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ESDC Considers Administrative Monetary Penalties and Longer Bans on Employers Who Violate the TFWP

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As was previously mentioned in the July 2014 issue of *Blaneys on Immigration*, on June 20, 2014, the Jason Kenney, Minister of Employment and Social Development, and Chris Alexander, Minister of Citizenship and Immigration, announced changes to Canada's Temporary Foreign Worker Program ("TFWP"). Among these changes was a proposal to impose fines of up to $100,000 on employers who violated the TFWP. The names of employers who were fined, and the amount of the fine, would also be published on the Blacklist.

At the end of September 2014, Employment and Social Development Canada ("ESDC") published a discussion paper, which proposed to implement an Administrative Monetary Penalty ("AMP") system for violations of the TFWP; penalties of up to $100,000 could be imposed under this new system. It also proposed to increase the maximum ban for employers who violate the TFWP from two years to ten years (a permanent ban was also being considered).

Under the current regulations, non-compliance with the TFWP may be justified (i.e. excused) in certain circumstances. According to Subsection 203(1.1) of the *Immigration and Refugee Protection Regulations* ("IRPR"), the permitted justifications include:

- A change in federal or provincial law;
- A change to the provisions of a collective agreement;
- The implementation of measures by the employer in response to a dramatic change in economic conditions that directly affected the business of the employer, provided that the measures were not directed disproportionately at foreign nationals employed by the employer;
- An error in interpretation made in good faith by the employer with respect to its obligations to a foreign national, if the employer subsequently provided compensation — or if it was not possible to provide compensation, made sufficient efforts to do so — to all foreign nationals who suffered a disadvantage as a result of the error;

- An unintentional accounting or administrative error made by the employer, if the employer subsequently provided compensation — or if it was not possible to provide compensation, made sufficient efforts to do so — to all foreign nationals who suffered a disadvantage as a result of the error;
- Circumstances similar to those set out above; or
- *Force majeure* (i.e. fire, flood, etc.).

If an employer can demonstrate that their failure to comply was justified, they will not be sanctioned under the current system.

For some reason, ESDC is concerned that the current regulations do not allow a non-compliant (but justified) employer to be sanctioned if they take corrective action. For example, if non-compliance due to an unintentional accounting or administrative error resulted in the underpayment of a temporary foreign worker, the employer cannot be sanctioned if the unpaid wages are paid. Of course, this is not necessarily a bad thing.

In response to this perceived loophole, ESDC is proposing to amend the IRPR so that consequences will be imposed on these non-compliant employers regardless of whether they take corrective action. Specifically, it wants non-compliance resulting from good faith errors and unintentional accounting or administrative errors to still be subject to sanctions such as an AMP, a ban, and/or the publication of the employer's name. Of course, ESDC claims that the employer's response to the violation (for example, the repayment of wages) would be taken into account in determining the amount of the AMP or the length of the ban so that there is still an incentive for the employer to take corrective action.

EDSC also claims that it would not change the justifications related to *force majeure* and changes to federal or provincial laws, collective agreements, and economic conditions (i.e. where the temporary foreign worker's hours are reduced below what was stated in the job offer due to an economic downturn that reduced the hours of all workers). Sanctions such as AMPs or bans would not be imposed on non-compliant employers when one of these justifications applies.

ESDC's rationale for its proposal is that the existing provisions to ban a non-compliant employer for two years and to revoke its Labour Market Impact Assessments ("LMIAs") and work permits may be too severe in some circumstances and not severe enough in others. It also claims that these consequences do not ensure that an employer does not benefit financially from non-compliance.

While the proposal to increase the maximum duration of the ban from two years to ten years is not unreasonable, the idea of imposing a financial penalty on employers who inadvertently become non-compliant due to a good faith error or an unintentional accounting or administrative error (caused by the employer) is questionable. The existing justifications are in place because the current system is intended to be remedial and to punish only violators whose actions are not justified.

By imposing penalties for inadvertent non-compliance due to good faith errors or unintentional accounting/administrative errors, ESDC will essentially impose strict liability on employers. If the intention really is to do that, there is no reason to retain the other justifications described in R203(1.1) either. If strict liability applies, even violations due to reasons beyond the control of the employer (i.e. *force majeure*) should be penalized, although these reasons can be considered when determining the appropriate penalty.

Of course, the imposition of strict liability for employers would not necessarily ensure greater compliance with the TFWP but it would impose even greater burdens on employers who are making a good faith attempt to comply. In other words, this would be a very bad idea.

There is certainly merit in applying AMPs to violations that do not fall under R203(1.1). Even where the violation cannot be justified, an employer ban or the revocation of the employer's LMIAs and work permits may be too severe a penalty under some circumstances. In addition, the current sanctions may not be severe enough to punish the most outrageous violators.

In general, the proposal to implement an AMP system is a reasonable one. However, it makes no sense to penalize employers who have made a good faith attempt to comply with the regulations. If the existing justifications described in R203(1.1) are retained and AMPs are imposed only in cases of unjustified non-compliance, the objectives of the TFWP program will still be served but will not place an undue burden on employers who are doing their best to comply.