

Employees coming to Canada:

An overview of the employment, immigration and tax considerations

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Summary

- When does your employee need a work permit?
- When can your employee come to Canada without a work permit?
- Specific examples not requiring a work permit
- Types of work permits
- Additional immigration considerations
- Employment considerations
- Tax considerations

When does your employee need a work permit?

What is considered “work”?

“means an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market”

When can your employee come to Canada without a work permit?

General requirements:

- Your employee has no intent to enter the Canadian labour market
- Your employee will not be employed in Canada
- Your employee’s main place of business, and source of income is outside of Canada
- Your employee’s activity is international in scope

A Business Visitor

- A foreign national who may enter Canada to conduct international business or trade activity for up to 6 months subject to the nature of the work.

When can your employee come to Canada without a work permit?

A Business Visitor

- Examples of why someone would come to Canada as a Business Visitor:
 - attend meetings, conferences, conventions or trade fairs,
 - attend training at a Canadian company that sold your company equipment or services,
 - attend training at a Canadian parent company,
 - provide training to the Canadian subsidiary of your foreign parent company,
 - work on a joint implementation project in Canada,
 - sell goods or services, or
 - provide after-sales services.

When can your employee come to Canada without a work permit?

Further examples:

- Public speakers
 - One-time / short term engagement
- Expert witnesses or investigators
 - Collecting evidence, surveying or testifying before a regulatory body, tribunal or court of law
- Convention organizers
 - Must not be a Canadian event planned by a Canadian organizer

Specific examples not requiring a work permit

Training and project implementation

- Receive or provide training in respect of goods and services purchased
- Project implementation
 - Any production of goods or services that results from the training must be incidental

After-sales services

- Service that is being performed as part of the original or extended sales agreement, lease/rental agreement, warranty or service contract
- If the goods are out-of-warranty
 - There is a need for specific knowledge
 - Canadian jobs would be affected if the equipment is not repaired in a timely fashion

Types of work permits

Intra-company transferees (executives, senior managers and specialized knowledge employees)

- Employee has to have been employed by the company for at least one out of the three years immediately preceding the application date, in the same position
- Employee's current position must either
 - be in a managerial capacity, or
 - require specialized knowledge.
- Employee must be transferring to a parent, subsidiary, branch or affiliate of the company

Types of work permits

Professionals (NAFTA, GATS, Chile, Peru, Colombia, Korea)

- Employee must be working within a profession that qualifies under this category
- Employee must have pre-arranged employment with a Canadian employer
- Employee must meet existing requirements for temporary entry

Types of work permits

Labour market impact assessment (“LMIA”)

- A LMIA is a process to verify and prove that there is a need for a temporary worker and no Canadians are available to do the job
 - The employer must advertise for the job opening for a minimum of 30 days and interview and assess all Canadian candidates that apply
 - If no Canadian candidate meets the job requirements, the employer can then apply to Employment and Social Development Canada (“ESDC”)
 - ESDC will assess the impact of issuing a work permit on the Canadian labour market
- A long, relatively costly process that requires disclosure from the employer
- Employers may be audited by ESDC and must comply with the requirements of their job postings

Additional immigration considerations:

- Documentation for certain types of Business Visitors
 - After sales contract
 - Training schedule
 - It is prudent to have a pocket letter
- Certain employees are required to apply for a Temporary Resident Visa before entering Canada
- Certain employees are required to apply for an electronic Travel Authorization before entering Canada
- Those in Canada on a Business Visitor Visa are not eligible for any OHIP coverage
- Those with past criminal offences may be inadmissible and may need to be rehabilitated

Employment considerations

- **When hiring**
 - Make sure the employee has valid work authorization
 - Work permits are often employer, occupation and location specific
 - Employment contracts
 - Conditions of employment must mirror the LMIA application
 - Employer may be subject to a Service Canada inspection
 - Contingency clause
 - Moving allowances or repatriation expenses
 - Choice of law clause
- **ESA considerations**
- **CPP and EI**

Employment considerations

- **When terminating**

- A foreign worker is legally entitled to remain in Canada until their work permit expires or is subject to a removal order
- Any new employer will have to obtain a new work permit
- Any employer-driven PR application processes may be put on hold
- Notice periods
 - Courts may take immigration status into account when assessing the appropriate notice periods
- Foreign workers do have the duty to mitigate

Tax considerations

- **Withholding and Reporting Obligations**

The *Income Tax Act* states that every person who pays at any time in a taxation year, a salary or wage or other remuneration shall, subject to certain exceptions, withhold from that payment the amount which is prescribed in the Regulations to the *Income Tax Act* (the “Regulations”).

Tax considerations

- **Non-resident employer**

- Is the employee a non-resident of Canada for tax purposes?
- No amount shall be deducted or withheld from a payment in respect of an employee who was neither employed nor resident in Canada at the time of payment except in respect of:
 - a) remunerationthat is paid to a non-resident person who has in the year, or had in any previous year, ceased to be resident in Canada; or
 - b) remuneration reasonably attributable to the duties of any office or employment performed or to be performed in Canada by the non-resident person.

Tax considerations

- **US-Canada Tax Treaty**

- a) Such remuneration does not exceed \$10,000 in the currency of the other State
- b)(i) The recipient is present in the other Contracting State for a period or periods not exceeding in the aggregate 183 days in a twelve month period;
- b)(ii) The remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and
- b)(iii) The remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

Questions?

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Thank you

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