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THE NUTS AND BOLTS OF COMPLYING WITH THE H-1B NOTICE REQUIREMENTS

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A US employer has to meet several requirements when filing an H-1B visa petition on behalf of the foreign national employee. One important requirement is for the employer to notify affected US workers regarding its intent to hire a foreign worker in H-1B nonimmigrant status. The notification requirement is considered to be an important protection for US workers as it informs them of the terms of the employment of the nonimmigrant H-1B worker, including the wage being offered, and the right of the US worker to examine documents justifying the wage, as well as the ability of the US worker to file complaints if they believe that violations have occurred.

The Wage and Hour Division of the Department of Labor has issued useful guidance regarding H-1B notice requirements by electronic posting in a Field Assistance Bulletin dated March 15, 2019 (FAB). The WHD has seen a rise in the use of electronic notification by employers who file H-1B petitions. Employers have the option to notify US workers either through a hard copy notice or through electronic means. In the case of large employers, especially consulting companies who place thousands of H-1B workers at third party worksites of their clients, they have been using their own public website to meet the notification obligation. The FAB clarifies that use of a public website is permissible provided "all affected workers, including those employed by a third party, have access to, and are aware of, the electronic notification."

212(n)(1)(C) of the Immigration and Nationality Act (INA) provides the legal basis for employers to provide notification to affected US workers of its intent to hire H-1B nonimmigrant workers. This notification obligation is triggered prior to the employer filing the Labor Condition Application (LCA). It is only after the LCA is certified that an employer may file the Form I-129 petition to classify the

foreign worker for an H-1B visa or H-1B status. The DOL is required to certify the LCA within 7 days unless the information provided therein is inaccurate or incomplete. The notice must be given on or within 30 days before the date the LCA is filed with the DOL. It is important to first post and then electronically file the LCA in order to ensure perfect compliance.

20 CFR 655.734 provides further guidance on the employer's notification obligation. Employers may comply with their notification obligation by posting either a hard copy notice or by electronic notification. Where there is a collective bargaining representative for the occupational classification in which H-1B nonimmigrants will be employed, the employer must provide the notice to the collective bargaining representative on or 30 days before the date the LCA is filed with the DOL.

Regarding who affected workers are, the FAB states:

"Affected workers are those at the same place of employment and in the same occupational classification in which H-1B workers will be or are employed. See 65 FR 80110; 80161. Affected workers need not be employed by the H-1B petitioner to qualify as such: the H-1B petitioner's notification responsibilities extend to all affected employees, regardless of whether they are employed by the H-1B petitioner or by a third party company. *Id*."

The FAB then goes onto discuss hard copy and electronic notification requirements.

Hard Copy Posting Requirements

These requirements are set forth in 20 CFR 655.734(a)(1)(ii). The petitioning employer must post notice in at least two conspicuous places at the place of employment so that affected workers can easily see and read the posted notices. The notice shall indicate that H-1B nonimmigrants are sought; the number of such nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the locations at which the H-1B nonimmigrant will be employed, and that the LCA is available for public inspection at the employer's principal place of business or at the worksite. The notice shall also include the following statement: "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States

Department of Labor."

There are additional requirements for H-1B dependent employers or willful violators who are not using exempt workers, which are also set forth in the regulation.

A copy of the LCA that is posted at two conspicuous locations also fulfills the notice requirement. Note, though, that the most recent version of ETA 9035 requires the employer to indicate the business name and address of the entity, if the H-1B worker will be assigned to a third party site. Thus, the information contained in the LCA, if it is used to fulfill the notice requirement, goes beyond what is required in the regulation. 20 CFR 655.734(a)(1)(ii) only requires notification of the "location(s) at which the H-1B nonimmigrants will be employed" and not the business name and address of the entity.

The FAB states that an employer will not be in compliance of its notice obligation if it posts the "hard copy notification, for example, in a custodial closet or little visited basement." 20 CFR 655.734(a)(1)(ii)(A)(2) suggests that appropriate locations for posting could be in immediate proximity to wage and hour notices or occupational safety and health notices. Still, if the intention of the notice is for workers in the same occupational classification to see them, then the notices could conceivably be posted conspicuously in the place where say software engineers in a large company congregate, such as in their pantry or recreational area. It would, however, be prudent for the employer to post the hard copy in the vicinity of other notices that the employer is obligated to post under law as that would maximize the ability of affected workers to read it.

The employer who intends to employ H-1B workers at third party worksites also has an obligation to post at the third party site even if that place is not owned by the petitioner. The FAB suggests that the hard copy posting must be placed in a location available to all affected employees. "For example, if the H-1B petitioner posts at a third-party worksite, but in a physical location accessible only to its own employees (such as a private employee lounge or office) affected workers employed by the third-party have not been notified and the employer has not complied with this provision."

There have been instances of entities that receive H-1B workers who do not cooperate with the posting requirement. The H-1B petitioner, unfortunately, is still liable for violating the notification requirement even if the third party entity

refuses to post the notice. *See Administrator v. Sirsal, Inc. and Vijay Gunturu*, 11-LCA-1 (ALJ July 27, 2012). There is no legal basis for penalizing the third party that refuses to cooperate. Some petitioners in a good faith attempt to comply, when the third party refuses to post, have the H-1B worker post the notice on his or her cubicle, but this attempt, even if sincere, may still not be in compliance if the posting is not visible to all affected workers in the occupational classification at the third party worksite.

The notice shall be posted on or within 30 days before the date LCA is filed, and shall remain posted for a total of 10 days.

Electronic Notification

In cases where the third party entity refuses to cooperate, electronic notification may be a way for the employer to be in compliance, especially those who place large number of H-1B workers at many worksites throughout the country. Electronic notification is as effective as hard copy notification under 20 CFR 655.734(a)(1)(ii)(B). The employer, according to the FAB, "must make the notification readily available, as a practical matter, to all affected employees." Thus, the affected worker must be capable of accessing the electronic notification. The employer may e mail or actively circulate electronic messages such as through an employer newsletter.

Such notification shall be given on or within 30 days before the date the LCA is filed, and shall be available to the affected employees for a total of 10 days, except that if employees are provided individual, direct notice (as by e-mail), notification only need to be given once during the required time period. The notification must contain the same language as a hard copy posting.

With respect to notification to affected workers employed at a third party worksite, when the petitioner places its employees there, electronic notification must be given to "both employees of the H-1B petitioner and employees of another person or entity which owns or operates the place of employment." 20 CFR 655.734(a)(ii)(B). The FAB still warns that some electronic resources used by H-1B petitioners may not be accessible to affected workers at a third party. Even if employees of the third party site can visit the electronic resource, "if they do not know to visit the electronic resource, the notification is not readily accessible, to affected workers employed by the third party." And if affected employees have access to the electronic notice, but they cannot determine which notice is applicable to their worksite, the notice is insufficient and the

employer will not be in compliance.

Electronic Notification on Public Websites

H-1B petitioners may provide electronic notification on their public websites, so long as the affected workers at the third-party worksite are aware of the notice and are able to determine which notice is applicable to their worksite. A number of large employers post the LCAs on their website and indicate the work locations.

Take for example PwC. PwC's website has a link to Careers. From the Careers page, one scrolls down to Labor Condition Applications, which in turn takes you to a link to the work location such as San Antonio, TX, which opens up the actual LCA for that location.

Similarly, with respect to Cognizant, one has to go to Careers, and then scroll quite a way down to LCA Notices, which then links to a location, which further links to the LCA notice rather than the actual LCA.

Both PwC and Cognizant are compliant relating to a website posting as the affected workers are able to determine which electronic notice applies to their worksite. However, the FAB indicates that employers may need to do more than just posting the links with the work locations on their websites, and may have to make affected workers aware that the petitioner has posted on its website. This is not to suggest that these companies are not taking additional steps to notify affected workers, but the point being made is that posting the worksite by any employer on its public website may not be enough. The FAB suggests posting a link to the electronic notice for a particular third-party employer's intranet site or emailing the link to all affected employees at that worksite. The FAB also suggests that the H-1B petitioner complies, after electronic notification, by posting a hard copy message in a conspicuous site or directing affected workers to the website where the notice is posted for that particular website.

According to Roman Zelichenko, CEO and Co-Founder of LaborLess, the "DOL has allowed for some flexibility." In the penultimate paragraph, the FAB states that, "an H-1B petitioner may provide this notification using whatever method, or combination of methods, it deems most prudent for its businesses." Zelichenko, whose company automates LCA posting for employers and attorneys, adds: "And this makes sense - small companies who hire H-1B

workers through a consulting company or staffing firm might use Slack, Microsoft Teams, etc. to communicate with their staff, making that potentially the "most prudent" means of notifying their employees of an LCA posting. For other employers, the easiest way to comply would be to post a notice where they traditionally posted hard copy LCAs, except now it would direct employees to a URL. Ultimately, the memo's language allows companies to decide for themselves how best to comply, while outlining the basic guidelines those companies should follow if they want to remain compliant."

Even if an H-1B employer posts electronically, the DOL may still find that the employer is non-compliant if affected workers are not notified about the existence of the electronic posting. The guidance thus suggests that "n H-1B petitioner may default to posting of a hard copy if it cannot ensure that all affected employers have ready access, as a practical matter, to the electronic notice." The lesson to be learned from this is that electronic notification may not be the ultimate solution, especially to get around a recalcitrant third party entity that refuses to cooperate, and H-1B employers may still have to resort to a paper posting to ensure that all affected workers have been notified. And if the third party refuses to post, the H-1B employer is caught in a classic Catch -22!