

A fork in the road for agricultural temporary foreign workers

Changes to Temporary Foreign Worker Program feature two pathways for employers and temporary foreign workers in the agriculture sector

BACKGROUND

The impact of COVID-19 has altered the hiring process for temporary foreign workers in Canada's agricultural sector. New opportunities have been made available through two streams: the Seasonal Agricultural Worker Program and the Agricultural Stream. These opportunities come with increased protections for workers but also strict obligations for employers who must have a thorough understanding of the updated legislation to navigate the changes affecting their businesses.

BY SERGIO KARAS

CANADA'S AGRICULTURE sector requires access to the global workforce to meet consumer demands. This leads employers to rely on temporary foreign workers (TFWs) to overcome shortages in general labour. TFWs that work in agriculture are a part of critical infrastructure; they ensure food security and serve an essential function for Canadians' well-being.

To remedy these labour shortages, employers can obtain work permits for TFWs through the Temporary Foreign Worker Program (TFWP). Work permit applications for TFWs in the agricultural sector are processed on a priority basis and they are exempt from travel restrictions because of their designation as essential workers. The TFWP has two streams: the Seasonal Agricultural Worker Program (SAWP) and the Agricultural Stream. With multiple pathways available, agricultural-sector employers should pursue a stream that suits their needs.

Preliminary requirements

There are two criteria for employers that are unique to both the SAWP and the Agricultural Stream: Production must be in a sector on the national commodity list and the job must be in on-farm primary agriculture. The national commodity list includes the following sectors:

- Apiary products
- Fruits, vegetables (including canning/processing if grown on the farm)
- Mushrooms
- Flowers
- Nursery-grown trees including Christmas trees, greenhouses/nurseries
- Pedigreed canola seed
- Seed corn
- Grains
- Oil seeds
- Maple syrup
- Sod
- Tobacco
- Bovine
- Dairy
- Duck

- Horse
- Mink
- Poultry
- Sheep
- Swine

Primary agriculture is defined under the Immigration and Refugee Protection Regulations (IRPR). It refers to work where the duties are performed within a farm, nursery or greenhouse. It entails machinery operation, working with raw animal products or working with plants. The products must be for market. The National Occupation Classification codes for jobs in on-farm primary agriculture are:

- Managers in agriculture (0821)
- Managers in horticulture (0822)
- Agricultural services contractors, farm supervisors and specialized livestock workers (8252)
- Contractors and supervisors, landscaping, grounds maintenance and horticulture services (8255)
- General farm workers (8431)
- Nursery and greenhouse workers (8432)
- Harvesting labourers (8611)

When hiring workers under the TFWP, a positive Labour Market Impact Assessment (LMIA) is required. The LMIA includes job offer details and demonstrates that there are no Canadian workers or permanent residents available for the job and that there is a need to hire foreign workers. A positive LMIA enables TFWs to apply for work permits under the SAWP and the Agricultural Stream.

Employers must provide the same wages and benefits to TFWs that they provide to other employees in the same occupation. Unionized workers are to be paid at the established rate under the collective bargaining agreement. Employers must agree to review and adjust wages to ensure that their rates meet or exceed those in the wage tables or the applicable minimum wage rate.

In the past, an LMIA was valid for six months. As a temporary measure due to the rise in COVID-19 infection rates, an

LMIA approved for 2021 is valid until Dec. 15, 2021. New measures have been taken to process LMIA applications in a more flexible manner. Employers are no longer required to submit minor administrative changes unless they impact the LMIA's terms and conditions.

There are some costs that are required to be paid by employers, such as TFWs' round-trip transportation and transportation between housing and the work location. Employers are obligated to provide adequate, suitable and affordable housing for TFWs, which requires an official inspection within eight months before the LMIA application submission. Due to COVID-19, housing inspection reports have greater flexibility when an employer can prove that the appropriate authority cannot conduct an inspection. If an employer lodges TFWs in commercial accommodations rated three stars or higher, a report is not required.

Employers may also have to ensure that their intended hires are covered by a provincial or territorial workplace safety insurance provider. When TFWs work with pesticides or hazardous chemicals, employers must notify workers and provide, at their expense, free protective equipment, training and supervision.

There is a mandatory recruitment period where employers must attempt to hire Canadian citizens and permanent residents before offering jobs to TFWs, with specific requirements on those attempts. Job advertisement requirements to the Canadian job market were updated because of the economic impact of COVID-19 — jobs posted before March 15, 2020 may need to be re-advertised for an additional two consecutive weeks. Service Canada will contact employers to re-advertise.

The Seasonal Agriculture Worker Program (SAWP)

For eligibility under the SAWP, there is a requirement that TFWs must be citizens of Mexico or a participating Caribbean country (Anguilla, Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, Montserrat, an

Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago). Canada has bilateral agreements with participating countries that inform how the SAWP operates. The roles of participating governments include recruitment and selection, ensuring that required worker documents are available and the designation of representatives that will assist TFWs in Canada.

Participating governments ensure that the workers selected for their job pools meet all the program requirements. The conditions include farming experience, age of 18 or older, citizenship in a participating country and the ability to satisfy Canadian immigration law and the laws of their home country. Employers cannot use private recruiters to select workers.

SAWP employers can recover some of the round-trip transportation costs for TFWs through payroll deductions, except in British Columbia. The standard employment contract specifies the amount that employers can deduct. If a SAWP employer re-applies for a replacement TFW, they are exempt from the requirement that their housing inspection report be from within eight months.

Employers are required to have all TFWs register for provincial or territorial health insurance as soon as they are eligible for it. When hiring Mexican TFWs, insurance payments are submitted to Great-West Life Assurance Company and they are recoverable through payroll deductions. Employers can get assistance for these deductions from participating government liaison officers.

Employers are not required to re-advertise vacant positions when submitting transfer LMIA applications if they or the transferring employer have a positive LMIA for the current season and the region and occupation are the same. Any informal transfer of employees contravenes the Immigration and Refugee Protection Act and risks a maximum fine of \$50,000 and two years imprisonment.

An emergency order made under the Quarantine Act requires a mandatory 14-day quarantine period for every person entering Canada, with limited exceptions. To calculate deductions for SAWP workers during the quarantine period, a week is considered to be six working days, with at least five hours per day and one day of rest. In addition to the minimum 240 hours of pay specified in SAWP contracts, employers must provide regular pay and benefits during the quarantine period. The quarantine period does not count toward work duration for LMIA applications.

Employment and Social Development Canada provides standard employment contracts with formats for either Mexican or Caribbean TFWs. This contract is non-modifiable as its purpose is to specify the rights and obligations of all parties. A copy of the contract in English, French or Spanish must be supplied to the worker and signed on their first day of work.



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Seasonal agricultural workers must be from Mexico or a participating Caribbean country.

The Agricultural Stream

TFWs can be hired for up to 24 months under the Agricultural Stream. With this program, employers draft the employment contracts themselves. Governments are not parties to these agreements, as opposed to contracts under the SAWP. The Agricultural Stream is favourable to employers who wish for greater control in the recruitment process and the employment agreement.

Wage deductions are available to employers that supply on-farm or off-site housing at \$30 per week from TFWs' wages unless the applicable labour standards require a lower amount. Private health insurance for TFWs must be paid for by their employers. This period begins on the workers' arrival in Canada and lasts until their provincial or territorial health insurance plans are active. When employers use recruiters or third parties for new hires, the cost cannot be deducted from TFWs' wages. After an employer completes the mandatory recruitment and advertisement efforts, they are ready to apply for an LMIA.

A public policy was introduced by Immigration, Refugees and Citizenship Canada (IRCC) that allows TFWs in Canada to change jobs before the final decision on their work permit applications. Priority processing is available when an employer provides writ-

ten notice to Service Canada that their TFWs are in Canada and that they wish to benefit from IRCC's COVID-19 Temporary Public Policy.

COVID-19 compliance

Updates to the IRPR include steep penalties for employers that prevent workers from complying with orders or regulations under the Quarantine Act or the Emergencies Act. Non-compliance that is discovered through inspections may lead to fines of \$1,000 to \$100,000 for each violation, with a cap of \$1 million annually. Employers may also be banned from the TFWP from one to 10 years, depending on the violation. For the most serious violations, an LMIA may be revoked and permanent program ban may be issued.

The emergency order made under the Quarantine Act on April 14, 2020 implements measures to combat the spread of COVID-19, which include the mandatory 14-day quarantine period. The federal government's Mandatory Isolation Support Program for Temporary Foreign Workers will pay employers \$1,500 for each worker to help ease the financial burdens that result from the quarantine period. This support program will remain in place until the Quarantine Act is no longer in force.

For more information, see:

- "Frequently asked questions: Changes to the Temporary Foreign Worker program regarding COVID-19" at <https://www.canada.ca/en/employment-social-development/services/foreign-workers/employer-compliance/covid-faq.html>.

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