

Employ H-1B Workers? What Employers Need to Know to Ensure That Their Records and Practices Comply with H-1B Laws

This e-alert is the first of a three-part series on best practices and records retention for employers who employ H-1B workers. The H-1B work visa is a popular visa used by employers to hire foreign professional or "specialty occupation" workers. Employers must ensure that their files and practices comply with all legal requirements, as the government continues to audit employers with respect to their H-1B employees. This e-alert details the requirements of the mandated H-1B public access files. Part II of this series will discuss the necessary contents of the recommended Department of Labor inspection file. Finally, part III of this series will provide recommendations on measures employers should take to ensure that they comply with other requirements specific to H-1B employees.

The law requires employers who employ H-1B employees to maintain a public access file for each H-1B employee.

Storing and Maintaining the File

- The file must be maintained at the principal place of business or the H-1B worker's actual place of employment.
- The file must be in place within one business day of filing the Labor Condition Application (LCA).
- The file must be maintained throughout the entire period of the LCA, and for one year after the expiration or withdrawal of the LCA.
- The file should be kept separate from the employee's personnel file.
- The file should be labeled with the H-1B worker's name or with a unique file number. If a file number is used, the employer must create a separate document identifying the number assigned to each H-1B worker which it may keep confidential from the public, but which must be available to government inspectors.

Contents of Files

There are specific legal requirements regarding the contents of the public access file. The following documents must be maintained in an H-1B worker's public

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access file:

- A copy of the certified LCA, including the instruction pages.
- Documentation of the actual wage rate paid to the H-1B worker. The wage information must be updated each time there is an increase or decrease to the employee's wages.
- A memorandum providing a full and clear explanation of the compensation system the employer used to determine the actual wage paid to the workers in the occupation for which the LCA was filed, or a copy of the system itself.
- Documentation as to how the prevailing wage was established. Generally, a description of the source of the prevailing wage and methodology used is sufficient.
- The original LCA posting notices, including documentation of the dates and locations of the postings.
- Documentation summarizing the benefits offered to U.S. workers in the same occupational classification as the H-1B worker. If all employees do not receive or are not offered the same benefits, the file must also contain a statement as to how differentiation in benefits is made.
- If the company became the H-1B worker's employer through a corporate restructuring, then the file must contain a sworn statement regarding the company's assumption of the LCA obligations, a list of each LCA affected by the restructuring and its date of certification, the new employer's Federal Employer Identification Number and a description of the new employer's actual wage determination system.
- If the employer uses the "single employer" rule to determine H-1B dependency, then the file must contain a list of entities comprising the "single employer."
- If the employer is H-1B dependent or a "willful violator" of certain H-1B laws, then the file must contain (a) a list of "exempt" H-1B workers (if the employer indicates on the LCA that only "exempt" H-1B workers will be employed) and (b) a summary of the methods the employer used to recruit U.S. workers and the time frames of such recruitment.

Employers should not include a copy of the H-1B petition, supporting documents or approval in the public access file. Employers should review their public access files on a regular basis to ensure that they satisfy all the requirements detailed above. In addition, employers must remember that any change in the employee's wages, location or actual employer (e.g., due to a corporate restructuring) must be reflected in the public access file, and may even require the filing of an H-1B amendment petition.



If you do not yet have a public access file for each H-1B worker, you should take immediate steps to create these files. Please contact your Reinhart attorney or any member of Reinhart's Immigration Group with any questions regarding public access files."

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