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How the United States' Withdrawal from the NAFTA Would Affect Canadians Working in the United States

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Introduction

Last week, it was reported by the media that the White House was in the final stages of drafting an executive order, which would give notice of the United States' intention to withdraw from the North American Free Trade Agreement (the "NAFTA"). The Financial Times even obtained and published a draft copy of the executive order that President Trump was about to sign.

Many experts believed that there was simply a negotiating tactic to scare Canada and Mexico into granting more concessions when the three parties finally sat down to renegotiate the agreement. This may have been the case, since it was later announced that President Trump had "changed his mind" after the President of Mexico and the Prime Minister of Canada reportedly called him and asked him to reconsider.

There was also some uncertainty regarding whether President Trump would have the legal authority to unilaterally withdraw from the NAFTA. Although the President of the United States does appear to have the ability to withdraw from trade agreements under Section 125 the *Trade Act of 1974*, the actual implementation of the NAFTA is due to the *North American Free Trade Agreement Implementation Act*, which Congress enacted in 1993. Because the President does not have the authority to unilaterally repeal legislation enacted by Congress, it is uncertain whether President Trump could actually follow through with his threat to withdraw from the NAFTA without the support of Congress.

The draft executive order required the United States Trade Representative to deliver a notice of withdrawal to Mexico and Canada, in accordance with Article 2205 of the NAFTA. Article 2205

states that a party may withdraw six months after it provides written notice to the other parties. However, Article 2205 is intended only to give notice of the party's *intention* to withdraw and not to actually cause the withdrawal itself. Even after such a notice was delivered, President Trump would still need to formally terminate the NAFTA under Section 125 of the *Trade Act of 1974*; he might also need Congress to repeal the *North American Free Trade Agreement Implementation Act*.

Nevertheless, President Trump has clearly expressed a willingness to walk away from the NAFTA if he does not obtain the concessions that he expects from Canada and Mexico. For this reason, it may be appropriate to consider how such a withdrawal might affect Canadians.

Although the Canadian trade-related implications of a U.S. withdrawal have been extensively discussed in the media, there has been no significant discussion regarding how it might adversely affect the continued ability of Canadians to seek U.S. work permits under the NAFTA. I will attempt to address this issue below.

NAFTA-Dependent Work Permits for Canadians

There are several popular U.S. work permits used by Canadian citizens, which are directly dependent on the United States' continued participation in the NAFTA:

a. The Trade NAFTA ("TN") classification for certain eligible professionals;

b. The E-1 Treaty Trader classification for entrepreneurs (and their key employees), who are engaged in substantial trade; and

c. The E-2 Treaty Investor classification for entrepreneurs (and their key employees), who have made a substantial investment in an eligible U.S. business.

In addition, although the L-1 classification for intracompany transferees exists independently from the NAFTA, the ability of Canadian citizens to apply for L-1s through United States Customs and Border Protection at a Canadian airport preclearance or at a land port-of-entry along the Canada-U.S. border is a direct result of the NAFTA. This represents a significant benefit for Canadian citizens since the processing of L-1 petitions can take months to adjudicate, if filed through a United States Citizenship and Immigration Services Service Center, the normal procedure for non-Canadians.

Implications for Canadians Currently Holding NAFTA-Dependent Work Permits

It is impossible to know exactly how the United States would deal with Canadian citizens who are already in the United States under a NAFTA-dependent work permit, if the United States withdraws from the NAFTA. There is very little precedent for this.

When the Government of Bolivia terminated its bilateral investment treaty with the United States, a ten-year transition period was given to Bolivian citizens who had qualifying investments in place in the United States on June 10, 2012 (the effective date of the termination). Any Bolivian

citizen who already held E-2 treaty investor status based on an investment established or acquired on or before June 10, 2012, was entitled to continue in E-2 status until June 10, 2022. Unfortunately, this ten-year transition period was only given to Bolivian citizens because Article XVI of their bilateral investment treaty specifically provided that it would continue to apply to covered investments established or acquired prior to the date of termination, for an additional period of ten years.

As the NAFTA does not contain a similar provision, nothing appears to prevent the United States from immediately terminating the existing TN, E-1, or E-2 status of any Canadian on the effective date of withdrawal. Of course, Canadians holding L-1 status should still be fine, since their eligibility is not dependent on the NAFTA; they would only lose their ability to apply at the time of entry.

The only good news is that Canadians working under one of the NAFTA-dependent work permits will receive some advance notice before their status terminates. As mentioned above, Article 2205 of the NAFTA prevents the United States from terminating its participation in the NAFTA for at least six months after it has given formal notice to Canada and Mexico. At the very least, Canadian citizens will have this period of time to settle their affairs.

In addition, the uncertainty regarding whether President Trump has the legal authority to unilaterally withdraw from the NAFTA without Congressional support is expected to give rise to numerous lawsuits. This may further delay the United States' ability to terminate its treaty-related obligations under the *North American Free Trade Agreement Implementation Act*.