(f) *Benefits and eligibility for benefits* provided as compensation for services must be offered to H-1B worker(s) on the same basis (and under the same criteria) as those offered to U.S. workers. Note 20 C.F.R. § 655.731(c)(3)(i) for detailed requirements.

(1) Benefits actually received by the H-1B worker(s) need not be identical to the benefits of U.S. workers, provided that the offers were the same and that the differences in the actual benefits were the result of voluntary choices by the H-1B worker(s) (20 C.F.R. § 655.731(c)(3)(ii)).

(2) If there are no U.S. workers similarly employed by the ER (so that the "offer" requirement is not applicable), the ER's fringe benefits or benefit policies may constitute a part of the ER's AW system applicable to the H-1B worker(s). For example, if the evidence shows that the ER *pays* a particular benefit (or has provided this benefit in the past to U.S. workers similarly employed), this would likely show that the benefit is part of the ER's AW and would be due the H-1B worker. The WHI should consult with RSOL through appropriate channels to determine the AW for purposes of the ER's required wage obligation.

(3) Special rules apply to the ER's offer of benefits and rules for benefit eligibility when an ER is part of a *multinational corporate operation.* Per 20 C.F.R. § 655.731(c)(3)(iii), this ER has three options for meeting its obligation regarding benefits to H-1B worker(s) continued on the "home country" payroll.

(4) Benefits provided as compensation for services (*e.g.*, cash bonuses, stock options) may be credited against the required wage (*i.e.*, treated as "wages paid") *provided that* the requirements described in subparagraph (b) above are satisfied.

(g) *FLSA OT pay.* Many H-1B workers are not entitled to FLSA OT pay, because they are exempt either as salaried professionals (FLSA § 13(a)(1)) or as skilled computer workers paid at least the FLSA exemption rate of $27.63 per hour (FLSA § 13(a)(17)).

(1) Where the FLSA OT requirement is *not* applicable, the ER may credit premiums paid for OT hours to other workweeks.

(2) Where the FLSA OT requirement *is* applicable, the following standards are to be followed:

(A) The "regular rate" for the calculation of the FLSA OT pay is the H-1B "required wage" rate for the hours worked in the pay period for which the OT pay is owed (*e.g.*, where the PW is the required wage, and the PW is $18.00 per hour, the "regular rate" for purposes of FLSA OT pay is $18.00; where the ER's AW is the required wage, and the AW is $20.00 per hour, the "regular rate" for purposes of FLSA OT pay is $20.00). This is in accordance with the FLSA principle that the "regular rate" can be no less than the legally-required wage for the hours worked (here, the H-1B "required wage" rate). (See 29 C.F.R. § 778.315.)

(B) The FLSA 40-hr-week standard is used to determine whether OT pay is due, even if the ER's standard for "full-time" work is greater than 40 hours per week.

(C) Payment of OT is compelled by a separate and distinct statutory obligation under the FLSA Therefore, the ER is required to pay the H-1B required wage and, in addition, to pay the FLSA OT premium wage for each pay period in which FLSA OT hours are worked.

(D) The ER's payment of FLSA OT cannot be "credited" outside of the pay period in which the OT pay is due. Therefore, the ER cannot "credit" FLSA OT pay from

OT weeks to "bench" weeks in which the H-1B worker(s) worked less than a full-time schedule and would be owed wages for "bench" time.

(E) The ER will not be required to pay "overtime on overtime." The FLSA OT pay will not be considered to have become part of the ER's AW for purposes of the H-1B program, since this could have the result of making the FLSA OT pay part of the H-1B required wage and, thus, part of the FLSA regular rate for future FLSA OT compliance purposes.

(3) If during the course of the H-1B investigation, the WHI determines that there are also FLSA OT violations, the FLSA findings should be separately reported under the appropriate act in WHISARD. The straight time rate for OT hours will be reflected under the H-1B program and the additional one-half time for OT hours will be recorded under the FLSA program in WHISARD.

(4) Whether to bring litigation under H-1B or FLSA for OT violations will depend on the facts of the individual case and should be discussed with RSOL. Factors to consider include: the amounts involved; the need for an injunction; and the utility of charging an individual as an FLSA employer.

71d11 Deductions (20 C.F.R. § 655.731(c)(9))

(a) "Deduction" means any amount by which the H-1B worker's cash wages are decreased. A deduction may be shown on the payroll records, marked as a deduction or a wage credit (*e.g.*, FICA; housing). However, a deduction will also be considered to exist where the H-1B worker's cash wages have been decreased through out-of-pocket expenditures made by the H-1B worker for business expenses of the ER (*e.g.*, travel expenses paid by the H-1B worker while on the ER's business).

(b) A *wage violation* will exist where a deduction causes the cash wage to fall below the required wage, unless the deduction is made in accordance with the H-1B regulations. If the H-1B worker receives the required wage despite the deduction, there is no violation. Therefore, a deduction is not necessarily a violation, even where the deduction fails to satisfy the regulatory criteria for allowable deductions.

(c) *Allowable deductions.* Deductions which reduce the H-1B worker's cash wage below the required wage may be made *only* if they meet one of the following criteria (20 C.F.R. § 655.731(c)(9)):

(1) *Required by law.* The ER may make deductions required by law (*e.g.*, income tax; FICA) (20 C.F.R. § 655.731(c)(9)(i)).

(2) *Reasonable and customary.* The ER may make deductions which are authorized by a CBA, or are reasonable and customary in the occupation and/or area of employment (20 C.F.R. § 655.731(c)(9)(ii)), provided they:

(A) Do not recoup ER's business expense(s)(see (d) below);

(B) Were revealed to the H-1B worker prior to the commencement of employment;

(C) If, as a condition of employment, were clearly identified as such prior to the commencement of employment;

(D) Are made against wages of U.S. workers (if any) as well as H-1B workers;

(E) Do not violate state or federal law.

(3) *Voluntary.* The ER may make deductions which meet all of the requirements listed in 20 C.F.R. § 655.731(c)(9)(iii).

(d) *Business expenses.* The ER cannot recoup business expenses (*e.g.*, cost of tools and equipment; transportation costs while on business travel) to the extent such recoupment reduces the H-1B worker's wage below the required wage (20 C.F.R. § 655.731(c)(9)(iii)(C)). See FOH 71d08 for treatment of USCIS fees.

(1) Attorneys fees incurred in the preparation and filing of the LCA, the Form I-129/I-129W, or a request for extension of H-1B status, are considered to be an ER business expense. However, the ER's business expenses would *not* include costs and fees connected with the H-1B worker's personal obligations in obtaining the H-1B visa (*e.g*, translation of credential materials for submission to the U.S. Consulate) or with the H-1B worker's personal interests concerning the employment (*e.g.*, attorney hired by H-1B worker to negotiate the employment contract, or to review the H-1B worker's immigration status, or to obtain visas for the H-1B worker's family members). Claims that H-1B worker(s) have paid attorneys fees should be reviewed with RSOL, through appropriate channels, to determine whether a violation exists and to determine BW in the event of a violation.

(2) *Deductions that are not considered business expenses* include: initial transportation from, and end-of-employment transportation to, the H-1B worker's home country (this is due to special treatment of transportation expenses in the INA); transportation for the H-1B worker's family; any expense incurred to obtain the H-1B worker's visa (or visas for his/her family members) at the U.S. Consulate or Embassy; and fair market value or reasonable cost of housing and food *unless* the H-1B worker is in business travel status, or the circumstances indicate that the arrangements for the H-1B worker's housing are principally for the convenience or benefit of the ER (*e.g.*, working /living at the worksite in an "on call" status).

(3) If the ER advances the H-1B worker the cost of non-business expenses (*e.g.*, travel expenses for the H-1B worker and his family members from the home country), then the ER may later recoup those advances through "voluntary deductions" from the H-1B worker's wages, provided that the deductions are in compliance with the regulation for such deductions as discussed in subparagraph (c)(3) above) (see 20 C.F.R. § 655.731(c)(9)(iii)(C); FOH 71e02).

(e) Any unauthorized deduction taken from the required wages is considered by the DOL to be non-payment of that amount of wages. See 20 C.F.R. § 655.731(c)(11). An ER may never withhold payment of required wages (especially the last paycheck).

71d12 Place of employment—worksite (20 C.F.R. § 655.715)

(a) The ER's obligations under the H-1B program are focused around the H-1B worker's "place of employment"/worksite. The ER must have an LCA on file for every place of employment or worksite, determine the applicable PW rate, give notice to U.S. workers that H-1B workers may be hired, and comply with the strike/lockout prohibition.

(b) *Place of employment* is the worksite or physical location where the H-1B worker's work is actually performed (20 C.F.R. § 655.715). Most H-1B program requirements (wages, notice, and strike/lockout) are tied to the place of employment/worksite.

(1) H-1B workers may have more than one place of employment/worksite during their stay in the U.S., since they may work for short periods at various worksites and be relocated from one worksite to another. Regardless of how often H-1B workers travel in the

performance of their job, or how often they move from one location to another, every H-1B worker has a worksite at all times, for purposes of determining the LCA which controls the H-1B workers' wage rights and the ER's other obligations.

(2) An H-1B worker may perform work at some locations that are not considered worksites (*e.g.*, receiving training; making a sales call on a customer), as explained in subparagraph (c) below. The WHI will determine what location(s) constitute worksite(s) for the H-1B worker(s) in an investigation, and then determine whether there are violations concerning the ER's treatment of wages, notice, and other matters with regard to such location(s).

(3) *"Worksite" examples* based on an H-1B worker's job functions are listed in 20 C.F.R. § 655.715.

(c) *Non-worksite*. For any days or periods when H-1B workers work at a non-worksite location, their worksite, for purposes of wages and other obligations, would be the H-1B workers' "home base" or regular worksite LCA. This regular worksite is often the location identified on the LCA used by the ER to petition for the H-1B worker, but it may be a different location if the H-1B workers were transferred (temporarily or permanently) to some other location after beginning employment. For any location that is not a worksite, there is no requirement to have an LCA on file for that location, to determine the PW, or to give notice to the U.S. workers of the ER's intent to hire an H-1B worker.

(1) There are *two categories of non-worksite locations* – training sites and short visit sites:

(A) *Training locations*. The "place of employment"/worksite does not include locations where the H-1B worker temporarily participates in various types of EE developmental activities, such as training seminars and management conferences. This exception would not include the location of an H-1B worker's on-the-job training (20 C.F.R. § 655.715), or an H-1B worker's work as an instructor at a training location.

(B) *Short visit locations*. Sometimes the nature and duration of an H-1B worker's job function may require frequent location changes and result in little time at any one location. The H-1B worker's visits may be recurring, but are to be on a casual (short-duration) basis. The following criteria are applied to such situations (20 C.F.R. § 655.715):

(i) "Peripatetic"/constantly traveling H-1B worker. Where the H-1B worker's duties require frequent travel to various locations (local or non-local), and the worker's visit to a location does not exceed five consecutive work days, the location will not be considered to be a worksite. An H-1B worker who makes sales calls or performs service calls on customers' equipment would commonly be "peripatetic" and the customers' facilities would not be worksites for the H-1B worker.

(ii) Occasional short visits by H-1B worker. Where the H-1B worker spends most work time at one location but occasionally travels to other locations for short periods of time (not exceeding 10 consecutive work days on any one visit), the location visited will not be considered to be a worksite.

(iii) The "worksite" analysis focuses on the normal duties of the H-1B worker's occupation, and not the nature of the ER's business. An ER operating as a "staffing provider" that routinely sends H-1B workers to customer locations to fill in for other workers or to supplement the customer's workforce in times of

heavy workload would be a worksite, unless the nature of the H-1B worker's occupation normally involves frequent visits to various locations.

(iv) The H-1B worker cannot be sent to a short visit site as a "strikebreaker" (i.e., the H-1B worker is not to be at the location performing work in an occupation in which U.S. workers are on strike or in lockout). If such a placement of an H-1B worker occurs, the location would be considered to be a worksite. The ER would be subject to all the requirements regarding a worksite (e.g., posting notices) and could be cited for a violation of the strike/lockout standards (see FOH 71d18).

(C) *"Non-worksite" short visit examples*, based on an H-1B worker's job functions (20 C.F.R. § 655.715): a customer location to which an H-1B computer programmer is sent to troubleshoot complaints regarding software malfunctions; a business location visited by an H-1B sales representative calling on prospective customers within a "home office" sales territory; a field office or out-station visited by an H-1B manager monitoring the performance of workers (H-1B and/or U.S. workers); a customer's facilities where an H-1B accountant is conducting reviews or auditing records; or private homes where an H-1B physical therapist treats patients.

71d13 Short-term placement (20 C.F.R. § 655.735)

(a) "Short-term placement" is a regulatory exception to the usual requirements concerning worksite notice and PWs. This exception provides an option that allows an ER to place an H-1B worker(s) at a worksite(s) within an area(s) of employment not listed on the ER's already existing LCA(s) (*i.e.*, non-LCA worksites). (See 71d12(c).) This option enables the ER to move its H-1B worker(s) quickly to the worksite(s), without waiting to complete the LCA filing process. Thus, the ER is afforded some flexibility in the use of its H-1B workers to respond to business opportunities and needs.

(b) While the H-1B worker is on a short-term placement, his/her wage rates are controlled by the LCA for his/her permanent worksite (often called the "home office").

(c) Travel and subsistence expenses. The H-1B ER must satisfy all requirements listed in 20 C.F.R. § 655.735(b)(3); the payment of actual expenses is required even where the H-1B worker's expenses do not take the H-1B worker's cash wage below the required wage. This is the only circumstance in which ER payment of the H-1B worker's travel and subsistence expenses is required without regard to any impact of the H-1B worker's payment of these expenses on receipt of the required wage. Where an ER is unable to demonstrate the actual expenses incurred, the WHI should use the best information available to make a determination. In such situations, the WHI may use the GSA standards for travel and subsistence expenses (see http://www.policyworks.gov/org/main/mt/homepage/mtt/perdiem/travel.shtml.)

(d) The ER cannot place an H-1B worker at a worksite where there is a strike/lockout in the H-1B worker's occupation. This prohibition applies to short-term placements as well as to permanent transfers and placements.

(e) *"Short-term" not applicable where an LCA is in effect.* Per 20 C.F.R. § 655.735(e), where the ER has an LCA in effect for the area of employment and occupation, the short-term placement option is *not* available as a method for placing H-1B workers at worksites. In addition, the H-1B worker's *first worksite placement* must be at a worksite in the area of employment identified on the LCA supporting that worker's Form I-129/I-129W petition. Therefore, no H-1B worker can be sent on a short-term placement as his/her initial job assignment.

(1) The short-term placement option does *not* provide a method by which the ER can send "extra" workers to an area or can evade the LCA obligations by treating some H-1B workers as "temporary" in that area.

(2) All H-1B workers at LCA-covered worksites must be employed in accordance with the LCA for that area and occupation. The existence of the LCA, with its local PW standard, may require the ER to make adjustments in the wages of H-1B workers who are sent to worksites in the area. The ER cannot avoid this possibility by claiming to be using the short-term placement option.

(3) Since the LCA has a designation of the number of H-1B workers to be employed by the ER in the area of employment, it is possible that the ER will be "*overcrowding*" or exceeding the designated LCA number by placing temporary H-1B workers at worksites in the area. If "overcrowding" is identified in an investigation, DOL will not charge a violation of the LCA specificity requirement (*see* FOH 71d19) if the ER's violation is not willful and the ER has taken prompt action to come into compliance (*i.e.*, filing a new LCA to add more "slots" for H-1B workers).

(f) *Standards for enforcement.* The determination as to whether a placement is truly "short-term" is based the following regulatory standard (the "30 plus 30" standard):

(1) Thirty workdays in a one-year period will be considered short-term. The days may be consecutive, but may also be broken into two or more "placements" during the one-year period.

(2) An additional 30 workdays (total of 60) in a one-year period will also be considered short-term (whether consecutive or broken into two or more "placements"), if the ER can show that the three criteria listed in 20 C.F.R. § 655.735(c)(1-3) have been met.

(3) For purposes of this test, "*workday*" means any day on which the H-1B worker performs any work at any worksite(s) in the non-LCA area and "*one year period*" means either the calendar year (January 1 through December 31) or the ER's fiscal year (whichever the ER has designated). (See 20 C.F.R. § 655.735(d).)

(4) For purposes of this test, the count of workdays is done worker-by-worker, and the short-term limit is reached when any one H-1B worker has accumulated the maximum number of days in a one-year period. The ER is not allowed to continuously rotate H-1B workers in a manner that would evade the purposes of the short-term placement option. Where the ER continuously or virtually continuously has H-1B workers in an area, but moves individual workers out of the area in a pattern that avoids the maximum days limit, the ER has violated the short-term placement regulations.

(5) Once the short-term placement option is exhausted (*i.e.*, once any H-1B worker accumulates the maximum number of days at any worksite or combination of worksites in the area in a one-year period), the ER must take one of the actions available in 20 C.F.R. § 655.735(f).

(g) *Investigative findings and remedies.* After the short-term determination is made, the WHI shall determine the ER's obligation and any appropriate remedies as follows:

(1) *If the placement is short-term*: The ER must meet all the requirements in 20 C.F.R. § 655.735 (b)(3)(i)to(iii). If the ER has an LCA in effect for the occupation in the area, the placement cannot be considered to be short-term and the wage and notice obligations under that LCA are fully applicable.

(2) *If the placement is not short-term, and the employer has no LCA* in effect for the occupation in the area, the ER must file an LCA for the area of employment that covers the worksite(s) (which includes the requirement to determine the PW); the ER must:

(A) Satisfy the notification obligations (give a copy of the new LCA to the H-1B worker(s) and provide notice at the worksite(s) (to the union, or by hard copy posting, or by electronic posting, as appropriate));

(B) Pay the required wage rate applicable to the worksite; *and*

(C) Pay the H-1B worker's actual costs of travel while on the ER's business. (See 20 C.F.R. § 655.735(g)).

(3) *If the employer has an LCA* for the occupation in the area (thus making the short-term placement option non-applicable), the ER must:

(A) Meet the notification obligations under that LCA (give a copy of the LCA to the H-1B worker upon placement at a worksite in the area;

(B) Provide notice at the worksite(s) (to the union, or by hard copy posting, or by electronic posting, as appropriate));

(C) Pay the required wage rate applicable under that LCA, which may require wage adjustments for the H-1B worker(s) in question;

(D) Pay the H-1B worker's actual cost of travel while on the ER's business, if these expenses depressed the worker's wages below the required wage.

71d14 Notification requirements (20 C.F.R. § 655.734)

(a) Any ER filing an LCA for the employment of H-1B workers must provide notice to the H-1B worker(s) and to U.S. workers. A failure to meet this requirement will be cited as a violation, and can result in CMPs and debarment if the violation is substantial.

(b) *Notice to H-1B workers.* A copy of the LCA must be given to the H-1B worker, per 20 C.F.R. § 655.734(a)(3). The LCA notice to the H-1B worker is required by the DOL regulation; USCIS regulations require that USCIS give the ER a copy of the Form I-129/I-129W and the Form I-797, but USCIS does not require that the ER give a copy of these documents to the H-1B worker. It is common practice for the ER to provide a copy of all of these documents, and many H-1B workers have these copies in their personal files.

(c) *Notice to U.S. workers.* This notification requirement can be met in one of two ways *(Union notice* or *Worksite notice)* (20 C.F.R. § 655.734).

(1) *Hard copy.* The ER must post a notice for at least 10 days in at least two conspicuous locations at each place of employment/worksite where any H-1B worker will be employed. This requirement to notify workers also applies to a client's worksite. The H-1B ER cannot send an H-1B worker to a client's worksite if the client refuses to notify its workers. Appropriate locations for posting the notices include, but are not limited to, locations in the immediate proximity of WH and OSHA posters. The ER may post a copy of the LCA or may create a notice that contains all the required information (described in subparagraph (d) below). Where the ER places an H-1B worker at a worksite not contemplated at the time of filing the LCA, the ER shall post a notice on or before the date any H-1B worker begins work at that location; or

(2) *Electronic.* The ER may provide an electronic notification to EEs in the occupational classification for which H-1B workers are sought. See 20 C.F.R.

§ 655.734.(a)(1)(ii)(B) for a description of methods that an H-1B ER can use to accomplish this requirement.

(3) *Contents of notice.* The notice must contain the following information: number of H-1B workers sought; occupational classification(s) in which the H-1B workers will be employed; wages offered; period of employment; location(s) at which the H-1B workers will be employed; and location where the LCA is available for public inspection.

(A) In addition to the above, the following specific statement for all notices must be included: "Complaints alleging misrepresentation of material facts in the LCA and/or failure to comply with the terms of the LCA may be filed with any office of the Wage and Hour Division of the United States Department of Labor." (See 20 C.F.R. § 655.734(a)(1)(ii).)

(B) If the ER is an H-1B-dependent ER or a willful violator, and the LCA is not being used only for "exempt" H-1B nonimmigrants, the notice must include "Complaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an ER's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street and Constitution Avenue, NW, Washington, DC 20530."

(4) *New worksite(s).* Where H-1B workers are placed at worksite(s) not contemplated when the LCA was filed, notice shall be provided in the manner described above at the new worksite(s) on or before the date the H-1B workers begin work at that site.

(5) The requirement for notice to U.S. workers applies whether or not an H-1B worker is ultimately approved to work for the ER on the LCA.

(6) The ER's notice violation must be "*substantial*" in order to be penalized by CMPs and debarment. An investigation may disclose that the ER failed to comply with the notice requirement in some respect (*e.g.,* failed to post the notice at one of several work sites or failed to give a copy of the LCA to every H-1B worker though many received them). If the ER immediately and completely corrects the failures upon being informed by the WHI, the violation will be cited but will not be characterized as "substantial." If the ER fails to correct the violation, it will be cited as substantial, resulting in a CMP assessment and debarment. Where the ER's failure to provide notice is pervasive or egregious (*e.g.,* no notice at any worksites), the violation should ordinarily be characterized as "substantial" and correction of the failure should be required as an administrative remedy (in addition to CMPs and debarment).

71d15 Changes in employer's corporate structure or identity (20 C.F.R. § 655.730(e))

(a) A corporate ER may experience changes in corporate structure as a result of an acquisition, merger, "spin-off" or other action. The ER's obligations and continued participation in the H-1B program will require particular attention by the ER.

(b) *"New" corporate employer.* The following criteria shall apply where an H-1B ER changes its corporate identity or structure:

(1) The "new" corporate entity may continue to employ the predecessor entity's existing H-1B workers without filing new LCA(s) (regardless of whether or not there is a change in the EIN) *provided that* the new entity explicitly agrees to assume the predecessor entity's obligations and liabilities under the LCA(s). See 20 C.F.R. § 655.730(e)(1)(i) to (iv) for a list of required documentation in the public access file.

The non-public records must contain a list of the H-1B workers transferred as employees of the new entity.

(2) The "new" corporate entity cannot use the predecessor entity's existing LCA(s) to employ H-1B worker(s). See 20 C.F.R. § 655.730(e)(2).

(c) *Successor(s)-in-interest.* If a change in corporate structure or identity occurs and the "new" corporate entity fails to comply with the standards discussed in the preceding subparagraphs, then liability for H-1B program obligations shall be imposed upon the entity(ies) which are identifiable as the sponsoring/original ER's successor(s)-in-interest. Whether there is a successor-in-interest generally depends on whether the successor firm had notice of the liability at issue, the ability of the predecessor to provide relief, whether there has been substantial continuity of business operations, whether the new employer uses the same plant, whether he uses the same or substantially the same work force, whether he uses the same or substantially the same supervisory personnel, whether the same jobs exist under substantially the same working conditions, whether he uses the same machinery, equipment and methods of production, and whether he produces the same products. If such possibilities are raised in an investigation, careful coordination among the WHI, DD/ADD, and RSOL is essential.

71d16 Misrepresentation of a material fact on the LCA

(a) The ER is subject to CMPs and debarment upon the finding of a misrepresentation of a material fact on the LCA.

(b) "*Misrepresentation*" means that the ER made a statement on the LCA which was false at the time the LCA was filed. The ER must exercise reasonable care and diligence to assure the accuracy of its LCA statements; failure to exercise such care and diligence may result in a false statement that could constitute a violation. The false statement may be a matter that was revealed through subsequent events (*e.g.*, LCA states that a particular wage rate would be paid, but evidence establishes that the ER never intended to pay that wage rate). To constitute a misrepresentation, the false statement must be more than an inadvertent error. Where the misrepresentation was willful (*i.e.*, the false statement was made knowingly, or the ER showed reckless disregard for the truthfulness of the statement), the violation is subject to an increased CMP ($5,000 maximum, rather than $1,000 maximum).

(c) "*Material fact*" means a significant item of information on the LCA. A material fact may include any of the following: the number of H-1B workers sought; the occupational classification for which the worker is sought; the rate of pay; the address where documentation is kept; the three-digit occupational group code; the job title; the part-time status of the employee(s); the prevailing wage rate and its source; the period of employment; the additional ER Labor Condition Statements; and the location where the H-1B worker will work.

(d) The number of H-1B workers sought, the occupational classification for which the worker is sought, and the rate of pay (and only these three facts) can also be cited as a violation under "fail to specify" (see FOH 71d19) but are never cited under both "fail to specify" and "misrepresentation of a material fact".

(e) For any violation committed by the ER that does not rise to the level of a misrepresentation, the violation can be cited as "Failed to Otherwise Comply with Subpart H or I" (see FOH 71d22 and FOH 71e17).

71d17 Working conditions (20 C.F.R. §655.732)

(a) Any ER seeking to employ an H-1B worker must attest that the employment of H-1B worker(s) in the named occupation(s) will not adversely affect the working conditions of similarly employed U.S. workers. The ER's obligation extends for the longer of two periods: the validity period of the LCA(s) or the period during which the H-1B workers are employed by the ER.

(b) Working conditions include hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules. Protected working conditions do not include the right to a job. Therefore, if a U.S. worker is displaced by an H-1B worker, such displacement is not a violation of the working conditions attestation (even though it may violate other H-1B provisions or other laws).

(c) "Similarly employed" means having substantially comparable jobs in the occupational classification at the worksite and in the area of intended employment. The comparison is to be made among the ER's own EEs, not among workers generally in the area of employment.

71d18 Strike/lockout provisions (20 C.F.R. § 655.733)

Any ER filing any LCA must attest that:

(a) On the date the LCA is signed and submitted there is no strike or lockout in the course of a labor dispute in the named occupation at the intended place of employment/worksite.

(b) The ER must adhere to requisites listed in 20 C.F.R. § 655.733(a)(1) if such a strike or lockout occurs after the LCA is submitted. (See FOH 71e04, 71d13(d).)

71d19 Specific and accurate information on the LCA

(a) The ER is required to provide specific and accurate information on the LCA concerning the number of H-1B workers sought, the occupational classification, and wage rate of the H-1B worker(s). Misrepresentation of these three items can, in the alternative, be cited as a material misrepresentation (see FOH 71d16) or failed to otherwise comply with subpart H or I (see FOH 71d22 and FOH 71e17).

(b) The ER's substantial failure to provide specific and accurate information would constitute a violation subject to a CMP not to exceed $1,000 per LCA (See FOH 71e06(b)(2)).

71d20 Early cessation penalty (20 C.F.R. § 655.731(c)(10))

(a) The INA prohibits the ER from requiring an H-1B worker to pay a penalty for ceasing employment with the ER prior to a date agreed to by the H-1B worker and the ER. However, the ER is permitted to recoup *bona fide* liquidated damages (LDs) for the ER's losses or expenses incurred due to the worker's leaving employment early (20 C.F.R. § 655.731(c)(10)(i)). See FOH 71b06 for procedures for screening complaints and conducting investigations for alleged early cessation penalty violations. Consultation with the RSOL on early cessation penalties is essential.

(b) The employment agreement between the ER and the H-1B worker may contain a provision imposing a monetary payment on H-1B workers if they terminate employment prior to the agreed date. The existence of such a contract clause does not, in itself, constitute a violation of the prohibition on an early cessation penalty and, conversely, does not assure that the payment would constitute permissible LDs. The determination of the nature of the payment (whether LDs or a penalty) must be made in light of the controlling State law.

(c) *Liquidated Damages.* In general, the laws of the various States recognize that LDs are amounts which are fixed or stipulated by the parties at the inception of a contract, and which are reasonable approximations or estimates of the anticipated or actual damages caused to one party by the other party's breach of contract. The LDs cannot be speculative; they must reflect a potential *bona fide* loss to the ER. LDs, in the context of an EE's early termination of employment, can cover business expenses and may include:

(1) Worker-related expenses incurred by the ER, such as ER-paid costs for transporting worker and/or family members from home country to the U.S.; ER-paid room and board for worker upon arrival in the U.S.; attorneys fees and filing fees (other than the special petition and anti-fraud fee (see FOH 71d08) and training costs.

(2) ER's losses attributable to H-1B worker's early departure from employment, such as a customer's cancellation of a contract with the ER due to the unavailability of crucial worker or the ER's termination of project or office due to loss of worker's services.

(d) *Penalties.* In general, the laws of the various States recognize that a penalty is an amount of money (fixed or stipulated in a contract) that is not a reasonable approximation or estimate of the damages actually resulting from the worker's early departure from employment. Characteristics of a penalty include: an amount of money that the ER routinely demands in a certain type of contract (*e.g.*, every H-1B contract specifies a termination payment of $30,000 to ER); an amount of money that is the same regardless of whether the agreement is terminated early in the contract period, when legitimate business losses might be substantial, or near the end, when such losses would be minimal; an unexplained or unjustified amount of money which is not attributed to any particular cost or loss; *and* an amount of money which appears unreasonable in comparison to the worker's earnings.

(e) *Employer action to impose or collect penalty.* Once an amount of money has been determined to constitute a penalty, a violation will be cited where the ER takes some action which can reasonably be construed as an effort to collect the penalty. A contract clause identifying the amount of money would not, in itself, be sufficient for an early cessation penalty violation (see FOH 71d05 concerning intimidation/retaliation). A violation would exist where the ER makes a written or oral demand for payment of the money, or where the ER has a history or a pattern of behavior of seeking payment of the money from other workers. An H-1B ER is not prohibited from seeking to collect any LDs for the early termination or seeking to enforce, or obtain damages for, other contract terms allegedly breached by a worker.

(f) A violation will be cited for every H-1B worker against whom the ER seeks to impose/collect a penalty, including those workers who have entered a settlement with the ER concerning the payment (with or without a State court order). Such a settlement may affect whether, and the extent to which, monetary relief should be obtained for the H-1B worker. In such instances, the amount of the H-1B BWs, if any, should be determined only after consultation with the NO/OEP/Immigration Team. Where a State court, in adjudicating a lawsuit or approving a settlement between the parties, has itself expressly made a judicial determination based on the facts of the case that a payment is not a penalty under applicable State law, there can be no citation of an H-1B violation for an early cessation penalty.

(g) *Employer's method of collection of liquidated damages.* In no instance may an ER withhold an H-1B worker's final paycheck in an attempt to recover any asserted LDs owed the ER.

(h) The special $750/$1,000/$1,500 petition filing fee can never be considered to be a LD. The statute prohibits the H-1B worker's payment of this fee in any circumstances. (See 20 C.F.R. § 655.731(c)(10(ii) and FOH 71e11.)

71d21 Required records

H-1B ERs are required to develop and maintain certain employment records to support their compliance with the attestations made on the LCA(s). These records include those specifically required by the H-1B program; (see C.F.R. § 655.731(b), .738(e), .739(i), .760, .805(a)(15)) as well as those required by the FLSA. (See FOH 71e15.)

71d22 Failed to otherwise comply with subpart H or I

(a) H-1B ERs must comply with all regulatory requirements in 20 C.F.R. § 655 subpart H or I. CMPs and debarment may be imposed for violations of regulations which implement specific statutory standards (except public disclosure files).

(b) CMPs but not debarment are available for violations of public disclosure requirements and other regulatory requirements (such as record keeping or refusal to cooperate in an investigation, where the violation impedes WH's ability to determine whether an attestation violation has occurred, or the public's ability to have information needed to file a complaint) which are not drawn from specific statutory provisions. The distinction between these types of violations is clearly made in the regulation specifying the amounts of CMPs applicable to particular violations (20 C.F.R. § 655.810(b)).

(c) Violations which are not subject to CMPs and debarment shall nevertheless be cited in the determination letter. This violation category is used for any violation not addressed in FOH 71e01 through 71e16. (See FOH 71e17.)

71d23 Good faith compliance or conformity (8 U.S.C. § 1182(n)(2)(H))

(a) The H-1B Visa Reform Act of 2004 provides for a good faith compliance defense, and a recognized industry standards defense.

(b) The H-1B ER meets the good faith defense requirement only when:

(1) The violation is technical or procedural only;

(2) The ER has made a good faith attempt to comply;

(3) The ER has corrected the problem within ten (10) business days of notice; and

(4) The ER has not engaged in a pattern or practice of willful violations under the H-1B program.

(c) The terms "technical" or "procedural" failures are not defined in the statute.

(1) Technical failures are minor violations which do not result in or cause substantive violations of the statute. Such technical failures may include clerical errors, insignificant failures to comply, or inadvertent mistakes.

(2) Procedural failures in most instances are similar to technical failures and involve minor procedural discrepancies, mistakes or omissions.

(3) Examples of technical or procedural failures:

(A) A large firm with many public access files mixes up documents or fails to include a required document in an insignificant number of files;

(B) Failure to report to IRS "in kind payments" such as rent, bonuses etc. as wages for tax purposes where the employer retroactively reports such wages, pays appropriate taxes and ceases the practice of non-reporting.

(d) Failures to meet attestation requirements are not technical or procedural in nature.

(e) "Good faith" requires that the employer affirmatively demonstrate that reasonable actions were taken to come into compliance.

(f) The WHI should provide notice of the technical or procedural failure as soon as practicable and should provide at least ten (10) business days to correct the failure. The WHI should document the date the notice was provided and note in the file the methods of compliance. The determination letter should not be issued until the period for correction has elapsed.

(g) ***Redacted 7e***

(h) ***Redacted 7e***

(i) ***Redacted 7e***

71e LIST OF VIOLATIONS and REMEDIES

71e00 Level or degree of employer's wrong-doing in violations

(a) The INA specifies certain degrees of wrong-doing necessary in order to impose a penalty for certain violations (*i.e.,* CMPs, debarment, or both). Some violations must be "substantial" (see FOH 71e05, 71e06 and 71e09) and others must be "willful" (see FOH 71e01 through 71e09), in order to assess CMPs and debarment. However, in any case where an H-1B worker has been denied money in violation of H-1B requirements, the ER will be liable without regard to whether or not the violation was willful or substantial.

(1) If any violation does not meet the "substantial" or "willful" standard, the violation should nevertheless be cited in the determination letter without assessment of CMPs.

(2) ***Redacted 7e***

(b) ***Redacted 7e***

(c) **Redacted *7e***

(d) "Willful" violation

(1) *Standard for "willfulness."* The H-1B program uses the *Richland Shoe* standard for determining willfulness: The ER's action is willful if it is a knowing failure of compliance or a reckless disregard with respect to whether the conduct was contrary to the statute or regulations. See 20 C.F.R. § 655.805(c); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). The ER's simple negligence, incorrect assumption of compliance, or mere carelessness in determining its H-1B obligations is not sufficient to meet the "willful" standard. Actions that are clearly inconsistent with the ER's attestation obligations, as set forth in the LCA, would be strong evidence that a violation was willful, absent evidence of inadvertence.

(2) ***Redacted 7e***

(3) *Violations requiring "willfulness" for imposition of penalties.* "Willful" violations are required for CMPs (up to $5,000 per violation) and debarment for an ER's failure to comply with the requirements concerning wage and benefits (20 C.F.R. § 655.731), working conditions (20 C.F.R. § 655.732), strike/lockout (20 C.F.R. § 655.733), notification (20 C.F.R. § 655.734), LCA specificity (20 C.F.R. § 655.730), displacement of U.S. workers (direct or secondary) (20 C.F.R. § 655.738), recruitment of U.S. workers (20 C.F.R. § 655.739), or misrepresentation of a material fact on the LCA. A non-willful misrepresentation of a material fact is subject to a CMP up to $1,000.

(4) ***Redacted 7e***

(5) ***Redacted 7e***

(e) *"Super penalty" for certain willful violations.* Where the ER displaces a U.S. worker in its workforce (*i.e.*, U.S. worker employed by the violating ER) during the course of a willful violation, the willful violation is subject to an enhanced CMP up to $35,000 per violation plus debarment for at least three years. It is not necessary for WH to show a causation link between the violation and the displacement, where the actions are contemporaneous or nearly so. This enhanced CMP which applies to all H-1B ERs (whether H-1B-dependent or non-dependent), requires NO/OEP/Immigration Team, NOSOL, and RSOL approval. (See FOH 71e10.)

(1) The "super penalty" applies where U.S. worker EEs of the H-1B ER are displaced. The penalty does *not* apply to the loss of work for U.S. worker consultants and *bona fide* independent contractors who performed services for the H-1B ER.

(2) In order for the "super penalty" to be applied, the displacement of the U.S. worker(s) (in the course of the willful violation) must occur within the period beginning 90 days before and ending 90 days after the date of the ER's filing of any H-1B visa application (Form I-129/I-129W). In other words, the "super penalty" is applicable only during specific time periods and is *not* available for all willful violations involving displacements of U.S. workers.

(3) After an initial assessment that the violation(s) under investigation may be willful, the WHI should be alert to the possibility of displacement of U.S. worker(s) during the course of the violation(s) and within the pertinent time period(s).

(4) The "super penalty" for a willful violation involving displacement of U.S. worker(s) is *not* to be confused with the non-displacement obligation which applies only to H-1B-dependent and willful violator ERs. See FOH 71d04. The following differences are significant:

(A) The "super penalty" applies to all H-1B ERs, rather than only to H-1B-dependent and willful violator ERs.

(B) The "super penalty" applies only where the displaced U.S. workers are employed by the violating H-1B ER. The "secondary displacement" concept (found in the H-1B-dependent and willful violator ER obligation) is not applicable to the "super penalty."

(C) The "super penalty" affects the size of the CMPs for the willful violation in which the displacement occurred. The displacement itself is not penalized by the "super penalty." Therefore, an ER which is assessed a "super penalty" cannot be required to remedy the displacement through additional administrative remedies such as reinstatement.

H-1B Level or Degree of Wrongdoing

Maximum CMPs and *Minimum* Period of Debarment

Violation	Base	If Substantial	If Willful	Regulation Cite	FOH Cite
Misrepresentation of Material Fact	$1000 1 year		$5000 2 years	§ 655.805(a)(1)	71e01
Failed to pay required wages or offer benefits	0 0		$5000 2 years	§ 655.805(a)(2)	71e02
Failed to provide required working conditions	0 0		$5000 2 years	§ 655.805(a)(3)	71e03
Filed LCA during a strike or lockout	$1000 1 year		$5000 2 years	§ 655.805(a)(4)	71e04
Failed to provide notice of filing the LCA	0 0	$1000 1 year	$5000 2 years	§ 655.805(a)(5)	71e05
Failed to accurately specify number of workers sought, the occupational classification, or the wage rate and conditions	0 0	$1000 1 year	$5000 2 years	§ 655.805(a)(6)	71e06
Displacement of U.S. worker *	$1000 1 year		$5000 2 years	§ 655.805(a)(7)	71e07
Failed to make required displacement inquiry of another employer at a worksite where H-1B workers are placed *	$1000 1 year		$5000 2 years	§ 655.805(a)(8)	71e08
Failed to take good faith steps in recruitment *	0 0	$1000 1 year	$5000 2 years	§ 655.805(a)(9)	71e09
Displaced U.S. worker in the course of committing a willful violation	$35000 3 years			§ 655.805(a)(10)	71e10
Required/accepted payment of ER's $750/$1500 fee for filing petition	$1000 0			§ 655.805(a)(11)	71e11
Required payment of penalty for early cessation of employment	$1000 0			§ 655.805(a)(12)	71e12
Discriminated or retaliated for protected actions	$5000 2 years			§ 655.805(a)(13)	71e13
Failed to make LCAs and public access documents available to public	$1000 only if public impeded 0			§ 655.805(a)(14)	71e14
Failed to maintain required documentation	$1000 only if WH impeded 0			§ 655.805(a)(15)	71e15
Failed to otherwise comply	$1000 only if WH impeded 0			§ 655.805(a)(16)	71e17
Failed to cooperate in Investigation	$1000 only if WH impeded 0			§ 655.800(c) & (d)	71e16

* Note: applies only to H-1B-dependent employers

71e01 **Misrepresentation of a material fact on the LCA (20 C.F.R. § 655.730 and 20 C.F.R. § 655.805(a)(1))**

(a) See FOH 71d16.

(b) A violation of this standard can be non-willful or willful.

(1) A non-willful violation should be cited as "(Name of firm on LCA) misrepresented a material fact on the LCA in violation of 20 C.F.R. § 655.730. See 20 C.F.R. § 655.805(a)(1)."

Maximum CMP: $1,000/violation Minimum Debarment: One year

(2) A willful violation should be cited as "(Name of firm on LCA) willfully misrepresented a material fact on the LCA in violation of 20 C.F.R. § 655.730. See 20 C.F.R. § 655.805(a)(1)."

Maximum CMP: $5,000/violation Minimum Debarment: Two years

(c) Any additional remedy: The ER will be required to file an LCA that reflects the correct material facts. Filing a new LCA requires that the ER obtain the applicable PW and provide notice to workers.

(d) A willful violation involving the displacement of a U.S. worker employed by the ER may be subject to an enhanced CMP (up to $35,000) and an enhanced debarment (minimum of three years). See FOH 71e00(e) and FOH 71e10.

71e02 **Failed to pay wages as required (20 C.F.R. §655.731 and 20 C.F.R. § 655.805(a)(2))**

The wage category includes benefits and eligibility for benefits provided as compensation for services. However, benefit violations are cited separately (See FOH 71e02A below).

(a) See FOH 71d09 and 71d10.

(b) A violation of this standard can be non-willful or willful.

(1) A non-willful violation pertaining to wages should be cited as "(Name of firm on LCA) failed to pay wages as required in violation of 20 C.F.R. § 655.731. See 20 C.F.R. § 655.805(a)(2)."

CMP: None Debarment: None

(2) A willful violation pertaining to wages should be cited as "(Name of firm on LCA) willfully failed to pay wages as required in violation of 20 C.F.R. § 655.731. See 20 C.F.R. § 655.805(a)(2)."

Maximum CMP: $5,000/violation Minimum Debarment: Two Years

(c) Any additional remedy: The ER will be required to pay BWs and/or provide benefits as deemed appropriate.

(d) A willful violation involving the displacement of a U.S. worker employed by the ER may be subject to an enhanced CMP (up to $35,000) and an enhanced debarment (minimum of three years). See FOH 71e00(e) and FOH 71e10.

71e02A **Failed to offer benefits, equal eligibility for benefits, or both (20 C.F.R. § 655.731(c)(3) and 20 C.F.R. § 655.805(a)(2))**

(a) See FOH 71d09 and 71d10.

(b) A violation of this standard can be non-willful or willful.

(1) A non-willful violation pertaining to benefits should be cited as "(Name of firm on LCA) failed to either offer benefits or equal eligibility for benefits or both in violation of 20 C.F.R. § 655.731(c)(3). See 20 C.F.R. § 655.805(a)(2)."

CMP: None Debarment: None

(2) A willful violation pertaining to benefits should be cited as "(Name of firm on LCA) willfully failed to either offer benefits or equal eligibility for benefits or both in violation of 20 C.F.R. § 655.731(c)(3). See 20 C.F.R. § 655.805(a)(2)."

Maximum CMP: $5,000/violation Minimum Debarment: Two Years

(c) Any additional remedy: The ER will be required to pay BWs and/or provide benefits as deemed appropriate.

(d) A willful violation involving the displacement of a U.S. worker employed by the ER may be subject to an enhanced CMP (up to $35,000) and an enhanced debarment (minimum of three years). See FOH 71e00(e) and FOH 71e10.

71e03 **71e03 Failed to provide working conditions as required (20 C.F.R. § 655.732 and 20 C.F.R. § 655.805(a)(3))**

(a) See FOH 71d17

(b) A violation of any part of this standard can be non-willful or willful.

(1) A non-willful violation should be cited as "(Name of firm on LCA) failed to provide working conditions as required in violation of 20 C.F.R. § 655.732. See 20 C.F.R. § 655.805(a)(3)."

CMP: None Debarment: None

(2) A willful violation should be cited as "(Name of firm on LCA) willfully failed to provide working conditions as required in violation of 20 C.F.R. § 655.732. See 20 C.F.R. § 655.805(a)(3)."

Maximum CMP: $5,000/violation Minimum Debarment: Two Years

(c) Any additional remedy: The ER may be ordered to provide working conditions to H-1B workers comparable to those provided to U.S. workers. Other remedies may be formulated on a case by case basis, after consulting with DD/ADD, Regional Immigration Coordinator (RIC), RSOL, NOSOL, and the NO/OEP/Immigration Team (for failures pertaining to benefits, cite under 20 C.F.R. § 655.731 (FOH 71e02)).

(d) A willful violation involving the displacement of a U.S. worker employed by the ER may be subject to an enhanced CMP (up to $35,000) and an enhanced debarment (minimum of three years). See FOH 71e00(e) and FOH 71e10.

71e04 Filed an LCA during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment (20 C.F.R. § 655.733 and 20 C.F.R. § 655.805(a)(4))

(a) See FOH 71d18.

(b) A violation of this standard can be non-willful or willful.

(1) A non-willful violation should be cited as "(Name of firm on LCA) filed an LCA during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment in violation of 20 C.F.R. § 655.733. See 20 C.F.R. § 655.805(a)(4)."

Maximum CMP: $1,000/violation Minimum Debarment: One Year

(2) A willful violation should be cited as "(Name of firm on LCA) willfully filed an LCA during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment in violation of 20 C.F.R. § 655.733. See 20 C.F.R. § 655.805(a)(4)."

Maximum CMP: $5,000/violation Minimum Debarment: Two Years

(c) Any additional remedy: The remedies for violations under this part should be formulated on a case by case basis, after consulting with DD/ADD, RIC, RSOL, NOSOL, and the NO/OEP/Immigration Team.

(d) A willful violation involving the displacement of a U.S. worker employed by the ER may be subject to an enhanced CMP (up to $35,000) and an enhanced debarment (minimum of three years). See FOH 71e00(e) and FOH 71e10.

71e05 Failed to provide notice of the filing of the LCA (20 C.F.R. § 655.734 and 20 C.F.R. § 655.805(a)(5))

(a) See FOH 71d14.

(b) A violation of this standard can be non-substantial, substantial, willful, or willful and substantial.

(1) A non-substantial violation should be cited as "(Name of firm on LCA) failed to provide notice of the filing of the LCA(s) in violation of 20 C.F.R. § 655.734. See 20 C.F.R. § 655.805(a)(5)."

CMP: None Debarment: None

(2) A substantial violation should be cited as "(Name of firm on LCA) substantially failed to provide notice of the filing of the LCA(s) in violation of 20 C.F.R. § 655.734. See 20 C.F.R. § 655.805(a)(5)."

Maximum CMP: $1,000/violation Minimum Debarment: One Year

(3) A willful violation should be cited as "(Name of the firm of LCA) willfully failed to provide notice of the filing of the LCA(s) in violation of 20 C.F.R. § 655.734. See 20 C.F.R. § 655.805(a)(5)."

Maximum CMP: $5,000/violation Minimum Debarment: Two Years