Foreign worker program changes impose burden on employers

Changes intended to protect Canadian jobs but will mean more red tape for employers using temporary foreign workers

BY SERGIO R. KARAS

THE FEDERAL government has announced major changes to the much maligned Temporary Foreign Worker Program (TWP) after months of negative media reports concerning high profile scandals, public pressure, and a looming federal election campaign. The changes are profound and will make it more difficult for employers to hire foreign workers in many categories.

The most significant policy changes can be summarized as follows:

- Labour Market Opinions (LMOs) are now replaced by Labour Market Impact Assessments (LMIAs), which will be based on enhanced labour market data rather than on occupation descriptions listed in the National Occupation Classification (NOC). Filing fees are increased from $275 to $1,000 per applicant.
- Temporary foreign workers (TFWs) will now be separated into two main categories according to wage level. "High-wage temporary foreign workers" will be those in positions at or above the provincial or territorial median wage, and "low-wage temporary foreign workers" will be those earning below the median wage. Hourly median wages vary from a low of $17.26 in Prince Edward Island to a high of $32.53 in the Northwest Territories. The median wages will be revised periodically.

For low-wage TFWs, work permit duration will be limited to a one-year maximum rather than the previous two years. TFWs who are currently in Canada with longer work permits will not be affected.

For high-wage TFWs, employers will be required to present transition plans in addition to recruitment efforts to demonstrate how they intend to decrease their dependence on TFWs, with limited exceptions.

- The Seasonal Agricultural Worker Program is renamed the Primary Agricultural Stream, but its elements are largely unchanged. Further, no changes have been made to the Live-In Caregiver program for the time being, but reports indicate the government is planning an overhaul in the near future.

New recruitment requirements

The new LMIA will require employers to provide much more comprehensive information regarding their recruitment efforts and to demonstrate that Canadians cannot be found for a specific position — in addition to current advertising requirements. Employers will also need to prove Canadians have not been laid off or had their hours reduced at a worksite that employs TFWs. Authorities will rely on better sources of labour market information to determine if there are Canadians who could fill those positions. The new labour market information will include a proposed new job matching service to allow Canadians to apply directly for positions through the Job Bank, a quarterly job vacancy survey by Statistics Canada, an annual national wage survey also to be conducted by Statistics Canada, and better use of government data. It remains to be seen how the government will roll out these new sources of information and how they will reflect labour market conditions.

Cap on low-wage workers

All employers with more than 10 employees will be subject to a cap of low-wage TFWs — 10 per cent of the employer's workforce per location.

These changes are designed to reduce the number of workers in low-skilled occupations by limiting the number of employees in each employer location. Employers with ten or more employees applying for a new LMIA are subject to a cap of 10 per cent of their workforce that can consist of low-wage TFWs. This cap will be calculated based on the total number of hours worked at the specific worksite by all employees.

Employers who are currently above the 10 per cent cap will be provided with a transition period to reduce the number of low-wage foreign workers. Initially, they will be limited at 30 per cent or frozen at their current level, whichever is lower. Those employers will have to reduce that percentage to 20 per cent as of July 1, 2015, and eventually to 10 per cent. According to recent media reports, the government has indicated a desire to eliminate the low-wage TFW program altogether, but no such action has yet been taken.

Unemployment rate and foreign workers

LMIA applications will be refused for employers in the accommodation, food services, and retail trade sectors for positions that require little or no education or training, in geographical areas where unemployment rates exceeds six per cent. This applies to jobs such as food counter attendants, kitchen helpers, light duty cleaners, cashiers, construction labourers, landscaping and grounds maintenance labourers, janitors, specialized cleaners, security guards, and attendants in accommodation and travel. The government's rationale for such a move is that Canadians hit with high unemployment rates should be afforded an opportunity to apply for those positions. However, this does not take into account the fact that many unemployed Canadians refuse to accept low-wage occupations.

High-wage workers transition plans

Employers who want to hire TFWs in high-wage occupations will be required, with limited exceptions, to submit transition plans with their LMIA applications to ensure they are taking steps to reduce their dependence on foreign workers over time. These transition plans are in addition to the existing recruitment and advertising requirements employers must meet during the course of an application. The transition plan is designed to provide proof that employers are training Canadians for the position or assisting the TFW become a permanent resident.

Employers will also be required to undertake further recruitment activities, including reaching out to organizations with groups traditionally underrepresented or affected by high unemployment such as aboriginal people, youth and Canadians with disabilities. Employers will need to report on the success of their transition plans if they are selected for inspection.

Highest-demand, highest-paid and shortest-duration occupations

Occupations in the skilled trades, or top 10 per cent of earners, or short-duration (under 120 days) will now be provided with a 10-business-day service standard. It must be noted that employers will still be required to advertise and undertake the same recruitment efforts as with other LMIA applications. Employers are exempt from the requirement of the transition plan when hiring in these categories. Typically, the positions benefitting from the faster process-

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Risk to public

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recordkeeping in COMS, so they continued to review how to do things and the director also emailed follow-ups.

In November 2012, it was discovered Benger had allowed a client to change residences in breach of a court order. This wasn't allowed without a variation from the court, but Benger said a previous manager had told him he could allow it. The director was concerned because such a variation wasn't within the jurisdiction of a probation officer, and as a result of the client's move Benger didn't know where the client was living or whether the client had gone through the family violence management program. As it turned out, the client — who had been convicted of domestic assault — was living with the victim of the crime and had not completed the program.

Benger claimed he had not received adequate training and coaching and he didn't know the whole process. However, the director knew Benger had been trained and attended review meetings but kept making the same mistakes, which made the Department of Justice look bad and created risk to the community.

In February 2013, Benger went on vacation for two weeks and failed to advise anyone of appointments scheduled with clients during his leave. He also took his appointment book home — though proper procedure was to leave his appointment book in his locked filing cabinet at work. The problem was only discovered when a client called regarding an appointment, causing confusion in the department. The director had to go through COMS and ensure all the clients were seen.

Benger said he took his book home with him because he had been subpoenaed to court and he might need it. He claimed he didn't know he had to tell anyone about his agenda when he left, but the director knew he had been told not to take his appointment book home on holidays.

Though no one got hurt because of the two incidents, the director felt Benger's actions created a significant amount of risk for the Department of Justice and the public. In addition, Benger didn't seem to appreciate the gravity of his misconduct. The director decided to terminate Berger's employment for not following directions, failing to document properly, breaching policy and guidelines, failing to recognize violent tendencies of offenders, failing to initiate breaches of probation order, and failing to collect collateral information to verify client data.

The arbitrator found Benger's explanation for the two incidents did not excuse them. Allowing a high-risk offender to move in with his victim while there was a court order prohibiting it wasn't acceptable, even if a previous manager said he could make such decisions, said the arbitrator. And Benger's claim that he didn't know he needed to inform someone about his scheduled appointments or the fact he took his appointment book with him when he left for vacation not only was contradicted by the department's training regime, but also just didn't make sense, said the arbitrator.

"(Berger's) failure to notify the employer as to scheduled appointments during his vacation and his removal of his appointment book are strong indicators that this employment relationship was irreparably broken," said the arbitrator. "Taken together, the last two incidents were sufficient in and of themselves to justify termination."

The arbitrator determined that there were problems with Berger's performance over a long period of time and the department tried to work on it, but Berger just didn't improve. The November 2012 and February 2013 incidents were the last straw for the department, and termination was an appropriate response, said the arbitrator. See *Manitoba and MGEU (Benger), Re*, 2014 CarswellMan 231 (Man. Arb.).

Policies reversed

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ing will be those in skilled trades that are critical for the development of infrastructure, those whose wage level indicates they are highest-skilled in their occupation, or are those involved in short-term projects or warranty work.

Enforcement measures

The government promises to increase the number and scope of inspections of employers hiring TFWs to ensure they are complying with all the requirements of the TWP, through more site visits conducted without a warrant, interviewing workers, compelling employers to provide documents verifying their compliance, and banning employers who break the rules. The government will also expand its use of the confidential tip line launched in April 2014 to report abuse of the TWP.

Perhaps the most serious enforcement mechanism will be the criminal prosecution of employers suspected of activities in breach of the Immigration and Refugee Protection Act (IRPA), such as employing foreign nationals that are not authorized to work in Canada along with counseling or performing misrepresentations. The government proposes to impose monetary fines of up to $100,000 and imprisonment of up to five years.

These major changes indicate a complete reversal of prior policies that encouraged TFWs to come to Canada with valid work permits first, in order to gain the necessary experience to become permanent residents. Also, prior policy allowed employers more flexibility in addressing labour shortages. The new guidelines penalize employers in specific service sectors that cannot attract a sufficiently high number of Canadians, such as the hospitality and fast food industries.

Notwithstanding the complexity of the new guidelines, the government has failed to address some of the most obvious sources of abuse, such as those perpetrated by small employers hiring relatives with little or no experience as a path to obtain permanent residency. Further, the government ignores a problem of its own creation: the growing number of open work permits granted under the International Experience Class (IEC) to young workers from overseas who come to Canada and compete directly against Canadians in entry level or junior professional positions. In fact, employment minister Jason Kenney has expanded that program, which is scheduled to climb to 10,000 open work permits to young citizens of Ireland. It makes little sense to expand the open work permit category while reducing the number of employer-specific work permits.

Rather than completely revamping the TWP, the government should have concentrated on detecting abuse, enforcing existing rules and imposing significant penalties on violators. It is noteworthy that although enforcement provisions have been part of immigration legislation since 2002, there have been very few prosecutions of employers under IRPA in connection with the unauthorized employment of foreign nationals, due to the fact that investigations are costly, time intensive, and usually require the co-operation of foreign worker victims as witnesses. There is also a high bar to obtain convictions, so it is difficult to understand how an increase in penalties will deter abuse, or result in better prosecutorial outcomes, as it is unclear how many resources will be allocated to investigate complaints and the enabling legislation remains fundamentally unchanged.

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