Proskauer

Compliance with Immigration-Related Requirements: Interruptions of H-1B Employment

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Advice to U.S. Employers: Immigration Insights Series During COVID-19 Crisis

A Series of Advisories

Proskauer's Immigration Practice Group is advising clients on an array of challenges as companies find it difficult to comply with their Immigration and Reform Control Act (IRCA) obligations and maintain the legal status of the non-immigrant population during the Coronavirus pandemic.

We are publishing a series of alerts addressing the many issues that have been identified during the course of our representation to facilitate guidance to our clients and companies in general, given this ever-changing and challenging situation.

Our first alert related to the challenge of completing an I-9 form remotely, and was updated the next day, as USCIS announced "flexibility" during the Coronavirus pandemic. The second alert reviewed compliance for telecommuting during the pandemic for H-1B and E-3 employees. In the last alert, we reviewed closings and changes the government is implementing during the pandemic.

In this advisory, we provide an overview of the limitations and compliance for foreign national employees in various nonimmigrant visa categories, when making personnel decisions regarding furloughs, reductions in hours and terminations of H-1B employees.

Our team is available to you to provide guidance and assistance in adapting to the challenges.

Advisory 4:

Furloughs/Leaves of Absence and Other Interruptions of Employment Including Termination/Rescission of Offers of Employment for H-1B Workers

As businesses attempt to remain nimble during the Coronavirus Pandemic and resulting economic downturn, they are considering strategies to reduce costs including reductions in force, including rescission of offers of employment, terminations, furloughs or reduced hours. Although foreign national employees on nonimmigrant visas remain "at will" employees there may be special requirements and considerations based on the visa classification. As such, employers must be sure that they are in compliance when applying these strategies to the foreign national population.

Termination

The Regulations require an H-1B employer to notify United States Citizenship and Immigration Services (USCIS) "immediately" of "any material changes in the terms and conditions of employment" affecting an H-1B employee. USCIS policy is that a termination or rescission of the offer of employment is a "material change." Employers should satisfy this notification obligation by sending a letter explaining the termination to the USCIS office that approved the petition. For the Department of Labor a "bona fide termination" of an H-1B worker generally requires the employer to notify both the H-1B worker and USCIS in writing, and to offer to pay the H-1B worker for the reasonable costs of return transportation abroad. If an employer fails to fulfill these requirements, the employer may be found liable by the DOL for back wages from the date of termination through the date on which the employer's H-1B approval expires. Employers should retain records of compliance with this obligation.

Furloughs

The H-1B regulations specifically prohibit "benching," defined as non-productive status during the H-1B period of validity. Specifically, the employer is required to pay the wage in the Labor Condition Application (LCA) for the entire duration of approved employment. The Labor Condition Application is an application filed with the Department of Labor's Employment and Training Administration (DOLETA) prior to the submission of certain non-immigrant petitions, including the H-1B. In the LCA, the employer attests that the foreign national worker will be paid at or above the prevailing wage for the occupation or the actual wage paid to similarly situated employees, whichever is higher. Further, the employer attests to the working conditions and proper notice of the nonimmigrant petition to affected employees.

An H-1B employee may not be put in non-productive status without pay, due to the decision of the employer or for the employer's benefit. This includes furloughing the employee for lack of work and lack of license or permit. If the employee voluntarily requests leave, i.e., maternity leave, recovery from an illness, to care for family; then the employer is not required to pay the H-1B worker during the leave that is for the employee's benefit. However, the employer may still be obligated to pay the required wage if the employee's non-productive period is subject to payment under the employer's benefit plan, or other statutes such as Family and Medical Leave Act, the Americans with Disabilities Act, and the Families First Coronavirus Response Act.

In the current pandemic, if the employee is in a "non-essential" role as defined by the State and the Governor orders a shutdown or "shelter in place," the employee must continue to be paid. Even if the employee is not able to perform the job duties remotely, the non-productive time is not at the employee's request and therefore the employer must continue to pay the required wage.

Employers that are trying to address temporary furloughs followed by resuming full work and how to manage that with regard to their nonimmigrant visa workers should consult their Proskauer professional about related strategies.

Reduction in Hours / Salary

Due to the economic impact of the pandemic, many employers are considering a reduction of hours of employees during the pandemic. Converting a full-time employee to part-time is a material change necessitating a new Labor Condition Application (LCA) and H-1B filing. An H-1B employee may begin working part-time once the H-1B amendment is filed and need not wait for the final adjudication. However, it is important to note that under the Executive Order "Buy American, Hire American" there is a preference for highly-compensated employees and higher scrutiny of all H-1B filings. As a result, it is possible that a new H-1B petition would receive a Request for Evidence, and could risk denial.

Typically, guidance for H-1B workers is that they must be paid as follows:

- Full-time salaried workers must be paid the full amount on the LCA;
- Full-time hourly workers must be paid 40 hours or the full-time equivalent hours as is full-time for its hourly employees;

- Part-time workers must be paid at least the number of hours listed on the H-1B petition.
- Part-time workers with a range of hours listed on the H-1B petition must be paid the average number of hours normally worked, provided the average is within the range.

In the case of company-wide salary cuts in response to a recession or economic crisis, it is possible to adjust the H-1B employee's salary so long as it remains above the prevailing wage. Specifically, "[w]here adjustments are made in the employer's pay system or scale during the validity period of the LCA, the employer shall retain documentation explaining the change and clearly showing that, after such adjustments, the wages paid to the H-1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation and area of intended employment." (20 CFR 655.731(b)(2)). Proskauer's Immigration Group can assist in analyzing company-wide salary reductions and maintaining compliance with the prevailing wage requirement and ensuring that the Public Access Files are appropriately updated for compliance.

Termination

The obligation to pay the required wage ends only when 1) an H-1B amendment is filed or 2) there is a bona fide termination of the employment relationship. A bona fide termination requires the employer to notify USCIS that the employment relationship has been terminated and the employer to offer to provide the employee with payment for reasonable costs of transportation to their home country or last country of residence. A relatively new regulation promulgated in January 2017 provides a grace period of up to 60 days for H-1B workers who are terminated prior to the authorized H-1B period.

Rescission of Offer

In an effort to protect the existing workforce, some employers are making the difficult decision to rescind offers to new hires. In the case of a rescinded offer to an H-1B employee that is presently in the United States, the rescission of the offer should be in writing and either direct them to contact the company travel agent to arrange a departure from the US during the 60-day grace period or provide a payment in an amount that would cover the reasonable costs of transportation to their home country or last country of residence. If payment is provided, the rescission letter should clearly state the purpose and amount of payment. In the case where the foreign national is not in the US, but in their home country, the employer would not be required to offer return transportation.

Enforcement

USCIS has set up a "tip" process to alert them of H-1B fraud and/or abuse. *See*: https://www.uscis.gov/report-fraud. Tips can be submitted by anyone, including the H-1B workers themselves. Indicators of fraud and/or abuse include:

- H-1B worker is not or will not be paid the wage on the Labor Condition Application (LCA).
- Wage disparity between H-1B workers and other workers performing the same or similar duties.
- H-1B worker is not performing the duties specified in the H-1B petition.
- Less experienced H-1B worker than U.S. workers in similar positions at the employer.
- H-1B worker is not working at the location as certified on the LCA.

Although site visits and other related enforcement actions are not likely in the foreseeable future due to the health crisis, USCIS has been conducting random site visits for H-1B workers since 2009 to ensure compliance. As part of the site visit, officers verify H-1B workers' wages, job duties, and work locations. Specifically, USCIS reviews whether workers are being or have been paid during non-productive time, to ensure there is no "benching" which violates U.S. immigration laws. In cases of suspected fraud or abuse, USCIS refers the cases to U.S. Immigration and Customs Enforcement (ICE) for further investigation.

Conclusion

H-1B workers require special consideration and analysis for personnel actions in order to ensure compliance with U.S. immigration regulations. An H-1B worker may seem eager to accept a pay-cut in order to maintain employment today; however, there is no guarantee whether the worker's opinion may change in the future, thus opening up the employer for investigations and liability, even years down the line. Even in times of pandemic, employers must ensure compliance. Proskauer's Immigration Practice Group is available to assist employers as they navigate the pandemic and address their foreign national population.