GENERAL OVERVIEW:
REGULATORY OBLIGATIONS
IMPOSED UPON H-1B EMPLOYERS

I. OVERVIEW

One of the most recurrently used methods for employing foreign nationals is the H-1B Temporary Worker provisions. In general, this temporary, nonimmigrant visa classification provides immigration status/employment authorization to foreign nationals who are working in professional positions, which are defined as positions that require at minimum a relevant bachelor's degree or the equivalent.[1] When filing an H-1B petition on behalf of a foreign worker, the H-1B sponsoring employer must meet regulatory obligations established by the Department of Labor.[2]

Specifically, the H-1B employer is obligated to comply with the Labor Condition Application rules, discussed in detail below. Through the Labor Condition Application process, the employer attests to adherence to Department of Labor rules pertaining to wages, working conditions, strikes and lockouts and provision of notice to U.S. workers.[3] These rules apply to all worksites, including those that arise after the approval of the H-B petition.[4] In addition, the H-1B employer is obligated to maintain records available to the public demonstrating this compliance.[5] These obligations are designed to ensure that U.S. workers do not suffer adversely from the employment of an H-1B foreign national.

II. THE LABOR CONDITION APPLICATION PROCESS

At the center of the H-1B obligations is the Labor Condition Application (LCA). There are two elements to this process: 1) the substantive provisions that largely relate to the working conditions and terms of employment related to the proposed H-1B employment; and 2) certain compliance obligations that the employer needs to fulfill once an LCA has been filed.

The H-1B petitioning process starts with the filing of the LCA with the Department of Labor. This LCA must be accepted, or "certified," by the Department of Labor prior to the filing of the H-1B petition with the U.S. Citizenship and Immigration Services (USCIS).[6]

The LCA describes certain key elements of the prospective position, including the worksite(s), the wages offered, and the required wage that must be paid to the H-1B employee to ensure that downward pressure is not exerted on the existing wage structure for similarly-employed U.S. workers. For the full contents of the LCA form, please refer to the relevant regulations.[7] Once the Department of Labor certifies the form, a signed copy is retained by the employer in a Public Access File, which must be made available to the public for the duration of the H-1B employment plus one additional year.[8]

---

[1] 8 C.F.R. § 214.2(h).
[2] 20 C.F.R. §§ 655.700–655.855.
[3] *Id.*
[4] 20 C.F.R. § 655.734(a)(1)(ii)(B)(2)-(3).
[5] 20 C.F.R. § 655.760(c).
[6] 20 C.F.R. § 655.730(b).
[7] 20 C.F.R. § 655.730(c)(4).
[8] 20 C.F.R. § 655.760(c).

III. LCA OBLIGATIONS

There are four general compliance obligations that accompany the filing of an LCA in conjunction with an H-1B petition. These involve a) wages, b) working conditions, c) strikes and lockouts, and d) notice.

a. Wages

The H-1B employer must demonstrate that it will pay the H-1B worker the required wage rate. This rate needs to be the greater of either the "prevailing wage" or the "actual wage." The prevailing wage can be generally defined as the normal wage offered for the foreign national's occupational classification within the area of intended employment.[9] The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question.[10]

b. Working Conditions

The H-1B employer must demonstrate that the employment of the H-1B worker will not adversely affect the working conditions of workers similarly employed in the area of intended employment.[11] These working conditions include, for example, matters such as hours, shifts, vacation periods, and certain benefits.

c. Strikes and Lockouts

The H-1B employer must state that at the time of filing the LCA there is no ongoing strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.[12] The purpose of this requirement is to ensure that employers are not seeking foreign workers to undermine the rights of striking U.S. workers.

d. Notice

Prior to filing the LCA with the Department of Labor, the H-1B employer must provide notice to its U.S. workers.[13] The purpose of this requirement is to ensure that U.S. workers are aware of the intention of the employer to hire an H-1B worker and to provide the general parameters of this employment. However, it does not require that an employer recruit for the position so as to show the unavailability of a fully qualified U.S. worker.

If there is a collective bargaining representative for the occupational classification in which the H-1B worker will be employed, the employer should provide notice to that representative that the LCA is being filed. This notice shall identify the number of H-1B workers the employer is seeking to hire, the occupational classification in which these H-1B workers will be employed, the wages offered, the period of employment, and the location of employment.[14] This notice must be provided on or within the 30 days prior to the date of the LCA filing.

Where there is no collective bargaining representative, the employer shall, on or within 30 days prior to LCA filing, place a notice in either of the following two ways:

---

[9] 8 C.F.R. § 655.731(a)(2).
[10] 8 C.F.R. § 655.731(a)(1).
[11] 8 C.F.R. § 655.732.
[12] 8 C.F.R. § 655.733.
[13] 8 C.F.R. § 655.734.
[14] 8 C.F.R. § 655.734(a)(1)(i).

a) **Hard copy notice for a total of 10 days:** This notice should be placed in at least two conspicuous locations at each place of employment where the prospective H-1B worker will be employed (whether such place of employment is owned or operated by the employer or by some other person or entity).[15] The notice shall be of sufficient size and visibility, and shall be posted in two or more conspicuous places so that workers in the occupational classification at the place(s) of employment can easily see and read the posted notice(s).[16]

b) **Electronic notice:** Notice can be provided via electronic notification to employees in the occupational classification (including both employees of the H-1B employer and employees of another person or entity which owns or operates the place of employment) for which the H-1B worker is sought, at each place of employment where the H-1B worker would be employed.[17] Note that the regulations are flexible as to the electronic means of communication, which can be accomplished by any means the employer ordinarily uses to communicate with its workers about job vacancies.[18]

IV. COMPLIANCE

Documentation of compliance with the notice requirement should be kept in the Public Access File and made available for public examination upon request.[19] The Department of Homeland Security (DHS) states explicitly in the instructions on the I-129 Form accompanying the H-1B petition that the signatory has authorized release of any information that USCIS may need to determine eligibility for H-1B approval. The instructions go on to clarify that DHS has the right to verify the information submitted with the H-1B to establish eligibility at any time.[20] Furthermore, the Department of Labor has authority to inspect these records in order to strictly ensure adherence to the LCA obligations.[21]

In recent years, H-1B oversight has been prominently executed by the Office of Fraud Detection and National Security (FDNS). In 2004, USCIS created the FDNS, which is funded by the anti-fraud fee paid by sponsors of H-1B workers. The purpose of this office is to detect, deter, and combat immigration benefit fraud. The FDNS regularly conducts site visits in order to confirm that H-1B employers are in compliance with the regulatory obligations placed upon them. These site visits may occur at the employer's principal place of business or the work location. Note that FDNS officers generally request details of the employment itself to confirm that these match with the attestations made in the H-1B filing. They do *not* generally request to view the Public Access File to confirm LCA record retention compliance.

Nonetheless, it is critical that an H-1B employer comply with the Department of Labor regulations pertaining to the maintenance of a Public Access File.[22] Strict maintenance of these records ensures that an audit by FDNS or directly by Immigration Customs and Enforcement (ICE) will not result in fines or limitations on future use of the H-1B visa program.

V. CONCLUSION

[15] 8 C.F.R. § 655.734(a)(1)(ii)(A)(1)–(3).
[16] Appropriate locations for posting the notices include, but are not limited to, locations in the immediate proximity of wage and hour notices required by 29 C.F.R. § 516.4 or occupational safety and health notices required by 29 C.F.R.§ 1903.2(a). 8 C.F.R. § 655.734(a)(1)(ii)(A)(2).
[17] 8 C.F.R. § 655.734(a)(1)(ii)(A)(3)(B).
[18] *Id.*
[19] 8 C.F.R. § 655.760(a).
[20] The I-129 instructions site 8 U.S.C. § 1103, § 1155, § 1184, and 8 C.F.R. § 103, § 204, § 205, and § 214 for this proposition.
[21] 20 C.F.R. § 655.800(b)-(c).
[22] 8 C.F.R. § 655.760.

These obligations have been set in place by the Department of Labor to protect any U.S. workers who may potentially be negatively affected by the presence of the foreign worker in H-1B status. This protection extends to any U.S. workers who may work alongside the H-1B worker, even if they are not employed by the same employer.