



Keeping Up With H-1B

An Employer Guide on Staying Up to Date on New Developments, Avoiding Common Mistakes, and Building the Strongest Immigration Program Possible

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About Us

ILBSG is a law firm focusing on U.S. Immigration and Global Mobility Services.

Our business is to understand yours - and your challenges. We are trusted for our successful representations, primarily in immigration, international arbitration, and contracts. Our clients consistently rate us highly, noting our strategic insights, attention to detail, and personal attentiveness.

With proprietary technology central to our processes, we deliver an efficient and personalized legal solution, enabling clients to access our services anytime, anywhere. Clients also see the status of each case anytime, in real-time.

Our organization is MSDC-certified minority-owned, ISO-9001 Quality Management System certified, and our attorneys are licensed to practice in the states of NY, CA, and IL. We are also licensed in the U.S. District Court for the Northern District of Illinois, U.S. District Court for the Southern District of California, U.S. Court of International Trade, U.S. Tax Court, and multiple foreign jurisdictions.

Our team speaks 12 languages and employs high levels of cultural sensitivity, always focused on the experience of the individual.

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Avoiding Complacency:

Staying vigilant is crucial to the success of your H-1B program. Your obligations don't end when the H-1B is approved, so it's important to avoid becoming complacent. The DOL and USCIS have strict requirements regarding H-1B employees, so you want to make sure you are constantly focused on compliance. This means making sure your employees are being paid the required amount, that amendments and extensions are being timely filed, and that your records are in order.

As a reminder, any material change in your H-1B holders' employment must be immediately reported to USCIS through an H-1B amendment petition. Material changes include salary increases, promotions, work location changes, job title changes, or project changes. If an H-1B holder at your company will experience any changes in their employment, you should consult with an experienced immigration attorney ahead of time to ensure the proper steps are taken. There is no bright line rule regarding what is considered material; this determination is fact-based inquiry. As such, it's very important to check each time. Every situation is different, so you want to make sure each scenario is individually evaluated before moving forward. Failure to file an amendment can result in an immigration violation for the employee, a potential disruption to your business if the employee must travel outside the U.S., or additional scrutiny of your company from USCIS (which can endure long term). These consequences are avoidable by simply staying on top of H-1B amendments. As a rule, if you're not sure whether an amendment is required, you should consult your attorney.



Next, it's important to make sure your company is keeping adequate records. In addition to the Public Access File (PAF), any changes in your H-1B holders' employment should be thoroughly documented and kept in the employee's file. This includes pay increases, leaves of absence, paid or unpaid time off, etc. Outside of filing H-1B amendments, you also need to make sure you are timely notifying USCIS anytime an H-1B employee is terminated. Under the regulations, if you terminate an H-1B employee, there is a three-step process that must be filed. You must notify the employee, notify USCIS in writing, and offer to pay the reasonable cost of the employee's return flight to the country of their last foreign address. If you don't document these steps in your records, issues can arise during a site visit from USCIS or the DOL. Failure to follow the required termination procedures can result in back wages assessed from the time the employee left your company until the date it is discovered.

Even if an employee leaves your company to work elsewhere through an H-1B transfer, you're still on the hook for the LCA wages until you send the H-1B cancellation notice to USCIS. While many employers will send the cancellation notice when employment is terminated from their end, employer often overlook sending the cancellation notice when it is the employee who makes the decision to leave. Make sure you're sending required notifications to USCIS no matter how the employment ends and documenting every step along the way. All employee records should be kept up-to-date and available for inspection at any time.

Common Mistakes:

Even long-time, veteran H-1B employers can make mistakes. For instance, if you've been filing H-1Bs for an extended period and you've never had a site visit or inspection from the DOL, it's easy to become a little lax about keeping your Public Access Files up to date and available for inspection. However, this is a mistake. If you have a site visit and you cannot produce complete PAFs, the situation can escalate to a full-blown audit. Every time you file an H-1B, you need to make sure you have the PAF completed and available for inspection upon request.



Next, we highly recommend regularly auditing your payroll records to make sure the proper wages are being paid to all H-1B employees. Simple payroll mistakes can cause major headaches for employers with foreign employees. You should compare the most recent LCA to the payroll amounts, to ensure all H-1B employees are being paid the required amount during each individual pay period. While USCIS generally accepts W-2s as evidence the employee is paid the required salary, this is not the case for the DOL. During an audit, the DOL performs rigorous paystub analysis, scrutinizing each pay period. When you file an H-1B, you agree to pay a minimum salary on the pay scheduled identified in the LCA. This means that if you don't pay the required amount during each pay period, it is a violation. This is true even if the year to date meets or exceeds the LCA salary. Whether during site visits/investigations or simply at the H-1B extension stage, you don't want to discover a simple payroll error has resulted in a violation. Regularly auditing your payroll safeguards your company from these kinds of mistakes.

Finally, many H-1B employers are making the mistake of assuming their remote employees can change projects without filing an amendment, since the work location isn't changing. This is not the case. USCIS considers end client / project changes to be material, so even if the employee will continue working from home, you must file an amendment first. This comes up at the H-1B extension stage or during USCIS compliance checks, complicating what should be a simple process. Don't make this mistake. If you're unsure when an amendment is required, consult with your attorney.

How to Strengthen Existing H-1B Program:

Even if your company has been filing H-1B petitions for a long time, there's always room to strengthen your H-1B program. First and foremost, you want to establish a reputation for seamlessly handling your employees' immigration needs, since immigration status is a major concern for these workers. If your company has a strong reputation for quickly obtaining H-1B approvals for your employees, you'll continue to attract and retain talent. Maintaining transparent practices and making the immigration process painless for your employees goes a long way.



To ensure you are getting the best results, make sure you are filing petitions with complete, thorough documentation. Don't skip on education evaluations or other important supporting documents at the initial stage. By submitting everything up front, you avoid getting a Request for Evidence (RFE). RFEs make employees nervous and delay the approval, affecting their ability to travel or plan for the future. Making it a practice to provide everything with the initial petition will ensure you avoid unnecessary RFEs, obtain the approval quicker, and overall bolster confidence in your company's ability to handle immigration matters.

Finally, consider starting the Green Card process for your H-1B employees early on. Companies who invest in their employees always see a return on their investment. In the immigration context, this means loyalty and long-term employee retention. By building a reputation for being the type of H-1B employer who sponsors its employees long term, you'll attract the best and brightest talent. When you can eliminate an employee's uncertainty about the future, you're much less likely to lose them to another company.

New Developments:

Finally, even if you've been handling H-1B petitions at your company for a long time, it's important to stay on top of recent developments. The immigration landscape constantly changes, so you need to stay apprised of any updates that might impact your employees. For example, USCIS recently reinstated concurrent filing for H-1B petitions, H-4, and H-4 EAD applications filed together. This means that if you file the H-4 and H-4 EAD with the H-1B petition, all three will receive a decision at the same time. It's important to be aware of updates like these, so you can ensure you are getting the best possible outcomes for your H-1B employees.

One of the easiest ways to do this is to subscribe to USCIS alerts, so you get an email notification about any major updates directly from the source. You can also regularly check ILBSG's news section on our website, where we post important updates and developments in this area.





If you have a question about how to improve and strengthen your H-1B program, reach out to an ILBSG attorney today.

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