



CERC Webinar: New Realities for Hiring Temporary Foreign Workers

Responses to Questions arising from the CERC Webinar June 26th 2014:

Please note that CERC is providing this information based on our knowledge and understanding of the changes to the Temporary Foreign Worker Program announced by Minister's Kenney and Alexander on June 20th 2014. Julie Lessard, Partner, Lawyer BCF LLP julie.lessard@bcf.ca kindly assisted in preparation of this document.

Readers are cautioned that the information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

1. *Do I understand that the fast stream (10 days) is only available to workers coming for a maximum of 120 days?*

The 10 day service standard is available to the following groups of occupations:

Highest-demand: Positions in skilled trades as per ESDC list

Highest-paid: Positions that pay wages in the top 10% of wages earned by Canadians (ESDC cites physicians as an example) in the province or territory of employment

Short-duration occupations: foreign workers in required for 120 days or less. (ESDC cites repair and warranty work)

http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/tables.shtml#h2.2

Note that the 10 business day processing stream is NOT available in the Province of Quebec which continues to offer expedited processing for 44 professions on its list for simplified processing.

2. *What do they mean by specific in unusual skills in Intra-company transferee (please give example with IT worker)?*

A high degree of **both** proprietary knowledge **and** advanced expertise. Proprietary knowledge alone, or advanced expertise alone, does **not** qualify the applicant under this exemption. The test that must be met for all occupations including IT workers

- abilities that are unusual and different from those generally found in a particular industry and that cannot be easily transferred to another individual in the short-term;
- the knowledge or expertise must be highly unusual both within the industry and within the host firm;
- it must be of a nature such that the applicant's proprietary knowledge is critical to the business of the Canadian branch and a significant disruption of business would occur without the applicant's expertise;
- the applicant's proprietary knowledge of a particular business process or methods of operation must be unusual, not widespread across the organization, and not likely to be available in the Canadian labour market.

Example: Skill in implementing an off-the-shelf product would not, by itself, meet the standard of specialized knowledge; **unless**, for example, the product is new or being highly customized to the point of being a "new" product. In other words, an ICT applicant is more likely to have truly specialized knowledge if they directly contribute to the (re)development of a product, rather than to the implementation of a pre-existing product

See newly published rules in CIC Operational Bulletin 575

<http://www.cic.gc.ca/english/resources/manuals/bulletins/2014/ob575.asp>

3. *If the advertised position in unionized and is intended to be a permanent one, how can we be expected to have continuous recruitment?*

Regulations just do not take that into account, there will be limited exemptions to the transition plans but no guidance has been released yet.

4. *How is "low skilled workers" defined?*

The low skilled worker stream has been replaced as follows:

Low-wage workers: includes occupations that usually require lower levels of formal training, such as a high school diploma or a maximum of two years of job-specific training, such as general labourers, food counter attendants, and sales and service personnel. These occupations are generally coded at the NOC C or D skill level. However the new criteria is the wage not the NOC.

5. *If we have such temporary workers working on any task that's not part of the job we hire them for, are we in jeopardy of being fined or otherwise penalized?*

Yes that may occur depending on the change in the work being performed. There are now 21 program requirements that must be met, including:

1. Have provided each foreign worker with employment in substantially the same occupation as stated in the offer of employment.

2. Have provided each foreign worker with wages that are substantially the same as those in the offer of employment.
 3. Have provided each foreign worker with working conditions that are substantially the same as those in the offer of employment.
6. *When do we expect more details on the operationalization of the IMP, particularly submission of information to CIC on non-LMIA jobs*
CERC will follow up with CIC.
 7. *Why would an employer hire a candidate who is already in Canada with a valid work permit that he/she obtained on their own - knowing that for the majority of positions an LMIA will be required when the work permit expires and the employer will not be able to say they don't have Canadians to do the job?*
Agree, a further LMIA permit would be required and employer would have to make efforts to hire a Canadian.
 8. *Can you confirm the LMIA and/or recruitment process is required to ensure a Canadian is not available for the role upon application renewal or annual basis?*
CERC has requested clarification on this from ESDC.
 9. *In a company that is interprovincial, the compliance numbers are by total %s and not by site and province?*
CERC has requested clarification from ESDC regarding worksites. Our current reading is that the % is determined by worksite.
 10. *The 10% cap per work site - are all TFW included in the 10% or only those requiring a LMIA?*
The 10% cap is for low wage TFWs
 11. *Senior executive positions - high salary and long term - are they LMIA exempt?*
No, the LMIA is still required unless entering under ICT or other specific LMIA exemption.
 12. *Do we have to keep counts for TWF that are contractors where the contractor or provider applied for the work permit?*
Employer should keep count of all workers holding a work permit bearing its name as the employer
 13. *What about TFW who come with a Post grad, Spousal, Refugee, Working Holiday permit where the employer has no role – are transition plans required for those positions?*
Transition plans are only required for LMIA applications
 14. *Is the IMP program subject to the 6-year archiving rule?*
No. We don't see anything that expands the obligation to conserve documents to establish compliance beyond the LMIA context.
 15. *Not sure if you mentioned this before, but what is the "transition" rule for EEs currently on LMO (max 4 years) that needs to renew work permit I understand now through LMIA... Will it be possible to renew for another year?*
ESDC/ CIC have advised this is under review for high wage TFWs

16. *Limitation of 2 years for stay (low wage): If after 2 years, employer still can't find Canadian candidate, need to lay off current FW to hire another one?*
Correct, 2 year limit only applies to low wage.

17. *Would be worth mentioning that the restrictions in areas of 6% unemployment rate and + is only for specific sectors (food service, retail, accommodation, retail trade.)*
The restrictions include the industries noted. In addition applications for selected NOC occupations D will not be processed.

NOC Code	Title
6641	Food Counter Attendants, Kitchen Helpers and Related Occupations
6661	Light Duty Cleaners
6611	Cashiers
6622	Grocery Clerks and Store Shelf Stockers
7611	Construction Trades Helpers and Labourers
8612	Landscaping and Grounds Maintenance Labourers
6672	Other Attendants in Accommodation and Travel
6663	Janitors, Caretakers and Building Superintendents
6662	Specialized Cleaners
6651	Security Guards and Related Occupations

Further details on compliance and record keeping are outlined in the Immigration and Refugee Protection Regulations R203, and R209, we have added highlights for convenience.

<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/page-84.html#docCont>

. (1) On application under Division 2 for a work permit made by a foreign national other than a foreign national referred to in subparagraphs 200(1)(c)(i) to (ii.1), **an officer must determine, on the basis of an opinion provided by the Department of Employment and Social Development**, of any information provided on the officer's request by the employer making the offer and of any other relevant information, if

(a) the job offer is genuine under subsection 200(5);

(b) the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada;

(c) the issuance of a work permit would not be inconsistent with the terms of any federal-provincial agreement that apply to the employers of foreign nationals;

(d) in the case of a foreign national who seeks to enter Canada as a live-in caregiver,

(i) the foreign national will reside in a private household in Canada and provide child care, senior home support care or care of a disabled person in that household without supervision,

(ii) the employer will provide the foreign national with adequate furnished and private accommodations in the household, and

(iii) the employer has sufficient financial resources to pay the foreign national the wages that are offered to the foreign national; and

(e) the employer

(i) during the period beginning six years before the day on which the request for an opinion under subsection (2) is received by the Department of Employment and Social Development and ending on the day on which the application for the work permit is received by the Department, provided each foreign national employed by the employer with employment in the same occupation as that set out in the foreign national's offer of employment and with wages and working conditions that were substantially the same as — but not less favourable than — those set out in that offer, or

(ii) is able to justify, under subsection (1.1), any failure to satisfy the criteria set out in subparagraph (i).

R209.2 (1) An employer who has made an offer of employment to a foreign national referred to in subparagraph 200(1)(c)(ii.1) must comply with the following conditions:

(a) during the period of employment for which the work permit is issued to the foreign national,

(i) the employer must be actively engaged in the business in respect of which the offer of employment was made, unless the offer was made for employment as a live-in caregiver,

(ii) the employer must comply with the federal and provincial laws that regulate employment, and the recruiting of employees, in the province in which the foreign national works,

(iii) the employer must provide the foreign national with employment in the same occupation as that set out in the foreign national's offer of employment and with wages and working conditions that are substantially the same as — but not less favourable than — those set out in that offer, and

(iv) the employer must make reasonable efforts to provide a workplace that is free of abuse, within the meaning of paragraph 72.1(7)(a); and

(b) during a period of six years beginning on the first day of the period of employment for which the work permit is issued to the foreign national, the employer must

(i) be able to demonstrate that any information they provided under subparagraph 200(1)(c)(ii.1) was accurate, and

(ii) retain any document that relates to compliance with the conditions set out in paragraph (a).

R209.3 (1) An employer who has made an offer of employment to a foreign national referred to in subparagraph 200(1)(c)(iii) (*i.e. with LMO*) must comply with the following conditions:

- (a) during the period of employment for which the work permit is issued to the foreign national,
- (i) the employer must be actively engaged in the business in respect of which the offer of employment was made, unless the offer was made for employment as a live-in caregiver,
 - (ii) the employer must comply with the federal and provincial laws that regulate employment, and the recruiting of employees, in the province in which the foreign national works,
 - (iii) the employer, in the case of an employer who employs a foreign national as a live-in caregiver, must
 - (A) ensure that the foreign national resides in a private household in Canada and provides child care, senior home support care or care of a disabled person in that household without supervision,
 - (B) provide the foreign national with adequate furnished and private accommodations in the household, and
 - (C) have sufficient financial resources to pay the foreign national the wages that were offered to the foreign national,
 - (iv) the employer must provide the foreign national with employment in the same occupation as that set out in the foreign national's offer of employment and with wages and working conditions that are substantially the same as — but not less favourable than — those set out in that offer, and
 - (v) the employer must make reasonable efforts to provide a workplace that is free of abuse, within the meaning of paragraph 72.1(7)(a);

(b) during the period of employment for which the work permit is issued to the foreign national or any other period that was agreed on by the employer and the Department of Employment and Social Development at the time the opinion referred to in subsection 203(2) was provided,

(i) the employer must ensure that the employment of the foreign national will result in direct job creation or job retention for Canadian citizens or permanent residents, if that was one of the factors that led to the issuance of the work permit,

(ii) the employer must ensure that the employment of the foreign national will result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents, if that was one of the factors that led to the issuance of the work permit,

(iii) the employer must hire or train Canadian citizens or permanent residents, if that was one of the factors that led to the issuance of the work permit, and

(iv) the employer must make reasonable efforts to hire or train Canadian citizens or permanent residents, if that was one of the factors that led to the issuance of the work permit; and

(c) during a period of six years beginning on the first day of the period of employment for which the work permit is issued to the foreign national, the employer must

(i) be able to demonstrate that any information they provided under subsections 203(1) and (2.1) was accurate, and

(ii) retain any document that relates to compliance with the conditions set out in paragraphs (a) and (b).