

# 10 Things Employers Need To Know About Employing Temporary Foreign Workers



These days, Canada's Temporary Foreign Worker Program ("TFWP") is more top of mind than ever for Canadian employers. This is in part because of the many changes made by the Government of Canada to transform the TFWP over the last couple of years and changes that continue to be made. Reforming Canada's TFWP continues to be a top priority for our government given that it featured prominently in the speech from the throne delivered by Governor General David Johnston on October 16, 2013. The throne speech said one of the measures the government will take to address the job or skills gap described as "too many people without jobs and too many jobs without people" is "to complete reforms to the TFWP to ensure that all Canadians always have the first chance at available jobs". This means that it is now harder than it once was to obtain approval to hire a temporary foreign worker ("TFW"). It also means that the government has more means for monitoring an employer's compliance with the TFWP. Employers' obligations under the TFWP continue after a TFW relocates to Canada. Canadian employers need to be mindful of a number of rules including the following.

**1 LOCAL LAWS APPLY TO ALL WORKERS** All local employment laws that apply to Canadian employees also apply to TFWs. This includes employment standards, industrial relations, human rights, workers' compensation and occupational health and safety laws. There may be added protections in local legislation that apply to TFWs with which employers should be familiar.

**2 RECRUITMENT COSTS** Employers bear the costs associated with recruiting TFWs, including the new processing fee for obtaining a Labour Market Opinion ("LMO"). None of these costs may be recovered from the TFW through salary deduction or otherwise.

**3 BE CAREFUL WHAT YOU ASK FOR** The same precautions taken when designing interview questions for Canadian citizens should be taken when interviewing a TFW. It is legitimate to ask whether a person is legally authorized to work in Canada and what languages they read, write and speak fluently (as long as what is asked is relevant to the functions of the job). It is important NOT to ask questions that invite discriminatory answers; for example, age, country of origin, race, nationality and sexuality.

**4 VERIFY AND MAINTAIN DOCUMENTS** Employers should review work permits to ensure they are issued correctly. It is also advisable to create an immigration compliance file for each TFW you employ and to flag important deadlines to ensure that work permit expiry dates are not missed and that all the required approvals are extended. Be

aware that some provincial laws and federal immigration policies impose specific record-keeping requirements on employers who hire TFWs. Consequently, we recommend that all documentation relating to the hiring of a TFW be retained for six years.

**5 CLARIFY TERMS AND CONDITIONS OF EMPLOYMENT** The best way to clarify terms and conditions of employment is to enter into a written employment contract with the TFW. The terms of that contract cannot contradict or override immigration documents or legislation. For example, if the LMO or work permit specifies an occupation, the TFW must be employed in that role and cannot agree to perform a different role.

**6 INFORM YOUR EMPLOYEES ABOUT OCCUPATIONAL HEALTH AND SAFETY** All provinces in Atlantic Canada have an occupational health and safety regime making workplace safety a joint responsibility of employers and employees. Employers should make TFWs aware of their rights and responsibilities under occupational health and safety legislation to ensure the employer's obligations under the legislation are met and all workers are on the same page with regards to workplace safety.

**7 DISCRIMINATION IS DISCRIMINATION IN ANY LANGUAGE** Employers are obligated to ensure that all workers, including TFWs, understand the need for a respectful workplace. The obligation to maintain a respectful workplace extends to conversations between TFWs in their home language. In a recent decision, the Ontario Human Rights Commission dealt with a cashier who made a discriminatory remark about a customer to a co-worker in his native language (Mandarin). The customer's wife understood the comment and explained it to him and a complaint followed. The Commission held the employer responsible for the discriminatory remark, because it found no evidence that the employer took proactive steps to address the customer's complaint.

**8 JUST CAUSE IS JUST CAUSE** Employers always have the right to terminate any employee for just cause. That said, the threshold for just cause is high and alleging just cause for dismissal can be risky. Seek legal advice when considering whether just cause exists for summary dismissal.

**9 FOREIGN WORKERS CAN BE ENTITLED TO AN INCREASED NOTICE PERIOD** There are very few cases dealing specifically with notice periods for TFWs, but the existing jurisprudence indicates that TFWs found to be wrongfully dismissed may be entitled to an increased notice period. This is generally the case where the TFW's employment is authorized by an employer specific work permit that ties their ability to work in Canada directly to a specific employer.

**10 FOREIGN WORKER CLASS ACTION LAWSUITS** TFWs have all of the same legal remedies against employers as Canadians. Recently, a class action lawsuit was brought in British Columbia on behalf of more than 70 TFWs against a restaurant chain, alleging the restaurant forced the workers to pay recruitment fees, failed to pay overtime, refused to reimburse travel expenses and did not provide the work hours promised. Allegations were also made that the employer was inappropriately pressuring individuals to opt out of the lawsuit. The class action settled for over \$1.4 million.



Article by Andrea Baldwin, Sean Kelly and Michelle McCann

**Stewart McKelvey**