Significant Penalties in New Compliance Regime for Temporary Workers

By: Jessica Young

The Canadian Government has announced further changes to the foreign worker system that come into effect on December 1, 2015. These changes stem from the complete overhaul of the temporary foreign worker regime that began over a year ago. The new compliance regime will apply to both foreign workers under the Temporary Foreign Worker Program (i.e. where a Labour Market Impact Assessment ("LMIA") is required) as well as those in the International Mobility Program (i.e. LMIA exempt categories like intra-company transferees).

New AMP Regime

The program will be administered by both Employment and Social Development Canada ("ESDC") and Citizenship and Immigration Canada ("CIC"). The new compliance regime consists of a system of Administrative Monetary Penalties ("AMP") for non-compliance. The severity of the penalty will be determined through a matrix taking into account the nature of the violation, compliance history and severity of the violation. Although the AMP system is intended to promote compliance and not be punitive, the penalties can be quite significant.

How the New AMP Regime Works

For the purpose of the AMP system, employers are categorized as either a "small business" or a "large business". In general, steeper penalties will be levied against large businesses. An employer will be considered a small business where it has fewer than 100 employees or less than $5 million in annual gross revenues. Note that the definition includes the business and any "affiliates". It is unclear if this would include affiliates in other jurisdictions.

The amount of an AMP will be determined through a point system. Contraventions are classified as Type A, Type B, or Type C, with Type A violations being the least serious and Type C being the most serious. A Type A violation may occur, for instance, where the employer has failed to retain a document for the required six year period. A Type B violation may occur, for instance, where the employer fails to provide "substantially the same, but not less favourable, wages and working conditions" as outlined in the foreign worker's offer of employment. A Type C violation may occur, for instance, where the employer has failed to provide a workplace that is free from abuse. A complete list of these classifications can be found here.

As mentioned above, the determination of the penalty is calculated based on the type of violation (i.e. Type A, B, or C), compliance history, and the severity of the violation. Even minor violations can add up to be costly. An AMP applies to each contravention. This means that where an employer has made the same Type A violation with respect to a number of foreign workers, each contravention will be treated separately. Not only will this impact the financial penalty

levied but it will affect any future non-compliance penalties as it will negatively impact the employer's compliance history.

The financial penalties for non-compliance can be substantial. The maximum penalty per violation is $100,000 (where 15 points are awarded for the violation), with a cap of $1 million on a single notice. Employers can also face a ban from hiring foreign workers ranging from a 1, 2, 5, or 10 year ban up to a permanent ban. Until we see this new regime in practice it is hard to predict how hard employers will be hit. There is broad discretion in determining the number of "points" in relation to the severity of the violation. If there is a trend toward treating violations as more severe, we could be seeing steep penalties.

Voluntary Disclosure

If employers provide voluntary disclosure of a violation, this can reduce the consequences that the employer will face. However, voluntary disclosure that comes "too little too late" will not assist the employer, for instance, disclosure that is incomplete or only made after compliance or enforcement action has commenced. Furthermore, for serious violations, the officer may determine that the penalty should not be reduced on account of the voluntary disclosure.

What Employers Should Do

Employers that hire foreign workers may consider conducting internal audits to ensure that they are compliant with the conditions of the LMIA, or in the case of LMIA-exempt workers, with the terms and conditions of employment specified in the work permit application and employment contract. Employers with LMIA-exempt workers where a Form IMM 5802 "Offer of Employment to a Foreign National Exempt from a Labour Market Impact Assessment (LMIA)" has been filed with CIC, must ensure that the terms and conditions listed in that document are adhered to.

Employers should also ensure that they are in compliance with employment standards and occupational health and safety legislation. Common employment standards mistakes, like failure to pay overtime to salaried employees (who are not otherwise exempt), can lead to penalties under the AMP system and from the Ministry of Labour. Furthermore, employers should ensure that they have taken steps to provide a workplace free of violence and harassment, including implementing workplace violence and harassment policies and complaint procedures.

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