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IMMIGRATION LAWYERS

**Ethical Dilemmas:
Who is your Client for P-LMIAs,
Employer Portal/IMM5802 & EFNA ?**

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Permanent LMIA (“PLMIA”)

- PLMIA/LMIA or PNP nomination needed for additional 600 points under Express Entry – guarantees ITA
- Need more than 400 points for selection under PNP – no guarantee of selection
- TFWs, particularly PGWP holders, are pressuring employers to complete PLMIA or LMIA

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Permanent LMIA (“PLMIA”)

- PLMIA needs to be completed and eAPR submitted before work permit expires
- PLMIA can be in support of PR and Work Permit (\$1000 fee) or just PR (no fee)
- Situations where PLMIA primarily benefits TFW in their application for PR so TFW retains lawyer for PLMIA – who is the client?
- Must advise employer of compliance regime (6yrs) & possible inspections, reviews and penalties.

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PLMIA Ethical Dilemmas

- TFW wants to retain lawyer to complete PLMIA to ensure they get 600 points for EE
- Who signs retainer?
- Who can pay lawyer's professional fees?
- Who pays PLMIA \$1000 processing fees?
- What can you say when TFW asks about status of LMIA application?
- Can employer claw back gov't processing fees?

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Who Signs the Retainer?

- PLMIA is an employer driven application
- Retainer must be signed by employer
- Employer is primary client for PLMIA
- Can sign Privacy Agreement with TFW and Joint Retainer agreement with TFW and Employer
- Can have a separate Retainer with TFW for PR

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Who Pays Lawyer's Professional Fees?

- Grey area – new Ontario legislation (Ontario's Employment Protection for Foreign Nationals Act, *EFNA*, 2009) says that **Prohibition against cost recovery by employers**

8. (1) No employer shall directly or indirectly recover or attempt to recover from a foreign national or from such other persons as may be prescribed,

(a) any cost incurred by the employer *in the course of arranging to become or attempting to become an employer of the foreign national;*

Be wary of any claw back provisions in Employment Contract!

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Who Pays Lawyer's Professional Fees?

- If PLMIA is only used for 600 points under Express Entry and not to support a work permit, can TFW pay professional legal fees?
- If PLMIA is required to support both PR and a work permit, does employer have to pay or repay TFW if they paid for professional legal fees?

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Who Pays PLMIA Processing Fee?

- Employers must pay the \$1000 PLMIA processing fee;
- This fee cannot be clawed back from the TFW's salary or otherwise recovered from the TFW;
- Employer must attest to having paid the fee on the PLMIA form.

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What can you say to TFW re: P-LMIA?

- TFW is not your client for the purposes of the PLMIA;
- If Joint Retainer then employer has given permission to sharing any and all information with TFW;
- If no Joint Retainer, information about the status of the PLMIA or any problems with PLMIA cannot be shared with TFW.

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Employer Portal Offer of Employment

- Employer specific, LMIA exempt work permits require that an *Offer of Employment* (previously IMM5802) and payment of the \$230 Employer Compliance fee to be submitted through the Employer Portal, in order to apply for a LMIA-exempt, employer-specific work permit; (i.e. NAFTA, GATS, ITC.)
- Employer specific, LMIA exempt work permits include:
 - NAFTA Professional;
 - Intra-Company Transfer;
 - International Experience class: (Young Professional w/ Job)
 - Out of Warranty/Emergency Repairs.

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Employer Portal & Compliance Regime

- Employers require advice on how to properly complete *Offer of Employment IMM5802* as they are subject to compliance checks.
- *Offer of Employment* is subject to a strict administrative compliance regime allowing for reviews and inspections for up to 6 years following work permit issuance.
- Severe penalties for violations: ranging from a warning to AMPs of \$500 - \$1 million.

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Employer Portal Ethical Dilemmas

- TFW wants to retain lawyer to set up Employer Portal and complete *Offer of Employment* and apply for work permit – Can they do this?
- Employer can do this on own w/out counsel?
- If wants counsel- Who retains you? Employer or TFW?
- Who can pay lawyer's professional fees?
- Who pays Employer Compliance fee @\$230?
- Can employer claw back fees?

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Employer Portal Offer of Employment

- Employer Portal must be set up online by employer or with their permission by an authorized secondary user.
- *Offer of Employment* must be completed by Employer or with their permission by secondary authorized user.
- Employer Compliance fee of \$230 must be paid by employer.

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Who Signs the Retainer?

- *Offer of Employment* is an employer driven application;
- Retainer for *Offer of Employment* must be signed by employer.
- Employer is primary client for *Offer of Employment* .
- Can sign Privacy Agreement with TFW and Joint Retainer agreement with TFW and Employer;
- Can have a separate Retainer with TFW for Work Permit application.
- Can have a limited scope retainer for filing *Offer of Employment*.

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Who Pays Lawyer's Professional Fees?

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Be wary of any claw back provisions in Employment Contract!

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What do you do when Employer doesn't want to retain lawyer to complete Offer of Employment?

- If *Offer of Employment* is required for work permit application, is there a duty to advise Employer on properly completing *Offer of Employment* application?
- Can have limited scope retainer with Employer to advise on completing *Offer of Employment*.
- Advise employer of compliance regime (6yrs) and possible inspections, reviews & penalties.

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Can TFW Retain Lawyer for Work Permit Application?

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Ontario's New TFW Legislation

- s. 8 of Ontario's *Employment Protection for Foreign Nationals Act*, revised in November 2015 to apply to all TFWs not just Live-In Caregivers.
- Unclear on how it will be enforced and how broadly the provision will be read.
- Ontario's Ministry of Labour has not responded to requests for further information.
- No cases have been brought under revised s.8.

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Employment Protection for Foreign Nationals Act (ON)

- Plain reading interpretation of the revised provision
 - Employer must pay for everything related to employer specific work permit:
 - LMIA/PLMIA – gov't processing fees and legal fees.
 - *Offer of Employment* – gov't processing fees and legal fees.
 - Work permit - gov't processing fees and legal fees.
 - Employee may pay for:
 - Spouse's open work permit & dependent's study permit/Visitor Record.
 - Permanent Residence – gov't processing fees and legal fees.

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Case Study #1

PGWP holder with 360 points who wants to apply for PR under Express Entry, whose work permit is expiring in 9 months and whose employer is willing to undertake a PLMIA.

- How should you advise them?
- How should you advise their employer?

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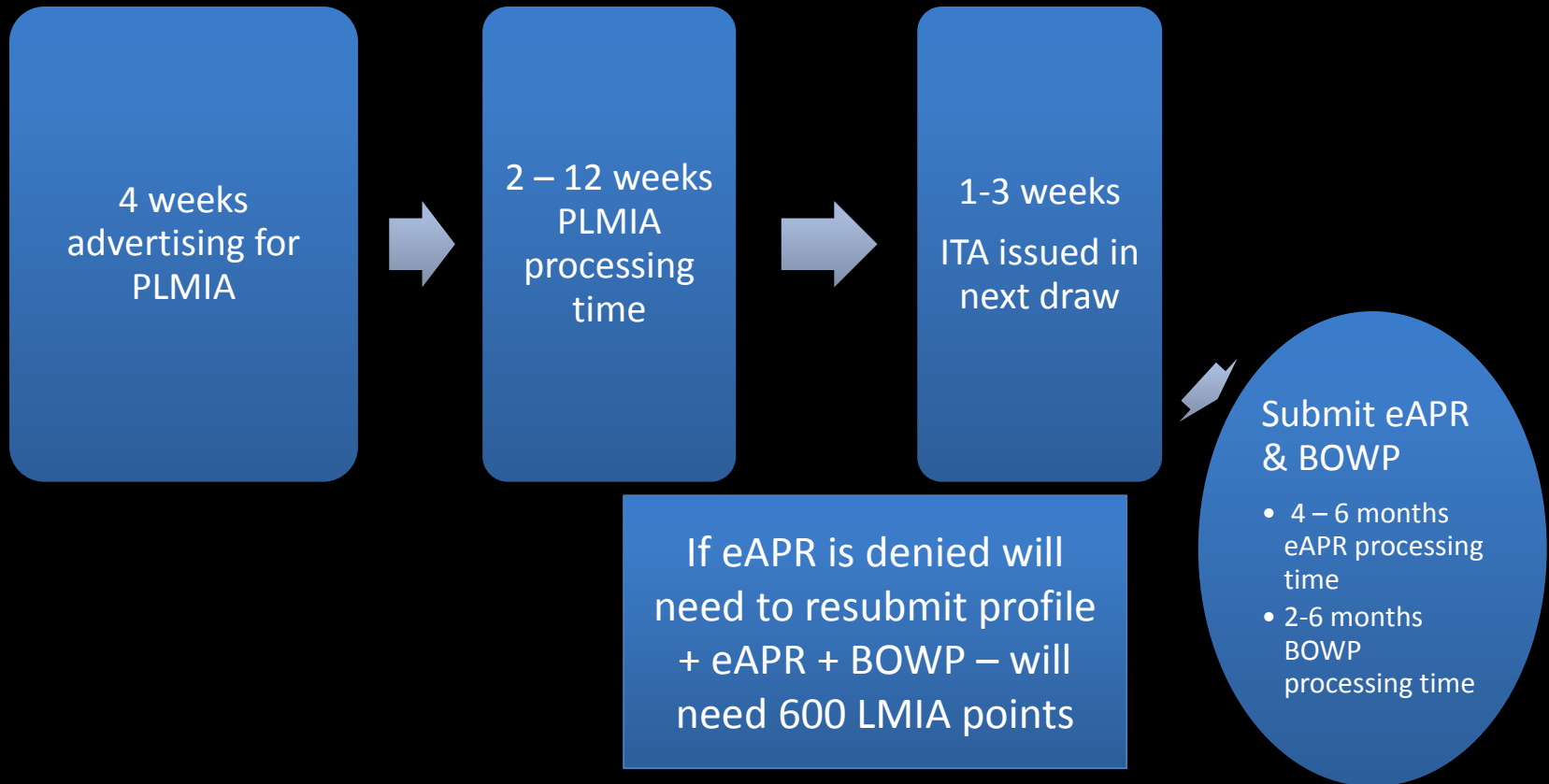
Case Study #1

- Things to consider:
 - Require a PLMIA for 600 Express Entry CRS points.
 - PLMIA processing time is 2 – 12 weeks + 4 weeks advertising.
 - E-APR processing time is 4-8 months.
 - BOWP can only be submitted after eAPR is filed
 - Approximately 50% of eAPR's are rejected so may need to re-file eAPR and will need points from PLMIA or PLMIA based work permit.

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Processing Times



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Case Study #2, EFNA (ON).

- Low Skilled TFW consults you stating that employer is willing to undertake the advertising for the LMIA application to extend WP. However, they are not prepared to incur the expenses associated with re-advertising & filing a new LMIA. Employer will only proceed if TFW agrees to work extra hours (OT) without pay given costs will likely exceed \$2000 dollars. What do you tell client?

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Case Study #2

- Things to Consider:
- Claw back per Section 8 is not specific to actual out of pocket expenses. Can include work in lieu of wages?
- Employer affirming they will be non-compliant from outset. Can you represent employer knowing their intent to circumvent EFNA?
- Advise TFW of rights under EFNA, (brochures).

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Advising on TFWP & IMP is not easy.



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