

What Employers Need to Know to Ensure Their Records and Practices Comply With H-1B Laws (Part 2 of 3)

Preparing and Maintaining the DOL Audit File

[Part 1](#) of this series detailed the necessary contents of a public access file ("PAF") for each of an employer's H-1B workers. Employers must also maintain a U.S. Department of Labor

("DOL") audit file ("Audit File") for each H-1B worker. An H-1B worker's Audit File must be separate and distinct from his or her PAF and must be surrendered to the government upon request. There are specific legal requirements regarding the contents of an Audit File. Per these requirements, the following documents must be maintained therein:

- Documentation establishing that a copy of the approved Labor Condition Application ("LCA") was given to the H-1B worker on or before his or her first day of employment.
- Documentation supporting the prevailing wage determination, which may consist of either (a) a completed DOL Prevailing Wage Determination; (b) an independent authoritative source survey that complies with all rules for independent wage surveys; or (c) other recognized sources of wage data appropriate to the occupation and relevant to the area of employment, such as a Davis Bacon Wage Determination, SCA Wage Determination, or a relevant portion of a union contract.
- The H-1B worker's payroll information, as it pertains to the LCA's entire term, as well as payroll records establishing the wage rate for all workers (H-1B or otherwise, and regardless of experience and qualifications) in the same occupational classification at the place of employment. Such payroll records must include: (a) full name and home address, (b) occupation, (c) rate of pay, hours worked (per day and per week) if nonsalaried or part-time, (d) additions or deductions from pay (per pay period), and (e) total wages paid each pay period (citing both the dates of pay and the dates included in each pay period). This payroll documentation must be retained for at least three years from the date of its creation. If an enforcement action is commenced by the DOL, the

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payroll records must be retained until the action has been completed.

- Documentation citing the data used to derive the H-1B worker's actual wage rate, which data arithmetically demonstrates how the employer's compensation system was applied to calculate the actual wage rate, and, further, how the H-1B worker's actual wage rate compares to that of all other employees with similar experience and qualifications in the same occupational classification at the place of employment. Any adjustments to the employer's compensation system must be documented, and data showing that the H-1B worker continues to receive the greater of the prevailing wage rate or the actual wage rate of all workers in the same occupational classification must be presented.
- Documentation describing the benefits offered to the H-1B worker, including:
(a) copies of documents provided to the H-1B worker that describe the benefits offered to employees, such as a copy of benefits plan description or employee handbook, along with rules of eligibility and participation, and how costs are shared; (b) if there is differentiation of benefits among employees, documents explaining how such differentiation is determined; (c) evidence of the benefits chosen by and provided to the H-1B worker; and (d) evidence of any "home country" benefit plans in which the H-1B worker participates, both before and after the H-1B worker transferred to the United States.
- If the employer claims it is not H-1B dependent but is required by law to make a calculation of its H-1B dependency, evidence of the calculation, including the date the calculation was performed.
- Documentation that supports the employer's attestations that the H-1B worker receives working conditions equivalent to the employer's U.S. workers, and which supports 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 a "willful violator," of certain H-1B laws, the employer must provide documentation relating to the displacement and recruitment of U.S. workers. This documentation must contain information regarding the separation of U.S. workers within 90 days prior to and 90 days following 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 any advertisements and/or postings, or other recruitment methods used).



The Audit File must be maintained at the employer's principal place of business or the H-1B worker's actual place of employment. Employers should review their DOL Audit Files to ensure the requirements detailed above are satisfied.

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