

As H-1B employees return to their workplace, compliance obligations arise

TNN | Oct 2, 2021, 04.39 PM IST



MUMBAI: Several offices in the US are opening their doors to employees once again – this includes the H-1B work force. In the backdrop of the pandemic when work from home was enforced, American employers who had hired H-1B workers had to comply with various requirements.

TOI had reported that this often meant an amendment of their H-1B petitions. No such requirement arose, only if the employees who were working from home did so within commuting distance of their workplace – this generally was not the case.

"Now as employees (including those on H-1B visas) are being welcomed into work premises, once again sponsoring employers will need to ensure that they remain in compliance with the Labour Condition Application (LCA) requirements and they need to check whether an H-1B amendment is warranted," says Snehal Batra, managing attorney with NPZ Law Group.

Ashwin Sharma, a Florida based immigration attorney explains to TOI, "In general, if the sponsoring employer previously obtained a certified LCA for the physical workspace at which the H-1B worker is resuming work; or if the previous LCA already included the Metropolitan Statistical Area (MSA) covering the H-1B worker's home job site, then the H-1B worker's resumption of employment at the physical workspace would be quite straight forward."

In such cases, the H-1B worker could effectively resume such employment with minimal to no effort on the part of the H-1B sponsoring employer, adds Sharma.

Batra points out that despite the Covid-19 pandemic, the US Citizenship and Immigration Services (USCIS) did not revise the LCA compliance requirements. When there is a material change in the H-1B employment, a new LCA is required to be filed, necessitating filing of an amendment to the H-1B application. The sponsoring employer is required to make attestations such as those relating to wages, working conditions, terms of employment, place of employment, to name a few.

"Material change includes a change in worksite location, a significant change in job duties or a change in occupational classification, or a reduction in hours from full-time to part-time or a reduction in salary," states Batra.

Rajiv S Khanna, managing attorney at Immigration.com says, "H-1B regulations require that whenever there is a 'substantial change' in the job, a formal amendment must be filed with the USCIS. Any relocation of an employee farther than approximately 50 miles is included within the definition of substantial change. Unfortunately, an amendment takes precisely the same amount of paperwork as a new H1B or a change of employer does. Further, an amendment is treated by the USCIS as an invitation to examine the already decided case anew. This adds on to the uncertainty of the outcome and creates an additional burden on the employers who are already struggling with the pandemic's economic effects."

Sharma cautions that if a new LCA is required to assign the H-1B worker to a new physical workspace, then the sponsoring employer must ensure that the new LCA along with the amended H-1B petition are timely filed with the USCIS before the effective date of any physical worksite change.

"When the pandemic hit, for those cases where clients needed to file a new LCA, we listed all possible anticipated work locations so that employers would not be required to file a second LCA and H-1B amendment when employees returned to work," says Batra.

Immigration attorneys point out that in addition to a change in the location, changes such as responsibilities of the employees, promotions, change in salaries, will also need to be examined, so see whether an amended H-1B petition is required.