Proposed TFW Regulations
August 10, 2021
Submitted by the British Columbia Fruit Growers' Association

This is a response to the proposed TFW regulations.

The proposal was posted on July 10, 2021 in the Canada Gazette.

Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)

Introduction

The BC Fruit Growers' Association appreciates the ability to respond to the Regulatory Impact Analysis Statement for the proposed Temporary Foreign Worker (TFW) program regulations. Umbrella organizations - specifically the Canadian Horticultural Council and the Canadian Federation of Agriculture - are responding separately. The comments in this document represent the direction of the BCFGA, with about 200 farms participating in SAWP and TFW Agriculture Stream, and about 4,500 Mexican and Caribbean SAWP employees each year. Almost all of the tree fruit farms in BC are small to medium sized enterprises that operate as family farms.

The regulatory impact analysis statement sets out detail, analysis, costing and rationale for regulatory proposals. This formal approach allows different interests to understand and, in certain instances, correct information, as well as state a preference for the proposal or an alternative regulation. The ability to see the rationale for regulation and to propose amendments before the regulation is finalized will lead to greater support and compliance when the responses are weighed by the government in finalizing the regulation.

Our comments on the proposed regulation are categorized into three areas:

1. Noting unqualified support.
2. Noting uncontested support, as the SAWP or TFW- Agricultural Stream will not be impacted.
3. Preference for an alternative approach.

Within these categories, we will also address any issues with the analysis of the Regulatory Impact Analysis Statement (RIAS).

Unqualified Support

1.2 Providing the employment agreement to the TFW.

> This is already a requirement of SAWP and TFW Agriculture Stream programs.

1.5 a Access to health care services

> We agree that the employer must make reasonable efforts to provide access to health care services, when injured or ill at work.

2.5 Make wage and labour dispute factors stand alone LMIA requirements

These requirements are currently in place for the SAWP and TFW-Ag Stream Programs.

3.1 Compliance with provincial or territorial laws that regulate the employment or recruitment of employees, including foreign nationals….

This is already a requirement of SAWP and TFW Agriculture Stream programs.

Uncontested Support (i.e. not relevant to the SAWP and Ag Stream Programs)

1.5 b. Private health insurance for emergency medical care (TFWP only, not SAWP or Ag Stream)

2.6 Collecting information regarding compliance with IMP conditions to ensure program integrity.

3.2 Repealing the sections in the IRPR that pertain to the employer compliance reviews (ECRs).

3.3 Harmonizing English and French languages.

Preference for a Different Approach

1.1 Providing information to temporary foreign workers about their rights in Canada.

The proposal is that the employer will provide the worker with a government-generated document on the rights of workers.

We absolutely agree that the document should be placed in the hands of the workers. However, coordinating this effort among the thousands of employers and tens of thousands of workers, and tracking and auditing this process is an incomprehensible task.

We propose that the employee rights document be attached to the Work Permit generated by the government. Attaching the document to the WP will:

a. Require far less coordination in the distribution of the document.
b. Require no additional recordkeeping and audit of many thousands of employers.
c. Be received in a more impartial and trusted manner by workers (e.g. information directly from the competent authority).
d. Be received prior to the start of work, so that the worker may make informed decisions if there is personal disagreement with Canada's employee rights.

If workers receive the information individually, there is no need to post the information "in an accessible location at the workplace". For farms, the workplace is usually a field, and there is the additional complication of where to post the document; however, the real issue is the need to post information that has already been provided to the worker, especially if the worker has the ability to read the information before arrival in Canada.

1.3 Amending the definition of "abuse" to include "reprisal" against temporary foreign workers.

We support the ability of government to regulate abuse of TFW workers.

"Reprisal" is not abuse and should not be included in the definition. Reprisal is a claim of improper termination, not abuse.

Reprisal is most often based on a TFWs claim that an employer has terminated employment (specifically "actual or threats of demotion, disciplinary measures or dismissal") due to an employee being unjustly treated due to making a complaint about employment practices.

However, there are also instances where the employer is disciplining the worker for a legitimate cause, and the worker evades the process by initiating a complaint of reprisal. There are regulatory and legal avenues currently in existence to determine the legitimacy of the complaint.

Government regulators are not able to make a legal judgement of reprisal, thus the courts or an adjudicator are the best solution for claims of reprisal.

1.4 a and b. Prohibit charging or recovering fees for the provision of services in relation to an LMIA, employer compliance fee and recruitment fees and require that employers ensure that any recruiters they use do not charge these fees.

We agree that the part of the proposed regulatory change relating to prohibiting employers collecting fees be a requirement.

However, the proposal that the employer validate a third-party recruiter has not collected fees is beyond the power and capacity of individual employers. Government should introduce a regulatory standard for recruiters, similar to the regulatory requirements for Immigration Consultants. The RIAS states that the employer would be able to justify a failure to comply … if they made all reasonable efforts to comply…." What is a reasonable effort to confirm that a third party is compliant, when that third party is operating in a foreign country not under the supervision or observation of the employer? The answer to this basic and necessary question is ambiguous and the requirement that the employer provide an empty attestation on the third party's compliance should be stricken from the RIAS proposal.

2.1 Requiring [employer] documents from third parties

This amounts to providing injunctive powers to administrators of the program, and should be avoided. The proposal may not be constitutional. The proposal may not comply with privacy rules (a ruling of the Privacy Commissioner would be necessary and has not been obtained). The proposal will allow administrators to go on 'fishing trips', which is unlawful.

Employers are already required to provide information to administrators of the program, and there are penalties and sanctions for not complying. There is no demonstrated need to extend these powers into areas that will be contentious under the Constitution and Privacy Laws.

2.2 Reducing timelines to respond to notices of preliminary findings

The determination of employer non-compliance currently provides the employer with a 4 week period to respond. Often, third party legal advice is sought, and four weeks is the considered timeframe for such consultation with advisors. Shortening this period to two weeks will result in many, unnecessary requests for extension.

In contrast, there is no timeframe for the audit to be completed, and when a serious infraction is being considered, the employer is prohibited from participating in the program (the processing of the LMIA is suspended). We propose that it be required that investigations be completed within a 30 day time period, and that this be enshrined in regulation, as a matter of equity and fairness.

2.3 Suspend processing of a request for an [TFWP] LMIA when there is reason to suspect employer non-compliance with certain regulatory conditions.

We agree with the suspension regulation, but the matter then needs to be investigated within a 30 day time period, followed by up to 30 days for the employer to respond, and then a final determination within 2 weeks. Thus, up to 10 weeks would pass where the employer is effectively suspended from the program. The investigation time, as well as the time (following employer response) to make a final determination needs to be set in regulation. There have been instances where employers have had lengthy (over 12 months) suspensions with no finding of wrongdoing, and this abuse of employers' right to fair and timely determinations must be placed in regulation.

2.4 New assessment requirements for employers applying for an LMIA

There are four requirements in this section of the RIAS.

- We agree with the requirement that new employers comply with laws that regulate the employment of recruitment of employees. However, this requirement should be clarified that it is the ‘current status’ of the employer with *no unresolved findings of non-compliance*. The regulation needs to avoid prohibitions against an employer who has successfully resolved any issues of non-compliance with labour laws and regulations.
- Ensuring compliance of third party recruiters is beyond the scope of capability for most employers and should not be included in the regulation. As stated in 1.4, above, the proposal that the employer validate a third-party recruiter has not collected fees is beyond the power and capacity of individual employers.
- Regarding the determination of ‘reasonable efforts’ that the workplace is free of abuse is an administrative power that is ambiguous at best. The regulation needs to avoid prohibitions against an employer who has successfully resolved any issues of abuse, and refer only to current unresolved disputes regarding abuse of employees.
- We can support the requirement to not have been an affiliate of an employer who is ineligible for the program, when the affiliation is within the time set out in the regulation.

Summary

BCFGA appreciates the opportunity to respond to the Regulatory Impact Analysis Statement for the proposed Temporary Foreign Worker (TFW) program regulations.

The shortage of Canadians willing and capable of farm labour is well established. Availability of the SAWP and TFW-Agriculture Stream programs is a priority for the agriculture sector.

Maintaining public confidence in the program, through the establishment of program requirements that protect potentially vulnerable workers is critical.

We have provided comments that generally agree with the intent of the regulatory proposals, but often suggest more efficient, balanced ways of achieving the goals of worker protection, while not overburdening employers with unnecessary regulation.