

# Employment insurance and work permit holders

Foreign workers pay into the EI program, but eligibility for benefits when their jobs end isn't automatic

## BACKGROUND

The employment insurance program (EI) is a federal insurance program that provides temporary income support to unemployed workers while they look for employment or upgrade their skills. It's available only to those who were employed in insurable employment, have paid premiums in the year immediately preceding their application for benefits and meet the qualifying conditions of the program. Foreign workers usually pay into the program, but whether they're eligible to receive benefits depends on their circumstances. Sergio Karas looks at the different circumstances that can exist for foreign workers applying for EI benefits.

BY SERGIO R. KARAS

Employment insurance is available only to those who were employed in insurable employment, have paid premiums in the year immediately preceding their application for benefits and meet the qualifying conditions of the program. The federal Employment Insurance Act defines insurable employment as employment in Canada under a contract. If a foreign worker is employed under a contract and has paid premiums, they may be eligible for EI benefits.

A person has to be willing and able to work to be eligible for EI benefits. To receive benefits for a working day in a benefit period, a claimant must prove — not simply allege — that they were capable of and available for work and unable to obtain suitable work on that day. The question of availability for work is an objective one and it cannot depend on the reason for the restrictions on availability: *Vezina v. Canada (Attorney General)*. Availability must be determined by analyzing three factors set out by the Federal Court in *Faucher v. Canada (Employment and Immigration Commission)*:

- The desire to return to the labour market as soon as a suitable job is offered
- The expression of that desire through efforts to find a suitable job
- Not setting personal conditions that might unduly limit the chances of returning to the labour market.

It is not intended to include unavailability imposed upon a claimant by circumstances beyond their control when the claimant is ready, available and willing to accept employment.

### Foreign workers pay premiums

A foreign worker under a contract of employment is required to pay premiums for EI and may generally qualify for benefits. However, there are circumstances under which a foreign national may be denied benefits. In *R.R. v.*

*Canada Employment Insurance Commission*, the claimant had an expired work permit when he applied for EI benefits. The Canada Employment Insurance Commission determined that he was not eligible for EI benefits as he did not hold a valid work permit. The claimant requested reconsideration, but the commission upheld its decision. The claimant appealed to the General Division of the Social Security Tribunal of Canada, explaining that he was actively seeking employment and would be able to obtain a work permit once he secured new employment. He also argued that he had paid EI premiums and, therefore, should be eligible for benefits. The General Division determined that the claimant was not able to prove his availability, regardless of whether he had paid premiums. The tribunal's appeal division upheld the decision.

### The individual situation of a foreign national will determine their eligibility.

If a foreign worker has a closed work permit — a work permit that is for a specific employer — they may or may not be eligible for EI, depending on whether they will be able to work despite the restriction on the work permit or if they will be able to have the restriction removed when they find employment.

In *Severine Desmedt*, the claimant was a French citizen who was issued a work permit under the Canada-France agreement. The permit restricted her employment to a specific employer. She was laid off due to shortage of work and claimed EI benefits. The commission denied her claim, stating that she was not available for work. She appealed to the Board of Referees, bringing evidence of a new work permit that was also tied to a specific employer. The Board of Referees dismissed her appeal because her work permit was not retroactive to the date of her claim and was subject to

limitations. She challenged the dismissal, arguing that her new permit was proof that the limitation in her original work permit was more technical than real. The Umpire under the Employment Insurance Act held that the board's decision was unreasonable and that "a flexible approach must be adopted because the absence of a valid permit without restrictions does not automatically mean that a claimant is not available. Making a decision of this issue involves more than simply reviewing the conditions set out on the permit."

In *R.D. v. Canada Employment Insurance Commission*, the tribunal reached a similar conclusion but recommended that the claimant apply to have their work permit renewed or extended prior to its expiry, even if they have not secured employment. A failure to do so may result in disentitlement to benefits.

In *Godoy Enriquez v. M.N.R.*, the claimants came to Canada as seasonal agricultural workers and held closed work permits that authorized them to work for a specific employer. They were recruited by an unscrupulous organization promising better pay and quality of life and, without changing their work permits to the new employer, they left their jobs. A representative of the employment agency promised that he would take care of all the required documentation to change their work permits but never did. The claimants spoke little English and did not understand the documents they signed. The Minister of National Revenue denied their claims for EI benefits because they did not have valid work permits. The Tax Court of Canada held that the appellants worked for an employer that was not the one specified in the work permit, but the good faith of the appellants and the object of the Employment Insurance Act enabled the court to uphold the validity of the contracts. It was ruled that the appellants were employed in insurable employment.

### Expired permit removes availability

If a work permit expires, the worker may not



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be eligible for EI benefits. In *A.W. v. Canada Employment Insurance Commission*, the claimant held an expired work permit when he applied for EI benefits. He applied for an extension of his work permit before it expired, but he was denied. His EI claim was denied, but his work permit was later restored. He appealed and argued that he was available for work, and the tribunal's appeal division held that the loss of work permit was attributable to the claimant and was not a circumstance beyond his control. The expiry of the work permit limited his chances of returning to the labour force.

Nevertheless, if a claimant has applied for an extension before the work permit expiry date, he may be eligible for EI benefits. In *D.D. v. Canada Employment Insurance Commission*, the applicant was eligible for EI benefits while he was on implied status in Canada. The commission determined that the claimant was not eligible for the time he spent in the United States to be with his terminally ill mother and, upon his return to Canada, his implied status was revoked, rendering him ineligible for EI benefits. The claimant appealed to the tribunal, which found that he knew his implied status would be revoked if he left the country. It also stated that a claimant may be eligible for EI benefits if he had a work permit application pending or a closed work permit, because those are circumstances beyond the control of the claimant. However, in this case, the claimant could have decided not to leave the country, hence the circumstances were not beyond his control.

A claimant may be eligible for EI benefits if the reason he did not apply for an extension or renewal before expiry of the work permit was

beyond his control. In *O.O. v. Canada Employment Insurance Commission*, the claimant was found to be qualified to receive regular benefits; but after her work permit expired, she was not available for work. The claimant appealed the decision as she had taken steps to renew her permit before its expiry. She contacted her settlement counsellor who could help her before her permit expired, but the counsellor was not able to meet her. The tribunal held that the claimant had the desire to return to the labour market as she took steps to have her work permit renewed. The distinction of when a claimant applied for a new work permit is not helpful when circumstances beyond a claimant's control prevent her from applying for a work permit before the previous one expires.

Foreign nationals may be eligible for EI benefits. The individual situation of a foreign national will determine their eligibility. In the wake of COVID-19, the federal government has introduced the Canada Emergency Response Benefit, which will be available to those who stop working for reasons related to COVID-19 or are eligible for EI benefits. Every individual who applies under this program will receive \$500 per week, even if they are entitled to EI benefits that are less than or more than \$500 per week. The requirements to be

met under this program do not yet specify whether benefits will be available to foreign nationals who are not eligible for EI.

**For more information, see:**

- *Vežina v. Canada (Attorney General)*, 2003 FCA 198 (F.C.A.).
- *Faucher v. Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (F.C.A.).
- *R.R. v. Canada Employment Insurance Commission*, 2018 SST 1129 (Can. Soc. Sec. Trib.).
- *Severine Desmedt*, CUB 6394
- *R.D. v. Canada Employment Insurance Commission*, 2015 SST 41 (Soc. Sec. Trib. App. Div.).
- *Godoy Enriquez v. M.N.R.*, 2019 TCC 114 (T.C.C.).
- *A.W. v. Canada Employment Insurance Commission*, 2016 SSTADEI 146 (Soc. Sec. Trib. App. Div.).
- *D.D. v. Canada Employment Insurance Commission*, 2014 SSTAD 660 (Can. Soc. Sec. Trib. App. Div.).
- *O.O. v. Canada Employment Insurance Commission* 2019 SST 868 (Can. Soc. Sec. Trib.).

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