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Immigration Compliance Essentials For 2019

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In today's aggressive immigration enforcement environment, immigration compliance has never been more important. This impacts all employers in the United States, because every employer, whether it employs foreign nationals on visas or not, must comply with the U.S. Department of Homeland Security's I-9 employment verification requirements.

In fact, I-9 inspections by U.S. Immigration and Customs Enforcement are up 60 percent for fiscal year 2018. An employer must retain I-9s for each employee until the later of three years from the date of hire or one year after the employee's termination. Though the I-9 form appears to be simple and straightforward, most I-9 audits turn up a host of deficiencies which, if not corrected, can lead to serious fines.

It surprises many employers to learn that even if their workforce consists entirely of U.S. workers, they can face significant fines for I-9 violations. Therefore, all employers should consider conducting I-9 self-audits to ensure their process is compliant, make necessary corrections, and cull those forms which no longer need to be retained.

Employers of foreign national workers face a myriad of additional compliance and record-keeping requirements. This article summarizes visa-specific legal obligations undertaken by employers of foreign nationals.

H-1B Workers

Employers that sponsor a new hire or an existing employee for H-1B visa status must make a series of attestations under the pains and penalties of perjury to two different federal government agencies: the U.S. Department of Labor and U.S. Citizenship and Immigration Services.

Obligations to DOL

Employers must promise the DOL that they will pay the H-1B worker the higher of two wages: (a) what the employer pays similarly situated employees; or (b) the prevailing wage for the job in its geographical

area. They must pay the associated legal and filing fees for the visa petition and cannot pass these costs on to the H-1B worker. They must pay the wages in regular payroll increments and cannot pay the total required salary by giving the H-1B worker a lump-sum payment at the end of the year.

H-1B employers are required to post information to their workforce regarding the position being sponsored and the wage to be paid for that position. They also must attest that by employing the H-1B worker they will not adversely impact the wages and working conditions of the existing workforce.

Other attestations include providing H1B workers with the same working conditions and benefits offered to U.S. workers; that there is no strike, lockout or work stoppage on the date the labor condition application, or LCA, is filed; and that a notice of the LCA has been posted to the employer's workforce. Finally, the employer must promise to retain and make available a special file, known as a "public access file" or "public inspection file" for at least three years, or one year beyond the date that the employee's H-1B status is terminated, whichever is longer.

The DOL can discover an employer's compliance lapses in a variety of ways. Often the DOL receives a tip from an employee (whether a foreign national or a U.S. worker), about alleged failures to follow the DOL's H-1B regulations. Alternatively following an H-1B visa site visit, USCIS will communicate compliance concerns to the DOL. If the DOL determines that an employer has violated any of the wage and related record-keeping requirements, it can impose a variety of penalties on the employer, including the imposition of mandatory back wages, debarment from further H-1B sponsorship for a period of time, and even possible criminal sanctions.

Obligations to USCIS

When employers submit their H-1B visa petition to USCIS, they are promising that they will employ the H-B worker in a particular position, in a specified geographic location (or locations), at a specified rate of pay. There is extremely limited flexibility for moving the H-1B worker to a different work site location without filing an amended visa petition. Similarly, moving an H-1B employee into a different position often requires filing an amended petition with USCIS. Furthermore, employers may not lower an H-1B worker's wages without filing an amended petition.

Part of the H-1B filing fees that an employer pays to USCIS is an "anti-fraud" fee that funds investigators to conduct in-person site visits of H-1B employers. If USCIS learns in a site visit or otherwise, that an employer has made a material change to the position or work location of an H-1B employee without filing and receiving approval of an amended petition, it has the right to rescind the visa petition entirely. This would adversely impact not just the employer but the foreign national's immigration status. In a site visit, USCIS also regularly asks the H-1B worker who paid the legal fees and filing fees for the visa petition. If USCIS learns that the H-1B employee paid these fees, they will immediately refer the matter to the DOL for investigation.

If an employer terminates an H-1B worker before the conclusion of the H-1B approval validity period, it must offer the H-1B worker the cost of return transportation to his/her home country. Similarly, if the employer terminates the H-1B worker's employment but does not notify USCIS that the individual has ceased employment with the sponsoring employer, it may be held liable to continue to pay the salary/wages promised to the H-1B worker in the relevant LCA. Employers face fines and back wages penalties for failure to meet these obligations.

L-1 Workers

L-1 workers are intracompany transferees whom the employer has transferred from an overseas location to the U.S. This visa is available to executives, managers and those employees who have "specialized knowledge" of the organization's products or processes.

As with the H-1B discussion above, L-1 employers also are subject to site visits by USCIS and should ensure that their L-1 employees are working within the stated parameters of their respective L-1 petitions. This means that certain changes in an L-1 worker's situation may require filing an amended petition. Such changes include any material change in the job such as a payroll entity change, change in the corporate relationship or change in job title or duties.

If amended petitions are not filed to reflect these changes, USCIS has granted itself the authority to initiate removal proceedings for those found no longer to be in a valid immigration status, such as a foreign worker who is working in a position or location that is different from what USCIS had previously approved. An unapproved deviation could have catastrophic consequences which is why it is more important than ever that if any of these changes is contemplated, to contact immigration counsel beforehand to determine whether any immigration filings will be needed.

L-1 employers also have enhanced obligations with respect to the employment of "specialized knowledge" workers who are sent to third-party work sites to perform work, including providing USCIS with details justifying this placement and identifying the supervisory personnel involved.

O-1 Workers

O-1 visas are for those who have "extraordinary ability" in their fields. Many employers who sponsor these visas do not realize that, as with H-1B visas, they are obligated to offer an O-1 worker the cost of return transportation home upon termination of their employment, if the termination occurs prior to the natural end date of the visa petition.

Liability for the return transportation is joint and several between the employer and petitioner, which do not have to be the same for an O-1. For example, an agent can serve as the petitioner for multiple O-1 "employers" and both can be held liable if the return transportation is not offered.

Foreign Students Working in STEM OPT Status

Foreign students in F-1 visa status who graduate from a U.S. science, technology, engineering and math, or STEM, degree program are allowed to extend their optional practical training, or OPT, work authorization from 12 months post-graduation, for another 24 months, as long as they work for an employer enrolled in the federal E-Verify program. But, in order to secure this special extension of their work authorization, they must complete a detailed training plan with their employer, and the employer is subject to periodic site visits by USCIS to ensure the F-1 student is receiving training and close supervision consistent with the plan.

The employer of F-1 STEM students on an extended OPT, must also pay these employees a proper wage commensurate with what it pays other employees or similarly situated workers in the community. While the wage standard is not as strict as it is in the context of H-1B employment, employers of students working in STEM OPT status should maintain a memorandum or other document on file, which explains the system it used to determine what compensation to offer the F-1 student.

A failure to articulate a rational basis for the salary could be grounds for further investigation by ICE. Similarly, a failure to follow the training plan, could be grounds to revoke the STEM OPT status.

Importance of Being Prepared for Potential Site Visits

Any organization that employs H-1B, L-1 or F-1 STEM OPT workers must be prepared for USCIS/DHS site visits.

Site visits to these employers are on the rise and are not limited to just "the usual suspects". Typically, a site visit officer is inquiring about a specific foreign national worker's employment and verifying the details stated in the visa petition or training plan. Every employer of foreign national workers in these visa categories should have a policy and set of protocols in place for when an unannounced site visit occurs.

Such site visits are aimed at identifying noncompliance with the employer's obligations as detailed above and can trigger serious penalties for both the employer and foreign national employee. Having informed personnel, from the point of first contact with a site visit officer, to the manager or supervisor of the subject employee, and the employee him or herself, is essential.

An uninformed, seemingly innocuous statement to the inspecting officer may cause serious problems or major inconvenience at the least. A well-articulated policy and set of protocols, together with basic training for those personnel who would encounter a site visit officer, implemented company-wide, is an important step to take for all employers of workers in these visa categories.

Payroll Considerations

Given the significance of ongoing wage obligations employers have toward their foreign national employees, payroll records constitute critical evidence of an employer's compliance or noncompliance. Thus, scrupulous attention must be paid so these records reflect the appropriate wages being paid and explanations for any deviation from them.

The Pros and Cons of a Formal Immigration Policy

A formal immigration policy is not right or necessary for every organization. Small organizations or those which eschew formalized processes may prefer not to have one. But for organizations that sponsor a significant number of foreign nationals for immigration benefits (temporary work visas and/or permanent residence status), there are many benefits to having a formal policy.

Benefits include (a) articulating in writing a formal commitment to comply with immigration laws; (b) promoting consistency and efficiency in immigration processing; (c) ensuring consistent and fair treatment of the workforce; and (d) creating transparency throughout the organization regarding the sponsorship process (including under what circumstances the organization will sponsor employees for permanent residence; whether the organization requires the sponsored employee to sign a reimbursement agreement for certain costs associated with the process; whether the organization will cover costs for employees' family members; etc.).

In sum, the current immigration enforcement environment makes employers' understanding of their obligations and their compliance with them essential. Risk management may be achieved through

informed development of policies and protocols, and their consistent implementation and maintenance throughout the organization.

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