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Immigration Update: The New Labor Condition Application ETA 9035/9035E and What It Means for Employers

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On November 19, 2018, the Department of Labor (DOL) implemented amendments to its attestation-based Labor Condition Application Form ETA 9035/9035E, which is a prerequisite filing by employers sponsoring workers in the H-1B, H-1B1, and E-3 nonimmigrant visa categories.

Most importantly, the new version of Form ETA 9035/9035E requires H-1B employers to provide significantly more detailed information about worksites, the specific numbers of sponsored H-1B workers at each of these sites, and the legal name of end user entities operating any third-party worksites. This will generate public and intra-governmental awareness of companies using H-1B workers supplied by third-party vendors, even if the companies sponsor few or no H-1B workers directly. In addition, employers who are considered in H-1B Dependent or Willful Violator status are now required not only to specifically attest to certain recruitment and non-displacement obligations, but to indicate (and support by uploaded evidence in certain cases) the specific exemption under which the sponsored foreign national (who is the subject of the LCA) qualifies.

What is the Labor Condition Application?

The "Labor Condition for Nonimmigrant Workers" (LCA) is a data collection and attestation form that must be filed electronically by an employer when it sponsors a professional worker in the H-1B, H-1B1, and E-3 categories. The LCA collects specific information about the employer (legal name, DBA, address, FEIN, NAICS classification, employer contact) and the position (job title, classification, number of workers sponsored on the LCA, worksite(s), prevailing wage, and wage range).

By filing the LCA, the sponsoring employer is attesting that (for the entire period of authorized employment):

- it will pay all nonimmigrant workers the *higher* of the actual wage paid to other workers in same position with similar experience AND the prevailing wage for the specific geographic area and occupational classification;
- the employment of the nonimmigrant workers will not adversely affect the working conditions of workers similarly employed in the area of intended employment;
- that, on the date the LCA is signed and submitted, there has not been a strike, lockout, or work stoppage in the course of a labor dispute in the relevant occupation at the place(s) of employment; and
- that, on or before the date of the LCA, notice of the application had begun to be posted in two conspicuous places *in each location where the work will physically be performed, which includes at any third party site not necessarily controlled by the H-1B employer*. The notices must remain posted for ten consecutive business days.

If the employer qualifies as H-1B Dependent (having a significant portion of its workers in H-1B status) or a Willful Violator (based on past enforcement action), the LCA requires the employer to further attest to

additional obligations regarding non-displacement of U.S. workers in its own workforce, non-displacement in a third-party employer's workforce, and recruitment and hiring of U.S. workers who are equally or better qualified than the sponsored H-1B nonimmigrants.

Lastly, the LCA requires the employer to designate where the required public access file will be maintained (principal place of business or place of employment) and affirm that it will comply with the retention of and providing DOL access to the necessary supporting document files required when filing the LCA.

What Changed?

The LCA now allows for inclusion of up to *ten* additional worksites (previously only three), includes an Appendix A required for H-1B Dependent and Willful Violator employers who are relying solely on the master's degree exemption, and collects expanded data for third-party worksites. Certain fields include a direct link to search prior wage determinations by FEIN or state and a calculator to determine wage based on level and OES classification.

- **Worksite Detail:** DOL requires the employer to identify all intended places of employment, including those of short duration. If there will be more than ten sites during the three-year period authorized on the LCA, a separate LCA should be filed detailing these additional sites. (Note that the regulatory exceptions for "non-worksite" locations for peripatetic occupations, occasional travelers for less than ten workdays, or incidental travel to training/conferences still apply). For each location, the employer needs to detail the number of H-1B workers included on the LCA assigned to that particular site, **whether this site is a third-party worksite** and if so, the **legal name and full address of the secondary employer**, and wage range/prevailing wage source. Previously, only the addresses of the additional worksites were listed on the LCA, and the form did not include a space for the legal name of the third-party employer or request clarification as to whether a particular worksite was controlled by a third-party or secondary employer.

- **Wage Data:** The form alters the way some wage data is collected.

- **Additional Specificity and Supporting Evidence for H-1B Dependent Employers and Willful Violators:** The new form more clearly reinforces the employer's obligation to actively assess of its ratio of workers to H-1B workers *as of the time the LCA is filed to determine if it is "H-1B Dependent."* The new LCA also asks employers to identify the statutory basis for the exemption of H-1B workers from "dependency"
requirements, either annual salary of at least $60,000, master's degree or higher in related specialty, or both.

  - For exempt workers, "dependent" employers must now complete an appendix detailing the full name of college/school, the degree, and date of issuance. For each exempt worker included on the LCA, the employer now must upload a copy of the degree, transcript, or official letter from the school evidencing the completion of the degree program.

What Now?

These noteworthy changes to a necessary form echo and support significant ongoing efforts already underway by Immigration Customs and Enforcement (ICE) to investigate offsite work, ensure appropriate immigration compliant arrangements are in place between H-1B employers and third-party "end users," and target H-1B dependent employers. Based on recent data compiled by the Student and H-1B employers and third-party "end users," Exchange Visitor Program in 2017 and released by ICE, 328,205 participated in the Optional Practical Training Program, which has been a focus of investigation by the Trump Administration as the bridge

to H-1B visas for primarily high-tech employers. It is not unusual for staffing companies and other service providers to rely heavily on contracts with multiple distinct employers in a range of geographic locations.

The increased level of detail required on the LCA and the associated challenges with evolving worksites in a shifting and mobile employment base demand increased employer care to ensure compliance with the DOL requirements not only by the foreign worker's sponsoring employer, but also by unrelated companies who benefit from services from the staffing agencies and vendors providing H-1B workers. These "secondary employers" will have their legal names included on the LCA filings, and aggregated data of the number of H-1B workers at any given worksite (whether it is for the sponsoring employer or a secondary employer) will be much more easily accessible. The increased transparency and detailed data collected by this form allow noncompliance to become detected more quickly, are likely to yield many more findings of H-1B dependency, and trigger targeted inspections of entities who employ or contract for onsite employment of larger numbers of H-1B workers.

Sponsoring employers should regularly assess their workforce for H-1B dependency, conduct their own housekeeping to ensure required documentation files are complete and updated, carefully review each attestation (wage, posting and notice, no adverse employment impact, no strike/lockout/work stoppage) as it applies to not only its own entity, but to any secondary employers included on the LCA where work will be performed.

Entities who use contracted workers in any capacity should carefully review their arrangements with these workers and be sure they appreciate the impact of the new rule on H-1B sponsorship by their contractors, who may be relying on services provided by sponsored workers from abroad. These "secondary employers" may need to confirm now their vendors are complying with H-1B and LCA requirements including on-site posting and non-displacement of U.S. workers.

The new form became mandatory on November 19, but certified LCAs submitted prior to November 19 will remain valid until they expire. Please contact the authors, Melanie C. Walker and Robert C. Divine, or any member of the Immigration Group if you have further questions as to how these changes will affect your organization and what you can do to make sure your LCA house is in order.

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