

What Employers Need to Know to Ensure Their Records and Practices Comply With H-1B Laws (Part 1 of 3)

This is the first article of a three-part series on best practices and records retention for employers who employ H-1B workers. The H-1B nonimmigrant status is a popular temporary work authorizing status that allows employers to employ foreign professional or "specialty occupation" workers. Employers who employ H-1B workers are required to create and maintain a "public access file" for each of their H-1B workers, as well as other documentation that verifies that the terms and conditions of the H-1B workers' employment are compliant with H-1B specific wage, benefit and related requirements. Employers must therefore ensure their public access files and practices comply with all legal requirements related to H-1B workers. As the government is increasingly auditing employers with respect to their H-1B workers, the urgency for ensuring compliance has also increased.

This article details the necessary contents of public access files. Part II of this series details the necessary contents of the U.S. Department of Labor ("DOL") audit file. Part III recommends measures employers should take to ensure they comply with other requirements specific to H-1B employees.

Preparing and Maintaining the Required H-1B Public Access File

The law requires employers who employ H-1B workers to maintain a H-1B public access file ("PAF") for each H-1B worker. To do so, the following needs to be addressed:

Storing and Maintaining the PAF

- The PAF must be maintained at the employer's principal place of business or the H-1B worker's actual place of employment.
- The PAF must be in place within one business day of filing the Labor Condition Application ("LCA").
- The PAF must be maintained throughout the LCA's entire term, and for one year after its expiration or withdrawal, or for one year after the H-1B worker's employment has ceased, whichever is longer.

POSTED:

Feb 14, 2020

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- The PAF should be kept separate from the H 1B worker's personnel file.
- The PAF should be labeled with the H 1B worker's full name or a unique file number. If a unique file number is used, the employer must create a separate, confidential document citing each H 1B worker's unique number.
- The PAF may be electronic or hard copy.

Contents of the PAF

There are specific legal requirements regarding the contents of a PAF. Per these requirements, the following documents must be maintained therein:

- A copy of the certified LCA, including its instruction pages.
- Documentation of the H 1B worker's actual wage rate, which documentation must be updated each time there is an increase or decrease in the actual wage rate. Instead of the H 1B worker's actual wage rate, employers may alternatively provide a wage range, as long as the bottom end of the wage range is above both the prevailing wage and the actual wage paid to the H 1B employee.
- Documentation explaining the compensation system used to determine the actual wage rate.
- Documentation explaining how the prevailing wage rate was established.
- The LCA posting notices, as well as documentation showing the proper posting of all required LCA notices, including dates and locations posted.
- Documentation summarizing the benefits offered to U.S. workers in the same occupational classification as the H 1B workers. If both groups of workers do not receive or are not offered substantially similar benefits, the documentation must also contain an explanation of how such differentiation is determined.
- If the H 1B worker's employment with the employer is the result of a corporate restructuring, the PAF must contain a sworn statement attesting to the new employer's assumption of the LCA obligations, a list of each affected LCA and its date of certification, the employer's federal Employer Identification Number, and a description of the employer's actual wage determination system.
- For employers using the "single employer" rule to determine H 1B dependency, the PAF must contain documentation citing the entities comprising the "single



employer."

- If the employer is H 1B dependent or a "willful violator" of certain H 1B laws, the PAF must contain documentation citing (a) a list of "exempt" H 1B workers (provided 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 timeframes of such recruitment.

The PAF should not include a copy of the H 1B petition and its supporting documents. The PAF must reflect any change in the H 1B worker's wages, location or actual employer (e.g., due to a corporate restructuring). Employers should regularly review their PAFs to ensure they satisfy all of the above cited requirements.

If you do not have a PAF for each H 1B worker, you should take immediate steps to create such.

For more information regarding PAFs, please contact [Attorney Ben Kurten](#) at bkurten@reinhartlaw.com or 414 298 8222, or your Reinhart attorney.

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