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Can an H-1B employee work from India?

Synopsis
Until 2019, when a decision from the Department of Labor (DOL) changed the calculus, our answer to this question was: "An H-1B employee may work from outside the USA and be paid under any terms, not necessarily those required by the H-1B laws."


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In many instances, an **H-1B** employee, by their own choice, or by the choice of the employer, works from outside the **USA**. May they do so? Yes, but, the law creates complications. So, what else is new?

Until 2019, when a decision from the Department of Labor (DOL) changed the calculus, our answer to this question was: "An H-1B employee may work from outside the USA and be paid under any terms, not necessarily those required by the H-1B laws." The rationale is simple. US laws generally cannot be extended extraterritorially to India. In fact, US federal courts have said that unless a law states otherwise, there is a presumption against such an extension.

Then, in 2019, the DOL said that unless an H-1B is terminated by the employer, the wage obligations under H-1B continue even if an employee is working from outside the USA. But, in formulating that decision, the international law issue of extraterritoriality was not discussed or considered. Their decision is at best highly questionable.

It is important to understand the H-1B laws are quite complex. One of the legal requirements is that H-1B employees cannot be moved without additional compliance formalities.

Are we then required to ensure compliance with US laws such as posting US legal notices (called LCA) in an Indian office or Indian home locations? I have heard this debated and considered amongst the stakeholders. My answer to that is a categorical no. Such a requirement, in my view, is utterly nonsensical. Employers in the US have been told that additional compliance is needed if the job is relocated more than 50 miles from an approved location. Is that true for a move to India as well? The answer is: no. And here are some points to ponder.

First, there is no magic in the number 50. The law permits moving H-1B employees anywhere within "Normal Commuting Distance" of an approved location. We have won cases where we were able to prove that 70 miles was a normal commuting distance. The number 50 is just the usually acceptable distance for normal commuting.

Second, posting an LCA in India, if required, would offend several principles of law, including extraterritoriality. How can US laws interfere with Indian employment laws? This issue was not discussed in the 2019 decision.

In the decision, the DOL said that an employer remains subject to US laws except under two circumstances:
— Where an employer properly terminates the US employment, including revocation of the H-1B, or
— Where an employee voluntary quits the US employment.

The above formulation is a spillover from the DOL's concern that employers could keep H-1B employees in low-paid status by simply moving them outside the USA. Therefore, offshoring was frowned upon. I think that is an untenable policy. The law permits employees to be outside the USA and not have to be governed by the US wage laws. The H-1B regulations provide for employees working in the USA for recurring time periods (intermittent H-1B) rather than the entire H-1B approval validity. For instance, see the regulation quoted below:

214.2(h)(13)(v) Exceptions. The limitations in paragraphs (h)(13)(iii) through (h)(13)(iv) of this section [This refers to the ceiling of 6 years maximum of H-1B] shall not apply to H-1B...aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitations shall not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment....To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

This USCIS regulation, in direct conflict with the DOL holding, not only permits intermittent employment, but requires proof that the employee was working abroad: "copies of tax returns, and records of employment abroad."

In view of the legal problem with the extraterritorial application of US laws to a foreign country and the conflict within the existing DOL and USCIS regulations, DOL will need to revisit its policy. As I said, working from India while still maintaining an H-1B is legal, but a little complicated. The employee will need to be paid the full US salary, under a questionable set of rules.

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