Canadian Government Announces Changes to the Temporary Foreign Worker Program

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Introduction

On June 20, 2014, the Jason Kenney, Minister of Employment and Social Development, and Chris Alexander, Minister of Citizenship and Immigration, announced significant changes to Canada's Temporary Foreign Worker Program. Prior to these changes, there were essentially two categories of temporary foreign workers – those who required a Labour Market Opinion ("LMO") and those who were LMO-exempt. The purpose of the LMO was to assess whether issuance of a work permit to the foreign national would have a neutral or positive effect on the Canadian labour market.

Under the new structure, the LMO will now be replaced by the Labour Market Impact Assessment ("LMIA"). LMIA-exempt foreign workers will become part of the newly-named International Mobility Program. As a result, the Temporary Foreign Worker Program will only refer to foreign workers who require an LMIA.

The International Mobility Program

As mentioned above, the International Mobility Program will include foreign workers who are exempt from the requirement of an LMIA. Changes in the processing of exempt foreign workers are described below.

REQUIREMENT TO SUBMIT JOB OFFERS DIRECTLY TO CITIZENSHIP AND IMMIGRATION CANADA ("CIC")

Employers are not currently required to submit any information directly to CIC regarding job offers made to LMIA-exempt foreign workers. Under the new structure, employers hiring through the International Mobility Program will be required to submit the job offer and other relevant information to CIC. Foreign nationals will not be able to apply for a work permit until their employer has done so.

NEW FEE AND EMPLOYER COMPLIANCE SYSTEM FOR THE INTERNATIONAL MOBILITY PROGRAM [IMPLEMENTATION: SUMMER 2015]

The reforms will introduce an enhanced compliance monitoring system for employers who are employing foreign workers through the International Mobility Program. These compliance systems will be on par with the enforcement improvements being made by Employment and Social Development Canada ("ESDC") to the Temporary Foreign Worker Program.

This system will be made possible by the collection of a new compliance fee of CAD$230 per work permit (up from CAD$155), which will be imposed in the near future. This fee will apply in cases where the foreign national is LMIA-exempt and the work permit is tied to a specific employer.

NEW PRIVILEGE FEE FOR OPEN WORK PERMIT APPLICANTS [IMPLEMENTATION: SUMMER 2015]

Some LMIA exemptions allow for foreign nationals to apply for open work permits, which are not tied to a specific employer. The Canadian Government claims that there is often inadequate information available regarding the types of jobs that open work permit holders take and what effect they may have on the Canadian labour market.

As a result, CIC will imposing a CAD$100 privilege fee on holders of open work permits in the near future. The privilege fee will allow for improved data collection on the employment of open work permit holders. In addition, the funds collected will be used to increase awareness and promote the participation of Canadians in opportunities to live and work abroad, and to provide information to foreign nationals with open work permits and their employers, in order to promote their transition to permanent residence.

CHANGES TO SPECIFIC EXEMPTIONS

The Canadian Government is currently undertaking a comprehensive review of existing LMIA-exempt streams. Any streams that it finds do not warrant an exemption will be reclassified under the Temporary Foreign Worker Program.

In addition, the Canadian Government is making immediate changes to the following exemptions:

- **International Experience Canada ("IEC")** - The IEC consists of thirty-two mobility agreements that allow young Canadians to live and work abroad for up to two years without meeting labour market (and other) requirements, while providing reciprocal opportunities for young people from those countries to work in Canada; the number of spots available for each country is negotiated each year. However, the Canadian Government is concerned about the imbalance between the number of young people from partner countries participating in the IEC and the number of young Canadians participating abroad. To remedy this problem, the Canadian Government will increase its promotion of the program to make young Canadians aware of the IEC and work with partner countries to reduce administrative barriers to Canadian participants. It will also review each agreement to ensure that the rate of reciprocity is improved.

- **Intra-Company Transferees ("ICTs") with Specialized Knowledge [Implementation: Immediate]** - The Canadian Government has expressed concern that the ICT exemption applicable to specialized knowledge workers is being abused. To address this concern, guidelines have been implemented to strictly define the meaning of "specialized knowledge." Immigration officers will also be required to compare a foreign worker's proposed salary to the prevailing Canadian wage for that job, when assessing whether the worker truly possesses specialized knowledge. In addition, a wage floor has been imposed in any ICT specialized knowledge cases that are not based on an existing or future free trade agreement; this wage floor will be the prevailing wage for the occupation, in the region where the proposed employment will occur. Please note that CIC previously announced these changes on June 9, 2014.

The Temporary Foreign Worker Program

As mentioned above, the Temporary Foreign Worker Program will now only include foreign workers who require an LMIA. Changes in the processing of LMIAs are described below.

USE OF WAGE INSTEAD OF NATIONAL OCCUPATION CODES

Wage levels will now replace the *National Occupational Classification* ("NOC") as the main criteria for administering the Temporary Foreign Worker Program. This is based on CIC's claim that wages more accurately reflect occupational skill level and local labour market conditions.

Jobs for which proposed wages are below the provincial or territorial median wage will be considered "low-wage." Similarly, jobs for which proposed wages are at or above the provincial or territorial median will be considered "high-wage."

NEW LMIA PROCESS

The old LMO is being replaced by the more rigorous LMIA as the screening mechanism for employers seeking to hire temporary foreign workers. The following will apply to the new LMIA process:

- Employers will need to provide information on the number of Canadians that applied for a particular job, the number of Canadians that the employer interviewed and an explanation if Canadian applicants were not hired.
- Employers will need to attest they are aware of the rule that Canadians cannot be laid-off or have their hours reduced at a worksite that employs temporary foreign workers.
- New and better sources of labour market information will be used to determine if there are Canadians who could fill these positions.
- ESDC will refuse to process applications if there are concerns that temporary foreign workers may or will have a significant negative effect on the Canadian labour market.

CAP ON LOW-WAGE TEMPORARY FOREIGN WORKERS [IMPLEMENTATION: IMMEDIATE]

Employers with ten or more employees applying for a new LMIA will be subject to a cap of 10% on the proportion of their workforce that can consist of low-wage temporary foreign workers. This cap will be applied per worksite of an employer and is based on total hours worked at that worksite.

To provide employers who are above the 10% cap sufficient time to transition to the new rules, it will be phased in over the next couple of years. Effective immediately, if an employer that currently has a low-wage temporary foreign worker workforce exceeding the 10% cap applies for a new LMIA, it will either be limited at 30% or be frozen at its current level, whichever is lower. The transitional cap will be further reduced to 20% beginning July 1, 2015 and reduced again to 10% on July 1, 2016. The Canadian Government may also consider lowering this cap below 10% in the future.

REFUSING APPLICATIONS IN AREAS OF HIGH UNEMPLOYMENT

Applications for the lowest-wage, lowest-skill, entry-level occupations in the food services, accommodation and retail trade sectors will be barred from the Temporary Foreign Worker Program in areas of high unemployment (6% or higher). LMIA applications will not be processed if the employer meets all of the following criteria:

- It is applying for an LMIA in a Statistics Canada Economic Region with an annual unemployment rate over 6%;
- It is seeking an LMIA in a specific occupation identified under North American Industry Classification System ("NAICS") as Accommodations & Food Service or Retail Sales (NAICS 72, 44, 45); and
- It is seeking an LMIA in an occupation in one of the following NOC Skill Level "D" occupations: (1) 6641 (Food Counter Attendants, Kitchen Helpers and Related Occupations), (2) 6661 (Light Duty Cleaners), (3) 6611 (Cashiers), (4) 6622 (Grocery Clerks and Store Shelf Stockers), (5) 7611 (Construction Trades Helpers and Labourers), (6) 8612 (Landscaping and Grounds Maintenance Labourers), (7) 6672 (Other Attendants in Accommodation and Travel), (8) 6663 (Janitors, Caretakers and Building Superintendents), (9) 6662 (Specialized Cleaners), and 6651 (Security Guards and Related Occupations).

REFUSAL OF PENDING APPLICATIONS FOR LOW-WAGE POSITIONS [IMPLEMENTATION: IMMEDIATE]

ESDC will also refuse to process any pending applications for low-wage positions as of June 20, 2014. Any pending application that was submitted prior to June 20, 2014, for a position where the prevailing wage is below the provincial or territorial median hourly wage will no longer be processed. However, this provision is not applicable in the Province of Quebec.

REDUCING THE DURATION OF WORK PERMITS [IMPLEMENTATION: IMMEDIATE]

Effective immediately, the duration of work permits set out in an LMIA will be limited to a maximum of one year for all low-wage positions, rather than the two-year duration that previously applied. As a result, employers of low-wage temporary foreign workers will be required to reapply every year for a new LMIA.

REDUCING THE CUMULATIVE DURATION LIMIT FOR LOW WAGE STREAM [IMPLEMENTATION: SUMMER 2015]

The current cumulative duration limit for temporary foreign workers (subject to certain exceptions) is four years. The Canadian Government intends to reduce how long a temporary foreign worker in the low-wage stream will be able to work in Canada. However, this measure will not apply to temporary foreign workers currently in Canada on valid work permits.

CHANGING THE PROVINCIAL/TERRITORIAL TEMPORARY FOREIGN WORKER ANNEXES

Five provincial/territorial governments (Alberta, British Columbia, Ontario, Nova Scotia and Yukon) currently have annexes to their immigration agreements with the Canadian Government that establish LMIA exemptions in their jurisdiction. In these cases, the provinces and territories may propose LMIA exemptions for certain occupations and pilot projects involving exemptions to the LMIA process can be initiated.

The Government of Canada has given notice that it is changing these existing agreements. Any new agreements with provinces and territories will be much more limited in scope. As a result, more employers will be subject to the LMIA requirement.

REQUIREMENT OF TRANSITION PLANS FOR HIGH-WAGE POSITIONS [IMPLEMENTATION: IMMEDIATE]

Employers who want to hire temporary foreign workers in high-wage occupations will be required (with limited exceptions) to submit transition plans with their LMIA application to ensure that they are taking steps to reduce their reliance on temporary foreign workers over time.

The transition plans are in addition to the existing recruitment and advertising requirements that employers must meet to ensure that Canadians are given the first chance at available jobs. Transition plans will oblige employers of high-wage temporary foreign workers to help Canadians obtain in-demand skills through activities like investing in skills training or taking on more apprentices, or an employer can provide proof that they are helping a high-skilled temporary foreign worker transition to becoming a permanent resident of Canada.

Employers will also be required to undertake additional recruitment activities, including reaching out to organizations serving groups traditionally under-represented in the workforce (i.e. new immigrants, Aboriginal people, youth, Canadians with disabilities) to fill available jobs.

Employers will be required to report on the success of their transition plan the next time they apply to hire high-wage temporary foreign workers. Employers must also report on the results of their transition plan if they are selected for an inspection.

HIGHEST-DEMAND, HIGHEST-PAID AND SHORTEST-DURATION OCCUPATIONS [IMPLEMENTATION: IMMEDIATE]

LMIAs for highest-demand occupations (skilled trades), highest-paid (top 10%) occupations or short-duration work periods (120 days or less) will now be provided within a ten-business-day service standard. However, the LMIA will still be subject to the same rigorous review as a standard LMIA application.

FOREIGN PILOTS IN CANADA [IMPLEMENTATION: IMMEDIATE]

In recent years, concerns have been raised that some airlines are excluding Canadian pilots from seasonal jobs by requiring job applicants to already be trained on specific types of planes (type-rating) before they are hired. Effective July 1, 2014, airlines filing an LMIA on behalf of a foreign pilot must:

- Meet the minimum advertising requirements for high-wage occupations;
- Specify the following criteria in their job postings:
- No more than a maximum of 4,000 flight hours for a First Officer and 5,000 hours for a Captain as required experience;
- Possess a valid commercial pilot's licence;
- Require English and/or French language proficiency;
- Include industry standard medical testing requirements for commercial flight;
- State both the legal and common names of the airline operating in Canada;
- Not include as an essential or asset requirement the necessity of holding a type rating for a specific type of aircraft (although requiring applicants to have experience flying equipment that is similar in configuration and complexity to the airline's fleet is considered acceptable);
- Indicate when training bonds will be applied and they must cover a minimum of two years employment;
- Negotiate a transition plan with ESDC documenting the airline's future efforts and commitment to decrease the reliance on foreign pilots while increasing its complement of Canadian citizen and permanent resident pilots; and
- Submit LMIA applications a minimum of three months before the first day of work to ensure that ESDC can thoroughly review the application (any exception to this timeline must be requested prior to the LMIA being submitted).

NEW JOB MATCHING SERVICE

A new enhanced Job Matching Service will allow Canadians to apply directly through the Canada Job Bank for jobs that match their skills and experience, and provide information to program officers reviewing an employer's LMIA application on how many qualified Canadians have applied for specific jobs.

STATISTICS CANADA QUARTERLY JOB VACANCY SURVEY [IMPLEMENTATION: SPRING 2015]

To provide better information on job vacancies in Canada, Statistics Canada will conduct a new Quarterly Job Vacancy Survey at a cost of CAD$8 million per year. This survey will collect information on occupations in-demand, job openings, duration of job vacancies, educational requirements for occupations and other pertinent data.

This new Job Vacancy Survey (to be launched in the Spring of 2015) will collect data from up to 100,000 employers compared to 15,000 employers under the current Job Vacancy Survey. The data will be available at the provincial/territorial level and by Statistics Canada Economic Region. The current survey provides data only by province/territory. The new survey will also provide quarterly job vacancy estimates by occupation and skill level required.

STATISTICS CANADA ANNUAL NATIONAL WAGE SURVEY [IMPLEMENTATION: SPRING 2015]

Statistics Canada will conduct a new annual National Wage Survey (to be launched in the Spring of 2015) at a cost of CAD$6 million per year. The data will be collected from up to 100,000 employers, compared to 56,000 households previously. The previous survey's information is only accurate at the provincial level. However, the new Wage Survey will include a sample size large enough to provide reliable data broken down by province/territory and by Statistics Canada Economic Region.

BETTER USE OF EXISTING GOVERNMENT DATA [IMPLEMENTATION: SUMMER 2015]

The survey data will be supplemented by information from the Employment Insurance ("EI") program and other internal sources to accurately determine the availability of qualified Canadian workers. For example, program officers will know if employers requesting temporary foreign workers have recently laid-off Canadian workers. Program officers will also be able to determine if employers are requesting temporary foreign workers in regions where there are unemployed Canadians with the appropriate skills. EI data can also be used to help match unemployed workers with available jobs.

INCREASED NUMBER AND SCOPE OF INSPECTIONS [IMPLEMENTATION: IMMEDIATE]

Effective immediately, the Canadian Government is significantly increasing the number of inspections so that one in four employers using temporary foreign workers will be inspected each year. These inspections will take place as a result of tips, employers being deemed high-risk, and random audits.

MORE CRIMINAL INVESTIGATIONS [IMPLEMENTATION: AUTUMN 2014]

Employers suspected of criminal activities under the *Immigration and Refugee Protection Act* ("IRPA") are referred to the Canada Border Services Agency ("CBSA"). CBSA will receive new financial resources to increase its capacity to investigate suspected offenses by employers under the IRPA.

IMPROVED INFORMATION SHARING [IMPLEMENTATION: AUTUMN 2014]

The Canadian Government will improve its ability to collect and share information between government departments and other levels of government.

BLACKLIST, SUSPENSION AND REVOCATION [IMPLEMENTATION: FALL 2014]

If an employer violates (or is suspected of violating) the Temporary Foreign Worker Program, ESDC has the authority to suspend or revoke the employer's LMIA. An LMIA will be suspended while an employer is under investigation and will be revoked if, following an investigation, it found to have violated the program. ESDC will also not process any LMIAs for employers that are under investigation until the investigation is complete and the employer is found to not to

have violated the program. In addition to revocation, if an employer violates the Temporary Foreign Worker Program it will be banned and fined.

The names of employers whose LMIAs are suspended or revoked are currently being added to a public Blacklist website. Beginning in Fall of 2014, the Blacklist will also include the names of any employer who has been found to be in violation of the Temporary Foreign Worker Program and details of the penalty imposed.

MONETARY FINES FOR EMPLOYERS WHO VIOLATE THE TEMPORARY FOREIGN WORKER PROGRAM [IMPLEMENTATION: AUTUMN 2014]

Beginning in Fall of 2014, the Canadian Government will impose fines of up to CAD$100,000 (depending on the severity of the offence) on employers who violate the Temporary Foreign Worker Program. These new fines would be in addition to fines that can already be imposed on employers convicted of offences under IRPA. The Canadian Government will also publicly disclose the names of employers who have been fined and the amount of the fine on the Blacklist.

INCREASED LMIA APPLICATION FEE [IMPLEMENTATION: IMMEDIATE]

The LMIA fee will increase from CAD$275 to CAD$1,000 for every temporary foreign worker position requested by an employer. ESDC will also be seeking the authority to impose an estimated CAD$100 privilege fee on employers applying for LMIAs to offset the costs of Government of Canada investments in skills and job training.

EXEMPTIONS FOR ON-FARM PRIMARY AGRICULTURE AND LIVE IN CAREGIVER PROGRAM APPLICANTS

On-farm primary agriculture, including the Seasonal Agricultural Worker Program (“SAWP”), will be exempt from the fee, the cap, the one-year LMIA duration, and the reduction in the period that a low-wage temporary foreign worker will be allowed to remain in Canada; there are proven acute labour shortages in this sector and the unfilled jobs are truly temporary. The Live-in Caregiver Program (“LCP”) is also exempt from the cap, the one-year LMIA, and the reduced duration in Canada. All other measures including stronger enforcement and tougher penalties will apply to on-farm primary agriculture, SAWP and LCP.

END OF MORATORIUM ON FOOD SERVICES SECTOR [IMPLEMENTATION: IMMEDIATE]

In light of the above changes to the Temporary Foreign Worker Program, the Canadian Government is ending the moratorium that was placed on the food services sector on April 24, 2014.

Conclusion

The Canadian Government has not provided a timetable for all of the announced changes. However, it is clear that some changes have not been implemented yet, while others have been scheduled for implementation at some future date. In any event, the above changes, once fully

implemented, will make it much more difficult for Canadian employers to hire temporary foreign workers.