Employment and Social Development Canada

Access to Information and Privacy Operations Division
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Emploi et Développement social Canada

Opérations de l'accès à l'information et de la protection des renseignements personnels
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JUIN JUN 2 9 2015

Our file - Notre référence
A-2015-00162 / CL

Mr. Jacobus Kriek
C/O Matrixvisa Inc.
362 - 10816 MacLeod Trail South
Unit 440
Calgary, Alberta T2J 5N8

Dear Mr. Kriek:

This is in response to your request submitted under the *Access to Information Act* (the *Act*), received at Employment and Social Development Canada on May 15, 2015, and which reads as follows:

"Please provide a copy of the ESDC Foreign worker Section Inspection Policy Manual for inspecting the work place of employers, employing foreign workers in Canada"

You will find attached the documents you have requested. You will note that some portions qualified for exemption pursuant to subsections 16(1) and 16(2) of the *Act*. A copy of these provisions is enclosed.

You are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to: Office of the Information Commissioner of Canada, 30 Victoria Street, 7th Floor, Gatineau, Quebec K1A 1H3.

This completes the processing of your request. Should you have any questions, do not hesitate to contact Claire Lamonde at 819-654-7003, or by email at claire.lamonde@hrsdc-rhdcc.gc.ca.

Sincerely,

Donna Blois

Donna Blois
Director
Access to Information and Privacy Operations

Encl.

Canada

Access to Information Act

16(1) LAW ENFORCEMENT AND INVESTIGATIONS

16. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

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16(2) SECURITY

16.(2) The head of a government institution may refuse to disclose any record requested under this Act that contains information that could reasonably be expected to facilitate the commission of an offence, including, without restricting the generality of the foregoing, any such information ...

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Temporary Foreign Worker Program Manual – Inspections Policy

Employer Inspections

Purpose

This section of the Temporary Foreign Worker Program (TFWP) Manual sets out parameters on employer inspections and authorities provided under S. 209 of the *Immigration and Refugee Protection Regulations* (IRPR.

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s.16(2)

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Temporary Foreign Worker Program Manual – Inspections Policy

1 – Overview: Employer Inspections

Introduction:

All employers that employ foreign nationals on the basis of a positive labour market impact assessment (LMIA – formerly called "labour market opinion") are required to meet the conditions set out in their positive LMIA and annexes, in accordance with the IRPR. Employers that have been issued a positive LMIA on or after December 31, 2013 may, if a corresponding work permit has been issued for that LMIA and, if triggered, be required to demonstrate compliance with the conditions set out on the LMIA and annexes. Employment and Social Development Canada (ESDC)/Service Canada (SC) staff may undertake an inspection from the first day of employment for which a work permit is issued (defined as the first day of employment on the work permit) up to a maximum of six years after.

Difference between an "employer compliance review" and an "employer inspection"

It is important to distinguish between an "employer compliance review" (ECR) (which is required under S. 203 of the IRPR) and **employer inspections which are allowed under S. 209 of the IRPR, only when triggered** [see "Triggers" definition below and "Triggers" section]. Whereas an ECR is part of the LMIA assessment and is required for all returning employers[1] to review whether they provided wages, occupation and working conditions in accordance with the information on previous positive LMIAs and annexes, an employer inspection can only occur if triggered, for one of the reasons stated under S. 209.5 of the IRPR, and allows for a broader review of conditions referenced in S. 209.3 and S. 209.4 of the IRPR.

What happens if an employer is deemed non-compliant with any of the conditions set out in S. 209.3 and S. 209.4 of the IRPR?

Employer inspections are administrative reviews (not investigations) with potentially serious consequences for employers. If, on the basis of information obtained during an inspection, an employer is, on the balance of probabilities, deemed non-compliant and no acceptable justification is provided, ESDC must inform the employer of the finding and as per S. 209.91 of IRPR, add their name to the Citizenship and Immigration Canada (CIC) TFWP "Employer List" on the CIC website[2], effectively banning this employer from accessing the TFWP for a period of two years.

Link to Ministerial Instructions

Depending on specific circumstances, employers found non-compliant with any of the conditions following an inspection may also have their existing LMIAs suspended or revoked using Ministerial Instructions. While a recommendation to suspend or revoke existing LMIAs may be included along with the recommendation of a finding of non-compliance, it should be noted that a decision to suspend or revoke LMIAs under this circumstance will not require any additional review actions by inspectors.

Authority:

[1] While verifying that all returning employers have provided appropriate wages, occupation and working conditions is a regulatory requirement, [redacted], depending on various factors and the employer's history.

[2] Employers listed on the CIC website are banned from accessing the TFWP. This list is not to be confused with the ESDC public list of Employers who have broken the rules of the TFWP.

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Temporary Foreign Worker Program Manual – Inspections Policy

The TFWP operates under the authority of the *Immigration and Refugee Protection Act* (IRPA) and the IRPR. The authorities relevant to inspections are set out in S. 209 of the IRPR.

The Minister of ESDC is accountable for the specific authorities under s. 209 and these authorities have been delegated to certain ESDC/Service Canada officials, as appropriate.

Inspection Objectives:

Employer inspections serve to:

1. Protect the integrity of the Canadian labour market by encouraging employers to comply with the conditions set out in the IRPR and applying consequences for non-compliance with TFWP requirements.

2. Protect the temporary foreign workers (TFWs) from abuse and exploitation, including human trafficking.

Inspections are not intended to be a re-assessment of information considered in the issuance of an LMIA; rather, they are intended to verify an employer's compliance/non-compliance with the conditions set out in the positive LMIA and annexes, in accordance with the IRPR.

Definitions:

Balance of probabilities –
A civil law standard that is met if a statement (e.g. "Employer X is non-compliant") is more likely to be true than not to be true. "Balance of probability" requires a lower standard of proof than "beyond a reasonable doubt". The latter standard requires that the truth of the statement, given the evidence, is supported such that it would be unreasonable to disbelieve it (it still may not be a certainty, but it is closer to it). Balance of probability is the standard upon which decisions on inspection outcomes must be based.

Compliance – The state or fact of according with or meeting rules, standards, requirements, or conditions. For the purpose of inspections, employers are deemed compliant when they have demonstrated that they have fulfilled the conditions stipulated on the positive LMIA and annexes..

Decision: To pass judgment on an issue under consideration; to pronounce a conclusion. Reasons supporting the judgment or conclusion may include recommendations by experts. The body taking the decision has ultimate responsibility (accountability) for it, as well as any consequences, including employer follow-up.

Employer – For the purpose of inspections, ESDC defines "employer" as any person or organization who has applied for an LMIA on or after December 31, 2013, whose name or business number appears on any positive LMIAs issued following an application on or after that date, and who, based on any of those positive LMIAs, employs or has employed TFWs.

Employer compliance review (ECR) – An ECR occurs under S. 203 of the IRPR and happens during an LMIA assessment, before an LMIA is issued. It is not an inspection, which occurs under S. 209 of the IRPR. An ECR is an assessment of whether a returning employer has provided each TFW with wages,

occupation and working conditions in line with those provided in the job offer. If an employer is deemed non-compliant during an ECR under S. 203, ESDC has no authority to ban the employer directly (but can issue a negative LMIA). *CIC may ban an employer under S. 203, However, in practice, this could only happen if a TFW applies for a work permit on the basis of a negative LMIA that was provided to an employer, which is improbable.*

Good faith – Is an abstract and comprehensive term that encompasses a sincere belief or motive without any malice or without the desire to defraud others.

Initial Finding of non-compliance – An inspection outcome that is determined before an employer has an opportunity to provide a justification. If an acceptable justification is provided, and associated compensation where required, the Final Determination may be one of satisfactory.

Inspection – An inspection occurs under S.209 of the IRPR in order to verify compliance with conditions set out in S. 209.3 and 209.4 of the IRPR. It is not an ECR, whereby an employer's compliance with TFWP requirements concerning wages, occupation and working conditions is assessed. An inspection under S. 209 occurs after a work permit has been issued and must be triggered (see definition for "trigger"). An inspection may entail document review and verification, on-site visits, employer interviews, and/or TFW/employee interviews (with consent only).
***Note**: to ensure that personal information and privacy are respected, any TFW or other employee subject to an interview needs to be aware and demonstrate that they understand why their information is being collected and how it will be used. For example, interview subjects may be asked to sign a voluntary consent form that describes how their information will be used and obtains their consent for the collection.*

Inspection outcomes – There are two main inspection outcomes:

(i) **Satisfactory**: On the balance of probabilities, it is determined that an employer has complied with condition(s) reviewed during an inspection.

(ii) **Non-Compliant**: On the balance of probabilities, it is determined that the employer has not complied with one or more conditions reviewed during the inspection.

These outcomes are then divided into "simple" and "complex" as follows:

a. **Simple Inspection:** Includes **Simple Satisfactory** and **Simple Non-compliant** cases where the process and analysis is straightforward, and where it is not a "hot" issue (e.g. in media). Examples include cases in standard sectors (e.g. food counter attendant), and where an acceptable justification may be presented but does not require compensation, or no acceptable justification, as per those listed in the IRPR is provided.

b. **Complex Inspection:** Includes **Complex Satisfactory** and **Complex Non-compliant** cases where the sector, occupation, or employer type is non-standard (e.g. Seasonal Agriculture Worker Program (SAWP), trucker, self-employed, etc.), and/or the case is in media, and/or justification was presented that was acceptable as per those listed in IRPR but requires compensation or is 203(1.1)*(f)*, "similar to circumstances set out in (a) to (e)".

Justification, acceptable – An acceptable reason that explains an initial finding of non-compliance during an inspection and renders the employer compliant (e.g. changes in federal/provincial laws, changes in collective agreements, response to a dramatic change in economic conditions, an error made in good faith, an unintentional accounting or administrative error, or force majeure). The IRPR stipulate

that when an inspection reveals non-compliance, employers must be provided with the opportunity to justify their actions. In some cases, compensation must be provided to the foreign worker for a justification to be considered acceptable.

Repetition of Justifications/Compensation

In cases in which an employer has been inspected more than once on the same conditions and had one of the justifications – *error in interpretation made in good faith* or *unintentional accounting or administrative error* – accepted previously, and should the circumstances surrounding the violation be similar, ESDC staff is to consult with TFWP regions to determine whether the same justification will be accepted again. Generally, the use of one of these justifications will only be accepted once per employer, however there may be legitimate reasons to accept the same justification more than once.

Justification, unacceptable – A reason or explanation offered by an employer in response to a finding of non-compliance that is not listed in IRPR s. 203 (1.1).

Non-standard (aka "Gap" or "Anomalous") Sector – The economic/occupational sectors that give rise to challenges related to the assessment of employer conditions, including but not limited to such core conditions as wage, occupation, and working conditions. Below is a non-exhaustive list of non-standard sectors to complement consultation with sector experts in Citizen Services and Program Delivery Branch (CSPDB):

- Academics
- Agriculture
- Seasonal Agriculture Worker Program (SAWP)
- Piecework (includes chicken catchers)
- Foreign-based firms
- Group of Employers
- Live-in Caregiver
- Nurses
- Owner-Operator
- Self-employed
- Physicians
- Trucking (long-haul)
- Vessel workers
- Senior Management Occupations (NOC 00)

Sufficient Effort – Employers who are found non-compliant are offered an opportunity to provide a justification. When the justification is an error in interpretation or an unintentional accounting or administrative error, the employer must provide compensation to the affected TFWs to correct the error(s). Where compensation is not possible, the employer can be deemed to have provided compensation if they can demonstrate that they made sufficient effort to compensate the TFWs.
If the TFW is no longer with the employer, proof of sufficient effort to compensate the TFW will include:

- a Record of Employment (ROE) to verify that the TFW does not work for the employer;
- a registered letter sent to the TFW's last known address detailing the compensation owed;
- an e-mail to the TFW; or
- a phone-call or email to the TFW's emergency contact.

Trigger – A reason to conduct an inspection. An employer inspection cannot be conducted unless triggered. Acceptable triggers include i) reason to suspect; ii) known past non-compliance; or, iii) random selection.

i) ***Reason to suspect***: When ESDC receives information leading staff to suspect that an employer is not complying or has not complied with any conditions imposed under S. 209.3 of the IRPR, this is understood as "reason to suspect" and could lead to an employer inspection whereby ESDC will review, at minimum, whether the employer is compliant with the condition(s) that are most closely linked to the information received. For more information please see the Triggers section.

ii) ***Known past non-compliance***: An employer who has not complied with TFWP conditions as set out under S. 209.2 or 209.3 of the IRPR and whose name and address have been put on the list referred to in S. 209.91 of the IRPR may be the subject of an inspection. (TBD ECRs).

iii) ***Random selection***: To determine employer compliance trends, vulnerable sectors/occupations, and policy directions, Inspections will also be performed based on a random sample determined by the Employer Selection Methodology (ESM) described below.

The ESM selects a representative sample of employers from among those estimated to be eligible for an Inspection over a one year period.

The ESM uses four major criteria (160 categories per province/category):

- *Province or territory* (13 locations);
- *Industry* (20 variables (employer's 2-Digit North American Industry Classification System (NAICS) code);
- *Employer volume of confirmed Temporary Foreign Workers* (TFWs) who have been issued a work permit (4 variables: 1-10, 11-50, 51-100, 101+); and,
- *Occupational skill level* (2 variables: high or low (National Occupational Classification (NOC).

The ESM will produce representative statistical reports quarterly, track results of ECRs over time, and maintain a real-time running total of the number of reviews either underway or completed. Uncompleted or inconclusive reviews will also be tracked within the system.

Privacy and Document Collection and Retention

Staff must always comply with federal legislation concerning the collection, use and disclosure of personal information outlined in the *Privacy Act* and the *Department of Employment and Social Development Act*. Employers may be required to redact certain information when providing information/documentation.

Collection of Information

ESDC is authorized to collect personal information under section 4 of the *Privacy Act*. ESDC has the authority to collect personal information that relates directly to its operating programs or activities, including for the purposes of carrying out its responsibilities (such as providing a LMIA or conducting an inspection) under the IRPR. ESDC is governed by the *Department of Employment and Social Development Act* concerning disclosure of certain information with other departments and agencies, such as Citizenship and Immigration Canada, the Canada Border Services Agency and provincial and territorial (PT) partners for the purposes of aiding these organizations to enforce their respective legislation. The provisions of such disclosures are identified in information sharing agreements - which identify the authorities for ESDC to release the information as well as how the information will be used and subsequently disclosed by our partners.

The *Privacy Act* defines personal information as any information about an identifiable individual that is recorded in any form. In the context of the TFWP, employers that are unincorporated, sole proprietors or partnerships are considered to be identifiable individuals rather than public entities. Even if some information might be considered as non-personal, some elements in a business or professional context will be considered as personal information. The Privacy Commissioner's website (www.priv.gc.ca) provides guidelines on that issue.

1.1 – Possible Inspection Outcomes

Based on a review of all available information, possible inspection outcomes are:

Satisfactory: The employer has complied with all conditions reviewed as set out in the positive LMIA and Annex.

Satisfactory with Justification: For the conditions set out in S. 209.3(1)*(a) and (b)*, possible justifications in initial findings of non-compliance include:

a. a change in federal or provincial law;

b. a change to the provisions of a collective agreement;

c. the implementation of measures by the employer in response to a dramatic change in economic conditions that directly affected the business of the employer, provided that the measures were not directed disproportionately at foreign nationals employed by the employer; (i.e. in an economic downturn);

d. an error in interpretation of IRPR made in good faith by the employer with respect to its obligations to a foreign national, if the employer subsequently provided compensation - or if it was not possible to provide compensation made sufficient efforts to do so - to all foreign nationals who suffered a disadvantage as a result of the error;

e. an unintentional accounting or administrative error made by the employer, if the employer subsequently provided compensation - or if it was not possible to provide compensation made sufficient efforts to do so - to all foreign nationals who suffered a disadvantage as a result of the error;

f. circumstances similar to those set out in paragraphs (*a*) to (*e*); or

g. *force majeure* (unforeseen, exceptional circumstances that have a dramatic impact on the business).

Note: Justifications are always to be considered and applied in accordance with relevant TFWP policies and procedures. For each condition (beginning in Section 6), the most likely justifications that may be applied are listed. These lists are not prohibitive and do not mean that another justification may not be applicable under certain circumstances. Any justification provided by the employer and in accordance with the IRPR must be considered.

An employer's failure to comply with the conditions set out in S. 209.3(1)*(c)* and 209.4 is justified if the employer made all reasonable efforts to comply with the condition. In the case of 209.4, non-compliance may also be justified if it results from anything done or omitted to be done by the employer in good faith.

Satisfactory with Justification and Compensation: S. 203(1.1) of IRPR sets out the parameters for employers to provide compensation to a TFW when justifications 'd' or 'e' apply.

Compensation may include payment for overtime hours, direct compensation if the worker is still with the employer. Additionally, proof of sufficient effort to compensate the TFW if they are no longer with the employer is required. (e.g. letter sent to the TFW's last known address detailing the compensation owed).

Non-compliant: Occurs when the employer fails to demonstrate, on the balance of probabilities, that they are in compliance with the conditions under IRPR and as set out on the positive LMIA and associated

annexes. Non-compliance will occur in cases where information has been collected by the officer from a number of sources, including documentation submitted by the employer, indicating that:

- The employer has not complied with the conditions under IRPR and as set out on the LMIA and associated annexes; and
- The employer has failed to provide an acceptable justification; or
- The justification provided requires the employer to undertake compensation and:
    - after being given the opportunity to undertake the appropriate compensation, is either non-responsive, refuses or does not attempt to resolve the matter; or
    - did not undertake the compensation within the requested timeline, or the attempts to compensate were insufficient.

As per S. 209.4, a finding of non-compliance will also be made if an employer refuses to provide requested documentation or is otherwise uncooperative during an inspection.

Employers found non-compliant through an inspection will face a two year ban and have their names and addresses published on a public ineligibility list. As noted, depending on the specific circumstances of the case and the information provided, they may also have existing LMIAs suspended or revoked.

1.2 – Employer Obligations During an Inspection

Inspections can entail employer responses to questions and provision of documents (S. 209.6), examination of documents (S. 209.7) and could include on-site inspections (S. 209.9), including interviews with TFWs or other employers (with consent).

Under S. 209.4, 209.6, 209.7 and 209.9 of the IRPR, for the purposes of inspections, employers must make reasonable efforts to:

- Report at any specified time and place to answer questions and provide documents, or ensure that a representative is available to provide assistance;
- Provide any documents (in the time allotted by ESDC staff) that are requested to verify compliance with specific TFWP conditions. Employers will be instructed on the website to redact all information that ESDC is not authorized to collect;
- Attend any inspection or ensure that a qualified/delegated employee attends any inspection, unless the employer was not notified of it;
- Give all reasonable assistance to the person(s) conducting the inspection;
- Allow ESDC staff to use copying equipment, or provide copies to ESDC staff as requested;
- Allow ESDC staff to take photographs or make video or audio recordings (with written consent);
- Allow ESDC staff to examine anything on the premises that is relevant to the inspection; and/or
- Provide ESDC staff access to any computer or electronic device in the premises to allow for the examination of any relevant document.

More detailed information is provided in the "On-site Inspections" section.

Reasonable Efforts

For TFWP purposes, an employer will be considered to have made reasonable efforts if they:

- Meet any of the conditions above that are relevant to a particular inspection; and/or
- Are considered by staff to have cooperated to the greatest extent possible during an inspection.

Negative Inference

Under the regulations, failure of an employer to meet these conditions may lead to a finding of non-compliance with conditions laid out in S. 209.4 of the IRPR. If there is insufficient information to determine, on the balance of probabilities, that the employer has not complied with any of the conditions in S. 209.3, then the employer may only be deemed non-compliant with conditions in S. 209.4.

1.3 Procedural Fairness and other Guiding Principles

Procedural Fairness:

It is important to ensure that the department has the legal authority to take action and proceeds fairly. All activities and decision making must adhere to the principles of procedural fairness, including:

- Actions and decisions must be based on the IRPA and IRPR;
- Employers must receive fair and equitable treatment;
- Employers must always be provided with the opportunity to provide new information or to respond to ESDC concerns;
- Decision makers must not be improperly fettered or interfered with during the process of coming to a decision (decisions must be impartial);
- ESDC should complete inspections in a 75 day time period without any undue delays. An expansion of scope and timelines must be justified and applied consistently ; and
- Employers must be given adequate, accurate and timely information during each step of the inspection process (including specific information requests and timelines).

Guiding Principles:

In addition to exercising procedural fairness, the department will:

- Be unbiased and transparent: work with employers during the inspection to educate them about their responsibilities under the IRPR and promote future compliance.
- Exercise due diligence to make sound and administratively fair decisions that are rationally justifiable and well documented.
- Follow departmental policy and guidelines concerning personal conduct, privacy and the management of sensitive and personal information.
- Seek assistance from National Headquarters (NHQ) and Legal Services when circumstances warrant it (e.g. high complexity and controversial cases).
- Apply the "precautionary principle" (a duty to prevent harm when it is in one's power to do so) and "newspaper test" (if documented in the newspaper, decisions would be judged to be ethical).
- Notify appropriate authorities when it is believed that there may be an imminent threat to any person(s), or criminal activity might have occurred.

2 – Triggers for an Inspection

Purpose:

The purpose of this section is to provide guidance on when an inspection may be launched.

Inspection triggers only include reason to suspect, known past non-compliance and random selection. These triggers are in place to ensure due process and sound reasoning for ESDC to launch an inspection.

Reminder: An inspection can only be conducted in situations where an employer is employing, or has employed, a foreign worker whose work permit corresponds directly to an LMIA applied for and received on or after December 31, 2013.

Authority:

The TFWP operates under the authority of IRPA and IRPR. The authority relevant to the triggers for an inspection is found in S. 209.5 of IRPR.

> **209.5** The inspection powers set out in sections 209.6 to 209.9 may be exercised in the following circumstances:
>
> (*a*) there is reason to suspect that the employer is not complying or has not complied with any of the conditions set out in section 209.2 or 209.3;
>
> (*b*) the employer has not complied with the conditions set out in section 209.2 or 209.3 in the past; or
>
> (*c*) the employer is chosen as part of a random verification of compliance with the conditions set out in sections 209.2 and 209.3.

Triggers:

Reason to Suspect: When ESDC receives intelligence, in any form, about an employer's failure to meet the conditions in S. 209.3 of the IRPR (as laid out on the positive LMIA and annexes), this will be weighed in conjunction with other facts and may constitute "reason to suspect".

In addition to new information, previous LMIA revocations due to an employer providing false, misleading or inaccurate information (common law or under Ministerial Instructions) may be considered in determining if there is reason to suspect non-compliance.

Please see the **TFWP Intelligence Directive** for details on how to handle new information.

Known non-compliance: An employer that failed to comply with Program requirements under s. 209.2 and 209.3 of the IRPR in the past may be subjected to an inspection to verify compliance with Program conditions. The inspection timeframe will be determined by staff based on the criteria that led to the ban (e.g. severity of the infraction) and the conditions set out under S. 209.3 of the IRPR.

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Random selection: Verification of employer compliance based on a truly random selection model. Representative samples will be generated by an Employer Selection Model (ESM), which considers several criteria, matches LMIAs to work permits and sorts employers by region, sector and occupational type.

s.16(1)
s.16(2)

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3 – Scope of Inspections (Core Conditions)

Purpose:

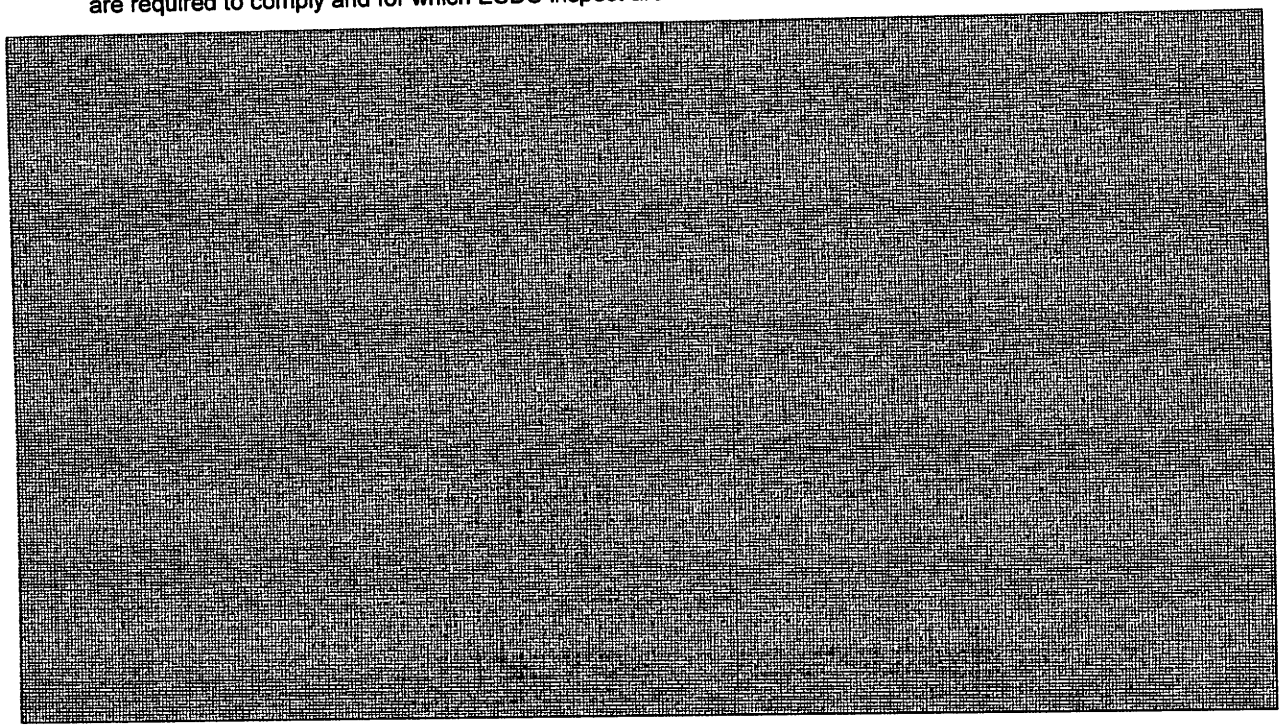
To support a consistent application of decision-making regarding the scope of an inspection, including the selection of specific conditions to review and when to expand the scope of the inspection.

Guiding Principles:

- **Timeliness/Procedural Fairness**: An inspection must be completed in a timely manner to remain procedurally fair. Inspections should be completed in 75 day time period. An expansion of scope and timelines must be justified and clearly documented in the Foreign Worker System (FWS).
- **Due Diligence**: Inspections must review an employer's compliance with Program conditions to satisfy the Program's responsibility to maintain integrity and to protect the Canadian labour market, including TFWs.
    - Inspections triggered by allegations/new information must review, at a minimum, the conditions most closely related to the allegation/new information.

Authority:

The TFWP operates under the authority of IRPA and IRPR. The specific conditions with which employers are required to comply and for which ESDC inspect are found in s. 209.3 and 209.4 of the IRPR.



Pages 15 to / à 17
are withheld pursuant to sections
sont retenues en vertu des articles

16(1), 16(2)

of the Access to Information Act
de la Loi sur l'accès à l'information

s.16(1)
s.16(2)

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Full list of conditions

ESDC has the authority to review any of the conditions listed below as part of an employer inspection, when triggered.

209.3(1)(a) During the period of employment:

- Wages, occupation and working conditions: the employer must provide a TFW with employment in the same occupation as that set out in that TFW's offer of employment and with wages and working conditions that are substantially the same as — but not less favourable than — those in the offer.
- There are two applicable genuineness conditions:
  - The employer must be actively engaged in the business in respect of which the offer of employment was made, unless the offer was made for employment as a live-in caregiver; and
  - The employer must comply with the federal and provincial laws that regulate employment, and the recruiting of employees, in the province in which the foreign national works.
- In the case of an employer who employs a TFW as a live-in caregiver, the employer must:
  - Ensure that the TFW resides in a private household and provides, without supervision, care as stipulated in the LMIA letter and annex(es);
  - Provide the TFW with adequate furnished and private accommodations in the household; and
  - Have sufficient financial resources to pay the TFW the wages offered.

Note: Additional policy guidance for inspections for the Live-in Caregiver, Seasonal Agricultural Worker and Agriculture streams are provided separately.

- The employer must make reasonable efforts to provide TFWs with a workplace that is free of abuse, more specifically, free of:
  - physical abuse, including assault and forcible confinement
  - sexual abuse, including sexual contact without consent
  - psychological abuse, including threats and intimidation
  - financial abuse, including fraud and extortion

209.3(1)(b) - During the period of employment, or any other period agreed to by the employer (as specified in the IRPR):

- Employers must ensure that the employment of the foreign national will result in direct job creation or job retention for Canadian citizens or permanent residents, if that was one of the factors that led to the issuance of the LMIA and subsequent work permit.

- Employers must ensure that the employment of the foreign national will result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents, if that was one of the factors that led to the issuance of the LMIA and subsequent work permit.
- Employers must hire or train Canadian citizens or permanent residents, if that was one of the factors that led to the issuance of the work permit.
- Employers must make reasonable efforts to hire or train Canadian citizens or permanent residents, if that was one of the factors that led to the issuance of the LMIA and subsequent work permit.

209.3(1)(c) Document retention and accuracy:

- During the period beginning on the first day of the period of the foreign worker's employment for which the work permit is issued and up to a maximum of six years following that date, the employer must be able to demonstrate that any information that they provided in relation to an LMIA and/or work permit application was accurate, and retain any document that relates to compliance with the imposed conditions.

209.4(1) During an inspection

Employers will also be found non-compliant if they refuse to cooperate during an inspection (S. 209.4 of the IRPR). In particular, employers must:

- Report at any specified time and place to answer questions and provide documents;
- Provide any documents that are required (and in accordance with TFWP authorities to collect documents); and
- Attend any inspection (unless the employer was not notified), give all reasonable assistance to the person conducting the inspection and provide that person with any document or information required.

4 – [redacted]

5 – Consultation and Communication between Parties

To promote administrative and procedural fairness, regular consultation and communication between all parties must take place. In addition to using the positive LMIA and annex(es) as the foundations for verifying employer compliance with conditions, inspectors must also ensure communication with Program Officers in order to verify that all employer information is up-to-date and that there have been no unrecorded agreements between the employer and Service Canada to update any LMIA conditions.

Effective communication will also ensure that inspectors review employer compliance with the appropriate TFWP policies, since policies on items such as wages, working conditions, among others, change from time to time.

6 – Employer Conditions

This section relates to conditions that may be assessed when verifying whether the employer is meeting conditions laid out in sub-section 209.3(1) of the IRPR.

The policies for verifying compliance with these conditions are provided below. However, to ensure that employers are being held accountable for upholding the policies that were in place when they applied for their LMIA, effective communication with Program Officers is encouraged.

6.1 – Wages

Purpose:

To support the administration of the TFWP and contribute to the consistent application of practices relating to the verification that wages paid to foreign workers are substantially the same as – but not less favourable than – those set out in the offer of employment and approved in the positive LMIA letter and annexes.

Assessing wages enables ESDC to promote the fair treatment of TFWs (i.e. that they receive wages as agreed to) and mitigate potential undermining of the Canadian labour market (e.g. had the employer advertised fair wages in the first place, they may have been able to hire a Canadian or permanent resident).

Authority:

The TFWP operates under the authority of IRPA and IRPR. The authority relevant to verifying wages during the period of employment for which a work permit has been issued is found in s.209.3(1)*(a)*(iv).

TFWP Policy:

Definition and Application

For TFWP purposes, "substantially the same – but not less favourable – wages" means that:

- Wages paid cannot be less than those outlined in the LMIA letter and annexes.
- Wages paid cannot be substantially higher than those provided in the LMIA letter and annexes, as the employer may have been able to hire a Canadian or permanent resident if higher wages had been advertised in the first place.

  For TFWP purposes, "substantially higher" generally means higher than the rate of inflation or 2% per year, whichever is higher. According to the TFWP wage policy, employers are asked to revisit the wages being offered to foreign workers at least once per year to promote ongoing alignment with the prevailing wage rate. An increase resulting from this review that is greater than the rate of inflation or 2% is also acceptable.

- The initial job posting should also be considered when verifying whether the wage being paid is acceptable. If the employer was transparent in declaring that performance-based pay incentives, or pay increments, would be part of the compensation package, and all employees are treated equally, a wage increase higher than inflation or 2% is acceptable.

  In the event that a wage higher than the rate of inflation or 2% is paid and opportunities for such increases were not initially advertised, the employer may be deemed compliant if it is clear that they were not trying to undermine the system. To be found compliant under these circumstances, employers must:

  - demonstrate that they tried to contact Service Canada in writing (e.g. mailing date); and
  - show that it would be a normal business decision to provide higher wages under the circumstances (e.g. all employees treated equally, raise is after the first year of employment, etc.).

Note: TFWs can be paid in Canadian currency, or in another legal currency, so long as the exchange rate is the same as the prevailing wage on the day the LMIA application was received AND the employer has verified with the TFW that it is acceptable to pay the workers in another currency. The currency must be noted in the LMIA application.

Wages paid in another currency must be verified at the time of the LMIA application to ensure that it meets the wage requirement. This information will be on file in the FWS.

Justification:

Justifications that may apply if an employer has provided wages that are not in line with what was offered can be found in S. 203(1.1) of the IRPR.

Justifications that may most commonly apply when an employer fails to comply with wages are:

a. Change in a federal, provincial law – e.g. increase in minimum wage;
b. Change to a collective agreement – e.g. increase or decrease in salary;
c. Changes in economic conditions, impacting all employees equally – e.g. economic downturn causing lay-offs;
d. An error in interpretation made in good faith (COMPENSATION REQUIRED) – e.g. overtime not paid;
e. Unintentional accounting or administrative error (COMPENSATION REQUIRED) – e.g. wrong compensation value entered into payroll system;
f. Circumstances similar to a-e (MAY REQUIRE COMPENSATION IF SIMILAR TO D OR E); or
g. *Force majeure* – e.g. fire or flood destroys place of business.

Compensation

Compensation may not be possible in the event of a dramatic change in economic conditions that directly impacts the business, in the event of *force majeure* or if the TFW has already gone home.

Efforts to compensate

Where justifications d or e above have been accepted, the employer must be able to demonstrate that they made sufficient efforts to provide compensation. If the employer cannot demonstrate sufficient efforts, they will be deemed non-compliant.

6.2 – Occupation

Purpose:

To support the administration of the TFWP and contribute to the consistent application of practices needed to ensure that the TFW occupation is the same as identified in the positive LMIA letter and annexes.

Assessing the occupation enables ESDC staff to promote the fair treatment of TFWs (i.e. to verify whether they have been provided with employment in the same occupation as that set out in the positive LMIA and annex(es)) and mitigate undermining of the Canadian labour market (e.g. an employer advertised an occupation with known labour shortages with the intent of hiring a TFW to perform other duties).

Authority:

The TFWP operates under the authority of IRPA and IRPR. The relevant authority to verify, during the period of employment for which the work permit has been issued, whether a TFW is working in the same occupation as outlined in the job offer is found in s. 209.3(1)*(a)*(iv).

TFWP Policy:

The occupation and duties must fall within the same NOC as those listed on the LMIA and annexes. If the duties are not in the same NOC, the employer is likely to be deemed non-compliant.

Initial Assessment

The initial assessment will include validating that the occupation is within the same NOC code as what is documented in positive LMIA and annexes. For the purposes of assessment, any added or removed duties compared to those originally described on the positive LMIA and associated annexes that result in a change in NOC code would be considered a failure to provide an occupation that is the same as the occupation in the initial offer.

Variance in Duties

Acceptable variations to job duties only include those that are covered by the same NOC, but may not have been explicitly listed in the confirmed LMIA. Any duties that fall outside of the approved NOC are considered as, "not the same."

Promotion or Change of NOC

In cases where the employer has promoted or otherwise changed the TFW's duties, they must receive a new LMIA prior to implementing the change. If a promotion or change in occupation had not been previously approved by ESDC and the TFW is found to be working in an occupation other than what was

stated on the positive LMIA and annex(es), this would constitute non-compliance, regardless of the merits of the change in occupation, unless the employer is able to provide an acceptable justification.

Justification:

Justifications that may be most likely to support a contravention of this condition are highlighted in bold:

a. Change in federal, provincial law
b. **Change to a collective agreement** – e.g. change in duties for a particular occupation;
c. **Changes in economic conditions, impacting all employees equally**
d. **An error in interpretation made in good faith** (COMPENSATION REQUIRED) – e.g. fire or flood destroys place of business, TFWs temporarily moved to another location;
e. **Unintentional accounting or administrative error** (COMPENSATION REQUIRED) – e.g. wrong NOC code entered into payroll system;
f. **Circumstances similar to a-e** (MAY REQUIRE COMPENSATION IF SIMILAR TO D OR E); or
g. ***Force majeure*** – e.g. fire or flood destroys place of business, TFWs temporarily moved to another location.

Compensation

If it is determined that the reason the occupation differs from that set out on the positive LMIA and annex(es) is due to circumstances similar to 'd' or 'e', the employer must either provide compensation or, if compensation is not possible, demonstrate sufficient efforts to do so.

The employer must inform ESDC of what compensation has been provided to ALL TFWs who suffered a disadvantage as a result of the employer's error. Compensation may not be possible in the event of a dramatic change in economic conditions that directly impacts the business, in the event of *force majeure*, or if the TFW has already gone home.

Efforts to compensate

Where applicable, the employer must be able to demonstrate that they made sufficient efforts to provide compensation (e.g. cancelled cheques or attempted correspondence with the affected workers). If the employer cannot demonstrate sufficient efforts, they will be deemed non-compliant.

6.3– Working Conditions

Purpose:

To support the administration of the TFWP and contribute to the consistent application of practices needed to ensure that working conditions are substantially the same, but not less favourable, than those set out in the offer of employment and approved in the positive LMIA letter and annexes.

Assessing working conditions enables ESDC staff to promote the fair treatment of TFWs (i.e. to ensure that working conditions are reasonable, as expected and in alignment with Canadian standards. For the

purposes of the TFWP, acceptable standards are set out in the provincial employment standards for the province in which the TFW is working).

Authority:

The TFWP operates under the authority of IRPA and IRPR. The authority relevant to verify, during the period of employment for which the work permit has been issued, that working conditions are substantially the same, but not less favourable than those provided in the job offer, is found in s.209.3(1)*(a)*(iv).

TFWP Policy:

Definition

Working conditions may include those non-wage related remuneration, benefits and entitlements specifically detailed in the positive LMIA and annexes, such as:

- statutory holidays, sick and vacation days;
- hours of work (including overtime);
- transportation costs (where applicable);
- accommodations conditions and costs (where applicable);
- health/medical insurance; and/or
- other non-taxable benefits.

Note: many other working conditions and workplace standards (e.g. obligations around dismissals and rights to file complaints, occupational health and safety regulations and recruitment laws), are governed by provincial and territorial legislation. TFW employers must comply with these laws in order to meet TFWP requirements.

Application

For TFWP purposes, in order to meet this condition, employers must provide TFWs with working conditions as specified in the positive LMIA letter and annexes.

Acceptable Changes

Changes to working conditions identified on the positive LMIA and annexes that are not prescribed by law may be permitted if the employer notifies ESDC prior to making the change and submits a new LMIA request if necessary. For example, a reduction in hours could be justified by a work sharing agreement, a documented illness, or a documented request by the worker for a reduction in hours. In such cases, the employer should submit documentation to substantiate their claims regarding the change (e.g. a copy of the work sharing agreement).

No Substitutions

Substitution of any condition of employment required either by the TFWP or relevant legislation and regulations for another form of compensation will not be permitted. For instance, subject to regional parameters, the substitution of worker transportation costs paid by the employer for free accommodation is not permitted. Comparison of the positive LMIA and annexes against documentation submitted by the employer, and the employer/employee contract, can provide valuable insight as to whether there were any substitutions of the terms of employment. Any such instances of substitution will be considered as non-compliance despite the value of the substitution or employer and employee consent.

Accommodations for Agriculture Workers

What will be assessed:

- proof that housing facilities meet acceptable provincial, territorial or municipal standards, based on the most recent housing inspection report, which could be different than the report used in the LMIA application.
- the state of the housing to ensure that those conditions match the information provided in the LMIA application and/or the report from the provincial, territorial or municipal housing inspector. If the housing conditions do not appear to match those cited in the preliminary housing inspection report, ESDC may ask the employer to secure another, up-to-date housing inspection report.

Note: On-site visits related to agricultural workers will include a verification of working conditions and specifically accommodations. Please see the SAWP or Agricultural Stream inspection policies for more details.

Deductions

If the employer is making deductions that were not outlined on the positive LMIA and annexes, but are acceptable under provincial or territorial legislation, it is up to the employer to demonstrate how these deductions are acceptable under provincial or territorial laws. Note: generally, any deductions should be stipulated on the positive LMIA and annexes.

Justification:

Justifications that are most likely to support a contravention of this condition are:

a. Change in a federal, provincial or territorial law – e.g. changes to employment standards;
b. Change to a collective agreement – e.g. changes to hours of operation of the business;
c. Changes in economic conditions, impacting all employees equally – e.g. economic downturn causing benefits to be temporarily halted;
d. An error in interpretation made in good faith (COMPENSATION REQUIRED) – e.g. having TFW pay for airline ticket then repaying TFW at a later date;
e. Unintentional accounting or administrative error (COMPENSATION REQUIRED)
f. Circumstances similar to a-e (MAY REQUIRE COMPENSATION IF SIMILAR TO D OR E); or
g. *Force majeure* – e.g. fire, natural disasters, ice storms or flood destroys place of business.

Compensation

If it is determined that the reason actual working conditions were substantially the same, but not less favourable than those set out on the positive LMIA and annexes is due to circumstances similar to 'd' or 'e', the employer must either provide compensation or, if compensation is not possible, demonstrate sufficient efforts to do so.

The employer must inform ESDC of what compensation has been provided to ALL TFWs who suffered a disadvantage as a result of the employer's error. Compensation may not be possible in the event of a

dramatic change in economic conditions that directly impacts the business, in the event of *force majeure*, or if the TFW has already gone home.

Efforts to compensate

Where applicable, the employer must be able to demonstrate that they made sufficient efforts to provide compensation (e.g. cancelled cheques or attempted correspondence with the affected workers). If the employer cannot demonstrate sufficient efforts, they will be deemed non-compliant.

6.4– Abuse-free Workplace

Purpose:

The objective of this policy is to support the administration of the TFWP and contribute to the consistent application of practices needed when verifying, through an inspection, whether an employer has made "reasonable efforts to provide a workplace that is free of abuse".

ESDC takes the integrity of the TFWP very seriously and works to protect the rights and safety of all TFWs. The Department also works to ensure that employers use the TFWP as intended and to mitigate negative impacts on the Canadian labour market.

Authority:

TFWP operates under the authority of IRPA and IRPR.

Employers who are issued a positive LMIA must comply with certain conditions set out under s. 209.3 and 209.4 of the IRPR. Section 209.5 authorizes employer inspections when there is reason to suspect non-compliance (e.g. an allegation of abuse), when there is known past non-compliance, or through random selection.

This directive is based, in particular, on the condition stated under S. 209.3(1)*(a)*(v), which requires that the employer, during the period of employment for which the work permit is issued to the foreign national,

"make reasonable efforts to provide a workplace that is free of abuse, within the meaning of paragraph 72.1(7)*(a)*," of the IRPR.

Guidelines:

Definition of Abuse

Paragraph 72.1(7)(*a*) of the IRPR defines abuse as:

(i) physical abuse, including assault and personal confinement;
(ii) sexual abuse, including sexual contact without consent;
(iii) psychological abuse, including threats and intimidation; and
(iv) financial abuse, including fraud and extortion.

In addition to the types of abuse outlined in the IRPR, if ESDC receives information indicating that a TFWP employer or one of their employees (including TFWs) have been accused of committing, or found to have been convicted of the following abuse-related crimes, that employer will be inspected (based on the "reason to suspect"), to determine whether reasonable efforts have been made to provide a workplace free of abuse:

- physical or sexual assault in the workplace;
- an offence causing death or bodily harm to an employee;
- trafficking in persons (or a related offense);
- uttering threats to cause death or bodily harm to an employee;

- harassment in the workplace (including bullying); and/or
- fraud/extortion against an employee (including withholding pay without reason and paying below what was agreed to in the positive LMIA)

Application

For the purposes of this policy, an "employer" is the person or organization:

- Who has applied for and received a positive LMIA on or after December 31, 2013;
- Whose name or business number appears on the positive LMIA; and
- Who, based on that LMIA, employs (or has employed) TFWs.

Where an employer holds sole supervisory authority in the workplace (e.g. small employers or employers of Live-in Caregivers), they are solely responsible for complying with this condition.

However, for larger employers with more complex organizational structures, everyone who is in a supervisory role, and particularly those responsible for supervising TFWs, has a shared responsibility to enable employer compliance with this condition.

If abuse is perpetrated by a third party (defined as a person or organization acting on an employer's behalf such as a recruiter, consultant, subsidiary, etc.), the employer may be found responsible for the actions of that third party. In this case, the employer will be expected to demonstrate efforts to address the third party's abuse.

If an employer is found to be actively responsible for abusing a TFW, the employer will be deemed non-compliant and will be subject to applicable consequences.

The employer must demonstrate positive, concrete steps taken to prevent workplace abuse and, where allegations of abuse are made or an actual incident has occurred, must take reasonable steps to respond and prevent any reoccurrence.

Employer Efforts

The employer must meet three conditions in order to demonstrate reasonable efforts:

- An employer has made general efforts to prevent workplace abuse;
- The employer, or anyone in a supervisory role or acting on the employer's behalf, has not actively participated in abuse, including failing to stop abuse of which they had knowledge; and
- Where an allegation or incident of abuse occurred, steps were taken to address it and prevent it from happening again.

To verify whether reasonable efforts have been made, the following three elements will be considered:

A) Efforts to prevent workplace abuse in general;
B) Information suggesting that abuse in the workplace has occurred; and,
C) Efforts to respond to or prevent the reoccurrence of abuse.

Where there is no indication that a specific incident of abuse has occurred, only element A) will be assessed.

Where there is indication that an incident of abuse has taken place, elements A), B) and C) will be assessed.

Failure by the employer to demonstrate compliance in assessments A) or C) will, where applicable, lead to a finding of non-compliance.

Regardless of findings in assessments A) or C), an employer will be deemed non-compliant where a determination is made through assessment B) that abuse has occurred and they are found to be actively responsible for the abuse, including failing to stop the abuse.

A. Efforts to Prevent Workplace Abuse in General

Indicators of general efforts made by an employer to prevent workplace abuse from occurring may include, but are not limited to:

- Development and distribution of policies and procedures that address situations of abuse in the workplace (e.g. what to do if an employee or supervisor is aware of or experiencing abuse);
- Mechanisms to address and resolve workplace abuse, which could include: complaints policies & protocols, dispute resolution mechanisms, an employee representative or contact person, employee counselling, anonymous hotlines, etc.;
- Recent training (within the last two years) provided to employees and supervisors to identify and recognize abuse, and to address it;
- Indication of the employer's commitment to relevant policies and procedures, or indication of lack of commitment to relevant policies;
- Indication that the employer was aware or should have been aware of the risk of abuse relating to particular staff members, or particular situations where workers are or were at risk; and
- Indication that the employer took reasonable steps to ensure that employees with known abusive or violent tendencies do not have direct contact with TFWs.

Not all employers will have the same types of policies and procedures in place to deal with matters of abuse. For example, smaller employers, including employers of Live-in Caregivers, may not have specific policies in place. Regardless, all employers must make efforts to treat employees, including TFWs, in a fair and abuse-free manner and to take steps to provide a work environment that is free of abuse and violence.

In this first assessment A), the employer must provide satisfactory responses to requests made by ESDC in accordance with the Department's inspection authorities. While the onus is on the employer to provide sufficient information to demonstrate compliance, relevant indicators (such as those listed above) would be assessed by taking into account the specific context of different kinds of employers.

B. Information suggesting that abuse in the workplace has occurred

Section 209.3(1)*(a)*(v), requires employers to make reasonable efforts to provide a workplace free of abuse. For TFWP purposes, in order to meet this condition, employers will be asked to demonstrate efforts taken to prevent abuse generally, as well as any measures taken to respond to specific allegations or instances of abuse that have occurred.

If an employer is found to be actively responsible for abusing a TFW, the employer will be deemed non-compliant and will be subject to applicable consequences. The employer will be considered actively responsible in situations where:

- He or she, or a supervisor, or a third party acting on the employer's behalf, has personally abused a TFW;
- There is information to suggest that it is more likely than not that the employer, or a supervisor/third party, has directed, encouraged or supported abuse (including failing to act when they have knowledge of abuse) by another individual;
- There is information to suggest that he or she, or a supervisor/third party, has taken action to protect the abuser, such as discouraging or preventing a report of abuse to authorities, or of suppressing information pertaining to abuse, or of providing false or misleading information to authorities, including ESDC; or,
- There is information to suggest that the employer or a supervisor has knowingly placed another employee who has been convicted of a violent crime or abuse, against an employee, in a position that directly interacts with TFWs.

In this second assessment B), in order to determine whether abuse in the workplace has taken place, ESDC must ensure that all relevant information is taken into consideration and make a determination as to whether it is more likely that abuse occurred, or did not occur (on the balance of probabilities). The outcome of any relevant legal procedure, where available, will be considered. Whereas a criminal conviction requires proof beyond a reasonable doubt and can take considerable time following an initial charge, ESDC may initiate an inspection and find an employer non-compliant following an allegation (no criminal conviction is required). Information to be considered includes:

- ESDC knowledge of a conviction under the *Criminal Code* of an offence related to abuse of an employee as referenced on page 2;
- Details of any relevant allegation or intelligence as it relates to abuse on an employee that ESDC has received or has been made aware of;
- Relevant information, documents or statements gathered from the employer and employees during the course of an inspection;
- Relevant information, documents or statements obtained from relevant provincial or federal authorities in accordance with applicable information-sharing agreements (ISAs); and/or
- Relevant information gathered from public sources (e.g. relevant media reports, including with respect to allegations, criminal charges, convictions or provincial offences).

The employer must provide satisfactory responses to requests made by ESDC in accordance with inspection authorities. Where there is evidence of a possible provincial/territorial offence or criminal behaviour on the part of the employer or other employees, ESDC will notify the relevant authorities in accordance with applicable procedures and directives related to information-sharing.

C. Efforts to Respond to or Prevent the Reoccurrence of Abuse

Reasonable efforts to provide a workplace free of abuse after an incident of abuse, or an allegation of abuse for which the employer will not be considered to be actively responsible, require the employer to demonstrate concrete changes of practice or policy, such as:

- Indication of relevant disciplinary action such as the dismissal of a staff member considered to be a risk to cause future abuse;
- Modification to any of the policies, protocols, training, or mechanisms listed in A, or the creation of new policies, protocols, training or mechanisms, etc.;

- Other organizational changes to improve the awareness, safety or protection of individuals such as additional security measures (e.g. locks, lights, individuals on call, etc.); new reporting factors (e.g. managers performance reviews are based on implementation of new abuse awareness, etc.);
- Indication of commitment to relevant policies and procedures, or lack of commitment to relevant policies, including from interviews with and statements made by the employer, employees and TFWs; and/or
- Full cooperation with the relevant authorities investigating allegations or instances of abuse.

For this third assessment C), the employer must provide satisfactory responses to requests made in accordance with the department's inspection authorities. Where ESDC has determined that abuse has occurred, following assessment B) above, the onus is on the employer to provide sufficient evidence of reasonable efforts to prevent abuse from reoccurring. In addition, where ESDC has determined that there is not sufficient evidence to conclude that abuse has occurred, but that there is sufficient information to cause reasonable concern that abuse may have occurred, the onus is also on the employer to provide sufficient evidence of compliance in this assessment C).

To demonstrate sufficient efforts to respond to actual instances of workplace abuse, employers must be able to explain the specific actions taken. Such actions could include a high-level description of a process that included some or all of the following:

- Assessment of the facts;
- Support measures for the person who made the allegation (e.g. receipts for medical care, counselling, etc.);
- Referral to relevant federal or provincial authorities, where appropriate (e.g. police);
- Result and action taken (e.g. firing the perpetrating employee or ensuring they will not have contact with TFWs);
- Employer follow-up with the victim(s); and
- Follow-up on efficacy of any changes made.

The Precautionary Principle

In verifying employer efforts to provide a workplace free of abuse, the Precautionary Principle would be followed. When there is evidence of any risk of serious harm to an individual or the Canadian labour market, ESDC would err on the side of caution. For example, if there is a concern that someone is at serious risk and ESDC is unsure whether information is true or whether or not to disclose information to another government department or agency, then ESDC would disclose the information to the relevant department or law enforcement agency, following applicable procedures for sharing information.

Justification:

In accordance with the IRPR, if, during an inspection, an employer fails to demonstrate compliance or refuses to cooperate with requests for documents to verify compliance for the purposes of an inspection (S. 209), the employer must be given the opportunity to provide justification and, if applicable, compensation (e.g. in the case of financial abuse). If an acceptable justification and/or compensation is not provided within the timeframe specified by ESDC, the employer will be informed that they have been deemed non-compliant and subject to applicable consequences.

6.5– Labour Market Conditions

Purpose:

To support the administration of the TFWP and contribute to the consistent application of practices needed when assessing whether an employer has met the labour market conditions in S. 209.3(1)(*b*).

These requirements are designed to ensure that Canadians and permanent residents are given the first chance at available jobs.

Authority:

The TFWP operates under the authority of IRPA and IRPR.

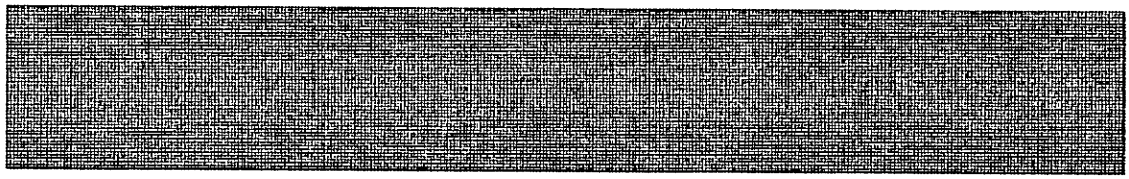
The particular conditions under review are set out under S. 209.3(1)(b) of IRPR and specify that, if one or all of these were factors that led to the issuance of a work permit:

- the employer must ensure that the employment of the foreign national will result in direct job creation or job retention for Canadian citizens or permanent residents;
- the employer must ensure that the employment of the foreign national will result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- the employer must hire or train Canadian citizens or permanent residents; and/or
- the employer must make reasonable efforts to hire or train Canadian citizens or permanent residents.

TFWP Policy:

General Recruitment Efforts/Commitments

General recruitment efforts will be checked in response to specific complaints that employers are not making reasonable efforts to hire and train Canadians and permanent residents, but only if the employer had committed to do so as part of their LMIA application and if this is indicated on the LMIA.



Justification:

Justifications that may be most likely to support a contravention of these conditions are highlighted in bold:

a. a change in federal or provincial law;

b. **a change to the provisions of a collective agreement;**

c. **changes in economic conditions, impacting all employees equally** – e.g. economic downturn causing lay-offs;

d. an error in interpretation made in good faith (COMPENSATION REQUIRED);

e. unintentional accounting or administrative error (COMPENSATION REQUIRED);

f. circumstances similar to a-e (MAY REQUIRE COMPENSATION IF SIMILAR TO D OR E); or

g. ***force majeure*** – e.g. fire or flood destroys business.

6.6– Compliance with Federal/Provincial/Territorial Employment and Recruitment Legislation

Purpose:

To support the administration of the TFWP and contribute to the consistent application of practices needed to verify that the employer is compliant with federal, provincial or territorial employment or recruitment laws.

Verifying that the employer is compliant with relevant legislation enables ESDC to promote the fair treatment of TFWs (i.e. to ensure that the job offer is from an employer that legally exists) and makes the TFWP complementary to existing legislation.

Authority:

The TFWP operates under the authority of IRPA and IRPR. The authority to verify compliance with relevant employment and recruitment laws is found in S. 209.3(1)*(a)*(ii).

TFWP Policy:

The employer must remain compliant with all federal, provincial and territorial laws that regulate employment and recruitment in the province in which the foreign national works. This includes for example, labour law areas dealing with health and safety, unfair dismissal and workplace privacy laws. It also includes recruitment laws that regulate the business of employment agencies and recruiters. More examples are provided below.

Regardless of the triggering event, there are some specific types of documentation for any F/P/T compliance issue that can or should be checked:

- Proof of registration – where required by Provincial or Territorial employment or recruitment legislation for Employers and/or recruiters;
- Workers' compensation clearance letter – declares that the employer is registered with the workers' compensation board and has an account in good standing;
- Other relevant official documentation, including any documentation available directly from provinces by way of information sharing agreements or information available online to the general public.

To meet this condition, employers must not be convicted of any offence, or be found in violation of any federal, provincial or territorial law governing employment or recruitment from the date the worker arrives. In most cases, information about violations and convictions is readily available online (e.g. from federal or provincial websites); however, prior to recommending a finding of non-compliance, contact should always be made with an F/P/T representative to confirm the employer's record. As a general rule, if the P/T representative does not respond or there is no confirmation that the employer has been convicted, the employer may not be found non-compliant against this condition.

Justification:

Justifications that may apply when the employer is deemed to not be compliant with relevant federal, provincial or territorial employment and recruitment laws can be found in S. 203(1.1) of the IRPR.

Justifications that may be most likely to support a contravention of these conditions are highlighted in bold:

a. **A change in federal, provincial law** – e.g. the sector or industry has been regulated in such a way that the employer may be found to not be actively engaged in the same type of business
b. A change to the provisions of a collective agreement
c. Changes in economic conditions, impacting all employees
d. An error in interpretation made in good faith (COMPENSATION REQUIRED)
e. Unintentional accounting or administrative error (COMPENSATION REQUIRED)
f. Circumstances similar to a-e (MAY REQUIRE COMPENSATION IF SIMILAR TO D OR E)
g. *Force majeure*

Examples Federal and Provincial/Territorial Laws

Including, but not limited to;

- *Immigration and Refugee Protection Act (IRPA)*
  http://laws.justice.gc.ca/eng/acts/i-2.5/
- *Immigration and Refugee Protection Regulations (IRP)*
  http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/index.html
- *Canada Labour Code*
  http://laws-lois.justice.gc.ca/eng/acts/L-2/
- Alberta: *Fair Trading Act*
  www.qp.alberta.ca/1266.cfm?page=2012_045.cfm&leg_type=Regs&isbncln=9780779763900
- Alberta: *Occupational Health and Safety Act*
  http://www.qp.alberta.ca/documents/Acts/O02.pdf
- British Columbia *Employment Standards Act*
  http://www.labour.gov.bc.ca/esb/esaguide/
- British Columbia *Workers Compensation Act*
  http://www.bclaws.ca/Recon/document/ID/freeside/296_97_00
- Manitoba: *Worker Recruitment and Protection Act (WRAPA)*
  web2.gov.mb.ca/laws/statutes/2008/c02308e.php
- Manitoba: *Workplace Safety and Health Act*
  http://web2.gov.mb.ca/laws/statutes/ccsm/w210e.php
- New Brunswick: Employment Standards Act

http://laws.gnb.ca/en/ShowTdm/cs/E-7.2//

- Nova Scotia: *Consultation on Temporary Foreign Workers*
  www.gov.ns.ca/lwd/employmentrights/ConsultationonTemporaryForeignWorkers.asp
- Nova Scotia: *Guide to the Labour Standards Code of Nova Scotia*
  https://www.novascotia.ca/lae/employmentrights/docs/labourstandardscodeguide.pdf
- Ontario: *Employment Protection for Foreign Nationals Act*
  www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_09e32_e.htm
- Ontario: *Employment Standards Act*
  http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_09e32_e.htm#BK4
- Ontario: *Occupational Health and Safety Act*
  http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90o01_e.htm
- Quebec: The province pre-published a regulation "Règlement sur les consultants en immigration" that would require, any representative filing an application to its provincial immigration program, to fulfil certain criteria (including having an office in Quebec) and be registered with the government
  www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/I_0_2/I0_2.html
- Saskatchewan's Foreign Worker Recruitment and Immigration Services Act
  http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/F18-1.pdf
- Saskatchewan: *Labour Standards Act*
  http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/L1.pdf
- Any other federal and provincial/territorial legislation related to employment standards or occupational health and safety as deemed applicable.

6.7 – Actively Engaged

Purpose:

To support the administration of the TFWP and contribute to the consistent application of practices needed to verify that the employer is actively engaged in the business in respect for which the offer of employment was made and provide a good or service related to the job offer, unless the offer was made for employment as a live-in caregiver.

Verifying that the employer is "actively engaged" enables ESDC to promote the fair treatment of TFWs (i.e. to ensure that the job offer is from an employer that legally exists).

Authority:

The TFWP operates under the authority of IRPA and IRPR. The authority relevant to verifying if the employer is actively engaged in the business in which the job offer is being made is found in S. 209.3 (1)*(a)*(i) of IRPR.

TFWP Policy:

To assess whether the employer of record is actively engaged in the business in which the job offer was made, ESDC staff will request relevant documentation, including a Canada Revenue Agency Business number, business licence or permit and the employer's relevant LMIA letter(s). TFWP policy also requires that the employer provide one of the following documents:

- An attestation by a lawyer, notary public or chartered accountant who are members in good standing within their respective professional bodies;
- An up-to-date commercial lease agreement; or
- A formal letter from a legal business confirming the existence of a contract for a good and/or a service being provided.

Additional information available to the public may also be used to make a determination on an employer's active engagement in business which has made the job offer to the TFW. Information sources include:

- Internet searches (e.g. Google, Better Business Bureau, Industry Canada, Canada 411)
- Provincial websites
- Employer websites
- Job Bank advertisements

Justification:

Justifications that may apply when the employer is deemed to not be actively engaged in the business in respect for which the offer of employment was made can be found in S. 203(1.1) of the IRPR.

Justifications that may be most likely to support a contravention of these conditions are highlighted in bold:

a. **a change in federal, provincial law** – e.g. the sector or industry has been regulated in such a way that the employer may be found to not be actively engaged in the same type of business;

b. a change to the provisions of a collective agreement;

c. **Changes in economic conditions, impacting all employees equally**
d. An error in interpretation made in good faith (COMPENSATION REQUIRED);
e. Unintentional accounting or administrative error (COMPENSATION REQUIRED);
f. Circumstances similar to a-e (MAY REQUIRE COMPENSATION IF SIMILAR TO D OR E); or
g. ***Force majeure*** – e.g. fire or flood destroys place of business.

6.8– Accuracy of Information

Purpose:

To support the administration of the TFWP and contribute to the consistent application of practices needed to assess the accuracy of information set out in the positive LMIA letter and annexes and to identify instances where the employer has provided materially false or misleading information under S. 203(1) and (2.1) of IRPR.

Authority:

The TFWP operates under the authority of IRPA and IRPR. The authority relevant to the accuracy of information provided is found in S. 209.3(1)(*c)*(i) of IRPR.

209.3(1) an employer who has made an offer of employment to a foreign national referred to in subparagraph 200(1)(c)(iii) must comply with the following conditions:

(c) during a period of six years beginning on the first day of the period of employment for which the work permit is issued to the foreign national, the employer must
(i) be able to demonstrate that any information they provided under S. 203(1) and (2.1) was accurate.

TFWP Policy:

Definition

Accuracy refers to the correctness of the information submitted in the LMIA application and/or contained in the positive LMIA letter and annexes, verifiable through information provided by the employer or from a third party. This is to ensure that the employer has not deliberately provided untrue statements on any part of the LMIA application.

Accuracy of information applies to all sections of the positive LMIA letter and annexes, as well as to all sections of the LMIA application. This includes all information provided or declarations made on or prior to receipt of the LMIA application.

As per S. 209.4(1)(*c)*, employers are also expected to, "give all reasonable assistance to the person conducting that inspection and provide that person with any document or information that the person requires." For TFWP purposes, "reasonable assistance" includes providing accurate information during any part of an inspection.

Requirements

All Information provided and attestations made on the LMIA application must be true and accurate. If an employer wishes to change any of the conditions of their LMIA, and still remain compliant, should contact Service Canada prior to making any changes. Employers that cannot demonstrate that they have provided accurate information on any section of the LMIA application will be deemed non-compliant.

Note that this is a verification of the accuracy of information provided on the LMIA application by the employer and not a re-assessment of the LMIA. As part of an inspection, only new information should be considered and compared against the information initially provided by the employer as part of the LMIA application. Should discrepancies be found, and if there is reason to believe that false or inaccurate information was provided intentionally, the employer may be found non-compliant.

Generally, inspections will involve an assessment of whether the employer is meeting one or more of the conditions found in S. 209.3(1) *(a) and (b)* of the IRPR. However, in line with a number of Program requirements announced on June 20, 2014 and before, where links to specific conditions in these sections are unclear, ESDC staff may choose to verify the accuracy of information provided as part of the LMIA application, including information pertaining to the following issues:

- Information pertaining to previous revocations;
- Information on recruitment efforts up to the time the LMIA is issued;
- Wage range;
- Language requirements; and
- Education/certification/experience requirements.

Further policy guidance is provided below:

Previous Revocations

Employers are asked to answer specific questions on the LMIA application relating to LMIA revocation history. In the event that an employer is found to have provided inaccurate information on this or any other section of the LMIA application and they received a positive LMIA, they will be deemed non-compliant.

Recruitment Efforts – up to the time the positive LMIA is issued

In order to demonstrate that they have fulfilled the commitment made on the LMIA to continue making advertising efforts from the time the LMIA application was submitted until the date the LMIA is issued (including the Job Bank or equivalent), employers must retain proof of those advertising efforts for a period of six years and, upon request, provide any relevant information to ESDC staff. If employers cannot demonstrate that they have met these recruitment requirements, they will be deemed non-compliant.

Wage Range

In order to help validate the wage being offered, employers will be asked to provide the range of wages offered in their workforce for the same occupation, in the same region. The information is used in LMIA processing to help assess whether the wage being offered is reasonable. If it is found that an employer deliberately provided inaccurate information concerning the wage range, they will be deemed non-compliant.

Information provided regarding the wage range will only be verified when ESDC receives new information that suggests that the employer provided false or misleading information. The validity of the new information is to be verified and compared to the information initially submitted as part of the LMIA application in order to develop a recommendation.

Language Requirements

On their LMIA application, employers are asked to indicate the language requirements stated in the offer of employment. Generally, unless the employer can provide a strong rationale that another language is a bona fide employment requirement, all workers must have the ability to communicate orally in English or French. In situations where it is found that the employer may have lied about the language requirement, where the language proficiency level results in an unsafe working environment, or where the employer has selected English or French without genuine intent, consultation is required with the Program region to determine whether a sanction should be considered.

Education/Certification/Experience Requirements

If the employer lied on their LMIA application about education, certification or experience requirements to intentionally limit the number of applications they would receive or to otherwise favour foreign workers, they may be found non-compliant, subject to consultation with the Program region.

Documentation

A comprehensive list of documentation used to substantiate the accuracy of the information is provided in Annex A.

NOTE: Documentation requests will depend on the particular employer, program stream etc., based on the information provided in the LMIA.

Assessing Discrepancies

Employers must demonstrate that any information provided under S. 203 (1) and (2.1), or during an inspection, was accurate and must make reasonable efforts to comply with the condition. This means that the employer must be able to demonstrate that they have taken positive, concrete steps to prevent discrepancies or inaccuracies and, if inaccuracies were present, to notify Service Canada immediately.

When information submitted by the employer demonstrates that the information provided in the context of an LMIA application was inaccurate, ESDC will check the FWS to see if the employer has been authorized to change any of the conditions in the positive LMIA letter and annexes.

Making a Decision on Employer Compliance

Where it is determined that an employer has provided false, inaccurate or misleading information on the LMIA application, knowingly omitted information, or knowingly provided false or misleading information during an inspection, ESDC will find that the employer did not make reasonable efforts to comply with Program requirements.

If the employer refuses to make reasonable efforts to cooperate with requests for information (e.g. refuses to answer questions, refuses to provide documents, or refuses to report at specified times and places as per S. 209.4), ESDC will deem them non-compliant.

Justification:

As per S. 209.3(4) of the IRPR, LMIA inaccuracies will only be justified if the employer has made reasonable efforts to provide accurate information. For TFWP purposes, an employer will be considered to have made reasonable efforts if they:

i. Can demonstrate that any inaccuracy in the LMIA letter or annexes is the result of an error made in good faith AND can demonstrate that any corrective measures necessary to achieve accuracy have been taken.

If it is found that any information provided was inaccurate and the employer cannot justify the inaccuracy, the employer will be deemed non-compliant and added to the TFWP ineligibility list (i.e. banned from using the TFWP for 2 years).

6.9– Document Retention

Purpose:

To support the administration of the TFWP and contribute to the consistent application of practices needed to verify that employers retain relevant documents, which ESDC is authorized to request, in order to verify the employer's compliance, with the terms and conditions set out in their positive LMIA letter and annexes.

Authority:

The authority relevant to retaining documents that relate to compliance with conditions is found in S. 209.3(1)*(c)*(ii) of IRPR.

TFWP Policy:

The compliance regulations enable ESDC to compel employers to produce documents for the purpose of verifying compliance. Employers are required to retain all documents to substantiate the accuracy of information provided on the LMIA application and to demonstrate their compliance with the conditions set out in S. 209.3(1)*(a)and (b)*of the IRPR and reproduced in the LMIA letter and annexes, from the first day of employment of the foreign worker to six years thereafter.

Note: Employers in certain TFWP streams will be required to retain documents (e.g. proof of airfare) from before the work permit has been issued. ESDC will encourage employers to retain any document that will help demonstrate compliance with conditions listed in S. 209.3(1) of the IRPR.

Documentation to verify compliance

Depending on the Program stream and conditions that are set out in the LMIA letter and annexes, employers must retain appropriate records for a period of six years, some or all of which may be required to be submitted to ESDC during an inspection. A comprehensive list of documentation can be found in Annex A.

Making a Decision on Employer Compliance

Where it is determined that an employer has not retained appropriate records, ESDC must provide that employer with the opportunity to provide an acceptable justification.

Justification:

As per S. 209.3(4) of the IRPR, failure to retain documents will only be justified if the employer can demonstrate reasonable efforts to do so. For TFWP purposes, an employer will be considered to have made reasonable efforts only if they:

i. Can demonstrate that failure to produce/retain documents is the direct result of an error made in good faith, or
ii. Can demonstrate that the documents are not available due to circumstances beyond their control (e.g. *force majeure*, such as the documents being destroyed by a fire, flood, etc.)

7 – Preliminary Findings

If, on the balance of probabilities, it is determined that an employer has not complied with TFWP conditions, ESDC must inform the employer of the preliminary finding and provide the employer with an opportunity to justify the non-compliance.

Note: If, upon inspection, it is determined that an employer has a satisfactory record, the file can be closed and the employer will be informed of the result.

7.3– Justification

As per the IRPR, employers found non-compliant must be given the opportunity to provide a justification. For non-compliance with conditions set out in S. 209.3(1) (a) and (b), possible justifications include:

a. a change in federal or provincial law;

b. a change to the provisions of a collective agreement;

c. the implementation of measures by the employer in response to a dramatic change in economic conditions that directly affected the business of the employer, provided that the measures were not directed disproportionately at foreign nationals employed by the employer; (i.e. in an economic downturn);

d. an error in interpretation of IRPR made in good faith by the employer with respect to its obligations to a foreign national, if the employer subsequently provided compensation - or if it was not possible to provide compensation made sufficient efforts to do so - to all foreign nationals who suffered a disadvantage as a result of the error;

e. an unintentional accounting or administrative error made by the employer, if the employer subsequently provided compensation - or if it was not possible to provide compensation made sufficient efforts to do so - to all foreign nationals who suffered a disadvantage as a result of the error;

f. circumstances similar to those set out in paragraphs (*a*) to (*e*); or

g. *force majeure* (unforeseen circumstances that have a dramatic impact on the business).

Non-compliance with conditions set out in S. 209.3(1)(c) may only be justified if the employer made all reasonable efforts to comply with the condition.

Non-compliance with conditions set out in S. 209.4 may only be justified if the employer:

- Made all reasonable efforts to comply with the condition, or
- Can demonstrate that the incident(s) of non-compliance resulted from anything done or omitted to be done in good faith.

Interpretation

Balance of probabilities: A civil law standard which is met if something is more likely to be true than not to be true. For decision-making, an employer can be deemed non-compliant if (an) incident(s) of non-compliance is more likely to have occurred than not to have occurred.

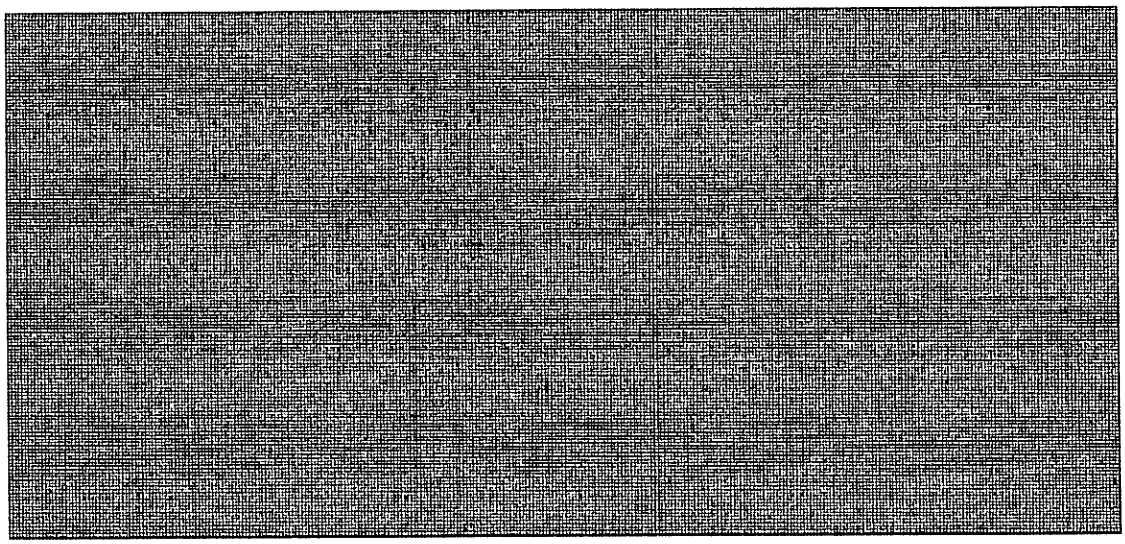
Error in interpretation made in good faith: For an error in interpretation to be considered to be in good faith, the employer must first demonstrate that they interpreted the IRPR (i.e. ignorance is not a

justification). To demonstrate that the error was made "in good faith", the employer must provide a sound explanation and be otherwise cooperative for the duration of the inspection.

Unintentional accounting or administrative error: To demonstrate that an error was unintentional and resulting from accounting or administrative actions, the employer must be able to demonstrate suitable efforts to correct the error. In addition, the employer must be able to demonstrate that there has been no pattern of similar errors.

Process

If ESDC determines that the employer has provided a sound justification, the file can be closed with a satisfactory finding unless justifications (d) or (e) are provided. See "Compensation", below.



8 – Making the Final Decision

Purpose:

To support the administration of the TFWP and contribute to the consistent application of practices relating to findings of non-compliance.

An employer failing to satisfy any of the conditions in S.section 209.3(1)*(a)(b)(c)* and 209.4 of the IRPR will, if that failure is not justified, be notified of a finding of non-compliance with the TFWP and have their name and address added to a public list, posted on the CIC website.

Authority:

The TFWP operates under the authority of IRPA and IRPR. The authority relevant to non-compliance is found in S. 209.91 (2) and (3).

Description:

Following an inspection whereby ESDC confirms that, on the balance of probabilities, an employer has not complied with Program requirements and where the employer cannot justify the instance of non-compliance or has not made a genuine effort to compensate TFWs that were affected, a finding of non-compliance will be rendered.

Employers found non-compliant with the conditions of their LMIA and annexes (i.e. the conditions in S. 209.3 and 209.4 of the IRPR), and that cannot provide a justification, will be notified. The employer's name, address and the date on which the determination was made will be published on the CIC TFWP Employer List. Any employer found non-compliant will be banned from using the TFWP for a period of two years.

Annex A – Documents that may be used to verify employer compliance

Employers must cooperate and provide documents as requested in order to demonstrate compliance. Information must always be collected following departmental information collection authorities and privacy laws. In some cases, certain information provided by the employer will need to be redacted (e.g. Social Insurance Numbers or other information that is not relevant to an inspection).

Examples of documents employers may be asked to provide to demonstrate compliance include:

- **The business license or permit, T2 Schedule 125 Income Statement Information and T2 Schedule 100 Balance Sheet Information, commercial lease agreement, etc.** - To demonstrate the genuineness of the job offer for foreign workers. In addition to these documents, a T4 Summary of Remuneration paid may be used to support permanent resident applications.
- **Provincial/territorial employer and recruiter registration certificate/license** (where applicable). - To demonstrate compliance with federal/provincial/territorial employment and recruitment legislation.
- **Job Bank advertisement / National Job Bank postings, other advertising processes (including internal processes), etc.** - To demonstrate recruitment and advertisement efforts.
- **Anti-abuse policies / codes of employee conduct / guidelines provided to staff / Protection or support protocols to staff / Training / Steps taken to resolve complaints of abuse, etc.**
- **Anti-harassment policies / Protocols, etc.** - Evidence that the employer has made reasonable efforts to provide a workplace free of abuse. In assessing this, all available information will be weighed.
- **Payroll records** - To ensure the appropriate prevailing wage and overtime are being paid; to make sure deductions are being made (Canada Pension Plan, Employment Insurance, Income Tax); and explain any non-standard deductions.
- **Cancelled cheques, money orders or bank statements** – To determine whether employers have provided TFWs with wages, working conditions, or appropriate compensation.
- **Time sheets** - To ensure that workers are working the number of hours set out in their offer of employment. In most cases this is usually defined as 30 or more hours per week.
- **A job description** - To ensure foreign workers are working in approved occupations and under the same labour standards as their Canadian counterparts.
- **Copy of the foreign worker's work permit** - To ensure the information on the work permit issued by CIC accurately reflects the information on the LMIA letter and annexes.
- **Registration with provincial/territorial workplace safety/Workers' compensation clearance letter (if applicable)** - To ensure that the employer has registered for workplace safety insurance and is in good standing to ensure that workers are covered in case of injury.

Employers employing foreign workers under the Stream for Lower-skilled Occupation NOC [skill level C and D] or under the SAWP, the Agricultural Stream or the LCP may also be required to provide:

- **Transportation cost** - Proof the employer has paid the worker's transportation costs from his/her current place of residence to the location of work in Canada, and proof the employer has or will pay the return transportation costs to the country of permanent residence. Documentation provided as proof of payment should not include financial account numbers (e.g. bank account information should be redacted when submitting a cancelled check).

- **Travel itinerary/invoices** - To determine if an employer provided round-trip transportation costs for foreign workers under their employment.
- **Accommodation information** - Where the employer is providing accommodation, a copy of the rental agreement.
- **Private health insurance coverage (if applicable)** - Proof the employer paid for private health insurance until the foreign worker was eligible for provincial/territorial health insurance coverage. The documentation provided as proof of payment should not include financial account numbers.
- **Employment contract** - While ESDC has no authority to enforce the terms and conditions of the employment contract, it is a program requirement that one be in place and signed by both the employer and the foreign worker. Employers may be required to submit a copy of the jointly-signed contract during an inspection to demonstrate compliance with this program requirement.

Note: this is not an exhaustive list; employers should keep a record of all documentation in order to demonstrate compliance with Program requirements.

Annex B – Supplemental Policy for the Live-In Caregiver Program (In-home Caregivers)

Note: The Live-In Caregiver Program as originally structured was eliminated on November 30, 2014. However, there are still Live-In Caregivers working in Canada and these employers are still subject to the original requirements.

Employers who employed a Live-In Caregiver between the December 31, 2013 and November 30, 2014 are eligible for inspection.

LIVE-IN CAREGIVER PROGRAM INSPECTION POLICY

1. Purpose:

This annex provides additional guidance and interpretation on inspection authorities under S.209 of the IRPR as they apply to the employment of live-in caregivers under the Live-In Caregiver Program (LCP).

This annex should be used in conjunction with Section 6 – Employer Conditions for further information. This annex includes only variances to inspections of employers under LCP; additional elements should be assessed according to the guidance provided in Section 6 – Employer Conditions.

Ultimately, the purpose of an LCP inspection is not to make judgements about a household's private decisions regarding care but to assess whether the employer has complied with the conditions set out on the positive LMIA and annexes relating to the foreign national's position.

2. Authority:

The TFWP operates under the authority of IRPA and IRPR. IRPR S.209.3(1)*(a)*(iii) identifies additional inspection criteria that apply only to LCP employers:

> The employer, in the case of an employer who employs a foreign national as a live-in caregiver, must:
>
> (A) ensure that the foreign national resides in a private household in Canada and provides child care, senior home support care or care of a disabled person in that household without supervision,
>
> (B) provide the foreign national with adequate furnished and private accommodations in the household, and
>
> (C) have sufficient financial resources to pay the foreign national the wages that were offered to the foreign national.

IRPR S.209.9 sets out how an inspector may enter a private dwelling house for the purpose of an inspection:

> 209.9(1) If any of the circumstances set out in section 209.5 exists, the Minister of Employment and Social Development may, for the purpose of verifying compliance with the conditions set out in section 209.3, enter and inspect any premises or place in which a foreign national referred to in that section performs work and any premises or place that the employer has provided to the foreign national as accommodations.

...(5) In the case of a dwelling-house, the Minister of Employment and Social Development may enter it without the occupant's consent only under the authority of a warrant issued under subsection

(6) On ex parte application, a justice of the peace may issue a warrant authorizing an officer who is named in it or the Minister of Employment and Social Development, as the case may be, to enter a dwelling-house, subject to any conditions specified in the warrant, if the justice of the peace is satisfied by information on oath that

(a) there are reasonable grounds to believe that the dwelling-house is a premises or place referred to in subsection (1);

(b) entry into the dwelling-house is necessary to verify compliance with the conditions set out in section 209.2; and

(c) entry was refused by the occupant or there are reasonable grounds to believe that entry will be refused or that consent to entry cannot be obtained from the occupant.

As with all inspections, inspections of the employment of live-in caregivers must be triggered. Refer to Section 2 – Triggers for an Employer Inspection.

3. Definitions:

Live-In Caregiver Program (LCP) – A stream of the TFWP~~)~~ that allows private individuals / households to hire a foreign caregiver to provide care for children, seniors or persons with disabilities. Live-in caregivers must work full-time (i.e. a minimum of 30 hours/week) and live and work without supervision in the private household where the care is being provided. The LCP was eliminated on November 30, 2014.

Live-in caregiver –*The* IRPA defines a live-in caregiver as: "a person who resides in and provides child care, senior home support care and care of the disabled without supervision in the private household in Canada where the person being cared for resides.". For more information on the job duties of live-in caregivers, consult the NOC codes 6474 – Babysitters, nannies and parents helpers and 6471 – Visiting housekeepers. Note that in all cases, the caregiver must reside in the private household where care is provided.

Private accommodation – Living and sleeping quarters provided to a live-in caregiver that are not generally accessible to other residents/persons in the household. Specific accommodations standards have been created under the LCP (see LCP Bedroom Description http://www.servicecanada.gc.ca/eforms/forms/esdc-emp5579(2013-09-001)e.pdf).

4. LCP Inspection Variances

As with other employer inspections, the primary document for the purpose of LCP inspections is the positive LMIA and annexes.

4.1 Timelines for Requests for Information

Although employers must obtain a Canada Revenue Agency (CRA) business number to apply to the LCP, these employers may have limited knowledge of standard business procedures. LCP employers

may also be faced with competing work and family demands on their time. Therefore reasonable timelines should be considered for these employers.

4.2 Interviews

To ensure that the employer is meeting the LCP-specific conditions, interviews should be conducted as a matter of course, wherever possible, with the employer, the foreign national and the recipient of care (if different from employer).

In the case of interviews with minors (i.e. individuals who are less than 18 years of age), due consideration should be given to the reliability of information obtained during an interview, as well as parents' wishes to be present during an interview and/or parents' consent to interview a minor.

Where a Power of Attorney is in effect (e.g. senior home support care, care of persons with disabilities), due consideration should be given to the competence of the recipient of care to participate in an interview.

4.3 Recruitment and Advertising

LCP recruitment and advertising standards require that job advertisements must be posted on Job Bank (or its equivalent where applicable) for a minimum of 14 days during the 3-month period prior to the employer applying for an LMIA. Other means of recruitment and advertisement are encouraged but not required. There is **no requirement** for LCP employers to conduct on-going recruitment and advertising efforts (e.g. until the LMIA is issued). In addition, there is no requirement for employers to target under-represented groups (e.g. Aboriginal persons, persons with disabilities, visible minorities, women) through recruitment and advertising efforts, although they are encouraged to do so.

4.4 Wages, Occupation, Working Conditions

4.4.1 Wages

Employers must always honour the wage commitments provided in the positive LMIA and annexes.

Under LCP, wages to be paid to the foreign national are calculated by ESDC and posted online (see http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/caregiver/index.shtml under Tab 3 - Wages, Occupation and Working Conditions for more information on current LCP prevailing wages).

LCP employers are required to periodically review and adjust the foreign live-in caregiver's prevailing wage, as recorded in the positive LMIA and annexes, to ensure it meets or exceeds at all times the posted LCP prevailing wage. Generally, LCP prevailing wages are updated annually with new rates coming into effect on January 1, except where provincial minimum wage increases follow a different schedule.

4.4.2 Sufficient financial resources

As described above in Section 2 – Authority, IRPR S.209(1) creates a specific requirement that employers of live-in caregivers to have sufficient financial resources to pay the wages offered to the

foreign live-in caregiver, as recorded on the positive LMIA and annexes. Sufficient financial resources" is defined within LCP by using a Financial Ability Calculator (see http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/caregiver/calculator.shtml).For the purpose of an inspection, the relevant period begins from the time that employer submitted an LMIA application to the time when he ceased to employ the live-in caregiver.

4.4.3 Occupation

To meet the regulatory requirement of the LCP, the live-in caregiver's main duties must involve providing full-time care to an eligible, designated individual or individuals (i.e. child, senior citizen, person with a disability). For administrative reasons, all live-in caregivers are coded as NOC 6474 – Babysitters, Nannies and Parents Helpers; although this NOC code only describes childcare duties, it is understood that for LCP purposes, it also includes duties related to senior home support care and care for persons with disabilities (e.g. light housekeeping, meal preparation, personal hygiene and care).

In the case of childcare, employers are required to substantiate that the recipient of care was under 18 years of age and that a parental or guardianship relationship exists between child and employer. These requirements exist throughout the entire period during which the caregiver was employed.

For senior care, employers are required to substantiate that the recipient of care was 65 years of age or older. In situations where the employer is not also the recipient of care (e.g. child, friend or other designated individual acting on behalf of the recipient of care), the employer is also required to substantiate that he/she has been named as the recipient of care's legal representative for personal care and financial decision-making. These requirements exist throughout the entire period during which the caregiver was employed.

For care of a person with a disability or disabilities, employers are required to substantiate that a medical doctor has certified that the recipient of care has a disability or disabilities. In situations where the employer is not also the recipient of care (e.g. child, friend or other designated individual acting on behalf of the recipient of care), the employer is also required to substantiate that he/she has been named as the recipient of care's legal representative for personal care and financial decision-making. These requirements exist throughout the entire period during which the caregiver was employed.

4.4.4 Live-In Requirement

Under LCP, employers are required to demonstrate that the live-in caregiver works and lives in the same private household as the recipient of care. This requires verification of the address in Canada of both parties. This requirement exists throughout the entire period during which the caregiver was employed.

4.4.5 Workplace Safety Insurance

LCP employers are required to register the live-in caregiver for workplace safety insurance, even if in certain provinces or territories the registration is not mandatory. Regardless of the details of how workers are registered for this type of coverage (i.e. mandatory or voluntary/optional), employers must demonstrate that they are bearing the payment of premiums.

Live-in caregivers (and other domestic workers) living and working in New Brunswick only are currently totally excluded from workplace safety insurance coverage. In addition, ESDC has determined that employers cannot obtain comparable private insurance. This point is further addressed below under Non-Compliance.

4.4.6 Accommodation Standards

The live-in caregiver's accommodations must meet the essential criteria of the LCP Bedroom Description, namely:

- The live-in caregiver has his/her own bedroom/private accommodation;
- The live-in caregiver's bedroom/private accommodation has a door that locks from the inside, including a deadbolt lock;
- The key to the lock on the live-in caregiver's bedroom/private accommodation has been provided to him/her;
- The live-in caregiver's bedroom/private accommodation has a secure exterior window (i.e. locks from the inside);
- The window in the live-in caregiver's bedroom/private accommodation closes and locks from within;
- The live-in caregiver's bedroom/private accommodation includes meet all of the following criteria: finished walls; finished floors; finished ceilings; heating; lighting; closet; bed with mattress; bedding (sheets, pillows, blankets).

4.4.7 Entering a Private Dwelling House

As per S. 209.9 (6) of IRPR, inspectors can only enter a private dwelling house with consent of the owner or, if consent is refused or reasonable grounds exist to suspect that it will be refused, a warrant. Departmental legal counsel must be consulted in order to obtain a warrant.

The caregiver does not have authority to grant entry (i.e. not the homeowner or tenant/leaseholder). Where a Power of Attorney is in place, the inspector should attempt to obtain consent from the appointed representative, not the recipient of care, even if latter is identified as the legal homeowner.

4.5 Abuse-Free Workplace

All employers who hire foreign nationals through the TFWP are obliged to undertake reasonable steps to provide workers with an abuse-free workplace. Abuse of live-in caregivers and other TFWs is not tolerated.

As referenced above, although LCP employers must obtain a CRA business number and are therefore registered businesses, inspectors should acknowledge that these employers may have limited capacity to put in place formal measures and procedures related to abuse in the workplace which may be present in larger workplaces. In inspecting this factor under LCP, due consideration should be given to the circumstances of employers in assessing whether they have upheld their obligations in this regard. At a minimum, employers should be able to demonstrate what steps they have taken to:

- Identify and anticipate potential risks to live-in caregivers ;

- put in place measures to mitigate these risks;
- remedy incidents of workplace abuse, where they have occurred; and,
- prevent their reoccurrence.

Inspectors should refer to Section 6.4 – Abuse-Free Workplace for further guidance.

5. Findings of Non-Compliance

As set out in the general inspection directive, LCP employers should be given an opportunity to justify and/or rectify any non-compliance issues raised through an inspection. Where applicable some flexibility may be given regarding timelines for undertaking compensation or corrective action for LCP employers, within reason.

5.1 Workplace Safety Insurance

For employer of live-in caregivers in New Brunswick only, in light of the total exclusion of these workers from provincial workplace safety insurance coverage and ESDC/Service Canada's findings that comparable insurance is not available for private household employers on the private market, employers in New Brunswick who fail to substantiate this requirement would be automatically eligible to provide justification (i.e.P/T legislation) and not required to undertake compensation.

Caregiver Program

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Annex C – Supplemental Policy for the Seasonal Agricultural Worker Program and the Agricultural Stream