



H-1B LCA/PAF Compliance Guide

What is H-1B LCA/PAF Compliance?

As a measure to protect wages and working conditions of U.S. workers, the American Competitiveness and Workforce Improvement Act (“ACWIA”) requires that each new/extended H-1B petition submitted to the U.S. Citizenship and Immigration Services (“USCIS”) be accompanied by a Department of Labor (“DOL”) certified Labor Condition Application (“LCA”) (Form ETA 9035). Employers are required to post the LCA and maintain a Public Access File (“PAF”) containing certain records regarding the employee’s wages and the employer’s compliance with the LCA requirements.

Rules & Regulations

- *LCA/PAF Maintenance*
 - Required to post approved LCAs for ten days in two “conspicuous” locations at the workplace where the H-1B worker will be employed, or the employer’s principal place of business
 - Must maintain a PAF containing the LCA and other employment information
 - Responsible for ensuring that H-1B employees’ job duties are accurately reflected by the H-1B; substantial changes in job duties may require the filing of an H-1B amendment with USCIS
- *Updating the H-1B Worker’s Salary:* H-1B worker’s rate of pay (increases/decreases) must be kept up-to-date in the PAF
- *Monitoring Full-Time and Part-Time Status of Employee:* If a foreign national’s employment status is reduced to part-time status and the salary is below the prevailing wage, the LCA and H-1B petition must be amended
- *Movement of H-1B Personnel:* If the H-1B employee is to work at locations not listed on the original LCA, a new LCA will be needed and an H-1B amendment filed

Exceptions:

- Travel to “non-worksites” location
 - Travel involving short-term work assignment
 - Travel to new work location covered by existing LCA
- *DOL Notification Regarding Strikes/Lockouts:*
 - Must provide the DOL with written notice of the strike or lockout within three days
 - Employer may not “place, assign, lease, or contract out” any new H-1B workers to a place of employment where there is a strike or lockout in the same occupational classification

Rules & Regulations

- *Monitoring H-1B Dependency:* If company status changes to H-1B dependent, additional LCA attestations will be required and the change must be reported to DOL
- *H-1B dependent status (based upon U.S. workforce):*
 - 25 or fewer full-time employees with more than 7 H-1B employees
 - Between 26 and 50 full-time employees with more than 12 H-1B employees
 - At least 51 full-time employees and H-1B employees equal to >15% of your company's full-time employees
- *No Benching*
 - Cannot "bench" a foreign national or place in non-productive work status
 - The employer is required to pay the employee at least the minimum prevailing wage for the duration of the H-1B employment

Why is H-1B compliance important?

- Department of Labor (DOL) solely enforces LCA requirements and plans to hire 250 additional agents for LCA enforcement
- Fraud Detection and National Security (FDNS) a subdivision of the USCIS randomly conducts audits to prevent immigration fraud
 - Every H-1B application includes a \$500 Fraud and Detection fee
 - Purpose is to confirm the information in the H-1B case looking for fraud/misrepresentation (not a raid): the company is a real operating business entity and employee is in fact a legitimate employee
- 25,000 on-site H-1B inspections announced in October 2009

What's my non-compliance risk?

- *Monetary Penalties*
 - \$1,000 fine and one-year prohibition from filing immigrant and nonimmigrant visa petitions for failure to meet strike or layoff attestations; substantial failure to meet working-condition attestations or displacement attestations, posting or recruitment attestations, or misrepresentation of material fact in LCA.
 - \$5,000 fine and two-year prohibition from filing immigrant and nonimmigrant petitions for willful failure to meet any attestation, or willful misrepresentation of material fact in the LCA.
 - \$35,000 fine and three-year prohibition from filing immigrant and nonimmigrant petitions for willful failure to meet an attestation condition, or willful misrepresentation of a material fact on an LCA, in the course of which failure or misrepresentation, a U.S. worker is displaced during the 90 days before filing the application through the 90 days after filing the petition.
- Subject to random investigations for five years
- Barred from bidding on government contracts or participation in immigration programs
- Payment of back wages

What Can I Do?

- Develop internal practices to ensure processes comply with requirements
 - Designate a first responder
 - Prepare all required PAFs and establish an internal LCA tracking system
 - Ensure that your employee files include copies of the approved H-1B petition, with current job titles, work location, and salary information
 - Maintain an accurate and up-to-date filing system
 - Update your H-1B application if there are material changes to the terms of employment
 - Set expectations with your employees that they are expected to be familiar with the terms of their H-1B employment and give the employee a redacted copy of their I-129 and supporting documentation
 - Remember that establishing processes proves “good faith”
- Provide H-1B compliance trainings to HR, legal and management
- Conduct regular voluntary audits with an immigration services provider

How Do I Handle a Government Visit?

- Don't panic
- Gather information to relay to your services provider
 - Did the visiting government agency identify themselves (USCIS, ICE, DOL, FDNS)?
 - What or who did the agent inquire about (specific foreign national, filings)?
 - Did the agent request specific access to particular records (I-9 files, LCAs/PAFs, company financials, copies of prior filed petitions)?
 - Who did the agent ask to speak with (Foreign National, HR, Foreign National's Manager or Supervisor)?
- Notify your immigration services provider immediately
- Don't guess when answering government agent questions
- Follow your established internal processes

VISANOW Services

- Voluntary compliance audits
- Compliance process development
- Compliance training
- Legal representation in employment eligibility compliance cases
- Mergers & Acquisitions compliance assessment