

# SIGNIFICANT NEW PENALTIES FOR NON-COMPLIANCE WITH TEMPORARY FOREIGN WORKER PROGRAM

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As part of the Government of Canada's ongoing overhaul of the foreign worker program, starting December 1, 2015, a new Administrative Monetary Penalty (AMP) regime for violations of the *Immigration and Refugee Protection Regulations* will come into force. The new AMP regime will be administered by both Employment and Social Development Canada (ESDC) and Citizenship and Immigration Canada (CIC). The new AMP regime is broader in scope than the current regime and includes significant new penalties for non-compliance.

## The Old Regime

Under the old regime, only employers found to be non-compliant with the Temporary Foreign Worker Program (TFWP) (i.e. where a Labour Market Impact Assessment is required) are subject to inspection and penalty. After an inspection, employers face a two-year ban from hiring temporary foreign workers. The ban from hiring temporary foreign workers does not vary depending on the severity of the violation. Employers are not subject to a monetary penalty.

## The New AMP Regime

The new AMP regime applies to both the TFWP as well as the International Mobility Program (IMP) (i.e. where a Labour Market Impact Assessment is not required). After an inspection, employers who are found to have violated the *Immigration and Refugee Protection Regulations* face a ban from hiring temporary foreign workers as well as a monetary penalty. The penalty imposed on an employer will vary according to a points system. The points system determines the penalty an employer must pay and the period of ineligibility from the TFWP that will be imposed. The monetary penalties range from zero to \$100,000 per violation and the period of ineligibility ranges from none to a permanent ban.

The points system is based on the following factors:

- **Type and Severity of Violation.** Employer non-compliance with the TFWP and the IMP is divided into three types of offences: Type A, Type B, and Type C. Type A violations are the least serious offenses and Type C are the most serious. Type A violations may occur, for instance, where the employer has failed to

retain a document for the required six year period. Type B violations may occur, for instance, where the employer fails to provide "substantially the same, but not less favourable, wages and working conditions" as outlined in the foreign worker's offer of employment. Type C violations may occur, for instance, where the employer has failed to provide a workplace that is free from abuse.

- **Compliance History.** An AMP applies to each contravention. This means that where an employer has made the same Type A violation with respect to a number of foreign workers, each contravention will be treated separately. Not only will this impact the financial penalty levied, it will also affect any future non-compliance penalties as it will negatively impact the employer's compliance history. Employers with a history of non-compliance will be subject to higher penalties.
- **Size of Business.** Employers are categorized as either a "small business" or a "large business". An employer will be considered a small business where it has fewer than 100 employees or less than \$5 million in annual gross revenues. In general, higher penalties will be levied against large businesses
- **Voluntary Disclosure.** If the employer voluntarily discloses non-compliance, then ESDC/CIC, at an officer's discretion, may reduce the number of points, depending on the circumstances.

### Practical Tips for Employers

ESDC published an Employer Compliance Guide which contains best practices for complying with the TFWP. All employers of foreign workers in both the TFWP and the IMP should read this guide. The Employer Compliance Guide can be found [here](#).

Employers that hire foreign workers should also consider conducting internal audits to determine whether they are in compliance with the conditions of all LMIAs, or in the case of LMIA-exempt workers, with the terms and conditions of employment specified in the work permit application and employment contract. Employers with LMIA-exempt workers where a Form IMM 5802 "Offer of Employment to a Foreign National Exempt from a Labour Market Impact Assessment (LMIA)" has been filed with CIC, must ensure that they are adhering to the terms and conditions listed in that document.

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### A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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