UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
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MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

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SUBJECT: H-1B program obligations for common-law employers

This Field Assistance Bulletin ("FAB") provides guidance to Wage and Hour Division (WHD) field staff regarding H-1B program obligations for common-law employers in light of interpretive changes being made by both the Department of Homeland Security's (DHS's) U.S. Citizenship and Immigration Services (USCIS), and the Department of Labor's Employment and Training Administration, Office of Foreign Labor Certification (OFLC). *See* USCIS Final Rule, "Strengthening the H-1B Nonimmigrant Visa Classification Program", and OFLC Guidance, "H-1B Program Bulletin Clarifying Filing Requirements for Labor Condition Applications by Secondary Employers at 20 C.F.R. §§ 655.715 and 655.730(a)".

Introduction

The USCIS final rule states that any entity that has an employment relationship with the H-1B worker, as defined by the common law, must file a petition. Similarly, OFLC guidance better implements the statutory and regulatory requirement that Labor Condition Applications (LCAs) must be filed by all H-1B petitioners. 8 U.S.C. 1182(n)(1); 20 C.F.R. §§ 655.715, 655.730(a). As a result, some H-1B workers will have multiple LCAs and petitions concurrently, and responsibility for H-1B program obligations will lie with all employers that file LCAs and petitions. Specifically, when a staffing or outsourcing company (primary employer) places an H-1B worker with another common-law employer (secondary employer), the INA and its regulations require both the primary employer and the secondary employer to file an LCA with OFLC as well as file a petition with USCIS. This FAB provides further information as to how these compliance principles apply in practice.[1]

[1] This FAB uses the term "primary employer" to refer to the staffing or outsourcing company (historically, the entity filing the LCA and petition) and "secondary employer" to refer to the client with which the H-1B worker is ultimately placed. These terms mirror regulatory language used in 20 C.F.R. § 655.738 and reflect the reality that an H-1B worker may be employed by the primary employer for significantly longer than the

Background on the H-1B Visa Program

The H-1B visa program, codified in the Immigration and Nationality Act (INA), permits the temporary employment of nonimmigrants (H-1B workers) in specialty occupations within the United States. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n); 20 C.F.R. Part 655, subparts H and I. A prospective H-1B employer must submit an LCA to the Department of Labor (DOL) attesting that it will satisfy program requirements, including required wages and working conditions. 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.700(b)(1). An H-1B-dependent employer or prior willful violator hiring a non-exempt worker must also attest to recruitment and non-displacement of U.S. workers. *See* 8 U.S.C. § 1182(n)(1)(E) –(G), 20 C.F.R. §§ 655.736–.739. If DOL certifies an LCA, the prospective employer may submit a nonimmigrant visa petition (I-129), together with the LCA, to USCIS. 20 C.F.R. § 655.700(b)(2). If the petition is granted, the H-1B nonimmigrant applies to the State Department for an H-1B visa. *Id.* § 655.700(b)(3).

Staffing and Outsourcing Companies in the H-1B Program

Staffing or outsourcing companies are significant users of the H-1B program. These companies file LCAs and petitions to employ H-1B workers, frequently placing those workers at sites owned, operated, and controlled by a client. While the petitioning staffing or outsourcing company maintains the worker on its own payroll, the H-1B worker generally reports to, and is supervised by, the client company. Data published by OFLC indicates that in fiscal year (FY) 2019, approximately 39% of certified H-1B LCAs with available data were for placements with a secondary entity. The U.S. Government Accountability Office (GAO) reported in 2011 that, in FY 2009, 10 of the top 85 H-1B-hiring employers participated in staffing arrangements, and that these 10 employers garnered nearly 11,456 approvals (representing about 6% of all H-1B approvals). *See* U.S. Gov't Accountability Office, *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program* 20 (2011), https://www.gao.gov/assets/320/314501.pdf.

The role that staffing or outsourcing companies play in the H-1B program has long been an area of concern. For example, in its 2011 report, GAO raised concerns that the H-1B program lacked an explicit provision for holding employers accountable to program requirements when they obtain H-1B workers through a staffing company, as only the employer filing the petition was responsible for H-1B program compliance. *See id.* at 52–56.

These concerns are well placed. If a primary employer places an H-1B worker with a secondary employer that has not filed an LCA, the Wage and Hour Division (WHD) is unable to hold the secondary employer responsible for compliance with the H-1B provisions. As a result, U.S. workers employed by the secondary employer retain few protections in the course of their work.

One such example is that an H-1B worker must be paid the higher of the prevailing wage or the actual wage. The actual wage is the wage rate paid by the employer that filed the LCA and petition to all other individuals with similar experience and qualifications for the specific occupation. *See* 8 U.S.C. § 1182(n)(1)(A)(i); 20 C.F.R. § 655.731(a). A primary employer,

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secondary employer (given the practice of staffing or outsourcing companies to move workers between their clients). However, these terms do not impute "primary" or "secondary" responsibility for compliance with H-1B program requirements. As described below, each petitioning employer has full responsibility for complying with the terms and conditions of its own LCA and H-1B petition.

therefore, must pay a software engineer at least $70,000 per year as the actual wage if $70,000 exceeds the prevailing wage rate and the primary employer pays that rate to its software engineers. However, a primary employer may place the worker with a secondary employer that pays its software engineers $90,000 per year. Under current practice, WHD has enforced an actual wage obligation of $70,000 per year, even if the H-1B worker is a common-law employee of the secondary employer and works alongside software engineers earning $90,000 per year. This is because the secondary employer has historically not been required to file an LCA, and therefore has been under no obligation to ensure that the H-1B worker is paid as much as its own similarly employed workers. This may provide the secondary employer with an incentive to lay off U.S. workers or reduce their salaries and instead contract for H-1B workers. The resulting adverse effect on U.S. workers is contrary to the INA's labor safeguards.

Another example is the requirement that employers "provide working conditions for [H-1B] nonimmigrant[s] that will not adversely affect the working conditions of workers similarly employed." 8 U.S.C. § 1182(n)(1)(A)(ii). The Department's regulations provide that "workers similarly employed" refers only to U.S. workers employed by the employer that filed the LCA. *See* 20 C.F.R. § 655.732(a). As a result, in the case of an outsourcing company that provides H-1B workers to a secondary employer that are employed at the secondary employer's jobsite, any adverse effects the employment of such workers has on the employees of the secondary employer would not be actionable under the current system. *See Perrero v. HCL Am., Inc.*, 2016 WL 5943600, at 3 (M.D. Fla. Oct. 13, 2016). Because the secondary employer is not currently required to file an LCA, and the outsourcing company is not responsible for adverse effects on the employees of the secondary employer with which it does not have an employment relationship, a secondary employer is currently able, for example, to require its U.S. workers to train H-1B workers prior to replacing the U.S. workers with the foreign workers they trained. Such a practice, depending on the circumstances, may be contrary to the INA's labor safeguards.

Responsibility for Compliance by Secondary Employers

A consistent reading of the INA and regulations provides for increased protections for U.S. workers through the apportionment of responsibility to secondary employers. The labor-related requirements of the H-1B program apply to "employer[s]" of H-1B workers. 8 U.S.C. § 1182(n). The statute does not define the term "employer," but both DOL and DHS regulations refer to entities with a common-law employment relationship with the worker. This is consistent with Supreme Court precedent. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992). DOL's regulations define "employer" as "a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H-1B, H-1B1, or E-3 nonimmigrants and/or U.S. worker(s)." 20 C.F.R. § 655.715. The regulation further states that an "employment relationship" is determined using the common law. *Id.* (citing *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968), which was in turn cited in *Darden*, *see* 503 U.S. at 324). Similarly, DHS regulations define an "employee-employer relationship" as "the conventional master-servant relationship consistent with the common law." *See* "Strengthening the H-1B Nonimmigrant Visa Classification Program".[2]

[2] DHS is codifying this definition in a final rule. *See* "Strengthening the H-1B Nonimmigrant Visa Classification Program".

Importantly, both DOL and DHS also have understood the term "employer" to necessarily include an entity that files (1) a petition with DHS to employ an H-1B worker and (2) an LCA with DOL. DOL regulations state that "[i]n the case of an H-1B nonimmigrant . . . the person, firm, contractor, or other association or organization in the United States that files a petition with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant," and that "an employer . . . which meets the definition of 'employer' set forth in § 655.715" must file an LCA, 20 C.F.R. §§ 655.715, 655.730(a). Similarly, DHS regulations state that any "United States employer seeking to classify an alien as an H-1B . . . temporary employee must file a petition," and that "[b]efore filing a[n H-1B] petition . . . the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application[,]" 8 C.F.R. § 214.2(h)(2)(i)(A), 214.2(h)(4)(B)(1). Both Departments' regulations thus treat petitioners and LCA filers interchangeably. The fact that an entity is required to file a petition with USCIS necessarily means it must have also filed an LCA with DOL.

Despite these considerations, USCIS has not previously interpreted the INA or its regulations as requiring secondary employers of H-1B workers to file petitions, nor has DOL historically interpreted its own regulations as requiring secondary employers to file LCAs. However, as explained in "Strengthening the H-1B Nonimmigrant Visa Classification Program", USCIS regulations explicitly state that "[i]f [a] beneficiary will perform nonagricultural services for, or receive training from, more than one employer, *each employer* must file a separate petition with USCIS as provided in the form instructions," *id.* § 214.2(h)(2)(i)(C) (emphasis added). Accordingly, USCIS will now be interpreting this regulation as requiring all employers, including secondary employers, who have a common-law employer-employee relationship with an H-1B worker to file petitions. *See* "Strengthening the H-1B Nonimmigrant Visa Classification Program"**;** *accord Comite De Apoyo A Los Trabajadores Agricolas v. Solis*, No. 09-240, 2010 WL 3431761, at *16 (E.D. Pa. Aug. 30, 2010) (concluding, in the H-2B context, that an interpretation requiring only job contractors to file for labor certifications was contrary to the plain language of the regulation, which required "each employer" to file a petition with DHS).

Given DHS's interpretation, as well as DOL's own regulations providing that entities with a common-law employment relationship with an H-1B worker, as well as entities filing a petition with DHS, are "employers" that must file an LCA, *see* 20 C.F.R. §§ 655.715, 655.730, OFLC has announced that it is now interpreting its own regulations as requiring secondary employers that meet the common-law test to file LCAs with DOL. *See* "H-1B Program Bulletin Clarifying Filing Requirements for Labor Condition Applications by Secondary Employers at 20 C.F.R. §§ 655.715 and 655.730(a)".

Accordingly, because H-1B violations are assessed against employers that are required to file LCAs, WHD must now hold such secondary employers responsible for violations of their LCA attestations and the associated H-1B program requirements.[3] *See* 8 U.S.C. §§ 1182(n)(1);

[3] OFLC similarly interprets its regulations as requiring secondary employers of H-1B1 and E-3 workers who are those workers' common-law employers to file LCAs. Since employers of H-1B1 and E-3 workers are not required to file petitions at all, the regulations provide that "[i]n the case of an E-3 and H-1B1 nonimmigrant, the person, firm, contractor, or other association or organization in the United States that files an LCA with the Department of Labor on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant." 20

1182(n)(2)(A) (requiring DOL to "establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in a[] [labor condition] application").

As noted in OFLC's guidance, to provide time for employers to become familiar with the interpretation and the accompanying guidance below, and in order to prevent this interpretation from being unnecessarily disruptive, secondary employers need not file LCAs until after the passage of 180 days from the publication of its guidance, i.e., July 14, 2021. As such, secondary employers who meet the common-law test who have not filed LCAs prior to July 14, 2021 need not meet the LCA attestation requirements prior to that date as well.

H-1B Requirements Affected by Employment with Multiple Petition-Holders

The H-1B provisions set basic wage and working condition standards for the employment of H-1B workers to ensure that their employment does not adversely affect U.S. workers. Most of these obligations are employer-specific and seek to protect the U.S. workers *employed by the employer* from adverse impact.[4] Additionally, responsibility for compliance with the H-1B provisions lies with the employer. As discussed above, the term "employer" in this context refers to an employer that has a common-law employment relationship with the H-1B worker. Consequently, if more than one employer employs an H-1B worker at the same time, both are responsible for compliance with their own LCAs and the related H-1B program requirements. It follows that employers may have differing compliance obligations depending on the details of the LCAs filed and the wages and working conditions that each employer offers its similarly employed non-H-1B workers. These compliance obligations are discussed in more detail below.

However, in most circumstances, wages or benefits received by the H-1B worker may be counted towards the obligations of both employers.[5] For example, if the primary employer has an actual wage obligation of $70,000 per year and the secondary employer has an actual wage obligation of $90,000 per year, both employers have met their actual wage obligation if the employee receives $90,000 per year (*not* $160,000 per year). Similarly, if the primary employer offers 10 days of paid vacation per year and the secondary employer offers 15 days of paid

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C.F.R. § 655.715. Previously, OFLC has not enforced the LCA requirement against secondary employers of H-1B1 and E-3 nonimmigrants, providing such secondary employers with treatment analogous to H-1B secondary employers. Going forward, in light of the common-law definition in DOL's regulations and the generally-consistent application of the H-1B, H-1B1, and E-3 programs, OFLC is interpreting its regulations as requiring secondary employers under those programs that meet the common-law definition of employer to file LCAs. *See* "H-1B Program Bulletin Clarifying Filing Requirements for Labor Condition Applications by Secondary Employers at 20 C.F.R. §§ 655.715 and 655.730(a)". As such, WHD must enforce LCA requirements against those secondary employers as well.

[4] Certain H-1B obligations, such as the notification requirement found at 20 C.F.R. § 655.734, do extend basic protections beyond the sphere of the employer's employees.

[5] Benefits and eligibility for benefits must be offered to H-1B workers on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers. *See* 8 U.S.C. § 1182(n)(2)(C)(viii); 20 C.F.R. § 655.731(c)(3).

vacation per year, both employers are in compliance when the employee receives 15 days of paid vacation (*not* 25 days of paid vacation).

Wage Obligations in General

The H-1B program requires an employer to pay the required wage rate to H-1B workers during the period of authorized employment. The wage obligation begins when the H-1B worker enters into employment pursuant to a certified LCA,[6] and continues until the period of authorized employment ends or the employer effectuates a bona-fide termination of the H-1B employee. The required wage rate is the higher of the prevailing wage level for the occupational classification in the area of employment (the prevailing wage) or the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question (the actual wage). 8 U.S.C. § 1182(n)(1)(A)(i); 20 C.F.R. § 655.731.

Prevailing Wage Rate

The prevailing wage rate is determined at the time of filing the LCA and is established for the entire period of employment authorized by the LCA. No specific method is required to determine the prevailing wage provided that it meets certain criteria. *See* 20 C.F.R. § 655.731(a)(2); For example, the employer may use a wage obtained from the OFLC National Processing Center, a collective bargaining agreement, an independent authoritative source, or another legitimate source of wage data. *See id.* Therefore, two employers employing one H-1B worker may file separate LCAs using different prevailing wage sources and may have different prevailing wage obligations relating to the same H-1B worker.

If both employers accurately identify the occupational classification and area of intended employment on the LCA and petition, but provide different legitimate prevailing wage sources, each employer will be responsible for complying with the prevailing wage obligation pursuant to its own LCA. For example, the primary employer might use the OES and obtain a prevailing wage rate of $74,000 per year, while the secondary employer might use a private survey meeting the criteria in 20 C.F.R. § 655.731(a)(2) and obtain a prevailing wage rate of $70,000 per year. In this situation, the primary employer must ensure that the worker is paid at least $74,000 per year, and the secondary employer must ensure that the worker is paid at least $70,000 per year. As explained above, both employers have met their obligation if the employee receives at least $74,000 per year.

Actual Wage Rate

The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. Where there are other employees with substantially similar experience and qualifications in the specific employment in question, *i.e.*, they have substantially the same duties and responsibilities as the H-1B worker, the

[6] In the case of an H-1B worker who has not yet entered into employment, but has an approved LCA and H-1B petition, the required wage obligations begin 30 days after the date the worker first enters the country pursuant to the H-1B petition, or 60 days after the date the H-1B worker becomes eligible to work for the employer (in the case of an H-1B worker who is present in the United States on the date of the approval of the petition). 8 U.S.C. § 1182(n)(2)(C)(vii)(III).

actual wage is the amount paid to these other employees. 20 C.F.R. § 655.731(a)(1). Where no such other employees exist at the place of employment, however, the actual wage is the wage paid to the H-1B worker by the employer. *Id.* Unlike the prevailing wage, the actual wage rate may fluctuate during the period of authorized employment. When two employers employ one H-1B worker, the actual wage obligation of each employer may differ depending on the other employees in the specific employment that each employer retains at the worksite where the H-1B worker performs work.

> **Example:** The primary employer places the H-1B employee in the role of a level II software engineer at the worksite of the secondary employer. The prevailing wage is $70,000/year, and the primary employer pays the H-1B worker $90,000/year. The H-1B worker is on the primary employer's payroll. The primary employer employs no other software engineers at the secondary employer's worksite, and thus the primary employer's required wage obligation to the H-1B worker is $90,000/year. The secondary employer, however, employs five additional level II software engineers at its own worksite, and pays these level II software engineers $100,000/year. The secondary employer's required wage obligation to the H-1B worker is $100,000/year. If the H-1B worker only receives $90,000/year from the primary employer, the secondary employer has not complied with the obligation to pay the actual wage. That the H-1B worker appears on the primary employer's payroll is irrelevant to the secondary employer's actual wage obligation since, as discussed above, the secondary employer is also considered an "employer" under the H-1B statute and regulations.

Benefits and Eligibility for Benefits

Benefits and eligibility for benefits provided as compensation for services (*e.g.*, cash bonuses; stock option; paid vacations and holidays; health, life, disability and other insurance plans; retirement and saving plans) must be offered to H-1B workers on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers. 20 CFR 655.731(c)(3). When two employers employ an H-1B worker, their benefit obligations will differ depending on the benefits that each employer offers its respective similarly-employed employees. The employer's criteria for benefits may not provide stricter eligibility or participation requirements for the H-1B worker than for similarly employed U.S. workers, and H-1B workers cannot be denied benefits because they are "temporary employees" by virtue of their nonimmigrant status. 20 C.F.R. § 655.731(c)(3)(i).

> **Example:** A primary and secondary employer employ an H-1B worker. The secondary employer offers two weeks of paid vacation to its U.S. workers, while the primary employer does not offer any paid vacation to its workers. The secondary employer must offer the H-1B worker two weeks of paid vacation, regardless of whether the H-1B worker is usually on the payroll of the primary employer.

However, employers may use legitimate criteria to determine eligibility for benefits—including tenure and full-time versus part-time status—so long as the criteria are applied equally between U.S. workers and H-1B workers, and comply with applicable non-discrimination laws (such as Title VII of the Civil Rights Act of 1964). For example, an employer may require all employees, both H-1B and U.S., to be employed for at least six months before they can enroll in the company's 401(k) program. Employers must also comply with applicable federal laws

governing benefits and eligibility for benefits, such as the Employee Retirement Income Security Act of 1974 and the Affordable Care Act, as well as any applicable State or local laws.

Moreover, benefits need only be *offered* to the H-1B workers on the same basis and in accordance with the same criteria as an employer offers its U.S. workers. 20 C.F.R. § 655.731(c)(3). For example, health insurance offered by a secondary employer may include a waiting period for both H-1B workers and U.S. workers. If the H-1B worker will only be employed by the secondary employer for a period that is shorter than the duration of the waiting period, that H-1B worker will not be eligible to enroll in the secondary employer's health insurance policy during his short period of employment. Similarly, since it may not be practicable for an employee enrolled in the primary employer's insurance policy to switch to the secondary employer's insurance policy, the employee may decline an offer to participate in the secondary employer's insurance policy. However, in both situations, the secondary employer will be in compliance because it *offered* the health insurance.

Bona Fide Termination

An employer's obligation to pay an H-1B worker the required wage ends when it effectuates a bona-fide termination of the employment relationship. *See* 20 C.F.R. § 655.731(c)(7)(ii). A bona fide termination occurs when: (1) the H-1B worker is notified that he or she is terminated; (2) DHS is notified of the termination so that the petition can be canceled; and (3) the employee is offered payment for return transportation under certain circumstances. *See Jinna v. MPRSoft, Inc.*, ARB Case No. 2019-0070, ALJ Case No. 2018-LCA-0039, 2020 WL 2319034, at *5 n.4.. Two employers that jointly employ one H-1B worker each have their own, individual obligations to effectuate a bona fide termination with respect to this worker. If one employer effectuates a bona fide termination of the H-1B worker, this has no effect on the status of the petition or employment relationship with the other employer. However, if one employer pays for outbound transportation costs, both employers may take credit for this aspect of effectuating the termination. Additionally, a secondary employer need not offer to pay for outbound transportation if the H-1B worker is continuing to work in the United States for the primary employer, as the H-1B worker is not returning to his or her home country at that time. Finally, if both employers terminate the employee at the same time, both employers may send one joint notification to DHS terminating both petitions.

Working Conditions

The employer must afford working conditions to its H-1B workers on the same basis and in accordance with the same criteria as it affords its U.S. employees who are similarly employed, and without adverse effect upon the working conditions of those U.S. workers. *See* 8 U.S.C. § 1182(n)(1)(A)(ii); 20 C.F.R. § 655.732. Working conditions include matters such as hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs. 20 C.F.R. § 655.732(a). When two employers employ an H-1B worker, both the primary and secondary employer must afford working conditions to the H-1B worker on the same basis and in accordance with the same criteria they afford to their similarly employed U.S. workers, and both must consider the potential for adverse impact on their respective similarly employed U.S. workers.

Recordkeeping Obligations and Public Access File

Both employers must maintain all required records and maintain a Public Access File for public examination as required by 20 C.F.R. § 655.760. An employer is also responsible for obtaining and maintaining records required by the H-1B program even if it did not create the records.

> **Example:** A primary employer and secondary employer employ an H-1B worker who appears on the primary employer's payroll. The secondary employer must obtain and maintain a copy of the required payroll records for its H-1B employees and for any U.S. workers it employs in the same occupation as the H-1B worker. 20 C.F.R. § 655.760(c). The secondary employer need not maintain payroll indicating payments made to the primary employer's U.S. workers employed in the same occupation as the H-1B worker (unless these U.S. workers are also employed by the secondary employer).

Notification Requirements

An employer must notify affected workers of the filing of an LCA. In most circumstances, this occurs via a hard copy posting in at least two conspicuous locations at each place of employment where the H-1B worker will be employed. Notification may also be made via electronic means to employees in the occupational classification for which the H-1B worker is sought (including both employees of the H-1B employer and employees of another entity which owns or operates the place of employment).[7] 20 C.F.R. § 655.734(a)(1).

If one posting or electronic notification satisfies the posting obligation for both employers—*i.e.*, it has all elements identified in 20 C.F.R. § 655.734(a)(1)(ii) with respect to both employers—no additional posting is necessary. Alternatively, the employers may opt for separate postings or electronic notification. Regardless of whether posting is made jointly or individually, both employers must maintain a record of the notification in the public access file as required by 20 C.F.R. §§ 655.734(c) and 655.760(c).

WHD does not anticipate that posting practices will significantly change in light of this new guidance. While primary and secondary employers will both bear responsibility for posting the required notice(s), the H-1B program has always required that notification be made to all affected workers, not just those employed by an employer that has filed an LCA.

Strikes and Lockouts

Each employer seeking to employ an H-1B worker must certify on its LCA that, at the time of filing, no strike, lockout, or work stoppage is occurring in the course of a labor dispute within the H-1B worker's occupational classification. 20 C.F.R. § 655.733. Labor disputes for this purpose

[7] If there is a collective bargaining representative for the occupational classification in which the H-1B nonimmigrant will be employed, notification of the filing of the LCA to the bargaining representative is instead required. However, the Department's enforcement experience has indicated that there rarely are collective bargaining representatives for these occupations, and thus notification more frequently occurs via hard copy posting at the place of employment or electronic notification to affected employees.

relate only to those involving employees of the employer (*i.e.*, the employer that filed the LCA) working within the occupational classification at the place of employment named in the LCA. *Id.* § 655.733(a).

In the case of multiple employers filing LCAs for a single H-1B nonimmigrant worker, each employer will be required to ensure that there is no strike or lockout with respect to its own employees at the time of filing. In order to remain in compliance with their respective LCA certifications, each employer is also responsible for notifying DOL of a strike or lockout if one should occur at its place of employment during the validity of its LCA. *See* 20 C.F.R. § 655.733(a)(1) (detailing an employer's reporting obligations). In addition to these reporting requirements, if an employer notifies DOL of a strike or lockout at its place of employment, that employer may not use its LCA in support of any petitions for H-1B workers for the affected occupation until DOL determines that the strike or lockout has ended. *Id.* Moreover, an employer may not place, assign, lease, or otherwise contract out an H-1B worker to a joint employer that has reported a strike or lockout in the same occupational classification as the H-1B worker. *Id.*

H-1B Dependent Employers and Willful Violators Employing Non-Exempt H-1B Workers

Employers that are H-1B dependent or that have been found to be willful violators of their H-1B program obligations have additional compliance obligations with respect to LCAs and petitions filed on behalf of non-exempt H-1B employees.[8] Specifically, such employers are required to conduct a good faith recruitment for U.S. workers to fill the position, are prohibited from laying off any similarly employed U.S. workers within 90 days before and 90 days after the filing of its H-1B petition using the LCA, and are prohibited from placing H-1B workers at a secondary worksite unless they first ask whether the secondary-site employer has displaced similarly employed U.S. workers within 90 days before and 90 days after placing the H-1B worker. *See* 8 U.S.C. §§ 1182(n)(1)(E)–(G); 20 C.F.R. §§ 655.738–.739.

In the case of two employers employing a non-exempt H-1B worker, each employer must independently determine if it is H-1B dependent or a willful violator, and is thus required to comply with the additional obligations. The classification of one employer as H-1B dependent or a willful violator has no effect on the classification of the other.

However, the existence of two LCAs containing these additional attestations may result in shared responsibility for compliance with the displacement provisions. For example, if an H-1B

[8]An H-1B dependent employer has (1) 25 or fewer full-time equivalent employees and at least 8 H-1B workers, (2) 26–50 full-time equivalent employees and at least 13 H-1B workers, or (3) 51 or more full-time equivalent employees of whom 15 percent or more are H-1B workers. 20 C.F.R. § 655.736(a)(1). A willful violator is an employer found by DOL or the Department of Justice, in a finding entered on or after October 21, 1998, to have committed either a willful failure or misrepresentation of material fact under the H-1B program within the 5-year period preceding the application. *Id.* § 655.736(f). A non-exempt employee (1) receives wages, including cash bonuses and similar compensation, of less than $60,000 per year, and (2) has not obtained a master's or higher degree (or its equivalent) in a field related to the occupation. *Id.* § 655.737.

dependent primary employer places a nonexempt H-1B worker at an H-1B dependent secondary employer's worksite without making a bona-fide inquiry as to whether the secondary employer will displace similarly employed U.S. workers, and the secondary employer displaces U.S. workers within 10 days of that placement (and within 45 days of the filing of its own H-1B petition), both employers are in violation of the H-1B prohibition against U.S. worker displacement. The primary employer is in violation of the secondary displacement provision, as it failed to ask the secondary employer of its intent to displace U.S. workers, and the secondary employer is in violation of the primary displacement provision because it displaced workers within its own workforce. *See* 20 C.F.R. § 655.738.