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Hiring foreign workers? Tread carefully

Promotions, demotions or a change in work location could all be violations of the work permit with serious consequences for employers

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Severe labour shortages in many industries have heightened the need for qualified workers across the country. Many companies are hiring foreign workers to fill the gap left by an aging population, a lack of qualified prospects in Canada and opportunities for growth at home and abroad.

While Canadian employers are now feeling the need to look abroad for qualified skilled workers, caution is necessary.

The Immigration and Refugee Protection Act (IRPA), in force since June 28, 2002, contains a number of provisions dealing with misrepresentations made by foreign nationals or by others with respect to applications for immigration status. Employers should be particularly careful when hiring foreign workers to ensure no misrepresentation is made to the authorities by any party to an application. The spectre of potential liability is very real under the current immigration legislation.

Employers should pay special attention to the provisions of section 124 of the IRPA. Specifically, section 124(1)(c) appears to be far reaching in its scope and may prove worrisome for employers.

The language, which states that it's a contravention of the act to "employ a foreign national in a capacity in which the foreign national is not authorized under this act to be employed," is very broad. It could be interpreted to cover any situation where there is a change in the employee's duties or in the terms of employment.

If a foreign worker receives a promotion, the conditions of her work permit may be violated and the employer could find itself in contravention of section 124(1)(c) of the act. Similarly, if an employer merges or is acquired by another company and this results in a change in the foreign worker's duties or reassignment to another location, the provisions of the act could also be contravened by the employer.

Generally speaking, when a foreign worker enters Canada, she receives a work permit. The permit could be issued by Citizenship and Immigration Canada (CIC) pursuant to an exemption from the IRPA Regulations (as in the case of intra-company transferees or other exempt categories), or it could be granted after the issuance of a labour market opinion by the Foreign Worker Unit of Service Canada when the employer has demonstrated there are no Canadians available for the position.

Or there could be a transfer of skills to Canada, a need to fill a labour shortage or a situation where other benefits could ensue. In each case, the entry of the foreign worker into the Canadian labour force is governed by the terms and conditions set out in the work permit or in the labour market opinion. A senior manager or a specialized knowledge worker could enter Canada as an intra-company transferee based on his status in the corporate structure, seniority, special skills, knowledge and salary commensurate with the position. However, if there is a change in the corporate structure which results in a change in the assignment of the foreign worker, a contravention of the act could occur.

Also, where a foreign worker is admitted to Canada to perform duties for an employer at a specific location, but the workplace is changed to another province, a contravention could also take place.

In cases where a labour market opinion has been issued, a contravention of the act could have serious ramifications. Labour market opinions set out, in great detail, the terms and conditions of employment including salary, vacation, benefits and place of employment. The opinions are issued after a careful review by Service Canada of all the circumstances surrounding the employer and its request to hire a foreign worker and, in many instances, after extensive national advertising and a thorough search for local candidates.

If the foreign worker's duties change due to reassignment or restructuring, it may trigger a contravention. If a company hires a foreign worker as a sales manager and she is then promoted to the position of marketing director, the employer may be in contravention of the act as it is engaging the foreign worker in a different capacity from that intended when the labour market opinion and the work permit were granted. Conversely, if the same sales manager is demoted to a non-managerial position, a similar difficulty would arise.

The problem of employing a foreign national in a capacity in which she is not authorized specifically by the work permit is compounded by the attribution of "deemed knowledge" to the employer by section 124(2) of the act. Under that section, a person who fails to exercise due diligence to determine whether the employment is authorized is "deemed to know that it is not authorized." The provision imposes a duty on the employer to ensure a foreign national is authorized to work in a specific position and to determine the work permit is valid at all times during the employment. It is therefore extremely important for an employer to keep track of all foreign workers in a systematic fashion, including the positions for which they are authorized to perform services, the duration of the work permits and the expiry dates.

When charged with a contravention, employers could rely on the defence of "due diligence" set out in section 124(3) of the act. But this is assuming the employer has exercised all reasonable care to prevent the commission of an offence. Again, this section places a duty on the employer to monitor foreign workers in a very detailed manner and to document their files as extensively as possible.

Penalties for breaking the law

Contraventions of the act carry serious penalties. Pursuant to section 125 a person who commits an offence may face heavy fines or even imprisonment. Section 125 states that a person who is convicted on indictment can be fined up to $50,000 and face up to two years in jail. A summary conviction carries a penalty of up to $10,000 and up to six months in jail.

Although there have been no reported cases of employer prosecution, there is anecdotal evidence that some smaller subcontractors in the construction industry have been cited for contraventions of the act. But generally, CIC and Canada Border Services Agency have not actively pursued employers that employ unauthorized foreign workers. Contrast this to the United States where large-scale employer prosecutions are common.

Employers must exercise the utmost care when hiring foreign workers. In particular, employers must adhere to the terms and conditions set out in the work permits and in labour market opinions. Failure to do so may result in serious penalties.

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