



UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210



March 15, 2019

FIELD ASSISTANCE BULLETIN No. 2019-3

MEMORANDUM FOR: Regional Administrators
District Directors

FROM: Keith Sonderling
Acting Administrator

SUBJECT: Compliance with the H-1B Notice Requirement by Electronic Posting

The Immigration and Nationality Act (INA),¹ as amended, requires an employer seeking to employ H-1B nonimmigrant workers (the H-1B petitioner) to comply with various requirements. Among other things, the H-1B petitioner must notify affected U.S. workers of its intent to hire H-1B nonimmigrant workers. This requirement, which is commonly referred to as the notice or posting requirement, is an important protection for U.S. workers. The posting informs U.S. workers of the terms of the employment of the nonimmigrant workers, the right of U.S. workers to examine certain documents, and the ability of U.S. workers to file complaints if they believe that violations have occurred.

Recently, WHD has seen a rise in the use of electronic notifications as workplaces increasingly provide their employees with documents by electronic means. This Field Assistance Bulletin (FAB) reiterates an H-1B petitioner's obligations when using electronic means to make the requisite notice to all affected employees. This includes those who are employed by a third-party employer.

The H-1B petitioner must notify all affected employees of its intent to place H-1B workers at the worksite using one of the three required methods. One of those options is electronic notification. If an H-1B petitioner chooses to provide notice via posting in an electronic location (such as an intranet, internal database, or public website), it must ensure that all affected workers, including those employed by a third-party, have access to, and are aware of, the electronic notification.

Background

The INA and corresponding H-1B regulations require a petitioner using the H-1B program to notify all affected workers of its intent to petition for H-1B workers.² 8 U.S.C. 1182(n)(1)(C);

¹ 8 U.S.C. 1101(a)(15)(H)(i)(b); 1182(n); 1184(c).

² This FAB will focus on the type of notice and location where it will be placed. Information on the required

20 C.F.R. 655.734. This requirement, which is commonly referred to as the notice or posting requirement, informs U.S. workers of the terms of the employment of H-1B workers as specified on the Labor Condition Application (LCA). It also informs U.S. workers of their right to examine certain documents and their ability to file complaints if they believe that violations have occurred. *See* 59 FR 65646, 65648, 65668 (Dec. 20, 1994).

Affected workers are those at the same place of employment and in the same occupational classification in which the H-1B workers will be or are employed. *See* 65 FR 80110, 80161. Affected workers need not be employed by the H-1B petitioner to qualify as such: the H-1B petitioner's notification responsibilities extend to all affected employees, regardless of whether they are employed by the H-1B petitioner or by a third-party company. *Id.*

The Department previously explained: “[T]he purposes of notification can only be satisfied by notice to all of the affected workers—*i.e.*, all of the workers in the occupation in which the H-1B worker is employed at the place of employment, including employees of a third-party employer. This is critical because of the real possibility of displacement by the H-1B employees.... [T]here remains a real possibility that U.S. workers of other employers could be harmed by the placement of the H-1B worker. Thus, the notice alerts affected employees to the fact that an LCA has been filed and that H-1B workers will be placed at the worksite.” *Id.*

An H-1B petitioner must provide notice to affected workers in the 30 days prior to filing the LCA with the Employment and Training Administration (ETA) or on the day it is filed. 20 C.F.R. 655.734. This requirement serves to “assure the achievement of Congressional intent that U.S. workers who will be working side-by-side with H-1B nonimmigrants be notified of the employer's intent and their ability to file complaints if they believe violations have occurred.” 1994 Final Rule, 59 FR at 65648.

The required notification must occur in one of three ways: (1) posting of a hard copy notice, (2) electronic notification, or, when applicable, (3) notification to a collective bargaining representative. The notice must be posted for at least 10 days. 20 C.F.R. 655.734. Electronic notice is not required; rather, it is an optional method of notification intended to provide additional flexibility to H-1B petitioners.³

Hard Copy Posting Requirements

If notifying via hard copy posting, the petitioning employer must post the notice in at least two conspicuous places at the place of employment so that affected workers can easily see and read the posted notices. 20 C.F.R. 655.734(a)(1)(ii)(A)(1). The notices must be of sufficient size and visibility. *Id.* An H-1B petitioner has therefore not complied with the notice requirement if it posts the hard copy notification, for example, in a custodial closet or little-visited basement.

contents of the notice can be found at 20 C.F.R. 655.734(a)(1)

³ On October 21, 1998, the American Competitiveness and Workforce Improvement Act (ACWIA) amended the INA to permit electronic notification in appropriate situations. *See* Pub. L. 105-277 (1998). Prior to 1998, H-1B petitioners were required to notify via notification to the collective bargaining representative or hard-copy posting.

If the H-1B petitioner intends to employ H-1B workers at a third-party worksite, the petitioner's obligation to post the notice extends to the third-party worksite, regardless of whether the place of employment is owned or operated by the petitioner or by some other person or entity. 20 C.F.R. 655.734(a)(1)(ii)(A). The hard copy posting at the third-party worksite must be placed in a location available to all affected employees. For example, if the H-1B petitioner posts at a third-party worksite, but in a physical location accessible only to its own employees (such as a private employee lounge or office), affected workers employed by the third-party have not been notified and the employer has not complied with this provision.

Electronic Notification to Affected Workers Employed by the H-1B Petitioner

Electronic notification must be as effective as hard copy posting. In order to provide sufficient notice, a petitioner who chooses to electronically notify must make the notification *readily available, as a practical matter*, to all affected employees.

Whether affected workers have ready access, as a practical matter, to the electronic notice depends on the facts. The affected workers must be capable of accessing the electronic notification (*e.g.*, have the correct permissions to visit the intranet site). The affected workers must have knowledge of the electronic resource where the notice is posted. “[A]n employer may accomplish this by any of the means it ordinarily uses to communicate with its workers about job vacancies or promotion opportunities, including through its ‘home page’ or ‘electronic bulletin board’ to employees who have, *as a practical matter*, direct access to these resources.” 20 C.F.R. 655.734(a)(ii)(B) (emphasis added). Similarly, the employer may email or actively circulate electronic messages such as an employer newsletter. *Id.* The regulations also state that the employer must notify via hard copy posting if affected employees lack practical computer access. *Id.*

If the H-1B petitioner has not taken steps to make affected workers aware of the existence or location of the electronic notification, the H-1B petitioner *has not* complied with the notice requirement. Posting on an unknown or little-known electronic location has the effect of hiding the notice, similar to posting a hard-copy notification in an inconspicuous place, such as a custodial closet or little-visited basement.

Electronic Notification to Affected Workers Employed by a Third-Party Employer

The specific regulations on electronic notice explicitly state that, similar to the hard copy format, notice must be given to “both employees of the H-1B petitioner and employees of another person or entity which owns or operates the place of employment.” 20 C.F.R. 655.734(a)(ii)(B). However, some electronic resources used by H-1B petitioners to communicate the required notice to their own employees may not be known or accessible to affected workers employed by a third-party.

Electronic notice is *insufficient* if posted in an electronic location known to or used by the H-1B petitioner's own employees, but not known to or used by employees of the third-party. Even if the employees of the third-party *can* visit an electronic resource, if they do not know to visit the

electronic resource, the notification is not readily accessible, to affected workers employed by the third-party.

Moreover, if the affected employees cannot determine which electronic notice is applicable to their worksite, the notice is insufficient because the employees are unable to discern the specific terms and conditions of employment as specified in the LCA and thereby cannot determine if violations have occurred. *See* 59 FR at 65648 (explaining that the purpose of the notice requirement is to inform affected U.S. workers of the terms of the employment as specified in the LCA and of their own rights to examine documentation and to file complaints).

H-1B petitioners may provide electronic notification on their public websites, so long as the affected workers at the third-party worksite are aware of the notice and are able to determine which notice is applicable to their worksite. For instance, H-1B petitioners may include a menu bar on their main page that provides links to all electronic notifications for each of their worksites. However, H-1B petitioners should be mindful that they still have notice obligations if some or all H-1B employees are placed at third-party worksites. If the H-1B petitioner informs the affected workers at the third-party site of the location of the electronic notice for their worksite, and the affected workers are able to determine which electronic notice applies to their worksite, the H-1B petitioner has complied with notice requirements. Other such compliance may include, for example, posting a link to the electronic notice for a particular third-party worksite on the third-party employer's intranet site or emailing the link to all affected employees at that worksite.

Similarly, the H-1B petitioner complies by posting a hard copy message in a conspicuous site or directing affected workers to the website where the notice is posted for that particular worksite. In this situation, the H-1B petitioner has complied with its obligation to notify.

H-1B Petitioners May Choose the Means of Notification, Consistent with Requirements Above

In conclusion, an H-1B petitioner may provide this notification using whatever method, or combination of methods, it deems most prudent for its business. An H-1B petitioner may default to posting of a hard copy if it cannot ensure that all affected employees have ready access, as a practical matter, to the electronic notice.

The options listed in this FAB serve only as examples. H-1B petitioners have the obligation and experience to determine the best way to ensure that affected employees have sufficient notice of the hiring of H-1B workers.