INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

WORKERS WITHOUT BORDERS

Commission(s) in charge of the Session/Workshop:

Labour Law and Immigration Commission

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National Report of Canada

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BIBLIOGRAPHY

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- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

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INTRODUCTION

Global mobility is on the rise. More and more companies increasingly operate on a cross-border scale. However, companies assigning their employees to another or multiple countries are often confronted with an increase of formalities and requirements affecting the cross-border employment. At first glance, only the work place of the employee temporarily changes. However, many other legal issues come into play and employees must comply with the rules and regulations governing immigration, employment and labour and social security law of each of those countries.

The aim of the present questionnaire is to outlining the legal aspects and issues affecting the temporary assignments of employees within and outside the European Economic Area (EEA).

1. Immigration

The first question employers should consider is whether the employee needs an authorization to work and reside in the country to which he/she is (temporarily) assigned.

Within the European Union, freedom of movement of persons is one of the main fundamental principles, guaranteeing EEA nationals the right to live and work freely in another EEA member state.

Non-EEA nationals in principle need an authorisation to work within the EEA. Does this obligation also apply to EEA nationals assigned by their employer outside the EEA?

2. Labour and employment law

Secondly, assuming the employee is allowed to work and reside in the relevant country, it is important knowing which law is governing the employment relationship during the assignment period. Is it the law of the employer (home country) or the law of the country where the employee will be assigned (host country)?

Within the European Union, the Rome Convention and the Rome I EC Regulation are the two sources dealing with this matter. Does these sources also apply when a non-EEA national is assigned to an EEA country and when an EEA employee is assigned outside the EEA? Can the employer and employee choose the law applicable to their employment relationship? Which law applies in case no law has been chosen? Can the employee also invoke the protection of statutory provisions of the country where he/she will be assigned?

The labour and employment law part of this questionnaire also includes a part on the strict rules on the 'lease of personnel' in assignment situations. Finally, we will look into (the content of) the assignment letter and the early termination of the assignment and employment relationship.

3. Social Security

The third part of this questionnaire deals with the social security aspects linked to assignments, as it is relevant and important to know in which country the social security must be paid during the assignment.

4. Other obligations and formalities

We will look into possible other obligations and formalities to be complied with in your countries in case of assignments of employees to your countries (e.g., prior notifications, drafting and keeping of social documents, etc.).

5. Social inspection

The last part of this questionnaire is based on whether or not cross-border assignments are a priority for the social inspectorate.

QUESTIONNAIRE

1. IMMIGRATION

1.1. Who needs a work permit to work in your country? Are there types of employees exempted (e.g., based on their nationality or type of work performed (business trips, etc.)?

All foreign workers, in other words, a worker who does not have Canadian citizenship or Permanent Residence needs a work permit or a business visitor visa to carry out work activities in Canada.

Certain workers who are in Canada for only a short period of time, and who are deemed not to be entering the Canadian labour market, only need an entry business visitor visa. Workers such as these can apply at the border for such a visa if they are from a visa-exempt country. Examples of these types of workers include but are not limited to athletes and coaches, clergy, convention organizers, business visitors, expert witnesses or investigators, military personnel entering Canada under the terms of the Visiting Forces Act, performing artists entering for a limited period of time, and public speakers speaking at events of no longer than five days.

If you do need a work permit to work in Canada, you will require pre-approval from the Ministry of Labour in the form of a Labour Market Impact Assessment (LMIA). There are however a list of specific categories where an individual may request a work permit on the basis that they are exempt from the requirement for an LMIA.

1.2. Are there different types of work permits in your legal system? Are there work permits for highly educated/qualified employees? If so, what are the conditions and what is the procedure to be followed? Who needs to file for the application and where? Which information and documents are to be provided to the competent authorities? What is the timing? What is the duration of the work permit? Can it be renewed? Is it possible to apply for permanent status after a certain period of time under the work permit?

The Canadian immigration system is complex and is currently in a state of evolution and transition.

As mentioned above, a Labour Market Impact Assessment (LMIA) is a document from Employment and Social Development Canada/Service Canada that allows an employer to hire a foreign worker through Canada's Temporary

Foreign Worker Program. Obtaining an LMIA generally requires a period of advertising on Canadian job sites to prove that a suitably qualified Canadian is not available for the position. The LMIA will determine whether in the opinion of the federal ministry of labour the foreign worker in question will have a negative, neutral or positive impact on the Canadian labour market and by extension, whether or not the person's entry into the Canadian labour market will be deemed at risk of taking a job away from a qualified Canadian who otherwise should have been hired. LMIA approvals must be provided to Citizenship and Immigration Canada for consideration before the worker can be provided with a work permit.

Certain types of workers are exempt from an LMIA but still require a work permit, including but not limited to certain professionals, traders and investors covered under international agreements, foreign workers deemed to be of significant social or cultural benefit, spouses of skilled foreign workers, workers who are nominated by a province or territory for Permanent Residence, repair personnel for industrial or commercial equipment, and workers who have been transferred to their company's Canadian operations (intra-company transfers).

Foreign nationals who wish to come to Canada to work are categorized byskill level, from Skill Level 0 (management level jobs), Skill Level A (professional level jobs), Skill Level B (technical jobs and skilled trades), Skill Level C (intermediate jobs), and Skill Level D (labour jobs). Skill Level A workers usually need a degree from a university for these jobs, and include professions such as doctors, dentists and architects.

Workers can apply to be invited to become Permanent Residents under Canada's Express Entry program for economic migrants. Only workers of Skill Level 0, A or B are entitled to use the Express Entry Program. In order to get invited to apply for Permanent Residence under the Express Entry Program, the candidate needs to first participate in a Comprehensive Ranking system that scores a candidate's profile in order to rank them in the Express Entry pool. Factors assessed in the points calculation include skills, work experience, language ability and education level. Extra points are given for workers who possess approvals such as an LMIA. The higher the points, the more likely it is that the candidate will be invited to apply for Permanent Residence, and the more likely it is that the candidate will be invited quickly.

1.3. Is a separate residence permit required/ granted via the work permit? Please explain.

Workers can apply to be invited to become Permanent Residents under the Express Entry program. Only workers of Skill Level 0, A or B are entitled to use the Express Entry Program. In order to get invited to apply for Permanent Residence, the candidate needs to participate in a Comprehensive Ranking system that scores a candidate's profile in order to rank them in the Express Entry pool. Factors assessed in the points calculation include skills, work experience, language ability and education level. Extra points are given for workers who possess an LMIA, and the higher the points, the more likely it is that the candidate will be invited to apply for Permanent Residence, and the more likely it is that the candidate will be invited quickly.

Even if you have a work permit you still need an entry visa if you are not from a visa-exempt country, though people from visa-exempt countries can apply to be admitted at the border - workers have to be determined to be generally admissible to Canada. Visitors or workers who are not from a visa-exempt country must apply for a visa ahead of time at their local Canadian consulate or embassy.

Further, as of March 15, 2016, even visa-exempt foreign nationals who fly to Canada will need a document procured online known as an Electronic Travel Authorization (eTA). Exceptions for the eTA include U.S. citizens and foreign nationals with a valid visa.

1.4. Who can be sanctioned in case of illegal employment in your country (e.g., the employer, the employee, the host company, etc.)? What are the sanctions (civil and/or criminal) in case of illegal employment?

Employers, employees, host companies, and essentially anyone deemed appropriate, even legal counsel, can be sanctioned in the case of illegal employment in Canada.

Foreign nationals are not authorized to work without a permit, so if a worker is found working without one, she or he could be found in breach of the *Immigration and Refugee Protection Act* (*IRPA*), and made to attend a hearing at the Immigration and Refugee Board. This hearing may lead to an order that prevents the worker from returning to Canada for several years. If illegal immigrants commit document fraud or misrepresentation, Citizenship and Immigration Canada may ban the person, create a permanent record of fraud

with the Canadian government, revoke citizenship or permanent resident states, be charged with a crime or be removed from Canada.

Employers must meet specific requirements to hire foreign workers and uphold the conditions within the *IRPA*. Employers are responsible for, among other things, ensuring they meet all the conditions and requirements of the Temporary Foreign Worker Program as outlined in documents such as the Labour Market Impact Assessment application, the LMIA decision letter and annexes, keeping records associated with the LMIA for a period of six years, and informing Service Canada of any changes or errors relating to an approved LMIA or a temporary foreign worker. Employers should review the activities of the temporary foreign workers regularly to ensure that the conditions as listed in the LMIA are continuously upheld.

Service Canada has authority to perform physical inspections, Employer Compliance Reviews, or a review under Ministerial Instruction, in order to ensure compliance. If an employer is found non-compliant, an employer can be subject to a range of penalties including a warning, administrative monetary penalties ranging from $500 CAD to a maximum of $1 million over one year per employer, a ban of one, two, five, or ten years for the most serious misuse of the Temporary Foreign Worker program, revocation of current LMIAs, or the listing of the employer name on a public website.

These sanctions are under the *IRPA* and are technically not criminal in nature, though illegal immigrants are under some circumstances detained in Canada while the government deliberates as to the outcome of their case.

1.5. Did your country implement the European Blue Card Directive 2009/50/EC? If so, please explain the scope, conditions, application process and validity of the blue card?

No.

1.6. Did your country implement the European Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer? If so, please briefly describe and explain importance and impact?

No.

2. LABOUR AND EMPLOYMENT LAW

2.1. In your country, how is the applicable law governing the employment contract during the assignment period determined?

Generally speaking, the jurisdiction for the governance of the employment relationship is determined by the specific wording of the employment agreement. The identity of the specific corporate entity hiring the individual should be in the agreement, as well as the country of origin of that corporate entity. The agreement should clearly state that in case of a dispute stemming from the employment agreement the employee agrees to accept the laws of the jurisdiction as set out in the contract.

For example, many states in the United States of America are "at-will" states, in which the employer may terminate employment without notice or pay in lieu of notice. In cases such as this, the employer generally prefers to design the employment agreement such that the applicable American state's law governs, because in general Canadian law is more generous to the employee in that regard.

In the case of ambiguity or disagreement as to where an employee can sue for compensation under an employment agreement, Canadian courts consider whether there is a "real and substantial connection" between the forum and the defendant, or between the forum and the facts surrounding the claim. In the employment law context, some examples of factors the courts consider include the currency in which

the employee is paid, which country governs the employee's payroll and benefits, where the contract was drafted, where it was signed, the jurisdiction where the factual matters arose, where the witnesses are located, etc.

2.2. Which local employment laws of your country are determined as mandatory minimum laws/ minimum hardcore protective rules and working conditions? Please explain. Is there relevant case law?

In Canada, leaving the concept of unions and collective agreements aside, each province and territory has its own employment standards legislation that outlines the mandatory minimums with respect to working conditions, including minimum wage, overtime, hours of work, minimum termination notice or pay in lieu of notice, severance wages, uniform allowance (if applicable), vacation and hours of rest, among other issues. The minimum amounts may vary substantially by province, but in no circumstances can any employment agreement contract out of the minimums such that the employee becomes entitled to less than his or her statutory minimums.

Certain industries in Canada are regulated federally (across and throughout the provinces) as opposed to provincial/territorial regulation. Examples of federally regulated industries in Canada include but are not limited to banks, air and rail transportation, radio and television broadcasting, telephone and cable systems, First Nation activities and federal Crown corporations. For employees of these types of corporations or organizations, their minimum standards are outlined by the *Canada Labour Code.*

There is a large body of case law in Canada in relation to cases about minimum employment standards.

In addition, provinces and territories have their own Occupational Health and Safety Legislation that outlines mandatory health and safety standards for workers. Additionally, each province and territory has its own Human Rights legislation that generally contains a provision applying the legislation's human rights standards to the employment context.

2.3. Does your country foresee specific rules on the 'lease of personnel'? Is there a principle prohibition of 'lease of personnel'? Please explain and provide examples. What are the sanctions and penalties? Is there a

possibility to reduce the risk? Please explain. Is there relevant case law dealing with this matter?

The unfamiliarity of the term "lease of personnel" is an indicator of the foreignness of this concept within Canadian labour and immigration law. There is no principle prohibition on the lease of personnel, and the National Reports do not foresee the development of such rules in Canada in the near future.

There is an average of over 200,000 temporary foreign workers entering the Canadian labour market each year. If the worker is documented and approved, either with the support of an LMIA or through an LMIA-exempt category, then the rules of those entry methods apply, and there is no special category with respect to the lease of personnel.

2.4. If you were asked by one of your clients to draft an assignment letter (secondment agreement between the original employer in the home country and the employee), which clauses would you include? What should the assignment letter cover? Is this foreseen by a specific law or based on case law? Please explain.

For example, if an American executive of a Company were coming up to the Company's Canadian operations through an Intra-Company Transfer, which allows the foreign worker to obtain a work permit without first getting an approved Labour Market Impact Assessment, we would draft an employment agreement that would make it clear where the "main" employment agreement lies. Generally speaking we would draft an agreement that outlines the worker's duties in Canada, their location within Canada and any plans for regular travel between cities or provinces.

We would likely include clauses that indicate that the United States of America is still the employee's work base, that any dispute arising from the employment would be dealt with in the American state of origin. We would also indicate that the employee will remain on American payroll, will stay within the same benefit and compensation plan, would be paid in U.S. dollars, and would return to the U.S. after the temporary assignment.

Drafting an agreement in this way has two advantages: 1) it demonstrates to Citizenship and Immigration Canada that the employee is here temporarily and will return to the United States afterward, and 2) it improves the likelihood that any employment disputes will be dealt with in the United States and per the company policy, rather than through Canadian common law, which is often more employee-friendly than its American counterparts. The agreement would

be drawn up according to contract law principles as informed by case law, and would not be required to follow a specific format according to any specific legislation.

Depending on the specific circumstances, it is also worth considering adding language within a foreign workers' contract regarding payments, if any, on termination of employment in the event that a court were to find that Canada is the proper jurisdiction to address any employment related dispute.

2.5. Please explain the applicable and most relevant rules of your country in case the employer wishes (1) to early terminate the assignment and (2) to terminate the employment relationship (e.g., is there a right to return? Should the assignment allowances be included in the calculation of the notice indemnity? Etc.). Is there relevant case law?

In situations such as this it is important that the employment agreement be drafted carefully such that the worker may be sent back to his or her home base in the home country, and that his or her employment would either resume there or be terminated per company policy and/or the home country's laws on termination of employment.

The Canadian assignment agreement should also contain a termination clause that sets out the details of compensation to be provided to the employee in the event that their employment in terminated while in Canada. Termination payments must comply with both minimum requirements of the relevant employment standards statute and the Canadian common law.

3. SOCIAL SECURITY

3.1. Provide a short overview of the level of social security charges in your country. What are the employer social security contributions? What are the employee social security contributions? Is there a cap/ maximum? Please briefly explain.

In 2015, employers in Canada currently pay a premium rate of $2.632 CAD per $100 of each employee's earnings, up to the annual maximum insurable earnings of $49,500 CAD for each employee. The maximum contribution amount of each employee is $1,302.84.

For employees working in Quebec, employers in 2015 paid a premium rate of $2.156 per $100 of each employee's earnings, up to the annual maximum insurable earnings of $49,500 for each employee. The maximum contribution amount for each employee is $1,067.22. This rate is lower than in the rest of Canada, because the Province of Quebec has been collecting premiums from their workers since January 2006 to administer its own maternity, parental, and paternity benefits under the Quebec Parental Insurance Plan.

These caps were subject to slight increases effective January 1, 2016.

As of 2016, the maximum weekly Employment Insurance benefit rate is $537 per week.

Employee and employer contribution rates toward the Canada Pension Plan is 4.95%, with maximum annual pensionable earnings at $54,900 for 2016.

These amounts must be automatically deducted from employee's pay cheques along with applicable income tax.

3.2. In case of assignments from outside the EEA to your country or from your country to non-EEA countries, with what countries has your country signed a social security agreement?

N/A

4. OTHER OBLIGATIONS AND FORMALITIES

4.1. Are there other relevant formalities and obligations in your country in case of assignments to your country (e.g., prior notification to the authorities, drafting and keeping social documents, etc.)?

There is nothing formally required other than what is required and described under work permit requirements and Canada's immigration programs.

4.2. What are the penalties and sanctions in case these formalities and obligations are not complied with? Who can be sanctioned? Is there relevant case law?

N/A

5. SOCIAL INSPECTION

5.1. Are cross-border assignments a priority in your country for the social inspection? Please explain.

Yes. The Canadian government is focused on ensuring that companies comply with both the provisions of the Immigration and Refugee Protection Act and employment standards as they relate to each individual foreign worker and the Canadian labour market in general. Both Citizenship and Immigration Canada and Employment and Social Development Canada have the authority to conduct audits and inspect workplaces to ensure that employers are in compliance with existing laws and that all representations made with respect to the terms and conditions governing a foreign worker's employment in Canada are respected. These agencies have broad powers to issue orders to employers and to apply penalties and sanctions as deemed appropriate.