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IMMIGRATION UPDATE: PROCESSING DELAYS AND TECH LAYOFFS ADD COMPLICATIONS FOR EMPLOYERS

Insights
Jan 25, 2023

Employers know that U.S. immigration laws are complex, and the Department of Labor's (DOL's) long processing delays – coupled with recent layoffs in the tech industry – have further complicated matters by adding new fact patterns never thought of before. What do you need to know about the latest developments and how they might affect your business?

3 Key Points About DOL Processing Times

The DOL is responsible for reviewing and approving certain employment-based applications such as Prevailing Wage Determinations (PWD) and Permanent Labor Certification Applications (PERM). The department recently released its latest processing times, and here are three key things you should note about the impact on employers:

1. *Long delays continue*

DOL data shows continued long delays in prevailing wage requests and PERM processing. As of December 31, the DOL was processing PWD requests for H-1B OES and PERM OES cases filed back in January 2022. The DOL is also processing PERM applications filed in April and earlier, averaging 255 days to complete.

2. *Complications can cause further delays*

At the current rate, employers may expect to wait at least 20 months to obtain a certified PERM for the green card process. This does not include cases where recruitment is

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not conducted concurrently while the PWD is pending, or in some cases when the DOL initiates an audit, which may take at least four months.

3. *Processing times may impact H-1B or L-1 workers who have a max-out period of employment eligibility*

Under the American Competitiveness in the Twenty-First Century Act of 2000, H-1B workers are eligible to obtain employment extensions past their sixth-year max-out date in certain circumstances. They may be eligible for a one-year extension if a perm labor certification was filed at least 365 days prior to the sixth-year max-out date being reached or a three-year extension if the H-1B worker has an approved I-140 application that does not have a current priority date.

When processing times were faster, employers could begin the green card process and obtain an approved I-140 in the foreign worker's final year of work eligibility. That timeline is no longer feasible, however, and you should begin the green card process within two to three years of the expiration date. Failure to do so may result in significant business disruption because the sponsored employee may not be able to continue working. Additionally, the employee may be forced to depart the United States.

3 Key Immigration Takeaways from Recent Tech Layoffs

Employers in the tech sector make up a significant portion of the H-1B visa program and PERM-based green card sponsorship. Notably, in response to uncertainty in the economy, many tech companies have recently laid off employees en masse and implemented hiring freezes. These employers will need consider federal regulation when terminating non-immigrant workers and if they are seeking to obtain new PERM certifications after layoffs. Here are three major considerations for employers in the wake of tech layoffs:

1. *Impact on non-immigrant visa workers*

All E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN visa holders have a 60-day grace period, or until the end of the authorized validity period, whichever is shorter from the date of termination. During this grace period, the impacted non-immigrant visa holder may remain in the U.S. without work and will not be considered "out of status." Further,

during this grace period, the employee can transfer their visa to a new employer without having to leave the country or change to another visa status, or they can use this time to prepare to depart the U.S. So, you will need to consider the grace period when onboarding affected non-immigrant visa workers.

Additionally, sponsoring employers will need to ensure federal compliance when terminating certain non-immigrant employees (H-1B and O visa holders) by:

- Notifying the employee that the employment relationship has ended;
- Notifying USCIS in writing that the relationship has ended; and
- Offering the employee reasonable costs for return transportation.

Employers that do not complete the bona fide termination process may face heavy penalties, such as paying back wages, paying civil monetary penalties, and debarment from the H-1B program.

2. *Layoff impact on PERM certification process*

A PERM certification is the first step towards allowing an employer to hire a foreign worker to work permanently in the United States. This certification is issued by the DOL after the petitioning employer has tested the local labor market where the permanent position is located to establish that there are no qualified U.S. workers available for the job. Employers that had layoffs within the last 180 days must comply with federal regulations to notify and consider all potentially qualified laid-off workers who meet the following criteria. Within a six-month period preceding the filing of a PERM application, did the laid-off employee work in the same geographic area, at the same time, and in the same or a related position as the PERM position being sponsored? If the U.S. worker applies and is deemed qualified for the job that is subject to the PERM process, the employer cannot file the PERM application for at least 180 days.

3. *How does this impact laid-off employees?*

Since the PERM Labor Certification process is employer specific, affected employees that are currently in the middle of the PERM process will be required to restart the process

when they are hired by a new company. Employees who have an approved PERM application at the company conducting layoffs can only benefit from recapturing their priority date with an approved I-140 from that company.

Laid-off employees who have an approved I-140 from their former company can use and "recapture" the secured immigrant visa priority date indicated on the approved I-140 for a future employment-based immigrant visa petition with the new employer unless the I-140 is withdrawn before the 180th day after its approval by the sponsoring employer.

Employees with adjustment of status applications pending for more than 180 days can change employers so long as they continue to work in the "same or similar occupation." Employees with adjustment of status application pending for less than 180 days will have to restart the green card process with the new employer.

Conclusion

We're here to help keep you in compliance and the employee in valid immigration status. We will continue to monitor further developments and provide updates, so make sure you are subscribed to the Fisher Phillips' Insight system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Immigration Practice Group.