Proskauer

Department of Labor Compliance for H-1B and E-3 Visas When Telecommuting Is Required

March 26, 2020

Advice to U.S. Employers: Immigration Insights Series during COVID-19 Crisis

The 2nd in our Series of Advisories

Proskauer's Immigration Practice Group is advising clients on an array of challenges as companies find it difficult to comply with Department of Labor (DOL) and Immigration and Reform Control Act (IRCA) obligations and maintain the legal status of the non-immigrant population.

This is the second in our series of alerts addressing the many issues that have been identified during the course of our representation to guide our clients and companies in general, given this ever-changing and challenging situation.

Our first alert related to the challenge of completing an I-9 form remotely and was updated the next day as USCIS announced "flexibility" during the Coronavirus pandemic.

Our second alert addresses LCA requirements during a time when many of us are required to work from home.

Our team is available to you to provide guidance and assistance in adapting to the challenges.

Advisory 2: Complying with LCA Posting Requirements

The Labor Condition Application (LCA) is required to be submitted with H-1B (as well as E-3 and H-1B1) Petitions. The LCA outlines details of the H-1B employment, and the DOL must approve the LCA in order for an employer to file an H-1B petition with the U.S. Citizenship and Immigration Services (USCIS). The form requires the employer to attest to certain labor condition statements. The employment is limited to the position set forth in the LCA, as well as the geographic location(s) listed on the LCA. The LCA is connected to the DOL's role in protecting U.S. workers, and failure on the part of the employer to comply with the LCA attestations could lead to civil and/or criminal liabilities and/or monetary fines.

But what if no one is in the office to post the LCA or to see the LCA? It may be time to consider implementing electronic posting. We also address below how to handle LCA-related issues if an H-1B worker is now working from home, exclusively, as a result of mandatory work-from-home policies.

What is the LCA Requirement?

Specifically, the Immigration and Nationality Act (INA) and H-1B regulations require an employer to notify employees of its intent to hire H-1B nonimmigrant workers. "Affected employees" include those at the same worksite, in the same occupational classification as the prospective H-1B worker, and also individuals employed by a third-party employer. This requirement, the "Posting Requirement," informs U.S. workers of the terms and conditions of the H-1B workers' employment. The intent is to protect U.S. workers and inform them of their right to examine certain documents and/or file complaints in case of violations.

Notice must be given to U.S. workers on or within 30 days before the date the employer files the Labor Condition Application (LCA) (Form ETA 9035 and/or ETA 9035E) with the Department of Labor (DOL). This notice must include:

- The number of H-1B nonimmigrants the employer is seeking to employ;
- The occupational classifications in which the H-1B nonimmigrants will be employed;
- The wages offered;
- The period of employment;
- The locations where the H-1B nonimmigrants will be employed; and

- The following statement: "Complaints alleging misrepresentation of material factsin the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor."

The H-1B regulations provide that the required notification must occur by providing notification to a collective bargaining representative, if applicable. If there is no collective bargaining representative, the employer may choose to: (1) post a hard-copy notice or (2) use electronic notification. Regardless of the manner of posting, the employer must ensure that the notification is readily available to all affected employees. Consequently, employers should take the current situation we are in as an opportunity to evaluate whether their LCA posting practices meet the posting requirements and whether moving to electronic LCA posting would improve notice.

How do Employers Notify Employees Using Electronic Posting?

The electronic posting must electronically notify all employees at the place of employment in the occupational classification for which H-1B workers are sought. This notice may be provided by individual e-mail messages, by posting on an appropriate electronic bulletin board, or by other appropriate methods.

Common options are to:

- **Company Website / Electronic Bulletin Board.** Set up a section of the website for LCA postings. However, if this is done, there must be an appropriate announcement to the company employees informing them that this exists. Posting does not meet DOL guidelines if the LCAs are posted in a hard to find, or "secret" area.
- **Company Email / Newsletter.** If the Company regularly sends email updates to employees announcing job openings or other company information, the LCA postings or a link to the LCA postings can be included. Specifically, the regulations allow employers to accomplish electronic notice by any means ordinarily used to communicate with workers about job vacancies or promotion opportunities.

As indicated, employers must notify via hard-copy posting if affected employees lack computer access; this includes not having access to a company intranet site and/or lacking knowledge of the electronic resource where the notice is posted. Therefore, if affected employees include consultants who are employed by a third-party employer, then the electronic posting will not be sufficient.

Employers must make affected employees aware of the existence or location of the electronic notification in order to comply with the Posting Requirement. Compliance is critical considering the increased enforcement; however, during this national emergency, considering electronic posting and whether it would work for your company, is an exercise worth doing in the event that physical posting is not possible. Moreover, exploring the electronic posting option is a good idea in light of the undetermined nature of the current pandemic situation. No one knows when things will be back to "normal" and all employers can have full access to their offices. Putting the electronic posting option in place will likely allow for continued compliance for the duration of the current situation as well as help prepare the company for future situations in which they may have limited access to their facilities, like a natural disaster.

H-1B Workers telecommuting from home due to Office Closure

An LCA must be filed for the geographic area where an H-1B worker is employed. The term "place of employment" means the worksite or physical location where an H-1B worker actually performs his or her work. The LCA applies to any worksites within this "area of employment," and thus will control the prevailing wage determination, posting, and other worksite-related obligations of the employer. The geographic area of intended employment means the area within normal commuting distance of the place (address) of employment, or worksite, where the H-1B nonimmigrant is or will be employed.

In the case where the H-1B employee lives within the same geographic area, i.e., commuting distance, then no LCA posting or H-1B amendment would be required if he/she is now working from home as a result of COVID-19 related restrictions.

If the H-1B employee does not reside within commuting distance or she chooses to "ride out the storm" at a distant location, she is telecommuting from outside of the prescribed geographic location covered by the LCA. A conventional understanding of the rules and guidelines would require an H-1B amendment unless the temporary employment fits into one of the short-term placement exceptions below, which are available for up to 60 days. There are those who would argue that telecommuting from a distance where the location is absolutely inadvertent should not require an amendment but, unfortunately, there is no formal source you could rely upon for that interpretation.

Specifically, a location where an H-1B worker temporarily performs job duties is not considered a worksite and no new LCA needs to be filed when the worker travels to a location (1) for employee developmental activity or (2) to fulfill the requirements of a particular job function. With regard to the latter activity, each of the following conditions must be met if the employer chooses to use an existing LCA (i.e., one that applies to a different geographic area):

- The H-1B worker's presence at the different location is casual and on a short-term basis (i.e., any single visit does not exceed five (5) consecutive workdays for any worker who travels frequently or ten (10) workdays for any worker who travels occasionally);
- The H-1B worker is not at the location as a "strikebreaker"; and
- The nature and duration of the H-1B worker's job function (rather than the nature of the employer's business) mandates his/her short-time presence at a different location. For example, in the following situations, an employer could choose to rely on an existing LCA when a computer engineer is sent out to customer locations to "troubleshoot" complaints regarding software malfunctions or a manager monitors the performance of off-site employees.

If an employer needs to temporarily place an H-1B nonimmigrant worker in a place of employment that is not listed on an existing certified LCA (or their home), they may do so under the short-term placement provision without filing a new LCA for the temporary geographic area of employment. While the H-1B worker is on short-term assignment, the worker must be paid the required wage rate and cost of travel, meals, lodging and incidentals. The H-1B worker can be on short-term placement only if there is no strike/lockout in progress in the H-1B worker's occupation at the short-term location; there is no LCA on file for the geographic area of employment; and placement does not exceed 30 workdays (consecutive or non-consecutive) within a one-year period. Such placement may be for an additional 30 workdays, but for no more than 60 workdays, in a one-year period, where the employer is able to show that the H-1B nonimmigrant maintains ties to the home worksite (e.g., a dedicated workstation at the permanent worksite; the employee's abode is located near that worksite), and the worker spends a substantial amount of time at the permanent worksite.

Summary

In summary of the above, here are some handy bullet points:

- If no one is in your office to post or to see the LCA, it may be time to consider implementing electronic posting.
- If your H-1B employee lives within the same geographic area, i.e., commuting distance, from your office, then no LCA posting or H-1B amendment would be required if he/she is now working from home as a result of COVID-19 related restrictions.
- If the H-1B employee does not reside within commuting distance or chooses to "ride out the storm" at a distant location, so she is telecommuting from outside of the prescribed geographic location covered by the LCA, an H-1B amendment would be required unless the temporary employment fits into a short-term placement exception for up to 30/60 days.

Please contact your Proskauer attorney with specific questions so we can help guide you through the unique circumstances created by this pandemic.

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Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. Visit our **Coronavirus Resource Center** for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.