social protections for workers.

To date, only the directive governing health and safety measures has been implemented; the United Kingdom is blocking passage of the other two directives due to its stance on non-regulation. However, on the basis of the views of the other eleven member nations, the proposed directive regarding working conditions will likely pass through the European Parliament in the near future (Blanpain 1993: 42).

The Directive on Certain Employment Relations with Regard to Working Conditions represents the most comprehensive effort to establish a minimum floor of rights for all workers (temporary and permanent) in

the EC.¹⁵ Three provisions are particularly relevant to this aim. First, the directive sets out to provide temporary help workers with the same entitlements to social assistance, non-contributory social security, and social services available to full-time workers (EC 1990a: Articles 3,4). Second, the directive states that all covered workers shall enjoy access to vocational training comparable to full-time permanent workers (EC 1990a: Article 1). Third, to guard temporary help workers against abuses by client firms and/or temporary help firms, the directive guarantees “free choice of employment” by requiring Member States to prohibit clauses preventing the conclusion of a contract of employment between a client firm and a temporary help worker (EC 1990a: Article 6).

The second directive, entitled Directive on Certain Employment Contracts and Employment Relationships Involving Distortion of Competition, aims to move towards the completion of an internal labour market in the EC. Predictably, this directive is quite contentious since it endeavours to eliminate disparities in both direct and indirect costs of remuneration. As analysts stress, there are profound obstacles to creating a transparent process applicable to gauging the indirect costs of competition (Blanpain 1993: 33). Nevertheless, the directive includes a provision that statutory and occupational social security schemes as well as holiday, dismissal and seniority allowances be identical for employment contracts of indefinite duration and temporary employment contracts (EC 1990b: Article 3). As well, it mandates a dismissal allowance in the event of “an unjustified break in the employment relationship” prior to the end of the fixed term, a proposal that differs from precarity pay since it only covers cases of unfair dismissal (EC 1990b: Articles 4,6). Finally, the directive sets a generous limit on the renewal of temporary work contracts, when they involve a fixed term of employment, so that the period of temporary employment with one client does not exceed 36 months (EC 1990b: Article 4a).¹⁶

The third directive, detailing supplementary health and safety measures for temporary help workers, came into force in 1991. Premised upon reducing injuries among temporary help workers, it begins by indicating that all temporary workers are at greater risk of accidents and

15. This directive is applicable to part-time employment relationships involving shorter working hours than statutory working hours and temporary employment relationships involving either contracts of fixed duration or temporary help firms. However, employed persons who work fewer than eight hours a week are excluded (EC 1990a: Article 1).

16. This limit satisfies existing guidelines in the German Employment Protection Act (1985) and the French Aurox Laws (1982).

occupational diseases than permanent workers (EC 1990c: Preamble). It then proposes to rectify this problem by mandating that temporary help workers not only be informed of potential dangers before entering into a client firm but must also receive adequate training and information to reduce the risks of occupational injury (EC 1990c: Articles 3, 4). It also encourages Member States to prohibit various forms of temporary employment in extremely dangerous work environments and, at a minimum, it mandates special medical surveillance for temporary help workers (EC 1990c: Articles 5, 6). Finally, the directive places the onus of responsibility for abiding by health and safety procedures on the client firm (EC 1990c: Article 4).

Together, the three directives illustrate the degree to which the EC aims to regulate the temporary employment relationship. While they echo the social goals integral to the EC Treaty and move towards establishing a minimum floor of rights for temporary help workers across Europe, these directives reflect the EC Commission's position that the recent increase in temporary employment, as a whole, "represents a *favourable* development in so far as it meets the need for flexibility in the economy, notably among firms" (EC 1990a: Preamble, emphasis added). Hence, the EC encourages numerical flexibility in the region, but within a regulated environment.

To accomplish the aim of establishing a minimum floor of rights for all types of temporary workers across Europe, an aim that differentiates the EC Treaty from the NAFTA, the EC Commission must still overcome several barriers. Most centrally, it must craft a definition of temporary employment that accommodates different regime-types. This definition must be broad-based so as to attend to two central obstacles: differences in how temporary workers are classified, whether as either self-employed workers (e.g., Britain) or dependent employees (e.g., Germany); and disparities in how the employment contract is viewed, whether as either a fixed-term contract (e.g., France) or a contract of indefinite employment (e.g., Germany). While this type of project is riddled with complexities, establishing a continent-wide definition of temporary employment that resolves these tensions would expedite the passage of directives aimed at protecting workers. However, upward harmonization in this area is only possible if the enforcement mechanisms attached to these directives are strengthened. Currently, the health and safety directive requires member countries to report to the EC Commission on its implementation every five years, but there is no clause in the directive detailing how it will be enforced.

*THE NEW INTERNATIONAL LABOUR CONVENTION ON PRIVATE
EMPLOYMENT AGENCIES*

Since the ratification of the NAFTA and the EC Treaty, the ILO has created a new instrument on private employment agencies which was formally adopted at the International Labour Conference in June 1997. The Convention Concerning Fee-Charging Employment Agencies (No. 181) reflects a shift within the ILO signaling both the organization's growing acceptance of non-standard forms of employment and private sector employment agencies such as temporary help firms and its new willingness to follow, rather than induce, national and supranational regulatory initiatives.¹⁷

Like its immediate predecessor, Convention No. 181 covers a range of private employment agencies engaged in permanent and temporary recruitment and placement activities. It explicitly refers to “services consisting of employing workers with a view to making them available to a third party” (i.e., temporary help firms) within its formal definition of private employment agencies (ILO 1997b). In contradistinction to ILO Convention Nos. 34 and 96 (Revised), however, Convention No. 181 abandons the ILO's traditional stance favouring either the gradual prohibition or the strict regulation of private employment agencies (ILO 1997a). Thus, while it still directs Member States to restrict direct fees to workers and establishes a comprehensive set of protections for migrant workers, Convention No. 181 also marks the end of the ILO's support for a public monopoly on placement and recruitment in employment (ILO 1997b). In these respects, it significantly departs from the mandate of Convention No. 96 (Revised) which offered Member States a solid framework for regulating private employment agencies such as temporary help firms.

By legitimizing and even encouraging the temporary employment relationship, and the THI more specifically, the tenor of Convention No. 181 follows supranational regulatory regimes emerging under both the EC Treaty and the NAFTA. However, while Convention No. 181 does not appear to go as far as the EC Commission in its enforcement mechanisms, its objectives closely mirror proposed EC Directives. For example, the new Convention calls on countries to ensure adequate protections for workers in a wide range of areas¹⁸ and to allocate responsibilities between service providers (i.e., temporary help firms)

17. For a more detailed analysis of Convention No. 181, see Vosko (forthcoming).

18. These areas include: freedom of association, collective bargaining, minimum wages, working time and other working conditions, statutory social security benefits, access to

and user-enterprises (i.e., client firms), illustrating the ILO's acceptance of triangular employment relationships under well-regulated conditions (ILO 1997b). Still, the language of the Convention is weak, especially in comparison to the new European model of regulation. Rather than requiring ratifying countries to develop guidelines and procedures in the above areas, Convention No. 181 provides only a basic framework for regulation, perhaps partly to accommodate the divergent regulatory responses to the spread of temporary employment.

DISCUSSION

Both the NAFTA and the EC Treaty reflect an acceptance of strategies aimed at achieving numerical flexibility in North America and Europe and the ILO is following suit, reversing its traditional stance against labour market intermediaries and its skepticism towards non-standard forms of employment. However, the two models of continental economic integration contribute to different region-specific regulatory regimes in the field of temporary employment and, predictably, the new ILO Convention more closely reflects the European model.

Despite these different models of integration, employment trends illustrate that the growth of firm-based strategies aimed at numerical flexibility is prompting the resegmentation of both North American and European labour markets. As Walby (1989) and Pollert (1988) predicted, labour flexibility strategies are resulting in a shrinking group of core workers, increasingly required to be functionally-flexible, and a growing mass of peripheral workers, whose employment status is significantly affected by fluctuating product demands. Still, a comparison of the status of temporary employment in Europe and North America illustrates that the *type* of resegmentation engendered by numerical flexibility need not go hand-in-hand with deregulation. Rather, evidence from both regions highlights the validity of a more nuanced approach to understanding the relationship between numerical flexibility and deregulation. In the case of temporary employment, the nature of country-specific regulatory regimes and the tenor of the EC Treaty and the NAFTA demonstrate that regions experience varying degrees of labour market regulation and deregulation in the face of increased numerical flexibility.

In Canada and the United States, the dearth of regulations pertaining to temporary employment in all its variants accompanies increased numerical flexibility. Non-regulation contributes to an environment where

training, occupational health and safety, compensation in case of occupational accidents or diseases, compensation in cases of insolvency and protection of workers' claims, and maternity and parental protection and benefits (ILO 1997b).

firms may draw on temporary workers, both temporary help workers and workers engaged in contracts of fixed-duration, with the reasonable expectation of lowering labour costs. Even when firms engage temporary help workers through a temporary help firm, where labour is indeed subject to a mark-up, they often realize lower labour costs since temporary help firms need only make contributions to basic social security schemes and are not obligated to abide by occupational wage scales. Without national regulatory requirements, there is virtually no impetus for temporary help firms to provide workers with extended health coverage, or any other benefits aimed at augmenting the social wage. The absence of any binding directives under the NAALC only reinforces this lack of incentive. Thus, although it is too premature to attribute a cause-and-effect relationship between the NAFTA and the growth of precarious employment generally, what is clear is that the NAFTA has not slowed the trend towards more precarious employment and, where the THI is concerned, it is very unlikely to do so in the future.

In contrast to the NAFTA, EC directives pertaining to temporary employment endeavour to establish a minimum floor of protections for all temporary workers, including temporary help workers. Since they aim to strengthen regulations, these directives will likely curb at least some of the negative outcomes of firm-based strategies aimed at numerical flexibility. While they clearly signal the abandonment of the standard employment relationship as the normative model of employment in Europe, the directives on working conditions and health and safety have considerable potential to promote upward harmonization for two central reasons. First, the EC Commission borrows its principles and guidelines from well-functioning country-specific regulatory regimes already in place in France and Germany. Second, EC directives encourage compliance on the basis of the fundamental principles embodied in the Community Charter of the Fundamental Social Rights of Workers, which commits Member States to promoting improved living and working conditions for workers (EC 1990a: Preamble).

A comparative analysis of country-specific and supranational regulations in Europe and North America also illustrates that the resegmentation accompanying growing numerical flexibility need not bring about a fixed set of gendered outcomes. As noted earlier, due to its inherently unstable nature, the temporary employment relationship is a highly “feminized” form of non-standard employment and numerical flexibility is a highly gendered labour organization strategy given women’s socially ascribed role in the family and their generally disadvantaged position in the labour market. However, since EC directives make a correlation between the poor working conditions common to temporary

employment, especially to temporary help work, and the disproportionate number of women engaged in this form of employment, and aim to promote equal treatment for men and women, they will likely contribute to counteracting persisting income and occupational polarization by sex (Blanpain 1993: 28). Conversely, the absence of regulations addressing these issues in North America will likely perpetuate a gendered resegmentation strategy where women remain concentrated in the numerically-flexible periphery and men remain concentrated in the functionally-flexible core. Witness the gender composition of temporary employment in Germany and France versus Canada and the United States: in France and Germany, where regulations are quite stringent, men engage in temporary employment in greater numbers than in Canada and the United States, where regulations are more lax (OECD 1993: 24; Statistics Canada 1996).

In conclusion, by opting for non-regulation, the NAFTA condones a version of numerical flexibility that aims to increase the efficiency and competitiveness of firms while minimizing social protections for non-standard workers. Conversely, in the EC, countries are responding to numerical flexibility by strengthening mechanisms geared at regulating non-standard forms of employment such as temporary employment. By establishing a community-wide regulatory regime that sanctions temporary employment only under specific conditions, the EC encourages a version of numerical flexibility that aims to prohibit firms from limiting the social protections accorded to non-standard workers in their drive to lower labour costs.

Since it seeks to establish a minimum floor of rights for all temporary workers across Europe, the European model of economic integration is certainly preferable to the North American model yet its basic premise demands further investigation. EC directives pertaining to temporary employment do acknowledge that firms are usually the beneficiaries of numerical flexibility and workers may be quite vulnerable to its potential consequences (EC 1990a-c). Indeed, these directives were drafted based on a mutual recognition among Member States that we need only look to the potentially precarious employment relationships associated with the THI to imagine the negative effects of numerical flexibility. Therefore, in contrast to North American measures, recent European attempts at regulation presume that it is possible to endorse strategies aimed at numerical flexibility, and the greater efficiency and competitiveness that come with them, while limiting the spread of precarious forms of employment often resulting from these strategies. However, the extent to which emerging EC directives will actually translate into a more stable and secure environment for vulnerable workers *as well as* greater

flexibility for firms remains to be seen and, thus, more comparative research probing the future impact of these regulatory initiatives is required. In particular, this research must scrutinize the presumed compatibility between encouraging numerical flexibility while also attempting to extend social protections to workers engaged in non-standard forms of employment.

■ REFERENCES

- ABRAHAM, K. G. 1990. "Restructuring the Employment Relationship: The Growth of Market Mediated Work Arrangements." *New Developments in the Labour Market*. Boston: Massachusetts Institute of Technology, 85.
- ADAMS, R. J. and Parbudyal SINGH. 1997. "Early Experience with NAFTA's Labor Side Accord." *Comparative Labor Law Journal*, Vol. 18, No. 2, 161.
- AKYEAMPONG, Ernest B. 1989. "The Changing Face of Temporary Help." *Perspectives on Labour and Income*, Summer, 43.
- AKYEAMPONG, Ernest B. 1993. "Flexitime Work Arrangements." *Perspectives on Labour and Income*, Autumn, 17.
- AKYEAMPONG, Ernest B. 1997. "Work Arrangements: 1995 Overview." *Perspectives on Labour and Income*, Spring, 2.
- ARMSTRONG, Pat. 1996. "The Feminization of the Labour Force: Harmonizing Down in a Global Economy." *Rethinking Restructuring*. Isabella Bakker, ed. Toronto: University of Toronto Press, 29.
- ATKINSON, J. 1984. *Flexibility, Uncertainty and Manpower Management*. Report No. 89. Brighton: Institute of Manpower Studies, University of Sussex.
- ATKINSON, J. 1988. "Recent Changes in the Internal Labour Market in the UK." *Technology and Work*. Aldershot: Avebury, 133.
- AVERY, D. 1979. *Dangerous Foreigners: European Immigrant Workers and Labour Radicalism in Canada, 1819-1932*. Toronto: McClelland and Stewart.
- BEFORT, Stephen F. and Virginia E. CORNETT. 1997. "Beyond the Rhetoric of the NAFTA Treaty Debate: A Comparative Analysis of Labor and Employment Law in Mexico and the United States." *Comparative Labor Law Journal*, Vol. 17, No. 2, 269.
- BELOUS, R. 1989. "How Human Resource Systems adjust to the shift toward contingent workers." *Monthly Labour Review*, March, 7.
- BLANPAIN, R. ed. 1993. *Temporary Work and Labour Law of the European Community and Member States*. Deventer: Kluwer.

- BRONSTEIN, A. S. 1991. "Temporary Work in Western Europe: Threat or complement to permanent employment?" *International Labour Review*, Vol. 130, No. 3, 291.
- CARRE, F. 1992. "Temporary Employment in the Eighties." *New policies for the part-time and contingent workforce*. V. DuRivage, ed. New York: M.E. Sharpe.
- CARRE, F. 1994. "Policy Responses to Short-Term, Temporary and Part-Time Employment in France." Washington: U.S. Department of Labor.
- CASEY, B. et al. 1989. "Temporary employment in Great Britain and the Federal Republic of Germany: An Overview." *International Labour Review*, Vol. 128, No. 4, 449.
- COHEN, Marjorie. 1994. "The Implications of Economic Restructuring for Women: The Canadian Situation." *The Strategic Silence: Gender and Economic Policy*. Isabella Bakker, ed. London: Zed Books, 103–116.
- CORDOVA, Efren. 1985. "From Full-Time Wage Employment to Atypical Employment: A Major Shift in the Evolution of Industrial Relations." *International Labour Review*, Vol. 125, No. 4, 641.
- DEAKIN, S. 1986. "Labour Law and the Developing Employment Relationship in the UK." *Cambridge Journal of Economics*, Vol. 10, 225.
- DOMBOIS, R. 1989. "Flexibility by law? The West German Employment Promotion Act and Temporary Employment." *Cambridge Journal of Economics*, Vol. 13, 359.
- DU RIVAGE, V. ed. 1992. *New Policies for the Part-Time and Contingent Workforce*. London: M.E. Sharpe.
- EC COMMISSION. 1990a. "Proposal for a Council Directive on Certain Employment Relationships with Regard to Working Conditions." *Official Journal of the European Communities*, 33(90/C224/04), 4.
- EC COMMISSION. 1990b. "Proposal for a Council Directive on Certain Employment Relationships with Regard to Distortions of Competition." *Official Journal of the European Communities*, 33(90/C224/05), 6.
- EC COMMISSION. 1990c. "Proposal for a Council Directive Supplementing the Measures to Encourage Improvements in Safety and Health at Work of Temporary Workers." *Official Journal of the European Communities*, 33(90/C224/06), 8.
- FUDGE, Judy. 1997. "Precarious Work and Families." Working Paper. Centre for Work and Society, York University.
- GOLDEN, L. and E. APPLEBAUM. 1990. "What Was Driving the 1982–88 Boom in Temporary Employment." *American Journal of Economics and Sociology*, Vol. 51, No. 4, 473.
- GONOS, G. 1994. "A Sociology of the Temporary Employment Relationship." Ph.D. Thesis, Department of Sociology, Rutgers University.

- GONOS, G. 1995. "The Battle Over 'Employer' Status in the Post-War U.S.: The Case of the Temporary Help Firm." Paper presented to the Annual Meeting of the Law and Society Association, Toronto, June.
- GRAYSON, G. W. 1995. *The North American Free Trade Agreement: Regional Community and New World Order*. Lanham, Maryland: University Press of America.
- HAMDANI, D. 1996. "The Temporary Help Service Industry: Its Role, Structure and Growth." *Service Indicators*, 2nd Quarter, 73.
- HEPPLE, B. 1993. "The United Kingdom." *Temporary Work and Labour Law of the European Community and Member States*. R. Blanpain, ed. Deventer: Kluwer.
- HUMAN RESOURCES DEVELOPMENT CANADA. 1994. "Report of the Advisory Group on Working Time and the Distribution of Work." Ottawa: Human Resources Development Canada.
- ILO. 1933. *Employment Exchanges: An International Study of Placing Activities*. Geneva: International Labour Organization.
- ILO. 1966. "Memorandum Sent by the International Labour Office to the Ministry of Health and Social Affairs of Sweden." *International Labour Office: Official Bulletin*, Vol. XLIX, No. 3, 390.
- ILO. 1987. "Report of the Working Party on International Labour Standards." *International Labour Office: Official Bulletin*, Vol. LXX, Special Issue, Series A, 1.
- ILO. 1992. *International Labour Conventions and Recommendations, 1919-1991*. Geneva, International Labour Organization.
- ILO. 1994. "The Role of Private Employment Agencies in the Functioning of Labour Markets." Geneva: International Labour Office.
- ILO. 1996. "List of Ratifications by Convention and by Country, Report III (Part 2)." Geneva: International Labour Office.
- ILO. 1997a. "Revision of the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96) Report IV (1)." Geneva: International Labour Office.
- ILO. 1997b. "Convention Concerning Private Employment Agencies (No. 181)." Geneva: International Labour Office.
- JACOBSEN, P. 1993. "Denmark." *Temporary Work and Labour Law of the European Community and Member States*. R. Blanpain, ed. Deventer: Kluwer.
- JENSON, J. 1989. "The Talents of Women, the Skills of Men." *The Transformation of Work?* London: Unwin Hyman, 141.
- KONARIS, T. B. 1993. "Greece." *Temporary Work and Labour Law of the European Community and Member States*. R. Blanpain, ed. Deventer: Kluwer.
- KRAHN, Harvey. 1995. "Non-Standard Work on the Rise." *Perspectives on Labour and Income*, Winter, 35.

- LIPSETT, Brenda and Mark REESOR. 1997. "Flexible Work Arrangements: Evidence From the 1991 and 1995 Survey of Work Arrangements." Ottawa: Human Resources and Development Canada.
- MACREDIE, Ian. 1996. "The Labour Market: Mid-year Review." *Perspectives on Labour and Income*, Autumn, 9-16.
- MANGUM, Garth, Donald MAYALL and Kristen NELSON. 1985. "The Temporary Help Industry: A Response to the Dual Internal Labor Market." *Industrial and Labor Relations Review*, Vol. 38, No. 4, 599.
- MARSHALL, Katherine. 1993. "Employed Parents and the Division of Housework." *Perspectives on Labour and Income*, Autumn, 23.
- MARSHALL, Katherine. 1994. "Balancing Work and Family Responsibilities." *Perspectives on Labour and Income*, Spring, 26.
- MEAGER, N. 1985. *Temporary Work in Great Britain: Its Growth and Changing Rationales*. Report No. 106. Brighton: Institute of Manpower Studies, University of Sussex.
- MUCKENBERGER, Ulrich. 1989. "Non-Standard Forms of Employment in the Federal Republic of Germany: The Role and Effectiveness of the State." *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe*. G. Rogers and J. Rogers, eds. Belgium: International Institute for Labour Studies, 227.
- OECD. 1993. *The OECD Employment Outlook*. Paris: Organization for Economic Cooperation and Development.
- OECD. 1994. *The OECD Jobs Study: Facts, Analysis, Strategies*. Paris: Organization for Economic Cooperation and Development.
- PARKER, Robert. 1994. *Flesh Peddlers and Warm Bodies: The Temporary Help Industry and Its Workers*. New Jersey: Rutgers University Press.
- PIORE, Michael J. and Charles F. SABEL. 1984. *The Second Industrial Divide: Possibilities for Prosperity*. New York: Basic Books Publishers.
- POLIVKA, Anne E. and Thomas NARDONE. 1989. "On the Definition of Contingent Work." *Monthly Labour Review*, December, 9.
- POLLERT, A. 1988. "Dismantling Flexibility." *Capital and Class*, Vol. 34, Spring, 42.
- REVISED REGULATIONS OF ONTARIO. 1990. "The Employment Agencies Act: Regulation 320." Toronto: Government of Ontario, 485.
- REVISED STATUTES OF ONTARIO. 1914. "An Act Respecting Employment Agencies." Toronto: Government of Ontario, 231.
- REVISED STATUTES OF ONTARIO. 1917. "An Act Respecting Private, Voluntary and Municipal Employment Bureaus." Toronto: Government of Ontario, 219.
- REVISED STATUTES OF ONTARIO. 1927. "An Act Respecting Employment Agencies." Toronto: Government of Ontario, 430.
- REVISED STATUTES OF ONTARIO. 1969. "The Employment Agencies Act." Toronto: Government of Ontario, 83.

- REVISED STATUTES OF ONTARIO. 1980. "Employment Agencies Act."
Toronto: Government of Ontario.
- REVISED STATUTES OF ONTARIO. 1990. "The Employment Agencies Act."
Toronto: Government of Ontario, 967.
- RICCA, S. 1988. "Private Temporary Work Organizations and Public
Employment Services: Efforts and Problems of Coexistence."
International Labour Review, Vol. 121, No. 2, 141.
- RODRIGUES-SANUDO, F. 1993. "Spain." *Temporary Work and Labour Law of
the European Community and Member States*. R. Blanpain, ed.
Deventer: Kluwer.
- ROGERS, Gerry. 1989. "Precarious Employment in Western Europe: The
State of the Debate." *Precarious Jobs in Labour Market Regulation: The
Growth of Atypical Employment in Western Europe*. G. Rogers and J.
Rogers, eds. Belgium: International Institute for Labour Studies, 1.
- ROJOT, J. 1993. "France." *Temporary Work and Labour Law of the
European Community and Member States*. R. Blanpain, ed. Deventer:
Kluwer.
- SHELLENBERG, Grant and Christopher CLARK. 1995. "Temporary
Employment in Canada: Profile, Patterns and Policy Considerations."
Ottawa: Canadian Council on Social Development.
- STANFORD, J. 1996. "Discipline, Insecurity and Productivity: The
Economics Behind Labour Market Flexibility." *Remaking Canadian
Social Policy*, Vancouver: Fernwood Press, 130.
- STATISTICS CANADA. 1996. Catalogue 62-232 (SIC 7712). Unpublished Data.
- TREU, T. 1993. "Italy." *Temporary Work and Labour Law of the European
Community and Member States*. R. Blanpain, ed. Deventer: Kluwer.
- U.S. DEPARTMENT OF LABOR. 1994. *The NAFTA Text*. Washington: CCH.
- U.S. DEPARTMENT OF LABOR. 1995a. *Report on the American Workforce*.
Washington, D.C.: Department of Labor.
- U.S. DEPARTMENT OF LABOR. 1995b. "Occupational Compensation Survey:
Temporary Help Services, United States and Selected Metropolitan
Areas, November 1994." Bureau of Labor Statistics: Washington.
- U.S. DEPARTMENT OF LABOR. 1996. LABSTAT Series Report (SIC 7363):
Series EEU80736302. Unpublished Data.
- VELDKAMP, G. M. et al. 1973. "Temporary Work Agencies and Western
European Social Legislation." *International Labour Review*, Vol. 107,
No. 2, 117.
- VOSKO, Leah F. forthcoming. "Legitimizing the Triangular Employment
Relationship: Emerging International Labour Standards from a
Comparative Perspective." *Comparative Labor Law and Policy Journal*,
February.
- WALBY, S. 1989. "Flexibility and the Changing Sexual Division of Labour."
The Transformation of Work? London: Unwin Hyman, 127.

WEISS, M. and M. SCHMIDT. 1993. "Germany." *Temporary Work and Labour Law of the European Community and Member States*. R. Blanpain, ed. Deventer: Kluwer.

RÉSUMÉ

Réglementer la précarité ? L'emploi, l'ALENA et le Traité de la Communauté européenne

Il y a de plus en plus de preuves que les formes atypiques d'emploi telles le temps partiel, le travail autonome, la sous-traitance et l'emploi temporaire sont en croissance tant en Europe qu'en Amérique du Nord (Akyeampong 1997 ; Krahn 1995 ; OCDE 1995 ; Lipsett et Reesor 1997 ; U.S. Department of Labor 1993). Cependant, l'amplitude et la direction des changements de l'emploi soulèvent des débats vigoureux. En autres, ceux-ci ont tendance à offrir des interprétations générales et même contradictoires des caractéristiques des principales tendances globales de l'emploi.

Certains associent la croissance de l'emploi atypique à l'incertitude croissante dans l'économie en général (Belous 1989 ; Polivka et Navidone 1989). D'autres lient ce phénomène à l'étendue des formes précaires d'emploi (Fudge 1994 ; Rogers 1989). Un dernier groupe, pour sa part, préfère qualifier ces nouvelles formes d'emploi d'atypique plutôt que de précaire évitant ainsi de se prononcer prématurément sur la nature même de ces changements dans l'emploi (Cordova 1985 ; Bronstein 1991). Même si ces débats sont très importants, nous en faisons notre point de départ en comparant plutôt les réponses réglementaires issues de l'ALENA et du Traité de la Communauté européenne (TCE) à ces formes non habituelles d'emploi. Plus spécifiquement, nous examinons les mesures (i.e., les législations nationales et supranationales) visant à réglementer une sorte d'emploi non habituel, la relation temporaire d'emploi, incluant le travailleur temporaire et l'industrie des services temporaires. Notre objectif est donc d'offrir une typologie descriptive des approches européenne et nord-américaine à la réglementation dans le domaine de l'emploi temporaire.

Notre thèse principale est à l'effet que les pays signataires du TCE et de l'ALENA réagissent de façon très différente à l'éclosion rapide de l'emploi temporaire. Alors que les membres de l'ALENA ont choisi en somme la non-réglementation, la Commission européenne suit le chemin des pays tels la France et l'Allemagne. Ce faisant, elle a entrepris la tâche

extraordinaire de définir un ensemble complet de directives obligatoires visant à réglementer l'emploi temporaire sur son territoire. Malgré ces réactions en apparence divergentes, ni le TCE ni l'ALENA ne visent formellement à empêcher la croissance de l'emploi temporaire. Ils endossent plutôt les stratégies corporatives visant l'atteinte de la flexibilité numérique. Contrairement à l'expérience de l'Amérique du Nord, cependant, le TCE tente encore d'établir un plancher minimum de droits pour les travailleurs à emploi temporaire sous une forme ou une autre. Ainsi, la Commission européenne vise une harmonisation vers le haut en s'attaquant activement au défi de réglementer les formes non habituelles d'emploi. Cependant, tant en Europe qu'en Amérique du Nord, il faut encore attendre un régime réglementaire de protections et de droits pour l'emploi temporaire comparable à celui existant pour l'emploi traditionnel.

Cet article comprend six sections. La première section inventorie différentes perspectives théoriques examinant et évaluant les pratiques visant l'atteinte de la flexibilité numérique au niveau de la firme. Elle établit aussi un lien entre l'étendue de l'emploi temporaire, la croissance de l'industrie des services d'aide temporaire et la demande croissante pour la flexibilité numérique dans les entreprises. La seconde section présente un bref historique des normes internationales du travail qui ont précédé les réformes réglementaires nationales en Europe et en Amérique du Nord. Ceci permet de comparer les initiatives supranationales apparaissant dans ces deux modèles distincts d'intégration économique continentale. Les sections trois et quatre présentent d'abord un profil statistique de l'emploi temporaire en Amérique du Nord (à l'exception du Mexique) et dans les pays européens. Ensuite, on y examine le processus historique de l'avènement de trois types de régimes réglementaires nationaux et supranationaux (i.e., l'interdiction, la réglementation et la non-réglementation). La section cinq présente brièvement la plus récente convention internationale (la Convention n° 181 visant les agences de placement privées) couvrant les firmes d'aide temporaire. Ce faisant, nous voulons démontrer que cette convention ressemble le plus au modèle émergent européen de réglementation. La comparaison des conventions internationales existant avant la Convention n° 181 avec cette dernière illustre le changement drastique de direction adopté par l'Organisation internationale du travail dans sa réglementation des agences privées de placement, incluant les firmes de travail temporaire.

Dans la dernière section, à la lumière des leçons tirées de la première, nous évaluons les régimes réglementaires naissant en Europe et en Amérique du Nord. Nous prétendons que, dans le domaine de

l'emploi temporaire, le modèle européen d'intégration économique est préférable au modèle nord-américain compte tenu de leur approche plus équilibrée à la réglementation. Nous concluons en questionnant la présumée compatibilité entre une flexibilité numérique plus grande et des meilleurs protections sociales pour les travailleurs employés dans des formes non traditionnelles d'emploi.

RESÚMEN

Regulando la precariedad ? La relación del empleo temporal dentro del ALENA y la Comunidad Europea

Este artículo examina las respuestas regulatorias a la expansión de las formas no standard de trabajo en la América del Norte y Europa verificando especialmente las medidas dirigidas a la relación del empleo temporal asociado con la industria de servicios. A través de un análisis de las convenciones internacionales, de las regulaciones específicas de cada país y las iniciativas super nacionales este artículo demuestra que los países que forman parte del ALENA y de la Comunidad Europea ambos soportan estrategias dirigidas a la flexibilidad numérica aun y cuando tomen caminos divergentes en respuesta al crecimiento del mercado de la mano de obra temporal. Mientras que en Norte América los países han optado por la no regulación, la Comunidad Europea esta intentando establecer protecciones de base para los trabajadores que forman parte de este grupo.