

ePAF Frequently Asked Questions

General

- **What documents must be kept in the LCA Electronic Public Access File (ePAF)?**
 - The Public Access File must contain the following documents:
 1. Signed ETA Form 9035 Labor Condition Application (LCA)
 2. ETA Form 9035 Cover Pages Instructions
 3. Declaration of Posting (as documentation that the employer has complied with the LCA notice requirement)
 4. Proof of Receipt of LCA by H-1B Employee
 5. Prevailing Wage Documentation
 6. Actual Wage Statement
 7. Summary of Benefits
 8. Summary of Corporate Change (if there is a qualifying corporate change during the H-1B employment)
 9. Additional Attestations and Documentation for “Dependent Employer” and “Willful Violators”
- **Do I need to print out and sign a copy of the LCA in addition to maintaining the documents in the ePAF?**
 - The regulations require employers to retain a signed LCA in the Public Access File. Since the current regulations do not specifically authorize electronic signatures of the LCA, the best practice for now is to print, sign, and retain a physical LCA containing the original signature.
- **What steps has Sidley Austin already taken to help me complete the ePAF?**
 - Sidley Austin has included the following documents within the ePAF in order to assist employers in maintaining compliance with the H-1B regulations:
 1. Documentation of proof of LCA receipt by employee (Attachment A of the ePAF), along with Proof of Receipt of LCA by H-1B Employee statement (page 5 of the ePAF)
 2. Documentation of prevailing wage source (Attachment B of the ePAF), along with Prevailing Wage Memorandum stating the source and details of wage survey used (page 6 of the ePAF)
 3. Certified LCA (Attachment C of the ePAF)
 4. ETA Form 9035 Cover Pages Instructions (Attachment D of the ePAF)

5. Corporate Change Memorandum (Attachment F of the ePAF), to be completed in the event of a corporate change

- **What do I need to do next in order to complete the ePAF document?**

- The employer will need to provide information for Item 1 and Item 2 the LCA Wizard (page 2 of the ePAF), in order to generate the following documents:
 1. Declaration of Posting (page 3 of the ePAF)
 2. Actual Wage Statement and Summary of Benefits (page 4 of the ePAF)
- Additionally, the employer will need to complete the Public Access File Checklist (page 1 of the ePAF) by checking boxes 1 and 2 to confirm that the employer has completed the LCA Wizard.

Prevailing Wage Determination

- **How is the proper prevailing wage for the H-1B worker determined?**

- The prevailing wage is determined by several factors, including the requirements of the position, the area of intended employment, and the job duties for similarly-employed workers. The prevailing wage rate is typically established by a wage survey, including the Bureau of Labor Statistics Occupational Employment Statistics Survey (OES) data, which can be accessed through the Department of Labor's website, or an independent authoritative survey source.
- Employers are required to maintain a copy of the documentation used to establish the prevailing wage for the occupation sought.

- **Is it important to be consistent over time with the job classifications and levels used on the LCA?**

- It is critical to be consistent with job classifications and levels used on the LCA. Consistency in the completion of the LCA is very important to ensure non-U.S. employees are being compensated in the same way as U.S. workers.
- Failure to compensate H-1B employees at the same level as U.S. employees in similar positions can result in fines and backwage penalties.

- **What could happen if we fail to pay the required H-1B wage?**

- Failure to pay the prevailing wage is a failure to comply with the LCA requirements and can result in a monetary fine of up to \$50,758 per violation, backwage liability, and possible debarment from using the H-1B program.

Declaration of Posting

- **Where at the worksite does the LCA need to be posted?**

- The regulations require employers to provide notice of filing of the LCA to others employed in the same occupational classification and working in the same place of employment as the H-1B employee. This requirement can be met by posting a physical LCA in two conspicuous locations at each worksite listed on the LCA. Each location should be one that is accessible by all employees, such as a lunch room or a location where other government notices are posted. Every location should

be one that is accessible by all employees, such as a lunch room or a location where other government notices are posted.

- **What if more than one worksite is listed on the LCA?**
 - The physical notice will need to be posted at all worksites listed on the LCA.
- **How long should the LCA be posted if I am putting up a physical notice?**
 - A physical notice will need to be posted for a period of ten (10) consecutive business days.
- **Instead of posting a physical notice, can I post the LCA electronically on our company website or circulate to employees by email?**
 - Yes, an employer may post the LCA electronically instead of posting a physical notice. This can be done either through an electronic posting on the company's intranet for a period of 10 days, or through a one-time e-mail to employees in the same or similar position.

Actual Wage Memo

- **What is the purposes of completing the actual wage memo?**
 - The regulations require employers to maintain documentation of the wage rate to be paid to the H-1B nonimmigrant, an explanation of the system used to set the actual wage to be paid to the H-1B worker, and a summary of the benefits offered to U.S. workers in the same occupational classification. By completing the actual wage memo, the employer provides confirmation of:
 - the salary range offered to similarly employed U.S. workers
 - the actual salary offered to the H-1B worker
 - factors considered in determining the proper wage for the H-1B employee
 - that the H-1B worker's actual wage was determined using the same methodology used for U.S. workers in the same occupational classification, and
 - that the H-1B worker has been offered the same benefits as U.S. workers in the same occupational classification.
- **Does the H-1B worker need to be paid and be given benefits in a way that is consistent with the way we pay U.S. workers?**
 - Employers are required to offer the same salary and benefits to H-1B workers. Failure to offer a salary and benefits to H-1B workers as those offered to U.S. workers can result in fines and backwage penalties.
- **If our company has a specific wage matrix that includes various levels and wage ranges, should I keep a copy of that document with the ePAF?**
 - If the employer has a specific wage matrix or any other documentation used in determining the wage rate of the H-1B employee, the additional documentation should be scanned and retained with the ePAF.

Document Retention

- **How long does the ePAF need to be kept in our company records?**
 - The ePAF must be retained for one year beyond the end of the period specified on the LCA or one year from the date the employee's employment is terminated and the H-1B withdrawal is filed with USCIS. The ePAF files should be audited internally on a periodic basis, so that files which are past the retention period can be purged.
- **Where should I store the file if it is being kept electronically?**
 - We recommend storing electronic public access files on a secured company-wide site that can be accessed by personnel who handle immigration matters on behalf of the company. In the event of an audit or a request by the public to view the public access files, a designated company representative should be able to access and produce the ePAF.
 - In addition to the ePAF document itself, we recommend that employers print, sign and retain a physical copy of the LCA containing the original signature.
- **Can I print out the ePAF and maintain a hard copy instead of an electronic file?**
 - Yes, the ePAF can be printed and a hard copy retained instead of an electronic file. When printing the ePAF, you should ensure that all attachments are also printed and retained in the hard copy file.
 - Additionally, physical public access files must be kept either at the employer's principal place of business or at the H-1B worker's place of employment, as specified in the LCA.

DOL Audits and Penalties for Non-Compliance

- **Who has the right to ask to inspect the public access file?**
 - Any member of the public may ask to inspect the public access file. Additionally, public access files must be provided to DOL investigators in the event of an audit.
- **If the DOL asks to review the file how much time to I have to give it to them?**
 - The DOL will issue an audit notice specifying the scope of the audit, and the employer is required to produce all records, information, persons, and places the DOL investigator has requested to inspect, as well as the timeline for the audit. In general, the employer should be prepared to produce public access files within one working day of receiving the audit notice, since the regulations require that public access files be readily available throughout the retention period.
- **What are the penalties when a company fails to comply with the LCA requirements?**
 - Failure to follow the LCA attestations and wage requirements can result in a variety of penalties, including:
 1. Monetary fines of up to \$50,758 per violation;
 2. Assessment of backwages to undercompensated H-1B workers; and
 3. Debarment from using the H-1B program.
- **What sort of complaint might trigger a DOL audit?**
 - DOL audits are triggered by complaints made by parties who possess facts of sufficient detail to allow the DOL to make a reasonable cause determination that there has been a violation. Typically, the

complaints come from a current or former employee who is knowledgeable about the company's LCA practices, or a current or former H-1B worker who believes they have been underpaid.

Corporate Change

- **If our company goes through a merger or acquisition or other corporate change, is there anything specific I need to do with the ePAF?**
 - If the employer undergoes a merger, acquisition, or other corporate change resulting in an H-1B employee being moved to a different payroll, the new entity must document the corporate change and execute a sworn statement that it will serve as the successor-in-interest accepting all liabilities of the predecessor entity. The corporate change statement must be retained in the public access file, along with a list of all LCAs affected by the corporate change, a description of the successor entity's actual wage system, and the successor entity's employer identification number. The ePAF contains a Corporate Change Memorandum template, which the employer should complete in the event of a corporate change.
- **If I amend the ePAF with the new corporate information, when does the amendment need to be completed?**
 - In the event of a corporate change, prior to or at the same time as the change. Technically the LCA regulations do not allow for completion of the successor statement after the transaction.

H-1B Dependent Employers

- **What is an H-1B “dependent” employer and how do the LCA requirements change for these types of employers?**

- Federal regulations define H-1B dependent employers as follows:

Number of Full-Time Equivalent Employees (U.S. and H-1B Workers)	Number of H-1B Nonimmigrant Employees
1 to 25	8 or more
26 to 50	13 or more
51 or more	15% or more of workforce

- H-1B dependent employers must include in the public access file a list of currently-employed “exempt” H-1B nonimmigrant workers, along with a summary of recruitment methods used (if the employer hired any “non-exempt” H-1B nonimmigrant workers).
- **Is it possible for dependent employer to claim an exemption from the additional attestations?**
 - Dependent employers must comply with the additional attestations as required by the regulations, unless they are filing H-1B petitions for exempt H-1B workers.
 - “Exempt” H-1B nonimmigrants are those who hold a master's or higher degree in a specialty field related to the employment, or those whose annual salary is at least \$60,000.

3rd Party Worksites

- **What if the employee is working as a consultant at a 3rd party worksite of a client, do I still need to post the notice?**
 - The notice is required to be provided to similarly-employed employees at all worksites where an H-1B nonimmigrant will be employed, whether the worksite is a company location or a third-party client worksite.
- **What if the client at the 3rd party worksite refuses to allow me to post the notice there?**
 - If the client refuses to allow a physical posting at the client location, please contact a Sidley attorney to discuss how to respond appropriately. An H-1B employer is not relieved of the duty to post the LCA merely because a third-party client refuses to allow the posting.

If you have any questions regarding this fact sheet, please contact the Sidley lawyer with whom you usually work.

The Immigration Practice of Sidley Austin LLP

Our Immigration Practice develops a comprehensive and cost-effective strategy to address the unique immigration needs of each client. The legal services we offer include assistance in obtaining temporary visas, permanent residence and U.S. citizenship. We also provide employees with immigration advice related to mergers and acquisitions, corporate law, international tax, I-9 compliance and other labor issues affecting the employment of foreign nationals. We routinely represent clients before The Department of Homeland Security, Department of Labor, Department of State and U.S. consular posts worldwide.



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10.2016