FAQ: What U.S. Companies Should Know About the New H-1B Labor Condition Application

Executive Summary

The Department of Labor (DOL) has revised the ETA Form 9035/9035E, the Labor Condition Application (LCA) for Nonimmigrant Workers, which is required for employers seeking to sponsor employees for H1B, H-1B1, and E-3 nonimmigrant visas. Employers must begin using the new form on November 19, 2018.

What is the ETA Form 9035/9035E Labor Condition Application (LCA)?

The LCA is used in the DOL employment-based temporary immigration program by employers to request permission to bring foreign workers to the United States as nonimmigrants to perform certain work in specialty occupations or as fashion models of distinguished merit and ability. The Immigration and Nationality Act (INA) mandates that no foreign worker may enter the United States for the purpose of performing professional work on a temporary basis unless the employer makes the following attestations to the Secretary of Labor (Secretary):

1. The employer will offer a wage that is at least the prevailing wage for the occupational classification in the area of employment or the actual wage paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, whichever is greater;
2. The working conditions for the nonimmigrant worker will not adversely affect the working conditions of similarly employed U.S. workers;
3. There is no strike or lockout in the course of a labor dispute in the occupational classification at the place of employment; and
4. The employer has provided notice of the filing of the LCA.

In addition, further attestations are generally required for H–1B dependent employers and employers who have been found to have willfully violated the statute.

Why is DOL changing the LCA?

Last summer, the Secretary directed the agency to develop changes to the LCA "to better identify systematic violations and potential fraud, and provide greater transparency for agency personnel, U.S.

workers and the general public." The Department has determined that additional information is required to better track employer usage of the program and provide greater transparency to the public with respect to the employment of H-1B, H-1B1, and E-3 nonimmigrant workers in the United States.

When will the final LCA text be released?

DOL has not published the final version of the LCA, but contacts at DOL have confirmed to BAL that the final version will be the same as the proposed version DOL published in May 2018.[1] The agency will host two webinars on Wednesday, November 14, 2018, at 10:00 a.m. and 3:00 p.m. Eastern Time, "designed to provide technical assistance to employers and, if applicable, their authorized attorneys or agents in completing and submitting an LCA using the revised ETA Form 9035/9035E."

When will the new form be required and will there be any transition period?

The form will become mandatory on November 19, 2018. The agency has not indicated plans to build in a grace period.

Will LCAs submitted or approved prior to November 19 remain valid?

Yes. LCAs submitted or approved prior to that date will remain valid for the full validity period.

My company used the prior version of the LCA to provide notice at the worksite. Can the company rely on that notice when submitting the new LCA on or after November 19?

DOL has also not issued guidance on whether an employer may rely on a prior LCA form that was used to provide the required notice at the worksite (either through physical posting or electronic posting). However, because the prior/current version of the LCA contains the information required by the regulations to comply with notice obligations, we anticipate, but cannot guarantee, that employers will be able to rely on a posting that utilized the prior/current version of the LCA.

What are the key changes to the form?

The Department's proposed form requires employers to provide the legal business name of any secondary entities with which H-1B workers will be placed. This obligation exists even if there is no employer-employee relationship between the third-party and the H-1B beneficiary.

[1] *See* https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201805-1205-001.

The Department has proposed to add Appendix A to Form ETA-9035/9035E, which collects the following information from employers seeking exempt status for employees based solely on their attainment of a Master's degree or higher in a related specialty:

- The number of H-1B nonimmigrant workers for which H-1B dependent or willful violator employers will seek exempt status based solely on the worker's attainment of a Master's degree or higher in a specialty related to the intended employment;
- The name of the institution that awarded the degree;
- The field of study in which the degree was awarded;
- The date on which the degree was awarded; and
- Documentation substantiating the degree information.

The Department also clarified that an LCA Public Access File ("PAF") meeting the requirements of 20 CFR 655.705(c)(2), 655.730(c)(3), 655.760, and 20 CFR 655 Subpart I may be stored electronically, as long as employers provide effective access. If the employer elects to store the PAF electronically, the employer must make the file available and accessible at the particular location(s) provided on the form.

When must an employer identify a worksite on the LCA?

In accordance with 20 CFR 655.730(c)(5), the employer must identify all intended places of employment on the LCA, including intended places of employment which qualify as short-term placements under 20 CFR 655.735. A place of employment means the worksite or physical location where the work actually is performed by the H-1B, H-1B1, or E-3 nonimmigrant.[2] A worksite location must be identified as an "intended place of employment" if the employer knows at the time of filing the LCA that it will place workers at the worksite, or should reasonably expect that it will place workers at the worksite based on: (1) an existing contract with a secondary employer or client, (2) past business experience, or (3) future business plans.

How should an employer handle a situation where a worksite was not contemplated at the time of filing?

When employers place H-1B workers at worksites not contemplated at the time of filing, but within the area of intended employment established by an approved LCA, the regulations at 20 CFR 655.734(a)(2) require posting of notice at those worksites, but do not require the filing of new LCAs. This and the short-term placement provisions at 20 CFR 655.735 apply to places of employment not contemplated at the time of filing. Therefore, such locations are not *intended* places of employment and cannot be included on the initial LCA. If an employer wants to move H-1B workers to worksites not contemplated at the time of filing, these provisions determine whether a new LCA must be filed.

[2] *See* 20 CFR 655.715.

Our company does not release the names of clients. Is there a way to protect that information from disclosure through the LCA?

No. The new form requires that the company provide the legal business name of the secondary entity.

The Department has considered concerns raised about proprietary business information and has concluded that the disclosure of names and locations of secondary entities does not violate protections for such information. Under the current regulatory requirements, it is sometimes possible to glean the secondary entity's identity by analyzing the worksite location and comparing it to known business addresses. However, this is administratively burdensome and hinders the Department's ability to determine where H-1B workers are placed, and reduces the transparency to the public. Further, although there are legal protections for certain categories of commercial information, they do not apply here.

Our company does not place H-1B workers at third-party sites, but vendors utilize H-1B workers on our locations. What should our company know about the new LCA?

You should be aware that your vendors will be required to identify your company on the LCA if they intend to place workers at your location. It is expected that this information will be made available to the public.

If an employee of an H-1B dependent employer qualifies for both the Master's degree exception and is paid over $60,000, how should the employer complete the form?

Employers must complete and attach Appendix A with documentation for any H-1B nonimmigrant worker if the statutory exemption for that worker is based *only* on the Master's or higher degree exemption. This means Appendix A does not need to be completed if the exemption for that worker is based on (1) the $60,000 annual wage exemption or (2) both the Master's or higher degree and the $60,000 wage.

The DOL press release suggested that an employer must list the total number of H-1B workers at a location. However, the new LCA states that an employer must list the total number H-1B workers for that location under the LCA. How should a company complete the LCA?

The most recently published form and form instructions make clear that an employer only needs to list the total number of workers sought under the LCA. This means an employer would not be required to count individuals who are already working at that location. If an employer uses a multiple slot LCA and lists multiple work locations, the employer must identify the total number of workers who will be placed at each location.