


# 9 Critical H-1B Mistakes Employers Can Make and How to Avoid Them

**Badmus Law Firm**  
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# Featured Speaker



**Michelle B. Richart**  
**Attorney, Badmus Law Firm**

Michelle joined Badmus in 2007 and has successfully represented immigrants in family-based and employment-based cases.





# Featured Speaker



**Angela M. Lopez**  
**Attorney, Badmus Law Firm**

Angela has more than 6 years of experience representing and counseling employers in all aspects of immigration law.

# Featured Speaker



**Martha James, “Marty”  
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Marty has more than 10 years of experience providing representation to and counseling employers in all aspects of immigration law.

# Featured Speaker



**Ann Massey Badmus**  
**Attorney, Badmus Law Firm**

Ann has more than 15 years of experience providing strategic advice and counsel to employers on issues of immigration law.





# Webinar Agenda

- New Era of Enhanced Enforcement
- Labor Condition Application (LCA) and Compliance Mistakes to Avoid
- How To Document LCA Compliance
- H-1B/LCA Internal Audits
- Responding to DOL And DHS Investigations



## **New Era of Enhanced Enforcement**



# Agencies

- Employment and Training Administration (ETA) of the U.S. Department of Labor (USDOL)
- U.S. Citizenship and Immigration Services (USCIS)
- Wage and Hour Division (WHD) of USDOL



## Enforcement Trends

- Increased LCA/H-1B audits
- H-1B Benefit Fraud & Compliance Assessment (BFCA)
- Complaint-based investigations



# Penalties

- Civil Money Penalties
- Back wages
- Fringe Benefit Reimbursements
- Debarment
- Negative Publicity



## **Labor Condition Application (LCA) and Compliance Mistakes to Avoid**



***Mistake No. 1***  
**Failure to Timely File LCA**

New LCA process takes 7 days or longer

Posting for 10 days

ICERT portal



## ***Mistake No. 2***

# **Failing to Provide Accurate Data**

- Employer name, EIN, contact information
- Rate of Pay
- Period of Intended Employment (beginning and ending dates)
- Work locations (include all)
- Occupation, title, number of H-1B workers



## Misrepresentation of Material Fact

- Failure to exercise reasonable care and diligence
- False statement at the time of filing
- More than inadvertent error

Willful misrepresentation – knowingly or recklessly provides incorrect information on the LCA



## ***Mistake No. 3*** **Failing to Pay the Correct Wage**

Wages: Must pay ***higher of*** actual or prevailing wage rate, pay for nonproductive time, and offer benefits on the same basis as offered to U.S. workers



## Prevailing Wage Source

- OES ([www.flcdatacenter.com](http://www.flcdatacenter.com))
- SWA
- Other surveys – Davis-Bacon Act, Collective Bargaining Agreement, McNamara-O’Hara Service Contract Act, employer-provided independent authoritative source survey
  - **Survey publication date no later than 24 months before date of LCA filing**



## Prevailing Wage

Choose the appropriate criteria -

- Occupational Class
- Skill level – Level I, Level II, Level III, Level IV
- Geographic area of intended employment – each location must meet wage requirement



## **Actual Wage**

*Documented* wage paid to all other employees with similar experience and qualifications for the specific employment -

- **Experience**
- **Qualifications**
- **Education**
- **Job responsibility and function**
- **Specialized knowledge**
- **Legitimate business factors**



## ***Mistake No. 4***

# **Prohibited Deductions from Wage**

- Penalty for early termination of employment (bona fide liquidated damages permissible)
- Reimbursement for ACWIA fee
- Recoupment of employer's business expenses including costs incurred in the petition process if such deduction depresses the employee's wages below the prevailing wage/actual wage



## ***Mistake No. 5*** **Failing to Pay Wages on Time**

Obligation to pay begins when the employee is available to work but no later than 30 days after employee enters U.S. with H-1B visa OR 60 days after H-1B validity date if employee is already in U.S. in H-1B status



## ***Mistake No. 6*** **Benching**

Employer must pay required wage for all nonproductive time related to employment caused by:

- **lack of work**
- **lack of licensing, permit**
- **studying for licensing exam**
- **employer required training**

*Payment not required for truly voluntary absences*



## ***Mistake No. 7***

# **Failing to Properly Document Terminations**

Obligation to pay ends only after bona fide termination of employment –

- Written notification to the H-1B worker of termination
- Written notification to the USCIS of termination

Offer transportation costs to return home



## Displacement of U.S. Workers

### *Super Penalty Violation*

Willful violation and U.S. worker in essentially equivalent job was laid off within 90 days before or after filing of the H-1B petition

- Three year debarment
- \$35,000 per violation



## ***Mistake No. 8***

# **Failing to Document Employment Changes**

- New work locations
- Changes in job duties, wages, working conditions, `
- Changes in corporate structure or ownership
- Mergers and acquisition



***Mistake No. 9***

**Failing to Maintain Compliance Records**

Public Access File -

LCA and supporting documentation must be made available to the public within one working day of filing the LCA



## **How To Document LCA Compliance**



## Public Access File

### **H-1B employers (non-dependent)**

- Copy of LCA
- Rate of pay for the H-1B worker(s)
- Actual Wage memorandum
- Prevailing wage determination
- Proof of LCA posting
- Acknowledgement of receipt of LCA by H-1B employee
- Summary of benefits offered to all workers
- List of entities included as “single employer”



## Public Access File

### Post-employment changes

- Copy of new LCA for new location(s)
- Updated rate of pay, actual wage memorandum, proof of posting, employee acknowledgement of LCA, prevailing wage determination
- Salary adjustments, e.g. cost-of-living, promotion to advanced level in same occupations



## Public Access File

### Corporate changes

- Sworn or notarized statement by successor accepting all liabilities
- List of H-1B workers transferred to successor
- Each affected LCA number and effective date
- Description of actual wage system
- Successors employer identification number (EIN)

### **List of Documents (not disclosed to public)**

- All documents included in public access file
- Records showing wage rate for all other employees for the specific employment at the specific place of employment
- Any documentation that supports the prevailing wage determination
- Documentation on the offer of benefits
- Documentation on working conditions



## Summary

Public Access File

LCA File

Copy of H-1B petition

Retention of documents



## **H-1B/LCA Internal Audits**



## LCA Audit

Review records for -

- Public Access File for each occupation
- Appropriate classification
- Correct prevailing wage/actual wage
- Documentation of employment changes
- Documentation of organization changes
- Payroll records reflect compliant start date
- Appropriate notifications/amendments to USCIS



## **Responding to DOL and DHS Investigations**



# Question and Answer Session





*"Immigration law is a mystery and a mastery of obfuscation, and the lawyers who can figure it out are worth their weight in gold."*

*- USCIS spokeswoman Karen Kraushaar*



# Legal Notice

Facts of individual situations differ.

The information provided here is general in nature and should not be relied upon for specific situations.

Consult with an experienced immigration attorney to ensure compliance.



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*Merci*

**Gracias**

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