



# Employer Compliance Reviews and what employers need to know

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**Employment and Social Development Canada** (ESDC) in cooperation with **Immigration, Refugees, and Citizenship Canada** (IRCC) has continued to focus its attention on stricter compliance requirements for employers who employ foreign workers in positions requiring **Labour Market Impact Assessments** (LMIAs). ESDC may initiate a review of the activities of any employer using the Temporary Foreign Worker Program (TFWP) by conducting an **Employer Compliance Review** (ECR), an Inspection or under Ministerial Instruction. This blog mainly focuses on the process and potential consequences of an ECR.

ECRs are triggered as part of the LMIA application assessment process to verify past compliance by the employer. The review may go back 6 years so all foreign worker files should be maintained for this period of time. Employers will be notified of these reviews initially by telephone and a follow up letter will be sent by mail confirming the documentation requested to conduct the review. The letter will also provide a deadline to submit the requested information. Employers are required to give all reasonable assistance to an officer conducting a review.

Under an ECR, the main factors that are reviewed for compliance are wages, occupation, and working conditions. Foreign workers are required to be employed under “substantially the same – but not less favourable” wages and working conditions as specified in the LMIA. It is critical that employers pay wages that are substantially the same (a 2% variance is acceptable), but not less favourable than stated in the annex of the LMIA. If an employer plans to provide employees with merit or performance based bonuses, regular salary increases, or other substantial benefits including a relocation allowance, vehicle allowance etc. these should be disclosed in the ads supporting the LMIA, the application forms and also be noted in the annex of the LMIA. Working conditions that employers must comply with also include non-wage related remuneration, benefits and entitlements such as statutory holidays, sick days, vacations days, hours of work (including overtime, if applicable) and other non-taxable benefits.

If an employer is selected for an ECR, the officer may request and consider the following documentation in order to determine compliance: payroll records, bank statements, time sheets, a copy of the LMIA application submitted and advertisements, job descriptions, collective bargaining agreements (if applicable), financial or business information of the employer, copies of the applicable work permits, registration with workers compensation, proof of benefits, and other related documents.

An ECR will freeze the processing of any pending LMIA applications until it is completed (and they can take some time to complete). During the ECR, employers will have an opportunity to provide explanations or justifications for any initial findings of non-compliance and take corrective action, if possible. If an employer is found to be non-compliant they may be subject to:

- a possible ban for use of the TFWP and International Mobility Program (IMP) (for LMIA exempt positions) for two years;
- a negative LMIA being issued for any pending applications; and/or
- the revocation of previously issued LMIA's.

Inspections, unlike ECRs, are not triggered by an LMIA application but may be initiated by ESDC randomly or because there is some reason to suspect non-compliance. The potential penalties under Inspections for findings of non-compliance are more severe. Under Inspections, as of December 1, 2015, ESDC has the power to issue Administrative Monetary Penalties (AMPs) based on the severity of non-compliance from \$500 to \$100,000 per violation, up to a maximum of \$1 million over one year, per employer. An employer who is found to be non-compliant, may be able to reduce any AMP administered if it can show the error was made in good faith, reasonable efforts were made to comply, there was a genuine misinterpretation of the law, there was a change in the law or a collective agreement, or if the employer voluntarily disclosed the non-compliance.

Under an Inspection, a non-compliant employer may also be subject to the penalties discussed above for the ECR in addition to a lengthier or permanent ban from the TFWP and IMP and/or the publication of the employer's name, address and details of the violation and consequences on the Government's website.

In addition, employers employing foreign workers under the IMP, where an Offer of Employment to a Foreign National exempt from an LMIA was submitted through the Employer Portal (formerly the IMM 5802) (the Offer of Employment), are also subject to review under the Inspection regime.

In order to ensure compliance, we recommend that employers pay clear attention to the annex of the LMIA and/or the information set out in the Offer of Employment for IMP applications. They should ensure that at all times wages and terms of employment match up with these documents. If any discrepancies are discovered, corrective action should be taken immediately and legal advice obtained.

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