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Management Alert

Canadian Immigration: Revisiting Canada's Tough New Employer Compliance Regime

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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.

Strict New Penalties for Non-Compliant Employers

The Government of Canada is increasingly focused on employer compliance and has implemented a number of initiatives since 2014, including the overhaul of the Temporary Foreign Worker Program, the launch of the new Labour Market Impact Assessment ("LMIA") application process and requirements, and significant processing changes to the LMIA-exempt International Mobility Program ("IMP").

With these new regulatory changes, the Canadian Government has taken extensive measures to gather information directly from employers about the offer of employment underlying every Canadian work permit application, when historically, this information was not required. Although the LMIA regime typically requires an application form and the submission of significant documentation and information, the LMIA-exempt work permit applications, such as Professionals under a Free Trade Agreement (NAFTA, for example) or intra-company transferees (specialized knowledge or senior managers) were not typically required to submit significant information about the nature of operations in Canada and the offer of employment.

The pre-clearance compliance filing process launched in February 2015, and revamped through the mandatory online Employer Portal filing process implemented in October 2015, now requires every employer to submit significant information about the nature and scope of business operations in Canada, identification information about each employee, his or her job duties, job title, wages, benefits, and working conditions. In addition, since February 2015, Canadian immigration officials have begun collecting a $230 CAD compliance fee to fund investigations of potential non-compliance.

New Significant Penalty Regime

In an effort to reiterate the importance of compliance, Immigration, Refugees and Citizenship Canada ("IRCC") also introduced significant new penalties for non-compliance. For all non-compliance findings after December 1, 2015, employers may receive a one, two, five, or ten-year ban from submitting work permit applications. In egregious circumstances, a new lifetime ban may be imposed.

Further, as of December 1, 2015, an employer may also face Administrative Monetary Penalties ("AMP"), which can range from $500 to $100,000 CAD per violation. There is a $1 million CAD dollar cap for cumulative AMPs per year. Employers will be given the opportunity to provide a response to non-compliance allegations or findings of an inspection and will be given an opportunity to explain any discrepancies while potentially relying on "good faith errors" that were administrative in nature or resulting from human error. Employers facing bans or penalties will continue to be posted online on a "Non-compliant Employer" list in an effort to publicly discredit these employers.

Overview of Compliance Requirements

It is critical that employers contact the Seyfarth Shaw Canadian Immigration team in light of any fundamental changes to its business in Canada or to an employee's job title, job duties, wages, and/or working conditions following the issuance of a Canadian work permit. Such changes in employment must be well-documented internally.

During the period of employment for which the Canadian work permit is issued to the employee, the employer must ensure:

- It is actively engaged in the business in which the offer of employment is made;
- It is compliant with federal and provincial laws that regulate employment (including the recruitment of employees);
- It provides (or has provided) the employee with employment in the same occupation as set out in the foreign national's offer of employment and with wages and working conditions that are substantially the same, but not less favorable, than those set out in the offer; and
- It makes reasonable efforts to provide a workplace that is free from abuse.

During the period of employment for which the work permit is issued to the employee based on a positive LMIA, the employer must also ensure that it follows through on any of the factors/representations it made to Department of Employment and Social Development Canada ("ESDC") that led to the issuance of the work permit, including:

- That employment will result in direct job creation or retention of Canadian citizens or permanent residents;
- That employment will result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- Hiring or training of Canadian citizens or permanent residents; and,
- Making reasonable efforts to hire or train Canadian citizens or permanent residents.

Employers must demonstrate that the offer of employment information is accurate and that the employer complied with the regulations. Employers are also responsible for maintaining documentary evidence with regard to the above measures for six years beginning on the first day of the period of employment for which the work permit is issued.

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