



The Benefits Of J-1 Workers – And The Costs

Insights

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Many hospitality employers use the Exchange Visitor Program which is intended to promote mutual understanding between the people of the United States and the people of other countries by educational and cultural exchanges. Under the Mutual Educational and Cultural Exchange Act of 1961, foreign students are allowed to enter the United States under J-1 visas as part of a specific training and internship program or as part of a college exchange program.

Since the primary purpose is education and cultural exchange, host organizations must provide training, oversight, and similar learning activities, and must not use J-1 workers to displace American workers or to serve a specific labor need.

But in utilizing this laudable program, employers must be careful not to violate the wage/hour laws. A recent case clearly sets out the problem areas. *Jatupornchaisri, et. al. v. Wyndham Bonnet Creek*.

Were The J-1 Workers "Employees"?

Chaturong Jatupornchaisri and five other southeast Asians from Vietnam and Thailand filed a complaint against the Wyndham Bonnet Creek Resort, alleging that the resort violated the Fair Labor Standards Act (FLSA) and Florida Minimum Wage Act. The workers claimed the resort recruited them and other J-1 visa holders (in direct violation of the Exchange Visitor Act regulations) to fill housekeeping positions at the resort, where they worked full time from January 2010 to October 2011.

But the crux of the workers' case is their claim that the resort violated the minimum wage provisions of the FLSA and state law by failing to reimburse them for the expenses they incurred in obtaining their J-1 visas, as well as travel expenses. The workers also allege that the resort improperly deducted rent from their wages.

The resort filed a motion to dismiss the workers' claims, stating that because the purpose of the Exchange Visitor Act is education, not labor, that the workers fell outside of the purview of the FLSA because they are effectively interns, not employees. The court disagreed and held that the workers sufficiently alleged that they were treated as employees of Wyndham Vacation regardless of their immigration status, and that the manner in which the workers were actually treated, not simply the goals of the Exchange Visitor Act, must be determined by a trial.

Hidden Costs

This case has implications beyond the coverage of J-1 workers under the FLSA and the state minimum wage act. This lawsuit is brought under the federal Fair Labor Standards Act and state law and is not specific to immigrant workers, although there have been a large number of these types of cases filed around the country on behalf of H2A and H2B workers. The lawsuit has two basic counts – 1) that the employer failed to reimburse the immigrant workers for their pre-employment expenses (incurred in their home countries – visa, transportation and recruiter fees) and 2) that the employer *improperly* deducted the costs of housing and transportation while these workers were in the U.S.

Several federal courts, including the U.S. Court of Appeals for the 11th Circuit, which covers Florida where the *Wyndham* case was brought, have held that when the employer pays workers for their first workweek of employment, it must reimburse them for the cost of transportation, visa, and border-crossing to the extent these costs cut into the workers' minimum wage for hours worked in the first workweek of employment. The practical effect of these decisions is that employers must reimburse the out-of-pocket expenses paid by these employees in the first workweek of employment and then collect it back over time, (if ever) so as not to violate the minimum wage laws.

Hospitality employers that hire workers under these visa programs must be careful to fully comply with the obligation to pay minimum wage under both the federal FLSA and any state minimum wage laws. As the federal court in the *Wyndham* case has indicated, these workers are likely going to be determined to be employees and therefore subject to these stringent requirements.

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