

What to Expect and How to Prepare for Government Worksite Visits

IMMIGRATION

U.S. employers who employ foreign workers under nonimmigrant petitions (i.e. H-1B, L-1, TN, H-2, etc.) must be prepared for worksite inspections along with I-9 investigations/audits. All U.S. employers may be subject to an I-9 investigation/audit whether or not they hire foreign nationals. The government entities with delegated powers to conduct worksite investigations related to non-immigrant petitions include the Department of Homeland Security's (DHS) United States Citizenship and Immigration Services (USCIS), Division of Fraud Detection and National Security (FDNS) and the Department of Labor Wage and Hour Division (WHD). DHS's Immigration and Customs Enforcement (ICE) is responsible for conducting I-9 audits/investigations or the unauthorized employment of foreign nationals.

These inspections by FDNS, WHD, and ICE may come in the form of an unannounced appearance of an investigator at a place of business, or in the receipt of a Notice of Inspection (NOI) from ICE, informing the employer of the agency's intention to conduct an I-9 audit. FDNS and DOL have also used email communication and written correspondence to initiate and conduct such investigations. Employers who have nonimmigrant workers through contractors working at their jobsites will also need to be prepared for inquiries and site visits from USCIS regarding the nonimmigrant worker.

Attached are a Q&A and checklists as guidance in the event any government investigator visits your business's premises or you receive written communication of an investigation or audit.

FREQUENTLY ASKED QUESTIONS REGARDING IMMIGRATION-RELATED WORKSITE AND I-9 INVESTIGATIONS

What do you recommend as the first step in preparing for an FDNS, ICE or WHD investigator?

We recommend that you designate, in advance, an individual as the primary person to respond to an inquiry and select an alternate contact to stand in when the primary contact is absent. It is also a good idea to alert and train your receptionist and corporate counsel of the possibility of an unannounced worksite visit. Everyone who might be involved in a worksite visit should be educated as to what to expect and how to conduct themselves should one occur.

If an investigator contacts our company, what should we do first?

Ask the investigator for identification and record the individual's name, title, agency and contact information. You may also ask for his or her business card. You should request information on the nature of the inquiry.

Most of the time, investigators conducting surprise visits are from the FDNS and will not have a subpoena or search warrant, but instead will wish to simply talk to someone of authority at the company, as well as the nonimmigrant worker. We recommend you first speak with an attorney at our firm or your corporate counsel before answering any of the investigator's questions unless the company has already established an investigation response protocol stating otherwise. In addition, we strongly recommend confirming in advance

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that any nonimmigrant employees are performing the functions described in their nonimmigrant petitions and that the employer is following all provisions of any applicable nonimmigrant petitions.

May I request that the investigator return later and attempt to reschedule?

If the investigator is from ICE:

An I-9 audit should be preceded by a written “Notice of Inspection,” giving at least three days’ notice. If the scheduled time is inconvenient, you should contact ICE promptly to reschedule within a reasonable timeframe. *You should then contact legal counsel immediately to assist you in preparing for and responding to the audit.*

If the investigator is from FDNS:

The law does not specifically provide for any period of notice for investigations conducted by FDNS. In our experience, investigators from FDNS expect to conduct their inquiries on the day they arrive. However, your company should not be unreasonably disrupted by the unannounced visit of an FDNS investigator. If the investigator’s visit has come at an inconvenient time for you, or the designated contact is not available, we suggest that you politely request the investigator return at a different day or time, and offer dates and times to the investigator for when he or she may return.

Please refer to the document at the end of this memo entitled “Checklist for Visit from Government Investigator” for guidance as to what you should ask the investigator.

If the investigator is from WHD:

WHD officers will notify an employer verbally or through written communication before they open an investigation, although they are under no obligation to do so. The rationale is that an unannounced site visit may be needed to ensure the gathering of accurate information and “observe normal business operations.” An investigator does not need *probable cause or consent* to conduct an investigation. An employer can technically refuse to permit an investigation, but such action may prompt WHD to instead use their subpoena powers to gain access to the site. WHD has jurisdiction to investigate several different laws addressing fair labor standards including provisions under the Immigration and Nationality Laws concerning, but not limited to H-1Bs, H-2s, and E-3s, the Fair Labor Standards Act, and Migrant and Seasonal Agricultural Worker Protection Act.

What will happen during an FDNS investigation?

During an FDNS visit, the investigator typically asks to meet with a company representative as well as with the nonimmigrant worker. Frequently, the investigator will be interested in viewing the actual worksite. The representative at your company should accompany the investigator at all times and take detailed notes on the questions asked of the company and employee. You should not allow the investigator to speak alone with any employee, whether they are the nonimmigrant worker or any other employee, nor should you permit the investigator to roam the premises unescorted.

Please refer to the document “FDNS or WHD Worksite Visit Guidelines” at the end of this memo for further detailed guidance.

What questions will the FDNS investigator ask?

In general, the investigator will seek information relating to the petitioning employer; the relationship between the petitioner and beneficiary; whether the beneficiary is or will be employed in the capacity described and at the location(s) specified in the petition; and whether the beneficiary has the requisite experience and/or qualifications.

More specifically, questions from FDNS investigators have focused on the following areas:

- Details about the employer, including ownership structure, financial information, number of employees, office locations in the U.S., number of H and L petitions and recent layoffs;
- Employer policies with respect to immigration matters, including repayment agreements, nonimmigrant hiring policies, and green card policies;
- Details about the specific petition under investigation, including job title, duties, day-to-day functions, salary, work schedule, work location(s), and dates of employment; and
- Qualifications of the nonimmigrant employee(s), including education, work experience, and prior immigration history.

How can I prepare our company in advance for a visit from an investigator?

The best way to prepare for an unannounced visit by FDNS, WHD, or ICE is to perform the following:

- Conduct your own internal review of the employment of all of your nonimmigrant employees to be sure that their job duties, work sites, and salary are consistent with the petition the company filed with USCIS. In addition, you should review any Public Access File (PAF) to be sure it contains all of the documents required by the regulations that pertain to the Labor Condition Application (LCA). You should also verify the company is complying with all representations made in the LCA. Our firm is well-versed in the laws and regulations which govern LCAs, as well as the documents which should be maintained in the Public Access File. We can assist you in conducting your own internal audit to ensure your company has complied with these regulations. For employers who file temporary labor certification applications for H-2s, you should ensure compliance with all written obligations and assurances, including all salary and payroll obligations.
- Conduct your own audit of the company's I-9 records to ensure they have been completed properly and are up to date. Our firm can offer you detailed guidance as to how I-9s should be prepared, as well as assist you in reviewing your I-9 records.
- Select a person from Human Resources as well as at least one other individual from the company who should be prepared to meet with any investigator should an unannounced visit occur. Provide those individuals with this memo and the checklists we have included so they can be prepared during any investigator's visit.
- Speak with your corporate counsel's office to advise them of the possibility your company may get a visit from USCIS or WHD, or receive a Notice of I-9 Inspection from ICE. Make sure you have the name of a specific attorney from your corporate counsel's office and know how that attorney can be

reached at all times. Our firm can provide you with the name and contact information of one or more of our attorneys who you will be able to reach at any time.

CHECKLIST FOR VISIT FROM GOVERNMENT INVESTIGATOR

Date: _____

Company Location: _____

Agent's Name: _____

Badge Number: _____

Agency: _____

Agent's Phone Number: _____

Agent's Email: _____

Office Address: _____

REASON FOR VISIT

Main Purpose: _____

Records he/she is requesting to see: _____

Individual(s) he/she wants to interview: _____

At this point, ask the investigator to wait while you contact the company's corporate counsel and one of the attorneys from our office.

FDNS OR WHD WORKSITE VISIT GUIDELINES

If you choose to answer the investigator's questions, be sure to follow these guidelines:

- Meet with the investigator in a conference room rather than in an open area or your office.
- Take detailed notes about the questions you are asked by the investigator as well as your responses.
- **Do not** let the investigator wander through the company's premises. The investigator must tell you specifically what he or she wants to see on the premises, and you should insist that you accompany the investigator at all times.
- Take detailed notes about every place the investigator looks and what he or she specifically looks at or asks about.
- Make sure you are present during every conversation the investigator has with any employee.
- Take detailed notes about the investigator's conversation with **any** employee, including the employee's responses.
- Take detailed notes about any records you allow the investigator to review.
- If the investigator asks to inspect any records, ask the investigator to be very specific about what he or she wants to see. We do not recommend that you simply hand over files which may contain private or confidential information or information that is not specifically necessary for the investigator's stated purpose.
- Do not allow the investigator to remove any documents from the company's files. If the investigator asks for photocopies of any documents, tell the investigator you will prepare those copies after he or she leaves and that you will forward them to his or her office address.
- Please contact us, or your corporate counsel, if you have any questions.

Please contact the Fredrikson & Byron Immigration Team at 612.492.7648 for additional information.

CLINK ON ATTORNEY NAME FOR FULL CONTACT INFORMATION:

LOAN HUYNH – DEPARTMENT CHAIR

DEBRA SCHNEIDER

JUNE CHENG

JENNY BOUTA MOJICA

MATTHEW WEBSTER

TESSA SPARKS

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