

Legal newsletter for business entrepreneurs
and executives

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LAW ► BUSINESS

EMPLOYMENT CONDITIONS OF FOREIGN WORKERS

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Employers frequently resort to the use of foreign workers. In some industries, this is practically unavoidable. Faced with the new reality of foreign workers, many companies have questions about how to manage the workers they hire and the specific conditions applying to them.

HIRING

Many different circumstances may lead to the hiring of a foreign worker. Often, the employer knows that it will have to make use of foreign labour for various reasons, including local shortage of labour. At other times, the foreigner may apply for a position, while confirming that they are entitled to work here.

In all cases, the employer must ensure that the person holds a valid work permit before they start working. Remember that a person whose social insurance number starts with the number 9 is a temporary worker, and that the employer is required to keep a copy of their work permit on file. The company must also ensure that the employment which is offered meets the conditions contained in the permit (employer, occupation, place of employment, expiry date, etc.).

EMPLOYMENT CONTRACT

It is often advantageous for companies to set down in writing the employment conditions offered to their employees. This is particularly true when hiring foreign workers who are less familiar

with the customs and realities of the local employment market. Moreover, to satisfy the conditions of temporary low-skilled foreign worker programs, including farm workers and live-in caregivers, the parties must sign an employment contract on the prescribed form. In addition to the salary and some other expenses, the employer must undertake to cover the worker's transportation cost to travel to Canada and back to their country of origin.

For skilled foreign workers, the offer letter or employment contract will be very similar to the document used for other hires, with a few differences. Among other things, this contract should be conditional upon obtaining a valid work permit and maintaining it during the term of employment. The employment conditions should be clearly set down in the contract, and any different treatment from that set out in the original offer should be documented.

MAINTAINING OF EMPLOYMENT CONDITIONS

The regulations contain an obligation on the employer to provide substantially the same employment conditions to a foreign worker as those set out in the initial offer of employment, i.e. the offer used for the initial authorizations (labour market opinion and job offer confirmation, where applicable) and for the work permit. The competent authorities may consider any positive or negative discrepancy of more than 2% as a departure from the applicable rules.

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Employers are therefore wise to inform the authorities of any such change in the employment conditions. It is easy to imagine the possibility of a salary increase of more than 2%, the payment of a performance bonus, a promotion, cuts applied to all the employees, or a reorganization resulting in the offer of similar, but nevertheless different, positions. One must therefore be very careful when a change in the business affects a foreign employee or their employment conditions are adjusted. A breach by the employer may make it ineligible to hire any foreign worker for a period of two years. This includes the renewal of the permits of workers unaffected by the infraction.

CONFERENCE

AVOID LITIGATION WITH A SHAREHOLDERS' AGREEMENT

You are invited to a breakfast seminar on **Thursday, March 14, 2013** from 7:15 a.m. to 9:00 a.m.

Speakers:
Jean-Sébastien Desroches
Emil Vidrascu

At the Lavery Conference Centre –
1 Place Ville Marie (40th floor)

If you wish to attend this event,
please respond at the following address:
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OTHER SPECIAL CONDITIONS

It is preferable to cover other special conditions applying to foreign workers in the employment contract or the company's applicable policies in order to avoid any ambiguities. A prudent employer will generally wish to specify who will be responsible for paying the expenses incurred to obtain visas and permits, travel expenses, moving expenses and the conditions thereof, etc. Furthermore, if the employer provides or contributes to the search for temporary housing in the first few weeks, or pays for return trips to the country of origin, the conditions of such special arrangements should be set down in writing.

Similarly, if the employer invests a substantial amount in the ancillary expenses associated with hiring the foreign worker, it could be useful to provide for a proportional method of repayment by the foreign worker based on the duration of the employment in the event they decide to leave within a specified time period. The terms and conditions applying at the end of the employment should also be specified, including for the return home, the expenses for the sale of the house, and any penalties on a car lease.

Also, in order to attract talent, businesses sometimes offer language or local culture courses for the employee and their family members. One may also wish to consider paying for the tuition fees of dependent children to enable them to attend a school whose program more closely resembles the education system of the country of origin. In short, there is much room for creativity, but it is best to manage expectations from the outset.

PUBLIC PLANS

A foreign worker holding a work permit for a specific employer, that is valid for more than 6 months, is generally eligible for the Quebec Health Insurance Plan. However, unless provided under a bilateral agreement between Quebec and the foreign worker's country of origin, coverage under Quebec's public health plan only takes effect after a 3-month waiting period. Private insurance should therefore be secured to provide coverage during this period for the foreign worker and the accompanying family members to avoid any unpleasant surprises.

The eligibility criteria for the public occupational health and safety program are generally the same for foreign workers as for Canadians. The same is true of the public employment insurance program. However, foreign workers having a work permit for a specific employer are not considered to be available for employment since they cannot, technically, seek other employment without first obtaining a new work permit. Their eligibility for employment insurance can therefore become more complex.

END OF EMPLOYMENT

In Quebec, the provisions dealing with termination of employment of such legislation as the *Act respecting Labour Standards* and the *Civil Code of Quebec* are of public order. Foreign workers are

therefore also protected by this legislation. However, frequently, the end of a temporary foreign worker's employment also means the end of their stay in Canada and the return to the country of origin. The employment contract and policies put in place by the employer on this subject may be useful in managing expectations and ending the relationship harmoniously.

CONCLUSION

Foreign workers are often hired to meet the critical needs of a business, but, in doing so, it is important for the appropriate documentation and requisite protective measures to be put in place to ensure this adventure is a happy and painless one. This will avoid needless risks to your business.

SHARE OWNERSHIP: AN OVERVIEW

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Preparing and drafting the authorized capital ("share capital" or "capital" depending on the incorporating statute) of a corporation requires a certain degree of expertise because the authorized capital must meet the specific needs of the corporation and achieve the objectives of its founders. It should, as far as possible, be adapted to any potential situation or transaction that could arise such as a merger, acquisition, rollover, estate freeze or tax operation. It must also take into account the persons having an interest in the corporation, i.e. the shareholders.

Although there are some standard templates, each authorized capital has its own characteristics, including because of the statutory requirements of the incorporating statute, whether it be the *Business Corporations Act* (Quebec) ("BCAQ"), the *Canada Business Corporations Act* (Canada) ("CBCA") or that of another jurisdiction. It is therefore recommended to seek the assistance of a practitioner to draft the text of the authorized capital, a fundamental document.

DESCRIPTION OF THE AUTHORIZED CAPITAL

Since the authorized capital determines the rights and restrictions of each class of shares which may be issued, it must be prepared upon the creation of the corporation even before shares can be issued. This drafting exercise must therefore take place at the time of incorporation, although it is still possible for a corporation to amend its authorized capital afterwards, however, only with the shareholders' consent and the filing of articles of amendment with the appropriate authorities. The authorized capital is one of the elements that must be determined at the time of incorporation, together with the name, head office and restrictions, if any, on the transfer of the corporation's securities. These elements must appear in the articles of incorporation which are filed with the authorities. The articles of the corporation therefore set out the classes of shares and the rights and restrictions attached to each class of shares, similarly to an instruction manual.

A FEW CHARACTERISTICS...

The authorized capital may be unlimited or limited to a fixed number of shares and is comprised of one or more classes of shares. Classes of shares can also be subdivided into several series of shares. Shareholders holding shares of the same class or same series always have equal rights between them. However, when shares are issued in series, each series of shares of the same class may have special characteristics pertaining to, for example, the amount of the dividend or share purchase or redemption rights. Furthermore, the shares are in registered form (they cannot be issued "to bearer") and, under the BCAQ, they may be with par value.

ESSENTIAL RIGHTS AND COMMON SHARES

The corporation's authorized capital must include shares carrying the right to (1) vote at any shareholders meeting, (2) receive any dividends declared by the corporation, and (3) receive a share of the remaining property of the corporation upon liquidation. Depending on whether the incorporating statute is the BCAQ or the CBCA, an express reference including or excluding such rights shall be required to determine whether they are attached to a class of shares or not. All of these rights are not required to be attached to a single class of shares. The shares of the class of shares that regroups all of these rights are usually designated as "common shares".

PREFERRED SHARES

Each class of preferred shares should serve a useful purpose and be based on strategy and logic. Some coherence is required in drafting the rights, restrictions and privileges of each class of shares in order to establish the rank and privileges inherent to each class. It is important to establish a clear order of priority between the rights attached to each class of shares.

Depending on the context, certain types of classes of shares are suitable to specific situations, such as investment shares (e.g., shares without voting rights, but entitling to the payment of dividends) or so-called rollover shares dedicated to tax purposes.

The following are some of the rights that may be attributed to preferred shares, the combination of which is up to the drafter:

- ▶ redemption at the option of the corporation: right of the corporation to force its shareholders to sell shares held by them back to the corporation;
- ▶ redemption at the option of the holder: right of the shareholder of the corporation to force the corporation to buy back shares held by him;
- ▶ preferential dividend: right of the shareholder of the corporation to receive a dividend in preference to any other shareholder of the corporation holding shares of a different class and ranking below the said class of shares in regard to the dividends, according to a predetermined order of priority. Such dividend may be cumulative or non-cumulative;
- ▶ multiple voting rights: right of the shareholder of the corporation to several votes per share, rather than just one vote per share;
- ▶ right to preferential reimbursement: right of the shareholder to the reimbursement, in case of liquidation, in preference to any other shareholder of the corporation holding shares of another class, generally of the amount paid for his shares, or of an amount equal to the fair market value of the consideration, in kind, received by the corporation at the time of their issuance.

HOW TO AMEND THE AUTHORIZED CAPITAL?

As hereinabove mentioned, the authorized capital is an integral component of the articles of incorporation. To make changes to it, one must, therefore, amend the articles of incorporation of the corporation in accordance with the procedure laid down in the incorporating statute. Both the BCAQ and the CBCA require the adoption by the shareholders of a special resolution and the filing of articles of amendment with the appropriate authorities. Note that a filing fee is always applicable to obtain a certificate of amendment and that the effective date of the certificate may not precede the filing date.

SHAREHOLDERS' AGREEMENT

Once the authorized capital is drafted, the corporation is incorporated and the shares are issued, a shareholders' agreement may provide for various rules pertaining to the management of the corporation's business, the consents required for the approval of important decisions or changes, and the transfer of shares held by each of the shareholders enabling, among other things, their co-shareholders to acquire the said shares before they are sold to third parties in accordance with pre-established terms and considerations.

The foregoing is a non-exhaustive summary of the features of a corporation's authorized capital. Informed readers will therefore retain the services of a professional in this area of law if they wish to perform any of the operations referred to above.

CERTIFICATE OF INTELLECTUAL PROPERTY PERTAINING TO SOFTWARE

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The computing world evolves rapidly, as do the software programs which support it. Moreover, their increasing complexity makes it difficult to identify with certainty their components and origin, as well as the rights inherent to them.

Knowing this information is essential to any developer who wants to market a software program. It is also a significant consideration when the software edition business becomes the subject of a merger or an acquisition.

A software program is composed of a group of instructions called "**source code**". While a portion of this source code is entirely created by the developers, other portions are obtained from third party sources such as free software directories or open source software or are acquired from other developers. These other portions constitute "**external source code**".

Although a portion of this external source code may be free, it is often subject to copyrights and its user licence may provide for certain obligations or conditions which must be disclosed to the public for whom the software is created.

Depending upon its complexity, any given software will likely include a significant amount of external source code. That being the case, anyone who wishes to market such a software program or hire a programmer and acquire his ongoing projects would be well advised to identify the rights and conditions attached to the software he develops.

In order to avoid the significant costs related to the due diligence process carried out after the software program is developed, it is preferable to implement an automatic and integrated verification process of the software from the initial steps of its development.

This process should particularly include the following items:

- ▶ a policy for managing the software related intellectual property, which delimits the external content which the developer may use (the "**policy**");
- ▶ the analysis of the existing source code (inherited code or patrimonial code) of the business and the creation of a data bank ensuring its compilation.
- ▶ the analysis of the status of each software program in respect of the policy;
- ▶ the real time compilation of any new source code which the developer creates or that he borrows from third parties;
- ▶ the preventive review of any new external source code to ascertain compliance with the established policy;

- ▶ the implementation of an automatic alert system which activates whenever external source code does not comply with the established policy and the implementation of a procedure to remedy the situation.

Using such a process will facilitate the preparation of a report on all the electronic content of the business, including information on all the source codes of its software programs, their origin, the obligations resulting from all licence agreements, the history of their suppliers, the versions thereof and any other useful information for their management and use.

This report on the electronic content may eventually serve as a basis for the preparation of a certificate of integrity of the electronic content (the "**certificate**") signed by a senior executive of the business.

The best business practices would require that such a certificate be provided each time a software program changes owners in order to establish with more certainty the scope of applicable rights and obligations.

Lavery's corporate law team is able to assist you in implementing an intellectual property management policy pertaining to the software programs which your business develops or uses.

LAVERY AN OVERVIEW

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