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Day 1

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**DENTONS' ONTARIO EMPLOYMENT
AND LABOUR SPRING WEBINAR SERIES**

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Your presenters



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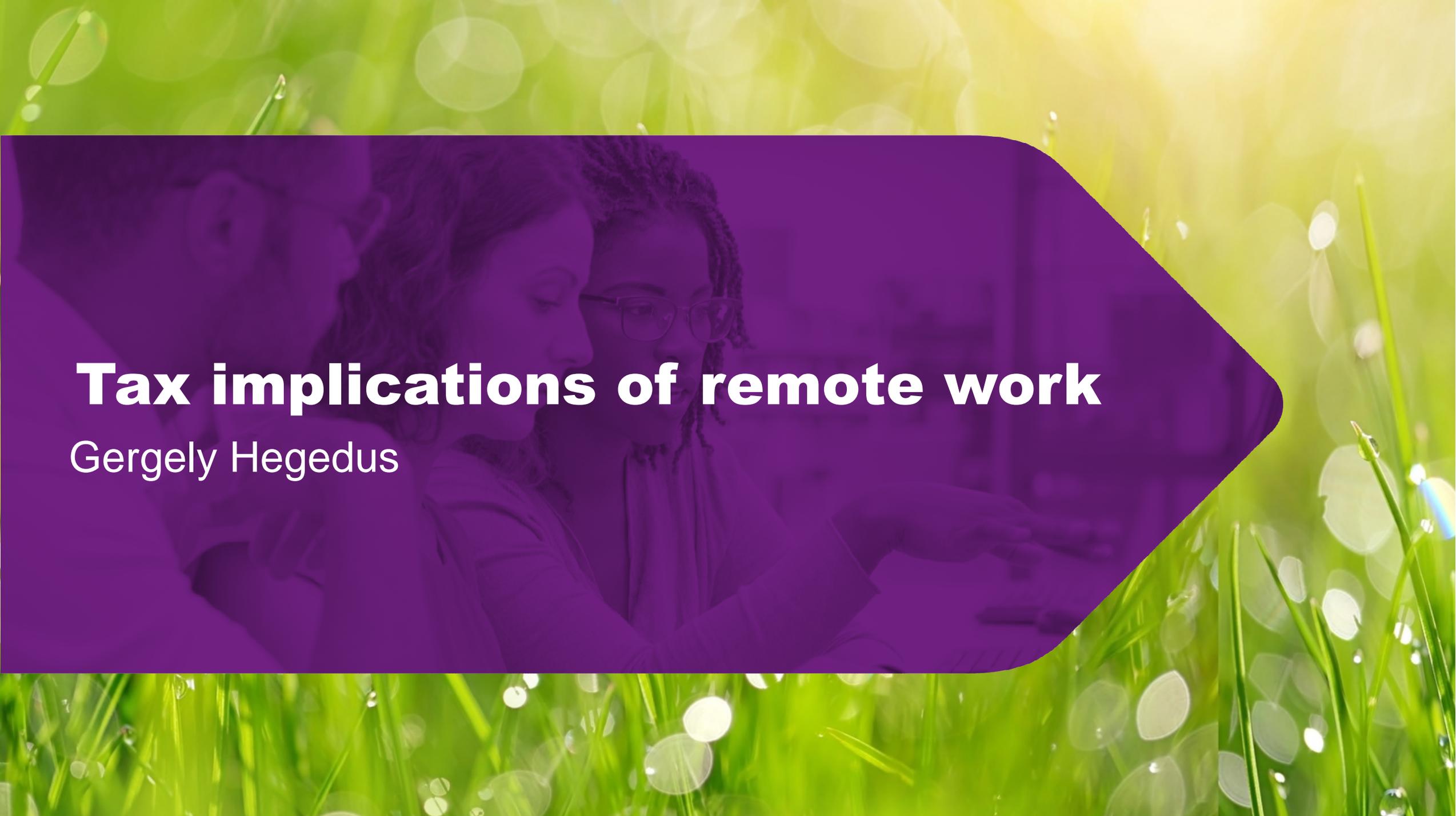


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Agenda

- **Gergely Hegedus:** *Tax implications of remote work*
- **Janice Pereira:** *Remote work / work from anywhere policies: Employment law considerations & implications*
- **Jonathan Mor:** *Immigration*





Tax implications of remote work

Gergely Hegedus

Remote work rates

- In 2016, about 1 in 20 employees worked most of their hours from home.
- From October to December 2021, **21%** of working Canadians reported working from home all the time, while an additional 18% worked from home some of the time.
- 75% of workers who worked from home all the time reported being very satisfied or satisfied with the balance between their job and home life.

Tax considerations

- Potential tax impacts on employer
- Potential tax impacts on employee
- Home office expenses

Potential tax impact on employer

- Permanent establishment (in other province or other territory) or other country
- Tax and filing obligations
- Payroll obligations

Permanent establishment in another province or territory

An employer may establish a PE in another province or territory or country:

- through a fixed **place of business** (i.e. a place of management, branch, office, etc.) in another country or province.
Generally, an employee's home office will not establish a PE as the employer does not exert control over the home office.
- If a person habitually exercises the authority to conclude contracts in another country. (i.e. see article V:5 of the *Canada-US Tax Treaty*)
- Other treaty rules (i.e. under the *Canada US-Tax Treaty* - if an individual is present in another state (i.e. US) for more than 183 days or more in any 12-month period and that person generates more than 50% of the gross active business income from the services in that state).

If a PE is established, then the employer may be taxed in that province, territory or country and may have tax filing and remitting obligations in that location.

Provincial/territorial payroll obligations

- Each province imposes its own individual tax rates.
- Amount of payroll deduction to be withheld is calculated based on tax rates of province where the employee reports for work.
- Where an employee is not required to report to work at any establishment of the employer, the employee will be deemed to report to work at the establishment from which the remuneration is paid.
- The withholding rate is the applicable rate in the province where the payroll department is located, as opposed to the province where the employee is located.

However, the individual's taxation rates are based on the province in which they reside.

Foreign Payroll obligations

- Canadian employers who hire foreign-resident remote workers may have foreign payroll obligations and business number registration requirements in the foreign employee's country of residence.
 - i.e. Canadian employers who have employees working in the US are required to withhold US federal and state (if applicable) income taxes, social security, healthcare tax, and any state unemployment or disability obligations.
- To remit and report the employees' wages and taxes, Canadian employers must apply for an Employer Identification Number.

Home office expenses

Deductible expenses may include the following:

- Electricity
- Heat
- Water
- Utilities portion (electricity, heat, and water) of your condominium fees
- Home internet access fees
- Maintenance and minor repair costs
- Rent paid for a house or apartment
- Office supplies like pens and paper, and cell phone minutes

You cannot deduct capital items like office chairs, mortgage interest and property taxes.

Requirements for home office expenses

- The workspace is where the employee principally spends time (**more than 50% of the time**) to perform his or her work;

or

- The employee must use the workspace exclusively to earn employment income AND he or she must use it on a regular and continuous basis for meeting clients, customers, or other people in the course of his or her employment duties. Video conferencing satisfies the definition of a “meeting”.

Simplified vs. detailed method

There are two ways to claim home office expenses:

1. Simplified method: Employees can claim **\$2** for each day they worked from home during that period they worked at home in **2020, 2021 and 2022** due to the COVID-19 pandemic, to a maximum of **\$400** for **2020** and **\$500 for 2021 and 2022** (250 working days) per individual.

Employer does not have to complete and sign Form T2200S or Form T2200.

2. Detailed method: This method allows employees to claim the actual amounts they paid, supported by documents.

Must complete Form T777S or Form T777 and get a completed and signed Form T2200S or Form T2200 from your employer.



**Remote work /
work from anywhere policies:
Employment law
considerations & implications**

Janice Pereira

Remote work within Canada

Which laws govern the employment relationship?

- Generally, the law of the province or territory in which the employee is physically located and where the work is performed.
- *E.g.*, an employee works remotely from British Columbia but solely performs work in connection with the employer's business activities in Ontario → BC's *Employment Standards Act* law would still govern.
- Can differ based on applicable employment standards legislation from province to province.

Shu Zhang v. IBM Canada Limited

2019 CanLII 79641 (ON LRB)

- 2009: Applicant hired by IBM as a software developer
- 2010: Applicant sought and was granted permission to work from home. Work at Home Agreement: IBM can terminate the program at its discretion and require the Applicant to transition back to a “traditional work environment” upon 4 weeks’ notice.
- 2015: Applicant moves to Vancouver, BC.
- October 2017: IBM notifies Applicant that he must relocate back to Ontario. Applicant refuses and IBM treats his refusal as a resignation, effective March 2018.
- 2018: Applicant claims severance pay under Ontario’s *Employment Standards Act, 2000*.

Ontario *Employment Standards Act, 2000*

Subsection 3(1)

3(1) Subject to subsection (2) to (5), the employment standards set out in this *Act* apply with respect to an employee and his or employer if,

(a) the employee's work is to be performed in Ontario; or

(b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

Shu Zhang v. IBM Canada Limited

2019 CanLII 79641 (ON LRB)

- The Ontario Labour Board rejected the Applicant's claim and held that the Ontario *Employment Standards Act, 2000* did not apply because at the time at which the employment relationship ended, it could not be said that the Applicant's employment was "*to be performed in Ontario.*"
- Further, as the Applicant's work was intended to be, and in fact was performed exclusively outside of Ontario, it could not have been said to be a "*continuation of work performed in Ontario.*"

Remote work implications

Employment contracts

- If an employee moves to work in another province, important provisions of their employment contract may no longer apply.

For example...

- Termination provisions that reference one province's employment standards legislation, even though the employee works in a different province → might render the entire termination provision inoperable and thus, no longer limits an employee's entitlements upon termination to minimum statutory entitlements.

Can a governing law clause save the day?

It depends...

- A “**Governing Law**” clause in a contract enables the parties to specify what substantive law will govern the rights and obligations of the parties.
- “*This Agreement shall be construed and performed in accordance with the laws of the Province of Ontario...*”

McMichael v. The New Zealand & Australian Lamb Company

2018 ONSC 5422

- Vice-President of Operations at employer's processing facility in Los Angeles, California.
- Employer argued that the Ontario *Employment Standards Act, 2000* did not apply as the employee had always resided in California and performed his employment duties out of LA.
- *"A choice of law clause often bears no relationship to the location in which the contract is to be performed. A governing law can thus be the law intended by the parties. As long as that choice is "bona fide and legal, and there is no reason for avoiding the choice on the ground of public policy", then the law will govern the contract."*

John Karpowicz v. Valor Inc.

2016 CanLII 49203 (ON LRB)

- The Labour Board considered whether the Ontario *Employment Standards Act, 2000* applied to an employee that resided in and worked out of Michigan for the entirety of the employment relationship.
- The employee occasionally visited the employer's head office in Burlington, Ontario for occasional meetings, and therefore argued that he performed some work in Ontario pursuant to s.3(1)(b) of the *Employment Standards Act, 2000*.
- Governing law clause: “*shall be governed by the law of the Province of Ontario*”

John Karpowicz v. Valor Inc.

2016 CanLII 49203 (ON LRB)

- *“It may be that, as a matter of contract, parties can agree to have certain statutes apply to their relationship even when the facts of their relationship make the statute inapplicable. That, however, is a matter for enforcement through the courts. The parties cannot confer authority on the administrative agency charged with enforcing the statute to deal with their dispute when the statute is on its face inapplicable to their dispute.”*
- *“[...] given where the substance of the work was performed by Mr. Karpowicz (outside of Ontario), and given that some incidental, though necessary, work was occasionally performed in Ontario, the Act has no application”.*

Remote work from other jurisdictions

Takeaways for employers

- Workers' compensation regimes and occupational health and safety laws vary by province
- Different wage entitlements
- Varying overtime triggers → e.g. exceeding 8 hours in one day in British Columbia and Manitoba vs. exceeding 44 hours in one work week in Ontario
- Potential issues are even greater when the proposed jurisdiction is another country

We can help!



Immigration

Jonathan Mor

Work-from-anywhere policies

Immigration law – implications/considerations

Whether a “work-from-anywhere” policy poses any risks under Canadian immigration law requires consideration of two primary factors:

1. Work location:
 - a) Will employees remain in the same province/territory as the employer?
 - b) Will employees work from a different province/territory?
 - c) Will employees work from another country?
2. The employee’s immigration status in Canada.

Work-from-anywhere policies

In-Canada vs. International

Canadian immigration law only applies to those who are physically-present in Canada:

- An employee who works remotely for a Canadian employer from outside of Canada will not pose any risks under Canadian immigration law, regardless of the employee's immigration status.
- However, employers must still consider whether this arrangement will be permitted by the laws of the destination country.
- Allowing international remote work must be considered on a case-by-case basis, as relevant laws will vary from country to country.

Determining whether immigration law would permit an employee to “work-from-anywhere” within Canada requires consideration of the employee's immigration status.

Work-from-anywhere policies – immigration status

Immigration status – We will consider:

- Canadian citizens;
- Permanent residents of Canada; and
- Temporary foreign workers.

Immigration status – Canadian citizens

Subsection 6(2) of the Canadian *Charter of Rights and Freedoms*:

Every citizen of Canada and every person who has the status of a permanent resident of Canada **has the right**

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

The Charter grants Canadian citizens mobility rights within Canada; they are permitted to live and work in any province or territory.

As applied to Canadian citizens, a “work-from-anywhere” policy will not pose any risks under Canadian immigration law.

Immigration status - Permanent residents of Canada

A permanent resident of Canada (“PR”) has almost the same rights and freedoms of Canadian citizens, but cannot:

- Vote or run for political office; and
- Hold some jobs that need a high-level security clearance.

What if the PR employee moves to another province/territory, and begins working from there on a permanent basis?

Permanent residents cont'd

Subsection 6(2) of the Canadian *Charter of Rights and Freedoms*:

Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

The Charter also grants mobility rights to PRs. A PR can therefore live and work in any province or territory, with one caveat.

Permanent residents cont'd

Whether a PR *should* relocate to another province will depend upon the immigration program used to obtain permanent residence:

1. Did the employee obtain permanent residence under one of the federal programs administered by Immigration, Refugees and Citizenship Canada?

Common examples of federal programs include:

- (1) Canadian Experience Class;
- (2) Federal Skilled Worker Program; and
- (3) Federal Skilled Trades Program.

2. Did the employee obtain permanent residence under one of the provincial/territorial immigrant nominee programs, administered by the destination province/territory?

Permanent residents cont'd

Provincial/Territorial Immigrant Nominee Programs

A Provincial/Territorial Immigrant Nominee Program (“PNP”) allows a province or territory to nominate foreign nationals who meet certain prescribed criteria, and facilitate their path to permanent residence.

Each province or territory has its own set of application streams, such as:

1. International students;
2. Skilled workers;
3. Semi-skilled workers;
4. Entrepreneurs;
5. Etc.

Permanent residents cont'd

Provincial/Territorial Immigrant Nominee Programs

Most PNPs require the applicant to demonstrate an intention to remain in the destination province/territory after becoming a PR.

Examples:

- Intend to and be able to live and work in **Alberta**
- Intend to live, work and economically establish in **British Columbia**
- Intend to live in **Ontario** after granted permanent residence
- Intend to live **in Nova Scotia**
- Plan to live and work in **Saskatchewan**

Permanent residents cont'd

Provincial/Territorial Immigrant Nominee Programs

- We saw that the Canadian *Charter of Rights and Freedoms* grants mobility rights to PRs.
- PRs do not waive their mobility rights under the Charter by using a PNP.
- However, should a PR relocate to another province/territory, it may cause the PNP to investigate whether they misrepresented their intention during the application process to permanently live/work in the province/territory.
- Should the PNP find that a misrepresentation did occur, it may begin proceedings to revoke their PR status.

Permanent residents cont'd

Provincial/Territorial Immigrant Nominee Programs (PNPs)

- This does not mean that a PR who used a PNP can never relocate, but the chances of an investigation are highest if:
 - The PR does not immediately settle in the destination province/territory; or
 - The PR relocates to another province/territory shortly after obtaining permanent residence.
- There is no standard timeframe for relocation that would entirely remove the risk of an investigation by the PNP.

In contrast with the other implications that will be discussed, this scenario only carries risk for the PR employee.

Immigration status – Temporary Foreign Workers

“Work-from-anywhere” policies carry the greatest risk for employers when applied to a Temporary Foreign Worker (“TFW”).

The risk will depend on the terms and conditions of the employee’s work permit.

Two broad categories of work permits:

- Open work permits; and
- Closed work permits

Temporary Foreign Workers

Open work permits

An open work permit allows a TFW to work for any employer.

With few exceptions, open work permits also allow the TFW to work:

- In any occupation; and
- In any location within Canada.

For an open work permit that allows a TFW to work from any location, there is no risk to the employer; the employee can be permitted to “work-from-anywhere” within Canada.

Temporary Foreign Workers Cont'd

Closed work permits

A closed work permit only allows a TFW to work for a specified employer.

In most cases, this means that the TFW's work location is also restricted.

Allowing a TFW with a closed work permit to “work-from-anywhere” poses the greatest risk to employers.

Temporary Foreign Workers Cont'd

Closed work permits – Two programs

Closed work permits are obtained through one of two temporary immigration programs:

- **Temporary Foreign Worker Program** - Requires employers to obtain a positive Labour Market Impact Assessment (“LMIA”) in order to hire a TFW.
- **International Mobility Program** – Allows employers to hire a TFW without a LMIA on the basis of one of the many LMIA-exempt work permit categories (e.g., intra-company transferee, CUSMA Professional, etc.).

Temporary Foreign Workers Cont'd

Closed work permits - Temporary Foreign Worker Program

Obtaining a work permit under the Temporary Foreign Worker Program is a two-stage process:

1. The Employer must first obtain the LMIA from Employment and Social Development Canada (“ESDC”). The LMIA application process requires the employer to disclose the conditions of employment for the TFW, such as:
 - Occupation;
 - Wages;
 - Hours of work; and
 - **Location(s) of work, by indicating the specific work address(es).**

The resulting positive LMIA is then tied to these specified locations.

2. The TFW applies for a work permit based on the terms of the positive LMIA. The Temporary Foreign Worker Program therefore results in a work permit that only allows the TFW to work from the location(s) specified during the application process.

Temporary Foreign Workers Cont'd

Closed work permits – International Mobility Program

In order to hire a TFW under the International Mobility Program, employers must first complete an online regulatory filing → the Offer of Employment.

Similar to the application form used for the LMIA, the Offer of Employment filing requires disclosure of the conditions of employment for the TFW, such as:

- Occupation;
- Wages;
- Hours of work; and
- **Location(s) of work, by indicating the specific work address(es).**

The TFW then obtains a work permit under the terms noted in the Offer of Employment filing.

The resulting work permit will only allow the TFW to work from the location(s) specified in the Offer of Employment filing.

Temporary Foreign Workers Cont'd

Closed work permits - Compliance

Under the Temporary Foreign Worker Program or International Mobility Program, employers are required to comply with a number of requirements, including:

- Adhering to the terms of the LMIA or Offer of Employment filing (including work location); and
- Maintaining relevant records for six years beginning on the day the work permit was issued.

ESDC is permitted to conduct an inspection of an employer for many reasons. For example, an inspection may occur if:

- ESDC has reason to believe the employer was non-compliant with the terms of the LMIA; or
- The employer was randomly selected.

Temporary Foreign Workers Cont'd

Closed work permits – Assessing compliance

Compliance with the terms of a LMIA issued under the Temporary Foreign Worker Program is assessed on a fairly strict basis. Any deviation from the terms of the LMIA will likely result in a finding of non-compliance during an inspection.

Compliance with the terms of an Offer of Employment under the International Mobility Program is assessed on a more forgiving basis, at least when compared with the Temporary Foreign Worker Program.

Temporary Foreign Workers Cont'd

Closed work permits – Compliance under the International Mobility Program

The Government of Canada has issued guidance relevant to compliance under the International Mobility Program as it relates to work location:

A change in location, from the location stated on the offer of employment, will be considered non-compliance if it would affect the decision on a work permit application or result in the foreign national working without authorization.

Risk – Had the unauthorized work location been disclosed during the application process, would the work permit application still have been approved?

Two scenarios:

- TFW employee works from another office operated by the employer → Less risk
- TFW employee works from home → Increased risk

Temporary Foreign Workers Cont'd

Closed work permits – Consequences of non-compliance

Employers deemed non-compliant following an inspection under the Temporary Foreign Worker Program or International Mobility Program may be subject to some or several of the following:

- A warning;
- Monetary penalties ranging from \$500.00 CAD to \$100,000.00 CAD per violation, and a cumulative maximum penalty of \$1 million CAD per year;
- A permanent ban from the Temporary Foreign Worker Program and the International Mobility Program for the most serious violations (thereby restricting the employer's access to TFW talent);
- Publication of the employer's business name and address on a government website with details of the violation(s) and/or consequence(s); and/or
- Suspension or revocation of previously issued LMIA's for unrelated employee TFWs.

Temporary Foreign Workers Cont'd

Conclusion

A finding of non-compliance that results from allowing a TFW to work from an unauthorized location is unlikely to result in the most severe penalties for an employer. However:

- The risk of warnings or monetary penalties still exist.
- Employers risk more severe penalties if found non-compliant for multiple violations, as the consequences are cumulative.

“Work-from-anywhere” policies carry no risks to the employer under immigration law when applied to Canadian citizen or PR employees, although there may be some consequences for a PR who obtained permanent residence through a PNP.

As the potential risks of a “work-from-anywhere” policy are far greater in the case of a TFW, employers should always review the terms and conditions of each employee’s work permit.

Thank you



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