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UNDERSTANDING THE NEW RULES FOR TEMPORARY FOREIGN WORKERS

By Rita Tripathy
Burnet, Duckworth & Palmer LLP

HISTORY INFORMS US that the Alberta government takes the rights of temporary foreign workers seriously. In April 2009, multiple charges were laid against employer companies following an investigation into the deaths of two temporary foreign workers at an oilsands construction site.

The Temporary Foreign Worker Program (TFWP) was designed by the federal government and implemented in 1973 to allow Canadian employers to hire foreign workers to address short-term labour and skill shortages. Service Canada authorizes employers to hire temporary foreign workers through an authorization known as a Labour Market Opinion (LMO). The Government of Canada says that the LMO “assesses the impact the foreign worker would have on Canada’s labour market or, in other words, how the offer of employment would likely affect Canadian jobs. An employer needs a positive Labour Market Opinion to hire a temporary foreign worker.”

Due to the increased number of these workers arriving in Canada, and abuse by some employers, the federal government enacted amendments to the program. These changes came into effect on April 1, 2011.

There are three key amendments to the TFWP:

- A four-year limit on work permits
- Consequences of non-compliance by employer
- The criteria for a genuine offer of employment

THE FOUR-YEAR LIMIT ON WORK PERMITS

Under the amended TFWP, foreign workers will only be able to hold a work permit for a cumulative period of four years and would not be eligible for a subsequent work permit for a further four years. The clock started on April 1, 2011.

This limit does not affect eligibility for permanent residence; the worker may still apply, at any time, while they are legally in Canada or after they return home, provided they qualify for residency. There are some temporary foreign workers who are exempted from the four-year limitations period:

- Those in managerial and professional occupations
- Those who have applied for permanent residence and received the necessary positive assessments
- Those employed under international agreements
- Those who are LMO-exempt (i.e. intra-company transfer)

With the new four-year limit, employers are well-advised to plan ahead for permanent residency for highly valued foreign employees.

THE CONSEQUENCES OF NON-COMPLIANCE

One of the most important changes to the TFWP from an employer’s perspective are the consequences for failing to comply with the program’s standards, namely, failure to comply with a prior LMO. The new LMO application requires the employer to provide any temporary worker with “wages, working conditions and employment in an occupation that are substantially the same” as those described in the prior LMO. Employers who fail to do so may be found to be in non-compliance and be subject to a

two-year ban from hiring any foreign workers. An employer found to be in non-compliance will be given the opportunity to justify any discrepancies between the LMO and company practice and, if the employer takes corrective action to account for the differences, this may reverse an initial finding of non-compliance.

The consequences of a finding of non-compliance are wide and varied, where possible penalties may include:

- Denial of any pending LMOs
- Revocation of positive LMOs
- Declaration of ineligibility for participation in the TFWP for the following two years
- Publication of the employer’s information on the Citizenship and Immigration Canada website
- Prevention of temporary workers from entering into an employment contract or extending an existing contract with an offending employer

Experience resulting from the prosecutions commenced in 2009 is an indication that the Government of Alberta will not hesitate to dole out consequences as severe as a two-year ban where a finding of non-compliance is made.

THE GENUINE JOB OFFER

Under the amended TFWP, the requirement for employers to demonstrate the genuineness of the job offer is an entirely new addition—

no such requirement existed previously. Employers who are new to the TFWP may be asked to complete a declaration form which requests general corporate information as well as a description of the principal business activity of the employer. It is noteworthy that the examining officer has discretion to request more information if he or she deems it necessary.

The four factors used in the assessment of the genuineness of a job offer are as follows:

1. Whether the job offer was made by an employer who is actively engaged in business. To satisfy this requirement the employer may be required to produce T4s and other relevant business documents. If the employer is a start-up company, a copy of the incorporating documentation may be required as well as an attestation by a lawyer or notary substantiating that the employer is actively engaged in the operation of business in Canada.

2. Whether the job offer is consistent with the reasonable employment needs of the employer. To satisfy this factor, the employer is required to demonstrate the purpose of the worker, more specifically, how the position will fit into greater business needs.

3. Whether the employer is reasonably able to fulfill the terms of the job offer. The primary concern is that the employer has

the ability to financially support the temporary foreign worker. Documents addressing the employer's financial stability will likely be required where employers are new to the program.

4. Whether the employer shows past compliance with federal/provincial/territorial laws that regulate employment in the jurisdiction where the worker will be working. This final factor is closely related to other amendments into the TFWP, which can be viewed as an effort to ensure that past violators of the TFWP standards will be denied participation in the program.

The amendments are a clear attempt on the part of regulators to further protect foreign workers, particularly from past employers who have demonstrated a lack of respect for worker's rights. Where an employer is found to be in violation of any of the four factors, the result will be a finding that future job offers are disqualified for a period of two years, and the employer will be unable to hire or renew a work permit for any foreign national during that time. Such a finding will often involve examining whether the employee's wages, working conditions or occupation were substantially the same as that which was initially promised.

The reality is that many workplaces have a fluid environment where employees are

asked to accept changes in position and/or pay. Employers who enact such changes without justification or properly informing the appropriate government authorities may be denied the ability to participate in the TFWP going forward. There are certain preventive measures that employers can take, including specifying on the LMO application form and on any offer letters whether the employee is entitled to regular salary increases in accordance with corporate policy. Companies should also educate their human resources personnel on the requirements to report, in advance, job promotions, location changes and changes in job duties that might change the National Occupation Classification.

GOING FORWARD

The legislation is very new and it will be interesting to see how Service Canada interprets it in practice. We are already experiencing longer waits for LMO opinions, presumably because of the greater time required to scrutinize applications. **OSR**

Rita Tripathy is a partner at Burnet, Duckworth & Palmer LLP who practices in the area of business immigration and insurance & risk management.

upcoming events

DECEMBER 2011

SUN	MON	TUE	WED	THU	FRI	SAT
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

THURSDAY 1
HR SUMMIT WEST 2011
 The Banff Centre, Banff, Alberta
www.conferenceboard.ca

TUESDAY 6
CANADIAN HEAVY OIL ASSOCIATION
TECHNICAL LUNCHEON—RESERVOIR
 Calgary, Alberta
www.choa.ab.ca

TUESDAY 6 - WEDNESDAY 7
2011 SHUTDOWNS SUPER CONFERENCE
 Calgary, Alberta
www.shutdownsuperconference.com

WEDNESDAY 14
ALBERTA OILSANDS LAND SALE
www.energy.alberta.ca/oilsands/831.asp