

H-1B Audits and Investigations:

DON'T GET CAUGHT WITH YOUR LCA PANTS DOWN: U.S. Department of Labor (DOL), Wage and Hour Division, Continues to Conduct H-1B Audits and Investigations.

Employers who hire H-1B professional and specialty occupation employees are required by law to submit a completed Labor Condition Application (LCA) on DOL Form ETA 9035E in the manner prescribed by the regulations. By completing and signing the LCA, the employer attests to several items called "attestations". These attestations concern the employer's responsibilities to the H-1B nonimmigrant employee, including the wages, working conditions, and benefits to be provided to the potential H-1B worker that will join the employer's pool of employees.

One important aspect of the LCA process is that the application is valid to a specific place or places - geographically location - designated on the LCA and addressed by certain prevailing wage conditions. Thus, it is to be noted that the H-1B employee for whom this LCA process is filed and approved should be employed within the designated areas. In order to enforce compliance of the LCA, the U.S. DOL continues to audit H-1B employers (both those that are H-1B dependent and those that are not).

Audits are usually triggered either when a current or former employee files a complaint with the DOL or when the DOL targets a specific industry for investigation. In some cases, the State DOL will conduct an investigation and information may be shared between the State and the Federal DOL authorities. In other cases, the Office of Federal Contract Compliance (OFCCP) may also conduct an Audit and then, depending upon the documentation provided by the employer, share the information with the Federal DOL authorities.

Most DOL investigations begin with an initial audit letter from the DOL officer. The Wage and Hour Division of the U.S. DOL is the section of the DOL that investigates the LCAs that are prepared and submitted by the employers for the H-1B employee. The DOL officer may meet or speak by telephone with the company (or one of its authorized representatives) and obtain an initial statement. Following a letter, an LCA investigation may commence and it may take several years to complete.

During the investigation, the lawyer works with the investigators and presents legal arguments in an attempt to mitigate the fines and penalties that have been levied on the employer. In general, the fines and penalties take two forms: (1) back wages; and (2) penalties for LCA violations. Finally, the Wage and Hour Division of the U.S. DOL will conclude its investigation and issue a final determination in regard to compliance. The final determination can be appropriately satisfied by the employer or it can be challenged by an Immigration Judge by way of an Administrative Hearing.

As previously stated, penalties for non-compliance vary widely. The penalties can include civil fines for willful violators of the displacement provisions, criminal fines and incarceration (when willful violations are egregious and rise to the level of a criminal action by the employer), payment of back wages, and termination of participation in the H-1B program (called debarment). The DOL can penalize the employer for instances where the employer has engaged in the following violations of the LCA rules: (1) For willful failures to pay the required wages; and (2) For failures to maintain public access files; and (3) For an employer's retaliatory action against the employees who may have taken step or actually did file a complaint.

The most prudent course of action is to avoid DOL Wage and Hour investigations altogether. The Nachman Phulwani Zimovcak (NPZ) Law Group, P.C. recommends, to both clients and potential clients, that they take steps to ensure full compliance with LCA regulations and engage in a program of meticulous record-keeping with regard to its H-1B nonimmigrant employees. The regulations are clear insofar as they provide a checklist of the items that are required to be kept in the Public Access File - which is required to be kept by an employer immediately after the Labor Condition Application is filed with the U.S. DOL.

It is true that the relevant regulations for the preparation and maintenance of the LCA and the Public Access file for the H-1B nonimmigrant workers are, at times, convoluted and confusing, we continue to find through our office's collective legal experiences that understanding the rules and implementing the appropriate procedures is essential to being able to emerge unscathed from a DOL investigation or Audit of the H-1B compliance issues. Most often the DOL investigation and Audit will result from a complaint about a failure to pay wages specified in the LCA. However, if there is specific documentation about deviations from the requirements, then employers may be able to deflect employee (and DOL officer) allegations.

Maintaining proper LCA compliance paperwork is a matter of patience and careful record-keeping. The company should develop and maintain policies with regard to its H-1B nonimmigrant foreign employees to ensure consistency and reduce the probability of employee complaints. If compliance is an issue, the company may wish to conduct an internal audit of all applicable records, with or without the assistance of a professional immigration firm. This is also one of the LCA compliance services provided by the Immigration Lawyers and Attorneys at Nachman Phulwani Zimovcak (NPZ) Law Group, P.C.

Notwithstanding the foregoing, it is possible that a company may become the subject of a DOL investigation. If that should happen, the company should immediately take action to address the alleged shortcomings and defend the company's practices. If the reason for the complaint is apparent, rebuttal information should be gathered and prepared. Employees who may be impacted should be notified about the investigation and be provided with coaching about the proper response.

Coaching of employees of the organization will help to minimize the negative affect within the office. If the reason for the complaint is unknown, the company should conduct an audit to identify weaknesses and prepare a rebuttal. In some circumstances, as suggested above, the company may find it appropriate to hire Immigration Attorneys or Lawyers to assist with the audit. In some cases the Audit may require the services of a Criminal Attorney (if the violation appears to be sufficiently egregious - see above).

The Immigration Lawyers and Attorneys at the NPZ Law Group will help you to assemble an "audit team" which, depending upon the composition of your company, might include, personnel from the company's HR department, payroll department, benefits department, and in-house counsel. It continues to be our Firm's experience that the DOL Audit or LCA investigation will focus on, but not be limited to, the following issues:

1. Wages – are the H-1B employees paid and was the pay similar to that of the other company employees?
2. Treatment – are the H-1B employees otherwise treated similarly to other employees?

3. LCA specifics – has the company accurately completed the LCA? Is the H-1B employee working in the same location listed on the LCA and under the same job title?
4. Displacement and Recruitment issues – Is the employer H-1B dependent? Has a U.S. worker been replaced by an H-1B employee? Did the H-1B employer attempt to recruit an U.S. employee if they were required to do so?
5. Is the Public Access File properly maintained and accessible? Can the employer immediately provide the required documents to an interested party? Did the proper postings take place at the proper places?

In the course of the DOL investigation, the DOL officers (Wage and Hour) generally request the following documentation from the company:

- Complete Public Access Files including postings and certifications;
- Payroll records including Federal and State Return Filings;
- List of similarly situated U.S. workers and their wages;
- Complete copies of H-1B Petitions;
- Listing of differences in job duties between H-1B employees and non-H-1B employees;
- Listing of benefits and deductions for H-1B employees and non-H-1B employees.

When an investigation is undertaken by the Wage and Hour Division of the U.S. DOL, the company must often make strategic decisions. The Immigration Lawyers and Attorneys at Nachman Phulwani Zimovcak (NPZ) Law Group, P.C. work closely with company clients to help them through the nuances of the Audit and investigation process. As the legal counselors for many organizations with very significant H-1B needs, we assist our clients to achieve full compliance with H-1B and LCA regulations in the U.S.

If you, or any member of your staff, should have any questions about the LCA or the H-1B investigation by the U.S. Department of Labor (DOL), please feel free to contact the Immigration Lawyers and Attorneys at the NPZ Law Group by e-mailing us at info@visaserve.com or by calling us directly at 201-670-0006 (x100). Our staffs assist clients nationwide with regard to DOL investigations and Audits.