U.S. Department of Labor

Employment and Training Administration

OFFICE OF FOREIGN LABOR CERTIFICATION

COVID-19

Frequently Asked Questions

ROUND 3

April 9, 2020

1. Due to the impact of the COVID-19 pandemic, can I move my H-1B workers to a new worksite that is located outside the area of intended employment on my certified Labor Condition Application?

An employer with an approved Form ETA-9035, *Labor Condition Application for Nonimmigrant Workers* (LCA), may place an H-1B worker at a new worksite located outside of the area(s) of intended employment certified by the Department's Office of Foreign Labor Certification (OFLC), without having to file a new LCA, ***if*** the employer meets the conditions for short-term placement. The conditions are fully discussed in the H-1B regulations at 20 CFR 655.735 and summarized as follows:

- The employer's in compliance with wages, working conditions, strike requirements, and notice for worksites covered by the approved LCA;
- The employer's short-term placement is not at a worksite where there is a strike or lockout;
- For every day the H-1B worker is placed outside the area of intended employment, the employer continues to pay the required wages; and
- The employer pays lodging costs, costs of travel, meals, and expenses (for both workdays and non-workdays).

Under the short-term placement provisions, an employer may place the H-1B worker at the new worksite location for up to 30 workdays in one year and, in certain circumstances, up to 60 workdays in one year. Employers will need to determine, on a case-by-case basis, whether the 30-workday and/or 60-workday provisions may apply. Employers should be aware that, if the worker's place of residence is outside the area of intended employment, the 60-workday provision would not apply. The short-term placement provisions only apply to H-1B workers; not H-1B1 or E-3 workers.

The area of intended employment is the area within normal commuting distance to the place of employment; there is no rigid measure of distance for "normal commuting distance." Generally, if an H-1B worker normally commutes from his or her place of residence to the worksite(s) on the approved LCA, the worksite(s) will be considered within commuting distance. If the worksite is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance, even if it crosses state lines. Accordingly, H-1B workers may be employed at a worksite within an MSA without the employer filing a new LCA and without the employer relying on the short-term

placement provisions. 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 or new petition with USCIS.

Important Reminder: Certain notice requirements would apply, as explained in separate Frequently Asked Questions concerning the COVID-19 pandemic, which OFLC published on March 20, 2020.

Additionally, employers retain the option of filing a new LCA, at any time, covering new worksite(s) that are located outside the area(s) of intended employment or to make other changes to the terms and conditions of the original LCA. Under the Department's H-1B regulations at 20 CFR 655.760, employers must document and retain evidence in their files demonstrating compliance with all LCA requirements. If an employer files a new LCA covering additional worksites outside the area of intended employment listed on the original LCA, or materially changes the terms and conditions of employment, the employer would need to file an amended or new H-1B petition with USCIS. Employers should consult DHS regulations and USCIS guidance regarding when an amended or new petition must be filed: https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf

Further, employers are reminded that they attest on the Form ETA-9035, section G(2), that the employment of H-1B, H-1B1 or E-3 nonimmigrant workers in the named occupation will not adversely affect the working conditions of similarly employed U.S. workers, and that nonimmigrant workers will be afforded working conditions on the same basis, and in accordance with the same criteria, as offered to U.S. workers similarly employed. *See* 20 CFR 655.732. This means that if an employer is offering H-1B workers the flexibility to telework from their home that is within the area of intended employment, the employer must offer those same flexibilities to its U.S. workers similarly employed. Additionally, if the employer is offering to move the H-1B worker to a new location outside of the area of intended employment, the employer must offer the same option to its U.S. workers similarly employed.

Workers or employers who have questions, or would like to file complaints with the Wage and Hour Division (WHD) should visit www.dol.gov/whd/, submit an inquiry online at webapps.dol.gov/contactwhd/, or call 1-866-487-9243. Callers will be directed to the nearest WHD office for assistance. WHD staffs offices throughout the country with trained professionals who have access to interpretation services to accommodate more than 200 languages. Specific information on how to file a complaint is available on WHD's website. All assistance from WHD is free and confidential.

2. Due to the impact of the COVID-19 pandemic, can I use alternative housing that was not initially disclosed in the H-2A job order as a temporary measure to promote social distancing and slow the spread of the virus within my community or during a quarantine period?

The Department understands that agricultural employers are making every effort to maintain the nation's food supply and meet their contractual obligations to foreign and domestic workers, while taking appropriate steps to slow the spread of the virus. In some cases, COVID-19 containment measures may require an employer to find alternative housing for some of its workers due to social distancing measures that reduce the maximum occupancy of approved housing, to accommodate quarantine periods, or both.

In some areas of the country, COVID-19 containment measures may require an employer to find alternative housing for some of its workers due to reduced occupancy standards (*i.e.*, to increase social distancing) or quarantine workers for a temporary period of time. In effect, part of the employer's approved housing has become temporarily unavailable after certification due to the impact of the COVID-19 pandemic (*i.e.*, an unforeseen reason outside the employer's control). Where certified housing becomes unavailable, in whole or in part, the employer must promptly notify the State Workforce Agency (SWA) in writing of the new housing situation. As COVID-19 measures require flexibility and immediate action, an employer may place workers in other employer-provided housing or rental or public accommodation housing that complies with applicable local, State, or Federal housing standards upon notice to the SWA and, then, work with the SWA to provide documentation demonstrating compliance and/or schedule an inspection of the alternative housing following the procedures outlined in 20 CFR 655.122(d)(6).