Major Changes to Canada’s Temporary Foreign Worker Program

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Table of Contents

Replacing the Labour Market Opinion with the Labour Market Impact Assessment 2
What's new in the LMIA Stream? 2
A) Higher Fees 2
B) The New Low-Wage/High-Wage Test 2
The Continuing Importance of the "Prevailing Wage" 3
The Continuing Importance of Canada's National Occupational Classification (NOC) 3
The Low-Wage TFW Cap 4
The LMIA One Year Time Cap for Low-Wage Occupations 4
The Transition Plan for High-Wage TFWs 4
LMIAs Will be Refused for Certain Occupations in Areas of High Unemployment 6
Employers Must Report on the Number of Canadians/Permanent Residents Who Apply for the Job 7
Attesting That Canadians Will Not be Laid Off or Have Their Hours Reduced Once a TFW is Hired 7
Faster Processing for the Highest Demand, Highest Paid and Shortest Duration Occupations 8
Employers Who Use the LMIA Program Will Now Have Their Names Revealed Publically 8
More Enforcement ..... **Error! Bookmark not defined.**
A) More immigration audits 9
B) Compelling banks and payroll companies to provide information to government 9
C) A new complaints website 9
Criminal Prosecutions Under the Immigration and Refugee Protection Act 10
New Fines for Noncompliance 10
The International Mobility Program 10
A) New IMP Fees 11
B) The New IMP Compliance System 11

Major Changes to Canada's Temporary Foreign Worker Program

Last month, the federal government announced major changes to Canada's Temporary Foreign Worker Program that increased employer application fees, changed the assessment criteria for approving temporary foreign workers, and added more stringent and wide ranging enforcement mechanisms.

These changes dramatically alter what businesses have to do to hire temporary foreign workers and to remain compliant with the law.

Replacing the Labour Market Opinion with the Labour Market Impact Assessment

The first major change was to reorganize the Temporary Foreign Worker Program into two distinct streams: Labour Market Impact Assessment (LMIA) and International Mobility Program (IMP).

The LMIA stream replaces the old Labour Market Opinion (LMO) process, and the IMP stream incorporates all other temporary foreign worker (TFW) programs.

What's new in the LMIA Stream?

Under the new LMIA process, employers will notice the following changes:

1. Most application fees have nearly quadrupled from $275/TFW to $1,000 per TFW
2. A new low-wage/high-wage test has been introduced that will determine, in many respects, an employer's ability to hire temporary foreign workers
3. TFWs who fall within the highest demand, highest paid and shortest duration occupations will be eligible for expedited 10-day service

A) Higher Fees

As of June 20, 2014, the filing fee for LMIA applications has increased from $275 to $1,000 per TFW. This fee applies to each position for which a LMIA application is filed and is non-refundable. For instance, if an employer is looking to hire ten TFWs as physicians, the fee would be $10,000.

The fee does not apply to specific higher-skilled positions related to on-farm primary agriculture.

B) The New Low-Wage/High-Wage Test

LMIA's will now be assessed in two categories: 1) low-wage workers and 2) high-wage workers. Low-wage workers will consist of TFWs paid under the provincial or territorial median wage

while high-wage workers will consist of TFWs paid at or above the median wage. At the present time, the wage cut-off amounts are as follows:

Province/Territory	Median Wage
Newfoundland and Labrador	$20.19/hour
Prince Edward Island	$17.26/hour
Nova Scotia	$18.00/hour
New Brunswick	$17.79/hour
Quebec	$20.00/hour
Ontario	$21.00/hour
Manitoba	$19.00/hour
Saskatchewan	$21.63/hour
Alberta	$24.23/hour
British Columbia	$21.79/hour
Yukon	$27.93/hour
Northwest Territories	$32.53/hour
Nunavut	$29.96/hour

The wage based test moves the focus to provincial and territorial wide wages as opposed to occupation specific wages. However, this change does not mean that prevailing wage test has been eliminated. The high-wage/low-wage test will be used for very specific purposes.

The low-wage/high-wage test will mainly be used to determine:

1. The total number of TFWs an employer can have at a particular work site
2. How long an LMIA will be issued for
3. Whether an employer must file a transition plan to demonstrate how it will move to a domestic work force

The Continuing Importance of the "Prevailing Wage"

The prevailing wage test requires employers to pay at or above the median wage for an occupation in a specific area. If the offered wage to a TFW falls below that of the median wage paid to Canadians or permanent residents in the same occupation and region, the LMIA will be refused.

The Continuing Importance of Canada's National Occupational Classification (NOC)

It is important for employers to continue to correctly describe the TFW's occupation using the NOC – the federal government's database on occupations in Canada. NOC codes will continue to be used to determine the prevailing wage in an occupation. They are also important for permanent residency applications for TFWs applying to become Canadian permanent residents.

The Low-Wage TFW Cap

Effective June 20, 2014, employers with 10 or more employees applying for a LMIA will be subject to a cap of 10% on the proportion of their workforce that consists of low-wage TFWs. For example, if an employer has 10 employees, only one of those employees can be a low-wage TFW.

The 10% cap will be applied per employer worksite and will be based on the total hours worked at that specific worksite (including overtime).

The transition to a 10% cap will be phased in for employers who currently have low-wage TFWs that comprise more than 10% of their workforce. Effective June 20, 2014, those employers will be limited to a 30% cap or their current level - whichever is lower. If companies have more than 30% of their workforce as TFWs, LMIAs will be refused until the number of TFWs fall below the 30% cap.

The 30% cap will be dropped to 20% beginning July 1, 2015, and to 10% on July 1, 2016. TFWs currently employed at worksites over the cap will be allowed to continue working at those sites until their existing work permits expire.

As the cap will be assessed on a per-location basis, it is not possible for an employer to have a 20% TFW complement at one location and a 0% TFW complement at another.

The LMIA One Year Time Cap for Low-Wage Occupations

LMIAs for all low-wage positions will only be granted for a maximum of one year. This is a decrease from the previous two-year maximum that was granted under the old low-skilled LMO process.

While LMIAs for low-wage positions will only be granted for one year, these are renewable if the employer meets the criteria for a LMIA at the time of renewal. However, by summer 2015, the government will limit the total time a low-wage TFW can be in Canada. While it is not clear what the total time cap will be, it will likely be different than the current four-year time cap that is currently in place for most TFWs.

The Transition Plan for High-Wage TFWs

Canadian employers must submit transition plans with their LMIA applications outlining the steps they are taking to reduce their reliance on TFWs for higher wage positions. The transition plan is a requirement over and above the recruiting requirements that the employer must undertake to find Canadians/permanent residents for the job.

Employers of high-wage TFWs must begin work on their transition plan the moment a positive LMIA is issued. Work on the transition plan must continue throughout the time TFW is employed.

Employers with multiple TFWs must ensure that each transition plan is carefully reviewed. It is possible to have multiple transition plans in place at various times in the employment cycle of TFWs. Employers who wish to reapply to hire a high-wage TFW must report on the success of their transition plans every time they reapply. Therefore it is important that records be kept. Employers should keep data on their progress current, as they may be selected for inspection at any time.

In preparing a transition plan, employers must include a list of activities that could help them transition to a Canadian work force. While it is possible for employers to undertake activities not on the list provided in the application form, it is advisable to review the list. The current list of recruitment and training "activities" found on the form includes:

- Increase wages offered
- Employee referral incentive program
- Offer part-time or flexible hours as an option
- Offer health insurance or other benefit
- Job fairs
- Financial support for relocations of Canadians or permanent residents
- Hire headhunting firm to identify prospective candidates
- Ongoing advertisement/modified advertising plan (e.g. different sources, target different audiences)
- Partner with unions / industry associations to identify potential candidates
- Apprenticeship / internship / Co-op
- Government programs
- Paid-leave for education
- On-the-job training

Transitions plans must include the following:

1. Three distinct activities
2. One additional "activity" to target underrepresented groups
3. One "activity" which facilitates the permanent residency of a temporary foreign worker

Once the activities are decided upon, employers must provide transition plans for each activity.

In the current application form, each transition plan must set out the following:

1. A description of the planned activity (i.e. the scale of the investment to be made in training, scholarships/bursaries, partnerships)
2. Results of the planned activities (once the proposed activity has taken place, documentation must be provided to show its completion)

3. Proposed dates for the activities (a general timeline)
4. The actual results of the activity (to be completed once the activity has taken place)
5. For both the proposed activities and the actual results:
    a) The number of Canadian/permanent resident applicants
    b) The number of temporary foreign worker applicants
    c) The number of Canadians/permanent residents interviewed
    d) The number of temporary foreign workers interviewed
    e) The number of Canadians/permanent residents offered employment
    f) The number of temporary foreign workers offered employment
    g) The number of Canadians/permanent residents hired
6. The rationale for not hiring Canadian/permanent resident candidates

If an employer wishes to change a transition plan after a LMIA opinion is issued, Service Canada must agree to the change. If a revised transition plan is not agreed to by Service Canada, the employer could be liable for not following the transition plan on file.

In certain cases, employers can apply for an exemption from submitting a transition plan. Examples provided by Employment and Skills Development Canada include:

1. TFWs required for unique skills (e.g. nuclear physicist or senior executives such as Chief Executive Officer)
2. TFWs here for a limited duration of:
    - Between 1 and 120 days (e.g. emergency or warranty work repair technicians / mechanics)
    - more than 120 days to a maximum of 2 years (e.g. project-based business consultant, specialized construction engineer)

The Transition Plan requirement does not apply to employers applying for positions related to on-farm primary agriculture such as: farm managers/supervisors and specialized livestock workers, general farm workers, nursery and greenhouse workers and harvesting labourers OR under Quebec's facilitated process.

LMIAs Will be Refused for Certain Occupations in Areas of High Unemployment

LMIAs will not be processed in specific occupations identified under North American Industry Classification System as Accommodations & Food Service or Retail Sales (NAIC 72, 44, 45) in economic regions with an unemployment rate at or above 6%.

In particular, employers will not be granted LMIAs for the following occupations in areas of unemployment higher than 6%:

1. Food counter attendants, kitchen helpers and related occupations
2. Light duty cleaners
3. Cashiers

4. Grocery clerks and store shelf stockers
5. Construction trades helpers and labourers
6. Landscaping and grounds maintenance labourers
7. Other attendants in accommodation and travel
8. Janitors, caretakers and building superintendents
9. Specialized cleaners
10. Security guards and related occupations

Employers Must Report on the Number of Canadians/Permanent Residents Who Apply for the Job

Another major change in the LMIA process is that employers will now have to provide information on the number of Canadians/permanent residents who responded to the job postings.

On each LMIA application, employers must provide this specific information:

1. The number of applications/resumes received from Canadians/permanent residents
2. The number of Canadian/permanent resident applicants interviewed
3. The number of Canadians/permanent residents offered the position
4. The number of Canadians/permanent residents hired
5. The number of job offers declined by Canadian/permanent resident applicants
6. The number of Canadian/permanent resident applicants who were not qualified for the job

For each unsuitable Canadian/permanent resident applicant, an explanation as to why the candidate was unsuitable for the position. The challenge in being able to answer these questions lies in prohibitions found in human rights legislation. In Manitoba, The Human Rights Code typically prohibits employers from asking questions that would require a job applicant to disclose certain characteristics including ancestry, ethnicity and national origin. In a number of other Canadian jurisdictions, similar rules apply.

As a result, it is important for employers to be aware of what they can and cannot ask job applicants for the purposes of answering these questions to avoid claims of discrimination.

Attesting That Canadians Will Not be Laid Off or Have Their Hours Reduced Once a TFW is Hired

The new rules also include an attestation in which employers must declare that the employment of TFWs will not lead to job loss or reduction in work hours for Canadians or permanent residents.

Failure to live up to this attestation could result in significant negative penalties including finding the employer made a misrepresentation on an application.

Faster Processing for the Highest Demand, Highest Paid and Shortest Duration Occupations

For certain occupations, LMIAs will be processed much faster than the old LMOs. The highest demand, highest paid and shortest duration occupations will be processed in 10 days.

The 10 day service standard for the highest-demand occupations will initially be limited to the following list of skilled trades where the wage paid is at or above the provincial or territorial median wage.

The highest-paid occupations will require that a TFW be paid at or above the top 10% of wages earned by Canadians in a given province or territory where the job is located according to this chart. Employers should note that the wage cut-off for this category is determined by province-wide statistics. If the prevailing wage for a specific highly skilled occupation is below the top 10% of wages earned in a province, an LMIA can still be requested but the 10 day service standard may not apply.

The shortest-duration occupations, will only be available for individuals employed in Canada for 120 calendar days or less in any occupation where the wage offered is at or above the provincial or territorial median wage.

Employers Using the LMIA Program to be Listed Publically

Beginning in the fall of 2014, Employment and Social Development Canada will post the names of companies that receive positive LMIAs and number of temporary foreign workers approved for work at those companies. This information will be updated on a quarterly basis.

The posting of this information should not be confused with the posting of employer names on employer ineligibility list (also known as the "blacklist") of employers who are no longer able to use the immigration program because of previous violations.

Before submitting an application for a LMIA, employers should carefully consider the impact of being publically listed as a foreign worker employer.

Leaving aside the possibility that the public could complain about specific companies that hire foreign workers, one of the possible side-effects is that an employer could open itself up to court actions brought about by third parties (unions, competitors, individuals) who may have issues with a company's hiring of TFWs.

In June 2013, I co-wrote this article about a court case in which the Construction and Specialized Workers' Union and the International Union of Operating Engineers was allowed to challenge the issuance of an LMO to a BC mining company.

While the unions who launched this court action eventually lost, what is significant in this case was that the judge allowed the unions to bring this case despite the fact that the unions did not

represent any workers at that mining company. This decision opened up the doors for interested third parties to bring court actions to strike out LMIAs that facilitate a company's ability to hire TFWs. If the unions in that case were successful, presumably, the foreign workers hired under that LMO would have to leave the country.

While the unions were successful in bringing a court action in that mining case, in another court case, United Steel Workers v. Canada (Citizenship and Immigration), 2013, FC 496 (CanLII), the judge refused to grant a union the ability to challenge the LMO. However, the judge did leave open the possibility that a union could challenge a LMO if a number of conditions were met.

Clearly the issue as to whether a union or other interested third party can bring an action against a company is still an open one. According to this media report from June 2014, there are further challenges to work permits by third parties that are in progress.

Increased Investigation and Enforcement May Lead to Large Fines for TFW Employers

In addition to changing the process for hiring TFWs, the government is introducing additional enforcement mechanisms that will affect TFW employers.

A) More immigration audits

The employer compliance review process (which is essentially an immigration audit) will be expanded so that 25% of employers using the Temporary Foreign Worker Program will be inspected each year.

B) Banks and payroll companies can be compelled to provide information to government

In addition to maintaining the enforcement rules that came out in January of this year, as of the fall of 2014, the government will be able to compel banks and payroll companies to provide documents to help government inspectors verify that employers are complying with the rules of the Temporary Foreign Worker Program.

C) A new complaints website

The government has instituted a complaints webpage allowing the public to submit tips with respect to potential violations of the Temporary Foreign Worker Program. This webpage is in addition to the confidential tip line that was introduced in April 2014 (1-866-602-9448). Businesses that employ TFWs may be concerned that these processes could be used not only by bona fide tipsters but by competitors to trigger government investigations.

Criminal Prosecutions Under the Immigration and Refugee Protection Act

In addition to the regulatory changes, the government has signaled that they will be increasing criminal investigations under the following sections of the Immigration and Refugee Protection Act:

1. S.124 – employing a foreign national that is not authorized to work in Canada

   Employers who employ foreign nationals not authorized to work can face fines of up to $50,000 and up to two years in prison.

2. S.126 – counselling misrepresentations

   Anyone who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to make a misrepresentation in the immigration process can face fines of up to $100,000 and up to five years in prison.

3. S.127 – misrepresentations

   Anyone who knowingly makes a misrepresentation in the immigration process can face fines of up to $100,000 and up to five years in prison.

New Fines for Noncompliance

Beginning in the fall of 2014, the government will impose fines of up to $100,000 on employers who break the rules of the TFW program. In addition, the government will publically disclose the names of employers who have been fined, and the amount of those fines.

The International Mobility Program

The International Mobility Program is not a new immigration program per se. The IMP is essentially an umbrella term for all work permits for which LMIAs are not needed. IMP categories include free trade professionals, intra-company transfers and certain other jobs for which a LMIA is not needed.

Under reforms to the IMP process, employers will have to pay higher fees and submit job offers and other relevant information to Citizenship and Immigration Canada before the work permit is being processed. As well, current LMIA/LMO occupations will be reviewed to see if these occupations should remain LMIA exempt.

a) New IMP Fees

Currently, applicants for work permits for individuals who fall within LMIA/LMO exempt occupations must pay a work permit fee. While not in place yet, a new $230 compliance fee is now in the works.

For open work permits (work permits that allow an individual to work for any employer), a new $100 fee will be introduced.

b) The New IMP Compliance System

Under the current system, LMIA/LMO exempt workers are not subject to employer compliance reviews. While the law has allowed for IMP work permits to be assessed for compliance, a mechanism has never been put into place. The introduction of this change will require employers to expand their immigration compliance systems to cover IMP work permits.

The government has signalled that the new rules will require job offers and other relevant information to be sent to Citizenship and Immigration Canada for all IMP applicants.

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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