

Seven Tips to Ensure Your Practices Comply with Laws for Employing H-1B Workers

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

In previous articles, we explained the specific requirements for public access files and Department of Labor (DOL) inspection files that apply to employers employing H-1B workers. This article, the last article in our series, provides tips and recommendations for employers to ensure compliance with other laws that apply when employing H-1B workers and also details potential penalties for failing to comply with the laws that apply to employers employing H-1B workers.

Recommendations for Employers That Employ H-1B Workers

1. **Hire an attorney to prepare the H-1B petition.** Employers should hire their own attorneys to prepare an H-1B petition. Occasionally, workers will personally hire an attorney to prepare the petition. However, as the H-1B petitioner, employers must sign the application under penalty of perjury. Therefore, it is critical that the employer is comfortable with the attorney preparing the petition and has a relationship of trust established. Moreover, the employer should have an attorney who is looking out for its best interests and advising it on its H-1B obligations.
2. **Pay the H-1B worker the required wages and benefits.** An employer must continue to pay the H-1B worker the required wage rate throughout the entire period of validity of the Labor Condition Application (LCA), or until the worker is formally terminated. The required wage rate is the greater of either the applicable prevailing wage (determined by a wage survey) or the actual wage for the position, which is the wage rate paid to all similarly situated employees in the same or similar occupation as the H-1B worker who also work at the same worksite as the H-1B worker. The H-1B worker must also receive any normal increases in the wage rate paid by the employer (e.g., costs of living increases, performance raises, etc.), as well as any normal increase in benefits provided to similar employees in accordance with the employer's established criteria, such as performance, seniority, etc. If the H-1B worker does not receive the same increases in

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wages or benefits as other similarly employed workers, the employer must be able to provide a compelling business justification for the discrepancy.

3. **Notify the DOL of strikes or lockouts.** Employers employing H-1B workers must notify the DOL within 3 days of the commencement of a strike or lockout during the validity period of the LCA. This requirement applies only to strikes or lockouts involving the employees of the employer working at the same place of employment and in the same occupational classification as the H-1B worker.
4. **Review the LCA if the H-1B worker may travel or transfer to a new worksite.** If an H-1B worker is assigned a new worksite or travels to locations other than those listed in the LCA, the employer may need to file a new LCA and H-1B petition to cover the new or additional worksites prior to the change. In addition, H-1B workers must also receive reimbursement or pay for the actual costs of lodging, travel, meals and incidental expenses they incur for any employment-related travel.
5. **Withdraw H-1Bs and LCAs after an H-1B worker separates.** Upon the separation of employment of an H-1B worker (voluntary or involuntary) that occurs before the end of the worker's period of authorized H-1B employment, employers should notify U.S. Citizenship and Immigration Services (USCIS) of the separation of employment. The employer should also withdraw the LCA with the DOL. An employer's failure to take these steps may result in the employer being liable for damages including front pay and back pay.
6. **Pay return transportation to separated workers.** If an employer terminates an H-1B worker's employment before the end of the authorized period of employment, the employer must offer to pay the reasonable cost of the worker's return transportation to the worker's home country or last country of residence.
7. **Evaluate changes to the worker's job duties, work schedule or wage rate.** Prior to implementing any changes to an H-1B worker's job duties, work schedule or wage rate, employers must analyze whether these changes will require an amended H-1B petition.

Penalties for Violations

Penalties for violating the laws on employing H-1B workers include: (1) back wages for failure to pay the required wage rate (including benefits); (2) civil fines of up to \$35,000 per violation; (3) debarment from receiving approval of nonimmigrant petitions and employment-based immigrant petitions for up to a



three-year period and from filing any permanent labor certification applications or LCAs for the same period; and (4) other administrative remedies as may be determined by the DOL.

In addition, the knowing and willful submission of false statements of material fact on the LCA or other documents submitted to the DOL or USCIS may also result in criminal prosecution with penalties of up to \$10,000 in fines and/or up to five years imprisonment.

As a result of the potential for severe penalties, it is critical that employers familiarize themselves with all the legal requirements that apply to them when they employ H-1B workers. If you have any questions regarding these requirements, please contact your Reinhart attorney or any member of Reinhart's Immigration Group."

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