

More than just suitcases! Legal Requirements when Moving an Employee to a New Location

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H-1B visas are becoming quite a coveted commodity. With the lottery system, cap numbers taken on the first day, and no increase of cap numbers in sight, employers are often forced to stretch their employees to the limit to fulfill contracts, service clients, and attract new business. For example, employees may be needed to work at multiple job sites for varying periods of time and with different tasks to complete for each client. Or, employees may be needed to move from one long-term contract project to the next. All of this occurs against a backdrop of heavy government regulation and severe penalties for employers and employees to break regulations established by the U.S. Departments of Labor and Homeland Security. In this era of increased enforcement, can you really afford to take risks with your employees? Could your business withstand penalties of \$1,000 to \$35,000 per LCA violation?! This article will briefly outline H-1B requirements relating to employees and changing work locations to determine when an employee can safely move to another site, when only a new LCA is needed, and when you must amend the H-1B petition in order to ensure compliance and avoid heavy fines and other penalties.

H-1B regulations require employers to complete and maintain a Labor Condition Application (“LCA” or “Form ETA 9035”) for each permanent worksite on which an H-1B employee will be placed. The LCA covers one employer and one “area of employment” which is defined to be a geographic area within normal commuting distance of the employer’s address or worksite. For many static jobs, the LCA attestation process is simple. The employer’s business is stable, the job is confined to a headquarters office or other facility, and the employee performs all of his or her work at only one location. Also, for short-term placements on a client site (lasting less than consecutive 5 days or 10 total, non-consecutive days at one site), the regulations are clear that a new LCA is not needed. However, with IT consulting and outsourced staffing on the rise, not all jobs and their corresponding H-1B petitions are that simple and confusion abounds as to what should be done when an employee moves to a new location ...

1. What does a certified LCA actually cover?

Katie P. Jacob: The Labor Condition Application (or “LCA”) is an attestation made to the Department of Labor that the employer will maintain specific working conditions and rates of pay at any worksites within the “area of employment.” One LCA can be used for up to ten employees working in the “area of employment.”

The “area of employment” covers the geographic area within “normal commuting distance” of the employer’s “place of employment.” An employer is required to have an LCA on file for each “place of employment,” which is described as any physical location where an H-1B employee actually performs his or her work, with the exception of short-term placements. If an employee moves to a work site within the “area of employment,” then no LCA or H-1B amendment would be required.

John T. Rotterman: Look we're all concerned about the size of our commutes; it's a perfectly normal concern. One man's normal may be another woman's nightmare. So it's best to talk to your attorney and make a good faith effort determine if it's normal in your neck of the woods. I mean, New Yorkers might tolerate an enormous commute, whereas folks from more remote areas just might not put up more than a ten-minute drive.

KPJ: A typical man ... it's not the size of the commute that matters – it's how you use it! If you can make an argument that a client site is commutable, then I think you are ok to avoid a new LCA. However, my rule of thumb – when in doubt, it's best to file a new LCA!

2. What should an employer do when a contract employee moves to a new client site for a long-term project?

KPJ: If an employee is required to work on a project lasting more than five (5) consecutive days or a total of ten (10) non-consecutive days at one employment site, a new LCA must be submitted. When a new LCA is filed, the employer must also file an amended H-1B Petition with USCIS.

However, if an employer anticipates regular need of employees at a specific off-site location (i.e. routinely sending employees to work on contracts for your best customer), the employer can file multiple LCAs to cover all areas of anticipated employment. If the employer already has an LCA with an “open slot” (i.e. it has been used by less than 10 permitted employees), the employer can utilize the LCA already in place and avoid having to file a new LCA specific to that employee and avoid the time and expense of amending the H-1B.

JTR: “[m]ust also file an amended H-1B petition?” That’s a bit draconian don’t you think? Certainly, there’s no harm in filing an amended petition, well, it costs money, so there’s that; but importantly, there’s no legal requirement to do so.

USCIS policy on the matter is quite clear, or at least as clear as the edicts spewed from a hulking bureaucracy are apt to get – they wrote a letter. In their letter, they address the question of if an amended H-1b is required if the position’s geographic location changes but nothing else does. According to the letter, everything’s copasetic as long as all of the LCA responsibilities, i.e., filing, certification, posting, wage/hour obligations, are met prior to the employee’s start at the new site, and no amended petition is required.

KPJ: Is that really safe? I'm guessing that when an employer moves an employee to a new client site under a new contract, the job duties will vary somewhat. That may be a material change....

In addition, the rate of pay may change to account for a higher or lower standard of living in that area. For example, let's say you move a Programmer Analyst from New York City (\$\$\$) to Indianapolis (\$\$). Wouldn't you rather obtain a new prevailing wage and adjust the salary accordingly? Or would you keep on paying the higher required wage? (Salary changes are certainly a material change...) If your answer is "just keep paying the higher wage," email me – I would like you to be my boss!

JTR: The need to file an amended LCA is not in dispute. For me, however, filing an amended H-1b petition concurrently is overkill.

3. When must I amend the H-1B for my employee?

KPJ: Any time that a new LCA is required, you should file an amended H-1B with USCIS.

As stated above, the only situations in which a new LCA and H-1B amended would not be required include short-term work assignments, development activities (attending conferences, seminars and other formal training), and work at locations that are already covered by another LCA with less than 10 employees.

JTR: That is certainly one approach, and you won't break any laws crossing every 'i' and dotting every 'T' like that (sic), but there's a very credible argument to be made that those filings just aren't necessary and only add expense.

According to the H-1b regulations, amended petitions only need to be filed to reflect a "...material changes in the terms and conditions of employment..." Existing USCIS policy interprets that passage to exclude mere changes in geography. In other words, if the original petition was for an accountant and now the foreign national is working as a programmer analyst that would require an amended petition. If, however, the accountant is moving from sunny Miami to snowy Anchorage, and a new LCA is filed, certified etc., before the move, then that's enough to keep the employer compliant.

4. New question – what if the LCA was not filed etc....prior to the change of employment location?

KPJ: The safe approach is always to file a new LCA and an amended H-1B to be absolutely certain that you are in compliance with the law. What's a filing fee compared to back wages, fines up to \$35,000 and prohibition from filing H-1B petitions?? I advise clients not to take chances – make the effort to follow the regulations carefully and it will pay off in the event of an audit.

JTR: Frankly, the USCIS letter that deals with amended petitions and LCAs just doesn't touch on this scenario. It limits itself to addressing the need for an amended petition if the LCA was filed, certified, etc., prior to the move.

Arguably, the implication is that if the new LCA is not in place before the move, then an amended petition would be required. *Arguably*, that idea is implicitly present. Factually, the question just isn't addressed. That said, prudence should prevail in this case and an amended petition should be filed if the new LCA postdates the move.

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