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A Practical Guide to Canada's New Immigration Rules

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On December 31, 2013, a number of immigration rules changed, impacting employers of temporary foreign workers (TFWs). These changes will require employers to update their human resources systems to ensure they meet these new rules. Failure to do so may result in significant penalties.

These changes include:

1. New ministerial instructions setting out:
    a. when labour market opinions (LMOs) can be revoked and suspended
    b. when Service Canada can refuse to process an LMO application
    c. when work permit processing can be suspended
    d. when an already issued work permits can be revoked
2. New regulations changing certain employer immigration compliance tests and prerequisites employers must meet before hiring temporary foreign workers
3. New regulations giving the Canadian government expanded powers to enforce immigration violations including the power to conduct warrantless searches

When can LMOs be revoked?

A LMO is an opinion provided by Service Canada that allows employers to hire foreign nationals for jobs in Canada. In most cases, LMOs will only be granted if an employer can establish that there are no Canadian workers willing and able to take on the job.

Under new ministerial instructions, LMOs can be revoked if:

1. New information becomes available indicating that the employment of a foreign worker will have a significant negative effect on the labour market in Canada
2. Employers provide false, misleading or inaccurate information in connection with a LMO request
3. The employer has been added to the employer ineligibility list, an "immigration blacklist", list kept by Service Canada which lists employers who have violated immigration laws and are not eligible to hire TFWs

In the past, once a LMO was issued, it was not revoked. The ability to revoke a LMO will mean that employers should always be prepared to establish the neutral or positive effect that hiring a temporary foreign worker will have on the labour market in Canada. The employer must make the case beyond the scope of their own company and to the broader Canadian labour market as a whole.

When can LMOs be suspended?

Under the new rules, LMOs can be suspended if:

1. New information becomes available that, if known at the time, would have led to a different opinion
2. There are reasonable grounds to suspect that the employer provided false, misleading or inaccurate information in connection with a LMO request
3. There are reasonable grounds to suspect that the employer is not complying with conditions of the current or previous work permits unless the noncompliance is justified under the law
4. The employer has been added to the immigration blacklist list

This change allows for the suspension of a LMO much more easily than the revocation. For instance, to suspend a LMO all Service Canada needs to establish is that there is "new information" that "would have led to a different opinion" as opposed to having to be convinced that hiring of a foreign national would result in a "significant negative effect" on the Canadian labour market.

When can Service Canada refuse to process a LMO?

In addition to being able to revoke or suspend a LMO, Service Canada now has the power to refuse to process a LMO application. Service Canada can refuse to process a LMO application when there is information to indicate that the employment of the TFW "in any portion, sector, region or occupational group of the labour market in Canada may or will have a significant negative effect on the labour market."

Essentially, a LMO may not be processed for a broad range of reasons, regardless of unique circumstances that a company may face when hiring a TFW.

What happens to a work permit when a LMO has been revoked or suspended?

The revocation or suspension of a LMO has a direct effect on the issuance of work permits.

In normal circumstances, if a positive LMO has been received by an employer, the next step is for the foreign national to apply for a work permit. If a foreign national is in the process of applying for a work permit, and a decision is made to suspend the LMO, the processing of work permit application will be put on hold until the LMO suspension has been lifted.

Similarly, if a positive LMO has been revoked, a work permit that has already been issued can also be revoked. Following the revocation, the foreign national is no longer permitted to work in Canada.

When can work permits be revoked?

Immigration Canada has added a number of additional rules that allow for the revocation of work permits in other circumstances. These additional circumstances include the following scenarios:

1. New information becomes available indicating that the employment of the TFW is having, or will have, a significantly greater negative effect than benefit on the

development of a strong Canadian economy. The work permit may stand if revocation would be inconsistent with any trade obligation of the government of Canada under an international agreement.
2. The employer provided false, misleading or inaccurate information in the context of the work permit application.
3. The employer has been added to the immigration blacklist.

Of note is Service Canada's ability to revoke a work permit if the employment of the TFW is having, or will have, a greater negative effect than benefit with respect to the development of a strong Canadian economy. As with some of the rules regarding the revocation and suspension of LMOs, the "benefit" test is not restricted to an industry, occupation or location.

Five changes to immigration compliance tests for employers

Since 2011, Citizenship and Immigration Canada and Service Canada have had the power to verify that the wages, working conditions and occupation provided to previously employed temporary foreign workers were "substantially the same" as what was originally presented by the employer and employee in the immigration process.

On December 31, 2013, a number of changes were made to these tests. Some of the more significant changes include the following:

1. The original 2011 rules allowed employers to change the wages, working conditions and occupation provided to previously employed temporary foreign workers as long as those changes were "substantially the same". Under the new rules, wages and working conditions can still be varied but, in addition to these wages and working conditions to being "substantially the same", they cannot be less favourable than what was originally presented.
2. Since 2011, employers have had the ability to justify non-compliance under certain circumstances. While these circumstances continue to exist, an additional justification, *force majeure* (e.g. natural disasters or fires), has been added.
3. Previous to the rule changes, employers needed only to establish "substantially the same" wages, working conditions and employment for a two-year period immediately prior to a new LMO or work permit application being submitted. Under the new regulations, this two year period has been increased to six years.
4. Under the new rules, employers must now make reasonable efforts to provide a workplace that is free of abuse. Specifically, workplaces must be free of:

    - physical abuse, including assault and forcible confinement
    - sexual abuse, including sexual contact without consent
    - psychological abuse, including threats and intimidation
    - financial abuse, including fraud and extortion

5. In LMO applications, employers need to agree to additional conditions. These conditions can include:

a. ensuring that the employment of the TFW will result in direct job creation or job retention for Canadian citizens or permanent residents
b. ensuring that the employment of the TFW will result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents
c. hiring, training, or making reasonable efforts to hire or train, Canadian citizens or permanent residents

The combined effect of these changes is that employers must now keep records and ensure compliance for a greater period of time. As well, employers must now incorporate human resource process systems to ensure compliance with expanded laws.

When can the government initiate an investigation?

In order for the government to require an employer to report or to execute a warrantless search on an employer's premises, one of these three situations must exist:

1. There are reasons to suspect that the employer is not complying or has not complied with any conditions imposed.
2. The employer has not complied with the conditions in the past.
3. The employer is chosen for random verification of compliance with the conditions.

While the first two reasons for an investigation apply to employers where there is knowledge or suspicion of current or past wrongdoing, the third reason for an investigation, random verification, can result in companies being targeted even if there is no suspicion or past record of wrongdoing.

The Canadian government's new investigative tools

In order to enforce these new rules, the Canadian government has given itself the authority to carry out certain actions to verify compliance with conditions employers must adhere to in the immigration process. These new powers include the following:

1. Requiring an employer to provide documents and to report at any specified time and place in order to answer questions
2. To enter and inspect any premises or place in which a TFW performs work without a search warrant

If an employer is being investigated under these new rules, the law allows officers to:

1. Require the employer to be available to be interviewed over the phone
2. Require the employer to provide any relevant documents requested by an officer
3. Take photos and make audio or video recordings
4. Require the employer to use any computer or electronic device so that an officer can examine any relevant document contained on those devices

What search powers does the government have under immigration regulations?

When conducting a warrantless search under immigration laws, the government officer will have a number of powers. These can include:

1. Asking the employer and any person employed at the company relevant questions
2. Requiring from the employer, for examination, any document (originals or copies) that relates to compliance with the conditions
3. Requesting the employer's assistance in making copies if necessary

The ability to conduct these warrantless searches extends to six years after the first day of that employment, even if the TFW is no longer employed by that company. The fact that a TFW has left the company does not excuse a company from investigation.

Employers should keep documents that relate to the compliance with immigration conditions for at least six years from the first day of the period of employment for which a work permit is issued.

What happens if an employer is found to be non-compliant?

Under existing rules, if a finding of non-compliance reveals a criminal or other breach of the law, employers can be prosecuted. Nothing in the new rules changes these potential penalties.

What has changed is that employers who are non-compliant (without adequate justification) will be denied work permits for two years. As well, the employer's name and address will be immediately added to the immigration blacklist. While the penalty has existed since 2011, the Canadian government has fixed a gap in the law that prevented them from adding employers to the immigration blacklist.

In addition, these new rule changes will now prevent an employer from making offers of employment in certain federal immigration programs for permanent residency.

This article is prepared for general information purposes only and is intended to provide information for readers of Aikins Law Immigration Newsletter. The contents should not be viewed as legal advice or opinion.

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