



# Blaneys on Immigration

This newsletter is designed to highlight new issues of importance in immigration related law. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Immigration Law Group, Ian Epstein at 416.593.3915 or iepstein@blaney.com.

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*“...Human Resource and Skills Development Canada (HRSDC) has adopted a new wage structure that will be applicable to Labour Market Opinion (LMO) applications and Accelerated LMO (A-LMO) applications.”*

## HRSDC ANNOUNCES NEW WAGE STRUCTURE FOR LMO APPLICATIONS

Henry J. Chang

On April 25, 2012, Diane Finley, Minister of Human Resources and Skills Development, announced her intention to make improvements to the Temporary Foreign Worker ("TFW") Program. In connection with this announcement, Human Resource and Skills Development Canada ("HRSDC") has adopted a new wage structure that will be applicable to Labour Market Opinion ("LMO") applications and Accelerated LMO ("A-LMO") applications.

Under the previous wage structure, employers were required to pay temporary foreign workers at least the average wage for the proposed occupation in the specific region where the employment was to occur, regardless of what they were paying their Canadian employees. In many cases, this resulted in employers paying TFWs more than Canadians. The method of determining the average wage was also inconsistent from region to region.

The new wage structure is based on Statistics Canada's data to ensure consistency from region to region (provided at the [Working in Canada Website](#)) and allows employers to pay wages that are below the average wage, within a set range, under certain circumstances. Employers can now

pay wages that are:

- a) Up to 15% below the average wage for a high-skill occupation (skill type 0, skill levels A and B under the *National Occupational Classification* ("NOC") in the region where the employment will occur; and
- b) Up to 5% below the average wage for a low-skill occupation (NOC skill levels C and D) in the region where the employment will occur (but the wage for a low-skill occupation cannot be below the minimum wage).

Employers who choose to pay a wage that is below the applicable average wage in accordance with the new wage structure will be required to provide documentation clearly demonstrating that the wage being paid to a TFW is the same as that being paid to their Canadian employees in the same job and in the same location. In addition, if they participate in HRSDC's new A-LMO initiative, they will likely be flagged for post-LMO compliance review.

According to HRSDC, the new wage structure does not apply to the Seasonal Agricultural Worker Program, the Agricultural Stream of the NOC C and D Pilot Project or the Live-in Caregiver Program, because employers participating in these programs hire mostly temporary foreign workers. ■

*“The A-LMO [Accelerated Labour Market Opinion] initiative is intended to expedite the regular Labour Market Opinion (LMO) process for employers with an established track record of compliance.”*



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## HRSDC ANNOUNCES ACCELERATED LABOUR MARKET OPINION INITIATIVE

Henry J. Chang

### Overview

Effective April 25, 2012, Human Resources and Skills Development Canada ("HRSDC") has implemented its new Accelerated Labour Market Opinion ("A-LMO") Initiative. The A-LMO initiative is intended to expedite the regular Labour Market Opinion ("LMO") process for employers with an established track record of compliance.

An A-LMO application does not exempt employers from normal criteria applicable to a normal LMO application. HRSDC will still assess the A-LMO based on:

- a) The genuineness of the job offer;
- b) The wage offered; and
- c) Whether the job offer is likely to fill a labour shortage.

However, A-LMO applications filed with HRSDC will be approved within ten business days, rather than after several weeks (or in some cases, months).

The A-LMO initiative applies only to higher skilled positions, which include positions within skill type 0 (management occupations), skill level A (occupations usually requiring university education), and skill level B (occupations usually requiring a college education or apprenticeship training) under the [National Occupational Classification](#). However, Canadian employers hiring in the film and entertainment and agriculture sectors must still apply under the regular LMO

process, even if the positions fall within skill type 0 or skill level A or B. In addition, the A-LMO is not being implemented in the Province of Quebec.

### Employer Eligibility

In order to qualify to participate in the A-LMO Initiative, employers must:

- a) Have been issued at least one positive LMO within the previous two years;
- b) Have a clean compliance record with the Temporary Foreign Worker ("TFW") Program within the previous two years;
- c) Have agreed to all of the attestations included in the A-LMO application;
- d) Not have been the subject of an investigation or a serious complaint, or have committed an infraction; and
- e) Not have any unresolved violations or contraventions under provincial laws governing employment and recruitment.

Eligible employers who participate in the A-LMO initiative are required to comply with all program requirements for higher skilled positions (i.e. Skill type 0, skill level A, and skill level B), including the following:

- a) They must research and understand the prevailing wage for the proposed occupation in the area where the employee will work, using the information provided on the [Working in Canada Website](#), and agree to pay a wage level at least equal to this amount. Under HRSDC's new wage structure, employers can pay wages that are up to 15% below the average wage in the area where the employment will occur,

*“...employers must consent to participate in a post-LMO compliance review. By consenting, employers allow HRSDC to perform a compliance audit of any positive LMO issued to the employer during the previous two years.”*

in the case of a high-skill occupation. Employers, however, must provide documentation that clearly demonstrates that the wage being paid to a temporary foreign worker is the same as that being paid to their Canadian employees in the same job and in the same location.

- b) They must comply with same advertisement and recruitment requirements that apply to regular LMO applications, prior to offering the job to the TFW and submitting the A-LMO application.

#### **Post-LMO Compliance Reviews**

In connection with an A-LMO application, employers must consent to participate in a post-LMO compliance review. By consenting, employers allow HRSDC to perform a compliance audit of any positive LMO issued to the employer during the previous two years. During the review, employers must submit documentation to demonstrate compliance with the terms and conditions of the positive LMO or A-LMO letters and their annexes.

HRSDC has indicated that up to 20% of positive A-LMOs will be selected for a compliance review. These reviews will normally be based on random selection, but cases may also be selected in response to information received subsequent to the issuance of an A-LMO. In addition, in cases where the employer files an A-LMO application offering to pay wages that are below the average wage in the area where the employment will occur (in accordance with HRSDC's new wage structure), that employer will likely be flagged for post-LMO compliance review.

According to HRSDC, in order demonstrate

compliance during a post-LMO compliance review, employers may be required to submit the following documents:

- a) Payroll information for the TFW and potentially for Canadian citizens and permanent residents;
- b) Collective bargaining agreements;
- c) Time sheets;
- d) Job descriptions;
- e) Copies of recruitment advertising;
- f) Proof of no labour dispute;
- g) Copies of the TFW's work permit; and
- h) Proof of registration with provincial/territorial workplace safety (where applicable).

Employers should retain all documents related to the A-LMO application and attestations, as well as any documents related to other positive LMOs, for up to six years. Failure to provide the requested documentation will disqualify the employer from future participation in the A-LMO Initiative.

#### **Consequences of Non-Compliance**

When non-compliance has been found, employers will have an opportunity to provide justification as well as to take any applicable corrective action. HRSDC will work with the employer to implement the appropriate corrective action and may request proof to this effect in order for the employer to be deemed compliant. Employers found non-compliant with the A-LMO Initiative will be subject to several adverse consequences, which may include:

- a) Ineligibility to utilize the A-LMO initiative in the future;

- b) Revocation of other LMOs for which work permits have not yet been issued;
- c) The sharing of HRSDC's findings with its federal and provincial partners, for further investigation; and
- d) Greater scrutiny in the review of any pending or subsequent LMO applications filed by that employer.

#### **Submitting A-LMO Applications**

Employers who want to hire TFWs using the A-LMO Initiative can apply online using HRSDC's TFW Web Service, which is also used for regular LMO applications, or send in a paper application. However, the employer and any third party representative must first register by completing, signing, and then faxing/ mailing the necessary registration forms to HRSDC before being permitted to file an A-LMO or LMO application online. This can make the online application process less convenient for both the employer and its third party representative. ■

EXPECT THE BEST

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