

Management Alert



Canada Announces Overhaul of the Temporary Foreign Worker Program

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The following alert is directed to organizations with a presence in Canada or who anticipate the need to place talent at a Canadian work site.

Seyfarth Shaw's Global Mobility Practice hosts attorneys licensed to practice in the UK, Canada, and Germany. The group has the capability to assist clients with obtaining work and residence visas for over 70 jurisdictions around the world. If we can assist you in placing talent, please call your Seyfarth attorney. We will be happy to help you.

The Government of Canada recently announced the restructuring of the Temporary Foreign Worker Program into two major work permit application streams:

- 1.) Applications for a work permit requiring a test of the Canadian labor market through the new and more vigorous Labour Market Impact Assessment ("LMIA") test to replace the former Labour Market Opinion ("LMO") regime. This is the general work permit category and only specific exemptions apply. It involves an application by the Employer directly to the Ministry of Economic and Social Development Canada ("ESDC"); and
- 2.) Applications for a work permit under the International Mobility Program ("IMP"). These work permits will further Canada's economic, social and cultural interests, including reciprocal treaties (such as NAFTA), and are exempted from the requirement to obtain a LMIA. The IMP will encompass all work permit applications that were previously classified as LMO-exempt work permits. This includes work permits for intracompany transferees, such as senior managers and specialized knowledge employees.

Essential elements of the LMIA regime take effect immediately, whereas the changes to the IMP will be rolled out over the course of several months with reforms to be completed by Summer 2015. This announcement signals a clear resolve to significantly restrict the use of the Temporary Foreign Worker Program while increasing compliance measures against employers across all work permit streams.

Effective Immediately — Canada Creates a New Labour Market Impact Assessment Regime

Canada Announces Tougher Compliance Measures for Employers Using the Temporary Foreign Worker Program

Canada Proposes a New International Mobility Program, Including Work Permits under NAFTA

Canada Creates a New Labour Market Impact Assessment Regime

Effective immediately, Canada has abolished the previous Labour Market Opinion (the “LMO”) regime and replaced it with a significantly more robust and rigorous test of the Canadian labour market. The new Labour Market Impact Assessment (the “LMIA”) regime will ensure that employers are only using this program as a last resort when no qualified Canadians are available. Employers will continue to submit applications to the Ministry of Economic and Social Development Canada (“ESDC”) to temporarily fill a position for a specific occupation and provide significant proof of recruitment efforts.

Measures to Take Effect Immediately

The new LMIA regime differs significantly from the former LMO regime. The following changes are effective immediately:

- 1.) **New Application Fees:** Non-refundable application fees have increased from \$275.00 CAD to a \$1000.00 CAD non-refundable fee for every position an employer requests in a LMIA application. Any requests for reconsideration will also trigger a new application and processing fee for each position.
- 2.) **New Application Streams:** The main criteria for segmenting and assessing new applications under the LMIA regime is the wage level. All applications will either fall under the low wage or the high wage application stream replacing the former application streams that were based on the National Occupational Classification (“NOC”). Each province is assigned a median wage and if an individual is paid more than the median hourly wage in the province or territory of destination, he or she will apply under the high-wage stream. All other applications will be considered low-wage regardless of the occupation. Please note that the individual position must continue to meet the Prevailing Wage requirement.
- 3.) **Increased Disclosure Requirements for Employers:** Employers will be required to provide significantly more information regarding recruitment efforts to justify the unavailability of a Canadian worker, including more information regarding the number of applicants, the number of interviews conducted and the reasons for rejecting Canadian applicants. The application forms are therefore more rigorous, requiring an increased level of disclosure. Employers must also confirm that Canadians should not or have not been laid off or have their hours reduced at a worksite that employs temporary foreign workers.
- 4.) **Guaranteed 10-Day Processing for Certain Positions:** The highest-demand (skilled trades receiving a high wage), highest-paid (top 10%) or shortest-duration (120 days or less) applications will be adjudicated within a 10-business day service standard.
- 5.) **Mandatory Transition Plans for High-Wage Positions:** For those employers seeking to fill a high-wage position, employers are now required to submit a transition plan that will require employers to prove they intend to increase efforts to hire more Canadians. Transition plans will need to reference activities that will include investing in skills training, hiring apprentices or assisting in the transition to permanent residency. Employers will need to report on the progress made with their transition plans at the time of any new LMIA application or if selected for compliance reviews or inspections. There are certain exemptions to this new requirement available to employers including whether the position requires unique skills or is of a limited duration.
- 6.) **Introduction of Caps for Low-Wage Positions:** For those employers seeking to fill a low-wage position, there is a cap on the number of low-wage temporary foreign workers that can be employed by an employer. Although there are transitional measures in place for those currently employing a significant number of low-wage temporary foreign workers, new applications by employers with ten or more employees are subject to a cap of 10 percent on the proportion of their work force that can consist of low-wage temporary foreign workers.
- 7.) **Limiting Work Permit Duration for Low-Wage Positions:** For those employers seeking to fill a low-wage position, work permit duration will be limited to a maximum of one year (with the option to re-apply after completing another LMIA). By Summer 2015, the Government of Canada will introduce a new maximum cap for all temporary foreign workers in the low-wage stream.

8.) Failure to Process Applications in Specified Positions in Specific Sectors in Areas of High Unemployment: LMIA applications for occupations in the accommodation, food service and retail trade sectors will not be refused in economic regions with an unemployment rate of six percent or higher if the position requires little or no education or training.

The Government of Canada also confirmed that in the near future, ESDC officers will have access to a comprehensive Labour Market analysis to support the new LMIA applications.

By Spring 2015, Statistics Canada will launch a new Quarterly Job Vacancy Survey and Annual National Wage Survey to provide reliable data per province or territory. This data will be analyzed and available for ESDC officers by Summer 2015.

Supplemented by an Employment Insurance Program that supports unemployed Canadians, Canada will also introduce a new enhanced Job Matching Service (JMS) allowing Canadians to apply directly through the Canada Job Bank for jobs that match their skills and experience including direct links to those positions available by Employers submitting applications under the LMIA regime.

Canada Announces Tougher Compliance Measures for Employers Using the Temporary Foreign Worker Program

As of December 2013, Citizenship and Immigration Canada ("CIC") and ESDC were granted significant inspection powers to: conduct warrantless on-site visits to a worksite employing foreign workers; interview temporary foreign workers and other employees; and compel employers to provide documentation to verify compliance with the program. Employers breaking the rules could be banned from the Temporary Foreign Worker Program and have their names published on a public List of Non-Compliant Employers. The penalty imposed would include suspensions or revocations of any positive Labour Market Opinion granted on the basis of incorrect information.

Increased Inspections and Abuse Detection Measures

Effective immediately, a dedicated team of ESDC Inspectors will "massively increase" the amount of inspections so that one in four employers using the LMIA regime will be subject to inspections each year. Moreover, ESDC has launched a Confidential Hotline and a Complaints web page to increase detection of abuse by employers.

Increased Information Sharing

In Fall 2014, ESDC intends to compel banks and payroll companies to provide bank records and payroll documentation to help inspectors verify that employers are complying with the regulations. In addition, information sharing agreements will be fully implemented among Canada Border Services Agency ("CBSA"), CIC and ESDC. By March 2015, Canada will ensure that new, more comprehensive information sharing agreements among the various provinces/territories are implemented so that employers violating provincial labour laws, health and safety standards or recruiting laws will be subject to greater scrutiny and will be considered "high-risk" employers by ESDC. ESDC will also reciprocate and provide information to provincial government bodies to increase effective compliance measures.

Increased Enforcement Measures

The CBSA is also receiving new funding to increase investigations of suspected cases of employers engaging in criminal offences under the Immigration and Refugee Protection Act ("IRPA") for employing a foreign national that is not authorized to work in Canada (section 124), counseling misrepresentation (section 126) or misrepresentation (section 127). Penalties for IRPA offences include significant fines of up to \$100,000 CAD and/or up to five years of imprisonment.

Beginning in Fall 2014, Governments will impose new additional fines of up to \$100,000.00 on employers based on the nature and severity of the offence including misrepresentation or omissions on the LMIA applications. The offending employers will be publicly disclosed on the List of Non-Compliant Employers.

Canada Proposes a New International Mobility Program, Including Work Permits under NAFTA

The Canadian government announced its intention to introduce significant regulatory changes to the International Mobility Programs including applications under the NAFTA and other Free Trade Agreements. These regulatory changes are scheduled to take effect in Summer 2015.

Currently, many work permit applications under the IMP are exempted from the requirement to first obtain an LMIA. Pending reforms will include a regime where all work permit applications under the IMP will first require employers submit the job offer and other relevant information to CIC. Foreign workers intending to apply under these LMIA-exempt categories will not be permitted to apply for a work permit in advance. It is unclear at this time the exact nature of the proposed 2015 amendments. However, it is clear that the Canadian government intends to increase enforcement and compliance measures by the Summer of 2015 for all work permit applications, including under the IMP, which will include an element of inspections, compliance review reporting and revocations of work permits similar to those currently being conducted by ESDC.

In addition, a new work permit application fee of \$230.00 will be introduced in Summer 2015. CIC will also introduce a new \$100.00 open work permit "privilege fee."

Seyfarth Shaw's Global Mobility team will keep you apprised of the changes as they are announced and help you navigate through these significant changes.

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