



GMS Flash Alert

Immigration Edition

2019-050 | March 20, 2019



United States - Notice Obligations for H-1B Employers Regarding Labor Condition Applications

On March 15, 2019, the U.S. Department of Labor (DOL) released a bulletin reiterating the labor condition applications (LCA)¹ notice and posting requirements for H-1B employers.²

WHY THIS MATTERS

The bulletin makes clear that an H-1B employer will not be in compliance with the LCA posting and notice requirements if it does not take steps to make affected workers aware of the existence and location of the electronic notification. In some instances, an H-1B petitioner may default to posting a 'hard copy' notice if it cannot be sure that its electronic notification procedures would satisfy the criteria set out by the DOL, as further explained below.

If an employer fails to meet the notification requirements, penalties may apply and participation in the H-1B program could be curtailed.

Background on Notifications

Current U.S. law requires employers to provide U.S. workers with notice of the intention to hire H-1B employees. This obligation is regarded as an important protection for U.S. workers, as the notice provided must reference the terms of employment for the H-1B employees as listed on the corresponding LCA, the right of U.S. workers to examine certain documents related to H-1B employment, and the ability of U.S. workers to file complaints in the event of a violation.

An H-1B employer must provide notice to affected workers in the 30 days prior to filing an LCA with the DOL, or on the day it is filed. Affected workers are those at the same place of employment and in the same occupational classification as the H-1B workers to be employed. Thus, an individual may be an affected worker despite the fact that she or he is not employed by the H-1B petitioner.

H-1B Employer Obligations

If the H-1B petitioner intends to employ H-1B workers at a third-party work-site, the petitioner's obligation to provide notice extends to the third-party work-site, regardless of whether the place of employment is owned or operated by the petitioner or by some other organization.

An H-1B employer may provide the necessary notice to affected workers using one of the following three acceptable methods:

- Posting of a hard copy notice;
- Electronic notification, such as on an Intranet, internal database, or public website; or
- Notification to a collective bargaining representative, if applicable.

The recent DOL bulletin confirms that if an H-1B employer chooses to provide notice through electronic means, the employer must establish that affected U.S. workers, including those employed by a third party, are aware of the electronic notification and have ready access to it.

KPMG NOTE

These are critical considerations as electronic resources utilized by H-1B employers for notification purposes are often not known by or readily accessible to affected workers employed by a third party.

Key Take-Aways from the DOL Bulletin

Employers need to make sure:

- affected workers have knowledge of the electronic resource where the notice is posted (e.g., the employer's home page or electronic bulletin board);
- affected workers are capable of accessing the electronic notification (e.g., have permission to access the employer's Intranet); and
- affected workers are able to determine which electronic notice is applicable to their work-site.

Penalties for Non-Compliance

An H-1B employer found not to have met the notification requirements may be significantly penalized and/or potentially barred from participating in the H-1B program. As such, employers must make every effort to comply with the notice requirements associated with H-1B regulations.

KPMG NOTE

With these considerations, we encourage all H-1B employers to re-assess whether their existing posting and notification procedures continue to comply with the DOL's recent guidance.

KPMG Law LLP will continue to monitor developments relating to notification requirements and provide updates as they become available.

FOOTNOTES:

1 The Form ETA-9035, *Labor Condition Application* (LCA) is required in support of all H-1B, H-1B1, and E-3 visa applications filed with the United States Citizenship and Immigration Services (USCIS) or with the United States Department of State (DOS) through its foreign embassies and consulates. For related coverage, see GMS [Flash Alert 2018-160](#), December 11, 2018.

2 See the [Field Assistance Bulletin](#) (2019-3, dated March 15, 2019) on the Department of Labor website.

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Contact us

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