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October 21, 2014

Via email: NA-TFWP-PTET@hrsdc-rhdcc.gc.ca

Campion Carruthers
Director, Program Integrity Division, Temporary Foreign Worker Program
Employment and Social Development Canada
140 Promenade du Portage (mailstop 409)
Gatineau, QC K1A 0J9

Dear Mr. Carruthers:

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section). The CBA is a national association of over 37,500 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section comprises lawyers whose practices embrace all aspects of immigration and refugee law.

We appreciated the opportunity to participate in a conference call with you on October 7, 2014 on the proposed compliance framework for the Temporary Foreign Worker Program (TFWP) and International Mobility Program (IMP).[1] We appreciate your willingness to consult with us as you develop the framework, and want to provide our written comments to more fully articulate our position on issues addressed during the call.

The federal government introduced a number of changes to the TFWP in recent years to prevent and deter employer non-compliance, including employer audits, inspections, publication of the names of non-compliant employers and bans. These changes were implemented in the absence of a comprehensive and transparent framework to assess employer compliance, which resulted in both employers and government officers being uncertain about employer rights and obligations during the process.[2]

While we support the government's introduction of a comprehensive compliance framework, we have concerns with several aspects of the proposal:

1. Overall, the proposed enforcement scheme risks stigmatizing employers who use the TFWP, which in turn risks undermining Canada's economic growth and hampering its ability to retain foreign skilled workers as permanent residents.

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1 This proposal was in EDSC's September 2014 discussion paper.

2 See, for instance, our June 2013 submission requesting that government powers and employer rights and duties during compliance investigations be articulated with more precision.

2. The compliance regime holds employers to an unprecedented absolute liability standard for errors, which provides no "due diligence" defense and gives decision makers no discretion to waive penalties.

3. Fines and other penalties of the scheme are more severe than sanctions levied by other comparable regulatory regimes in Canada and in other jurisdictions.

4. The ability of individual officers to make findings of non-compliance and impose severe sanctions without employer recourse to a court appeal or review by independent tribunal is fundamentally unfair.

Effect of the Proposed Compliance Framework

While the government has referred to the TFWP as a program of "last resort," these workers are largely the pool of preferred candidates from which Canada draws for permanent residents under our economic streams. Arranged Canadian employment and Canadian work experience are deemed primary factors in assessing candidates under these streams. TFWs qualify for the Federal Skilled Worker and Federal Skilled Trade Workers categories by holding a Labour Market Impact Assessment (LMIA). The TFWP/IMP is also the original entry point to Canada for many applicants applying under the Canada Experience Class, which allows TFWs with one year of skilled work experience to apply for permanent residence. The government has created the Express Entry program to facilitate permanent residence for those who have the best chances of economic success in Canada, and we have been advised that those with an LMIA will be ranked highest in the candidate pool. Therefore, TFWs are in fact many of the "best and brightest" workers that Canada is seeking to attract on a long-term basis.[3] The proposed sanctions will undoubtedly have a cooling effect on use of the TFWP, inhibiting Canada's ability to recruit and retain those most likely to succeed and meet our ongoing labour market needs.

Canadian businesses seeking to remain competitive in the global economy need to attract and recruit industry leaders, even where Canadian citizens and permanent residents may meet basic qualifications for a given role. The proposed employer penalties risk unnecessarily stigmatizing those who employ TFWs. Many businesses may be unwilling to risk this liability and either decentralize their operations outside of Canada or engage in increased off-shoring or outsourcing. This in turn will cause further losses for the Canadian labour market, including loss of tax revenues and loss of employment opportunities for Canadian citizens and permanent residents. It may also deter businesses from investing in Canada. While the purpose of the compliance regime is to deter and punish employer non-compliance with the TFWP, an inadvertent effect of the measures will be to encourage businesses to find ways of meeting their business needs outside of Canada.

Absolute Liability

The proposed compliance framework would remove as a justification for non-compliance good faith errors in interpreting an employer's obligations and inadvertent accounting or administrative errors, where the employer has taken corrective action. Under the proposed regime, an employer's only defences to non-compliance under s.203(1.1) of the *Immigration and Refugee Protection Regulations* would be limited to conditions outside its control, including force majeure and changes

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[3] See, for instance, Citizenship and Immigration Canada, Press Release, "Attracting the best and brightest skilled workers" (December 11, 2012).

to federal or provincial laws, collective agreements and economic conditions. It appears that the proposed changes would not even allow a "due diligence" defence, essentially imposing an absolute liability regime for errors.

Holding employers liable for non-compliance even where they have made good faith efforts to comply and have exercised due diligence is contrary to the stated policy goals of the compliance regime, which are to deter non-compliance, abuse and fraud. The government encourages employers from voluntarily and proactively disclosing any potential non-compliance. We question whether employers would continue to do so under this regime. While an employer's efforts to remediate non-compliance will be taken into consideration in assessing the severity of any alleged non-compliance, it is difficult to understand why a full remediation would not absolve the employer from liability from inadvertent error, particularly when it occurred despite all due diligence.

If employers are held absolutely liable for errors resulting in non-compliance and may suffer severe penalties as a result of any adverse finding, the burden of proof must be higher than the balance of probabilities standard we were advised would apply.

Penalties

The severity of the administrative monetary penalties (AMPs) and other sanctions proposed under the compliance regime are disproportionate to those imposed by other federal regulators in Canada and other jurisdictions.[4] Under the Canada Pension Plan, for example, a maximum fine of $10,000 may be levied per violation. The Canada Border Services Agency may levy a maximum penalty of $25,000 per contravention under the *Customs Act*. Environment Canada may levy a maximum fine to companies of $25,000 per environmental violation. Under the Guest Worker Program in the United States, non-compliant employers may be fined up to $16,000 per worker. In Australia, the Department of Immigration and Border Protection's focus is on businesses that wilfully take part in illegal work. Maximum employer fines under its regime include $15,000 for corporate infringement and a $75,000 maximum civil penalty for corporations where the infringement notice is disputed and the case decided in civil court. Under the proposed TFWP/IMP compliance framework, non-compliant employers may be fined up to $100,000 per worker, and be banned from the program for up to 10 years. A permanent ban is also under consideration.

The proposed penalties are overly punitive and disproportionate to many violations. Take, for example, an employer who raises the salaries of its entire workforce, including 20 TFWs. An officer could find the resulting salaries to be *both* not "substantially the same" as the wages and working conditions in the workers' offers of employment and also to have negatively impacted the Canadian labour market. The "substantially the same" criteria is vague and subject to differing interpretation by officers. Whether the employer's conduct might have "negatively impacted on the Canadian labour market" can never be more than speculation. Nevertheless, on the basis of those findings, the employer could be fined up to $80,000 per TFW, and would also be banned from the TFWP for two years. This would result in a total fine of $1.6 million, which is large enough to have a severe impact on the viability of many operations, and could jeopardize the jobs held by Canadians and permanent residents. To make matters worse, it seems the department would be *compelled* to impose these penalties, even if the employer had proactively disclosed the intended salary increases and never been advised by ESDC that new LMIAs would be required.

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4 See the chart attached as Appendix "A."

The proposal to publish the names and addresses of all employers found to be non-compliant, including those whose non-compliance may result from simple administrative or accounting error, is overly harsh and could cause severe financial harm to employers. While there is good reason to publish the names of employers who have been banned from the program (to ensure TFWs do not contemplate employment with such employers), there are no public policy reason to publish the names of employers who have received AMPs only. The publication would serve as a public shaming, unnecessarily stigmatizing employers whose violations may have been administrative in nature.

Procedural Fairness

The proposed compliance framework will give individual officers the power to impose significant penalties with minimal due process. There would be no hearing and no appeal, but only what appears to be an internal review by another official if an employer wishes to challenge the finding of non-compliance. Given that the government proposes to empower officers to impose severe sanctions under an absolute liability regime for error, there should be a robust review mechanism for both the finding of non-compliance and the penalty, preferably a right to appeal to a court or, at the very least, review by an independent and impartial administrative tribunal. Procedural fairness would also require that employers have an opportunity to know the case against them, and a right to make oral or written representations before penalty is imposed.

Most federal regulators that currently impose AMPs for regulatory violations allow a *de novo* hearing by an independent administrative tribunal, *in addition* to judicial review. In the immigration context, severe penalties, including removal from Canada, may be issued by Minister's Delegates under the s. 228 of the *Immigration and Refugee Protection Regulations*, but this is only when the violation involves a foreign national. Canadian citizens and permanent residents have recourse under IRPA to a tribunal to appeal a negative decision.

The proposed system of administrative sanctions lacks procedural fairness in a number of other ways:

- Immigration authorities can suspend processing LMIAs and work permits during investigations, with no cap on the length of time of the investigation. This creates the possibility of indefinite suspensions.
- The discussion paper suggests that the compliance framework would apply to all TFWs, not just those issued work permits after the proposed expansion of the compliance powers. We question the fairness of retroactive consequences for acts or omissions that occurred when the law did not stipulate the consequences for violation.
- One requirement under the proposed compliance framework is that employers must comply with all provincial laws on employment and recruitment. We question whether the federal government has capacity to train officers to assess compliance with employment standards legislation in each province and territory, and indeed whether federal decision makers even have jurisdiction to impose penalties for non-compliance with provincial or territorial legislation. Most jurisdictions have sophisticated mechanisms to ensure compliance, with specialized tribunals to adjudicate employment standards and robust appeal mechanisms. Non-compliance with provincial or territorial laws and determinations of non-compliance by government officials outside federal jurisdiction should not have federal consequences. Employers could potentially be found liable both under federal and provincial laws for the same act or omission and subject to multiple penalties.
- ESDC manuals are not public, leading to a lack of transparency in the criteria to determine:

- what is deemed "not substantially the same" wages and working conditions,
- what will constitute satisfactory evidence of an employer's efforts to hire or train Canadians, create jobs for or retain Canadians and transfer skills and knowledge to Canadians, and
- other criteria to be considered in making an assessment, particularly with respect to compliance with transition plans.

Recommendations

The CBA Section recommends that ESDC:

1. Develop a comprehensive review process that includes an appeal to a court, or at least a *de novo* hearing by an independent and impartial tribunal for findings of non-compliance and imposition of penalty;

2. Allow decision makers to exercise discretion to not levy AMPs and other penalties for non-compliance, on the basis of an employer's history of non-compliance, due diligence, efforts to remediate, voluntary disclosure, and seriousness of breach;

3. Eliminate the proposed absolute liability standard for errors that would result in consequences imposed on non-compliant employers regardless of whether they take corrective action and employed due diligence;

4. Make the ESDC manuals available immediately so employers understand the standards by which they will be assessed;

5. Develop a voluntary disclosure mechanism whereby employers can avoid penalty by:

    a. seeking formalized opinions from ESDC or CIC as to whether any intended changes to employment will be considered substantially not the same, and

    b. proactively disclose non-compliance prior to an inspection and obtain guidance as to how to remediate;

6. Dramatically decrease the proposed AMP amounts to ensure fairness and consistency with other federal AMP regimes. Cap the maximum AMP amount that can be levied;

7. Define the maximum time that an employer's access to the TFWP/IMP could be suspended during an inspection. Clarify whether suspensions apply to all affiliated businesses or locations, or are confined to the specific location or corporate entity subject to the compliance review;

8. Remove the potential retroactivity of the compliance measures;

9. Eliminate the ability of federal immigration authorities to penalize employers for non-compliance with provincial employment laws; and

10. Publish only the names of non-compliant employers who have been issued a ban from the program and have exhausted all of their avenues of appeal.

We would welcome the opportunity to engage in further discussions about the proposed compliance framework. Thank you once again for the opportunity to consult with you on this important issue.

Yours truly,

(original signed by Kerri Froc for Deanna L. Okun-Nachoff)

Deanna L. Okun-Nachoff
Chair, Immigration Law Section

Appendix "A" – Summary of Canadian Federal AMP Schemes and Selected International Comparisons

REGULATOR	TRIBUNAL (Y/N)	Exemption from AMP Possible?	Maximum AMP
Canada Pension Plan (CPP)	Y First level: Review by officer (reconsideration) within 90 days www.servicecanada.gc.ca/eng/services/pensions/cpp/appeal.shtml Second level: Appeal to Social Security Tribunal and then to the Appeal division of the SST http://www.canada.ca/en/sst/ap/cppoasgd.html	Y Pursuant to s. 90.1 (4) of the *Canada Pension Plan*, the Minister may rescind the imposition of a penalty under subsection (1), or reduce the penalty, (a) on the presentation of new facts; (b) on being satisfied that the penalty was imposed without knowledge of, or on the basis of a mistake as to, some material fact; (c) on being satisfied that the penalty cannot be collected within the reasonably foreseeable future; or (d) on being satisfied that payment of the penalty would cause undue hardship to the debtor.	$10,000 pursuant (s. 90.1 (2) of the *Canada Pension Plan*) http://laws-lois.justice.gc.ca/eng/acts/C-8/page-52.html#h-55
Employment Insurance (EI)	Y First level: Review by officer (reconsideration) within 90 days http://www.ei.gc.ca/eng/home.shtml Second level: Appeal to Social Security Tribunal and then to the Appeal division of the SST www.canada.ca/en/sst/ap/eigd.html	N	Individuals: Subsection 38(2) of the *Employment Insurance Act* makes distinctions based on benefit periods. In general, the penalty is not more than 3 times the claimant's rate of weekly benefit for each act or omission. Employers: $12,000 per Record of Employment, or a fine that would total the amount of all claimants' penalties in relation to the offences* *Up to $25,000 for major contravention (*s.* 39(5) of the *Employment Insurance Act*) http://www.servicecanada.gc.ca/eng/ei/fraud/fraud_serious.shtml http://laws-lois.justice.gc.ca/PDF/E-5.6.pdf
Old Age Security (OAS)	Y First level: Review by officer Second level: Appeal to Social Security Tribunal http://www.servicecanada.gc.ca/eng/services/pensions/oas/appeal.shtml	Y Pursuant to s. 44.1 (4) of the *Old Age Security Act*, the Minister may rescind the imposition of a penalty under subsection (1), or reduce the penalty, (a) on the presentation of new facts; (b) on being satisfied that the penalty was imposed without knowledge of, or on the basis of a mistake as to, some material fact; (c) on being satisfied that the penalty cannot be collected within the reasonably foreseeable future; or (d) on being satisfied that payment of the penalty would cause undue hardship to the debtor.	$10,000 (s. 44.1 of the *Old Age Security Act*) http://laws-lois.justice.gc.ca/eng/acts/O-9/page-29.html#h-37

REGULATOR	TRIBUNAL (Y/N)	Exemption from AMP Possible?	Maximum AMP
CBSA	Y First level: Review by the issuing CBSA office within 30 days for evident errors pursuant to s. 127.1 of the *Customs Act* (request for correction) Second level: Formal review pursuant to s. 129 of the *Customs Act* within 90 days (request for redress = ministerial decision), or in exceptional circumstances, 1 year http://www.cbsa-asfc.gc.ca/publications/dm-md/d22/d22-1-1-eng.html (no. 43 to 45)	Y Penalty reduction agreement (PRA) which may allow a partial or full reduction of the payment of a penalty if corresponding penalty amount are invested in the correction of the commercial information system error. http://www.cbsa-asfc.gc.ca/publications/dm-md/d22/d22-1-1-eng.html (Memorandum points 46 to 48)	$25,000 for each contravention (Memorandum points 23 to 24)
Environment Canada (EC)	Y First level: Request for review by Chief Review Officer pursuant to s. 15 of the *Environmental Violations Administrative Monetary Penalties Act* Second level: pursuant to s. 23 of the *Environmental Violations Administrative Monetary Penalties Act*, the decision of the Officer is final and binding, except for judicial review by a Federal Court http://laws-lois.justice.gc.ca/eng/acts/E-12.5/FullText.html See also the consultation document: https://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=465314E0-1&offset=1&toc=show	N	Individuals: $5,000 for each violation Companies: $25,000

REGULATOR	TRIBUNAL (Y/N)	Exemption from AMP Possible?	Maximum AMP
Health Canada (HC)	Y First level: Review by Minister, completed by a Health Canada official within 30 days Second level: Review of Minister's decision by The Canada Agricultural Review Tribunal (2 types of review available) http://www.hc-sc.gc.ca/cps-spc/pubs/pest/_fact-fiche/amp-sap/index-eng.php	Y Compliance agreement are possible for monetary penalties of $2,000 or more and must be done by sending a written request which included a detailed proposal within 30 days of the penalty. The amount of the monetary penalty will be reduced by $1 for every $2 that you spend on compliance measures.	Non business: $400 Business: $4,000 * For violations classified as serious and very serious, committed by persons or companies in the course of business, the penalty amounts may be adjusted up or down, depending upon the total gravity value. No other penalty amounts are adjusted.
National Energy Board (NEB)	Y First level: Request for review of the AMP officer's decision by the Board members for the amount of the penalty, the facts of the violation or both, pursuant to ss. 144-148 of the *National Energy Board Act*. Second level: No (only to FCA on question of law or of jurisdiction after leave to appeal is obtained pursuant to s. 22 of the *National Energy Board Act*) http://www.neb-one.gc.ca/clf-nsi/rpblctn/ctsndrgltn/rrggnmgpnb/dmnstrtvmntrypnlts/dmnstrtvmntrypnltsprcssgd-eng.html#s5_0	N	Individuals: $25,000 for each violation Companies: $100,000 for each violation

REGULATOR	TRIBUNAL (Y/N)	Exemption from AMP Possible?	Maximum AMP
Guest Worker Program (AUS)	N	N	Individuals: $3,060 AUD per worker (infringement notice) Bodies corporate: $15,300 AUD per worker (infringement notice) Civil penalties: $15,300 AUD for individuals and $76,500 AUD for bodies corporate [as of October 2, 2014, the AUD has approx. the same value as the CAD] *Persons found to have committed an offence will be able to elect to pay a penalty as an alternative to proceedings for a civil penalty pursuant to s. 140K of the *Migration Act (1958)* http://www.immi.gov.au/managing-australias-borders/compliance/legalworkers/guideforbusiness.htm
Guest Worker Program (US)	Y First level: The employer has the opportunity to negotiate a settlement with ICE Second level: Appeal to the Office of the Chief Administrative Hearing Officer (OCAHO) http://www.justice.gov/eoir/ocahoinfo.htm	N	$16,000 for each worker http://www.uscis.gov/i-9-central/penalties and http://www.ice.gov/news/library/factsheets/i9-inspection.htm
Guest Worker Program (UK)	Y First level: Objection to the Secretary of State pursuant to s. 16 of the *Immigration, Asylum and Nationality Act 2006* http://www.legislation.gov.uk/ukpga/2006/13/section/16 Second level: Appeal to a court pursuant to s. 17 of *Immigration, Asylum and Nationality Act 2006* http://www.legislation.gov.uk/ukpga/2006/13/section/17	Y Fast payment option automatically reduce the penalty by 30% if paid in full within 21 days* * If the employer is found to be employing illegal workers within the previous three years, it is not eligible for this reduced payment after the first penalty notice or offence. Other factors can reduce the amount of the penalty. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311668/Code_of_practice_on_preventing_illegal_working.pdf	See s. 19 of the *Immigration, Asylum and Nationality Act 2006* which refer to a Code of Practice to be issued by Secretary of State : https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311668/Code_of_practice_on_preventing_illegal_working.pdf £20,000 [$36,000 CAD]