

## Temporary Foreign Worker Program

### Policy: Definition of Employer (Interim)

#### Policy Statement

An employer is an entity that makes an offer of employment to a foreign national to perform work in Canada. An employer must be identified to allow Employment and Social Development Canada (ESDC) to fulfill its regulatory responsibilities in the administration of the Temporary Foreign Worker (TFW) Program.

#### Scope

This policy applies to all streams of the TFW Program.

#### Exemptions

There are no exemptions to this policy.

#### Authority (Acts, regulations and other legislation)

The TFW Program is governed by the *Immigration and Refugee Protection Act* (IRPA) and the *Immigration and Refugee Protection Regulations* (IRPR).

As per Section 203 (2)(2.01)(2.1) of the IRPR –

(2) The Department of Employment and Social Development must provide the assessment referred to in subsection (1) on the request of an officer or an employer or group of employers, none of whom is an employer who

- (a) on a regular basis, offers striptease, erotic dance, escort services or erotic massages; or
- (b) is referred to in any of subparagraphs 200(3)(h)(i) to (iii).

(2.01) A request may be made in respect of

- (a) an offer of employment to a foreign national; and
- (b) offers of employment made, or anticipated to be made, by an employer or group of employers.

(2.1) The assessment provided by the Department of Employment and Social Development on the matters set out in paragraphs (1)(a) to (e) must be based on any information provided by the employer making the offer and any other relevant information, but, for the purposes of this subsection, the period referred to in subparagraph (1)(e)(i) ends on the day on which the request for the assessment is received by that Department.

#### Policy

##### Definitions

An **Employer** is an entity (e.g. person, business, corporation or organization) that makes an offer of employment to one or more foreign nationals who provide labour in return for compensation for a specified period of time. The employer is generally the entity that hires, controls working conditions and remunerates the foreign national.

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A **Group of Employers** are two or more entities who agree to be employers of the foreign national(s) and share employer functions (simultaneously or subsequently) with respect to one or more foreign nationals who provide labour in return to the group of employers for compensation for a specified period of time.

A **Foreign National** is an individual who is not a Canadian or permanent resident who is offered employment in Canada in exchange for compensation.

An **Offer of Employment** is the formal offer of employment made to a foreign national by an employer or group of employers that stipulates the terms of employment (e.g. wages, benefits, and working conditions). The offer of employment forms the basis of the Labour Market Impact Assessment (LMIA) application provided to ESDC by the employer/group of employers.

A **Third-party Representative** is the individual who is authorized to represent an employer or a group of employers for filling out and responding to questions relating to the LMIA application or chosen to act on their behalf during an inspection or a Review under Ministerial Instruction.

### Determining the Employer

An offer of employment is made by an employer or group of employers to a foreign national thereby establishing an employer—employee relationship. The determination of who is the employer/group of employers of the foreign national is made during the application process, to identify the correct employer/group of employers and they understand their obligations to foreign nationals.

Where there is doubt over which entity a foreign national would be working for, including situations where more than one entity share characteristics of an employer or whether the foreign national appears to be self-employed, some analysis may be required to determine who the employer is. For the purpose of the TFW Program, characteristics of the relationship, such as control and remuneration, including statutory benefits (e.g. CPP and EI), will be reviewed to determine when an employer—employee relationship exists. The total relationship will be examined and assessed, bearing in mind that no one factor is determinative and there is an extensive list of factors that may be examined.

All employers making an offer of employment to a foreign national are responsible for meeting the compliance regulations set out in IRPR.

### Entities considered the employer of a foreign national under the TFW Program:

#### **Canadian-based entity**

A person, business, corporation or organization based in Canada that makes an offer of employment to one or more foreign nationals.

#### **Foreign-based entity**

A person, business, corporation or organization that is not based in Canada that makes an offer of employment to one or more foreign nationals to work in Canada. For identification purposes, it is strongly recommended that the foreign-based employer obtain a Canadian business number to facilitate the TFW Program's assessment of their genuineness.

#### **Group of Employers**

In cases where two or more entities are determined to share employer responsibilities by the Department, a group of employers may make an offer of employment to a foreign national.

- All parties handling employer responsibilities relating to the employment of a foreign national (via an LMIA) are considered to be part of a group of employers for the purpose of the TFW Program.
- The Department determines who is able to apply under a Group of Employers, including whether employers should be included or excluded based on the relation to the foreign worker being offered a position.



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- The roles and responsibilities of each party must be clear and defined at the time of application, including whether employment responsibilities are occurring sequentially or simultaneously (including a defined period where the foreign national would be reporting to a specific entity).
- All parties may be held jointly responsible in cases of non-compliance.

### **Independent Contractors – Fulfilling a contract**

For the purpose of the TFW Program, in cases where a self-employed foreign national's services have been contracted by a Canadian company, and the self-employed individual is offering their services exclusively to that firm and is required to perform work within Canada, the contract should be evaluated as the job offer. **The contracting firm is considered to be the employer**

### **Self-employed – Operation of a business in Canada (owner-operator)**

For the purpose of the TFW Program, in cases where a self-employed individual wishes to enter Canada to establish or purchase a business and be involved in its day-to-day operations, the business plan or contract to purchase shares in a business should be evaluated as the job offer

Ownership of shares does not guarantee that a foreign national would qualify as an owner-operator. The term owner-operator generally refers to small business owners and does not refer to individuals who receive shares as part of a compensation package. To qualify as an owner-operator the foreign national should be able to establish a level of controlling interest in the business (e.g. a majority or plurality of shares, is not able to be fired) and be actively involved in its operation. Foreign nationals who do not meet this definition would not qualify for the Program exemptions under owner-operator.

### **Entities NOT considered the employer of a foreign national under the TFW Program:**

#### **Canadian Company contracting services to a foreign firm**

A Canadian company that is engaged in business (e.g. contracting services or partners) with a foreign-based company that employs a foreign national is not the employer and as such should not submit the LMIA application on behalf of the foreign-based company.

#### **Parent Company**

In situations where an employer is legally owned by a parent company, but the parent company does not have day-to-day control over business operations that the TFW would be involved in, the parent company would not be considered the employer.

#### **Third-party Representatives**

*Refer to the Third-party Representatives Policy*

### **Administrative policy relating to the employer in the TFW Program**

#### **Defining the employer when there are multiple businesses**

An employer is the entity that oversees and has direct control (e.g. business decisions, accounts, human resources) over the operations of a single business or multiple businesses and has the established employer-employee relationship with a foreign national as defined above.

#### **Changes of Ownership or Name**

In cases where employer responsibilities are transferred to a different employer through a merger or acquisition, both the original and successor employer must provide details on when employer responsibilities were transferred, and the successor must agree to and acknowledge in writing, all conditions set out in the original LMIA.

If an employer changes its legal or business name, and the business retains the same or substantially the same business activity (e.g. selling pizza, gas station), they would continue to be considered the employer for the purpose of the TFW Program.