Understanding the New Temporary Foreign Worker Program

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Some franchises, like other businesses in Canada, have relied on the support of foreign workers to temporarily deal with their labour shortages, where there are no Canadian citizens or permanent residents available. Due to recent major changes in corporate/business immigration law, employers must now reassess their global immigration and mobility strategies in response to said shortages and to ensure full compliance with Canadian laws and regulations.

On June 20, 2014, the Ministers of Employment and Social Development (“ESDC”) and Citizenship and Immigration (“CIC”) introduced an important reform to the Temporary Foreign Worker Program (“TFWP”). Said reform changed the landscape for a number of Canadian employers by restricting their access to the TFWP. The reform has been accompanied by a stronger enforcement, strengthened penalties for non-compliance and a structural and more comprehensive reorganization of the immigration program.

Employers must be aware that while some of the changes to the TFWP have been implemented to be effective immediately, the government decided to phase-in the implementation of many components of the reform. Consequently, unless indicated otherwise, the changes to the TFWP described in this article are deemed to be effective immediately.

A Reorganized TFWP

From now on, the TFWP only includes the following two broad programs: (i) the TFWP; and (ii) the International Mobility Programs (“IMP”).

The TFWP refers to those streams that require the approval from ESDC of a Labour Market Impact Assessment (“LMIA”), formerly known under the old regime as a Labour Market Opinion or for its acronym as a LMO. A LMIA evaluates the impact that hiring temporary foreign workers could have on the Canadian labour market. In order to be successful when applying for a LMIA, employers need to demonstrate, after having met specific advertising requirements, that there are no qualified Canadian citizens or permanent residents to fill a job position and that the hiring of a prospective foreign worker will not have a negative impact on the Canadian labour market. As part of the LMIA process, employers first need to advertise their positions in Canada for a minimum period of four weeks and to continue to actively seek qualified Canadian citizens and permanent residents to fill said positions from the time the LMIA application is submitted until it is finally approved by ESDC. Employers need to keep the recruitment documents that were used during the LMIA process, like the resumes from the applicants who applied for the advertised position, for a period of six years. Thus, developing retention procedures of specific documents and keeping more detailed records of recruitment efforts are key elements that should be considered by employers using the program. After the employer obtains LMIA approval from ESDC, the prospective employee will become eligible to apply for a work permit from CIC.

Contrary to the TFWP, the IMP does not require LMIA approval and encompasses those streams of work permit applications that are aimed to advance Canada’s broad economic and cultural national interest, rather than finding solutions to shortages in the Canadian labour market. The IMP is largely based on multilateral/bilateral agreements and the particular skill set and other characteristics of the prospective foreign worker (e.g. individuals eligible to apply under GATS/NAFTA, Intra-company Transferees, etc.). CIC is the department responsible for administering this LMIA-exempt program.
The New LMIA

These are some of the highlights of the new LMIA process:

1. Disclosure requirements

When applying under the new TFWP for LMIA approval, employers are required to disclose the number of Canadian citizens and permanent residents that applied for a particular position, to indicate how many were interviewed and to provide an explanation as to why their applications were rejected. Employers are also required to attest that they are aware of the rule that Canadian citizens and permanent residents cannot be laid-off or have their hours reduced at a worksite that employs temporary foreign workers.

2. Switch to a wage-oriented program

While the former regime was mainly focused on assessing skill levels based on the parameters found in the National Occupational Classification Matrix ("NOC"), the new LMIA uses instead a wage assessment as the main criteria to determine the occupational skill levels of a given position.

Employers should use Job Bank (Government of Canada’s recognized job listing website) to gather all the necessary labour market information needed for the purposes of preparing a LMIA application. Interestingly, the LMIA program uses the 2006 edition of the NOC coding system to determine the skill level of a given occupation.

One must still be mindful that, like it was under the former program, a determination as to whether a given occupation is to be considered a higher-skilled occupation (coded at the NOC as management occupations, skill level A or B) or a lower-skilled occupation (coded at the NOC as skill level C or D) still remains relevant despite the new wage assessment rules of the TFWP. Indeed, this skill level assessment would help the employer to determine certain formalities that may apply when filing for LMIA approval (e.g. applicable LMIA forms, particular advertisement requirements, etc.).

3. LMIA streams

The LMIA now includes the following streams:

(i) High-wage

Positions where the prevailing wage is at, or above, the provincial/territorial median wage, where the job is located. Some examples generally include managerial, scientific, technical/skill trades and professional positions.

In most cases, employers applying under this stream are required to submit a transition plan in addition to complying with the advertising requirements of the program. One of the main governmental objectives of implementing a transition plan is to ensure that the employer will reduce his reliance on temporary foreign workers over time. Efforts to help Canadian citizens or permanent residents to obtain in-demand skills or to facilitate the transition to permanent residency of a temporary foreign worker are some of the activities that meet the conditions of a transition plan. Employers are required to report on the results of their transition plans when they reapply for LMIA approval or during the course of an inspection.
(ii) Low-wage

Positions where the prevailing wage is below the provincial/territorial median wage, where the job is located. Some examples generally include general labourers and sales and service personnel. It is important to mention that not all lower-skilled occupations are to be considered low-wage positions.

Applications by employers with 10 or more employees will not be accepted if more than 10% of the workforce in the intended work location consists of low-wage temporary foreign workers. This cap will be phased-in over the next 2 years to allow employers who have used the TFWP prior to the overhauling of the program with time to transition. The transition will be made as follows:

- currently limited to 30% or frozen at their current level, whichever is lower;
- reduced to 20% as of July 1, 2015; and
- further reduced to 10% as of July 1, 2016.

For example, employers who currently exceed the 10% cap will have until July 1, 2015 to get their proportion of low-wage temporary foreign workers reduced to 20%, and until July 1, 2016, to have it further reduced to 10%.

Finally, the duration of work permits issued under this stream has been reduced from two years to one year. As such, employers seeking approval for low-wage positions will be required to reapply annually for a LMIA. It has been announced that in Summer 2015, the government will reduce the cumulative period during which low-wage temporary foreign workers will be allowed to work in Canada.

(iii) Primary agricultural

Positions related to on-farm primary agriculture. Some examples generally include farm workers, feed lot workers and harvesting labourers.

(iv) Priority assessment

It encompasses 3 categories of occupations that benefit from a 10 business days service standard:

(a) Highest-demand. For skilled trades listed as highest-demand occupations that have a prevailing wage at, or above, the provincial/territorial median wage, where the job is located. Some of the skilled trades that are currently listed include many occupations in the construction sector, such as contractors and supervisors of electrical, mechanical and carpentry trades, occupations for oil and gas drilling services, power engineers and different types of construction operators and workers.

(b) Highest-paid. Category available when the prevailing wage for the position is at or above the top 10% of wages earned by Canadian citizens or permanent residents in the province/territory, where the job is located. Relevant information on the provincial/territorial hourly wages for this category is available at ESDC’s official website.

(c) Shortest-duration. Available to employers seeking to hire temporary foreign workers for a short duration (less than 120 calendar days) in any occupation where the prevailing wage is at, or above, the provincial/territorial median wage, where the job is located.
(v) **Live-in caregiver**

For individuals who are qualified to provide care for children, elderly persons or persons with disabilities in private homes.

4. **Modifications to the provincial/territorial agreements**

In order to expand the reach of the new rules and to make more employers subject to the new LMIA process, the government has announced modifications to the existent five provincial/territorial immigration agreements (Alberta, British Columbia, Yukon, Nova Scotia and Ontario). As a result, it is anticipated that the annexes to these immigration agreements (containing special exemptions to the LMIA process) will be amended in the coming months.

Moreover, the government has also announced that any new agreements with other provinces and territories will be much more limited in allowing for LMIA exemptions.

5. **Applications in regions with high unemployment rates will not be processed**

Although ESDC has lifted the moratorium on employers applying for LMIA approval in the food services sector due to allegations of abuse of the TFWP, employers should be aware that certain LMIA applications in areas of high unemployment rates are currently not being processed. Presently, the following LMIA applications are not being processed by ESDC (provided they meet all the three criteria):

(i) the employer applies for LMIA approval in a Statistics Canada economic region with an annual unemployment rate of 6% or higher;

(ii) the employer applies for LMIA approval in a specific occupation identified under the North American Industry Classification System as Accommodations & Food Service or Retail Sales (NAIC 72, 44, 45); and

(iii) the employer applies for LMIA approval in a selected occupation that requires little or no training. The current selected occupation titles are: (i) food counter attendants, kitchen helpers and related occupations (NOC 6641); (ii) light duty cleaners (NOC 6661); (iii) cashiers (NOC 6611); (iv) grocery clerks and store shelf stockers (NOC 6622); (v) construction trades helpers and labourers (NOC 7611); (vi) landscaping and grounds maintenance labourers (NOC 8612); (vii) other attendants in accommodation and travel (NOC 6672); (viii) janitors, caretakers and building superintendents (NOC 6663); (ix) specialized cleaners (NOC 6662); and (x) security guards and related occupations.

6. **Increased LMIA processing fee**

The LMIA processing fee has been raised from $275 to $1,000 for every position being requested.

Moreover, ESDC has announced that it will seek the authority to impose an estimated $100 privilege fee on employers applying for LMIA approval in order to offset governmental investments in skills and job training. This privilege fee is likely to be applicable in 2015.
Best Practices

Adapting the way you do business and understanding the underlying principles of the new TFWP will help you to navigate the new international mobility challenges that were created by the substantial regulatory changes that were introduced by the Canadian government. Employers are strongly encouraged to:

- consult the ESDC and CIC websites for updates on the TFWP on a regular basis;
- develop innovative transition plans that are customized to their type of business/industry;
- implement internal immigration policies, guidelines and protocols that would facilitate compliance of the new TFWP requirements;
- make sure that the hiring of temporary foreign workers will not result in outsourcing or offshoring of Canadian jobs and in any other forbidden practice. Offshoring refers to the shifting of a business function from one country to another country while outsourcing involves moving production outside of a business; and
- establish appropriate recruitment procedures and document retention practices for inspection and compliance review purposes.

Employers should be aware that the government has announced a massive increase on the number of inspections and investigations, including on-site visits, that will be carried as part of the overhauling of the TFWP. Also of note is that ESDC has the authority to revoke or suspend an employer's LMIA for various reasons relating to non-compliance of the new TFWP rules and to include an employer's name in a public blacklist. Presently, there are four businesses named on the blacklist.

The government has announced that, effective this fall, fines of up to $100,000 (depending on the type of offence) will be applicable to employers who break the law. These fines are in addition to those that can be imposed to employers for offences under the Immigration and Refugee Protection Act.

If you have any questions about this information or if you would like further information about the new TFWP rules, please contact the authors, Pablo Guzman (pguzman@davis.ca) or Julio Mena (jmena@davis.ca).

This publication is intended to provide our general comments on developments in the law. It is not intended to be a comprehensive review nor is it intended to provide legal advice. Readers should not act on information in the publication without first seeking specific advice on the particular matter. The firm will be pleased to provide additional details or discuss how this information is relevant to a specific situation.

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