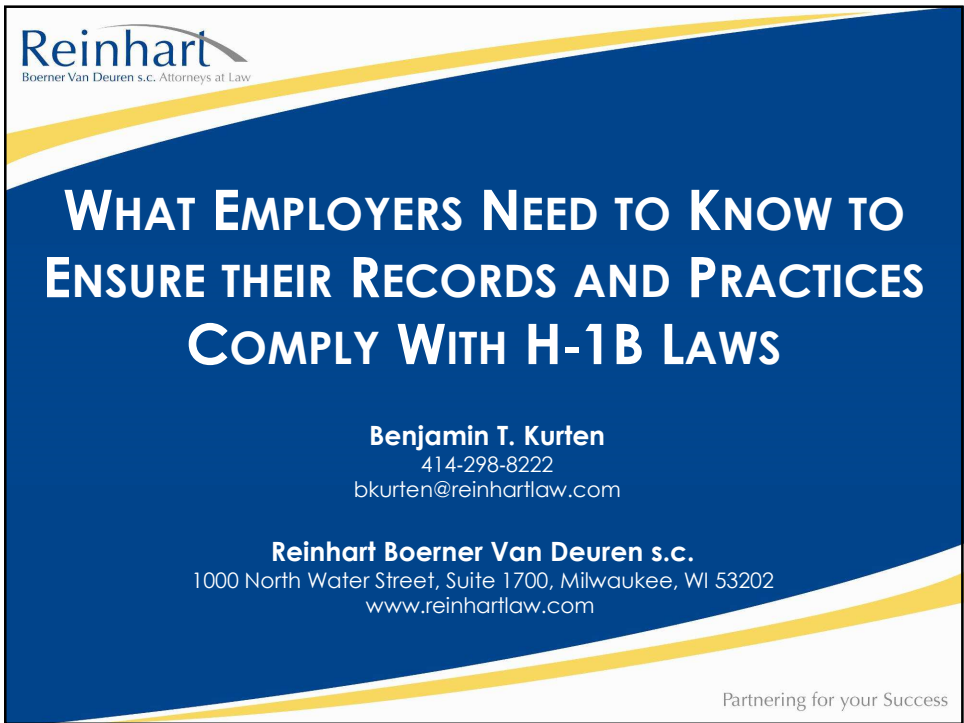


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H-1B: *What Employers Need to Know to Ensure Their Records and Practices Comply With H-1B Laws*
April 27, 2016



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WHAT EMPLOYERS NEED TO KNOW TO ENSURE THEIR RECORDS AND PRACTICES COMPLY WITH H-1B LAWS

Benjamin T. Kurten
414-298-8222
bkurten@reinhartlaw.com

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700, Milwaukee, WI 53202
www.reinhartlaw.com

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Presenter

Benjamin T. Kurten is a shareholder at Reinhart Boerner Van Deuren s.c., and is the chairperson of Reinhart's immigration group. Ben has more than 17 years of broad immigration law experience and represents both large and small clients across the country in a variety of industries, including manufacturing, health care, financial services, technology, entertainment, consumer goods, and agriculture. His work includes assisting clients with navigating the immigration regulations to be able to employ foreign-born talent as well comply with U.S. immigration regulations. Ben is a member of the American Immigration Lawyers Association, is a frequent speaker and panelist on the topic of immigration, and has written numerous immigration-related articles that have been published in professional journals and online.



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AGENDA

- 11:45 a.m. CDT Attendees Sign On
- 12:00 p.m. CDT Presentation
- 12:50 p.m. CDT Questions and Answers

Asking Questions

Throughout the webinar, type your questions using the "QUESTIONS" section in the webinar panel. We will answer as many questions as possible during our Q & A session at the end of the webinar.

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Webinar Housekeeping

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Information

This webinar provides general information about legal issues. It should not be construed as legal advice or a legal opinion. Attendees should seek legal counsel concerning specific factual situations confronting them.

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Overview

- The H-1B work visa is a popular visa used by employers to hire foreign professionals or "specialty occupation" employees
 - Specialty occupation = job that normally requires a bachelor's degree or higher to enter

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Overview (cont.)

- Employers must ensure their files and practices comply with all legal requirements, as the government continues to audit employers with respect to their H-1B employees.
- The law requires employers that employ H-1B employees to maintain a public access file for each H-1B employee

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Public Access File—

Storing and Maintaining the File

- The file must be maintained at the principal place of business or the H-1B employee's actual place of employment
- The file must be in place within one business day of filing the Labor Condition Application (LCA)
- The file must be maintained throughout the entire period of the LCA, and for one year after the expiration of the LCA

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Public Access File— Storing and Maintaining the File (cont.)

- The file should be kept separate from the employee's personnel file
- The file may be labeled with the H-1B employee's name or with a unique file number. If a file number is used, the employer must create a separate, confidential document identifying the number assigned to each H-1B employee.

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Public Access File— Content of File

- There are specific legal requirements regarding the contents of the public access file. The following documents must be maintained in an H-1B employee's public access file:
 - A copy of the certified LCA, including the instruction pages
 - Documentation of the actual wage rate paid to the H-1B employee. The wage information must be updated each time there is an increase or decrease to the employee's wages.

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Public Access File— Content of File (cont.)

- A complete explanation of the compensation system the employer uses to determine the actual wage paid to the employees in the occupation for which the LCA was filed
- Documentation as to how the prevailing wage was established. Generally, a description of the source of the prevailing wage and methodology used is sufficient.

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Public Access File— Content of File (cont.)

- The *original* LCA posting notices, including documentation of the dates and locations of the postings
- Documentation summarizing the benefits offered to U.S. employees in the same occupational classification as the H-1B employee. If all employees do not receive or are not offered the same benefits, the file must also contain a statement as to how differentiation in benefits is made.

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Public Access File— Content of File (cont.)

- If the company became the H-1B employee's employer through a corporate restructuring, then the file must contain a sworn statement regarding the company's assumption of the LCA obligations, a list of each affected LCA by the restructuring and its date of certification, the new employer's Federal Employer Identification Number and a description of the new employer's actual wage determination system

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Public Access File— Content of File (cont.)

- If the employer is H-1B dependent or a "willful violator" of certain H-1B laws, then the file must contain (1) a list of "exempt" H-1B employees (if the employer indicates on the LCA that only "exempt" H-1B employees will be employed) and (2) a summary of the methods the employer used to recruit U.S. employees and the timeframes of such recruitment
- Dependency:
 - 25 or fewer full-time equivalent employees and at least 8 H-1B nonimmigrant employees; or
 - 26–50 full-time equivalent employees and at least 13 H-1B nonimmigrant employees; or
 - 51 or more full-time equivalent employees of whom 15% or more are H-1B nonimmigrant employees
 - If the employer uses the "single employer" rule to determine H-1B dependency, then the file must contain a list of entities comprising the "single employer"

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Public Access File— Content of File (cont.)

- Employers should *not* include a copy of the H-1B petition and supporting documents in the public access file
- Employers should review their public access files on a regular basis to ensure they satisfy all the requirements detailed above
- In addition, employers must remember that any change in the employee's wages, location or actual employer (e.g., due to a corporate restructuring) must be reflected in the public access file

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DOL Inspection File— Content of File

- In addition to creating and maintaining public access files, it is recommended that employers also have Department of Labor (DOL) audit files for each H-1B employee
- The audit file should be its own file separate from the public access file. The audit file must be made available to the government upon request and should contain the following:
 - Evidence that a copy of the approved LCA was given to the H-1B employee on or before the first day of employment

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DOL Inspection File— Content of File (cont.)

- 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

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DOL Inspection File— Content of File (cont.)

- Payroll information on the H-1B employee for the time period covered by the LCA, as well as payroll records establishing the wage rate for all similarly employed employees 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)

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DOL Inspection File— Content of File (cont.)

- 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 employee
 - This payroll documentation must be retained for at least three years from its creation

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DOL Inspection File— Content of File (cont.)

- Documentation showing the data used to establish the actual wage rate for the H-1B employee
 - This data should demonstrate arithmetically how the 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 employee continues to receive the *greater* of the prevailing wage or the actual wage paid to similarly employed employees

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DOL Inspection File— Content of File (cont.)

- Documentation of the employer's offer of benefits to the H-1B employee, including:
 - Copies of documents provided to employees that describe the benefits offered to employees and rules of eligibility and participation
 - Documents describing any of the employer's rules regarding differentiating among employees with regard to benefits
 - Evidence of the benefits chosen by and provided to the H-1B employee
 - Evidence of any "home country" benefit plans, if the H-1B employee remained on such a plan

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DOL Inspection File— Content of File (cont.)

- 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 that are required by law to make a calculation of their H-1B dependency.
- Documentation on the H-1B employee's working condition. Specifically, this documentation should support the employer's attestations that the H-1B employee is receiving working conditions equivalent to the employer's U.S. employees, as well as support the employer's compliance with all other applicable LCA attestations (e.g., no strike or lock-out when the H-1B employee was hired)

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DOL Inspection File— Content of File (cont.)

- If the employer is H-1B dependent or previously deemed to be a willful violator, the employer must provide additional documentation relating to the displacement and recruitment of U.S. employees. This additional documentation must contain information regarding the separation of U.S. employees within 90 days before and after the employer's petition for the H-1B employee, 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).

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Recommendations for Employers that Employ H-1B Employees

- Pay the H-1B employee the required wages and benefits
 - An employer must continue to pay the H-1B employee the required wage rate throughout the *entire* period of validity of the LCA, or until the employee is formally terminated

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Recommendations for Employers that Employ H-1B Employees (cont.)

- However, if the required wage rate is based on the actual wage rate (*i.e.*, the wage rate paid to all similarly situated employees in the same or similar occupation as the H-1B employee who also work at the same worksite as the H-1B employees), then the employer must ensure the H-1B employee will continue to be paid the actual wage throughout the LCA validity period

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Recommendations for Employers that Employ H-1B Employees (cont.)

- As such, the H-1B employee must receive any normal increases in the wage rate paid by the employer (*e.g.*, costs of living increases, performance raises, etc.)
 - If the H-1B employee does not receive the same increases in wages or benefits as other similarly employed employees, the employer must be able to provide a compelling explanation for the discrepancy

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Recommendations for Employers that Employ H-1B Employees (cont.)

- Notify the DOL of strikes or lockouts
 - Employers employing H-1B employees must notify the DOL within three 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 place of employment in the occupations classification identified in the LCA.

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Recommendations for Employers that Employ H-1B Employees (cont.)

- Review the LCA if the employee travels or is assigned a new worksite
 - If an H-1B employee 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 to cover the new or additional worksites
 - H-1B employees must receive reimbursement or pay for the actual costs of lodging, travel, meals and incidental expenses they incur for any employment-related travel

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Recommendations for Employers that Employ H-1B Employees (cont.)

- Withdraw H-1Bs and LCAs after an H-1B employee separates
 - Upon the separation of employment of an H-1B employee (voluntary or involuntary) that occurs before the end of the period of authorized admission, 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

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Recommendations for Employers that Employ H-1B Employees (cont.)

- Hire an attorney to prepare the H-1B petition
 - The employer should have an attorney that is looking out for its best interests and advising it on its H-1B obligations

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Recommendations for Employers that Employ H-1B Employees (cont.)

- Pay return transportation to separated employees
 - If an employer terminates an H-1B employee's employment before the end of the authorized period of employment, the employer must offer to pay the reasonable cost of the employee's return transportation to the employee's home country or last country of residence

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Recommendations for Employers that Employ H-1B Employees (cont.)

- Evaluate changes to the employee's duties, work schedule, work location or wage rate
 - Prior to implementing any changes to an H-1B employee's job duties, employment location, work schedule or wage rate, employers must analyze whether these changes will require an amended H-1B petition

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Penalties for Violations

- Penalties for violating H-1B employment laws include:
 - Back wages for failure to pay the required wage rate (including benefits);
 - Civil fines of up to \$35,000 per violation
 - 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
 - Other administrative remedies as may be determined by the DOL

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Penalties for Violations (cont.)

- 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

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Questions?



Thank You!