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Appeals Court Decision Shines a Spotlight on H-1B Employees and Work Site Location

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The recent rise in remote work has transformed industries across the United States, with a large number of employers allowing employees to perform their jobs entirely from home. In many cases, an employee's home can be located in a different city or state than the company's office. For employers of H-1B professional workers, remote work has allowed for wider authority in hiring H-1B professionals in different geographic locations across the United States, but it has also introduced unique challenges and questions related to work location and H-1B amendments. Issues most commonly arise when H-1B employees change their remote work address without informing their employer in advance, and employers should have systems in place to proactively address this.

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.

United States Citizenship & Immigration Services (USCIS) regulations state that employers are required to file an H-1B amendment on an employee's behalf if any “material change” occurs to the employee's current authorized employment. This includes significant changes in job duties, salary, and **worksite**. The H-1B amendment must be filed *before* the material change in employment occurs. Typically, if an H-1B employee is working remotely, their home address is listed as one of the worksites on the original Labor Condition Application (LCA) accompanying the H-1B petition. If the employee moves outside of the county or geographic area listed on the LCA, this is considered a material change and an H-1B amendment must be filed. However, an amendment may not be necessary if the employee moves to a location within the same county or geographic area (i.e., Salt Lake City, UT to Sandy, UT).

Filing an H-1B amendment with USCIS can be costly, and if not filed before a material change takes place, an H-1B amendment can introduce unwanted scrutiny into a foreign national employee's maintenance of status. A recent decision by the U.S. Court of Appeals for the District of Columbia in *ITServe Alliance, Inc. v. United States Department of Homeland Security* (1:20-cv-03855) maintained that USCIS has the authority to require H-1B amendments for employees who have moved to

a new location, meaning that USCIS will likely monitor this issue closely in the near future and issue Requests for Evidence (RFEs) on petitions that show discrepancies in H-1B employee work location.

Employers should also 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.

Considering these financial implications, employers should work to develop internal systems that require H-1B employees to inform them prior to a change in remote work location. This is particularly important for large employers who allow employees to work remotely from any location in the United States and may not otherwise keep track of an employee's home address. In addition, employers should work to inform their H-1B employees of the risks associated with changing worksites without timely filing of an H-1B amendment and emphasize the importance of discussing a potential change in address with the employer, even if the employee is not seeking to move outside of their current geographic area. Being proactive in this sense can help employers anticipate and address potential H-1B issues before filing with USCIS.

Emma Fahey assisted in writing this article. Emma is an Immigration Project Assistant at Holland & Hart and is not an attorney.