Recent Changes To The Temporary Foreign Worker Program



On June 20, 2014, the Government of Canada announced a series of reforms to overhaul the Temporary Foreign Worker Program ("TFWP"). These reforms, many of which are effective immediately, function to:

1. RE-ORGANIZE THE TFWP

The former TFWP has been re-organized into two distinct programs:

a. The TFWP now encompasses only foreign workers employed in Canada under a work permit supported by a Labour Market Impact Assessment ("LMIA") – a new more rigorous labour market test that has replaced the Labour Market Opinion ("LMO") process. Employment and Social Development Canada ("ESDC") is the government department responsible for the TFWP; and
b. International Mobility Programs ("IMP") which include all LMIA-exempt work permit categories whose primary objective is to advance Canada's economic and cultural interests. The IMP includes work permits issued to intra-company transferees under the *Immigration and Refugee Protection Act* ("IRPA") and free trade agreements, other work permits categories available under the North American Free Trade Agreement, and work permits that promote youth mobility under the International Experience Class. Citizenship and Immigration Canada ("CIC") is the lead government department for the IMP. A series of reforms will be introduced to the IMP next summer, including a new fee and an employer compliance system, to ensure that work permits issued to foreign nationals outside the LMIA process promote Canada's economic and labour market interests.

The prevailing wage rate[1] for an occupation, rather than its National Occupational Classification ("NOC") code, is now the starting point for assessing applications submitted to the TFWP (LMIA process), because the prevailing wage is said to constitute a more accurate reflection of occupational skill level and local labour market conditions. Jobs for which the prevailing wage is below the newly defined provincial or territorial median wage will be considered "low-wage," while those being paid at or above the provincial/territorial median wage will be considered "high-wage."

In Atlantic Canada, the current provincial median wage rates are as follows:

The actual wage or salary offered or paid to a foreign worker has nothing to do with the determination of whether a position is considered to be low-wage or high-wage. That determination is based solely on how the prevailing wage rate for the occupation in question, in the applicable region of Canada, compares against the above-noted provincial median wage rate.

The LMIA processing fee has increased from $275 to $1,000 per foreign worker.

2. RESTRICT ACCESS TO THE TFWP TO ENSURE JOB OPPORTUNITIES FOR CANADIANS

It is more difficult to obtain an LMIA to confirm the employment of a foreign national in Canada than it was to obtain an LMO before June 20, 2014.

The new process requires employers to provide additional information to ESDC for assessment, including the number of Canadians (and permanent residents) that applied for the job, the number of Canadians interviewed, and an explanation of why each Canadian was not hired.

Transition Plans

With few exceptions, employers seeking to hire high-wage temporary foreign workers ("TFWs") are now required to submit a transition plan to demonstrate how they will increase efforts to hire and train Canadians/permanent residents for any position filled by a TFW. Employers will be required to report on the success of a transition plan if they apply for a subsequent LMIA to hire a foreign worker in the same NOC code, or if selected for an employer compliance inspection.

Acceptable "recruitment and training activities" for a transition plan include increasing wages; employee referral incentive programs; offering part-time work or flexible hours; offering health insurance or other benefits; offering financial support for the relocation of Canadians or permanent residents; hiring a search firm; partnering with unions and industry associations to identify Canadians or permanent residents; ongoing recruitment advertising or a modified advertising plan that uses different sources and targets different audiences; offering apprenticeship/internships/co-op placements; paid leave for education; and on-the job training. As part of a transition plan, employers are also required to reach out to organizations serving groups traditionally underrepresented in the workforce such as new immigrants, Aboriginal people, youth and Canadians with disabilities about available positions within their organization.

An employer can satisfy the transition plan requirement by undertaking to support a high-skilled (and high-wage) TFW in becoming a permanent resident of Canada. Recently, however, ESDC has suggested that employers will only be able to support the permanent residency of a TFW in fulfillment of the transition plan requirement for a given occupation in a particular work location once. In other words, if an employer returns to the TFWP to request an LMIA to confirm the employment of another TFW in the same or a similar role (to which the same NOC code applies) in the same location, the employer's transition plan activities cannot be limited to support for permanent residency only and must include recruitment, retention and training activities for Canadians/permanent residents. This policy is currently being applied inconsistently in different regions of Canada, but has the potential to significantly impact an employer's access to the TFWP.

Employers may qualify for an exemption from the transition plan requirement if they are hiring TFWs for positions requiring unique skills or with a limited duration. ESDC has offered little guidance to date as to what constitutes a position requiring unique skills other than to say that a "nuclear physicist or senior executives such

as Chief Executive Officer" might qualify. We are awaiting further clarification on the definition of "unique skills", but for now ESDC is applying a restrictive interpretation. They have indicated that only positions requiring skills so uncommon they are held by only a few individuals in the world will be eligible for the "unique skills" transition plan exemption. Limited duration positions are those jobs that will no longer exist when the TFW leaves Canada. Applications for time-limited LMIAs may not require a transition plan where the employment duration is:

a. One to 120 days (e.g. emergency or warranty repair technicians/mechanics), or
b. Between 120 days and two years (e.g. project-based business consultants or specialized constructions engineers).

10-Business day service standard

ESDC now offers a 10-business day service standard to process LMIA applications for the highest-demand occupations (skilled trades on a list of eligible occupations), the highest-paid occupations (with prevailing wage rates at or above the compensation level earned by the top 10 per cent of Canadians or permanent residents in a province or territory), and short-duration work periods (120 day or less).

In Atlantic Canada, the current wage thresholds for the top 10 per cent of wage earners are as follows:

For greater clarity, positions paid in excess of the above-noted figures will not necessarily qualify for the 10-business day processing standard. To qualify, an occupation's prevailing wage rate must meet or exceed the 90th percentile figures noted.

Various other measures were introduced that pertain exclusively to the employment of low-wage TFWs. In summary, these changes include:

- A cap on the proportion of low-wage TFWs has been introduced. Employers with 10 or more employees are now limited to a cap of 10 per cent of their workforce who can be low-wage TFWs. The cap will be applied per worksite and is based on total hours worked at a particular worksite. This transition measure will be phased in over the next couple of years for employers who currently have a low-wage TFW workforce above the cap.
- ESDC will not process LMIA applications for 10 specific low-wage/lower-skilled occupations from employers in the accommodation and food services sector and the retail trade sector in economic regions across Canada that have an unemployment rate of six per cent or higher. The affected occupations in these sectors are food counter attendants, kitchen helpers and related occupations; light duty cleaners; cashiers; grocery clerks and store shelf stockers; construction trades helpers and labourers; landscaping and grounds maintenance labourers; other attendants in accommodation and travel; janitors, caretakers and building superintendents; specialized cleaners; and security guards and related occupations. There are currently very few regions in Canada (and none in Altantic Canada) where the unemployment rate is under six per cent.
- The duration of employment of TFWs hired in low-wage positions will now only be confirmed for a maximum of one year at a time.

3. IMPLEMENT STRONGER ENFORCEMENT MECHANISMS AND PENALTIES FOR NON-COMPLIANCE

ESDC has significantly increased the number of employer compliance inspections so

that one in four employers using TFW will be inspected each year. Inspections are triggered randomly, as a result of tips from the public, or when employers are deemed by the Government of Canada to be at high risk of non-compliance.

ESDC expects to obtain legal authority to compel banks and payroll companies to provide records to help their inspectors verify an employer's compliance with the rules of the TFWP.

Beginning in the fall of 2014, fines of up to $100,000 (depending on the severity of the offence) are expected to be imposed on employers who break the rules of the TFWP.

Employers suspected of criminal activity under IRPA will be referred to the Canada Border Services Agency ("CBSA"). Under IRPA an employer can be charged for (a) employing a foreign national without the proper authorization to work in Canada; (b) counselling misrepresentation; and (c) committing misrepresentation. CBSA will receive additional resources to investigate criminal offences by employers under IRPA.

Better information sharing agreements are being negotiated between federal government departments and between the federal and provincial governments so that employers who violate provincial labour laws, occupational health and safety standards or recruiting laws will be restricted from accessing the TFWP.

ESDC can suspend LMIAs when an employer is suspected of breaching the rules of the TFWP, and can revoke LMIAs when, following an investigation, an employer is found to be non compliant. Non-compliant employers will also be banned from using the TFWP and fined. The list of employers who have had LMIAs suspended or revoked is available online at: http://www.esdc.gc.ca/eng/jobs/foreign-workers/employers_revoked.shtml

Article by Andrea Baldwin

Stewart McKelvey

Footnotes

1. The prevailing wage rate for an occupation is defined by ESDC as the median wage paid for a particular occupation in a given geographical area according to the Government of Canada. Prevailing wage rates can be ascertained online at Explore Careers by Wages – Job Bank.

2. These wage levels are based on Statistics Canada's Labour Force Survey and will be updated annually.