H-1B Labor Condition Application Violations Could Cost Your Company Millions

Insights
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Nothing weighs down an employer more than an investigation by the Wage and Hour Division of the U.S. Department of Labor. Just ask the following information technology companies who failed to properly pay their H-1B workers and ended up paying a lot more in back pay and penalties:

Date	Company	Back Pay Determination	Other Penalties	# of Affected Employees
02/23/10	Peri Software Solutions Inc.	**$1,456,422**	**$439,000** penalty for willful violation & debarment from H-1B program for two yrs	163 Computer Analysts
04/06/09	Cognizant Technology Solutions	**$509,607**	N/A	67 Computer Professionals on H-1Bs
10/30/08	GlobalCynex, Inc.	**$1,683,585**	N/A	343 Systems Analysts
06/2007	Patni Computer Systems Limited	**$2,400,000**	N/A	607 Computer Professionals on H-1Bs
11/28/05	Computech Corporation	**$2,250,000**	**$400,000** penalty & debarment from H-1B program for 18 months	232 Computer Professionals on H-1Bs

The H-1B work visa is an indispensable tool used by employers to hire talented foreign workers to fill professional or "specialty occupation" positions, such as engineers, accountants, architects, scientists, managers, teachers and computer programmers. In order to qualify for the H-1B the position must require a minimum of a bachelor's degree or the equivalent.

Exhibit 1: The Labor Condition Application
Before you submit an H-1B petition, you first must obtain certification of a Labor Condition Application (LCA) from the U.S. Department of Labor. The LCA regulations require that you pay your H-1B workers the required wage, which is defined as the greater of the actual wage level you pay to

H-1B workers the required wage, which is defined as the greater of the actual wage level you pay to all other individuals with similar experience and qualifications for the position, or the prevailing wage for the occupation in the area of intended employment.[1] Among other requirements, the LCA regulations also require that you provide working conditions (i.e. hours, shifts, vacation periods, and fringe benefits) for H-1B workers that will not adversely affect other similarly-employed workers.

Sometimes employers do not realize that they are not complying with the terms of the LCA (e.g. paying H-1B workers on 1099s or on commissions). Other times, employers intentionally fail to pay as required. Ignoring the cautions listed on the LCA that fraudulent representations can lead to civil or criminal action can be costly. After all, every USDOL determination of H-1B wage violations begins with the LCA.

Investigation Triggers

In September 2008, U.S. Citizenship and Immigration Services (CIS) released the results of an H-1B Fraud and Compliance Assessment study. This study revealed a 21% baseline fraud and technical violations rate for H-1B petitions. In 27% of the cases where CIS found fraud and technical violations, the employer failed to pay the H-1B worker the required wage.

In an effort to combat the fraud, CIS initiated the Administrative Site Visit and Verification Program. The primary goal is to substantiate that the working conditions stated in the H-1B petition actually exist. CIS has engaged outside contractors to conduct thousands of on-site visits to H-1B employers. Among the many questions CIS directs the Site Inspector to ask both the employer and the H-1B worker in its five-page Compliance Review Report is whether the employer is paying the H-1B worker the required salary as indicated on the LCA. The Site Inspector is also required to review W-2s and pay stubs to verify that the stated salary is paid.

The Site Inspector may conclude the site visit with a recommendation for further inquiry by CIS. Penalties for noncompliance could be revocation of the underlying H-1B petition, civil and criminal penalties, and an order to pay back wages, civil monetary penalties from $1000 to $35,000 per violation and debarment from participating in the H-1B and other immigration programs for up to two years.

Disgruntled employees can also be the trigger for an investigation by DOL. In fact, the DOL often sends out a four-page questionnaire to present and former H-1B employees to determine whether the employer is honoring the terms of the LCA. It is believed that the DOL used evidence from such completed questionnaires to assess penalties of over $1.5 million against Peri Software Solutions, Inc. for violations of the H-1B wage requirements.

How To Get Into Compliance

Here are some simple steps you can take to avoid penalties similar to those assessed against other companies:

1. Pay your H-1B employees the required wages and benefits:

Wages are compensation treated as earnings for income tax and FICA purposes. The value of fringe benefits cannot be used in the wage calculation. And if you require the H-1B worker to pay the fees and costs associated with the H-1B petition, DOL may consider these payments as unauthorized deductions if they act to reduce the wage below the prevailing wage.

Under no circumstances should you require the H-1B worker to pay the H-1B training fee of $750 ($1500 if your company employs 25 or more employees) because the employer is required by law to pay it. Finally, if an H-1B worker is in non-productive status at your direction, such as on furlough, you must continue to pay the H-1B worker.

2. Maintain and audit public access files:
All H-1B employers are required by law to maintain a public access file for each H-1B worker and must make the file available for public examination within one working day after the LCA is filed with DOL. The public access files for most employers[2] must contain:

- a copy of the certified LCA;
- documentation of the wage rate to be paid to the H-1B worker;
- an explanation of how the actual wage was calculated (e.g. a copy of the employer's pay scale);
- documentation used to establish the prevailing wage for the position;
- a copy of the internal notice of posting given to the union/employees; and
- a summary of the benefits offered to U.S. workers in the same occupation as the H-1B worker and an explanation of any differentiation in benefits.

You must retain all records one year beyond the end date on the LCA or, if a complaint is filed, until the complaint is resolved. To avoid additional scrutiny from the government, you should keep your Public Access files separate from I-9s, personnel files and other immigration-related employee files.

3. Withdraw H-1Bs and LCAs when an H-1B worker is no longer employed:
If you terminate an H-1B worker or the worker resigns before the end of the 3-year period of authorized admission, you should notify USCIS in writing of the end of the employment and withdraw the underlying LCA with USDOL to avoid accrual of front pay and back pay damages.

You are also required by law to pay for the reasonable cost of the terminated H-1B worker's return transportation to his or her home country.

4. Prepare for unexpected company:
Develop and disseminate an immigration-related notification and response policy so all employees know how to handle unannounced government visits.

5. Take a hands-on approach to filing an H-1B petition:

You are the H-1B petitioner and you sign the application under the penalty of perjury.
Do not allow the H-1B candidate to take the lead on finding an immigration attorney and providing the information required for the petition. You should consult an immigration attorney that will fully inform you about your legal obligations as an H-1B employer.

6. Surf the net:
Monitor what your H-1B employees are saying about your company on the internet – the DOL is.

7. In case of emergency, break glass:
Don't wait until DOL renders a determination against your company to consult immigration and employment attorneys.

Although the Wage and Hour Division's attorneys often have a thorough understanding of the Fair Labor Standards Act, they do not always have a comprehensive understanding of immigration law. This leaves room for negotiating penalties associated with the H-1B program. For instance, DOL takes the position that the H-1B worker cannot pay any part of the statutory $500 fraud protection and detection fee imposed by CIS for H-1B petitions. CIS, on the other hand, takes the stance that the petitioning employer or the H-1B worker may submit this fee as long as the fee does not take the H-1B worker's salary below the required wage.

One DOL official has even stated that if there is only one H-1B worker in the position at the worksite, that individual's wage is the actual wage. Thus, any deductions of H-1B fees and costs would drop the wage below the required wage and are impermissible. This view is ripe for challenge in a DOL enforcement proceeding. The bottom line is that there is always room for negotiating with DOL, including requesting flexible payment options, and the option of seeking an Administrative hearing before a judge.

Complying with the above-listed recommendations will allow you to maintain your valuable H-1B program.

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[1] The prevailing wage is determined by the collective bargaining agreement (CBA), if one exists for that occupation. If there is no CBA, the State Workforce Agency makes the prevailing wage determination. Alternatively, you may provide a prevailing wage based on the Davis Bacon Act, the Service Contract Act, or a survey conducted by an independent authoritative source.

[2] Employers involved in changes in structure, "single employers" as defined by the Internal Revenue Code, H-1B dependent employers, and willful violators have additional public access file requirements.

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