

# Employee Relations LAW JOURNAL

## **H-1B Employers Beware: An Employer's Step-By-Step Guide to Fraud Detection and National Security Directorate Site Visits**

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*In this article, the authors discuss the increased level of Fraud Detection and National Security Directorate inspections at workplaces across the country and provide a step-by-step guide to help employers understand every aspect of the process from beginning to end.*

If you have “won” the H-1B lottery and are fortunate enough to have key foreign national workers at your organization, you may think your worries are over – but a recent trend may mean you will get a site visit at your workplace to ensure you are fulfilling your responsibilities. Under the Trump administration, we have seen an increased level of Fraud Detection and National Security Directorate (FDNS) inspections at workplaces across the country, as immigration officers are making site visits to companies to confirm details about H-1B and L-1 employees.

This article provides a step-by-step guide to help you understand every aspect of the process from beginning to end.

### **WHAT IS AN FDNS SITE VISIT?**

The U.S. Citizenship and Immigration Services (USCIS) launched the Administrative Site Visit and Verification Program in 2009 as part of its efforts to enhance the integrity of the immigration process. Under this program, FDNS officers may conduct unannounced site visits to verify information submitted in certain visa petitions. FDNS conducts site visits for religious worker petitions, H-1B petitions, and since 2014, L-1 petitions.

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## **WHAT IS THE PURPOSE OF FDNS SITE VISITS?**

The purpose of an FDNS site visit is to enable officers to verify the accuracy of information contained in petitions submitted to USCIS and to confirm that sponsored foreign nationals are in compliance with the terms and conditions of the approved work authorization and status.

## **WHAT TAKES PLACE DURING THE FDNS SITE VISITS?**

These site visits may include interviews with company representatives, foreign workers, review of documents, and verification of work locations. During such visits, officers assess the existence of the petitioning employer, the accuracy of the representations made in H-1B or L-1 petitions, and whether foreign nationals are performing services in accordance with the terms set forth in the corresponding petition approval. During the site visit, the officer may speak to employer representative (human resources manager, sponsored foreign worker's supervisor) and/or sponsored foreign nationals to verify the terms of a particular petition filing.

## **CAN AN EMPLOYER REFUSE TO PARTICIPATE IN AN FDNS SITE VISIT?**

FDNS site visits are voluntary, but it is strongly recommended that you cooperate should one occur.

## **HOW WILL EMPLOYERS LEARN OF AN FDNS SITE VISIT?**

Though most site visits are unannounced, an officer occasionally may contact the company in advance of an impending visit.

## **CAN EMPLOYERS HAVE LEGAL COUNSEL PRESENT FOR AN FDNS SITE VISIT?**

FDNS will not reschedule a visit to accommodate counsel, but counsel is permitted to be present if logistically possible and might be permitted to participate via telephone.

## **WHAT CAN EMPLOYERS DO TO PREPARE FOR A FDNS SITE VISIT?**

- First, you should ensure that petition-related information is current, accurate, and readily available in the event of a visit.

- It is important that you have policies and procedures in place in case of an FDNS inspection. Human resource departments, employees and company signatories should be aware of the potential for unannounced site visits and should be prepared to follow the employer's procedure in place.
- You should instruct receptionists and security personnel of the possibility of a site visit and be instructed to:
  - Know who to contact when an officer arrives. In each work-site where a sponsored foreign national is employed, you should designate a point of contact, such as an HR manager, to receive FDNS officers.
  - Advise that the officer should not be permitted to tour the worksite or speak to employees without a company representative present.
  - Advise receptionists or security to ask for and record the credentials of the inspector. You should record the name, title, and contact information of the inspector to ensure that any post-visit communications are directed toward the appropriate agent.
  - You should advise foreign national workers and managers about possibility of an FDNS site visit and what to expect during the visit. Copies of the petitions should be readily available to the extent possible.
- If your employees have material changes to job duties, and in the case of H-1Bs, changes to work location, this will require an amended petition – so work with your immigration counsel to do this work before a site visit occurs. If there are discrepancies between pay stubs and the salary listed on the I-129 petition, be ready to offer a complete explanation to FDNS officers.

### **WHAT CAN AN EMPLOYER EXPECT DURING AN FDNS SITE VISIT?**

- An FDNS visit may last anywhere from 30 to 90 minutes.
- An officer may request to tour your premises and foreign national's work area, and the officer may photograph premises to verify its existence.

- If you have a policy against allowing unaffiliated individuals to tour/photograph your premises, you should still comply with reasonable requests to examine and photograph employer's premises or work area. However, if you have a strict policy against tours or photographs, you should explain this to the inspector.
- The officer will typically ask questions regarding a foreign national's job duties, salary, physical work location.

### **WHAT QUESTIONS CAN EMPLOYERS EXPECT DURING AN FDNS SITE VISIT?**

During an FDNS site visit, the FDNS officer usually works from a standard list of questions used for all employers. The officer may ask about:

- Your business, annual revenue, and the number of employees at a particular location, in the United States or worldwide.
- Whether your company or your representative actually signed and filed the H-1B or L-1 petition (to make sure that it was not filed fraudulently).
- Your immigration program in general, including the number of foreign nationals sponsored for nonimmigrant programs and employment-based green cards.
- The foreign national's job title, responsibilities, salary and work schedule, as well as those of other employees in similar positions.
- The foreign national's education, previous employment, residence, and family members in the United States.
- Number of all sponsored foreign workers employed by your company in the United States.
- Number of immigration petitions your company filed within a given time period.

### **WHAT DOCUMENTS SHOULD EMPLOYERS EXPECT TO BE ASKED ABOUT?**

The officer may also ask for documents pertaining to your company and the foreign national, including:

- Extensive personnel documentation about the foreign national, including W-2 forms, payroll records, and paystubs.
- Organizational charts.
- Company wage and tax documentation.
- Contracts, statements of work and/or agreements between the petitioner and an end-client, if the foreign national is placed offsite.

### **CAN AN EMPLOYER ASK FOR TIME TO PROVIDE RESPONSES?**

If you are unable to give an exact answer without reviewing company records or requiring assistance of outside immigration counsel to obtain data, it is acceptable to let the FDNS office know that you need additional time to obtain the requested documentation/information that is outside of the scope of the petition.

### **WHAT ARE A COMPANY REPRESENTATIVE'S RESPONSIBILITIES DURING AN FDNS SITE VISIT?**

During a site visit, your company representative (such as an HR manager) should accompany the officer while they are onsite. However, be aware that the FDNS officer may decline the company representative's request to sit in on interviews with foreign employees.

During the site visit, your company representative should take detailed notes, including:

- Officer's name, title and contact information.
- Names and titles of individuals the officer interviews.
- Questions asked during interviews.
- Any company documents provided to the officer.
- Areas of the worksite that the officer visits.
- Any photographs taken by the officer.
- If company documents are provided to the officer, your company representative should list the documents provided and retain their copies.

- If the FDNS officer takes photographs of the premises, your representative should ask for copies of the photos.

## **ARE THERE SPECIAL CIRCUMSTANCES FOR FOREIGN NATIONALS WHO WORK FROM HOME?**

An FDNS site visit may occur at a foreign worker's home office, and many of the items outlined above also apply to home office FDNS site visits. With FDNS site visits on the rise, you should make your foreign workers aware of potential FDNS visits at their home office worksites and prepare them so that they are familiar with the details of their immigration filing, such as their job duties, salary, worksite details, etc.

If an officer comes to an employee's home or contacts the employee to set up a time to visit them at home, the employee can refuse to allow them to enter and ask to meet at a nearby public location. If an employee is meeting with the officer alone, they should request that counsel or a company representative be allowed to attend either in person or virtually. And any requests to review company documents, laptops, etc., should be approved by the company before providing access to the officer.

During an FDNS site visit, the FDNS officer usually works from a standard list of questions used for all foreign workers. Some typical questions they may ask include:

- How long have you been employed by the organization?
- What is your title/designation?
- What is your current annual salary?
- What company will you be working for during the assignment?
- If you will be working for a client company: Who is the client company?
- If you will be working for a client company: Please provide the contact information for the client company.
- What is your typical work schedule?
- What is your current address?
- Are there any middle vendors with this contract with the end-client? What are the names of the vendors?
- What are your basic job duties?

## **ARE THERE COMMON RED FLAGS THAT FDNS SITE INVESTIGATORS LOOK FOR?**

You should be aware that the FDNS officer may be especially on the lookout for data that reveals:

- The foreign national's salary in pay statements does not match the amount stated in the petition.
- Reported income on the foreign national's Form 1040 does not match the foreign national's salary, or the foreign national reports as "self-employed."
- The address of the foreign national's work location in the petition is not an actual work site.
- Virtual offices or empty offices without equipment are listed as the foreign national's place of employment.
- The foreign national lacks a work email or work phone number.

## **WHAT HAPPENS AFTER AN FDNS SITE VISIT IS COMPLETED?**

As FDNS officer will prepare a Compliance Review Report prepared which identifies any indicators of fraud or noncompliance. Where appropriate, an FDNS officer may refer the matter to U.S. Immigration and Customs Enforcement (ICE) for further investigation, including potential criminal enforcement. Under the current Department of Justice's expansion of criminal statutes to address illegal immigration, you should take compliance practices very seriously and have systems in place to ensure compliance with immigration regulations.

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