

DEMYSTIFYING THE LABOUR MARKET OPINION PROCESS ACROSS CANADA

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INTRODUCTION

For many a corporate immigration practitioner, recommending the Labour Market Opinion (“**LMO**”) process to a client will usually only occur when a more suitable and expedient HRSDC-exempt Work Permit category does not exist. Whereas in the past LMOs were generally seen as a “last resort” option for the corporate client who needed to fill a position urgently, Service Canada has in recent years greatly increased both the flexibility and rapidity of the LMO process in an effort to address important labour shortages across Canada.

In this paper, we will seek to demystify the LMO Process across Canada by comparing and contrasting the regular LMO process versus the Accelerated LMO (“**ALMO**”) procedure. We will also introduce the new Facilitated Labour Market Opinion (“**FLMO**”) procedure in Quebec and compare it to the regular LMO process in Quebec. A portion of this paper will be devoted to taking the reader through the steps involved in a Service Canada compliance audit.

I. CANADA – “LMO” VERSUS “ALMO”

Applicability

The regular LMO application process applies to the higher-skilled occupations (National Occupational Classification (“**NOC**”) 0, A or B categories) as well as to the low-skilled¹ (NOC C and D categories) occupations, to seasonal agricultural workers, and to live-in caregivers.² The

¹ Lower-Skilled Occupations are occupations that usually require at most a high school diploma or job-specific training.

² The LMO application process for lower skilled occupations, live-in caregivers and agricultural workers differs from those of higher skilled occupations and will not be addressed in this paper.

ALMO procedure only allows employers to hire temporary foreign workers (“TFW”) in higher-skilled positions: (namely management, professional, scientific, and certain technical trade occupations) when Canadian citizens and permanent residents are not available.

The major differences between ALMO and LMO processing are:

- 1) Timing: ALMOs have a 10 day processing standard which is met in the vast majority of cases - and if it cannot be met due to incomplete documentation, officers will render a negative decision to ensure consistency with this service standard. Regular LMO standard range from 2 weeks to 4 months, depending on the region.
- 2) Attestations: ALMOs have a back-end auditing function, in that recruitment and other supporting documentation does not have to be provided up front (and is indexed highly discouraged). LMOs have a front-end system whereby Service Canada (“SC”) officers vet all requisite documentation, and may request missing documentation without the risk of a “timing out” refusal. As a result, the employer does not have to be as concerned about multiple attestations, unlike in the ALMO process.

Details about the LMO and LMO processes can be found in Annexes B and C respectively³.

Recruitment

Under both the regular LMO and ALMO streams⁴, employers must include proof of recruitment efforts with their LMO application. For higher skilled occupations, namely NOC 0, A and B level occupations, an employer must, at a minimum, conduct the following recruitment efforts, as can be referenced on the HRSDC website under the main TFW page.

- i) ***All Canadian provinces except Quebec***

³ See attached. Annex B – ‘Major Changes Made to Canada’s Temporary Foreign Worker Program: April 1 Regulation Highlights’ by Alan Diner, and Annex C - ‘Spring 2012 Alert on the ALMO program.

⁴ Lower skilled LMO applications have even greater recruitment requirements.

NOC 0 and A Occupations:

- Recruitment activities consistent with the practice within the occupation (e.g., advertise on recognized Internet job sites, in journals, newsletters or national newspapers or by consulting unions or professional associations); **or**
- Advertise on the national [Job Bank](#) or its provincial/territorial counterpart in [British Columbia](#), [Newfoundland and Labrador](#), the [Northwest Territories](#), or [Saskatchewan](#) for a minimum of fourteen (14) calendar days, during the three (3) months prior to applying for a LMO.

NOC B Occupations:

- Conduct recruitment activities consistent with the practice within the occupation for a minimum of fourteen (14) calendar days (e.g., advertise on recognized Internet job sites, in journals, newsletters or national newspapers or by consulting unions or professional associations); **and**
- Advertise on the national [Job Bank](#) or its provincial/territorial counterpart in [British Columbia](#), [Newfoundland and Labrador](#), the [Northwest Territories](#), or [Saskatchewan](#) for a minimum of fourteen (14) calendar days during the three (3) months prior to applying for a LMO.

Regular font/spacing on job postings for NOC B positions must include:

- the company operating name;
- job duties (for each position, if advertising for more than one vacancy);
- wage range (i.e. an accurate range of wages being offered to Canadians and permanent residents);
- the location of the work (local area, city, or town); and
- the nature of the position (i.e. project based, or permanent position).

ii) *Quebec*

NOC 0, A and B Occupations - For all of the higher-skilled positions advertised in Quebec, the minimum advertising efforts are defined as follows:

- Advertise on the Emploi Quebec website (<http://emploiuebec.net/index.asp>) for a minimum of 14 calendar during the 3 months prior to applying for the LMO; **OR**
- Conduct similar recruitment activities consistent with the practice within the occupation (internet job sites, professional associations, journals, newspapers, etc.)

Note that there are exceptions to these advertising requirements, which are discussed later in this paper.

Prevailing Wage

One major component, aside from the recruitment campaign ensuring that prevailing wages are paid. These should be accessed at WorkinginCanada.com and should be checked for every job location, and new application. Companies can offer up to 15% below the prevailing wage if similarly situated Canadians receive said lower amount.

Employer Requirements for LMOs and ALMOs

Employers that hire TFWs are expected to be compliant with the LMO Program in that they must uphold the terms and conditions of employment set out in the LMO confirmation letter and annex, which includes, but is not limited to the: i) wages (including deductions); ii) working conditions (hours of work, overtime, and workplace safety insurance); and iii) identified occupation (job duties and skill level). For the ALMO Program, employers are subject to additional requirements. Specifically, to be eligible to participate in the ALMO Program, employers must: i) have been issued at least 1 positive LMO in the previous 2 years; ii) have a clean record of compliance with the LMO Program within the last 2 years; iii) not have been the subject of an investigation, infraction or a serious complaint; and iv) not have any unresolved violations or contraventions under provincial laws governing employment and recruitment.

The Forms

Whereas the EMP5517 – LMO Application form must be used for regular LMO applications, ALMO applications must instead use the EMP5535 – Accelerated LMO Application form. Please note that the following standard questions in the EMP5517 form are not found in the ALMO EMP5535 form: i) description of the recruitment efforts; ii) what are the benefits to the Canadian labour market for offering this job to a foreign worker(s); iii) provide a rationale for the job offer the employer is making to the foreign worker(s) and describe how this will meet your employment needs; and iv) does the employer plan to train Canadian citizens/permanent residents for the position(s) for which the employer is requesting an LMO? These forms are all available on the HRSDC TFW website at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/fwp_forms.shtml.

Ability to Expedite

As mentioned above, regular LMOs can take anywhere from 2-16 weeks to adjudicate while processing times vary from province to province for the regular LMO process (they are on average, over the past two years, in the neighbourhood of 12 weeks). In the case of ALMO applications, the processing time is **10 business days** across Canada, with the exception of Quebec. True to its moniker as a distinct society, Quebec has a special program known as the FLMO in place of the ALMO.

II. QUEBEC – “LMO” VERSUS “FLMO”

Quebec Regular LMO

In the province of Quebec, employers can apply for an LMO under the Regular LMO stream or under a Facilitated (or “*simplifié*” in French) process, depending on the position they are seeking to fill. Please take note that the regular LMO application process for Quebec is identical to the one across Canada, save for the following two (2) major differences:

i) The minimum recruitment requirement

As it was outlined earlier in the paper, in Quebec the advertising requirements for positions under NOC 0, A, or B are the same (there is no differentiation made between NOC 0 / A and NOC B).

ii) The requirement to apply for a Quebec Certificate for Acceptance (“CAQ”)

In Quebec, the employer’s job offer is assessed jointly by SC and the *Ministère de l’Immigration et des Communautés culturelles* (“**MICC**”). The employer files the LMO application with Service Canada and simultaneously, the TFW is expected to file an application for a CAQ with the MICC (a copy of the LMO application must be enclosed with the CAQ application). A joint decision letter is then issued by SC and the MICC jointly to the employer and the TFW.

Quebec FLMO

Applicability

First established on February 24th, 2012, the FLMO is a provincial program that allows employers wishing to hire a TFW in one of 44 targeted professions to obtain a positive LMO without needing to recruit in Canada.

As of February 24, 2013, the list of occupations for the FLMO program was amended to include the following:

- 0213 Computer and Information Systems Managers
- 0611 Sales, Marketing, and Advertising Managers
- 0631 Restaurant and Food Service Managers
- 1111 Financial Auditors and Accountants
- 1122 Professional Occupations in Business Services to Management
- 1221 Administrative Officers
- 1222 Executive Assistants
- 2131 Civil Engineers
- 2132 Mechanical Engineers
- 2146 Aerospace Engineers
- 2147 Computer Engineers (Except Software Engineers/Designers)
- 2171 Information Systems Analysts and Consultants
- 2173 Software Engineers and Designers
- 2174 Computer Programmers and Interactive Media Developers
- 2231 Civil Engineering Technologists and Technicians
- 2232 Mechanical Engineering Technologists and Technicians
- 2233 Industrial Engineering and Manufacturing Technologists and Technicians
- 2241 Electrical and Electronics Engineering Technologists and Technicians
- 2253 Drafting Technologists and Technicians
- 2281 Computer Network Technicians
- 3111 Specialist Physicians
- 3112 General Practitioners and Family Physicians
- 3131 Pharmacists
- 3141 Audiologists and Speech-Language Pathologists
- 3142 Physiotherapists
- 3143 Occupational Therapists
- 3152 Registered Nurses
- 3211 Medical Laboratory Technologists and Pathologists' Assistants
- 3214 Respiratory Therapists, Clinical Perfusionists and Cardiopulmonary Technologists
- 3215 Medical Radiation Technologists
- 3222 Dental Hygienists and Dental Therapists

3233 Licensed Practical Nurses
4131 College and Other Vocational Instructors
4141 Secondary School Teachers
4152 Social Workers
4212 Community and Social Service Workers
5241 Graphic Designers and Illustrators
6221 Technical Sales Specialists – Wholesale Trade
7231 Machinists and Machining and Tooling Inspectors
7311 Construction Millwrights and Industrial Mechanics (Except Textile)
7312 Heavy-Duty Equipment Mechanics
7321 Automotive Service Technicians, Truck and Bus Mechanics and Mechanical Repairers
7333 Electrical Mechanics
8231 Underground Production and Development Miners

The list of 44 occupations differs from the previous one first established on February 24, 2012 in the following important ways:

➤ The following occupations were **added** to the new list:

0213 Computer and Information Systems Managers
0631 Restaurant and Food Service Managers
1122 Professional Occupations in Business Services to Management
2132 Mechanical Engineers
2147 Computer Engineers (Except Software Engineers and Designers)
2233 Industrial Engineering and Manufacturing Technologists and Technicians
2281 Computer Network Technicians
5241 Graphic Designers and Illustrators
8231 Underground Production and Development Miners

➤ The following occupations were **removed** from the old list:

0112 Human Resources Managers
0621 Retail Trade Managers
1243 Medical Secretaries
2282 User Support Technicians
2283 Systems Testing Technicians
3113 Dentists
3114 Veterinarians
5125 Translators, Terminologists and Interpreters
6211 Retail Trade Supervisors

Recruitment Efforts

Unlike the regular LMO stream, which requires employers to advertise for positions falling under NOC 0, A or B, employers seeking to fill positions that pertain to one of the 44 above-referenced positions need not submit **any** proof of recruitment/advertising efforts.

Employer Requirements

Despite being exempt from minimum advertising requirements, employers seeking to obtain a FLMO for a TFW must still meet all the requirements of the TFW Program. Specifically, employers seeking to hire TFWs under this program are expected to uphold the terms and conditions of employment set out in the LMO confirmation letter and annex, which include, but are not limited to the: i) wages (including deductions); ii) working conditions (hours of work, overtime, and workplace safety insurance); and iii) identified occupation (job duties and skill level). Moreover, in order for the application to be successful, the description of the job offered to the TFW must match the NOC description and the TFW's credentials must be consistent with the corresponding requirements as featured in the NOC for that occupation.

As with the regular LMO stream, the wages and working conditions offered to foreign workers under the FLMO must be consistent with the wage rate paid to Canadian citizens and permanent residents working in the same occupation and geographical area. To determine the applicable wage rate in Quebec for a given NOC code, whether under the regular LMO or FLMO application process, please refer to the following helpful links:

http://imt.emploiquebec.net/mtg/inter/noncache/contenu/asp/mtg941_accueil_fran_01.asp

<http://www.workingincanada.gc.ca/home-eng.do?lang=eng>

http://www.stat.gouv.qc.ca/donstat/societe/march_travl_remnr/remnr_condt_travl/salaires_annuels/index.htm

The Forms

Whereas the EMP5517 – LMO Application form must be used for regular LMO applications, FLMO applications must instead use the Formulaire EMP5517 – *Professions spécialisées*. Unlike the regular LMO program procedure in Quebec, the FLMO and CAQ applications must both be submitted together to the MICC. The MICC is then responsible for faxing to SC the information it needs to assess the job offer. A joint decision is subsequently issued by the MICC and SC. Two (2) processing fees of \$187 each (total \$374) must be paid to the MICC when filing the CAQ application. One fee is for the review of the employer's job offer and the other fee is for processing the TFW's CAQ application. Applications to the MICC must always be sent by mail/courier. The MICC does not accept e-filing or requests by facsimile.

All Quebec forms can be found on the MICC website at

<http://www.micc.gouv.qc.ca/fr/formulaires.html>.

Processing Times

Processing times under the regular LMO process in Quebec usually take approximately 8-10 weeks. To that you must add the 2 week minimum advertising requirement and the time it takes to collect and review all received resumes. In the case of FLMO applications, the targeted processing time is approximately 2-4 weeks, but these have been taking longer to process in 2013 than the 2012 benchmark (between 6-8 weeks).

III. SERVICE CANADA COMPLIANCE AUDIT - both ALMO and LMO

For many years, Canadian employers who violated or otherwise deviated from LMO commitments and undertakings, did so with impunity. There were reports of minor and more serious LMO abuse coming from both lower and higher skilled occupations, whether the live-in caregiver program, or professional-level positions. With the increasing number of foreign workers in Canada, and with the global trend towards enforcement (of foreign worker programs), the government introduced legislation in the Spring of 2011, that provided a basis for Service Canada to pursue LMO violations. Previously, SC lacked a legal basis for enforcement of its own program.

Granted, the Federal department had introduced a voluntary compliance initiative, but many employers chose not to tick that box on the LMO form, and SC had no basis to audit those program users.

The April, 2011 amendments to the *Immigration and Refugee Protection Act and Regulations* (“IRPR”) foreign worker provisions introduced the “substantially the same” (“STS”) employer compliance review test⁵, which created a legal test to be applied in an audit context.

Today, SC has adopted the ECR (Employer Compliance Review) assessment process to conduct its audits. The process consists of requiring data and documentation, at some point into the passage of the foreign national’s work in Canada, or even after that foreign worker has concluded the Canadian assignment and returned home. The key elements of ECR are:

- Wages;
- Occupation (NOC level);
- Location; and
- Job duties.

Specifically, the government seeks assurance that the foreign national is working in opposition substantially the same as that approved in the LMO Annex (provided with the LMO). Thus, the four elements provided above must all be substantially the same as those set out in the LMO or ALMO. The auditors, now known as Integrity Officers (they were originally simply officers from within the regional TFW offices), will scrutinize relevant documentation to ensure that everything matches up with the original LMO/ALMO, and Annex. Typical documentation sought for these ECR Audits are:

- Three consecutive payroll (payslips);
- Corresponding time sheets;
- Work permits;

⁵ See attached: Annex A – Substantially the Same (STS) Employer Compliance Review – Initial Contact example

- Confirmation of job title, duties, and location;
- Any collective bargaining agreement;
- Record of Employment (if applicable);
- Registration or clearance from provincial workplace insurance; and
- Description of duties performed by TFW

Other information requested for the audited employees includes the hourly wage and first day of work.

Communicating with Service Canada

SC will speak to lawyers or other approved third party representatives if duly authorized in their computer system. However, as has been evident over the list serve over the recent past, this provides no assurance that SC will actually communicate with the representative.⁶

When the audits originally occurred, SC held in abeyance all pending LMO/ALMO applications pending satisfactory conclusion of the audit. This had a major negative impact on regular users of the program whose current cases were prejudiced by any delays in the audit process, which could take weeks or months to complete. To SC's credit, this particular weakness in the process (unlike the one mentioned above vis-à-vis third parties), appears to have been remedied with respect to historically clean (compliant) companies. A sample ECR (audit) letter has been censored and included as Annex A to this paper for your ease of reference, and can be used to prepare your

⁶ The authors' opinion is that while this may be justified in unusual or suspicious circumstances, just as it may be under regular LMO processing, the default should be to communicate with the authorized third party representative that the organization has duly appointed. The authors are not aware of another area of law where such appointment of counsel is regularly flouted by a department, including Citizenship and Immigration Canada. The current pattern of ignoring the employer's direction undermines the legal regime (Bill 35) which was introduced around the same time as SC's TFW regulations. To only abide by one part of the law is inconsistent, and unfair to program users. While headquarters has publicly stated that the practice is unacceptable, as long as it continues, Counsel should continue to raise the issue with senior departmental officials and/or bring it to the attention of regional management.

clients for what they will ultimately experience if they are repeat users of the LMO or ALMO programs

The Impact of the 2013 Federal Budget on LMOs

The federal government published the 2013 budget (“Budget”) in March 2013. The Budget suggests that the government will work towards imposing further restrictions on employers that hire foreign workers in the future. Such restrictions include:

- Consulting with employers to ensure that Canadians are given priority in the hiring process;
- Increasing employers’ recruitment efforts as well as the length and reach of job advertising (the current minimum advertising period is 14 days);
- Amending immigration legislation to restrict the identification of non-official languages as job requirements when hiring foreigners; and
- Introducing fees for employers that apply for labour market opinions to hire temporary foreign workers.

As with any budget, the devil will lie in the details of the Budget bill, which has yet to be seen.⁷

Upcoming LMO Reform

We have heard for several months (dating back to early 2012) that major changes – other than the ALMO – were coming in the area of TFWs. Certainly, we are expecting some of these reforms in the area of LMOs.

CONCLUSION

The new initiatives taken by SC to expedite the issuance of LMOs both in Quebec and across Canada are a good first step to addressing the needs of Canadian employers, all while preserving the integrity of the Canadian labour market. The fact that the MICC modified the list

⁷ We expect changes to obviously come in the area of LMOs.

of 44 professions within 1 year of FLMO introduction, makes the policy stance clear: MICC is prepared to facilitate the process for Quebec employers, but only for those occupations where labour shortages truly do exist. SC's message across Canada is equally clear: it will collaborate with Canadian employers to help them fill urgent positions, but only on the condition that the employer has gained the assurances of the government through its attestation process and potential for back-end compliance checks.



**SUBSTANTIALLY THE SAME (STS)
EMPLOYER COMPLIANCE REVIEW - INITIAL CONTACT**

Service Canada Centre #
Foreign Worker Recruitment Branch
Suite 1440 Canada Place
9700 Jasper Avenue
Edmonton, AB, T5J 4C1

2012-

ER ID #

Dear

As discussed during our telephone conversation on 2012- , the purpose of this letter is to inform you, as an employer of temporary foreign workers (TFWs), of your responsibilities under the *Immigration and Refugee Protection Act and Regulations* (IRPA/R). In accordance with the April 1, 2011 amendments to the IRPR, all employers who have employed a TFW during the period beginning two years immediately preceding the application and who are seeking to hire TFWs, must demonstrate that the terms and conditions set out in previous Labour Market Opinion (LMO) confirmation letters and annexes were met. Namely, that they have provided substantially the same (STS) wages, working conditions and occupation as identified in the previous LMO confirmation letter and annex.

As part of our employer compliance review, please find the enclosed checklist to be completed and a list of documents to be provided. The review period will cover the two years immediately preceding the date on which your current LMO application was received. Only submit documentation for transactions which occurred after 2010-04-20. The information can be submitted by fax, e-mail or regular mail. When submitting documents that may contain personal information such as a social insurance number, the name of an employee other than the TFW, or personal financial codes/bank account numbers, as an employer, it is your obligation to protect personal information. Please ensure care is taken to avoid the inclusion of this personal information. Once your documentation has been reviewed, it may be necessary to contact you for further clarification.

During the review, where it is found that you have not provided wages, working conditions or an occupation to a TFW that were substantially the same as the terms of employment as stipulated on the LMO confirmation letter and annex of the previous job offer, you will have the opportunity to provide a rationale and undertake corrective actions. HRSDC/Service Canada will work with you to implement the appropriate compensation. Should you not provide a reasonable justification, refuse or only partially implement compensation, you may be deemed ineligible for the Temporary Foreign Worker Program (TFWP). If you are found to have failed a STS assessment, access to the TFWP may be denied for two years. And finally, where there is reason to believe that you may not have fully adhered to the requirements of the TFWP, and the activity involves the legislative responsibilities of other agencies, HRSDC/Service Canada may share this information with the relevant federal and/or provincial/territorial bodies where appropriate authorities exist.



**SUBSTANTIALLY THE SAME (STS)
EMPLOYER COMPLIANCE REVIEW - INITIAL CONTACT**

Your cooperation is appreciated and we look forward to receiving the documentation by 2012- .26.

Documentation may be submitted by facsimile at
address:

or sent to the officer listed below at the following

Service Canada Centre #
Foreign Worker Recruitment Branch
Suite 1440 Canada Place
9700 Jasper Avenue
Edmonton, AB, T5J 4C1

Should you have any questions, please do not hesitate to contact me at
@servicecanada.gc.ca.

or by e-mail at

Sincerely,

A handwritten signature in black ink, consisting of a large loop followed by a horizontal stroke.

Foreign Worker Officer

Tel:

Fax:

Email:

http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/index.shtml

Annex B – Enclosure - NOC 0, A & B

Annex B - Enclosure

Please complete this form and return it with the requested documentation. The information requested relates to the TFW(s) listed in Annex A.

Please note that it is the employer's obligation to protect personal information, such as: a social insurance number, the name(s) of employees other than the TFW, employee numbers (if applicable), personal financial codes/bank account numbers, and insurance policy numbers. This information should not be included in the documentation submitted.

The review period will cover the two years immediately preceding the date on which your current LMO application was received. Only submit documentation for transactions which occurred within the last two years of submitting your current LMO application.

1) Wages

To demonstrate compliance, please submit:

A copy of three consecutive payroll statements for the TFW(s) listed, starting from the date the work permit was issued for LMO which should include at a minimum:

- (a) the total number of hours worked,
- (b) hourly wage, and
- (c) all deductions.

Timesheets that correspond to the payroll statements provided

Please explain any discrepancy on the payroll statements (for example, the difference between the anticipated number of hours to be worked at the time of application, and the actual total number of hours worked as indicated on the payroll records).

Where applicable, please also provide:

- Copy of a Collective Bargaining Agreement.
- Copy of a Work-sharing Agreement.
- Copy of Record of Employment, if the TFW(s) is/are no longer in your employ.
- Copy of work permit for LMO

2) Working conditions - workplace insurance

To demonstrate compliance, please provide proof of registration or clearance letter from your applicable provincial compensation organization

Proof attached

3) Occupation

Please provide a description of duties performed by the TFW.

**ANNEX A****COMPLIANCE REVIEW DOCUMENTATION****Employer ID:****Employer Name:**

The information that we are requesting is related to the(se) TFW(s):

System File #	Full Name	Date of Birth (dd-mm-yy)	Position (NOC)	Total # of hours worked per week	Hourly Wage	First day of work dd-mm-yy (if applicable, last day of work)	Copy of Work Permit (attached)

PLEASE COMPLETE THIS FORM AND RETURN IT WITH ANNEX B AND THE REQUESTED DOCUMENTATION.

Major Changes Made to Canada's Temporary Foreign Worker Program: April 1 Regulation Highlights

April 21, 2011 | *Posted by Alan Diner* | [Print this page](#)

By Alan Diner

It is commonly acknowledged that immigration will be the main driver of supply for Canada's dwindling labour market. And while the government has allowed for flexibility in the program, Canada has been notoriously free in enforcement of the TFWP, and abuses have resulted. These abuses have been increasingly prevalent in recent years, with the attendant growth of Canada as a leading economy and foreign worker destination. The objectives, of these changes, as expressed by the Government of Canada, are as follows:

1. to reduce the potential for the exploitation of temporary foreign workers (TFWs) by employers and third party agents, thereby better protecting TFWs who work in Canada,
2. to implement stricter employer accountability mechanisms, including a denial of service provision, to encourage greater adherence by employers to the terms and conditions of their job offers (e.g. wages, working conditions, and occupations); and
3. to underline that employment facilitated through the TFWP is meant to be temporary in nature.

This Alert explains the new Regulations in detail and is organized in the following manner:

1. The government's new method of evaluating the genuineness of the job offer made by an employer in Canada to a foreign national, and the new test the government will use to determine whether the employer is in compliance.
2. The new penalties that will be imposed by the government should an employer be deemed non-compliant.
3. The changes that reflect the temporary nature of Canada's TFWP.

Highlights and Summary of Changes

1. (a) The Method of Evaluating the Genuineness of the Job Offer

At their core, the Regulations offer three major changes to address the three objectives outlined above. First, all visa officers, before approving a work permit in Canada, must ensure that the job offer is genuine. An officer will evaluate the genuineness of an offer of employment by various due diligence measures, including ensuring that the offer is made by an employer that is actively engaged in the business in respect to which the offer is made.

An officer may request an employer's T4 Summary of Remuneration Paid and/or other business documents. This is more likely in the case of a smaller or start-up company where an officer may be concerned

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with the employer's active engagement in its business.

Another component of the genuineness assessment is that the offer must be consistent with the reasonable employment needs of the employer. Officers must be satisfied that the offer of employment is reasonable in relation to the type of business the employer is engaged in. Should the officer have doubts in this respect, more information will be requested from the employer to show that the role the foreign worker will be engaging in is reasonable both in terms of the occupation and from a business perspective. A refusal to submit further information, if requested, may result in a refusal to issue the work permit.

The terms of the offer must be terms which the employer is reasonably able to fulfill. Again, this will apply mainly to smaller and/or start-up companies. Until a database is created that will enable officers to view an employer's past history of genuineness, an officer may request documents such as a T4 Summary of Remuneration Paid, T2 schedule, T2125 (Workers' Compensation clearance letter or business contracts).

A major addition to the genuineness assessment is past compliance with the law. The employer must have been in compliance with the federal and/or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national will work.

Federal and provincial laws are defined as laws related to the regulation of employers, employer consultants and/or recruiters, as well as the employment of foreign workers, Canadian citizens and permanent residents. Violations by employers and/or third parties such as recruiters working on behalf of employers reported by either the federal or provincial authorities may be considered whether the violations involved Canadian citizens, permanent residents or foreign workers.

It is anticipated that further instructions on assessing compliance with federal, provincial and/or municipal legislation will be provided by Citizenship and Immigration Canada (CIC) in a future Bulletin. We will advise once this has been published.

1.(b) The "Substantially the Same" (STS) Test

The new Regulations will allow the government to examine the last two years of the employer's record with regard to its foreign workers. In doing so, the government will want to see that the employer provided each foreign worker with wages, working conditions and employment in an occupation that were **substantially the same** as those set out in the employer's original offer of employment and/or work permit authorization. Deviations from this STS test can be excused if justified. Justifications include:

1. A change in federal or provincial law;
2. A change to the provisions of a collective agreement;
3. The implementation of measures by the employer in response to a dramatic change in economic conditions that directly affected the employer, provided that the measures were not directed disproportionately at foreign nationals employed by the employer;

Resources

Immigration Processing Times

Human Resources and Skills
Development Canada

Working in Canada

Citizenship and Immigration Canada

Canada-U.S. Business Travel Guide

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4. An error in interpretation made in good faith by the employer with respect to its obligations to a foreign national, if the employer subsequently provided compensation or made sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error;
5. An unintentional accounting or administrative error made by the employer, if the employer subsequently provided compensation or made sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error; or
6. Circumstances similar to (1) to (5) above.

A negative STS assessment will reflect situations in which the difference relating to the wage, working conditions or occupation that were provided to the foreign national as compared to those in the original job offer are considered detrimental or disadvantageous to the foreign national vis-à-vis the original plan. This would, in the view of the government, compromise the integrity of the TFWP.

On the other hand, should an employee be earning slightly more wages than the original job offer, that will not, in and of itself, be cause for a negative STS assessment. However, we recommend that any potential future increases in salary (via pay raises or bonuses) are addressed at the outset in the foreign national's contract of employment. We further advise that as a best practice that all changes be brought to the attention of the government.

We expect that that CIC will be publishing further guidance with more detailed instructions on the subject. We will advise as soon as this Bulletin has been issued by CIC.

2. Penalties

The new Regulations provide for sanctions against employers that contravene the TFWP by providing job offers that are not deemed to be genuine, or that have provided job offers that are not deemed to be genuine in the previous two-year period. The main new penalties are an exclusion from using the TFWP for a two year period going forward and the publication of the name of the offending employer on a Canadian government website, available for the public to see (the "blacklisted employer" list).

The government will maintain a list of blacklisted employers on its website, stating the names and addresses of each employer and the date that the determination was made. The government will not issue a work permit for any employer on the blacklist, nor will a current employee be able to obtain a work permit extension if his/her employer is a new addition to the blacklist.

Of course, the increased scrutiny and enforcement resulting from the new Regulations will also expose more employers and TFWs to findings of immigration law violations. All previously existing penalties will still be available to the government, including fines, jail terms and exclusion from the country for offending foreign nationals. In short, we expect to see an increase in immigration law enforcement as a result of these changes.

3. Temporary Nature of the TFWP: The 4-year Cap

The third objective of the new Regulations is to underline the temporary nature of the TFWP. To achieve this end, the government is, starting from April 1, 2011, imposing a four year limit on the number of years that foreign workers can remain working in Canada. There are exceptions to this rule, as follows:

- TFWs in managerial (NOC 0) or professional (NOC A) occupations
- TFWs who are employed in Canada under an international agreement, such as the North American Free Trade Agreement (NAFTA), Canada-Chile Free Trade Agreement (CCFTA), General Agreement on Trade in Services (GATS), or another agreement.
- Foreign nationals who are exempt from the Labour Market Opinion process, including but not limited to:
 - Spouses and common-law partners of international graduates participating in the Post-Graduation Work Permit Program; and
 - Entrepreneurs, intra-company transferees, researchers and academics (under the definition of Canada's immigration legislation).
- TFWs who have applied for Canadian Permanent Residence and have received:
 - a "Certificat de sélection du Québec" (CSQ) if applying as a Quebec Skilled Worker;
 - a Provincial Nominee (PN) certificate if applying under a province's Provincial Nominee Program;
 - an approval in principle letter if applying as a Live-in Caregiver;
 - a positive selection decision if applying as a Federal Skilled Worker; or
 - a positive selection decision if applying as a Canadian Experience Class applicant.

Further information related to the 4-year cap:

A CIC officer, when calculating the number of years a foreign national has already worked in Canada, will assume that the foreign national worked for the length of time indicated in the previous work permit(s). Put another way, if the foreign national had a work permit issued for three years, the officer will assume the foreign national worked for that entire three year period. However, legitimate breaks in employment which include, but are not limited to, extended sick-leave, maternity leave and extended absences from Canada, will not be counted against the 4-year cap, provided the foreign national can show, by way of documentary evidence, that s/he was in fact not working in Canada during that time. This includes time spent outside Canada by those who split their work or residence between Canada and another country, such as the United States. As such, we strongly recommend that employees keep records of all absences from work and the reason for those absences. Examples of such documentary evidence include letters from doctors, employers, schools, proof of maternal/parental benefits from government agencies, Record of Employment documentation, etc.

All work performed in Canada while on implied status *will* count towards the 4-year cap. In other words, work performed after the expiry of a work permit while the foreign national is waiting for a fresh work permit, which was applied for prior to the previous work permit's expiration, counts toward the 4-year cap.

On the other hand, work performed in Canada by a foreign national who was/is a full-time student at the time the work was performed **will not** count towards the 4-year cap.

4. Changes to the TFW forms

The application forms have been changed and/or added to reflect the new Regulations. For instance, there is a new form that must be submitted with all new LMO-exempt work permits. This form makes certain representations about genuineness to CIC and to the Canada Border Services Agency (CBSA), the body that oversees and administers Canada's borders. As for the other major government department involved, Human Resources and Skills Development Canada (HRSDC), their LMO form poses additional questions that permit an officer to address the genuineness of the application. Specific certifications must also now be provided by the employer. Employers will need to make the following four attestations:

1. I will provide any temporary foreign worker employed by me with wages, working conditions and employment in an occupation that are the same as those described in the Labour Market Opinion confirmation letter and annex.

2. I will immediately inform Service Canada/Temporary Foreign Worker Program officers of any subsequent changes related to the temporary foreign workers' terms and conditions of employment, as described in the Labour Market Opinion confirmation letter and annex.

3. I am compliant with, and agree to continue to abide by the relevant federal/provincial /territorial laws that regulate employment in the occupation specified and, if applicable, the terms and conditions of any collective agreement in place. I recognize that any terms and conditions of the attached offer of employment are considered null and void if they are less favourable to the temporary foreign worker than the standards stipulated in the relevant *Labour Standards Act*.

4. I am compliant with, and agree to continue to abide by federal/provincial/territorial Legislation related to the temporary foreign worker's recruitment applicable in the jurisdiction where the job is located. I declare that all recruitment done or that will be done on my behalf by a third party, was or will be done in compliance with federal/provincial/territorial laws governing recruitment. I am aware that I will be held responsible for the actions of any person recruiting temporary foreign workers on my behalf.

Recommendations

We encourage employers to implement an audit system which can address the genuineness of employment offers made to any and all foreign workers employed during for the past two years in order to take the appropriate corrective action necessary. We have included a basic audit tip sheet as a [link](#) to this Alert.

HR representatives must also ensure that they are in a position to abide by all representations made to the government in TFW applications. Strategies should be updated (or in some cases, implemented) to ensure the accuracy of the applications being filed, and ensure that those making the representations have the appropriate authority to make them to the government. We therefore recommend

that the employer advise government of any significant changes to the terms and conditions of employment of any TFW.

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Related Attorneys

Diner, Alan

Spring 2012 Alert

April 25, 2012 | *Posted by* Alan Diner | [Print this page](#)

HRSDC, after much anticipation and some delay, introduced the long-anticipated A-LMO (Accelerated Labour Market Opinion) program on April 25, 2012. Simultaneous with the A-LMO launch, HRSDC introduced its national Web Service, which allows employers to track their LMO applications (whether through the traditional or A-LMO streams) over the Internet.

1. Accelerated Labour Market Opinions (ALMOs)

Both programs – the Web Service and A-LMO – are intended to bring efficiencies to this part of the Temporary Foreign Worker (TFW) program which has been plagued of late by excessive waiting times and other inefficiencies. The A-LMO program allows employers to submit much simpler and smaller application packages for adjudication within a target service standard of days, rather than 3-4 months. Specifically, Service Canada hopes to achieve 10-day processing times for A-LMOs.

In order to qualify for participation in the A-LMO program, employers must:

- have been issued at least 1 positive LMO in the previous 2 years;
- have a clean record of compliance with the LMO program within the last 2 years;
- not have been the subject of an investigation, infraction or a serious complaint; and
- not have any unresolved violations or contraventions under provincial laws governing employment and recruitment.

Employers must also complete a series of attestations on the application form which attest to a range of commitments including for wages, occupation, working conditions, recruitment, and compliance with federal and provincial recruitment and employment law. These attestations are significantly further reaching than what employers previously attested to in prior LMOs.

If genuine, the A-LMO will be provided on the basis of the genuineness of the job offer, the wage offered, and whether the job is likely to

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resolve a labour shortage.

The employer is still expected to comply with all recruitment requirements. There have recently been updates to the prevailing policy wage for LMOs. Specifically, every employer is now expected to pay wages that are in line with what Canadian workers in the same job, at the same location, are being paid. In fact, this requirement has always been the case. However, what has been newly implemented is the ability to pay less than the prevailing (median) wage.

Under the previous system, employers were expected to always meet the average (prevailing) wage. Now, "median wage" replaces the previous "average wage", and along with this change, employers have been advised that for higher skilled occupations (NOC 0, A and B), they can pay up to 15% less than the posted median wage for the region in question provided Canadians employed in the same location are paid similar wages. For lower skilled positions (NOC C and D occupations), employers may now pay up to 5% less than the posted median, if that is what they can prove similarly situated Canadians are making in their workplace.

This shift in policy is intended to remedy situations in which employers were forced to prejudice Canadian employees, by paying foreign workers a higher amount due to the posted prevailing wage. In most cases, the wages posted on the government website will be lower than the actual prevailing wage due to the fact that the economic data trails current industry conditions. However, in times of economic recession, or for other valid reasons, a company's wages may be lower than the median, and so employers now have increased flexibility.

It must be noted, that the lower wage policy only intended to be used in cases where the shortfall can be proven by employer evidence including pay slips and other proof, and should not be used as the default position. Indeed, if an application submitted with lower-than-prevailing wages, the organization is certain to be audited and called upon to demonstrate the assertion.

In terms of advertising, the actual posting requirements are still as they were before, namely 14 days on the national job bank, with added requirements for NOC C and D positions, and more choice in advertising for the higher skill (NOC A and 0 occupations).

2. Audit and Demonstration of Compliance

Resources

Immigration Processing Times

Human Resources and Skills
Development Canada

Working in Canada

Citizenship and Immigration Canada

Canada-U.S. Business Travel Guide

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Employers must prove that they have met the terms and conditions of the positive A-LMO or LMO approvals to be compliant. Three key elements to evidence in a Service Canada audit are (i) wages, (ii) working conditions, and (iii) occupation. Employers will also need to ensure that the recruitment efforts mentioned above were met (subject to "variations from advertising" exceptions), as well as proof of other elements of the legislation, such as proof that the LMO did not adversely affect the settlement of a labour dispute.

(i) Documents Required to Demonstrate Compliance

Documents must be provided to Service Canada in order to prove compliance, including: payroll information for the employee, and if applicable, information relating to a "15/5%" claim below prevailing wage; timesheets; payroll slips; copies of recruitment advertising; collective bargaining agreements and proof of no labour dispute; copy of the work permit; and proof of corporate (provincial) workplace safety registration.

It is suggested that employers retain all documents related to the A-LMO and LMO applications for up to six years. While the actual look back period provided in the "substantially the same" legislation (see Spring 2011 Alert), is only two years, providing prior records may be of assistance in demonstrating compliance.

(ii) Sanctions for non-compliance

The consequence of alleged non-compliance may either be (i) providing sufficient justification, (ii) taking the opportunity to take corrective action, or, (iii) in a worst case, a finding of non-compliance, which renders the employer unable to use the A-LMO initiative, and subject to possible revocation of pending LMOs, as well as greater scrutiny of any future LMO applications. Of course, all penalties under Canadian immigration legislation, quite apart from Service Canada's LMO program, are also available to the government in any enforcement action coming out of work permit non-compliance.

3. Proactive Measures for Compliance

The government is now closely scrutinizing the foreign worker program, both in the areas of LMO and LMO-exempt work permits. It is our strong recommendation that employers take their foreign workers and foreign worker policies seriously, and prepare for the eventuality of such scrutiny and/or audit.

To manage any significant population of foreign workers within an organization, we suggest that the oversight of foreign worker applications be assigned to one person, or one area of the organization. Fragmentation of foreign worker oversight across a company, including various sites and locations, results in a greater likelihood of errors and ultimately, of non-compliance. One incident of non-compliance can impact an entire company's ability to participate in the program.

At seminars, we often talk about our 10-point foreign worker compliance tips. We reproduce them below for your reference.

1. Adopt a formal HR compliance program or policy for TFWs.
2. Ensure all authorizations are current, including immigration and social insurance paperwork, keeping in a separate personnel file.
3. Ensure HR representatives are in a position to abide by all representations made in TFW applications.
4. Audit all foreign workers regularly - preferably every six months, and at a minimum, once annually.
5. Report all material changes to government, and/or amend status documentation.
6. Apply for extensions early.
7. Provide immigration resources for TFWs.
8. Provide a central HR contact for TFW questions, which can be discreet and private.
9. Have audit process set out in cover letter from counsel to protect under solicitor-client privilege.
10. Work with counsel to address and resolve issues.