

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

## Tips to Ensure Compliance with Other H-1B Requirements

[Part I](#) and [Part II](#) of this series detailed the necessary contents of a public access file ("PAF") and a U.S. Department of Labor ("DOL") audit file ("Audit File") for each of an employer's H-1B workers. Part III, the last in this series, recommends measures employers should take to ensure they comply with other requirements specific to H-1B workers, and also details potential penalties for noncompliance.

### Recommendations

1. Pay the H-1B worker the required wages and benefits. An employer must pay an H-1B worker the required wage rate throughout the Labor Condition Application's ("LCA") entire term, or until the worker formally separates. If the required wage rate is based on the prevailing wage, the employer need not take further action. However, if the required wage rate is based on the actual wage rate (i.e., the wage rate paid to all similarly situated workers in the same or similar occupational classification as the H-1B worker and who also work at the same place of employment), the employer must ensure that the H-1B worker will continue to be paid the actual wage throughout the LCA validity period. Additionally, an employer must grant the H-1B worker any normal increases in the wage rate (or benefits) (e.g., cost of living increases, performance raises, etc.) that is granted to other similarly situated workers. If the employer does not grant the H-1B worker such increases, the employer must be able to provide a compelling business justification for the differentiation.
2. Notify the DOL of strikes or lockouts. If during the validity period of the LCA, a strike or lockout occurs that involves similarly situated workers in the same or similar occupational classification, an employer must notify the DOL within three days of the strike's or lockout's commencement.
3. Review the LCA before the H-1B worker travels. If the H-1B worker needs to

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travel to locations other than those listed in the LCA, the employer may need to file a new LCA that includes the additional worksite(s), which filing would also necessitate amending the worker's H-1B with U.S. Citizenship and Immigration Services ("USCIS"). Alternatively, the DOL's short term placement rules or LCA posting rules may allow some limited travel without filing a new LCA or amending the H-1B. In any event, an employer must reimburse or pay in advance H-1B workers' actual costs of lodging, travel, meals and incidental expenses incurred for any employment-related travel.

4. Review the LCA before the H-1B worker is assigned to a new or additional worksite. If the H-1B worker is assigned a new or additional worksite other than those listed in the LCA, the employer may need to follow the same procedures as detailed in No. 3 above.
5. Withdraw LCA and H-1B after an H-1B worker separates. If the H-1B worker separates before the end of the H-1B worker's period of H-1B admission or the underlying LCA's period of validity, the employer must promptly notify USCIS, and withdraw the LCA filed with the DOL. The employer must also offer to pay the reasonable cost of the H-1B worker's return transportation to his or her home country or country of last residence. Failure to take these steps may result in the employer's continuing liability to the H-1B worker for wages—and potentially for damages.
6. Hire an attorney to prepare the H-1B petition. Employers should hire their own attorney to prepare the H-1B petition. Occasionally, H-1B workers themselves will hire an attorney to prepare the petition. However, as the employer is the H-1B petitioner and must sign the petition under penalty of perjury, it is critical that the employer be comfortable with the attorney, and be assured the attorney is looking out for the employer's best interests.
7. Pay the separated H-1B worker's cost of return transportation. Upon the H-1B worker's separation of employment—either at the end of the authorized period of H-1B admission or the underlying LCA's period of validity—the employer must offer to pay the reasonable cost of the H-1B worker's return transportation to his or her home country or last country of residence.
8. Evaluate changes to the H-1B worker's job duties, work schedule, work location or wage rate before making the changes. Prior to implementing



any such changes, employers must analyze whether these changes will require filing a new LCA and amending the worker's H-1B.

### **Penalties**

Penalties for noncompliance 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, as well as from filing any permanent labor certification applications or LCAs, for up to three years; 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 result in criminal prosecution with penalties of up to \$10,000 and/or up-to five years' imprisonment. It is critical that employers familiarize themselves with all applicable legal requirements when employing H-1B workers.

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