

Administrative Monetary Penalties for Employer Non-Compliance Effective as of December 1, 2015

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Background

As was [previously mentioned](#), Jason Kenney, Minister of Employment and Social Development, and Chris Alexander, Minister of Citizenship and Immigration, announced changes to Canada's Temporary Foreign Worker ("TFW") program on June 20, 2014. Among these changes was a proposal to impose fines of up to \$100,000 on employers who violated the TFW program. The names of employers who were fined, and the amount of the fine, would also be published on the public list of violators.

At the end of September 2014, Employment and Social Development Canada ("ESDC") published a [discussion paper](#), which proposed to implement a system of Administrative Monetary Penalties ("AMPs") for violations of the TFW program. It also proposed to increase the maximum ban for employers who violate the TFW program from two years to ten years (a permanent ban was also being considered).

On June 12, 2015, the Minister of Citizenship and Immigration published [amendments](#) (the "Amendments") to the *Immigration and Refugee Protection Regulations* ("IRPR"), which were intended to implement these proposed changes. These Amendments will now come into force on December 1, 2015.

Overview

According to R209.94, the purpose of AMPs is to encourage compliance with the provisions of the *Immigration and Refugee Protection Act* ("IRPA") and the IRPR, and not to punish. According to R209.95(1), an employer who fails to comply with one of the conditions listed in Schedule 2, Table 1, *if the failure to do so is not justified under the IRPR*, commits a violation and:

- a. Is liable to an administrative monetary penalty of an amount that is determined in accordance with R209.98 [see Schedule 2, Table 2] or if it is determined under that section that there is no penalty, is issued a warning informing the employer that there is no administrative monetary penalty for the violation but that the violation will be considered in the calculation of the total number of points under R209.991(1)(a)(i) [see Schedule 2, Tables 4 and 5] for any subsequent violation; and
- b. If applicable, is ineligible to employ a foreign national for whom a work permit is required for the period determined in accordance with R209.99 [Schedule 2, Table 3].

Calculation of AMPs

The AMPs will be determined by the Minister of Employment and Social Development (“ESDC”) or a Citizenship and Immigration Canada (“CIC”) officer based on:

- a. The type of violation;
- b. Whether the employer is an individual, small business, or large business;
- c. The employer’s history of violations that occurred on or after December 1, 2015; and
- d. The severity of the violation according to a system of points.

AMPs are cumulative, and separate AMPs will be imposed for each violation.

According to R209.93, the term “small business” is defined as any business, including its affiliates, that has fewer than 100 employees or less than \$5 million in annual gross revenues at the time a request for an assessment is received, or if no such request is made, at the time a copy of an offer of employment for a work permit application is provided to the Minister. The term “large business” is defined as any business that does not meet the definition of “small business.”

According to R209.991, the total number of points in respect of each violation is determined by adding the points resulting from the employer’s compliance history [Schedule 2, Table 4] to the points resulting from the severity of the violation [Schedule 2, Table 5]. However, where the employer has made an *acceptable* voluntary disclosure, the total number of calculated points may be reduced as follows:

- a. If the total number is four or more, four points will be subtracted from the total; or
- b. If the total number is less than four, the value will be replaced with a value of zero.

The voluntary disclosure made by an employer with respect to the commission of a violation by the employer is considered *acceptable* if:

- a. a) The disclosure is complete; and

- b. b)At the time the voluntary disclosure is made, the employer's compliance is not being reviewed and no enforcement action related to an offence under IRPA is being undertaken against the employer.

However, a CIC officer or the Minister of ESDC may still conclude that the voluntary disclosure is not acceptable after considering

- a. The severity of the impact of the violation on the foreign national;
- b. In the case of an LMIA-exempt work permit, the severity of the impact of the violation on the Canadian economy, or in the case of an LMIA-based work permit, the severity of the impact of the violation on the Canadian labour market;
- c. Whether the disclosure was made in a timely manner;
- d. The number of times an acceptable voluntary disclosure is made by the employer; and
- e. The nature of the condition with which the employer failed to comply.

The maximum AMP is \$100,000 per violation and the total that can be imposed is capped at \$1 million on a single notice of final determination. In addition, the total AMPs imposed on a single employer cannot exceed \$1 million in the one-year period preceding the date of the final determination.

There is no limitation on the collections period for AMPs. A new Labour Market Impact Assessment ("LMIA") or work permit application will not be accepted if the employer has not paid an outstanding AMP or is not complying with a payment agreement (if it has entered into one).

Rules Applicable to Violations

As violations are calculated based on the number of violations that have occurred, the following rules will determine when certain conduct will be treated as a separate violation:

- a. A violation of a condition that affects more than one foreign national constitutes a separate violation for each foreign national affected [R209.96 (1)].
- b. A violation of any one of the following conditions constitutes a separate violation:
 - 1. To provide the foreign national with employment in the same occupation as the occupation that is set out in the foreign national's offer of employment;
 - 2. To provide the foreign national with wages that are substantially the same as — but not less favourable than — those set out in the foreign national's offer of employment; and

3. To provide the foreign national with working conditions that are substantially the same as — but not less favourable than — those set out in the foreign national's offer of employment [R209.96(2)]
- c. For employers who employ foreign nationals as live-in caregivers, a violation of either one of the following conditions constitutes a separate violation:
 1. To ensure that the foreign national resides in a private household in Canada,
 2. To ensure that the foreign national provides child care, senior home support care or care of a disabled person in that household without supervision [R209.96(3)].
 - d. A violation of the condition of making reasonable efforts to provide a workplace that is free of abuse within the meaning of R72.1(7)(a) [physical abuse, sexual abuse, psychological abuse, and financial abuse] constitutes a separate violation [R209.96(4)].

Assessment Procedure

If it is assessed during an inspection that a violation has been committed because the employer failed to comply with a condition and that failure was not justified under the IRPR, a preliminary finding must be issued to the employer. A notice of preliminary finding may be corrected or cancelled before a final determination is made.

After the notice of preliminary finding is issued, employers will be provided the opportunity to make written submissions regarding the information in the notice within 30 days after it is received. An employer may be granted an extension to this opportunity to respond if the Minister of ESDC or the CIC officer is satisfied that there is a reasonable explanation for requesting a longer period.

The Minister of ESDC or a CIC officer shall issue a notice of final determination if it is determined that a violation was committed because the employer failed to comply with a condition and that failure was not justified. This determination is final and binding except for judicial review.

Ineligibility to Participate in the TFW Program

Employer violations may also result in a ban from future participation in the TFW program. As of December 1, 2015, the maximum period of ineligibility will change from two years to a permanent ban in the most serious cases.

According to R209.99(1), the period of ineligibility for a violation is the period set out in Column 2, 3 or 4 of Schedule 2, Table 3. If a ban is imposed, the duration of the ineligibility can vary from one year to a permanent bar, depending on the circumstances. According to R209.99(2), the ban begins on the day that the determination is made in respect of the employer.

Publication of Employer's Information

According to R209.997(1), if the Minister of ESDC or a CIC officer makes a determination under R209.996 that a violation has occurred, the employer's details will be added to the public list of violators, except where the employer has received only a warning and no AMP has been imposed. The public list will include the following information:

- a. The employer's name;
- b. The employer's address;
- c. The criteria or conditions with which the employer failed to comply;
- d. The day on which the determination was made;
- e. The eligibility status of the employer; and
- f. If applicable:
 - i. The AMP amount, and
 - ii. The ineligibility period of the employer.

Conclusion

In light of the increased penalties that will become effective on December 1, 2015, it is critical that employers ensure their compliance with all conditions imposed upon them, in connection with any LMIA-based or LMIA-exempt work permit, and that they continue to comply with these conditions for the duration of the TFWs work permit in Canada.

SCHEDULE 2

VIOLATIONS

TABLE 1
EMPLOYER CONDITIONS

Item	Column 1 Provision	Column 2 Short-form Description	Column 3 Classification
1	209.2(1)(b)(i)	Be able to demonstrate that any information provided in respect of a work permit application was accurate during a period of six years, beginning on the first day of the foreign national's employment	Type A
2	209.2(1)(b)(ii) and 209.3(1)(c)(ii)	Retain any document that relates to compliance with cited conditions during a period of six years, beginning on the first day of the foreign national's	Type A

		employment	
3	209.3(1)(a)(iii)(C)	For employers of a live-in caregiver: have sufficient financial resources to pay wages that were offered	Type A
4	209.3(1)(c)(i)	Be able to demonstrate that any information provided for the assessment was accurate during a period of six years, beginning on the first day of the foreign national's employment	Type A
5	209.4(1)(a)	Report at any time and place specified to answer questions and provide documents	Type A
6	209.4(1)(b)	Provide required documents	Type A
7	209.4(1)(c)	Attend any inspection, unless the employer was not notified, give all reasonable assistance to the person conducting the inspection and provide that person with any required document or information	Type A
8	209.2(1)(a)(ii) and 209.3(1)(a)(ii)	Comply with the federal and provincial laws that regulate employment and the recruiting of employees in the province in which the foreign national works	Type B
9	209.2(1)(a)(iii) and 209.3(1)(a)(iv)	Provide the foreign national with employment in the same occupation and substantially the same, but not less favourable, wages and working conditions as outlined in the foreign national's offer of employment	Type B
10	209.3(1)(a)(iii)(A)	For employers of a live-in caregiver: ensure that foreign national resides in a private household in Canada and provides child care, senior home support care or care of a disabled person in that household without supervision	Type B
11	209.3(1)(b)(i)	Ensure that the employment of the foreign national will result in direct job creation or retention for Canadian citizens or permanent residents, if that was a factor that led to the issuance of the work permit	Type B
12	209.3(1)(b)(ii)	Ensure that the employment of the foreign national will result in the development or transfer of skills	Type B

		and knowledge for the benefit of Canadian citizens or permanent residents, if that was a factor that led to the issuance of the work permit	
13	209.3(1)(b)(iii)	Hire or train Canadian citizens or permanent residents, if that was a factor that led to the issuance of the work permit	Type B
14	209.3(1)(b)(iv)	Make reasonable efforts to hire or train Canadian citizens or permanent residents, if that was a factor that led to the issuance of the work permit	Type B
15	209.2(1)(a)(i) and 209.3(1)(a)(i)	Be actively engaged in the business in which the offer of employment was made, unless the offer was made for employment as a live-in caregiver	Type C
16	209.3(1)(a)(iii)(B)	For employers of a live-in caregiver: provide the foreign national with adequate furnished private accommodation in the household	Type C
17	209.2(1)(a)(iv) and 209.3(1)(a)(v)	Make reasonable efforts to provide a workplace that is free of abuse within the meaning of paragraph 72.1(7)(a) of these Regulations	Type C

TABLE 2
ADMINISTRATIVE MONETARY PENALTY AMOUNTS

Item	Column 1 Total Number of Points	Column 2 Type A Violation		Column 3 Type B Violation		Column 4 Type C Violation	
		Individual or Small Business (\$)	Large Business (\$)	Individual or Small Business (\$)	Large Business (\$)	Individual or Small Business (\$)	Large Business (\$)
2	0 or 1	none	none	none	none	none	none
3	2	500	750	750	1,000	1,000	2,000
4	3	750	1,000	1,250	2,000	5,000	10,000
5	4	1,000	2,000	3,000	7,000	10,000	20,000
6	5	4,000	6,000	7,000	12,000	15,000	30,000
7	6	8,000	10,000	12,000	20,000	20,000	40,000

8	7	12,000	20,000	20,000	30,000	35,000	50,000
9	8	20,000	30,000	35,000	45,000	45,000	60,000
10	9 or 10	30,000	45,000	50,000	60,000	60,000	70,000
11	11 or 12	40,000	60,000	60,000	70,000	70,000	80,000
12	13 or 14	50,000	70,000	70,000	80,000	80,000	90,000
13	15 or more	100,000	100,000	100,000	100,000	100,000	100,000

TABLE 3
PERIOD OF INELIGIBILITY

Item	Column 1 Total Number of Points	Column 2 Type A Violation	Column 3 Type B Violation	Column 4 Type C Violation
1	0 to 5	none	none	none
2	6	none	none	1 year
3	7	none	1 year	2 years
4	8	1 year	2 years	5 years
5	9 or 10	2 years	5 years	10 years
6	11 or 12	5 years	10 years	10 years
7	13 or 14	10 years	10 years	10 years
8	15 or more	permanent	permanent	permanent

TABLE 4
COMPLIANCE HISTORY

Item	Column 1 Criterion	Column 2 Points
1	For Type A and Type B violations — first violation	1
2	For Type A violations — second or subsequent violation	2
3	For Type B violations — second violation	2
4	For Type C violations — first violation	2

5	For Type B violations — third or subsequent violation	3
6	For Type C violations — second violation	3
7	For Type C violations — third or subsequent violation	4

TABLE 5
SEVERITY OF THE VIOLATION

Item	Column 1 Criterion	Column 2 Points
1	The employer derived competitive or economic benefit from the violation	0 to 6
2	The violation involved abuse of a foreign national (physical, psychological, sexual or financial)	0 to 10
3	The violation negatively affected the Canadian labour market or the Canadian economy	0 to 6
4	The employer did not make reasonable efforts to minimize or remediate the effects of the violation	0 to 3
5	The employer did not make reasonable efforts to prevent recurrence of the violation	0 to 3