

# The Human Resource Quarterly

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**Slogan: It is better to let people wonder why you didn't talk than why you did!**

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## TIGCHELAAR FARMS COURT CASE

Three Mexican workers under the Seasonal Agricultural Workers Program (SAWP) were terminated and repatriated in August, 2010. The United Food and Commercial Workers Trade Union (UFCW) filed a claim against the Federal Government, the Foreign Agricultural Resources Management Services (FARMS) and Tigchelaar Farms. The case took 3 days to hear and a ruling is expected later in February.

The UFCW is claiming the SAWP contract contravenes the Canadian Charter of Rights and Freedoms (CCRF), Section 7. Section 7 guarantees the rights of workers to know why they have been terminated and an opportunity to defend themselves. The SAWP contract reflects our countries immigration policy and it has been argued that the government has delegated powers through FARMS to the employer which deprive the workers of Section 7 rights. Once a SAWP worker is terminated they lose employment and residence and are repatriated shortly after.

The Federal Government has filed a "motion to strike". In short they are arguing they have no relevant role and the case is at best a wrongful dismissal civil matter. The Federal Government argues that repatriation is not forcible deportation. If deportation was occurring it would allow access to the protocols identified in the CCRF. Workers upon termination make an economic decision to accept the air travel home. Technically workers can stay in the country until the end date on their work Visa. FARMS position is that it is a non-profit private corporation that administers the program and is not an agent of the federal government. FARMS is not a signatory on the contract and has no direct control over the employer. Through CanAg an airplane ticket is purchased but they have no authority to forcibly put the worker on the plane. Tigchelaar Farms followed the protocols and engaged the Mexican consulate who upon reviewing a number of options, agreed the worker should return home. Tigchelaar has argued they do not have power from government to force a worker to return home.

Regardless of the ruling the opposing side will consider appealing the decision.

## CAHRC

Canadian Agricultural Human Resources Council (CAHRC) funding from HRSDC (federal government) ends on March 31, 2013. HRSDC will still fund projects related to Labour Market Information. CAHRC has prepared 3 proposals a) labour supply and demand by province and commodity; b) National Agr. Occupational Framework—agricultural competency dictionary; and c) Expanding On-Farm Energy to include Bio-mass and Ethanol. If CAHRC is not successful in the applications a decision must be made to find other funding or close the council down. All federal government departments are reducing or ending funding of industry groups as a means of liaison or consultation. It is not clear at this point how future consultations will occur.

## WSIB 2013 RATES

On October 24, 2012 it was announced that all rate groups would receive an increase of 2.5% to their WSIB rates. The Unfunded Liability has grown to \$14.2 Billion. 91% of injured workers are back to work with no wage loss within 12 months of injury. WSIB has one of the lowest costs for new claims and administration among all provinces.

See Table (right) for changes.

Rate Group	Description	2012	2013
159	Livestock	\$7.09	\$6.92
267	Field Crops	\$2.84	\$2.77
174	Tobacco & Mushrooms	\$5.15	\$5.03
181	Misc.	\$3.67	\$3.58
184	Poultry & Ag. Service	\$3.27	\$3.19
190	Landscape	\$4.93	\$4.81

## DETERMINING THE EMPLOYER/EMPLOYEE RELATIONSHIP

The nature of work has changed over the last 10 years and the boundary between independent contractor and paid employee is blurring.

Independent contractors are not employees and thus do not enjoy the protection of work protection legislation (Occupational Health and Safety, Employment Standards, Labour Relations/Agricultural Employees Protection Act, Workplace Safety Insurance Act).

A worker can be classified as an *employee* if the following characteristics are present:

- Works exclusively for the payer
- Payer provides tools
- Payer controls duties, whether that control is used or not
- Payer sets working hours
- Worker must perform services
- Provisions of pension, group benefits
- Worker is paid vacation pay
- Payer pays expenses
- Paid salary or hourly wages
- Reports to the payer's workplace on regular basis



A worker can be classified as an *independent contractor* if the following characters are present:

- May work for other payers
- Worker provides tools
- Worker decides how the task is completed
- Sets own hours
- May hire someone to complete the job
- Not allowed to participate in the payers benefit plans
- No vacation pay, and no restrictions on hours of work, or time off
- Worker pays expenses
- Worker is paid by the job on predetermined basis
- Submits invoice to Payer for payment
- Worker may accept or reject work

Over time a number of “tests” have been developed to help determine the relationship such as a) control test—who decides what is done; b) Fourfold test—control, ownership of tools, chance of profit; chance of loss; c) integration test—work is integral part of business or is it accessory to the business.

## HUMAN RIGHTS CLAIMS

- Two claims based on discrimination because of physical disability of SAWP workers occurred in 2012. One claim has settled out of court with a non-disclosure clause and a not an admission of guilt clause. The other case remains in mediation.
- A fatality of a SAWP worker is the basis of a request for an automatic coroner's inquest on SAWP worker fatalities. This case is in its early stages.

## HEALTH & SAFETY UPDATE

**Basic Awareness Training** will be offered through a Worker H&S Workbook with Office of Worker Assistance support and an Employer Guide with Office of Employer Assistance support has been released. Supervisor training will be offered by face to face training, e-learning and on CD. The Farming Operations Regulation would need to be amended to include these features. A consultation period on the “mandatory H&S training” will end on February 4, 2013 and will be applicable to farming.

**New awareness posters** are to be posted by employers titled “Health and Safety at Work—Prevention Starts Here”. It is available in 17 different languages. Copies of the poster can be accessed off of the Ministry of Labour website. It can be either 8.5 X 11 or 11 X 17 colour or black and white. The poster outlines the rights and responsibilities of those in the workplace.

**Inspection Blitzes** are proactive random inspections for compliance to Health and Safety regulations and are considered a key method of raising awareness and increasing compliance. Roughly 10 Blitzes have been scheduled for the year but only a couple cover farming operations. There is a Blitz for new and young workers from May to August. There is also a Blitz on Slips, Trips and Falls scheduled for February & March of 2013.

**Spanish language resources** from the Ministry of Labour can be found on their website. One of the items available is the guideline on the Farming Operations Regulation.

## ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT (AODA)

One in seven people in Ontario have a disability and as our population ages that percentage is expected to increase. Ontario’s businesses, organizations and communities are working to become more accessible and inclusive to people with disabilities. Currently there are 4 standards including a) Customer Service; b) Employment; c) Information/Communications; d) Built Environment.

Accessibility Standards for “customer service” came into force on January 1, 2008. If you are a provider of goods or services, and have one or more employees you were required to comply with the regulations by January 1, 2012. If you have 20 or more employees you should have filed a report by December 31, 2012. If you have not completed these reports please do so immediately.

This will impact farms that have retail (.i.e garden centers) or wholesale operations.

The Act is administered by the Ministry of Community and Social Services. Information can be accessed at: [www.mcsc.gov.on.ca](http://www.mcsc.gov.on.ca). There is a AODA Compliance Wizard that will assist each business in determining the requirements.

## BACK TO THE BASICS

### Required to Post in the Workplace

- Occupational Health and Safety Act
- Violence and Harassment Policy Statement
- Health and Safety at Work—Prevention Starts Here
- Health and Safety Policy Statement—6 or more workers
- Health and Safety Representative name—6 or more regularly employed (90 consecutive days) selected by co-workers
- Form 82 from WSIB—In Case of Injury at Work 1,2,3,4
- First Aid requirements—Regulation 1101
- Employees with First Aid Certification

(depends on number of workers)

- Employment Standards Poster—What You Should Know

### What You Might Want to Post in the Workplace

- A Guide to the Occupational Health and Safety Act for Farming Operations
  - Emergency Procedures & Phone Numbers (by phones)
  - Agricultural Industry Exemptions from the Employment Standards Act
  - Personal Protective Equipment Checklist



## **LAW COMMISSION—VULNERABLE WORKERS ADVISORY COMMITTEE**

The interim report was made public in the summer with an October 1, 2013 deadline for public consultation. The tenor of the report lacks the balance necessary to bring all stakeholders together. Close to 70% of farm workers are considered vulnerable. There are a number of recommendations that cause concern. They include:

- Increase minimum wage to \$14.55
- Remove all exemptions from the Employment Standards Act (ESA)
- Permit 3<sup>rd</sup> party anonymous complaints for ESA
- Cost recovery for enforcement of ESA from employers
- Remove repatriation feature of SAWP
- Include a “duty to bargain” in the Agricultural Employees Protection Act
- Target SAWP workers for ESA blitzes
- Mobile medical clinic services



## **CHIEF PREVENTION OFFICER—HEALTH & SAFETY**

- Agriculture was not successful in gaining a seat on the Provincial Advisory Council. It is not clear at this point as to how agriculture is represented.
- Ken Linington has been asked to sit on a Section 21 Vulnerable Workers Council that is to be composed of 6 employer and 6 worker representatives. The first meeting is scheduled for the end of February, 2013.
- Susan McBride Friesen, Human Resources Director for Highline Mushrooms is also one of the employer representatives on the Section 21 Vulnerable Workers Council
- MOL Inspection Blitzes—Slips, Trips and Falls February-March, 2013

## **ARMMI**

The Agriculture Response Materials Management Inc. (ARMMI) origins were from the feather boards with a goal of establishing a stockpile of PPE (Personal Protective Equipment) in the event of a disease outbreak related to poultry or livestock. A “kit” was developed and includes items like coveralls, gloves, boots, head cover etc to protect workers from various disease agents. The primary example for their development was the Avian Flu outbreak in BC. There are 8 Kits to a carton. The carton is made of cardboard wrapped in plastic. There are roughly 700 cartons at a cost of \$350 each stored at strategic locations in the province for emergency use. The benefit would be to: a) reduce human risk; b) pooling of resources; c) PPE available quickly; d) biosecurity.

## **HVCRT & LABOUR TASK FORCE**

The Horticultural Value Chain Round Table has a Labour Working Group with 4 sub-committees (innovation, management practices, policy and regulation and career pathway and promotion. There are 11 Round Tables and all have identified labour as an issue impacting competitiveness. A team of 6 people have a 1 year mandate to determine the best way to manage the issue. The AAFC Labour Task Force has developed 3 sub committees—a) Temporary Foreign Workers; b) Education and Training opportunities; c) Information Sharing Initiatives