CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

LCA POSTING REQUIREMENTS AT HOME DURING THE COVID-19 PANDEMIC: DO I POST ON THE REFRIGERATOR OR BATHROOM MIRROR?

Posted on April 8, 2020 by Cora-Ann Pestaina

"The LCA is to an H-1B worker like a leash is to a dog." (Cyrus Mehta and Myriam Jaidi, The LCA in the Age of Telecommuting). In the midst of the global pandemic that is COVID-19, these words have never seemed truer. Across the US, employers of H-1B workers are understandably very concerned about how to handle forced changes in the employment of their H-1B workers. Employers have had to make the difficult decisions such as to shut down completely, lay off employees, lower salaries, reduce employees' hours of work, place employees on furlough or have them work from home. In last week's blog, FAQ on Changes in Salary and Other Working Conditions for H-1B Workers During the COVID-19 Crisis, Cyrus Mehta provided a list of frequently asked questions (FAQ) seeking to provide some guidance to US employers. But one issue keeps on rearing its ugly head, how exactly can an employer ensure compliance with the Labor Condition Application (LCA) posting requirements when the H-1B worker is forced to work from a worksite (such as his/her home) that was not intended at the time the LCA was filed?

As background, the LCA ensures that notice is provided to US workers about the fact that an H-1B worker is being sought, the occupational classification, the wages offered, the period of employment, locations at which the H-1B worker will be employed, and that the LCA and accompanying documents are available for public inspection. See 20 CFR § 655.734. The notice must be posted at the "place of employment", which means the worksite or physical location where the work actually is performed by the H–1B, H–1B1, or E–3 nonimmigrant. See 20 CFR § 655.715. So one's home in the age of virtual cloud-based desktops and Zoom video can conceivably constitute "place of employment."

As explained in the FAQ, if the H-1B worker relocates to the home within the area of commuting distance from the original workplace, a new LCA need not be obtained, but notice must still be given at the new place of employment. If the H-1B worker relocates to a home outside the area of intended employment, a new LCA has to be obtained and the employer must file an amended petition. "Area of intended employment" means the area within normal commuting distance of the place (address) of employment where the H–1B nonimmigrant is or will be employed. See 20 CFR §655.715.

Employers have run into issues due to the fact that employees are hesitant to post LCAs at their home. They are understandably resistant to the idea of broadcasting their yearly salary to everyone currently sheltering in place due to COVID-19 (e.g. in-laws or au pairs) and they may also be unable to even print the LCA at home due to lack of a printer. There is constant pushback from employers and pleas for an alternative. Unfortunately, the Department of Labor (DOL) has not set forth any guidance upon which the employer can confidently rely. In the above referenced blog, The LCA in the Age of Telecommuting, the authors discussed the fact that however absurd it may sound, it might still be advisable to file an LCA for the worker who telecommutes (if the home location was not contemplated when the LCA was filed), and have the worker post the LCA in two conspicuous locations in his or her home or the location from which he or she is telecommuting. In the alternative, the LCA notice provision may be satisfied by an electronic posting directed to employees in the relevant occupation classification. Pursuant to 20 CFR 655.734(a)(ii)(B), such electronic posting may be accomplished:

> *by any means ordinarily uses to communicate with its workers about job vacancies or promotion opportunities, including through its "home page" or "electronic bulletin board" to employees who have, as a practical matter, direct access to these resources; or through e-mail or an actively circulated electronic message such as the employer's newsletter. Where affected employees at the place of employment are not on the "intranet" which provides direct access to the home page or other electronic site but do have computer access readily available, the employer may provide notice to such workers by direct electronic communication such as e-mail (i.e., a single, personal e-mail message to each such employee) or by arranging to have the notice appear for 10 days on an intranet which includes the affected employees (e.g., contractor arranges to have notice on customer's intranet*

accessible to affected employees).

Electronic posting is not foolproof. The rules governing electronic posting do not make clear who has to be notified – all employees everywhere and anywhere who fall within the same "occupational classification" (how narrowly or broadly should that be interpreted?) or only those in the "area of intended employment." But, on how to effectuate a compliant electronic notification, see Cyrus Mehta's blog, "Nuts and Bolts of Complying with the H-1B Notice Requirements". An employer can post notice on its own website or on a web portal of an LCA hosting service, but must still inform affected workers of the existence of this web posting through notification via e-mail, the company intranet, through Slack channels or by providing hard copy notification of the existence of the notice on the website.

Then, in the minutes of an October 13, 2017 meeting between the American Immigration Lawyers Association (AILA) and the DOL Wage and Hour Division (WHD) there was this question and answer:

> **10. Many H-1B workers are now working remotely from their homes, instead of the employer's office. If the employer has an LCA for its office but then will allow the H-1B worker to work remotely from home in a geographic area of employment that is not covered by the LCA, is the employer required to file a new LCA prior to the H-1B worker being allowed to work from home (assuming that the short-term placement option does not apply)? Is an employer required to complete the LCA notifications for an H-1B worker who will be working from home? If so, how/where should these notifications be posted at the H-1B employee's home?**
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> **WHD Response**: WHD does not expect employees to post at their houses. If the worker will be working at HQ and at home, the employer should post at HQ. Unless one of the short-term placement exceptions apply, the employer will need to file a new LCA for the employee's home location if the employee will be working at a home location that is not within normal commuting distance of the location on the existing LCA covering the employee.

That unclear response provided no comfort that there would be no future penalty for failing to post an LCA at an employee's home during the COVID-19 pandemic.

Most recently, on March 20, 2020 the DOL's Office of Foreign Labor Certification answered FAQs that addressed COVID-19 impacts to OFLC operations and employers. The following question and answer was included:

> **4. I am an employer with an approved Labor Condition Application (LCA). Due to the impact of the COVID-19 pandemic, I may need to move workers on an H-1B, H-1B1, and/or E-3 visa to worksite locations unintended at the time I submitted the LCA for processing by OFLC. Do I need to file a new LCA if the worksites are located in the same area of intended employment? If not, what are my notice obligations for moving the workers to the new worksite locations?**
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> If an employer's H-1B employee is simply moving to a new job location within the same area of intended employment, a new LCA is not generally required. See 20 CFR 655.734. Therefore, provided there are no changes in the terms and conditions of employment that may affect the validity of the existing LCA, employers do not need to file a new LCA. Employers with an approved LCA may move workers to other worksite locations, which were unintended at the time of filing the LCA, without needing to file a new LCA, provided that the worksite locations are within the same area of intended employment covered by the approved LCA. Under 20 CFR 655.734(a)(2), the employer must provide either electronic or hard-copy notice at those worksite locations meeting the content requirements at 20 CFR 655.734(a)(1) and for 10 calendar days total, unless direct notice is provided, such as an email notice. It is important to note that if the move includes a material change in the terms and conditions of employment, the employer may need to file an amended petition with USCIS. Notice is required to be provided on or before the date any worker on an H-1B, H-1B1, or E3 visa employed under the approved LCA begins work at the new worksite locations. Because OFLC acknowledges employers affected by the COVID-19 pandemic may experience various service disruptions, the notice will be considered timely when placed as soon as practical and no later than 30 calendar days after the worker begins work at the new worksite locations. Employers with an approved LCA may also move H-1B workers to unintended worksite locations outside of the area(s) of intended employment on the LCA using the short-term placement provisions. As required for all short-term placements, the employer's placement must meet the requirements of 20 CFR 655.735. The short-

term placement provisions only apply to H-1B workers.

Requiring the H-1B worker to post at home makes no sense as there are no other workers in that home. Some of our esteemed colleagues believe that since the H-1B worker is the only worker at the home location, e-mailing the LCA notification to that worker, without requiring a posting in two ridiculous conspicuous locations – such as one on the refrigerator and the other on the bathroom mirror – would be the most appropriate way to handle it.

At the end of the day, the lack of various concessions in the midst of a global pandemic does nothing to ease fears that employers who fail (with good reason) to properly post the LCA for their H-1B workers could be penalized following a DOL audit. Knowing the various issues employers face during the pandemic, will the chances of an audit actually *increase* once everyone is able to go back to work? Will the DOL seize the opportunity to say "gotcha?" It remains to be seen and of course, the hope is that any DOL auditor will exercise discretion and not impose any penalty against an employer with a history of compliance. But, at this point, it is still a significant risk. Unless and until the DOL says otherwise, the refrigerator and the bathroom mirror may have to come into play.