Canadian Employee Relocation Council Response to Employment and Social Development Canada discussion paper: Regulatory proposals to enhance the Temporary Foreign Worker Program and International Mobility Program compliance framework

INTRODUCTION

The Canadian Employee Relocation Council (CERC) welcomes this opportunity to comment on the Discussion paper: Regulatory proposals to enhance the Temporary Foreign Worker Program (TFWP) and International Mobility Program (IMP) compliance framework.

While we are pleased to see documented principles to support program compliance, which will inform employers of their obligations, we are concerned that the proposed measures are excessively punitive, administratively complex and, in certain circumstances, unfair to employers who are making best efforts to comply with the new rules. In consultations with members of CERC, these measures have been described as "overly punitive and draconian."

The proposals appear to be based on the premise that employers are generally non-compliant with their obligations under the new regulations. The discussion paper lacks any detailed measures that would educate and inform employers of their obligations under the TFWP or IMPs.

DETAILED COMMENTS

CERC is in agreement that clarity and consistency in the administration of the compliance requirements for the TFWP and IMP are necessary and will assist employers in meeting those obligations.

Since the changes to the TFWP and IMP were introduced in June 2014, ESDC has been implementing further program refinements without consultation or notice to employers. These ongoing and unannounced changes are making it very difficult for employers to fully understand their compliance obligations. For example, the recent changes to rules regarding the prevailing wage introduced in October 2014, were implemented without any notice to employers. We are also learning from our member firms that these new rules on wages are being applied inconsistently by ESDC personnel.

In a further example of the challenges for employers, CERC wrote ESDC in June 2014, requesting clarification on several issues and questions we had received from our members. To date a response from ESDC to those questions has not been received.

The discussion paper suggests that "some compliance activities are preventative and educational in nature." However, there is no detailed outline contained in the paper as to how ESDC intends to inform and educate employers about their compliance obligations and how employers can implement measures to prevent non-compliance with the programs. The rules around the programs are complex. As a first step ESDC should be devoting resources to education and outreach to the business community.

PROPOSED MEASURES TO PREVENT DETECT AND RESPOND TO EMPLOYER NON-COMPLIANCE

CERC is of the view that the existing upper limits, including the banning of employers for two years and revoking associated LMIAs and work permits are more than severe enough sanctions to promote employer compliance with the regulations.

While the introduction of the AMPs to ensure appropriate program compliance has some merit, the upper limits as proposed are unreasonable. Where there is evidence of cooperation and the employer has taken measures to remedy the factors leading to a finding of non-compliance, we propose the AMP limits be capped at $5,000 for a small employer, and $10,000 for a large employer, with the size of the employer as defined in the discussion paper.

The proposal to suspend LMIAs while an inspection is underway, could have significant impact on the business operations of the employer. Suspension further suggests a finding of non-compliance even before the inspection is complete. We are concerned that there are no clear grounds outlined in the discussion paper upon which a decision to rescind or suspend an active LMIA are made.

Employers will very often suffer serious harm when they unexpectedly lose the services of a TFW or have their pending applications for LMIAs frozen. Therefore, the amount of time that an inspection takes can have significant consequences for an employer. Past experience has shown that it can take several months for a decision to be rendered, even when an employer has fully and adequately complied with requests for documents and information. ESDC should therefore either be under an obligation to act promptly in any situation where a delay in decision-making could be disruptive to an employer or the TFW, or delay action to suspend processing of applications until such time as non-compliance has been determined to have occurred that would merit such a sanction.

A further concern where the LMIA is suspended is how does that impact the foreign worker and the work permit? Suspension of the LMIA could have a broad negative impact on business operations and employment of both foreign and Canadian employees.

If the principal rationale for TFW enforcement is to protect the labour market, it makes no sense in many cases to have the suspension of existing work permits as a sanction. This may doubly victimize the TFW who may have been provided with less than the compensation or work conditions promised. In such cases, it would make more sense to fine the employer so as to eliminate any economic advantage (and punish the employer) and prevent future abuse of the program or TFWs but not to withdraw existing work permits.

Also, care should be taken to ensure that employers are not sanctioned for failure to provide the conditions promised on an LMIA where the employee has acted in such a manner as to make this impossible (e.g. refusing to work the number of hours in the LMIA) or where the employer is a foreign entity that has assigned the TFW to work in Canada but the assignment was completed in less time than

the period specified on the LMIA and the employer returned to his or her employment in the foreign country on completion of the assignment. In other words, employers should not be deemed to have been non-compliant where they have acted in good faith and the TFW was not prejudiced by not having received the same work conditions as those in the LMIA.

STRONGER STANDARDS FOR COMPLIANCE

CERC is of the view that the proposal to expand the range of the program ban from two to ten years is unnecessarily severe. The ban should not exceed a period of two years, and lesser periods should be considered.

CERC is equally of the view that a finding of non-compliance in those situations where corrective action has been taken, or where a finding of non-compliance resulting from good faith errors and unintentional accounting or administrative errors, should not be subject to AMPs, a program ban, or publishing the name of the employer on the government website. Such measures are grossly unfair to the vast majority of employers who wish to comply with the program requirements.

There is simply no basis to inflict such harsh measures on employers where errors have been made in good faith and corrective measures have been taken. A more flexible approach should be taken to recognize the efforts of employers who take steps to address and rectify their errors. For example, in the U.K. the civil penalty calculator includes a penalty reduction factor where mitigating circumstances are present, or there is evidence of active co-operation on the part of the employer. Such an approach should be considered in Canada.

Employers should not be subject to sanctions for non-compliance arising from an issue that ESDC itself has previously been able to provide clear guidelines on, or that are the result of errors by government agents, such as: 1) who is the "employer" in situations where the TFW works at the site and is supervised by one company but is paid by another (generally an agency); 2) errors by CBSA officers in issuing a work permit such as entering the wrong place of work or employer through no fault of the employer or employee.

Compliance with "federal and provincial laws on employment and recruitment" (R209.2 (i)(a)(ii) and R209.3(1)(a)(iii)) should exclude violations of those laws that are unrelated to respect for the rights of the employee or the rules relating to recruitment. An example would be a failure to submit a reply to an allegation of a contravention by a labour tribunal in a timely fashion where the employer was exonerated of any violation with regard to the employment of the complainant.

PROPOSED AMPS SYSTEM

The proposed AMP measures outlined in the paper are unfair, particularly in those cases where errors have been made in good faith. While the proposed minimum amounts of $500 are reasonable, the combined limits based on the number of workers impacted should be capped at $5,000 and $10,000 respectively for smaller and larger employers. This is particularly true where the employer has taken corrective action, which may include the payment of any wage shortfall to the worker. In those circumstances it is a double financial penalty to the employer, which may in turn have negative financial implications for continuity of the business.

In those cases where corrective action has been taken, or errors have been made in good faith, it is equally unfair to publish the names of employers as being non-compliant with the regulations.

PROPOSED BAN LENGTHS

The proposal to amend the regulations to provide for bans of one, five and ten years, in addition to the existing ban of two years are far too severe, and may have wider negative economic consequences than intended. Such severe bans have the potential to close businesses resulting in job losses.

As noted above, a ban of up to a maximum of two years is sufficient to ensure program compliance.

CLASSIFYING VIOLATIONS

The proposal of classifying violations into specific categories is a reasonable approach to apportioning some level of seriousness to the level of non-compliance.

However, the matrix used to apply the various employer conditions is overly complex and will prove difficult to administer. While the categories for those conditions listed in A and C of the matrix are clear and straightforward (e.g. Must provide relevant documents to be examined as requested), those conditions listed under category B are far more subjective and open to interpretation.

In a system where the rules are seemingly in constant flux, imposing these measures is, in our view, unfair to employers. For example, the requirement to "demonstrate job creation or retention for Canadians/PRs, if that was a condition that led to a positive LMIA." Economic or business circumstances may change throughout the transition period that make it difficult for the employer to fully comply with the requirements. A more nuanced approach is needed in such circumstances, where there is evidence that the employer has taken steps to comply, but conditions beyond the employer's control have frustrated those efforts.

We are also concerned about the application of a ban in other programs. For example, would a ban in the TFWP program result in a ban in the IMP, or in the new express entry program?

ADMINISTRATIVE REVIEW PROCESS

The proposed administrative review process lacks impartiality or administrative independence. To suggest that a review would "be conducted by an official who was not involved in the original determination of non-compliance" will not provide employers challenging such decisions with any sense of due process and fairness. Such a model lacks openness and transparency, and decisions of such officials will be viewed as simply rubber stamping the original findings.

The administrative review should be a full re-consideration of the employer's alleged non-compliance. New evidence could be submitted by the employer or by ESDC. It should not be simply a review of the initial decision.

If this administrative review process is to work effectively, an impartial review body, separate and apart from CIC and ESDC overview, is necessary. Such a body must be fully resourced, with staff adequately trained in administrative law and operate at arm's length from the control of CIC and ESDC.

The question as to the availability of resources that will be required to administer the program is of significant concern to employers. The paper provides no cost benefit analysis for the program administration.

CONCLUSION

CERC welcomes this opportunity to comment on the proposals to enhance compliance with the IMP and TFWP.

In our view the changes implemented to the program in June 2014 are complex, and will take great effort on the part of employers to comply. Outreach by ESDC and CIC to fully outline the scope and consequences of the changes to employers has been sadly lacking since the changes were introduced. Indeed even front line staff within CIC and ESDC are struggling to administer the program changes in a consistent and cohesive manner across the country.

The existing sanctions in the system should serve as the 'upper limit' of any sanctions and penalties to employers – particularly in those circumstances where non-compliance has resulted from errors in accounting, administrative errors and errors of good faith.

The AMPs as proposed with bans of up to 10 years and fines of S100,000 for what very well may be an error of good faith and a first time offence, far outweigh the gravity of such non-compliance, and can only be described as overly punitive.

A more reasonable approach to AMPs is required that considers the employer's history of compliance, and in such circumstances employers should be afforded a reasonable period of time to correct their program administration to comply, with the assistance of ESDC and CIC officials to develop compliance strategies.

If the regulatory changes are to be implemented, an impartial review body is required to provide a level of equity and transparency for employers wishing to challenge negative findings of officials.

About the Canadian Employee Relocation Council

The Canadian Employee Relocation Council (CERC) is a not-for-profit organization dedicated to removing barriers that restrict mobility and deployment of human capital, which are vitally important to Canada's future prosperity. Established in 1982, the Council represents the interests of its members on workforce mobility matters. Many of the Council's members are listed in Canada's Financial Post Top 500.