Checklist for Maintaining Immigration Compliance in a COVID (and Post-COVID) World

by Karin Wolman, Tiffany Hill, Marketa Lindt, and Nicole Kersey

Karin Wolman is a graduate of Columbia University and UCLA School of Law. She began preparing employment-based visa petitions at the Brooklyn Academy of Music, the nation's oldest performing arts center. She worked there when the O and P visa categories were first introduced for performing artists, obtaining visas for touring theater, opera and dance companies, musicians, multimedia artists, and children's entertainment groups. Since 1996, Ms. Wolman has practiced in small & medium sized law firms handling immigration matters exclusively. She opened her own practice in 2006.

Tiffany B. Hill is a partner at Weaver Schlenger LLP in San Francisco, California. She represents fast-growing, mid-size corporate clients, counseling them on how to establish competitive programs and scalable systems. Tiffany serves as the San Francisco CBP Liaison of the AILA Northern California Chapter and is also a Member of the AILA National Distance Learning Committee.She has been consistently recognized in the International Corporate Immigration edition of Who's Who Legal.

Marketa Lindt (AILA Past President) is a partner at Sidley Austin LLP in Chicago, where she advises employers on business immigration, leads the firm's I-9 compliance practice, and represents clients in immigration-related white-collar defense matters. Previously, she served as chair of the AILA Chicago Chapter, and also served on AILA national liaison committees for Verification, DOL, ICE, SSA, and the NSC. In addition, Ms. Lindt serves in an advisory capacity to organizations representing underserved and indigent immigrant communities. She frequently speaks and writes on business immigration and compliance issues. In addition to writing numerous articles for AILA publications on I-9 issues and business immigration, she is an author of the treatise: *Business Immigration Law: Strategies for Employing Foreign Nationals*.

Nicole A. Kersey (Nici) is Managing Director of Kersey Immigration Compliance, LLC in St. Petersburg, FL. She serves as Vice Chair of the AILA National Verification Liaison Committee. She manages a national practice focused on corporate immigration compliance issues. Nici loves to run, read, and cheer on the Tampa Bay Rays.

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INTRODUCTION

The COVID-19 pandemic has scattered some employees widely, immediately, and perhaps permanently, changing how companies do business and where their employees perform their work. Remote work has become the new normal and, as a result, many companies are downsizing their physical premises, if not closing them altogether. No longer tethered to a specific worksite, some employees are moving farther away from their offices or even taking up a nomadic lifestyle. Others may be forced to work remotely from abroad for long periods of time due to travel bans or the inability to obtain visa appointments at consulates abroad.

For the business immigration practitioner, the question of the location and worksite has become more important than ever before, changing the way that many business handle critical aspects of H-1B and PERM processing. This practice pointer provides a checklist for practitioners to consider when advising clients in a COVID (and post-COVID) world.

WORK FROM HOME POLICIES

When the pandemic required many U.S. businesses initially to shift from an in-person to a work-from-home (WFH) environment with very little advance notice, at first employers believed this to be a short-term arrangement. For H-1B employees working from home only once, and for less than 60 days, the short-term placement H-1B rules at 20 CFR §655.735 appeared to provide sufficient

coverage.[1] However, as the pandemic raged on, the regulatory requirement for a "short-term" placement in excess of 30 days—that the "H-1B nonimmigrant spends a substantial amount of time at the permanent worksite in a one-year period"—began to cause questions about when the short-term placement limitation had been or would be reached.

Because most employers would exceed a 30– or 60-day placement, and because the short-term placement rule only applies where the employer does not have a labor condition application (LCA), employers began to re-post LCA notices where the H-1B/E-3 worker's "home" was inside the Metropolitan Statistical Area (MSA) or within a reasonable commute. Many opted for electronic re-posting of LCA notices to include the WFH address.

Now that WFH has become the new normal for many organizations, additional issues have arisen warranting further discussion with clients.

1. ***Discuss the company's overall WFH policy (not just your immigration policy) with your HR contacts.***

   - Recommend that your client formulate a firm policy whether the company permits employees to WFH beyond commuting distance outside the MSA. Decide if employees may WFH in an MSA with higher prevailing wage requirements.
   - Consider specifying whether employees may WFH from abroad. Working from abroad may be deemed to interrupt H-1B, E-3 and L status for applicable employees, and may implicate the "wages paid" LCA regulations which require workers to be compensated as U.S. employees, with wages reported to the Internal Revenue Service (IRS). Recommend discussing these implications with in-house legal team or employment counsel as well. There may also be tax and cybersecurity implications for companies whose employees work remotely from abroad, particularly if the company does not have existing operations in that location.
   - Include clear submission/approval protocols for all WFH requests and minimum notice provisions (how much time is sufficient notice to re-post LCA notice or file amendments if needed (i.e., two weeks, one week)?).
   - Apply and communicate the policy to all employees, not just employees requiring visa sponsorship.

2. ***Communicate to foreign national employees the immigration consequences of moving.***

   - Have HR remind H-1B/E-3 workers repeatedly that ANY move of residential address impacts both their own work authorization *and* the employer's compliance obligations and expenses.

[1] The short-term placement rule only applies in a location where the employer does not have an LCA – so it does not apply to WFH in the same metro area, where reposting would be required. DOL did provide an accommodation for this situation initially – 30 days due to the pandemic. See FAQs: www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/DOL-OFLC_COVID-19_FAQs_Round%201_03.20.2020.pdf

  - *If the H-1B/E-3 worker moves within the MSA* but fails to give the employer notice and a chance to re-post the LCA notice, the worker could be found to be out of status, and the employer could face fines for noncompliance.
  - *If the H-1B/E-3 worker moves outside of the MSA* and beyond commuting distance (to a parent's home, across the country, etc.), this requires an amended petition.
- Make clear to all H-1B/E-3 workers that the Fraud Detection and National Security Directorate (FDNS) is continuing to conduct site visits to verify LCA compliance, including at home worksites; prepare them to show a copy of the LCA posting notice and certified LCA; and give them correct job description.
- Remind all foreign national employees of timely AR-11 obligations, especially if expecting biometrics appointments, interview appointments, advance parole (AP)/employment authorization (EAD) documents, or permanent residence cards.

3. Discuss with HR other consequences of office closures.

- Discuss LCA Public Access Folder (PAF) maintenance and conversion to electronic PAFs, especially for employers shifting to all-virtual or long-term WFH models.
- Is someone regularly checking for government mail (especially for time sensitive RFEs and NOIDs)? Timely government notice is required for pending cases if the primary office moves or closes, or if an all-virtual model is created.
- Itineraries for office/work from home/ third party clients need to include the home address, so the worker needs to keep the employer apprised of any planned moves, even if they are temporary. Confirm whether any third-party client assignments are actually happening "onsite" now.
- I-9s: Perhaps the most useful U.S. Department of Homeland Security (DHS) concession due to COVID is that, if the employer is operating in a fully remote model, a new hire may appear before the employer electronically, such as by videoconference, to complete the Form I-9. However, when DHS ends this remote I-9 verification policy, the employer will be required to verify—in-person—and within a three-day period—all of those employees whose I-9 verification was conducted virtually. Also, when an employer returns to "normal operations," the three-day period begins, and many employers will find it impossible to conduct the required in-person verifications. As such, a remote agent model (conducing in-person verification through an agent) may be a better option for some employers.

INTERNATIONAL TRAVEL POLICIES

1. Discuss the company's international travel policy with HR.

- Clarify how immigration policy interplays with existing international travel policies/protocols. Many companies have policies in place due to COVID and/or COVID committees which review all travel requests.
- Set a policy requiring that employees and contractors clear all international travel plans in advance (*i.e.*, 30 days?) with HR, immigration counsel, and immediate supervisors.
- Discuss whether and for how long the employer would allow employees to work from abroad if they cannot return home for extended periods of time. Recommend seeking the advice of the in-house legal team or employment counsel regarding how work from abroad

may subject the company to corporate establishment and tax laws in the foreign jurisdiction. Raise questions of liability, other insurance issues, employee benefits, plus the application of foreign labor and contract laws.
- Consider amending the corporate immigration policy to deter prohibited travel and/or insufficient advanced notice. If unable to return to employment in the U.S., the policy can state that the employer has no obligation to assist with or bear the cost of legal and immigration services of U.S. re-entry and can specify the right to terminate employment.
- Consider circulating updated provisions of immigration policy to employees and requiring acknowledgement of receipt.

2. Communicate to foreign national employees the immigration risks of international travel.

- Have HR flag for all employees (plus contract staffing vendors) that travel bans, vaccination and testing requirements, quarantines and lockdowns, and limited visa processing at U.S. posts worldwide may leave workers stranded abroad for extended periods of time if they travel abroad, which puts them at risk of termination.

PERM PROCESSING, H-1B ISSUES, AND NEW OFFICE Ls AND Es

Discuss consequences for PERM and green card processing with HR.

- When preparing current PERM cases, discuss with the company its post-COVID plans. Could this position be performed remotely, and if yes, from where and how often?
- Warn that it might be necessary to re-start the PERM case if circumstances change and telecommuting is not advertised or the prevailing wage is issued for an MSA that is different from where the employee will work.
- Consider including all likely worksites in the prevailing wage request, including the primary company worksite, the employee's home address, and other possible future work locations.
- Talk about office planning. Ask what would an all-virtual office look like? Where would official mail be delivered? By what electronic means are government notices being distributed to employees while WFH during temporary office closures?

Discuss the implications of location changes for H-1Bs.

- Consider including the employee's home address on all LCAs and requiring posting of the LCA in the employee's home office.
- Ask the employer to monitor all changes of work location to determine whether a new posting, new LCA, and/or amended petition may be required.
- If an employee moves to a home office (or other location) within normal commuting distance from the H-1B work location, no new LCA or petition are required. Instead, the employee must post the required notice at their home address for 10 days. This must be done as soon as practical and no later than 30 calendar days after the work begins at the new site.

- If the home office/location is outside of the MSA/normal commuting area, then determine whether the short-term placement provision applies. If not, a new LCA and amended petition are required.

Discuss particular challenges with clients for New Office L-1s & Es

- Discuss risks of not leasing office space. While before COVID, a company typically would need to lease a physical (non-virtual) office in a commercial zoned office building to qualify for a new office L-1 or E,, USCIS now appears to be more open to considering more non-traditional office arrangements for new offices. However, remote or other non-traditional office arrangements will increase the burden on the employer to establish that employees and contractors are working in a legitimate operating business that has the protocols in place to direct and monitor its workforce.
- There is a helpful non-precedent AAO decision in *Matter of WLtd*. #1735950 (Nov. 20, 2018), which states that a change of location alone for an L-1 worker, where all other terms and conditions of employment remain the same, is not a material change and does not require an amended petition. However, a good practice is to ask the employer to update its worksite address in the VIBE database.

PLANNING FOR AN ALL-VIRTUAL OFFICE

What if after closing its offices temporarily, the company ultimately decides to transition to a permanent virtual arrangement? LCA postings can be completed electronically under 20 CFR §655.734, but compliance is more challenging under the more restrictive PERM regulations. Where does the employer advertise the job, and where do it post the Notice of Filing to its employees?

20 CFR §656.10(d) specifically requires a Notice of Filing to all the employer's employees, wherever there is no bargaining representative,

> posted…at the facility or location of employment… for at least 10 consecutive business days … clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment… *In addition*, the employer must publish the notice in any and all -in-house media, whether electronic or printed, in accordance with the normal procedures.[2]

Notice that this language does not actually specify "print" or "hard copy," but the U.S. Department of Labor (DOL) has interpreted the provision to require a hard copy posting.

At the DOL Open Forum during AILA's Annual Conference in 2020, in response to a question regarding PERM posting compliance for employers whose offices were closed due to the pandemic, the Office of Foreign Labor Certification (OFLC) confirmed that employers can satisfy the Notice of Filing requirement by posting the notice on the exterior door of the building, even if the workplace is closed and employees are 100% remote, as long as the organization is conducting

[2] 20 CFR §656.10(d).

business. This statement again highlights the DOL's position that an employer must post a physical copy of the Notice of Filing to comply with the regulations.

Unfortunately, while this response is helpful for employers whose offices remain closed due to the pandemic, it does not resolve the posting requirement for an organization that no longer maintains a physical location. Therefore, employers who are operating 100% virtually with no physical office will need to be creative to satisfy the DOL that they have complied with the notice requirements. Such employers may wish to look to other DOL statements for guidance. For example, DOL permits electronic postings in lieu of hard-copy physical posted notices to satisfy certain notice requirements under the Family and Medical Leave Act, Fair Labor Standards Act, Employee Polygraph Protection Act, and Service Contract Act. In the FMLA context, electronic posting is only acceptable in lieu of physical posting "where (1) **all** of the employer's employees exclusively work remotely, (2) all employees customarily receive information from the employer via electronic means, and (3) all employees have readily available access to the electronic posting at all times." Wage & Hour Division Field Assistance Bulletin No. 2020-7 on December 23, 2020. However, any practitioners who develop creative approaches that do not comply with the letter of the DOL PERM regulations should exercise caution, advise the employer of the risks of such an approach, and consider multiple methods of postings to establish good faith.

CONCLUSION

To practice immigration law in a COVID and post-COVID world, practitioners must not only carefully consider the statutory and regulatory requirements relating to location for foreign national employees, but also stay apprised of the rapidly developing agency guidance that is often issued without notice to stakeholders. Practitioners must educate their clients on the immigration impacts of seemingly simple changes to business operations. Not every scenario has a solution and not every question has an answer. As regulations do not reflect current business realities, practitioners must remain nimble and creative.