THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

October 28, 2022

Via email: christiane.fox@cic.gc.ca

Deputy Minister
Immigration, Refugees and Citizenship Canada
365 Laurier Avenue West
Ottawa, ON K1A 1L1

Dear Deputy Minister Fox:

Re: Canada Gazette, Part 1, Volume 155, Number 28 - Regulations Amending the Immigration and Refugee Regulations (Temporary Foreign Workers)

I am writing on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to recommend improvements to program delivery regarding temporary foreign workers, in the context of the International Mobility Program (IMP).

The CBA is a national association of 37,000 members, including lawyers, notaries, academics, and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Immigration Section has approximately 1,200 members across Canada practising in all areas of immigration and refugee law.

When we commented on the pre-published regulations in August 2021,[1] the CBA Section expressed satisfaction that the amendments were intended to better protect vulnerable temporary foreign workers working in Canada. We also raised concerns about legislatively imposing an employment agreement on companies who access the IMP. The employment agreement has since been implemented in the amended Regulations, and the CBA Section wishes to offer additional insights to permit Canadian companies who require access to the service of temporary foreign workers to more easily comply with the law.

1 Letter from CBA Section to Ian Gillespie and Brian Hickey, re: Canada Gazette, Part 1, Volume 155, Number 28 - Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers), August 9, 2021, Online.

Requiring an Employment Contract between the Canadian Employer and the Foreign National

Under s. 209.11(1)(e) of the Immigration and Refugee Protection Regulations, the employer must attest that:

(i) the employer has entered into an employment agreement with the foreign national that:

a. provides for employment in the same occupation and the same wages and working conditions as those set out in the offer of employment,

b. is drafted in the foreign national's chosen official language of Canada, and

c. is signed by both the employer and the foreign national,

(ii) the employer has provided a copy of the employment agreement referred to in subparagraph (i) to the foreign national

In a number of circumstances, however, the company completing the Offer of Employment on the Employer Portal will not have entered into an employment agreement with the foreign national:

a. "Contract for service" between the Canadian entity and foreign company or between the Canadian entity and a foreign national

In a "contract for service" scenario, the Canadian entity enters into a contract for services with a foreign company or into a contract for services directly with a foreign national.

Where the contract for service is between the Canadian entity and foreign company, the foreign company sends an employee(s) to Canada to undertake the work contemplated in the contract for services. These include, for example, management consulting agreements or contracts for repair services not covered by an after-sales service agreement.

The employer of the foreign national in this scenario is not the Canadian entity, but the foreign company. Where an employment agreement is in place, that agreement is between the foreign company and the foreign national.

Given the requirement that the employer of a foreign national must attest that it has entered into an employment agreement with the foreign national, s. 209.11(1)(e) contemplates that the "employer" completing the offer in the Employer Portal is the entity that entered into an employment agreement with the foreign national; in this case, the foreign company.

IRCC's Employer Portal enrolment guide[2] gives contrary guidance:

> If you are a Canadian company that contracts the services of a foreign company, you must complete and submit the offer of employment, not the foreign company. This is because it is your Canadian company that is creating the need for the temporary worker to enter Canada. You must submit the offer even if:
>
> - the temporary worker is, and will stay, an employee of the foreign company, and/or
> - the foreign company is paying the temporary worker's wages.

[2] IRCC, Employer Portal enrolment guide, Online.

The conflict between the requirement in s. 209.11(1)(e) and the guidance in the Employer Portal enrolment guide can be resolved by either:

- Not following the guidance in the Guide and having the foreign company submit the Offer of Employment on the foreign company's Employer Portal; or
- The Canadian company engaging in misrepresentation by attesting to entering into an employment agreement with the foreign national when that is not the case.

In addition to the concern about misrepresentation, requiring the Canadian company to attest that it has entered into an "employment agreement" in a contractual situation where it is not the employer of the foreign national can have other unintended repercussions, including in employment law and taxation law.

Further, the Employer Portal does not properly contemplate the situation of a contract for service between the Canadian entity and a foreign national, who is engaged as a contractor. In this case, there is no "Canadian employer" or "foreign employer" per se, given the contractual (as opposed to employment) relationship between the temporary foreign worker and the Canadian entity. At minimum, we recommend that a new field be added to the Employer Portal that allows the employer to state that a contract for service with a foreign national applies and the contractual agreement assumes the place of an employment agreement.

Given an interconnected world, where international trade is dependent on the ability of goods, equipment and services to flow across borders, this has created an untenable situation for Canadian companies that enter into contracts for crucial services with foreign entities.

b. International employees assigned temporarily to Canadian business or Intermittent travellers

Multinational corporations with operations in Canada and abroad frequently transfer employees across borders for temporary assignments. Whether the foreign national remains on foreign payroll or is moved to Canadian payroll, there is often no new employment agreement. Rather, the foreign national is given an Assignment Letter setting out the terms and conditions: the role they will assume in Canada, the compensation, and the work location. The assignment letter may not be signed by the employee.

In other instances, an individual will be employed by the foreign entity, with a cross border role and responsibilities – and often direct reports – at both the foreign entity and the Canadian entity. These foreign nationals require work permits to provide services in Canada on an intermittent basis. When they are in Canada providing services, they remain on foreign payroll. The time spent in Canada can vary – they may work in Canada every other week, for a week every month, or two weeks each quarter. There is no employment agreement with the Canadian entity. The terms and conditions of their employment are governed by their employment agreement with the foreign company, if applicable. In some cases, there may be no written employment agreement, as a written employment agreement is not a requirement under employment law in many jurisdictions.

c. Work permit extensions where wages, occupation or working conditions change (e.g. due to a promotion/annual salary review)

It is not uncommon for a foreign worker who has been in Canada on a work permit to receive an increase in compensation or a promotion at the time of seeking an extension of their work permit. It is not the practice of most employers, however, to enter into a new employment agreement with a worker each time their wages, occupation or working conditions change. The new compensation or working conditions are communicated through more informal means, such as an email. The

Canadian company in these circumstances would not be able to attest that they have entered into an employment agreement with the foreign national with the same terms and conditions of employment as those on the Offer of Employment on the Employer Portal.

In these circumstances, the Canadian company accessing the foreign worker's services is unable to complete the attestation required by the Regulations.

In prescribing that a Canadian company retaining the services of a foreign national must present a written employment agreement to the foreign national, and setting out the form, terms and nature of that agreement, the Regulations encroach on an area of provincial jurisdiction. Since most provincial employment laws do not impose similar requirements on Canadian entities when employing Canadian citizens or permanent residents, complying with the regulation can result in a Canadian company having to treat employees differently based on their nationality and immigration status.

Recommendations:

The CBA Section recommends several changes to address the concerns outlined above.

1. Where the foreign national is employed by a foreign entity, the Employer Portal enrolment guide should be amended to indicate that the entity that has entered into the employment relationship with the foreign national – i.e., the foreign entity – is the employer for the purposes of the Offer of Employment in the Employer Portal. Only the foreign employer can attest that it has entered into an employment or other contractual agreement with the foreign national, and attest to the terms and conditions and the form of employment. The same should apply in situations where the foreign national holds a cross-border position with responsibilities at the foreign and Canadian entities, and who enters Canada intermittently to provide services while remaining on the payroll of the foreign entity.
2. Alternatively, we recommend offering alternative attestations in the Employer Portal for common situations where an employment contract is not available. For a contract for service between the Canadian entity and foreign entity where the foreign national is employed by a third party:

   > I attest that I am not the employer of record for this foreign national. Therefore, there is no employment agreement between the foreign national and our company and I have not provided a copy of an employment agreement to the foreign national. At all material times the foreign national will remain under a contractual relationship with a foreign entity with which our company has contracted for services, and that entity is responsible for the terms and conditions of engagement, including compensation, for the foreign national. Our company is not a party to that contractual relationship and cannot provide a copy or attest to the terms of the relationship.
   >
   > For a contract for service with the foreign national contractor:
   >
   > I attest that I am not the employer of record for this foreign national. Therefore there is no employment agreement between the foreign national and our company and I have not provided a copy of an employment agreement to the foreign national. Our company has a contractual relationship with the foreign national to provide the service instead of any employment agreement. The terms and conditions of the contract for service provide the legal framework for the service to be completed in Canada.

3. Expand the acceptable forms of "employment agreement" to include generally accepted forms of establishing terms and conditions of employment such as assignment letters, email communications and HR software programs.

4. For a foreign national whose terms and conditions of employment change at the time of filing an application to extend or amend a work permit, allow for generally accepted forms of communicating changes to the temporary foreign worker, including email communication from the employer addressed to the foreign national. Under current employment law, a written employment agreement is not necessary to establish terms and conditions of an employment relationship. Other forms of agreements, including oral agreements, are acceptable.

Conclusion

While the CBA Section supports regulatory change that seeks to better protect vulnerable temporary foreign workers, the regulations should also offer flexibility to allow for relationships other than that of a Canadian employer and a foreign national employee. In today's global economy, Canadian companies must be able to enter into contracts for services with foreign companies and foreign nationals, particularly in situations where the foreign entities are providers of equipment, software or services that are of vital importance to the Canadian economy. Our additional recommendations seek to balance the protection of temporary foreign workers with ensuring that the IMP program continues to meet the needs of Canadian companies and of the Canadian economy.

The CBA Section appreciates the opportunity to recommend these solutions and would be pleased to discuss its recommendations or offer additional insights.

Yours truly,

(Original letter signed by Véronique Morissette for Lisa Middlemiss)

Lisa Middlemiss
Chair, Immigration Law Section