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H-1B DOL Inspection Files – Are Yours Ready?

This e-alert is the second of a three-part series on best practices and records retention for employers who employ H-1B workers.

We previously detailed the requirements pertaining to public access files for H-1B workers. In addition to creating and maintaining public access files, it is recommended that employers also have Department of Labor (DOL) inspection files for each H-1B worker. The documents and information in the inspection files must be available to the DOL in the event the DOL ever conducts an investigation of the employer's H-1B workers. The inspection file should be its own file separate from the public access file and employee's personnel files. The inspection file should contain the following:

- Evidence establishing that a copy of the approved Labor Condition Application (LCA) was given to the H-1B worker on or before the first day of their H-1B employment covered by the LCA.
- Documentation supporting the prevailing wage determination, which may consist of (1) a completed DOL prevailing wage determination, (2) an independent authoritative source survey, or (3) other legitimate sources of wage data appropriate to the occupation and relevant to the area of intended employment.
- Payroll information on the H-1B worker for the time period covered by the LCA, as well as payroll records establishing the wage rate for all similarly employed workers at the place of employment. As to each such employee, the payroll records must include the employee's full name, home address, occupation, rate of pay, hours worked (per day and per week) if the employee is not compensated on a salary basis, additions or deductions from pay (per pay period), and total wages paid each pay period (showing both the date of pay and the dates included in the pay period). Significantly, the payroll information must cover all other employees in the same occupation; it is not sufficient to merely include those employees with similar experience and qualifications to the H-1B worker. This payroll documentation must be retained for at least three years from its creation. Given that this documentation is often very voluminous, many employers may choose to retain all required data in an easily accessible electronic format instead. The inspection file should include a note advising where and in what format the payroll data is being retained electronically.
- Documentation showing the data used to establish the actual wage rate for the H-1B employee. This data should demonstrate arithmetically how the

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employer's wage system was applied to calculate the H-1B employee's actual rate of pay and how the wages set for the H-1B employee relate to the wages paid to all other employees with similar experience and qualifications for the specific employment in question at the place of employment. If any adjustments are made to the pay system during the validity period of the LCA, the employer must document the pay adjustments and also show that the H-1B worker continues to receive the greater of the prevailing wage or the actual wage paid to similarly employed workers with similar qualifications.

- Documentation of the employer's offer of benefits to the H-1B worker, including: (a) copies of documents provided to employees that describe the benefits offered to employees and rules of eligibility and participation; (b) documents describing any of the employer's rules regarding differentiating among employees with regard to benefits; (c) evidence of the benefits chosen by and provided to the H-1B worker; and (d) evidence of any "home country" benefit plans, if the H-1B worker remained on such a plan.
- Evidence of the employer's H-1B dependency calculation, indicating the date the calculation was performed. This requirement applies to those employers that claim they are not H-1B dependent but who are required by law to make a calculation of their H-1B dependency (*e.g.*, borderline dependency).
- Documentation of the H-1B employee's working conditions. Specifically, this documentation should support the employer's attestations that the H-1B worker is receiving working conditions equivalent to the employer's U.S. workers, as well as support the employer's compliance with all other applicable LCA attestations (*e.g.*, no strike or lockout when the H-1B worker was hired).
- If the employer is H-1B dependent or was previously deemed to be a willful violator, the employer must provide additional documentation relating to the displacement and recruitment of U.S. workers. This additional documentation must contain information regarding the separation of U.S. workers within 90 days before and after the employer's petition for the H-1B worker, as well as information regarding secondary displacement and recruitment documentation (*i.e.*, recruitment methods used, places and dates of the advertisements, and postings or other recruitment methods used).

Employers should review their DOL inspection files to ensure that the requirements detailed above are satisfied. Please contact any member of Reinhart's Immigration Group or your Reinhart attorney with any questions regarding your DOL inspection files.

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