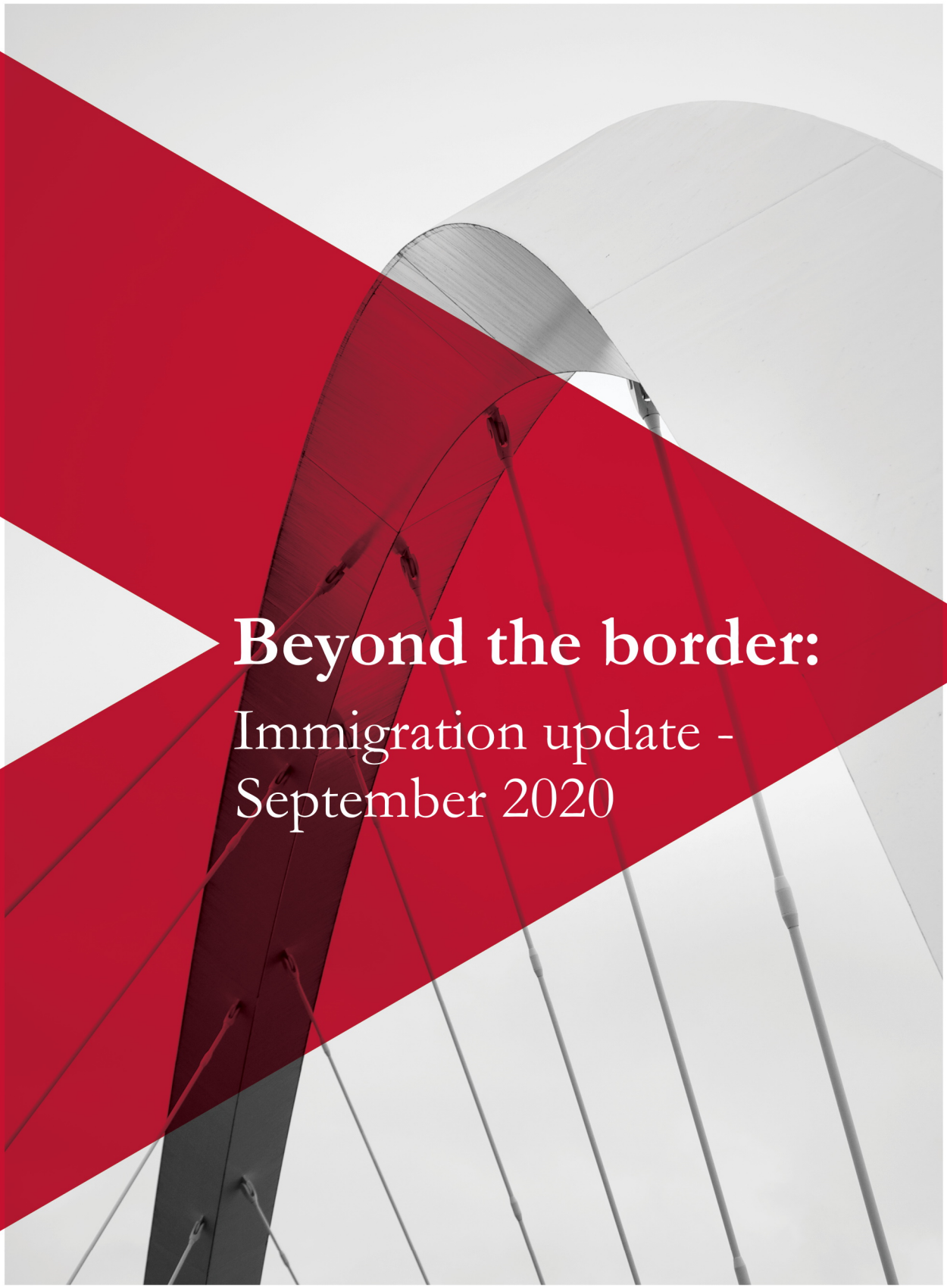

Beyond the border:

Immigration update - September 2020

STEWART McKELVEY
LAWYERS • AVOCATS

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INTRODUCTION

Hiring international talent? The Stewart McKelvey Immigration team has the experience necessary to help get your talent on the ground in a timely and compliant manner. Team members have the experience needed to counsel and assist clients who bring international business travelers, professionals or skilled workers to Canada through the necessary employment-based immigration processes. This installment of Beyond the Border covers various topics relevant to employers, including the nuances of recruiting and hiring foreign nationals in Canada, the concept of "implied status", options to hire international students, and the impacts of structural company changes on foreign national employees.

Additionally, the ongoing COVID-19 pandemic has caused a number of immigration issues to become increasingly complex, with rules and restrictions changing rapidly. Our group has prepared a COVID-19 Immigration Guide that covers travel restrictions and exemptions, the ability of foreign workers to enter Canada during the pandemic, quarantine requirements, and related topics to assist employers. This can be found here.

Should you have any questions regarding COVID-19 implications on immigration matters, or would like to learn more about the topics discussed in this publication, please contact a member of our Immigration Group.

THE NUANCES OF RECRUITING AND HIRING FOREIGN NATIONALS IN CANADA

Kathleen Leighton; associate, Halifax; Annie Gray; associate, Halifax

Employers need to be aware of the nuances of recruiting and hiring foreign nationals to work in Canada. The following is a general overview of some relevant considerations.

Confirming authorization to work while avoiding discrimination

Employers must carefully navigate the recruitment and hiring process to ensure applicants can legally work for them in Canada, without engaging in discrimination. Federal, provincial and territorial laws in Canada protect against discrimination on certain grounds in the course of employment, including the recruitment and hiring process. Discrimination will be found where employees or candidates are negatively impacted because of a protected ground.

As an example, the *Nova Scotia Human Rights Act* prohibits discrimination on a number of grounds, including, but not limited to, ethnic or national origin. The following actions could be found to be discriminatory:

1. Refusing to employ or to continue employing an individual based on a protected ground;
2. Circulating job application forms that seek information in respect of a protected ground;
3. Publishing job advertisements that impose or suggest limits based on protected grounds; or
4. Making inquiries in connection with employment (including in the interview process) that require disclosure of protected characteristics.

There are certain circumstances in which conduct that would otherwise constitute discrimination is justified, such as in the case of affirmative action and employment equity programs, or when the alleged discrimination is based on a *bona fide* occupational requirement. Such requirements must be reasonably necessary to accomplish a work-related purpose.

By way of example, employers have a duty to ensure their employees, including foreign national employees, are legally able to work for, and be employed by, the company. However, employers must be mindful that they do not engage in discrimination on the basis of national origin or similar grounds when attempting to fulfil this obligation. As a result, best practice is to seek appropriate confirmation at the conclusion of the hiring process, at which point employers should request a Social Insurance Number ("SIN") and other *general* evidence the individual is legally able to work in Canada as contemplated in the job offer. Employers may also verify if individuals speak or write a language sufficiently to perform a job with genuine language skill

requirements, and otherwise ensure the applicant is appropriately qualified for the role. However, they should avoid asking about nationality, requesting *specific* types of documents like a birth certificate or proof of citizenship, or requiring Canadian work experience, as further discussed below.

Requiring citizenship or permanent residency

In a recent application to the Human Rights Tribunal of Ontario (the "Tribunal"), an individual alleged that they experienced employment discrimination on the basis of citizenship (contrary to the *Ontario Human Rights Code*) during a prospective employer's recruitment and hiring process.[1] In this case, the company in question required job applicants to be able to work in Canada on a "permanent" basis in job postings and requested confirmation of this in the application form and during the interview process. Further, the company requested either a Canadian birth certificate, citizenship certificate, or proof of permanent residence from the applicants. Their interview guide specifically noted that work permits are only temporary in nature and would disqualify applicants.

While the Tribunal acknowledged the legal requirement for an employee to provide evidence of a SIN and valid work authorization to their employer, it found that distinguishing an individual on the basis of Canadian citizenship, permanent residence status, or domicile in Canada with the intention to obtain citizenship (in the above-described manner) was discriminatory on the basis of citizenship, even though permanent residents were a subcategory of non-citizens who were not disadvantaged in this particular case. The Tribunal additionally found that the hiring requirements of the company were not imposed or authorized by law and no other defences were met (for example, it was not a *bona fide* occupational requirement to be able to permanently work in Canada). Ultimately, this case is an example of how a requirement for applicants to be citizens or permanent residents of Canada could be subject to review.

Requiring Canadian experience

Additionally, the Ontario Human Rights Commission in their *Policy on Removing the "Canadian experience" barrier*, as approved February 1, 2013, also notes that a strict requirement for "Canadian experience" is discriminatory on its face and can only be used in limited circumstances. The onus is on employers and regulatory bodies to justify any requirement that prior work experience was gained in Canada. Therefore, language requiring Canadian experience should be avoided in job postings and elsewhere in the recruitment and hiring process. Even posing indirect questions about the geographic location of work experience could be problematic.

Key takeaways

Employers should limit questions and job requirements to those that are necessary to confirm whether applicants are appropriately skilled for a role and able to work in Canada as contemplated in a given job offer, and should avoid a permanence requirement as discussed.

[1] *Haseeb v Imperial Oil Limited, 2018 HRTO 957 (CanLII)*

Employers can request evidence of ability to work as contemplated in the job offer and can require a SIN to be provided at the time an offer is made, but should not request specific types of documents that only Canadian citizens or permanent residents could provide and, in most cases, should not require Canadian experience for a role. Valid work authorization and relevant work experience in general should be acceptable.

Other obligations:

Employers should verify other local requirements pertaining to the hiring and employment of foreign workers that may apply depending on the jurisdiction and should seek advice to verify obligations as necessary. In Nova Scotia, for example, there are several requirements employers must abide by pursuant to the Nova Scotia *Labour Standards Code*:

1. **Costs of recruitment:** Employers are prohibited from making deductions from a workers' pay to cover recruitment costs, including in the case of foreign workers.

2. **Use of recruiters:** Employers using third-party recruiters can only use licensed recruiters when recruiting foreign workers, except in certain exempted circumstances.

3. **Employer Registration Certificate:** Most employers recruiting and hiring foreign workers for employment in the Province must obtain a Foreign Worker Employer Registration Certificate, which has to be renewed annually.

4. **Record keeping:** Employers in Nova Scotia must keep records of all employees, including foreign workers, and including records related to recruitment for at least 36 months after the work has been performed. Additionally, there may be further federally imposed record keeping requirements depending on what type of work permit the foreign national holds. We recommend maintaining employment records for foreign workers for a period of at least 6 years.

Finally, employers should seek advice to ensure their job offers or contracts contain language surrounding the obligations of foreign national employees to obtain and maintain proper work authorization that will enable them to perform the job as contemplated, and employers are strongly encouraged to consider including a properly drafted termination clause that establishes the amount of notice the employee will be entitled to on termination. See additional information on considerations when terminating foreign workers here.

WHAT EMPLOYERS SHOULD KNOW ABOUT "IMPLIED STATUS"

Kathleen Leighton; associate, Halifax

"Implied status" is a term you might hear your foreign national employees mention when they are trying to assure you they are authorized to work in Canada, even though they are unable to provide you with a work permit. It can be concerning for an employer who is keen to abide by immigration rules to rely on assurances like this from an employee without seeing a valid work permit. However, "implied status" is a real type of status that allows individuals to temporarily keep working in Canada without a work permit, albeit under some very specific circumstances.

In addition to understanding the term, there are also a few best practices employers should be aware of when it comes to implied status.

What is "implied status"?

A temporary foreign worker will have implied status to continue working in Canada after the expiration date of their work permit if:

1. They applied for a new work permit before the prior work permit expired;
2. They have not yet received a decision on the new work permit application; and
3. They have not left Canada since the prior work permit expired.

As soon as the worker receives a decision on the new work permit application, their implied status ends. If their new work permit application is approved, they can continue work under the terms and conditions of their new work permit once it is in hand. If the new work permit application is rejected, they are likely out of status to continue working in Canada.

Example of implied status

By way of example, say your temporary foreign worker employee held a work permit that was valid until August 31, 2020. They applied for a new work permit on August 25, 2020, but that application is still in processing with the Government as of September 5, 2020. As of this date, even though the employee's work permit is now expired, they have implied status to continue working in Canada, assuming they did not leave Canada after August 31, 2020.

If the same employee left for vacation on August 26, 2020 and did not return to Canada until September 4, 2020, they would no longer have implied status on their return. Despite making their new work permit application before the expiration of their old permit, they left Canada since that work permit expired. Unless they were granted some new work authorization on re-entry to Canada, they are likely out of status to work in Canada.

Alternatively, if it is September 5, 2020 and the same employee has not left Canada since August 31, 2020, but did not apply for a new work permit until September 3, 2020, they do not have implied status to continue work. This is because they did not apply for the new work permit

before their old permit expired on August 31, 2020. In fact, they are likely out of status and may need to make a restoration application before they can resume work.

These examples all assume the employee did not obtain alternate status, like permanent residency, in the meantime.

Limitations of implied status

Implied status only allows workers to work under the same conditions as those of their old work permit. If your employee held an employer-specific work permit allowing them to work as an Engineer but they applied for a new work permit to allow them to work as an Engineering Manager, they would only have implied status to continue work in the Engineer role. They cannot start work as an Engineering Manager until that work permit application is approved and the new work permit is in hand. If the original permit was an open permit, however, this is less of a concern, since the employee was not previously restricted to a given role in any case. Learn more about employer-restricted and open work permits here.

Best practices

If your employee indicates they are on implied status, you should take the following steps:

1. Ensure you already have copy of their prior work permit in their employee file;
2. Request official confirmation of their new work permit application submission and keep this in their employee file;
3. Verify that the date of submission for the new work permit application was before the old work permit expiry date;
4. Confirm likely processing time for the new work permit application and set yourself a reminder - note however that government processing times are only estimates, and your employee's application may take more or less time in reality;
5. Request that the employee immediately informs the company as soon as a decision is made on the new work permit application (whether positive or negative);
6. Check in with the employee regularly regarding the status of the new application; and
7. Seek advice from immigration counsel if you are not confident your employee has implied status and/or has provided proper documentation to demonstrate their implied status.

EMPLOYING INTERNATIONAL STUDENTS IN CANADA

Kathleen Leighton; associate, Halifax

International students are foreign nationals attending school in Canada who are neither Canadian citizens nor permanent residents. Employers may wish to hire international students, particularly at the post-secondary level, to help address labour shortages and draw new talent through their doors. In doing so, employers must ensure they only employ students with proper authorization to work. The authorization required may differ depending on the nature of the employment.

Employment without a work permit

Employers may be able to employ post-secondary international students who do not have a work permit in the following scenarios:

1. **For on-campus work:** Full-time post-secondary students with a valid study permit and a Social Insurance Number ("SIN") may be able to work on their school campus without a work permit. If so, their study permit should indicate that they are allowed to work on campus. "On-campus work" includes work for the school, a faculty member, a student organization, the student themselves if they run a business physically situated within the buildings on the school campus, and other private businesses or private contractors that are located on the campus.

2. **For off-campus work:** Full-time students in certain post-secondary academic, vocational, or professional training programs may be able to work off-campus without a work permit. The relevant program must be at least six months long and lead to a diploma, degree or certificate. Again, the student will need to have a SIN and a valid study permit that indicates they can work off campus in the remarks or conditions section. However, there are limits that apply to off-campus work, namely the student can only work:

    a) up to 20 hours per week during a regular academic session; and

    b) full-time during scheduled academic breaks (i.e. winter and summer holidays, spring break, etc.).

    Note that while the off-campus work rules apply to full-time students only, there is an exception for those studying part-time in their last semester of their study program if they do not need a full course load to complete that program and maintained status as a full-time student in that Canadian program up until that last semester.

In either case, the student must have already begun their studies to be eligible to work on or off-campus. Additionally, the ability to employ students without a work permit does not apply to

those who are on authorized leave from their studies, or any student switching schools who is not currently studying.

Employment with a work permit

Employers can also employ international students for co-op positions or intern work if the student holds a **co-op work permit**. Students who hold a valid study permit and who are required to complete work terms as part of their study program in Canada, so long as the work terms do not exceed 50% of the study program, can obtain such a permit.

Compliance issues

Employers can be found non-compliant with immigration requirements (and face consequences) for employing a student without proper authorization. There can additionally be significant consequences for the student who worked without authorization. It is therefore vital to confirm the student's ability to work, but unfortunately study permits sometimes leave out comments regarding the ability to work on and off-campus in Canada. This can create confusion.

Similarly, students may present documents that appear to allow them to work in Canada, but additional details may be required to truly verify their status to work as contemplated for a particular employer. It is therefore helpful to seek advice from immigration counsel to confirm if an individual student is able to work for you. It is also possible in some cases to have study permit conditions revised to accurately reflect the authorization to work where needed. Counsel can also assist with this.

COVID-19 measures for essential industries

There was a temporary rule change announced near the end of April 2020 regarding the restriction that limits international students to working off-campus no more than 20 hours per week during regular academic sessions. Specifically, the Government removed this restriction for international students in the case of those working in an essential service or function, such as health care, critical infrastructure, or the supply of food or other critical goods. This temporary change was put in place until August 31, 2020. As of the date of this article, there has not been further information on whether this will be extended.

Recent graduates

There are other options for recently graduated international students to obtain work authorization as well. These were discussed in our Spring 2019 *Discovery: Atlantic Education and the Law* Issue 04.

IMMIGRATION IMPLICATIONS OF CORPORATE RESTRUCTURINGS

Brittany Trafford; associate, Fredericton

Corporate restructuring and changes in ownership of businesses raise questions about liabilities and responsibilities, including regarding the existing workforce with prior employment contracts. As more and more companies operate with temporary foreign workers, these questions become even more important to consider as there are unique impacts to foreign nationals and compliance requirements that may need to be addressed.

Generally, the impact to temporary foreign workers and the new entity resulting from the restructuring depends on the type of restructuring and what kind of permits the workers hold.

Ensuring that all workers under the newly restructured entity are legally authorized to perform the work they are being assigned in Canada is an essential step in the restructuring process. This is because employers are prohibited under the *Immigration and Refugee Protection Act* from employing a foreign national in a capacity for which they are not properly authorized.

Types of permits

Temporary foreign nationals have either "open" permits, which are not tied to a specific location, position, or employer or "closed" work permits, which limit the worker to a specific employer, position, and location. Those on "open" permits do not pose an immigration issue in restructuring, but foreign nationals on "closed" or employer-specific permits may need to obtain new permits before they have authorization to continue working as described below.

Types of restructuring

There are three common corporate restructurings to consider:

- An **acquisition** occurs where there is a take-over of the controlling interest in an organization by another entity, but where both entities continue in legal existence after the structure change.
- A **contraction** involves a reduction in the size of a corporation. Contractions can come about in a few different ways, including where there is a sale of part of an organization, among others.
- A **merger or consolidation** occurs when two entities join to form one "surviving" entity, which entity will assume the assets and liabilities of the individual merged organizations.

For the purposes of immigration, the most important variable is whether the restructuring creates a "successor in interest." A successor in interest is found when the new or purchasing entity substantially assumes the interests, obligations, assets, and liabilities of the prior owner and whether this new entity continues operation of the same type of business. The assumed liabilities can include the continued employment of workers. Therefore, a true successor in

interest assuming all liabilities may indeed be on the hook for the immigration implications of said continued employment.

When do employees need new permits?

Successors in interest who assume all assets and liabilities of the previous organization essentially step into the shoes of that organization, and where the successor continues operating the same type of business, it will similarly step into the shoes of the "employer" for any existing work permits. In this case, given the employer is essentially the same as before the structure change, temporary foreign worker employees would not usually require a new work permit.

However, successor employers should seek advice to confirm this, as certain circumstances can still necessitate a new work permit. For example, if the worker's employment conditions change as a result of the restructuring from what was originally outlined during the work permit application process, new authorization may be required. Therefore, changes to wages and job duties could result in non-compliance if the individual remains on their existing work permit. Similarly, employers must be careful that other work permit requirements can continue to be met. For example, if the employee is an intra-company transferee (i.e. they are on a work permit based on their transfer from an entity with a qualifying relationship, like a subsidiary company), the successor entity would need to maintain that qualifying relationship with the employee's transferring entity in order for the existing work permit to stand. If they continued to be a subsidiary or similar, this may be sufficient.

If the new entity is not a successor in interest, any temporary foreign worker employees will likely require new permits. These new applications would need to be based on either new Labour Market Impact Assessments ("LMIAs") or, in some cases, Online Offers of Employment for permits that are not dependent on an LMIA, such as a permit based on an international trade agreement.

Compliance impacts and responsibilities

When an organization supports a foreign national for a work permit on the basis of an LMIA or an LMIA exemption, they have agreed to a number of requirements for the duration of the work under the permit that is obtained. For this reason, during any restructuring there are likely to be some compliance requirements to consider. This may include reporting updates or changes and being aware of ongoing obligations.

Because of the penalties associated with non-compliance with immigration requirements, it is important for successors in interest to ensure continuing employees have proper authorization to work post-restructuring, as the successor employer will be accountable for continuing to honour the ongoing requirements of any employment obligations to foreign workers under LMIA-based permits, LMIA-exempt permits, and general immigration requirements when it comes to employing foreign nationals.

That said, it is similarly necessary for successor employers to consider possible inherited liability for past employer compliance violations that may have occurred pre-restructuring. Therefore, before completing the restructure, there should be an audit of compliance related to the employment of the foreign nationals in the previous six years, which is the length of time the government can consider in a compliance review.

This all may lead to reporting requirements. For any past non-compliance discovered, it may be necessary to complete a voluntary disclosure process. Where work permits are based on LMIAs, the employer who was issued the positive LMIA also has an obligation to inform Employment and Social Development Canada of any changes from when the application was submitted. If there are changes to the employment of individuals on LMIA-exempt permits, this can also justify disclosure to the government. Where there are changes to the name, address or organization type (and a new business number is issued), but the entity remains otherwise unchanged, the employer has an obligation to update Immigration Refugees and Citizenship Canada to inform them of the updates. Finally, it is recommended to provide written confirmation to temporary foreign worker employees of the name change so they will be able to prove a connection between the employer listed on their work permit and the successor employer, in case needed.

Compliance impacts and responsibilities

A number of specific considerations need to be made where the organizations undergoing restructuring employ foreign nationals. These issues must be considered carefully at the onset as changes can impact legal authorization to work on existing permits and can trigger compliance requirements. It is best to review these potential issues early in the process and to ensure that the organizations involved are in compliance with their immigration requirements. It is in the successor's best interest to be aware if there is improper employment of foreign nationals.

DID YOU KNOW?

Did you know, wages must be paid to employees even if they do not yet have their social insurance number ("SIN")? Workers are required to apply for their SIN within 3 days of when they begin their employment, but it is not necessary for them to already have the SIN in order to start work. They are, however, required to provide the SIN to their employer within 3 days of receipt. Immigration, Refugees and Citizenship Canada recently updated its employer compliance inspections to provide this clarification on the responsibility of employers to pay wages to foreign nationals who have not yet obtained their SIN.

FURTHER INFORMATION

This publication is intended to provide brief informational summaries only of legal developments and topics of general interest, and does not constitute legal advice or create a solicitor-client relationship. This publication should not be relied upon as a substitute for consultation with a lawyer with respect to the reader's specific circumstances. Each legal or regulatory situation is different and requires review of the relevant facts and applicable law. If you have specific questions related to this publication or its application to you, please contact our immigration team. Due to the rapidly changing nature of the law, Stewart McKelvey is not responsible for informing you of future legal developments.

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