New regulations send shockwaves to businesses with foreign workers

Proposed amendments would grant broad powers to government officials for compliance investigations

OPINION

By
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IMMIGRATION

THE TEMPORARY Foreign Worker Program has been in the limelight for much of 2013. It attempts to strike a balance between the protection of the local labour force and the needs of employers to hire qualified workers not readily available in the labour market, but concern over the size of the program has become a politically charged topic pitting employers against labour unions. Now the federal government has entered the fray, introducing new regulations that give sweeping powers to officials administering the program.

The new regulations usher in a new era of increased scrutiny on employers, who have come to be viewed negatively in the labour market and accused of preferring foreign workers instead of Canadians.

On June 8, 2013, the federal government introduced proposed amendments to the Immigration and Refugee Protection Act Regulations, implementing changes to the Temporary Foreign Worker Program. The proposed amendments tackle many aspects of the employer's responsibilities under the program, including increased protection for foreign workers from abuse and exploitation, protecting the integrity of the Canadian labour market by requiring increased efforts by employers to hire Canadians, and increased compliance. However, the most controversial aspect of the proposed amendments is granting Human Resources and Skills Development Canada (HRSDC) and Citizenship and Immigration Canada (CIC) officials the authority to conduct inspections to verify compliance with the conditions imposed on employers of temporary foreign workers.

The proposed inspection authority would allow officials to verify whether the information provided by the employer at the time of the Labour Market Opinion (LMO) application or obtaining a work permit was accurate, and whether the employer complies with the conditions imposed on it during the period of employment of the foreign workers. Officers would have the authority to require the employer to provide documents and report at any specified time and place to answer questions in connection with the employment of a foreign worker. In addition, officers would have the authority to enter and inspect any premises in which a temporary foreign worker performs her duties. In the case of a private dwelling, officers would have to obtain a warrant issued by a justice of the peace.

However, no such warrant would have to be obtained for an inspection of business premises. Moreover, while conducting an inspection, officers may request the employer or any of its employees to answer any relevant questions, demand any documents for examination, make photocopies, take photographs, and request assistance if necessary. It must be noted that such authority applies to LMOs and all work permits, including those granted under international treaties such as NAFTA or other immigration programs. The authority to conduct inspections and ensure compliance will extend for six years after the employment of a temporary foreign worker has concluded. Inspections could be triggered where an officer has reason to suspect the employer is not complying or has not complied with any conditions imposed; where the employer has not complied in the past; or where the employer is chosen for random verification of compliance with the conditions.

Employers who are found to be in violation of the regulations would be denied access to the temporary foreign worker program for two years and their names and addresses would be added to an ineligibility or "black" list posted on the CIC website. Further, noncompliant employers would be barred from offering employment to foreign nationals under the Federal Skilled Trades or Federal Skilled Worker program.

Compliance burden increased

This heavy-handed approach increases the regulatory compliance burden significantly and would have a chilling effect on many businesses. In granting officers broad inspection powers without a search warrant, the government has created a quasi-criminal situation for employers who will be receiving impromptu visits by omnipotent bureaucrats, demanding documents and the employer's presence at an inopportune time. This "sledgehammer" approach is generally reserved, in other legislation, for situations involving danger to the public and not for routine document inspections. It is intimidating, inefficient and unnecessary, and it will do nothing to deter bad employers since the penalties associated with noncompliance are insignificant.

While compliance is an important aspect of program integrity and it is true some employers have abused the Temporary Foreign Worker Program, it would have been more productive to uti-

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8 incidents over 15 years was insufficient to show a problem

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icant encroachment into employee privacy that was "out of proportion to any benefit." In reaching this decision, the New Brunswick Arbitration Board chose to follow a line of decisions in which random testing was upheld only where there was a demonstrable drug or alcohol problem in the workplace. According to the board, Irving's eight alcohol-related incidents over 15 years were insufficient to demonstrate a "problem in the workplace".

The arbitration decision was overturned, and ultimately appealed to the Supreme Court of Canada, which found the random testing policy to be unreasonable:

"In this case, the expected safety gains to the employer were found by the board to range from uncertain to minimal, while the impact on employee privacy was severe," said the Supreme Court. "(Irving) exceeded the scope of its management rights under a collective agreement by imposing random alcohol testing in the absence of evidence of a workplace problem with alcohol use."

Broad implications for employers

The decision from the Supreme Court could have broad implications, as it is considered a national test case for how far an employer can go when it comes to a worker's right to privacy. The case attracted numerous interveners, including the Canadian Civil Liberties Association, Canadian National Railway Company, Via Rail Canada, the Canadian Mining Association, and the Canadian Manufacturers and Exporters.

Ultimately, whether random alcohol testing is justified will depend on whether an employer can demonstrate a workplace problem with alcohol use. What constitutes a significant enough problem remains unclear. What is clear is that random testing without evidence of an identifiable issue in the workplace will be considered an unreasonable infringement on employee privacy, even in safety sensitive positions.

For more information see:

■*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34 (S.C.C.).

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Regulatory tools already exist

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lize other regulatory tools already in existence. For example, the government could strictly enforce the provisions of the Income Tax Act that require employers to take the appropriate source deductions and remit them to the Canada Revenue Agency. Many employers of foreign workers fail to do so, as many employees who hold work permits wish to remain on foreign payrolls. Second, the government could have required that employers should have a minimum number of current Canadian employees before benefiting from the program. This would have ensured the employer would not be foreign worker dependent and Canadians have an opportunity to apply for the positions. Third, the government could have imposed a minimum revenue threshold before an employer could use the program.

The proposed regulations also miss the mark in portraying temporary foreign workers as "victims" in a generalized fashion. While some foreign workers are the victims of abuse by unscrupulous employers — especially live-in caregivers and those working in the agriculture, construction or hospitality industries — the vast majority of employers abide by their obligations and provide good pay and excellent working conditions to all their employees, including foreign workers, assisting them to stay in the organization. In fact, many foreign workers enjoy higher pay than their Canadian counterparts because they have international qualifications and experience in sophisticated occupations. Many remain on work permits only for a brief period of time, until they can secure permanent residence. It can hardly be said these workers need protection by the government.

It is naïve to think the government can force employers to run their businesses in a manner contrary to their interests. If the authorities were concerned about the large number of temporary foreign workers in Canada, then they could impose meaningful fines on violators. Granting bureaucrats the power to enter business premises without a warrant is reminiscent of the tactics employed by security services in the former Eastern European totalitarian regimes and not in accordance with the core values guaranteed by the Canadian Charter of Rights and Freedoms and due process of law.

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