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## CHANGES TO THE TEMPORARY FOREIGN WORKER PROGRAM

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Changes to Canada's Temporary Foreign Worker Program are scheduled to come into force on April 1, 2011. These changes are intended to reduce the exploitation of foreign workers and to impose greater culpability for employers who wilfully fail to meet up with their minimum requirements and employee promises.

This change will require that Canadian employers make far greater efforts to ensure company-wide compliance with respect to temporary foreign workers. Human resources, project managers, and immigration counsel must work together to be certain that all foreign workers are in compliance with the terms and conditions promised in the foreign worker's work permit application regardless of whether or not a Labour Market Opinion was required.

As such, the new amendments have enumerated specific factors that are to be used to establish the genuineness of an offer of employment. Specifically, Citizenship and Immigration Canada will assess whether the employer is actively engaged in the business in respect to which the offer is made; whether the offer is reasonable in light of the legitimate employment needs of the employer; and whether the employer is able to reasonably fulfill the terms being offered. Additionally, the past immigration and employment compliance of the employer will also be assessed.

While these factors have always made up some part of the Labour Market Opinion application, and have been reviewed somewhat by the applicable visa post, it should be noted that for the first time, Immigration is instituting penalties to employers who have been found to violate these regulations.

In fact, employers who are found to have not complied with their stated terms and conditions can be barred from bringing any foreign worker to Canada for a period of two years unless the failure to meet the requirements was justified. Government authorities will determine what is considered a justification, but it should be based on one of four factors: whether there was an applicable change in federal or provincial law that made compliance impossible; whether there was a change to the provisions of a collective agreement that affects the foreign workers employment; whether the employer could not comply based on some measure outside of the employers control such as a recession, provided that the measures implemented by the employer are disproportionately applied to foreign workers; if the employer has made a good faith error in the interpretation of his/her obligations to the foreign national; if there was an unintentional error that is corrected; and/or some other situation of similar circumstance. In addition to being barred for two years from bringing in a foreign worker, the company will also have its name listed on Citizenship and Immigration Canada's website under a list of companies who have failed to live up to their requirements.

In an effort to encourage the “temporary” aspect of the Temporary Foreign Worker Program, the new regulations also limit the amount of time a foreign worker can remain in Canada, barring certain exceptions. Many foreign workers will be limited to a total work time in Canada of four years. Therefore, a foreign worker is not entitled to a new work permit until the four year window has tolled. This is especially important for companies to consider when bidding on RFP's and planning long-term contracts.

As a result of this, any changes to a foreign national's employment, whether initiated by HR, a team lead, or the employee's frontline supervisor, the repercussions of this change can be broad and can result in enormous financial and professional inconvenience to the company. It is vital that companies are aware of any work permits that have been issued to the company and what the terms of those work permits were. This includes things such as location of work, salary, and job title. If there are any deviations from what was promised to what is/has been delivered, this must be disclosed and corrected, if possible. Immigration counsel can assist an employer in this review.

In order to remain compliant, it is important that all supervisors who come into contact with a foreign worker are aware of the foreign worker's work permit conditions, and that the appropriate contact person is immediately made aware of any changes to the foreign worker's situation. This includes promotion/demotions, salary increases that were not contemplated in the original application, and any changes to work location. The consequences of failed compliance are greater than ever.

While the fear of retribution and severe consequences is increased, it is important to always be cognizant that there is a mechanism for justification for good faith mistakes. However, in order to be prepared for the April 1, 2011 start date, it is important that employers audit all work permit holders for their company to ensure that the company has been compliant, and to institute sound immigration policies now to ensure that the company remains compliant.