

H-1B Workers: Worksite Changes at Time of COVID-19

If you are employing H-1B professionals, you probably recall posting notices concerning their employment at the intended worksites with your company, and are likely aware that H-1B employment is not only employer-, but also location-specific. In these uncertain times of COVID-19 related business changes, do you have flexibility to have your H-1B employees work from home (e.g., those in IT may well be able to perform their usual duties from offsite) or work at new or additional worksites (which may be crucial for certain medical and emergency services professionals)? You can certainly amend the H-1B petitions to reflect the changes, but this is not the easiest or fastest thing to do during a pandemic, so let us look for work-arounds:

Working from Home.

This is increasingly becoming a necessity for many employees under quarantine. If the H-1B worker has always had the option to work from home and the home worksite was listed on the currently valid H-1B petition and the accompanying certified Labor Condition Application (LCA), there is no need to do anything – you can move the affected workers to a home worksite immediately and without any additional immigration compliance steps. If the work-from-home option wasn't available previously and the home address was not part of the H-1B petition and LCA, you need to verify that it is located within the same Metropolitan Statistical Area (MSA) as the worksite(s) that were included in the previously filed H-1B petition and LCA. An MSA is defined by the Department of Labor regulations as “the area within the normal commuting distances of the place (address) of employment where the H-1B nonimmigrant is or will be employed.” Most workers tend to reside within the same MSA as their habitual place of employment, and if this is the case with your H-1B employee, you should be able to fulfil the H-1B program compliance requirements by simply posting a notice in the employee's residence for 10 consecutive business days and, subsequently, place the notice in the H-1B worker's Public Access File. The employee may start working from home immediately upon the notice posting under this scenario and your immigration legal counsel should be able to assist you with the necessary notice preparation. If the employee's home is outside the MSA in which his or her originally declared worksite is located, you need to consider using “Short Term Placement” option allowed under the Department of Labor regulations. These regulations allow H-1B employers to place H-1B workers at a worksite not listed on the certified LCA for up to 30 workdays each year. “Workdays” are days actually worked and do not include holidays and weekends, which means that the short term placement option may cover approximately 6 weeks of work at a temporary location. Importantly, the “short term placement” regulations require employers to pay for the actual cost of lodging during the temporary placement and for the cost of travel, meals, and incidental or miscellaneous expenses for both work and non-work days at the location of short-term placement. If the quarantine lasts longer than 30 days, the employer would need to move to the next compliance step and file a new LCA to include the employee's home address and also file an amended H-1B petition with the immigration service (USCIS). Lobbying efforts are on the way for the government to waive or, at least, suspend the H-1B amendment requirement under the current circumstances, but, for now, the amendment requirement stands and we recommend considering this as soon as you determine that the work-from-home arrangement is going to remain in place longer term.

Adding New or Additional Worksites.

Workers in some occupations (most notably, medical doctors, in the situation of healthcare professionals shortage) may need to report to worksites not listed on the previously approved H-1B petitions and certified LCAs. Again, we need to look at both the LCA notice posting at the new employment location(s) if these locations are within the same MSA as the worksite(s) previously included in the H-1B petition and the previously certified LCA. If we remain within the same MSA, posting notices at the new worksites may be done via hard copy notice placement in visible location or, if substantial number of employees are unlikely to see hardcopy notices due to quarantine or work offsite, the notices should be distributed to the workforce electronically. If the new worksite(s) or some of them are not in the same MSA, consider the “Short Term Placement” option per the above. Importantly, the Department of Labor regulations permit working at the non-worksite (i.e., not previously included in the H-1B/LCA proceedings work locations) up to 60 days, but only if the employee's residence is not in the MSA of the temporary location. Here too, be sure to discuss needs for a new LCA certification and an amended H-1B petition filing with your immigration counsel and to remain tuned for – hopefully – some relaxation or waiver of the existing rules by the government.

USCIS Processing Changes During the COVID-19 Pandemic

In the wake of the COVID-19 pandemic, the U.S. Citizenship and Immigration Services (USCIS) recently announced two major changes in the government's usual methods for processing immigration benefits applications:

- While the government has historically required “wet-ink” signatures for all immigration forms, USCIS has now announced that they will accept all benefit forms and documents with reproduced original signatures. This means that a document may be scanned, faxed, photocopied, or similarly reproduced provided that the copy must be of an original document containing an original handwritten signature. Importantly, the original documents containing the “wet-ink” signature must be retained as USCIS may request to see the original documents at a later time. USCIS will accept electronically reproduced original signatures for the duration of the COVID-19 National Emergency.
- The government's Premium Processing service (i.e., 15-day expedited processing) has been temporarily suspended for all Form I-129 (Petition for a Nonimmigrant Worker) and I-140 (Immigrant Petition for Alien Worker) petitions. The suspension applies to new premium processing requests for EB-1, EB-2, and EB-3 I-140 petitions, as well as I-129 benefit requests for the following categories: E-1, E-2, H-1B (all H-1B petitions, including FY2021 H-1B cap-subject petitions, petitions from previous fiscal years, and all cap-exempt H-1B petitions), H-2B, H-3, L-1A, L-1B, LZ, O-1, O-2, P-1, P-1S, P-2, P-2S, P-3, P-3S, Q-1, R-1, TN-1 and TN-2.



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