



LABOUR + EMPLOYMENT LUNCH 'N' LEARN: **HIRING FOREIGN WORKERS**

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Today we will cover:

- 1 Legislative updates
- 2 Hiring Foreign Workers:
 - The Hiring Process
 - Immigration Compliance
 - Terminating Temporary Workers
- 3 Review of recent noteworthy cases
- 4 Questions + Discussion



LEGISLATIVE UPDATES

Legislative Updates

British Columbia

- *Employment Standards Act*
 - Sick Leave

- *Labour Relations Code*
 - Auto Certification
 - Communication by employer

- *Workers Compensation Act*
 - Bullying and Harassment
 - COVID Communicable Disease Guidance

Legislative Updates

Ontario

- *Employment Standards Act, 2000*
 - Non-Competition clause prohibition
 - Disconnecting From Work Policy (June 2, 2022)
 - Electronic Monitoring Policy (October 11, 2022)

Legislative Updates

Federal

- *Canada Labour Code*
 - Personal Leave (3 paid days – increasing to 10)
- Privacy and Personal Information (Bill C-27)
- *Competition Act* (Bill C-19)
 - Wage fixing and no-poach agreements criminalized



HIRING TEMPORARY FOREIGN WORKERS

The Basics

- ***foreign national*** means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person.
- A foreign national is a worker and a member of the worker class if the foreign national has been authorized to enter and remain in Canada as a worker (section 195 IRPR).
- A foreign national must not work in Canada unless authorized to do so by a work permit or these Regulations.
- What is considered “work” under immigration legislation? Any activity that:
 - Someone is paid to do, or
 - Someone is not paid to do, but is a job that is either would usually be paid for or could be valuable work experience for a Canadian or permanent resident (ie an unpaid intern)

Interviewing/Hiring Process

- Section 124(1) of the *Immigration and Refugee Protection Act* makes it an offence to employ a foreign worker without valid work authorization. Penalties are up to \$50,000, jail time of up to two years or both
- Must ensure that employee is authorized to work with your company, in your occupation, and your location
- Health care and childcare are restricted occupations and require specific authorization
- If helping an employee to come to Canada, figure out the process and timing
- Ensure you obtain certificate of registration from BC Government before hiring


The Interview

- Avoid questions relating to country of origin or race
- Stick to questions relating to authorization to work
- Employer should review work permit prior to hiring, to ensure that worker is authorized to work
- Collect SIN number from the applicant or assist employee to apply for SIN number

What to Look For When Reviewing a Work Permit

1. Employee Name
2. Location
3. Expiry Date
4. Job Position
5. Employer Name
6. Any restrictions or remarks?

ADDITIONAL INFORMATION/INFORMATION SUPPLÉMENTAIRE

| | |
|--|-----------------------|
| Date Issued/Délivré le: | 2017/08/15 |
| Expiry Date/Date d'expiration: | 2020/06/05 |
| Case Type/Genre de cas: | 24 |
| ESDC/EDSC #: | |
| Employer/Employeur: | University of Toronto |
|  Employment Location/Emplacement de l'emploi: | Toronto |
| Occupation/Profession: | Network Security |
| In Force From/En vigueur le: | 2017/08/15 |

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Conditions:

1. May not accept employment outside of Toronto;
2. May not work in any other field than the one specified on the permit

Special Terms of Employment for Foreign Workers

- Ensure employment terms are in accordance with any LMIA
- Choice of law clause, indicating that laws of BC apply
- Clause stating that agreement is frustrated if employee loses authorization to work
- Consider any moving allowances

Different Common Work Authorizations

1. Business Visitor
2. International students (up to 20 hours per week)
3. Open Work Permit (Spousal, Working Holiday)
4. LMIA-Exempt Options
 - I. Intra-Company Transferee
 - II. Professional
5. LMIA-Supported Work Permit



IMMIGRATION COMPLIANCE

New Requirements in effect September 26, 2022

- Employment Agreements – required to provide employee with signed agreement which outlines the occupation, wages, and working conditions on first day of employment.
- Employment Rights Information – required to provide temporary foreign workers with information about their rights in Canada, on or before the first day of work.
- Cost Recovery - Prohibited from charging and recovering for LMIA or employer compliance fee, and fees relating to recruitment.
- Health Care – required to provide reasonable access to healthcare services

Other obligations

- Comply with all federal and provincial laws regulating employment and recruitment, provide a workplace free of abuse
- Must provide employment as set out in offer of employment and *working conditions that are the substantially the same, but not less favorable than*, those in the offer
- Must ensure employee only works in location, job, and under the conditions they are authorized
- Different requirements depending on program, ensure you are following the requirement of your program
- Keep all relevant records for 6 years starting the day the work permit was issued

Compliance Audits by Service Canada

- May be initiated if there is 1. reason to suspect non-compliance, 2. previous non-compliance and 3. random selection
- Can be conducted up to six years after the worker has started
- May involve interviews of employee or other employees
- Inspectors can request copies of documents, take photographs or audio recordings, and inspect the worksite
- Inspections can occur virtually or onsite, announced or unannounced, and can be executed without a warrant (excluding private dwellings)
- If non-compliance is found, can result in an administrative monetary penalty up to \$100,000 per violation, limitations on hiring other temporary foreign workers, public posting of non-compliance on IRCC website, and all pending LMIAAs could result in a negative decision



TERMINATING TEMPORARY WORKERS

Considerations from an Immigration Perspective

- They can be terminated
- Employee is entitled to remain in Canada until work permit expires
- Employer may be required to notify Service Canada
- In some cases, may be required to pay for their flight to their home country or other expenses
- Can affect employee's ability to obtain permanent residency (BCPNP or FSW)

Considerations from an Immigration Perspective

- Terminating a temporary foreign worker may result in a higher damages award in a wrongful dismissal action
- Unique challenges for temporary foreign worker may prevent individual from being able to mitigate
- *Nishina v Azuma Foods (Canada) Co. Ltd.*, 2010 BCSC 502



RECENT NOTEWORTHY CASES

Noteworthy Cases

1. *Farkas v Island Lake Resort Group (2003) Inc.*, 2022 BCSC 1282
2. *Cho v. Café La Foret Ltd.*, 2022 BCSC 1560
3. *Desmarais v. Eat Your Cake Personal Health Delivery Inc.*, 2022 BCSC 1566
4. *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147

Farkas v Island Lake Resort Group (2003) Inc., 2022

BCSC 1282

Factual background

- Executive Chef at backcountry ski lodge with a fine-dining restaurant
 - Only accessible by snowmobile in winter
- Employees expressed concern regarding Plaintiff's communication with staff
 - 2019 performance review – Plaintiff asked to improve communication, staff recruitment and retention
- Perceived toxic work environment after wife's termination in January 2020
 - Medical leave of absence
- Meeting to discuss return to work
 - Advised lodge was winding down operations in 2 days, kitchen shifts already filled
 - Non-essential staff removed due to pandemic-caused closure
 - Plaintiff put on payroll, but asked not to attend workplace
 - WFH, build a communication plan to be presented to staff at next meeting

Held

- Plaintiff not constructively dismissed
 - acted precipitously – resigning without allowing time to determine how changes affect his responsibilities
- Temporary measures in good faith in response to pandemic
 - Temporary change in manner work will be performed
 - Implicit term of employment contract
 - Not amount to unilateral breach of Plaintiff's employment contract
- Constructive dismissal highly fact-driven – COVID-19 as context
 - uncertainty at start of pandemic, particularly given Defendant's nature of business
 - Required to remove clients and staff from lodge and shut down restaurant operations
- Defendant did not terminate or permanently change the contract
 - Reasonable person in Plaintiff's place would not conclude that Defendant no longer wished to be bound by employment contract

Cho v. Café La Foret Ltd., 2022 BCSC 1560

Factual Background

- 60-year-old Head Baker found to have inappropriately touched a 20-year-old subordinate on the shoulder, arm and buttocks
- Employer conducted an investigation
- Plaintiff admitted to his conduct and offered apology to the young woman
- Employer told him the only way he could keep his job was to sign an affidavit (Plaintiff not fluent in English) admitting that he had committed a sexual assault
- Employer refused to give the Plaintiff his ROE unless he signed the affidavit

Findings

- The sexual harassment was “relatively minor” and was just a “gross error of judgement”
- Plaintiff awarded 5 months’ notice (after 2.5 years’ service), but reduced to two months due to a failure to mitigate
- Plaintiff awarded an additional \$25,000 for aggravated/punitive damages due to Employer’s insistence that he sign an affidavit and put himself in legal jeopardy

Desmarais v. Eat Your Cake Personal Health Delivery Inc., 2022 BCSC 1566

Factual background

- Plaintiff was sent a warning letter by employer advising that his conduct was not acceptable (failing to meet obligations, without clearly stating what obligations were)
- Warning letter outlined a number of expectations and stated that failure to meet obligations may result in termination
- Employer continued to be dissatisfied with the Plaintiff's conduct – several follow-ups and warning letters
- Employment contract provided for additional wages to the plaintiff exceeding \$150,000 if he continued to be employed until completion
- Plaintiff was terminated for failing to address the concerns in the warning letter

Procedural history

- Plaintiff brought an ESA complaint
 - determined that he was dismissed without cause and awarded \$10,000
- Also sued for wrongful dismissal
 - ER alleged just cause as defence
- Plaintiff brought an application to have defence struck as *res judicata* (“a matter judged”)
 - argued the ESA determination was conclusive of the just cause issue

Held

- Issue estoppel applied and Plaintiff awarded costs
 - Determination by the delegate that the plaintiff was terminated without cause was focused on discrete issues that could be assessed by reviewing documents
 - Critical information lay primarily within the knowledge and or control of the defendant
 - Defendant was provided ample opportunities to provide information, respond to information provided to the delegate by the plaintiff and related parties, and respond to the delegate's preliminary findings;
 - Defendant was unable to point to any identifiable injustice arising from the process

Beach Place Ventures Ltd. v. Employment Standards Tribunal, 2022 BCCA 147

Factual Background

- Taxi Drivers filed ESA complaints
 - Alleging Employer breached the ESA by failing to pay regular wages, overtime, statutory holiday pay and vacation pay
- None of the drivers owned their taxi or taxi licence: one driver leased a taxi and the other two paid fees to acquire a license to operate the taxis for periods of time
- After deducting the cost of the lease or licence fee, the drivers kept the fares earned while driving during their lease or licence period
- Employer provided admin, accounting and dispatch services

Main issue: whether the Drivers were in an employment relationship with Beach Place Ventures Ltd. and Black Top Cabs Ltd. (the “Employer”)

Procedural History

- ESB determination: Drivers were employees and Employer owed the monies for unpaid wages
- Employer appealed the Delegate’s decision to the Employment Standards Tribunal
- Employer included a copy of a decision by the Tax Court of Canada, where one of the Drivers was found on the basis of the same facts to be an independent contractor and not an for the purpose of EI and CPP
- Tribunal upheld the Delegate’s decision and found that the Drivers were employees despite the Tax Decision
- Reconsideration of the Tribunal’s decision was denied
- Judicial review of the Tribunal’s decision to the Supreme Court – dismissed
- Appealed the dismissal of their judicial review petition to the BC Court of Appeal

Factors Considered in Determining Whether a Worker Is an Employee or Independent Contractor

1. whether the worker provides their own equipment, tools and supplies
2. whether the worker hires their own employees or sub-contractors
3. the degree of financial risk taken by the worker
4. the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of their tasks
5. whether the worker has a high degree of freedom in the manner in which the services contracted for are provided to the company
6. whether the worker sets their own hours
7. whether the worker has the ability to work for several companies or competitors
8. whether the worker is an incorporated business, invoices the company, remits GST and is paid without deductions for EI and CPP
9. whether the worker is hired for a set time or specific project
10. whether the terms of the agreement state the worker is an independent contractor

Takeaways

- No single universal test for employee
 - a factual determination based on the specific context
 - non-exhaustive list of factors
- Individual to be an employee for the purposes of one regime (ESA) without necessarily also being an employee in another (EI)
- Potential liability associated with misclassification of independent contractors can be significant
 - unpaid wages, overtime pay, vacation pay and holiday pay;
 - wrongful dismissal;
 - CPP and EI deductions and remittances;
 - penalties, and interest, for failure to make income tax withholdings and failure to issue T4s; and
 - retroactive workers' compensation premiums and penalties.



■ QUESTIONS + DISCUSSION

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