

Payment of H-1B Legal Fees, Filing Fees and Costs¹

Employers often ask whether they must pay all or any part of the legal and filing fees associated with filing an H-1B “specialty occupation” worker petition for a foreign national employee. As explained in the following FAQs, the answer is yes and no.

What fees and costs are associated with an H-1B petition?

The preparation and filing of an H-1B petition, either for a first-time H-1B worker or one who is “porting,” (i.e., already has an H-1B and is transferring from another employer) entail the following: a legal fee which will vary depending on the scope and quality of service and other factors; a “training fee” of \$1500 for employers with more than 25 employees or \$750 if the company has not more than 25 employees (this goes into a fund that is used to train US workers in shortage occupations); a \$325 base filing fee; a \$500 fraud detection fee (which is deposited in an account that has now exceeded \$90 million and is being used for H-1B and L-1 intra-company transferee visa fraud detection inspections) and incidental costs, such as courier delivery.

What is the employer’s obligation regarding payment of wages?

Under regulations of the US Department of Labor (“DOL”), the employer must pay the worker the “required wage” cash in hand, except for authorized deductions, such as for income tax and FICA withholding. The “required wage” is the higher of (1) the wage paid to all other similarly qualified workers who are performing substantially the same work as the H-1B worker, and (2) the prevailing wage as established by a legally acceptable wage survey. The rate of pay in any given case is set forth in the certified Labor Condition Application (“LCA”), which the employer must obtain from DOL and file with the H-1B petition.

What part of the H-1B fees and costs must an employer pay?

The answer depends on the fees and costs in question.

An employer clearly must pay the training fee (of \$1500 or \$750 depending on the number of employees) and may not allow the worker to pay it directly, by deduction from wages or in any other fashion.

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Whether an employee can pay other H-1B fees and costs is not as clear. DOL regulations, on one hand, say that H-1B costs and fees are employer business expenses. The regulations specifically exclude such fees and costs from the list of “authorized deductions” from pay and specifically include them among “unauthorized deductions,” which are simply not allowed. A conservative view of these rules suggests that an employee may not pay any part of the H-1B fees and costs. However, the regulations more specifically state that unauthorized deductions are prohibited only insofar as they would cause the net wage to fall below the required wage. In other words, a less conservative view of the DOL regulations would suggest that an employee can pay H-1B fees and costs provided that he or she is still receiving the “required wage” net of the “deduction.”

Can an employer require an employee to reimburse it for H-1B fees and costs if the employee leaves the job before an agreed upon date?

Under a conservative reading of the DOL regulation, an employer may not require the employee to pay a penalty for leaving the job before an agreed upon date under any circumstances. However, a less conservative view is that a penalty may be lawful if its deduction would not cause the net wage to drop below the required wage. Clearly, an employer can receive “bona fide liquidated damages” from an H-1B worker who leaves the job prematurely. To be “bona fide”, the liquidated damages clause in the employment contract must meet applicable state law requirements.

What are the penalties for “unauthorized deductions” from wages?

DOL considers any unauthorized deduction from wages to be non-payment of that amount of wages quite possibly even if the wage paid exceeds the required wage net of the deduction. In the event of an investigation, DOL can seek to recover back wages plus civil money penalties and/or disqualification from H-1B and other immigration programs, if willful.

What are the employer’s options and risks with respect to paying H-1B costs and fees?

While there is some ambiguity in the rules governing an employer’s payment obligations under the H-1B program, the following “take-always” may be helpful:

- The employer must pay the “required wage” (as defined above);
- The employer must pay the training fee (as defined above) and may not allow the worker to pay it either directly, by deduction from wages or under any other circumstance;
- The employer may include a provision in an employment contract requiring the worker to pay “bona fide liquidated damages” for leaving the job prematurely;
- To ensure legal compliance, a conservative employer:
 - should not require an employee to pay a penalty for leaving the job prematurely;
 - should pay all H-1B fees and costs or, at a minimum and with appreciation for the risk of DOL enforcement action, ensure that the wage paid equals or exceeds the required wage net of any deduction to recoup H-1B fees and costs.

What is DOL Doing to Enforce Employer H-1B Wage Obligations?

With the exception of the prohibition on employee payment of the training fee, the above DOL regulations arguably exceed DOL's authority and are improper. Regardless, spurred by increased unemployment and perceived abuse of the program, DOL is rigorously enforcing employer H-1B wage obligations. For instance, the Wage and Hour Division of its Employment Standards Administration recently began sending the attached questionnaire to H-1B workers to detect noncompliance with employer wage obligations. Therefore, employers should approach their H-1B payment obligations carefully.