

FE Eye Opener

The Changing Business Landscape – Challenges around managing your business travellers.

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An independent global immigration law firm allied with Deloitte*
*Deloitte LLP, a Canadian limited liability partnership



Agenda

What has changed?

What are the business issues?

Regulatory activity

What are my alternatives?

Why should I act now?

Immigration – Business Travellers

What has changed?

What has changed?

Demographics of mobile work forces

Increased risk that employees' activities may trigger a permanent establishment under the Services PE provision of the Canada-U.S. Tax Treaty (the "Treaty")

Increased audit activity by the Canada Revenue Agency ("CRA") and Internal Revenue Service ("IRS") on cross-border services

Corporate governance leading practices to manage risk

New advanced technology tools being developed that facilitate compliance – and detection

What are the business
issues?

What are the business issues?

Shift in business models results in new increased risks

Tax risks are significant for non-compliance

- Corporate and indirect tax
- Domestic withholding tax (Individual, Payroll and Corporate)
- Personal tax for employees
- Significant penalties and interest

Reputational risk to the company

Significant cash flow impact

Financial statement impact

What are the business issues? (cont'd)



Personal Tax

Corporate Tax

PE/Services PE

Permanent Establishment (“PE”) issues

- Under the Treaty, a non-resident only taxable if carries on business through a permanent establishment
- In the past, Article V of the Treaty required:
 - Fixed place of business;
 - Dependent agent concluding contracts; or
 - Construction/Installation projects.
- New Services PE provision substantially expands the meaning of a PE
 - Introduced a deeming rule
 - Applies where a non-resident exceeds a threshold level of services in Canada (183 days over any 12 month period)
 - Single individual test
 - Enterprise test

Consequences of a Canadian services PE

–Corporate

- Net corporate tax cost of Services PE may be minor issue
- Corporate tax paid likely creditable in whole or in part in home country

–Employee/Payroll taxes

- Most significant issue; loss of Article XV Treaty exemption for employees not meeting any treaty de minimus test (e.g., \$10,000 test in U.S. – Canada treaty)
- Canadian effective personal tax rate up to twice the effective U.S. rate
 - Foreign tax credits will not fully offset the Canadian taxes paid, employees will want to be kept whole
- These costs are critical to project costing

Impact on secondment arrangements

- Is Usco providing services to Canco or merely loaning a person?
- In true secondment arrangements, the enterprise should not be viewed as providing services in Canada
 - Services PE for Usco would not apply
- True secondment
 - Employee has been loaned to Canco
 - Employee working under Canco's direction and control
 - Only costs of employee, without any profit element, charged to Canco
- However, Services PE could apply to other arrangements where a profit element is charged and services are provided to a customer

Impact on sub-contracting arrangements

- Issue is whether subcontractors' days are factored into the Services PE 183 days
- Neither the Treasury nor Joint Committee Technical Explanations addressed this issue
- OECD: Services outsourced by a NR to another NR are not included unless subcontractor under direction and control of NR
- CRA differentiated their position on basis working is “*provides*” not “*performs*”
- 2011 CTF Roundtable November 29, 2011
 - If subcontractor U.S. resident – days are included
 - If subcontractor CDN resident – days are not included provided Canco charges an arm's length fee

Corporate Tax – Withholding on fees paid to a non-resident for services rendered in Canada (Regulation 105)

–Applies to

- Any contract that includes services performed in Canada by a non-resident
- Portions of services that a non-resident renders in Canada, even where contract includes services to be performed both in Canada and out of Canada
- Services that non-resident is contractually obliged to perform in Canada, even if non-resident subcontracts some or all of them

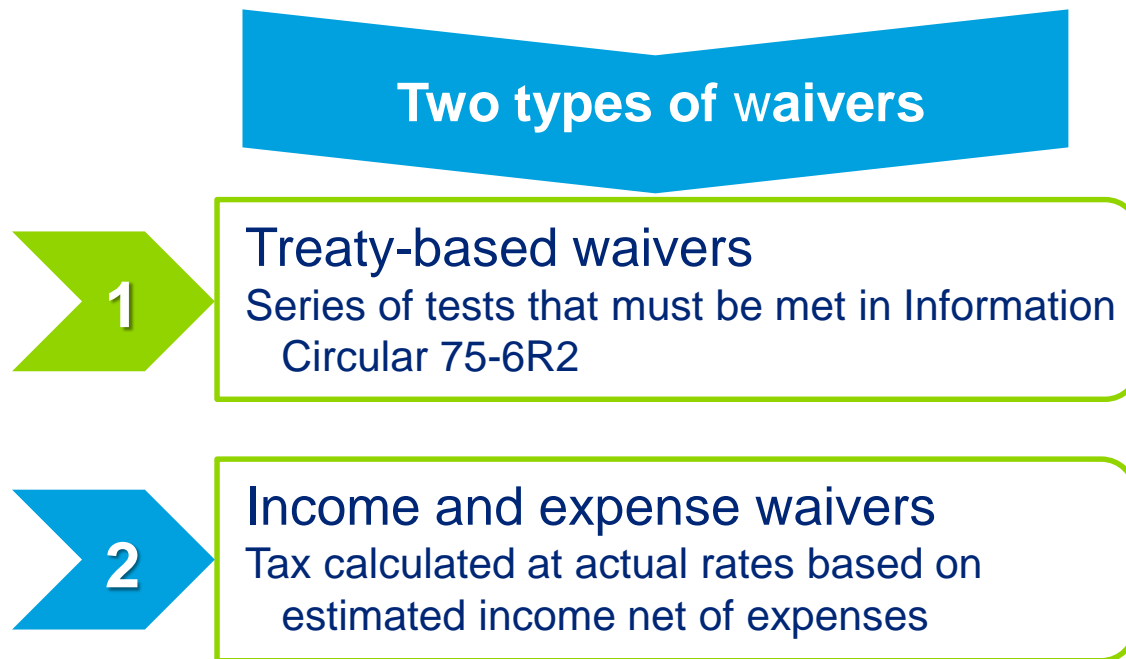
–Excludes remuneration paid to employees

–Can result in cascading withholding

–Not a final tax, but a pre-payment of tax

Regulation 105 waiver

- Non-resident must obtain waiver before receiving payment for services rendered
 - Waiver does not relieve non-resident from withholding on secondary services (e.g., to a subcontractor) or from reporting requirement (i.e. T4A-NR)

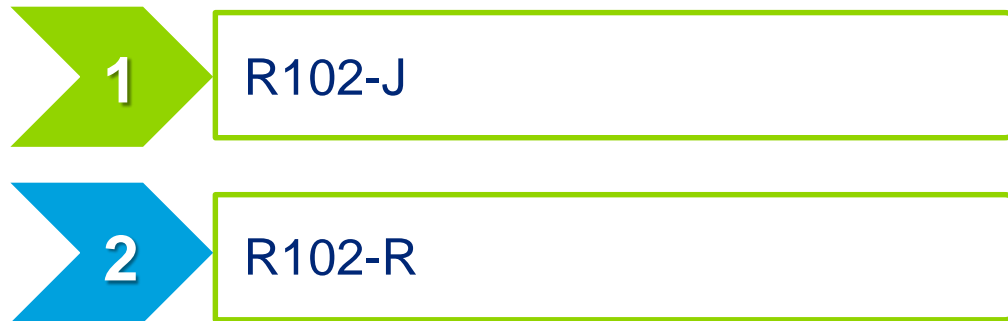


Payroll withholding Canada – (Regulation 102)

- Every person paying remuneration to employees present in Canada must withhold in respect of employees' Canadian source pay
 - Applies to non-resident and Canadian resident employers
 - Withholding is at marginal rates (not a flat rate)
 - Applies even if the employee is treaty exempt
 - Withholding applies to tax and possibly CPP/EI
 - Only exemption is where a Reg 102 waiver is obtained
 - Employer required to issue annual T4 slips
- To obtain tax refund where treaty exemption available, non-resident must file tax return and if agreement in place, give refund to employer
- Employer to register and open payroll accounts with CRA
- Penalties imposed for not withholding and reporting

Reg 102 waivers

Two types of waivers



R102-J

- Simplified waiver process where employee is Treaty exempt under the C\$10,000 minimum test of Canadian – U.S. Tax Treaty (C\$5,000 for employees resident in other Treaty countries)

R102-R

- Used where requirements for R102-J Waivers are not met
- Non-resident employee's Canadian source compensation greater than C\$10,000/C\$5,000, but other conditions for Treaty exemption apply

Article XV exemptions

- What does “borne by” mean in the context of a cross charge for a U.S. resident employee exercising employment duties for the Canadian subsidiary?
 - Does it depend on the nature of the charge, i.e. cost, cost plus, per diem?
- CRA’s position found in CRA Documents 2011-0403551E5 (dated July 15, 2011) and 2011-0418281E5 (dated January 23, 2012)
 - In order for compensation to be considered “borne by”, two tests must be met:
 1. The Canadian entity must assume an employment relationship with the employee; and
 2. The charge bears some close relationship to actual compensation costs (even if there is a profit mark-up) as opposed to a fee for services (where compensation costs are merely one component).

Payroll withholding on director's fees

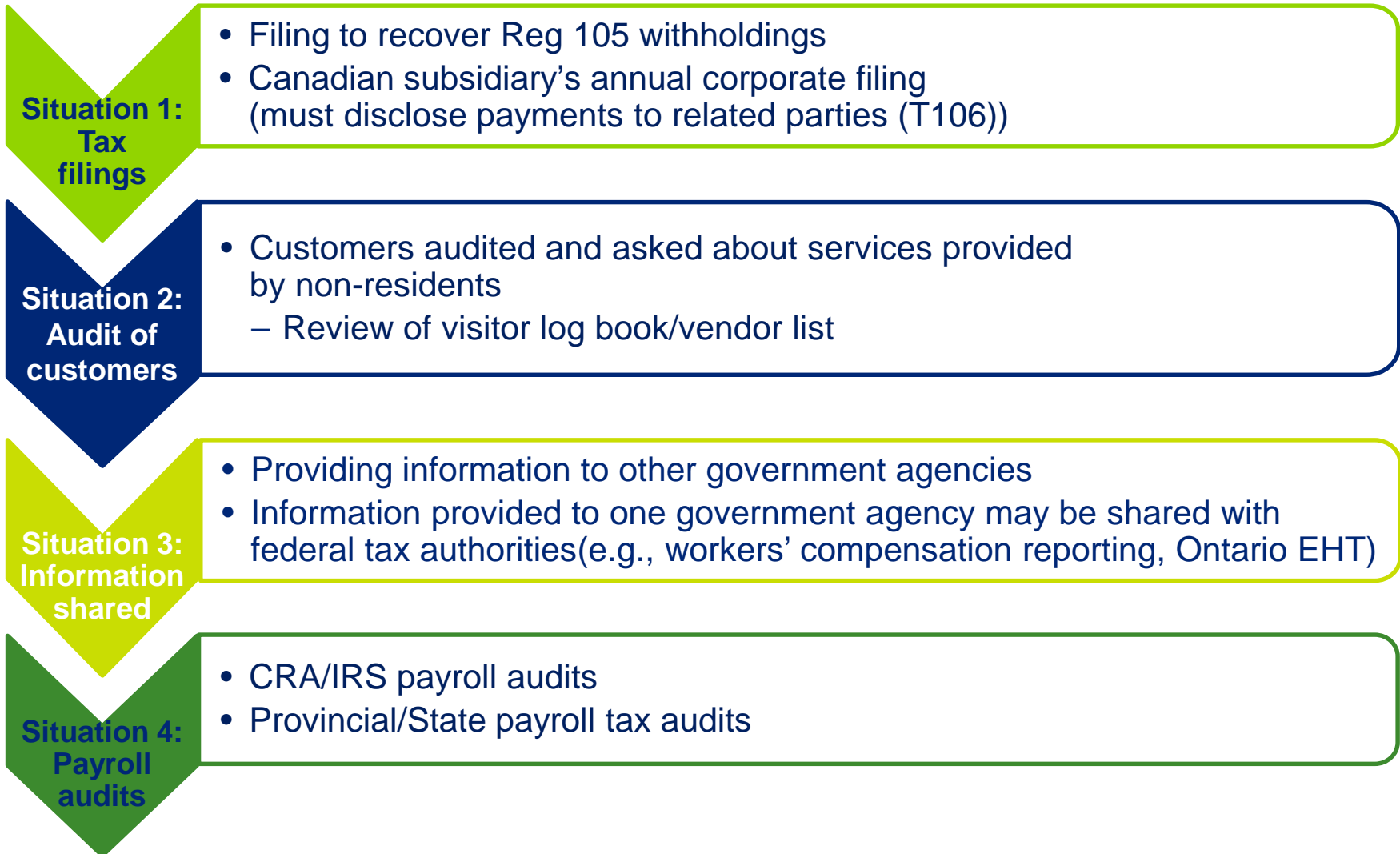
- Are director's fees paid to a non-resident subject to Reg 102?
 - Yes, director's fees constitute income from an office or employment
- What portion of director's fees paid to a non-resident of Canada are taxable in Canada?
 - Taxable on fees attributable to duties performed in Canada
 - Board retainer taxable based on workdays in Canada divided by total work days
 - Fees for attending meeting taxable where meeting is held in Canada
- What if the director attended a meeting held in Canada by phone while physically located in the U.S.?
 - For federal purposes, considered a U.S. workday and therefore not taxable
 - For Quebec purposes, considered a Quebec workday if the meeting was held in Quebec (administrative practice)

Similar Compliance Issues in the U.S.

- Corporate and payroll withholding taxes on a federal and potentially State level
 - Registration with the US and state
- PE rules are similar
- State nexus considerations – may be lower than PE threshold under Treaty
 - Not all states follow the Treaty and therefore treaty exempt income federally may not be exempt on a state level
- State Sales tax considerations
 - Physical presence in the state may create a state sales tax liability
- U.S. Federal and State Payroll tax issues
 - Withholding and reporting requirements (1042-S / W-2)
 - Waiver available where treaty exempt (Form 8233)

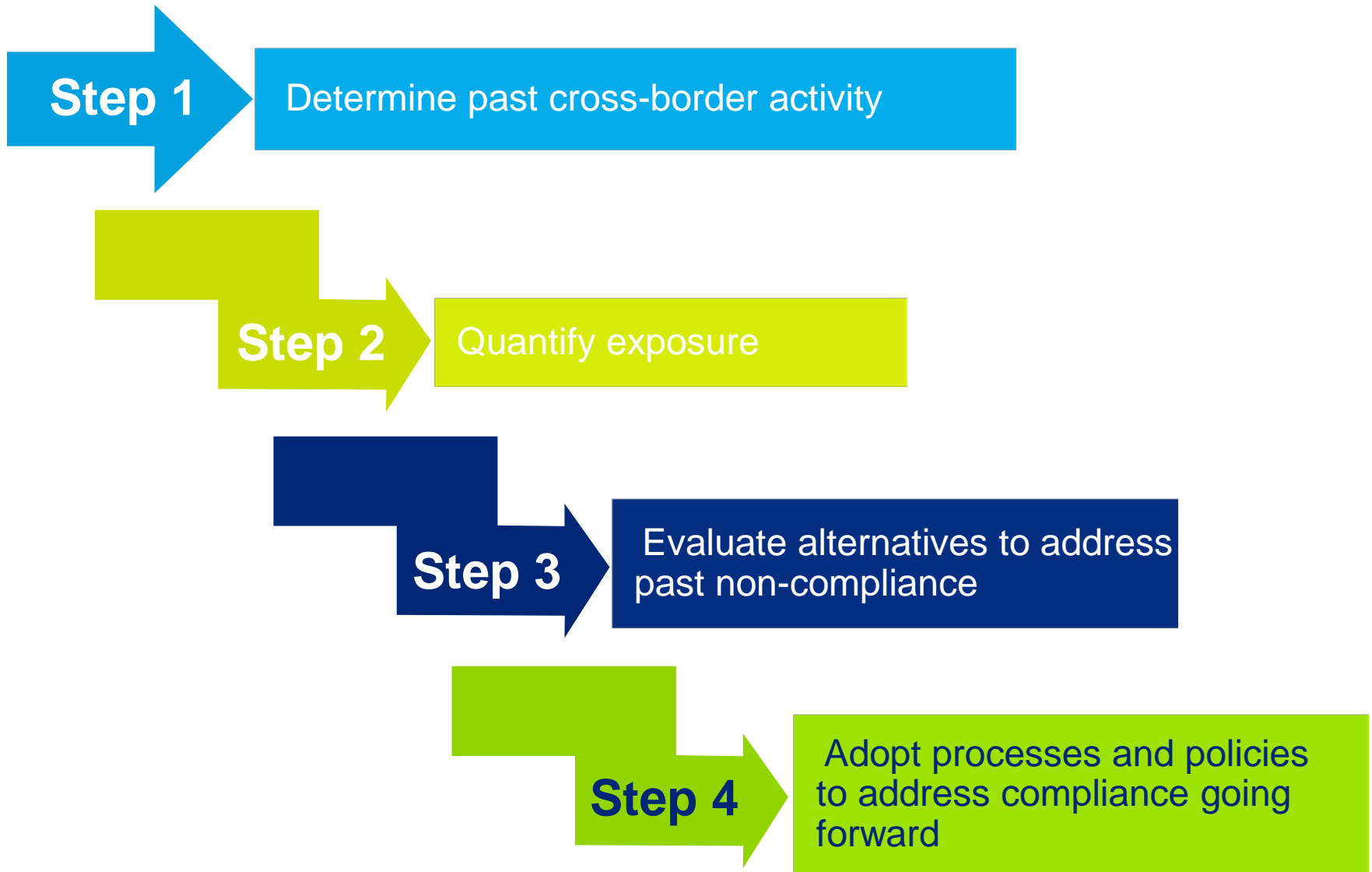
Regulatory activity

Detection by CRA/IRS/State



What are my
alternatives?

What are my alternatives?



Determine past cross-border activity

– Reconstructing travel activity

- Travel agent records
- Expense reports
- Remember the corporate jet

– What constitutes a day

- Different definitions for Services PE, Article XV and Reg 102 purposes



Quantify exposure

– Tax exposures

- Payroll withholding
- Corporate tax exposures (branch tax if PE)
- Personal tax exposure for employees

– Financial exposures

- Depends on accounting method

– Cashflow issues

- Corporate tax withholding
- Payroll withholding



Evaluate alternatives to address past non-compliance

- Do nothing
 - Risk continues to increase indefinitely
- Voluntary disclosure
 - Waiver of penalties, sometimes relief on interest assessments
 - Number of conditions must be met
 - Must remain compliant in future years
- Take corrective action without a voluntary disclosure
 - Remit all taxes owing and make all required filings
 - May be appropriate in limited circumstances
 - Risk capped but interest cost continue to increase each year



Route chosen for past impacts future choices

Business travellers non-compliance-reputational risk

- Employees providing appropriate and authorized services on behalf of the company become subject to statutory sanctions unknowingly
- Employees receive demands to file personal returns as detection and enforcement becomes much more sophisticated
- Information about such events are generally in the public domain and are often cited in the press
- Current and former employees may take legal action against the company
- Loss of contracts, i.e. federal/provincial government and agencies
- Financial statement implications, i.e. undisclosed liabilities
- Implications regarding the company's ability to certify internal controls

Why should I act
now?

Act now

- Impact may go beyond the tax group
 - Employees
 - Accounting
 - Treasury (cash management)
 - Operations (business contracts)
 - HR
- Very likely more costly to address after the fact
- CRA is actively investigating cross-border travelers
- IRS and state tax authorities have stepped up audits





Canadian immigration information and fundamentals

Business visitors in Canada

Eligibility requirements include:

- Individual must be seeking to engage in international business activities in Canada without entering the Canadian labour market
- The primary source of remuneration is outside of Canada
- Principal place of business and the actual place of accrual of profits remain outside of Canada

Most common and straight-forward type of business visitor:

- People coming to Canada for a business meeting

Other business visitor activities fall into a “grey area” and are subject to the discretion of an officer. Different officers, especially those at different ports-of-entry may have different views on who is a business visitor and who is not.

The age of stricter enforcement and compliance

Era of reforms

- Reforms to the temporary foreign worker program reflect the government's changing policy towards the appropriate use of the program
- Need to balance the critical business needs of Canadian employers and the overall need to protect the Canadian labour market
- “Canadians first” recruitment strategy
- Employers should expect the Government to scrutinize recruitment efforts, review employer transition plans and examine rationale behind attempt to hire foreign workers
- Companies receiving services will need to closely examine its business needs and the overall economic benefit to Canada

Hiring foreign workers for higher-skilled occupations

Foreign workers can help employers meet their labour needs when Canadians and permanent residents are not available. These workers often bring new skills and knowledge to help the country's economy grow.

Under the stream for higher-skilled occupations, employers can hire foreign workers in higher-skilled positions such as: management, professional, scientific, technical or trade occupations. These occupations can be found throughout many sectors of the economy, and as a result often have very diverse recruitment practices and regulatory requirements.

Stream for higher-skilled occupations

Position must require education or formal training such as:

- University education
- College education
- Vocational education
- Apprenticeship training

Labour Market Impact Assessment - LMIA

LMIA based:

- Employer must first obtain a positive LMIA before the foreign worker can apply for the work permit
- Starts with four weeks minimum recruitment efforts, in 3 unique advertising vehicles
- The wages being offered to the potential employee are consistent with the prevailing wage rate paid to Canadians in the same occupation in the region
- This is demonstrated through a comprehensive document called a “Transition Plan”, the expectation being that the foreign worker will be replaced in the course of their work authorization
- Any potential benefits that hiring a foreign worker might bring to the Canadian labour market, such as the creation of new jobs or the transfer of skills and knowledge.
- Work permit limit of two years (there are exceptions)

Recent developments

What does this mean for employers?

Summary of changes

- New processing fee of Canadian \$1000 for each labour market opinion
- Employers who rely on temporary foreign workers need to develop and implement a plan to transition to a Canadian workforce
- Introduction of “Integrity officers” with broad powers to conduct inspections at employer’s premises
- Advertising requirements now a minimum of four (4) weeks



NAFTA

NAFTA

- Professionals
 - Must be U.S. or Mexican citizen
 - Appendix 1603.D1 (64 professions)
 - Must hold a minimum of a Bachelor's degree in one of the listed professions (exception: Management Consultants)

Intra-company transferees

- Must be U.S. or Mexican citizen
- Must have worked for a multi-national corporation outside of Canada for a minimum of one year
- Is being transferred to a parent, subsidiary or affiliate of that multi-national corporation in Canada
- Must be specialized knowledge worker, senior management or executive
- Work permit limit of five years (specialized knowledge) or seven years (senior management or executive)

Significant benefit/ exemption

Significant benefit

General definition: Significant social or cultural benefit to Canada

Intra-company transferee

- Must have advanced level of expertise and advance proprietary knowledge = “specialized knowledge or uncommon” and must meet prevailing wage
- Is being transferred to a parent, subsidiary or affiliate of that multi-national corporation in Canada
- Must be specialized knowledge worker, senior management or executive
- Work permit limit of five years (specialized knowledge) or seven years (senior management or executive)

Reciprocal agreement

- Youth exchange programs
 - For youth ages 18 to 30
 - Only certain countries are involved
 - Working holiday, young professional, co-op categories
- Employment Exchange
 - Employer has internal exchange programs or "Global Mobility Policy"
 - Company has history of reciprocal exchanges between Canadian entity and its foreign entities



US immigration information and fundamentals

Common non-immigration visa categories

B-1 = Business visitors

H-1B = Professionals

L-1A = Executive/managerial transferees

L-1B = Specialized knowledge transferees

TN = NAFTA professionals

E-2 = Treaty traders/investors



B-1 travel – What is permissible?

- Attending business meetings
- Attending meetings as a board level
- Participating in intra-company training (job-shadowing, field observation and occasional demonstrations with tools/equipment)
- Supervising the installation of specialized machinery purchased or leased **outside the US**
- Meeting/negotiating with business associates
- Soliciting business
- Undertaking fact-finding missions
- Searching for a new office or office space
- Finalizing contracts



Changes on the horizon for US immigration law

Impact on non-immigrant visa categories

L-1A/B, Intra-company transferees

- Higher scrutiny of “managerial” and “specialized knowledge” positions
- Increased fees, visa revalidation, waived interview in certain circumstances

NAFTA: TN-1 and TN-2 Visas

Professionals

- Appendix 1603.D1 (64 professions)
 - Definition
 - Requirements – job offer
 - Length of stay – three (3) years
 - Documentation
 - Spouses and children (TD)



H-1B

- One of the most popular visa categories is the H-1B. H-1B's are specifically allotted for individuals to be hired for specialty occupations and must meet certain Department of Labor (DOL) wage requirements. A specialty occupation refers to positions requiring a bachelor's degree or equivalent as minimum requisite.
- Given the popularity of this classification, the United States Citizenship and Immigration Services (USCIS) has deemed it necessary to put a cap on the number of H-1Bs allowed in one fiscal year.
- The cap currently allows 65,000 foreign nationals to obtain H-1B status in one fiscal year with an additional 20,000 allotted for foreign nationals who hold a US Master's degree or above, noted as the "Master's Cap."

Fees

1

Forecasting to manage the business' expectations

2

Transparency

3

Flat fees

4

No hidden fees

5

Creative immigration strategies to reduce, control, or minimize immigration costs

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