

What Employers Should Know about Remote Work if they Employ Foreign Nationals

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By Sarah Bileti, Law Clerk, Holland & Hart LLP

According to a new report from the U.S. Bureau of Labor Statistics, approximately 34 percent of private-sector employers expanded remote-work options for workers during the COVID-19 pandemic, and about 60 percent of those organizations intend to keep those policies in place going forward.

While this is good news for many employees, for employers it brings added complication to the already complex immigration processes they must undertake to sponsor foreign workers for temporary and permanent employment in the U.S.

Remote Work Implications for H-1B Workers. The most common non-immigrant visa type is the H-1B visa which allows U.S. employers to hire foreign workers for specialty positions that require a bachelor's degree or equivalent at a minimum. H-1B visas are numerically limited with a current annual statutory cap of 65,000 plus another 20,000 for foreign professionals who graduate with a U.S. master's degree or doctorate. Beyond the annual numerical limitation that results in a lottery for coveted H-1B visa spots each year, the H-1B category is also the most restrictive in terms of worksite location.

H-1B workers are permitted to work *only* at the location(s) listed in the H-1B sponsorship petition filed by their employer. This is largely due to the associated Labor Condition Application (LCA) and prevailing wage requirements designed to prevent wage discrimination of foreign workers. The prevailing wage rate is defined as the average wage paid to similarly employed workers in the requested occupation in the area of intended employment.

Financial Implications for Employers. In the new remote work world, to maintain compliance with H-1B regulations and LCA posting requirements, employers should consider including the employee's home address *and* normal employer worksite address in the H-1B petition if employees are permitted to work from home all or part of the time. In addition, employers should be aware that changes in an employee's home location when working remotely, could have significant financial implications for the employer. An H-1B worker must be paid the higher of the prevailing wage rate *of the multiple worksite locations* or the offered rate for the role, whichever is higher. If an employer headquartered in

Draper, Utah allows its employees to work remotely and one of its H-1B employees relocates to Denver, Colorado, not only will an H-1B amendment petition be required resulting in additional legal and government filing fees, the wage the employee must be paid is also likely to substantially increase based on higher prevailing wage rates for Denver, Colorado.

Remote Work Implications for the Green Card process. The explosion of remote and hybrid working arrangements spawned by the COVID-19 pandemic has also impacted the employment based Green Card process. In the new era of remote work, how to reflect the employee's work location on the PERM labor certification application, and where to base recruitment efforts has been an area of increased confusion and uncertainty.

Having gone to a remote work model during the pandemic, some employers have reduced office space with flexible hours, or given up physical space altogether in favor of a fully remote work model. Employees are being hired into fully remote roles, and some employers have now set policies regarding which states in the U.S. they can hire fully remote workers from based on myriad tax and business-related concerns. This all adds complexity to determining how to reflect the employee's work location on the PERM labor certification application and where to conduct the required test of the U.S. labor market.

As a result of the increased urgency and prevalence of these issues, on July 20, 2022, the U.S. Department of Labor's Office of Foreign Labor Certification ("OFLC") confirmed to the American Immigration Lawyers Association ("AILA") that in situations where the employer permits remote work or telecommuting, recruitment should be conducted using the employer's headquarters as the job location even if the remote work location is in another state. The DOL provided additional guidance regarding where and how to reflect the telecommuting benefit in the PERM application and its underlying prevailing wage request.

Takeaways for employers. For employers, this guidance also has economic significance. If an employer's headquarters is in San Francisco, California where prevailing wage rates are higher, the wages the employer must pay its remote workers will be controlled by wage rates in California under this new guidance, even if the employee is working remotely in a location with a much lower prevailing wage rate.

In short, changes to worksite locations for foreign workers should be carefully analyzed on a case-by-case basis and employers should consider these elements, in coordination with knowledgeable immigration counsel when designing their remote work policies.

Q&A

1. When is an employer required to file an H-1B amendment petition for a foreign worker?

A: An H-1B amendment petition is required when there is a material change in the terms and conditions of authorized employment. What

constitutes a material change is not explicitly defined by statute, but the United States Administrative Appeals Office (AAO) held in its precedent decision, *Matter of Simeio Solutions, LLC* that a change in work location that would require the filing of a new Labor Condition Application (LCA) constitutes a material change requiring the filing of an amended H-1B petition. A new LCA is required for a change in work location that is outside the Metropolitan Statistical Area (MSA), or normal commuting distance, of the work location listed in the original petition. In addition to changes in work location, other material changes prompting an amended H-1B petition may include significant changes in job duties and reductions in salary or hours.

2. What is the employer's obligation with respect to H-1B workers if they begin to allow remote or hybrid work?

A: If an employee's H-1B petition is already approved and there is a transition to fully remote or hybrid work, the employer may be required to file an amended H-1B petition if the employee's home address is outside of the metropolitan statistical area (MSA) of the worksite listed in the petition. On the other hand, if the employee's home is within the MSA, reposting the LCA at the employee's home for the required period and adding it to the public access file with a memo about the worksite change may be enough. This would have to be analyzed on a case-by-case basis for all H-1B workers impacted.

3. If an H-1B amendment petition is required for an employee due to a change in work location, when can the employee begin working at the new worksite?

A: The employee can begin working at the new place of employment as soon as the employer properly files the amended H-1B petition. The employer does not have to wait for a final decision on the amended petition.

4. Can an employer allow an H-1B employee to work from a different location temporarily without triggering an amended H1B petition or new LCA?

A: Yes, there is a short-term placement exception that employers may utilize, but only if the following conditions are met:

- There is no strike/lockout in progress at the short-term placement location,
- The employer does not already have an LCA on file for the geographic area of employment related to the short-term placement; and
- The placement will not exceed 30 workdays within a one-year period. This is subject to the following additional caveats:
 - a. A workday is any day the employee performs any work at the short-term placement location,
 - b. The 30 workdays can be consecutive or nonconsecutive,

and

- c. The temporary placement can be extended for an additional 30 workdays within the one-year period if the employer can demonstrate that the H-1B worker maintains ties to the home worksite, for example through maintaining a dedicated workstation at the permanent worksite or a home nearby, and the worker spends a substantial amount of time at the permanent worksite.

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