

Salary Increases And Temporary Foreign Workers – Are You Compliant?



There have been many changes to the Temporary Foreign Worker Program (TFWP) over the last year, with an emphasis on employer compliance.

Service Canada updated its “Employer Compliance” webpage in late June. It now sets out in more detail the various compliance obligations and conditions placed on employers that use Temporary Foreign Workers (TFWs), and includes links to the regulations that create the requirements. This article also sets out best practice suggestions for employers.

Salary Increases and Compliance

One of the new sections of the webpage deals with how employers should handle salary increases of TFWs who hold LMIA-based work permits.

Service Canada has set out information on salary increases and when such increases may fail to meet the “substantially the same – but not less favourable” test (“STS test”). There is a regulatory requirement that employers must provide wages and employment conditions to TFWs that are “substantially the same – but not less favourable” than the job offer and the LMIA confirmation.

According to Service Canada’s webpage, an employer may not be compliant with the STS test if there is a salary increase of more than 2% or the rate of inflation, whichever is higher. While the 2% increase “rule” has been referred to by Service Canada over the years (for example at seminar presentations on the TFWP), it has not explicitly been set out in a publicly accessible location. This has made it very difficult for employers to know what the expectations were regarding how to deal with salary increases to TFWs.

There are some exceptions to the “2% increase rule”, including:

“Pay increases resulting from good performance or pay increments that are

greater than 2% or the rate of inflation may also be acceptable reasons to increase wages, as long as:

- This was advertised as part of the employer's recruitment efforts; **and**
- The increases apply to all employees working in the same occupation."

The Service Canada webpage further advises employers to contact Service Canada if there is a discrepancy between the job offer amount and the actual wages paid to a TFW.

The LMIA application form (which was revised earlier this year) also sets out a section that tells employers to contact Service Canada if there are changes. It states (as of June 2015) that: *"Employers must immediately inform Service Canada of any changes related to the foreign worker's terms and conditions of employment as described in the positive LMIA and annex. If Service Canada accepts the employer's changes to the original LMIA, the employers' file will be updated accordingly"*.

Implications for Employers

Employers must ensure that they continue to meet all compliance requirements under the TFWP. Changes to a TFW's wages or terms of employment must be carefully reviewed *prior* to any changes being implemented.

Where a salary increase to a TFW is contemplated, employers must be cognizant of the STS requirement and must review any increase in salary in light of that requirement and the "2% increase rule". The context of any increase must also be examined. For example, was the increase one that all employees received? Was it part of an annual review process across the company?

Employers seeking LMIAs should also review the content of their job listings. The Service Canada webpage suggests that in some circumstances a salary increase greater than 2% may be acceptable where pay increases were advertised during the recruiting process. No details are provided on what that content should look like. However, we assume that at the very least the job listings should include a reference to salary reviews and possible salary adjustments.

Employers should also consider whether they should advise Service Canada of any salary increase to a TFW holding a LMIA-based work permit. Where the increase is more than 2% or is not under one of the exceptions to the "2% increase rule", Service Canada would want to be informed in advance. It is possible that Service Canada could require new recruiting and a new LMIA application on the theory that there may be Canadians who would apply for the position now that it has a higher salary.

Where the increase is less than 2%, it may still be a best practice to inform Service Canada of the new salary, so that the deviation from the salary set out in the original job offer is documented if the employer faces a government review or inspection.

This article has focused on salary increases to TFWs. Please note that where any salary *decrease* or a reduction in benefits to a TFW is contemplated, the STS requirement will generally not be met. Employers must therefore carefully consider the implications of any potential salary or benefits reduction.

Conclusion

Given the risk of non-compliance, and the penalties that a finding of non-compliance can bring, employers should seek legal advice prior to changing the wages or the terms of employment of any TFWs. This includes situations where a salary increase is contemplated, especially where the TFW is holding an LMIA-based work permit. Employers should also obtain legal advice regarding how to communicate any changes to salary or terms of employment to Service Canada where the TFW holds an LMIA-based work permit.

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