

## Temporary Immigration measures during COVID-19

The advent of the COVID-19 virus and the reaction of both the Provincial and Federal governments to the pandemic witnessed a flurry of announcements as they related to Immigration measures commencing mid-March 2020.

A combination of Orders in Council under the Aeronautics Act, and the Quarantine Act, as well as Ministerial Instructions and Program Delivery Instructions from Immigration Refugees and Citizenship (IRCC) Canada and Canada Border Service have been issued which pose challenges for international travellers in general, and no less so for those Temporary Foreign Workers who use the temporary foreign worker program to enter Canada to fill worker shortages in various sectors of the Canadian economy.

By way of background on March 18, 2020 to slow the spread of COVID-19, a temporary prohibition on foreign nationals entering Canada was implemented.

Two days later, the Federal government announced that certain foreign nationals would be exempt from the ban, and exemptions were put in place for foreign nationals who held or were approved for a work permit and international students who held or were approved for a study permit prior to March 18, 2020, as well as for permanent residents approved prior to March 18, 2020 who had not yet travelled to Canada.

On March 24, 2020, an emergency order was issued under the Quarantine Act which requires that all individuals entering Canada (and no distinction was made between Citizens of Canada, permanent residents or temporary residents) to isolate themselves for 14 days upon arrival in Canada.

On March 26, 2020 a Quarantine Act order came into force, namely an Order prohibiting entry into Canada of any foreign national from any country other than the United States PC number 2020 0184 which provided for certain exemptions including, but not restricted to:

- Foreign Nationals holding a work permit or study permit.
- Foreign nationals who had received written notice of approval of a work permit but who had not yet been issued the work permit.
- Foreign nationals who had received written notice before March 18, 2020 of the approval of a study permit.
- Foreign nationals in the opinion of the chief Public Health Officer, will provide an essential service while in Canada.
- This order effective the day of issue is valid to June 30, 2020.

A second order of that date PC 2020 185 Minimizing the risk of exposure to COVID19 in Canada Order ( Prohibition of Entry into Canada from the United States) was repealed and replaced by PC 2020 0263 , valid to May 21, 2020 but now extended that prohibited entry to foreign nationals seeking entry from the United States for an optional or discretionary purpose, such as tourism, recreation or entertainment .

The Ministerial Instructions M37 entered into Force on April 9, 2020 repealed and replaced by Ministerial Instructions M38 which were to remain in place for a period of 21 days commencing April 29, 2020 and now have been replaced by M 39 which will remain in effect until June 9th .

The general terms of the M39 instructions are to operate consistently with the two Emergency Orders under the Quarantine Act, namely:

- Minimize the risk of exposure to COVID-19 in Canada Order ( Prohibition of Entry into Canada from any country other than the United States)\*.
- Minimizing the risk of exposure to COVID-19 in Canada Order ( Prohibition of Entry into Canada from the United States) and thirdly, to operate consistently\* with the following enactment:
- The Interim Order to prevent certain persons from boarding flights to Canada due to COVID-19 pursuant to the Aeronautics Act\*.

For our purposes in this article, they shall be called the Orders.

The M39 instructions also emphasize that all applications for temporary resident visas, including a work permit or study permit, must be submitted online. Temporary resident visas for visitors will not be processed unless they relate to foreign nationals who are not prohibited from entering Canada or boarding a flight per the aforementioned emergency orders under the Quarantine Act and the interim order under the Aeronautics Act.

The Program Delivery Instructions issued by IRCC and effective April 29, 2020, as they relate to temporary residents, specifically state they are to align with the Ministerial Instructions.

A foreign national travelling by air and departing from any country OTHER than the United States is prohibited from boarding the flight if they are not exempt from the Orders set out, and prohibited if they are travelling for optional or discretionary purposes.

A foreign national departing from the United States is prohibited from entering Canada when travelling for an optional or discretionary purpose.

Those travellers who are permitted to enter must self-quarantine for a period of 14 days. Travel for an optional or discretionary purpose clearly applies to tourism, recreation or entertainment. Travel is not considered optional or discretionary where that person is seeking to enter to provide economic services, to maintain supply chains and critical support, and to provide immediate medical care.

Nor does the latest PDI issued on April 29, 2020 consider that it is an optional or discretionary function to enter to work, study or land as a permanent resident. That statement notwithstanding, when the issue of coming forward on a work permit is to be addressed employers are to be mindful of the following specific guidelines:

Workers who are already established on work permits before the travel instructions were put in place may come forward. New workers coming to Canada to be employed in critical industries such as agriculture, food processing, health, transportation and emergency services are also not considered optional or discretionary.

Those workers at the point of boarding must demonstrate a valid work permit or a letter of introduction from IRCC. The letter of introduction cannot be obtained from a Port of Entry; effectively that means a consular officer will be required to issue the letter.

The most recent PDI dated April 29, 2020 does state that certain applicants from the United States (due to Order in Council 11, namely Minimizing the Risk of Exposure to COVID 19 in Canada (Prohibition of Entry in to Canada from the United States)) can in fact apply at a Port of Entry if the work permit is for an essential purpose. However we would not advise attempting a Port of Entry work permit application without first applying online for a work permit if at all possible, or at least contacting Border Information Services or an Immigration lawyer.

The May 1, 2020 update for travellers on the CBSA website also refers to an essential purpose test, for any one travelling to Canada and advises individuals to contact the Border Information Service before travelling.

he stumbling block in all of this is the nature of an essential purpose function in the occupation to be filled by a foreign worker. It is clearly open to argument as to whom is essential.

In addition there does not appear to be a consistent application of the newly implemented rules at Ports of Entry. On the one hand IRCC provides the aforementioned instructions for boarding flights and travelling but it is CBSA at the Port that makes the final determination as to whether a foreign national will be admitted.

Therefore, if the employer seeking to import a foreign worker is to proceed, it would be our recommendation that the following steps be taken:

- Apply online for the work permit even entering from the USA as a US national under NAFTA and do not appear at the Port without an approval letter.
- Determine if the sector to which the prospective worker coming to Canada is in a critical industry? Check the Guidance on Essential Services and Function in Canada during COVID-19 at [www.publicsafety.gc.ca/ccnt/ntnl-scr/crtcl-nfrstrctr/esf-sfe-en.aspx](http://www.publicsafety.gc.ca/ccnt/ntnl-scr/crtcl-nfrstrctr/esf-sfe-en.aspx)
- Emphasize in a covering submission letter the work function is not optional or discretionary.
- Prepare to assert an essential purpose for the Temporary Foreign Worker.
- Hold a current letter from the employer indicating the job for which the work permit is being requested is still open to be filled.
- Have a quarantine plan in place for self-isolation.

## APPENDIX

- 2020-03-26 OIC 7 Entry into Canada from other than the United States
- <https://orders-in-council.canada.ca/attachment.php?attach=38990&lang=en>
- 2020-04-20 OIC 11 Entry from the United States
- <https://orders-in-council.canada.ca/attachment.php?attach=39166&lang=en>
- Interim Order to prevent persons Boarding Flights under Aeronautics Act
- 2020-04-14 OIC Mandatory Isolation
- <https://orders-in-council.canada.ca/attachment.php?attach=39166&lang=en>