



# HIRING FOREIGN WORKERS? Take the Right Steps

WAVEBREAK MEDIA LTD./ISTOCK/THINKSTOCK

By Reis Pagtakhan and  
Paul McDonald

*Reis Pagtakhan is a partner with Aikins Law and practice in the area of immigration law. His direct line is 204.957.4640. If you would like to know more about Reis, follow him on Twitter or connect with him on LinkedIn. Reach him at [rrp@aikins.com](mailto:rrp@aikins.com).*

*Paul McDonald is an associate with Aikins Law and practices in the area of labour and employment law. His direct line is 204.957.4869. You can reach him at [pam@aikins.com](mailto:pam@aikins.com).*

## DOMESTIC LABOUR SHORTAGES

are resulting in employers recruiting more temporary foreign workers: individuals who are neither Canadian citizens nor permanent residents. Temporary foreign workers must obtain work permits from the government to legally work in Canada.

Work permit applications contain a number of personal questions about date and place of birth, citizenship, and marital status. Questions regarding family medical history, immigration history, and criminal background are also asked. If this information is not provided to Citizenship and Immigration Canada, a work permit can be refused.

## Can employers ask temporary foreign workers questions unrelated to their job qualifications?

*The Human Rights Code (Manitoba) prohibits, with one exception explained below, employers from asking questions that require an applicant to disclose certain personal characteristics including, but not limited to, ancestry, ethnicity, religion or national origin. The exception to the prohibition is that employers may ask such questions if it is required to determine whether the applicant possesses the bona fide and reasonable requirements or qualifications for employment. Therefore, when hiring applicants Manitoba employers should refrain from asking questions that are unrelated*

to the applicant's ability to meet the bona fide and reasonable qualifications for the position if those questions require the applicant to disclose information about his or her personal characteristics that are enumerated by the *Code*.

There are circumstances when knowledge of personal characteristics enumerated by the *Code* is required to determine whether the applicant possesses the requirements or qualifications for a position. However, those instances are uncommon. Employers are advised to review the questions asked in the pre-employment process and consider: "Is this question and the anticipated response necessary to determine whether an applicant possesses the bona fide and reasonable qualifications for the advertised position?" If the answer to that question is "no," and the question requires a response concerning personal characteristics, as enumerated by the *Code*, that question should not be asked. Doing so may provide the basis for an allegation of discrimination, regardless of whether the response was a factor in determining whether the applicant would be offered employment.

In the context of hiring foreign workers, some may argue that questions related to national origin, by way of example, must be asked since they directly impact whether or not a work permit will be obtained and whether the applicant will be legally entitled to work in Canada. The weakness in the argument is that the Government of Canada, not the employer, controls whether or not a work permit will be granted, and therefore the employer does not actually require that information. It is best for employers to let the government ask questions pertaining to personal characteristics connected to the work permit since the employer only needs to know whether the appropriate work permit has been issued; it does not need to know the information upon which that decision was made.

The best approach is for the employer to ask questions that assess an applicant's ability to perform the job independent of his or her ability to

obtain a work permit. If the employer determines the applicant is qualified for the position and wants to hire the applicant, it can extend an offer of employment conditional upon the applicant securing the required permits by a date reasonably determined by the employer as related to legitimate operational needs.

#### **Do companies have any obligation to temporary foreign workers after making a conditional offer of employment?**

If an offer of employment is conditional upon an applicant obtaining all necessary approvals to work in Canada, the employer should make every reasonable effort and take every reasonable step to secure that authorization. Failing to act in good faith and take all reasonable steps required to assist the applicant in meeting the conditions could result in liability.

#### **Can employers obtain personal information from temporary foreign workers?**

There are some situations when personal information is required by an employer for the immigration process. For instance, in what is known as the Labour Market Opinion (LMO) process, employers must specifically name the employee they will be looking to hire before a work permit application can be submitted. Employers typically apply for LMOs if they require temporary foreign workers to meet skill gaps. In the application form required by the government, an employer must disclose the full name of the temporary foreign worker as it appears on his or her passport as well as their citizenship, date of birth and, if in Canada, their current Canadian immigration status. While it is necessary to obtain this information for the Labour Market Opinion process, before doing so, it is important that a conditional offer of employment is made first. Employers should only obtain information required by the government to complete their portion of the application.

#### **What if an employer wants to help a prospective employee with the immigration process?**

The issue can become more challenging when an employer is willing to assist an employee in completing a work permit application. Under immigration law, work permit applications are the individual's application, not the employer's application. Work permit applications require sensitive personal information about an individual and their family members. In these cases, employers should obtain the written consent of the applicant and his or her family members to collect their personal information and use it as necessary to assist them in completing the work permit application. The best practice may be to have the temporary foreign worker sign a release. Again, before obtaining such information and assisting in the work permit process, a conditional offer should be made.

#### **What questions can be asked by an overseas recruiter on my company's behalf?**

A more challenging question is whether these questions can be asked by recruiters acting on behalf of a Canadian employer when the law overseas allows these questions to be asked. In these cases, it is best for recruiters not to ask questions beyond what is allowable under Manitoba law regardless of the applicable law overseas. Again, it is important that conditional offers be made and accepted before such personal information is obtained. It is also important to obtain the written acknowledgement and consent of the temporary foreign worker for such information.

*This article is prepared for general information purposes only and should not be viewed as legal advice or opinion.* ●



give your company the  
**EDGE**  
Get your new employees  
started sooner –  
criminal background  
checks within 48 hours

**COMMISSIONAIRES**  
TRUSTED · EVERYDAY · EVERYWHERE

See how Commissionaires can help a  
[www.commissionaires.mb.ca](http://www.commissionaires.mb.ca) or call 204-942-5993  
290 Burnell St. Winnipeg