



Get A Passing Grade When Employing H-1B Teachers

Insights

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Employers of foreign teachers learned some hard lessons this year about following the rules for H-1B visa holders. In March, the U.S. Department of Labor Wage and Hour Division (WHD) assessed over \$1.7 million in civil money penalties and ordered the payment of over \$4.2 million in back wages against Maryland's Prince George's County Public Schools system for illegally reducing the wages of 1,044 foreign H-1B teachers when it required the teachers to pay H-1B filing fees.

That same month, Global Teachers Research and Resources, Inc. (an international employment company supplying foreign teachers to school districts in Georgia and other states) agreed to pay \$77,958 in back wages to 22 foreign teachers for failure to pay them for employer-provided training and not keeping records of hours worked. If your school employs foreign teachers on H-1B visas, it is more important than ever to audit your compliance with the H-1B program requirements and take steps to ensure that you are not the next victim of a WHD investigation.

What Triggers An Investigation – And What Does The WHD Review?

WHD investigations usually are triggered when an H-1B employee complains about the employer's failure to pay the wage listed in the Labor Condition Application (LCA). The H-1B program allows foreign nationals to work in the U.S. in professional or specialty jobs so long as the employer obtains a certified LCA from the U.S. Department of Labor attesting that it will pay the H-1B employee at least the prevailing wage (set by the DOL based on the job duties and the location of the employment) and offer the foreign worker benefits comparable to those offered U.S. workers in the same job classification.

During an investigation, the WHD reviews 1) the Public Access documentation required under the LCA regulations (the certified LCA; a statement of how the wage rate was set; documentation showing how the prevailing wage was established; the original notices posted advising workers of the LCA filing; and a summary of the benefits offered to U.S. workers in the same occupation as the H-1B worker); 2) payroll records and dates of employment for the H-1B employee; 3) a copy of the H-1B petition submitted to the U.S. Citizenship and Immigration Services (USCIS); 4) evidence that the employer notified the USCIS if the H-1B employment was terminated prior to the end of the authorized period and that the LCA was withdrawn; and 4) the current or last known address and contact information for all H-1B employees.

The primary goal of the investigation is to determine if the employer paid the H-1B employee the wage on the LCA for all times that the LCA remained in effect (liability for not doing so can continue even after the employee was no longer employed but the LCA was not withdrawn) and to ensure the H-1B employee's wages were not docked as a result of benching or furlough.

The investigation generally includes interviewing the employer and the H-1B employees. If the DOL concludes that the employer violated the LCA requirements, in addition to assessing back pay, interest, civil money penalties and debarring the employer from using the H-1B visa program, it may monitor and continue to audit the school's compliance with the H-1B LCA requirements.

Preventive Steps Your School Should Take

Here are some steps H-1B employers can take today to reduce the risk of WHD investigations and avoid costly violations:

- pay H-1B employees the required wage as listed on the certified LCA and offer the same benefits to H-1B and U.S. workers;
- make sure that you continue to pay an H-1B employee in accordance with the LCA at all times that the LCA remains in effect so long as the employee is ready, willing and able to work. You must pay the H-1B worker even during a furlough or some other non-productive work period that results due to a decision by the employer. If conditions exist where the H-1B employee is unable to work due to conditions unrelated to employment (such as maternity leave, caring for an ill relative, or a natural disaster), the employer is not obligated to pay the required wage rate during that period provided that an employer's benefit plan or other statute (such as the Family and Medical Leave Act) does not require otherwise;
- diligently maintain and audit Public Access files for each H-1B worker. All Public Access documents must be retained for one year beyond the LCA period or, if a complaint is filed, until the complaint is resolved;
- promptly withdraw H-1Bs and LCAs when an H-1B worker is no longer employed with your school;
- pay for the reasonable cost of the H-1B worker's return transportation to his or her home country if you terminate an H-1B worker before the end of the period on the H-1B;
- ensure that any proposed material changes in the H-1B employee's job description, work schedule or salary are reviewed by your immigration attorney to determine if you must file an amended H-1B petition; and
- take a hands-on approach to filing an H-1B petition. As the H-1B petitioning employer, you sign the petition and the LCA under the penalty of perjury. Be aware of and understand your legal obligations as an H-1B employer before you sign the documents and submit the petition to the USCIS.

How would your organization fare in an WHD H-1B investigation? Are your Public Access files in order and complete? Are you paying your H-1B foreign workers as you agreed to do when you submitted the LCA? Do not wait for the WHD to show up on your doorstep with a complaint in hand. Take steps today to make sure your H-1B compliance is in order and that you can pass any WHD test with flying colors.

For more information or assistance in auditing your compliance, contact the authors at kthompson@fisherphillips.com or sstevenson@fisherphillips.com or 404-231-1400.

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