

Tough penalties for foreign worker program violators

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For Law Times

The time has come for the federal government to switch its focus away from compliance and enforcement when it comes to temporary foreign workers, according to a Toronto immigration lawyer.

Joel Guberman, the founding partner at immigration boutique Guberman Garson Segal LLP, says tough new administrative monetary penalties for violators of the Temporary Foreign Worker Program — which came into force Dec. 1 and follow hot on the heels of a fresh inspection drive to monitor compliance with the program — are an overreaction to a relatively minor problem.

"The truth is that Canada is not a hotbed of illegal immigration, and the idea that Canada's biggest employers are cheating the system is a mirage. The vast majority are *bonafide* employers who will not hire foreign workers unless they need them," Guberman says. "Obviously, if an employer has said they will pay someone \$100,000, and an investigation shows they're actually paying them \$50,000, that's a problem, but it doesn't require pages and pages of bureaucratic nonsense to discover. The amount of effort it will take to administer one fine is ridiculous." Guberman says the number

of hoops employers have to jump through just to take part in the TFWP, and the increasing difficulty of acquiring a positive Labour Market Impact Assessment, make the new system of fines even less necessary.

"There's so much screening that goes on at the outset that the likelihood of employers tripping up further down the road is remote," Guberman says. "The government has almost set itself up for failure, because when you look at what they will actually find, it's not going to stand up to a cost-benefit analysis."

Much of the tightening of the TFWP took place under the previous Conservative government, and Guberman says he's hopeful the new Liberal regime will change its approach to make life easier for employers who face a skills shortage in Canada.

"I like to think that the new government will take a cold, hard look at what the previous government did, and undo a lot of it. I know it makes sense on a populist level, but on a reality level, it makes no sense," he says. "I think it's draconian for the government to take this approach when Canada needs skilled people."

Evan Green, a partner at Toronto-based immigration

law firm Green and Spiegel LLP, says he's seen no evidence the current government plans to reduce the "huge stress on compliance" in immigration law. In the meantime, he says the TFWP has "become so onerous" for his clients that they steer away from it wherever possible, but he warns that such an approach has consequences for the broader Canadian economy.

"When employers are scared off from hiring temporary workers, that affects Canada's competitiveness internationally. There are many sectors where we have an enormous skills shortage. In the IT industry in particular, you can have a terrible time trying to find people," Green says.

Howard Greenberg, the national practice leader for immigration at KPMG Law LLP, says the shaky state of the Canadian economy makes it unlikely that the current government will make a significant departure from the aggressive approach to foreign worker compliance taken by its predecessor.

"When the economy turns, and unemployment starts to rise, the natural predisposition

is to move away from a policy that is generous to foreign workers, and instead to focus on enforcement, which is exactly what we're seeing now," he says.

The amendments, which introduced administrative monetary penalties to the Immigration and Refugee Protection Regulations, were unveiled last July, but they only came into force on Dec. 1. Under the new rules, employers found non-compliant with the TFWP and the International Mobility Program, which involves foreign workers exempted from the LMIA requirement, face a sliding scale of penalties depending on the severity of their infraction. Financial penalties range from \$500 to \$100,000 per violation, up to a \$1-million cap.

In addition, employers could find themselves banned from using the foreign worker programs for anywhere from one to 10 years per violation, with permanent exclusion an option for the most serious offenders. Details about violations and the employers who committed them can also be published on a government web site, according to the regulations.

Greenberg says the old rules, which allowed only for the imposition of a two-year ban, were limited and inflexible when it came to ensuring compliance with the program.

"In circumstances where there was really outrageous conduct, that could be seen as a bit of a slap on the wrist," he says.

"For everyone else, the first disciplinary step can't be a two-year ban. For a major employer, like a big bank, that would be devastating, because the flow of human capital is critical to their success and growth."

Despite the potential stiffness of the monetary penalties available under the regulations, Greenberg says the threat of being named and shamed by the government could prove the most effective compliance tool, especially for companies with offices around the world.

"That could have considerable consequences in terms of reputational risk, both in Canada and worldwide," he says.

"It's going to affect how a company is viewed by the public, but it will also make their non-compliance known to every other immigration authority in the world." LT